Jurisprudence

The Philosophy and Method of the Law

Edgar Bodenheimer

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JURISPRUDENCE

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Revised Edition

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PREFACE

to the Revised Edition

Twelve years have passed since the publication of the 1962 edition of this textbook. During this time there have occurred significant developments in analytic jurisprudence and in the legal philosophy of values which have received recognition in additions to the historical part of this volume. The second and central part of this book, dealing with the nature and functions of law, has been largely rewritten. More extensive consideration than in the previous edition has been given in particular to the psychological roots of the law, the conceptual scope and substantive components of the notion of justice, and the criteria for validity of the law. Less comprehensive were the revisions in the third part of the book, concerned with problems of legal method. The section on legal logic was replaced by a more differentiated analysis of the modes of legal reasoning, which in turn made necessary a reappraisal of the role of value judgments in the adjudicatory process.

Throughout this revised edition, reference has been made to important books and articles in the field which have appeared since the publication of the 1962 edition.

Davis, California
June 1974

Edgar Bodenheimer

PREFACE

to the 1962 Edition

My early work (*Jurisprudence*, 1940) which forms the nucleus for parts of the present volume, stated as its purpose "to give aid to the student of law and politics who is interested in the general aspects of the law as an instrument of social policy." The purpose of the present book remains essentially the same, although large portions of the material have been completely rewritten and the scope of coverage has been substantially enlarged. Attention has here been given to a number of jurisprudential problems which were not mentioned in the early work, and an entirely new part, entitled "The Sources and Techniques of the Law," has been included. This last part of the book is addressed primarily, but by no means exclusively, to law students and members of the legal profession interested in the methodology of the law and in the characteristic features and instrumentalities of the adjudicatory process.

The historical materials dealing with the development of jurisprudential thought, which were dispersed through the 1940 volume, have been concentrated in the first part of the present book and have been reorganized along essentially chronological lines. The reader will soon discover that this historical introduction is largely descriptive in character and, with the exception of the concluding section, contains almost no critical appraisal of the schools of thought therein discussed from the point of view of my own legal philosophy. I felt that inasmuch

as the use of the book for instructional purposes was included within the objectives for which it was published, an evaluation of the contributions of the great legal thinkers might appropriately be reserved for class discussion.

The treatment of the substantive problems of general legal theory in the second and third parts of this book, on the other hand, is based on certain philosophical and methodological assumptions which are implicit in my approach to the domain of jurisprudence. Perhaps the most basic one among these assumptions is the firm conviction that no jurisprudential treatise should bypass or ignore the burning questions connected with the achievement of justice in human relations, notwithstanding the difficulties encountered in any attempt to apply objective criteria in dealing with this subject. It is submitted that the theory and philosophy of the law must remain sterile and arid if they fail to pay attention to the human values which it is the function of the law to promote. This does not mean, of course, that the jurisprudential scholar should be encouraged to let his imagination and emotional predispositions run amok in his treatment of the fundamental problems of the legal order. On the contrary, he should be held to a standard of detachment and objectivity which enjoins him to separate, to the best of his ability and within realizable limits, objective phenomena or data verifiable by reason or experience from subjective opinion or purely speculative thought. Furthermore, the jurist must be aware that conclusions with respect to axiological questions are necessarily tentative in character and subject to reconsideration in the light of new findings and new experiences. But although scholarly modesty and restraint is mandatory for those who attempt to seek the truth in the realm of human values, no a priori reason can be shown to exist which compels us to ban all scientific effort from this important sphere of human existence.

The subject matter of jurisprudence is a very broad one, encompassing the philosophical, sociological, historical, as well as analytical components of legal theory. It is impossible within the limits of a one-volume introductory treatise to pursue all the various objectives of this discipline at the same time. Inasmuch as a considerable number of jurisprudential works have been published in this century in English-speaking countries which have concentrated upon an analytical elucidation of basic legal concepts (such as the concepts of right, duty, liability, or corporate personality), no attempt has been made in this volume to provide definitions or explanations of such technical terms of the law or to develop a general theory of contract, property, or criminal responsibility. Furthermore, there has been undertaken only a cursory treatment of the historical, sociological, and economic forces

which in the past and present have helped to shape the evolution of the law. Much valuable insight into this field of jurisprudence can be gained from the works of Ehrlich, Pound, Fechner, Friedmann, and others. Since I feel that the philosophical analysis of the essential nature of the law and of the basic goals and values to be served by the legal order is an aspect of jurisprudential theory which has been somewhat neglected in the nineteenth and twentieth centuries, a substantial part of the present volume has been devoted to this critical area of legal thought.

I wish to thank the Rockefeller Foundation for facilitating the completion of this volume by a generous research grant. Gratitude is also expressed to the Yale Law School, which afforded me not only the use of its excellent research facilities but also the benefit of great intellectual stimulation. Invaluable help has been given by my wife, Brigitte M. Bodenheimer, who assisted in my research and contributed much constructive criticism. She also prepared the Index. Last but not least, appreciation is expressed to Miss Dorothy Alice Cox and Mrs. Mar Dean Leslie for their painstaking assistance in the preparation of the manuscript.

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February 1962

Edgar Bodenheimer

CONTENTS

PART II

THE NATURE AND FUNCTIONS OF THE LAW

PART III

THE SOURCES AND TECHNIQUES OF THE LAW

PART I

HISTORICAL INTRODUCTION TO THE PHILOSOPHY OF LAW

I

GREEK AND ROMAN LEGAL THEORY

Section 1. *Early Greek Theory*

All peoples and nations of this world, beginning with the early stages of their history, have formed certain ideas and conceptions—of varying concreteness and articulateness perhaps—about the nature of justice and law. If we start our survey of the evolution of legal philosophy with an account of the legal theory of the Greeks rather than that of some other nation, it is because the gift of philosophical penetration of natural and social phenomena was possessed to an unusual degree by the intellectual leaders of ancient Greece. By subjecting nature as well as society and its institutions to a searching, fundamental analysis, the Greeks became the philosophical teachers of the Western world and Greek philosophy a microcosm of world philosophy as a whole. While some of the presuppositions and conclusions stated by Greek thinkers have not been able, of course, to stand the test of time because of the discoveries and experience of later epochs, the way these thinkers posed and discussed the basic problems of life in philosophical terminology and explored various possible approaches to their solution

may claim enduring validity. In this sense, the words of Friedrich Nietzsche still hold true today: "When we speak of the Greeks, we unwittingly speak of today and yesterday." [1]

The legal conceptions of the archaic age of the Greeks are known to us through the epic works of Homer and the poetry of Hesiod. Law at that time was regarded as issuing from the gods and known to mankind through revelation of the divine will. Hesiod pointed out that wild animals, fish, and birds devoured each other because law was unknown to them: but Zeus, the chief of the Olympian gods, gave law to mankind as his greatest present.[2] Hesiod thus contrasted the *nomos* (ordering principle) of nonrational nature with that of the rational (or at least potentially rational) world of human beings. Foreign to his thought was the skepticism of some of the Sophists of a later age, who sought to derive a right of the strong to oppress the weak from the fact that in nature the big fish eat the little ones.[3] To him law was an order of peace founded on fairness, obliging men to refrain from violence and to submit their disputes to an arbiter.

Law and religion remained largely undifferentiated in the early period. The famous oracle of Delphi, considered an authoritative voice for the enunciation of the divine will, was frequently consulted in matters of law and legislation. The forms of lawmaking and adjudication were permeated with religious ceremonials, and the priests played an important role in the administration of justice. The king, as the supreme judge, was believed to have been invested with his office and authority by Zeus himself.[4]

The burial of the dead was regarded by the Greeks as a command of the sacral law, whose violation would be avenged by divine curse and punishment. A famous scene in Sophocles' tragedy *Antigone* graphically depicts a situation where this religious duty came into irreconcilable conflict with the command of a secular ruler. King Creon forbade the burial of Polyneikes, brother of Antigone, because he had offended against the laws of the state. Antigone, convinced that her action would expose her to certain death, heroically defied this command and buried her brother in accordance with the prescribed rites

[1] *Human, All-Too-Human,* vol. 7 of *Complete Works,* ed. O. Levy (New York, 1924), pt. II, p. 111.

[2] Hesiod, *Erga* (Works and Days), transl. A. W. Mair (Oxford, 1908), pp. 273–285 (verses 274 ff.).

[3] Felix Flückiger, *Geschichte des Naturrechts,* I (Zürich, 1954), 10; Alfred Verdross-Drossberg, *Grundlinien der antiken Rechts- und Staatsphilosophie* (Vienna, 1948), p. 17.

[4] See Flückiger, pp. 12–13.

of the Greek religion. When the king called her to account, she pleaded that in burying her brother she had broken Creon's law, but not the unwritten law:

> "Not of today or yesterday they are,
> But live eternal: (none can date their birth)
> Not I would fear the wrath of any man
> (And brave God's vengeance) for defying these."[5]

Here, in a famous dramatic work, we find one of the earliest illustrations of a problem which has occupied the attention of the legal thinkers of all ages: namely, the problem of the conflict between two orders of law, both of which seek to claim the exclusive allegiance of man.

An incisive change in Greek philosophy and thought took place in the fifth century B.C. Philosophy became divorced from religion, and the ancient, traditional forms of Greek life were subjected to searching criticism. Law came to be regarded not as an unchanging command of a divine being, but as a purely human invention, born of expediency and alterable at will. The concept of justice was likewise stripped of its metaphysical attributes and analyzed in terms of human psychological traits or social interests.

The thinkers who performed this "transvaluation of values" were called the Sophists, and they may be regarded as the first representatives of philosophical relativism and skepticism. Protagoras, for instance, one of the leading figures among the earlier Sophists, denied that man could have any knowledge about the existence or nonexistence of the gods and asserted that man as an individual was the measure of all things; "being" to him was nothing but subjectively colored "appearance." He also took the view that there exist at least two opinions on every question, and that it is the function of rhetoric to transform the weaker line of argumentation into the stronger one.[6]

A sharp distinction between nature (*physis*) and law (*nomos*) was drawn by the Sophist Antiphon. The commands of *physis* are necessary and inexorable, he taught, but those of the *nomos* stem from human arbitrariness and are nothing but casual, artificial arrangements changing with the times, men, and circumstances. According to him, nobody can violate the laws of nature with impunity; but one who violates a law of the state does not suffer either punishment or dishonor if the violation remains undetected. Implicit in this argument

[5] *Antigone* 450.

[6] The text of the preserved fragments of Protagoras (in Greek and German) is found in Hermann Diels, *Die Fragmente der Vorsokratiker*, 6th ed. by W. Kranz (Berlin, 1952), II, 263 ff.

is the assumption that human conventions are in reality nothing but fetters of natural "right." [7]

Proceeding from similar premises, the Sophist Callicles proclaimed the "right of the strong" as a basic postulate of "natural" as contrasted with "conventional" law. Nature in animal as well as human life, he argued, rests on the innate superiority of the strong over the weak; human legal enactments, on the other hand, are made by the weak and the many, because they are always in the majority. The laws attempt to make men equal, while in nature they are fundamentally unequal. The strong man, therefore, acts merely in accordance with *physis* if he flouts the conventions of the herd and throws off the unnatural restrictions of the law.[8]

The "right of might" was likewise taught by Thrasymachus, who, though he did not perhaps share Callicles' love of the self-sufficient superman, was convinced that laws were created by the men and groups in power to promote their own advantage. In a famous passage in the *Republic,* Plato puts into his mouth the following definition of justice: "I declare that justice is nothing else than that which is advantageous to the stronger." [9] It follows that the just man is he who obeys the laws serving the interest of the governing groups; the unjust man is he who disregards them. But since the subject who obeys the commands of the ruler is in reality promoting the good of another and inflicting injury on himself, Thrasymachus submitted, the just man is always worse off than the unjust man; it pays therefore to act unjustly, if one can get away with it. "Injustice, when great enough, is mightier and freer and more masterly than justice." [10]

Section 2. *Plato's View of the Law*

Socrates, in discussing the meaning of justice with Thrasymachus in Plato's *Republic,* is able to convince the listeners to the argument that the definition of justice had been turned "upside down" by Thrasymachus.[1] This indeed was the considered opinion of Socrates and his great pupil, Plato (429–348 B.C.), of most of the teachings of the Sophists: that the meaning of truth had been turned "upside down" by them, and that their skepticism and agnosticism posed a danger to the

[7] Diels, II, 346. See also J. Walter Jones, *The Law and Legal Theory of the Greeks* (Oxford, 1956), p. 38.

[8] See Callicles in Plato, *Gorgias,* transl. W. R. M. Lamb (Loeb Classical Library ed., 1932), 483–484.

[9] *The Republic,* transl. A. D. Lindsay (Everyman's Library ed., 1950), Bk. I. 338.

[10] *Id.,* Bk. I. 344.

[1] *The Republic,* transl. A. D. Lindsay, Bk. I. 343. On Thrasymachus' view of justice see the preceding section.

well-being of society and harmony within the commonwealth. Socrates set himself the task of overcoming the subjectivism and relativism of the Sophists and of establishing a substantive system of ethics based on an objectively verified theory of values. But he developed his ideas solely in oral disputation with his Athenian fellow citizens; as far as we know, he never reduced his teachings to written form. His philosophical views are known to us exclusively through the dialogues of Plato, who used Socrates—with whose ideas he was in basic agreement —as the mouthpiece through which he enunciated his own philosophy.[2]

In Plato's philosophy, a clear-cut distinction must be made between his thinking about justice and his ideas about law. His theory of justice was elaborate and forms a cornerstone of his philosophical edifice; it also remained largely unchanged throughout his life. His ideas on law, on the other hand, were peripheral in his scheme of thought and underwent a substantial change in the latter part of his life.

Justice meant in Plato's eyes that "a man should do his work in the station of life to which he was called by his capacities." [3] Every member of society, according to him, has his specific functions and should confine his activity to the proper discharge of these functions. Some people have the power of command, the capacity to govern. Others are capable of helping those in power to achieve their ends, as subordinate members of the government. Others are fit to be tradesmen, or artisans, or soldiers.

Plato was deeply convinced of the natural inequality of men, which he considered a justification for the establishment of a class system in his commonwealth. He exclaimed:

> You in this city are all brothers, but God as he was fashioning you, put gold in those of you who are capable of ruling; hence, they are deserving of most reverence. He put silver in the auxiliaries, and iron and copper in the farmers and the other craftsmen. For the most part your children are of the same nature as yourselves, but because you are all akin, sometimes from gold will come a silver offspring, or from silver a gold, and so on all round. Therefore the first and weightiest command of God to the rulers is this—that more than aught else they be good guardians of and watch zealously over the offspring, seeing which of those metals is mixed in their souls; if their own offspring has an admixture of copper or iron, they must show no pity, but giving it the place proper to its nature, set it among the artisans or the farmers; and if on the other hand in these classes children are born with an admixture of gold and silver, they shall do them honour and appoint the

[2] On Socrates see Ernest Barker, *Greek Political Theory: Plato and His Predecessors*, 4th ed. (London, 1951), pp. 86–99.

[3] This able definition of Platonic justice is found in Barker, p. 149.

first to be guardians, the second to be auxiliaries. For there is an oracle that the city shall perish when it is guarded by iron or copper.[4]

The men of gold are to become the rulers in Plato's ideal commonwealth; they must be philosophers (for until philosophy and governmental power coalesce, there will be no end to evil in the state in Plato's opinion),[5] and they will be endowed with absolute power, to be exercised rationally and unselfishly for the good of the state. The men of silver are to be the military guardians of the state and are to assist the rulers in the discharge of their governmental duties. The men of iron and copper will form the producing classes. The first two classes, in order to be able to devote their full energy to public duties, must renounce family life and private property; all unions between men and women in these two classes are to be temporary and to be regulated by the state for eugenic ends—the production of the fittest stock. The members of the third and largest class, on the other hand, will be permitted to found families and to own private property under the strict supervision of the government.

Each class, says Plato, must strictly confine its activity to the performance of its own specific functions. A rigorous division of labor among the three classes is to prevail within his commonwealth. Each citizen must fully discharge the duties which have been assigned to him by the government, according to his special capabilities and qualifications. The ruler, the auxiliary, the farmer, the craftsman—each of them must keep to his own calling and not interfere with the business of anyone else. "To mind one's own business and not to be meddlesome is justice." [6]

Plato realized that even in his ideal commonwealth disputes will arise which must be decided by the public authorities. It is the theory of *The Republic* that in deciding such controversies, the judges of the state should have a large amount of discretion. Plato does not wish them to be bound by fixed and rigid rules embodied in a code of laws.[7] The state of *The Republic* is an executive state, governed by the free intelligence of the best men rather than by the rule of law. Justice is to be administered "without law." [8]

[4] *The Republic,* Bk. III. 415.

[5] *Id.,* Bk. V. 473.

[6] *Id.,* Bk. IV. 433. A further discussion and analysis of Plato's views on justice will be found *infra* Sec. 47.

[7] *Id.,* Bk. IV. 425, 427.

[8] See Roscoe Pound, "Justice According to Law," 13 *Columbia Law Review* 696–713 (1913); 14 *Col. L. Rev.* 1–26, 103–121 (1914). Karl R. Popper, in *The Open Society and Its Enemies* (Princeton, 1950), chs. 6–8, depicts Plato as the philosopher of racialist totalitarianism. A different view is taken by John Wild, *Plato's Modern Enemies and the Theory of Natural Law* (Chicago, 1953). See also Jerome

The reasons for Plato's unfavorable attitude toward law are stated in his dialogue, *The Statesman.* "Law," he says there, "can never issue an injunction binding on all which really embodies what is best for each; it cannot prescribe with perfect accuracy what is good and right for each member of the community at any one time. The differences of human personality, the variety of men's activities, and the restless inconstancy of all human affairs make it impossible for any art whatsoever to issue unqualified rules holding good on all questions at all times." [9] Principles of law, he believed, consist of abstractions and oversimplifications; a simple principle, however, can never be applied to a state of things which is the reverse of simple. Hence, "the best thing of all is not full authority for laws but rather full authority for a man who understands the art of Kingship and has wisdom." [10]

In the last decade of his life, however—perhaps under the impact of the negative experiences which an attempt to set up the ideal Platonic commonwealth in the city of Syracuse in Sicily had produced —[11] Plato contrasted the picture of the state governed by the free and untrammeled rule of personal intelligence with that of another type of state, in which the discretion of the rulers was limited by law. While the "non-law" state was still upheld by him as the highest and most perfect type of government, he admitted that its effective operation required men of the highest wisdom and infallibility of judgment. Since such men could only rarely be found, he proposed the "law state" as the second best alternative for the governance of man. The blueprint of such a state is drawn in great detail in his last work, *The Laws.* No longer are the governing authorities of the state free to administer justice without written codes and legal enactments; they are to become the servants of the law, bound to take their directions from the general enactments which are to guide the conduct of the citizens without respect of persons.[12]

Hall, "Plato's Legal Philosophy," in *Studies in Jurisprudence and Criminal Theory* (New York, 1958), pp. 48–82; Carl J. Friedrich, *The Philosophy of Law in Historical Perspective* (Chicago, 1963), pp. 13–19; Huntington Cairns, *Legal Philosophy from Plato to Hegel* (Baltimore, 1949), pp. 29–76.

[9] *The Statesman,* transl. J. B. Skemp (New York, 1957), 294b. In a later passage, Plato says in a similar vein: "The legislator . . . will never be able, in the laws he prescribes for the whole group, to give every individual his due with absolute accuracy." *Id.,* 295a.

[10] *Id.,* 294a.

[11] The Sicilian experiment is described in Barker, pp. 113–116.

[12] See Plato, *The Laws,* transl. R. G. Bury (Loeb Classical Library ed., 1926), Bk. IV. 715. D. The communism of the ruling classes advocated in *The Republic* is also abandoned in this work. The rulers of the state and their auxiliaries, like the members of the producing class, are allowed to possess a family and private property.

Section 3. *The Aristotelian Theory of Law*

Aristotle (384–322 B.C.) received his philosophical education at Plato's Academy in Athens and was strongly influenced by the ideas of his teacher. He departed from them in many respects, however, in his own philosophy and tempered the Platonic idealism and rationalism by paying greater deference than his teacher to the actual conditions of social reality and the imperfections of men and institutions.

Aristotle's realism permitted him to see that a state organized in the image of Plato's ideal republic would necessarily founder on the rocks of average human nature. As Plato himself had come to realize after the bitter experiences of the Sicilian adventure,[1] "no human being . . . is capable of having irresponsible control of all human affairs without becoming filled with pride and injustice." [2] Aristotle, avoiding the Platonic route of drawing blueprints for the "perfect" as well as the "second-best" state, postulated a state based on law as the only practicable means of achieving the "good life," which, according to him, was the chief goal of political organization.[3] "Man," he exclaimed, "when perfected is the best of animals, but if he be isolated from law and justice he is the worst of all." [4]

Rightly constituted laws, said Aristotle, should be the final sovereign; these laws should be sovereign on every issue, except that personal (that is, executive) rule should be permitted to prevail in those matters on which the law was unable to make a general pronouncement.[5] In general, Aristotle held, "the rule of law is preferable . . . to that of a single citizen." [6] Even though he agreed with Plato that, if there was a man of outstanding eminence in virtue and political capacity in the state, such a man should become the permanent ruler,[7] he insisted that even such a "godlike" man must be a lawgiver, and that there must be a body of laws even in a state governed by such a man.[8]

[1] See *supra* Sec. 2, n. 11.

[2] Plato, *The Laws*, transl. R. G. Bury, Bk. IV. 713. C.

[3] Aristotle, *The Politics*, transl. E. Barker (Oxford, 1946), Bk. I. 1252b. See also Ernest Barker's introduction to this volume and Friedrich, *The Philosophy of Law in Historical Perspective*, pp. 19–26.

[4] *The Politics*, Bk. I. 1253a.

[5] *Id.*, Bk. III. 1282b; Bk. IV. 1292a.

[6] *Id.*, Bk. III. 1287a. This is probably the first historical formulation of Harrington's conception of an "empire of laws and not of men."

[7] *Id.*, Bk. III. 1284a and b. In the absence of such a "God among men," Aristotle regarded a democracy based on the strength of the middle classes as the best form of government. Bk. IV. 1295b and 1296a.

[8] *Id.*, Bk. III. 1286a. This view seems to be contradicted by an earlier passage, according to which "there can be no law which runs against men who are utterly superior to others. They are a law in themselves." *Id.*, 1284a. The context suggests,

"He who commands that law should rule may thus be regarded as commanding that God and reason alone should rule; he who commands that a man should rule adds the character of the beast. Appetite has that character; and high spirit, too, perverts the holders of office, even when they are the best of men. Law . . . may thus be defined as 'reason free from all passion.' " [9]

Aristotle, however, was conscious of the fact that in the administration of a system of law situations may arise where the universality and rigidity of legal rules may cause hardship in an individual case.[10] Aristotle proposes to cure such hardships by means of equity (*epieikeia*). In his definition, equity is "a rectification of law where law is defective because of its generality." [11] The law takes into consideration the majority of cases, the typical and average situation, but it cannot condescend upon particulars; it is frequently unable to do justice in the unique case. When such a case arises, the judge may depart from the letter of the law and decide the case as the lawgiver himself would presumably have disposed of the matter had he foreseen the possibility of its occurrence.[12]

The famous Aristotelian distinction between distributive and corrective justice will be discussed elsewhere.[13] Aristotle makes a further important distinction between that part of justice which is *natural* and that which must be regarded as *conventional.* "A rule of justice is natural that has the same validity everywhere, and does not depend on our accepting it or not. A rule is conventional that in the first instance may be settled in one way or the other indifferently, though after having once been settled it is not indifferent: for example, that the ransom for a prisoner shall be a mina, that a sacrifice shall consist of a goat and not of two sheep." [14]

While the meaning of the term "conventional justice" is quite clear

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however, that Aristotle is speaking here of election laws and laws relating to the distribution and terms of political office, which, in his opinion, should not be applied to men who are "utterly superior to others."

[9] *Id.*, Bk. III. 1287a.

[10] "Law is always a general statement, yet there are cases which it is not possible to cover in a general statement." Aristotle, *The Nicomachean Ethics*, transl. H. Rackham (Loeb Classical Library ed., 1934), Bk. V. x. 4.

[11] *Id.*, Bk. V. x. 6. The early English system of equity, in accordance with Aristotle's idea, was conceived as a correction of the rigid, inflexible system of the common law.

[12] *Id.*, Bk. V. x. 4–6. On the Aristotelian conception of *epieikeia* see also *infra* Sec. 55.

[13] See *infra* Secs. 47 and 49.

[14] *Nicomachean Ethics*, Bk. V. vii. 1. In *The Politics*, Aristotle took the view that the state belongs to the class of things that exist by nature, and that man is by nature an animal intended to live in a state. See Bk. I. 1253a.

—the rule of the road being a typical example of it—the Aristotelian notion of natural justice has been obscured by the passages immediately following the sentence quoted above, where Aristotle seems to recognize a changeable part of natural law as well as an immutable one. He even seems to suggest that permanent justice exists perhaps only among the gods, and that within the range of our human world, although there is such a thing as natural justice, all rules of justice are variable. What Aristotle may have had in mind—although the text has perhaps been transmitted to us in a garbled form—is that what might be regarded by man as "naturally just" in a primitive society might offend the common sense of justice in a highly developed civilization. As men advance in controlling the blind forces of nature, in developing a stronger moral sense, and in gaining a greater capacity for mutual understanding, their feeling of justice becomes more refined; it may dictate to them certain forms of social conduct and intercourse which, unlike the rules of conventional justice, are considered imperative rather than accidental or morally indifferent.[15] He may also have meant that natural law is variable in the sense that human effort can, to some extent, interfere with its operation. Thus he tells us that "the right hand is naturally stronger than the left, yet is it possible for any man to make himself ambidextrous." [16] The cryptic way in which the thought is formulated by Aristotle makes any attempt at genuine interpretation a hazardous guess.

The question as to the legal consequences of a collision between a rule of natural justice and a positive enactment of the state is left unanswered by Aristotle. He clearly admits the possibility of an "unjust" law, giving as an example an enactment by a majority dividing among its members the possessions of a minority.[17] He also points out that other acts of oppression, whether committed by the people, the tyrant, or the wealthy, are "mean and unjust." [18] Aristotle also taught, as was stated earlier, that *rightly constituted* laws (rather than laws *per se*) should be the final sovereign.[19] But he does not give us his opinion on whether bad laws must under all circumstances be enforced by the judiciary and observed by the people.[20]

[15] The author's own views on this question are stated in Sec. 50.
[16] *Nicomachean Ethics*, Bk. V. vii. 4.
[17] *The Politics*, Bk. III. 1281a.
[18] *Ibid.*
[19] See *supra* n. 5.
[20] Plato, on the other hand, to some extent recognized a right—or even a duty—of resistance to unconscionable commands of the state in *The Laws*, Bk. VI. 770 E. On the question of the validity of unjust laws see *infra* Sec. 58.

Section 4. *The Stoic Law of Nature*

The Stoic school of philosophy was founded by a thinker of Semitic origin by the name of Zeno (350–260 B.C.). Zeno and his followers placed the concept of "nature" in the center of their philosophical system. By nature they understood the ruling principle which pervades the whole universe and which, in a pantheistic manner, they identified with God. This ruling principle was of an essentially rational character; to Zeno the whole universe consisted of one substance, and this substance was reason. The law of nature was to him identical with the law of reason. Man, as a part of cosmic nature, was an essentially rational creature. In following the dictates of reason, he was conducting his life in accordance with the laws of his own nature.[1] The Stoics taught that man should live free from emotions and passions, that he should make himself independent of the outside world and of worldly goods, and that he should order all his faculties in a rational manner. He should be fearless, bear his ineluctable fate with equanimity, and strive to attain a complete inner tranquillity and harmony.

Reason, as a universal force pervading the whole cosmos, was considered by the Stoics as the basis of law and justice. Divine reason, they held, dwells in all men everywhere, irrespective of nationality or race. There is one common law of nature, based on reason, which is valid universally throughout the cosmos. Its postulates are binding upon all men in every part of the world. The Stoic philosophers taught that there should not be different city-states, each distinguished from the rest by its own peculiar system of justice. They developed a cosmopolitan philosophy, founded on the principle of the equality of all men and the universality of natural law. Their ultimate ideal was a world-state in which all men would live together harmoniously under the guidance of divine reason.

Cicero (106–43 B.C.), the great Roman lawyer and statesman, was strongly influenced by the ideas of the Stoic philosophers. Like them, he was inclined to identify nature and reason and to assume that reason was the dominating force in the universe.

> True law is right reason in agreement with nature; it is of universal application, unchanging and everlasting; it summons to duty by its commands, and averts from wrongdoing by its prohibitions. And it does not lay its commands or prohibitions upon good men in vain, though neither have any

[1] "What then is peculiar to man? Reason. When this is right and has reached perfection, man's felicity is complete." Seneca, "Ad Lucilium," in *Epistulae Morales*, transl. R. M. Gummere (Loeb Classical Library ed., 1930), Epistle 76. 10.

effect on the wicked. It is a sin to try to alter this law, nor is it allowable to attempt to repeal any part of it, and it is impossible to abolish it entirely. . . . And there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and all times and there will be one master and ruler, that is God, over us all, for he is the author of this law, its promulgator, and its enforcing judge.[2]

In ascribing "natural force" to the law, Cicero made it clear that the mind and reason of the intelligent man was the standard by which justice and injustice were to be measured.[3] Characteristic of the reasonable man was the disposition of his mind to give everyone his due, and this attitude was equated with justice by Cicero.[4] Being perhaps first confined to the family, relatives, and friends of a man, he pointed out, this attitude was with the unfolding of civilization bound to spread to fellow citizens, then to political allies, and would finally embrace the whole of the human race.[5] To Cicero, the sense of justice, though capable of growth and refinement, was a universal possession of all reasonable men. "For since an intelligence common to us all makes things known to us and formulates them in our minds, honourable actions are ascribed by us to virtue and dishonourable actions to vice; and only a madman would conclude that these judgments are matters of opinion, and not fixed by Nature." [6] Justice is therefore inherent in nature (understood as human nature), and as a necessary condition of human collective well-being it can never be separated from utility (as some Sophists had attempted to do).[7]

Cicero regarded as "the most foolish notion of all" the belief that everything was just which was found in the customs or laws of nations. Would this be true, he asked, even if these laws had been enacted by tyrants? Could, for instance, a law be considered just which provided that a dictator might put to death with impunity any citizen he wished, even without a trial? Could theft and adultery and forgery

[2] *De Re Publica,* transl. C. W. Keyes (Loeb Classical Library ed., 1928), Bk. III. xxii. Examples of "natural law" given by Cicero are the rule permitting self-help against aggression (*De Inventione,* transl. H. M. Hubbell, Loeb Classical Library ed., 1913, Bk. II. liii. 61); prohibitions against insidious and fraudulent acts (*De Officiis,* transl. W. Miller, Loeb Classical Library ed., 1913, Bk. III. xvii); and in general the principle that one should not do harm to anybody (Bk. III. v). Cf. Ernst Levy, "Natural Law in the Roman Period," 2 *University of Notre Dame Natural Law Institute Proceedings* 43, at 44–51 (1949).

[3] *De Legibus,* Bk. I. vi. 20.

[4] *De Finibus Bonorum et Malorum,* transl. H. Rackham (Loeb Classical Library ed., 1951), Bk. V. xxiii.

[5] *Ibid.*

[6] *De Legibus,* Bk. I. xvi. 45.

[7] *Id.,* Bk. I. xii. 33–34.

of wills be sanctioned by the edict of a ruler or a law passed by a legislature? To Cicero the answer was clear.[8] "Pestilential" statutes put into effect by nations, he emphasized, no more deserved to be called laws than the rules a band of robbers might pass in their assembly.[9] Cicero thus appeared to favor the position that an utterly unjust law lacks the quality of law.

Many of the famous Roman jurists of the classical epoch of Roman law (which lasted from the first century B.C. to the middle of the third century A.D.) were likewise under the influence of the Stoic philosophy. However, the work of these men was largely of a practical nature, and they had little occasion to engage in abstract theoretical discussions about the nature of law and justice. Although the legal texts of the classical epoch abound with references to *jus naturale, naturalis ratio,* and *natura rerum,* the "natural law" envisaged in these texts is usually not the universal and supratemporal law discussed by Cicero, but rather represents a proposed solution of a case which is in accord with the expected conduct of men in Roman society or with the inherent justice of a particular factual situation. As Ernst Levy points out, " 'Natural' was to them not only what followed from physical qualities of men or things, but also what, within the framework of [the legal] system, seemed to square with a normal and reasonable order of human interests and, for this reason, need not be in need of any further evidence." [10]

Sometimes the concept of natural law was employed by the classical Roman jurists in a sense more closely akin to Cicero's use of the term. The classical jurist Gaius, for instance, declares in his *Institutes:* "All nations who are ruled by law and customs make use partly of their own law, and partly of that which is common to all men. For whatever law any people has established for itself is peculiar to that State and is called the *jus civile,* as being the particular law of that state. But whatever natural reason has established among all men is equally observed by all mankind, and is called *jus gentium,* because it is the law which all nations employ." [11]

The *jus civile* referred to by Gaius was a law that was applicable to Roman citizens only. *Jus gentium,* on the other hand, was a body of

[8] *Id.,* Bk. I. xvi. 43–44.

[9] *Id.,* Bk. II. v. 13. On Cicero see also Cairns, *Legal Philosophy from Plato to Hegel,* pp. 127–162; Friedrich, *Philosophy of Law in Historical Perspective,* pp. 27–34; R. Stone de Montpensier, "A Reappraisal of Cicero's Jurisprudence," 54 *Archiv für Rechts- und Sozialphilosophie* 43 (1968).

[10] Levy, *supra* n. 2, p. 51. Many examples are given on pp. 51–54. See also Max Kaser, "*Mores maiorum und Gewohnheitsrecht,*" 59 *Zeitschrift der Savigny-Stiftung* (*Roman. Abt.*) 59 (1939).

[11] Gaius, *Inst.* I. 1. 1; *Justinian's Digest* I. 1. 9.

rules which were applied in controversies involving non-citizens of Rome. It was composed of usages, rules, and principles which represented the common ingredients in the legal systems of the people with which Rome came into contact.[12] Whenever a particular rule or usage was observed by the Romans to be practiced by a large number of other nations, it was incorporated into the *jus gentium.*[13] As a body of universal or well-nigh universal principles, Gaius equated it with *jus naturale.*

However, another and less meaningful definition of natural law also appears in the Roman sources. According to Ulpian, a Roman jurist of the third century A.D., "The law of nature is that which nature has taught all animals. This law is not peculiar to the human race, but belongs to all creatures living on the land or in the sea and also to birds. Hence arises the union of male and female which we call marriage, hence the procreation of children, hence their rearing; for we see that all animals, even wild beasts, appear to take part in this knowledge of the laws." [14] This community of law among men and animals is foreign to the thinking of Cicero and the Stoics, and the passage is also not considered by modern scholars to be representative of the views of the classical jurists.[15]

An important element in the Stoic concept of natural law was the principle of equality. The Stoic philosophers were convinced that men were essentially equal and that discriminations between them on account of sex, class, race, or nationality were unjust and contrary to the law of nature. This Stoic idea of human equality gained some ground in the political philosophy and jurisprudence of the Roman Empire. Naturally, the influence of Stoic philosophy was merely one element among others that contributed to the tendency toward a somewhat greater social equality, which was noticeable in the post-Augustan period. But since some of the great emperors of that period, like Antoninus Pius and Marcus Aurelius, as well as some of the jurists, like Papinian and Paul, were under the sway of Stoicism, the causal connection between this philosophy and the growth of humanitarian and equalitarian ideas in the Roman Empire should not be underestimated. Various attempts were made to adapt the positive law to the

[12] See Henry Maine, *Ancient Law,* ed. Frederick Pollock (London, 1930), pp. 52–60.

[13] Common observances of this type were, among others, the right of self-defense; the right to appropriate chattels that had been abandoned by their owner; the prohibition of incest between ascendants and descendants; the determination of the status of an illegitimate child according to the status of the mother.

[14] *Dig.* I. 1. 1. 3.

[15] Levy, *supra* n. 2, pp. 66.

postulates of a Stoic natural law, although the scope of these attempts was limited to certain specific measures and did not affect the main body and institutions of Roman law.[16] The institutions of slavery and the family, especially, were influenced by the spread of the new doctrine.

With regard to slavery, the Stoic idea of human equality made itself felt in the definition of slavery which is found in Justinian's Corpus Juris Civilis. The jurist Florentinus, who taught under the emperors Marcus Aurelius and Commodus, defined it as follows: "Slavery is an institution of the *jus gentium* by which, contrary to nature, one man is made the property of another." [17] The interesting feature of this definition is the remark that the institution of slavery is "contrary to nature." The assumption underlying this statement is that there exists a law of nature according to which all men are equal. The same idea appears in the following passage by Ulpian: "So far as the civil law is concerned, slaves are not considered persons; but this is not the case according to natural law, because natural law regards all men as equal." [18] In these statements the influence of Stoic ideas is very apparent. Although this supposed principle of human equality was never put into practice in the Roman Empire, it may have been an element in the legal reforms through which the status of the slaves was gradually ameliorated. Seneca, the Roman Stoic philosopher, demanded with great vigor a more humane regulation of slavery; and some of the emperors put into practice actual measures which caused an improvement in the legal and social positions of slaves. The emperor Claudius decreed that a slave who had been cast off on account of old age or sickness should become a free man. Hadrian forbade masters to kill their slaves except upon the judgment of a magistrate.[19] He also prohibited the torture of slaves for evidence, unless there was some case against the accused, and suppressed private prisons for slaves. In addition, he stopped the sale of men or women slaves to purveyors for gladiatorial shows. The emperor Antoninus Pius provided that slaves who had been ill-treated by their owners might lodge a complaint with the magistrates; he also forced masters who had gravely mal-

[16] Later the ideas of Christianity also encouraged the practice of greater humanitarianism.

[17] *Dig.* I. 5. 4.

[18] *Dig.* L. 17. 32. See also *Inst.* I. 2. 2: "Wars have arisen, and captivity and slavery, which are contrary to natural law, as according to natural law all men were originally born free."

[19] A violation of this statute did not subject the master to criminal punishment and therefore the statute did not attain great importance. Theodor Mommsen, *Römisches Strafrecht* (Berlin, 1899), p. 617, n. 2; Fritz Schulz, *Principles of Roman Law,* transl. M. Wolff (Oxford, 1936), p. 220.

treated slaves to sell them.[20] It is true that economic reasons were partly responsible for these protective measures; after the pacification of the Roman Empire by Augustus, the number of slaves began to decline, and it became necessary to conserve the labor power of the remaining ones. But the influence of humanitarian ideas upon this development was very considerable.

The growth of humanitarian ideas, which may to some extent be traced to the Stoic concept of natural law and equality, can likewise be noticed in the legal development of the Roman family. First of all, it affected the legal status of the Roman housewife and contributed to her gradual emancipation from the autocratic power of the husband. In early Roman law, the normal marriage was accompanied by *manus;* under this form of marriage, the wife became subjected to the despotic rule of her husband. He held the power of life and death over her, and he could sell or enslave her. She was not capable of owning any separate property. She had no right to divorce her husband, while he had the power to divorce her. Besides this strict and formal marriage, there existed a free form of marriage in which the wife kept her personal and financial independence. But in early republican Rome the marriage with *manus* was the customary form of matrimonial life. This whole situation, and with it the legal and social status of the married woman, changed in the late republican period and under the reign of the emperors. Marriage with *manus* was more and more supplanted by free marriage. In the last century of the republic, free marriage already predominated, and marriage with *manus,* though it still existed, became the exception. The *lex Julia de adulteriis,* enacted by Augustus, abolished the husband's power of life and death over his wife in the *manus* marriage. By the time of Justinian (483–565 A.D.), marriage with *manus* had died out and was no longer recognized by the law. For all practical purposes, the Roman married woman in the imperial period was independent of her husband. He had little or no control over her actions. She could freely and easily divorce him. In some respects, she was more emancipated than women are today under the laws of most civilized countries.[21]

The legal relationship between parents and children was likewise

[20] On the reform of slavery see W. W. Buckland, *The Roman Law of Slavery* (Cambridge, Eng., 1908), p. 37; Schulz, pp. 215–222; Paul Jörs, Wolfgang Kunkel, and Leopold Wenger, *Römisches Privatrecht,* 2d ed. (Berlin, 1935), p. 67; William L. Westerman, "Sklaverei," *Pauly-Wissowas Realenzyklopädie,* supp. vol. VI, p. 1041.

[21] The Roman woman, however, did not acquire political rights, such as the right to vote and to take office.

assuming more humane forms, although this was accomplished very slowly and gradually. The autocratic power which the Roman family father held over the person and property of his children was never abolished as such, but it was gradually mitigated through a series of specific legal measures. Caracalla forbade the sale of children except in case of extreme poverty. Hadrian punished abuses of the right of the *pater familias* to kill his child. The right of the father to force his grown-up son or daughter to divorce a spouse with whom he or she lived in free marriage was taken away by the emperors Antoninus Pius and Marcus Aurelius. A duty of the father to support his children was recognized in the late imperial period. The father's absolute power of disposition over the property of his grown-up sons was gradually restricted. Under Augustus, soldiers who stood under *patria potestas* gained the independent use of property which they had acquired during their service in the army (*peculium castrense*). Other restrictions on the father's power of disposition were introduced in the course of time.[22]

It shall by no means be contended that in this whole development the influence of Stoic natural-law concepts was the primary factor. Every historical development is determined by a great number of concurring and intertwining causes, and it is often very difficult to measure the exact weight of one particular factor. All that may be said is that many of the leading men of Roman political and legal life in the late republic and the imperial period stood under the influence of Stoic philosophy, and that it is very likely that this humanitarian philosophy played some part in the legal and social reforms which took place in this period of Roman history. Among the sociological reasons which may perhaps explain why the Stoic philosophy fell on such fertile soil in Rome must be counted the trend toward a universal empire, which was very marked in the last period of antiquity and which led to the creation of the *Imperium Romanum*. The Stoic concept of a world-state with a common citizenship and a common law, based on natural reason, acquired a very real and nonutopian meaning under these circumstances. With the granting of citizenship rights to most of the Roman provincial subjects in 212 A.D., the idea of a community of civilized mankind (*civitas maxima*), as opposed to the parochialism of

[22] On the development of family relations in Roman law see Schulz, pp. 192–202; W. W. Buckland, *The Main Institutions of Roman Private Law* (Cambridge, Eng., 1931), pp. 56–72; Jörs, Kunkel, and Wenger, pp. 271–296; James Bryce, "Marriage and Divorce," in *Studies in History and Jurisprudence* (New York, 1901), pp. 782–811; H. F. Jolowicz and Barry Nicholas, *Historical Introduction to the Study of Roman Law*, 3rd ed. (Cambridge, Eng., 1972), pp. 114–120, 233–239.

the small city-states of earlier periods, had found an approximate realization. It was no wonder that under these conditions the philosophical concepts of Stoicism, which found additional support in the rise and spreading of Christian ideas, had a significant impact on the political and legal developments of the Roman Empire.

II

LEGAL PHILOSOPHY IN THE MIDDLE AGES

Section 5. *Early Christian Doctrine*

In the Middle Ages all Christians shared one common concept of the universe: that which had been laid down in the New Testament and in the teachings of the Fathers of the Church. Legal philosophy, like all other branches of sciences and thinking, was dominated by the church and its doctrines. But the heritage of antiquity was not lost; Plato, Aristotle, and the Stoics exercised an influence upon the minds of many ancient and medieval Christian thinkers, even though the concepts and ideas which the philosophy of antiquity had produced were reinterpreted or revised in the light of the theology and doctrines of the Christian church.

The early foundations of Christian legal philosophy were laid several centuries before the beginning of the Middle Ages. A reference to "natural law" can be found in the Epistle of Paul to the Romans, in which he speaks of a "law written in [men's] hearts" and contemplates the possibility of Gentiles, who do not have the law of the sacred

books, doing "by nature the things contained in the law." [1] This passage may be interpreted as a recognition of an innate moral sense in man which, if properly developed, directs him toward the good even in the absence of a written law known to him.

Perhaps the most important and influential among the Fathers of the Church was St. Augustine (354–430 A.D.). He was born in North Africa and lived and died as a citizen of the late Roman empire. It was Augustine's conviction that in a golden age of mankind, prior to man's fall, an absolute ideal of the "law of nature" had been realized. Men lived in a state of holiness, innocence and justice; they were free and equal; slavery and other forms of dominion of men over other men were unknown. All men enjoyed their possessions and goods in common and lived as true brothers under the guidance of reason. Not even death existed at this period.

