

4-1-1980

American Legal Realism and Empirical Social Science: The Singular Case of Underhill Moore

John Henry Schlegel

University at Buffalo, schlegel@buffalo.edu

Follow this and additional works at: <https://digitalcommons.law.buffalo.edu/buffalolawreview>



Part of the [Legal Education Commons](#), [Legal History Commons](#), and the [Legal Theory Commons](#)

Recommended Citation

John H. Schlegel, *American Legal Realism and Empirical Social Science: The Singular Case of Underhill Moore*, 29 Buff. L. Rev. 195 (1980).

Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol29/iss2/1>

This Article is brought to you for free and open access by the Law Journals at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Buffalo Law Review by an authorized editor of Digital Commons @ University at Buffalo School of Law. For more information, please contact lawscholar@buffalo.edu.

AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE: THE SINGULAR CASE OF UNDERHILL MOORE*

JOHN HENRY SCHLEGEL**

*Toto, somehow I don't think
we're in Kansas any more.*

INTRODUCTION†

As a coherent intellectual force in American legal thought American Legal Realism simply ran itself into the sand.¹ If proof of this assertion be needed one has only to ask a group of law

* Copyright © 1981, John Henry Schlegel. Research for this article was supported by a Faculty Research Fellowship and Grant-in-Aid from the Research Foundation of the State University of New York. I am grateful to the late Robert M. Hutchins, David Kammerman, Emma Corstvet Llewellyn, the late Mark May, Jane Moore, the late Donald Slessinger and the late Dorothy Swain Thomas for granting me interviews with respect to the subject of this article; to Gilbert Sussman, Esq., for his extensive taped recollections; to Allan Axelrod, Grant Gilmore, and Friederick Kessler for having taken the time to supply interesting answers to my open-ended questions; to Arthur Charpentier of the Yale Law School Library and his staff; Judith Schiff and Patricia Bodak of the Department of Archives and Records, Sterling Memorial Library, Yale University and the staff there; the staff of the Rare Book and Manuscript Library, Butler Library, Columbia University; Albert Tannler of the University Archives, Regenstein Library, University of Chicago, and his staff; Kathryn Jacob, archivist, Milton S. Eisenhower Library, Johns Hopkins University; Donald D. Marks, and Steve Masar, University Archivists, Memorial Library, The University of Wisconsin; and John M. Nugent, University Archivist, Kenneth Spencer Research Library, University of Kansas for their kind assistance in my research and their attempts to make my research both easier and more fruitful; to Jane Moore for permission to use the papers of W. Underhill Moore; to Emma Corstvet Llewellyn for copies of documents she saved from her years at Yale; to Harry Wellington, Dean, Yale Law School, for permission to use the minutes of the Yale Law School; and to Bliss, Bob, Tom, Jack, Al, Fred, Janet, and Tom, each of whom took the time to read and comment, often copiously, on previous drafts of this manuscript.

** b. 1942. A.B. 1964, Northwestern; J.D. 1967, Chicago. Private practice 1968, Chicago. Teaching fellow 1967, Stanford; Ass't. Prof. 1973, Assoc. Prof. 1978, Prof. 1979, SUNY/ Buffalo.

† This is the second part in a series of articles intended to explore American Legal Realism, its foundation, development, demise and legacy. This introduction is, in part, repeated to give the new reader a sense of the overall project, *see* note 13 *infra*, and, in part, because we all liked it so well. *See* Schlegel, *American Legal Realism and Empirical Social Science: From the Yale Experience*, 28 BUFFALO L. REV. 459. The Editors.

1. Prof. Duncan Kennedy supplied me with this felicitous image of the decline of Realism.

school faculty members what American Legal Realism was and what it accomplished. If one gets any but the most cursory of responses, the answers will range from "a naive attempt to do empirical social science that floundered because of its crude empiricism," through "a movement in jurisprudence that quickly played itself out because it really had no technical competence and little to say," to "a group of scholars who did much to destroy the 19th Century doctrinal universe but left nothing in its place."² Each of these answers is both wrong and essentially partial. The answers are wrong in that first, the Realists' social scientific research died out because of the impermanence of the institutionalized circumstances under which it was undertaken, the peculiarities of the personalities of the leaders of the undertaking, and the difficulties in matching the impulse to do such research with the social science of the time; second, their jurisprudential activities gave out when, faced with the implications of their own constructions, the protagonists lost their nerve; and third, their destruction of the 19th Century legal universe left behind enduring achievements in commercial law, corporations, and procedure that point toward the largely legislative legal universe in which we live.³ The answers are notably partial in that they ignore, if not suppress, both the political coherence of the movement and the more directly political activities of many of its key members, as well as the extent to which it reflected, albeit belatedly, similar movements in American academic thought generally—the rise of the social sciences,⁴ the destruction

2. I see no reason to document these attitudes towards Realism in great detail for they are ubiquitous. Gilmore, *Legal Realism: Its Cause and Cure*, 70 YALE L.J. 1037 (1961) expresses all of them, but especially the third; Llewellyn, *On What Makes Legal Research Worth While*, 8 J. LEGAL EDUC. 399, 400-01 (1956) expresses the first with his usual degree of overstatement; H.L.A. HART, *THE CONCEPT OF LAW* 132-44 (1961) expresses the second with some reserve; H. REUSCHLEIN, *JURISPRUDENCE: ITS AMERICAN PROPHETS* (1951) is an unusually vituperative presentation of all three; *Annual Report of the Dean of Yale Law School to the President and Fellows of Yale University 1977-78*, pp. 1-2 (1978) is a particularly silly, though thoroughly contemporary, example.

3. I do not wish to document these assertions here; the series of articles that I plan to write, of which this is the second, will provide all the necessary documentation. See note 13 *infra*.

4. See generally, M. FURNER, *ADVOCACY AND OBJECTIVITY A CRISIS IN THE PROFESSIONALIZATION OF AMERICAN SOCIAL SCIENCE 1865-1905* (1975); T. HASKELL, *THE EMERGENCE OF PROFESSIONAL SOCIAL SCIENCE: THE AMERICAN SOCIAL SCIENCE ASSOCIATION AND THE NINETEENTH CENTURY CRISIS OF AUTHORITY* (1977); Oberschall, *The Institutionalization of American Sociology*; in *THE ESTABLISHMENT OF EMPIRICAL SOCIOLOGY* 187 (A. Oberschall ed. 1972). See also F. MATTHEWS, *QUEST FOR AN AMERICAN SOCIOLOGY: ROBERT E. PARK AND THE*

of the general formalist universe,⁵ and the decline of "pragmatic" political and social thought.⁶

Given these deficiencies in the common legal understanding of the Realist movement, it is at least curious that each partial understanding is invariably accompanied by the implicit, fatherly assertion, "We are all realists now; don't worry about these questions." While one may speak prose without knowing it, and similarly put forth ideas without knowing their lineage, it is more difficult to have learned a lesson—to no longer be that young and foolish, but rather to have grown up, as it were—without having a rudimentary understanding of the something about which the lesson was learned. No less curious is the fact that historians, who have generally paid little attention to narrowly legal matters, have better understood the movement. Not only have they pointed out the previously enumerated similarities between Realism and other intellectual movements in the twenties and thirties, but also they have explicitly noted that the intellectual roots of the movement can be found in the progressive politics of the pre-war period.⁷

These twin curiosities—the failure of understanding of the lawyers and the relative success of the historians—can be explained, in part, if one recognizes that the common understandings of Realism are both a part and a product of the intellectual world of its successors, either the more conservative harvardian ones or the less conservative las-dougalian ones. For the harvardians, deprivation of the certainty of doctrine by the destruction of the formalist universe and of the certainty of fact by the failure of empirical social science provided the justification for seeking legitimacy in orderly process;⁸ for the las-dougalians the same two deprivations provided the justification for seeking legitimacy in a policy analysis based on assertedly democratic values and the soft facts of

CHICAGO SCHOOL (1977).

5. See generally M. WHITE, *SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM* (1947).

6. See generally E. PURCELL, *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE* (1973).

7. See generally O. GRAHAM, *AN ENCORE FOR REFORM* (1967).

8. Ackerman, *Law and the Modern Mind by Jerome Frank*, 103 *DAEDALUS* 119, 123 & n. 26 (1974) provides a general list of the members of this school although I do not agree with all his choices. The classic work is H. HART & A. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (1958).

experts' opinions.⁹ And for both groups, the failure of Realist jurisprudence provided the occasion for their theorizing. Given the heavy stake of the successors of Realism in a particular understanding of that movement, and their near total success in dominating post-Realist legal theory in America, it is not surprising that the understanding of the movement necessary to post-Realist theorizing is the understanding generally held in the legal community. Nor is it surprising that the historians who have a less immediate stake in the fortunes of post-Realist theory have managed to understand the movement more fully.

To know that the intellectual world of the successors of Realism has shaped our understanding of that movement is not to know how to respond to that insight, however. And how to respond is an important question, for it has become an increasingly pervasive perception that post-Realist legal theory has about run its course headlong into a dead end. The harvardian search for legitimacy in orderly process has not succeeded in avoiding troublesome questions of value, including those raised by the process itself, any more than the formalist universe had or empirical social science was thought capable of.¹⁰ The las-dougalian search for legitimacy in policy analysis has not succeeded in avoiding troublesome questions about the source and beneficiaries of the values assumed and the independence of the experts' opinions from those values. And so, the question of whose values legal rules serve, a question highlighted in the Realist's destruction of the formalist universe and in their attempts at legislative law-making, and believed to have been put to rest by post-Realist legal thought, has re-emerged, exactly where it was found forty years ago.

One might respond to the "dead end" feeling accompanying this reemergence in several different ways.¹¹ One which comes im-

9. Here the classic works are H. LASSWELL & A. KAPLAN, *POWER AND SOCIETY: A FRAMEWORK FOR POLITICAL INQUIRY* (1950) and Lasswell & MacDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 *YALE L.J.* 203 (1943).

10. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 *HARV. L. REV.* 1 (1959) makes the deficiencies obvious even as it attempts to argue for the primacy of "process."

11. One might simply ignore the feeling and build a castle at the dead end as does B. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* (1977). Ackerman, who from his footnotes, though not his other writing, seems to answer the question "What was American Legal Realism and what did it accomplish?" with an "American Legal Who?", seems to be struggling to reunite harvardian and las-dougalian thought by stiffening orderly process with a spine of formalist welfare economics and wrapping up the result in the banner of

mediately to mind, because of its current popularity, is to attempt to return to the mainstream of European, specifically continental European, social thought after close to 200 years of largely ignoring that intellectual force.¹² However, the juxtaposition of the feeling of being at a dead end and the knowledge that the intellectual world of the successors of Realism has shaped our understanding of that movement in such a way as to suggest that, "We might not all be Realists now," counsels a second, though related, enterprise. One might attempt to recover an understanding of what Realism was and how and why it ran itself into the sand. Such an endeavor could be undertaken in order both to learn what went wrong, if anything, in that particular revolt against legal orthodoxy and to regain the mainstream of American legal thought at some point before it turned into its present dead end, all in the hope if not to learn from the mistakes of the past, at least to better understand the way in which the choices of the past inform the world, and thus the options, of the present.

What follows is the second installment of an attempt to undertake the second enterprise and thus recover an understanding of what Realism was.¹³ It is another excursion into why and how

scientific policymaking. The echo of Langdell in this use of science is surely no accident, any more than is the echo of las-dougalian assertedly democratic values. See, e.g., *id.* at 229 n.3. Of course, Ackerman is not the only contemporary practitioner of the castle builder's art. See, e.g., R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977); R. POSNER, *ECONOMIC ANALYSIS OF LAW* (2d ed. 1977).

12. R. UNGER, *KNOWLEDGE AND POLITICS* (1975); R. UNGER, *LAW IN MODERN SOCIETY* (1976) is the best known of such attempts but others exist, for example, Balbus, *Commodity Form and Legal Form: An Essay on the "Relative Autonomy" of Law*, 11 *L. & Soc'y REV.* 571 (1977) (marxist); Gabel, *Intention and Structure in Contractual Conditions: Outline of a Method for Critical Legal Theory*, 61 *MINN. L. REV.* 601 (1977) (existential marxist); Katz, *Studies in Boundary Theory: Three Essays in Adjudication and Politics*, 28 *BUFFALO L. REV.* 383 (1979) (structuralist).

13. The following outline of the entire project as presently conceived may present a better sense of the relationship of part to whole, and of the significance of this part:

- I. The Intellectual Roots of Realism
- II. Realism and Empirical Social Science
 - A. The Yale Experience
 - B. The Singular Case of Underhill Moore
 - C. The Johns Hopkins Institute of Law
- III. Realism and the Politics of Law Reform
 - A. Economic Life and the New Deal
 - B. The Reform of Federal Procedure
 - C. The Belated Reform of Commercial Law
- IV. The Implicit Jurisprudence of Realism
- V. The Intellectual Legacy of Realism

empirical legal research came to be done by one of the Realists at Yale and how it then died out.¹⁴ This excursion builds on an earlier examination of the empirical legal research engaged in by two of the Realists at Yale, Charles E. Clark and William O. Douglas.¹⁵ That examination disclosed several tensions between the impulse to do empirical research, growing out of the "progressive law reform tradition," and the means chosen to execute the research, growing out of the "emerging social science tradition." These tensions, it was argued, together with "accidents" such as the onset of the depression and the character of the leadership of Deans Hutchins and Clark during the period when the research was done were accountable for the decline of empirical legal research at Yale. This explanation, however, ignores the possibility that a researcher who combined "reform" and "science" in different proportions would encounter different problems attempting to sustain his research over a period of time. Examination of the course of that individual's research could thus provide a salutary check on the initial understanding of the decline of empirical legal research at Yale, based as it was solely on the work of Clark and Douglas. Such a check is found by looking at the work of Underhill Moore. Of all the Realists at Yale, Moore was the one most attracted to empirical social science and least tempted to side track his scientific enterprise in a more direct pursuit of reform through more overtly political activities.¹⁶ How Moore became so singlemindedly

The reason for beginning this study anywhere other than at the beginning is found in the pressures of the tenure process; because of the vagaries of research this is the second part of the study to be completed and rather than perish

14. This aspect of Realism is inadequately treated in both of the major reconsiderations of the movement to date. W. RUMBLE, *AMERICAN LEGAL REALISM* (1968); W. TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* (1973). The same is true of G. TARELLO, *IL REALISMO GIURIDICO AMERICANO* (1962). Bechtler, *American Legal Realism Reevaluated* in *LAW IN A SOCIAL CONTEXT: LIBER AMICORUM HONOURING PROFESSOR LON L. FULLER 1* (T. Bechtler, ed. 1978) does a slightly better job on this as on almost every aspect of Realism.

15. Schlegel, *American Legal Realism and Empirical Social Science: From the Yale Experience*, 28 *BUFFALO L. REV.* 459 (1979).

16. Northrup, *Underhill Moore's Legal Science: Its Nature and Significance*, 59 *YALE L.J.* 196 (1950) is the only substantial study of Moore's work as a whole. Although the author was a personal friend of Moore, I have found the article singularly unhelpful, largely because it reflects Northrup's preoccupation with certain issues in the philosophy of science that do not seem to have troubled Moore more than incidentally. See note 409 *infra*. Two works touch one or the other of Moore's two major research projects. Moskowitz, *The American Legal Realists and an Empirical Science of Law*, 11 *VILL. L. REV.* 480, 490-97, 509-13 (1966), discusses Moore's banking research. This article accurately portrays Moore's work

dedicated to his vision of what legal research should be¹⁷ and what that dedication produced in terms of empirical research in law are the questions addressed below. A search for an answer to the "how" question may conveniently begin with Moore's return to the Columbia Law School from a sabbatical semester in France, where he studied French banking practice, lectured on American banking law and, most important, read and wrote.

I. FROM COLUMBIA TO YALE

*It's my life's work . . .
and it's all wrong.*

In 1923 John Henry Wigmore¹⁸ and his philosophical sidekick,

but suffers by being largely trapped in the Realism debates of the post-war period and thus misses the anthropological roots of Moore's theorizing which would make sense out of what Moskowitz sees as an inadequate explanation of a theory of judicial decision-making. Verdon-Jones & Cousineau, *The Voice Crying in the Wilderness: Underhill Moore as a Pioneer in the Establishment of an Interdisciplinary Jurisprudence*, 1 INT. J. OF L. & PSYCH. 375 (1978), which was brought to my attention only after this work was completed, discusses Moore's parking and traffic studies. It is the first article I have seen that appreciates the significance of Moore's work. However, it is mistaken in seeing a continuity to Moore's interest in behaviorial psychology as opposed to behaviorial social science generally. By ignoring his interest in anthropological explanations it thus levels criticisms of Moore's work that might be altered had the course of that work been known in more detail. At the same time, its explanation for the disappearance of Moore's work in the years after the war seems quite correct.

17. Moore's singleminded dedication is the source of some colorful, if doubtfully accurate stories. The two most famous are the one about Moore "pulling drawers from his filing cabinets and dumping the contents into waste baskets" while explaining " 'It's my life work . . . all the notes I have taken in a lifetime of research—and it's all wrong,' " enshrined in FOUNDATION FOR RESEARCH IN LEGAL HISTORY, A HISTORY OF THE SCHOOL OF LAW COLUMBIA UNIVERSITY 251 (1955), and the one about him sitting dressed in shorts on a camp stool in front of the New Haven's old Hotel Taft and when questioned as to what he was doing responding "Don't bother me. Can't you see I'm busy counting these cars?" enshrined in Llewellyn, *supra* note 2, at 4 and Clark, *Underhill Moore*, 59 YALE L.J. 189, 191 (1950). The first is demonstrably wrong; Moore's annotations of American negotiable instruments cases survive with his papers at Sterling Memorial Library, Yale University. The second, which to my ear bears the tell tale signs of Thurman Arnold's authorship, is likely untrue except in Clark's limited version which omits implicit reference to the season of the year; work near the Hotel Taft was primarily done in December and January, indeed only three days of observation were conducted other than in late fall or winter. True or not, however, the stories do capture the common understanding of Moore among academic lawyers; the man was thought slightly mad.

18. b. 1863. A.B. 1883, LL.B. 1887, Harvard. Private practice, 1887, Boston. Prof. 1889, Keio Univ., Tokyo, Japan; prof. 1893, dean 1901, Northwestern. His most famous work is A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW (1904-05). d. 1943. W. ROALFE, JOHN HENRY WIGMORE: SCHOLAR & REFORMER (1977), though wholly inadequate to

Albert Kocourek,¹⁹ edited a rather commonplace book called *The Rational Basis of Legal Institutions* as part of the Modern Legal Philosophy Series. The series was primarily designed to make contemporary European legal philosophy available in translation to the American academic legal community,²⁰ and Wigmore's book was intended to be a representative compendium of post hoc justifications by various scholars of existing legal "institutions"—liberty, property, succession, the family and punishment.²¹ Although the collection was a useful one at this time when many parts of the legal profession thought it sufficient justification for a legal rule that it existed, the volume itself was of limited import. As the essays were largely Anglo-American and no more than twenty years old, the book was a monument to the relative poverty of recent jurisprudential thinking. It was an example of rational thought about legal institutions only in the sense that any product of sustained thought without extensive regard to the plausibility of its factual premises was rational. Therefore, given the limited intentions of the editors, Col. Wigmore²² might well have been surprised when the publication of his little book provoked an abso-

its task, is the only full length biography.

19. b. 1875. LL.B. 1897, Michigan. Private practice, 1897, Chicago. Lecturer (part-time) 1907, prof. 1914, Northwestern. His major publication is the now forgotten *JURAL RELATIONS* (1927). d. 1952.

20. The series was the brainchild of Wigmore, Roscoe Pound, Ernst Freund, and C.H. Huberich who convinced the Association of American Law Schools to provide editorial direction to a project already begun by Wigmore's publisher. They justified the project on the basis of the profession's being "almost wholly [sic] untrained in the technique of legal analysis and legal science in general" such as would be needed in the coming "period of constructive readjustment and restatement of our law." *ASSOCIATION OF AMERICAN LAW SCHOOLS*, [1910] *HANDBOOK AND PROCEEDINGS* 49 [hereinafter cited as *A.A.L.S. HANDBOOK*, without cross-reference]. Four years later the publisher was complaining that only one third of the Association's member schools were subscribers. [1914] *A.A.L.S. HANDBOOK* 8. Ten years later when the last book in the series was published the same lament could still be heard. [1925] *A.A.L.S. HANDBOOK* 90. Moore once owned a subscription to the series, but later sold the rights to it to a local Madison, Wisconsin book dealer. Boston Book Co. to Underhill Moore, Oct. 2, 1911; Underhill Moore to Boston Book Co., Apr. 20, 1915 (on file in the Underhill Moore papers at Butler Library, Columbia University) [hereinafter cited as *Moore papers*, Columbia, without cross-reference].

21. *THE RATIONAL BASIS OF LEGAL INSTITUTIONS* xx-xxvii (J. Wigmore & A. Kocourek eds. 1923).

22. Wigmore had been a colonel in the United States Army during World War I. Although he served only in Washington on selective service and other manpower problems during the war, he continued to serve in the reserve forces and liked the title which fit his military bearing and so was known generally as Col. Wigmore. See W. ROALFE, *supra* note 18, at 120-43.

lutely vicious attack from W. Underhill Moore,²³ a respected scholar in the field of negotiable instruments who had almost never before said anything in print on any subject outside the bounds of commercial law.²⁴ Perversely, in reviewing the book at length, Moore ignored its manifest content but took its title at face value. He thus observed that legal institutions were only patterns of habitual human behavior, the rationality of which depended on the ends to which the behavior was a means.²⁵ Quickly disposing of historical inquiry into ends as largely valueless and of a more philosophical inquiry into ends based on "human nature" as flimsy speculation, he suggested that the rationality of legal institutions was an unsolvable, non-problem. What was a problem to Moore was, "What are means to legal institutions and to what proximate ends are legal institutions means? Concretely, of what facts are group habits consequences and what are the consequences of group habits?"²⁶ He then reasoned that solution to the problem would lie in "the direction of detailed observation and systematic experiment" into the psychology of "habit formation, stabilization, modification, and obliteration," the limitations on habitual behavior resulting from biological and social inheritance, and the impact on habitual behavior of changes in material and non-material culture.²⁷ He also suggested the importance of examining "the available means to experimentation" in the modification of group habits, that is, "the legislative power of the government," and "current experiments," such as collective bargaining, public utility rate regulation, and minimum wages for women, in the exercise of that power.²⁸ Finding in Wigmore's book few examples of the inquiry he proposed, Moore then proceeded to bitterly slash at what was presented for missing the point, only to give up before reaching the end in a "spirit of weariness" with the entire enterprise that he was criticizing.²⁹

23. b. 1879. A.B. 1900, A.M. 1901, LL.B. 1902, Columbia. Private practice, 1902, New York City. Prof. 1906, Kansas; asst. prof. 1908, assoc. prof. 1909, prof. 1910, Wisconsin; prof. 1914, Chicago; prof. 1916, Columbia; prof. 1929, Yale. d. 1949.

24. Moore, *Rational Basis of Legal Institutions*, 23 COLUM. L. REV. 609 (1923) [hereinafter cited as *Rational Basis*].

25. *Id.* at 609-10.

26. *Id.* at 612.

27. *Id.* at 612-14.

28. *Id.* at 615.

29. *Id.* at 617.

The combination of social science, especially behavioral psychology and cultural anthropology, and pragmatism in Moore's presentation is striking especially in the context of the dry pages of the 1923 *Columbia Law Review*.³⁰ Surely others were struck by it, if Col. Wigmore was not. However, the ideas were apparently not brand new to Moore; his friends and acquaintances seemingly took his review in stride. Orrin K. McMurray, a visitor at the Columbia Law School just before Moore's sabbatical, expressed sympathy with the general attitude but wanted the criticisms more pointed;³¹ John Dewey, also a member of the Columbia faculty, expressed "pity for poor Wigmore" and "delight" at the "lucidity of thought and statement."³² But if on the basis of the program set forth in Moore's review anyone expected a dramatic flurry of activity, such a person would be sadly disappointed because, for the time being, Moore did little on any projects. He continued to collect materials on the operation of commercial checking accounts and loan mechanisms, as he had done for several years, but his effort was half hearted. Moore was unhappy.

The apparent reason for his unhappiness was the present condition and future prospects of his law school. Moore had been brought to Columbia in 1916 as part of a general attempt to improve the law school after its relative decline around the turn of the century as a result of both ineffective leadership and a series of appointments that were notable largely for the paucity of scholarship and the only occasionally better teaching by the appointees.³³ The key to this largely successful advance was the law school's new dean, Harlan F. Stone,³⁴ a former law school instructor and friend

30. See text at notes 253-57, *infra*.

31. Orrin K. McMurray to Underhill Moore, Sept. 28, 1923, (on file in the Underhill Moore papers at Sterling Memorial Library, Yale University) [hereinafter cited as Moore papers, Yale, without cross-reference].

32. John Dewey to Underhill Moore, Nov. 13, 1924, Moore papers, Yale.

33. FOUNDATION FOR RESEARCH IN LEGAL HISTORY, *supra* note 17, does not explicitly agree with this assessment, but it characterizes the term of the previous dean, George W. Kirchwey, as "rather barren of positive achievement." *Id.* at 191. Its recounting of the careers of the faculty members hired in the years before Kirchwey's resignation in 1909, and its view of Kirchwey's successor, Harlan F. Stone, as the creator of the "modern law school," *id.* at 214, all suggest that the characterization is correct.

34. b. 1872. B.S. 1894, Amherst; LL.B. Columbia, 1898. Private practice, 1898, New York City. Lecturer (part-time), 1899, adjunct prof. 1903-05, dean 1910, Columbia. Attorney General of the United States, 1924; Justice of Supreme Court of United States, 1925, Chief Justice, 1941. d. 1946. The standard biography is A. MASON, HARLAN FISKE STONE: PILLAR

of Moore's. Among Stone's additions to the faculty were Thomas Reed Powell,³⁵ with whom Moore immediately made friends, and Walter Wheeler Cook³⁶ and Herman Oliphant,³⁷ friends and colleagues of Moore's from Chicago. Then, just as things had gotten going, Cook left for Yale,³⁸ Powell, for Harvard ultimately,³⁹ and Stone, who resigned the deanship under pressure from the University's president, Nicholas Murray Butler,⁴⁰ for private practice.⁴¹ The remaining friend, Oliphant, had finished a clear second to Young B. Smith in a fight to succeed Stone⁴² that was so very divisive that the law school faculty's inability to agree on a successor allowed the choice to fall to President Butler. Butler, finding that his two wholly unrealistic but preferred candidates⁴³ were unavailable, chose compromise by selecting Huger W. Jervey,⁴⁴ a faculty

OF THE LAW (1956).

35. b. 1880. A.B. 1900, Vermont; LL.B. 1904, Harvard; Ph.D. 1913, Columbia. Private practice, 1904-06, Vermont. Lecturer (pol. sci.) 1907, Columbia; assoc. (pol. sci.) 1908-10, Illinois, lecturer (pol. sci.) 1911, (law), 1912, assoc. prof. 1913, prof. 1920, Columbia; prof. 1925, Harvard. d. 1955.

36. b. 1873. B.A. 1894, LL.M. 1901, Columbia. Inst. 1901, asst. prof. 1902, prof. 1903, Nebraska; prof. 1904, Missouri; prof. 1906, Wisconsin; prof. 1910, Chicago; prof. 1916, Yale; prof. 1919, Columbia; prof. 1922, Yale; prof. 1926, Johns Hopkins; prof. 1935, Northwestern. *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* (1942) is his best known work. d. 1943. See W. TWINING, *supra* note 14, at 38-39.

37. b. 1884. B.A. 1907, Marion Normal; A.B. 1909, Indiana Univ.; LL.B. 1914, Chicago. Inst. (English) 1907-11, Marion Normal; inst. (commercial law) 1914, asst. prof. (commercial law) 1915, lecturer (law school) 1914, asst. prof. 1916, assoc. prof. 1917, prof. 1919, Chicago; prof. 1922, Columbia; prof. 1928, Johns Hopkins. General counsel, United States Treasury Department, 1934. d. 1939. See Pollak, *Memorial of Herman Oliphant*, [1939] ASSN. OF BAR OF CITY OF N.Y. Y.B. 432. Oliphant was a bit of a wild man who drove a yellow Stutz Bearcat. Interview with Jane Moore, May 18, 1976.

38. Up until his experience at the Institute of Law at Johns Hopkins and his difficulties in finding a job in the middle of the depression when the Institute folded, Cook was constantly on the move in search of a better place and a higher salary. See *FOUNDATION FOR RESEARCH IN LEGAL HISTORY*, *supra* note 17, at 263-64.

39. Powell first took a visiting appointment at the University of California for the year 1923-24.

40. There is a capsule biography of Butler in A. MARRIN, *NICHOLAS MURRAY BUTLER* 13-52 (1976).

41. See *FOUNDATION FOR RESEARCH IN LEGAL HISTORY*, *supra* note 17, at 272-74. The two gentlemen had been at odds for nearly fifteen years. *Id.* at 217, 466-67 n.55, 468-69 n.67.

42. See Harlan F. Stone to Underhill Moore, Feb. 23, 1923 (vigorous dissent by minority), Mar. 23, 1923, Apr. 6, 1923 (two or three oppose Smith), Moore papers, Yale.

43. Harlan F. Stone to Underhill Moore, Apr. 23, 1923, (Butler favors Dwight Morrow or Benjamin N. Cardozo) Moore papers, Yale.

44. b. 1878. B.A. 1900, M.A. 1901, University of the South; LL.B. 1913, Columbia. Private practice, 1913, New York City. Prof. (Greek) 1902-09, University of the South; assoc. prof. (part-time) 1923, prof. 1924, Columbia. d. 1949.

member with one year's part-time experience, who was notable only for being a partner in Stone's law firm. The combination of these departures and concern about the future of the school given the general support in the faculty for Smith, a person whom Moore thought to be wholly unsuited for the deanship, was sufficiently disheartening that Moore considered leaving Columbia.⁴⁵ While pondering this possibility, Moore, one of the highest paid members of the entire Columbia faculty,⁴⁶ put his time and effort into his consulting practice (most notably a study of the cement industry for the industry trade association)⁴⁷ and used the income to send his children to good, private schools.⁴⁸

Curiously, Moore's indecision about leaving Columbia was in part related by the most unlikely of routes to his unhappiness with the law school's present and future. In 1922 President Butler publicly criticized law schools for their failure to engage in "searching criticism" of their "program of study" and "methods of instruction."⁴⁹ In response, Stone, who had been indirectly, though sharply, criticized at the same time, appointed a curriculum committee, consisting of himself, Moore, Oliphant, Smith and T. R. Powell, that began a survey of Columbia's course offerings for their formal coherence.⁵⁰ The survey apparently led to nothing in particular, what with the fight over Stone's successor that erupted four months later. But the following fall, while the outcome of the deanship fight was still in doubt, Butler let it be known that he

45. Underhill Moore to Orrin K. McMurray, Apr. 22, 1924, Moore papers, Yale.

46. Moore came to Columbia with a salary of \$7,500 per year. Harlan F. Stone to Underhill Moore, Feb. 8, 1916, Moore papers, Columbia. His salary climbed steadily to \$12,000, the absolute top of the Columbia salary scale in 1928. See Nicholas M. Butler to Underhill Moore Apr. 5, 1928, Moore papers, Yale.

47. "It is desired that you should make a thoroughly independent investigation of the origin, purposes, and uses of specific job contracts; how they affect both manufacturer and purchaser; and whether this method of selling a portion of the output of the cement industry is concealing any impropriety or illegality." C.H. Boynton (Atlas Portland Cement) to Underhill Moore, Sept. 4, 1924, Moore papers, Yale. William O. Douglas and Carroll Shanks, Moore's research assistants at the time, did much of the work. See W. DOUGLAS, *GO EAST, YOUNG MAN* 145 (1974). The work was terminated by the decision in *Cement Manufacturers Protective Ass'n v. United States*, 268 U.S. 588 (1925).

48. See Underhill Moore to H.T. Manning, Apr. 3, 1928, Moore papers, Yale.

49. Butler, Annual Report in [1922] Columbia University: Annual Reports of the President etc. to the Trustees 27-28 cited in *FOUNDATION FOR RESEARCH IN LEGAL HISTORY*, *supra* note 17, at 273. The report was likely prepared in late June though not publicly released until December. See A. MASON, *supra* note 34, at 132 n.22, 134 n*.

50. Harlan F. Stone, Memo to Faculty, Oct. 17, 1922, Moore papers, Yale.

was interested by the activities of the curriculum committee.⁵¹ In response to a request for suggestions as to what might be done to further the work of the committee, and thus maintain Butler's interest,⁵² Herman Oliphant drafted a long memo to the new curriculum committee suggesting that the faculty undertake a total reorganization of the curriculum along "functional" lines.⁵³

Exactly what Oliphant meant by "functional" was remarkably opaque, even after he had added a short memo designed to clarify the matter.⁵⁴ The best he could do was to suggest that a functional organization first, was "more in terms of the human relations dealt with and less . . . in terms of the logical concepts of the conventionally trained legal mind,"⁵⁵ second, would facilitate "any great application of pertinent scientific knowledge as developed in the other social sciences,"⁵⁶ and third, did not imply "the application of an objective methodology in arriving at a rule of law to be applied in a particular case" or "an unorganized study of the special facts lying back of a particular decision."⁵⁷ Beyond naming the three general areas of human relations to be dealt with—family, business and government—⁵⁸ when Oliphant provided details for his plan they largely followed the curriculum organization at the University of Chicago's School of Commerce and Administration⁵⁹ where he had taught while attending law school.⁶⁰ Indeed his only specific suggestion was to begin the job of reorganization with busi-

51. Thomas I. Parkinson (acting dean), Memo to Faculty, Oct. 23, 1923, Moore papers, Yale.

52. *Id.*

53. Herman Oliphant, The Revision of the Law School Curriculum, Oct. 29, 1923, Moore papers, Yale. This memorandum forms the core of Oliphant, *The Future of Legal Education*, 6 AM. L. SCH. REV. 329 (1928).

54. Herman Oliphant, Addendum, n.d., Moore papers, Yale.

55. Herman Oliphant, The Revision of the Law School Curriculum 8, Oct. 29, 1923, Moore papers, Yale. See Oliphant, *supra*, note 53 at 332.

56. *Id.*

57. Herman Oliphant, Addendum, n.d., Moore papers, Yale.

58. Herman Oliphant, The Revision of the Law School Curriculum 8, Oct. 29, 1923, Moore papers, Yale.

59. Compare *id.* at 10 (subdividing business relations into form of business unit, labor relations, marketing, finance, and risk) with *The School of Business at Erewhon* in THE COLLEGIATE SCHOOL OF BUSINESS 168-70 (L. Marshall ed. 1928) (subdividing business relations into labor, marketing, finance, risk and risk bearing, production, and accounting and advocating the teaching of the form of the business unit at the junior college level).

60. See ASSOCIATION OF AMERICAN LAW SCHOOLS, DIRECTORY OF TEACHERS IN MEMBER SCHOOLS 29 (1922).

ness credit and labor relations.⁶¹

The memo was sent to President Butler⁶² and to Stone, then still technically a faculty member.⁶³ Butler indicated general agreement.⁶⁴ Stone, who did likewise, suggested that a "definite and concrete program" for the adoption of "the functional approach to certain portions of our curriculum" be prepared and that "domestic relations, law administration . . . security law and . . . creditors' rights" would be appropriate areas to begin with.⁶⁵ However, the curriculum committee was apparently unmoved by either Oliphant's or Stone's suggestions and nothing came of the project.

Undaunted, in the fall of 1924, Oliphant joined with James C. Bonbright of Columbia's School of Business to offer a year-long seminar in business organization—a "functional" classification in the business school curriculum—as a part of Columbia's new graduate program in law.⁶⁶ This seminar, for which planning was begun even before Oliphant's memorandum,⁶⁷ was explicitly understood to be a "concrete experiment" which if successful might be "extended into other fields, and . . . conceivably lead to reorganization of the undergraduate courses in such a way as to introduce, not merely as incidental but as primary, a consideration of the business situation under which the law is to be applied."⁶⁸ Moore

61. Herman Oliphant, *The Revision of the Law School Curriculum* 18, Oct. 29, 1923, Moore papers, Yale.

62. FOUNDATION FOR RESEARCH IN LEGAL HISTORY, *supra* note 17, at 299, suggests that Oliphant wrote a long letter to Butler that did not survive. I infer from Herman Oliphant to The Committee on Curriculum, Nov. 1923? (detailing the response of Stone to the memo of Oct. 29, 1923), Moore papers, Yale, that the missing letter dated Nov. 1, 1923, to which Butler replied on Nov. 17, 1923, either enclosed a copy of the memo or reproduced it.

63. Stone submitted his resignation February 23, 1923 (Harlan F. Stone to Underhill Moore, Mar. 15, 1923, Moore papers, Yale), to be effective on June 30, 1924. He then arranged to secure a leave of absence to October 1, 1923. He was later appointed to the Attorney General of the United States and at that time advanced the effective date of his resignation to April 7, 1924. FOUNDATION FOR RESEARCH IN LEGAL HISTORY, *supra* note 17, at 273-74.

64. FOUNDATION FOR RESEARCH IN LEGAL HISTORY, *supra* note 17, at 299.

65. See Herman Oliphant to The Committee on Curriculum, Nov. 23, 1923? (excerpting letters from Stone dated Nov. 5, 1923 and Nov. 9, 1923), Moore papers, Yale.

66. See Herman Oliphant & James C. Bonbright to Dear Colleague, Oct. 25, 1923; James C. Bonbright to Underhill Moore, Apr. 5, 1924; James C. Bonbright to Huger W. Jervey, Nov. 25, 1924, Moore papers, Yale. The seminar was open to graduate students in law, management and the social sciences as well as to some undergraduates by permission.

67. Herman Oliphant & James C. Bonbright to Dear Colleague, Oct. 25, 1923, Moore papers, Yale.

68. James C. Bonbright to Underhill Moore, Apr. 5, 1924, Moore papers, Yale.

participated in the seminar,⁶⁹ as did Robert L. Hale,⁷⁰ an acquaintance of Moore's with a joint appointment in law and economics. But more important was the participation of Dean Jervey.⁷¹ His participation in this seminar made Moore think twice about severing his ties with Columbia, at least until he saw what would be done "with respect to major appointments," for Jervey's interest meant that curriculum reform along the lines set forth in Oliphant's memo, or at least along the less ambitious lines suggested by the seminar's organizers, was still a possibility.⁷² Either alternative suggested the central relevance of the kind of inquiry into legal institutions that Moore had proposed in his review of Wigmore's book.

The seminar was successful enough that it was repeated in 1925, this time focusing on corporate finance in an obvious attempt to take a still more "functional" approach to the subject.⁷³ It drew the interest of several of the younger faculty members on whom Moore pinned his hopes for reform in teaching at Columbia, most notably Karl N. Llewellyn⁷⁴ and William O. Douglas. It also provided a focus for efforts of those members of the Columbia faculty most interested in curriculum reform, largely the participants, and kept that subject alive by providing some evidence of the plausibility of functional organization of the curriculum. This second role proved to have been valuable when, in the spring of 1926, Harvard

69. James C. Bonbright (?), Syllabus, Fall 1924?, Moore papers, Yale. Moore taught "lien instruments," various kinds of mortgage financing. Hale's contribution is not detailed.

70. b. 1884. B.A. 1906, A.M. (economics) 1907, LL.B. 1909, Harvard; Ph.D. 1918, Columbia. Private practice 1909-12, Chicago & New York City. Lecturer (economics), 1915, lecturer (part-time) 1919, lecturer (legal econ.) 1922, asst. prof. 1928, assoc. prof. 1931, prof. 1935, Columbia. d. 1969. Hale was the first modern law professor with a background in technical economics. His piece, *Coercion and Distribution in a Supposedly Non-coercive State*, 38 POL. SCI. Q. 470 (1923) was extremely influential among the Realists at Columbia. He is the subject of a forthcoming work by Prof. Warren E. Samuels of the Department of Economics, Michigan State University; see Samuels, *The Economic System of Power and Its Legal Bases: The Legal Economics of Robert Lee Hale*, 27 U. MIAMI L. REV. 261 (1973).

71. James C. Bonbright (?), Syllabus, n.d., Moore papers, Yale. Jervey taught "non-lien instruments," stocks and debentures.

72. Underhill Moore to Orrin K. McMurray, Apr. 22, 1924; Underhill Moore to James C. Bonbright, Apr. 28, 1924, Moore papers, Yale.