At the time of man's fall, Augustine taught, his nature was vitiated by original sin. The good elements in man's nature were not eradicated, but they became vulnerable and easily thwarted by evil predispositions.[2] The former order of love gave way to a condition of existence in which concupiscence, greed, passion, and lust for power came to play a conspicuous part, and the curse of mortality befell mankind as a punishment for its corruption. The absolute law of nature which had mirrored the perfection and unqualified goodness of the human soul was no longer capable of realization. Reason had to devise practical means and institutions to meet the new conditions. Government, law, property, and the state appeared on the scene; although products of sin in their roots, they were justified by Augustine in the light of the deteriorated condition of mankind. Augustine believed that the church, as the guardian of the eternal law of God (*lex aeterna*), may interfere at will with these sinful institutions. It has unconditional sovereignty over the state. The state is justified only as a means of keeping peace on earth. It must defend the church, execute its commands, and preserve order among men by enforcing the worldly law (*lex temporalis*).[3]

The worldly law, in Augustine's opinion, must strive to fulfill the demands of the eternal law. If it contains provisions which are clearly contrary to the law of God, these provisions are of no force and should be disregarded. "Justice being taken away then, what are King-

[1] Rom. ii:14–15.

[2] See *Basic Writings of Saint Augustine*, ed. W. J. Oates (New York, 1948), I, 432–433, 643–644. Augustine believed that "the entire mass of our nature was ruined beyond doubt, and fell into the possession of its destroyer. And from him no one—no, not one—has been delivered, or is being delivered, or ever will be delivered, except by the grace of the Redeemer." *Id.*, p. 644.

[3] *Id.*, II, 468 ff.

doms but great robberies?"[4] Even if the worldly law attempts to comply with the postulates of the *lex aeterna* and to accomplish justice in the relations of men, it will never attain the perfection of the eternal law. At some time in the remote future, Augustine hoped, the *civitas terrena*, the mundane commonwealth, would be replaced by the *civitas dei*, the commonwealth of God. In that commonwealth, envisioned as a community of all the faithful and believing, the eternal law of God would reign forever, and man's original nature, contaminated by Adam's transgression, would be restored to full glory.

Isidore of Seville (who died in 636) taught, like Augustine, that the institution of the state owed its origin to man's corrupted nature. Government became necessary to restrain bad men from evil-doing through fear of punishment. He maintained, however, that only just rulers deserve to be respected as genuine bearers of authority, while tyrants are not entitled to such reverend homage.

Isidore, following the Roman jurists, distinguished between *jus naturale*, *jus civile*, and *jus gentium*. His conception of natural law was formulated as follows: "Natural law is common to all peoples in that it is possessed by an instinct of nature, not by any human agreement, as the marriage of man and woman, the begetting and rearing of children, the common possession of all things, the universal freedom of all, the acquisition of those things that are taken in the air or sea or on land, likewise the restoring of property entrusted or lent, the repairing of violence by force. For this, or whatever is like this, could never constitute an injustice but must be considered in accord with natural equity."[5] Obviously the definition, insofar as it speaks of a "common possession of all" and of universal liberty, contemplates partly the supposed "absolute natural law" of mankind's early period, since at the time when Isidore of Seville wrote, neither communism nor the equal liberty of all men were realized either in his country or in others.

Section 6. *The Thomist Philosophy of Law*

The theology and philosophy of medieval Catholicism reached its culmination in the monumental system of Thomism. St. Thomas

[4] *Id.*, p. 51. On St. Augustine see also Carl J. Friedrich, *The Philosophy of Law in Historical Perspective*, 2d ed. (Chicago, 1963), pp. 35–41; A. H. Chroust, "The Fundamental Ideas in St. Augustine's Philosophy of Law," 18 *American Journal of Jurisprudence* 57 (1973); Michel Villey, *La formation de la pensée juridique moderne* (Paris, 1968), pp. 69–96.

[5] Isidore, *Etymologia* (in Migne, *Patrologia Latina*, vol. 82), Bk. V, ch. 4; see also the *Decretum Gratiani*, dist. prima, ch. vii, in *Corpus Juris Canonici*, ed. A. Friedberg (Leipzig, 1879), p. 1.

A different conception of natural law is found in the Preamble to the *Decretum Gratiani*, where we read that the law of nature is nothing other than the golden rule, comprised in the law and the gospel, which bids us to do as we would have done to us, and forbids the contrary.

Aquinas (1226–1274) was the greatest of the Scholastic philosophers of the Middle Ages,[1] and his teachings may still be regarded as an authoritative expression of the theological, philosophical, and ethical convictions of Roman Catholicism. His system represented an ingenious synthesis of Christian scriptural dogma and Aristotelian philosophy. The influence of Aristotle reveals itself particularly in Aquinas' thinking on law and justice, but is adapted by him to the doctrines of the gospel and integrated into an imposing system of thought.

Thomas Aquinas distinguished between four different kinds of law: the eternal, the natural, the divine, and the human law.

The eternal law (*lex aeterna*) is the "plan of government in the Chief Governor." [2] It is the divine reason and wisdom directing all movements and actions in the universe. All things subject to divine providence are ruled and measured by the eternal law. In its entirety it is known only to God. No human being is capable of knowing it as it is, except perhaps "the blessed who see God in His essence." [3]

But though no ordinary mortal can know the eternal law in its whole truth, he can have a partial notion of it by means of the faculty of reason, with which God has endowed him. This participation of the rational creature in the cosmic law is called natural law (*lex naturalis*) by St. Thomas. The natural law is merely an incomplete and imperfect reflection of the dictates of divine reason, but it enables man to know at least some of the principles of the *lex aeterna*.[4]

Natural law directs the activities of man by means of certain general precepts. The most fundamental of these precepts is that good is to be done and evil to be avoided.[5] But what are the criteria of that which is to be regarded as good and that which must be apprehended as evil? St. Thomas is convinced that the voice of reason in us (which enables us to obtain a glimpse of the eternal law) makes it possible for us to distinguish between morally good and bad actions. According to his theory, those things for which man has a natural inclination must be apprehended as good and must be regarded as forming part of the natural law. First, there is the natural human instinct of self-preservation, of which the law must take cognizance. Second, there exists the attraction between the sexes and the desire to rear and educate children. Third, man has a natural desire to know the truth about God, an inclination which drives him to shun ignorance. Fourth, man wishes to

[1] By Scholasticism we designate a system of medieval thinking under which an attempt was made to bring secular philosophy, especially Aristotelianism, into harmony with religious dogma.

[2] St. Thomas Aquinas, *Summa Theologica*, transl. Fathers of the English Dominican Province (London, 1913–1925), pt. II, 1st pt., qu. 93, art. 3.

[3] *Id.*, qu. 93, art. 2.

[4] *Id.*, qu. 91, arts. 2 and 3.

[5] *Id.*, qu. 94, art. 2.

live in society, and it is therefore natural for him to avoid harming those among whom he has to live.[6] While the basic precepts of natural law are considered immutable by St. Thomas, he admits the possibility of changing the secondary precepts (which are certain detailed conclusions derived from the first principles) under certain circumstances.[7]

It is obvious that natural law according to the Thomistic conception consists of certain physical and psychological traits of human beings and, in addition, of some dictates of reason which direct man toward the achievement of the good. The latter are regarded by Aquinas as "natural" in the same sense that the instinct of self-preservation or the sex instinct are natural. "There is in every man a natural inclination," he says, "to act according to reason: and this is to act according to virtue. Consequently, considered thus, all acts of virtue are prescribed by the natural law: since each one's reason naturally dictates to him to act virtuously." [8] Under this view, irrational, antisocial, and criminal acts are interpreted as morbid deviations from our normal nature, just as the innate instinct of self-preservation may in some people and under certain circumstances be blotted out by an urge to destroy one's own life.

Natural law, as a body of rather general and abstract principles, is supplemented in Thomist philosophy by more particular directions from God as to how men should conduct their lives. This function is performed by the divine law (*lex divina*). It is the law revealed by God through the Holy Scriptures and recorded in the Old and New Testaments.

The last kind of law is the human law (*lex humana*). It is defined by Aquinas as "an ordinance of reason for the common good, made by him who has care of the community, and promulgated." [9] Thus Aquinas, like Aristotle, incorporates the concept of reason into his definition of law.[10] In order that a governmental mandate may have the quality of law, it needs to comply with some postulate of reason. An unjust and unreasonable law, and one which is repugnant to the law of nature, is not a law, but a perversion of law.[11] In St. Thomas' view, an enactment which is arbitrary, oppressive, or blasphemous does not bind in conscience, "except perhaps in order to avoid scandal or disturbance, for which cause a man should even yield his right." [12] In other words, the appropriateness of exercising a right of resistance

[6] *Ibid.*
[7] *Id.*, qu. 94, art. 5.
[8] *Id.*, qu. 94, art. 3. Cf. also art. 6.
[9] *Id.*, qu. 90, art. 4.
[10] Cf. qu. 90, art. 1: "Law is something pertaining to reason."
[11] *Id.*, qu. 92, art. 1; qu. 95, art. 2.
[12] *Id.*, qu. 96, art. 4.

must be weighed against the inconvenience of disturbing the public peace and order, a disturbance from which the community may suffer great harm. St. Thomas believed, however, that the right of resistance becomes transformed into a genuine duty of disobedience in the case of laws promulgated by tyrants which induce to idolatry or prescribe anything else contrary to the divine law. "Laws of this kind must nowise be observed, because . . . we ought to obey God rather than men." [13]

The Thomistic conception of justice, as distinguished from his theory of law, strongly shows the influence of Cicero and Aristotle. Justice is defined as "a habit whereby a man renders to each one his due by a constant and perpetual will." [14] It consists of two parts: *distributive* justice, which "allots various things to various persons in proportion to their personal dignity," [15] and *commutative* (corrective) justice, which concerns the dealings of individuals with one another and the adjustments to be made in case of the performance of improper or illegal acts. Like Aristotle, he holds that the equality implicit in the concept of distributive justice is not a mechanical, but a proportional, equality.[16] "In distributive justice something is given to a private individual, insofar as what belongs to the whole is due to the part, in a quantity that is proportionate to the importance of the position of that part in respect of the whole. Consequently in distributive justice a person receives all the more of the common goods, according as he holds a more prominent position in the community." [17] In corrective justice, on the other hand, it is necessary to equalize thing with thing in an arithmetical fashion, so that losses suffered by someone as a result of a harmful act can be restored and unjust enrichments of one party at the expense of another can be rectified.

Section 7. *The Medieval Nominalists*

One of the recurrent themes of medieval philosophy was the celebrated dispute about "universals," which had as its subject matter the question as to the character of our general ideas and their relationship to the particular objects existing in reality. Two chief schools of

[13] *Ibid.* See R. Darrell Lumb, "The Duty of Obeying the Law," 1963 *Archiv für Rechts- und Sozialphilosophie* (Beiheft No. 39) 195.

[14] *Id.*, pt. II, 2d pt., qu. 58, art. 1. Cf. Cicero's definition *supra* Sec. 4.

[15] *Id.*, qu. 63. art. 1.

[16] See *infra* Sec. 47.

[17] *Id.*, qu. 61, art. 2; see *infra* Sec. 44. On St. Thomas Aquinas see also Friedrich, *Philosophy of Law in Historical Perspective*, pp. 43–50; Huntington Cairns, *Legal Philosophy from Plato to Hegel* (Baltimore, 1949), pp. 163–204; Wolfgang Friedmann, *Legal Theory*, 5th ed. (New York, 1967), pp. 108–112; Thomas E. Davitt, "Law as Means to End—Thomas Aquinas," 14 *Vanderbilt Law Review* 65 (1960).

thought emerged with respect to the solution of this question, although within these schools radical as well as moderate viewpoints were advanced and attempts were sometimes made to bridge the gulf between the most extreme positions on each side.

The great contestants in this dispute were the "realists" and the "nominalists." According to the view of the medieval realists, there exists a strict parallelism between the world of our thought and the world of external reality. To the general conceptions that we form, the mental representations that we make to ourselves of external objects and phenomena, there corresponds an extramental, objective counterpart in the real world. Such universal ideas as truth, virtue, justice, and humanity are therefore not merely constructions of the human mind but are real substances and things in themselves, existing independently of their concrete manifestations in the empirical world.

The medieval nominalists, on the other hand, denied the reality of universals. To them, the only real substances in nature were the individual things apprehended by us through observation and the perception of our senses. The generalizations and classifications which we use to describe the outside world are merely *nomina*, that is, names, which have no direct and faithful copies and counterparts in external nature. There can be in the real world no justice apart from just acts, no mankind apart from concrete living human beings. No universal, abstract representation, in their opinion, can adequately reflect a world in which individuation is the dominating principle.[1]

This dispute—which raises basic questions as to the genesis and objective validity of our intellectual knowledge—has an important bearing on the problem of natural law. The realist (or rationalist) who believes that human beings have the possibility of knowing things as they really are and to detect the uniformities and laws operative in nature by the use of their reasoning faculties will be much more inclined to recognize the existence of a law of nature than the nominalist, who is skeptical with respect to our power to ascertain the essential nature of things and prone to close his eyes to propositions which cannot be validated by immediate sense perception and concrete observation of individual facts.

A train of thought away from Thomist realism toward nominalism and positivism in theology and social ethics is clearly noticeable in the

[1] On the dispute over universals see Maurice de Wulf, *History of Medieval Philosophy*, transl. P. Coffey, 3d ed. (London, 1909), pp. 149 ff.; Henry Adams, *Mont-Saint-Michel and Chartres* (Boston, 1905), pp. 294–300; Glanville Williams, "Language and the Law," 61 *Law Quarterly Review* 71, at 81–82 (1945). The author's views on this dispute appear in Sec. 79.

writings of the Scotch Franciscan monk John Duns Scotus (1270–1308).[2] Scotus taught that the individual alone possesses full and complete substantiality in nature and that universal conceptions and abstractions are merely the product of thought. From these premises Scotus arrived at a philosophy in which the determination of individuals by universal laws (such as laws of reason) plays a subordinate role, while the decisions brought about by free individual volition assume a place of paramount importance. The main intention of the Creator, said Scotus, was to produce individuals.[3] That which is singular and unique, however, cannot be derived from general conceptions and laws: it can only be experienced spontaneously by human souls. The individual acts by means of concrete decisions which flow from his will rather than from his intellect; and it is impossible, according to Scotus, to explain the vagaries of the individual will fully by invoking general notions of reasonableness. If will were subordinate to reason, as St. Thomas assumed, a truly free decision and genuinely moral act would be impossible in the view of Scotus, for every act of reason is necessarily determined by a sufficient cause and thus is not free. Scotus teaches that it is wrong to say that the intellect dictates to the will; on the contrary, it is the will that governs the intellect.[4] Even from the point of view of a hierarchy of values, will must be rated more highly than intellect, for the will is the only unfettered agency of human conduct.

This primacy of the will is characteristic, according to Duns Scotus, not only for human beings but also for God. God is not subjected to paramount immutable laws of the cosmos. His own will is the sole source of all law, and his justice merely an efflux of his power. All laws are merely contingent edicts of the maker. "The rules of divine world government are shaped by divine will rather than by divine wisdom." [5] All emanations of divine volition are to be accepted as just, and it is improper to ask why God has decreed a certain order of things and not an entirely different one. There exists only one principle of natural law, according to Scotus: that is, to love God, however harshly and incomprehensively he may deal with mankind. A natural law such as the one conceived by Thomas Aquinas, distinguishing between things that are in their essential nature good or bad, is unknown to Scotus.

[2] The ensuing discussion follows closely the thorough study of medieval nominalism and its impact on legal philosophy made by Hans Welzel, *Naturrecht und Materiale Gerechtigkeit*, 4th ed. (Göttingen, 1962), pp. 66–89.

[3] Duns Scotus, *Opus Oxoniense* II d. 3 qu. 7 n. 10. On Scotus see also Thomas E. Davitt, *The Nature of Law* (St. Louis, 1951), pp. 24–38.

[4] *Opus Oxoniense* IV d. 49 qu. 4 n. 16.

[5] *Id.*, II d. 7 qu. un. n. 18.

He was not, however, afraid that by his theses he was in danger of supplanting divine law by divine arbitrariness. This danger was obviated by his conviction that God was always benevolent and benign.

An even more radical version of theological voluntarism and nominalism is found in the philosophy of William of Occam (ca. 1290–1349). Any attempt of human reason to comprehend the divine government in terms of human rational postulates is sharply rejected by him. God might have taken the shape of a stone, a piece of wood, or a donkey, he said, and this possibility need not tax our religious faith.[6] Instead of ordering man to refrain from murder, theft, and adultery, he might some day decide to command the commission of these acts, in which case we would have to regard them as good and meritorious.[7] Under his view, the concepts of the criminal law do not relate to substantive ethical qualities of our actions, but merely reflect the existence of a prohibitory command; if this command were changed, the quality of the act itself would be transformed. In other words, moral injunctions are valid only under the premises of a particular given order.[8] Occam maintained that as God had revealed his present will to us in the sacred books of the Bible, these laws constituted the only genuine source for the ascertainment of the divine will. There is no natural law, discoverable by human reason, apart from the positively revealed divine law.

The close relation of these views to the ethical relativism and positivism of a later age is obvious. As in the case of Scotus, however, the potential nihilism of these theories was mitigated by Occam's conviction that God was by his nature a benevolent ruler, not an arbitrary tyrant. Occam was also convinced that there existed a basis for true morality in the subjectively good or evil intentions of human beings, guided by the dictates of the individual conscience.

A return to rationalism and the Thomistic view of natural law took place in the writings of the late Catholic scholastics, such as the Spaniards Francisco de Vitoria (d. 1546) and Francisco Suarez (1548–1617). In the writings of these men, the dispute over whether will or reason represented the nobler faculty was again resolved in favor of reason, and the possibility of an objectively existing *lex naturalis* was reasserted. "Natural law," said Suarez, "embraces all precepts or moral principles which are plainly characterized by the goodness necessary to rectitude of conduct, just as the opposite precepts clearly involve

[6] William of Occam, *Centilog.* 6 f. On Occam see also Davitt, *Nature of Law*, pp. 39–54.

[7] Occam, *Sententiae* II qu. 19. o.

[8] *Id.*, III qu. 12 CCC.

moral irregularity or wickedness." [9] He pointed out that the promulgation of law and its enforcement by means of sanctions clearly required an exercise of will on the part of the governing authorities. However, the will of the prince does not suffice to make law unless "it be a just and upright will." [10] This rationalistic strain in Roman Catholic legal philosophy can, on the whole, be said to conform to the official position of the Catholic Church up to our own day.

[9] Francisco Suarez, *Selections from Three Works*, The Classics of International Law, ed. J. B. Scott (Oxford, 1944), p. 210. See also *id.*, p. 42: "Natural law is that form of law which dwells within the human mind, in order that the righteous may be distinguished from the evil."

[10] *Id.*, p. 58.

III

THE CLASSICAL ERA OF NATURAL LAW

Section 8. *Introduction*

During the Middle Ages, the Church was the center of life in Europe. It controlled education and science, and theology occupied the first place among the sciences. All knowledge emanated from the mainsprings of Christian belief, as interpreted by the Church of Rome. Access to truth about ultimate things could be obtained only through the interposition of the Church and its dignitaries.

The domination of the spiritual life by the Church was attacked by Protestantism in the sixteenth century. The Protestant religion reinterpreted the statement of the Bible that all souls have equal value before God to mean that everybody had the right of communion with the Deity without mediation through a priest. It was therefore willing to allow the individual a larger degree of autonomy to form an opinion about God's intentions and the guiding principles of life than had been accorded to him in the preceding centuries.

The attack against hierarchy which was waged in a number of countries in Europe in the sixteenth century was directed against the spiritual order of Catholicism as well as against the worldly order of feudal-

ism. In the economic field, its chief target was the feudal system of economics, with its concomitant institutions of serfdom and vocational guilds. In the political field, the new orientation found expression in the fight against the feudal nobility and its privileges. Its ultimate effect in the countries in which the rebellion was successful was a strengthening of secular, individualistic, and liberalistic forces in the political, economic, and intellectual life.

In the legal field, the early centuries of the modern age were dominated by a new form of natural-law philosophy, which we have designated as the natural law of the classical era. This classical natural-law philosophy which, in various and often-discrepant manifestations dominated Europe in the seventeenth and eighteenth centuries, was a legal by-product of the forces which transformed Europe as a result of the Protestant revolution. It cannot be said, however, as has sometimes been asserted, that the classical natural law constituted a complete break with medieval and scholastic legal theory. There are many links and influences connecting Aristotelian and scholastic thinking with the doctrines of the classical law-of-nature philosophers, especially those of the seventeenth century. On the other hand, the new law of nature, in spite of the notable diversity of views expressed by its representatives, possessed certain distinct characteristics which make it necessary to set it apart from medieval and scholastic natural law. First, it completed and intensified the divorce of law from theology for which the Thomistic distinction between a divinely revealed law and a natural law discernible by human reason had already prepared the ground. Second, while the medieval scholastic philosophers were strongly inclined to restrict the scope of natural law to a few first principles and elementary postulates, the classical law-of-nature jurists tended to favor the elaboration of systems of concrete and detailed rules which were believed to be directly deducible from human reason. The legal thinkers of the new age were convinced that the power of reason was universal for all men, nations, and ages, and that a complete and satisfactory system of law could be erected on the foundation of a rational analysis of human social life. Third, the postmedieval law of nature, by a process of gradual development, shifted the emphasis from a law of reason objectively grounded in the social nature of human beings to a doctrine in which the "natural rights" of man and his individual aspirations and happiness played a dominant role. That version of the postmedieval natural law which gained wide acceptance in the United States of America was strongly tinged with individualistic tendencies and postulates.[1] Fourth and last, the classical natural-law philosophy by gradual steps accomplished a shift in its mode of approach from a

[1] See *infra* Sec. 12.

teleological to a causal and empirical view of the nature of man. Aristotle and St. Thomas Aquinas had grounded their natural-law doctrine on a picture of man according to which the human being strives for perfection and has in himself the potentialities for a full and complete development as a rational and social being; this development, unless interrupted by morbid or "unnatural" impediment, will result in a full maturing of his true "nature." Thus "nature" is, under this theory, more or less identified with the highest potential of a human being.[2] With Hobbes, Locke, Spinoza, Montesquieu, and other representatives of the classical natural law, a conception of man emerges which is based on mere observation of his characteristic traits and a study of the causal laws that determine or influence human behavior. Thus, the rise of modern natural and psychological science did not fail to exert an impact on the history of natural law theory.

From its early beginnings in the modern age, the classical law-of-nature doctrine found a rival in another doctrine which in some respects was a product of the same political, social, and economic forces that helped shape the rationalistic and individualistic natural law philosophy. This rival was the doctrine of *raison d'état* (reason of state), which received its most influential formulation in the writings of the Italian political philosopher Niccolo Machiavelli (1469–1527). Machiavelli glorified the omnipotence of the state and subordinated ethical principles in public life entirely to the political necessities of statecraft. Drawing an uncomplimentary picture of the passions, weaknesses, and vices of men, he counseled the rulers to be hard-boiled and cynical in using their subjects as instruments for the building up of powerful, unified, national states. This end, in his opinion, justified the employment of means which might easily be considered reprehensible from a purely moral point of view.

In order to understand the doctrine of *raison d'état* in its historical significance, it must be kept in mind that the emancipation of the individual which took place in Europe in the postmedieval period went hand in hand with the rise of sovereign, independent, and national states, which sought to emancipate themselves from the universal medieval empire which was still in existence in large parts of Europe. This national emancipation was part of the struggle against feudalism and the "ultramontane" claims of the Church. The rising national states were for the most part governed by absolute monarchs who claimed freedom of political action in order to establish and strengthen the

[2] For a modern version of the teleological concept of man see John Wild, *Plato's Modern Enemies and the Theory of Natural Law* (Chicago, 1953), pp. 64–76. *Contra:* Hans Kelsen, "Plato and the Doctrine of Natural Law," 14 *Vanderbilt Law Review* 23, at 27–33 (1960).

power and prestige of their countries. A weapon against the claims of the universal Holy Empire as well as against possible interventions by other states was offered to them in the doctrine of national sovereignty, which received its first elaboration at the hands of the French political philosopher Jean Bodin (1530–1597). A weapon against their own nationals was available to them in the doctrine of *raison d'état*, which sought to subordinate the individual citizen to the needs of the state. Every European political thinker of this era attempted in some way to reconcile the claims of the law-of-nature doctrine (which assumed the existence of a law superior to political force and independent of it) with the postulates of *raison d'état* (which sought to protect the rights of the states and their rulers). In general it can be said that in western Europe, and later in the United States, the law-of-nature philosophy gained the upper hand, while in central Europe the doctrine of *raison d'état* tended to prevail, although it did not completely defeat the claims of the law-of-nature school. The differences in the views of the political and legal thinkers of the seventeenth and eighteenth centuries can often be explained by reference to the manner in which they sought to combine and reconcile the conflicting doctrines of *raison d'état* and natural law.

Three periods may be distinguished in the evolution of the classical law-of-nature philosophy. These periods correspond roughly to three successive stages in the social, economic, and intellectual development of this epoch. The first stage in the process of emancipation from medieval theology and feudalism which took place after the Renaissance and Reformation was marked by the rise of Protestantism in religion, of enlightened absolutism in politics, of mercantilism in economics. To this epoch, which lasted longer in Germany than in the western countries of Europe, belong the theories of Grotius, Hobbes, Spinoza, Pufendorf, and Wolff.[3] It is a characteristic feature of the theories of these men that the ultimate guaranty for the enforcement of natural law is to be found largely in the wisdom and self-restraint of the ruler. The second epoch, which started approximately with the English Puritan Revolution of 1649, was marked by a tendency toward free capitalism in economics and liberalism in politics and philosophy. The views of Locke and Montesquieu were characteristic expressions of this epoch, which sought to guarantee by means of a separation of powers the natural rights of individuals against undue encroachments by the government.[4] The third epoch was marked by a strong belief in popular sovereignty and democracy. Natural law was entrusted to

[3] See *infra* Secs. 9 and 10.
[4] See *infra* Sec. 11.

the "general will" and the majority decision of the people. The most outstanding representative of this stage was the French political thinker Jean-Jacques Rousseau.[5] The third stage in the development of the law-of-nature school had a profound impact on the political and constitutional development of France, while the second form of the law-of-nature school gained the upper hand in the United States of America.[6]

Section 9. *Grotius and Pufendorf*

Hugo Grotius (1583–1645), a great Dutch jurist and thinker, was not only one of the fathers—if not *the* father—of modern international law, but also the author of an influential natural law philosophy. In detaching the science of law from theology and religion, he prepared the ground for the secular, rationalistic version of modern natural law. Among the traits characteristic of man, he pointed out, was an impelling desire for society, that is, for the social life—"not of any and every sort, but peaceful, and organized according to the measure of his intelligence, with those who are of his own kind." [1] He refuted the assumption of the Greek Skeptic Carneades that man was actuated by nature to seek only his own advantage, believing that there was an inborn sociability in human beings which enabled them to live peacefully together in society. Whatever conformed to this social impulse and to the nature of man as a rational social being was right and just; whatever opposed it by disturbing the social harmony was wrong and unjust. Grotius defined natural law as "a dictate of right reason which points out that an act, according as it is or is not in conformity with rational nature, has in it a quality of moral baseness or moral necessity." [2] This law of nature would obtain "even if we should concede that which cannot be conceded without the utmost wickedness, that there is no God, or that the affairs of men are of no concern to Him." [3] Grotius thereby grounded the natural law on an eternal reason pervading the cosmos, although he admitted the alternative possibility of a theist foundation.[4]

[5] See *infra* Sec. 13.

[6] See *infra* Sec. 12.

[1] *De Jure Belli ac Pacis*, transl. F. W. Kelsey, The Classics of International Law (Oxford, 1925), proleg. 6. On Grotius see also F. J. C. Hearnshaw, "Hugo Grotius," in *The Social and Political Ideas of Some Great Thinkers of the Sixteenth and Seventeenth Centuries*, ed. F. J. C. Hearnshaw (London, 1926), pp. 130–152.

[2] *De Jure Belli ac Pacis*, Bk. I, ch. i. x. 1.

[3] *Id.*, proleg. 11; see also Bk. I, ch. i. x. 5: "The law of nature . . . is unchangeable—even in the sense that it cannot be changed by God."

[4] *Id.*, proleg. 12–13.

Grotius pointed out that two methods existed for proving whether something was or was not in accordance with the law of nature. "Proof *a priori* consists in demonstrating the necessary agreement or disagreement of anything with a rational or social nature; proof *a posteriori*, in concluding if not with absolute assurance, at least with every probability, that that is according to the law of nature which is believed to be such among all nations, or among all those that are more advanced in civilization." [5] Grotius added that no conclusions unfavorable to human nature needed to be drawn from the practices of nations that were savage or inhuman. He agreed with Aristotle that in order to find out what was natural, we must look to those things which are in a sound condition, not to those that are corrupted.[6]

Among the chief axioms of natural law enumerated by Grotius are the following: to abstain from that which belongs to other persons; to restore to another any goods of his which we may have; to abide by pacts and to fulfill promises made to other persons; to repay any damage done to another through fault; and to inflict punishment upon men who deserve it.[7] Many of the more detailed and special rules of the law, in his opinion, represented merely necessary derivations from these general precepts.

To the law of nature Grotius opposed the "volitional law," whose rules could not be deduced from immutable principles by a clear process of reasoning and which had their sole source in the will of man. A combination of both forms of law, in his opinion, existed in the law of nations. Grotius devoted the main part of his lifework to investigating this combination. To him the law of nations consisted of those rules which had been accepted as obligatory by many or all nations, but he sought its deeper roots in the natural principles of social life which followed from man's social impulse, namely in the principles of the law of nature.

The state was defined by Grotius as "a complete association of free men, joined together for the enjoyment of rights and for their common interest." [8] It originated in a contract, but usually the people had transferred their sovereign power to a ruler who acquired it as his private right and whose actions were ordinarily not subject to legal control.[9] The ruler is bound, however, to observe the principles of natural law and of the law of nations. If he misuses his power, his sub-

[5] *Id.*, Bk. I, ch. i. xii. 1.

[6] *Id.*, Bk. I, ch. i. xii. 2. Quoting Andronicus of Rhodes, Grotius makes the point that "He who says that honey is sweet does not lie, just because to sick people it may seem otherwise." *Ibid.*

[7] *Id.*, proleg. 8.

[8] *Id.*, Bk. I, ch. i. xiv. 1.

[9] *Id.*, Bk. I, ch. iii. vii–xii.

jects, as a general rule, have no right to revolt against him. But in some clear cases of usurpation or flagrant abuse of power Grotius was willing to recognize a right of resistance.[10]

A system of natural law even more elaborate than that of Grotius was worked out by Samuel Pufendorf (1632–1694), a German law professor. Pufendorf was in accord with Thomas Hobbes [11] that man is strongly motivated by self-love and egotism and that there is a certain amount of malice and aggressiveness inherent in his nature. But at the same time he believed, like Grotius, that there is in man also a strong inclination to seek association with other men and to live a peaceful and sociable life in society. These inclinations, according to Pufendorf, coexist in man's soul, and both are implanted in man by nature. The law of nature is an expression of this dual character of human existence. It acknowledges the fact that nature has commended self-love to man, but it also takes cognizance of the fact that self-love is tempered by man's social impulse. In accordance with these two sides of human nature, there are two fundamental principles of natural law. The first of these principles tells man to protect life and limb as far as he can, and to save himself and his property. The second axiom demands that he not disturb human society, or, in his words, that he not do anything whereby society among men may be less tranquil. These two principles of natural law were combined and integrated by Pufendorf into one single fundamental precept, which he formulated as follows: "That each should be zealous so to preserve himself that society among men be not disturbed." [12]

From the second axiom of natural law Pufendorf derived the following important legal postulate: "Let no one bear himself towards a second person so that the latter can properly complain that his equality of right has been violated in his case." [13] This rule of natural law, which breaks up into a number of special rules,[14] expresses the principle of legal equality which is often emphasized by Pufendorf. It is

[10] For instance, if a ruler who under the constitution is responsible to the people transgresses against the law and the state (*Id.*, Bk. I, ch. iv. viii), or if the king has abdicated or lost his sovereign power (Bk. I, ch. iv. ix), if he alienates his kingdom (Bk. I, ch. iv. x), if he shows himself to be the enemy of the whole people (Bk. I, ch. iv. xi), or in certain cases, if he has usurped his power (Bk. I, ch. iv. xv–xix).

[11] See *infra* Sec. 10.

[12] *Elementa jurisprudentiae,* transl. W. A. Oldfather (Oxford, 1931), Bk. II, observ. iv, 4.

[13] *Id.*, Bk. II, observ. iv, 23; cf. also Pufendorf, *De officio,* transl. F. G. Moore (Oxford, 1927), Bk. I, ch. 7, 1.

[14] For instance, the rule not to do harm to the body of another; not to violate the chastity of a woman against her will; not to usurp the property of a second person; not to break a promise; to make good the damage caused by one's own fault, etc. Pufendorf, *Elementa jurisprudentiae,* Bk. II, observ. iv, 24–34.

essential, he says, that everybody should himself practice the law which he has set up for others. The obligation to maintain and cultivate sociability binds all men equally, and one man should no more be permitted than another to violate the dictates of the law of nature.

Two fundamental compacts are necessary, in the view of Pufendorf, to maintain society and to guarantee the enforcement of natural and civil law. By the first, men agree among themselves to abandon the state of natural liberty and to enter into a permanent community for the purpose of guaranteeing their mutual safety. Following this agreement, a decree must be made stating what form of government is to be introduced. After this decree, a second contract is needed, this time made between the citizens and the government. By this compact the ruler binds himself to take care of the common security and safety, while the citizens promise obedience to him and subject their wills to the authority of the ruler in all things that make for the safety of the state.[15] The sovereign power is bound by the principles of natural law, which, in Pufendorf's view, is true law and not merely a moral guide for the sovereign. But the obligation of the ruler to observe the law of nature is merely an imperfect obligation, because there exists no court in which an action can be brought against the prince. God alone is the "avenger of the law of nature"; the citizens under normal circumstances have no right of resistance against the sovereign for a breach of the law of nature. Only in the extreme case when the prince has become a real enemy of the country, and in the face of actual danger, does there belong to individuals or the people the right to defend their safety against him.[16]

A follower of Pufendorf was the Genevese jurist Jean Jacques Burlamaqui (1694–1748), whose works, *Les Principes du droit naturel* (1747), and *Les Principes du droit politique* (1751), exercised a considerable influence on natural-law jurists, especially in the United States.[17] Reason, he pointed out, was the only means that man had at his disposal to attain happiness. Law was to him nothing else but what reason prescribes as a reliable road to happiness. Burlamaqui defined the law of nature as a law "that God imposes on all men, and which they are able to discover and know by the sole light of reason, and by

[15] *De officio,* Bk. I, ch. 6, 8–9.

[16] Pufendorf, *Elementa jurisprudentiae,* Bk. I, def. xii, 6; Pufendorf, *De jure naturae et gentium,* transl. C. H. and W. A. Oldfather (Oxford, 1934), Bk. VII, ch. 8. 5. Later, in *De officio,* Pufendorf goes further in restricting the right of resistance, confining it to obvious violations of a divine command. Bk. II, ch. 9, 4. For a detailed study of Pufendorf's natural-law philosophy see Hans Welzel, *Die Naturrechtslehre Samuel Pufendorfs* (Berlin, 1958).

[17] On Burlamaqui see Ray F. Harvey, *Jean Jacques Burlamaqui* (New York, 1938).

attentively considering their state and nature";[18] like Pufendorf, he viewed the principle of sociability as the basis of this law.

Mention should also be made of another great teacher of law who made valuable contributions to the interpretation and systematization of the law of nature: the German jurist Christian Wolff (1679–1754), who may be regarded as the legal theorist of the enlightened absolutism of the Prussian king Frederick the Great. A follower of the philosophical doctrines of Leibniz, he taught that the highest duty of human beings was to strive after perfection. This moral duty of self-perfection, combined with an effort to further the perfection of others, was to him the basis of justice and natural law. The law of nature commands one to do that which makes for the improvement of oneself and one's condition. From this first principle Wolff rigidly deduced a vast system of positive law designed to effectuate the basic purpose of the natural law. It was one of Wolff's chief convictions, linking his theory to the political philosophy of his age, that the self-perfection of man cannot be achieved in a state of complete liberty. In order that men may live together harmoniously, they must be governed by a paternalistic and benevolent sovereign, whose task it is to promote peace, security, and self-sufficiency for the purpose of guaranteeing a contented life to the citizens of the state.

Section 10. *Hobbes and Spinoza*

It has been pointed out above[1] that the efforts of seventeenth- and eighteenth-century thinkers were directed toward maintaining some form of balance or adjustment between the claims of the law of nature and the needs of state policy (*raison d'état*). We find that in the philosophical systems of Thomas Hobbes, an English thinker, and Benedict Spinoza, a Dutch philosopher, the scales of the conflicting demands of natural law and governmental power were tipped in favor of the latter.

Thomas Hobbes (1588–1679) proceeded from anthropological and psychological assumptions quite different from those of Grotius. While Grotius believed that man is an essentially social and gregarious being, Hobbes pictured him as intrinsically selfish, malicious, brutal, and aggressive.[2] In the state of nature—a theoretical construct used by

[18] *The Principles of Natural and Politic Law,* transl. T. Nugent, 7th ed. (Philadelphia, 1859), p. 87.

[1] See *supra* Sec. 8.

[2] Hobbes's gloomy view of human nature must be accounted for by his experiences in observing the English civil war, in which the fabric of English society had broken down and violence had become the order of the day. Cf. Leo Strauss, *Natural Right and History* (Chicago, 1953), p. 196.

Hobbes to denote the absence of organized government—each man is a wolf to every other man (*homo homini lupus*) and, in an atmosphere of hate, fear, and mutual distrust, everybody is at war with everybody else (*bellum omnium contra omnes*); in this war all men were considered by Hobbes to be of equal strength, since even the weakest is able to kill the strongest.[3] According to Hobbes, there exists no right or wrong in the moral or legal sense in this state of nature. Everybody has a right to all things, and profit is the only measure of lawfulness. Furthermore, every individual in this state possesses the "natural right" to preserve his life and limbs with all the power he has against the aggressions of others.[4]

Hobbes pointed out, however, that men have certain passions that incline them to prefer peace to the warlike state of nature. These are, first, a strong fear of death; second, the desire for things necessary to commodious living; and third, the hope of obtaining these things by industry. Since these passions cannot be satisfied in the state of nature, reason suggests to mankind certain convenient articles of peace termed by Hobbes the "laws of nature." [5]

It is the first and most fundamental law of nature, according to Hobbes, that peace is to be sought wherever it can be found. From this law, a number of more specific precepts are derived: Everybody must divest himself of the right he has to do all things by nature; every man must stand by and perform his covenants; all men should help and accommodate each other as far as may be done without danger to their persons; no man should reproach, revile, or slander another man; there must be an impartial arbiter in controversies; and, above all, men should not do to others what they would not wish others to do to them.[6] These laws are declared to be eternal and immutable.[7]

These mandates of nature cannot be safely carried out as long as the state of nature and the war of all against all continues. In order to secure peace and to enforce the law of nature, Hobbes argued, it is

[3] Hobbes, *Elements of Law,* ed. F. Tönnies (Cambridge, Eng., 1928), pt. I, ch. xiv. 2–5; *De Cive,* ed. S. P. Lamprecht (New York, 1949), Preface, p. 13; pt. I, ch. i. 3–6. Hobbes contends that "though the wicked were fewer than the righteous, yet because we cannot distinguish them, there is a necessity of suspecting, heeding, anticipating, subjugating, self-defending." *De Cive,* Preface, p. 12.

[4] *Elements of Law,* pt. I, ch. xiv. 6–11; *De Cive,* ch. i. 7–10.

[5] *Leviathan,* ed. M. Oakeshott (Oxford, 1946), pt. I, ch. xiii; see also *Elements of Law,* pt. I, ch. xv. 1.

[6] See *Elements of Law,* pt. I, chs. xv–xvii; *De Cive,* ch. iii. Among the other "laws of nature" are (1) avoiding ingratitude; (2) using things in common that cannot be divided; (3) allowing commerce and traffic indifferently to everybody; (4) insuring safety to the messengers of peace.

[7] *De Cive,* ch. iii. 29. See Howard Warrender, *The Political Philosophy of Hobbes* (Oxford, 1957), pp. 250–265.

necessary for men to enter into a compact mutually among themselves by which everyone agrees to transfer all his power and strength upon one man, or upon an assembly of men, on condition that everybody else does the same. The sovereign power thus constituted, called "Leviathan" or the "Mortal God" by Hobbes, should use the combined power and strength of the citizens for the purpose of promoting the peace, safety, and convenience of all.[8]

Hobbes was convinced that the sovereign, in order to perform its functions adequately, should be omnipotent and not subject to legal restraints. This view was a necessary consequence of his pessimistic estimate of human beings as selfish, uncooperative, and pugnacious creatures;[9] only an indivisible and extremely strong power can keep peace and order among such an intractable crowd.

The chief instrument by which Hobbes' sovereign imposes its will on the people are the "civil laws" (as distinguished from "laws of nature" which are laws only in a nontechnical sense).[10] Civil laws are "to every subject, those rules which the commonwealth hath commanded him, by word, writing, or other sufficient sign of the will, to make use of, for the distinction of right and wrong."[11] It appears from this definition that the contents of "right" and "wrong" are determined solely by the imperatives of the civil laws: there can be no right or wrong, justice or injustice, apart from the commands of the sovereign power. "No law can be unjust."[12] The people themselves, by having transferred their powers to the sovereign, are the authors of all laws, and nobody can do an injustice to himself.[13]

But while laws cannot be unjust in the view of Hobbes, they can be iniquitous.[14] They are iniquitous if they depart from the precepts of the "law of nature" as defined by him. Sovereign dominion is established for the sake of peace, and it is the highest duty of the rulers to promote the safety and well-being of the people. In order to be faithful to their trust, the rulers must defend the people against their enemies, permit them to enrich themselves, and see to it that they enjoy a "harmless" liberty.[15] There should be "infinite cases which are neither

[8] Leviathan, ch. xvii. See D. P. Gauthier, *The Logic of Leviathan* (Oxford, 1969).

[9] "All society . . . is either for gain, or for glory; that is, not so much for love of our fellows as for the love of ourselves." *De Cive,* ch. i. 2.

[10] *Leviathan,* ch. xv.

[11] *Id.,* ch. xxvi.

[12] *Id.,* ch. xxx; see also *De Cive,* ch. xii. 5.

[13] *Leviathan,* ch. xviii.

[14] *Ibid.*

[15] *De Cive,* ch. xiii. 2 and 6. This liberty may not be extended so far as to permit the teaching of heretical opinions dangerous to the safety of the state. *Elements of Law,* pt. II, ch. ix. 8.

commanded, nor prohibited, but every man may either do, or not do them, as he lists himself." [16] A certain amount of property should be conceded to each man. Men should be allowed to buy and sell and otherwise contract with each other, and to choose their own trade. There should be no penalties imposed upon citizens which they cannot foresee, and every man should without fear be able to enjoy the rights accorded to him by the laws.[17]

If the government enacts iniquitous or tyrannical laws, this does not entitle the people to resist their enforcement; the only sanction for governmental wrong is that the rulers, instead of enjoying a happy afterlife, will suffer "the pain of eternal death." [18] There is one situation, however, in which the subjects are absolved from their duty of loyalty toward their rulers: when the sovereign has lost the power to preserve the peace in society and to protect the safety of the citizens.[19]

Hobbes in his political and legal doctrines advocated a form of government which may be described as "enlightened absolutism" and which was to prevail in the eighteenth century in many countries of Europe.[20] The sociological basis for his philosophy was a commonwealth consisting of equal individuals who were endowed with private property, lived by their own industry, and regulated their mutual relations by way of contract, being protected in their life and possessions by a strong government. Life, liberty, and property were not yet recognized as "inalienable rights," immune from governmental interference; they were subject to benevolent regulation by the state. In spite of this fact, certain distinct elements of individualism and liberalism are discernible in Hobbes' theory of natural law and in his philosophy of governmental duties.[21] It is a liberalism whose enforcement is entrusted to an "enlightened" absolute monarch. He is to be the faithful guardian of natural law. He is to secure the life, property, and happiness of his subjects; their welfare (not his own self-aggrandizement)

[16] *De Cive*, ch. xiii. 15.

[17] *Id.*, ch. xiii. 16–17; *Elements of Law*, pt. II, ch. ix. 4–5.

[18] *Elements of Law*, pt. II, ch. i. 7; ch. ix. 1.

[19] *Leviathan*, ch. xxi. Hobbes also points out that the sovereign cannot force a citizen to kill, maim, or accuse himself so as to destroy his right of self-preservation; such a command would not be binding. *Id.*, ch. xxi. According to Hobbes, the right of self-preservation must be protected at all costs. Cf. Strauss, *supra* n. 2, p. 181. See also P. C. Mayer-Tosch, *Thomas Hobbes und das Widerstandsrecht* (Tübingen, 1965), pp. 83–118.

[20] See Ferdinand Tönnies, *Thomas Hobbes*, 3d ed. (Stuttgart, 1925), p. 222; Friedrich Meinecke, *Idee der Staatsräson* (Munich, 1925), p. 265.