73. James C. Bonbright (?), Syllabus, Fall, 1925?; James C. Bonbright to Huger W. Jervey, Nov. 25, 1924; James C. Bonbright to Underhill Moore, June 12, 1926, Moore papers, Yale.

74. James C. Bonbright (?), Syllabus, Fall, 1925?; Underhill Moore to Roswell Magill (Columbia law school faculty), Apr. 7, 1927, Moore papers, Yale.

announced its drive for a mammoth increase in its endowment to be used, in large part, for research professorships. Columbia searched for an enterprise that would both distinguish it from Harvard and draw attention from Harvard's effort.⁷⁵ As part of that search a day after the *New Republic* editorialized in favor of the Harvard campaign, the law faculty decided to undertake a thorough revision of its curriculum, "so as to secure better correlation between law and the other social sciences, particularly economics."⁷⁶

These two developments, the seminar and the curriculum study, were enough to create a limited kind of optimism about Columbia and its prospects and thus to get Moore working again. The transformation was marked. He gave up his consulting practice, acquired money for use during 1926-27 from a special presidential fund for research, and began work on a book on banking law and practice along the lines he had outlined in his review of Wigmore's book three years before.⁷⁷ The method behind the research was notably eclectic. Moore used secondary sources extensively, but to these he added direct inquiries to bankers about bank practice⁷⁸ and questionnaire surveys designed to show some representativeness in their findings, though hardly any sophistication in design.⁷⁹ The immediate results of this renewed activity were two. The first was a restructuring of Moore's old course in negotiable instruments

75. The Harvard fund drive is recounted in A. SUTHERLAND, *THE LAW AT HARVARD: A HISTORY OF IDEAS & MEN, 1817-1967*, 262-70 (1967). Explicit acknowledgement of the motivation of the Columbia faculty is detailed in Young B. Smith (?), Memorandum for the President at 2-3, Spring 1926?, Moore papers, Yale.

76. FOUNDATION FOR RESEARCH IN LEGAL HISTORY, *supra* note 17, at 300, which, however, does not acknowledge the relationship between the curriculum study and the Harvard endowment drive. The editorial was *Socializing Legal Education*, 15 *NEW REPUBLIC* 211 (1926) (Apr. 14, 1926). The curriculum study was moved, Apr. 15, 1926. FOUNDATION FOR RESEARCH IN LEGAL HISTORY, *supra* note 17, at 300 n.126. Harvard's announcement had a similar impact at Yale. See Schlegel, *supra* note 15, at 471-72 and nn.64-65.

77. Underhill Moore to H. T. Manning, Apr. 3, 1928; Frederick J. E. Woodbridge to Underhill Moore, Apr. 29, 1927 (detailing grants to Moore), Moore papers, Yale.

78. See, e.g., Underhill Moore to W.L. Trumble (Barclay's Bank), June 20, 1927, Moore papers, Yale.

79. See Underhill Moore to Young B. Smith, Dec. 24, 1927 (recounting use of funds), Moore papers, Yale. Some of the questionnaire research was published as Klaus, *Identification of the Holder and Tender Receipt on the Counter-Presentation of Checks*, 13 *MINN. L. REV.* 281 (1929). See *id.* at 299 & n.64. Samuel Klaus, a 1927 graduate of Columbia, was one of Moore's research assistants during the academic years 1926-1928. See Moore to Hugh Satterlee, Nov. 26, 1927, Moore papers, Yale.

into one in commercial bank credit, a course in which he supposed most parts of the earlier course would be dealt with "somehow, someplace."⁸⁰ The second was an article by Moore and his research assistant about the practice of giving interest on the balances of checking accounts.⁸¹ That article, however, showed only exhaustive caselaw research and comprehensive knowledge of the secondary banking literature both in the United States and in the British Empire. It was a start, of a sort.

Meanwhile "the great debate" over curriculum reform proceeded in earnest.⁸² Moore was an interested, although not particularly active, player in what was plainly Herman Oliphant's show. Along with Oliphant, he formed the steering committee that arranged the seminar,⁸³ and helped frame the request to President Butler for the funds to bring Leon C. Marshall⁸⁴ as director of the seminar. Marshall, a personal friend of Oliphant's and former Dean of the University of Chicago's business school had gained a reputation as a curriculum reformer at Chicago.⁸⁵ But, while a reg-

80. Underhill Moore to Leon C. Marshall, Oct. 22, 1927, Moore papers, Yale.

81. Moore & Shamos, *Interest on the Balances of Checking Accounts*, 27 COLUM. L. REV. 633 (1927). Abraham Shamos, a 1927 graduate of Columbia, was another of Moore's research assistants. Apparently Shamos did library research while Samuel Klaus (*see* note 79, *supra*) did "field" research, a differentiation of function that Moore kept for many years. The library assistant did all of Moore's personal accounts as well as prepared semi-annual balance sheets and income statements! *See* Underhill Moore to Abraham Shamos, June 22, 1927; Underhill Moore to David L. Daggett, Apr. 21, 1936 (describing job of assistant), Moore papers, Yale.

82. The reform of Columbia's curriculum has been fully recounted elsewhere, four times to be exact. Currie, *The Materials of Law Study* (pt. 3), 8 J. LEGAL EDUC. 1 (1955) is the most comprehensive. *See also* FOUNDATION FOR RESEARCH IN LEGAL HISTORY, *supra* note 17, at 297-303 (rather badly biased toward view of the victors); W. TWining, *supra* note 14, at 45-52; Stevens, *Two Cheers for 1870: The American Law School*, 5 PERSPECTIVES IN AMERICAN HISTORY 403, 470-77 (1971).

83. Huger W. Jervey to Underhill Moore & Herman Oliphant, Apr. ?, 1926, Moore papers, Yale.

84. *See* Young B. Smith (?), Memorandum for the President, Spring, 1926? Moore papers, Yale. Marshall's appointment was justified to Columbia's president only in part by his leadership of the seminar. Its primary justification was as the second step of a general plan to integrate "law and the allied sciences, such as economics and sociology." Thus he was supposed to coordinate the work in commercial law with "underlying economic problems" and "the actual structure and working of . . . business life"—apparently the work he did during the latter half of his year and a half appointment. *Id.* at 1, 4.

85. For Marshall's views on business education and his impact on the University of Chicago's Business School *see* L. MARSHALL, *supra* note 59; L. Marshall, *The Collegiate School of Business* 3 (1928) reprinted in HIGHER EDUCATION IN AMERICA 78 (R. Kent, ed. 1930); H. DREISER, A BRIEF HISTORY OF THE UNIVERSITY OF CHICAGO, GRADUATE SCHOOL OF

ular participant in the seminar, Moore generated few of the formal documents that were the basis for discussion. His major contributions were to suggest scraping trusts,⁸⁶ to supply a detailed syllabus for the proposed course in commercial bank credit,⁸⁷ and to help author a report on the law library. He chose instead to continue his work on banking law and practice with an intensity that in the summer of 1927 made it seem appropriate to take a research assistant with him while he taught at Cornell.⁸⁸

The optimism that fueled Moore's intense activity was short-lived however. The following fall it became clear that Dean Jervey's health would not permit him to continue his administrative duties.⁸⁹ Young B. Smith was thereupon appointed acting dean and, when in spring Jervey chose to resign, the fight over the deanship between Oliphant and Smith broke out again.⁹⁰ Smith had been rather driving in his role as acting dean,⁹¹ nevertheless Moore still feared the effects of Smith's selection on the programs of the school.⁹² Whether he supported Oliphant's candidacy is not clear,⁹³ but whatever the case, Moore knew from recent experience

BUSINESS 6-10 (n.d.). Marshall was dean at Chicago when Oliphant taught there.

86. Underhill Moore to Leon C. Marshall, Oct. 22, 1927, Moore papers, Yale.

87. See Underhill Moore & Karl N. Llewellyn, Report of the Committee on Finance and Credit, Apr. 7, 1927, in Faculty Conference on Legal Education, 1926-1927, Documents, on file at the Columbia University Law School Library. The document is summarized in H. OLIPHANT, SUMMARY OF STUDIES IN LEGAL EDUCATION 92-94 (1928).

88. Underhill Moore to Robert C. Rathbone, July 8, 1927, Moore papers, Yale.

89. FOUNDATION FOR RESEARCH IN LEGAL HISTORY, *supra* note 17, at 303.

90. *Id.* at 303-04.

91. See, e.g., Young B. Smith to Faculty, Oct. 29, 1927 (on securing funds from Commonwealth Fund), Moore papers, Yale.

92. See Theodore S. Hope to Underhill Moore, June 11, 1928 (recounting earlier conversation with Moore), Moore papers, Yale.

93. While there are several scraps in the Moore papers to support the proposition that Moore opposed Smith's appointment, there is little to suggest support for Oliphant's candidacy, except as an alternative to Smith's, and reason to believe that Moore questioned Oliphant's ability to stick to a job once begun. See note 105 *infra*. I thus am more cautious than FOUNDATION FOR RESEARCH IN LEGAL HISTORY, *supra* note 17, at 304, which, in drawing sides in the battle between Smith and Oliphant, relies heavily on the word of Smith, the winner, and Julius Goebel, Jr., a relative outsider whose regular appointment to the faculty was not made until spring 1928, although he had been an associate in law since fall 1925. The resulting bias in favor of the winners, portrayed as a hearty little band, *id.* at 310, overlooks matters such as Llewellyn's ambiguous role, see W. TWINING, *supra* note 14, at 103-04, which contributed to his estrangement from Moore, and Roswell F. Magill's support for Oliphant which tabbed him as a potential emigrant to Yale, see Minutes of the Faculty of Law, Yale University, May 18, 1928. Indeed, I suspect that the fight may not have been nearly as one sided as is usually portrayed.

that, given the division of the faculty, the choice of dean would fall to President Butler. Therefore, Moore personally counselled Butler of the wisdom of a further interregnum.⁹⁴ When Butler refused to take that advice⁹⁵ and appointed Smith, Moore sulked and went to his summer home.

Within a week Robert M. Hutchins, Dean at Yale, on learning of events at Columbia from William O. Douglas, another opponent of Smith, who had not just sulked, but resigned,⁹⁶ secured authorization from his faculty to offer a job to Moore.⁹⁷ Simultaneously Walter Wheeler Cook apparently used the fight at Columbia and the prospect that the losers would be willing to leave to secure the agreement of the Johns Hopkins University Board of Trustees to begin an Institute of Law devoted to research and not teaching.⁹⁸ Both men moved quickly. Hutchins offered the possibility of combining teaching with research in a social science institute;⁹⁹ Cook offered a newly organized Institute devoted to legal research alone. Hutchins waited while the Yale Corporation decided how many of the Columbia dissidents it could hire in one year;¹⁰⁰ Cook brought

94. See Nicholas M. Butler to Underhill Moore, May 2, 1928 (recounting visit), Moore papers, Yale.

95. *Id.*

96. See W. DOUGLAS, *supra* note 47, at 163 (perhaps overdrawn, but close).

97. Minutes of the Faculty of Law, Yale University, May 10, 1928. Hutchins did not really know much at this time. See Robert M. Hutchins to James R. Angell (Yale's President), May 11, 1928 ("Must go to New York to get what light I can on the Columbia men"), (on file in the James R. Angell Presidential Papers, Sterling Memorial Library, Yale University) [hereinafter cited as Angell papers, without cross-reference].

98. See Herman Oliphant to Underhill Moore, May 25, 1928 (implies discussion begun earlier), Moore papers, Yale. Cook had gone to Hopkins in the fall of 1926 as the school's lone professor of jurisprudence, his salary paid under a special grant. Walter Wheeler Cook to Frank J. Goodnow (Johns Hopkins' president) Apr. 1, 1926. He came to Hopkins with a formulated plan for a School of Jurisprudence which in the next two years slowly metamorphosized into a research institute, but as late as April, 1928, the project looked as if it would remain in the planning stage for another year. See Joseph S. Ames (acting president) to Walter Wheeler Cook, Apr. 11, 1928. Yet by late May the concept of a research Institute had hardened, funding was being sought, and a faculty decided on. See Joseph S. Ames to Daniel Willard (President of Bd. of Trustees) May 29, 1928. (All three letters are filed in the Presidential papers, Milton S. Eisenhower Library, Johns Hopkins University).

99. At the time Yale had pending an application to the Rockefeller foundations for a grant to support what became the Institute of Human Relations. See Schlegel, *supra* note 15, at 486-88.

100. Hutchins made his offer to Moore in Robert M. Hutchins to Underhill Moore, May 21, 1928, Moore papers, Yale. He planned to also add Douglas, Theodore S. Hope, Jr. (Moore's assistant), Roswell P. Magill, Oliphant and Hessel Yntema. Robert M. Hutchins to James R. Angell, May 24, 1928, Angell papers. President Angell immediately wrote the rele-

the chairman of the Hopkins' Board of Trustees and the member most interested in the project to New York to meet with Moore and with Oliphant,¹⁰¹ who had earlier expressed a willingness to go to Hopkins even without the attraction of a going Institute.¹⁰² Although each side pressed and came up with unheard of salaries,¹⁰³ Moore declined both offers. His reasoning was simple. While the Hopkins plan was ideal,¹⁰⁴ Moore was concerned that given the financial instability of the enterprise, the lack of any firm idea on the part of the Hopkins' trustees as to the standard for measuring progress in research of the kind proposed, and the questionable ability of Oliphant and, even more so, Cook to stick to research during the first lean years, the plan would never really get carried out, with the result that the trustees, seeing the limited results, would withdraw their support and the participants would head off in other directions.¹⁰⁵ Yale on the other hand was not ideal because of the teaching obligation,¹⁰⁶ but at least if the proposed Institute were funded, as expected, it would be financially stable for a long enough period to prove the value of the social science method as applied to law. So Moore waited to see what would happen. While he waited, he and his research assistant, Theodore S. Hope, Jr.,¹⁰⁷

vant members of the Yale Corporation and eight days later was able to say that Yale would hire all six if Oliphant and Magill would wait until fall 1929. James R. Angell to Robert M. Hutchins, June 1, 1928, Angell papers. In the interim Magill declined the offer, Oliphant accepted the offer from Hopkins, and Hutchins thought that Moore, and with him Hope, had done likewise. Robert M. Hutchins to James R. Angell, June 8, 1928, Angell papers. In fact Moore had done no such thing, but had that day declined the Hopkins offer. See Underhill Moore to Miss Basset, June 8, 1928 (directing relay of message to Hope announcing decision to stay at Columbia), Moore papers, Yale. Throughout the scramble Hutchins suffered from hopeful misunderstandings. At the time of making the offer to Moore, Hutchins thought he had already obtained acceptances from Oliphant and Magill. See Robert M. Hutchins to Underhill Moore, May 21, 1928, Moore papers, Yale. In fact at the time Oliphant was working to get Moore to come to Hopkins. See Herman Oliphant to Underhill Moore, May 25, 1928, Moore papers, Yale.

101. See Underhill Moore to Walter Wheeler Cook, May 31, 1928; Herman Oliphant to Underhill Moore, June 8, 1928, Moore papers, Yale.

102. See Walter Wheeler Cook to Frank J. Goodnow, Dec. 22, 1927, (on file in Presidential papers, Milton S. Eisenhower Library, Johns Hopkins University).

103. Cook offered \$15,000; Yale ultimately matched that figure which was \$3,000 above Moore's salary at Columbia.

104. Underhill Moore to Homer F. Carey (former student teaching at Kansas), July 11, 1928, Moore papers, Yale.

105. See Herman Oliphant to Underhill Moore, June 15, 1928 (replying to Moore's arguments), Moore papers, Yale.

106. Cf. Underhill Moore to Homer F. Carey, July 11, 1928, Moore papers, Yale.

107. b. 1903. A.B. 1925, Harvard, LL.B. 1928, Columbia. Research asst. 1928, Columbia;

wrote, this time not out of optimism, but out of determination.

When they were done, Moore and Hope had produced an article setting forth a method quite obviously designed to test Moore's ideas first put forth over five years earlier at the expense of Col. Wigmore.¹⁰⁸ The idea behind the article was simple. Moore began with the assertion, not made in the earlier piece but implicit in it and current in Moore's thought at that time,¹⁰⁹ that, "[t]he central problem of the lawyer is the prediction of judicial and administrative decisions of government officers."¹¹⁰ Then, ignoring entirely the possibility that legal rules might provide an adequate basis for making such a prediction, he quickly dispatched as "not . . . verified in experience" the new notion, prominently associated with Oliphant¹¹¹ and Llewellyn,¹¹² that "study of the relation between decisions and 'the facts' of recorded cases" might provide such a basis.¹¹³ Moore's explanation for not verifying the newer technique was that the facts of a case were only one element in a situation the balance of which was not possible to control for "in the actual behavior situations of everyday life."¹¹⁴ Although thus admitting that perfect prediction was impossible because of the singularity of the phenomenon to be explained,¹¹⁵ Moore nevertheless proposed, in line with his argument in the Wigmore review, to examine the relation between the "facts" in a given case and the "institutional (frequent, repeated, usual) ways of behaving" in the relevant community in the hope that "if such relation be found to be significant, a step towards more reliable prediction will have been made."¹¹⁶

In the abstract, Moore's proposal to investigate the relationship between what is classically known as law and custom was

research assoc. 1929 Johns Hopkins. Private practice, 1933, New York City.

108. Moore & Hope, *An Institutional Approach to the Law of Commercial Banking*, 38 *YALE L.J.* 703 (1929).

109. And for some time "The 'law' governing a particular state of facts which happens to-day is the rule which will to-morrow be applied to the state of facts by the . . . officers engaged in administering justice." Underhill Moore, *Answers of Underhill Moore to Questionnaire*, n.d. (Fall 1923), Moore papers, Yale.

110. Moore & Hope, *supra* note 108, at 703.

111. See Oliphant, *A Return to Stare Decisis*, 14 *A.B.A.J.* 71 (1928).

112. See K. LLEWELLYN, *THE BRABLE BUSH* (1930).

113. Moore & Hope, *supra* note 108, at 703.

114. *Id.* at 704.

115. *Id.*

116. *Id.* at 705.

hardly novel, especially coming from a teacher of commercial law; the question had a long history in both the general jurisprudential literature as well as that more narrowly limited to commercial law.¹¹⁷ But, in the context of the traditional discussion of the question, his way of going about the enterprise was nothing less than astonishing. Working largely with a generalized behaviorist psychology, still a controversial thing to do at the time, Moore proceeded to subdivide the "facts" of a case, as lawyers would know them, into "terms", which when aggregated serially made up "transactions", which when aggregated serially made up a "transaction-series".¹¹⁸ Grouping transactions by their descriptive similarity yielded a group of "sequences"; similarly grouping transaction-series yielded a "sequence-series", also known as "institutional sequences."¹¹⁹ All of this apparatus was assembled for "comparing with comparable sequences-series actual transaction-series followed by judicial behavior" or, more simply, comparing customary behavior, habit, with the parties' behavior in litigated cases.¹²⁰ Methods were also described for establishing comparability of transactions-series when one of the transactions, implicitly assumed to be a part of the series litigated, was "deviational", which is to say not "institutional", not in the relation "frequently following—frequently preceding,"¹²¹ and for evaluating the degree of deviation—"slight" or "gross"—according to the efficiency, certainty, familiarity and riskiness of the deviational as against the institutional transaction.¹²² The entire procedure was presented with the expectation that "after the method has been applied to large numbers of cases in many fields it may be possible to state 'law' for some fields in terms of" the correlation between "the decision and the measured degree of deviation between 'the facts' and the institution," a correlation with "apparent" utility in the prediction of decisions.¹²³

117. Discussion of the question dates back at least to Plato. In the narrower commercial context, Anglo-American lawyers think of the opinions of Lord Mansfield as the starting point of the discussion. See, e.g., Ewart, *What Is the Law Merchant?* 3 COLUM. L. REV. 135 (1903).

118. Moore & Hope, *supra* note 108, at 706-07.

119. *Id.* at 707.

120. *Id.* at 708.

121. *Id.* at 707-09.

122. *Id.* at 717-19.

123. *Id.* at 719.

If the apparatus was not enough to intimidate all but the most determined lovers of social science jargon,¹²⁴ the examples Moore gave of the process of comparison, complete with symbolic notation, were. Each was a common banking transaction in which the bank had breached an agreement, explicit or implicit, made with a customer, for example, by refusing to discount a note tendered under a loan agreement or by dishonoring an overdraft despite the existence of an overdraft agreement.¹²⁵ Yet in the process of an analysis designed to isolate exactly in which ways the bank had acted contrary to expected behavior, Moore managed to deform each into something queerly unrecognizable, turning the overdraft agreement into a note offered for discount and the overdraft into a draft for the balance of the account.¹²⁶ The reader who was both undeterred by the jargon and willing to fight through the seeming disorientation of the examples, upon careful examination, might have noticed that there were problems with the relationship between the concepts of causality and institutional relation,¹²⁷ that the surface impression of a complexity unnecessary for the simplicity of the inquiry was indeed accurate,¹²⁸ and that the complexity was potentially misleading.¹²⁹ Unfortunately careful examination

124. Moore justified his method with the slightly disingenuous observation that it was necessary because the facts in recorded cases "are a small, and very probable non-representative, sample of all behavior" and the cases, "distinguished by dissimilarity rather than similarity one to another." As a result, Moore asserted, legal categories are broad so as to include as many cases as possible and thus "inadequate for classification." Moore & Hope, *supra* note 108, at 705. Truth of the matter is, I suspect, that Moore also quite plainly loved the arcane terminology he had invented.

125. *Id.* at 711-12.

126. *Id.* at 714-15.

127. Moore's notion of an institutional relation, "frequently following—frequently preceeding" (*id.* at 707) though intended to describe only habitual behavior in fact implied causality as well. In so doing it raised the possibility that his attempt to establish a causal relation between customary behavior and legal decisions validating conduct in accordance with that behavior might either founder because the assumed underlying causality was absent or succeed but only because of a spurious correlation with some element in the institutional behavior.

128. *See, e.g.,* Moore & Hope, *supra* note 108, at 715. "The second comparison of the second deviational transaction with its first comparable sequence is made by substituting for the prior terms of the transaction the correlative terms of the comparable sequence." Translation: If we assume a less troublesome circumstance, it may highlight the bank's error.

129. This was especially true in evaluating the degree of deviation between the transaction and a sequence where the factors to be evaluated quite obviously overlapped as well as were loaded in the direction of banker opinion. However, it is also true with respect to the way that the method of deriving comparable entities lead away from the transaction in

by outsiders, although sought, was not forthcoming,¹³⁰ so whatever deficiencies there were in the method remained. But, at least, it was a method, a start toward research. Thus, when the Institute of Human Relations at Yale was funded¹³¹ and Moore was again invited by Hutchins to join it, Moore signed on because he remained still "critical and disappointed" at Smith's appointment and felt "quite lonely and out of it" by the departure of his friends.¹³² He was, however, cautious enough to ask to see a copy of the deed of gift from the Rockefeller Foundation,¹³³ donor of funds for the Institute, and to inquire who were to be the other appointees.¹³⁴ His salary was to be higher than any other faculty member at the law school, including the Dean;¹³⁵ his two research assistants were to have salaries similarly out of line,¹³⁶ and several other promises about research support had to be made to close the deal.¹³⁷ Then, less than two weeks later, the promisor, Robert Hutchins, left to become President of the University of Chicago.

There is a sense in which starting back at Columbia in 1923 in order to attempt to explain how Moore came to dedicate himself so singlemindedly to his vision of what legal research should be is to knowingly indulge in a kind of genetic fallacy, positing origins because they must be there. This is especially true because Moore suggested a perfectly adequate explanation for the effective hiatus in his activities during his last years at Columbia when he expressed a belief that every law professor experienced a kind of in-

question. Ultimately Moore did not fully understand his own observation (*see* note 124, *supra*) about the singularity of litigated phenomena.

130. Moore sent out dozens of reprints of the article. Most went unacknowledged. Of those that were acknowledged none were accompanied by anything more elaborate than President Butler's objection to the behaviorist psychology in the piece and his prediction that Moore would in time get over it. Nicholas M. Butler to Underhill Moore, Jan. 15, 1929, Moore papers, Yale. Others such as C. J. Keyser, a Columbia philosopher of science, and Alfred L. Kroeber, the anthropologist, were not even this helpful.

131. *See* Schlegel, *supra* note 15, at 488.

132. Underhill Moore to Alexander M. Kidd (Cal. Berkeley, visitor at Columbia 1926-28), May 15, 1929, Moore papers, Yale.

133. Underhill Moore to Robert M. Hutchins, Feb. 11, 1929, Moore papers, Yale.

134. Underhill Moore to Robert M. Hutchins, Feb. 15, 1929, Moore papers, Yale.

135. And remained so for years, a fact that rankled the new dean. *See* Charles E. Clark to Charles Seymour, Feb. 10, 1934, Angell papers.

136. *See* Charles E. Clark to Underhill Moore, May 17, 1929, Moore papers, Yale.

137. Interview with Jane Moore, May 19, 1976.

tellectual menopause in the middle years of his career.¹³⁸ And menopause is an apt description for much of Moore's years at Columbia, for, after an initial flurry, he completed little significant work there, although he had done much before arriving and would do much at Yale. Equally important, during this period of relative inactivity, Moore somehow underwent one of the more profound examples of a "change of life" by a major law professor—entering a respected, traditional negotiable instruments scholar and exiting a full-fledged, if only self-trained, social scientist. However, to accept Moore's conceit and view most of his years at Columbia as simply an example of intellectual menopause is to accept the kind of transparent post hoc rationalization he mocked in Wigmore's little volume. There Moore suggested that rationalizations about the law such as Wigmore had collected obscured the kind of regularities of behavior he proposed to isolate in his own work. Here his rationalization similarly obscures the degree to which the origins of, and stimulus for, his research first evidenced in the Wigmore review partake of both the uniquely personal and the quite commonplace in the career of an early twentieth century law professor. Starting with the commonplace will provide a good basis for gauging the impact of the personal. Unfortunately, so doing requires an apparent detour into comparatively "ancient" history.

Langdell's revolution in legal education—the teaching of law solely by means of cases—can only be understood as the *aperçu* of one possessed. Had this revolution been begun anywhere else than Harvard¹³⁹ and lacked the assistance of James Barr Ames¹⁴⁰ in all

138. See Clark, *Underhill Moore*, 59 YALE L.J. 189, 190 (1950).

139. Being at Harvard aided Langdell in two ways. First, during the first fifteen to twenty years Langdell could exploit Harvard's traditional position, and thus an essentially captive market, as the finishing school for relatively wealthy young men from upper New England generally, and Boston in particular, who wanted to be lawyers. See, e.g., C. WARREN, 2 HISTORY OF THE HARVARD LAW SCHOOL 358. As a result Langdell had the time to let the innovation mature and then to produce a half generation of student converts who might spread the word. Second, because of Harvard's central position in the movement to create the American university and its success in doing so, see L. VEYSEY, THE EMERGENCE OF THE AMERICAN UNIVERSITY (1965), it provided Langdell with a new and ready market for his innovation: all the presidents of all the lesser universities for whom success was creating a little Harvard on the prairie.

140. Stevens, *supra*, note 82 at 440, acknowledges the important role of Ames, Langdell's first convert, in the success of Langdell's revolution, although he does not pinpoint exactly what Ames contributed. Apparently Ames was a more dynamic teacher. He made the shift from Langdell's casebook which was organized on historical principles to a

likelihood it would have sunk beneath the waves as John Norton Pomeroy's similar innovation had done.¹⁴¹ Indeed, twenty years after Langdell began his revolution he had but one major convert, Keener's Columbia,¹⁴² and the merits and demerits of the innovation were still quite seriously being discussed in the pages of the second university based law review, that of Yale.¹⁴³ But accompanying Keener's victory at Columbia a succession of individuals, of which Wigmore, and Nathan Abbott are among the most notable, effectively conquered the law schools west of the Appalachians in the name of Langdell and his system.¹⁴⁴ The lucky ones like Abbott returned to the East coast; the others, for example Harry Richards, long time dean at Wisconsin, learned, or chose, to live in the provinces.¹⁴⁵ But for all it was an exciting enterprise, at least at the start.¹⁴⁶ The work of conquest done there then came the problem of populating these law schools with law teachers devoted to Langdell's system. The problem was not unprecedented; the English civil service had met it as the British colonial empire expanded, and there are earlier precedents. But peopling colonial law schools is a different problem from that of claiming territory in the name of Langdell.

casebook organized in a more analytical format as the treatises had been and shifted the justification for case law teaching from the teaching of doctrine to training for thinking like a lawyer. Even more importantly, Ames, unlike Langdell, was a missionary for the new system.

141. Pomeroy, Jr., *John Norton Pomeroy* in 8 GREAT AMERICAN LAWYERS 91, 99-101, 106, (W. Lewis ed. 1909).

142. See FOUNDATION FOR RESEARCH IN LEGAL HISTORY, *supra* note 17, at 135-58 for the story of Keener's takeover of the Columbia faculty.

143. See, e.g., Phelps, *The Methods of Legal Education*, 1 YALE L.J. 139 (1892); Keener, *The Methods of Legal Education*, 1 YALE L.J. 143 (1892).

144. Wigmore and Abbott introduced the case method at Northwestern in 1893. See W. ROALFE, *supra* note 18, at 35. Then in 1895 Abbott moved and introduced the method at Stanford where he was dean for ten years. FOUNDATION FOR RESEARCH IN LEGAL HISTORY, *supra* note 17, at 203. Francis M. Burdick was another conqueror. He introduced a system of text and cases at Cornell in 1887. See *id.* at 162.

145. b. 1868. A.B. 1892, Iowa; LL.B. 1895, Harvard. Private practice 1895, Iowa. Prof. 1898, Iowa; Dean 1903, Wisconsin. d. 1929. For a summary of Richards' early career, see W. JOHNSON, *SCHOOLED LAWYERS: A STUDY IN THE CLASH OF PROFESSIONAL CULTURES* 115, 121-33, 138-44 (1978). Richards brought case study to both Iowa and Wisconsin.

146. The excitement even comes through the dreary pages of W. ROALFE, *supra* note 18, at 34-44. It is strangely missing from W. JOHNSON, *supra* note 145, largely because he views the coming of "schooled lawyers" on the Harvard model at best ambivalently. FOUNDATION FOR RESEARCH IN LEGAL HISTORY, *supra* note 17, at 144-55, succeeds capturing the excitement at Columbia in spite of itself.

While there were several ways of solving the problem of populating the law schools with langdellian case law teachers, one seems to have been chosen. Promising young aspirants for teaching posts at major law schools like Harvard and Columbia were sent to, or placed in, provincial law schools, most notably in the midwest, with the expectation that they would learn their craft and in effect work their way back East.¹⁴⁷ There were obvious exceptions to this pattern of advancement, indeed careful examination of the growth of the Harvard and Columbia faculties shows that by and large service in the provinces was not the most likely way to a major teaching appointment.¹⁴⁸ Nevertheless, career patterns of early twentieth century law professors suggest that the idea of working one's way up through a kind of "colonial" service was at least wide-

147. The demonstration of this proposition in a small compass is quite obviously difficult. Some evidence can be garnered by looking at the first "stud book." ASSOCIATION OF AMERICAN LAW SCHOOLS, DIRECTORY OF TEACHERS IN MEMBER SCHOOLS (1922). Looking only at the first half of the listings, the following individuals, grouped by the school from which they received their final law degree with their post fifteen years later indicated in parenthesis, some quite obvious successes, others "drop-outs" of one kind or another, seem to fit the pattern.

Harvard

Henry W. Ballentine (Cal., Berkeley)
 Morton C. Campbell (Harv.)
 Elliott Cheatham (Colum.)
 E. Merrick Dodd, Jr. (Harv.)
 Henry H. Foster (Neb.)
 Everett Frazer (Minn.)
 Ralph W. Gifford (Colum.)
 Eugene Gilmore (Wis.)
 Herbert F. Goodrich (Penn.)
 William G. Hale (So. Cal.)

Henry Craig Jones (Iowa)

Steven I. Langmaid (Cal., Berkeley)
 Edwin R. Keedy (Penn.)
 Charles W. Leaphart (Mont.)

Columbia

Percy Bordwell (Iowa)
 Charles K. Burdick (Cornell)
 Homer F. Carey (Northwestern)
 Walter Wheeler Cook (Northwestern)
 Noel T. Dowling (Colum.)
 Edward W. Hinton (Chgo.)

A clear class difference can be seen in the ultimate employment of individuals at the "also-ran" law schools.

Chicago

Leslie Ayer (Wash.)

Michigan

Edmund C. Dickinson (W. Va.)
 Alvin E. Evans (Ky.)

Northwestern

Earl C. Arnold (Vand.)

Yale

Millard Breckenridge (N. Car.)
 George W. Goble (Ill.)
 John E. Hallen (Ohio St.)
 Albert J. Harno (Ill.)

148. Of the major appointments at Columbia between 1900 and 1925, only Moore, Cook, and Nathan Abbott had done any significant teaching elsewhere; at Harvard, only Pound, Edmund Morgan and Edward Thurston. See generally SUTHERLAND, *supra* note 75 and FOUNDATION FOR RESEARCH IN LEGAL HISTORY, *supra* note 17.

spread, if not well founded, and wholly new for this group of academics that had traditionally been recruited from local practitioners, often locally educated practitioners.¹⁴⁹

Individuals were not, however, simply thrown to the wolves that quite literally still were to be found in the Midwest at the time and told to teach law for the greater glory of Christopher Columbus Langdell. Rather, several different kinds of support were provided for these young law teachers. First, and most obvious, was personal support and encouragement in correspondence from the folks back home.¹⁵⁰ Beyond this the case method itself provided a common identity in academic endeavors as well as a link to the past that helped to justify colonial life. Similarly, common hazards and the camaraderie often engendered in the course of meeting them created a network of friends whose help could be called on when advancement was sought.¹⁵¹ However, at least as important as these forms of support was the notion of professional role that received its early definition by Dean Ames and substantial affirmation at almost every meeting of the visible focus of the profession, the new Association of American Law Schools.¹⁵²

When Ames, drawing on ideas of Thayer¹⁵³ and, to a lesser extent Langdell,¹⁵⁴ posited the "threefold vocation of the law professor—teacher, writer, expert counselor in legislation," and adverted to the "strenuous" nature of these tasks, as well as their importance for "the maintenance and wise administration" of the

149. W. JOHNSON, *supra* note 146, repeatedly emphasizes the fact that before adopting Langdellian case method Wisconsin relied almost exclusively on local practitioners. The same is true at Minnesota and Virginia. See J. RITCHIE, *THE FIRST HUNDRED YEARS: A SHORT HISTORY OF THE SCHOOL OF LAW OF THE UNIVERSITY OF VIRGINIA FOR THE PERIOD 1826-1926* (1978); Stein, *In Pursuit of Excellence—A History of the University of Minnesota Law School, Part I: The Pattee Years—A Time of Accommodation*, 62 MINN. L. REV. 485 (1978).

150. See text and notes at 192-95 *infra* for examples.

151. See text and notes at 177-80 *infra* for examples.

152. A short history of the A.A.L.S. can be found in Seavey, *The Association of American Law Schools in Retrospect*, 3 J. LEGAL EDUC. 153 (1950). Aspects of its history are treated throughout Stevens, *supra* note 82.

153. Thayer, *The Teaching of English Law at Universities*, 9 HARV. L. REV. 169 (1895) (emphasizing the scholarly role of the professional law teacher). This lecture was quite obviously inspired in part by A. DICEY, *CAN ENGLISH LAW BE TAUGHT IN THE UNIVERSITIES?* (1883) and J. BRYCE, 2 *THE AMERICAN COMMONWEALTH* 623 (1888).

154. See J. HURST, *THE GROWTH OF AMERICAN LAW* 263 (1950) (Langdell on the law professor as "juris consult").

law,¹⁵⁵ he created an appealing vision of the academic lawyer's role in society. Central to that vision was its scholarly aspect; Ames expected the "full-time" law professor to shortly create "a high order of treatises on all the important branches of the law, exhibiting the historical development of the subject and containing sound conclusions based on scientific analysis."¹⁵⁶ For the next twenty years, if not longer, this vision of the professorial role, embroidered in dozens of slightly different variations, but almost always emphasizing an ideal of detailed, systematic, sustained, and comprehensive works of scholarship on the German grand scale, formed the core of the identity of the professional law teacher.¹⁵⁷ Its impact can be seen in the scholarly landmarks of the time, Williston's and Wigmore's treatises, and the more monumental of the early casebooks, of which Gray's six volumes on property is surely the most extraordinary. Equally strong was its impact on the young law teachers posted to the Midwest. For them, Ames' vision, if only in its teaching aspect, provided at least rhetoric support for enduring the routine teaching responsibilities encountered at small law schools.¹⁵⁸ At the same time, Ames' notion of the scholarly aspect of the professional vocation resonated with that of advancement through colonial service in such a way as to hold out the possibility that better conditions at better schools would bring better chances for writing and legislative drafting.¹⁵⁹ Thus the concept of a professional role provided additional support for the harried, underpaid young law professor who found himself in Columbia, Lawrence, or Grand Forks with many students and many courses but few col-

155. *The Vocation of the Law Professor* in J. AMES, LECTURES ON LEGAL HISTORY 354, 368, 369 (1913) (The address was given in 1901 and privately printed thereafter).

156. *Id.* at 366.

157. Hohfeld, *A Vital School of Law and Jurisprudence and Law; Have Universities Awakened to the Enlarged Opportunities and Responsibilities of the Present Day*, in [1914] A.A.L.S. HANDBOOK 15, in its baroque detail, is perhaps the apogee of this notion of professional vocation as well as an important early statement of the case for a still more analytic, less genetic scholarship than that pioneered by Ames. Lewis, *The Law Teaching Branch of the Profession*, in [1924] A.A.L.S. HANDBOOK 65 is about the last statement of the notion in any form that Ames would have recognized.

For the impact of the Germanic model of legal scholarship on these law teachers, see AMES, *supra* note 155, at 68-69. See generally J. HERBST, THE GERMAN HISTORICAL SCHOOL IN AMERICAN SCHOLARSHIP (1965).

158. For an example of those teaching responsibilities, see text and note at 168, 172 *infra*.

159. See, e.g., text at notes 172-75, 211-19 *infra*.

leagues and precious little in the way of library resources.¹⁶⁰

The twin notions of advancement through colonial service and of a serious commitment to legal scholarship in a particular mode—treatises, and to a lesser extent casebooks, that provided a systematic presentation of a particular branch of law—by and large defined much of the world of the pre-World War I law professor.¹⁶¹ It was into this world that Underhill Moore came as a young law teacher. How much he knew about that world is not clear, although he cannot have been wholly unprepared for it. He was a 1902 graduate of Columbia, at that time at the peak of its early development.¹⁶² He knew something about what scholarship was; while in law school he completed a masters degree in the School of Political Science, the premier department in the country,¹⁶³ and as part of that degree wrote and subsequently published a short thesis.¹⁶⁴ Moore also knew what it meant to be a professional; his father was a Park Avenue ophthalmologist and there were lawyers among his family, most notably his grandfather, Abraham Underhill, and his grand uncle, Thomas S. Moore.¹⁶⁵ He likewise knew what contemporary practice was having worked for five years doing “probate, the construction of wills and trusts, the ‘disentangling’ of statutes and the law of property.”¹⁶⁶ But whatever Moore

160. On the limited libraries of provincial law schools, see D. WIGDOR, *ROSCOE POUND: PHILOSOPHER OF LAW* 121 (1974); Pattee, *The College of Law in FORTY YEARS OF THE UNIVERSITY OF MINNESOTA* 141, 142 (E. Johnson, ed., 1910).

161. One can discount the purely verbal expressions of the notions of colonial service and scholarly vocation as simply that—much talk the unimportance of which is shown by the little action that accompanied it. And as is often the case with such an objection, it has more than a bit of merit. The histories of major law schools such as Harvard and Columbia are replete with faculty whose commitment to anything more than a very episodic scholarship is highly dubious. Any attempt to account generally for the process of professionalization of law teachers before World War I would have to account for these negative cases too. But for present purposes all that is important is that, whether these two notions are dominant or only subsidiary themes over the profession as a whole, they adequately explain Moore's early professional activities. And that they do.

162. See *FOUNDATION FOR RESEARCH IN LEGAL HISTORY*, *supra* note 17, at 161.

163. The department included John W. Burgess, Frank J. Goodnow, John Bassett Moore, and Munroe Smith. See generally R.G. Hoxie, *A HISTORY OF THE FACULTY OF POLITICAL SCIENCE, COLUMBIA UNIVERSITY* (1955).

164. Moore, *What Constitutes a Contract?* 63 *ALBANY L.J.* 411 (1901).

165. Cohen, *Prof. Underhill Moore and His Influence On The Growth of the Law School*, 2 *BULL. OF ALUMNI ASS'N OF L. SCH. OF COLUM. U.* 3 (1929).

166. Horace E. Deming to Edmund J. James (Pres., U. of Ill.), June 17, 1910, Moore papers, Columbia. On Moore's employer Horace E. Deming and his practice, see text at note 276 *infra*.

knew about the world of the academic lawyer, when he decided in 1906 that it was time to teach, he sought a hand from Columbia's dean, George Kirchwey, and at his suggestion took a job at the University of Kansas Law School.¹⁶⁷

At Kansas, Moore was a real colonial officer. As the low man on a faculty of four, Moore introduced a variant of the case method of teaching while in one year offering six courses.¹⁶⁸ His students were apparently a bit intimidated by his forceful teaching style which, given that at the time he had red hair, red whiskers "in rich and tangled profusion," and a temper to match, is probably best described as fierce.¹⁶⁹ With his heavy course load little research was done; all that Moore managed to publish was an edited version of his old A.M. thesis¹⁷⁰ already published once before. After two years he moved on to Wisconsin, a school where, unlike Kansas, text books were not used in classes,¹⁷¹ and thus presumably a step up the ladder. At Wisconsin a somewhat lighter teaching schedule¹⁷² permitted him some time for scholarship, initially a casebook on negotiable instruments done in collaboration with a senior colleague there,¹⁷³ a book review,¹⁷⁴ and several articles on negotiable instruments each done with quite exacting thoroughness.¹⁷⁵ At the same time there was occasion to renew his friend-

167. FOUNDATION FOR RESEARCH IN LEGAL HISTORY, *supra* note 17, at 249.

168. Underhill Moore to Harry S. Richards, Feb. 28, 1907, (assigned text and cases but used cases in class)(on file in the Law School Administration, General Correspondence Files at Memorial Library, University of Wisconsin, Madison) [hereinafter cited as Wisconsin Law School Files, without cross-reference]; Note, 2 AM. L. SCH. REV. 245, 246 (1908) (taught Agency, Bills and Notes, Bailments and Carriers, Damages, Partnership and Insurance, International Law, and Elementary Law and Jurisprudence); Kansas Law Class of 1908, 25th Annual Reunion Booklet (1933), Moore papers, Yale.

169. See Kansas U. Law Class of 1908, 25th Annual Reunion Booklet (1933), *supra* note 168. Moore's teaching style is uniformly described as terrifying. See, e.g., FOUNDATION FOR RESEARCH IN LEGAL HISTORY, *supra* note 17, at 250.

170. Moore, *Significance of the Term "Contract" in Article I, Section 10 of the Constitution*, 14 KANSAS LAW 1 (1907).

171. Underhill Moore to George Richards, Dec. 19, 1910, Moore papers, Columbia.

172. Note, 2 AM. L. SCH. REV. 245, 246 (1908) (Bankruptcy, Bills and Notes, Criminal Law, Conflict of Laws and Suretyship).

173. H. SMITH & W. U. MOORE, CASES ON THE LAW OF BILLS AND NOTES (1910).

174. Moore, Book Review, 4 ILL. L. REV. 607 (1910) (review of F. MEECHAM & B. GILBERT, CASES ON DAMAGES (1909)).

175. Moore, *Negotiable Instruments* in 7 AMERICAN LAW AND PROCEDURE 1 (1912) (This series, edited by James Parker Hall, Dean at the University of Chicago, contains articles by Walter Wheeler Cook, Albert Kales, and Roscoe Pound, among others. To the consternation of these individuals this work, originally designed for non-lawyers, was in fact utilized by

ship with Walter Wheeler Cook and to run unsuccessfully for local office as part of an attempt to institute the commission form of government in Madison.¹⁷⁶

Moore and his colleagues understood their place on the colonial career ladder. Cook, who left Wisconsin first, seems to have helped start Moore down the road that ultimately led to Moore's joining Cook at Chicago;¹⁷⁷ Moore repaid the favor by opening up the possibility for Cook to further advance by teaching summer school at Columbia.¹⁷⁸ Moore quite explicitly valued the potential claim to advancement that was symbolized by his "connection" with Columbia through his teaching summer school there.¹⁷⁹ Eugene Gilmore, another colleague at Wisconsin, recognizing the way Wisconsin was for many but a way station to better places and wanting to join the parade, attempted to fit his career into his friends' pattern.¹⁸⁰ Similarly Moore internalized Ames' notion of a scholarly vocation. Early on he criticized a damages casebook for giving only a "half-hearted" rather than "thorough-going" application of the inductive method by lumping together tort and contract cases rather than separately working out the development of each form of action.¹⁸¹ Later he picked Williston as the model against which to measure "true scholarly instincts."¹⁸² The joint impact of these two notions can be seen in Moore's response to his first dean-ship offer. He turned it down because the library was so small that scholarship would be difficult and because the school, North Da-

the La Salle Extension University as a part of its correspondence course in law. See Hall, *Communications*, 2 AM. L. SCH. REV. 471 (1910)); Moore, *Banks and Banking in the United States* in DIE HANDELSGESETZE DES ERDBALLS 1 (O. Borchard ed. 191?); Moore, *Bills of Exchange* in 11 DIE HANDELSGESETZE DES ERDBALLS 111 (O. Borchard ed. 191?).

176. Underhill Moore to Harold Kellock, Mar. 13, 1912, Moore papers, Columbia. I infer that Moore knew Cook while both were students at Columbia from Harry S. Richards to Underhill Moore, Mar. 10, 1908 (Cook says try Missouri); Underhill Moore to Harry S. Richards, Mar. 16, 1908 (remember me to Cook), Wisconsin Law School Files.

177. See Walter Wheeler Cook to Underhill Moore, Feb. 27, 1912, Moore papers, Columbia.

178. See Underhill Moore to Harlan F. Stone, Dec. 19, 1913 (try Cook); Walter Wheeler Cook to Underhill Moore, Dec. 29, 1913 (thanks), Moore papers, Columbia.

179. See Underhill Moore to Harlan F. Stone, Dec. 19, 1913, Moore papers, Columbia.

180. See Eugene Gilmore to Underhill Moore, May 27, 1919, June 3, 1919 (I am a good teacher, but have lacked the time for scholarship); Harry S. Richards to Underhill Moore, June 16, 1919 (Gilmore not interested in scholarship), Moore papers, Columbia. On Gilmore see W. JOHNSON, *supra* note 145, at 115, 166-67.

181. Moore, *supra* note 174.

182. See Underhill Moore to Harlan F. Stone, Feb. 22, 1916, Moore papers, Columbia.

kota, was so far off the circuit that it would be hard to get good teachers.¹⁸³

It would, however, be a mistake to infer from Moore's internalization of the notions of advancement through colonial service and professorial vocation that his years at Kansas and Wisconsin were in any sense idyllic. On the contrary, while at both schools Moore expressed all of the complaints one might expect from a young man at a colonial outpost. From the beginning he was unhappy at Kansas, a place where, as Moore saw it, the Dean was proud that the law school was a "dumping ground" for athletes.¹⁸⁴ Even with his advance to Wisconsin Moore was unwilling to be contented with a law professor's salary¹⁸⁵ and soon was complaining not only about salary but also about the slow pace of his academic advancement and the general lack of appreciation or substantial recognition as a law teacher.¹⁸⁶ In the summer of 1910 an offer to teach at the University of Illinois, which, somewhat to his surprise, brought forth a matching offer at Wisconsin,¹⁸⁷ and the possibility of an offer from Cornell,¹⁸⁸ raised Moore's spirits a bit, but not for long. In the winter of 1912, he resigned his post at Wisconsin with the expectation of returning to New York, reentering practice, this time with a friend, and hopefully teaching part-time at Columbia.¹⁸⁹ However the friend died unexpectedly¹⁹⁰ and

183. Frank McVey to Underhill Moore, Apr. 6, 1912 (offer); Underhill Moore to Frank McVey, Apr. 1912 (draft) Moore papers, Columbia. A later offer at Missouri where "modern methods of teaching . . . [were] thoroughly established" Charles K. Burdick to Underhill Moore, Mar. 26, 1914, Moore papers, Columbia, floundered on the question of compensation alone, Underhill Moore to Charles K. Burdick, Apr. 13, 1914, Moore papers, Columbia. The pecking order was indeed finely drawn.

184. Underhill Moore to Harry S. Richards, Feb. 28, 1907, Wisconsin Law School Files.

185. Horace E. Deming to Underhill Moore, Dec. 23, 1908, Moore papers, Columbia. At the time Moore's salary was \$2200.

186. See George Kirchwey to Underhill Moore, Apr. 27, 1910 (replying to Moore's complaints), Moore papers, Columbia.

187. Oliver A. Harker (Dean) to Underhill Moore, June 4, 1910 (offer), June 10, 1910 (salary \$3,000); Underhill Moore to Horace E. Deming, July 30, 1910 (recounting outcome), Moore papers, Columbia. At the same time Moore had an offer to teach at George Washington. Ernest G. Lorenzen (Dean) to Underhill Moore, June 17, 1910, Moore papers, Columbia. That school was apparently below Wisconsin in the pecking order too, for a year later, Lorenzen took a post as a professor at Wisconsin.

188. See George Kirchwey to Underhill Moore, June 8, 1910 (I have written Cornell); Underhill Moore to George Kirchwey, July 30, 1910, ("Although I am devoted to my work here and like the school & faculty immensely, I hope something will come of the Cornell matter another year."), Moore papers, Columbia.

189. Underhill Moore to Charles R. Van Hise (President), Feb. 1, 1912 (resignation);

Moore stayed on at Wisconsin buoyed a bit by the deanship offer at North Dakota.¹⁹¹

While Moore struggled with his lot at Wisconsin his mentors offered necessary support and simultaneously reinforced his colonial and vocational perspectives on that lot. Dean Kirchwey provided encouragement and also reproof when confronted by Moore's impatience in the early years at Wisconsin. He emphasized both that Moore was an "infant . . . in point of years and experience" and that Moore had assumed for himself "the arduous paths of academic life."¹⁹² And he rejoiced at the possibility that Moore might receive an offer from Cornell—"a long step in the right direction."¹⁹³ When Stone took over the deanship at Columbia he took over the job of encouraging Moore, too, for example by suggesting that "ultimately" part-time work would be available if Moore sought to return to practice¹⁹⁴ or by releasing Moore from an agreement to teach summer school so Moore could take the chance to establish a connection with, and perhaps open the possibility of a job at Chicago, with the observation that Moore's teaching had been "extremely satisfactory."¹⁹⁵ Friends provided support too, most notably Cook who nurtured the hope that Moore could move to the University of Chicago,¹⁹⁶ "one of the three best law schools in the country."¹⁹⁷

While Moore waited for something better to come along, he continued to work to make sure that that something better would come along. He resumed his "intensive study of negotiable paper"¹⁹⁸ that had as its first product a new edition of Norton's *Handbook*, notable for the unbelievable thoroughness of the

Underhill Moore to Lawrence W. Trowbridge, Mar. 12, 1912 (discussion of partnership); Underhill Moore to Harlan F. Stone, Mar. 23, 1912 (what about part-time teaching?); Harlan F. Stone to Underhill Moore, Mar. 26, 1912, (nothing but patents available), Moore papers, Columbia.

190. Underhill Moore to Harlan F. Stone, Apr. 22, 1912, Moore papers, Columbia.

191. See text at note 183 *supra*.

192. George Kirchwey to Underhill Moore, Apr. 27, 1910, Moore papers, Columbia.

193. George Kirchwey to Underhill Moore, June 8, 1910, Moore papers, Columbia.

194. Harlan F. Stone to Underhill Moore, Mar. 26, 1912, Moore papers, Columbia.

195. Harlan F. Stone to Underhill Moore, Dec. 22, 1913, Moore papers, Columbia.

196. See Walter Wheeler Cook to Underhill Moore, Feb. 27, 1912, Moore papers, Columbia.

197. Underhill Moore to Charles R. Van Hise, Feb. 13, 1913, Moore papers, Columbia.

198. Walter Wheeler Cook to Underhill Moore, Aug. 4, 1916, Moore papers, Columbia.

notes.¹⁹⁹ Then, in the spring of 1914, Moore helped organize a "legal and philosophical colloquium" whose participants included John Commons, Richard T. Ely and the prominent moral philosopher F.C. Sharp.²⁰⁰ At the same time he nurtured his relationship with Chicago, not only by teaching summer school,²⁰¹ but also by teaching part-time during the school year at substantial personal inconvenience.²⁰² His efforts were not wasted. In the summer of 1914, when Julian Mack, a faculty member at Chicago, was appointed to the United States Commerce Court,²⁰³ Moore was chosen as his replacement.²⁰⁴

With his appointment at Chicago, at a substantial increase in salary, Moore's overt complaints about the financial lot of a law professor ceased,²⁰⁵ although a careful observer cannot fail to notice a reoccurrence of the pecuniary motivation in his behavior from time to time.²⁰⁶ Reunited with Cook, acquainted with Oliphant for the first time, and located at a place he could respect, Moore began to lose the manner of a sub-altern.²⁰⁷ He started attending the

199. C. NORTON, HANDBOOK OF THE LAW OF BILLS AND NOTES (4th ed. W.U. Moore & H. Wilkie 1914). At the same time he published W.U. MOORE, ILLUSTRATIVE CASES ON THE LAW OF BILLS AND NOTES (4th ed. 1914). He also tried to get the job of editing Ames' casebook on the subject. Underhill Moore to Richard Ames, May 31, 1912, Moore papers, Columbia.

200. See Underhill Moore & Henry W. Ballentine (Wis. law faculty), Notice of Legal—Philosophical Colloquium, Jan. 1914?, Moore papers, Columbia. Commons spoke on the "Legal and Economic Theory of Value and Valuation," Ely, on "The Social Theory of Private Property," and Sharp, on "Principles of Judicial Legislation."

201. James P. Hall to Underhill Moore, Dec. 13, 1912, Jan. 23, 1914, Moore papers, Columbia.

202. James P. Hall to Underhill Moore, Feb. 6, 1913 (offer to teach suretyship two days per week for spring quarter); Underhill Moore to Charles R. Van Hise, Feb. 13, 1913 (request for permission), Moore papers, Columbia.

203. On Mack see H. BARNARD, THE FORGING OF AN AMERICAN JEW: THE LIFE AND TIMES OF JUDGE JULIAN W. MACK (1974) which unfortunately slights most of Mack's career except for his Zionist activities.

204. Deans kept up their role in encouraging youngsters well into retirement. See George Kirchwey to Underhill Moore, Dec. 9, 1914 (Congratulations on your move, but I still wish you were at Columbia.), Moore papers, Columbia.

205. Moore's starting salary at Chicago was \$5500, a substantial jump from the \$4000 he would have made had he stayed at Wisconsin. With the advancement came a further decrease in teaching load. Note, 3 AM. L. SCH. REV. 587 (1914) (Bills and Notes, Municipal Corporations, Suretyship and Mortgage, and half of Contracts).

206. See text at notes 212-13 *infra*.

207. Which is not to say he was entirely satisfied with his position at Chicago. "The position here is a very attractive one and my opportunities and compensation are, *I suppose*, as good as there would be at Columbia," Underhill Moore to James McClelland, Aug. 19, 1915, Moore papers, Columbia (emphasis supplied). See also text at note 215 *infra*.

meetings of the Association of American Law Schools and participating in its affairs.²⁰⁸ He continued his research in Anglo-American negotiable instruments law, pointedly giving up its regional character.²⁰⁹ Then in 1916, almost before he had a chance to get settled in Chicago, there came the call from Columbia.²¹⁰

Moore attempted to maintain a studied indifference to Stone's offer, citing family, social, and business reasons for staying at Chicago,²¹¹ but, when Stone made that offer financially attractive,²¹² Moore came running. Indeed he began to recruit for his new school by attempting to steal colleagues from Chicago even before he had arrived at Columbia.²¹³ In truth, he was a bit surprised to get an offer from Stone²¹⁴ and not unhappy to leave the "close and stuffy" atmosphere of the University of Chicago Law School.²¹⁵ Stone's argument that plans were "well under way for the organization and development" of Columbia "as a professional school and for carrying on in connection with it work in legal research" such as would "make the strongest appeal for the man ambitious to increase his power and influence as a law teacher and a writer on legal subjects" echoed Ames' idea of a professional role.²¹⁶ It plainly hit home with Moore who acted on it as he bargained for subjects in "closely related fields of law" in order to facilitate his scholarship²¹⁷ and, not incidentally, not get stuck teaching torts.²¹⁸ In-

208. See [1914] A.A.L.S. HANDBOOK 2, [1915] A.A.L.S. HANDBOOK 25, 29 (nominating committee). Moore was also chairman of the local arrangements committee in 1915.

209. See Underhill Moore to Harold M. Wilkie (collaborator on Norton), Oct. 18, 1916 (no longer wish to do Wisconsin annotations to Negotiable Instruments Law), Moore papers, Columbia.

210. Harlan F. Stone to Underhill Moore, Jan. 11, 1916 (salary of \$6,000), Moore papers, Columbia.

211. Underhill Moore to Harlan F. Stone, Jan. 13, 1916 (and in any case I make \$6,000 and am scheduled to go to \$7,500 in due course), Moore papers, Columbia.

212. Harlan F. Stone to Underhill Moore, Jan. 17, 1916 (I can go to \$7,500); Underhill Moore to Harlan F. Stone, Jan. 19, 1916 (what about private practice?); Harlan F. Stone to Underhill Moore, Jan. 26, 1916 (I will meet but not top Chicago; you may practice but may not "maintain an office and have regular office engagements"); Underhill Moore to Harlan F. Stone, Jan. 26, 1916 (I will come talk); Harlan F. Stone to Underhill Moore, Feb. 8, 1916, (offer of \$7,500), Moore papers, Columbia.

213. See Underhill Moore to Harlan F. Stone, Feb. 22, 1916 (E. W. Hinton); Underhill Moore to Harlan F. Stone, Apr. 16, 1916 (Walter Wheeler Cook), Moore papers, Columbia.

214. Underhill Moore to W. Oliver Moore (father), Mar. 10, 1916, Moore papers, Columbia.

215. Underhill Moore to E. W. Hinton, fall 1916?, Moore papers, Columbia.

216. Harlan F. Stone to Underhill Moore, Jan. 17, 1916, Moore papers, Columbia.

217. Underhill Moore to Harlan F. Stone, Feb. 18, 1916; May 4, 1916, Moore papers,

deed, he argued with such force that Stone rearranged the curriculum in order to accommodate Moore and at the same time hold to the "cardinal principle . . . that the more prominent instructors would meet each of the three classes" each year.²¹⁹

When Moore got to Columbia he had made it, and he knew it. He worked to build his "power and influence" in many ways. He increased his activities in the A.A.L.S. by taking on the chairmanship of the round table on commercial law for two years²²⁰ and by actively participating in floor debate on proposals to classify law schools.²²¹ He increased his efforts at scholarly productivity by acquiring a student research assistant to aid in "briefing, examination of law and collection of authorities" on the grand negotiable instruments project.²²² He even planned a casebook on suretyship.²²³ In short, he acted as if he believed in scholarship on the grand scale and was in every way fully committed to the "strenuous" career of the law teacher.²²⁴ Yet almost as soon as his position at Columbia was established, somewhat curious things began to take place. First his research, once urgently up to date,²²⁵ began to fall behind.²²⁶ Then Moore stopped participating in A.A.L.S. affairs.²²⁷ Instead he began to read John Dewey on education,²²⁸ and various authors on psychoanalysis.²²⁹ He made friends with mem-

Columbia.

218. See Harlan F. Stone to Underhill Moore, Feb. 15, 1916 (torts; no one wants it and I can get you the retiring teachers' notes); Apr. 26, 1916 (again); Underhill Moore to Harlan F. Stone, May 1, 1916 (no, ignorant on the subject), May 4, 1916 (again), Moore papers, Columbia.

219. Harlan F. Stone to Underhill Moore, May 5, 1916, Moore papers, Columbia.

220. See [1920] A.A.L.S. HANDBOOK 64; [1921] A.A.L.S. HANDBOOK 29.

221. [1921] A.A.L.S. HANDBOOK at 115-19.

222. Underhill Moore to Harlan F. Stone, June 30, 1916, Moore papers, Columbia.

223. Ultimately he would even play the role of providing support for the young teachers sent to the Midwest as he had been. See Homer F. Carey (Kansas) to Underhill Moore, Feb. 6, 1929; Underhill Moore to Homer F. Carey, Feb. 13, 1929; Homer F. Carey (Michigan) to Underhill Moore, May 11, 1930; Underhill Moore to Homer F. Carey, May 14, 1930; Homer F. Carey to Underhill Moore, Sept. ?, 1931; Underhill Moore to Homer F. Carey, Sept. 30, 1931, Moore papers, Yale.

224. Underhill Moore to Harlan F. Stone, May 1, 1916, Moore papers, Columbia.

225. See Underhill Moore to Frederick C. Hicks (Colum. librarian) June 30, 1916, July 11, 1916 (must not miss a single advance sheet), Moore papers, Columbia.

226. See Underhill Moore to Max Radin (Cal., Berkeley), Oct. 27, 1919 (I am a year behind), Moore papers, Columbia.

227. After 1921, he attended only one meeting, see text and note at 646 *infra*.

228. See Underhill Moore to Robert L. Hale, Nov. 30, 1918, Moore papers, Columbia.

229. See Harold Kellock (classmate) to Underhill Moore, June 20, 1920, Moore papers,

bers of Columbia's sociology department,²³⁰ and helped raise money for a "detailed inquiry into several lines of productive industry and business enterprise" to be run by Thorsten Veblen.²³¹

The shift in Moore's interests was gradual. During this same time he published two bits of caselaw research notable largely for the copious footnotes,²³² and completed a previously contracted for revision of his jointly authored casebook.²³³ And he considered moving to Yale to be with Cook.²³⁴ But, however gradual in cumulative effect, the change was well enough known in the New York intellectual community that when Morris R. Cohen, a prominent City College professor of philosophy who was interested in legal topics, chose to take a swipe at the critics of Col. Wigmore's book as "marxians, positivists, behaviorists, and psychoanalysts . . . united in the dogma that the reasons we give for any legal institution cannot possibly have any effective influence on its growth or administration," a position he characterized as "a snap judgment"

Columbia.

230. See, e.g., William F. Ogburn to Underhill Moore, July 20, 1920 (visit to summer home) Moore papers, Columbia.

231. See *An Inquiry into Business and Production*, (unpublished study) Spring, 1920?; Harold Kellock to Underhill Moore, May 20, 1920, Moore papers, Columbia.

232. Moore, *Theft of Incomplete Negotiable Instrument and Negotiation to Holder in Due Course*, 17 COLUM. L. REV. 617 (1917); Moore, *The Right of the Remitter of a Bill or Note*, 20 COLUM. L. REV. 749 (1920). Moore also published two book reviews at this time, one mildly humorous, 19 COLUM. L. REV. 87 (1919) (review of T. BATY, *LOAN AND HIRE* (1918)) and the other quite serious, 20 COLUM. L. REV. 365 (1920) (with Walter Wheeler Cook) (review of E. LORENZEN, *THE CONFLICT OF LAWS RELATING TO BILLS AND NOTES* (1919)).

233. H. SMITH & W. U. MOORE, *CASES AND MATERIALS ON THE LAW OF BILLS AND NOTES* (2d ed. 1922).

234. See Walter Wheeler Cook to Underhill Moore, Mar. 24, 1919, Moore papers, Columbia. Moore was apparently sought as a replacement for Wesley N. Hohfeld who died in October 1918 after an illness of some nine months. Ultimately Cook decided to come to Columbia, apparently because he had concluded that it was the "place [where] the greatest progress is to be hoped for in really doing constructive things during the next twenty years," (*id.*) and, as a result, Moore decided to stay. See Ernest G. Lorenzen (then at Yale) to Underhill Moore, Apr. 16, 1919, Moore papers, Columbia. Moore and Cook had engaged in this little dance once before, but with no result. See Walter Wheeler Cook to Underhill Moore, Feb. 4, 1917 (I'll consider Columbia), Feb. 18, 1917 (well then you come to Yale); Underhill Moore to Walter Wheeler Cook, Feb. 5, 1917 (can't get faculty together for another week), Moore papers, Columbia. Dean Stone had said it was not the time to add Cook to the faculty less than a year earlier. See Harlan F. Stone to Underhill Moore, Apr. 18, 1916, Moore papers, Columbia. It took Oliphant two times to make up his mind to come to Columbia, too. See Herman Oliphant to Underhill Moore, May 29, 1920, Moore papers, Columbia.

unsupported by any serious evidence from the realm of law,"²³⁵ one of Moore's friends considered this criticism a "slap" directed squarely at Moore.²³⁶

But notoriety does not imply explicability, indeed it probably implies the reverse. The question remains just as it was posed before this detour into the commonplace in the life of the early twentieth century law professor: notoriety aside, what brought about the change in Moore's interests that first showed itself in print in the Wigmore review? The answer is to be found in the more personal aspect of Moore's participation in and reaction to the commonplace in the world of the law professor as he knew it.

One of the ideas that held together the notions of advancement through colonial service and of professorial vocation was that of the university law school. This idea was first formulated by Thayer who affirmed that "law must be studied and taught as other great sciences" at the universities, "as deeply, by like methods, and with as thorough a concentration and life-long devotion of all the powers of a learned and studious faculty" and then relegate the "difficult main work of teaching" to an "of course."²³⁷ Research, especially that in the German historical tradition,²³⁸ was

235. Cohen, Book Review, 33 YALE L.J. 892, 892 (1924). On Cohen see D. HOLLINGER, MORRIS R. COHEN AND THE SCIENTIFIC IDEAL (1975).

236. Thomas Reed Powell to Underhill Moore, June 20, 1924, Moore papers, Yale. Cohen may well have had Moore in mind as having written one of "the notices of this book [that] have been rather unjust in failing to take account of what the editors actually set out to do"—namely, create "a new type of text for students of law, occupying an intermediate position between the ordinary casebooks and treatises on the general theory of law." Cohen, *supra* note 235, at 892, 893. But, if so, it is curious that many of their specific complaints were identical. Compare Cohen, *supra* note 235, at 893 ("many of the selections seem to me perfectly valueless," "[p]roperty is discussed as if it were just one simple thing existing by itself"), and 894 ("the overpowering impression which the reading of this book makes . . . is the awful amount of nonsense written by worthy people on serious and momentous subjects") with *Rational Basis*, *supra* note 24, at 616 ("the selection and arrangement of the material under the heads of property and succession are all that would be expected from a treatment of the institution of property as a single problem to be settled *a priori*.") and 617 ("Upon opening the volume, we thought we sensed a spirit of weariness in Mr. Justice Holmes' Introduction; upon closing the book, our confidence is strengthened that this impression was correct."). Indeed they identified similar good points, too. Compare Cohen, *supra* note 235, at 894 (Pound, McMurray, and Charmont) with *Rational Basis*, *supra* note 24, at 616, 617 (Pound, Bosanquet, Charmont and Parsons). It would not have been unlikely for Cohen to have attacked an individual with whom he was in basic agreement. See generally D. HOLLINGER, *supra* note 235, at 69-90.

237. Thayer, *The Teaching of English Law at Universities*, 9 HARV. L. REV. 169, 173, 183 (1895).

238. *Id.* at 175-180. See generally J. HERBST, THE GERMAN HISTORICAL TRADITION IN

thus in the forefront, rhetorically at least, of discussion aimed at forging a professional role. Ames, similarly emphasized the scholarly aspects of the university law professor's "vocation" but, as might be expected from a stronger teacher, began with the "paramount duty" of teaching on the part of one who has "mastered his subject."²³⁹ The vision of the younger generation, those who were Moore's chronological contemporaries, was if anything more extreme as can be seen from Hohfeld's *Vital School of Jurisprudence and Law* in which, drawing on the example of "schools of medicine and education" that have "gone far . . . in developing the sciences and activities that lie back of the purely professional work," he created a school for "the systematic and developmental study of legal systems" so grand as to quite obviously dwarf the professional program.²⁴⁰ And Hohfeld's was a vision with more than a little magic to it as can be seen from the later somewhat bewildering history of the idea.²⁴¹ As these leaders of the profession saw the matter it was the true university law school where one advanced and in which one could most fully practice one's scholarly vocation. In support of this goal they identified as one of the reasons for the superiority of the university affiliated law school the advantage to be derived from the manifold resources of the other departments of the university.²⁴²

Looked at critically the idea of a university law school was partially a device whereby academic lawyers attempted to differentiate themselves from their netheren in the proprietary schools. At the same time it was an idea that could be acted upon, just as the

AMERICAN SCHOLARSHIP (1965).

239. J. AMES, *supra* note 155 at 364-65, 362.

240. Hohfeld, *A Vital School of Jurisprudence and Law: Have American Universities Awakened to the Enlarged Opportunities and Responsibilities of the Present Day?* in [1914] A.A.L.S. HANDBOOK 76, 82, 80.

241. Hohfeld's speech and a similar one by Harry Richards led to the formation of a Committee on the Establishment of A Juristic Center of the Association of American Law Schools. See [1915] A.A.L.S. HANDBOOK 28-29. Richards, Joseph Beale and Harlan Fisk Stone as members of the Committee tried to kill the idea of establishing such a center since "constant work with advanced classes in speculative jurisprudence is not calculated to produce results that are of great practical value." [1916] A.A.L.S. HANDBOOK 180-182. Kocourek managed to keep the idea of such a center alive, *id.* at 94-95. When it surfaced on the other side of World War I, it had metamorphized into the organization that became the American Law Institute, [1922] A.A.L.S. HANDBOOK 37-39. The common law world had again managed to triumph.

242. See, e.g., Swan, *Reconstruction of the Legal Profession*, 28 YALE L.J. 784, 792-94 (1919) (a peculiarly mundane example).

notion of a professional vocation, in part a plea for higher salaries, could be.²⁴³ Moore quite obviously acted on the notion of a professional vocation as he did his colonial service.²⁴⁴ Likewise, he acted as if he believed in the idea of the university law school. When he sought, or was asked, to leave Kansas and teacher's training,²⁴⁵ Moore looked for a place where he could "sympathize with the ideals of the rest of the faculty."²⁴⁶ When he found that place with his move to Chicago he gave up any lingering parochial conception of the appropriate scope of his research and began to give his work national scope.²⁴⁷ Then, two years later, with the move to Columbia, Moore reached the university law school *par excellence*. Columbia, unlike almost any other major law school, had had a constant, if rocky, relationship with studies in political science for nearly sixty years.²⁴⁸ The school was thus, in theory at least, more open to the resources of the university than were most law schools at the time. When Moore arrived he started to explore just what he had been told would be his reward for successful advancement up the ladder of colonial service—the resources of a major university; the same resources he had begun to explore in a very tentative way his last semester at Wisconsin.²⁴⁹

243. See, e.g., AMES, *supra* note 155, at 369. This note continues down to this day. See H. Wellington, Annual Report of the Dean of Yale Law School to the President and Fellows of Yale University for 1977-78, at 4-5 (1978).

244. See text at notes 173-75, 181-83, 198-99, 209 *supra*.

245. Clark, *Underhill Moore*, 59 YALE L.J. 189, 190-91 (1950) suggests that Moore created some trouble while at Kansas. Exactly what that trouble was is hard to pinpoint, however. There is a family story that Moore was fired from his post at Kansas in a dispute over Chapel attendance and that William Allen White helped him out of this bind. Interview with Jane Moore, May 19, 1976. I have been unable to verify the story, though it has a certain ring of truth to it. The survival of compulsory chapel at Midwestern state universities as late as 1907 is one of those quaint native customs that Moore, the colonial officer, would have felt bound to resist just as in other places he would have felt compelled to clothe the natives. But, however plausible, the story is not likely to be true. Moore ascribed his troubles at Kansas to his having flunked 15 to 20 per cent of his classes, a fact which together with his use of the case method earned his dean's enmity. Underhill Moore to Harry S. Richards, Feb. 28, 1907, Wisconsin Law School Files. One of the Regents at Kansas ascribed those troubles to a feeling on the part of students that Moore was too severe and expected too much work. A.C. Mitchell to Harry S. Richards, May 22, 1908, Wisconsin Law School Files.

246. Underhill Moore to Harry S. Richards, Mar. 7, 1908, Wisconsin Law School Files.

247. See text at note 209 *supra*.

248. See generally, FOUNDATION FOR RESEARCH IN LEGAL HISTORY, *supra* note 17, at 85-91, 96-98, 110-15, 126-28, 148, 167-68, 210-11.

249. See text at note 200 *supra*.

What Moore found was an intellectual community in its most extraordinary period of social scientific creativity: James Harvey Robinson and Charles Beard in history, Thorstein Veblen²⁵⁰ and William D. Mitchell in economics, Franz Boas in anthropology, E.L. Thorndike in educational psychology, William F. Ogburn in sociology and, of course, John Dewey. And again Moore did just what he was expected to do, or at least what the idea of a university law school purported to expect; he attempted to learn what this exciting atmosphere had to offer for the study of law.

Part of what Moore in fact learned in this atmosphere is easy to isolate. As the citations in the Wigmore review indicate, he gained a basic grounding in social science as it was taught in the years around World War I.²⁵¹ But specific knowledge is not all that Moore acquired in these years. A more important, though less tangible, acquisition was an understanding of, and commitment to, the modern concept of science as an empirical or experimental activity.²⁵²

Evidence of the fact and the impact of the adoption of a modern concept of science on Moore's previously quite conventional thought can be seen by comparing any of his earlier articles with the Wigmore review or, even better, by browsing through the pages of the volume of the *Columbia Law Review* in which that review appears. There, amid discussions of determinable fees,²⁵³ frolic and

250. Veblen was not at Columbia but at the New School for Social Research, an establishment of dissident Columbia faculty members. He was, however, a part of the intellectual community that had its center first at Columbia and then at Columbia and the New School.

251. See *Rational Basis*, *supra* note 24, at 613-14. Each of the books cited is a general introductory work, occasionally a text book even, written with one exception (William McDougall) by people at, or associated with, Columbia University in the years on either side of World War I. Each is the kind of book a technical specialist might suggest to an interested but green colleague in response to the lunchtime observation, "That's very interesting; I'd like to read some more about these problems"—the kind of introduction one unlettered in social science could usefully have acquired immediately after becoming seriously interested in it. One of the authors is known to have been a personal friend of Moore—William F. Ogburn; the rest were individuals that a prominent new faculty member less than forty years old and hired at a quite extraordinary salary would have met at the faculty club of what was still a relatively small university.

252. My understanding of the reception of the "scientific ideal" into American academic thought has been immeasurably aided by many discussions with Prof. David Hollinger. He should not, however, be tarred with responsibility for what I have done to his essential insight into American thought around the turn of the century.

253. Powell, *Determinable Fees*, 23 COLUM. L. REV. 207 (1923).

detour,²⁵⁴ and confusion of goods,²⁵⁵ Moore's article stands out as virtually the only piece that looks both to experimental methods and to social and economic conditions for the answer to any question about law and this in a volume that contains articles by Karl Llewellyn²⁵⁶ and A.A. Berle, Jr.²⁵⁷ Yet, the review is singularly devoid of suggestions of how this quite remarkable change in Moore's thinking took place.

Although one could easily argue that by 1920 the modern concept of science was sufficiently established within the university community for it to be simply in the air and thus capable of penetrating unaided even the walls of a law school, the specific source for Moore's ideas was more concrete; it was a trio of scholars quite squarely within the social science community that Moore confronted with his arrival at Columbia: John Dewey, James Harvey Robinson, and Thorstein Veblen.

These three men who Moore acknowledged had made him over during his "first years of enthusiasm at Columbia"²⁵⁸ were in

254. Smith, *Frolic and Detour: I*, 23 COLUM. L. REV. 444 (1923). Smith, *Frolic and Detour: II*, 23 COLUM. L. REV. 716 (1923).

255. Arnold, *Confusion*, 23 COLUM. L. REV. 235 (1923).

256. Llewellyn, *Supervening Impossibility of Performing Conditions Precedent in the Law of Negotiable Paper*, 23 COLUM. L. REV. 142 (1923).

257. Berle, Jr., *Non-Cumulative Preferred Stock*, 23 COLUM. L. REV. 358 (1923). The contrast is heightened if one notes that the only other article that from its title sounds as if it will deviate, and in some ways does, from the norm of langdellian disputation is an article that emphasizes the source of that contrast with a footnote acknowledgement to Dewey. See Isaacs, *How Lawyers Think*, 23 COLUM. L. REV. 555 n.2 (1923).

258. Underhill Moore to James Harvey Robinson, Jan. 13, 1934, Moore papers, Yale. The context of this letter lends strength to deductions from it. Moore was the co-organizer of a committee to raise funds to commission a portrait of Thorstein Veblen, Yale's first Ph.D., to be hung in Yale's new Hall of Graduate Studies. The committee included Edgar Furniss, an economist and Dean of Yale's Graduate School, Wesley C. Mitchell, the Columbia economist, Jerome Frank and Harold Laski. Moore had written Robinson, a personal friend from the years at Columbia, Interview with Jane Moore, May 19, 1976, for a contribution, which Robinson cheerfully made. The quotation asserting that Robinson, Veblen, and Dewey "made . . . [Moore] over" in his early years at Columbia is from Moore's uncharacteristically warm thank you note to Robinson.

The similarity in the thought of these three men has been noted. See generally M. WHITE, *SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM* (2d ed. 1957). As subject for biography Veblen is the best represented. See J. DORFMAN, *THORSTEIN VEBLER AND HIS AMERICA* (1935); D. RIESMAN, *THORSTEIN VEBLER: A CRITICAL INTERPRETATION* (1953). The standard work on Dewey is still S. HOOK, *JOHN DEWEY, AN INTELLECTUAL PORTRAIT* (1939) although G. DYKHUYEN, *THE LIFE AND MIND OF JOHN DEWEY* (1973) merits some attention. See also L. HENDRICK, *JAMES HARVEY ROBINSON, TEACHER OF HISTORY* (1946).

fact friends, all living and working in New York City by about 1919, just the time when Moore's interests began to shift.²⁵⁹ All three shared and were known for their thorough commitment to the modern notion of science and their equally thorough opposition to the more ancient notion of science as any rational activity, specifically, as a rationalistic activity. Dewey was a tireless proselytizer for a scientific attitude of mind.²⁶⁰ Robinson, who has been described as a "cheer-leader" for the social sciences, fought for a scientific history that explained not how things were but how they had come about.²⁶¹ Veblen similarly attacked classical economics for not concerning itself with actual institutions and for not basing its theoretic propositions on examination of functioning economic entities.²⁶²

The impact of these concepts from Robinson, Veblen, and Dewey on the content of the Wigmore review and also to Moore's later work can be seen by examining the langdellian science of law as it was known to Moore and his contemporaries.²⁶³ For all of its

259. Dewey and Robinson were at Columbia when Moore arrived there. Veblen came to New York in 1918 and joined Robinson at the New School for Social Research in 1919 when that institution was established, about the time Moore published his last bit of conventional research. Soon after its founding Moore showed a definite interest in activities at the New School. See Underhill Moore to A.A. Goldenweiser, Nov. 17, 1922 (meeting of the Social Science Club of the New School), Moore papers, Yale. Robinson was a personal friend; Dewey, at least a solid acquaintance. See John Dewey to Underhill Moore, Nov. 13, 1924 (comment on Wigmore review: "I haven't seen the book, but I can readily believe that it called for this treatment; the general type of thought you criticize is certainly the great intellectual enemy at present."), Moore papers, Columbia. How well Moore knew Veblen is open to question. At least he did not know Veblen well enough in 1919 to ask him directly for an article for the *Columbia Law Review*. See Underhill Moore to Harvey T. Maun, Mar. 4, 1919, Moore papers, Columbia. See also text and note 231 *supra*.

260. M. WHITE, *supra* note 258, 238-39.

261. *Id.* at 29.

262. *Id.* at 7-8, 21-27.