[21] René Capitant is right when he denies that Hobbes is the spiritual father of the collectivist totalitarian state of the twentieth century. Cf. Capitant, "Hobbes et l'état totalitaire," *Archives de philosophie du droit et de sociologie juridique*, nos. 1–2 (1936), p. 46. Hobbes's *Leviathan* is the state of Frederick the Great or Napoleon, not of Hitler or Mussolini. For the same view see Carl J. Friedrich, *The Philosophy of Law in Historical Perspective* (Chicago, 1963), p. 87.

is to be his highest concern. But in executing his functions he is not bound by any legal curbs on his power. Thus in its practical effect Hobbes's law of nature is nothing more than a moral guide for the sovereign, while law in its proper sense consists of the commands of the sovereign.[22] On this ground it has not unjustly been said that Hobbes is a precursor of modern positivism and analytical jurisprudence.[23]

Hobbes's theories of law and government have often been compared to those of the great philosopher Benedict Spinoza (1632–1677). Indeed, there are some striking resemblances, although divergences also exist between the two philosophies. Spinoza believed, like Hobbes, that man in his natural state is ruled less by reason than by desire and the will to power. According to Spinoza, the right of an individual in the state of nature extends as far as his power. "Every individual has sovereign right to do all that he can; in other words, the rights of an individual extend to the utmost limits of his power, as it has been conditioned. Now it is the sovereign law and right of nature that each individual should endeavour to preserve itself as it is, without regard to anything but itself. . . . Whatsoever an individual does by the laws of its nature, it has a sovereign right to do inasmuch as it was conditioned by nature, and cannot act otherwise." [24]

There is no sin, no justice or injustice, Spinoza declares, so long as men live under the sway of nature alone. But this condition must lead to strife and disorder, because men, in the desire to increase their individual power and to satisfy their passions, will necessarily clash. In the state of nature, hatred, jealousy, and warfare will always exist. Men will attempt to overcome this miserable condition. They will discover that if they combine, they will possess much more power, even as individuals, because it will no longer be necessary for each individual to be in constant fear of his neighbor and on perpetual guard against enemies. Thus, the power of reason inherent in men drives them to give up the state of nature and to order their lives in a peaceful and rational manner. They will combine in the state and set up a govern-

[22] See *Leviathan,* ch. xxvi; *De Cive,* pt. II, ch. xiv. 1. In the view of Hobbes, the law of nature becomes a part of the civil law of all countries. It is the moral philosophy underlying the legislative enactments of the state. But the binding force of these enactments upon the citizens is derived from the will of the sovereign power. Bentham and Austin, who recognized the command of the sovereign as the sole source of all law, built upon this doctrine. See *infra* Secs. 22 and 25.

[23] On positivism see *infra* Sec. 24.

[24] *Tractatus theologico-politicus,* transl. R. H. M. Elwes (London, 1895), ch. 16. On Hobbes and Spinoza see also Huntington Cairns, *Legal Philosophy from Plato to Hegel* (Baltimore, 1949), pp. 246–294. On Spinoza's view of natural law and natural right see Gail Belaief, *Spinoza's Philosophy of Law* (The Hague, 1971), pp. 41–53; R. J. McShea, *The Political Philosophy of Spinoza* (New York, 1968), pp. 45–91.

ment whose primary function will consist in the preservation of peace and security of life for those who have submitted to its authority.

So far Spinoza's doctrine largely conforms to that of Hobbes, but their ways separate when they express their views on the scope of governmental functions and the best form of government. For Hobbes, the function of government exhausts itself in preserving peace and security, and in granting to the citizens a "harmless liberty" which does not include the right of free speech or even free thought.[25] Spinoza, on the other hand, considered liberty to be the highest aim of government.[26] "The object of government is not to change men from rational beings into beasts or puppets, but to enable them to develop their minds and bodies in security, and to employ their reason unshackled; neither showing hatred, anger, or deceit, nor watched with the eyes of jealousy and injustice." [27]

A good government, in his opinion, will grant freedom of speech to its citizens and will not attempt to control their opinions and thoughts. It will rule according to the dictates of reason and refrain from oppressing its subjects. If no higher motive guides it, the mere desire for self-preservation will induce the government to follow such a course. The right of the sovereign, just as the right of an individual in the state of nature, does not extend farther than its power, and this power will be short-lived if it is not supported by moderation, sound reason, and the consent of the citizens. "No one can long retain a tyrant's sway." [28] The limits to sovereign power, in Spinoza's view, are set, not by any superior legal rules by which it is restrained, but by the power of the many or by the government's own well-conceived self-interest. In this sense, it might be said that Spinoza's sovereign is limited by natural law; by disregarding a dictate of reason, the government violates a law of nature, namely, the law of its own self-preservation. In other words, natural law, in Spinoza's doctrine, is coextensive with those limitations on sovereign might which result from the power of the multitude, or from the government's reasonable realization of its own interests.[29]

As far as the best form of government is concerned, Spinoza believed, contrary to Hobbes, that democracy or a moderate form of constitutional aristocracy was preferable to monarchy. His discussions

[25] See *supra* n. 15.
[26] *Tractatus theologico-politicus*, ch. 20.
[27] *Ibid.*
[28] *Id.*, ch. 16 (quoting Seneca).
[29] Cf. Spinoza, *Tractatus politicus*, transl. R. H. M. Elwes (London, 1895), ch. 4, 4; ch. 3, 7 and 9; *Tractatus theologico-politicus*, ch. 17. (Both of these works are found in the same volume.)

on the nature of democracy, begun in the last chapter of his *Tractatus Politicus*, unfortunately remained unfinished because of his early death.

Section 11. *Locke and Montesquieu*

The second period in the history of the classical law-of-nature school is marked by an attempt to erect effective safeguards against violations of natural law by the government. Law in this period was conceived primarily as an instrument for the prevention of autocracy and despotism. The rise of absolute rulers throughout Europe made it evident that a shield of individual liberty against governmental encroachments was strongly needed. Thus, the emphasis was shifted to those elements in law which render the institution capable of functioning as a guarantor of individual rights. In this period legal theory placed the main emphasis on liberty, while the first period had favored security more than liberty.

In the political theory of John Locke (1632–1704), this new tendency became very obvious. Locke assumed that the natural state of man was a state of perfect freedom, in which men were in a position to determine their actions and dispose of their persons and possessions as they saw fit, and that it was, furthermore, a state of equality, in the sense that no man in this state was subjected to the will or authority of any other man. This state of nature was governed by a law of nature which, looking toward the peace and preservation of mankind, taught men that, all persons being equal and independent, no one ought to harm another in his life, health, liberty, or possessions.[1] As long as the state of nature existed, everybody had the power to execute the law of nature and punish offenses against it with his own hand.

This situation was fraught with disadvantages, inconveniences, and dangers. In the first place, the enjoyment of the natural rights of life, liberty, and property was uncertain and constantly exposed to the invasions of others. Second, in punishing infractions of the law of nature, each man was a judge in his own cause and liable to exceed the rule of reason in avenging transgressions.[2] In order to end the confusion and disorder incident to the state of nature, men entered into a compact by which they mutually agreed to form a community and set up a body politic. In contrast to Hobbes, who construed the social contract as a pact of complete subjection to an absolute sovereign, Locke as-

[1] Locke, *Of Civil Government* (Everyman's Library ed., 1924), Bk. II, ch. ii, secs. 4 and 6. On Locke see Frederick Pollock, "Locke's Theory of the State," in his *Essays in the Law* (London, 1922), pp. 80–102; Cairns, *Legal Philosophy from Plato to Hegel*, pp. 335–361; G. J. Schochet, *Life, Liberty, and Property* (Belmont, Cal., 1971); C. B. Macpherson, *The Political Theory of Possessive Individualism* (Oxford, 1962), pp. 194–262.

[2] Locke, *Of Civil Government*, Bk. II, ch. ix, sec. 123; ch. ii, secs. 12–13.

serted that men in establishing a political authority *retain* those natural rights of life, liberty, and property (often grouped by Locke under the single concept of property [3]) which were their own in the pre-political stage. "The law of nature," said Locke, "stands as an eternal rule to all men, legislators as well as others." [4] Only the right to *enforce* the law of nature was given up to the organs of the body politic. In consequence of this view, Locke—again in opposition to Hobbes—rejected absolute monarchy as a form of government and favored a government with limited powers. "The great and chief end . . . of men uniting into commonwealths, and putting themselves under governments, is the preservation of their property; to which in the state of Nature there are many things wanting." [5] The preservation of property, in the broad sense in which Locke used the term, was declared by him to be coincident with "the common good," and he pointed out that "the power of the society or legislative constituted by them can never be supposed to extend farther than the common good." [6] The supreme power cannot take away from any man any part of his property without his own consent. If it deals arbitrarily and improperly with the lives and fortunes of the people, it violates the essential conditions of the social compact and the trust relationship under which it holds its power.

What authority, asked Locke, should decide whether or not the government has transgressed the bounds which are set to its power? In other words, what organ of the community is the ultimate guarantor of the law of nature? On this question, Locke does not seem to have reached a clear-cut conclusion. At one point he drops a somewhat obscure hint to the effect that the judicial power might have to be the ultimate arbiter to decide whether the law of nature had been violated by a legislative act.[7] On the other hand, in his discussion of separation of powers within the state, the judicial power is not mentioned, the chief emphasis being placed on the divorce of the legislative from the

[3] *Id.*, ch. vii, sec. 87; ch. ix, sec. 123. It is obvious that in Locke's contemplation the right to property was not created by the community or state, but existed already in the state of nature.

[4] *Id.*, ch. xi, sec. 135.

[5] *Id.*, ch. ix, sec. 124.

[6] *Id.*, ch. ix, sec. 131.

[7] "The legislative or supreme authority cannot assume to itself a power to rule by extemporary arbitrary decrees, but is bound to dispense justice and decide the rights of the subject by promulgated standing laws, and known authorised judges. For the law of Nature being unwritten, and so nowhere to be found but in the minds of men, they who, through passion or interest, shall miscite or misapply it, cannot so easily be convinced of their mistake where there is no established judge." *Id.*, ch. xi, sec. 136.

executive power.[8] The legislative power, being but a delegated power from the people, cannot be transferred to any other hands.[9] It must be exercised through the promulgation of laws, "not to be varied in particular cases, but to have one rule for rich and poor, for the favourite at Court, and the countryman at plough." [10] The end of these laws, in the opinion of Locke, is "not to abolish or restrain, but to preserve and enlarge freedom." [11]

The execution and enforcement of the laws passed by the legislators is placed by Locke in the hands of the executive branch of the government. In a well-framed political order, he said, the legislative and executive powers must be in distinct hands. He pointed out, however, that for the good of society certain things must be left to the discretion of the executive authorities. They may, for instance, use their prerogative for the public advantage in instances where the municipal law has given them no direction, until the legislature can conveniently be assembled; in times of stress, even the laws themselves may have to give way to executive prerogative.[12]

While the separation of the legislative from the executive power of government will accomplish a great deal in the way of preventing governmental tyranny and arbitrariness, it does not in itself constitute a full and complete safeguard against the violation of individual rights. Locke was aware of this fact, and therefore was willing to recognize one additional and final guarantor of the law of nature: the people as a whole. They may remove and replace a legislature forgetful of its trust.[13] When the executive or the legislative power attempts to make its rule absolute and to enslave or destroy the people, the last resort of an "appeal to Heaven" is open to the people. By the exercise of the right of resistance or revolution, the natural law may then be revindicated against an oppressive positive law which negates and denies it.[14]

A necessary complement to the legal philosophy of John Locke was offered by the teachings of the French nobleman Baron Charles Louis de Montesquieu (1689–1755). Locke had presented a clear and con-

[8] See *id.*, ch. xii. Locke also mentions a third power, called "federative power," whose function it is to conclude treaties and other arrangements with foreign nations or their subjects. This power, as Locke himself recognized, is in reality a special department of the executive power. See ch. xii, secs. 146–148.

[9] *Id.*, ch. xi, sec. 141. See also *infra* Sec. 70.

[10] *Id.*, ch. xi, sec. 142.

[11] *Id.*, ch. vi, sec. 57. See also ch. xviii, sec. 202: "Wherever law ends, tyranny begins."

[12] *Id.*, ch. xiv, sec. 159. On Locke's conception of the executive prerogative see also *infra* Sec. 75.

[13] *Id.*, ch. xiii, sec. 149.

[14] See *id.*, ch. xiv, sec. 168; ch. xix, secs. 203–204, 222, and 242; cf. also Giorgio Del Vecchio, *Justice*, transl. L. Guthrie (New York, 1953), p. 158.

sistent theory of natural law, but he had neglected to elaborate a political system by which the observance of his law of nature would be effectively guaranteed. Montesquieu agreed with Locke that human liberty was the highest goal to be achieved by a nation, but his concern for liberty found its expression not so much in his natural-law philosophy as in his attempt to devise a system of government under which liberty could be obtained and secured in the most practicable and efficient way.

Montesquieu's natural-law philosophy can be dealt with rather briefly. He proceeded from the assumption that laws are "the necessary relations arising from the nature of things." [15] The "nature of things," according to him, manifests itself partly in universal and partly in variable tendencies and traits of human nature. Among the universal conditions of man's existence in society, he mentions the desire for peace (without which no social group life would be possible), the satisfaction of certain primary needs such as food, clothing, and shelter, the attraction arising from the difference of the sexes, and man's inherent sociability.[16] The other "necessary relations" which form the basis of laws are described as relative and contingent by him. They depend on geographical, especially climatic, conditions, on religious factors, on the political structure of a particular country. In tracing and describing the multifarious natural and cultural factors responsible for the genesis of laws, Montesquieu became in fact the precursor of the sociological jurisprudence of a later age.[17] And yet his affinity with the classical natural-law philosophers is clearly attested by the fact that he viewed law in general as "human reason" [18] (although he was aware that human reason may demand different legal solutions under different circumstances), as well as by his acknowledgment that there existed relations of justice antecedent to the positive laws by which they were established. "To say that there is nothing just or unjust but what is commanded or forbidden by positive laws, is the same as saying that before the describing of a circle all the radii were not equal." [19]

[15] *The Spirit of the Laws,* transl. T. Nugent (New York, 1900), Bk. I, ch. i. On Locke and Montesquieu see Friedrich, *Philosophy of Law in Historical Perspective,* pp. 101–109. See also Robert Shackleton, *Montesquieu* (Oxford, 1961), pp. 244–283.

[16] *The Spirit of the Laws,* Bk. I, ch. ii. In some of the later chapters of the book he gives concrete examples of laws which would violate the law of nature: for example, laws authorizing incest (Bk. XXVI, ch. xii), laws forbidding self-defense (Bk. XXVI, ch. iii), laws permitting a father to dissolve the marriage of his daughter (Bk. XXVI, ch. iii), laws dispensing the father from the duty to care for his children (Bk. XXVI, ch. v).

[17] See Eugen Ehrlich, "Montesquieu and Sociological Jurisprudence," 29 *Harvard Law Review* 582 (1916).

[18] *The Spirit of the Laws,* Bk. I, ch. iii.

[19] *Id.,* Bk. I, ch. i.

Montesquieu's fame rests above everything else on his political theory of the separation of powers. "Constant experience shows us," he said, "that every man invested with power is apt to abuse it, and to carry his authority as far as it will go." [20] To prevent such abuses it is necessary that power should be checked by power. In Montesquieu's opinion, that form of government will be safest in which the three powers—legislative, executive, and judicial—are separated; that is, made independent of each other and entrusted to different persons or groups of persons. Furthermore, according to him, they should be so constituted that they hold one another in check.[21] By this device he hoped to prevent an undue extension and arbitrary use of governmental authority in general.

Montesquieu believed that his scheme for a division and mutual balancing of governmental powers had been observed and carried out by the unwritten constitution of England. In reality, however, the executive and judicial powers, under the British system of government, are inferior in strength to the legislative power, which for all practical purposes is regarded as omnipotent. As Professor Hanbury has pointed out, "By a curious irony Montesquieu, searching, like the children in Maeterlinck's play, for the Blue Bird of Happiness, imagined that it had already taken tangible form in the neighbouring wood, whereas his thought had really called it into being in the Country of the Future. That is to say, abandoning the language of metaphor, the system, whose existence he wrongly ascribed to contemporary England, was destined to see the light for the first time in the United States of America." [22]

Section 12. *The Philosophy of Natural Rights in the United States*

The combination of Locke's theory of natural law with Montesquieu's doctrine of separation of powers forms the philosophical basis of the American system of government. The constitutional division of government into three independent branches, accompanied by an intricate system of checks and balances to forestall a decisive supremacy of any one of these three branches, owes its inspiration to Montesquieu. Among other details, the grant of the veto power to the chief executive, the vesting in the legislature of the power to impeach and try high officials, and the delegation to the legislative branch of the prerogative to make appropriations of money may be traced back to Montesquieu's renowned treatise.[1] The Lockian theory of natural rights, on the other

[20] *Id.*, Bk. XI, ch. iii (the chapter numbers vary in different editions).
[21] See particularly *id.*, Bk. XI, ch. v.
[22] H. G. Hanbury, *English Courts of Law*, 2d ed. (London, 1953), p. 26.
[1] *The Spirit of the Laws*, transl. T. Nugent (New York, 1900), Bk. XI, ch. v.

hand, together with Locke's doctrine of justified resistance against governmental oppression, formed the philosophical background of the Declaration of Independence. It also influenced the interpretation of certain clauses of the Bill of Rights, especially the due-process clauses, by the United States Supreme Court during certain periods of its history.[2] Typical in this respect is the language used by the court in the case of *Savings and Loan Association v. Topeka:*

> There are . . . rights in every free government beyond the control of the state. A government which recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. . . . There are limitations on such power which grow out of the essential nature of all free governments, implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name.[3]

Locke, it can be assumed, would have thoroughly agreed with this statement. Furthermore, the right of private property, which he held very high among the natural rights of man, has received an exceedingly strong protection at the hands of the Supreme Court in the nineteenth and early twentieth centuries.[4]

The link between Montesquieu and Locke in the system of American government was forged chiefly by the doctrine of judicial review. The United States Supreme Court has taken the position that, in order to guarantee the enforcement of natural rights, the power to make the laws must be separated not only from the power to execute the laws, but also from the power to review the laws with regard to their conformity with higher-law principles, as recognized by the United States Constitution. Thus, in the United States the courts, and especially the Supreme Court, have assumed guardianship over natural law.

A typical representative of American natural-law philosophy was

[2] See J. A. C. Grant, "The Natural Law Background of Due Process," 31 *Columbia Law Review* 56 (1931); Lowell J. Howe, "The Meaning of Due Process of Law," 18 *California Law Review* 583, 588–589 (1930); Wolfgang Friedmann, *Legal Theory*, 5th ed. (New York, 1967), pp. 136–151.

Cf. also the Constitution of Virginia of June 12, 1776, which says that "all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety."

[3] 20 Wall. 655, at 662-663, 22 L.Ed. 455, at 461 (1875).

[4] See Edward S. Corwin, *Liberty against Government* (Baton Rouge, La., 1948), pp. 47–48, 171 ff.; Charles G. Haines, *The American Doctrine of Judicial Supremacy*, 2d ed. (Berkeley, 1932), pp. 216–217; Walton H. Hamilton, "Property—According to Locke," 41 *Yale Law Journal* 864, at 873–874 (1932).

James Wilson (1742–1798), an associate justice of the United States Supreme Court and a professor of law in the College of Philadelphia. He believed strongly in the existence of a law of nature emanating from God and "manifesting itself to the universal conscience of mankind in simple, eternal, and self-evident principles." [5] One chapter in his lectures on law, which he delivered in Philadelphia during the winters of 1790 and 1791, begins with the following statement: "Order, proportion, and fitness pervade the universe. Around us we see; within us we feel; above us, we admire a rule from which a deviation cannot, or should not, or will not be made." [6] Human law, Wilson believed, must depend for its ultimate sanction on this immutable law of nature. He rejected Blackstone's assumption that human law involved the command of a superior to an inferior; in his view human law was grounded on the consent of those whose obedience the law required.[7] He thus linked the doctrine of natural law with the theory of popular sovereignty, believing that the natural law had its foundation in the character, strivings, and mutual relations of men and, therefore, "had an essential fitness for all mankind." [8]

The state, in Wilson's opinion, was founded by a compact of its members, who united together for their common benefit in order to enjoy peaceably what was their own and to do justice to others.[9] Each man, he said, has a natural right to his property, to his character, to liberty, and to safety.[10] It is the function of the law to guarantee these natural rights against any encroachment by the government. Law and liberty are thus closely connected in Wilson's philosophy. "Without liberty, law loses its nature and its name, and becomes oppression. Without law, liberty also loses its nature and its name, and becomes licentiousness." [11] In order to safeguard the rule of law, a system of checks and controls must be introduced into the system of government, so "as to make it advantageous even for bad men to act for the public good." [12] The legislative power should not only be separated from the executive power, but it should be divided in itself, by instituting two branches of the legislature. If one of them should depart, or attempt to depart, from the principles of the constitution, so Wilson

[5] Morris R. Cohen, "A Critical Sketch of Legal Philosophy in America," in *Law—A Century of Progress* (New York, 1937), II, 272.
[6] James Wilson, *Works,* ed. J. D. Andrews (Chicago, 1896), I, 49.
[7] *Id.*, I, 88.
[8] *Id.*, I, 124.
[9] *Id.*, I, 271.
[10] *Id.*, II, 309. By "character" Wilson means the reputation, integrity, and honor of a person, which should be protected by the law. *Id.*, p. 310.
[11] *Id.*, I, 7.
[12] *Id.*, I, 352.

argued, it would probably be drawn back by the other.[13] If, however, the legislature as a whole should do violence to the commands of the constitution, it should be curbed by the judicial branch of the government, to which falls the duty of declaring void all statutes which are repugnant to the supreme law of the land.[14]

The philosophy of James Wilson is perhaps the most consistent expression of the classical American philosophy of law and government. It was shared by most of the fathers of the United States Constitution. John Adams, Thomas Paine, and Thomas Jefferson were convinced that there existed natural rights which could not be restrained or repealed by human laws. And the view that it was the function of the courts to defend human rights, as recognized and sanctioned by the Constitution, against any violations by the legislature, was held not only by Wilson, but also by Hamilton and Jefferson.[15] Men like Chancellor James Kent (1763–1847) and Justice Joseph Story (1779–1845) likewise were firm believers in the existence of a natural law.[16] It can safely be stated that there is no country in the world where the idea of a law of nature, understood as a safeguard of liberty and property against governmental encroachments, gained a higher significance for the political and social development and the molding of all political and legal institutions than in the United States of America.

[13] *Id.*, I, 355.

[14] *Id.*, I, 415–417.

[15] Hamilton said in the *Federalist*, essay no. 78, "The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute; the intention of the people to the intention of their agents."

Jefferson said: "What I disapproved from the first moment, also, was the want of a bill of rights to guard liberty against the legislative as well as executive branches of the government." "In the arguments in favor of a declaration of rights, you omit one which has great weight with me, the legal check which it puts into the hands of the judiciary." Letters to F. Hopkinson, March 13, 1789, and to J. Madison, March 15, 1789, in the *Papers of Thomas Jefferson*, ed. J. P. Boyd (Princeton, 1958), XIV, 650, 659. After Jefferson's party was in command of the legislative and executive branches, Jefferson occasionally attacked "judicial usurpation."

[16] See particularly Joseph Story's "Essay on Natural Law," reprinted in 34 *Oregon Law Review* 88 (1955), where natural law is defined as "that system of principles which human reason has discovered to regulate the conduct of man in his various relations." The essay contains an interesting attempt to prove that the institution of polygamy violates the law of nature. *Id.*, pp. 95–96. On Wilson, Kent, and Story see also Harold G. Reuschlein, *Jurisprudence—Its American Prophets* (Indianapolis, 1951), pp. 38–44, 46–55.

Section 13. *Rousseau and His Influence*

Jean Jacques Rousseau (1712–1778), a native of the Swiss city of Geneva, may be said to belong to the classical tradition of natural law in the sense that he firmly believed in the existence of "natural rights" of the individual. But it has been asserted that, at least in some parts of his teaching, he deserted this classical tradition by seeking the ultimate norm of social life, not in the protection of indestructible personal rights, but in the supremacy of a sovereign and collective "general will." [1]

It is not altogether easy to follow the rather complex deductions of Rousseau. To him the fundamental political problem was "to find a form of association which will defend and protect with the whole common force the person and goods of each associate, and in which each, while uniting himself with all, may still obey himself alone, and remain as free as before." [2] In order to achieve this goal, each individual must by a social contract alienate all his natural rights without reservation to the whole community.[3]

One would expect that by alienating all of their natural rights to the community the citizens of the state would deprive themselves of their liberty. Rousseau, however, strongly denied this consequence. "Each man," he said, "in giving himself to all, gives himself to nobody; and as there is no associate over whom he does not acquire the same right as he yields others over himself, he gains an equivalent for everything he loses, and an increase of force for the preservation of what he has." [4] In the words of Sir Ernest Barker, "All are thus, at one and the same time, a passive body of subjects and an active body of sovereigns." [5] This sovereign body of citizens will see to it that what the individual has lost by the surrender of his natural rights he will regain in the form of civil liberty and in the guaranteed security of his possessions.[6]

In civil society, the individual is subject to no other individual, but merely "to the general will" (*volonté générale*), that is, the will of the

[1] See in this connection the Introduction by Sir Ernest Barker, ed., to *Social Contract: Essays by Locke, Hume, and Rousseau* (London, 1947), pp. xxxviiff. On Rousseau see also Emile Durkheim, *Montesquieu and Rousseau* (Ann Arbor, 1960), pp. 65–134; I. Fetscher, "Rousseau's Concepts of Freedom," in *Liberty* (NOMOS, vol. IV), ed C. J. Friedrich (New York, 1962), pp. 29–56.

[2] *The Social Contract,* transl. G. D. H. Cole (Everyman's Library ed., 1913), Bk. I, ch. vi.

[3] As Barker points out, Rousseau agrees with Hobbes that each individual, by the social contract, surrenders all his natural rights; he differs from Hobbes in that the individual, according to him, surrenders his right to no man or group of men, but to the community as a whole. See Barker, p. xlvi.

[4] *Social Contract,* Bk. I, ch. vi.

[5] *Supra* n. 1, p. xlvi.

[6] *Social Contract,* Bk. I, ch. viii.

community. Sovereignty, to Rousseau, meant the exercise of the general will. The sovereign, he argued, being formed wholly of the individuals who compose the state, can never have any interests contrary to theirs. The sovereign therefore need not give any guarantees to his subjects. Each individual, in obeying the general will, merely obeys himself; his individual will is merged in the general will. When the state is formed by means of the social contract, the general will is expressed by a unanimous consent of all citizens; all subsequent manifestations of the general will, however, are to take place in the form of majority decisions.[7]

The general will is the central concept in Rousseau's philosophy, but the full meaning of the term is far from clear and has been the subject of a great deal of argument and controversy.[8] Rousseau asserted that the general will is "always in the right," although the judgment which guides it may not always be enlightened.[9] Did he mean to say that the majority entrusted with the execution of the general will could make no mistakes, that it would be incapable of violating the rights of a minority? The answer must be sought in part in Rousseau's identification of the general will with the common good.[10] At least in a well-governed state, the general will operates to promote the welfare of all, although Rousseau conceded the possibility of a weak state in which the particular interests outweigh or smother the common good.[11] Rousseau's conclusions can also in part be explained by his optimistic appraisal of man's original nature and of the chances for perfecting this nature through moral teaching and political education.[12] This optimism led him to the belief that the majority would be prone to exercise its judgment in an enlightened and rational way, and that those opposing its opinion must be deemed to have acted in error.[13]

Rousseau, in contrast to Montesquieu, did not provide for a system of government under which the three powers of government are separate, independent, and equal. In the political scheme advocated by him, the legislative power is superior to the other two powers. It is vested in the people as a whole, not in a representative organ like a

[7] *Id.*, Bk. I, ch. vii; Bk. IV, ch. ii.

[8] See the discussion of the concept by Friedrich, *Philosophy of Law in Historical Perspective*, pp. 123–125.

[9] *Social Contract*, Bk. II, ch. vi; cf. also Bk. II, ch. iii, and Bk. IV, ch. i.

[10] *Id.*, Bk. II, ch. iii. This chapter seems to indicate that there is a definite *ideal* element in Rousseau's concept of the general will.

[11] See *id.*, Bk. IV, ch. i.

[12] His appraisal of man's uncorrupted nature in early primitive society is found in his *Dissertation on the Origin and the Foundation of the Inequality of Mankind*, reprinted in the edition cited in n. 2. On man's perfectibility through education and religion, see *Social Contract*, Bk. II, chs. vi and xii, and Bk. IV, ch. viii. See in this connection Ernst Cassirer, *The Question of Jean-Jacques Rousseau*, transl. P. Gay (New York, 1954).

[13] *Id.*, Bk. IV, ch. ii.

parliament. "The moment a people allows itself to be represented, it is no longer free." [14] Rousseau went so far as to contend that a law not ratified by the people as a whole was null and void. In consequence of these views, he came to the conclusion that the English nation, with its representative system of government, was not a free nation. "It is free only during the election of members of parliament. As soon as they are elected, slavery overtakes it, and it is nothing." [15]

Law, according to Rousseau, must be general in character and equally applicable to all within the purview of its mandates. It cannot be directed to a particular man or a particular object.[16] For particular acts of authority the community institutes a government, a commission for the execution of the general will. There is no contract of subjection between the people and the government, such as had been construed by Hobbes.[17] Expressed in legal language, government is nothing but an agency which may be revoked, limited, or modified at the will of the sovereign people. The depositaries of public power are not the masters of the people, but merely their officers. The government exists by grace of the sovereign and does not itself possess any attributes of sovereignty.[18]

There can be no doubt that Rousseau's theory may easily lead to an absolute democracy, in which the will of the majority is not subject to any limitations. He leaves no safeguard against the omnipotence of the sovereign and no guaranty of natural law except the wisdom and self-restraint of the majority.[19] Rousseau himself was convinced that there would be no conflict between individual liberty and collective authority in a well-governed state, but it is highly doubtful whether he was justified in this assumption. A social system based on the om-

[14] *Id.*, Bk. III, ch. xv.

[15] *Ibid.* In Rousseau's native land, Switzerland, the system of direct legislation by the people is in force in a few cantons. Other cantons have representative legislative bodies but submit many important issues to the populace as a whole for decision.

[16] "Thus the law may indeed decree that there shall be privileges but cannot confer them on anybody by name. It may set up several classes of citizens, and even lay down the qualifications for membership of these classes, but it cannot nominate such and such persons as belonging to them." *Id.*, Bk. II, ch. vi.

[17] Rousseau said: "There is only one contract in the State, and that is the act of association, and it excludes all others." *Id.*, Bk. III, ch. xvi. (The translation has been slightly modified.)

[18] See Bk. III, ch. xviii.

[19] Roscoe Pound's statement that "to Rousseau, the law is an expression not of natural law or of eternal principles of right and justice but simply of the general will" ("Theories of Law," 22 *Yale L.J.* 129, 1912) seems to go too far. Rousseau, because of his optimistic view of man's propensity to act for the common good, merely thought that the protection of natural rights, especially the rights of freedom and equality, was generally safe in the hands of the sovereign people.

nipotence of the general will contains some danger of a form of despotism which Tocqueville has described as the "tyranny of the majority." [20]

Rousseau's ideas exercised a strong influence upon the political doctrines of the French Revolution. Furthermore, Rousseau's concept of the general will affected the constitutional structure of the French Republic during the nineteenth century and the first half of the twentieth. Even though Rousseau's idea of a pure democracy, in which the people themselves exercise the legislative function, did not prevail in the French political system, his postulate of a sovereign *volonté générale* finding its expression through majority vote was accepted as the basic premise of a parliamentary democracy. This meant that the protection of the natural rights of men was entrusted to the legislature rather than to an organ of government set up as a brake upon majority rule.

In England, too, the will of the majority as expressed through the elected representatives of the people is deemed to have unlimited sway. There had been an epoch in English legal history in which a different theory prevailed. Sir Edward Coke (1552–1634), a great English judge, took the view that there existed an immutable law of nature which no parliament could change. As Chief Justice of the Court of King's Bench, he enunciated the doctrine that in many cases the common law, considered as an embodiment of certain unchangeable principles of natural reason, will control an act of Parliament, and that a parliamentary law contravening "common right and reason" must be adjudged null and void.[21]

The political development of the following centuries worked, however, against this theory. When Sir William Blackstone (1723–1780) wrote his famous *Commentaries on the Laws of England*, the doctrine of parliamentary supremacy had already defeated Coke's theory of judicial supremacy. Like most legal authors in the eighteenth century, Blackstone assumed that there was an eternal law of nature from which all human laws derived their force of authority. He even contended that "no human laws are of any validity, if contrary to this [law of

[20] Alexis de Tocqueville, *Democracy in America*, transl. H. Reeve (New York, 1899), pp. 263–274.

[21] Dr. Bonham's Case, 77 Eng. Rep. 646 (1610). For comments on this case see Charles H. McIlwain, *The High Court of Parliament and Its Supremacy* (New Haven, 1910), pp. 286 ff.; Haines, *American Doctrine of Judicial Supremacy*, pp. 32–36; Edward S. Corwin, "The Higher Law Background of American Constitutional Law," 42 *Harv. L.R.* 365, at 367 ff. (1928); Samuel E. Thorne, "Dr. Bonham's Case," 54 *Law Quarterly Review* 543 (1938).

nature]." [22] But it has been rightly said that these statements are but "ornamental phrases." [23] In another passage in his *Commentaries*, Blackstone clearly admitted that no authority could prevent Parliament from enacting laws contrary to the law of nature. "The power of Parliament," he said, "is absolute and without control." [24] This doctrine has prevailed in England to the present day. Its implications are clear: it entrusts the enforcement of man's natural rights to the wisdom of a parliamentary majority, in the expectation that the commands of reason and justice will act as moral restraints on the omnipotence of the legislature.

Section 14. *Practical Achievements of the Classical Law-of-Nature School*

The classical natural-law jurists prepared the ground for the legal order of modern civilization by elaborating certain elements and principles of legal regulation which constitute the basic prerequisites of a mature system of law. The classical law-of-nature school detected that there is some connection between law and the values of freedom and equality, at least in the sense that a wholly oppressive and arbitrary rule over human beings is incompatible with the concept of law.[1] All of the philosophers of natural law, including Hobbes, would probably have agreed with Rousseau's statement that "force does not create right." [2] Furthermore, the classical philosophers found out, by successive steps, that law must be a bulwark against anarchy as well as against despotism. Even those authors who, like Hobbes and Spinoza, put the antianarchical features of the law into the foreground, demanded that the strong government which they desired should grant, of its own free will, certain liberties to the citizens. Those authors who, like Locke and Montesquieu, emphasized above all the antidespotic features of the law, recognized the necessity of governmental authority to prevent the spread of anarchy. The methodical approaches of these philosophers to the problem of law were often characterized by unhistorical simplicity and arbitrary assumptions such as, for example, the

[22] *Commentaries on the Laws of England*, ed. W. C. Jones (San Francisco, 1916), vol. I, intro. sec. 2, par. 39.

[23] H. D. Hazeltine, "Blackstone," *Encyclopedia of the Social Sciences*, II, 580.

[24] *Commentaries*, Bk. I, ch. 2, sec. 222. Blackstone did state that Parliament could not do things that are "naturally impossible." But his idea of a law of nature embodying "the relations of justice" (*Id.*, intro. sec. 2, par. 39) would appear to encompass more than absolute natural necessity.

[1] This thought will be developed in Part II of this book.

[2] *The Social Contract*, transl. G. D. H. Cole, Bk. I, ch. iii.

unfounded belief that reason had the capacity to devise universally valid legal systems in all their details. Even in this respect the classical natural-law jurists do not deserve an excessive blame. By disregarding history and concentrating their efforts upon the discovery of an ideal system of law and justice, they performed a task superior in social significance to the efforts of the pure historians of the law. Through the collective efforts of several generations of thinkers, the classical law-of-nature philosophers laid the foundation stones which were used in erecting the legal edifice of modern Western civilization.

Even though the doctrines of the classical law-of-nature school have undergone needed revisions and modifications in the twentieth century, this does not detract from the great historical accomplishments of this school. In the practical politics of their own day, the teachers of natural law furnished valuable aids to progress. They created the legal instruments by which the liberation of the individual from medieval ties was achieved. The law of nature contributed to the abolishment of villeinage and serfdom. It helped to destroy the medieval guilds and medieval restrictions upon trade and industry. It aided in freeing landed property from feudal burdens. It created freedom of movement and of vocational choice. It inaugurated an era of religious and spiritual freedom. It purged criminal law and procedure of its most serious shortcomings by abolishing torture and humanizing punishment. It did away with witchcraft trials.[3] It sought to achieve legal security for everybody and sponsored the principle of equality before the law. It elaborated the general principles of international law. All these achievements were not due exclusively to the immediate influence and pressure of the natural-law philosophers. Many factors were at work in the process of the liberation of the individual, which started in the sixteenth century, and the vigor and speed of this process were different in the various countries of the Western world. But there can be no doubt that the classical law-of-nature movement was one of the creative and invigorating forces in the rise of liberalism and in the legal reforms which liberalism achieved.

Another practical result of the philosophy of natural law was a strong movement for legislation. The advocates of a law of nature believed that by the mere use of their rational powers men would be able to discover an ideal legal system. It was only natural that they should endeavor to work out in a systematic form all the various rules and principles of natural law and to embody them in a code. Accordingly, about the middle of the eighteenth century a movement for

[3] It was a teacher of natural law, Christian Thomasius, who led the attack upon witchcraft trials in Germany.

legislation set in. Its first fruit was the Code of Frederick the Great of Prussia (*Allgemeines Landrecht*, promulgated in 1794 under Frederick's successor), which contained important elements of the benevolent and paternalistic legal philosophy of Christian Wolff.[4] One of the highest achievements of the movement for legislation was the Code Napoléon of 1804, which is still law in France. Austria enacted a code in 1811. Later milestones on the road to codification were the German Civil Code of 1896 and the Swiss Civil Code of 1907. All of these codes, by granting a certain amount of freedom, equality, and security to all persons within their sphere of operation, realized and put into effect some of the elementary postulates of the classical law-of-nature school.

[4] See *supra* Sec. 9.

IV

GERMAN TRANSCENDENTAL IDEALISM

Section 15. *The Legal Philosophy of Kant*

Transcendental idealism is a philosophical attitude which attributes an autonomous existence to ideas and concepts formed by the human mind and denies that such ideas and concepts are merely human reactions to the empirical world of flux. It is characteristic of this philosophical approach that it ascribes great force and strength to the human intellect and considers that empirical reality is to a great extent shaped by the ideas conceived or produced by human thinking. Transcendental idealism also inclines to the belief that either knowledge of reality itself, or at least the forms, ways, and categories by which the human mind attempts to gain knowledge of reality, are not given a posteriori, through sense experience, but a priori, independently of empirical sense data. In the most radical manifestations of this philosophy, human thought becomes converted into "the exclusive pillar of the universe." [1] It was in the Germany of the eighteenth and nine-

[1] Guido de Ruggiero, "Idealism," *Encyclopedia of the Social Sciences,* VII, 568.

teenth century that the idealistic strain in Western philosophy was carried to its highest pitch.

Whether the great German philosopher Immanuel Kant (1724–1804) should properly be classified as a transcendental idealist has been the subject of debate and doubt. Kant's philosophy, at least in certain of its aspects, lends itself to the interpretation that its primary objective was to attempt a reconciliation between an idealistic rationalism, characterized by a belief in the primacy of thinking over experience, and an empirical sensualism, guided by the assumption of the dependence of all human knowledge upon sense perception. Kant took the position that "sensations" are the only source of our knowledge of objects in the empirical world. However, he viewed sense experience as conditioned by the constitution of the human mind, which, in his opinion, contained certain forms of cognition or understanding by which the fleeting impressions of the senses are absorbed, coordinated, and integrated. Among these forms and categories of cognition indigenous to the human mind he listed the concepts of space, time, and causality, as well as the propositions of mathematics. All of these he considered not as products of experience but as a priori categories brought by the knowing observer to the data of the senses.[2]

While Kant's scientific philosophy, as outlined in his *Critique of Pure Reason,* is susceptible of being interpreted as a compromise between empirical sensualism and transcendental idealism, his idealistic bent becomes very strong in his philosophy of morality and freedom. Insofar as man is part of the world of empirical phenomena, he taught, his will and actions are subject to the iron laws of causality as expounded in Newton's theory of the physical universe; they are therefore unfree and determined. Man's inner experience and practical reason, on the other hand, tell him that he is a free moral agent who can choose between good and evil. In order to solve this contradiction between the theoretical reason of natural science and the practical reason of the human moral life, Kant assumed that man belongs not only to the "sensible" world (that is, the world of sense perception), but also to a world he called "intelligible" or "noumenal."[3] In this world freedom, self-determination, and moral choice are possible and real. To Kant, law as well as morality must be assigned to the intelligible world. In con-

[2] See F. S. C. Northrop, *The Meeting of East and West* (New York, 1946), pp. 196–199; B. A. G. Fuller and Sterling McMurrin, *A History of Modern Philosophy,* 3d ed. (New York, 1955), II, 219.

[3] Kant did not believe that these two worlds were separate and independent from each other, although he distinguished them for purposes of philosophical inquiry. He seems to have assumed that the noumenal world was the ground or cause of the empirical world.

trast to the philosophers of the natural law, he rejected all attempts to predicate general principles of morality and law on the empirical nature of man; instead he sought to find their basis in an a priori world of "oughts" founded on the dictates of reason. A close study of Kant's philosophy as a whole strongly conveys the impression that he considered the noumenal world, the world of freedom and human reason, as the *real* world, as the "thing-in-itself," while the empirical world of physical nature and causality was to him a shadow world, a world of appearances, viewed by us through colored and defective spectacles. If this interpretation is correct, then it is entirely proper to classify Kant as a transcendental idealist.[4]

The concept of freedom is central in Kant's moral and legal philosophy.[5] He makes a distinction, however, between ethical and juridical freedom. Ethical or moral freedom meant to him the autonomy and self-determination of the human will; we are morally free insofar as we are capable of obeying a moral law which is engraved in the hearts of all of us.[6] This moral law, formulated by Kant in the form of the Categorical Imperative, demands that we act according to a maxim which we could wish to become a universal law.[7] Juridical freedom, on the other hand, he defines as independence of an individual from the arbitrary will and control of another. This freedom he considered as the only original and inborn right belonging to man by virtue of his humanness.[8] This basic right, he pointed out, comprises in itself the ideas of a formal equality, because it implies that each man is independent and his own master. Kant had a strong belief in the inherent dignity of the human personality, and he taught that no man had the right to use another person merely as a means to attain his own subjective purposes; each human individual was always to be treated as an end in itself.[9]

Law was defined by Kant as "the totality of the conditions under which the arbitrary will of one can coexist with the arbitrary will of

[4] On Kant's philosophy of morality and freedom see H. J. Paton, *The Categorical Imperative* (London, 1946).

[5] The line drawn by Kant between morality and law is discussed elsewhere. See *infra* Sec. 57. On Kant's legal philosophy see also Huntington Cairns, *Legal Philosophy from Plato to Hegel* (Baltimore, 1949), pp. 390–463; Giorgio Del Vecchio, *Philosophy of Law*, transl. T. O. Martin (Washington, 1953), pp. 102–115.

[6] In Kant's own words: "A free will and a will subject to moral laws are one and the same." *Fundamental Principles of the Metaphysic of Morals*, transl. J. K. Abbot (New York, 1949), p. 64. A free will, under this concept, is not one which freely and without inhibitions satisfies desires, inclinations, and appetites but, on the contrary, one which is in full control of irrational impulse.

[7] *Id.*, p. 38.

[8] Kant, *The Metaphysical Elements of Justice*, transl. J. Ladd (Indianapolis, 1965), pp. 43–44.

[9] *Metaphysic of Morals*, p. 46.

another according to a general law of freedom." [10] This means: if my action or my condition can coexist with the freedom of everybody else, according to a general law, then whoever hinders me in the performance of this act or in the maintenance of this condition is doing me a wrong. From this it follows that the law may use coercive force against a person who improperly and unnecessarily interferes with the freedom of another individual. As Roscoe Pound has pointed out, this conception of law "seems to be the final form of an ideal of the social order which governed from the sixteenth to the nineteenth century: an ideal of the maximum of individual self-assertion as the end for which the legal order exists." [11]

Kant's theory of the state corresponded to that of Rousseau. Kant recognized the social contract, not as a historical fact, but as a postulate of reason and "a criterion whereby to evaluate the legitimacy of a State." [12] Kant also adopted Rousseau's theory of the general will by proclaiming that the legislative power can only belong to the united will of the people. The will of the legislator with regard to what constitutes the external Mine and Thine is irreproachable, for it is the joint will of all, and this will cannot do any wrong to an individual citizen (*Volenti non fit injuria*).[13]

In Kant's opinion, it is the sole function of the state to enact and administer the law. Consequently, he defined the state as a "union of a number of men under juridical laws." [14] The state must not needlessly interfere with the activity of its citizens or paternalistically look

[10] *Metaphysik der Sitten,* ed. K. Vorländer (Leipzig, 1922), pp. 34–35 (My translation). J. Ladd's translation (*supra* n. 8, p. 34) deems this definition to be one of "justice" rather than "law." It is possible that Kant used the term *Recht* in this context as a synonym for "just law."

It is of interest to observe that the term "law" connoted to Kant a set of invariable, inflexible principles from which, in the words of James Wilson (*supra* Sec. 12), "a deviation cannot, or should not, or will not be made." This conception had its source in Newton's view of the physical universe as an entity governed by immutable, never-failing causal laws. As a result of this conception, Kant rejected the Aristotelian idea that the general rules of the positive law might be corrected or mitigated, in harsh cases, by individual equity; he also was unwilling to recognize the maxim "Necessity knows no law" except as a justification for mitigating or abating punishment; and he wished to limit the executive's right of pardon to cases of lesé-majesté. See Kant, *supra* n. 8, pp. 39–42, 107–108.

[11] *Interpretations of Legal History* (Cambridge, Mass., 1930), p. 29. On Kant's concept of law see also Pound, *The Spirit of the Common Law* (Boston, 1921), pp. 147–148, 151–154; Carl J. Friedrich, *The Philosophy of Law in Historical Perspective* (Chicago, 1963), pp. 125–130.

[12] Del Vecchio, p. 113.

[13] Kant, *supra* n. 8, pp. 78, 81. In view of the fact that Kant excluded large classes of people, such as women, servants, and day laborers from active participation in the formation of the political will, this argument appears to lack conviction.

[14] *Metaphysik der Sitten,* p. 135 (My translation).

after their interests and personal happiness; it ought to confine itself to the protection of their rights. In order to prevent the establishment of a despotic regime, Kant demanded a separation of powers. The legislative power must belong to the people; if it is entrusted to the executive arm of the government, tyranny will result. The judicial power will award to each person that which is due to him under the law. The Kantian judiciary does not, however, possess the right to pass upon the validity of legislation. Thus, freedom and the rights of men are, in Kant's view, guaranteed solely by the will of a legislative majority. This will, Kant said, cannot be resisted under any circumstances; nor does a right of rebellion against executive tyranny exist under his political scheme. "The Supreme Power in the state has only Rights, and no (compulsory) Duties towards the subject." [15] It is the duty of the people to bear the abuses and the iniquities of the legislative power even though they may become unbearable; for the sovereign, being the source of all law, can himself do no wrong.[16] By thus attributing obligatory force to positive law alone, Kant prepared the ground for the rise of positivism in legal theory.[17]

Section 16. *The Legal Philosophy of Fichte*

Transcendental idealism presented itself in a pure and uncompromising form in the philosophy of Johann Gottlieb Fichte (1762–1814). To him, the starting point and center of all philosophical thinking is and must be the intelligent human ego. Not only the *forms* of our cognition, as Kant had taught, but also the *content* of our perceptions and sensations, were regarded by Fichte as the product of our consciousness. "All being, that of the ego as well as that of the non-ego, is a certain modality of consciousness; and without consciousness there is no being." [1] The nonego, that is, the world of objects, is in Fichte's view, nothing but a target for human action, a domain for the exertion of the human will, which is able to shape and transform this world.[2] Fichte's philosophy is one of human activism without bounds, and it

[15] *Id.*, p. 143 (My translation).

[16] Kant, *supra* n. 8, p. 78. Kant seems to distinguish, however, between *legal* wrong and *moral* wrong, recognizing a *moral* right of resistance under certain circumstances. See Kant, *Religion within the Limits of Reason Alone*, transl. T. M. Greene and H. H. Hudson, 2d ed. (La Salle, Ill., 1960), p. 90, n. 2.

[17] Jerome Hall, *Foundations of Jurisprudence* (Indianapolis, 1973), pp. 39–44, places Kant within the natural-law tradition. This classification can be accepted to the extent that Kant recognized a natural and universal right of freedom as the foundation stone of the legal order.

[1] "Grundlage des Naturrechts nach Prinzipien der Wissenschaftslehre," in *Sämtliche Werke* (Berlin, 1845), p. 2 (translation mine).

[2] Although we may be disinclined today to accept this form of subjective idealism as a true philosophy, it gave strong impetus in its day to man's attempts to become the master of nature and use his creative powers to the fullest extent.

represents an enthusiastic affirmation of the sovereign power of human intelligence.

The rational human ego is viewed as free by Fichte in the sense that it sets its own goals and is capable of attaining them; in other words, the actions of human beings are determined solely by their own will.[3] Since, however, human egos stand in relations of interaction with other human egos, their respective spheres of freedom must be adjusted and harmonized. Thus Fichte, like Kant, considered law as a device for securing the coexistence of free individuals. Every man must respect the freedom of every other man. No one may claim a freedom which he would not concede to others in the same way. Differently expressed, each individual must exercise his freedom within certain limits determined by the equal freedom of every other person.[4] Fichte emphasized that limitations upon the freedom of the individual ego should be decreed by general laws, not by the individual pronouncements of judges.[5] For the individual must be deemed to have consented to the promulgation of general laws guaranteeing the freedom of all; he cannot be deemed to have subjected himself to the arbitrary decision of a particular judge.

Fichte's philosophy of law was laid down in a complete and systematic form in a relatively early period of his academic activity. It underwent certain important modifications, however, in the course of his life.[6] While Fichte had emphasized the freedom, independence, and natural rights of the individual in his early period, his later writings stressed the importance of the national state and justified an extension of its activities beyond the protection of universal freedom. In the economic field, for example, he rejected free trade and laissez-faire policies, demanding governmental regulation of production and the establishment of a foreign trade monopoly by the state. In the political domain, too, he gradually and increasingly moved away from the individualism of his younger years and came to see the chief destiny and duty of the individual in his submergence in the national state, conceived as an indivisible and organic collective entity. His cult of the spirit ended with his surrendering the political life of the state to Machiavellian policies.

[3] "Grundlage des Naturrechts," pp. 8, 59, 85.

[4] *Id.*, pp. 10, 92.

[5] *Id.*, p. 103. Like Kant, Fichte held that human laws should be categorical and invariable, i.e., not subject to equitable exceptions in cases where they would work severe hardship. *Id.*, p. 104.

[6] A good brief account of the evolution in Fichte's thought is given by Alfred Verdross, *Abendländische Rechtsphilosophie*, 2d ed. (Vienna, 1963), pp. 154–156; see also Cairns, *Legal Philosophy from Plato to Hegel*, pp. 464–502; Wolfgang Friedmann, *Legal Theory*, 5th ed. (New York, 1967), pp. 161–164.

Section 17. *Hegel's Philosophy of Law and the State*

In the philosophy of Georg Wilhelm Friedrich Hegel (1770–1831), German transcendental idealism took a turn from a subjective to an objective form of rationalism. While Fichte had placed the seat of rationality chiefly in the mind of the human individual, Hegel declared the "objective spirit" manifesting itself in the unfolding of history and civilization to be the principal standard bearer of reason. He taught that reason revealed itself in different ways in the various epochs of history and that its content was constantly changing. Hegel saw in history an "evermoving stream which throws up unique individualities as it moves, and is always shaping individual structures on the basis of a law which is always new." [1] The new idea which he developed and which was to become of far-reaching importance in the history of legal philosophy was the idea of *evolution.* All the various manifestations of social life, including the law, taught Hegel, are the product of an evolutionary, dynamic process. This process takes on a dialectic form: it reveals itself in thesis, antithesis, and synthesis. The human spirit sets a thesis which becomes the leading idea of a particular epoch. Against this thesis an antithesis is set up, and from the struggle of both a synthesis develops which absorbs elements of both and reconciles them on a higher plane. This process repeats itself again and again in history.

What is the meaning and ultimate goal of this dynamic process? According to Hegel, the great ideal which lies back of the colorful and often perplexing pageant of history is the realization of *freedom.* History, said Hegel, did not realize this ideal once and for all. The achievement of freedom is a long and complicated process, in which the working of reason, although always present, cannot be easily discerned; it is the "ruse of reason" to let even the forces of evil work in its service. In this evolutionary process a specific task has been assigned to each nation in history. After its fulfillment this nation loses its significance in history: the "world spirit" has surpassed its ideas and institutions, and it is compelled by fate to hand the torch to a younger and more vigorous nation. It is in this fashion that the world spirit, according to Hegel, accomplishes its ultimate goal of universal freedom. In the old oriental monarchies only one person, the king, was really free. In the Greek and Roman world some were free, but the majority of the population were slaves. The Germanic peoples were the first to recognize that every individual is free, and that freedom of the spirit is man's most peculiar characteristic.[2]

[1] Ernst Troeltsch, "The Ideas of Natural Law and Humanity in World Politics," in Otto Gierke, *Natural Law and the Theory of Society,* transl. E. Barker (Cambridge, Eng., 1934), I, 204.

[2] See Hegel, *Lectures on the Philosophy of History,* transl. J. Sibree (London, 1890), Introduction.

In this historical process, law and the state play a vital role, according to Hegel. The system of law, he asserted, is designed to realize the ideal of freedom in its external manifestations.[3] It bears emphasis, however, that for Hegel freedom did not signify the right of a person to do as he pleased. A free person, in his view, is one whose mind is in control of his body, one who subordinates his natural passions, irrational desires, and purely material interests to the superior demands of his rational and spiritual self.[4] Hegel admonished men to lead a life governed by reason and pointed out that one of the cardinal postulates of reason was to accord respect to the personality and rights of other human beings.[5] The law was considered by him as one of the chief instruments devised to reinforce and secure such respect.

The state was defined by Hegel as the "ethical universe" and the "actuality of the ethical ideal."[6] This definition demonstrates that Hegel, unlike Kant, viewed the state not merely as an institution for the enactment and execution of laws but, in a much broader use of the term, as an organism within which the ethical life of a people unfolds itself. This ethical life finds its expression in the mores, customs, common beliefs, art, religion, and political institutions of a nation; in short, in the pattern of its community values. Hegel taught that, since the individual is embedded in the entire culture of his country and epoch, since he is a "Son of his Nation" as well as a "Son of his Age," he possesses his worth and reality as a rational being only through the state, conceived as the total embodiment of the spirit and social ethics of the people. It is the highest privilege of an individual to be a member of the state, Hegel said.[7] In his singularity the individual is often not capable of discerning clearly the specific content of his ethical duties; their content must be determined in an objective fashion by the mores and ways of life of the organized community.[8]

The contention has often been made that Hegel was a panegyrist of the power state and the philosophical progenitor of modern fascist totalitarianism. Undoubtedly, legal theorists of fascist persuasion have sometimes tended to rely extensively on Hegel's philosophy of the state,[9] and passages can be found in Hegel's writings which would seem to give countenance to such reliance. This is particularly true

[3] Hegel, *The Philosophy of Right*, transl. T. M. Knox (Oxford, 1942), pp. 20, 33 (secs. 4 and 29). Knox in his translation erroneously uses the word "right" where he should have used the term "law."

[4] *Philosophy of History*, p. 43; *Philosophy of Right*, p. 231 (addition to sec. 18).

[5] *Id.*, p. 37 (sec. 36).

[6] *Id.*, p. 11 (Preface) and p. 155 (sec. 257).

[7] *Philosophy of History*, pp. 40–41, 55 (Introduction).

[8] *Philosophy of Right*, p. 156 (sec. 258).

[9] See in this connection Friedmann, *Legal Theory*, 5th ed., pp. 174–176. It has also been asserted, however, that Hegel—because he emphasized freedom and reason—was highly unpopular in the Nazi state. Ernst Bloch, *Subjekt-Objekt-Erläuterungen zu Hegel* (Frankfurt, 1962), p. 249.

for Hegel's discussion of the external relations of states. Hegel believed that the sovereignty of individual states in the conduct of their foreign affairs was absolute and unrestrained. Disputes between states not susceptible of being settled by mutual agreement could be decided only by war, an institution which Hegel regarded at the same time as necessary and beneficial for the preservation of the internal health and vigor of the nation.[10] But it would be incorrect to assert that Hegel advocated totalitarian methods of government in the internal relations of the state or, more particularly, in the treatment of the citizens or subjects. He did not believe that the highest aim to be pursued by the state was aggrandizement of the power of its rulers.[11] This would be contrary to Hegel's basic conviction that the state should serve the interests of the human mind, and that, in its innermost essence, it was an embodiment of spiritual forces. He viewed that type of state as the ideal commonwealth in which art, science, and other forms of cultural life were developed to the highest degree. Such a state, he thought, would at the same time be a powerful state.

Hegel made it quite clear that the state should grant its citizens the right to own private property, and he expressed a general dislike for public ownership.[12] He wished to give individuals the right to enter into contracts of their own choice, and he assigned a very high value to the institution of the family. Furthermore, he demanded that the rights and duties of the citizens, as well as the rights and duties of the state, be fixed and determined by law. He conceded to individuals the right to live a private life, to foster their personality, and to promote their particular interests as long as they did not in so doing lose sight of the interests of the community as a whole.[13]

The following famous aphorism is found in the preface to Hegel's *Philosophy of Law:* "That which is rational is real and that which is real is rational." Some writers have attempted to deduce Hegel's supposed approval of modern totalitarian governments from this statement. A close study of Hegel's philosophical disquisitions will reveal, however, that for Hegel only *ideas* had genuine reality.[14] History was real and rational to him to the extent that its events demonstrated and

[10] *Philosophy of Right,* pp. 209–210 (sec. 324), 213–214 (secs. 333–334), 295 (addition to sec. 324).

[11] *Id.,* pp. 158–160 (note to sec. 258). See also the excellent exposition of Hegel's philosophy of law and the state by Friedrich, *Philosophy of Law in Historical Perspective,* pp. 131–138; René Marcic, *Hegel und das Rechtsdenken* (Salzburg, 1970).

[12] *Philosophy of Right,* p. 42 (sec. 46), and p. 236 (addition to sec. 46).

[13] *Id.,* p. 160 (sec. 260). Cf. also p. 280 (additions to secs. 260 and 261), and *The Philosophy of Hegel,* ed. C. J. Friedrich (New York, 1953), p. xlvii.

[14] See Hegel, "The Phenomenology of the Spirit," in *The Philosophy of Hegel,* pp. 411–412.

symbolized the forward march of the idea of freedom in its gradual and relentless progress toward its goal, even though in particular and perhaps inessential happenings a considerable degree of irrationality might manifest itself. It must not be forgotten that Hegel was a thoroughgoing idealist who believed in the sovereignty of the spirit over the material and the essential dignity of the human being. The state he glorified was the ethical state, not the state which degraded and enslaved the individual and was oblivious of his justified claims.[15] Hegel's philosophy contained, therefore, a substantial amount of individualistic liberalism, although this aspect of his thought is sometimes obscured by statements which, taken in isolation, might appear to exalt the state at the expense of the individual.

[15] This is emphasized by Friedrich, *op. cit. supra* n. 11, pp. 131–132. On Hegel's philosophy of law see also Cairns, *Legal Philosophy from Plato to Hegel,* pp. 503–550.

V

HISTORICAL AND EVOLUTIONARY THEORIES OF LAW

Section 18. *Savigny and the Historical School in Germany*

The natural-law philosophers of the seventeenth and eighteenth centuries had looked to reason as a guide for discerning the ideal and most perfect form of law. They were interested in the aims and purposes of the law, not in its history and growth. They sought to construct a new legal order based on certain principles of liberty and equality, which they proclaimed to be eternal postulates of reason and justice.

The age of rationalism and natural law in Europe culminated in the French Revolution of 1789. When this revolution failed to reach its objectives in the doctrinaire way in which it had set about to achieve them, and had to be content with partial results, a certain reaction against its rationalistic premises set in throughout Europe. In Germany and England especially, those two countries which had resisted and to some extent thwarted the attempts to spread the ideas of the French Revolution across the whole continent of Europe, the movement

against the unhistorical rationalism of the forerunners of the revolution became quite powerful. Conservative ideas, based on history and tradition, were emphasized and propagated. In the sphere of law and legal philosophy, this meant the accentuation of legal history and legal tradition as against the speculative attempts to establish a law of nature. The history of law was investigated thoroughly and brakes were put on the zeal of law reformers. This was the period in which scientific research into the law-shaping forces began to replace the rationalistic inquiries into the ideal nature, purposes, and social objectives of the law.

In England, it was Edmund Burke who, in his *Reflections on the Revolution in France* (1790), denounced the excesses of this revolution and emphasized the values of tradition and gradual growth. He protested against what he considered a reckless reshuffling of the political and legal order of the French people and pointed to history, habit, and religion as the true guides to social action. An even stronger reaction against the rationalistic and cosmopolitan principles of the French Revolution took place in Germany. There arose in that country a powerful movement which was romantic, irrational, and vehemently nationalistic in character and found its expression in literature, art, and political theory. In the domain of law, this movement was represented by the historical school of law. The most eminent exponent of this school was Friedrich Carl von Savigny (1779–1861), whose most distinguished pupil was Georg Friedrich Puchta (1798–1846).

Savigny's view of the law was first presented in his famous pamphlet "Of the Vocation of Our Age for Legislation and Jurisprudence" (1814). This pamphlet was an answer to a proposal made by a professor of civil law, A. F. J. Thibaut of Heidelberg University, to the effect that a codification of the laws and customs of the various German states be undertaken in a coherent arrangement, on the basis of Roman law and the Napoleonic code. Savigny vehemently attacked this suggestion. In his view, the law was not something that should be made arbitrarily and deliberately by a lawmaker. Law, he said, was a product of "internal, silently-operating forces."[1] It was deeply rooted in the past of a nation, and its true sources were popular faith, custom, and "the common consciousness of the people." Like the language, the constitution, and the manners of a people, law was determined above all by the peculiar character of a nation, by its "national spirit" (*Volksgeist*).[2] In every people, Savigny pointed out, certain

[1] *Of the Vocation of Our Age for Legislation and Jurisprudence*, transl. A. Hayward (London, 1831), p. 30.

[2] Savigny, *System des Heutigen Römischen Rechts* (Berlin, 1840), I, 14.

traditions and customs grow up which by their continuous exercise evolve into legal rules.[3] Only by a careful study of these traditions and customs can the true content of law be found. Law in its proper sense is identical with the opinion of the people in matters of right and justice. In the words of Savigny,

> In the earliest times to which authentic history extends the law will be found to have already attained a fixed character, peculiar to the people, like their language, manners, and constitution. Nay, these phenomena have no separate existence, they are but the particular faculties and tendencies of an individual people, inseparably united in nature, and only wearing the semblance of distinct attributes to our view. That which binds them into one whole is the common conviction of the people, the kindred consciousness of an inward necessity, excluding all notion of an accidental and arbitrary origin.[4]

Thus in the view of Savigny, law, like language, is a product not of an arbitrary and deliberate will but of a slow, gradual, and organic growth.[5] The law has no separate existence, but is simply a function of the whole life of a nation. "Law grows with the growth, and strengthens with the strength of the people, and finally dies away as the nation loses its individuality." [6]

What role was assigned by Savigny to the legal profession in this evolutionary process? Savigny was well aware of the fact that in an advanced system of law, legal scholars, judges, and lawyers play an active part in the shaping of legal institutions. He knew that the popular spirit does not fashion codes of procedure, rules of evidence, or bankruptcy laws. But he viewed the technical jurists less as members of a closed profession than as trustees of the people and as "representatives of the community spirit . . . authorized to carry on the law in its technical aspects." [7]

Puchta agreed with his teacher that the genesis and unfolding of law out of the spirit of the people was an invisible process. "What is

[3] On the role of custom in law see *infra* Sec. 63.

[4] *Legislation and Jurisprudence*, p. 24.

[5] Hermann Kantorowicz, "Savigny and the Historical School of Law," 53 *Law Quarterly Review* 326, at 340 (1937), gives an excellent summary of the chief doctrine of this school: "Law, like civilization in general, is the emanation of unconscious, anonymous, gradual, and irrational forces in the individual life of a particular nation."

[6] *Legislation and Jurisprudence*, p. 27. Hayward translates *Eigentümlichkeit* as "nationality." I have substituted "individuality," which seems preferable in the context of this sentence.

[7] Edwin W. Patterson, *Jurisprudence* (Brooklyn, 1953), p. 412. On Savigny see also Roscoe Pound, *Interpretations of Legal History* (Cambridge, Mass., 1930), pp. 12–21; Julius Stone, *Social Dimensions of Law and Justice* (Stanford, 1966), pp. 86–118.

visible to us is only the product, law, as it has emerged from the dark laboratory in which it was prepared and by which it became real." [8] His investigations on the popular origin of law convinced him that customary law was the most genuine expression of the common conviction of the people, and for this reason, far superior to legislation. He considered explicit legislation useful only insofar as it embodied the prevailing national customs and usages.

It will easily be seen that the doctrines of the historical jurists stood in sharp contrast to the teachings of the classical natural-law philosophers. The thinkers of the age of enlightenment believed that the legal rules could be discovered and laid down in a code by consulting human reason alone. The historical school detested legislation and placed the emphasis on the irrational, almost mystical concept of a "national spirit" rooted in the traditions of a remote past.[9] The law-of-nature school taught that the fundamental principles of law were everywhere and at all times the same. The historical jurists believed in the predominantly national character of legal institutions. The classical law of nature, as an essentially revolutionary doctrine, looked to the future. The historical school, as a reaction to it, looked to the past. The historical school was, in fact, a legal counterpart to the epoch of political reaction in Europe which followed the defeat of Napoleon and the Congress of Vienna and found its expression in the "Holy Alliance" of imperial dynasties. In evaluating the historical school of law it should not be forgotten that Savigny was a conservative nobleman who detested the equalitarian rationalism of the French Revolution. Furthermore, he was a German nationalist who was opposed to the cosmopolitan implications of the French doctrine. He was very critical of the Code Napoléon and sought to prevent the enactment of similar codes in Germany. These facts explain his dislike of legislation and his emphasis upon silent, anonymous, and unconscious forces as the true elements of legal growth, with which no legislator should be allowed to interfere.

The historical school of law was perhaps the strongest stimulating factor for the revival of historical interest which was typical of nine-

[8] Georg Friedrich Puchta, *Outlines of Jurisprudence as the Science of Right*, transl. W. Hastie (Edinburgh, 1887), p. 38. (The word "right" in the translation has been replaced by the term "law.")

[9] Even though Hegel (see *supra* Sec. 17) had to some extent inspired the ideas of the historical school by his emphasis on the "spirit of the people" as the chief vehicle through which reason unfolds itself in history in a gradual, dynamic, and evolutionary process, he sharply denounced the antilegislative attitude of this school as disgraceful and insulting to the intelligence of the peoples of this world. Hegel, *The Philosophy of Right*, transl. T. M. Knox (Oxford, 1942), sec. 211.

teenth-century jurisprudence. Everywhere, but above all in Germany, detailed investigations into the primitive and early periods of legal history were undertaken. Elaborate volumes were frequently written on some minor details in a remote legal system. In some cases the labor expended on these historical studies was out of proportion to the result achieved, but in many instances it led to a great and indispensable enrichment of our knowledge of the early development of legal institutions.

Section 19. *The Historical School in England and the United States*

The founder and chief exponent of the English historical school of law was Sir Henry Maine (1822–1888).[1] He was strongly influenced by Savigny's historical approach to the problems of jurisprudence, but he went beyond Savigny in undertaking broad comparative studies of the unfolding of legal institutions in primitive as well as progressive societies. These studies led him to the conviction that the legal history of peoples shows patterns of evolution which recur in different social orders and in similar historical circumstances. There do not exist infinite possibilities for building and managing human societies; certain political, social, and legal forms reappear in seemingly different garb, and if they reappear, they manifest themselves in certain typical ways. Roman feudalism produced legal rules and legal institutions strikingly similar to English feudalism, although differences and divergences can also be demonstrated.

One of the general laws of legal evolution which Maine believed to have discovered is set forth in his classical treatise *Ancient Law:*

> The movement of the progressive societies has been uniform in one respect. Through all its course it has been distinguished by the gradual dissolution of family dependency, and the growth of individual obligation in its place. The Individual is steadily substituted for the Family, as the unit of which civil laws take account. The advance has been accomplished at varying rates of celerity, and there are societies not absolutely stationary in which the collapse of the ancient organization can only be perceived by careful study of the phenomena they present. But, whatever its pace, the change has not been subject to reaction or recoil, and apparent retardations will be found to have been occasioned through the absorption of archaic ideas and customs

[1] His chief works are: *Ancient Law* (London, 1861); new ed. with notes by Frederick Pollock (London, 1930); *Village Communities in the East and West* (London, 1871); *Lectures on the Early History of Institutions* (London, 1874); *Dissertations on Early Law and Custom* (London, 1883).

On Maine see Pound, *Interpretations of Legal History*, pp. 53–61; Paul Vinogradoff, "The Teaching of Sir Henry Maine," in *Collected Papers* (Oxford, 1928), II, 173–189; Patterson, *Jurisprudence*, pp. 414–418; Wolfgang Friedmann, *Legal Theory*, 5th ed. (New York, 1967), pp. 214–221.

from some entirely foreign source. Nor is it difficult to see what is the tie between man and man which replaces by degrees those forms of reciprocity in rights and duties which have their origin in the Family. It is Contract. Starting, as from one terminus of history, from a condition of society in which all the relations of Persons are summed up in the relation of Family, we seem to have steadily moved towards a phase of social order in which all these relations arise from the free agreement of Individuals.[2]

Thus Maine arrived at his often-quoted conclusion that "the movement of the progressive societies has hitherto been a movement from Status to Contract." [3] Status is a fixed condition in which an individual finds himself without reference to his will and of which he cannot divest himself by his own efforts. It is indicative of a social order in which the group, not the individual, is the primary unit of social life; every individual is enmeshed in a network of family and group ties. With the progress of civilization this condition gradually gives way to a social system based on contract. This system is characterized by individual freedom, in that "the rights, duties, and liabilities flow from voluntary action and are consequences of exertion of the human will." [4] A progressive civilization, in the view of Maine, is manifested by the emergence of the independent, free, and self-determining individual as the primary unit of social life.

Maine's "status to contract" doctrine is by no means his only outstanding contribution to jurisprudence. He has enriched our knowledge and understanding of legal history in several respects. Very interesting, for example, is his theory regarding the sequence of phenomena in the general development of law and lawmaking. He believed that in the earliest period law was created by the personal commands of patriarchal rulers, who were considered by their subjects to act under divine inspiration. Then followed a period of customary law, expounded and applied by an aristocracy or small privileged class which claimed a monopoly of legal knowledge. The third stage was marked by a codification of these customs as the result of social conflicts (the Law of the Twelve Tables in Rome, for example). The fourth stage, according to Maine, consists in the modification of strict archaic law by the help of fiction, equity, and legislation; these instrumentalities are designed to bring the law into harmony with a progressing society. Finally, scientific jurisprudence weaves all these various forms of law into a consistent and systematic whole. Not all

[2] New ed., p. 180.
[3] *Id.*, p. 182.
[4] Roscoe Pound, "The End of Law as Developed in Juristic Thought," 30 *Harvard Law Review* 201, at 210 (1917).

societies, said Maine, succeed in passing through all these stages, and their legal development in its particular aspects does not show a uniform line. Maine merely wished to indicate certain general directions and trends of development in the evolution of law. Modern research has shown that, on the whole, he has succeeded remarkably well in tracing some of the fundamental lines of a "natural history" of the law.

Maine's comparative analysis of legal evolution was supplemented in the early twentieth century by the historical studies of Sir Paul Vinogradoff.[5] English historical research also produced such ripe fruits as Pollock and Maitland's *History of English Law Before the Time of Edward I*[6] and Holdsworth's *History of English Law*,[7] as well as a host of specialized treatises and monographs. What is lacking up to this day is a history of English law which closely correlates legal developments with the general political, social, and cultural history of England.

We shall now turn to the United States of America. In 1849, Luther S. Cushing gave a course of lectures at Harvard Law School, in which he sympathetically expounded the doctrines of the German historical school, especially those of Savigny. One of the students in this course was James Coolidge Carter (1827–1903), who subsequently became a prominent New York attorney and leader of the American bar.[8] The lectures left a deep imprint on Carter's mind, and in the course of his life he became a devoted American apostle of Savigny's legal creed.

It was a basic thesis of Carter that habit and custom furnish the rules which govern human conduct, and that a judicial precedent is nothing but "authenticated custom."[9] It is essentially custom which determines whether an act is right or wrong, and a judicial decision which settles a problem of right or wrong merely puts the stamp of public approval on a societal custom and evidences its genuineness. Thus, in Carter's opinion, the courts do not make law, but discover and find it in an existing body of facts, that is, the customs recognized by so-

[5] *Outlines of Historical Jurisprudence*, 2 vols. (Oxford, 1922); *Essays in Legal History* (London, 1913); *Villeinage in England* (London, 1892); *Custom and Right* (Oslo, 1925).

[6] 2d ed., 2 vols. (London, 1909).

[7] 3rd ed., 13 vols. (London, 1922–1938).

[8] See Roscoe Pound, *The Spirit of the Common Law* (Boston, 1921), p. 154.

[9] James C. Carter, *Law: Its Origin, Growth, and Function* (New York, 1907), pp. 59, 65, 84–86, 119–120. Carter argued that, while all law is custom, all custom is not necessarily law, since there is a large range of conduct of which the law takes no notice and which is controlled by rules of morality, fashion, and etiquette. *Id.*, p. 120. See also Carter, "The Ideal and the Actual in Law," 24 *American Law Review* 752 (1890). For a full account of Carter's views see Moses J. Aronson, "The Juridical Evolutionism of James Coolidge Carter," 10 *University of Toronto Law Journal* 1 (1953).

ciety.[10] Even the great codes of continental Europe he considered restatements of pre-existing law rooted in the popular consciousness. "The creation of new law was but a small part of the object." [11]

Like his great predecessor, Savigny, Carter became involved in an acrimonious controversy over codification. In the second half of the nineteenth century, David Dudley Field proposed the adoption of a comprehensive civil code for the state of New York. He argued that judges should not be lawmakers, as in his opinion they necessarily were under the common law system; that a code would give definiteness and certainty to the law, so that people could know beforehand what their rights, duties, and obligations consisted of; and that a code would make the law systematic and accessible and thus reduce the load of legal research. Carter opposed the proposal vigorously, asserting, among other things, that code law, requiring interpretation and implementation, would still be judge-made law; that laymen would not consult a codified law any more than they had hitherto studied and consulted case law; and that a code would impede the growth of law, since amendments could come only after the mischief caused by a bad rule had been done.[12] Just as Savigny's crusade against legislation had been successful in preventing the adoption of a German civil code, at least during his lifetime,[13] Carter's arguments against the Field Code had considerable influence in defeating the enactment of this piece of legislation in the state of New York.

Section 20. *Spencer's Evolutionary Theory of Law*

Herbert Spencer (1820–1903) was an English philosopher and sociologist who became the author of a theory of law, justice, and society strongly influenced by Charles Darwin's *Origin of Species*. Spencer considered civilization and law as products of biological, organic evolution, with the struggle for existence, natural selection, and the "survival of the fittest" as the principal determining factors. Evolution revealed itself to him in differentiation, individuation, and increasing division of labor. Civilization, according to his teaching, was a gradual progress of social life from simple to more complex forms, from primitive homogeneity to ultimate heterogeneity. He distinguished two main stages in this development of civilization: a primitive or military

[10] Carter, *Law: Its Origin, Growth, and Function*, p. 85.
[11] *Id.*, p. 118.
[12] This condensation of the arguments is based on the excellent summary in Jerome Hall, *Readings in Jurisprudence* (Indianapolis, 1938), pp. 119–121; see also the account of the Field-Carter controversy in Patterson, *Jurisprudence*, pp. 421–425.
[13] See *supra* Sec. 18.

form of society, with war, compulsion, and status as regulatory devices, and a higher or industrial form of society, with peace, freedom, and contract as the controlling elements.[1]

The second stage of development, Spencer wrote, was marked by an increasing delimitation of the functions of government in favor of individual liberty. Government gradually comes to confine its field of action to the enforcement of contracts and a guaranty of mutual protection. Spencer rejected all forms of social legislation and collective regulation as an unjustified interference with the law of natural selection which, in the most developed stage of civilization, should have unlimited sway. He abhorred any social activity by the state and was opposed to public education, public communications, public hospitals, a national currency, a government-operated postal system, and poor laws.[2]

Spencer's concept of justice was shaped by the idea of liberty and composed of two elements. The egoistic element of justice, he argued, demands that each man derive the utmost benefit from his nature and capabilities. The altruistic sentiment of justice is conscious of the limits which the existence of other men having like claims necessarily imposes upon the exercise of freedom. A combination of both elements yields the law of "equal freedom," formulated by Spencer as follows: "Every man is free to do that which he wills, provided he infringes not the equal freedom of any other man." [3] Differently expressed, justice is the liberty of each limited only by the like liberties of all.

This "law of equal freedom" clearly and unequivocally expressed a notion of justice adapted to a period of individualism and *laissez faire*. The corollaries of this notion were a number of particular determinations of freedom which Spencer denominated by the term "rights." Among these he counted the right of physical integrity, the right of free motion, the right to use the natural media (light and air), the right of property, the right of free exchange and free contract, the right of free belief and worship, the right of free speech and publication. It is interesting to note that his strong individualism prompted him to deny the attribute of right to social "rights," which only the state could guarantee and implement, such as the right to work and the right to public maintenance in the case of indigence.[4] He was even reluctant to recognize a political "right" of every citizen to vote.

[1] The analogies to Maine's doctrine should be noted. See *supra* Sec. 19.

[2] See particularly his work *Social Statics*, first published in 1850.

[3] *Justice* (New York, 1891), p. 46. The formula is strongly reminiscent of Kant's definition of law. See *supra* Sec. 15. Spencer points out, however, that he arrived at his definition independently of Kant. *Id.*, p. 263.

[4] *Id.*, p. 63.

"With a universal distribution of votes," he said, "the larger class will inevitably profit at the expense of the smaller class." [5] The best constitution for an industrial society seemed to him one in which there was a representation of interests rather than a representation of individuals. His zeal for *laissez faire* made him fearful of the political consequences of majority rule.

Section 21. *The Marxian Theory of Law*

This theory of law, which has greatly influenced jurisprudential thinking in the socialist countries of the world, is generally identified with the following three basic assumptions: (1) That law is a product of evolving economic forces; (2) That law is a tool used by a ruling class to maintain its power over the lower classes; and (3) That, in the communist society of the future, law as an instrument of social control will "wither away" and finally disappear. The question must be raised whether all these assumptions represent the views of the founders of the socialist movement, Karl Marx (1818–1883) and Frederick Engels (1820–1895), or whether some of them must be viewed as later doctrinal additions or interpolations.

(1) The view that law is a reflection of economic conditions was an integral part of the doctrine of dialectical materialism as expounded by Marx and Engels. According to this doctrine, the political, social, religious, and cultural order of any given epoch is determined by the existing system of production and forms a "superstructure" erected on top of this economic basis. Law is considered a part of this superstructure, with the consequence that its forms, content, and conceptual apparatus constitute reflexes of economic developments. "Legal relations as well as forms of the State could neither be understood by themselves, nor explained by the so-called progress of the human mind, but they are rooted in the material conditions of life. . . . With the change of the economic foundation the entire immense superstructure is more or less rapidly transformed." [1]

According to this view, law seems to be nothing more than a function of the economy without any independent existence. Engels, however, in some letters written during his later years restated this proposition in a revised and extenuated form. The economic element, he said,

[5] *Id.*, p. 192. On Spencer see also Friedmann, *Legal Theory*, 5th ed., pp. 225–228.

[1] Marx, *A Contribution to the Critique of Political Economy*, transl. N. I. Stone (Chicago, 1904), p. 11. See also Engels, *Ludwig Feuerbach*. ed. C. P. Dutt (New York, 1934), p. 63: "If the State and public law are determined by economic relations, so too, of course, is private law, which indeed in essence sanctions only the existing economic relations between individuals which are normal in the given circumstances."

is not the only and exclusive factor in social development. The various components of the superstructure, including the norms and institutions of the law, exercise a reciprocal effect upon the economic basis and may, within certain limits, modify it.[2] The state, for example, influences the course of economic development by protective tariffs, free trade policies, or fiscal measures.[3] In this interaction between the various forces active in social development economic necessity will *ultimately*, however, always assert itself. "Men make their history themselves, only they do so in a given environment which conditions it and on the basis of actual relations already existing, among which the economic relations, however much they may be influenced by the other—political and ideological—ones, are still ultimately the decisive ones, forming the red thread which runs through them and alone leads to understanding." [4]

(2) The second important doctrine widely associated with the Marxian theory of law is the characterization of law as a form of class rule. One source for this conception of law is an often-quoted passage from Marx's *Communist Manifesto*, which was addressed to the bourgeoisie of his day: "Your jurisprudence is but the will of your class made into a law for all, a will whose essential character and direction are determined by the economic conditions of existence of your class." [5]

It will be noted that this statement goes no further than to characterize the law of *bourgeois* society as an expression of class will, and its sets forth no generalized judgment on the nature of law. Taken by itself, the statement also does not include a charge to the effect that such class will always has been exercised in a manner detrimental to the interests of the non-dominant classes.[6] Engels specifically rejected such an implication by declaring that "rarely it happens that a code of law is the blunt, unmitigated, unadulterated expression of the domination of a class." [7]

It was in early Soviet legal theory that the class-rule conception of law found its most unqualified expression. Shortly after the Russian Revolution a Commissar of Justice, P. I. Stuchka, set out to define law as "a system (or order) of social relations which corresponds to the

[2] Letter of Engels to C. Schmidt dated October 27, 1890, in Karl Marx and Frederick Engels, *Selected Works* (Moscow, 1955), II, 494. See also letter of Engels to J. Bloch dated September 21–22, 1890, *id.*, p. 488.

[3] Letter of Engels to H. Starkenburg dated January 25, 1894, *id.*, p. 505.

[4] *Id.*, p. 505.

[5] Karl Marx, *The Communist Manifesto*, ed. S. T. Possony (Chicago, 1954), Pt. II, p. 47.

[6] See the further comments by Edgar Bodenheimer, "Antilaw Sentiments and Their Philosophical Foundations," 46 *Indiana Law Rev.* 175, at 178–180 (1971).

[7] Letter of Engels to C. Schmidt, *supra* n. 2, p. 494.

interests of the dominant class and is safeguarded by the organized force of that class." [8] This definition was adopted officially by the governing body of the Commissariat of Justice in 1919, and it was in the same year incorporated into a statute.[9] About twenty years later the then Attorney-General of the Soviet Union, Andrei Vyshinsky, reconfirmed this approach by describing law as a system of norms designed "to guard, secure, and develop social relationships and social orders advantageous and agreeable to the dominant class." [10]

Such an uncomplimentary definition of law may serve its purpose in a society whose propagandistic apparatus harps on the theme of the temporary character of legal institutions and their early disappearance in a classless society. After the Soviet Government had realized that it would not be able to dispense with the law as an instrument of social control for an indefinitely long period of time, a shift of emphasis in official jurisprudential teaching took place. Two separate stages must be distinguished in this reorientation of legal theory.

During the first stage, the "dominant class" in the Soviet Union was identified with the working class, which was declared to comprise the majority of the people. It was suggested that the toiling masses, organized in the form of the dictatorship of the proletariat, were using the weapon of law against their class enemies for the purpose of "destroying completely and finally the survivals of capitalism in the economy." [11] This reformulation of the class-rule theory of law still maintained the connotation of law as a vehicle of the class struggle and an instrumentality for the preservation of class advantage.

This characterization of law lost its usefulness after Nikita Khrushchev had issued a proclamation that the Soviet state had become the state of all the people and should no longer be viewed as a proletarian dictatorship. This announcement was responsible for a second volte-face in official legal ideology. It was then declared that Soviet law had merged with the "general will" of the people as a whole. In the words of two leading academicians, "Soviet law, subsequent to the disappearance of the historical necessity for the dictatorship of the proletariat in our country, now constitutes the expression of a unified will of the entire people, and not the will of the working class and the laboring masses under its leadership, as was formerly the case." [12] This view can

[8] Pavel I. Stuchka, "The Revolutionary Part Played by Law and the State," in *Soviet Legal Philosophy*, ed. J. N. Hazard (Cambridge, Mass., 1951), p. 20.

[9] R.S.F.S.R. Laws 1919, Sec. 590.

[10] *The Law of the Soviet State*, transl. H. W. Babb (New York, 1948), p. 50.

[11] S. A. Golunskii and M. S. Strogovitch, "The Theory of the State and Law," *supra* n. 8, p. 386.

[12] O. S. Joffe and M. D. Shargorodskii, "The Significance of General Definitions in the Study of Problems of Law and Socialist Legality," 2 *Soviet Law and*

find little support in orthodox Marxism and must look for its intellectual ancestry to the writings of Jean-Jacques Rousseau, who is regarded in the socialist part of the world as a "bourgeois" philosopher.[13] This change in Soviet legal thought has come under attack by the governing circles of the People's Republic of China as a form of "revisionism" incompatible with genuine Marxian doctrine of law and the state.[14]

(3) Like the class-rule theory of law, the prophecy of the disappearance of law in a communist society does not find a firm support in the writings of Marx and Engels. It is true that Engels predicted that the society of the future would substitute the "administration of things" for the "government of persons," and that the state in such a society would "wither away." [15] This statement does not, however, specifically refer to the law. While it is probable that Engels viewed state and law as twin institutions whose development and fate would be closely intertwined, such a presupposition was never made explicit by him.

Here again, it was early Soviet theory which took the initiative in propagating the doctrine. The "withering away" idea was expounded in an original and interesting manner by Eugene Pashukanis, whose rise and fall as the dean of Soviet legal philosophers and eventual execution as a traitor to Marxism contributes an odd chapter in the history of legal thought.[16] Pashukanis put forward the thesis that law is the typical agency of social regulation in a market economy in which independent private producers and owners of commodities exchange their products by means of contracts. The interests of these producers and owners frequently come into conflict, he argued, and it is the function of the law to adjust such clashes of interests. He believed that law was out of place in a socialist society characterized by a unity of social purpose. There would be in such a society social-technical rules designed to accomplish collective goals such as economic planning,

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Government 3, at 4 (1963). See also V. Chkhikvadze, *The State, Democracy and Legality in the U.S.S.R.*, transl. D. Ogden (Moscow, 1972), p. 268; Eugene Kamenka and Alice Erh-Soon Tay, "Beyond the French Revolution: Communist Socialism and the Concept of Law," 21 *University of Toronto Law Journal* 109, at 126–127 (1971).

[13] On Rousseau see *supra* Sec. 13.

[14] Information received by this author from students of recent legal developments in China. See also Jyun-Hsyong Su, "Wesen und Funktion von Staat, Recht und Regierung im Kommunistischen China," 15 *Osteuropa Recht* 154, at 157 (1969).

[15] Engels, *Anti-Dühring*, transl. E. Burns (New York, 1934), p. 309.

[16] On Pashukanis see Lon L. Fuller, "Pashukanis and Vyshinsky," 47 *Michigan Law Rev.* 1157 (1949); Edgar Bodenheimer, "The Impasse of Soviet Legal Philosophy," 38 *Cornell Law Quarterly* 51, at 56–61 (1952); Stephen J. Powell, "The Legal Nihilism of Pashukanis," 20 *University of Florida Law Rev.* 18 (1967).

but no legal rules aiming at settling the disputes between disunited individuals and groups.[17]

This theory fell into disfavor when the Soviet Government decided upon a policy of rehabilitating the law and stressing the benefits of what was called "socialist legality." [18] The "withering away" doctrine was not entirely abandoned but its realization was deferred to a far-away future. It is also of interest that the line taken recently has been to the effect that only "coercive" law will disappear in the perfected society of coming ages. Rules of community living regulating the mutual relations of men will continue to be required, and the hope is voiced that the time will arrive when the members of society will comply with these norms voluntarily and without the necessity of state-imposed sanctions.[19]

[17] Pashukanis, "The General Theory of Law and Marxism," in *Soviet Legal Philosophy*, pp. 135–137, 154–156, 167–170. See also *infra* Sec. 61.

[18] See D. A. Kerimov, "Liberty, Law, and the Legal Order," 58 *Northwestern Law Rev.* 643, at 653–654 (1964); Chkhikvadze, pp. 262–263, 317–318, 322.

[19] P. S. Romashkin, "Problems of the Development of the State and Law in the Draft Program of the CPSU," 1 *Soviet Law and Government* 3, at 8–10 (1962); Joffe and Shargorodskii, pp. 6–7, reprinted in Dennis Lloyd, *Introduction to Jurisprudence*, 3rd ed. (New York, 1972), pp. 676–677.