263. It is extremely doubtful that specific works of Dewey, Robinson, and Veblen, as opposed to their general attitude or approach, provided a direct influence on Moore that resulted in his adoption of the ideas expressed in the Wigmore review. Of the two books by Dewey it is known that Moore read—*DEMOCRACY AND EDUCATION* (1916) and *HUMAN NATURE AND CONDUCT* (1922)—neither is central to his concerns and, even more important, Dewey's well known opposition to Watsonian behaviorist psychology is wholly at odds with Moore's early and continuing interest in that psychological approach. As for Robinson, Moore showed no interest in history until during World War II. Veblen is a more difficult case. In a very real sense Veblen was an urban anthropologist and his notion of an institution and of the importance of examining institutional behavior finds a parallel in Moore's notion of an institution, see text at note 116, *supra*, which like Veblen's is borrowed in part from cultural anthropology, and an exemplar in at least one of Moore's activities during the

talk about being an inductive enterprise, legal science was precisely the kind of science Dewey, Robinson, and Veblen had attacked. Concerned with the formal interrelationship of rules and the principles from which they were supposedly derived, legal science assumed the efficacy of the rules and ignored their origins, except as readily disclosed in old English cases or as produced out of an ill-defined custom or an hypothesized sovereignty. It thus purported to describe and understand a human activity without putting that activity into its social context and then subjecting that complex of conceptual artifact and social context to empirical, especially causal, scrutiny.²⁶⁴ Therefore legal science, if seen as a description of the operation of legal institutions, was open, first, to the charge that it had ignored its ostensible subject matter and, second, to the prescription that direct examination of that subject matter in a detached, empirical attitude would improve understanding of the activity or institution far more than further formal elaboration.

This was precisely the line of argument that Moore took in his Wigmore review. Moore began his review with the assertion that, since legal institutions were the products of the habitual behavior of individuals, to propose and carry out an inquiry into the rational basis of group habits was, first, to pose "a problem that does not exist" and second, to ignore the only plausible subject matter for inquiry: the ways in which group habits are formed. Such an inquiry necessitated examining the "proximate ends" to which existing group habits, that is, existing legal institutions, are means and the ways in which group habits can be modified, implicitly to attain different proximate ends.²⁶⁵ Moore's prescription was just what one might have expected of Dewey and the others: immedi-

twenties—the cement industry study. However both the notion of an institution and the related study of cement production are easily derived from sources other than Veblen and, in fact, to the extent ascribed to individual authors are ascribed to authors other than Veblen (See *Rational Basis*, *supra* note 24, at 614 n.5). On the other hand, at one time Moore's attachment to Veblen's thought was well enough known to be mentioned in the high-brow press. See *The Honorable Supreme Court*, 13 *FORTUNE* 79, 83 (May 1936).

264. The conspicuous exception to this generalization is Roscoe Pound who in *THE SPIRIT OF THE COMMON LAW* (1921) adopted an explicitly causal approach to legal history, but utilized a notion of causation (*i.e.*, what precedes causes what follows) so simpleminded as to only emphasize its similarity with langdellian lawyer's history of doctrine and its distance from a social history of law such as Robinson, or more obviously his friend Charles Beard, might have written. See, *e.g.*, C. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* (1913).

265. *Rational Basis*, *supra* note 24, at 612.

ately turn inquiry "in the direction of detailed observation and systematic experiment," in other words adopt a modern empirical cast of mind.²⁶⁶ And finally, in detailing criticism of Wigmore's volume, Moore sketched the kinds of inquiries that might be undertaken by one with the requisite empirical cast of mind: the impact of material, especially biological and technological culture on the formation and maintenance of group habits,²⁶⁷ "the available means to experimentation"—executive, legislative, and judicial legislation—in the modification of group habits,²⁶⁸ and current experiments in the use of these tools.²⁶⁹

Equally important, Moore's two pronged argument against Wigmore's book, that it asked the wrong question, and failed to adopt a scientific attitude, was precisely the same as the one Dewey had made with respect to formal logic seen as a description of human thought,²⁷⁰ Robinson, with respect to European history seen as a list of kings, treaties, and plagues,²⁷¹ and Veblen, with respect to classical economics seen as a description of industrial production and marketing.²⁷² Moreover, not only was the substance of Moore's argument such that it could have been done by Dewey, Robinson, or Veblen, the form was too. In making his point Moore took an ambiguously normative/descriptive question, "What is the basis of legal institutions?", asserted that *the* question was descriptive, and criticized the answer for being ambiguously normative/descriptive instead of rigorously descriptive, just the procedure which Dewey and Veblen adopted, and have been criticized for, in their critiques of formal logic and classical economics.²⁷³

Now why Moore found the scientific message of Dewey, Robinson, and Veblen so enticing that after accepting it he could say to a friend, "There is no God and Dewey is his prophet,"²⁷⁴ is a different question. Here the truly personal factors enter in. Part

266. *Id.*

267. *Id.* at 612-14.

268. *Id.* at 615. Curiously Moore did not mention various types of government propaganda as he would years later.

269. *Id.*

270. See, e.g., Dewey, *Logical Method and Law*, 10 CORNELL L.Q. 17, 18-20 (1924). See also M. WHITE, *supra* note 258, at 24.

271. M. WHITE, *supra* note 258, at 28-29, 48-52.

272. *Id.* at 22-24, 186-89.

273. *Id.* at 23.

274. Underhill Moore to Cassius J. Keyser (Columbia Mathematics), Feb. 6, 1924, Moore papers, Columbia.

of the reason is his literal mindedness which, when combined with a streak of thoroughness, could easily reason "If this is legal science, then it will be really scientific."²⁷⁵ Equally critical is the identification of each of the three men, and social science generally, with progressive politics. Moore had been associated with liberal or progressive political activities at least since he was graduated from law school, ties acquired if nowhere else through his association in practice with Horace E. Deming, a dogged advocate of the Australian ballot and significant force in reform politics, first in New York, through his work in the Reform Club, and then nationally, as one of the founders of the National Municipal League.²⁷⁶ Indeed, Moore affirmed this political background in his losing run for local office, made on behalf of that classic progressive reform, the commission form of government²⁷⁷ and in working with such organizations as the American Civil Liberties Union²⁷⁸ and the Society for Cultural Relations with Russia²⁷⁹ during his years at Columbia. But beyond these two factors little can be isolated, little except that uniquely personal factor of having come to Columbia, to the university law school, from colonial service primed, as it were, to learn what the university had to offer for the study and teaching of law.

What Moore expected to learn, or what his mentors expected him to learn, from his confrontation with the university is unclear. What he in fact learned, however, as the Wigmore review quite dramatically showed, was that he had been asking the wrong questions, that in the words of the largely apocryphal Moore throwing out his research notes, "It's my life work . . . and it's all wrong."²⁸⁰ He had been seeking an understanding of law by asking questions

275. Cf. Interview with Emma Corstvet Llewellyn, Aug. 19, 1975 (emphasizing "bull-headedness"); Gilbert Sussman to John Henry Schlegel, Oct. 1, 1976 (taped interview). The parking study, *see* text accompanying notes 410-606, is a monument to thoroughness, if nothing else. As for literal mindedness it is notable that in all of Moore's correspondence there are virtually no metaphoric statements and that even his closest associates never comment on his humor, even indirectly.

276. *See* 33 NAT'L CYCLOPEDIA AM. BIOG. 424 (1947).

277. *See* text at note 176 *supra*.

278. *See, e.g.*, Albert De Silver to Underhill Moore, Apr. 27, 1922; Roger Baldwin to Underhill Moore, Nov. 10, 1922, Moore papers, Yale. Cf. Minutes of a meeting of Lawyers at the Lawyer's Club, Mar. 17, 1920 at 1 P.M. (meeting concerning "legal service needed in presenting the civil liberties issue at the present time . . .") Moore papers, Columbia.

279. Of which Moore was once a director.

280. *See* FOUNDATION FOR RESEARCH IN LEGAL HISTORY, *supra* note 17, at 251.

about doctrine when all the other social sciences had been asking questions about society and individuals in society. And so, perversely—for the lack of activity surrounding rhetoric about the resources of the university suggests the rhetoric was not intended to be taken seriously—Moore started off to acquire a social understanding of law. Being a commercial lawyer and thus being familiar with arguments about commercial law as little more than the law facilitating the customs of businessmen, Moore was quite naturally attracted to cultural anthropology. So when it came time to not just talk about research, but do some, he isolated a method to look seriously at the relation between law and custom and then abandoned Columbia where he got the idea, but lost his friends, for Yale and a new start.

II. RESEARCH AT YALE

*Can't you see I'm busy
counting these cars?*

Oil portraits are an unusual form of stock-taking, among the living a voluntary acquiescence in being "framed." When Moore left Columbia several of his former students assembled a fund to acquire a portrait of Moore for his former law school.²⁸¹ The resulting likeness, painted by a neighbor whose work Moore tirelessly promoted, shows a rather stiff, possibly corseted, late-Edwardian gentleman, his glasses forcefully grasped in one hand but, for a pipe smoker, his pipe rather gingerly held in the other. He is seated gazing off into the middle distance with a certain amount of obvious self-satisfaction. The background of book shelves and desk suggests an office, but there are few clues to the fact that the subject is a law professor; he might as well be a banker or a prosperous businessman. Yet, if one discounts for the relatively limited talent of the artist, the picture offers a significant insight into the subject at this time in his career. Moore was, first of all, a gentleman. The family was at least upper middle class and accordingly his tastes ran to expensive pipes, bone handle knives, and gray Packard roadsters. He was likewise a late-Edwardian. He had come to maturity as the twentieth century began, then learned two gentle-

281. The fund was assembled by Carroll Shanks and Homer F. Carey. A photograph of the portrait appeared in 2 BULL. OF THE ALUMNI ASS'N OF THE L. SCH. OF COLUMB. U. 1 (1929).

manly crafts, initially that of the office lawyer in the world of small but elite corporate and commercial practice that was already dying out, and then, as the first decade of that century drew to a close, that of the law teacher. In the process Moore acquired, if he had not been born with, the attitudes of the pre-war lawyer or businessman. Work was neither fun nor unimportant; it was to be seriously and thoroughly pursued. Recreation was neither frivolous nor a family affair; it was most often a walk in the woods with one's friends, a long boat or auto trip, or a chance to read alone at one's summer home. Yet, at the same time, Moore was neither dour nor hidebound. His occasional dalliances were known to his employees at least.²⁸² His most trusted assistants, William O. Douglas and Carroll Shanks, are known to have been set to the illicit task of grading his exams in the secrecy of the Moore family living room in Englewood.²⁸³ His tastes in music ran to the moderately avant-garde and in literature, to contemporary novels, poetry, and drama.²⁸⁴ And his politics was distinctly liberal, if not left.²⁸⁵ These hints of modernity aside however, overall Moore was distinctly a man of the pre-war world.

While the figure in the foreground of Moore's portrait captures the man, the indefinite surroundings likewise suggest the essential ambiguity of his position in the already balkan intellectual world of the twenties and thirties. Trained as a lawyer and law professor, Moore had foresworn the method of research peculiar to his training because it was "not verified in experience" with the intention of beginning a line of research that by its method, the distinguishing demarcation for modern academics, should have placed him in one of the social science departments of the University.²⁸⁶ Yet, wholly without the credentials that would have admit-

282. Interview with Emma Corstvet Llewellyn, Aug. 19, 1975; Interview with William L. Dennis, Apr. 21, 1977.

283. Interview with Jane Moore, May 19, 1976.

284. Moore knew and supported the music of the American composer Carl Ruggles, read Joyce's *ULYSSES* when published only as *WORK IN PROGRESS*, knew T.S. Eliot's poetry and was a regular at Yale Drama School productions.

285. Not only was he an A.C.L.U. regular but he supported such causes as the sustaining fund for Emma Goldman, see Mildred Mesirow to Underhill Moore, Apr. 3, 1935 (thank you for the contribution), Moore papers, Yale, and the International Committee for Political Prisoners. Emma Corstvet remembers that at this time Moore considered himself a socialist. Interview with Emma Corstvet Llewellyn, Aug. 19, 1975.

286. It is likely that the oft-noted (see, e.g., J. REDLICH, *THE COMMON LAW AND THE CASE METHOD* 23-25 (1914); Stevens, *supra* note 82, at 440-41) shift in the justification of

ted him to one of these newly professionalized and thus highly credential conscious departments,²⁸⁷ Moore lacked a natural home. He was an amateur in a world increasingly intolerant of anything but professionals and as such was without a recognizable peer group. Moore was not, however, wholly without resources, at least if a sense of self-satisfaction, of confidence in one's view into the middle distance, if not farther, can be considered a resource. In his gaze and in the force with which his glasses, if not his pipe, were held, there was sufficient confidence to last for a while, at least until the support which Moore expected from the Institute of Human Relations could materialize. How long that self-confidence lasted and what it produced in the way of research is a matter that divides neatly into two subjects—banking research and parking research.

A. *The Law and Practice of Commercial Banking*

It is precisely with a sense of self-confidence that Moore began his research at Yale. Before he had lost Theodore S. Hope, Jr., to Herman Oliphant and the Hopkins' Institute,²⁸⁸ the two men had isolated a subject for research and devised a questionnaire with which to begin the study. So in the fall of 1929, Moore set his new assistant, Gilbert Sussman,²⁸⁹ to work pretesting the questionnaire²⁹⁰ and calmly left on a sea voyage to Europe on board the yacht of an insurance broker friend.²⁹¹ When he returned, midway into his first semester at Yale,²⁹² problems with the questionnaire had already surfaced, problems intimately related to the research method, the subject for research, and not incidentally, Moore's

the case method of legal instruction from a better way of learning doctrine to the way of learning to think like a lawyer was in part an academic lawyer's response to being part of a university. Thinking like a lawyer was a distinctive method; it thus distinguished law as an academic discipline as much as participant observation distinguished anthropology or the experiment distinguished early psychology.

287. See generally works cited at note 4 *supra*.

288. Theodore S. Hope to Underhill Moore, June 27, 1930, Moore papers, Yale.

289. b. 1905. A.B. 1926, Oregon; LL.B. 1929, Colum. Research ass't 1929, Yale. Government practice, 1934, Washington D.C. & Oregon; Private practice, 1945, Oregon.

290. See Moore & Sussman, *Legal and Institutional Methods Applied to the Debiting of Direct Discounts—III. The Connecticut Studies* 40 YALE L.J. 752 (1931) [hereinafter cited as *The Conn. Studies*].

291. See Underhill Moore, *Diary Written During the Cruise from New York to Gibraltar, on the Schooner Yacht Black Eagle*, Aug. 7—Sept. 4, 1929, Moore papers, Yale.

292. Moore's first faculty meeting was Nov. 4, 1929.

lack of experience in questionnaire design.

Using his so-called "institutional approach" Moore set out to examine the extent to which judicial decisions reflect judicial acceptance and enforcement of community custom. In such an enterprise the otherwise despised law reports were peculiarly useful because they were full of countless "natural experiments," instances where the decisions on a given point of law "go both ways." In these instances one could attempt to discover the institutional, customary, ways of behaving and then match this behavior to the rule of law adopted in the jurisdiction.²⁹³ Moore chose to research one of these instances: the liability of a bank for wrongful dishonor of a customer's check where the bank's defense was its decision to charge the customer's account, without notice to the customer, with the amount of that customer's overdue personal time note which had been previously discounted for the customer by the bank and its proceeds credited to the account in question—in banking jargon of the time the practice of debiting (without notice) direct discounts. On this quite abstruse and now largely unintelligible question of banking law Moore isolated three decisions, a 1904 South Carolina case holding for the customer and 1920 New York and 1928 Pennsylvania cases holding for the bank, and set out to investigate banking practice in these three states during the relevant period of time.²⁹⁴

To begin this investigation Moore gave Sussman the task of pretesting Moore's questionnaire by administering it to all of the banks in the state of Connecticut.²⁹⁵ Soon after Sussman began this task it became apparent that although Moore had done a very careful legal analysis of his fact situation, his questionnaire omitted any mention of the frequency of one of the suspected variables, the existence of security.²⁹⁶ The omission was one of the problems that faced Moore when he returned from Europe. It was easily corrected and so Sussman returned to the field with a new questionnaire, one which both showed a growing awareness that behavior

293. Moore & Sussman, *Legal and Institutional Methods Applied to the Debiting of Direct Discounts—II. Institutional Method*, 40 YALE L.J. 555, 564-65 (1931).

294. Moore & Sussman, *Legal and Institutional Methods Applied to the Debiting of Direct Discounts—I. Legal Method: Banker's Set-Off*, 40 YALE L.J. 381, 381-85 (1931).

295. *The Conn. Studies*, *supra* note 290, at 752-53.

296. See Moore & Sussman, *supra* note 293, at 571; *The Conn. Studies*, *supra* note 290, at 754-55.

was a matter of more or less, and not yes or no,²⁹⁷ and collected data on matters that were irrelevant to the study, but of general interest to Moore.²⁹⁸ A more difficult problem that emerged was the recognition that, even as revised, the questionnaire would uncover not the behavior patterns in question, but only bankers' opinions about those behavior patterns. In one sense that problem, too, could be solved, at least in Connecticut, and Moore set about solving it. He sent Sussman to observe the activities of the bank employees who carried out the transactions Moore was interested in.²⁹⁹ This study, which by its small sample showed a growing awareness of the limited purposes of pretesting methods,³⁰⁰ generally supported the findings of the questionnaire study.³⁰¹ But sending Sussman into the field in Connecticut for the third time only accentuated another, much less tractable problem: money.

Moore had negotiated with Hutchins for the payment of the salaries of two research assistants, one for the empirical research and the other for more mundane tasks, including doing Moore's personal bookkeeping.³⁰² Some money for expenses other than the salary of these two assistants was included in what was plainly seen by Moore, at least, as a package deal,³⁰³ but he had not really understood how expensive the planned field work was going to be. The cost of field work was brought directly home when, even before Sussman had finished with the third round of pretesting in Connecticut, Moore sent him off to Pennsylvania to study the practices of banks there before any more time could elapse between the 1928 Pennsylvania decision and the investigation.³⁰⁴ In

297. Compare *The Conn. Studies*, *supra* note 290, at 753-54 with *id.* at 755 (especially questions 22 and 26).

298. *Id.* at 755 (for example, the practice of paying interest on the balance in checking accounts).

299. *Id.* at 766-67.

300. Sussman visited nineteen (12 per cent) of the commercial banks in the state, "each . . . chosen because of its proximity to New Haven and because of the likelihood that it would allow the study to be made." *Id.* at 766.

301. See *id.* at 773-74.

302. See Charles E. Clark to Underhill Moore, May 17, 1929 (recounting conversation with Hutchins), Moore papers, Yale. See note 81 *supra*.

303. Charles E. Clark to Underhill Moore, Mar. 13, 1930 (expense money); Underhill Moore to Charles E. Clark, Nov. 5, 1931 (Moore's understanding), Moore papers, Yale.

304. Moore & Sussman, *Legal and Institutional Methods Applied to the Debiting of Direct Discounts—IV. The South Carolina and Pennsylvania Studies*, 40 *YALE L.J.* 928, 942 (1931) [hereinafter cited as *The S. C. and Penn. Studies*].

so doing Moore substantially depleted his available funds and thus jeopardized speedy completion of the research. So, while Sussman finished his work in Connecticut, Moore worked to get Hutchins' successor, Charles E. Clark, to supply more money in order to send Sussman to South Carolina.³⁰⁵ Moore's plea, made in the name of the "morale of everyone in the Bank Credit study,"³⁰⁶ fell on deaf ears. To Clark, a budget was a budget, especially when he was "doubtful about the feasibility of tracing the life history of a case so far away as South Carolina and so long ago as 1900."³⁰⁷ Moore turned to Yale's President James R. Angell, an acquaintance from back at the University of Chicago, for help in softening up Clark.³⁰⁸ Although Angell agreed to help,³⁰⁹ Clark did not seem to relent.

Part of the reason why the morale of everyone in the Bank Credit study needed lifting was that the results in Pennsylvania had hardly been a cause for great joy; they were, at the least, somewhat ambiguous. For this study Moore had sent Sussman to conduct interviews at a selection of the banks in the state, a selection made so as to over-represent the banks in the Philadelphia area where the case had arisen.³¹⁰ From his experience in Connecticut Moore had substantially improved his questionnaire. It was narrower in scope and more naturalistic than the obviously legalistic Connecticut questionnaire.³¹¹ But a better instrument had not brought better results. If anything the reverse was true; the better instrument had brought more ambiguous results.³¹² Moore discovered that most discounted time notes were paid by the borrower's drawing a check, generally on his account at the bank holding his note, and tendering this check in payment of the note. This practice was all but universal outside of Philadelphia. A significantly smaller proportion of matured time notes were paid by the borrower explicitly instructing the bank that held the note to pay it

305. Underhill Moore to Charles E. Clark, Mar. 12, 1930, Moore papers, Yale. The Connecticut study was finished in March, 1930 when the Pennsylvania study was begun. *Id.*

306. *Id.*

307. Charles E. Clark to Underhill Moore, Mar. 13, 1930, Moore papers, Yale.

308. Underhill Moore to James R. Angell, May 19, 1930, Angell papers.

309. James R. Angell to Underhill Moore, May 20, 1930, Angell papers.

310. *The S. C. and Penn. Studies*, *supra* note 304, at 942-43.

311. Compare *The Conn. Studies*, *supra* note 290, at 753-55 with *The S. C. and Penn. Studies*, *supra* note 304, at 943.

312. *The S. C. and Penn. Studies*, *supra* note 304, at 947 reports that result in tabular form.

by directly charging the borrower's account at that bank. No one could have been surprised by these results which were essentially similar to the results in Connecticut.³¹³ But on the key question of whether a bank ever liquidated a matured time note without either a check of, or instructions from, the borrower, the results were inconsistent. They showed that in Philadelphia such action was at least as common as that of liquidating a note on the borrower's instructions, but that outside that city such unilateral action by a bank was virtually unheard of.³¹⁴ Working with a decision from a court of statewide jurisdiction and getting this queer discontinuity in data, Moore concluded that only liquidation by check was a recurrent, in his jargon, institutional, transaction in Pennsylvania.³¹⁵

Moore's conclusion seemingly suggested that in this circumstance at least, the law was not following custom, for the Pennsylvania decision had upheld the Philadelphia bank's defense. But Moore did not take time to puzzle over this implication; rather, despite the shortage of funds, he sent Sussman to South Carolina. For the investigation there, a sample of 93 banks located throughout the state that had survived the twenty-five years since the decision was chosen³¹⁶ and appropriate letters of introduction secured, including some from the skeptical Clark.³¹⁷ At first Moore helped with the research. It soon became apparent that many of the banks chosen either lacked records back the twenty-five years or were unwilling to let Sussman look at the records they did have.³¹⁸ Thus even working together the two men only managed to secure records at about half of their sample and even those records generally spanned only the first decade of the century.³¹⁹ However, these limited records, bolstered by largely unstructured interviews with officers at the banks investigated and correspondence with other bankers in South Carolina,³²⁰ disclosed a uniform pattern.³²¹ Matured time notes were never involuntarily liquidated by the

313. Compare *id.* at 947 with the *Conn. Studies, supra* note 290, at 773-74.

314. *The S. C. and Penn. Studies, supra* note 304, at 947.

315. *Id.* at 952-53.

316. *Id.* at 928-29.

317. More importantly from Prof. E. C. Coker of Yale whose brother taught in South Carolina. Gilbert Sussman to John Henry Schlegel, Oct. 1, 1976 (taped interview).

318. Gilbert Sussman to Underhill Moore, Aug. 12, 1930, Moore papers, Yale.

319. *The S. C. and Penn. Studies, supra* note 304, at 929.

320. *Id.* at 930-31.

321. *Id.* at 937 reports the results in tabular form.

bank holding the note. They were either paid in cash or by check and on very rare occasions on instructions. The reason was simple; most commercial credit was agricultural and intended to be liquidated out of the sale of harvested crops.³²² Harvest time was unpredictable and therefore maturities stated on notes were largely a matter of informed guessing.

These results were intriguing, but then the money ran out, the research stopped, and Moore and Sussman began the task of writing up the results of the year's effort. In so doing they had to deal with the criticisms of their enterprise offered by Dorothy Swaine Thomas, a statistical sociologist, who was new at Yale and attached to the law school.³²³ She found the project "very obscure" in both writing and method, and urged Moore to give up the research because the method was too complicated and the data too problematical to yield good results.³²⁴ He was quite obviously looking for help and eager to learn, but nevertheless kept on with the project, learning what he could from her, but also desiring to see what he could learn about what interested him.³²⁵ Then, in the middle of writing, more money came in the form of a \$2,000 allocation from the Institute's budget.³²⁶

Quickly, Moore sent Sussman and five assistants into the field in New York.³²⁷ This time Moore used two investigative techniques: first, a variant of the third Connecticut study, in which the teller responsible for the transactions in question filled out work sheets and then the research assistant examined the results for "ambiguities and incompleteness,"³²⁸ and second, a questionnaire administered in small banks to the bank officer or teller in charge

322. *Id.* at 941.

323. Schlegel, *supra* note 15, at 519-22, 527-29, 538-45, recounts Thomas' background and her participation in research by William O. Douglas while at Yale. Moore & Sussman, *Legal and Institutional Methods Applied to the Debiting of Direct Discounts—VI. The Decisions, the Institutions, and the Degrees of Deviation*, 40 *YALE L.J.* 1219 n.1 (1931) [hereinafter cited as *Debiting Study Results*] directly acknowledges "her skeptical, pointed and invaluable criticism."

324. Interview with Dorothy Swaine Thomas, June 3, 1975. *Cf.* Gilbert Sussman to John Henry Schlegel, Oct. 1, 1976 (taped interview).

325. Interview with Dorothy Swaine Thomas, June 3, 1975.

326. *See* Charles E. Clark to Underhill Moore, Nov. 18, 1930, Moore papers, Yale.

327. Moore & Sussman, *Legal and Institutional Methods Applied to the Debiting of Direct Discounts—V. The New York Study*, 40 *YALE L.J.* 1055 (1931) [hereinafter cited as *The N.Y. Study*].

328. *Id.* at 1055-56.

of the discounting of notes, and, in larger banks, to the person in charge of loans or discounting.³²⁹ By using these two techniques Moore apparently hoped to avoid the problems of finding, getting access to, and using old records that had been encountered in South Carolina. He reasoned that a correspondence between the two measures of current practice would strengthen interview results about former practice. Other attempts were made to improve the reliability of his results. In both parts of the inquiry Moore tried to work with a scientifically chosen sample, although limited cooperation by interviewees made such attempts largely nugatory.³³⁰ And his questionnaire explicitly took into account the possibility that banking practice had changed in the ten years since the decision in question; it also showed a great deal of care in structuring the inquiry to get plain "yes" or "no" answers.³³¹

The results of the New York study came in after publication of the initial parts of the whole study had already been begun.³³² In the more urban counties the dominant form for the liquidation of matured time notes was by means of a debit charge without instructions or a check from the borrower. In rural counties almost all notes were liquidated by check; some, on customer instructions; few, by bank debit in the absence of either. But, taken as a whole, the one most common transaction was that of the bank's debiting a customer's account on its own initiative. Thus, it might be argued that while there was some variation between studies, where bank debits were a known, if not always frequent, practice (Pennsylvania and New York) the court decision validated them; where such action was virtually unknown (South Carolina) the court decision failed to approve the practice.

With the completion of the New York work Moore rushed to get his results in print, and in the process passed up a chance to get embroiled in Llewellyn's feud with Pound over the existence and content of Realist Jurisprudence.³³³ In the resultant nearly 150

329. *Id.* at 1055, 1063.

330. *Id.* at 1063-64.

331. *See id.* at 1057-63 where questionnaire is reproduced in detail.

332. *Id.* at table III following 1068 reports the results.

333. *See* Underhill Moore to Karl N. Llewellyn, Apr. 4, 1931, Apr. 11, 1931, Moore papers, Yale. The relevant articles are Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431 (1930); Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697 (1931); Llewellyn, *Some Realism about Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931). The controversy is thoroughly summarized in W. TWINING,

pages stretching over six successive issues of the *Yale Law Journal*, the convoluted, opaque prose dictated by the convoluted, opaque method developed two years earlier in the *Rational Basis of Legal Institutions* thoroughly obscured the quite interesting results. Moore's cautious conclusion did little to remedy this obvious defect. He hazarded that his research had presented only "rough outlines" of the institutional patterns and his method for choosing a standard against which to compare those patterns and for measuring the degree of deviation of the pattern from that standard had fallen "far short of attainable precision."³³⁴ Yet he concluded that where the action of the bank deviated "slightly" from the institutional pattern of behavior, the court validated that behavior; where it deviated "grossly" the court refused to validate that behavior.³³⁵ As that conclusion was precisely what he had set out to prove, a certain amount of joy was in order.

Moore had the six articles bound together and distributed the set to friends and acquaintances at Yale, Columbia, and elsewhere. Among the recipients were President Angell and Clark Hull, a psychologist associated with the Institute.³³⁶ Moore surely knew the limits of the study³³⁷—most obviously the lack of any explanation of how the institutional patterns were brought to judicial attention, the lack of simultaneity of the events studied, and the singularity of the demonstration. What his audience thought about it, or whether their understanding was so thoroughly impeded by the structure and jargon of the research as to preclude thought, is quite impossible to say. Beyond pleasantries, no one commented on the research, at least by letter or in print, except perhaps for Llewellyn, who, begging off "mature critique" until a second read-

supra note 14, at 70-83. Moore thought Llewellyn had blown the matter entirely out of perspective. "I don't see why you are so excited . . . Personally I am not interested in whether or not there be a school of realists and if there be what Pound's views about the school are." Underhill Moore to Karl N. Llewellyn, Apr. 4, 1931, Moore papers, Yale.

334. *Debiting Study Results*, *supra* note 323, at 1249.

335. *Id.* at 1249-50.

336. A list of the recipients entitled *Debiting Direct Discounts* is in Moore papers, Yale.

337. As an example of Moore's rapidly growing statistical sophistication, he had acquired a decent layman's understanding of the concept of spurious correlation (see *Debiting Study Results*, *supra* note 323, at 1219); this at the time when the concept was only first being introduced in the United States. See Lazarsfeld, *An Episode in the History of Social Research: A Memoir* in 2 PERSPECTIVES IN AMERICAN HISTORY 270, 293-94 (1968) (recounting his introduction of the notion of spurious correlation in 1933).

ing, ignored the research and griped about how "unintelligible" the last third of the earlier Moore and Hope article had been.³³⁸

Encouragement, however, was not what Moore needed to keep his enterprise going. The results of this one study were a sufficient impetus for further work, if only money could be found to support that work. Thus, even before the debiting study was fully published, Moore knew exactly what further work he wished to do. He proposed to send "six men or women of Ph.D. or law journal caliber" into the field to investigate the institutional patterns underlining twenty-five "recent decisions in the field of Commercial Bank Credit in order to determine the causal relation, if any," between the pattern of banking behavior and the decision.³³⁹ The estimated cost of such an endeavor, excluding his and Sussman's salaries, would be a little over \$11,000.³⁴⁰

The idea was a sensible one;³⁴¹ it was surely better to build on a small bit of successful research than to run off after something else. Whether it was equally sensible to continue to use the framework for research set forth in the Moore and Hope article is another matter. Dorothy Thomas thought not and told Moore so;³⁴² he thought otherwise, though of course he thought his method "perfectly clear."³⁴³ However, money for further research was not to be had either directly from President Angell³⁴⁴ or indirectly through the Institute.³⁴⁵ Stymied, Moore decided to raise a small

338. Karl N. Llewellyn to Underhill Moore, July 27, 1931, Moore papers, Yale. *See also* Underhill Moore to Karl N. Llewellyn, July 28, 1931 (earlier article was "perfectly clear"); Karl N. Llewellyn to Underhill Moore, July 31, 1931, ("Perfectly clear to whom?"), Moore papers, Yale.

339. Underhill Moore, Memorandum In Re Continuation and More Extensive Prosecution of Work in "Commercial Bank Credit," Apr. 1931?, Moore papers, Yale.

340. *Id.*

341. It should be noted that the proposal was based on a different theory of validation than that underlying the debiting study. It is impossible to determine whether Moore understood the significance of this shift from the natural experiment to the cumulation of individual instances, especially since his later banking research shows a shift first to the new theory and then back to the old, for Moore nowhere even notes the fact of these shifts, much less discusses them. *See text accompanying notes 360-67 infra.*

342. Interview with Dorothy Swaine Thomas, June 3, 1975.

343. Underhill Moore to Karl N. Llewellyn, July 28, 1931, Moore papers, Yale.

344. *See* Underhill Moore to James R. Angell, Apr. 1, 1931; James R. Angell to Underhill Moore, Apr. 13, 1931, Moore papers, Yale. *See also* James R. Angell to Underhill Moore, Apr. 8, 1931, Angell papers.

345. *See* Underhill Moore to Mark A. May (Ex. Sec'y of Institute), May 31, 1931, Moore papers, Yale.

portion of the necessary funds by agreeing to do a new edition of his casebook³⁴⁶ and amused himself with an informal study of the reasons for the failure of a local bank.³⁴⁷ Then, with both of these tasks begun and in need of completion, the Institute decided in the fall of 1931 to support Moore's work with an allocation of \$5000, almost half of what he had said he needed.³⁴⁸

While Moore cleaned up the projects begun before Institute funds became available he worked on two short articles. One, a study of the consequence of a bank's insolvency on its relationship with its commercial customers, a bit of pure doctrinal research, was an outgrowth of his work on the local bank failure.³⁴⁹ The other, called *The Lawyer's Law*, was an attempt to provide an intellectual framework different than that provided in the Wigmore review for the kind of study Moore had proposed before leaving Columbia and had carried out at Yale in the discounted notes study.³⁵⁰ This time following the central thrust of the argument in the *Rational Basis of Legal Institutions* he emphasized not institutional patterns of behavior but rather what he took to be the lawyer's central task: predicting judicial behavior.³⁵¹ From this premise Moore argued that when a lawyer predicts judicial behavior, no matter what he says, he takes into account not just rules of law derived from judicial decisions,³⁵² but also "every factor in the situation which he can differentiate from its context," and then

346. Contract between West Publishing Co. and Underhill Moore, July 13, 1931, Moore papers, Yale. Sussman did most of the work on this project. Gilbert Sussman to John Henry Schlegel, Oct. 1, 1976 (taped interview).

347. See Underhill Moore to Edgar Furniss, Feb. 19, 1932 (recounting research and enclosing copy of resulting report), Moore papers, Yale.

348. See Charles E. Clark to Underhill Moore, Nov. 6, 1931 (reporting decision), Moore papers, Yale.

349. Moore & Sussman, *The Current Account and Set-Offs Between an Insolvent Bank and Its Customer*, 41 YALE L.J. 1109 (1932).

350. Moore & Sussman, *The Lawyer's Law*, 41 YALE L.J. 566 (1932) [hereinafter *The Lawyer's Law*]. The occasion for writing this piece is unclear. Even Moore's co-author cannot remember it. Gilbert Sussman to John Henry Schlegel, July 28, 1977. Despite the total absence of helpful footnotes to the ideas Moore expressed, one can see in the piece at least three possible occasions. First, the emphasis on prediction is reminiscent of the Realist controversy, see note 333 *supra*. Second, the long central section on the logic of proof in multi-causal analysis suggests Thomas' methodology seminar, see note 390 *infra*. Third, the final section on interdisciplinary research seems a logical part of discussions at the time of the Institute's first reorganization, see Schlegel, *supra* note 15, at 553-57, 558-60.

351. *The Lawyer's Law*, *supra* note 350, at 566.

352. *Id.* at 570-71 (a practice that is "grossly inadequate and filled with misleading notions" *Id.*).

makes an "intuitional judgment" on the basis of the whole.³⁵³ Then, drawing, not always correctly,³⁵⁴ on probability theory, Moore illustrated how the lawyer's predictions might be formally represented as the probability of the "future occurrence . . . [of a particular event] based upon the frequency of its past concurrence with other particular events."³⁵⁵ Finally he lamented that,

[T]he lawyer's failure to see his problem as one of attempting to systematize and to make methodical the processes implicit in his intuitional judgments and his clinging to the traditional notion that his problem is one of systematizing statutes and decisions have completely blinded those with scientific curiosity to take the direction which the inquiries into judicial behavior should take.³⁵⁶

Response to this justification of Moore's efforts was sparse. Herman Oliphant, then still at work at his studies for the Hopkins' Institute, suggested that he and Moore were "pillars of conservatism" with radicals like "Michael and Adler to the right and Frank to the left."³⁵⁷ Robert C. Angell, a sociologist who had worked on family law at Columbia as part of the aftermath of the curriculum study, expressed more than a little skepticism at the willingness of lawyers to do the kind of work Moore advocated.³⁵⁸ But with this piece out of the way,³⁵⁹ Moore took to his research with some relish.

To begin, Moore sent a third year student, C. E. Brandt, into

353. *Id.* at 569.

354. See Ray Westerfield (Yale Dep't of Pol. Econ.) to Underhill Moore, Mar. 8, 1932 (pointing out error), Moore papers, Yale.

355. *The Lawyer's Law*, *supra* note 350 at 571.

356. *Id.* at 575.

357. Herman Oliphant to Underhill Moore, Mar. 2, 1932, Moore papers, Yale. Jerome Frank had taken a position on the almost total unpredictability of judicial decisions in *LAW AND THE MODERN MIND* (1930) such as to effectively preclude the possibility of serious empirical work; Jerome Michael and Mortimer Adler had concluded that there was no scientific knowledge in criminology despite the mountain of research in their book. *J. MICHAEL & M. ADLER, CRIME, LAW AND SOCIAL SCIENCE* (1932). For some reason Michael and Adler were very interested in Moore's reaction to their book. See Emma Corstvet to Underhill Moore, July 17, 1933, Moore papers, Yale.

358. Robert C. Angell to Underhill Moore, Mar. 15, 1933, Moore papers, Yale. Angell had published *A RESEARCH IN FAMILY LAW* (1930) with Columbia Law School professor Albert C. Jacobs, the pioneer attempt to merge social science data and family law. His piece, *The Value of Sociology to Law*, 31 *MICH. L. REV.* 512 (1933), is a good statement of his skeptical position.

359. As a result of Moore's acquaintance with a German anthropologist, *The Lawyer's Law*, *supra* note 350, was translated into German as *Das Gesetz des Juristen*, 8 *SOCIOLOGUS* 385 (1930). See Underhill Moore to Richard Thurnwalt, July 18, 1932, Moore papers, Yale.

the field to start the first of the projected twenty-five additional tests under the Moore and Hope method.³⁶⁰ Moore chose to investigate a six-month-old Pennsylvania case holding that a bank was not liable to recredit a customer's account with the amount of a check certified, and thus paid, by a teller at the main office within a minute of receiving notice to stop payment based on an order placed moments earlier at the branch where the drawer normally transacted business. The method of investigation was similar to that used in the New York debiting study.³⁶¹ All the Pennsylvania banks with branches were isolated and Brandt attempted to secure cooperation of each such bank to permit the officer in charge to complete a record of all the stop payment transactions during an entire week. Better than three-quarters of the relevant banks cooperated in the study and over half participated for a second week as a kind of control group. The work sheet was designed to isolate the time it took to relay stop payment orders between main and branch offices as well as to determine whether there was any difference in practice based on the depositor's mode of giving notice or the reason for the order. While interviews were held with bank officers, the information gathered in the interviews was not used in the investigation except to clarify the data through an understanding of the internal organization of each bank.³⁶²

While Brandt worked in Pennsylvania, Moore set Emma Corstvet, another social scientist at the Institute assigned to the law school, to work on a second inquiry.³⁶³ Moore had isolated two recent cases on the narrow question of whether the depositor of a check, the proceeds of which were collected after the sequestration of the assets of, and appointment of a receiver for, the depository bank, was a general or preferred creditor of that bank.³⁶⁴ This vexing, but quite topical, question turned on whether the check had been "deposited" or only "received for collection," a matter that

360. Moore, Sussman & Brand, *Legal and Institutional Methods Applied to Orders to Stop Payment of Checks—II. Institutional Method*, 42 YALE L.J. 1198 (1933) [hereinafter cited as *Stop Payments*].

361. *Id.* at 1205-10 describes the method of the study in detail. See *The N.Y. Study*, *supra* note 327, at 1055-66.

362. *Id.* at 1209.

363. Moore, Sussman & Corstvet, *Drawing Against Uncollected Checks: II*, 45 YALE L.J. 260 (1935) [hereinafter cited as *Uncollected Checks*].

364. Moore, Sussman & Corstvet, *Drawing Against Uncollected Checks: I*, 45 YALE L.J. 1, 1-2 (1935). The cases were decided in the same month.

under traditional doctrine was to be deduced from the terms, usually implicit, of the bargain between the bank and the customer. One of the important indicia of the terms of the bargain was the time at which checks drawn against the deposit would be honored. If the so called "uncollected funds" were immediately available then the check had been deposited and the customer was a general creditor; if available only at some later time the check had been received for collection and the customer was a preferred creditor. Here then was a circumstance, as in the debiting study, tailor made for testing Moore's institutional hypothesis, and this time without either the difficulties caused by using historical records to verify old practice or the theoretical problems raised by the lack of simultaneity of the events being investigated.