VI

UTILITARIANISM

Section 22. *Bentham and Mill*

Utilitarianism was a philosophical movement which flourished in nineteenth-century England and, although it made converts in other countries, always retained a distinctly English flavor. Some of its roots can be found in the writings of the Scottish eighteenth-century philosopher David Hume (1711–1776), who became the founder of an empirical theory of value grounded on the value experiences of the common man.[1] Hume cannot, however, be regarded as a typical and thoroughgoing exponent of utilitarianism.[2] We must look to the writings of Jeremy Bentham (1748–1832) and John Stuart Mill (1806–1873) in order to obtain a fully elaborated and systematic view of utilitarian doctrine.

Bentham proceeded from the axiom that nature has placed mankind under the governance of two sovereign masters, pleasure and pain. They alone point out to us what we ought to do, and what we should refrain from doing.[3] The good or evil of an action, according to him,

[1] See particularly Hume's two essays *Inquiry concerning Human Understanding* (1748) and *Inquiry concerning the Principles of Morals* (1752).

[2] See the Introduction by Charles Hendel to Hume, *An Inquiry concerning the Principles of Morals* (New York, 1957), pp. xxxv–xxxvi.

[3] Bentham, *An Introduction to the Principles of Morals and Legislation* (Oxford, 1823), p. 1. On Bentham see Elie Halévy, *The Growth of Philosophical Radicalism*,

should be measured by the quantity of pain or pleasure resulting from it.

Utility was defined by Bentham as "that principle which approves or disapproves of every action whatsoever, according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question." [4] If that party should be a particular individual, then the principle of utility is designed to promote his happiness; if it should be the community, then the principle contemplates the happiness of the community. Bentham emphasized, however, that the community can have no interests independent of or antagonistic to the interests of the individual; community interest meant to him nothing but "the sum of the interests of the several members who compose it." [5]

The business of government, according to Bentham, was to promote the happiness of the society by furthering the enjoyment of pleasure and affording security against pain.[6] "It is the greatest happiness of the greatest number that is the measure of right and wrong." [7] He was convinced that if the individuals composing the society were happy and contented, the whole body politic would enjoy happiness and prosperity.

The Benthamite legislator who wishes to insure happiness for the community must strive to attain the four goals of *subsistence*, *abundance*, *equality*, and *security* for the citizens. "All the functions of law," said Bentham, "may be referred to these four heads: to provide subsistence; to produce abundance; to favour equality; to maintain security." [8] Of these four ends of legal regulation, security was to him the principal and paramount one. Security, he pointed out, demands that a man's person, his honor, his property, and his status be protected, and that his expectations, insofar as the law itself had produced them, be maintained. Liberty, although a highly important branch of security in his view, must sometimes yield to a consideration of the gen-

transl. M. Morris (New York, 1928), pp. 35–87; John Plamenatz, *The English Utilitarians* (Oxford, 1949), pp. 59–84; Edwin W. Patterson, *Jurisprudence* (Brooklyn, 1953), pp. 439–459; Dean Alfange, "Jeremy Bentham and the Codification of Law," 55 *Cornell Law Quarterly* 58 (1969); H. L. A. Hart, "Bentham and the Demystification of the Law," 36 *Modern Law Rev.* 2 (1973).

[4] *Morals and Legislation*, p. 2.

[5] *Id.*, p. 3.

[6] *Id.*, p. 70. The pleasures of which human nature is susceptible are analyzed by Bentham as pleasures of sense, wealth, skill, amity, good name, power, piety, benevolence, malevolence, memory, imagination, expectation, association, and relief from pain. *Id.*, p. 33. They are defined further on pp. 34–37. Bentham believed that pleasure and pain could be treated as mathematical quantities and weighed against each other through the application of a "hedonistic calculus."

[7] *A Fragment of Government*, ed. F. C. Montague (Oxford, 1891), p. 93.

[8] *The Theory of Legislation*, ed. C. K. Ogden (London, 1931), p. 96.

eral security, since laws cannot be made except at the expense of liberty.[9]

Next to security, the legislator must try to foster equality, Bentham demanded. Equality, he maintained, "ought not to be favoured except in the cases in which it does not interfere with security; in which it does not thwart the expectations which the law itself has produced, in which it does not derange the order already established." [10] The equality which Bentham had in mind was not an equality of condition, but merely an equality of opportunity. It was an equality that allows every individual to seek his own happiness, strive after wealth, and live his own life.

Bentham never questioned the desirability of economic individualism and private property.[11] A state, he said, can become rich in no other wise than by maintaining an inviolable respect for the rights of property. Society should encourage private initiative and private enterprise.[12] The laws of the state, he argued, can do nothing to provide directly for the subsistence of the citizens; all they can do is to create motives, that is, punishments and rewards, by whose force men may be led to provide subsistence for themselves. Nor should the laws direct individuals to seek abundance; all they are capable of doing is to create conditions that will stimulate and reward man's efforts toward making new acquisitions.[13]

In spite of Bentham's preference for economic liberalism, there exists a link between his theory of legislation and the ideas of modern social reformers. This connection was shown by A. V. Dicey, who pointed out that the greatest-happiness principle may be adopted by the advocates of the welfare state as well as by believers in *laissez faire*.[14] It is not without significance in this respect that in Bentham's view it is not liberty, but security and equality that form the main objective of legal regulation. Bentham rejected natural rights and recognized no

[9] *Id.*, p. 98.

[10] *Id.*, p. 99. See also *id.*, p. 120: "The establishment of perfect equality is a chimera; all we can do is to diminish inequality."

[11] Property was defined by Bentham as "a basis of expectation; of deriving certain advantages from a thing which we are said to possess, in consequence of the relation in which we stand towards it." *Id.*, pp. 111–112.

[12] Bentham believed that if the laws do nothing to combat private economic effort, do not maintain certain monopolies, put no shackles upon industry and trade, great properties would be divided little by little without shock and revolution, and a much greater number of men would come to participate in the moderate favors of fortune. *Id.*, p. 123. On Bentham's advocacy of *laissez faire* see Friedrich Kessler, "Natural Law, Justice, and Democracy," 19 *Tulane Law Review* 32, at 44–46 (1944).

[13] *Theory of Legislation*, pp. 100–102.

[14] A. V. Dicey, *Law and Public Opinion in England*, 2d ed. (London, 1914), pp. 303 ff.

limitations whatsoever on parliamentary sovereignty. His theory of legislation therefore opened the door to state intervention and social reform, and certain pieces of legislation which were favored by Bentham or his disciples (like the Poor Act of 1834, the creation of authorities for the enforcement of public health laws, and other measures) constituted first steps in that direction.[15]

John Stuart Mill agreed with Bentham that "actions are right in proportion as they tend to promote happiness; wrong as they tend to produce the reverse of happiness." [16] He attempted, on the other hand, to defend utilitarianism against the reproach of coarse hedonism by pointing out that human beings have faculties more elevated than the animal appetites and do not regard anything as happiness which does not include their gratification. The conclusion at which he arrived was that the pleasures of the intellect (such as the enjoyment of art, poetry, literature, and music), the pleasures of the feelings and imagination, as well as those of the moral sentiments, must be assigned a much higher value than those of mere sensations.[17] He also insisted that the utilitarian doctrine of happiness was altruistic rather than egoistic, since its ideal was "the happiness of all concerned." [18]

One of the chief issues of legal philosophy to which Mill suggested an approach different from that of Bentham was the significance that should be attributed to the concept of justice. Bentham had spoken of justice in a deprecatory fashion and had subordinated it completely to the dictates of utility.[19] Mill, although taking the position that the *standard* of justice should be grounded on utility, believed that the *origin* of the sense of justice must be sought in two sentiments other than utility: namely, the impulse of self-defense and the feeling of

[15] *Id.*, pp. 306–307.

[16] *Utilitarianism,* ed. O. Piest (New York, 1957), p. 10. Mill is also known for his essay *On Liberty* (1859), in which he made an eloquent plea on behalf of freedom of speech, assembly, and religion. On Mill see Plamenatz, *supra* n. 3, pp. 122–144; William Ebenstein, "John Stuart Mill," in *Liberty* (NOMOS vol. IV), ed. C. J. Friedrich (New York, 1962), pp. 89–109; *Limits on Liberty,* ed. P. Radcliff (Belmont, Cal., 1966).

[17] *Utilitarianism,* pp. 11–12, 18–19.

[18] *Id.*, p. 22. Mill added: "In the golden rule of Jesus of Nazareth, we read the complete spirit of the ethics of utility." Cf. also *id.*, pp. 15–16.

[19] "Sometimes in order the better to conceal the cheat (from their own eyes doubtless as well as from others) they set up a phantom of their own, which they call Justice: whose dictates are to modify (which being explained, means to oppose) the dictates of benevolence. But justice, in the only sense in which it has a meaning, is an imaginary personage, feigned for the convenience of discourse, whose dictates are the dictates of utility applied to certain particular cases." *Morals and Legislation,* pp. 125–126.

Bentham was also opposed to all doctrines of natural law. He defined law as "the will or command of a legislator." *Theory of Legislation,* p. 82. Bentham thereby became a precursor of legal positivism. See *infra* Sec. 24.

sympathy.[20] Justice appeared to him to be "the animal desire to repel or retaliate a hurt or damage to oneself or to those with whom one sympathizes, widened so as to include all persons, by the human capacity of enlarged sympathy and the human conception of intelligent self-interest." [21] Differently expressed, the feeling of justice is the urge to retaliate for a wrong, placed on a generalized basis. This feeling rebels against an injury, not solely for personal reasons, but also because it hurts other members of society with whom we sympathize and identify ourselves. The sense of justice, Mill pointed out, encompasses all those moral requirements, which are most essential for the well-being of mankind, and which human beings therefore regard as sacred and obligatory.[22]

Section 23. *Jhering*

In his well-known essay "On Liberty," John Stuart Mill had set forth a principle which, in his opinion, should guide the actions of the state in delimiting and curbing the freedom of the individual. That principle was "that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant." [1]

The German jurist Rudolph von Jhering (1818–1892), in his influential work *Law as a Means to an End,* subjected this formula to a detailed criticism. He pointed out, for example, that under this formula the Chinese government could not prohibit the importation of opium into China because this would constitute an unwarranted infringement on the liberty of the buyer. "So the Chinese government," he asked, "has not the right to prohibit the opium trade? It must stand idly by with folded arms and look on while the nation is ruining itself physically and morally, simply out of academic respect for liberty, in order not to violate the inherent right of every Chinaman to buy whatever he pleases?" [2]

In the opinion of Jhering, it is not the sole purpose of the law to pro-

[20] *Utilitarianism,* p. 63.
[21] *Id.,* p. 65.
[22] *Id.,* pp. 73, 78.
[1] In *The English Philosophers from Bacon to Mill,* ed. E. A. Burtt (New York, 1939), p. 956.
[2] Jhering, *Law as a Means to an End,* transl. I. Husik (New York, 1924), pp. 408–409. On Jhering see Patterson, *Jurisprudence,* pp. 459–464; Friedmann, *Legal Theory,* 5th ed., pp. 321–325; Iredell Jenkins, "Rudolf von Jhering," 14 *Vanderbilt Law Review* 169 (1960).

tect individual liberty; Jhering rejected all attempts to solve the problem of control of personal liberty by the use of an abstract, all-embracing formula. To him the goal of the law was to bring about an equilibrium between the individual principle and the social principle. An individual exists for himself as well as for society, he argued, and the law should be viewed as the "realized partnership of the individual and society." [3] He saw the principal aim of this partnership in the accomplishment of a common cultural purpose. "To make the work of the individual, whether it be of the hand or the brain, as useful as possible for others, and thereby indirectly also for himself, to effectuate every force in the service of humanity—this is the problem which every civilized people must solve, and with regard to which it must regulate all its economies." [4] In the light of this basic philosophic attitude, Roscoe Pound has characterized Jhering as a "social utilitarian." [5]

The central notion in Jhering's philosophy of law was the concept of *purpose.* In the preface to his chief jurisprudential work, he pointed out that "the fundamental idea of the present work consists in the thought that *Purpose* is the creator of the entire law; that there is no legal rule which does not owe its origin to a purpose, i.e., to a practical motive." [6] Law, he declared, was consciously set by the human will to achieve certain desired results. He admitted that the institution had part of its roots in history; but he rejected the contention of the historical jurists that law was nothing but the product of unintended, unconscious, purely historical forces.[7] In his opinion, law was to a great extent shaped by an action of the state intentionally directed to a certain end.

The end or purpose of legal regulation was indicated by Jhering in his often-quoted definition of law: "Law is the sum of the conditions of social life in the widest sense of the term, as secured by the power of the State through the means of external compulsion." [8] This definition contains a substantive and a formal element. Jhering viewed the securing of the conditions of social life as the substantive aim of the law. In the conditions or foundations of social life he included not only physical existence and self-preservation of society and its members, but "all those goods and pleasures which in the judgment of the subject give life its true value"—among them honor, love, activity, education,

[3] Jhering, *supra* n. 2, p. 397.
[4] *Id.*, pp. 68–69. The value of the individual life, Jhering said, must be measured in terms of the benefits which society derives from it. *Id.*, p. 63.
[5] Pound, *Jurisprudence* (St. Paul, Minn., 1959), I, 130.
[6] Jhering, *supra* n. 2, p. liv.
[7] Jhering, *The Struggle for Law,* transl. J. Lalor (Chicago, 1915), pp. 8–9.
[8] Jhering, *supra* n. 2, p. 380.

religion, art, and science.[9] He believed that the means and instrumentalities used by the law to secure these values cannot be uniform and unvarying; they must be adapted to the needs of the period and the state of civilization reached by a nation.

The formal element in Jhering's definition is found in the concept of *compulsion.* The state exercises compulsion and force for the purpose of ensuring compliance with the norms of the law. A legal rule without compulsion, Jhering declared, was "a fire which does not burn, a light that does not shine." [10] International law, in which the element of coercion is weakly developed, was described by him as a merely incomplete form of law.

A theory which looks upon law as a means for the accomplishment of utilitarian purposes will have a tendency to place great faith in the conscious and systematic activity of legislators. "It is not mere chance, but a necessity," said Jhering, "deeply rooted in the nature of the law, that all thorough reforms of the mode of procedure and of positive law may be traced back to legislation." [11] If purpose is the creator of law, a purposeful formulation of rules by statute appears to be the best way of producing a legal system which conforms to the demands of the time. It is, therefore, no accident that Bentham, the English utilitarian reformer, insisted upon a complete codification of the law. His efforts at achieving a codified law were at least partly successful. In the very year of his death, 1832, some of his proposals for improvement of the law were realized in the English reform legislation of that date. In Germany, a civil code was adopted four years after Jhering's death. Although Jhering had no decisive share in its enactment, his general attitude toward the law and his insistence upon "purpose" as the motivating force in legal control had prepared the ground and created the atmosphere for a legislative effort of this kind.

[9] *Id.*, p. 331.
[10] *Id.*, p. 241.
[11] Jhering, *supra* n. 7, pp. 9–10.

VII

ANALYTICAL POSITIVISM

Section 24. *What Is Positivism?*

The French mathematician and philosopher Auguste Comte (1798–1857), who may be regarded as the philosophical founder of modern positivism, distinguished three great stages in the evolution of human thinking. The first stage, in his system, is the theological stage, in which all phenomena are explained by reference to supernatural causes and the intervention of a divine being. The second is the metaphysical stage, in which thought has recourse to ultimate principles and ideas, which are conceived as existing beneath the surface of things and as constituting the real moving forces in the evolution of mankind. The third and last stage is the positivistic stage, which rejects all hypothetical constructions in philosophy, history, and science and confines itself to the empirical observation and connection of facts under the guidance of methods used in the natural sciences.[1]

This celebrated "law of the three stages," insofar as it characterizes positivism as the last and final stage in the development of human thought, is open to grave objections.[2] It serves, however, a useful pur-

[1] Comte, *The Positive Philosophy*, transl. and condensed by H. Martineau (London, 1875), I, 2.

[2] In our own day, interpretations of human life and society have arisen in opposition to positivism which, according to the terminology of the movement, should

pose in describing the movement and general direction of Western philosophy from the early Middle Ages to the beginning of the twentieth century. As far as the philosophy of law is concerned, we have seen that the interpretation of law during the Middle Ages was strongly influenced by theological considerations: law was brought into close connection with divine revelation and the will of God. The period from the Renaissance to about the middle of the nineteenth century, on the other hand, may be described as the metaphysical era in legal philosophy. The classical law-of-nature doctrine as well as the evolutionary philosophies of law advocated by Savigny, Hegel, and Marx were characterized by certain metaphysical elements. These theories sought to explain the nature of law by reference to certain ideas or ultimate principles, which were conceived as working beneath the empirical surface of things. Neither the eternal reason of the natural-law philosophers, nor Savigny's "national spirit" and "silently operating forces" shaping the law, nor Hegel's "world spirit" handing the torch of evolution from one nation to another, nor any "withering away of the law" in a communist society, can be judged and measured in terms of the empirical world. All these constructions are "metaphysical" in a broad sense, inasmuch as they go beyond the physical appearance of things and proceed from the assumption of invisible forces and ultimate causes that are to be sought behind the facts of immediate observation.[3]

In the middle of the nineteenth century a strong countermovement against the metaphysical tendencies of the preceding centuries set in. This movement may be described by the loose but comprehensive term positivism. Positivism as a scientific attitude rejects a priori speculations and seeks to confine itself to the data of experience. It turns away from the lofty heights of the spirit and restricts the task of scholarship to the analysis of the "given." It refuses to go beyond the phenomena of

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be denominated "metaphysical." It should also be noted that Comte's law itself, by making untested and categorical assertions about the evolution of human thought, should be described as "metaphysical."

[3] The following are good definitions of the concept of metaphysics:

"Metaphysics is the systematic study of the fundamental problems relating to the ultimate nature of reality and of human knowledge." *Encyclopaedia Britannica,* 14th ed., XV, 332.

"One calls 'metaphysical' every inquiry which claims to go beyond the sphere of the empirical and seeks either hidden essences behind phenomenal appearances, or ultimate efficient and final causes behind things." Guido de Ruggiero, "Positivism," *Encyclopedia of the Social Sciences,* XII, 260.

"The metaphysical view of the world contemplates the whole (the totality) and the absolute (the ultimate reality)." Karl Jaspers, *Psychologie der Weltanschauungen* (Berlin, 1925), p. 189 (translation mine).

"Metaphysics is philosophical search going beyond the existing world in order to regain it for our comprehension as a whole." Martin Heidegger, *Was ist Metaphysik?* (Bonn, 1929), p. 24 (translation mine).

perception and denies the possibility of a comprehension of nature in its "essence." The basis for positivism had been prepared by the immense success achieved in the domain of the natural sciences during the first half of the nineteenth century. This success brought about a strong temptation to apply the methods used in the natural sciences to the realm of the social sciences. A careful observation of empirical facts and sense data was one of the principal methods used in the natural sciences. It was expected that in the social sciences this same method would prove to be highly fruitful and valuable.

In the twentieth century, positivism assumed a new and radical shape in the logical positivism of the so-called Vienna Circle. This circle was formed after World War I around Moritz Schlick and Rudolf Carnap and found a considerable number of adherents in England, the United States, and the Scandinavian countries.[4] The epithet logical was annexed to the term positivism by the members of the Circle because they wished to use the discoveries of modern logic, especially symbolic logic, in their analytical work. Although neither all of the original members of the Circle nor the later converts adhered to an identical set of philosophical convictions, certain basic ideas and postulates are typical for logical positivism as such. In the first place, it rejects all dogmatic and speculative assertions in philosophy. Statements about reality (or more precisely, about phenomena which appear to us as reality) are considered valid only on the basis of tested and verified sensory experience.[5] Second, a deprecatory and almost contemptuous attitude is taken by the adherents of this creed toward the development of philosophy from Plato to the modern era. The majority of the great philosophers of Western civilization are regarded by them as metaphysicians and purveyors of nonsense.[6] Third, while the logical

[4] The best introduction to the work of the Circle is Victor Kraft, *The Vienna Circle,* transl. A. Pap (New York, 1953). The Circle was dissolved in 1938.

[5] "Nothing is in the intellect which was not previously in the senses." Hans Hahn, "Logics, Mathematics, and Knowledge of Nature," in *Logical Positivism,* ed. Alfred J. Ayer (Glencoe, Ill., 1959), p. 149.

Schlick, in one of his last papers, modified the requirement of verifiability by demanding only a "logical" and not necessarily an empirical possibility of verification. Thus he stated that the proposition "Man is immortal" is meaningful because it possesses logical verifiability; it could be verified by following the prescription "Wait until you die." See Arnold Brecht, *Political Theory* (Princeton, 1959), pp. 177–178.

[6] The famous "book burning" statement by David Hume was described by the logical positivist Alfred J. Ayer as an "excellent statement of the positivist's position." *Logical Positivism,* p. 10. Hume's words are as follows: "If we take in our hand any volume, of divinity or school metaphysics, for instance; let us ask, *Does it contain any abstract reasoning concerning quantity or number?* No. *Does it contain any experimental reasoning concerning matter of fact and existence?* No. Commit it then to the flames: for it can contain nothing but sophistry and illusion." Hume, "An Enquiry concerning Human Understanding," in *The English Philosophers from Bacon to Mill,* ed. E. A. Burtt (New York, 1939), p. 689. Ayer added

positivists assign to science the task of description and analysis of phenomena, they limit the task of philosophy to the logical classification of ideas. In the words of Schlick, "it is the peculiar business of philosophy to ascertain and make clear the meaning of statements and questions." [7] Only logical questions are regarded as philosophical questions, and the building of a logical syntax is described as one of the highest tasks of philosophy. Fourth, the logical positivists hold that ethical imperatives are merely "ejaculations" or "emotive" utterances which are cognitively worthless. Inasmuch as the objective validity of a value or ethical norm cannot be empirically verified, it cannot be meaningfully asserted.[8] It is not, according to this view, the task of ethics to provide guidance to people as to how they ought to live. At best, its task can be to explain causatively why people hold, accept, or reject certain ethical views.

Beginning with the second half of the nineteenth century, positivism invaded all branches of the social sciences, including legal science. Legal positivism shared with positivistic theory in general the aversion to metaphysical speculation and to the search for ultimate principles. It rejected any attempt by jurisprudential scholars to discern and articulate an idea of law transcending the empirical realities of existing legal systems. It sought to exclude value considerations from the science of jurisprudence and to confine the task of this science to an analysis and dissection of positive legal orders. The legal positivist holds that only positive law is law; and by positive law he means those juridical norms which have been established by the authority of the state.[9] In the words of the Hungarian jurist Julius Moór, "Legal positivism is a view according to which law is produced by the ruling

that the Vienna positivists had not gone so far as to say that all metaphysical works deserved to be committed to the flames; they allowed that some of them might have poetic merit or might express an exciting attitude toward life.

[7] Moritz Schlick, "Positivism and Realism," in *Logical Positivism*, p. 86; see also Rudolf Carnap, "The Elimination of Metaphysics," *id.*, p. 68.

A. J. Ayer says: "The philosopher, as an analyst, is not directly concerned with the physical properties of things. He is concerned only with the way in which we speak about them." *Language, Truth, and Logic* (London, 1950), p. 57.

[8] "From the statement 'Killing is evil' we cannot deduce any proposition about future experiences. Thus this statement is not verifiable and has no theoretical sense, and the same is true of all other value statements." Rudolf Carnap, "Philosophy and Logical Syntax," in Morton White, *The Age of Analysis* (Boston, 1955), p. 217. The view that this approach to ethics leads to the "self-destruction of civilization" was developed by Albert Schweitzer in his *Verfall und Wiederaufbau der Kultur* (Munich, 1923), pp. 2–5. See also *infra* Sec. 38.

[9] See Reginald Parker, "Legal Positivism," 32 *Notre Dame Lawyer* 31 (1956); Brecht, *supra* n. 5, p. 183.

According to Karl Olivecrona, *Law as Fact*, 2d. ed., (London, 1971), pp. 50–64, the traditional view of legal positivism identifies law with the will of the state, while the modern view (which he rejects) equates legal positivism with a non-evaluative approach to the law. On the different uses of the term see also H. L. A. Hart, *The Concept of Law* (Oxford, 1961), pp. 253–254.

power in society in a historical process. In this view law is only that which the ruling power has commanded, and anything which it has commanded is law by virtue of this very circumstance." [10] The legal positivist also insists on a strict separation of positive law from ethics and social policy, and he tends to identify justice with legality, that is, observance of the rules laid down by the state.[11]

Legal positivism has manifested itself most conspicuously in a jurisprudence of an analytical type, here designated as analytical positivism. Analytical positivism takes as its starting point a given legal order and distills from it by a predominantly inductive method certain fundamental notions, concepts, and distinctions, comparing them perhaps with the fundamental notions, concepts, and distinctions of other legal orders in order to ascertain some common elements. As Julius Stone has pointed out, analytical positivism is primarily interested in "an analysis of legal terms, and an inquiry into the *logical* interrelations of legal propositions." [12] In this fashion it provides the science of law with an anatomy of a legal system. Legal positivism, however, may also take on a sociological form. Sociological positivism undertakes to investigate and describe the various social forces which exercise an influence upon the making of positive law. It is concerned with analyzing not the legal rules produced by the state, but the sociological factors responsible for their enactment. It shares with analytical positivism a purely empirical attitude toward the law and a disinclination to search for and postulate ultimate values in the legal order.[13]

Section 25. *John Austin and the Analytical School of Law*

The view of analytical positivism that law is essentially a command or normative pronouncement by the state was foreshadowed by Bentham and Jhering.[1] Yet the jurisprudence of these two thinkers was so thoroughly permeated with philosophical deductions concerning the ends of the law and the values which the institution should serve to effectuate that they cannot be counted among the analytical positivists proper.

[10] "Das Problem des Naturrechts," 28 *Archiv für Rechts- und Wirtschaftsphilosophie* 331 (1935).

[11] See in this connection Friedrich Kessler, "Natural Law, Justice, and Democracy," 19 *Tulane Law Review* 32, at 53 (1944) and "Theoretic Bases of Law," 9 *University of Chicago Law Review* 98, at 105–108 (1941); F. S. C. Northrop, "Ethical Relativism in the Light of Recent Legal Science," 52 *Journal of Philosophy* 649–650 (1955), reprinted in Northrop, *The Complexity of Legal and Ethical Experience* (Boston, 1959), pp. 247–248. The identification of legality with justice is not, however, a necessary concomitant of positivism.

[12] *The Province and Function of Law* (Cambridge, Mass., 1961), p. 31.

[13] An example of sociological positivism is Gumplowicz' theory of law, described *infra* Sec. 28.

[1] See Jeremy Bentham, *The Theory of Legislation,* ed. C. K. Ogden (London, 1931), p. 82; Rudolf von Jhering, *Law as a Means to an End,* transl. I. Husik (New York, 1924), pp. 240, 252.

It was John Austin (1790–1859), an English jurist, who became the founder of the analytical school of law.[2]

Like Bentham, Austin was an adherent of the utilitarian philosophy of life. The principle of utility appeared to him to be the ultimate test of law. "The proper purpose or end of a sovereign political government," he said, "is the greatest possible advancement of human happiness." [3] Since the principle of utility is a principle of ethics, and since the analytical method in legal science which Austin advocated rejects the infusion of ethics into law, it has been argued that Austin was not consistent in his method of approach to the problems of law.[4] It would seem that this reproach is unjustified. In contrast to Bentham, Austin drew a sharp theoretical line between jurisprudence and the science of ethics. He regarded jurisprudence as the autonomous and self-sufficient theory of positive law. "The science of jurisprudence (or, simply and briefly, jurisprudence) is concerned with positive laws, or with laws strictly so called, as considered without regard to their goodness or badness." [5] The science of legislation, on the other hand, which to Austin was a branch of ethics, was to perform the function of determining the tests by which positive law was to be measured and the principles upon which it must be based in order to merit approbation.[6] This separation of jurisprudence from ethics which Austin advocated is one of the most important characteristics of analytical positivism. According to this attitude, the jurist is merely concerned with the law as it is; the legislator or ethical philosopher alone should be interested in the law as it ought to be. Positive law, in the view of the analytical jurist, has nothing to do with ideal or just law.[7]

The function of jurisprudence, in the view of Austin, is the exposition of general notions and principles abstracted from positive systems

[2] For a sketch of the life of John Austin see Sarah Austin's Preface to Austin, *Lectures on Jurisprudence*, 5th ed. by R. Campbell (London, 1885). On Austin and the analytical school of law see also Roscoe Pound, *Jurisprudence* (St. Paul, Minn., 1959), II, 68–79, 132–163; R. W. M. Dias, *Jurisprudence*, 3rd ed. (London, 1970), pp. 381–405; Julius Stone, *Legal System and Lawyers' Reasonings* (Stanford, 1964), pp. 62–97; Cornelius F. Murphy, "A Restatement of Analytical Jurisprudence," 8 *Western Ontario Law* Rev. 45 (1969).

[3] Austin, *The Province of Jurisprudence Determined*, ed. H. L. A. Hart (London, 1954), p. 294

[4] See James Bryce, "The Methods of Legal Science," in *Studies in History and Jurisprudence* (New York, 1901), II, 613–614.

[5] *Province of Jurisprudence*, p. 126.

[6] *Id.*, p. 127. Austin admitted, however, that it was impossible to consider jurisprudence quite apart from legislation, "since the inducements or considerations of expediency which lead to the establishment of laws must be adverted to in explaining their origin and mechanism." "The Uses of the Study of Jurisprudence," *id.*, p. 373.

[7] Samuel E. Stumpf is correct in pointing out that "Austin did not deny that moral influences were at work in the creation of law, but he allowed nowhere in his *theory* any place for the moral element when defining the nature of law."

of law. The more mature systems of law, Austin pointed out, are allied by numerous uniformities and analogies in their conceptual structure; and it was the objective of general jurisprudence (as distinguished from national or particular jurisprudence) to elucidate these uniformities and analogies. "I mean, then, by General Jurisprudence, the science concerned with the exposition of the principles, notions, and distinctions which are common to systems of law: understanding by systems of law, the ampler and maturer systems which, by reason of their amplitude and maturity, are pre-eminently pregnant with instruction." [8] This task would involve an exposition of the leading terms of the law, such as Right, Obligation, Injury, Sanction, Punishment, and Redress. It would also entail, among other things, the categorization of rights, the classification of obligations, and the elaboration of various distinctions indigenous to legal systems.[9]

The most essential characteristic of positive law, according to the Austinian doctrine, consists in its imperative character. Law is conceived as a command of the sovereign. "Every positive law is set by a given sovereign to a person or persons in a state of subjection to its author." [10] Not every type of command, however, was considered a law by Austin. Only *general* commands, obliging a person or persons to acts or forbearances of a class, merited the attribute of law in his opinion.[11]

It was not necessary, in Austin's view, that a command qualifying as a law must issue directly from a legislative body of the state, such as Parliament in England. It may proceed from an official organ to which lawmaking authority has been delegated by the sovereign. Judge-made law, according to Austin, was positive law in the true sense of the term, since the rules which the judges make derive their legal force from authority given by the state. Such authority the state may have conferred expressly; ordinarily, however, it imparts it by way of acquiescence.[12] "For, since the state may reverse the rules which he [the judge] makes, and yet permits him to enforce them by the power of the political community, its sovereign will 'that his rules shall obtain as law' is clearly evinced by its conduct, though not by its express declaration." [13] The norms enunciated by the judges comply with the

See his "Austin's Theory of the Separation of Law and Morals," 14 *Vanderbilt Law Review* 117, at 119 (1960).

[8] "The Uses of the Study of Jurisprudence," p. 367.

[9] *Id.*, pp. 367–368.

[10] *Province of Jurisprudence*, p. 201. Cf. also id., p. 350.

[11] *Id.*, pp. 22–24. See also *infra* Sec. 45.

[12] *Id.*, pp. 31–32. On Austin's position toward judicial legislation see W. L. Morison, "Some Myths about Positivism," 68 *Yale Law Journal* 212 (1958); Edgar Bodenheimer, "Analytical Positivism, Legal Realism, and the Future of Legal Method," 44 *Virginia Law Review* 365 (1958).

[13] *Province of Jurisprudence*, p. 32.

prerequisite most essential to positive law in the Austinian sense, namely, that law be set by a political superior for the guidance of political inferiors. This prerequisite is not fulfilled, on the other hand, in that branch of the law which is called international law. True to his own premises, Austin therefore denied the character of law to the rules and principles of international law. In his view, they should be looked upon merely as rules of "positive morality," a branch of norms regarded by Austin as "rules set or imposed by opinion." [14]

A few words might be said about the Austinian conception of justice. He did not deny that a positive law could be "unjust" in a loose sense of the term if measured by a standard extraneous to it, as for instance the law of God.[15] This did not mean, in his opinion, that a human law conflicting with the law of God was not obligatory or binding. The positive law, he argued, carries its standard in itself, and a deviation from, or disobedience to, positive law "is unjust with reference to that law, though it may be just with reference to another law of superior authority. The terms just and unjust imply a standard, and a conformity to that standard and a deviation from it; else they signify a mere dislike, which it would be far better to signify by a grunt or a groan than by a mischievous and detestable abuse of articulate language." [16] According to this view, a law which actually exists is a law, disregard of which can never be legally justified, though it might be excusable from a purely moral point of view.[17]

Austin's theory of law, although it remained almost unnoticed during his lifetime, later gained a great influence on the development of English jurisprudence. The well-known treatises on jurisprudence by Thomas Erskine Holland,[18] William Markby,[19] and Sheldon Amos [20]

[14] *Id.*, pp. 1, 142, 201. The norms of customary law were likewise considered by Austin to be mere rules of positive morality. See *infra* Sec. 78.

[15] *Id.*, p. 184.

[16] *Id.*, p. 190.

[17] The following passages seem to suggest that Austin was willing to recognize a *moral* right of resistance in case of a conflict between the divine law and the human law: "The evils which we are exposed to suffer from the hands of God as a consequence of disobeying His commands are the greatest evils to which we are obnoxious; the obligations which they impose are consequently paramount to those imposed by any other laws, and if human commands conflict with the Divine law, we ought to disobey the command which is enforced by the less powerful sanction." *Id.*, p. 184.

[18] *The Elements of Jurisprudence*, 13th ed. (Oxford, 1924). Holland defined law as "a general rule of human action, taking cognizance only of external acts, enforced by a determinate authority, which authority is human and, among human authorities, is that which is paramount in a political society." *Id.*, p. 41. More briefly, "law is a general rule of external human action enforced by a sovereign political authority." *Id.*, p. 42.

[19] *Elements of Law*, 6th ed., (Oxford, 1905). Markby defined law as "the general body of rules which are addressed by the rulers of a political society to the members of that society, and which are generally obeyed." *Id.*, p. 3.

[20] *The Science of Law* (London, 1874).

were based on the analytical method which Austin advocated in legal science. George W. Paton in Australia and Sir John Salmond in New Zealand published texts which, although making concessions to non-analytical theories of jurisprudence, bear the earmarks of the Austinian approach.[21]

In the United States, John Chipman Gray, Wesley N. Hohfeld, and Albert Kocourek made contributions to analytical jurisprudence. Gray, in an influential work, modified the Austinian theory by shifting the seat of sovereignty in lawmaking from the legislative assemblies to the members of the judiciary. "The law of the State or of any organized body of men," he maintained, "is composed of the rules which the courts, that is the judicial organs of that body, lay down for the determination of legal rights and duties." [22] It was his opinion that the body of rules the judges lay down was not the expression of pre-existing law but the law itself, that the judges were the creators rather than the discoverers of the law, and that the fact must be faced that they are constantly making law ex post facto.[23] Even the statutory law laid down by a legislature gains meaning and precision, in his view, only after it has been interpreted by a court and applied in a concrete case.[24] Although the judges, according to Gray, seek the rules laid down by them not in their own whims, but derive them from sources of a general character (such as statutes, judicial precedents, opinions of experts, customs, public policies, and principles of morality),[25] the law becomes concrete and positive only in the pronouncements of the courts. Judge-made law thus was to Gray the final and most authoritative form of law, and this conviction led him to the sweeping declaration that "it is true, in the Civil as well as in the Common Law, that the rules laid down by the courts of a country state the present Law correctly." [26]

[21] Paton, *A Textbook of Jurisprudence*, 4th ed. (Oxford, 1972); Salmond, *On Jurisprudence*, 11th ed., partly rewritten by G. Williams (London, 1957).

[22] John C. Gray, *The Nature and Sources of the Law*, 2d ed. (New York, 1931), p. 84. See also p. 103: "To determine rights and duties, the judges settle what facts exist, and also lay down rules according to which they deduce legal consequences from facts. These rules are the law."

[23] *Id.*, pp. 100, 121.

[24] "The shape in which a statute is imposed on the community as a guide for conduct is that statute as interpreted by the courts. The courts put life into the dead words of the statute." *Id.*, p. 125.

[25] *Id.*, p. 124.

[26] *Id.*, p. 94. See the comments on Gray's views by Hans Kelsen, *General Theory of Law and State*, transl. A. Wedberg (Cambridge, Mass., 1949), pp. 150–155.

Hohfeld's attempt at a systematic classification and arrangement of basic legal relations is briefly described *infra* Sec. 79. Albert Kocourek, dissatisfied with the attempt, tried to improve and refine the system. See his *Jural Relations*, 2d ed. (New York, 1928); *Introduction to the Science of Law* (Boston, 1930).

Section 26. *The Pure Theory of Law*

Austin believed that the proper purpose or end of government was "the greatest possible advancement of human happiness," and he insisted that the principle of utility, thus formulated, was to be the guiding rationale in the making of law by legislatures.[1] By raising the principle of utility to the level of an authoritative test to control the "science of legislation," Austin imparted an evaluative element to what he considered a scientific endeavor. In this sense, it might be said that a remnant of "natural-law" thinking remained inherent in Austin's theory of law.

It was the objective of Hans Kelsen (1881–1973) to purify the science of law from all evaluative criteria and ideological elements. Justice, for example, was viewed by Kelsen as an ideological concept. Justice, to him, was an "irrational ideal" representing the subjective predilections and value preferences of an individual or group.[2] "The usual assertion," he wrote, "that there is indeed such a thing as justice, but that it cannot clearly be defined, is in itself a contradiction. However indispensable it may be for volition and action of men, it is not subject to cognition. Regarded from the point of view of rational cognition, there are only interests, and hence conflicts of interests." [3] The theory of law, Kelsen maintained, cannot answer the question of what constitutes justice because this question cannot be answered scientifically at all. If justice is to be given any scientifically meaningful denotation, it must be identified with legality. According to Kelsen, it is "just" for a general rule to be actually applied in all cases where, according to its content, this rule should be applied. " 'Justice' means the maintenance of a positive order by conscientious application of it." [4]

Kelsen's methodological objectives did not stop with the elimination of political and ideological value judgments from the science of law. He wished to go a step further by keeping legal theory free from all extraneous, nonlegal factors. "Uncritically," he said, "the science of law has been mixed with elements of psychology, sociology, ethics, and political theory." [5] He sought to restore the purity of the law by

[1] John Austin, *The Province of Jurisprudence Determined*, ed. H. L. A. Hart (London, 1954), pp. 59, 294. See in this connection Jerome Hall, *Foundations of Jurisprudence* (Indianapolis, 1973), pp. 30–31.

[2] Hans Kelsen, *General Theory of Law and State*, transl. A. Wedberg (Cambridge, Mass., 1949), p. 13. See also Kelsen, *What Is Justice?* (Berkeley, 1960), pp. 5–6, 228. For a criticism of this view see *infra* Sec. 48.

[3] Kelsen, "The Pure Theory of Law and Analytical Jurisprudence," 55 *Harvard Law Review* 44, at 48–49 (1941).

[4] Kelsen, *supra* n. 3, p. 49; Kelsen, *General Theory*, *supra* n. 2, p. 14. For a criticism of this view see Edgar Bodenheimer, *Treatise on Justice* (New York, 1967), pp. 14–16.

[5] Kelsen, *The Pure Theory of Law*, transl. M. Knight (Berkeley, 1967), p. 1.

isolating those components of the work of a lawyer or judge which may be identified as strictly "legal."

According to Kelsen's pure theory of law, the objects of the science of law are those norms "which have the character of legal norms and which make certain acts legal or illegal." [6] By the term norm, Kelsen means that "something *ought* to be or *ought* to happen, especially that a human being *ought* to behave in a certain way." [7] This definition of norm is, however, also applicable to moral and religious norms. It is characteristic of a legal norm, according to Kelsen, that it prescribes a certain human behavior by attaching to the contrary behavior a coercive act as a sanction.[8] The pure theory of law considers the element of coercion as an essential ingredient of the concept of law. "Law is a coercive order of human behavior." [9] Kelsen holds that the coercion exercised by the legal order is not primarily a psychological one. The sanctions used by the law are outward sanctions consisting in the forcible deprivation of life, freedom, or property, or the imposition of some other measure regarded as an evil by the affected individual.[10]

A legal norm is valid if it has been authorized by another legal norm of a higher rank. Only norms can validate a source of law, not social facts like popular acceptance or actual use.[11] Thus, an administrative order is valid if authorized by a statute, a statute is valid if it corresponds with the provisions of the constitution. The constitution, in turn, is valid if its making was authorized by an earlier constitution. But if a constitution is, for example, the first constitution of a new country, there is no positive source of law from which it can derive its validity. In that event, Kelsen resorts to the notion of a "basic norm," which is a norm presupposed by legal thinking and not an actual norm, and which runs as follows: "Coercion of man against man ought to be exercised in the manner and under the conditions determined by the historically first constitution." [12] The basic norm is considered by

[6] *Id.*, p. 4.

[7] *Ibid.* From the prescriptive norms laid down by the legislator, which command, prohibit, or authorize certain acts, Kelsen distinguishes the descriptive statements about legal norms found in scholarly accounts of the law. *Id.*, pp. 71–75.

[8] *Id.*, p. 33; Kelsen, "Professor Stone and the Pure Theory of Law," 17 *Stanford Law Review* 1128, at 1131 (1965).

[9] Kelsen, *supra* n. 5, p. 33; Kelsen, *supra* n. 3, p. 57. For a criticism of this view see *infra* Sec. 59.

[10] Kelsen, *supra* n. 5, p. 35.

[11] Kelsen, "On the Basic Norm," 47 *California Law Review* 107, at 108 (1959); Kelsen, *supra* n. 5, p. 193.

[12] Kelsen, *supra* n. 5, p. 50. In a shorter formulation, the basic norm reads as follows: "One ought to behave as the Constitution prescribes." *Id.*, p. 201. On the basic norm of international law see *id.*, pp. 214–216.

Kelsen the ultimate source for the validity of all norms that belong to the same legal system.

From the validity of a legal norm Kelsen distinguishes it effectiveness. Effectiveness means that a norm is actually obeyed and applied, while validity means that it *ought* to be obeyed and applied.[13] In his earlier writings, Kelsen took the position that the validity of a legal norm was not conditioned by its factual effectiveness, as long as the legal system as a whole was, for the most part, observed.[14] In his later writings Kelsen assumed a closer relationship between validity and effectiveness by declaring that "a norm that is not obeyed by anybody anywhere, in other words, a norm that is not effective at least to some degree, is not regarded as a valid norm." [15] Kelsen thus reached the conclusion that, although a norm required authorization by a higher norm, a minimum of effectiveness was a further condition of its validity.

According to Kelsen, "the legal order is not a system of coordinated norms of equal level, but a hierarchy of different levels of legal norms." [16] At the apex of the structure stands the basic norm postulating fidelity to the constitution. The constitution (which may be written or unwritten) sets the framework for the statutory and customary law.[17] These two forms of law, in turn, prescribe rules for the exercise of judicial, administrative, and private activity. When the judiciary applies the statutory or customary law in a litigated case, it concretizes the general norms controlling the case and renders a decision which constitutes an "individual norm." [18] Such a norm is directed at a single individual or group of determinate persons and provides a sanction (such as an award of damages) or other disposition designed to terminate the litigation. Individual norms are also set by administrative organs which apply general norms in a case resulting in an administrative decree or other concrete disposition.[19] Such individual norms are considered by Kelsen "law" in the same sense as the general norms on which their creation is based.[20]

[13] *Id.*, pp. 10–11.

[14] Kelsen, *Reine Rechtslehre* (Leipzig, 1934), pp. 70–73.

[15] Kelsen, *supra* n. 5, p. 11.

[16] *Id.*, p. 221.

[17] Customary law may be used only if authorized by the constitution or basic norm. *Id.*, p. 226.

[18] *Id.*, p. 230.

[19] For a criticism of the concept of "individual norm" see *infra* Sec. 45, n. 2. The concept is defended by Julius Stone, *Legal System and Lawyers' Reasonings* (Stanford, 1964), pp. 113–114.

[20] For a critique see *infra* Sec. 45, where the position is taken that a system of *ad hoc* decisions not based on general rules or standards would not be a system of law. On this question see also Luis Recaséns Siches, *Tratado General de Filosofía del Derecho*, 2d ed. (Mexico City, 1961), pp. 329–331. Like Kelsen, Recaséns Siches recognizes the concept of individual norm, but insists at the same time that a social system without general norms would be a system of arbitrariness rather than law.