Unfortunately, in place of the theoretical and historical problems in the debiting study, Moore acquired two quite immense practical problems. One was the sheer volume and complexity of the records that would have to be examined in order to investigate whether and how often uncollected funds were drawn against. The other was the unwillingness of banks to let anyone examine the accounts of individual depositors, an examination necessary in order to make the investigation.³⁶⁵ In order to avoid, at least temporarily, the second of these problems, Moore arranged for Corstvet to begin an "exploratory study" in the records of the failed bank in New Haven that he had previously studied.³⁶⁶ Corstvet took a group of deposit slips for a nine day period a few months before the failure and laboriously recreated the account of each of the nearly three hundred depositors, in the process checking potential variables such as age, occupation, age of account, average balance, and outstanding borrowings.³⁶⁷

The following year was spent tabulating and analyzing the data collected in the two studies.³⁶⁸ The stop payment study turned out to be the easier to complete. Although there were serious problems with the accuracy of some of the data collected by tellers filling out the work sheets,³⁶⁹ the accurate data showed that the modal, median, and average time for a portion of the behavior

365. *Uncollected Checks*, *supra* note 363, at 262.

366. See Underhill Moore to Gilbert Sussman, Dec. 11, 1935, Moore papers, Yale.

367. *Uncollected Checks*, *supra* note 363, at 262.

368. Underhill Moore to Edgar Furniss, Mar. 1, 1933, Moore papers, Yale.

369. *Stop Payments*, *supra* note 360, at 1214-17.

investigated—the time from receipt of notice of the stop payment order in the main bank to its communication to the tellers in that office—was at least as long as, and generally longer than, the time found in the case in question for completion of the entire process beginning with the giving of notice at the branch bank.³⁷⁰ Reasoning that the time for the entire process must necessarily be greater than that for any known part, Moore concluded, quite turgidly, that, as the teller at the bank in question certified the check only moments before learning of the stop payment order, which was communicated at the very least as fast as and more likely faster than usual, the court, in upholding the bank's defense to the suit to recredit the customer's account, was acting in accordance with usual banking behavior.³⁷¹ Thus the study again validated Moore's hypothesis.

Tabulation and analysis of Corstvet's exploratory study on the uncollected funds cases was in fact completed long before the stop payment study was published.³⁷² Preparation for field work in New York, the site of one of the decisions, was then started³⁷³ and, with the help of President Angell, introductions to bankers in Ohio, the site of the other, were secured.³⁷⁴ Then, suddenly, "theoretical difficulties" which Moore "could not dispose of" were discovered.³⁷⁵ So, rather than spend "time and money when it was not clear precisely how the results could be interpreted," Moore stopped further research.³⁷⁶ With this sudden jolt, after four years, the banking studies were over.

It is difficult to understand what theoretical problems, peculiar to the uncollected funds study, were so devastating as to have been grounds for terminating that research. Practical problems ex-

370. Compare *id.* at 1223 with *id.* at 1203.

371. *Id.* at 1231, 1234-35.

372. Underhill Moore to Edgar Furniss, Mar. 1, 1933, Moore papers, Yale.

373. *Id.*

374. See James R. Angell to Underhill Moore, May 23, 1933, Moore papers, Yale.

375. Underhill Moore to James R. Angell, June 10, 1933, Moore papers, Yale. A year or so later Moore described his problem as caused by "the difficulty of utilizing . . . methods which were identical with those pursued in the two preceding studies, . . . the great amount of time and labor necessary to execute it and . . . many difficulties inherent in the field work." Underhill Moore, Report of Work Done by Underhill Moore and Associates in Connection with the Institute of Human Relations, fall, 1934?, Moore papers, Yale [hereinafter cited as Moore Report, 1934].

376. Underhill Moore to James R. Angell, June 10, 1933, Moore papers, Yale.

isted, even monumental ones, given the technology of the time. Two years later, just to publish the exploratory study, Moore and Corstvet had to make crucial, simplifying assumptions about both customers' bank balances and the time necessary for checks to go through the collection process and for funds to return;³⁷⁷ replacing these assumptions with anything but more accurate opinions would have required months, if not years, of work. But these were not theoretical problems; they were the kind of practical problems Moore had met and overcome several times before. Thus his own explanation for the termination of the uncollected fund study and thereafter all of the commercial banking research, like his explanation for the hiatus in his activities at Columbia during the twenties, is at least a bit disingenuous. If in the end Moore faced theoretical problems, they were theoretical problems common to all the banking research and not peculiar to the uncollected funds study. What those theoretical problems were can be seen by looking again at the course of Moore's research in his early years at Yale.

In four years Moore learned a great deal about social science research. Indeed, the progress of his education can be seen in the progressive refinement of the technical detail of his banking studies. In Connecticut Moore started with a lawyerly questionnaire and a census methodology.³⁷⁸ Less than six months later in Pennsylvania his questionnaire had lost its lawyerliness and he was content to work with an informally defined sample.³⁷⁹ At the same time, as shown by the third Connecticut study, Moore had begun to doubt the reliability of questionnaire findings and thus began to study by direct observation.³⁸⁰ With the extension of work to South Carolina and New York he began to worry about the problems created by nonsimultaneous events.³⁸¹ Then, in the written reports of those studies, concerns surfaced about the representativeness of sample, the consistency and accuracy of questionnaire answers and data interpretation generally.³⁸² With the stop pay-

377. *Uncollected Checks*, *supra* note 363, at 281-84.

378. *See* text at notes 295-96 *supra*.

379. *See* text at notes 310-11 *supra*.

380. *See* text at notes 299-300 *supra*.

381. A problem he solved in the uncompleted study of drawing on uncollected checks. *See* note 364 *supra*.

382. *See The Conn. Studies*, *supra* note 290, at 753, 767; *The S.C. & Penn. Studies*, *supra* note 304, at 930-31, 944; *The N.Y. Study*, *supra* note 327, at 1063.

ment study, further problems with the accuracy of observation appeared as third party recording of data turned out to be suspect.³⁸³ Moreover, interviews began to diminish in importance as an awareness of statistical technique began to surface.³⁸⁴ Finally, in the uncollected funds study, first party recording became very difficult and the results problematic to interpret.³⁸⁵

The pattern to these progressive refinements in technique is really very simple—methodological objection, methodological improvement, methodological objection, methodological improvement, again and again. Moore was going through a short, informal course in contemporary social science method first at the hands of Dorothy Thomas and then under the direction of both Thomas and Emma Corstvet. Thomas knew a great deal about methodological theory and was at the time working hard on studies of methods and accuracy of observation.³⁸⁶ Corstvet had basic statistical training and had just completed directing her own extremely careful statistical study of the consequences of auto accidents for Dean Clark and a committee of lawyers studying the problem.³⁸⁷ Both were quite obviously taken with the idea of teaching this particular old dog some new tricks.³⁸⁸

The process of learning about method by responding to the objections of Thomas and Corstvet was nevertheless a trifle exasperating as can be seen from a passage in *The Lawyer's Law*. There, after Moore had completed setting out his framework, he noted the important role that other social science disciplines could play in improving on the lawyers' intuitions, but was careful to in-

383. See text at note 369 *supra*.

384. Most obviously in the distinctions between median, modal, and average frequency of the various time intervals.

385. See text at note 367 *supra*.

386. See Schlegel, *supra* note 15, at 521.

387. *Id.* at 521, 534-35.

388. Interview with Dorothy Swaine Thomas, June 3, 1975; Interview with Emma Corstvet Llewellyn, Aug. 19, 1975. The relationship between Thomas and Moore was quite definitely that of junior specialist to senior colleague. A full year after she had arrived at Yale she still referred to him as "Mr. Moore," see Dorothy Swaine Thomas to Underhill Moore, Sept. 3, 1931, Moore papers, Yale. The more puckish Corstvet quickly solved the relational problem by calling Moore "Honored Professor," see Emma Corstvet to Underhill Moore, July 17, 1933; Aug. 16, 1933, Moore papers, Yale. Even when giving up her connection with the law school, Thomas indicated her continuing interest in working with Moore. See Dorothy Swaine Thomas to Charles E. Clark, Mar. 9, 1933 (I'll be glad to . . . participate in . . . seminars, particularly those of Underhill Moore . . ."); the handwritten note on the blind carbon to Moore said, "I'm at your service, as always—"), Moore papers, Yale.

sist that cooperative research must be focused, not on an "amorphous and unorganized experience," but rather "of necessity" on "a problem set by one . . . [of the investigators] and the cooperation of the others must be aimed at the verification of his hypotheses."³⁸⁹ Yet, exasperated or not, Moore continued to learn from his long drawn out lessons, acquired not just from the criticism of his own work, but also through his participation in Thomas' methodological seminar at the law school³⁹⁰ and his reading of books on method from the lists she recurrently prepared for him,³⁹¹ as well as through hours of discussion with Corstvet as she played out her role as Dostoyevski's washerwoman.³⁹²

As Moore learned the canons of social science method from Thomas and Corstvet he also acquired something more intangible from them: the culture of contemporary social science. Both women were at the time a part of the leading edge of the movement to make social science "scientific" by making it numerical and quantifiable,³⁹³ or, in the accepted jargon of the day, behaviorist, not in the sense of Watsonian, but in the sense of the observation of overt behavior, rather than introspection.³⁹⁴ They, and others taking part in what was simultaneously a methodological revolution and the establishment of a distinctive academic identity, were concerned with problems of method—observational techniques, statistical techniques, and controls—to insure reliability, verifiability and replicability.

Examples of these concerns in the work of both women are easy to find. Thomas taught William O. Douglas about the need to independently verify answers to questionnaires and tried to teach him about the rudiments of causal inference.³⁹⁵ Corstvet spent great amounts of time in her auto compensation study actually verifying answers³⁹⁶ and, in another of her studies, painstakingly

389. *The Lawyer's Law*, *supra* note 350, at 576.

390. See Dorothy Swaine Thomas to Underhill Moore, spring 1932?, (plans for seminar), Moore papers, Yale.

391. Several of these undated, untitled, handwritten lists are found in Moore papers, Yale, starting in fall 1930 and continuing to fall 1932. The lists become increasingly technical in nature and ultimately focus on statistical technique.

392. Interview with Emma Corstvet Llewellyn, Aug. 19, 1975.

393. See Schlegel, *supra* note 15, at 520-22.

394. See, e.g., Emma Corstvet to Underhill Moore, Aug. 16, 1933, Moore papers, Yale.

395. See Schlegel, *supra* note 15, at 527-28.

396. *Id.* at 534-35.

gathering otherwise boring information in order to be able to make a causal inference.³⁹⁷ One of their associates used utility company records to study city migration in an attempt to completely avoid interviews.³⁹⁸ All three tried to be very scientific.

Moore was quickly drawn into and absorbed this culture. How quickly and how thoroughly can be seen from his study of the failure of the local bank. When it was completed in early 1932, Moore gave a copy to the local economist who had recently become director of social science activities at the Institute, with the observation that the work was not for the Institute since it was *ad hoc* and of no scientific value.³⁹⁹ After reading it, the economist, less bothered by method than his social science colleagues, gently chided Moore that he was "far too modest in the characterization" of his work.⁴⁰⁰ But for Moore the characterization was precisely correct and this fact suggests why he was ultimately faced with an insurmountable theoretical problem in the banking research.⁴⁰¹

From the beginning Moore was interested in pursuing an essentially anthropological insight: law follows culture, not doctrine. He may have phrased his point as a hypothesis, but it was a conclusion. When push finally came to shove and it became time to show that one could do real scientific work in law,⁴⁰² Moore produced a method to test his hypothesis which bore all the hallmarks of crank social theory⁴⁰³—formal over-elaboration, arcane termi-

397. *Id.* at 438-39 (study on accounting practices of bankrupt and going business concerns).

398. Interview with Mark A. May, June 9, 1975. Two other female social scientists at Yale shared a house in New Haven with Thomas and Corstvet. Interview with Dorothy Swaine Thomas, June 3, 1975.

399. Underhill Moore to Edgar Furniss, Feb. 19, 1932, Moore papers, Yale.

400. Edgar Furniss to Underhill Moore, Feb. 26, 1932, Moore papers, Yale.

401. Another indication of Moore's growing identification with an academic social science can be seen by examining the list of individuals who received reprints of his early articles. The debiting study went mainly to law professors and social scientists associated with Columbia or the Institute. Two years later only twenty per cent of the mailing went to law professors: almost the entire balance went to the social scientists, but not just to acquaintances at Yale. Included on the list were Petirim Sorokin, F. Stuart Chapin, Stuart Rice, Abraham Flexner, Robert Lowie, Bronislaw Malinowski and five other faculty members at the London School of Economics, and Robert E. Park and five of his colleagues in the Sociology Department at the University of Chicago.

402. Such had been the goal of Moore and those of his generation. Cf. Walter Wheeler Cook to Underhill Moore, Mar. 24, 1919; Harlan F. Stone to Underhill Moore, Jan. 1, 1916, Moore papers, Columbia.

403. For this concept, I must again thank Prof. Robert Gordon.

nology, pseudo-mathematical precision—except one—imperiousness to criticism. Although the formal apparatus stayed the same, the method changed with each criticism.

Moore started with something close to a crude anthropology: Ask the natives what they do. And for a scientific demonstration, he relied on what would today be known as a natural experiment: The natives on one side of the river carry water on shoulder poles, those on the other side, on their heads; what accounts for this difference?⁴⁰⁴ Through their criticisms Thomas and Corstvet reinforced the natural experiment form and tightened the observational method. Cases had to be decided simultaneously and investigation made as soon after the fact as possible. Direct observation was to be preferred and, if impossible, elaborate verification was essential. But ultimately even all of these methodological refinements were not enough, for still there could be troublesome problems of data interpretation, as, for example, was the case in the uncollected funds study. There, unlike the Connecticut pretest in the debiting study, no clear pattern emerged, so one could only wonder whether a finding that uncollected funds were drawn on in six to twenty-five per cent of all transactions, depending on the time in the check collection process chosen as a yardstick, was high, low or average.⁴⁰⁵ With comparable data from other banks and other jurisdictions, even these practical problems could be solved, as Moore eventually all but admitted.⁴⁰⁶ But, that work having been done, there would still remain the basic theoretical question underlying all the banking research: How similar were the two cultures? Were they only separated by a river or by a gulf of one kind or another?

Given Moore's hypothesis and his subject matter, there was simply no way to answer that basic question by holding everything but banking practice constant, no way to be even vaguely assured that all of the other potential variables washed out. Even worse, Moore knew that the other variables did not wash out.⁴⁰⁷ Therefore, lacking any but the crudest techniques for correlating multi-

404. *Stop Payments*, *supra* note 360, is an exception, as were, of course, the entire projected twenty-five case studies, text at notes 339-41 *supra*.

405. See *Uncollected Checks*, *supra* note 363, at 288-92.

406. See Moore Report 1934, *supra* note 375.

407. See, e.g., *The Lawyer's Law*, *supra* note 350, at 572-74. Cf. Moore & Hope, *An Institutional Approach to the Law of Commercial Banking*, 38 YALE L.J. 703, 705 (1929).

ple, simultaneously varying factors, Moore was quite squarely faced with the choice of either abandoning his four year long commitment to quantification—to science as he had just learned it—or abandoning his topic of research.

Faced with this dilemma he chose to stick with social science, and with the kind of understanding of law he had been working to develop for over ten years, by affirming its methodological preconceptions and abandoning his chosen topic for research. In so doing, in choosing to do something that was, in theory at least, readily understandable to all academic social scientists who might care to know, he was not securing an answer to his theoretical problem. As he well knew, and as Emma Corstvet put it, paraphrasing him, "one cannot deny the possible existence of many intangibles, some of them important enough to threaten the overthrow of anything induced by a more strictly behaviorist approach; but . . . hope lies only in dealing with elements we can measure, running that risk [and struggling to measure]."⁴⁰⁸

Like Thomas, Corstvet, and dozens of other social scientists Moore would struggle to measure, to confine his theoretical problem with a "strictly behaviorist approach," and would therefore orient his research around that struggle. In short he had in a real sense, become, if only in his head, a twentieth century social scientist.⁴⁰⁹

408. Emma Corstvet to Underhill Moore, Aug. 16, 1933, Moore papers, Yale.

409. Northrup, *Underhill Moore's Legal Science: Its Nature and Significance*, 59 *YALE L.J.* 196 (1950) suggests that in shifting from his commercial banking studies to the parking and traffic studies Moore was influenced (1) by Ehrlich's advocacy of a "deductively formulated," experimentally verified scientific theory, *id.* at 198; and (2) by an experience of the lack of trustworthiness of even the limited intuitive judgments he allowed himself in the banking studies, *id.* at 204. While, Moore surely knew the work of Ehrlich, at the very least he attended the 1914 A.A.L.S. meeting at which a paper was read on Ehrlich's work, *see* Page, *Professor Ehrlich's Czernowitz Seminar of Living Law*, [1914] A.A.L.S. HANDBOOK 46, there is no other evidence to support this half of Northrup's thesis and indeed Ehrlich's work did not become generally available in English until 1936, after Moore had made his switch in subject matter. When the *FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW* appeared, Moore agreed to review this book for the *YALE LAW JOURNAL* (*See* Eugene V. Rostow to Underhill Moore, summer 1937?, Moore papers, Yale), but never completed the task. The second half of the thesis fits well with the interpretation presented here, especially the Corstvet paraphrase of Moore's thoughts on the necessity of running risks in adopting a more strictly behaviorist method, *see* text at note 408 *supra*. However, Northrup's evidence for Moore's conclusion *Debiting Study Results*, *supra* note 323, at 1231 n.35, is rather weak given that Moore had a chance to terminate his banking research when he completed the debiting studies, *see* text at notes 339-47 *supra*, but instead worked to further refine his methodology.

B. *Studies of Traffic and Parking*

When Moore chose to look for something more obviously measurable to study he was not without ideas, or for that matter, not without other things to occupy his time. Dorothy Thomas had recently decided to give up her seminar at the law school because it was "clearly against certain of the prevailing dominant attitudes" there⁴¹⁰ and Moore, her collaborator during the previous year, had inherited it. That meant recasting it into a form more to his liking,⁴¹¹ a task that may have made up for having had his own pet course, Commercial Bank Credit, tossed out of the first year curriculum,⁴¹² in part a response to continuing student "tumult" and pressure to "simplify and legalize . . . work so as to put it over [to] the first-year men."⁴¹³

Affairs related to the Institute also occupied Moore's time. Having come to Yale in large part because of the Institute⁴¹⁴ and having eagerly expressed an interest in helping to plan its program,⁴¹⁵ Moore arrived nearly a year after its funding only to find that all the planning had been done⁴¹⁶ and most of the money, distributed.⁴¹⁷ Secure with his appointment as part of the Institute's original staff,⁴¹⁸ he did not overtly complain about having thus been shut out of the organization that existed at that time, because of its lack of central quarters, largely in the campus mail system anyway. Instead, he quite directly attempted to become a part of the Institute's activities and thus to deal with the apparent antipathy of some of the staff to what they perceived of as "law

410. Dorothy Swaine Thomas to Charles E. Clark, Mar. 9, 1933, Moore papers, Yale.

411. See, e.g., Underhill Moore to Charles E. Clark, June 19, 1933 (change in name to *Theories of Law*) Moore papers, Yale.

412. Part of a swap in the fall of 1933 that brought a course in the sale of goods called Marketing I into the first year. Reports of the Dean and of the Librarian, The School of Law, *Bulletin of Yale University* 18-21 (1933-34).

413. Charles E. Clark to Underhill Moore, June 3, 1936 (recounting earlier problems) Moore papers, Yale.

414. See text at notes 99, 131, 133-34 *supra*.

415. Underhill Moore to Robert M. Hutchins, Jan. 28, 1929, Jan. 31, 1929, Feb. 1, 1929; see Robert M. Hutchins to Underhill Moore, Jan. 30, 1929; Underhill Moore to Charles E. Clark, Apr. 29, 1929, Moore papers, Yale. Underhill Moore to James R. Angell, June 9, 1929, Angell papers.

416. See Minutes of the Faculty of the Yale Law School, Feb. 21, 1929.

417. See Minutes of the Faculty of the Yale Law School, Dec. 12, 1929.

418. See James R. Angell to Underhill Moore, May 13, 1929, Moore papers, Yale.

projects."⁴¹⁹ Moore regularly attended the meetings of the senior research staff at the Institute; indeed he was the only person at the law school to do so.⁴²⁰ He also served on Institute committees, even when it was quite obvious he was not very interested in the activity.⁴²¹ And when three prominent Institute members began an informal discussion group on sociology and anthropology Moore made sure he was included and led a session.⁴²²

Even after Moore had received his first grant from Institute funds and then a renewal at a substantially increased level of funding⁴²³ he continued to work at becoming an integral member of the group of researchers at the Institute that he saw as being the core of the professional social scientists at Yale. Thus, long after his colleagues at the law school effectively abandoned their connection with the Institute, in large part because they perceived it solely as a source of funds and expert advice and they no longer felt they had much need for either,⁴²⁴ Moore volunteered to undertake some research as part of a plan designed to coordinate research at the Institute.⁴²⁵ This plan, an outgrowth of a reorganization of the Institute's administrative structure,⁴²⁶ proposed to focus available resources on an in depth study of the city of New Haven as seen in its two communities, the Italian and the "American."⁴²⁷ One of the proposed topics for research was "social control." Under this general project, Moore proposed a two part study to be begun when the two then uncompleted banking studies were finished.⁴²⁸

The first part of the study was a novel idea for Moore that showed the imprint of Thomas and Corstvet. Moore proposed to

419. See Charles E. Clark to Underhill Moore, July 24, 1930, Moore papers, Yale.

420. See Mark A. May to Underhill Moore, May 12, 1930 (thanks for participating), Moore papers, Yale.

421. For example, the Institute's committee on Human Relations in Industry which was making a "total science" study of the impact of new loom techniques in mills. The product of the study was E. CLAGUE, W. COUPER & E. BAKKE, *AFTER THE SHUTDOWN* (1934).

422. See Maurice Davie, Jerome Davis & Edward Sapir to Underhill Moore, Jan. 4, 1931, Mar. 10, 1932, Moore papers, Yale.

423. See text at notes 326, 348 *supra*.

424. See Schlegel, note 15 *supra*, at 550-54.

425. See Underhill Moore to Edgar Furniss, Mar. 1, 1933, Moore papers, Yale.

426. For a discussion of this reorganization see Schlegel, note 15 *supra*, at 555-56.

427. Mark A. May to James R. Angell, Nov. 17, 1932, Angell papers. The untitled memo enclosed with this letter shows that virtually no one at the Institute was interested in the idea.

428. Underhill Moore to Edgar Furniss, Mar. 1, 1933, Moore papers, Yale.

survey the incidence of the contacts of "2000 sample families . . . with each of the government agencies" in New Haven to be made with special emphasis on "contacts which should have been made but were not (e.g., poll taxes not paid, divers [sic.] licenses not secured). . . ."⁴²⁹ It was a complex task, especially if substantial effort were to be expended in verifying questionnaire responses, but methodologically it was an easy study that might have yielded interesting results since the 2000 families were to be divided evenly between the two target communities. The second part of the study had the mien of an old friend. It was to be "an attempt to observe the degree of correspondence between the behavior of the community, as represented by the 2000 sample families, and the models of behavior set forth in statutes, ordinances, etc."⁴³⁰ Now, Moore was by no means sure how he was going to attempt this, except that it "would probably involve specific inquiries, for example, into desertion laws and family support, or tax laws, their administration and the actual payment of taxes."⁴³¹ But the ethnically split sample made the project formally similar to the design of the banking studies and placing the study in what was formally at least a single legal community removed one significant aspect of Moore's earlier methodological problems.

Moore expected to begin the first part of the new study in the fall of 1933.⁴³² So when, in the summer of 1933, he desired to call a halt to the banking studies he had a new project already in the works. While he tried to make up his mind what to do with his old research, he had Corstvet prepare massive bibliographies of the literature on social control, though without any real idea, or at least ability to communicate, exactly what he wanted.⁴³³ At the same time they began several months of study of the recent statutes of Connecticut and the recent ordinances of New Haven looking for potential topics for investigation in the second part of the

429. *Id.*

430. *Id.* It should be noted that Moore's topic bore a strong resemblance to one suggested by Dorothy Thomas some eighteen months earlier at the time of the reorganization of the Institute. See Arnold, Smith & Thomas, Memo, Nov. 27, 1931, (plausible to study "the interrelation between governmental policy . . . with the habit formation and behavior reactions of the people") Moore papers, Yale; Schlegel, *supra* note 15, at 107.

431. Underhill Moore to Edgar Furniss, Mar. 1, 1933, Moore papers, Yale.

432. *Id.*

433. See Emma Corstvet to Underhill Moore, July 17, 1933, Aug. 16, 1933, Moore papers, Yale.

study.⁴³⁴ Their plan, developed as they worked, was to do field observations both before and after implementation of a statute or ordinance. From the accumulation of "probably feasible investigations" Moore came to focus on changes in New Haven's traffic and parking ordinances because of the "relative simplicity" of the subject and because the Chief of Police, in his role as the New Haven Traffic Authority, was willing to cooperate.⁴³⁵ And so, without really ever deciding to stop his banking research, by December 1933 Moore slid into a new project. He sent his field workers, armed with Corstvet's meticulous directions,⁴³⁶ out to watch drivers on the streets of New Haven.

The first study Moore set to do was again a natural experiment. On two blocks in the heart of downtown an ordinance limited parking to thirty minutes before 7 P.M., but not after.⁴³⁷ So for six days, just before Christmas, observers, placed on the street, timed the duration of parking for all people who parked in these two blocks during certain half hour periods both before and after 7 P.M.⁴³⁸ In order to be sure that the two time periods were comparable, observers also monitored the flow of traffic and shadowed parkers to learn their ultimate destination.⁴³⁹ The second study, begun one month later, was a different kind of "natural" experiment, obviously planned with the connivance of the Chief of Police. This time Moore's field workers spent five three-day, eight-hour periods of observation at a complex intersection about two blocks from the Institute.⁴⁴⁰ Positioned on three of the five corners the observers charted the paths taken by cars travelling through the intersection. The first time the intersection was unmarked; the second time a traffic circle was painted on the pavement, but in fact no ordinance establishing the circle had been enacted. Two months later the observers went out again. This third observation came after an appropriate ordinance had been adopted and while the circle was still painted on the street. For the fourth observation, stanchions were added to further emphasize the perimeter of

434. Underhill Moore to Edgar Furniss, May 25, 1934, Moore papers, Yale.

435. Moore Report 1934, *supra* note 375 at 7.

436. See Underhill Moore to Edgar Furniss, May 26, 1934, Moore papers, Yale.

437. Moore & Callahan, *Law and Learning Theory: A Study in Legal Control*, 53 *YALE L.J.* 1, 88-94 (1943) [hereinafter cited as *Law and Learning Theory*].

438. *Id.*

439. *Id.* at 92.

440. *Id.* at 127-28.

the circle; for the fifth observation both the stanchions and the painted circle were removed, though the ordinance was not repealed.

On each of these studies Moore and Corstvet took their turns like everyone else and Mrs. Moore saw that no one froze by providing coffee and donuts.⁴⁴¹ Collecting the data was not the hardest part of either study by any means; interpreting it was much harder. The parking study showed that just over two thirds of the parkers obeyed the time limit when applicable, while only half of the cars were parked for similarly short periods of time after the restriction was lifted.⁴⁴² But even if one knew what significance to attribute to that fact, the number of observations was small⁴⁴³ and even after the effort to shadow parkers and count passing cars the best one could say was that there was "no clear indication" that the time periods "were not comparable."⁴⁴⁴ The traffic circle studies were even more problematical. In general, painting the traffic circle on the street, with or without an ordinance, caused people to deflect their normal path through the intersection so as to avoid the area where the circle was; removing the circle, even though the ordinance was still in effect, allowed traffic to return to its former pattern.⁴⁴⁵ Adding stanchions to the painted circle accentuated its effect. But examining the data in detail indicated that three of the four traffic patterns studied did not entirely accomplish their goals⁴⁴⁶ and the fourth had comparably few observations.

The effort to make sense out of this data brought two results.

441. Underhill Moore to Agatha Bowley (family friend), Dec. 18, 1934, Moore papers, Yale. In this letter Moore states that he was able to get the New Haven Parking Authority to make and repeal ordinances in order to advance these two studies. Emma Corstvet concurs that this was the case. See Emma Corstvet Llewellyn to John Henry Schlegel, Feb. ? 1980.

442. *Law and Learning Theory*, *supra* note 437, at 110-11.

443. Approximately 200, *id.* at 111.

444. *Law and Learning Theory*, *supra* note 437, at 92.

445. *Id.* at 128-30.

446. In one case the normal pattern was through the circle. Here the results conformed to the common sense hypothesis; only introduction of the stanchions moved all of the traffic out of the area of the circle, although the painted circle moved about three-quarters. In the second, two-thirds traffic normally passed on the correct edge of the circle. Painting the circle on the street moved almost all of the traffic out of the circle, but perversely adding the stanchions moved it even farther over. In the third case, the circle was designed to shift the traffic pattern completely around the circle. Only the stanchions accomplished that result; the painted circle functioned generally in the intended manner but hardly decisively. *Id.* at 128-30.

First, frustration set in, as evidenced by a plain hiatus in the studies and a decision to work into publishable shape the preliminary study done on the uncollected funds problem.⁴⁴⁷ Second, in the process of preparing an annual report for submission to the Institute,⁴⁴⁸ Moore acquired a slightly clearer understanding of exactly what he was interested in investigating when he talked about studying "social control." Moore's report began by differentiating his work from traditional legal research. He emphasized the continuity of his new work with the banking studies. The earlier studies attempted to isolate "those factors in community life in significant causal relation or significantly associated with the behavior of the official government in laying down propositions of law and administering them."⁴⁴⁹ The parking and traffic studies were directed at isolating precisely the reverse relationship: "that the established patterns of overt behavior which are unlike the model set forth in . . . [a] proposition of law . . . effect the degree of correspondence between subsequent behavior and the model in the proposition."⁴⁵⁰ In other words, taken together, banking and parking would prove that law generally follows custom and, when not, custom modifies law. Moore also hoped to isolate "types of legal regulation" for which there would be a constant ratio between the frequency of behavior conforming to the legal rule before and after its adoption.⁴⁵¹

Work on the uncollected funds articles occupied most of the following year,⁴⁵² but with the start of classes in the fall of 1935

447. Cf. Underhill Moore to Mark A. May, June 15, 1935 (reporting work during 1934-35), Moore papers, Yale.

448. Moore Report 1934, *supra* note 375.

449. *Id.* at 3.

450. *Id.* at 6. Moore described his hypothesis as:

. . . difference between the frequency distribution among the various classes of relevant overt behavior before and after the enactment of a statute or ordinance regulating the overt behavior classified is a function (a) of the number of classes, (b) of the distribution of the frequencies among the classes as disclosed by observation before the enactment of the statute or ordinance, and (c) of the formal similarity of the model in the statute or ordinance to the models which describe the classes

Id. at 7.

451. Moore Report 1934, *supra* note 375, at 7.

452. Underhill Moore to Mark A. May, June 15, 1935, Moore papers, Yale. One parking study was simultaneously undertaken—this time on two different blocks, judged to be comparable—one with a parking limit and the other without. This study discovered that virtually no one parking in either block was remaining longer than the durational limitation,

parking studies were begun again in earnest. Initially, two more studies were completed. One took place on a block of mixed residential and commercial property located a short distance from the center of town. Parking was prohibited on one side only with the prohibition changing sides each month. The second observation took place on a block considered comparable to the first, though it was closer to the center of town. Parking on the second block was permanently prohibited on one side and on the other side limited to thirty minutes.⁴⁵³ In spring still another study was added, this time in the heart of downtown where, similar to the first study, parking was limited before 7 P.M. to 15 minutes and thereafter was unlimited.⁴⁵⁴ Thus, by the time this fourth study was completed, Moore had collected two pairs of studies, each a variation on the natural experiment form, one pair with which one might contrast parking limited to 15 minutes or 30 minutes against unlimited parking, the other pair with which one might contrast parking limited to thirty minutes or unlimited against parking totally prohibited. A pattern to his work was plainly emerging.

While Moore worked on gathering data, Emma Corstvet worked on analyzing the results.⁴⁵⁵ Curiously she ignored the obvious pairing of the studies and instead treated each study separately. She began by attempting to determine parking duration by whether the sub-units—side of street, block, day—could be combined.⁴⁵⁶ Once she had determined that such aggregation was appropriate, she turned her attention to determining whether the differences between the regulated and unregulated distributions were significant, using six different methods, some standard, some

hardly a helpful investigation. *Law and Learning Theory*, *supra* note 437, at 92.

453. *Id.* at 88-94. Two periods of observation, each four days in duration extending over the change in regulation at the end of a month and limited to daylight hours were undertaken. Observers were hidden in a second floor bay window overlooking the street and parkers were shadowed to learn their destination.

454. *Id.* at 88-94.

455. Emma Corstvet to Underhill Moore, June 23, 1936 (summarizing work done that year), Moore papers, Yale. For this task she had the assistance of William L. Dennis, a Yale undergraduate who was working for Moore as part of his scholarship, and three statisticians associated with the Institute. See Emma Corstvet to Underhill Moore, July 27, 1936, Moore papers, Yale. Emma Corstvet, Memo on Discussions of Parking Studies—Status as of Fall, 1936, summer 1936? (copy in possession of the author courtesy of Emma Corstvet Llewellyn).

456. Corstvet, *supra* note 455.

rather novel.⁴⁵⁷ When she finished this task, Corstvet was convinced that the last study would have to be discarded as unusable because it had sampling problems.⁴⁵⁸ The rest she found quite fine, if a bit small in scale. Having thus destroyed Moore's careful pairings, she proceeded to make several suggestions for further work. One was for reducing the existing data, which had been turned into graphic form, into mathematical form.⁴⁵⁹ Another was for doing further studies with larger samples so as to reduce the possibility of sampling error.⁴⁶⁰ And then, her summary of the work to date complete, Emma Corstvet, in fall 1936, quite reluctantly stopped working for Moore.⁴⁶¹

The task of finding a replacement for Corstvet was difficult;⁴⁶² ultimately Moore had to accept Charles Callahan,⁴⁶³ a J.S.D. candidate with an interest in procedure, instead of the professional social scientist he wanted.⁴⁶⁴ But finding an assistant was the least difficult problem Moore faced while Corstvet worked at recapping the work to date. The others could conveniently be gathered under the heading money—Yale was notably short of it.

Though all of Moore's money problems were related to the parking research, the first problem was in a sense quite personal. In spring 1937 Moore was eligible for a sabbatical. He planned to

457. *Id.*

458. *Id.* The problems she identified were the small size of the sample and the fact that even when unregulated nearly two-thirds of the parking on both sides of the street was for less than the shorter permissible duration.

459. Corstvet, *supra* note 455.

460. *Id.*

461. Interview with Emma Corstvet Llewellyn, Aug. 19, 1975. She had married Karl Llewellyn in 1933. Two years later the sudden illness of her father-in-law made it necessary for her to move to New York. The extended commute forced her to cut her work week to three days, but that too proved unsatisfactory, so reluctantly she chose to stop working for Moore.

462. Moore first tried to hire one of the other sociologists at the Institute who lived with Thomas and Corstvet, but she declined even though pressured by Mark May to accept. Underhill Moore to Ruth Arrington, Jan. 30, 1936 ("I am looking for a person who is sufficiently interested and sympathetic with the kind of work . . . [Corstvet and I] have been doing to carry it on, or, better even, to develop it."); Ruth Arrington to Underhill Moore, Feb. 3, 1936; Mark A. May to Underhill Moore, Apr. 8, 1936, Moore papers, Yale. Then Moore tried one of the statisticians who had helped Corstvet, but with no success either. See Mark A. May to Underhill Moore, May 18, 1936, Moore papers, Yale.

463. b. 1910. B.S. 1932, J.D. 1934, Ohio State; J.S.D. 1937, Yale. Private practice 1934, Ohio. Research asst. 1936, lecturer 1938, asst. prof. 1939, Yale; assoc. prof. 1943, prof. 1948, Ohio State. d. 1973.

464. Underhill Moore to Mark A. May, May 26, 1936, Moore papers, Yale.

take it and spend the semester and the following summer in England and on the continent replicating the parking studies in an attempt to control for cultural variables in his data.⁴⁶⁵ In an effort to prepare for that research he had planned to spend summer 1936 in England arranging for the necessary governmental cooperation.⁴⁶⁶ In winter 1935 the faculty routinely supplied the necessary approval and then to everyone's surprise the Yale Corporation decided to economize by requiring that persons seeking a sabbatical agree to do so at half salary, the balance to defray the cost of hiring a replacement.⁴⁶⁷ Moore was absolutely unwilling to take his leave under these conditions, although he was at the time quite solvent.⁴⁶⁸ So, although the law faculty, already angry with the Corporation over two successive budget cuts, was ready to fight with a solemn declaration that they could cover Moore's courses without hiring anyone,⁴⁶⁹ Moore, with a certain amount of annoyance, withdrew his sabbatical request.⁴⁷⁰

While the sabbatical problem was hanging fire Moore tangled first with the Corporation⁴⁷¹ and then with Clark⁴⁷² over the question of who would pay the salary of his research assistant at the

465. Underhill Moore to Charles E. Clark, Dec. 20, 1935, (application); Charles E. Clark to Underhill Moore, Dec. 21, 1935 (no problem), Moore papers, Yale. Moore had a second reason for wanting to go to England; he had secured an invitation to give several lectures at the London School of Economics.

466. Underhill Moore to Charles E. Clark, Dec. 20, 1935, Moore papers, Yale.

467. Charles E. Clark to Underhill Moore, Feb. 28, 1936; Charles E. Clark to Faculty, Mar. 3, 1936, Moore papers, Yale.

468. His objection, never articulated in writing, may have been based on the expenses he foresaw in connection with the salary of his assistant and the cost of further studies. See text at notes 471-84 *infra*.

469. Minutes of the Board of Permanent Officers, Yale Law School, Mar. 6, 1936.

470. Underhill Moore to Charles E. Clark, Mar. 7, 1936; Underhill Moore to James R. Angell, Mar. 7, 1936; James R. Angell to Underhill Moore, Mar. 7, 1936 (sorry for "annoyance"), Moore papers, Yale.

471. See Charles E. Clark to Underhill Moore, Feb. 28, 1936 (reporting decision of Corporation to terminate salary), May 23, 1936 (reporting his understanding of solution), Moore papers, Yale. Thomas W. Farnam (Yale Comptroller) to Underhill Moore, Apr. 27, 1936 (reiterating decision); Charles E. Clark to Thomas W. Farnam, Apr. 27, 1936 (stating his position); Underhill Moore to James R. Angell, May 8, 1936 (offering compromise of partial payment by University); James R. Angell to Underhill Moore, May 14, 1936 (tentative acceptance); James R. Angell, Memo to file, May 14, 1936? (recording his understanding of resolution), Angell papers.

472. See Underhill Moore to James R. Angell, May 18, 1936 (reporting dispute with Clark over solution); Charles E. Clark to Thomas W. Farnam, May 19, 1936 (reporting his side of fight); Thomas W. Farnam to James R. Angell, May 20, 1936 (reporting outcome), Angell papers.

law school. Although Moore largely won that dispute,⁴⁷³ his victory came at the cost of being reminded how jealously his colleagues viewed the special provisions made to support his research in the agreement he had reached with Hutchins when he came to Yale⁴⁷⁴ and, at the same time, how, as he put it, "no one around here seems to be interested in . . . [empirical] research."⁴⁷⁵ But these two indications of the financial precariousness of Moore's research were not half as serious as the one emanating directly from the Institute.

Moore's most recent grant from the Institute had been the \$5,000 received in fall 1931 to support the banking studies.⁴⁷⁶ For the following four years his "budget" had been the unexpended balance of that sum,⁴⁷⁷ even though in the interim his research topic had shifted, and his new research was seen to be "quite in harmony with the program of the Institute."⁴⁷⁸ So long as the banking studies were the only research activity that arrangement was fine, for the salary of Moore's assistant at the Institute was paid out of Institute funds⁴⁷⁹ and out of pocket expenditures were limited. But with the start of the parking studies out of pocket expenditures climbed drastically because of the need for multiple paid observers and some paid consultants. Then, in 1935 when, as a result of these costs, the balance had sunk dangerously low, the perennial problem of what the Institute should be doing was again

473. The agreement struck was that the University would put up \$1000, one-half to come out of an already shrunken law school budget, and Moore, the balance up to \$800. See Charles E. Clark to Thomas W. Farnam, May 19, 1936, Angell papers. Moore then turned around and hired a part-time assistant, thus obviating the necessity of expending any of his own funds and, not incidentally, infuriating Clark. Underhill Moore to James R. Angell, May 18, 1936, Angell papers. The real cost, of course, was the diminution in the amount of assistance available for Moore's work.

474. See Charles E. Clark to Thomas W. Farnam, Apr. 27, 1936 (recounting objections of Edwin Borchard), Angell papers. Charles E. Clark to Charles Seymour (Yale Provost), May 29, 1934 (recounting objections of Walton Hamilton, Thurman Arnold & Wesley Sturges), Moore papers, Yale.

475. Underhill Moore to Charles J. Tilden, Nov. 5, 1936, Moore papers, Yale.

476. See text at note 348 *supra*.

477. See, e.g., Mark A. May to Underhill Moore, Oct. 3, 1932, Moore papers, Yale.

478. Edgar Furniss to Underhill Moore, Mar. 4, 1933, Moore papers, Yale.

479. Clark had engineered the switch of Sussman to the Institute's budget several years earlier. See Charles E. Clark to Mark A. May, Jan. 15, 1931, Moore papers, Yale. Emma Corstvet was already on the Institute's payroll, though paid out of grant funds, when, in 1932, she began to work for Moore. See, e.g., Underhill Moore to Mark A. May, Sept. 29, 1932; Mark A. May to Underhill Moore, Apr. 23, 1934, Moore papers, Yale.

raised. The decision to focus the activities of the social science staff on the New Haven community had neither brought about much more cooperative research, nor unified the research program of the Institute.⁴⁸⁰ In another attempt to realize these objectives the Institute was once again administratively reorganized, this time under a single director, and a decision was made to liquidate existing research projects whenever possible in order to provide that director with a "liquid research fund" to be used to support such projects as appeared to be most promising for the development of "a unified science of behavior and human relations."⁴⁸¹ Moore attempted to recast his research in order to fit it into what seemed to be the developing program of the Institute's director, Mark A. May.⁴⁸² Nevertheless, when, virtually simultaneously, Corstvet left and the last of the \$5000 grant had just about run out, May balked at either paying the salary of Callahan or providing another grant to support parking research.⁴⁸³ After some haggling May agreed to pay part of the salary if Moore would pay the rest,⁴⁸⁴ but the matter of research support hung fire.

The combination of these three financial attacks on his research and the growing indications that few people were otherwise interested in it left Moore deeply depressed.⁴⁸⁵ His normally abrasive teaching style got even more irritating to the point that one of his better students, long the staple of his teaching, was offended and contemplated leaving his course.⁴⁸⁶ Nevertheless, during this

480. Interview with Mark A. May, June 9, 1975. Cf. May, *A Retrospective View of the Institute of Human Relations at Yale*, 6 BEHAVIOR SCI. NOTES 141, 150 (1971).

481. May, *supra* note 480, at 148-50.

482. See Mark A. May to Underhill Moore, Nov. 29, 1935 (How does your work fit in?); Underhill Moore to Mark A. May, Dec. 26, 1935 (answer); Clark L. Hull, Memorandum to Mark A. May and his Committee on Agenda for the Institute of Human Relations, Dec. 3, 1935 (proposal for joint research); Clark L. Hull to Mark A. May, Dec. 18, 1935 (addition of material on Moore to memo of Dec. 3, 1935); Clark L. Hull to Underhill Moore, Dec. 18, 1935 (recounting Moore visit to talk about proposal); Mark A. May to Underhill Moore, Jan. 29, 1936 (have I correctly identified your research interests?); Underhill Moore to Mark A. May, Feb. 5, 1936 (yes, but you do not recognize other ways my research fits in with other activities at the Institute), Moore papers, Yale.

483. See Underhill Moore to James R. Angell, May 8, 1936, Angell papers.

484. Underhill Moore to James R. Angell, May 18, 1936 (I have agreed to pay \$1000 of Callahan's salary during next 18 mos.), Angell papers. Underhill Moore to Charles Seymour, May 18, 1936, Moore papers, Yale.

485. Underhill Moore to Hessel Yntema, Feb. 10, 1940 (recounting Yntema's visit to New Haven in summer 1936), Moore papers, Yale.

486. See Eugene V. Rostow to Underhill Moore, Feb. 26, 1936?, Moore papers, Yale.

depression Moore did not allow himself to lapse into inactivity. During the summer of 1936 he went to England as planned and secured the cooperation of the English government for his planned research there, now rescheduled for the summer of 1938.⁴⁸⁷ When he came back he began in earnest on the plan of further research Corstvet had laid out for him. And to finance it all he began seeking funds from various sources, including the Carnegie Foundation,⁴⁸⁸ the Commonwealth Fund,⁴⁸⁹ the Macy Foundation,⁴⁹⁰ the Penrose Fund of the American Philosophical Society,⁴⁹¹ the Rosenwald Foundation,⁴⁹² and the federal government.⁴⁹³

Of the two obviously related efforts the research went better, or at least easier. Taking Corstvet's advice he reran two of the studies: the one where parking restrictions were lifted each evening at 7 P.M., that she had suggested would have to be discarded, and another one where the no parking zone changed signs each month, that she thought required a larger sample to be useful.⁴⁹⁴ Both reruns were a success,⁴⁹⁵ but neither was in any sense a perfect ex-

Moore's reply was, for him, unusually cordial. Underhill Moore to Eugene V. Rostow, Feb. 27, 1936, Moore papers, Yale.

487. See Underhill Moore to S. S. Wilson, Sept. 19, 1936; S. S. Wilson to Underhill Moore, Oct. 2, 1936, Moore papers, Yale.

488. See F. W. Keppel to Underhill Moore, June 4, 1937, Moore papers, Yale.

489. See George Wellwood Murray to Underhill Moore, May 21, 1937, Moore papers, Yale.

490. See Underhill Moore to John Dewey, Feb. 27, 1937, Moore papers, Yale.

491. Underhill Moore to American Philosophical Society, Nov. ?, 1936, Moore papers, Yale.

492. See Underhill Moore to Robert M. Hutchins, Mar. ?, 1937 (on file in the Robert M. Hutchins papers, Regenstein Library, University of Chicago) [hereinafter cited as Hutchins papers without cross-reference].

493. See Wm. G. Eliot, III, to Underhill Moore, Mar. 15, 1937, Moore papers, Yale.

494. See text at notes 459-60 *supra*.

495. In the first of these efforts, Moore again sent his observers out to check parking in the area where the prohibition of parking and unlimited parking shifted sides each month. But this time instead of eight days of observation he kept his observers in the field for six weeks, eight hours per day, again hidden in a bay window and again shadowing parkers. The second observation was again of an area where parking restrictions were lifted early each evening, but this time the study was moved a block away. For seven weeks observers in a second floor window of city hall watched parkers for one hour before the restriction was lifted and for one hour after. *Law and Learning Theory*, *supra* note 437, at 88-94.

The results of the first study were substantially the same as in the earlier study. Compare *id.* at 100-02, with *id.* at 102-04. But the second one showed a substantially different and more marked effect from the parking limitation than had the earlier study. Compare *id.* at 104-06, with *id.* at 106-07. This result in part confirmed Corstvet's feeling that there had been something wrong with that study. But see text at note 504 *infra*.

periment. It is by no means obvious that parkers during working hours are likely to be doing the same things, even if they are going to the same places, as parkers in the early evening,⁴⁹⁶ nor that parking is such random behavior that, on a two way street, the side on which parking is prohibited makes no difference. So in two more studies Moore tried to improve on his earlier research design.

In each of these new studies Moore took advantage of advance knowledge when parking restrictions were going to be first imposed.⁴⁹⁷ In one of these areas, a warehouse district near the train station, his observers worked for three weeks before, and then again after, parking was limited to thirty minutes.⁴⁹⁸ In the other area, a spot on the edge of the campus away from town, observers similarly spent four weeks before and after the imposition of a sixty minute limitation.⁴⁹⁹ Unfortunately what Moore gained in simplicity of design he lost to the possibility that parking behavior changed with the seasons as late fall went into mid-winter.

Even with these studies Moore had by no means covered all of the possibilities. He had made no attempt to account for the effects of police enforcement of parking limitations. To remedy that omission, in the spring and summer 1937 he arranged to have a police officer assigned to his control who was set to work placing regular city parking tickets on cars at precisely determined times after the elapse of the period for permissible parking.⁵⁰⁰ In this study, carried out at the site of the earlier study in the warehouse district, observers watched before regular tagging was instituted, while it was going on, and after it was discontinued.⁵⁰¹ By thus tagging cars in a place where law enforcement was apparently expected to be lax Moore caused some problems with at least one local businessman who had to be threatened with jailing in order to convince him that the policeman and tags were real.⁵⁰² But the

496. As Moore recognized, see *Law and Learning Theory*, *supra* note 437 at 91-92.

497. See *id.* at 93. Underhill Moore to Emma Corstvet, Dec. 10, 1936; Underhill Moore to Agatha Bowley, Apr. 9, 1938, Moore papers, Yale.

498. *Law and Learning Theory*, *supra* note 437, at 88-94.

499. *Id.*

500. *Id.* at 117.

501. *Id.* at 116-17. For one part of the study only parkers who had stayed fifty minutes beyond the posted time were tagged; for another, all those who had stayed fifteen minutes. *Id.* at 117.

502. William L. Dennis (research assistant) to Underhill Moore, Aug. 5, 1937, Moore papers, Yale. See also William L. Dennis to Underhill Moore, Aug. 12, 1937, Aug. 17, 1937, Moore papers, Yale.

results were probably worth the effort and the businessman's aggravation, because they showed a small, though noticeable, shift in the direction of fewer parkings lasting thirty minutes or more.⁵⁰³

Taken together all the studies revealed several facts: where parking behavior did not already conform with a regulation, imposition of that regulation made some difference in the behavior of parkers; that this effect was consistent and more extreme the more extreme the limitation imposed; that the limitation did not seem to effect the ultimate destination of those individuals parking in the place, although it was obviously not clear whether the same individuals were parking for shorter durations or only parking elsewhere; and that systematic enforcement seemed to make the ordinances at least marginally more effective. A little further thought would have suggested that the most marginal effect found, the one in the study that Corstvet had decided was unusable and Moore had then rerun, might have been explained by the location of the study—across from the post office, a classic location for stops of less than the fifteen minute limitation.⁵⁰⁴ One might have called the effort a success and quickly written up the results. Moore, however, did no such thing.

His attempts to secure funds from outside grantors had proven uniformly unsuccessful.⁵⁰⁵ Although May had belatedly contributed about \$500 toward Moore's expenses,⁵⁰⁶ even before the tagging studies were begun Moore had expended nearly \$2000 of his own funds in addition.⁵⁰⁷ By the time completion of the tagging experiments, Moore had spent enough to require that he take out a \$3500 loan to finance the expenditures.⁵⁰⁸ The trip to England to do research was thus scrapped and the following year spent in analysis of the data, analysis of a very particular kind.⁵⁰⁹

503. See *Law and Learning Theory*, supra note 437, at 117-26.

504. *Id.* at 90.

505. See Robert M. Lester (Carnegie) to Underhill Moore, Mar. 9, 1938; George Welwood Murray (Commonwealth) to Underhill Moore, May 21, 1937; John Dewey (Macy) to Underhill Moore, Feb. 27, 1937; American Philosophical Society to Underhill Moore, Apr. 12, 1937; Wm. G. Eliot, III (federal gov't) to Underhill Moore, Mar. 15, 1937, Moore papers, Yale. Robert M. Hutchins (Rosenwald) to Underhill Moore, Mar. ?, 1937, Hutchins papers.

506. Mark A. May to Underhill Moore, Nov. 11, 1936, Moore papers, Yale.

507. Underhill Moore to Emma Corstvet, Dec. 10, 1936 (\$2000); Underhill Moore to Fritz M. Marx, Dec. 18, 1936 (over \$1700), Moore papers, Yale.

508. Underhill Moore to Agatha Bowley, Apr. 9, 1938; Underhill Moore to Mark A. May, May 10, 1937, (request for reimbursement of \$3,113.39), Moore papers, Yale.

509. Underhill Moore to Agatha Bowley, Apr. 9, 1938, Moore papers, Yale.

While in 1934 Moore thought only in terms of determining the "significant association" of various factors and ratios of difference in frequency distributions,⁵¹⁰ by 1936 he was determined to express his results as "simple mathematical functions" by which one might predict "behavior *after* the statute as a function of (i) . . . behavior *before* the statute, and (ii) the statute itself."⁵¹¹ To this end he had shifted from two pairs of related studies to a collection of studies encompassing four different regulations: no parking, 15, 30 and 60 minute parking. Even before he finished he had isolated a mathematical relationship which he thought might hold for all the studies. It suggested that a parking regulation diminished the frequency of parking for durations longer than the limitation only for durations that exceeded the sum of (a) 37% of the difference between the longest duration observed when the area was unregulated and the limitation and (b) the limitation.⁵¹² Apparently, upon further analysis the relationship did not hold; at least it was never heard of again. But Moore and his assistants worked hard to develop other such relationships, deforming curves, aggregating data this way and that, and generally trying to learn exactly, quantitatively, what was the relationship between the phenomena they had observed and the parking regulations in question.⁵¹³

In spring, 1938, Moore, who had been filing research reports with the American Sociological Society for several years, had his project selected out of the research directory by the chairman of the Social Research section and was asked to present his tentative findings in a panel discussion for that section at the annual meeting of the Society that December.⁵¹⁴ Analysis of the data had proceeded far enough by then that Moore agreed to do so.⁵¹⁵ The resulting paper appears to have been an unadorned presentation of the mathematical analysis, largely devoid of an explanatory frame-

510. Moore Report 1934, *supra* note 375, at 6.

511. Underhill Moore, A Quantitative Investigation of Human Behavior, 1, Nov. 25, 1936 (application to Penrose Fund), Moore papers, Yale.

512. Underhill Moore, Memorandum re an Investigation of the Effect of Statutes and Ordinances and their Administration, 6, Feb. 27, 1937 (grant application), Angell papers, Hutchins papers.

513. See Underhill Moore to Roswell P. Angier (Yale, Psychology) June 27, 1938.

514. Calvin Schmid to Underhill Moore, June 3, 1938, Moore papers, Yale.

515. *Preliminary Program, 33d Annual Meeting, American Sociological Society, 3 AM. Soc. Rev.* 749, 754 (1938).

work which might have made the analysis intelligible.⁵¹⁶ It is also relatively apparent that even on its own terms the analysis was not wholly successful.⁵¹⁷ Nor did the presentation bring Moore anything more than cursory, on the spot, criticism of the work.⁵¹⁸

With a completed, if not necessarily wholly satisfactory paper written at this point Moore was faced with two alternatives: publish a report of the work to date in the hope of generating criticism from a wider audience than he had been able to attract so far, or expand the research to other fields in an effort to increase the data base from which generalizations could be drawn.⁵¹⁹ Moore plainly preferred the second alternative,⁵²⁰ but he was rather limited in his choices by Mark May's decision, taken at the time the Rockefeller Foundation refunded the Institute at a lower level of funding,⁵²¹ to terminate all support for Moore's work.⁵²² Appeals for funds made to the new university administration⁵²³ met with no success,⁵²⁴ although the law school managed to provide places on the faculty for Callahan and Moore's other research assistant out of funds freed by the resignations of Clark, Thurman Arnold, and Dorothy Thomas and the termination of other programs. However, these posts were accompanied with teaching responsibilities and thus substantially limited the time available to engage in reanalysis of the data, or to mount further studies, even if money could be found. They also provided the occasion for diversions from those tasks through the ever-present need to spend time on the development and revision of curriculum.⁵²⁵

While the "painstaking, though undramatic, work" of reanal-

516. Cf. Mark A. May to Underhill Moore, Feb. 3, 1939, Moore papers, Yale.

517. *Id.*

518. There is nothing in Moore papers, Yale, reflecting comment on the paper.

519. Mark A. May to Underhill Moore, Feb. 3, 1939 (May's formulation), Moore papers, Yale.

520. See Underhill Moore to Charles Seymour (by then Yale's President), Feb. 7, 1939, Moore papers, Yale.

521. May, *supra* note 480 at 147.

522. Mark A. May to Underhill Moore, Dec. 5, 1938; Feb. 3, 1939, Moore papers, Yale.

523. Underhill Moore to Edgar Furniss, Feb. 7, 1939; Underhill Moore to Charles Seymour, Feb. 7, 1939, Moore papers, Yale.

524. Edgar Furniss to Underhill Moore, Feb. 8, 1939; Charles Seymour to Underhill Moore, Feb. 14, 1939, Moore papers, Yale.

525. See, e.g., Memorandum for Callahan, Dennis & Moore of Work Proposed to be Given Next Year, Dec. 15, 1939 (detailing a split of Commercial Bank Credit I & II into four courses), Moore papers, Yale.

ysis of Moore's data proceeded, if ever so slowly,⁵²⁶ Moore received a wholly unexpected chance to clarify his ideas about the study and, in the process, provide the explanatory framework for it that was absent when he had presented his paper at the American Sociological Society Meeting. Albert Kocourek, the junior editor on Wigmore's *Rational Basis of Legal Institutions*, requested a short piece for a projected volume on "American Legal Philosophies" expressing Moore's views on "the ultimate ideas of the origin, nature, or ends of the law."⁵²⁷ Kocourek suggested that he was interested in securing a diversity of approach and offered a variety of potential starting points: "ontology, epistemology, psychology, logic, value . . . [or] social fact."⁵²⁸ Moore accepted "gladly, but with many misgivings."⁵²⁹ Unlike most of the other participants in the project, Moore took Kocourek's suggestion seriously and used the occasion to "make a logical construct of the theory which underlies . . . [my] empirical work and indicates the relation of that kind of legal research to work in psychology and the so-called social sciences."⁵³⁰ The effort took all of the summer and fall of 1940 and on into winter 1941. Moore found the work "difficult far beyond expectation,"⁵³¹ but when he and Callahan had finished they had a piece that Moore was obviously proud of. Significantly, it was absolutely unlike anything else in the resulting "coffee-table" volume.

Moore began his essay with a flat, if a bit confused, espousal of the Vienna Circle/logical positivist⁵³² requirement that all scientific, by which he meant causal, theories use operational or observ-

526. Underhill Moore to Mark A. May, Apr. 19, 1940, Moore papers, Yale.

527. Albert Kocourek to Underhill Moore, May 31, 1940, Moore papers, Yale.

528. Albert Kocourek, Untitled Memorandum, n.d., accompanying Albert Kocourek to Underhill Moore, May 31, 1940, Moore papers, Yale. The recipients of the letter who declined were Mortimer Adler, Thurman Arnold, Louis D. Brandeis, Felix Frankfurter, Learned Hand, and Joseph C. Hutcheson, Jr. Kocourek also planned to include pieces representing the views of James Barr Ames, James Collidge Carter, Benjamin N. Cardozo, John Chipman Gray and Oliver Wendell Holmes, Jr., though this part of the plan was never completed.

529. Underhill Moore to Albert Kocourek, June 17, 1940, Moore papers, Yale.

530. Underhill Moore to Albert Kocourek, Jan. 16, 1941, Moore papers, Yale.

531. *Id.*

532. At this time in his life Moore considered himself a logical positivist. See Underhill Moore to A. H. Pekelis, Mar. 29, 1943, Moore papers, Yale. Others thought so too. See Albert Kocourek to Underhill Moore, June 23, 1941, Moore papers, Yale.

able definitions.⁵³³ He therefore dismissed all "philosophies of law with which . . . [he was] acquainted" for not being "useful guides in attempting to formulate operational hypotheses as to the relations between law and other behavior."⁵³⁴ In place of the "sterility" of existing philosophies of law for generating such operational hypotheses, Moore proposed to set forth a theory of law "based on an analysis of the process of learning, through pain or reward, a response to a sign in a stimulus-response situation."⁵³⁵ His goal was to acquire "precise knowledge of the specific effects of law on behavior," in the belief that "until such knowledge is available, any discussion of the relative desirability of alternative social ends which may be achieved by law is largely day-dreaming and any discussion of the 'engineering' methods by which law may be used to achieve those ends is largely futile."⁵³⁶

Having thus abused, if not disposed of, both traditional legal scholarship and the then newer forms of policy analysis, Moore presented his own theory. He first asserted that legal rules as well as legal behavior "may or may not be a sign to which a response has been learned."⁵³⁷ Then, importing legal phenomena wholly into the world of every day events, Moore further asserted that it was improper to distinguish "between law . . . and other behavior and artifacts" as was commonly done. Rather, Moore claimed, the more important distinction was between "behavior and artifacts which are signs" (i.e., those "to which human beings have been taught, through pain, humiliation, or reward, to respond") "and those which are not."⁵³⁸ He proceeded to distinguish learned responses from other responses, and briefly review the mechanism of learning through reinforcement.⁵³⁹ Then, reverting to concerns first expressed in the Wigmore review nearly twenty years earlier, he imported culture into the learning situation as learned responses or behavior patterns of those who teach, primarily parents, and attempted to account for changes in culture either as random behavior by reinforcing agents or as responses to new stimulus situa-

533. Moore & Callahan, *Underhill Moore in MY PHILOSOPHY OF LAW: CREDOS OF SIXTEEN AMERICAN SCHOLARS* 203 (1941).

534. *Id.* at 204.

535. *Id.*

536. *Id.* at 206-07.

537. *Id.* at 205.

538. *Id.*

539. *Id.* at 207-10.

tions.⁵⁴⁰ Further, emphasizing cultural aspects of learning, Moore observed that as others were often responding to the same sign when an individual was learning his response to it, "the frequency with which . . . [the] behavior [of others] corresponds to the response being reenforced, may become a part of the sign" for the individual learning that response.⁵⁴¹ He thereafter emphasized the wide variation in the range of stimuli to which "in life situations" responses may be learned and attempted to account for problems created by the verbal content of many stimuli. Moore further noted that not all things, be they legal rules, advertising messages or other exhortations, purporting to be stimuli were necessarily such unless a response to them was learned, if only on the basis of recognizing the authority of the individual or organ issuing the stimulus.⁵⁴²

With the general description of his theory thus complete Moore returned to a more narrowly legal context and observed, somewhat dogmatically, that:

the common assumption that propositions of law are exhibited by the state to most people, that responses to them are conditioned in most cases by punishment inflicted by the state and that therefore law is a peculiar class of signs to which is given responses differing in degree from responses to other signs, is erroneous.⁵⁴³

"[M]ost propositions of law are not exhibited by anyone to the senses of most people;" "most responses which are thought of as responses to propositions of law . . . actually are responses to stimulus situations which do not include any proposition of law;" most responses given to propositions of law are not responses "learned through the punishment of the state" but rather have "been taught by parents;" and those instances "in which the state does carry out the process of conditioning a response," "cases of a few deviational individuals" or cases where "the state is an innovator" that "attempts to obtain a response different from the responses being given by the great majority of people," "the process of conditioning a response to a law-sign" and other learning processes "are fundamentally the same."⁵⁴⁴

540. *Id.* at 210-11.

541. *Id.* at 211.

542. *Id.* at 211-15.

543. *Id.* at 216.

544. *Id.* at 216-17.

Having thus asserted his wholly naturalistic view of legal processes, Moore returned to the world of behavioral psychology in an attempt to produce an hypothesis for testing that was operational, in the sense he asserted at the outset. With some difficulty he derived as such an hypothesis the proposition that the change in behavior after the imposition of a legal regulation "varies directly . . . with the ratio, observed . . . before" the regulation was "introduced, between the frequency of behavior not corresponding to the" regulation "and the frequency of behavior corresponding to the" regulation.⁵⁴⁵ In other words, behavior in conformity with a law is more likely where behavior has previously conformed without that law; or, stated negatively, the greater the disparity between the behavior designed to be altered by a law and the behavioral standard established by that law, the less likely behavior will conform to the law. And thereafter Moore summarily presented the results of the parking research, complete with three by no means elegant algebraic formulas, as partial support for the hypothesis.⁵⁴⁶

Although Kocourek's book was widely reviewed, Moore's contribution was generally either ignored,⁵⁴⁷ found puzzling or perplexing,⁵⁴⁸ or subjected to generally vituperative, though unpercep-

545. *Id.* at 221. Moore explained his thesis as follows:

In life situations in which an individual is being conditioned to give a reinforced response to a sign, the learned responses of others to that sign are part of the stimulus situation. [Also] . . . the degree of pain or reward by which the response of the individual is reinforced varies with the relative frequency of failures to successes in the responses of those others. Accordingly there is a relation, throughout the learning periods in which responses to a large number of signs are learned, between the relative frequency of failures to successes in the behavior of others and the degree of pain or reward by which the response of the particular individual is conditioned. Since this behavior of others is present to the senses of the individual during the learning process and since the degree of pain or reward varies with it, the behavior of others becomes a part of the sign and differing ratios of failures to successes become parts of different signs to which different responses are learned because differing degrees of pain or reward have been applied in the process of teaching those responses.

Id. at 221-22.

546. *Id.* at 223-25.

547. See, e.g., Bowman, Book Review, 22 B.U. L. REV. 487 (1942); Prosser, Book Review, 27 CORNELL L.Q. 292 (1942); Rose, Book Review, 8 OHIO ST. L.J. 353 (1942).

548. Reiblich, Book Review, 26 MINN. L. REV. 340, 345 (1942); Rottschaefer, Book Review, 26 MINN. L. REV. 771, 772 (1942); Laughlin, Book Review, 3 WASH. & LEE L. REV. 61, 77 (1941).

tive, criticism.⁵⁴⁹ Only four of the reviewers seem even to have understood the piece⁵⁵⁰ and of the four only one offered even vaguely useful criticism—the quite contemporary suggestion that experimental method alone does not make a science.⁵⁵¹ Another at least understood the relationship between Moore's offering and his having come to intellectual maturity at a time when "science" was an important, new intellectual force.⁵⁵²

Moore's friends and associates did little better. Eugene Rostow, understanding the piece to be a "preface" to a larger work, found it "an entirely articulate statement of the argument of . . . [Moore's] research," yet cautioned that the research might "confirm an infinite number of hypotheses" in addition to Moore's. Rostow, then, suggested that Moore "dramatize" his research "for law professors unfamiliar with other kinds of study" by distinguishing it from "other kinds of permissible scholarship in law"—studies of policy or doctrine.⁵⁵³ Mark May found the piece "interesting" and "sound" but suggested that Moore make "a more careful study of the recent formulations of learning theory" by Hull since Moore's results could be "predicted from the main postulates of Hull's system."⁵⁵⁴ Hull in turn found Moore's contribution "important" and noted his "impression" that Moore's philosophy of law had "advanced very greatly within the last year or two, particularly in the psychological direction."⁵⁵⁵ He also offered a

549. Lucey, Book Review, 30 *Geo. L. Rev.* 800, 801 (1942) ("another loud 'toot! toot!' for social institutions, with dynamic behaviorism supplying the steam."); Hanft, Book Review, 20 *N.C. L. Rev.* 123, 125 (1941) ("The principal accomplishment seems to have been to state some fairly simple matters in the other-worldly language of behaviorist psychology."); Bullington, Book Review, 20 *Tex. L. Rev.* 644, 645 (1942) ("obfuscating jargon contrived by the sociologists to bolster their scientific pretensions . . . ends with some meaningless mathematical formulae"); Hütcheson, Jr., Book Review, 51 *Yale L.J.* 523, 525-26 (1942) ("too long has devoted himself to too much about too little and too little about too much until he has come to know everything about nothing and nothing about everything"). See also Smith, Book Review, 53 *Ethics* 46, 47 (1942) ("[T]here is such a thing as getting so scientific that one forgets what he's scientific about."). Moore said he liked this review. See Underhill Moore to T. V. Smith, Oct. 12, 1942, Moore papers, Yale.

550. Husserl, Book Review, 42 *Colum. L. Rev.* 894 (1942); Sharp, Book Review, 36 *Ill. L. Rev.* 591, 592 (1942); Cairns, Book Review, 27 *Iowa L. Rev.* 337, 341-42 (1942); Cohen, Book Review, 18 *Tul. L. Rev.* 172, 177 (1942).

551. Cairns, *supra* note 550 at 342.

552. Husserl, *supra* note 550 at 894.

553. Eugene Rostow to Underhill Moore, Apr. 11, 1941, Moore papers, Yale.

554. Mark A. May to Underhill Moore, Mar. 7, 1941, Moore papers, Yale.

555. Clark Hull to Underhill Moore, Mar. 17, 1941, Moore papers, Yale.

criticism of Moore's use of "operational," drawing on his own knowledge of the works of the Vienna Circle, and an extended discussion of "experimental extinction," the "one important lack" in a "remarkably realistic account of the psychology of behavior involving statutes."⁵⁵⁶

Moore quickly followed May's advice⁵⁵⁷ and with the aid of Hull's book,⁵⁵⁸ then still in draft, he and Callahan set to work completing their analysis and presentation of the studies. In the course of the two and a half years they worked, World War II intervened and as a result Moore lost his office at the Institute⁵⁵⁹ and his research assistant at the law school.⁵⁶⁰ Then, Callahan lost his teaching job at Yale.⁵⁶¹ Finally in December, 1943, a full ten years to the month after the first observations were made, Moore's study, *Law and Learning Theory*, finally appeared in 136 pages of the *Yale Law Journal*.

This time, after taking a brief, acid slap at "the failure of jurists and others to undertake . . . investigations of the quantity and degree of conformity [of behavior] to rules of law,"⁵⁶² Moore

556. *Id.*

557. See Underhill Moore to Clark L. Hull, Mar. 11, 1941, Moore papers, Yale.

558. See Clark L. Hull to Underhill Moore, Mar. 17, 1941, Moore papers, Yale.

559. Mark A. May to Underhill Moore, Oct. 6, 1942 ("come back after the war is over"); Underhill Moore to Mark A. May, Oct. 12, 1942 (enclosing keys), Moore papers, Yale.

560. See Ashbel Gulliver (new dean) to Underhill Moore, Apr. 28, 1942; Edgar Furniss to Underhill Moore, May 6, 1942, Moore papers, Yale.

561. Gulliver, *Report of the Dean of the Law School for the Academic Year 1942-1943*, 14 (1943). Part of the reason was lack of money due to reduced enrollments, part to dissatisfaction with Callahan's teaching. See Ashbel Gulliver to Underhill Moore, May 7, 1943, Moore papers, Yale. The university was also attempting to enforce a general policy against reappointments, see Ashbell Gulliver to Board of Permanent Officers, May 4, 1943, Moore papers, Yale. Nevertheless Moore was bitter over the decision. See Underhill Moore to Ashbell Gulliver, Oct. 16, 1943, Moore papers, Yale.

562. *Law and Learning Theory*, *supra* note 437, at 2. Moore hypothesized reasons for this failure as:

in great part the result of their harboring, more or less unconsciously, one or more of the following presuppositions. The first of these is that the effect of a rule of law or of its administration is so different from the effect of all other devices affecting behavior that it is to be accounted for by a particular theory, applicable to law alone, and that the effect of law cannot be accounted for by a general theory of behavior which accounts for the effect of devices other than law. The second presupposition is that a proposition of law, or its administration, is the single and only cause of "its" effect; that is to say, that the behavior which follows the enactment of a law or its enforcement is a dependent variable, the value of which depends alone upon the law or its enforcement and upon no other variable. The presence of either one or both of the first two of these

began a straightforward presentation of the work he had done. By subdividing two of his studies and saving the one Corstvet had earlier suggested should be scrapped, Moore managed to present ten studies of parking behavior spread over the four durational limitations—no parking, 15, 30, and 60 minute parking. These studies plus the two tagging studies and the old traffic circle study were his data base. In presenting them Moore straightforwardly emphasized the variables controlled for and those left uncontrolled or tolerated as uncontrollable.⁵⁶³ With these basics out of the way, he next turned to an analysis of the data he had acquired. With respect to the parking studies Moore quickly passed over the marked shift of behavior in the direction of conformity with the regulation;⁵⁶⁴ instead he highlighted two other findings. First, he noted that, although there was a marked shift of behavior for parking durations up until a “point” substantially in excess of the regulation imposed, the relative distribution of parkers among these durational classifications was largely identical both before and after the regulation imposed.⁵⁶⁵ Only beyond this point was there any decline in the relative frequency of parking for a given duration.⁵⁶⁶ Second, he laboriously observed that although on cursory inspection it appeared that there was no regularity to the difference between the number of cars parking in comparable periods before

presuppositions so successfully insulates the investigator from contact with the theories and methods of disciplines investigating human behavior that the investigator either withdraws, *in limine*, from the prospect of unrewarded effort, or undertakes statistical surveys of this and that somehow connected with law and its administration. The third presupposition is either that complete conformity on the part of substantially all the persons whose behavior is prescribed or proscribed by the proposition follows the issuing of the rule, or that, if all do not completely conform, the number or percentage of persons conforming and the degree of conformity are known. Entertaining it leads natural-law and analytical jurists to restrict the study of law to dialectic; historical jurists to the art of writing either the history of a literature of legal propositions or the history of a larger fragment of culture; sociological jurists to speculation upon the more remote consequences of propositions of law, speculation upon the effect of the supposedly known but in fact unknown quantity and degree of conformity to the proposition upon behavior which is not prescribed or proscribed in the proposition; and “realists” to random behavior.

Id.

563. *Id.* at 5-8.

564. *Id.* at 9.

565. *Id.* at 15 (graphs 11-20).

566. *Id.*

and after the imposition of a parking regulation,⁵⁶⁷ in fact, by carefully accounting for the actual use of the available time and space, one could observe a decrease in the percentage of available time used in regulated areas.⁵⁶⁸ Moore accounted for this decrease as the effect of the ordinance in making space available by simply eliminating parkings of long duration.⁵⁶⁹ Each of these observations was accompanied by precise mathematical formulas designed to quantify the relationships discovered, often through the use of variables, such as the cumulated percentage of unregulated parkings of a duration less than the "point."⁵⁷⁰ Thereafter Moore explained the results of the tagging studies. Here he argued that the tagging had made its impact not in the behavior of all parkers but rather the difference in before and after behavior could be wholly accounted for by the effect of tagging on the behavior of individually tagged parkers who again parked in the same location.⁵⁷¹ Finally, with respect to the traffic circle study, he argued that the decrease in behavior prohibited by the ordinance was greatest when compliance required the least deviation from the path normally taken through the intersection and least when compliance required the most deviation, in other words the degree of compliance was directly related to the ease of compliance.⁵⁷²

Having thus summarized his results, Moore turned to articulating an explanation of them in terms of their congruence with a more general theory of human behavior which he labelled learning theory. This time his presentation was markedly different from the piece he had written for Kocourek. Where three years before Moore had explained learning theory in almost common sense terms and had integrated into that explanation an appreciation for the cultural aspects of human behavior that dated back to the Wigmore review, Moore now spoke in the technical language of the academic psychologist and reduced the cultural dimension of his presentation to a short almost afterthought that emphasized not the impact of culture on behavior but of learned behavior as an

567. *Id.* at 29.

568. *Id.* at 34-39.

569. *Id.* at 37.

570. *Id.* at 27-28, 39.

571. *Id.* at 42.

572. *Id.* at 57-60.

explanation of cultural change.⁵⁷³ He began by directly presenting a slightly simplified version of stimulus-response psychology. Relying on presentations by Hull and two of his colleagues,⁵⁷⁴ Moore emphasized the pattern: drive, cue, response, reward.⁵⁷⁵ "In order to learn one must be driven to make a response in the presence of a cue, and that response must be rewarded."⁵⁷⁶ He then noted that the bare outline of the theory would "suffice to explain only the most simple instances of human behavior"⁵⁷⁷ and proceeded to complicate the presentation in three ways. First he distinguished between "inate or primary drives" and "acquired or secondary drives," especially the acquired drive of "anxiety or fear."⁵⁷⁸ Second, Moore observed that responses may "extend over considerable time and space" such that one might refer to them as "chain responses."⁵⁷⁹ And third, Moore recognized that the multiplicity of drives may, taken together, simultaneously call for conflicting responses⁵⁸⁰ and that the verbal nature of some cues may create problems in isolating the learned response to the cue because the response might differ from the cue.⁵⁸¹ Finally Moore attempted to generalize from individual learning to group learning by the function of parental or group approval as a reward, the extinction of responses by the cessation of reward, and the part played by "technological and sociological invention or innovation" in learning "cue-response" relations.⁵⁸²

From this rapidly sketched theoretical framework, Moore proceeded to analyze each of his studies. In each case he began with the observation that the study was of the change in the frequency of a particular response brought about by the introduction of a cue calling for a conflicting response.⁵⁸³ In the parking studies Moore carefully identified the drives, cues, responses, and rewards⁵⁸⁴ of

573. *Id.* at 68-70.

574. *Id.* at 61, citing C. HULL, *PRINCIPLES OF BEHAVIOR* (1943); N. MILLER & J. DOLLARD, *SOCIAL LEARNING AND IMITATION* (1941).

575. *Law and Learning Theory*, *supra* note 437, at 61-63.

576. *Id.* at 61.

577. *Id.* at 63.

578. *Id.* at 64-65.

579. *Id.* at 65-66.

580. *Id.* at 66-67.

581. *Id.* at 67-68.

582. *Id.* at 69-70.

583. *Id.* at 77, 83, 85.

584. *Id.* at 72-74.

the individuals parking when the area was unregulated, "not a period during which a new response was being learned, but . . . a period during which each of the individuals . . . was giving a response which he had already learned."⁵⁸⁵ After eliminating problems based on the lack of knowledge of the quality and strength of the drives and rewards of individual parkers by assuming that they were distributed proportionately among studies and durational categories,⁵⁸⁶ Moore was left with one further problem. Learning theory would have postulated that the elapsed time of parking was a measure of the delay in securing the reward and thus an index of the strength of the reinforcement of the response of parking.⁵⁸⁷ However elapsed time of parking nowhere entered into the equations that Moore had painstakingly derived to order his data. He explained this discrepancy between the theory and his data by suggesting that the strength of reinforcement was not determined by the absolute duration. Rather, it was determined by the relative duration between the cue and the response, "by the *conception which exists in the mind of the person giving the response*" as to the duration,⁵⁸⁸ a conception that "depends on his conception of his relative position in a distribution which includes not only his behavior but also the behavior of others who . . . are doing the 'same thing.'"⁵⁸⁹ With this problem out of the way, Moore asserted that the introduction of a new cue—the durational limitation—created a conflict in responses between parking in response to the errand to be done, and not parking in response to the anxiety aroused by the possibility of violating the durational limitation.⁵⁹⁰ He then explained the changes in the frequencies of the various durations of parking after introduction of the limitation by suggesting that the point where the relative frequencies began to change corresponded to the time at which parkers began to feel anxiety arising from the subjective perception that they were about to violate the limitation.⁵⁹¹ Because the response of not parking was in the circumstances more strongly reinforced than the re-

585. *Id.* at 72.

586. *Id.* at 72, 73-74.

587. *Id.* at 74-75.

588. *Id.* at 75.

589. *Id.* at 76.

590. *Id.* at 77-78. Note particularly, Moore emphasizes that the learned response to the durational limit is not to park at all, and not to park for a shorter time.

591. *Id.* at 80.

sponse of parking, the apparent decrease in the duration of parkings beyond the point where anxiety appeared was thus the effect of the actions of parkers in passing up potential spaces.⁵⁹² Finally, Moore suggested that, in the aggregate, the extent to which the response of not parking predominated was a function of the frequency with which individuals parked less than a given time even when the area was unregulated.⁵⁹³

Moore discussed the other two studies similarly, though in less detail. He explained the tagging study by observing that since removal of the repeated parkings of tagged individuals totally eliminated the effect of the tagging program, that program presented no new cue to anyone but the individuals tagged.⁵⁹⁴ To explain the traffic circle experiments he postulated that the painted circle was a cue that in the presence of the secondary drive of anxiety called forth the response of keeping to the right to the degree that this response was more greatly rewarded by the reduction of anxiety than the response of driving directly through the intersection was rewarded by reduction of the drive related to crossing the intersection more quickly.⁵⁹⁵

Four friends read the manuscript before publication; none had much to say in response, although Rostow did observe that "the presentation was admirably clear, and the confrontation of difficulties direct and courageous . . ." ⁵⁹⁶ Three reviews of the piece were planned,⁵⁹⁷ in the following spring two materialized, one by Clark Hull and the other by Hessel Yntema, Moore's former colleague at Columbia and participant in the empirical research at the Johns Hopkins Institute of Law between 1928 and 1933. Hull found the study "an original, fearless and convincing exemplification of the implementation of . . . [Moore's] philosophy" as stated three years earlier⁵⁹⁸ and a "courageous *tour de force*" given the

592. *Id.* at 80-81.