In the view of Kelsen, "most legal norms both apply and create law." [21] A legislative body unquestionably fashions new law, but in doing so it must remain within the framework of, and thus apply, the provisions of the constitution. An adjudicating authority determining whether and in what way a general norm is to be applied in a particular case is engaged in a process which is partly declaratory and partly creative. The judge (or other law-administering official) must discover the existing law relevant to the disposition of the case, but in establishing the presence of the conditions calling for the application of this law and decreeing a sanction, the judicial decision has a constitutive character.[22] In certain spheres of the law, Kelsen points out, a private transaction laying down norms for the mutual conduct of the contracting parties may stand between the general law of the state and the judicial decision.[23] Here again, the norms set by private parties constitute partly an application of the general rules of contract law and partly the creation of new relations between the parties. The final stage in the descending process of applying, concretizing, and individualizing legal norms is the execution, the carrying out, of the compulsive act decreed by a court or administrative agency.[24]

Law, according to Kelsen, is a specific technique of social organization. "The concept of law has no moral connotation whatsoever"; its decisive criterion is "the element of force." [25] The mechanical apparatus of the law is capable of protecting any political, economic, or social setup. "Any kind of content might be law. There is no human behavior which, as such, is excluded from being the content of a legal norm." [26]

Kelsen also asserts the identity of State and law. As a political organization, the State is a legal order, and every State is governed by law.[27] The expression "government of laws" is therefore a pleonasm to Kelsen.[28] The State is nothing but the sum total of norms ordering compulsion, and it is thus coextensive with the law.

Kelsen's doctrine is perhaps the most consistent expression of posi-

[21] William Ebenstein, "The Pure Theory of Law: Demythologizing Legal Thought," 59 *California Law Review* 617, at 643 (1971). This article provides a useful account of Kelsen's thinking. See also Ebenstein, *The Pure Theory of Law* (Madison, 1945).

[22] Kelsen, *supra* n. 5, pp. 234–235, 237–239; Kelsen, *General Theory*, *supra* n. 2, p. 135.

[23] *Id.*, pp. 256–262.

[24] *Id.*, p. 235.

[25] Kelsen, *General Theory*, *supra* n. 2, p. 5; Kelsen, *supra* n. 5, p. 34.

[26] Kelsen, *supra* n. 5, p. 198.

[27] *Id.*, pp. 286, 312. "A state not governed by law is unthinkable." *Id.*, p. 312. The doctrine of the identity of state and law is approved by Hersch Lauterpacht, "Kelsen's Pure Theory of Law," in *Modern Theories of Law* (London, 1933), pp. 118–125. For a different approach see Edgar Bodenheimer, "Reflections on the Rule of Law," 8 *Utah Law Review* 1 (1962).

tivism in legal theory.[29] For it is characteristic of legal positivism that it contemplates the form and structure of law rather than its moral and social content, that it views the institution of law without regard to the justness or unjustness of its norms, and that it endeavors to segregate jurisprudence as completely as possible from other disciplines, such as psychology, sociology, and ethics. For purposes of analysis at least, Kelsen treats the law as though it were contained in a hermetically sealed container.[30]

Section 27. *Neo-Analytic and Linguistic Jurisprudence*

While the influence of the Pure Theory of Law has recently suffered a decline in most of the countries in which it was strongly in vogue at an earlier time, there has arisen, in the second half of the twentieth century, a neo-analytic movement which has exhibited particular strength in the Anglo-American orbit but has also extended its influence to other parts of the world. It is characteristic of many representatives of this movement that they have abandoned the monolithic exclusivity with which earlier analytical jurists sought to confine the province of jurisprudence to the exegesis of basic legal notions and concepts; they have admitted the legitimacy of other ways to deal with the phenomenon of law, such as the sociological interpretation or the natural-law philosophy. Furthermore, a substantial number of these jurists have made use of the modern sharpened tools of logic, including symbolic logic and computer science, while others have strongly relied on the findings and attainments of twentieth-century linguistic science. Last but not least, the new analytic jurists have subjected the judicial process to a more searching and subtle investigation than was accomplished by their predecessors.[1]

[28] *Id.*, p. 313. The only meaning that in Kelsen's view might be attributed to the phrase is a political (and therefore ideologically colored) identification of the law State (*Rechtsstaat*) with a State which conforms with the postulates of democracy and legal security.

[29] It has been observed that Kelsen's thought is deeply rooted in Neo-Kantian philosophy. M. P. Golding, "Kelsen and the Concept of 'Legal System'", in *More Essays in Legal Philosophy*, ed. R. S. Summers (Berkeley, 1971), p. 69. Kelsen's philosophy belongs to that version of Neo-Kantianism which has sought to eliminate every trace of metaphysics from the Kantian system and thus is practically indistinguishable from positivism.

[30] For an interesting criticism of Kelsen's theory see Maurice Hauriou, "Classical Method and Juridical Positivism," in *The French Institutionalists*, ed. A. Broderick (Cambridge, Mass., 1970), pp. 125–131.

[1] Robert S. Summers, "The New Analytical Jurists," 41 *New York University Law Quarterly* 861, at 863 (1966), has summarized the difference between the old and the new analytic approach as follows: "The new is broader in scope, more sophisticated in methodology, less doctrinaire and positivistic, and more likely to be of practical utility." A valuable textbook oriented towards the neo-analytic approach is R. W. M. Dias, *Jurisprudence*, 3rd ed. (London, 1970).

These tendencies become manifest in the work of the most influential exponent of the new movement, the British legal philosopher Herbert L. A. Hart (b. 1907). The pronounced analytic strain in Hart's thinking is apparent in his thesis that the key to the science of jurisprudence must be found in the combination of two categories of rules, which he calls primary and secondary. Primary rules are standard modes of behavior which obligate the members of a society to perform, or abstain from, certain types of action. These rules spring from the needs of society and are designed to guarantee a satisfactory way of life. The roots of their binding force lie in their acceptance by the majority, and strong pressures for their observance are exerted by the majority upon noncooperative members of the society.[2]

According to Hart, a developed system of law must also have a set of "secondary" rules which establish an official machinery for the recognition and enforcement of the primary rules. First of all, they serve to identify the valid and subsisting rules of the system in some authoritative fashion. Second, they make provision for formal and regularized procedures designed to modify the primary rules. Third, they guarantee the implementation of the primary rules by setting up elaborate processes of adjudication and enforcement.[3]

It is obvious that this view of the law avoids the one-sidedness of the Austinian command theory and seeks to construct a bridge between the imperative and sociological conceptions of law.[4] Hart also attempts to mitigate the sharp confrontation that has often characterized the relation between legal positivists and believers in natural law. He concedes to natural-law theory that "there are certain rules of conduct which any social organization must contain if it is to be viable" and that such rules do in fact constitute a common element in the law of all societies.[5] He has, on the other hand, strongly defended the positivistic axiom that the duty of "fidelity to law" embraces all rules which are valid by the formal tests of a legal system, although some of them may be decisively repugnant to the moral sense of the community.[6]

[2] H. L. A. Hart, *The Concept of Law* (Oxford, 1961), pp. 77–88.

[3] *Id.*, pp. 89–96.

[4] On the Austinian theory see *supra* Sec. 25. On sociological conceptions see *infra* Secs. 28–31. The historical view of the law discussed *supra* Sec. 18 is related to the sociological conception and opposed to the imperative view.

[5] Hart, *supra* n. 2, p. 188. The rules which, in Hart's view, embody the minimum content of natural law are discussed *id.*, pp. 189–195. For a neo-analytic treatment of legal systems which ignores their contentual elements see Joseph Raz, *The Concept of a Legal System* (Oxford, 1970).

[6] *Id.*, p. 205; Hart, "Positivism and the Separation of Law and Morals," 71 *Harvard Law Review* 593, at 615–621 (1958). Lon L. Fuller has taken issue with Hart's approach *id.*, pp. 644–661.

Professor Hart has also subjected the Austinian concept of sovereignty to a searching critique,[7] written extensively on the philosophy of the criminal law,[8] and engaged in a thorough analysis of legal method and the judicial process.[9] His writings have produced extensive comments and reactions throughout the Anglo-American legal orbit.[10]

Whether or not Ronald M. Dworkin (b. 1931) may be classified as a neo-analytical jurist is somewhat doubtful, since he has been a critic of legal positivism and has also written about problems generally deemed outside the scope of analytical jurisprudence.[11] A justification for such a classification may be found in the fact that Dworkin has concerned himself extensively with an analysis of basic legal notions, such as "right," "obligation," "rule," and "principle." He has argued that the absence of a well-circumscribed rule directing the decision in a litigated case does not confer upon the judge a discretion to make new law in accordance with his personal views of good policy. He is bound in such a case to follow general principles of justice and fairness recognized by the social order which, although they have found no clearly articulated and formalized expression in the positive law, impose substantial limits on judicial freedom.[12] In taking this view, Dworkin has acknowledged the importance of the nonformal sources of the law.[13]

[7] Hart, *supra* n. 2, pp. 49–76.

[8] Hart, *Punishment and Responsibility* (Oxford, 1968); Hart, *The Morality of the Criminal Law* (Jerusalem, 1964); Hart, *Law, Liberty, and Morality* (Stanford, 1963).

[9] Hart, *supra* n. 2, pp. 120–144; Hart, *supra* n. 6, pp. 606–615; Hart, "Scandinavian Legal Realism," 1959 *Cambridge Law Journal* 233.

[10] See, among others, Clifford L. Pannam, "Professor Hart and Analytical Jurisprudence," 16 *Journal of Legal Education* 379 (1964), including a bibliography of Hart's major writings; B. E. King, "The Basic Concept of Professor Hart's Jurisprudence," 1963 *Cambridge Law Journal* 270; Graham Hughes, "Rules, Policy and Decision-Making," in *Law, Reason, and Justice*, ed. G. Hughes (New York, 1969), p. 101; Rolf Sartorius, "Hart's Concept of Law," in *More Essays in Legal Philosophy*, ed. R. S. Summers (Berkeley, 1971), p. 131; Edgar Bodenheimer, "Modern Analytical Jurisprudence and the Limits of Its Usefulness," 104 *University of Pennsylvania Law Review* 1080 (1956), and the reply by Hart, "Analytical Jurisprudence in Mid-Twentieth Century," 105 *University of Pennsylvania Law Review* 953 (1957).

[11] See, for example, his articles on "Taking Rights Seriously," in *Is Law Dead*, ed. E. V. Rostow (New York, 1971), p. 168 and "On Not Prosecuting Civil Disobedience," *New York Review of Books*, June 6, 1968. See also Dworkin, "Lord Devlin and the Enforcement of Morals," 75 *Yale Law Journal* 986 (1966) and Dworkin, "Philosophy, Morality, and Law—Observations Prompted by Professor Fuller's Novel Claim," 113 *University of Pennsylvania Law Review* 688 (1965).

[12] Dworkin, "The Model of Rules," in *Law, Reason, and Justice*, ed. G. Hughes (New York, 1969), pp. 13–35; Dworkin, "Social Rules and Legal Theory," 81 *Yale Law Journal* 855, 879–890 (1972). See also *infra* Sec. 45, n. 21, 22.

[13] On the nonformal sources of law see *infra* Ch. XVI and Edgar Bodenheimer, "Analytical Positivism, Legal Realism, and the Future of Legal Method," 44 *Virginia Law Review* 365, at 375–378 (1958).

It was stated earlier that neo-analytic jurisprudence has utilized the sharpened tools of twentieth-century logical science and has also placed strong reliance on semantic research. Systems of legal logic characterized by an extensive use of mathematical symbols were produced by Ulrich Klug, a German teacher of law, and Ilmar Tammelo, who holds a chair of legal philosophy in Austria after having taught for many years in Australia.[14] Neither of these two authors, however, questions the legitimacy of other approaches to jurisprudence. Tammelo, for example, has supplemented his logical studies by thorough reflections on substantive issues of legal ordering, especially the problem of justice.[15]

The role of language in the law was emphasized in England by Glanville Williams (b. 1911) and in the United States by Walter Probert (b. 1925). Williams, in his semantic studies of the law, has dwelled extensively on the ambiguity of words and the emotive character of many legal terms. He has taken the position that a great deal of confusion has been engendered by the use of legal concepts carrying many different meanings, that it was inadmissible to speak of the "proper" sense of a word, and that value-impregnated terms like "justice," "wrong," or "the rule of law" serve emotional rather than rational functions.[16] Probert has stressed the need for "word-consciousness" on the part of lawyers, since he considers language "*the* major instrument of social control." [17] Norms and rules are inherently ambiguous, he asserts, and the heart of the common-law process in the courts is not rules (although they play a part in it) but rhetoric.[18] His semantic view of the law leads him to define justice as "the search for some verbal guide to aid in selecting among competing premises." [19]

Modern analytic and semantic jurisprudence received a great deal of stimulation from the work of Ludwig Wittgenstein (1889–1951), an Austrian-born philosopher who later taught at the University of Cam-

[14] Ulrich Klug, *Juristische Logik*, 3rd ed. (Berlin, 1966); Ilmar Tammelo, *Outlines of Modern Legal Logic* (Wiesbaden, 1969).

[15] See Tammelo, *Justice and Doubt* (Vienna, 1959); Tammelo, *Rechtslogik und Materiale Gerechtigkeit* (Frankfurt, 1971), pp. 50–83, 149–155; Tammelo, *Survival and Surpassing* (Melbourne, 1971).

[16] Glanville Williams, "Language and the Law," 61 *Law Quarterly Review* 71, 179, 293, 384 (1945), 62 *Law Quarterly Review* 387 (1946); Williams, "International Law and the Controversy concerning the word 'Law,'" 22 *British Yearbook of International Law* 146 (1945). For an intense criticism of Williams' position see Jerome Hall, "Reason and Reality in Jurisprudence," 7 *Buffalo Law Review* 351, at 380–385 (1958); *see also* Hall, *Foundations of Jurisprudence* (Indianapolis, 1973), pp. 78–81.

[17] Walter Probert, "Word Consciousness: Law and the Control of Language," 23 *Case Western Reserve Law Review* 374 (1972).

[18] Probert, *Law, Language and Communication* (Springfield, Ill., 1972), pp. XXII, 11, 21.

[19] Probert, "Law and Persuasion: The Language-Behavior of Lawyers," 108 *University of Pennsylvania Law Review* 35, at 57 (1959).

bridge and was able to influence trends of philosophical thinking in the Anglo-American orbit decisively. In his *Tractatus Logico-Philosophicus*, Wittgenstein undertook an analysis of language, a human enterprise which he described as a picture of the facts constituting reality. He declared that all of philosophy was criticism of language,[20] that its purpose was the logical clarification of thoughts,[21] and that it was particularly important to elucidate the meaning of complex sentences and propositions by dissolving them into their elementary constituents (which depict simple facts).[22] Wittgenstein rejected the idea that it was the task of philosophers to offer explanations of the workings of the universe, or to advise individuals or societies how to conduct their affairs. He did not deny that human beings are confronted with questions of ethics and value, but he deemed such questions to be in the realm of mysticism, in which meaningful propositions cannot be expressed.[23]

In a later work, the *Philosophical Investigations*, Wittgenstein repudiated many of the theorems set forth in the *Tractatus*. His interest shifted from a logical analysis of propositions and their meanings to a consideration of the ways in which language actually works. He declared in his later work that "the meaning of a word is its use in the language," [24] and that "philosophy may in no way interfere with the actual use of language; it can in the end only describe it." [25] He expressed the hope that philosophical problems and riddles would completely disappear if this method were properly used.[26]

The reasons for Wittgenstein's turn towards a pure form of linguistic empiricism must probably be sought in the fact that the *Tractatus* still preserved elements of an idealized theory of language. The philosopher was admonished to discover the hidden logical structure of language and to improve semantic understanding by breaking propositions down into their basic components, presumably for the purpose of discerning their "true" meaning. Wittgenstein may have reached the conclusion that this mode of analysis, in view of the diverse ways in which words and concepts are used, leaves too much room for subjective,

[20] *Tractatus Logico-Philosophicus* (London, 1922), No. 4.0031.

[21] *Id.*, No. 4.112.

[22] *Id.*, Nos. 4.21, 4.221, 4.26, 4.431, 5, 5.01; see also Hanna F. Pitkin, *Wittgenstein and Justice* (Berkeley, 1972), pp. 27–30.

[23] *Id.*, Nos. 6.42, 6.421, 6.522; *Pitkin, supra* n. 22, p. 30. See in this connection also Alfred J. Ayer, *Language, Truth and Logic*, 2d ed. (London, 1946), p. 113; George Nakhnikian, "Contemporary Ethical Theories and Jurisprudence," 2 *Natural Law Forum* 4, at 16–36 (1957).

[24] *Philosophical Investigations*, transl. G. E. M. Anscombe (Oxford, 1953), No. 43.

[25] *Id.*, No. 124.

[26] *Id.*, No. 133.

idiosyncratic interpretations to serve as a proper basis of scientific method.[27]

Much of what has been done in the field of analytic jurisprudence corresponds to the notion of philosophical activity which Wittgenstein advocated in the *Tractatus*. The analytical jurists have aimed at the clarification of legal concepts by dissecting them and reducing them to their basic ingredients. The question might be asked what kind of a direction jurisprudence would have to take if the "ordinary-language" philosophy of the late Wittgenstein were to be accepted as its foundation. It must be taken into account here that legal language contains many terms of a specialized, technical nature, although there are also broad, non-technical terms (like justice, resonableness, and morality) which are part of the common, colloquial vernacular. It has been suggested that the notion of "ordinary language" does not exclude words which are characteristically employed in special disciplines or in the professions, as long as reference is made to their prevailing denotations.[28] If this position is taken, the task of analytic jurisprudence, conceived as a branch of ordinary-language philosophy, would be reduced to the description of standard uses of legal terms and concepts.[29]

[27] See in this connection Anthony Quinton, "Linguistic Analysis," in *Philosophy in the Mid-Century*, ed. R. Klibansky (Florence, 1961), pp. 117–178; G. J. Warnock, "The Philosophy of Wittgenstein," *id.*, pp. 203–206.

[28] Gilbert Ryle, "Ordinary Language," in *Ordinary Language*, ed. V. C. Chappell (Englewood Cliffs, N.J., 1964), pp. 25–27, 35–36; Brand Blanshard, *Reason and Analysis* (La Salle, Ill., 1962), p. 342.

[29] It is clear that such standard uses can sometimes not be found because the scope of the term is controversial, or because the term is used in various incongruous senses.

VIII

SOCIOLOGICAL JURISPRUDENCE AND LEGAL REALISM

Section 28. *Sociological and Psychological Theories of Law in Europe*

It was pointed out earlier [1] that positivism in jurisprudence may manifest itself in a sociological as well as in an analytical form. A good example of a sociological-positivistic interpretation of law is furnished by the doctrines of the Austrian sociologist Ludwig Gumplowicz (1838–1909). Gumplowicz erected a sociological foundation for the positivistic theory that law is essentially an exercise of state power. He taught that the chief moving force in history was the struggle of different races for supremacy and power.[2] In this struggle the stronger race subjugates the weaker race and sets up an organization for the stabilization and perpetuation of its dominion. This organization is the

[1] See *supra* Sec. 24.

[2] Ludwig Gumplowicz, *Der Rassenkampf*, 2d ed. (Innsbruck, 1909), pp. 218–219.

state, and the law is one of the most important instruments for the attainment of governmental objectives. Law, Gumplowicz wrote, is a form of social life arising from the conflict of heterogeneous social groups of unequal power.[3] Its aim is to establish and uphold the dominion of the stronger group over the weaker through the use of state power. The guiding idea of law, according to Gumplowicz, is the maintenance and perpetuation of political, social, and economic inequality. There exists no law which is not an expression of inequality. In this respect, law is a true reflection of state power, which also aims only at the regulation of the coexistence of unequal racial and social groups through the sovereignty of the stronger group over the weaker.[4] Law cannot arise outside the state, because it is essentially an exercise of state power. The notions of "natural law" and of "inalienable rights" are preposterous products of pure imagination, said Gumplowicz, as meaningless as the concepts of "free will" or "reason." [5] The assumption that law is concerned with the creation of freedom and equality among men is a manifestation of spiritual delusion. Exactly the opposite is true. Law is "universally the very contrary of freedom and equality and indeed naturally must be." [6]

Gumplowicz did not assert, however, that the relation between the dominant and subjugated groups within the state remained static throughout the life of a society. There takes place in human history, he pointed out, an emancipatory struggle of classes and groups that have been excluded from a share in political, social, and economic power. In this struggle for a greater amount of freedom and equality, the suppressed classes use ideal notions of law as an important weapon. This weapon has been forged by the ruling class, but it is employed by the lower classes in order to attack and destroy the dominion of the ruling class. For instance, the bourgeoisie in its struggle with the feudal class appealed to universal human rights, freedom, and equality.[7] In more recent times, the working class has made use of a similar ideology in its struggle for increased rights and economic power. Gumplowicz maintained that in their campaign for emancipation the lower classes are apt to obtain certain successes, but that their ultimate goal of complete freedom and total equality is never reached.

[3] Gumplowicz, *The Outlines of Sociology*, transl. F. W. Moore (Philadelphia, 1899), p. 178.
[4] *Id.*, p. 179.
[5] *Id.*, p. 180.
[6] *Id.*, p. 182. See also Gumplowicz, *Rechtsstaat und Sozialismus* (Innsbruck, 1881), p. 135. For a criticism of this viewpoint see Edgar Bodenheimer, *Power, Law, and Society* (New York, 1973), Secs. 6, 14, 15.
[7] Gumplowicz, *supra* n. 3, p. 149.

A pioneer of legal sociology in Germany was Max Weber (1864–1920), whose monumental work on the subject, covering a great variety of problems, is not easily summarized.[8] One of his most interesting contributions to legal theory is his elaboration of the distinction between irrational and rational methods of lawmaking and his detailed analysis of these two methods from a historical and sociological point of view.

A theory of law which contains components of a sociological character but which may also be explained as an attempt to revive some of the ideas of Hegel was advanced by the German jurist Joseph Kohler (1849–1919). Kohler taught that human activity was cultural activity, and that man's task was "to create and develop culture, to obtain permanent cultural values, thus producing a new abundance of forms which shall be as a second creation, in juxtaposition to divine creation." [9] The law, he pointed out, plays an important part in the evolution of the cultural life of mankind by taking care that existing values are protected and new ones furthered. Each form of civilization, Kohler said, must find the law which best suits its purposes and aims. There exists no eternal law; the law that is adequate for one period is not so for another. Law must adapt itself to the constantly changing conditions of civilization, and it is the duty of society, from time to time, to shape the law in conformity to new conditions.[10]

Kohler advocated a synthesis and reconciliation of individualism and collectivism in legal control. Egoism, he maintained, "stimulates human activity, urges man on to constant effort, sharpens his wit, and causes him to be unremitting in his search for new resources." [11] An attempt by the legal order to uproot or combat egoism would therefore be foolish. He pointed out, on the other hand, that social cohesion is also necessary, in order that humanity may not fall apart, turning into a collection of individuals, and the community lose control over its members. Nothing great can be accomplished, in his view, except

[8] His "Rechtssoziologie," in *Wirtschaft und Gesellschaft* (Tübingen, 1925), II, 387–513, has been published in English under the title *Max Weber on Law In Economy and Society*, transl. E. Shils and M. Rheinstein, with an excellent introduction by M. Rheinstein (Cambridge, 1954). On Weber see also Wolfgang Friedmann, *Legal Theory*, 5th ed. (New York, 1967), pp. 245–247; Clarence Morris, "Law, Reason and Sociology," 107 *University of Pennsylvania Law Rev.* 147 (1958); David M. Trubek, "Max Weber on Law and the Rise of Capitalism," 1972 *Wisconsin Law Rev.* 720.

[9] *Philosophy of Law*, transl. A. Albrecht (New York, 1921), p. 4. Culture meant to Kohler "the culture of knowledge on the one hand, and that of new production and new activity on the other; which again is divided into esthetic culture, and the culture that controls nature." *Id.*, p. 22.

[10] *Id.*, pp. 4–5, 58.

[11] *Id.*, pp. 60–61.

by devoted cooperative effort. "The individual should develop independently but the tremendous advantage of collectivism should not therefore be lost." [12]

While Kohler's philosophy of law moved on the borderline between sociological jurisprudence and legal idealism, a thoroughly sociological type of legal theory was propounded by the Austrian thinker Eugen Ehrlich (1862–1922). Genuine sociological jurisprudence teaches, in the words of Northrop, that the "positive law cannot be understood apart from the social norms of the 'living law.' " [13] The "living law" as conceived by Ehrlich is "the inner order of associations," that is, the law practiced by society, as opposed to the law enforced by the state.[14] He identified the living law with the law which dominates societal life, even though it has not been posited in legal propositions. "At the present as well as at any other time, the center of gravity of legal development lies not in legislation, nor in juristic science, nor in judicial decision, but in society itself." [15]

In the view of Ehrlich, a court trial is an exceptional occurrence in comparison with the innumerable contracts and transactions which are consummated in the daily life of the community. Only small morsels of real life come before the officials charged with the adjudication of disputes. To study the living body of law, one must turn to marriage contracts, leases, contracts of purchase, wills, the actual order of succession, partnership articles, and the bylaws of corporations.[16]

Ehrlich contrasted the "norms of decision," laid down for the adjudication of disputes, with the "norms of organization," which originate in society and determine the actual behavior of the average man. An individual, said Ehrlich, finds himself enmeshed in innumerable legal relations and, with some exceptions, he quite voluntarily performs the duties incumbent upon him by virtue of these relations. One performs one's duties as father and son or as husband or wife, one pays one's debts, delivers that which one has sold, and renders to one's employer the performance due to him. It is not, in the view of Ehrlich, the threat of compulsion by the state that normally induces a man to perform these duties. His conduct is usually determined by quite different motives: he might otherwise have quarrels with his relatives,

[12] *Id.*, p. 51. Cf. also pp. 60–61. On Kohler's philosophy of law see Roscoe Pound, *Jurisprudence* (St. Paul, Minn., 1959), I, 158–169.

[13] F. S. C. Northrop, "Ethical Relativism in the Light of Recent Legal Science," 52 *Journal of Philosophy* 649, at 651 (1955).

[14] Eugen Ehrlich, *Fundamental Principles of the Sociology of Law*, transl. W. L. Moll (Cambridge, Mass., 1936), p. 37.

[15] *Id.*, Foreword.

[16] *Id.*, p. 495.

lose customers, be dismissed from his job, or get the reputation of being dishonest or irresponsible.[17] His performance of legal duties is less a matter of conscious thinking than of unconsciously habituating himself to the emotions and thoughts of his environment. "The most important norms function only through suggestion. They come to man in the form of commands or of prohibitions; they are addressed to him without a statement of the reason on which they are based; and he obeys them without a moment's reflection." [18] Thus there is a psychological component in Ehrlich's theory of law: he attributes great weight to the power of habit in the life of the law.

The psychological element in law was more fully elaborated by Leon Petrazycki (1867–1931), a Russian philosopher of law. It was his opinion that legal phenomena consist of unique psychic processes which may be observed only through the use of the introspective method.[19] "In everyday life, we ascribe to ourselves and to others various rights at every step and act in conformity therewith—not at all because it is so stated in the Code or the like, but simply because our independent conviction is that it should be so." [20] Petrazycki developed a theory of "intuitive law," in which the individual juridical conscience and the inward experiences of human beings figure large in the explanation of legal and social phenomena. Petrazycki also put forward an interesting analysis of the relationship between law and morality, which will be discussed elsewhere.[21]

Section 29. *The Jurisprudence of Interests and the Free-Law Movement*

The jurisprudence of interests, a movement in legal theory which arose on the continent of Europe, was an offspring of sociological jurisprudence and gained a large following, particularly in Germany and France. In Germany, the movement was founded by Philipp Heck and was carried on by Heinrich Stoll, Rudolf Müller-Erzbach, and others.[1] The jurisprudence of interests arose as a protest against the conceptualism and formalism which had dominated German juridical thinking around the turn of the century. Conceptualistic jurisprudence

[17] *Id.*, p. 21.
[18] *Id.*, p. 78.
[19] Petrazycki, *Law and Morality*, transl. H. W. Babb (Cambridge, Mass., 1955), pp. 8, 12. On Petrazycki see F. S. C. Northrop, *The Complexity of Legal and Ethical Experience* (Boston, 1959), pp. 79–92.
[20] *Id.*, p. 57.
[21] See *infra* Sec. 62.
[1] A collection of important writings by the representatives of this school is presented in *The Jurisprudence of Interests*, transl. and ed. M. M. Schoch (Cambridge, Mass., 1948).

had proceeded from the assumption that the positive legal order was "gapless," and that by proper logical operations a correct decision could always be derived from the existing body of positive law.

Heck and his followers challenged this contention of the conceptualistic jurists, which they considered unfounded and contrary to fact. They pointed out that every positive legal order was necessarily fragmentary and full of lacunae, and that satisfactory decisions could not always be gained on the basis of existing legal norms by a process of logical deduction.

The method of judicial adjudication proposed by the jurisprudence of interests rests on the premise that the norms of the law constitute principles and maxims fashioned by the legislator for the solution of conflicts of interests. In this sense they must be regarded as value judgments, "pronouncements which one of the interests of conflicting social groups shall prevail over the other, or whether perhaps the interests of both have to yield to the interests of third groups or the community as a whole." [2] In order to arrive at a just decision, the judge must ascertain the interests which the legislator intended to protect by a particular statutory rule. Among conflicting interests, that which is favored and preferred by the law itself should be held to prevail. Thus Heck and his followers preached the subordination of the judge to the written and enacted law. They refused to provide the judge with a scale of values not contained in the positive law, and left him without much guidance in cases where the system of law, even if taken as an integrated whole, does not offer any clues to the solution of a conflict of interests.[3]

In France, François Gény (1861–1944) was the proponent of a system of legal methodology which had a number of points in common with the jurisprudence of interests. In a famous treatise,[4] he pointed out that the formal sources of the law were incapable of covering the whole field of judicial action. He showed that there is always a certain sphere of free discretion left to the judge within which he must exercise a creative mental activity. This discretion, Gény said, should not be exercised according to the uncontrolled and arbitrary personal feelings of the judge, but should be based upon objective principles. The judge should attempt to give the greatest possible satisfaction to the wishes of the litigants insofar as they are

[2] Max Rheinstein, "Sociology of Law," 48 *Ethics* 233 (1938).

[3] On the balancing of interests see also *infra* Sec. 66.

[4] *Méthode d'interprétation et sources en droit privé positif*, 2d ed., transl. Louisiana State Law Institute (Baton Rouge, 1963). See also Richard Groshut, "The Free Scientific Search of François Gény," 17 *American Journal of Jurisprudence* 14 (1972).

consistent with the general purposes of society. The method of accomplishing this task should be "to recognize the interests involved, evaluate their relative force, weigh them on the scales of justice so as to assure the preponderance of the most important ones according to a social criterion, and finally to establish the most desirable balance." [5]

In order to produce a just equilibrium of interests the judge, according to Gény, must carefully scrutinize the prevailing moral sentiments and inquire into the social and economic conditions of the time and place. He should respect, as far as possible, the autonomous will of the parties, as expressed in contracts, wills, and other transactions, but he should see to it that this autonomous will of the parties does not conflict with basic principles of public order.[6]

An approach to jurisprudential method substantially more radical than that of the jurisprudence of interests and of Gény was advocated by the adherents of the free-law movement, which originated in Germany at the beginning of the twentieth century. The pioneers of the movement were Ernst Fuchs (1859–1929) and Hermann Kantorowicz (1877–1940).[7] The free-law movement stressed the intuitive and emotional element in the judicial process and demanded that the judge should find the law in accordance with justice and equity. The free-law jurists did not want to go so far as to relieve the judge of a general duty of fidelity to the statutory law. When, however, the positive law was unclear or ambiguous, or when it was unlikely that the contemporary legislator would decide the case as required by the statute, then the judge was to decide the case according to the dominant conceptions of justice or, if such were absent, according to his subjective legal conscience.[8] With this far-reaching extension of judicial discretion by the adherents of the free-law movement, the representatives of the jurisprudence of interests expressed strong disagreement.

[5] Gény, *supra* n. 4, pp. 415–416.

[6] *Id.*, pp. 42–43. Gény is not only known for his methodological studies but also for his legal-philosophical work *Science et technique en droit privé positif* (Paris, 1913), a work belonging to the neo-Scholastic school of thought. See *infra* Sec. 35. On Gény see Pound, *Jurisprudence*, I, 181–184; Thomas J. O'Toole, "The Jurisprudence of Gény, 3 *Villanova Law Review* 455 (1958); B. A. Wortley, "François Gény," in *Modern Theories of Law* (London, 1933), pp. 139–159.

[7] Gnaeus Flavius (Kantorowicz), *Der Kampf um die Rechtswissenschaft* (Heidelberg, 1906); Hermann Kantorowicz, *Aus der Vorgeschichte der Freirechtslehre* (Mannheim, 1925); Ernst Fuchs, *Die Gemeinschädlichkeit der Konstruktiven Jurisprudenz* (Karlsruhe, 1909); Fuchs, *Juristischer Kulturkampf* (Karlsruhe, 1912). See also Albert S. Foulkes, "On the German Free Law School," 1969 *Archiv für Rechts- und Sozialphilosophie* 367.

[8] See particularly *Der Kampf um die Rechtswissenschaft*, p. 41. In his later years, Kantorowicz formulated the free-law doctrine in a more conservative way. See Kantorowicz, "Some Rationalism about Realism," 43 *Yale Law Journal* 1240, at 1241 (1934).

Section 30. *Pound's Sociological Jurisprudence*

In his essay "The Moral Philosopher and the Moral Life," the American philosopher William James, in attempting to determine the essence of the ethical "good," arrived at the following conclusion: "In seeking for a universal principle we inevitably are carried onward to the most universal principle,—that *the essence of good is simply to satisfy demand.*" [1] He expressed the view that all demands were prima facie respectable, and that the best imaginary world would be one in which every demand was gratified as soon as made. Since, however, there is always in reality a gap between the ideal and the actual, he asked: "Must not the guiding principle for ethical philosophy (since all demands conjointly cannot be satisfied in this poor world) be simply to satisfy at all times as many demands as we can?" [2]

Roscoe Pound (1870–1964), the founder of American sociological jurisprudence, was strongly influenced by James's pragmatic philosophy, although in his later years a certain sympathy with the idealism of natural-law philosophies became noticeable in his writings.[3] A concise statement of the quintessence of his basic attitude toward law can be found in his *Introduction to the Philosophy of Law:*

> For the purpose of understanding the law of today I am content with a picture of satisfying as much of the whole body of human wants as we may with the least sacrifice. I am content to think of law as a social institution to satisfy social wants—the claims and demands and expectations involved in the existence of civilized society—by giving effect to as much as we may with the least sacrifice, so far as such wants may be satisfied or such claims given effect by an ordering of human conduct through politically organized society. For present purposes I am content to see in legal history the record of a continually wider recognizing and satisfying of human wants or claims or desires through social control; a more embracing and more effective securing of social interests; a continually more complete and effective elimination of waste and precluding of friction in human enjoyment of the goods of existence—in short, a continually more efficacious social engineering.[4]

Unlike Kant and Spencer, Pound thinks of the end of law not primarily in terms of a maximum of self-assertion, but principally in terms

[1] *Essays on Faith and Morals* (New York, 1943), p. 201. On James see Edwin W. Patterson, *Jurisprudence* (Brooklyn, 1953), pp. 477–486.

[2] James, *supra* n. 1, p. 205.

[3] See, for example, his *Social Control through Law* (New Haven, 1942), pp. 28–29, 38–39, 66, 97–101, 108–109, and *Justice According to Law* (New Haven, 1951), pp. 6, 19, 22–23.

[4] Rev. ed. (New Haven, 1954), p. 47.

of a maximum of satisfaction of wants.[5] During the nineteenth century, he points out, the history of the law was written largely as a record of a continually increasing recognition of individual rights, often regarded as "natural" and absolute. In the twentieth century, he proposed, this history should be rewritten in terms of a continually wider recognition of human wants, human demands, and social interests.

The interests to be secured and protected by the legal order were catalogued and classified by Pound in an ambitious project.[6] He distinguished between *individual interests* ("claims or demands or desires involved immediately in the individual life and asserted in title of that life"), *public interests* ("claims or demands or desires involved in life in a politically organized society and asserted in title of that organization"), and *social interests* ("claims or demands or desires involved in social life in civilized society and asserted in title of that life").[7] In the last category he included, among others, the interests in the general security, the individual life, the protection of morals, the conservation of social resources (physical as well as human), and the interest in economic, political, and cultural progress.

Pound declines to commit himself to a rigid canon of evaluation of these interests. He feels that certain interests may have priority at a certain time and that others should be given preferred treatment in other periods. "I do not believe the jurist has to do more than recognize the problem and perceive that it is presented to him as one of securing all social interests so far as he may, of maintaining a balance or harmony among them that is compatible with the securing of all of them." [8] This leaves the jurist with an indefinite commission, but in Pound's opinion jurisprudence cannot provide him with more absolute and authentic standards.

Justice, Pound writes, may be administered with or without law. Justice according to law means "administration according to authoritative precepts or norms (patterns) or guides, developed and applied by

[5] *Id.*, p. 42. This does not mean, however, that Pound wished to deny the protection of the law to the self-regarding impulses. "Free individual self-assertion," he said, "—spontaneous free activity—on the one hand, and ordered, even regimented cooperation, are both agencies of civilization." Pound, *The Task of the Law* (Lancaster, Pa., 1944), p. 36.

[6] See his "A Theory of Social Interests," 15 *Papers and Proceedings of the American Sociological Society* 16 (1921); "A Survey of Social Interests," 57 *Harvard Law Review* 1 (1943); cf. Patterson, *Jurisprudence*, pp. 518–527.

On Pound see also Julius Stone, "Roscoe Pound and Sociological Jurisprudence," 78 *Harvard Law Rev.* 1578 (1965); Herbert Morris, "Dean Pound's Jurisprudence," 13 *Stanford Law Rev.* 185 (1960). For a jurisprudential approach that bears some similarity to that of Pound see Thomas A. Cowan, "Postulates for Experimental Jurisprudence," 9 *Rutgers Law Rev.* 404 (1955).

[7] "A Survey of Social Interests," pp. 1–2. See also *infra* Sec. 66.

[8] Pound, *supra* n. 4, p. 46.

an authoritative technique, which individuals may ascertain in advance of controversy and by which all are reasonably assured of receiving like treatment. It means an impersonal, equal, certain administration of justice so far as these may be secured by means of precepts of general application." [9] Justice without law, on the other hand, is administered according to the will or intuition of an individual who in making his decision has a wide amount of free discretion and is not bound to observe any fixed and general rules.[10] The first form of justice is of a judicial, the second of an administrative character. According to Pound, elements of both of these forms of justice are to be found in all legal systems. The history of law, he points out, shows a constant swinging back and forth between wide discretion and strict detailed rule. For instance, the nineteenth century abhorred judicial discretion and sought to exclude the administrative element from the domain of the law, relying instead upon a systematic dispensing of justice according to fixed, uniform, and technical concepts. The twentieth century, on the other hand, has witnessed a revival of executive justice, as demonstrated by the growth of administrative boards and commissions. A demand for individualization of justice has arisen, which must be interpreted as a reaction against the overrigid application of the law in the preceding epoch of legal stability. The problem of the future, says Pound, is the achievement of a workable balance between the judicial and the administrative element in justice. "A legal system succeeds as it succeeds in attaining and maintaining a balance between extreme of arbitrary authority and extreme of limited and hampered authority. This balance cannot remain constant. The progress of civilization continually throws the system out of balance. The balance is restored by the application of reason to experience, and it is only in this way that politically organized societies have been able to maintain themselves enduringly." [11]

Section 31. *Cardozo and Holmes*

American sociological jurisprudence has arisen not merely as a protest against traditional concepts of natural rights, but also as a reaction to the formalistic attitude of analytical jurisprudence. American sociological jurisprudence denies that the law can be understood without regard for the realities of human social life. To the analytical cry for self-sufficiency of legal science it opposes the demand for teamwork

[9] Pound, *Jurisprudence*, II, 374–375.

[10] Pound, "Justice According to Law," 13 *Columbia Law Review* 696 (1913); see also *Jurisprudence*, II, 352 ff.

[11] "Individualization of Justice," 7 *Fordham Law Review* 153, at 166 (1938).

with the other social sciences.[1] Sociological jurists urge that a judge who wishes to fulfill his functions in a satisfactory way must have an intimate knowledge of the social and economic factors which shape and influence the law.

One of the greatest of American judges, Benjamin N. Cardozo (1870–1938), stressed the necessity of judicial alertness to social realities. Influenced by the theorems of sociological jurisprudence, he gave a keen and comprehensive analysis of the judicial process.[2] Without belittling the role of logical deduction in the interpretation and application of the law, Cardozo came to the conclusion that considerations of social policy loom large in the art of adjudication. The judge seeks to interpret the social conscience and to give effect to it in the law, but in so doing he sometimes helps to form and modify the conscience he is called upon to interpret.[3] Thus, there is an element of creation as well as an element of discovery contained in the judicial process. The judge must often weigh conflicting interests and make a choice between two or more logically admissible alternatives of decision. In making this choice, the judge will necessarily be influenced by inherited instincts, traditional beliefs, acquired convictions, and conceptions of social need. "He must balance all his ingredients, his philosophy, his logic, his analogies, his history, his customs, his sense of right, and all the rest, and adding a little here and taking out a little there, must determine, as wisely as he can, which weight shall tip the scales." [4]

Cardozo believed that adherence to precedent should be the rule and not the exception in the administration of justice. But he was willing to relax the rule in situations where faithfulness to precedent would clearly be inconsistent with the sense of justice or the social welfare. The need for certainty, he argued, must in some measure be reconciled with the need for progress, and the doctrine of precedent can therefore not be treated as an eternal and absolute verity. "Somewhere between worship of the past and exaltation of the present, the path of safety will be found." [5]

[1] Roscoe Pound, "Fifty Years of Jurisprudence," 51 *Harv. L. Rev.* 777, at 812 (1938); Pound, "How Far Are We Attaining a New Measure of Values in Twentieth-Century Juristic Thought?" 42 *West Virginia Law Review* 81, at 94 (1936).

[2] *The Nature of the Judicial Process* (New Haven, 1921); *The Growth of the Law* (New Haven, 1924); *The Paradoxes of Legal Science* (New York, 1928). These writings, together with other essays, were reprinted in *Selected Writings of Benjamin Nathan Cardozo*, ed. M. E. Hall (New York, 1947).

[3] *Selected Writings*, p. 228.

[4] *Id.*, p. 176.

[5] *Id.*, p. 175. See also pp. 170–172, 246, and *infra* Sec. 86.

Law, in Cardozo's view, constitutes "the expression of a principle of order to which men must conform in their conduct and relations as members of society, if friction and waste are to be avoided among the units of the aggregate, the atoms of the mass." [6] He was convinced that many social forces were instrumental in shaping the aggregate of norms called the law: logic, history, custom, utility, accepted standards of right and wrong.[7] Cardozo vigorously rejected the view that law was an institution lacking generality and coherence, that it consisted merely of a more or less fortuitous and haphazardous sequence of "isolated dooms." [8] He was certain that the existence of accepted community standards and objective value patterns imparted a measure of unity and consistency to the law, even though the personal and subjective decision of the judge could not be avoided in all cases.[9] In Cardozo's own words, "The traditions of our jurisprudence commit us to the objective standard. I do not mean, of course, that this ideal of objective vision is ever perfectly attained. We cannot transcend the limitations of the *ego* and see anything as it really is. None the less, the ideal is one to be striven for within the limits of our capacity. This truth, when clearly perceived, tends to unify the judge's function." [10]

When we compare the views of Cardozo with those of another distinguished American judge, Oliver Wendell Holmes (1841–1935), we shall find that the two men were in substantial agreement with regard to some of the major facets of the judicial decision-making process. We shall also note, however, that Holmes's judicial philosophy was less imbued with ethical idealism than that of his colleague Cardozo.

Holmes, like Cardozo, emphasized the limits that are set to the use of deductive logic in the solution of legal problems. But he went further than Cardozo in discounting the role of logical reasoning in adjudication:

> The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.[11]

[6] *Id.*, p. 248. This conception of the law was obviously influenced by Roscoe Pound's ideas. See *supra* Sec. 30.

[7] *Id.*, p. 153.

[8] *Id.*, p. 159.

[9] *Id.*, pp. 151–153.

[10] *Id.*, p. 151. On Cardozo see also Patterson, *Jurisprudence*, pp. 528–537, and "Cardozo's Philosophy of Law," 88 *University of Pennsylvania Law Review* 71–91, 156–176 (1939).

[11] *The Common Law* (Boston, 1923), p. 1.