593. *Id.* at 81.

594. *Id.* at 83. There was no public announcement of the tagging program and the tags were not noticeable to one driving by. Thus the only people affected by the program were those actually tagged.

595. *Id.* at 86-87.

596. Eugene V. Rostow to Underhill Moore, n.d., Moore papers, Yale. The other three readers were John Dollard, Mark May, and Henry Margenau (Yale, Physics). See Underhill Moore to Charles C. Callahan, fall 1943?, Moore papers, Yale.

597. Underhill Moore to Mark A. May, Dec. 11, 1943, Moore papers, Yale.

598. Hull, *Moore and Callahan's "Law and Learning Theory": A Psychologist's Impressions*, 53 YALE L.J. 330, 337 (1944).

“state of our ignorance concerning ultimate behavioral laws.”⁵⁹⁹ He suggested a somewhat crude, but effective simplification of Moore’s data by which he quite directly related the point at which the limitation began to have an effect to a simple multiple of the duration specified by the limitation.⁶⁰⁰ This relation, he observed, reflected “the habits of successful (and so, reinforced) disregard of law produced by our characteristically lax customs of law enforcement.”⁶⁰¹ Yntema emphasized the importance of the study, both as a pioneering bit of research, and an exemplar of what might be done in quantitative studies of legal material of a normative nature.⁶⁰² At the same time he questioned whether, in the face of limited resources for empirical research in law, it was wise to concentrate, as Moore had, on the regularities of behavior, rather than on admittedly abnormal “litigious behavior” that could be investigated through the use of “more expeditious, if less exact, techniques of objective inquiry.”⁶⁰³ In a similar vein he wondered whether, contrary to Moore’s assertions, it was not “legitimate to study legal propositions without reference to their conformity to or effect upon behavior.”⁶⁰⁴

A thousand copies of the article were printed with a special introduction by Mark May. Half of these were given away to individuals on the Institute’s mailing list; the rest awaited buyers who never appeared. Beyond the two comments in the *Yale Law Journal*, the law reviews were similarly silent. Moore, who with the advent of the War, had cancelled all of his subscriptions to social science journals⁶⁰⁵ and turned his reading interests to military his-

599. *Id.* at 331.

600. *Id.* at 333-34. Hull argued that an ordinance had an effect only in reducing the frequency of parking that was more than 2.3 times the duration specified in the ordinance.

601. *Id.* at 334. Wondering why “if the parkers took a chance on such an extensive violation of the ordinance, they should be influenced by it at all,” Hull suggested an explanation based on “the general practice in American culture for the authorities practically to wink at small violations, but to punish gross violations with increasing certainty and severity.” *Id.* at 335-36.

602. Yntema, “*Law and Learning Theory*” *Through the Looking Glass of Legal Theory*, 53 *YALE L.J.* 338, 340-41 (1944).

603. *Id.* at 344-45.

604. *Id.* at 345.

605. Underhill Moore to *American Journal of Sociology*, Dec. 28, 1941; Underhill Moore to *American Sociological Review*, Dec. 28, 1941; Underhill Moore to *Association for Symbolic Logic*, Dec. 28, 1941; Underhill Moore to *Journal of the American Statistical Association*, Dec. 28, 1941, Moore papers, Yale.

tory and strategy,⁶⁰⁶ was silent too.

In Moore's banking studies the matter most obviously in need of explanation and most significant for developing an understanding of that and later work is what caused the studies to die out. In contrast, the major cause for terminating the parking studies—lack of money—is both relatively obvious and not particularly significant for developing an understanding of them. More important for an explanation of the studies is an analysis of the form they ultimately took. Traditionally, this problem of explanation has been approached as one of criticizing Moore for ignoring, or at least slighting, the obvious in the pursuit of the esoteric.⁶⁰⁷ Such is the tenor of Llewellyn's criticism of Moore's work delivered ten years after the publication of *Law and Learning Theory*.⁶⁰⁸ The best example of this failure on Moore's part is Hull's rather simple, though admittedly slightly less accurate, reinterpretation of Moore's data to establish a direct relationship between the durational parking limit and the observed effect of the ordinance.⁶⁰⁹ Another is Moore's decision to ignore the possibility, demonstrated to be the case by the tagging study,⁶¹⁰ that in response to a durational parking limit, people might simply park for a shorter time either by doing fewer errands or by doing them more efficiently. Adopting either simplification would have made Moore's work significantly more accessible, at least to a legal audience.⁶¹¹ Use of Hull's reinterpretation would have obviated Moore's excursus into the subjective relativity of time.⁶¹² Similarly, acceptance of the notion that parking for a shorter time was an appropriate response to the anxiety created by the possibility of having to park for a period longer than specified in the ordinance would have eliminated

606. Underhill Moore to Barnes & Noble, Co., Dec. 28, 1941, Moore papers, Yale.

607. See W. TWING, *supra* note 14 at 63; FOUNDATION FOR RESEARCH IN LEGAL HISTORY, *supra* note 17 at 252. More recently the criticism has been that the concept of relative time has no place in a learning theory. See Verdun-Jones & Cousineau, *supra* note 16, at 388-90.

608. Llewellyn, *On What Makes Legal Research Worthwhile*, 8 J. LEGAL EDUC. 399, 400, 403 (1956).

609. See text at note 600 *supra*.

610. See text at note 503 *supra*.

611. Not that Moore sought this audience. See Allan Axelrod to John Henry Schlegel, Oct. 12, 1976.

612. As well as another into the significance of cumulative distributions, see *Law and Learning Theory*, *supra* note 437, at 23-29.

Moore's complicated computations necessary to account for the actual use of the time and space available for parking. A third example of Moore's penchant for ignoring the obvious is his almost total failure to advert to the cultural factors that can influence behavior, factors that Hull, the academic behavioral psychologist, immediately noticed and presented. Some of these factors virtually jump out at the reader, for example, in the study done near the post office where stops of short duration were predominate,⁶¹³ or in the study done near the Yale campus where stops of about seventy minutes—just long enough to get to a class and get back—were unusually frequent.⁶¹⁴ Unfortunately, however, these criticisms, accurate as they are, completely miss the significance of the peculiar, narrow perspective that Moore adopted in presenting the parking studies for an understanding of his work. In order to see the significance of that perspective one must examine the academic context in which Moore and the other Realists at Yale who were interested in empirical research found themselves.

Moore was one of the three Realists at Yale who actually participated in empirical research. The other two, Charles E. Clark and William O. Douglas, became caught between the two "traditions" of social research.⁶¹⁵ The first and older tradition, the "progressive reform tradition," saw the gathering of facts as an initial step in the campaign to reform social or governmental institutions. Facts were the prerequisite to reform. In its more narrow legal aspect this tradition dated back at least to the mid-nineteenth century and emphasized the reform of legal institutions through procedural reforms, though occasionally doctrinal reforms were recommended. In this tradition, reform was seen as a means to curb popular dissatisfaction with the administration of justice. Participants in the progressive reform tradition were impatient with research that did not contribute to reform or that continued beyond a time when the needs of the campaign for reform had been satisfied. The second tradition, the "social scientific tradition," saw the gathering of facts as part of the process of gaining an understanding of social or governmental institutions. This tra-

613. *Id.* at 90, 106-07.

614. *Id.* at 90, 111-15.

615. See Schlegel, *supra* note 15, at 517-19, 539-45, 567-69, 578-85. This and the following paragraph is a summary of the argument advanced there.

dition developed as part of the process by which, with the development of the American university around the turn of century, individual professional disciplines grew out of the undifferentiated "social science" of the progressive reformers. Participants in this tradition tended to ignore, or at least attenuate, the relationships between research and reform and to emphasize the necessity of making social inquiry a science—objective, rigorous, precise, mathematical—on the model of the natural sciences. They were exasperated with research that did not use the latest methods and carry an inquiry through to the absolute end of potential.

The tension between these two traditions with respect to the impulse to do research, the standards by which it was to be judged, and the time when it was to be considered complete, not to mention the objectives of the research, are obvious. These tensions ultimately contributed to the decline of the interest of Clark and Douglas in empirical research. The reformers would not support work that went beyond the needs of reform; the social scientists would not support work that was less than wholly scientific. Thus deprived of necessary support from either quarter, Clark and Douglas slid away from empirical research and into other interesting things.

In contrast to Clark and Douglas, Moore was not caught between two traditions. He was, or at least saw himself as, wholly within one—the social scientific tradition. His banking and parking research alone supports this assertion. The reform impulse at the base of either body of work is impossible, or at least extremely difficult, to perceive. But the degree of Moore's identification with that tradition is equally well demonstrated by his suggestion at the time of Angell's retirement as to the necessary qualifications for potential candidates for the university's presidency. The "first indispensable . . . requirement" was that the candidate be a "natural scientist," Moore asserted.⁶¹⁶ He reasoned that neither undergraduate work nor graduate work "in the humanities and in disciplines such as economics" needed attention and that professional training would not "be changed very much for a long while;"⁶¹⁷ therefore, if a natural scientist were chosen "there is at

616. Underhill Moore to James R. Angell, Dec. 19, 1936, Moore papers, Yale.

617. *Id.* See also Underhill Moore to Jerome N. Frank, Jan. 5, 1934 ("I should put the beginning student in an office and give the law professors a generation to get something to put in the curriculum . . ."), Moore papers, Yale.

least a bare chance that he will have a vision of the possibility of the application of scientific thinking and scientific method to fields of experience to which they have never been applied" and "the will" to see that some of these possible applications will be carried out.⁶¹⁸ In other words, the university generally should follow the pattern of activity he had.

How Moore, whose politics were as progressive as that of the bulk of the Realists, at least up until 1936,⁶¹⁹ escaped wholly from the progressive reform tradition which animated the work of Clark and Douglas has been, in part, suggested earlier. Moore entered law teaching at a time when legal academics were still in the process of professionalizing their discipline. As a participant in that process, he took his place in a university law school very seriously and carried that seriousness into his exploration of the social sciences and their methods while at Columbia. Presented with a forceful critique of his legal science by these participants in the exciting development of the social sciences at Columbia, Moore gradually, but quite definitely, accepted the modern concept of an empirical science. With that, he began to fashion a new legal science that was like the social science he had come to respect.

In contrast, Clark, a half generation younger than Moore, and Douglas, a whole generation younger than, as well as a student of, Moore, entered teaching after the profession's identity had been formed.⁶²⁰ Thus, they were not as a general matter available to a

618. Underhill Moore to James R. Angell, Dec. 19, 1936, Moore papers, Yale.

619. By 1936 Moore claimed to be a Landon supporter, though admitted he was at first "tempted at a schizoid contribution to [Norman] Thomas." Underhill Moore to Mitchell Levensohn, Oct. 26, 1936, Moore papers, Yale. Moore was certainly skeptical about the New Deal. He cautioned Abe Fortas, then at the S.E.C., that "all private enterprise is . . . predatory" and that thus the attempt to stop predatory activities would "drive private enterprise out of existence" and lead to an "unfortunate, and perhaps terrible, period of transition." Underhill Moore to Abe Fortas, Feb. 21, 1938, Moore papers, Yale. Yet, he recognized the necessity "to face and make adaptation to the new social and economic situation in which we unfortunately find ourselves." Underhill Moore to N. F. Glidden (former client), Mar. 11, 1939, Moore papers, Yale. On his politics at an earlier time, see text at notes 276-79 *supra*.

620. The importance of recognizing generational differences in American legal scholars cannot be ignored. W. TWINGING, *supra*, note 14, at 81-83 makes a start, though I quite obviously disagree with important parts of the argument he constructs. Twining focuses on six scholars he labels Realists. Of these Corbin and Hohfeld were simply not Realists; their science was a doctrinal, analytical science and their politics, conservative. Cook and Moore, though from the same generation, were Realists; their science was empirical and their politics, liberal. The balance of the Realists, including Twining's other two scholars, Oliphant, who was not graduated from law school until he was 30 years old, and thus ought to be

new identity in the way Moore was, nor were they really confronted with one. Instead, responding to a felt need for reform in legal institutions, they drew from the progressive reform tradition the necessity of fact research to aid in their endeavor, and at the same time, being university academics, they sought the assistance of the academic apostles of the social scientific tradition in their factual investigations.⁶²¹ In the process they became caught between the two traditions instead of partisans of one. Yet, given their impulse to do empirical research and their time of entry into the profession, it would have been extremely difficult for them to have done otherwise, to have made a clean break from their established professional identity to a new identity squarely within the social science tradition.⁶²² Thus, although these three men shared common politics and were animated in their empirical research, in part, because of their position as university academics, the impulse toward academic social science had radically different consequences for their research.

Though Moore escaped from the conflicting demands of the two traditions of social research, his escape by no means eliminated problems like those experienced by Clark and Douglas. He, too, needed support for his research, both financial and intellectual, and for each he looked squarely to Yale's social scientific community. The match should have been a natural one. Moore was committed to a wholly naturalistic view of legal phenomena and was fiercely determined to pursue research in that mode. But somehow from the beginning the match was never quite made.

Moore came to Yale because of the establishment of the Institute of Human Relations and with the support of Yale's President, James R. Angell, a social scientist himself, who also was an acquaintance from Moore's brief stay at the University of Chicago.⁶²³

treated as younger than he in fact was, and Llewellyn, were from a second generation. Isolating these relationships helps explain the disparate aspects of the movement (*see, e.g.*, text at notes 621-22 *infra*) and not fragment its essential intellectual, though not jurisprudential, unity the way Twining's categorization does.

621. *See* Schlegel, *supra* note 15, at 579-81.

622. Which is not to say that they could not have established a new identity. In fact they did. *See* text at note 728 *infra*. But that new identity was hardly a clean break from anything.

623. Though he had retired six years earlier Angell was prominently thanked for his help when *Law and Learning Theory* was published. *Law and Learning Theory*, *supra* note 437, at 1, n*.

However, though Moore eagerly and immediately sought to participate in planning the research program of the Institute, instead of being in on the ground floor, he ended up an outsider knocking at the gate. That turn of events was clearly not his fault; rather it should be laid squarely at the doorstep of Robert Maynard Hutchins who oversold, and probably overestimated as well, the law school's control over, and role in, the Institute's affairs.⁶²⁴ Had Moore planned research that was methodologically mundane, the fact that he was an outsider when he finally appeared at Yale might not have made a difference. But his research was unusual and his method had all the hallmarks of having been put together by someone who had heard about scientific research but had never seen or done any. In short, it immediately stamped Moore for what he was, a rank amateur.

For some people associated with the Institute, most notably Emma Corstvet,⁶²⁵ but probably also President Angell,⁶²⁶ Moore's status as an amateur social scientist made no difference. Rather, the important point for them was the fact that Moore was engaged in interesting research and was attempting to execute it as best he could. For most of the people at the Institute, however, the appearance of an amateur was a problem. The majority of these men and women were part of the second generation of academic social scientists in the American university. They had not created the discipline in which they worked, but had participated in it as graduate students in the new Ph.D. programs of the newly formed departments, as members of the academic societies that defined the discipline, as researchers within the bounds so defined, and as guides for their own graduate students who were headed down the same paths.⁶²⁷ In short, they were the first beneficiaries of the pro-

624. See Schlegel, *supra* note 15, at 482-88, 573-75 for an estimate of Hutchins' part in the formation of the Institute.

625. Also Edgar Furniss who provided Moore with consistent encouragement. See, e.g., Edgar Furniss to Underhill Moore, Feb. 26, 1932; Mar. 4, 1933; Mar. 10, 1937, Moore papers, Yale.

626. Donald Slesinger, director of the Institute during its first year, should probably also be included. Interview with Donald Slesinger, July 8, 1975.

627. There is virtually nothing written about this generation of scholars. I draw my conclusions here from casual conversations with their students, from scraps in the available works on the professionalization of the social science disciplines (see works cited at note 4 *supra*), from exposure to two of these men, Hull and May, as they appear in Moore papers, Yale, and from Interview with Mark A. May, June 9, 1975. Obviously this research needs amplification; I doubt, however, whether I am the one to do it.

cess by which the academic social sciences professionalized. An integral part of that process was the almost ritual gesture of excluding the amateurs from the profession through a combination of the adoption of technical methods and vocabulary, the imposition of "standards" for acceptable research, and, most effectively, the establishment of the Ph.D. as *the* requirement for academic employment.⁶²⁸ As the Moore and Hope piece showed, Moore did not know the technical methods and vocabulary, had no inkling of what the standards were, and had never seen the inside of a modern social science Ph.D. program. His mere appearance at the Institute was thus a threat to the professional status of the social scientists; his work might well give their Institute a bad name.⁶²⁹

Reactions to this threat varied somewhat. Dorothy Thomas was plainly puzzled, even forty-five years later, how Moore, who had an obvious commitment to scientific research, could have looked for help with his research and yet finished the negotiable instruments studies without abandoning what was to her a patently unsatisfactory method.⁶³⁰ In this respect, Douglas' attitude, which allowed Thomas to restructure his research technique, was preferable to Moore's single-mindedness.⁶³¹ But, matter of fact to the core, she taught Moore what she could, worked with him in their joint seminar, and, when she found more interesting things to do, moved on.

Others at the Institute, less charitable perhaps, or maybe only more insecure, simply chose to ignore him. Thus, nearly two years after his arrival, Moore's own work, though funded by the Institute and already visible in the published parts of the direct discounts study, was omitted from Mark May's virtually complete listing of research at the Institute issued at the dedication of its building.⁶³² A year later when May's program to study the City of New Haven

628. See *supra*, note 4. A similar process seems to have taken place among the legal academics. For an example of research standards in operation see Huger Jervey to Stacy May (Washington lawyer later with the Rockefeller Foundation), Feb. 20, 1925 (patronizing response to paper entitled "The Economic Foundations of Legalism" to which are attached handwritten notes from Herman Oliphant and Karl N. Llewellyn), Moore papers, Yale.

629. Prof. Fred Konefsky suggested to me that the potential bad name may have been the problem for May, Hull and the others. He supplied an example that beautifully captures the entire difficulty. Said he, "It's as if A. James Casner had gone to the Littauer School with a project to count fee simples. They laughed after he left the room!"

630. Interview with Dorothy Swaine Thomas, June 3, 1975.

631. See Schlegel, *supra* note 15, at 527-29, 543-44.

632. See Yale Daily News, May 9, 1931, at 5.

was first floated, Moore's potential contributions were again ignored.⁶³³ Even individuals such as Clark Hull⁶³⁴ who, from the beginning, were largely interested in and vaguely supportive of Moore's work,⁶³⁵ assumed that seminars designed for the Institute as a whole would be of no interest to Moore,⁶³⁶ and ignored Moore's potential contribution to the joint research program they tried to design for the Institute.⁶³⁷

In time Moore's presence simply could not be ignored. It could, however, be begrudged. Thus, in the 1936 Institute reorganization plan, while Moore's research was noted, his interest in and potential contributions to other proposed research, though quite obvious, were still passed over.⁶³⁸ Three years later, when the Institute's funds were reduced and its "commitment to certain lines of research" necessitated corresponding budgetary cutbacks, support for Moore's research was terminated.⁶³⁹ The termination stood even though that research was squarely within the behavioral paradigm toward which the Institute's commitment had been made. Only begrudging acceptance, if acceptance is the right word for the activity of killing a line of research and then later supporting the preparation of the article tombstoning the corpse,⁶⁴⁰ was offered and that only with an accompanying condescending attitude. Mark May, for example, suggested that Moore's presentation in the piece for Kocourek's symposium could be strengthened "somewhat by a

633. Mark A. May to James R. Angell, Nov. 17, 1932, Moore papers, Yale.

634. From the acknowledgements at the beginning of *Law and Learning Theory*, *supra* note 437, at 1, n*, and my interview with Jane Moore, May 19, 1976, I suspect that Hull's associate John Dollard ought to be included here also.

635. See, e.g., Clark L. Hull to Underhill Moore, Oct. 19, 1931, Feb. 13, 1935 (arranging appearance at Moore's seminar), Nov. 11, 1936, Moore papers, Yale.

636. Clark L. Hull to Institute Staff, Nov. 30, 1935; Underhill Moore to Clark L. Hull, Dec. 7, 1935 (sorry I missed); Clark L. Hull to Underhill Moore, Dec. 9, 1935 ("I am sure most of the meetings will have no interest for you."), Moore papers, Yale. The seminar was to be "an attempt to integrate the major concepts and principle of the conditioned reaction with those of psychoanalysis." Hull, Notice of Informal Seminar, Jan. 20, 1936 (copy in possession of the author courtesy of Emma Corstvet Llewellyn).

637. Clark L. Hull to Mark A. May, Dec. 3, 1935; Dec. 18, 1935; Clark L. Hull to Underhill Moore, Dec. 18, 1935, Moore papers, Yale.

638. Mark A. May to Underhill Moore, Jan. 29, 1936; Underhill Moore to Mark A. May, Feb. 5, 1936, Moore papers, Yale.

639. Mark A. May to Underhill Moore, Feb. 3, 1939, Moore papers, Yale.

640. Mark A. May to Underhill Moore, Apr. 12, 1940, (\$3000 for 1940-41), July 1, 1943 (\$600 for Callahan's salary for summer), Moore papers, Yale.

more careful study" of Hull's work.⁶⁴¹ Hull was no less offensive when, in the response to the same article, he commented that Moore's account of "the psychology of behavior situations involving statutes" was "remarkably realistic" but when discussing the "one important lack" in that account—a discussion of experimental extinction, a subject wholly tangential to Moore's article—presented his observations in such a way as to suggest that Moore might never have heard about experiments with white rats on electric grids.⁶⁴² Even when *Law and Learning Theory* was completed, May could not resist emphasizing in his introduction to the separately bound version that Moore had not attempted to derive his empirical formulas by deduction from "any set of basic postulates" but had only made "a first crude beginning" with an attempt "to describe parking behavior . . . in terms of the concepts of behavior theory."⁶⁴³

Treated as an amateur by the social scientists, Moore might have been tempted to look elsewhere for support, but for him there was no elsewhere to look. The law school world generally was hardly hospitable. Indeed, it had delivered to Moore such "misunderstanding and intellectual hardknocks"⁶⁴⁴ that a merely kind letter from a former colleague⁶⁴⁵ about a presentation Moore made at an A.A.L.S. meeting⁶⁴⁶ brought forth an expression of great pleasure.⁶⁴⁷ In the more circumscribed world of the Yale Law School,

641. Mark A. May to Underhill Moore, Mar. 7, 1941, Moore papers, Yale.

642. Clark L. Hull to Underhill Moore, Mar. 7, 1941, Moore papers, Yale.

643. May, *Forward*, in *Law and Learning Theory*, *supra* note 437, at v, vi (1943).

644. Underhill Moore to John A. Hanna, Jan. 14, 1932, Moore papers, Yale.

645. John Hanna to Underhill Moore, Jan. 8, 1932, Moore papers, Yale.

646. Dorothy Thomas had agreed to give a paper at the Round Table on Jurisprudence and Legal History chaired by Edwin Patterson, Moore's former colleague and companion on the ferry back and forth to their Englewood, New Jersey homes. Patterson, who claimed to be "genuinely loyal to the movement for fact finding research as an aid to change in, or understanding of, law," had asked Moore to lead discussion of Thomas' paper. Edwin W. Patterson to Underhill Moore, Oct. 15, 1931, Moore papers, Yale. When Moore wanted to present a paper of his own Patterson agreed, but with the warning to use a "minimum of novel terminology," Edwin W. Patterson to Underhill Moore, Oct. 29, 1931, Moore papers, Yale. Moore's paper, *The Data for the Study of Law and Environment* has not survived. From the evidence provided by a critique of it by Dorothy Thomas (Dorothy Thomas to Underhill Moore, Dec. 25, 1931, Moore papers, Yale), it appears to have been a bridge between the Moore and Hope institutional method and *The Lawyers Law*, *supra* note 350. *Cf.* Underhill Moore to Edgar Furniss, Mar. 1, 1933, Moore papers, Yale. This was Moore's only appearance at an A.A.L.S. meeting after 1920.

647. Underhill Moore to John Hanna, Jan. 14, 1932, Moore papers, Yale.

the conflicting impulse toward research entertained by Clark and Douglas made it all but impossible for Moore to look to these men for support. And at Yale, at least, there was no other social scientific community to look to⁶⁴⁸ except that of the economists and political scientists—corners of the intellectual world where a little support was offered, but where, however peculiar it may seem given Moore's work in banking, his interests never ran.⁶⁴⁹ Disciples could, and to some extent did, provide some support. But good disciples were hard to recruit, as Moore's experience in finding a research assistant to replace Emma Corstvet had proven and as his unsuccessful attempts to interest Friedrich Kessler in the soft social science of the always proposed, always in process, commercial bank credit book only emphasized.⁶⁵⁰ And even when potential disciples were recruited, they somehow never managed to gain a real enthusiasm for empirical research, but rather drifted away to other activities.⁶⁵¹

Moore was thus left largely to his own devices. He pursued his own iconoclastic, idiosyncratic view of empirical research, drawing on ideas from Dewey, Robinson, and Veblen about what science was, and on what Dorothy Thomas and Emma Corstvet had taught him about research design. Thomas' emphasis on the niceties of observation and the more subtle aspects of statistical method, left a particularly strong mark on the research, although in this she was aided by Moore's predisposition to detail as shown in his earlier doctrinal research and continually emphasized in his teach-

648. The sociology department was adamantly opposed to the statistical studies in general and the Institute in particular, largely because it was still controlled by the shade of William Graham Sumner. Interview with Robert M. Hutchins, June 20, 1975; Interview with Dorothy Swaine Thomas, June 3, 1975.

649. Not that either discipline was at the time particularly empirically oriented anyway.

650. See note 462 and accompanying text *supra*; text accompanying note 740 *infra*.

651. Sussman stayed five years, far longer than he had planned. He liked working for Moore and Moore quite obviously liked him. See Underhill Moore to Gilbert Sussman, Dec. 2, 1935 ("Your loving, hating, admiring and contemptuous friend"), Moore papers, Yale. That fact made staying easier, as did the lack of good alternatives caused by the Depression and exacerbated by prejudice against Jews seeking professional jobs. But once Sussman made up his mind to leave he seems to have expressed no regrets at having given up empirical research for the practice of law. Gilbert Sussman to John Henry Schlegel, Oct. 1, 1976 (taped interview). Callahan was probably equally trapped by the Depression for he was not much taken with the parking study. Interview with Emma Corstvet Llewellyn, Oct. 19, 1975. He likewise never did any other empirical work.

ing.⁶⁵² Her mark was also strengthened by Moore's surroundings at the Institute, for although treated as an amateur by the psychologists who came to dominate affairs at the Institute, Moore constantly turned to this group for what little support they would provide. They were the only game in town, the only peer group available. That they did not want or need him, that his very interest in, and commitment to empirical research was even a bit threatening and thus brought forth all kinds of negative feedback from them, made little difference. Moore needed their support and sought it, almost pathetically. He constantly tried to become a part of the enterprise. Indeed, but for the rather ponderous dignity of his mien, one can almost visualize Moore, a three year old, chasing after the big kids yelling, "I want to play too!". He first shifted the form of his research to fit their idea of what research should look like, and then when they announced a new game—community studies—not only volunteered to play, but also attempted to fit his research design more closely to their specifications, even to the extent of adopting a topic of research he was not particularly interested in.⁶⁵³ Then, when the game changed again, he gave up the sociological/anthropological perspective on his research developed at Columbia at the end of World War I, a perspective that had twice led him to look directly at the relationship between law and custom, and adopted as his ideal the smooth stimulus-response curves of the experimental psychologists as well as their language and theoretical universe. He wanted to play in the worst of ways.

Of course, there is another way to see Moore's behavior. In one sense he was a captive of the social scientists at the Institute,⁶⁵⁴ for as an amateur, strung along with occasional hand-outs of cash, he knew no better, and perhaps, just perhaps, they did. But if in bondage, it was a quite willing bondage. Moore wanted help with his work and wanted acceptance in the world where he thought real scientific research was being done. He searched elsewhere for that help and acceptance, in Malinowski's anthropology⁶⁵⁵ and

652. Grant Gilmore to John Henry Schlegel, Sept. 19, 1976; Friedrich Kessler to John Henry Schlegel, Feb. 10, 1977. Cf. Underhill Moore to G. H. Robinson, July 11, 1930, Moore papers, Yale (comments about a planned casebook; "your book should deal for the most part with the minute problems arising today. The general principles of today are . . . general descriptions of the way in which the minute problems of yesterday were settled.")

653. *Law and Learning Theory*, *supra* note 437, at 3.

654. Grant Gilmore to John Henry Schlegel, Sept. 19, 1976.

655. Malinowski was a personal friend. Interview with Jane Moore, May 19, 1976. The

Timasheff's sociology,⁶⁵⁶ for example. But always he came back to his quite lovely vision of what the scientific study of law meant, not the nineteenth century science of Langdell, but the twentieth century science of Eddington, whose book on relative theory Moore had read the summer before coming to Yale.⁶⁵⁷

Whether prisoner, or simply tag along, the form of the parking study—the range of questions asked and left unasked, and the kinds of answers sought and ignored—was largely determined by Moore's inability to find support for his work elsewhere. As long as experimental psychology was the scale against which success was measured in the world of social science at Yale, amateurs, at least had to play by the apparent rules. Those rules forbade simple, contextual explanations of the kind tossed off by professionals like Hull. And so Moore, who thought he knew precisely why he was "busy counting these cars,"⁶⁵⁸ produced a grand piece of research that Llewellyn, for example, thought proved Moore mad,⁶⁵⁹ and that everyone else in the law school world either disliked, or ignored, or both.⁶⁶⁰

III. AND THEN THERE WERE NONE

*There has always seemed to be some jinx operating at Columbia and Yale; just when the prospects seem brightest something happens.*⁶⁶¹

By spring of 1943 Moore, who knew that Callahan would not be kept on at Yale and thus that none of the hearty band that

two men taught a seminar together in 1940-41.

656. See Underhill Moore to Nicholas S. Timasheff, Oct. 3, 1939, Moore papers, Yale. Moore unsuccessfully tried to bring Timasheff to Yale to join the seminar with Malinowski. See Underhill Moore to Ashbel Gulliver, Nov. 11, 1939; Underhill Moore to Edgar Furniss, Jan. 16, 1940, Moore papers, Yale.

657. See Underhill Moore, Diary written during the Cruise from New York to Gibraltar on the Schooner Yacht Black Eagle, Aug. 7-Sept. 4, 1929, Moore papers, Yale.

658. Clark, *Underhill Moore*, 59 YALE L.J. at 189, 191.

659. Grant Gilmore to John Henry Schlegel, Sept. 19, 1976. Cf. Llewellyn, *supra* note 608.

660. Douglas, *Underhill Moore*, 59 YALE L.J. 187, 188 (1950) ("I was not one to ridicule it. There were many who did.")

661. Alexander M. Kidd (colleague at Columbia 1926-28) to Underhill Moore, June 10, 1929, Moore papers, Yale.

worked on *Law and Learning Theory*, but he, would be left at Yale when it was published, penned a friendly letter, a most uncharacteristic gesture, to former student Justice William O. Douglas. The letter ended with the plaintive question, "Isn't there some way in which you can lend me a hand?"⁶⁶² It was not the first time Moore had momentarily lost faith in his enterprise and sought refuge in the more glamorous goings on of the day.⁶⁶³ And ultimately the request amounted to little more than a chance to do some hearings for the War Labor Board. But symbolically the request, with both its sense of despair and dead ends and its view toward Washington and the Roosevelt administration, signalled the end of the brief attempt by the Realists to do empirical legal research and with it the end of the Realist movement. Significantly that same month Lasswell and McDougal published their grand vision of legal education for policy making,⁶⁶⁴ which, under the banner of "Law, Science, and Policy," maintained the Realists' dreams of empirical legal research, though only as the smile on the cheshire cat,⁶⁶⁵ the processual reaction had begun.⁶⁶⁶

Moore seemed not to notice, or at least not to care about, this quite obvious changing of the guard. According to contemporary observers he was depressed with the results of his efforts in the parking study,⁶⁶⁷ although exactly why is not clear. Assuredly, *Law and Learning Theory* was not a critical success in the law school world, but the reaction from those quarters had never concerned Moore before, so it is doubtful that Moore was depressed because the law professors, who had little but "bright ideas" to offer as "the principal pablum of the law student,"⁶⁶⁸ had not beat a path

662. Underhill Moore to William O. Douglas, Mar. 4, 1943, Moore papers, Yale.

663. See, e.g., Underhill Moore to William O. Douglas, Dec. 11, 1939 (can you help me get the chairmanship of Federal Deposit Insurance Corporation?), Dec. 29, 1939 (embarrassed withdrawal of request), Moore papers, Yale.

664. Lasswell and McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L.J. 203 (1943).

665. Dean Richard D. Schwartz provided me with this apt characterization of the commitment of LSP, as it is called, to empirical research. He would not, however, subscribe to the negative connotations in the text.

666. The only even rudimentary documentation of the legal process movement in American legal thought remains Ackerman, *Law and the Modern Mind by Jerome Frank*, 103 DAEDALUS 119, 122-24 (1974).

667. Grant Gilmore to John Henry Schlegel, Sept. 19, 1976; Friedrich Kessler to John Henry Schlegel, Feb. 10, 1977.

668. Underhill Moore to Jerome N. Frank, Jan. 5, 1934, Moore papers, Yale. Moore

to his door. Suggestions that Moore had decided that empirical legal research was either "fruitless or worthless,"⁶⁶⁹ either impossible to do or of unproven value, seem less than likely, too. Although he had previously concluded that his earlier institutional approach was not "a sufficient intellectual apparatus for doing scientific work"⁶⁷⁰ by the end of his remaining few years at Yale he had returned to analyzing it.⁶⁷¹ Indeed, the one thing that seems rather certain is that Moore did not give up his search for an adequate empirically based understanding of legal phenomena.⁶⁷² He may have soured on behaviorist psychology, but not on empirical research generally. Moore's general interest, however, generated no further research, or even projects for future research, only endless speculations about what the world of facts might disclose as he passed the five years until his death in 1949.

Twenty years, most of it spent in quite active work, had proven that for Moore at least, Captain Kidd's optimistic assessment, "It really looks this time as though Yale is going to put it over," was simply wrong.⁶⁷³ The "jinx" was operating again. While this is neither the time nor place to explore the general jinx on reform movements in legal thought and legal education,⁶⁷⁴ Moore's

quite generously included himself among those with little but bright ideas.

669. Grant Gilmore to John Henry Schlegel, Sept. 19, 1976.

670. Underhill Moore to Theodore S. Hope, Jr., Dec. 5, 1939, Moore papers, Yale.

671. Allan Axelrod to John Henry Schlegel, Oct. 12, 1976.

672. See Clark, *supra* note 658, at 192 ("Some have thought that he may have weakened a bit in his faith towards the end. But I am quite sure this is a misinterpretation.")

673. Alexander M. Kidd to Underhill Moore, June 10, 1929, Moore papers, Yale.

674. Kidd's observation about the jinx at Columbia and Yale, text at note 661 *supra*, is unusually interesting as a reflection of contemporary understanding and as a measure of real intellectual growth in legal thought. Yale's prospects seemed brightest in the years 1916-18 when Corbin and Hohfeld were joined by Cook. Those prospects were quickly ended with Hohfeld's death. Columbia then had exciting prospects from 1919-22 when Cook, Moore, and T. R. Powell attempted to educate Dean Stone. See *The Honorable Supreme Court*, 13 FORTUNE 79, 83 (May 1936), a piece that Moore contributed to; see Margaret Cobb to Underhill Moore, Mar. 24, 1936, Moore Papers, Yale. Those prospects evaporated with the departure of first Cook and then Powell. Columbia's prospects again rose in 1926-28 during the curriculum reform debates. Those prospects disappeared with Butler's appointment of Young B. Smith and the departure of Douglas, Moore, Oliphant and Yntema.

Hindsight suggests that, given the outcome of the deanship fight in 1923, the prospects of 1926-28 were largely the euphoria of losers being allowed in the ring again. But such matters aside, when the Yale of 1929-32 is added to the chain of prospects the series of ups and downs is quite enlightening. It shows a remarkable pattern of growth from an analytical scholarship, through a kind of fireside speculation about "real" causes of legal phenomena, through serious consideration of social science materials, and finally to the doing of empirical social research. In less than a generation the modern notion of science had somewhat

personal jinx is another matter. Its contours can be more easily sketched. As was the case with the research by Charles E. Clark and William O. Douglas, essentially three aspects are presented—the times, the person, and the nature of the research enterprise—though in no sense did these three aspects have the same impact on both bodies of research.

For Clark and Douglas the times had played a crucial role in the decline of their enterprise.⁶⁷⁵ The onset of the depression virtually doomed their efforts, for the style of their research required large quantities of money which after 1929 simply was not to be found for the work they wished to do. As a result, when the two men ran out of sources of funds, their research stopped as other less difficult, equally attractive opportunities appeared. In contrast, initially at least, the times had less of an impact on the decline of Moore's attempts to do empirical research than they had had in the rise of those attempts. While Clark and Douglas starved, Moore had an assured, if small, source of funds in the Institute. When that source of funds began to dry up the Depression had long since dried up any private funds and Yale's sabbatical policy had become stingy in the extreme. Already financing part of his own research, Moore was led not away from research as Clark and Douglas were, but to an even stronger dependence on his source of funds at the Institute. At least there, for a while, the salary of his regular research assistants was being paid, though no money for further research, such as the planned comparative study in England, was available. By this time interpretation of already acquired data was such an overwhelming problem⁶⁷⁶ that the lack of such funds was probably a blessing, though plainly a morale depressant. Thus, perversely, the Depression directed Moore toward continuing work already begun and relying on his connections at the Institute rather than sliding away into some other, seemingly more interesting, activity, like writing the Federal Rules or regulating the securities industry.

Of course, sliding away was just as viable an alternative for

belatedly penetrated the insular law school world.

675. See Schlegel, *supra* note 15, at 572-73.

676. How serious this problem had become can be seen from Moore's various attempts to reach out for other things to do and other perspectives on his work as recounted in text accompanying notes 655-56 *supra*. The chance to write for Kocourek's volume was thus a real boon.

Moore as it had been for Clark and Douglas. And there is no question that at times that alternative was attractive to him and even utilized in part. The failed bank study, the work, inherited from Douglas, on the first Statement of Accounting Principles,⁶⁷⁷ and the attempt to become a part of the Uniform Commercial Code project⁶⁷⁸ were all, in part, examples of the attractiveness of sliding away. Similarly, the hours Moore lavished on his course in Commercial Bank Credit, jointly taught with a professor at the Harvard Business School as part of the Yale-Harvard law and business program,⁶⁷⁹ represented a sliding away too, for the collaboration was so obviously empty.⁶⁸⁰ Although such interludes from empirical research abound, Moore never allowed them to become more than interludes. Why that is so is largely a function of the

677. See Arthur H. Carter (Haskins and Sells Foundation) to Underhill Moore, Mar. 20, 1936 (appointment); Underhill Moore to Arthur H. Carter, Mar. 27, 1936; Underhill Moore to William O. Douglas, Dec. 24, 1937 (work substantially done); Underhill Moore to George Parmly Day (Yale's treasurer), Apr. 28, 1938 (enclosing copy; "tells one exactly what to do after one has done it.") Moore papers, Yale. The product of the effort is H. SANDERS, H.R. HATFIELD & U. MOORE, AMERICAN INSTITUTE OF ACCOUNTANTS, A STATEMENT OF ACCOUNTING PRINCIPLES (1938). As part of the effort to publicize the principles Moore wrote *Relationship Between Legal and Accounting Concept of Capital* in PAPERS ON ACCOUNTING PRINCIPLES AND PROCEDURE 64 (1938). For a full description of the origins of this project and its results see R. CHATOV, CORPORATE FINANCIAL REPORT: PUBLIC OR PRIVATE CONTROL? (1975).

678. Grant Gilmore to John Henry Schlegel, Sept. 19, 1976.

679. See Stevens *supra* note 82, at 485-86. The project started as a Business-Law Institute proposed by Carroll Shanks with Moore's support. See Charles E. Clark to Underhill Moore, Feb. 28, 1930; Charles E. Clark to Carroll Shanks, Feb. 28, 1930, Moore papers, Yale. As a part of that effort the two men went to both the Wharton School and Harvard for assistance. Minutes of the Faculty of the Yale Law School, Mar. 27, 1930. Underhill Moore to Wallace B. Donham, Mar. 29, 1930, Moore papers, Yale. The two men liked Harvard best and starting in 1931 members of the Harvard faculty began teaching joint seminars at Yale. Minutes of the Faculty of the Yale Law School, May 21, 1931. By 1933 when the joint degree program was announced, Douglas had replaced Shanks as its prime backer and he and Moore arranged the details in a joint trip to Cambridge. See Charles E. Clark to Underhill Moore, June 9, 1933, Moore papers, Yale.