Only a judge or lawyer who is acquainted with the historical, social, and economic aspects of the law will be in a position to fulfill his functions properly.[12]

While history and social forces were assigned a large role in the life of the law by Holmes, the ethical or ideal element in law was deemphasized by him. As an ethical skeptic, he regarded law largely as a body of edicts representing the will of the dominant interests in society, backed by force. "When it comes to the development of a *corpus juris*, the ultimate question is what do the dominant forces of the community want and do they want it hard enough to disregard whatever inhibitions may stand in the way." [13] Although Holmes admitted that moral principles were influential in the initial formulation of rules of law, he was inclined to identify morality with the taste and value preferences of shifting power groups in society. Furthermore, he thought it would probably be a gain for the interpretation of the existing positive law if "every word of moral significance could be banished from the law altogether." [14] His basic philosophy was that life meant essentially a Darwinian struggle for existence, with survival of the fittest as the prize, and that the goal of social effort was "to build a race" rather than to strive for the attainment of humanitarian ethical objectives.[15]

Holmes's ethical agnosticism also influenced his general attitude toward the institution of law. A pragmatic approach to the law, he declared, must view the law from the point of view of the "bad man."

> If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience. . . . If we take the view of our friend the bad man we shall find that he does not care two straws for the axioms or deductions, but that he does want to know what the Massachusetts or English courts are likely to do in fact. I am

[12] See Holmes, "The Path of the Law," in *Collected Legal Papers* (New York, 1920), pp. 180, 184, 187, 202.

[13] Letter to John Wu, in *Holmes' Book Notices and Uncollected Letters and Papers*, ed. H. C. Shriver (New York, 1936), p. 187. On Holmes's ethical skepticism see Francis E. Lucey, "Holmes—Liberal—Humanitarian—Believer in Democracy?" 39 *Georgetown Law Journal* 523 (1951). Cf. also Thomas Broden, Jr., "The Straw Man of Legal Positivism," 34 *Notre Dame Lawyer* 530, at 539–543 (1959).

[14] "The Path of the Law," p. 179. On the relation between law and morals in Holmes's thought see Mark De Wolfe Howe, "The Positivism of Mr. Justice Holmes," 64 *Harv. L. Rev.* 529 (1951); reply by Henry M. Hart, Jr., "Holmes' Positivism—An Addendum," *id.*, p. 929; rejoinder by Howe, *id.*, p. 937.

[15] Holmes, "Ideals and Doubts," in *Collected Legal Papers*, p. 306. See his rejection of the Kantian injunction that human beings should never be treated as means, *id.*, p. 304.

much of his mind. The prophecies of what the courts will do in fact, and nothing more pretentious are what I mean by the law.[16]

This epigrammatic definition of law became a basic tenet in the credo of some American legal realists, whose views will be discussed in the next section.

Section 32. *American Legal Realism*

The realist movement in American jurisprudence may be characterized as a radical wing of the sociological school of law. This movement does not constitute a school of law in itself, because it is not composed of a group of men with an identical creed and a unified program. It is a peculiar method of approach, a specific way of thinking about law which is typical of those writers who describe themselves as legal realists.

It is perhaps the most characteristic facet of the realist movement in jurisprudence that its representatives tend to minimize the normative or prescriptive element in law. Law appears to the realist as a body of facts rather than a system of rules, a going institution rather than a set of norms. What judges, attorneys, police and prison officials actually do about law cases—essentially this, to the legal realists, appears to be the law itself.[1]

Karl Llewellyn (1893–1962), in his earlier writings, was a spokesman for orthodox realist theory. He argued that the rules of substantive law are of far less importance in the actual practice of law than had hitherto been assumed. "The theory that rules decide cases seems for a century to have fooled, not only library-ridden recluses, but judges." [2] He proposed that the focal point of legal research should be shifted from the study of rules to the observance of the real behavior of the law officials, particularly the judges. "What these officials do about disputes is, to my mind, the law itself." [3]

[16] "The Path of the Law," pp. 171, 173. On Holmes see also J. Willard Hurst, *Justice Holmes on Legal History* (New York, 1964); Yosal Rogat, "Mr. Justice Holmes: A Dissenting Opinion," 15 *Stanford Law Rev.* 3, 254 (1962); G. Edward White, "The Rise and Fall of Justice Holmes," 39 *University of Chicago Law Rev.* 51 (1971).

[1] Friedrich Kessler, "Theoretic Bases of Law," 9 *University of Chicago Law Review* 98, at 109 (1941), says: "Realism introduced a sharp distinction between what courts say and what they actually do. Only the latter counts. . . . Law became the behavior pattern of judges and similar officials. Fortunately, legal realism did not stop at this empiricism. It developed and perfected the functional approach."

The treatment of legal realism in this work does not include functional approaches to the law which view the law primarily as an institution for the promotion of justice or the furtherance of an identifiable ideal of the social good. For critical evaluations of American legal realism see Lon L. Fuller, "American Legal Realism," 82 *U. Pa. L. Rev.* 429 (1934); Hermann Kantorowicz, "Some Rationalism about Realism," 43 *Yale L. J.* 1240 (1934). See also Wilfrid E. Rumble, *American Legal Realism* (Ithaca, 1968).

[2] "The Constitution as an Institution," 34 *Col. L. Rev.* 1, at 7 (1934).

[3] *The Bramble Bush* (New York, 1930), p. 3. See also Llewellyn, *Jurisprudence*

This last statement, however, was withdrawn by Llewellyn in 1950.[4] In his more recent writings, he has placed a somewhat greater stress on the importance of normative generalization in law, pointing out that the rule part of the law is "one hugely developed part" of the institution, but not the whole of it.[5] He has also, in keeping with the postulates of sociological jurisprudence, sought to explore the relations and contacts between the law and the other social sciences, coming to the conclusion that the lawyers as well as the social scientists have thus far failed to make an "effective effort at neighborliness." [6]

Jerome Frank (1889–1957) presented a realist view of the law which, at least in its earlier expressions, was characterized by a considerable radicalism. In an influential book, *Law and the Modern Mind*,[7] he described the American system of judicial administration as a more or less disguised system of oriental cadi justice. The rules of law, he argued, are not the basis of the judge's decision. Judicial decisions are conditioned by emotions, intuitive hunches, prejudices, tempers, and other irrational factors.[8] The knowledge of legal rules will therefore offer little help in predicting the decision of a particular judge. "No one knows the law about any case or with respect to any given situation, transaction, or event, until there has been a specific decision (judgment, order, or decree) with regard thereto." [9]

According to this view, a court decision is obviously something very uncertain and almost unpredictable. But this uncertainty of the law, said Frank, should not be deplored; he considered much of it as of immense social value.[10] The view that law can be made stable, fixed, and settled was dismissed by him as the "basic legal myth" and

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(Chicago, 1962), pp. 16, 31, 56, where the emphasis is placed on interactions between official behavior and laymen's behavior. For behavioristic interpretations of law see also Glendon A. Schubert, "Behavioral Jurisprudence," 2 *Law and Society Rev.* 407 (1968); Schubert, *Judicial Behavior* (Chicago, 1964), pp. 445–447; Stuart S. Nagel, *The Legal Process from a Behavioral Perspective* (Homewood, Ill., 1969).

[4] *The Bramble Bush*, rev. ed. (New York, 1951), Foreword, pp. 8–9. Llewellyn stated there that his earlier description of law contained "unhappy words when not more fully developed, and they are plainly at best a very partial statement of the whole truth." *Id.*, p. 9.

[5] "Law and the Social Sciences, especially Sociology," 62 *Harv. L. Rev.* 1286, at 1291 (1949). See also his "The Normative, the Legal and the Law Jobs," 49 *Yale L. J.* 1355, at 1359, 1364 (1940). Llewellyn's analysis of the judicial process in appellate courts is found in his *The Common Law Tradition: Deciding Appeals* (Boston, 1960).

[6] "Law and the Social Sciences, Especially Sociology," p. 1287.

[7] New York, 1930. On Frank see Julius Paul, *The Legal Realism of Jerome N. Frank* (The Hague, 1959); J. Mitchell Rosenberg, *Jerome Frank* (New York, 1970).

[8] *Law and the Modern Mind*, pp. 100–117. See also Frank, "Are Judges Human?" 80 *U. Pa. L. Rev.* 17, 233 (1931).

[9] "Are Judges Human?" p. 41.

[10] *Law and the Modern Mind*, p. 7.

an infantile survival from a "father complex." Why do men seek unrealizable certainty in law, he asked. "Because, we reply, they have not yet relinquished the childish need for an authoritative father and unconsciously have tried to find in the law a substitute for those attributes of firmness, sureness, certainty, and infallibility ascribed in childhood to the father." [11] If men would relinquish their desire for a father substitute, they would acquire a much sounder attitude toward the law. They would realize that until a court has passed on some particular question, no law on that subject is as yet in existence. Prior to such decision the only law available is the guess of the lawyers as to what the court might do. "Law, then, as to any given situation is either (a) actual law, i.e., a specific past decision, as to that situation, or (b) probable law, i.e., a guess as to a specific future decision." [12] Roscoe Pound has characterized this view as the "cult of the single decision." [13]

After Frank had ascended to the bench of a federal appellate court, he shifted his attention from the rule aspect of the law to the scrutiny of the fact-finding process in the trial courts. To use his own nomenclature, the former "rule sceptic" turned into a "fact sceptic." [14] Trial-court fact-finding, Frank declared, constituted the soft spot, the Achilles heel in the administration of justice. With unrelenting zest, he probed into the innumerable sources of error which may enter into a determination of the facts by a trial court. There may be "perjured witnesses, coached witnesses, biased witnesses, witnesses mistaken in their observation of the facts as to which they testify or in their memory of their observations, missing or dead witnesses, missing or destroyed documents, crooked lawyers, stupid lawyers, stupid jurors, prejudiced jurors, inattentive jurors, trial judges who are stupid or bigoted and biased or 'fixed' or inattentive to the testimony." [15] Many of these factors, he said, and above all the impenetrable and unique personality of the judge, make every lawsuit in which conflicting testimony is presented a highly subjective affair. According to Frank, the

[11] *Id.*, p. 21.

[12] *Id.*, p. 46. See in this connection Wilfrid E. Rumble, "Law as the Decision of Officials," 20 *Journal of Public Law* 217 (1971).

[13] Roscoe Pound, "How Far Are We Attaining a New Measure of Values in Twentieth-Century Juristic Thought," 42 *W. Va. L. Rev.* 81, at 89 (1936). The similarity of Frank's view and Holmes's "prophecy" definition of law should be noted. See *supra* Sec. 31.

[14] Frank, *Courts on Trial* (Princeton, 1949), pp. 73–74.

[15] Frank, "Modern and Ancient Legal Pragmatism," 25 *Notre Dame Lawyer* 207, at 254 (1950).

judge (or jury) has a "virtually uncontrolled and virtually uncontrollable fact discretion" or "sovereignty," that is, the power to choose which witnesses' stories are to be accepted as correct.[16] Although Frank made a number of positive proposals for the rationalization and improvement of trial court procedures,[17] he was convinced that, notwithstanding such reforms, a large element of irrationality, chance, and guesswork would always inhere in judicial fact-finding, making predictability of the outcome of lawsuits well-nigh impossible.[18]

With lower-court fact-finding as the center of his legal universe, Frank took a new look at legal rules and precedents. He admitted that many legal rules are settled and certain and that the precedent system possesses considerable value.[19] He recognized the necessity of legal rules as general guideposts for making decisions and declared that the rules embody important policies and moral ideals.[20] But he maintained that the objective legal norms are in many instances frustrated by the "secret, unconscious, private, idiosyncratic norms" applied in the fact-finding process by trial judges or jurors.[21] He concluded that the judges often play havoc with the precedent system, with the consequence that the uniformity and stability which the rules may seem to supply at first are frequently rendered illusory and chimerical in practice.

Notwithstanding his skepticism concerning the reliability of trial procedures for the discovery of the truth, Judge Frank was deeply concerned with the problem of achieving justice in the adjustment of the relations of individual parties before the courts. In order that this goal might be obtained, Frank demanded an "unblindfolding of justice." [22] He called for a greater individualization of cases and wished to inject a large dose of judicial discretion into all or most rules, making them as flexible as possible. Each legal controversy is unique and singular, he argued, and the judge for this reason should not be fettered too much by rigid universals and abstract generalizations.[23]

While Judge Frank focuses his attention primarily on those aspects of the law which revolve around court trials and other adjudicatory

[16] Frank, " 'Short of Sickness and Death': A Study of Moral Responsibility in Legal Criticism," 26 *New York University Law Review* 545, at 584 (1951).
[17] *Op. cit. supra* n. 14, pp. 98, 100, 141–145, 183–185, 224, 248–251.
[18] *Id.*, ch. iii; cf. also *op. cit. supra* n. 16, p. 630.
[19] *Op. cit. supra* n. 14, ch. xix.
[20] *Id.*, p. 396, and *op. cit. supra* n. 15, p. 256.
[21] *Op. cit. supra* n. 16, p. 582.
[22] *Op. cit. supra* n. 14, pp. 378 ff.
[23] *Id.*, pp. 395 ff.; cf. Harry W. Jones, "Law and Morality in the Perspective of Legal Realism," 61 *Columbia Law Rev.* 799 (1961).

procedures,[24] Thurman Arnold (b. 1891) is concerned with a social-psychological analysis of the institution as such.[25] This analysis is permeated with a deep-seated skepticism and distrust in the power of human reason. Legal theories and principles signify to Arnold "methods of preaching rather than of practical advice." [26] Jurisprudence is regarded by him as "the shining but unfulfilled dream of a world governed by reason." [27] In its actual practice, he asserts, the law consists of a large number of emotionally colored and contradictory symbols and ideals. The efforts made by legal scholars to construct a logical heaven for the courts wherein contradictory ideals are made to seem consistent is viewed by him not only as futile but also as devoid of beneficial purpose. The rule of law is best preserved, in his opinion, by the coexistence of various and conflicting symbolisms and ideologies. "The judicial system loses in prestige and influence whenever great, popular, and single-minded ideals sweep a people off its feet." [28] Only value-skepticism and value-pluralism can prevent the rise of intolerant and totalitarian political regimes, Arnold believes.[29]

Section 33. *Scandinavian Legal Realism*

Scandinavian legal realism shares with American legal realism a distaste for metaphysical and speculative reflection and a desire to focus juris-

[24] See his study of administrative justice in *If Men Were Angels* (New York, 1942).

[25] See *The Symbols of Government* (New Haven, 1935); *The Folklore of Capitalism* (New Haven, 1937).

[26] *Symbols of Government*, p. 21. See also *Folklore of Capitalism*, p. 148: "Legal and economic theories are in reality nothing more than huge compound words with high emotional content."

[27] *Symbols of Government*, p. 58.

[28] *Id.*, p. 247. See also *id.*, p. 243: "Intolerance and cruelty follow when great people march in step to a single ideal."

[29] Other writings of legal-realist vintage include: Joseph W. Bingham, "What Is the Law," 11 *Michigan Law Review* 1, 109 (1912); Underhill Moore, "Rational Basis of Legal Institutions," 23 *Col. L. Rev.* 609 (1923); Underhill Moore and Theodore S. Hope, "An Institutional Approach to the Law of Commercial Banking," 38 *Yale L.J.* 703 (1929); Herman Oliphant, "Facts, Opinions, and Value-Judgments," 10 *Texas Law Review* 127 (1932); Walter W. Cook, "Scientific Method and the Law," 13 *American Bar Association Journal* 303 (1927); Edwin N. Garlan, *Legal Realism and Justice* (New York, 1941); Max Radin, *Law as Logic and Experience* (New Haven, 1940); Frederick K. Beutel, *Some Potentialities of Experimental Jurisprudence as a New Branch of Social Science* (Lincoln, Neb., 1957).

In Argentina, Carlos Cossio has developed a theory of law which exhibits some points of contact with legal realism in the United States. His "egological theory" considers that the subject matter of jurisprudence is not legal rules, but human conduct in its intersubjective interaction. He also places much emphasis on the creative powers of the judge. See Carlos Cossio, "Phenomenology of the Decision," transl. G. Ireland, in *Latin-American Legal Philosophy* (Cambridge, Mass., 1948), pp. 345–400.

prudential inquiry on the "facts" of legal life. Its European Continental provenience is revealed, however, by certain characteristic features of its approach to the legal process. There is less emphasis than in the corresponding American literature on the behavioristic aspects of adjudication, such as the political and emotional motivations of judicial action, and on the vicissitudes of fact-finding. There will be found, instead, elaborate discussions of somewhat abstract questions, such as the grounds for validity of legal norms and the nature of rights and duties.[1]

Axel Hägerström (1868–1939) is considered the founder of the "Uppsala school" of the modern Scandinavian realist movement. His doctrines were cast into a more extremist mold by his disciple Vilhelm Lundstedt (1882–1955), also a Swedish professor of law.[2] Other leading representatives of the movement are Karl Olivecrona (b. 1897), a Swede, and Alf Ross (b. 1899), a Dane.

Hägerström subjected the basic concepts of the law to a critical analysis, especially the concept of a "right." The traditional view of a right has been that of a non-physical power enabling a person to have or do something lawfully.[3] To Hägerström's antimetaphysical cast of mind, such a conceptualization carried no meaning because it has no counterpart in the physical world. He pointed out, for example, that a right of ownership had no empirical significance unless and until it had been infringed and become the subject matter of a judicial proceeding. Even in that event, the litigant's claim to ownership was unreal and speculative until he had proved his title. It is therefore useless, in Hägerström's opinion, to speak of rights in dissociation from remedies and enforcement measures.

Hägerström sought to offer, however, a historical as well as a psychological explanation for the recognition of an abstract conception of right. He sought to trace the notion historically to the legal magic practiced by ancient systems of law and psychologically to the emotional strength of the feeling of a person who believes that he has a good and valid claim.[4] The psychological thread was taken up by Olivecrona, who developed the thesis that it was the subjective idea or image of right beheld by the mind of a human being, rather than any

[1] Cf. Barna Horvath, "Between Legal Realism and Idealism," 48 *Northwestern University Law Rev.* 693, at 704 (1954) and Wolfgang Friedmann, *Legal Theory*, 5th ed. (New York, 1967), pp. 304–306.

[2] See Karl Olivecrona, "The Theories of Axel Hägerström and Vilhelm Lundstedt," in 3 *Scandinavian Studies in Law* 127 (Stockholm, 1959).

[3] Hugo Grotius described a right as a moral power. *De Jure Belli ac Pacis*, transl. F. W. Kelsey (Oxford, 1925), Bk. I, Ch. I. iv.

[4] See Hägerström, *Inquiries into the Nature of Law and Morals* (Stockholm, 1953).

reified or objective concept, which forms the basis for the recognition of rights.[5]

The fight against traditional legal concepts was sharpened by Lundstedt and extended to other fundamental legal notions, such as duty, wrongfulness, guilt, liability, and the like. Such concepts, Lundstedt maintained, were operative only in the "subjective conscience" and could have no objective meaning. To say, for instance, that the defendant acted wrongfully was merely a semantic circumlocution for the fact that he may be adjudged to pay damages.[6] To contend that the defendant had violated a duty was a judgment of value and thus an expression of a mere feeling.[7] The only realistic signification that could be assigned to such terms was in connection with the coercive legal machinery of the state, called into action for the purpose of enforcing a contract or punishing a wrongdoer.[8] Similar sentiments were echoed by Ross. The word "right," he declared, had "no semantic reference whatever." [9] It was merely a tool in the technique of presentation, not something that could be "hypostatized" into a substance.[10]

Alf Ross devoted special attention to the problem of validity of law. He sought to divest legal validity of all transcendental and purely normative ingredients and to place it safely in the world of observable phenomena.[11] The conclusion he reached was that a norm of law was valid if a prediction could be made that a court would apply it in a future case.[12] He based this view on the assumption that a norm, from a juristic and logical vantage point, was addressed to courts rather than private individuals.[13] Ross insisted that, in making a forecast of future

[5] Karl Olivecrona, *Law as Fact*, 2d ed. (London, 1971), pp. 184–212.

[6] A. Vilhelm Lundstedt, *Legal Thinking Revised* (Stockholm, 1956), pp. 34–38.

[7] *Id.*, p. 48. "The duty is only a person's *feeling* or *sentiment* that he ought to conduct himself in a certain manner, consequently, something quite *subjective*. This subjective element legal writers have been forced to turn into the exact opposite, into the monstrous contradiction: an *objective duty!*" *Id.*, p. 62.

[8] *Id.*, pp. 118, 120. Similar ideas were expressed by Olivecrona in the first edition of *Law as Fact* but reformulated in a much less apodictic way in the second edition, *supra* n. 5, pp. 45–47, 77, 270–273.

[9] Alf Ross, *On Law and Justice* (Berkeley, 1959), p. 172.

[10] *Id.*, pp. 178–179. Ross reports the following experiment with his children, made apparently for the purpose of forestalling such a hypostatization: "Until my children reached the age of ten I was able, to our mutual satisfaction, to come to an agreement with them that they should 'have' certain flowers in the garden, at the same time reserving to myself complete control over what should be done with them." *Id.*, p. 179.

[11] Ross, *Towards a Realistic Jurisprudence* (Copenhagen, 1946), pp. 11–13, 90–92. For a criticism of this position see Jerome Hall, *Foundations of Jurisprudence* (Indianapolis, 1973), pp. 57–62.

[12] Ross, *supra* n. 9, pp. 34, 41–50.

[13] *Id.*, p. 35. In a later book, Ross took the position that, from a psychological point of view, legal rules addressed to private citizens are deemed to be in a

judicial action, a purely behavioristic interpretation of judicial attitudes was insufficient. It was necessary to take into account the set of specific normative ideas as well as the general legal ideology of the time with which the mind of the judge was imbued.[14]

The endeavor to eliminate value judgments completely from the realm of legal science prompted the Scandinavian legal realists to wage an unrelenting war against what they called "the method of justice." Value judgments, Hägerström taught, are judgments only with regard to their verbal form.[15] No science of the Ought is possible, he declared. Inquiries into the true principles of justice are therefore illusory.[16] In the opinion of the Scandinavian realists, law is not an attempt to realize justice but is brought about by social group pressures or inescapable societal needs. Justice, according to Lundstedt, is merely the feeling of the addressees of the law, engendered by habit and the ruling ideology, that the legal order is satisfactory.[17] "The feelings of justice do not direct law. On the contrary, they *are directed* by law." [18]

To the method of justice deemed useless by Lundstedt, he opposed "the method of social welfare." [19] He insisted that this method was free of all ethical evaluation, since the notion of social welfare referred merely to arrangements considered useful by men in a certain society at a certain time. "Socially useful is that which is actually evaluated as a social interest." [20]

Non-cognitivism in matters of morality and justice was elaborately defended by Ross. In his opinion, the fundamental postulates concerning the nature of man which underlie the natural-law philosophy are entirely arbitrary, and the same holds true for the moral-legal ideas evolved on this basis. "The noble guise of natural law has been used in the course of time to defend or fight for every conceivable kind of demand, obviously arising from a specific situation in life or determined by economic and political class interests, the cultural traditions of the era, its prejudices and aspirations—in short, all that goes to make what is generally called an ideology." [21] Neither the view that men shall be

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separate category from norms addressed to officials. *Directives and Norms* (New York, 1968), pp. 90–92.

[14] Ross, *supra* n. 9, pp. 18, 73–74; *Directives and Norms*, pp. 87–88.

[15] Hägerström, *supra* n. 4, p. xi.

[16] Note the affinity of this view with the teachings of the logical positivists, *supra* Sec. 24.

[17] Lundstedt, *supra* n. 6, pp. 169–170.

[18] *Id.*, p. 203.

[19] *Id.*, pp. 6, 291.

[20] *Id.*, p. 137.

[21] Ross, *supra* n. 9, p. 259.

brothers, nor the opposite view that the strong shall rule over the weak can be proved as objectively right or wrong. Such judgments are based on subjective and emotional feelings, and justice can be appealed to for any cause.[22] "To invoke justice is the same as banging on the table: an emotional expression which turns one's demand into an absolute postulate." [23] The only meaning that might possibly be assigned to the concept is that of a reminder addressed to the judge that he should apply the general rules of the law correctly and without arbitrary discrimination.[24]

Ross also leveled his criticism against what he called "the chimera of social welfare." He denied that a community of human beings could have needs and interests of its own. "All human needs are experienced by individuals and the welfare of the community is the same as the welfare of its members." He concluded that the inevitable incommensurability of needs and disharmony of interests could not be resolved by any normative principles of political action claiming general validity.[25]

The doctrines of the Uppsala school did not remain unopposed in Scandinavia. The Danish legal philosopher F. Vinding Kruse (1880–1963) vigorously criticized the radically naturalistic form of realism advocated by this school and called for the elaboration of a normative and ethical jurisprudence resting on experimental methods. He took the position that it was possible to develop fundamental axioms of morality and justice on a scientific basis. Thus, the principle that human beings living together in society should not injure one another can be derived from the normal reactions of men to assaults on their persons and possessions, and this principle should therefore not be viewed as an arbitrary normative postulate.[26] In Norway, Frede Castberg (b. 1893) has insisted that jurisprudence can never give up the search for an

[22] *Id.*, p. 269. See also *id.*, p. 280: "To declare a law unjust contains no real characteristic, no reference to any criterion, no argumentation." For a criticism of this position see H. L. A. Hart, "Scandinavian Legal Realism," 1959 *Cambridge Law Journal* 233, at 235.

[23] Ross, *supra* n. 9, p. 274. In *Directives and Norms*, pp. 65–68, Ross declares that his view has no connection with moral nihilism (since morality as a personal attitude and individual commitment remains recognized as valid and necessary) or with moral relativism (since an individual need not consider all moral viewpoints as equally supportable and may be willing to fight strongly for what he considers to be good and right).

[24] Ross, *supra* n. 9, pp. 273–274, 280.

[25] *Id.*, pp. 295–296. From this point of view Ross rejected Bentham's utilitarian principle as a metaphysical postulate based on intuition. *Id.*, pp. 292–294.

[26] F. Vinding Kruse, *The Foundation of Human Thought* (London, 1949), pp. 201–206, 232–237, 249–251; Kruse, *The Community of the Future* (New York, 1952), Ch. 4.

answer to the questions of right and wrong, since "the demand for justice in the community is rooted in our spiritual nature just as strongly as the need for logical connection in our thinking." [27]

[27] *Problems of Legal Philosophy*, 2d ed. (Oslo, 1957), p. 111. See also *id.*, p. 110: "Philosophical thinking must not turn aside from the problems raised by the seeking after the objectively right law."

IX

THE REVIVAL OF NATURAL LAW AND VALUE-ORIENTED JURISPRUDENCE

Section 34. *Neo-Kantian Natural Law*

From the middle of the nineteenth century to the beginning of the twentieth the theory of natural law was at a low ebb in most of the countries of Western civilization. It was largely displaced by historical-evolutionary interpretations of law and by legal positivism. Historical and evolutionary views of the law sought to explain the law causally in terms of ethnological factors or by reference to certain evolutionary forces which pushed the law forward along a predetermined path. Legal positivists, especially the analytical jurists, sought to discourage philosophical speculation about the nature and purposes of the law and set out to limit the province of jurisprudence to a technical analy-

sis of the positive law laid down and enforced by the state. Inquiries concerning the ends and ideals of legal regulation tended to vanish from jurisprudence and legal philosophy, and at the close of the nineteenth century the philosophical search for the ultimate values of legal ordering had practically come to a halt.[1]

The twentieth century, however, witnessed a revival of natural-law thinking and value-oriented jurisprudence.[2] Certain elements of legal idealism can be noticed already in some versions of sociological jurisprudence. Joseph Kohler saw the end of legal regulation in the promotion of culture but held an entirely relativistic view with respect to the ethical values to be served by a law dedicated to culture.[3] Roscoe Pound defined the aim of the law in terms of the maximum satisfaction of human wants through ordering of human conduct by politically organized society.[4] Although he viewed the rise of a new philosophy of values with sympathy, his own theory of law did not go much beyond a quantitative surveying of the multifarious interests demanding satisfaction or requiring adjustment through the art of legal "engineering." Twentieth-century legal realism was well aware of the role which value judgments and considerations of social policy actually play in the legal process, but it refrained from building up a rational and objective theory of legal ends and social ideals.

A pioneering attempt to create a modernized natural-law philosophy based on a priori reasoning was made in Germany by Rudolf Stammler (1856–1938). As a philosophical disciple of Kant, he was convinced that human beings bring to the cognitive perception of phenomena certain a priori categories and forms of understanding which they have not obtained through the observation of reality.[5] Stammler taught that there exist in the human mind pure forms of thinking enabling men to understand the notion of law apart from, and independently of, the concrete and variable manifestations in which law has made its appearance in history.

Stammler, however, departed from his master Kant by breaking the notion of law down into two components: the *concept* of law and the *idea* of law. Kant had defined law as the aggregate of the conditions

[1] Roscoe Pound, "The Revival of Natural Law," 17 *Notre Dame Lawyer* 287 (1942), points out that natural-law thinking survived only in Scotland, Italy, and in the writings of teachers in some Catholic faculties.

[2] See Charles G. Haines, *The Revival of Natural Law Concepts* (Cambridge, Mass., 1930); Joseph Charmont, *La Renaissance du Droit Naturel* (Paris, 1910), partly translated by F. W. Scott in *Modern French Legal Philosophy* (New York, 1921), pp. 65–146; Pound, *op. cit. supra* n. 1.

[3] On Kohler see *supra* Sec. 28.

[4] See *supra* Sec. 30.

[5] On Kant see *supra* Sec. 15.

under which the freedom of one could be harmonized with the freedom of all. Stammler pointed out that this formula was faulty because it confused the concept of law with the idea of "right" or just law. The concept of law, he said, must be defined in such a manner as to cover all possible realizations and forms of law in the history of mankind. Stammler believed that he had found such an all-embracing definition of law in the following formula: "Law is the inviolable and autocratic collective will." [6] A number of different elements are contained in this formula. Law is the collective will, that is, a manifestation of social life. It is an instrument of social cooperation, not a tool for the satisfaction of purely subjective desires of individuals devoid of community value. Furthermore, law is an expression of a collective will which is autocratic and sovereign. The rules of law, once they have been established, claim a compulsory force. They are binding irrespective of the individual citizen's inclination to follow them. This fact, said Stammler, distinguishes law from customs and social conventions, which constitute mere invitations to the citizens to comply with them and do not purport to be absolutely compulsive. Finally, the rules of law contain an element of inviolability. This means that, as long as they are in effect, they are strictly binding not only upon those who are subject to them but also upon those who are entrusted with their creation and enactment. Herein, according to Stammler, lies the difference between law and arbitrary power. We are confronted with the latter when a command is issued which the holder of power does not regard as an objectively binding regulation of human affairs, but merely as a subjective gratification of a present desire or impulse without normative force.[7]

From the concept of law Stammler distinguished the *idea* of law. The idea of law is the realization of justice. Justice postulates that all legal efforts be directed toward the goal of attaining the most perfect harmony of social life that is possible under the conditions of the time and place. Such a harmony can be brought about only by adjusting individual desires to the aims of the community. According to Stammler, the content of a rule of law is just if it is conducive to harmonizing the purposes of the individual with those of society. The social ideal, as Stammler sees it, is a "community of free-willing men." [8] The

[6] *Rechtsphilosophie*, 3d ed. (Berlin, 1928), p. 93.

[7] See Stammler, "Recht und Willkür," in *Rechtsphilosophische Abhandlungen und Vorträge* (Charlottenburg, 1925), I, 97. Stammler held, however, that if in a despotic state there exists a written or unwritten rule of law to the effect that the legal relations of the subjects are determined exclusively by the individualized decisions of the ruler, this imparts to the system the character of a legal system. *Id.*, p. 111.

[8] *The Theory of Justice*, transl. by I. Husik (New York, 1925), p. 153.

term "free," as used in this formula, does not denote an act of volition which is directed by the subjective and selfish desire of an individual; in accordance with Kantian terminology, a free act is one that is objectively and rationally justified from the point of view of the common interest.[9]

Stammler pointedly emphasized that his social ideal could serve merely as a formal method for determining whether the content of a specific law was just; it could not be used as a universal substantive standard for passing judgment on the "rightness" of concrete enactments.[10] Stammler's formula has in fact been decried as essentially empty in content.[11] It cannot be denied, however, that Stammler, in contradiction to his own methodological premises, did derive some absolute postulates of "right law" from his social ideal. In any attempt to realize it, he wrote, the legislator must keep four fundamental principles in mind:

1. The content of a person's volition must not be made subject to the arbitrary power of another.

2. Every legal demand must be made in such a manner that the person obligated may remain his own nearest neighbor (retain his self-respecting personality).

3. A member of the legal community cannot be excluded from it arbitrarily.

4. A power of control conferred by law can be justified only to the extent that the person affected thereby may remain his own nearest neighbor (retain his self-respecting personality).[12]

What do these "principles of respect and participation," as Stammler called them, mean in substance? They mean that each member of the community is to be treated as an end in himself and must not become the object of the merely subjective and arbitrary will of another.[13] No one must use another merely as a means for the advancement of his own purposes. "To curb one's own desires through respect of another, and to do so with absolute reciprocity, must be taken as a principle in the realization of the social ideal."[14] This notion of a com-

[9] Stammler, *Wirtschaft und Recht nach der Materialistischen Geschichtsauffassung*, 2d ed. (Leipzig, 1906), pp. 356–357, 563.

[10] *Theory of Justice*, pp. 89–90.

[11] Morris R. Cohen, "Positivism and the Limits of Idealism in Law," 27 *Columbia Law Review* 237, at 241 (1927). Cohen gives a number of examples designed to show the essential vagueness and indeterminateness of Stammler's ideal.

[12] *Theory of Justice*, pp. 161, 163. The translation has been changed and follows in a few places Pound's translation in his *Jurisprudence* (St. Paul, Minn., 1959), I, 150–153.

[13] From the above principles, Stammler inferred, for example, the unjustness of slavery, of polygamy, and of absolute prohibition of divorce.

[14] *Theory of Justice*, p. 162.

munity of free men treating each other as ends in themselves is close to the Kantian idea of law, but differs from it in two respects. First, the *community* of individuals takes the place of the free individual as such; this means that Stammler's formula is somewhat less individualistic than Kant's.[15] Second, Stammler's formula in its abstractness leaves more room for variety and diversity in positive law than Kant's natural-law definition. "There is not a single rule of law," said Stammler, "the positive content of which can be fixed a priori." [16] In his view, two legal systems with widely varying rules and principles of law may both be in conformity with his social ideal. This ideal does not embody a concrete system of natural law but represents merely a broad yardstick by which the justice or injustice of positive rules of law may be tested. It is, at the most, a "natural law with a changing content." [17] With the eternal and immutable law of nature of the classical period it has very little in common.

Like Stammler, the Italian legal philosopher Giorgio Del Vecchio (1878–1970) distinguishes sharply between the concept of law and the ideal of law.[18] The concept of law, he maintains, is logically anterior to juridical experience, that is, constitutes an a priori datum. The essential characteristics of law, according to him, are first, objective coordination of the actions of several individuals pursuant to an ethical principle, and second, bilateralness,[19] imperativeness, and coercibility.[20]

The legal ideal is identified by Del Vecchio with the notion of natural law. "Natural Law is . . . the criterion which permits us to evaluate Positive Law and to measure its intrinsic justice." [21] Accepting the fundamental tenets of Kantian ethics, he derives natural law from the nature of man as a rational being. Respect for the autonomy of the human personality is to him the basis of justice. Every human being may demand from his fellowmen that he should not be treated

[15] See *supra* Sec. 15. In accord: Carl J. Friedrich, *The Philosophy of Law in Historical Perspective* (Chicago, 1963), p. 163.

[16] *Theory of Justice*, p. 90.

[17] *Wirtschaft und Recht*, p. 165. On Stammler see also Morris Ginsberg, "Stammler's Philosophy of Law," in *Modern Theories of Law* (London, 1933), pp. 38–51; George H. Sabine, "Rudolf Stammler's Critical Philosophy of Law," 18 *Cornell Law Quarterly* 321 (1933); Wolfgang Friedmann, *Legal Theory*, 5th ed. (New York, 1967), pp. 179–186; Edwin W. Patterson, *Jurisprudence* (Brooklyn, 1953), pp. 389–395.

[18] See Del Vecchio, *Philosophy of Law*, transl. by T. O. Martin (Washington, 1953), p. 248. On Del Vecchio see also Friedmann, pp. 186–189.

[19] This means that the law brings together at least two subjects and gives a norm for both, in the sense that what is allowed to one party may not be impeded by the other. Del Vecchio, p. 277.

[20] See *id.*, pp. 270, 280 ff., 297, 304.

[21] *Id.*, p. 450.

as a mere instrument or object.[22] Del Vecchio is convinced that the evolution of mankind leads to a constantly increasing recognition of human autonomy and thus to a gradual realization and ultimate triumph of natural law.

> The absolute value of the person, equal liberty of all men, the right of each of the associates to be an active, not just a passive, participant in legislation, liberty of conscience, and in general the principles in which is summed up, even amid accidental fallacies, the true substance of the classical philosophy of law, *juris naturalis scientia*, have already received important confirmations in the positive juridical orders, and will receive others soon or in the course of time, whatever may be the resistances and the oppositions which they still encounter.[23]

Del Vecchio, though in general he may be classified as a neo-Kantian, differs from Kant in his conception of the purposes of the state. For Kant, the purpose of state power exhausted itself in the promulgation and enforcement of laws designed to protect the equal liberty of all. Del Vecchio holds that the state need not be indifferent to the problems of the economic, cultural, and moral life. It may extend its regulatory power over all aspects of human social life, and it is its highest function to promote the well-being of society generally. But in doing so, the state must always operate in the forms of the law, so that every act of the state has for its basis a law manifesting the general will.[24] With this conviction, Del Vecchio leaves the soil of Kantian individualism and moves into the orbit of the Hegelian philosophy of the state.[25] However, he is willing to recognize a right of resistance against the commands of state power in extreme cases in which these commands come into irreconcilable conflict with the most primordial and elementary requirements of natural law and justice.[26]

The German legal philosopher Gustav Radbruch (1878–1949) started out from a neo-Kantian philosophy of values, which erects a

[22] "Do not extend your will to the point of imposing it upon others, do not try to subject to yourself one who, of his nature, is subject only to himself." *Id.*, p. 443.

[23] *Id.*, pp. 449–450. "Participant in legislation" is my substitution for Martin's translation "participant in social laws."

[24] *Id.*, pp. 382–383.

[25] "The empirical antithesis between the individual and society . . . finds in the State its rational composition. . . . Individuality is tempered in the State and therein 'it reveals its true nature,' as Vico said." *Id.*, p. 383. On Hegel's philosophy of the state see *supra* Sec. 17.

[26] "Legitimate, then, is 'the appeal to Heaven' according to Locke's expression, that is, the struggle against the written laws in the name of the 'unwritten' ones, the vindication of Natural Law against the Positive Law which denies it." *Id.*, p. 456. See also Del Vecchio, *Justice*, ed. A. H. Campbell (New York, 1953), pp. 157, 158.

strong barrier between the "is" and the "ought" and denies that any judgment as to what is "right" can be gained from the observation and apperception of reality. In giving an account of Radbruch's legal philosophy it is necessary, however, to distinguish two phases in the evolution of his thought.

Prior to the Second World War, Radbruch adhered to an essentially relativistic view of law and justice. The chief trend of his thought ran as follows: Law is the sum of the general rules for the common life of man. The ultimate goal of the law is the realization of justice. But justice is a rather vague and indeterminate concept. It demands that those who are equal be treated in an equal manner, while those who are different be treated differently according to their differences. This general maxim leaves open two questions: first, the test by which equality or inequality is to be measured, and second, the particular mode of treatment to which equals as well as unequals are to be subjected.[27] In order to obtain the substantive and specific contents of the law, the idea of justice must be supplemented by a second idea, the idea of *expediency*. The question as to the expediency of a legal regulation cannot be answered unequivocally and generally in one way or another. The answer is colored by political and social convictions and party views. One man or group of men may see the highest goal of the law in the development of the individual human personality (individualism); another may see it in the attainment of national power and glory (supraindividualism); a third one may regard the promotion of civilization and the works of culture as the worthiest aim of the law (transpersonalism).[28] Even though Radbruch expressed preference for the transpersonalist conception, he denied that a choice between the three views could be justified by any scientific argument; the choice was to him a matter of personal preference. But it is obvious, said Radbruch, that the legal order cannot be made the plaything of conflicting political and social opinions. In the interest of security and order, what is right and what is wrong must in some way be authoritatively settled. The ideas of justice and expediency must be supplemented by a third idea, the idea of *legal certainty*, which demands the promulgation and maintenance of a positive and binding legal order by the state.[29]

Thus we have three elements or principles, all of which contribute

[27] Gustav Radbruch, "Legal Philosophy," in *The Legal Philosophies of Lask, Radbruch, and Dabin,* transl. K. Wilk (Cambridge, Mass., 1950), pp. 90–91.

[28] *Id.*, pp. 91–95.

[29] *Id.*, p. 108: "The certainty of the law requires law to be positive: if what is just cannot be settled, then what ought to be right must be laid down; and this must be done by an agency able to carry through what it lays down."

in some degree to the building up of the legal order: the idea of justice, the idea of expediency, and the idea of legal certainty. These three elements, according to Radbruch, "require one another—yet at the same time they contradict one another." [30] Justice, for example, demands generality in the formulation of a legal rule, while expediency may require an individualized treatment adapted to the specific situation of the case. To take another example, the idea of legal certainty postulates fixed and stable laws, while justice and expediency demand a quick adaptation of the legal system to new social and economic conditions. The full realization of one of these ideas will make a certain sacrifice or neglect of the two others indispensable, and there is no absolute standard by which the proportionate relation of these three elements within the legal order can be satisfactorily determined.[31] Different ages will lay decisive stress upon the one or the other of these principles.[32] Radbruch himself, before World War II, was committed to the view that in case of an irreconcilable conflict between them, legal certainty ought to prevail. "It is more important *that* the strife of legal views be ended than that it be determined *justly* and *expediently*." [33]

After the cataclysmic events of the Nazi period and the collapse of Germany in the Second World War, Radbruch undertook a revision of his former theories.[34] He expressed the view that there exist certain *absolute* postulates which the law must fulfill in order to deserve its name. Law, he declared, requires some recognition of individual freedom, and a complete denial of individual rights by the state is "absolutely false law." [35]

Furthermore, Radbruch abandoned his former view that in case of an irreconcilable conflict between justice and legal certainty, the positive law must prevail. He argued that legal positivism had left Ger-

[30] *Id.*, p. 109.

[31] *Id.*, p. 109.

[32] Thus, he pointed out, the police state of the Prussian Kings tended to disregard justice and legal security in the interest of political expediency. The epoch of natural law attempted to deduce the whole content of the law from the idea of justice. Nineteenth-century legal positivism looked only to security and neglected the investigation of expediency and justice in law. *Id.*, p. 111.

[33] *Id.*, p. 108.

[34] Not only the extent, but even the occurrence of a revision has been the subject of debate among legal authors. See Erik Wolf, "Revolution or Evolution in Gustav Radbruch's Legal Philosophy," 3 *Natural Law Forum* 1 (1958). Most convincing are the arguments of Alfred Verdross, *Abendländische Rechtsphilosophie*, 2d ed. (Vienna, 1963), pp. 216–218, who finds a substantial break. See also Lon L. Fuller, "American Legal Philosophy at Mid-Century," 6 *Journal of Legal Education* 457, at 481–485 (1954); Fuller, "Positivism and Fidelity to Law," 71 *Harvard Law Rev.* 630, at 655–661 (1958).

[35] *Vorschule der Rechtsphilosophie* (Heidelberg, 1947), pp. 27–28.

many defenseless against the abuses of the Nazi regime, and that it was necessary to recognize situations where a totally unjust law must give way to justice. His revised formula regarding the relation between positive law and justice reads as follows: "Preference should be given to the rule of positive law, supported as it is by due enactment and state power, even when the rule is unjust and contrary to the general welfare, unless the violation of justice reaches so intolerable a degree that the rule becomes in effect 'lawless law' and must therefore yield to justice." [36] By this formula Radbruch, in his old age, made himself a convert to natural law in a moderate form.

Section 35. *Neo-Scholastic Natural Law*

Neo-Scholasticism is a modern philosophical movement of Catholic origin which will be considered in this section only with regard to its impact on the philosophy of law. In this field, neo-Scholastic thought has in the last few decades been particularly active in France, Germany, and the United States.

Although neo-Scholastic jurists have developed legal theories with differing emphases and implications, certain basic convictions are held in common by them. The most important of these convictions is the belief in a natural law which exists prior to positive law and is superior to it. This natural law is no longer the law of nature of the classical period of Western legal philosophy. It draws its inspiration from a different source, namely, from medieval Catholic Scholastic thought and particularly from the legal philosophy of St. Thomas Aquinas.[1]

The chief difference between the classical and the Thomist natural law may be sought in the fact that the Thomist consists of very broad and general principles, while many of the classical thinkers developed very specific and detailed systems of natural law. Neo-Scholasticism in this respect definitely follows the Thomist tradition. It rejects the idea that natural law is an unchangeable order of specific and concrete legal norms and contents itself with laying down some broad and abstract principles. Victor Cathrein, for example, a Swiss neo-Thomist, defined the supreme principle obligatory for human action as follows: "You should observe the order which is fitting for you as a rational being in your relations to God, your fellowmen, and yourself." This maxim, as applied to legal ordering, demands above all the recognition of the *suum cuique* principle (to give everybody that which is due

[36] "Gesetzliches Unrecht und Übergesetzliches Recht," in *Rechtsphilosophie*, ed. E. Wolf, 4th ed. (Stuttgart, 1950), p. 353. The text follows Fuller's translation in 6 *J. Leg. Ed.* 484. On Radbruch see also Max A. Pock, "Gustav Radbruch's Legal Philosophy," 7 *St. Louis University Law Journal* 57 (1962); Zong Uk Tjong, *Der Weg des rechtsphilosophischen Relativismus bei Gustav Radbruch* (Bonn, 1967).