680. Moore began his joint teaching with J. Franklin Ebersole of Harvard in spring of 1934. See Underhill Moore to J. Franklin Ebersole, Jan. 20, 1934, Feb. 14, 1934, Mar. 21, 1934, Apr. 20, 1934, Moore papers, Yale. After this one semester Ebersole recognized that given "the large amount of work which you have done here-to-fore in emphasizing the banking practice background . . . there is not much that can be added by me." J. Franklin Ebersole to Underhill Moore, Apr. 20, 1934, Moore papers, Yale. The two men taught again in the springs of 1935 through 1938, but each time it became harder to get Ebersole to return. See, e.g., J. Franklin Ebersole to Underhill Moore, Dec. 13, 1937, Dec. 16, 1937; Underhill Moore to J. Franklin Ebersole, Dec. 11, 1937; Charles E. Clark to J. Franklin Ebersole, Dec. 28, 1937, Moore papers, Yale. The course collaboration was ended when the law-business program folded in Fall, 1938.

particular nature of the man—his temperament, and thus, his reaction to his surroundings.

All the published accounts of Moore emphasize his gruffness as well as a teaching style that combined a withering, remorseless logic with a totally domineering manner.⁶⁸¹ Eugene Rostow tried to put the matter diplomatically when he blamed himself for an “irritant effect” that he seemed to have on Moore such that, “Twice I was vigorously assaulted; the questions I raised remained undiscussed; and I was of course materially deterred from raising . . . any further problems.”⁶⁸² But, diplomacy was not always the best or at times even a possible way to deal with a man whose reputation for throwing objects out of windows was such that he once concluded he was slipping since he hadn’t thus disposed of anything in years.⁶⁸³ Emma Corstvet, for example, took a more direct approach: when Moore’s neck got red, she took the day off.⁶⁸⁴ On the other hand, Moore’s last research assistant, faced with the task of spending long hours “talking with a disembodied pure brain running about 600 I.Q. points,” took refuge in facial gestures: “‘I agree,’ ‘I don’t understand,’ ‘That doesn’t seem quite right.’”⁶⁸⁵

Published accounts, however, largely fail to capture other quite different aspects of Moore’s personality. For example, it is perfectly clear that when he chose to do so the gruffness could completely disappear and Moore could become unbelievably gracious and charming.⁶⁸⁶ Instead of viciously attacking he could at times spend long hours building up individuals, such as the painter who did his portrait or his marine insurance broker friend.⁶⁸⁷ This activity was not simply a matter of noblesse either. Stone, for example, was the unknowing beneficiary of Moore’s campaign to se-

681. See FOUNDATION FOR RESEARCH IN LEGAL HISTORY, *supra* note 17, at 250.

682. Eugene V. Rostow to Underhill Moore, Feb. 26, 1936, Moore papers, Yale.

683. Interview with Emma Corstvet Lewellyn, Aug. 19, 1975, (books); Emma Corstvet Lewellyn to John Henry Schlegel, (Feb. 1980), (plates).

684. Interview with Emma Corstvet Lewellyn, Aug. 19, 1975.

685. Allan Axelrod to John Henry Schlegel, Oct. 12, 1976.

686. See, e.g., Underhill Moore to Ruth Arrington, Jan. 30, 1936; Underhill Moore to Eugene V. Rostow, Feb. 27, 1936, Moore papers, Yale. Friedrich Kessler to John Henry Schlegel, Feb. 10, 1977; Gilbert Sussman to John Henry Schlegel, Oct. 1, 1976 (taped interview). Clark, *supra* note 658, at 189.

687. Interview with Jane Moore, May 19, 1976, wholly born out through Moore papers, Yale.

cure for him the presidency of the University of Wisconsin,⁶⁸⁸ Hope, as a slightly discontented partner in a major New York firm, received Moore's support in an elaborate campaign to secure for him a post on the Yale faculty.⁶⁸⁹ Similarly, Moore did not have to be intimidating in order to be effective. When he chose to attend and participate in faculty meetings, an occasion where intimidation alone would count for little, he could be quite impressive.⁶⁹⁰ And students like Douglas⁶⁹¹ and Wesley Sturges, who could, or were permitted to, cut through the gruffness, could also find something special and expressed in quite personal terms a lasting debt to Moore for in Sturges' words "initiating" them in "a pattern of thinking" which kept them free from the ways of "an earlier tradition."⁶⁹² Why students with humbler legal minds stuck it out in courses whose content was overly detailed and technical⁶⁹³ is more of a mystery. Yet these students, too, sensed that something was present in addition to the shouting. They felt strongly enough about the force and value of Moore's teaching to line the hallway from his class to his office in a show of respect on the occasion of his last class before retirement from Yale,⁶⁹⁴ and are known to have remarked years later that though they didn't understand a word in Moore's courses, what they somehow managed to learn was the most valuable part of their legal education.⁶⁹⁵

However disparate these aspects of Moore's temperament may seem, it would be a serious mistake to simply write him off as a paradox and leave it at that. For something did hold his personality together. Despite the gruffness and the aura of the aging, self-assured, late-Edwardian gentleman that his portrait shows, Moore

688. See, e.g., Underhill Moore to John Dewey, Jan. 12, 1919 (solicitation of letter of support); Underhill Moore to Benjamin N. Cardozo, Apr. 12, 1919 (same); Underhill Moore to Ben F. Fast, Mar. 31, 1919, (Stone knows nothing of my campaign), Moore papers, Columbia.

689. See, e.g., Underhill Moore to Dean Acheson, Apr. 27, 1940 (solicitation of letter of support), Moore papers, Yale. The pile of letters of support Moore collected was truly extraordinary, but to no avail. His colleagues did not want Hope, and Hope, who went to Cornell instead, returned to practice after one year because he missed the excitement. Theodore S. Hope, Jr. to Underhill Moore, Christmas 1942, Moore papers, Yale.

690. Friedrich Kessler to John Henry Schlegel, Feb. 10, 1977.

691. See Douglas, *supra* note 660.

692. Wesley A. Sturges to Underhill Moore, Mar. 29, 1939, Moore papers, Yale.

693. See note 652 & accompanying text, *supra*.

694. Friedrich Kessler to John Henry Schlegel, Feb. 10, 1977.

695. Grant Gilmore to John Henry Schlegel, Sept. 10, 1976.

was basically quite shy and a bit sensitive. His correspondence shows that fact well. Although his daughter⁶⁹⁶ and others⁶⁹⁷ remember many visitors at Moore's house both while at Columbia and at Yale, his papers are virtually devoid of any friendly, personal, non-family correspondence other than with two long time non-law school friends; this at a time when long distance telephone was simply not a possible way to hold together a friendship. Indeed, time after time openings from former students or friends at other law schools were left hanging or only prefunctorily acknowledged. Though a colleague of Cook's on three different occasions, as well as a supporter later on, and prominently associated in the legal academic mind with him, the two never corresponded after the demise of Cook's Institute at Hopkins. Though a good friend of Stone's while at Columbia, Moore let that relationship lapse soon after Stone's appointment to the Supreme Court despite the fact that Stone quite obviously expected the friendship to continue, even to the extent of asking Moore's opinion on cases then pending before the Court.⁶⁹⁸ All correspondence with Yntema was initiated by Yntema. Only Douglas would get an occasional letter *apropos* of nothing at all and even then a business purpose could often be discerned lurking in the background and embarrassment in the foreground.⁶⁹⁹ In short, Moore made acquaintances, but kept few friends.

Of course, it may be objected that Moore was not shy, but rather intentionally standoffish, a lone-wolf who by nature preferred his own company. But in addition to a home full of visitors, Moore had an intense need to work out his ideas with someone. His research assistants attest to that fact; Moore regularly spent hours discussing his ideas with them.⁷⁰⁰ One gets the impression that, for at least a time at Columbia, Moore similarly talked with colleagues, exposing them to his "tenaciously meticulous . . . logically ruthless" thought,⁷⁰¹ and that at Yale he missed similar in-

696. Interview with Jane Moore, May 19, 1976.

697. Gilbert Sussman to John Henry Schlegel, Oct. 1, 1976 (taped interview).

698. Harlan F. Stone to Underhill Moore, Mar. 18, 1926, [re: *United States v. National Exchange Bank*, 270 U.S. 527 (1926)], Moore papers, Yale.

699. See, e.g., Underhill Moore to William O. Douglas, Mar. 4, 1943, Moore papers, Yale.

700. Interview with Emma Corstvet Llewellyn, Aug. 19, 1975. Allan Axelrod to John Henry Schlegel, Oct. 12, 1976.

701. Hessel E. Yntema to Underhill Moore, Jan. 22, 1940, Moore papers, Yale.

terchange.⁷⁰² Thus the gruffness, the bluster, the myriad of devices for keeping the world at a distance—for example, by calling everyone by their last name⁷⁰³ or by regularly suggesting explanations for his own behavior that were at the least misleading—was a response to that shyness, a defense which made it easier to deal with other people by making it less likely that they would appear.

Once Moore's basic shyness is recognized, the course of his research, not just parking but banking too, becomes easier to understand. As Moore once observed, he came to Yale in answer to "the question: 'Where will my personal life probably be happier?'" He had found that "the ructions at Columbia had been such that . . . [he] could no longer be happy there" and so he left.⁷⁰⁴ Then, in the same breath, he observed that "it makes very little difference where one does one's work . . . [;] [i]ntellectual curiosity and drive are what count."⁷⁰⁵ Here one sees still another misleading explanation of his behavior. It made quite a difference to Moore where he worked for he both needed, and looked for, sustained intellectual contact as a stimulant for his ideas. It was the search for just such contact that brought him to Yale. Yet because he was basically shy his approach was seldom direct. He all but "hung around" the Institute, always wanting to be counted in, but always overlooked because he never did much to call attention to his presence. While he learned much from Dorothy Thomas, he put it in practice so slowly that she lost interest. Likewise, though he had been acquainted with Hull for nearly ten years at the time he began his piece for Kocourek's volume in which he drew heavily on Hull's learning theory, Moore quite obviously wrote that piece without ever having talked at length with Hull about that theory and its contemporaneous refinements. Over and over he looked for help, for intellectual stimulation, but from a distance.

While shyness might not have been a handicap in many academic endeavors, the nature of Moore's enterprise made shyness a positive disability. Had he been working in a well-plowed field he might have received the necessary stimulation and guidance simply by being around other scholars and keeping up with the journals.

702. Cf. Underhill Moore to Hessel E. Yntema, Feb. 10, 1940, Moore papers, Yale.

703. *Id.* ("Dear Hessel . . . I have lived in this army-post atmosphere so long that I am beginning to call people by their first names.")

704. Underhill Moore to Eugene V. Rostow, Mar. 19, 1941, Moore papers, Yale.

705. *Id.*

But he was not working such a field; he was cutting "first growth timber."⁷⁰⁶ So for his needs Moore had to rely on the law school, or the Institute, or go it alone.

Relying on the law school for intellectual stimulation and guidance was impossible for several reasons. First, in simple personal terms, there was no one there to look to. Charles Clark, the most obvious candidate, and Moore simply could not get along.⁷⁰⁷ Clark's quarrelsomeness and his pompousness together with his administrator's wish to placate all, to achieve a "balanced" faculty,⁷⁰⁸ and to avoid hard decisions, when opposed to Moore's gruffness and bluster, together with his singlemindedness, especially in the defense of what he saw as his prerogatives, made these two neighbors as compatible as a pair of porcupines. Douglas, the next most obvious choice, while a friend of sorts to the end, was quite obviously not sufficiently committed to empirical research over any long haul to fit the bill. And, Thurman Arnold, although plainly a good buddy,⁷⁰⁹ was simply not serious enough about anything for Moore's taste.⁷¹⁰ Beyond Arnold there was simply no one,⁷¹¹ except for Arthur Corbin,⁷¹² but even to mention Corbin's

706. Donald Slessinger provided this description of the activities of all of the Realists at Yale. Interview, July 8, 1975. It fits Moore's work better than that of anyone else.

707. See, e.g., *supra* note 472; especially Thomas W. Farnam to James R. Angell, Apr. 20, 1936 ("This will be my last effort to get these two contrary characters together."), Angell papers. Schlegel, *supra* note 15, at 577 n.618. Cf. James William Moore to Charles E. Clark, Nov. 11, 1941 (on file in the Charles E. Clark papers, Sterling Law Library, Yale University) (suggesting that Underhill Moore led the forces opposing Clark's teaching of procedure at Yale to fill in for J. W. Moore who had taken a years leave of absence to teach at Texas); Underhill Moore to Arthur L. Corbin, Apr. 28, 1939 (referring to a deanship candidate as having a temperament such that "his leadership and administration would be afflicted with the same morale-destroying defects which have marred Judge Clark's deanship."), Moore papers, Yale. Gilbert Sussman to John Henry Schlegel, Oct. 1, 1976 (taped interview).

708. Charles E. Clark to Walton Hamilton, June 21, 1934 ("I am . . . disturbed . . . about . . . Thurman's statement that you and he would not accept a balanced faculty."), Moore papers, Yale.

709. Interview with Jane Moore, May 19, 1976; Interview with Emma Corstvet Llewellyn, Aug. 19, 1975. See, e.g., Thurman Arnold to Underhill Moore, Oct. 21, 1936, Moore papers, Yale.

710. See Underhill Moore to Arthur L. Corbin, Apr. 28, 1939, Moore papers, Yale.

711. The other alternatives were mostly out of the question. Edwin Borchard seems to have been a bit of an outcast at Yale and was extremely jealous of Moore's special arrangements for research assistance. See Charles E. Clark to Thomas W. Farnam, Apr. 27, 1936, Angell papers. Walton Hamilton opposed empirical research generally. Interview with Dorothy Swaine Thomas, June 3, 1975. Roscoe Turner Steffen, "a man of great resentments," was embittered by the arrival of Moore and Douglas to teach in what he considered to be his field. Interview with Fleming James, Jr., June 11, 1975. William Reynolds Vance, whom

name is to raise problems broader than personalities.

Doubtless there was a special bond between Corbin and Moore, although its source is, at first, not obvious. Corbin, the grand old man of the Yale faculty, having begun his teaching there in 1903,⁷¹³ was one of the bluest of the old blues,⁷¹⁴ a Landon Republican, well known for his devotion to golf and for singing when intoxicated,⁷¹⁵ none of which were likely to have created any common bond with Moore. Moreover, though an intellectual maverick from before the First World War,⁷¹⁶ he was an educational conservative⁷¹⁷ and by no means a Realist. His politics was wrong and his science, a doctrinal science, was too. Indeed the only significant relationship between Corbin and Realism was his treatment of caselaw materials and his at first rather lonely defense of the scraps of a Holmesian jurisprudence⁷¹⁸ that link together most of the dissidents in American legal thought between about 1890 and 1960, and thus largely fail to distinguish any of them. But Realism and its empirical science was not the only potential link between Moore and other legal scholars, and in the case of Corbin the link was age, or more accurately age of intellectual maturity.

Like Moore, Corbin began teaching in the first decade of the twentieth century during the years when law teaching was under-

Moore had known at least since 1912, actively disliked Moore's work. See Underhill Moore to E. C. Coker, Oct. 28, 1931; E.C. Coker to Underhill Moore, Nov. 5, 1931, Moore papers, Yale. Ernest G. Lorenzen, who had been a colleague at Wisconsin, seems to have kept to himself. And that left Wesley A. Sturges, who, although a former student, seems not to have been a good friend. I have been unable to learn why.

712. b. 1874. B.A. 1897, Kansas, LL.B. 1899, Yale. Private practice, 1899, Cripple Creek, Colo., Prof. 1903, Yale. His major work, A. CORBIN, A TREATISE ON THE LAW OF CONTRACTS (1960), was in preparation for nearly thirty years. d. 1967.

713. See W. TWINING, *supra* note 14, at 28. This is the only readily available biographical sketch of Corbin.

714. In spirit, though not in fact, since his undergraduate degree was from Kansas.

715. Interview with Donald Slessinger, July 8, 1975; Interview with Leon Green, July 19, 1975.

716. See W. TWINING, *supra* note 14, at 30-33.

717. See, e.g., Arthur L. Corbin to Members of the Governing Board of the School of Law, Feb. 8, 1935 (concerning the appointment for Jerome Frank); Arthur L. Corbin, Report of Curriculum Committee, Comment by A.L.C., fall, 1937?, Moore papers, Yale; Robert M. Hutchins to Karl N. Llewellyn, May 7, 1926, May 21, 1926, Hutchins papers. Interview with David Kammerman, June 2, 1975.

As Prof. Fred Konefsky has noted, there is a certain irony in Corbin's position as a member of the party of the right at a time when he was busily working to deformalize Williston's conception of contract law.

718. See W. TWINING, *supra* note 14, at 30-31, 32-33.

going the process of professionalization. Although Corbin never saw colonial service, he in large measure colonized Yale, his own law school, when, soon after his arrival, he introduced his own variety of the case method in his first year contracts course.⁷¹⁹ He was deeply enough involved in professional affairs to have become one of the few non-dean presidents of the Association of American Law Schools. In addition to these surface indications of potential similarity of outlook, both men were incredibly serious, indeed single-minded, scholars. For example Corbin opposed the appointment of Jerome Frank to the faculty because Frank seemed "to be a propagandist and an agitator rather than a teacher and investigator."⁷²⁰ He likewise opposed Thurman Arnold's proposal to add "practical" work in administrative law to the curriculum based on a "survey of what the lawyer must do in present practice"⁷²¹ because to do so in the present climate of opinion, "it would be very easy to turn . . . [Yale] into a second rate school of 'political science.'⁷²² Similarly, Moore opposed one candidate for the deanship because he suspected that the candidate "would regard work done in the School as quite satisfactory though it consisted of no more than the teaching of students along traditional lines plus a liberalistic destructive social criticism."⁷²³ Moore also opposed Arnold's candidacy for much the same reasons that Corbin had expressed with respect to Arnold's administrative law proposal.⁷²⁴ Thus, though their politics were different, both men's commitment to sustained and not faddish scholarship was the same.

Seriousness may have provided the basis for a tolerant friend-

719. Stevens, *supra* note 82, at 439.

720. Arthur L. Corbin to the Members of the Governing Board of the School of Law, Feb. 8, 1935 ("[H]is well-known book seems to me to have fundamental defects that invalidate his major conclusions and will prevent it from having any permanent influence."), Moore papers, Yale.

721. Thurman Arnold to Arthur L. Corbin, Dec. 14, 1937, Moore papers, Yale.

722. Arthur L. Corbin, Untitled memo, Dec. 1937, Moore papers, Yale.

723. Underhill Moore to Arthur L. Corbin, Apr. 28, 1939 (said of Harry Shulman), Moore papers, Yale.

724. *Id.* ("His theories as to the purpose, scope and methods of the work to be done by a law faculty . . . make him entirely unqualified for a position" as dean).

At the same time it should be remembered that Moore was no educational conservative. He quite honestly doubted whether "a law school has . . . anything substantive to offer a student of law." Underhill Moore to Jerome Frank, Jan. 1, 1934, Moore papers, Yale. But he did not therefore believe that serving up any trendy "innovation" was an improvement.

ship,⁷²⁵ but that was hardly the kind of support that Moore sought. What he needed was the support of a common intellectual community such as might have been built around the kind of research that Clark and Douglas, Corstvet and Thomas, and yes, even Thurman Arnold for a while,⁷²⁶ engaged in. Thus, except for the women, the kind of seriousness that Moore derived from his participation in the process of professionalizing academic legal educators and that drew Moore toward Corbin separated him from the other empirical researchers, as well as the other Realists at Yale. For the one thing that really grand crew was not noted for was sustained commitment to anything. Clark's dogged pursuit of procedural reform came the closest to Moore's ideal of committed scholarship, but Clark broke the traces and ran back to property or over into constitutional law with some regularity and even in procedure Clark's scholarship soon gave way to cheerleading for the new Federal Rules. Douglas went from business associations to bankruptcy to securities in seven years. Arnold changed horses at every stream. Hamilton could never decide whether he was studying economic organization or constitutional law. Surges covered a permanent shift from creditor's rights to arbitration by publishing virtually nothing for nearly ten years. Rodell's idea of consistent effort was to write regularly for the same magazine. Moore, in contrast, when at the end of a session with his research assistant spent fleshing out sections of the Negotiable Instruments Law in a way easily "ten times . . . better than the regular literature on the topic," quickly turned aside the suggestion that they should write up and publish the analysis with the observation " 'You know, we're not trying to show everybody how smart we are.' "⁷²⁷

The other Realists at Yale were thus unable to provide Moore with the intellectual stimulation and guidance he needed. And equally important, they were actively destroying the professional identity forged by Moore, Corbin and their contemporaries. Whether they knew it or not, by flitting about as they did the Yale Realists were forging a more contemporary notion of the law professor's role, that of the policy maker—the omni-competent member of the academic-governmental "Commissions to Study the

725. The key to recognizing this friendship is address. Corbin was the only faculty member Moore addressed by his first name.

726. See Schlegel, *supra* note 15, at 492-93, 503.

727. Allan Axelrod to John Henry Schlegel, Oct. 12, 1976.

Causes of Almost Anything."⁷²⁸ Why they did so is unimportant, for present purposes at least; that they did so is obvious. But as a result, their efforts served to undercut Moore's own notion of scholarship and thus to make it doubly difficult for him to find necessary support in the law school community.⁷²⁹

Lacking intellectual support in the law school, Moore was driven in the direction of the Institute. There, as an amateur he was not particularly welcome; yet, being shy, he was uncomfortable about elbowing his way in. When an even tangentially common interest made discussion easy, as when an engineer offered some research on automobile speeds, Moore opened up quite directly.⁷³⁰ But short of that kind of invitation he had a hard time starting any discussion. Thus Moore's temperament only served to make it easier for individuals at the Institute to ignore or begrudge his presence. As a result, he was largely left on his own, led to rely on himself and his research assistants for much of his intellectual support.

728. This characterization has been stolen, partly out of context, from Kennedy, *Why the Law School Fails: A Polemic*, 1 YALE REV. OF L. AND SOC. ACT. 71, 88 (1970). One of the few references to this new, though now old, conception of the law professor's role is Mac Neil, *The Wheel and the Hearth*, 28 J. LEGAL EDUC. 1 (1977).

729. Mention should be made of Karl Llewellyn here. At one point the two were plainly friends, at least, in the way that friendships develop between junior and senior professors. For example, Moore tried to get Llewellyn the job of drafting the Uniform Chattle Mortgage Act as early as 1922, a full four years before Llewellyn finally landed the job. See George M. Hogan to Underhill Moore, Jan. 9, 1922 (will you draft?); Underhill Moore to George M. Hogan, Feb. 9, 1922 (no, try Llewellyn), Moore papers, Yale. Their relationship never ripened beyond that; plainly something about Llewellyn irritated Moore. See, e.g., Underhill Moore to Karl Llewellyn, Apr. 4, 1931, Moore papers, Yale.

Why their friendship never developed no one can agree on. Grant Gilmore suggests that the causes are to be found in Llewellyn's ambiguous role in the Columbia deanship crisis and the treatment of Emma Corstvet during their marriage. Grant Gilmore to John Henry Schlegel, Sept. 10, 1976. Emma Corstvet, on the other hand, suggests that Llewellyn just didn't have or make many friends, Interview with Emma Corstvet Llewellyn, Aug. 19, 1975, and was more than a bit in awe of Moore, Emma Corstvet Llewellyn to John Henry Schlegel, Feb. 1980, while Jane Moore observes that it was wholly unclear why the two men did not get along, Interview with Jane Moore, May 19, 1976. Perhaps it was largely a matter of style of research. See Underhill Moore to Max Ascoli, May 18, 1934 (in response to Ascoli, *Realism versus the Constitution*, 1 SOC. RESEARCH 169 (1934); Llewellyn's "unwillingness to undertake the methodological responsibilities of objective research and at the same time his unwillingness to abandon the title of scientist have forced him to blind himself to the distinction between philosophy and science;" "a sin against the Holy Ghost."), Moore papers, Yale.

730. See Underhill Moore to Charles J. Tilden (Yale, Engineering), Nov. 5, 1936, Moore papers, Yale.

Unfortunately, while Moore was a formidable personality and a fine, widely read intellect, left to his own devices he was hardly a juggernaut capable of both completing his research and understanding and remedying the defects in the original design of that research.⁷³¹ Indeed, his ideas about reasonable methods of research were anything but naturally sound. Twice he simply made wrong choices when problems developed with the research. First, in the banking studies, where he began with a wonderful topic of research and a bizzarely over-detailed method, he failed to see that the desirable improvement was not to tighten observational techniques, which were already as rigorous as the subject matter warranted, but to loosen the overt reliance of quantification and simplify the elaborate structure of method. Then, in the parking studies, where he again chose a sensible topic for research, he failed to recognize that the behavior that to him seemed so simple was in fact too complicated for Hull's psychological model. Thus he never saw that what his study needed was not complicated mathematics, but the simplification of data in the direction of the ethnographic studies that he had been quite obviously interested in at least as far back as the time of the review of Wigmore's book.

Why Moore made these critically wrong choices is easy to see. Too shy to seek real help, he followed the natural bent of his mind which was toward the methodical and technical. He thus quickly learned and understood statistical technique and the rudiments of experimental design,⁷³² but never the theory behind it, for he was not a theoretician, even at a low level. For example, although, in his own awkward way, he often tried to contribute to the jurisprudential debates of the time, his record in this territory, which he knew comparatively well, was hardly impressive.⁷³³ So to say that

731. Here and in the following pages my interpretation of Moore's career differs markedly from Northrup, *Underhill Moore's Legal Science: Its Nature and Significance*, 59 YALE L.J. 196 (1950), which locates the causes for the decline of Moore's research in certain problems with the nature of scientific proof, particularly, with respect to social science. I do not see such considerations in Moore's research; that may well be my blindness, I admit.

732. Interview with Dorothy Swaine Thomas, June 3, 1975; Interview with Emma Corstvet Llewellyn, Aug. 19, 1975. Which is not to say that Moore was capable of doing the direct manipulation of his own data unaided; he was not. Gilbert Sussman to John Henry Schlegel, Oct. 1, 1976 (taped interview).

733. The introduction to Moore & Hope, *An Institutional Approach to the Law of Commercial Banking*, 38 YALE L.J. 703, 703-05 (1929) is a comment on the debate over the adequacy of the traditional system for the classification of legal materials that developed during the curriculum reform debate at Columbia. Moore & Sussman, *supra* note 294;

he could have intuited that the problems with his research lay in the dominant statistical ethos of the social science that he knew (and that perversely came to offer help when he really needed it), then could have dug his way out of that ethos in order to recover the ground of this thought from some twenty years earlier, and finally could have built anew on that thought (all much harder

Moore, Sussman & Brand, *Legal and Institutional Methods Applied to Orders to Stop Payment of Checks—I. Legal Method*, 42 *YALE L.J.* 817 (1933); Moore, Sussman & Corstvet, *supra* note 364, are, taken together, a series of demonstrations of the inadequacy of lawyerly intuitive analysis, traditional doctrinal analysis, and introspective sociological jurisprudence, respectively, to provide answers to legal questions which Moore's institutional method could answer. See Moore, Sussman & Corstvet, *supra* note 364, at 3. See also, Moore & Sussman, *supra* note 293, at 555-60 (1931) (comment on preceding article). *The Lawyer's Law*, *supra* note 350, can also be seen as a part of this attempt to contribute, for it states his own theories. His other attempts, Underhill Moore to Morris R. Cohen, Mar. 16, 1931, Moore papers, Yale; Moore Report, 1934, *supra* note 375; Moore & Callahan, *supra* note 533, at 203-05 (1941); *Law and Learning Theory*, *supra* note 437, at 2, are more like bits of guerrilla warfare, but still are aimed at the debates of the time. And there is a none too subtle comment on a jurisprudential issue in the traffic circle study where Moore had the circle in place before the relevant ordinance was adopted and removed while the ordinance was still in effect. See text accompanying note 440 *supra*. This little ploy still infuriated Llewellyn twenty years later. See Llewellyn, *supra* note 608, at 400 (1956). See also note 562 *supra*.

Unfortunately in his dabblings in jurisprudence Moore's literal mindedness again led him astray. He took at face value the proposition that the debate was about legal method. His was, so he thought, demonstratively the best, for it was truly scientific. He seems never to have understood that the manifest content of the debate masked a deeper dispute about class control of the legal system and thus the degree that its rules reflected class interests. This blindness on his part is nevertheless puzzling because he quite firmly believed in a rather general way in the notion that law is a reflection of class interests. See Underhill Moore to Oswald Garrison Villard, May 10, 1927, Moore papers, Yale.

Mr. Ernst's position is the result of his harboring a very common preconception. He thinks of the governing group existing in a particular geographical area as consisting of all or most of the people in the area. He thinks that the interests of the governing group are the interests of the inhabitants, and that the ethics of both should be the same. If he abandoned his preconception and were more realistic, he would see the government as only one among a number of groups, such as the United States Steel Corporation, the American Federation of Labor, and the Rockefeller Foundation. Further, he would note that the governing group is much smaller in number than he supposes. He would not expect the interests and ethics of the governing group to be the same as those of the other inhabitants, but would rather expect them to be class interests and class ethics. Consequently he would not be surprised in a case like the Sacco-Vanzetti case, to find many members of the governing group, including the courts, sharing the feelings of the prosecutor, one of their fellow members. Nor would he urge, by argument, the governing group to restrict its power by changing its rules.

Id. [said of Morris Ernst, *Deception According to Law*, 124 *THE NATION*, 602 (1927)]. This letter was printed as a reply from "A Professor of Law whose name must be withheld," 124 *THE NATION* 630 (1927).

tasks in less familiar intellectual terrain than moving along the jurisprudential peanut of the day) is simply impossible.⁷³⁴ He was by temperament and training committed to scientific research in law, committed enough that he could not fall away from it as Clark and Douglas had done, but he was not therefore the man to see beyond the particular science he had found his way into.

Time and person are not the only factors in the decline of Moore's research, however. The nature of the research enterprise contributed its part too. Hutchins and Clark, and perhaps Douglas too, saw the rest of the university as it passed by and wondered what it might have to offer for the study and teaching of law beyond a common heating plant.⁷³⁵ Their research drew on their perception that the university was somehow other than the law school and thus they tried to reinvigorate a legal world gone stale by attempting to cross progressive reform politics, a part of what the law had to offer, with empirical social science, a part of what the university had to offer. Moore, on the other hand, was, at least in his head, in the parade the others only watched. As part, albeit a junior part, of the generation that created the academic lawyer, being a professional meant being a part, an integral part, of the developing university. Thus Moore did not want to cross anything with anything; he only wanted to create a legal science that was like the other sciences in the university.

After the endless curriculum reform discussions at Columbia, Moore was impatient with endless talk, "mental masturbation" as he called it.⁷³⁶ He had said his piece in the Wigmore review; that was enough. So, well aware that "the preparation of preliminary sketches for a bridge to be built sometime, somewhere is not building a bridge"⁷³⁷ and doubting "very much whether a law school has

734. Much less could Moore have known that it would be thirty-five years before the development of a statistical technique powerful enough to readily handle his data, even in simplified form. See J. Meeker, *The Impact of Law On Behavior: A Reanalysis of Moore & Callahan* (1978) (unpublished student work). He surely would have been pleased to learn that reprocessing his data with modern techniques of loglinear analysis demonstrates that, after the length of the durational regulation, the next most influential factor in determining parking behavior is a cultural aspect of legitimacy—the appropriateness of the particular regulation in the place where it is imposed.

735. See Schlegel, *supra* note 15, at 575-79. The heating plant metaphor comes from interview with Robert M. Hutchins, June 20, 1975.

736. Interview with Mark A. May, June 9, 1975.

737. Underhill Moore to Felix Cohen, Oct. 24, 1932 [said in criticism of Cohen's article,

. . . anything substantial to offer to a student of law,"⁷³⁸ Moore set out to fashion a university, empirical legal science himself. The idea was wonderful, noble even, but in fashioning his science Moore ignored three things—the law school world he was in, the world of the other departments of the university, and the university itself. In short he ignored the "real world" that he so obviously wanted to make the center of legal scholarship.

Had Moore looked as dispassionately at the law school world of the late twenties and thirties as he had at the behavior of his parkers in New Haven, he would have quickly discovered that the world he inhabited was significantly different from the world in which he had come to intellectual maturity. In the years around the First World War the role of the law professor had changed from that of the university scholar to one in which the centerpiece was professional education. Whether this not so subtle shift was the price paid for upper bar support for the law school's role as guardian of entry into the profession, or only a reflection of the fact that the great research tasks laid out by Thayer and Ames were really quite simple and soon disposed of in the flood of casebooks and treatises produced around the turn of the century, is not necessary to decide. Similarly it is not necessary to decide whether a scholarly vocation for lawyers became hard to conceive of without stepping out of the doctrinal box that distinguished law from other academic disciplines. But a different professional role was served up to the younger Realists like Hutchins and Clark and accepted by most other legal scholars. That role was socratic discussion for the purpose of teaching how to think like a lawyer and scholarship for the purpose of restating and updating the common law.

For those who were satisfied with this new professional role because it was all they could handle, men like Vance and maybe Lorenzen, Moore's science of law was frightening. Thus they disliked it, even if they did not oppose it.⁷³⁹ For those like Corbin and Llewellyn, satisfied because the new role gave ample room for using their quite extraordinary talents to uncover substantial insights about doctrine and its use, Moore's science was simply unneces-

The Subject Matter of Ethical Science, 42 INT. J. ETHICS 397 (1932)], Moore papers, Yale.

738. Underhill Moore to Jerome Frank, Jan. 5, 1934, Moore papers, Yale.

739. See note 711 *supra*.

sary. A suggestion to go to Cincinnati to "observe the operations of bank tellers at close range"⁷⁴⁰ was pointless when a call to a friendly banker coupled with a bit of imagination would provide the same information. Thus these men, like Friedrich Kessler to whom the suggestion was made, mostly ignored Moore's science.⁷⁴¹ For those like Hutchins, Clark, and Douglas, who found the new role both a bit empty and largely devoid of sustained commitment to absolutely anything except the law school, Moore's science was largely puzzling. They were surprised when, dissatisfied with their role, they woke up in a university.⁷⁴² But the university they woke up in and thus responded to was a university in which scholarship of a German historical, or really any sustained kind, was becoming a lost ideal. Moore's dogged espousal of this ideal was anachronistic. Despite the quite obvious similarities, somehow his science was not the science these younger men saw around them and so they tolerated it, but at a distance. Thus, for all the inhabitants of the law school world Moore's research, neither doctrinal nor directed at reform and sustained really beyond imagination, was weird, thus perhaps dangerous. It left all concerned very ambivalent.⁷⁴³ Not surprisingly many, if not all, felt the need, not to confront it, but to distance it with a slightly decisive humor—"the love of life of a check,"⁷⁴⁴ or "Can't you see, I'm busy counting these cars." None felt the need to imitate it.

740. Friedrich Kessler to John Henry Schlegel, Feb. 10, 1977.

741. Kessler was another of Moore's projects. Although Kessler resisted getting into the "sociology of law" (Underhill Moore to Mark A. May, Oct. 10, 1934, Moore papers, Yale), Moore worked to get money for him to stay at Yale (Underhill Moore to Stacy May, Apr. 19, 1935), and tried hard to get Kessler a summer school teaching job away from Yale (see, e.g., Underhill Moore to Charles K. Burdick, Dec. 18, 1935, Moore papers, Yale). The two men did a little joint teaching, even tried to write an article together (Friedrich Kessler to John Henry Schlegel, Feb. 10, 1977), however Kessler's "lack of sympathy" with Moore's approach led to "a mild estrangement" (*Id.*) That estrangement suggests another side to Moore. He was not charitable in intellectual matters. Several years later when thanking Kessler for a copy of his article *Theoretic Basis of Law*, 9 U. CHI. L. REV. 98 (1941), Moore could not resist simultaneously remarking that he was "not much interested in the description and analysis of literature." Underhill Moore to Friedrich Kessler, Jan. 13, 1942, Moore papers, Yale.

742. Interview with Robert M. Hutchins, June 20, 1975.

743. Friedrich Kessler to John Henry Schlegel, Feb. 10, 1977, quite directly admits this ambivalence. Grant Gilmore to John Henry Schlegel, Sept. 19, 1976, does not, but shows it. See also Clark, *supra* note 658, at 191.

744. Clark, *supra* note 658, at 191; Interview with Dorothy Swaine Thomas, June 3, 1975.

The law school world could not deal with Moore's research enterprise. Unfortunately the world of the other university departments could do little better. They found his research for the most part unintelligible for they too looked nothing like what Moore, talking at the faculty club at Columbia, imagined them to be. Thoroughly balkanized and solidified as Moore slowly got ready to work, these largely sealed compartments of university life could not recognize his science, drawn as it was to a non-existent paradigm within a non-existent culture. They might help his research become more like something they knew and could understand, but taking it on its own terms was really quite impossible. That the research was scientific, empirical and all that, may have been enough when Dewey, Robinson, and Veblen made Moore over, but it was not enough fifteen or twenty years later. By then, research had to be part of a definable academic tradition and by its nature this was the one thing that Moore's research could not be.

The university too was not, if it ever had been, the university to which Moore thought he brought his scientific enterprise. The younger Realists who Moore scorned as "a nest of Dealers who, in order to get in the New Deal, are Newer Dealers than New Dealers"⁷⁴⁵ were forging a new understanding of the role of educator of professionals. They and scholars like Charles E. Merriam⁷⁴⁶ or William F. Ogburn⁷⁴⁷ were busy forming the much derided "multiversity." Their creation, structured as it was toward public issues and public service, had no use for Moore's empirical science of law because that science had no apparent use, except one too far down the trail to be worth much in the way of support. And so, having ignored three important aspects of the world he had chosen to investigate a part of, Moore created an enterprise that in large measure contained within it its own doom and within that doom the extinction of the Realists' attempts to do empirical legal research.

While the research by Clark and Douglas suggests the faint

745. Underhill Moore to N. F. Glidden, Mar. 11, 1939, Moore papers, Yale.

746. See B. KARL, CHARLES E. MERRIAM AND THE STUDY OF POLITICS (1974).

747. Karl, *Presidential Planning and Social Science Research: Mr. Hoover's Experts* in 3 PERSPECTIVES IN AMERICAN HISTORY 347 (1969), chronicles Ogburn's work on one of the earliest Presidential social science advisory studies. Moore, a friend from Columbia, reacted to it with the observation that the work was "a piece of high class journalism" and wanted to know why Ogburn had bothered to do it. Underhill Moore to William F. Ogburn, Sept. 1, 1933, Moore papers, Yale.

possibility that things might have worked out otherwise with the result that law schools would be different and law professors know more about the world outside their doors,⁷⁴⁸ it would be silly to suggest that there might have been any other ending to the story of Moore and his research. Part of an entire generation of law professors whose work has by and large disappeared either in unread journals or the equally unread Restatement project, Moore left no known intellectual heirs, just as was the case with his friend Corbin. Moore's work has not even enjoyed the phoenix-like cycle of the rediscovery of social science research that might be traced to the door of Charles E. Clark. No one thinks that way anymore. Yet, at the same time, Moore and his research quietly suggest a possible way of an oft stated problem with contemporary legal education—the piteously low level of scholarly activity, especially activity outside narrow doctrinal bounds and unrelated to the topical concerns of which ever social science calls the current tune in “law and” studies. The role of university scholar and teacher of law⁷⁴⁹ to individuals who will become lawyers may not be beyond being recovered, any more than may be the development of a distinctive paradigm for such scholarship. At least it would not hurt if a few more Moore-like individuals, possessed of that extraordinary flinty integrity and seriousness of purpose that was the essence of the man, should surface to give the idea a try.⁷⁵⁰

748. Schlegel, *supra* note 15, at 585-86.

749. Or more precisely, the teacher “about law” to use the current jargon. See Abel, *Law Books and Books about Law*, 26 STAN. L. REV. 175 (1973).

750. I find it curious as I reach this last footnote that Clark, *supra* note 658, at 192-93, sounded a similar, if more bombastic note in praising Moore for his “fierce devotion, unswerving persistence, against all obstacles, to the discipline of the mind and . . . his following of the intellectual approach wherever it should lead . . .” and quite uneasy that Felix Frankfurter particularly liked this passage in Clark's review. See Felix Frankfurter to Charles E. Clark, Feb. 27, 1950 (on file in the Charles E. Clark papers, Sterling Law Library, Yale University).