[1] See *supra* Sec. 6.

him).[2] Natural law, according to Cathrein, embraces only some very fundamental principles and must be made concrete and implemented by the positive law of the state. Heinrich Rommen states that only two self-evident principles belong to the content of natural law in the strict sense. These are: "What is just is to be done, and injustice is to be avoided," and the old axiom, "Give to everyone his own." [3] He assumes that, in the light of these maxims, the legal institutions of private property and inheritance must be deemed to be of natural law, but that the natural law "does not demand the property and inheritance institutions of feudalism, or of liberalist capitalism, or of a system in which private, corporate, and public forms of ownership exist side by side." [4] The supreme maxims of natural law would, of course, prohibit such obviously unjust acts as the killing of innocent persons, and they also require that human beings be granted a certain amount of liberty and the right to found a family.[5] Louis Le Fur, a French author, declares that there exist three principles of natural law: to keep freely concluded agreements, to repair damage unjustly inflicted on another person, and to respect authority.[6] Jacques Maritain states that "there is, by very virtue of human nature, an order or a disposition which human reason can discover and according to which the human will must act in order to attune itself to the necessary ends of the human being. The unwritten law, or natural law, is nothing more than that." [7] Maritain's catalogue of rights to be derived from natural law is more comprehensive than Rommen's. Maritain holds, however, that these rights are not necessarily absolute and unlimited; they are, as a rule, subject to regulation by the positive law for the purpose of promoting the public interest.[8]

[2] *Recht, Naturrecht, und Positives Recht*, 2d ed. (Freiburg, 1909), pp. 132–133, 222.

[3] *The Natural Law*, transl. T. R. Hanley (St. Louis, 1948), p. 220.

[4] *Id.*, p. 235.

[5] *Id.*, pp. 222–223, 232, 238 ff.

[6] *Les grands problèmes du droit* (Paris, 1937), p. 181.

[7] *The Rights of Man and Natural Law*, transl. D. C. Anson (New York, 1947), p. 61.

[8] *Id.*, pp. 78–80, 72, 89–90, 113–114. On Maritain's philosophy of law and state see also Clarence Morris, "The Political Philosophy of Jacques Maritain," 88 *Daedalus* 700 (1959); Edgar Bodenheimer, "Some Recent Trends in European Legal Thought—West and East," 2 *Western Political Quarterly* 45, at 46–48 (1949).

A comprehensive legal philosophy on a neo-Thomist basis was developed by Johannes Messner, *Social Ethics*, 2d ed., transl. J. J. Doherty (St. Louis, 1965). Other neo-Scholastic contributions include: Thomas E. Davitt, *The Elements of Law* (Boston, 1959); Michel Villey, "Law and Values-A French View," 14 *Catholic University of America Law Rev.* 158 (1965); and the contributions listed in Harold G. Reuschlein, *Jurisprudence—Its American Prophets* (Indianapolis, 1951), pp. 360–393, and Edgar Bodenheimer, "A Decade of Jurisprudence in the United States," 3 *Nat. L. For.* 44, at 65–66 (1958).

A significant contribution to neo-Thomistic legal thought has been made by Jean Dabin (b. 1889), a Belgian jurist. Dabin conceives of the legal order as "the sum total of the rules of conduct laid down, or at least consecrated, by civil society, under the sanction of public compulsion, with a view to realizing in the relationships between men a certain order—the order postulated by the end of civil society and by the maintenance of the civil society as an instrument devoted to that end." [9] Dabin places a great deal of emphasis on the rule element in law and on compulsion as an essential ingredient of the positive legal order, approaching in this respect the positivistic position.[10] On the other hand, he also undertakes an elaborate analysis of the ends of legal regulation portrayed in terms of justice and the public good. The latter, in Dabin's view, embraces the totality of human values. It requires the protection of the legitimate activities of individuals and groups as well as the institution of public services in aid or supplementation of private initiative. The state, by means of the law, should coordinate and adjust conflicting economic efforts and counteract undue dispersion and waste engendered by unregulated competition.[11]

Nothing which is contrary to morality can, in Dabin's view, be considered as included in the public good.[12] This maxim forms the link between Dabin's conception of the public good and his theory of natural law. He deduces natural law from the nature of man as it reveals itself in man's basic inclinations under the control of reason. More concretely, Dabin appears to identify natural law with certain minimal requirements of ethics postulated by reason.[13]

What happens when the positive law comes at odds with the ethical minimum? Dabin says: "Everybody admits that civil laws contrary to natural law are bad laws and even that they do not answer to the concept of a law." [14] This statement should probably be construed to reflect the general Thomistic and neo-Scholastic position, according to which a flagrantly and outrageously unmoral law, as distinguished from a merely unjust law, must be deemed invalid.

Dabin's theory of justice contemplates three different forms of jus-

[9] Jean Dabin, "General Theory of Law," in *The Legal Philosophies of Lask, Radbruch, and Dabin*, p. 234. On Dabin see also Patterson, *Jurisprudence*, pp. 355–358.
[10] See, for example, Dabin, pp. 251–252, 259.
[11] *Id.*, pp. 355–358.
[12] *Id.*, p. 456.
[13] *Id.*, pp. 419–431, 455–456.
[14] *Id.*, p. 425. See also *id.*, p. 420: "Natural law . . . dominates positive law in the sense that, while positive law may add to natural law or even restrict it, it is prohibited from contradicting it."

tice: commutative, distributive, and legal justice.[15] The first kind of justice is aimed at the proper adjustment of the relations of private individuals, particularly by means of the legal remedies designed to award adequate damages in contract and tort cases, restore stolen or lost property, grant restitution in cases of unjust enrichment, and the like. Distributive justice determines what is due from the collectivity to its members: it governs the legislative distribution of rights, powers, honors, and rewards. Legal justice, on the other hand, is concerned with what is owed *to* the collectivity by its members. Its object is "ordination for the common good," that is, determination of the duties and obligations which the members of society owe to the social whole, such as revenue, military service, participation in public functions, obedience to laws and legitimate orders. "Legal justice," says Dabin, "is the virtue most necessary to the public good precisely because its object is the public good (of the state or of the public). It is in legal justice that law and morals meet so closely as almost to merge."[16] Although legal justice will come into play only after a demonstration of the insufficiency of the two other forms of justice for the solution of a problem, it will prevail in the case of an irreconcilable conflict with the latter.[17]

Closely linked with the neo-Thomist natural law is the *institutional theory*, which was devised by Maurice Hauriou (1856–1929) and, after his death, developed in detail by Georges Renard (1876–1943).

Hauriou defines the concept of "institution" as follows: "An institution is an idea of a work or enterprise that is realized and endures juridically in a social milieu."[18] For the realization of this idea an authority is constituted which provides itself with organs; in addition, among the members of the social group interested in the realization of the idea, manifestations of communion arise which are directed by the organs of authority and regulated by procedural rules. Expressing the same general thought, Renard defines an institution as "the communion of men in an idea."[19]

[15] *Id.*, pp. 443 ff.

[16] *Id.*, p. 463.

[17] Certain aspects of the legal theory of François Gény, another author of an influential neo-Thomist philosophy of law, were described *supra* Sec. 29. On Gény see also Pound, *Jurisprudence*, I, 181–184.

The attention of the reader is also called to Joseph Charmont, "Recent Phases of French Legal Philosophy," in *Modern French Legal Philosophy*, transl. F. W. Scott and J. P. Chamberlain (New York, 1921), pp. 65–147.

[18] Hauriou, "The Theory of the Institution and the Foundation," in *The French Institutionalists*, ed. A. Broderick (Cambridge, Mass.. 1970), p. 99.

[19] Georges Renard, *La théorie de l'institution* (Paris, 1930), p. 95.

The institution is supposed to symbolize the "idea of duration" in law. An individual is certain to die, and contracts concluded between individuals are of a transitory character. An institution like the state, the Catholic Church, Harvard University, or the British Board of Trade will be likely to endure for a long time to come. The idea to whose realization the institution is consecrated will live and prevail long after the original founders of the institution have died, and this idea is wholly detached from the casual individuals who belong to the institution at some particular time. It may be noted that Renard finds the most perfect definition of the institution in the first article of the former Italian Fascist Charter of Labor, which reads as follows: "The Italian nation is an organization endowed with a purpose, a life, and means of action transcending those of the individuals or groups of individuals composing it." [20]

Institution and contract are sharply contrasted by Renard. The touchstone of a contract is the notion of equality; a contract serves the merely subjective purposes of two or more individuals. The criterion of the institution, on the other hand, is the idea of authority; the organization of an institution implies differentiation, inequality, direction, and hierarchy. It demands subordination of individual purposes to the collective aims of the institution. Subjective rights, typical in the law of contracts, are restricted in institutional law. Status, not contract, is the chief organizational principle of the institution.[21] The relations and qualifications of the members are objectively and authoritatively determined. This does not mean, Renard states, that the members of the institution lose their human personality; it merely means that the common good of the institution must prevail over the private and subjective interests of the individual members. Renard admits that the members of an institution lose their liberty to some degree; but in his opinion they gain in security what they lose in liberty.[22]

The state, according to the theory of institution, is the most eminent manifestation of the institutional phenomenon. But the advocates of the theory do not consider the state as an omnipotent and totalitarian entity. There are other institutions, they say, which enjoy a considerable autonomy and independence from state interference and which should represent an effective counterweight against state power. First, there is the family, which is the oldest of institutions. Second, there is the religious congregation, the Church. Third, there are professional associations, corporations, labor unions, employers' associations. Every

[20] *Id.*, p. 168.
[21] *Id.*, pp. 329–334.
[22] *Id.*, pp. 345–346, 365.

individual belongs to some institution other than the state, and the autonomy of the various institutions guarantees him a certain amount of liberty, because no institution has an entirely unlimited power over him. The institutional theory is opposed to statism and to that form of socialism which would make the individual a mere cog in the apparatus of an all-powerful state. It believes in corporate or syndicalist pluralism and in the self-government of institutions, subject of course to the state's police power.[23]

Section 36. *Duguit's Legal Philosophy*

A natural-law theory with strongly sociological overtones was propounded by the French jurist Léon Duguit (1859–1928). This doctrine was diametrically opposed to the natural-law doctrines of the age of enlightenment in that Duguit repudiated any natural or inalienable rights of individuals. His objective was to supplant the traditional system of legal rights by a system which would recognize only legal duties. Every individual has a certain task to perform in society, Duguit said, and his obligation to perform this function may be enforced by the law.[1] The only right which any man might be said to possess under this theory is the right always to do his duty. As Corwin has aptly said, this theory is "that of Locke stood on its head." [2]

Notwithstanding his emphasis on social duties, Duguit rejected any absolutist conception of state power. He proposed to strip the state and its organs of all sovereign rights and other attributes of sovereignty with which the traditional doctrine of public law had endowed it. Duguit taught that the governing authorities, like the citizens, have only duties, and no rights. Their activity is to be confined to the performance of certain social functions, and the most important of these functions is the organization and maintenance of public services. It is the duty of governmental officials to guarantee a continuous and uninterrupted operation of the public services. This aim, Duguit believed, would be most efficiently realized by a far-reaching decentralization and technical autonomy of the public utilities under a syndicalist structure of the state.[3]

[23] *Id.*, p. 151. See also Renard, "The Philosophy of the Institution," *supra* n. 18, pp. 308–309, 320–321; Georges Gurvitch, *L'Idée du droit social* (Paris, 1932), pp. 634 ff. On institutionalism see also Julius Stone, *Social Dimensions of Law and Justice* (Stanford, 1966), pp. 516–545.

[1] *Les transformations générales du droit privé*, 2d ed. (Paris, 1920), pp. 24–25.

[2] Edward S. Corwin, "The 'Higher Law' Background of American Constitutional Law," 42 *Harvard Law Review* 365, at 382 (1929).

[3] See Duguit, "The Law and the State," 31 *Harv. L. Rev.* 1 (1917); Duguit, *Law in the Modern State*, transl. F. and H. Laski (New York, 1970), pp. 32–60; Harold J. Laski, "M. Duguit's Conception of the State," in *Modern Theories of Law*, pp. 52–67.

The social function of law, according to Duguit, is the realization of *social solidarity*. This is the central concept in Duguit's theory of law. "The fact of social solidarity is not disputed and in truth cannot be disputed; it is a fact of observation which cannot be the object of controversy. . . . Solidarity is a permanent fact, always identical in itself, the irreducible constitutive element of every social group."[4] Thus Duguit regarded social solidarity not as a rule of conduct or imperative, but as a fundamental fact of human coexistence.

The fact of social solidarity becomes, however, converted into a normative principle under Duguit's "rule of law" (*règle de droit*). The rule of law demands of everyone that he contribute to the full realization of social solidarity. It imposes upon the governors as well as the governed the duty to abstain from any act which is motivated by a purpose incompatible with the realization of social solidarity.[5] The rule of law is so conceived by Duguit as to constitute a definite limitation upon the power of all governing authorities. No statute or administrative order is valid which is not in conformity with the principles of social solidarity and social interdependence. Duguit suggests that a tribunal composed of representatives of all social classes should be set up which would be entrusted with the task of interpreting the concept of social solidarity authoritatively, and with determining whether a certain legal enactment is or is not in accord with this supreme requirement.[6]

It was Duguit's professed intention to create an entirely positivistic, realistic, and empirical theory of law, free from any ingredients of metaphysics and natural law. In truth, as Gény has pointed out, Duguit's rule of law based on social solidarity is far removed from legal positivism and empiricism.[7] The theory is essentially metaphysical and must be classified as a peculiar version of natural-law doctrine in a socialized form.

Section 37. *The Policy-Science of Lasswell and McDougal*

Harold Lasswell (b. 1902) and Myres McDougal (b. 1906), two American writers who have joined in an effort to develop a policy-science of the law, have in common with Léon Duguit the objective of build-

[4] Duguit, "Objective Law," 20 *Col. L. Rev.* 817, at 830 (1920); see also Duguit, "The Theory of Objective Law Anterior to the State," in *Modern French Legal Philosophy*, pp. 258 ff.

[5] Duguit, *L'État, le droit objective, et la loi positive* (Paris, 1901), p. 87.

[6] *Le droit social, le droit individuel, et les transformations de l'état* (Paris, 1911), p. 58. On Duguit see also Pound, *Jurisprudence*, I, 184–191.

[7] François Gény, *Science et technique en droit privé positif* (Paris, 1919–1925), II, 248 ff.

ing an empirical legal theory free from metaphysical speculation. Unlike Duguit, however, they admit openly that their approach to the law represents a theory of values rather than a mere description of social facts.

The Lasswell-McDougal value system proceeds from the assumption that a value is a "desired event." [1] Thus, inasmuch as men want power (defined as participation in the making of important decisions), power is "unmistakably a value, in the sense that it is desired [or likely to be desired]." [2] Other value categories or "preferred events" gratifying the desires of men are wealth, that is, control over economic goods and services; well-being, or bodily and psychic integrity; enlightenment, or the finding and dissemination of knowledge; skill, or the acquiring of dexterities and development of talents; affection, or the cultivation of friendship and intimate relations; rectitude, or moral responsibility and integrity; and respect, or recognition of merit without discrimination on grounds irrelevant to capacity.[3] This list is regarded as representative, but not necessarily exhaustive. A ranking of the values in question in the order of their importance is held impossible by the authors since "the relative position of values varies from group to group, from person to person, and from time to time in the history of any culture or personality." [4] Nor is it regarded as feasible to assign a universally dominant role to any particular value. What the values controlling a group or individual are in a given situation must in principle be determined separately in each case.[5]

Law is conceived by Lasswell and McDougal as a form of the power value and described as "the sum of the power decisions in a community." [6] It is essential to the legal process, McDougal says, that a formally sanctioned authority to make decisions be conjoined with an effective control ensuring the execution of these decisions.[7] This combination of formal authority and effective control produces a flow of decisions whose purpose it is to promote community values in conformity with the expectations of the community.[8] It is one of the basic

[1] Harold D. Lasswell and Abraham Kaplan, *Power and Society* (New Haven, 1950), p. 16.

[2] Lasswell, *Power and Personality* (New York, 1948), p. 16.

[3] *Id.*, p. 17; Myres S. McDougal, "International Law, Power, and Policy," in 82 *Recueil des Cours* 137, at 168 (Hague Academy of International Law, 1953).

[4] *Op. cit. supra* n. 2, p. 17.

[5] Lasswell and Kaplan, p. 56.

[6] McDougal, "The Law School of the Future: From Legal Realism to Policy Science in the World Community," 56 *Yale Law Journal* 1345, at 1348 (1947).

[7] McDougal, "Law as a Process of Decision: A Policy-Oriented Approach to Legal Study," 1 *Nat. L. For.* 53, at 58 (1956).

[8] Thus, law is viewed as the process of decision-making in a community as a whole, and not as a mere body of rules. McDougal, *supra* n. 7, p. 56.

postulates of the authors that the members of the community should participate in the distribution and enjoyment of values, or, differently expressed, that it must be the aim of legal regulation and adjudication to foster the widest possible sharing of values among men. The ultimate goal of legal control as envisaged by Lasswell and McDougal is a world community in which a democratic distribution of values is encouraged and promoted, all available resources are utilized to the maximum degree, and the protection of human dignity is regarded as a paramount objective of social policy.[9]

These authors believe that legal science, in approaching its task of fostering the democratization of values on a global scale and contributing to the creation of a free and abundant society, should minimize and deflate the role of technical legal doctrine, which is referred to as the "authoritative myth." Legal doctrines, McDougal says, have the unfortunate habit of "traveling in pairs of opposites." [10] Conceptual and doctrinal antinomies are endemic to the law, and legal terms take their meaning from the context in which they are used, the person who uses them, and the objective for which they are employed. Thus, reliance on doctrine does not ensure legal certainty and often defeats the attainment of socially desirable ends.

Lasswell and McDougal propose, therefore, that the technical-doctrinal approach to law, although it should not be entirely discarded, ought largely to be supplanted by a "policy" approach. Key legal terms should be interpreted in relation to the goals and vital problems of democratic living.[11] Legal decisions should be viewed as "responses to precipitating events best described as value changes in social processes." [12] Emphasis on definition and orientation upon rules should be replaced by "goal thinking" and functional consideration of the effect of alternative solutions upon over-all community patterns. Legal doctrines should be relegated to the role of "symbols whose function is to serve the total policies of their users." [13] Sharp distinctions between law and policy, between formulations *de lege lata* and propositions *de lege ferenda* should be shunned. "Every application of legal rules," says

[9] See Lasswell and McDougal, "Legal Education and Public Policy," 52 *Yale L. J.* 203, at 212 (1943): "The supreme value of democracy is the dignity and worth of the individual; hence a democratic society is a commonwealth of mutual deference—a commonwealth where there is full opportunity to mature talent into socially creative skill, free from discrimination on grounds of religion, culture, or class." Cf. also McDougal, *op. cit. supra* n. 7, pp. 67, 72.

[10] "The Role of Law in World Politics," 20 *Mississippi Law Journal* 253, at 260 (1949).

[11] Lasswell and McDougal, p. 216.

[12] McDougal, *supra* n. 7, p. 65.

[13] McDougal, *supra* n. 10, p. 263.

McDougal, "customary or conventional or however derived, to specific cases in fact requires the making of policy choices." [14] While the adjudicating organs may seek guidance from past judicial experience, they should always focus their vision strongly upon the probable impact of the decision upon the future of their community.[15] Such a future-oriented approach to the decision-making process is regarded by McDougal and Lasswell as far superior to the mechanical manipulation of traditional doctrines.[16]

Although both of these authors hold that their legal "policy-science" should not be classified as natural-law doctrine, such a characterization would not appear to be wholly inappropriate. While the eight values recognized by them correspond largely to the actual desires held by people and are therefore empirical in character, the insistence of the authors that these values be democratically shared in a world-wide order, resting on respect for human dignity as a supervalue, would appear to bear certain earmarks of natural-law thinking.

Section 38. *Other Recent Value-Oriented Philosophies of Law*

In addition to Lasswell and McDougal, a number of other thinkers in the United States have turned their attention in recent decades to the fundamental values which the institution of law should be made to promote. Although the revival of natural law or justice-oriented approaches to the law has not in this country reached the degree and intensity of Western European developments, the trend is at the present time still gaining in momentum and strength.

Edmond Cahn (1906–1964) is in many important aspects of his thought connected with the realist movement in American jurisprudence. Although Cahn realizes the importance of the rational element in the administration of justice, he views legal processes to a far-reaching extent as intuitive ethical responses to concrete and particular fact situations.[1]

Cahn has expressed the conviction that the problem of justice should be approached from its negative rather than its affirmative side. Suggesting that the postulation of affirmative ideals of justice has been "so

[14] *Op. cit. supra* n. 3, p. 155. See also p. 144.

[15] McDougal, "Law and Power," 46 *American Journal of International Law* 102, at 110 (1952).

[16] This account of the thinking of Lasswell and McDougal was first published in my article on "A Decade of Jurisprudence in the United States of America: 1946–1956," 3 *Nat. L. For.* 44, at 53–56 (1958) and has been reprinted here with some changes by permission of the editors of that journal. For a critical appraisal of this theory see *id.*, pp. 56–59.

[1] See particularly Edmond Cahn, *The Moral Decision* (Bloomington, 1955).

beclouded by natural law writings that it almost inevitably brings to mind some ideal relation or static condition or set of perceptual standards," Cahn prefers to place the emphasis on the "sense of injustice." [2] The sense of injustice is a blend of "reason and empathy" which forms part of the human biological endowment. Justice is essentially a process of remedying or preventing whatever would arouse the sense of injustice.

How does the sense of injustice manifest itself? First and perhaps most important of all, feelings of injustice are precipitated in a group of human beings by the creation of inequalities which the members of the group regard as arbitrary and devoid of justification. "The sense of injustice revolts against whatever is unequal by caprice." [3] The inequalities resulting from the law must make sense; the law becomes unjust when it discriminates between indistinguishables.

The sense of injustice also makes certain other demands, such as the demand for recognition of merit and human dignity, for impartial and conscientious adjudication, for maintenance of a proper balance between freedom and order, and for fulfillment of common expectations.[4] The last-mentioned demand, Cahn points out, may manifest itself in two different ways. It may assert itself, first, where normal expectations of human beings regarding the consistency and continuity of legal operations have been disappointed by lawmakers or judges. Any retroactive change of substantive law which reaches transactions and acts undertaken in justified reliance on the earlier law presents, therefore, a challenge to the sense of injustice. Second, a similarly unfavorable reaction may be produced by the opposite way of proceeding, namely, by a failure of the law to respond to new moral convictions and new social needs. Thus, the positive law may become unjust not only by breaking its promise of regularity and consistency, but also by violating its commitment to be sensitive to new demands of the social and economic life. Law, in order to be just, must maintain a precarious and hazardous balance between regularity that is uncompromising and change that is inconsiderate. The sense of injustice "warns against either standing still or leaping forward; it calls for movement in an intelligible design." [5]

Lon Fuller (b. 1902) has turned a critical searchlight on both juridical positivism and legal realism. The positivistic attitude, he points out, is as a general rule associated with ethical skepticism. "Its unavowed basis will usually be found to rest in a conviction that while one may significantly describe the law *that is*, nothing that transcends personal

[2] Cahn, *The Sense of Injustice* (New York, 1949), p. 13.
[3] *Id.*, p. 13.
[4] *Id.*, pp. 20–22, 102 ff, 111 ff.
[5] *Id.*, p. 22.

predilection can be said about the law *that ought to be.*" [6] In his opinion, it is impossible to study and analyze the law apart from its ethical context. The legal realists, he charges, have made the same mistake as the positivists, the mistake of assuming that a rigid separation of the *is* and *ought,* of positive law and morality, is possible and desirable.[7]

Law, to Fuller, is a collaborative effort to satisfy, or to aid in satisfying, the common needs of men. Each rule of law has a purpose which is directed at the realization of some value of the legal order. Because of the close connection which exists between purposes and values, a purpose must be regarded as "at once a fact and a standard for judging facts." [8] Since the interpretation and application of the law is permeated with purposive and axiological considerations, the dualism of "is" and "ought," in his opinion, also cannot be maintained in the context of the judicial process.[9]

Fuller maintains that the search for the principles of successful human living must always remain open and unshackled. He rejects the notion of natural law as a body of authoritative "higher-law" axioms against which human enactments must be measured. No natural law theory can be accepted, he insists, that attempts to lay down in advance an eternal, unchanging code of nature.[10]

Because of widespread association of the term "natural law" with doctrinaire and absolutist philosophies of law and ethics, Fuller recommends that a new name be used for an old phenomenon. He suggests the term "eunomics," which he defines as "the theory or study of good order and workable arrangements." [11] He warns that eunomics must not attempt to teach any orthodoxy or doctrine of binding ultimate ends, but must see its task primarily in furnishing a doctrine of the *means* which the legal order must employ to attain the aims of a certain form of social organization.[12] However, it may go beyond such concern for the means aspects of social ends and attempt to demonstrate scientifically that there exist unattainable social goals for which no practicable and manageable legal forms can be devised. Fuller believes that there are some constancies and regularities in man's nature which

[6] Lon L. Fuller, *The Law in Quest of Itself* (Chicago, 1940), p. 5.

[7] *Id.*, p. 60. See also Fuller, "Human Purpose and Natural Law," 3 *Natural Law Forum* 68 (1958).

[8] Fuller, "American Legal Philosophy at Mid-Century," 6 *Journal of Legal Education* 457, at 470 (1954).

[9] *Id.*, pp. 472–473. *See also* Fuller, "Positivism and Fidelity to Law—A Reply to Professor Hart," 71 *Harvard Law Review* 630, at 661–669 (1958).

[10] Fuller, "A Rejoinder to Professor Nagel," 3 *Natural Law Forum* 83, at 84 (1958).

[11] Fuller, *supra* n. 8, pp. 477–478.

[12] *Id.*, p. 478. Fuller realizes, however, that there is a close interaction between means and ends, and that the means chosen may affect the content of the ends.

impose limitations upon the desire of legal utopians and social engineers to create radically novel forms of society.[13]

According to Fuller, the integrity of the law is determined primarily by the processes which it uses in order to accomplish its goals. The "morality that makes law possible" [14] requires the satisfaction of eight conditions which may be summarized as follows: (1) there must be general rules formed to guide particular actions; (2) these rules must be made known to the public, or at least to all those to whom they are addressed; (3) the rules should, in most instances, be prospective rather than retroactive; (4) they should be clear and comprehensible; (5) they should not be inconsistent with one another; (6) they should not require the impossible; (7) they should be reasonably stable, i.e., they should not be changed too frequently; (8) there should be congruence between the rules as announced and their actual administration.[15]

Fuller views these eight canons as "a procedural version of natural law." [16] A total failure to satisfy any one of these conditions of legal morality does not, in Fuller's view, simply produce a bad system of law; it results, he declares, "in something that is not properly called a legal system at all, except perhaps in the Pickwickian sense in which a void contract can still be said to be one kind of contract." [17] Thus the intrinsic legitimacy of a legal system seems for Fuller to rest on requirements of a somewhat structural and technical character. He is convinced, however, that a legal order which lives up to these requirements will usually be essentially sound and just in its substantive contents.[18]

Jerome Hall (b. 1901) is deeply concerned with the question of whether rationality and morality are "of the essence" in law, and his answer to the question is affirmative. He advocates the adoption of a restrictive definition of positive law which would limit the term to

Id., p. 480 and Fuller, *supra* n. 7, pp. 72–73. On this phase of Fuller's thought see the critical discussions by A. P. d'Entrèves, "The Case of Natural Law Re-Examined," 1 *Natural Law Forum* 5, at 31–32 (1956) and Joseph P. Witherspoon, "The Relation of Philosophy to Jurisprudence," 3 *Nat. L. For.* 105, at 109–113 (1958).

[13] Fuller, *supra* n. 8, pp. 477–478, 480–481.

[14] This is the heading of Ch. II of Fuller's *The Morality of Law*, 2d ed. (New Haven, 1969).

[15] *Id.*, pp. 38–91.

[16] *Id.*, p. 96. By "procedural," Fuller means that "we are concerned, not with the substantive aims of legal rules, but with the ways in which a system of rules for governing human conduct must be constructed and administered if it is to be efficacious and at the same time remain what it purports to be." *Id.*, p. 97.

[17] *Id.*, p. 39.

[18] This conclusion is questioned by H. L. A. Hart, Book Review, 78 *Harvard Law Review* 1281, at 1287–1288 (1965); Ronald M. Dworkin, "Philosophy, Morality, and Law—Observations Prompted by Professor Fuller's Novel Claims," 113 *University of Pennsylvania Law Review* 668, at 670–678 (1965); Robert S. Summers, "Professor Fuller on Morality and Law," in *More Essays on Legal Philosophy*, ed. R. S. Summers (Berkeley, 1971), pp. 126–130.

"actual ethical power norms" and exclude "sheer power norms." [19] He is convinced that there may be norms enacted by the state which lack the quality of law because they are entirely devoid of ethical content. In an attempt to lay the foundations for a democratic natural law, Hall proposes that the democratic ideal should be included in the essence of our positive law. "Especially, we include therein the 'consent of the governed' and all that that implies in the context of the democratic process. That is the fundamental correction which must be made in the traditional Natural Law theories of positive law." [20]

Law, in Hall's view, is a "distinctive coalescence of form, value, and fact." [21] The value component of law, he points out, is not merely an expression of subjective desires and personal interest, but lends itself to rational analysis. "People sometimes act against their desires and sacrifice their interests because they decide to do the right thing. The naturalistic dogma must condemn Socrates as an idiot." [22] Under the skeptical theory of value judgments, "expressions of delight when witnessing a murder would be just as rational as expressions of intense anger directed at someone who had just risked his life to rescue a drowning child." [23] The fact that it is sometimes very difficult to solve a moral problem does not justify the conclusion that objectivity in valuation is impossible or that justice is, in the words of Kelsen, an "irrational ideal." [24]

Hall has been a vigorous critic of legal positivism, insofar as it claims to provide a complete explanation of the phenomenon of law exclusive of the valid elements in natural-law reasoning and sociological jurisprudence.[25] He has advocated an "integrative" jurisprudence which would combine analytical studies of the law with sociological descriptions and an understanding of the value-components of legal ordering.[26] Hall sees the bond lending unity to the various aspects of jurisprudence in the term "action." "Law-as-action" relies extensively on legal rules and concepts, but the law as a social institution cannot be comprehended unless the day-to-day practice of judges, administrators, and law enforcement officials is studied. This practice will to some extent conform, to some extent diverge from the conceptual structure of the

[19] Jerome Hall, *Living Law of Democratic Society* (Indianapolis, 1949), pp. 138–139.

[20] *Id.*, p. 85. "Consent of the governed" means to Hall the active participation of the citizens in the processes of government. *Id.*, p. 89.

[21] *Id.*, p. 131.

[22] *Id.*, p. 69.

[23] *Ibid.*

[24] *Id.*, p. 76. Cf. *supra* Sec. 26 and *infra* Sec. 48.

[25] Hall, *Foundations of Jurisprudence* (Indianapolis, 1973), pp. 54–77; Hall, *Studies in Jurisprudence and Criminal Theory* (New York, 1958), pp. 31–37.

[26] Hall, "From Legal Theory to Integrative Jurisprudence," 33 *Cincinnati Law Review* 153, at 191–205 (1964); Hall, *Comparative Law and Social Theory* (Baton Rouge, 1963), Chs. 4 and 6. See also *infra* Sec. 39.

law. The conception of law as action also brings within the province of jurisprudence the subject of compliance with, and obedience to, legal prescriptions by the general population, and the interactions between laymen and law-related officials.[27]

Filmer Northrop (b. 1893) agrees with Hall that an evaluative science of the law is possible.[28] According to him, a scientifically meaningful evaluation of legal norms ought to be undertaken on two different levels. First of all, the positive law enacted by the state should be tested with respect to its conformity with the living law of a people or culture. Only a positive law which meets the social and legal needs of the people and is, in general, accepted and acted upon by them can function as an effective legal system.[29] The living laws of nations or groupings of nations in this world, Northrop points out, are not uniform, but pluralistic and widely divergent. This does not mean that the sociological "is" of a culture constitutes the ultimate test for the goodness or badness of its legal system. "The normative ideal for judging today's human behavior and cultural institutions cannot be the de facto 'is' of that human behavior and those social institutions; otherwise the status quo would be perfect and reform and reconstruction would be unnecessary." [30] The criterion of virtue and sin for culture and cultural man, according to him, is the truth or falsity of the philosophy of nature and natural man underlying a culture.[31] This philosophy of nature and natural man is identified by Northrop with natural law, which in his view includes "the introspected or sensed raw data, antecedent to all theory and all cultures, given in anyone's experience in any culture." [32] Ethics, he argues, is nothing but empirically verified natural philosophy applied to human conduct and relations. The ethical principles on the basis of which the Hitler government operated must be adjudged to be bad because Hitler's conduct was the consequence, in part at least, of philosophical beliefs about natural man which scientific method can demonstrate to be false.[33]

Northrop is of the opinion that the natural law of the modern

[27] Hall, *Foundations of Jurisprudence*, pp. 142–177.

[28] F. S. C. Northrop, *The Complexity of Legal and Ethical Experience* (Boston, 1959), p. xi.

[29] *Id.*, pp. 15, 41. Northrop finds himself with respect to this point in agreement with the theories of Eugen Ehrlich, discussed *supra* Sec. 28.

[30] *Id.*, p. 240.

[31] *Id.*, p. 11. See also *id.*, p. 155: "Cultural facts are good or bad solely because the propositions concerning natural facts from which they derive are true or false."

[32] *Id.*, p. 254. These facts are called "first-order facts" by Northrop, while he applies the appellation "second-order facts" to cultural elements or phenomena. *Ibid.*

[33] *Id.*, pp. 244–246.

world cannot be based either on the Aristotelian-Thomist conception of this law or on the natural-rights philosophy of Locke and Jefferson. It must be grounded on the conception of nature and natural man supplied by modern physics, biology, and other natural sciences (including psychology). Northrop insists that the building of an effective international law to secure the survival of mankind must of necessity be predicated on the scientific foundations with which this theory of natural law may provide us. Only a truly universal natural law can, in the long run, mitigate and alleviate the hostility and tensions engendered by the living law pluralism of the present world and bring about that modicum of mutual understanding between peoples which is indispensable to world peace.[34] The "dying legal science" of positivism, with its emphasis on legal force and power politics, is inadequate, in his opinion, to furnish us with the tools and the inspiration needed to cope with the momentous problems which the atomic age has thrust upon mankind.[35]

A recent attempt to revive the social contract theory and the Kantian philosophy of law in a modernized garb and to oppose them to the utilitarianism of Bentham and Mill is represented by the *Theory of Justice* of John Rawls (b. 1921). In the opinion of a reviewer, the book "shows how the values of individual liberty and dignity can be assigned an independent status that does not derive from the maximization of the social good." [36] Like Kant, Rawls defines liberty as absence of constraints,[37] and the first of his two fundamental principles of justice requires that "each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all." [38] Going beyond Kant, Rawls then incorporates the notion of equality into his theory of justice by means of the following axiom: "Social and economic inequalities are to be arranged so that they are both (a) to the greatest benefit of the least advantaged, consistent with the just savings principle,[39] and (b) attached to offices and positions open to all under conditions of fair equality of oppor-

[34] Northrop, "Contemporary Jurisprudence and International Law," 61 *Yale Law Journal* 623, at 650 ff (1952).

[35] *Id.*, p. 654; Northrop, *supra* n. 28, pp. 18, 252. On Northrop see Joyotpaul Chaudhuri, "F. S. C. Northrop and the Epistemology of Science," 12 *South Dakota Law Review* 86 (1967); Edgar Bodenheimer, Book Review, 108 *University of Pennsylvania Law Review* 930 (1960).

[36] Charles Fried, Book Review, 85 *Harvard Law Review* 1691, at 1693 (1972).

[37] John Rawls, *Theory of Justice* (Cambridge, Mass., 1971), p. 202. Note the similarity of this formula to the Kantian definition of law, *supra* Sec. 15. See also *infra* Sec. 47.

[38] *Id.*, p. 302.

[39] This principle deals with the duty of one generation to preserve a just society for the benefit of future generations. See *id.*, pp. 284–293.

tunity." [40] The question of determining what kinds of social and economic inequality will work out for everyone's advantage is to be resolved according to the hypothetical concept of the "original position" (which is Rawls' new version of the social contract theory). If it can be assumed that rational human beings, concerned in general with advancing their own interests but ignorant of the particular manner in which a decision as to equality or inequality would affect them personally in a concrete situation, would accept certain principles for the distribution of goods, rights, positions, and offices as fair and just, a particular determination concerning distributive justice is thereby legitimated.[41] There remains the possibility, however, that a step towards greater egalitarianism might result in a curtailment of liberty. In that event, the value of liberty is to be given preference.[42]

An increased emphasis on the value components of legal ordering is also noticeable in certain modern varieties of sociological and psychological jurisprudence. Philip Selznick (b. 1919) has proposed that the sociology of law should pay as much attention to the axiological goals pursued by a legal system as to the genetic origins of legal norms and legal institutions. Sociology, therefore, "should have a ready affinity for the philosophy of natural law." [43] It should not view law simply as a system of culture-conditioned rules but also as an instrumentality for moral development and the satisfaction of morally relevant needs. In short, law should be examined for its potential contribution to human welfare.[44] The philosophy of values has entered from a different point of departure into the psychoanalytic jurisprudence of Albert Ehrenzweig (1906–74). While Selznick places considerable emphasis on the psychic unity of mankind and the universal characteristics of human nature, Ehrenzweig views the legal order chiefly as an enterprise designed to moderate conflicting individual views of justice. He is convinced that a sense of justice is inborn in all men and women, but regards its competing and often inconsistent manifestations ("justnesses"), in reliance on the general psychological theories of Sigmund

[40] *Id.*, p. 302. See also pp. 150–151. For criticisms of the Rawlsian position, based on his earlier writings, see Chaim Perelman, *Justice* (New York, 1967), pp. 39–52; John W. Chapman, "Justice and Fairness," in *Justice* (NOMOS vol. VI), ed. C. J. Friedrich and J. W. Chapman (New York, 1963), pp. 147–169.

[41] *Id.*, pp. 17–22, 118–192. On the "veil of ignorance" under which decisions in the original position are made see particularly pp. 137–138.

[42] *Id.*, pp. 215, 244, 302, 541–548. See also *id.*, p. 204: "A basic liberty covered by the first principle can be limited only for the sake of liberty," and *id.*, p. 207: "Greater economic and social benefits are not a sufficient reason for accepting less than an equal liberty." See on this problem the comments by Joel Feinberg, "Justice, Fairness and Rationality," 81 *Yale Law Journal* 1004, at 1028–1030 (1972).

[43] Philip Selznick, "Sociology and Natural Law," 6 *Natural Law Forum* 84 (1961).

[44] *Id.*, pp. 93, 101. See also Selznick, *Law, Society, and Industrial Justice* (Russell Sage Foundation, 1969), pp. 8–11, 18–34.

Freud, largely as a product of unconscious factors in early personality development. Ehrenzweig does not, however, deny the possibility of reaching some measure of group consensus as to the basic values to be served by a legal order.[45]

In Germany and Austria, a strong revival of value-oriented legal philosophy took place after the fall of Hitler's Third Reich. The conversion of the distinguished German jurist Gustav Radbruch from a position of value-relativism to the acceptance of an indubitable, though moderate, form of natural-law thinking gave a strong impetus to a development which emphasized the role of law in protecting human dignity, freedom, and other substantive values of individual and social life.[46] The legal philosophy of Helmut Coing (b. 1912) is in its methodological approach decisively influenced by the phenomenology of Edmund Husserl, Max Scheler, and Nicolai Hartmann, a philosophical movement which recognizes an objectively subsisting realm of values amenable to intuitive perception.[47] In its contents, Coing's jurisprudence represents a restatement, with some modifications, of the classical philosophy of individual and economic liberalism.

According to Coing, it is the duty of the state to safeguard basic individual rights and freedoms, which include bodily integrity, privacy, preservation of one's reputation, private property, protection against fraud and overreaching, freedom of speech and assembly. Coing concedes that these rights cannot be hypostatized into illimitable absolutes. They are subject to some restrictions necessary to promote the general welfare, but their core and essential substance may not be touched. Coing takes the position that a law which violates a supreme principle of liberty and justice is not void but justifies, in extreme cases, active or passive resistance on the part of the people or law-enforcing authorities.[48]

The philosophy of values underlying the phenomenological movement also forms the foundation of the work of Heinrich Henkel,[49] Karl

[45] A. A. Ehrenzweig, *Psychoanalytic Jurisprudence* (Leiden, 1971), pp. 145–158, 182–206.

[46] The early developments in post-World War II German jurisprudence are described by Edgar Bodenheimer, "Significant Developments in German Legal Philosophy since 1945," 3 *American Journal of Comparative Law* 379 (1954). On Radbruch's conversion see *supra* Sec. 34.

[47] The phenomenological movement is described by J. M. Bochenski, *The Methods of Contemporary Thought* (Dordrecht, 1965), Ch. II. On Husserl, Scheler, and Hartmann in particular see Wolfgang Stegmueller, *Main Currents in Contemporary German, British, and American Philosophy* (Bloomington, 1970), Chs. II, III, and VI.

[48] Helmut Coing, *Grundzüge der Rechtsphilosophie*, 2d ed. (Berlin, 1969). The ideas expressed earlier by Coing in *Die Obersten Grundsätze des Rechts* (Heidelberg, 1947) appear to be to some extent superseded by his later work.

[49] Heinrich Henkel, *Einführung in die Rechtsphilosophie* (Munich, 1964). On Henkel see Karl Engisch, "Recent Developments of German Legal Philosophy," 3 *Ottawa Law Review* 47, at 49–62 (1968).

Engisch,[50] and Reinhold Zippelius.[51] These three authors, however, differ from Coing in that they take a more relativistic, culture-oriented position towards the problem of legal values, without accepting an extreme form of axiological subjectivism.

While legal thought in Austria prior to World War II was dominated by Kelsen's Pure Theory of Law and the logical positivism of the Vienna Circle,[52] a revival of natural-law thinking took place in that country, too, in the period following the war. Modernized versions of Aristotelian and Thomist legal philosophy were produced, in highly subtle and differentiated forms, by Alfred Verdross[53] and René Marcic.[54] Their reflections on law and justice cannot easily be summarized, and it is to be regretted that no translations of their major works are available in the English language.

The philosophical movement known as existentialism also has had an impact on legal philosophy, although its bearing on the problems of legal ordering are a matter of doubt and controversy.[55] The German jurists Werner Maihofer[56] and Erich Fechner[57] have developed legal philosophies proceeding from existentialist premises, while the Danish scholar Georg Cohn has presented a view of the judicial process based on what he considers to be the implications of the movement for adjudication and legal reasoning.[58] Like phenomenological philosophy, existentialism pays a great deal of attention to axiological (as distin-

[50] Karl Engisch, *Die Idee der Konkretisierung in Recht und Rechtswissenschaft unserer Zeit* (Heidelberg, 1953); Engisch, *Vom Weltbild des Juristen* (Heidelberg, 1950); Engisch, *Einführung in das Juristische Denken*, 2d ed. (Stuttgart, 1956).

[51] Reinhold Zippelius, *Das Wesen des Rechts*, 3rd ed. (Munich, 1973).

[52] On Kelsen see *supra* Sec. 26. On logical positivism see *supra* Sec. 24.

[53] Alfred Verdross, *Abendländische Rechtsphilosophie*, 2d ed. (Vienna, 1963); Verdross, *Statisches und Dynamisches Naturrecht* (Freiburg, 1971).

[54] René Marcic, *Rechtsphilosophie: Eine Einführung* (Freiburg, 1969); Marcic, *Recht, Staat, Verfassung* (Vienna, 1970). For a brief introduction to his thought see Marcic, "The Persistence of Right-Law," 1973 *Archiv für Rechts- und Sozialphilosophie* 87.

[55] On existentialism in general see B. A. G. Fuller and Sterling McMurrin, *A History of Philosophy*, 3rd ed. (New York, 1955), Vol. II. pp. 603–612; Stegmueller, *supra* n. 47, Chs. IV and V. On the relation between existentialism and law see Anthony R. Blackshield, "The Importance of Being: Some Reflections on Existentialism in Relation to Law," 10 *Natural Law Forum* 67 (1965); Edgar Bodenheimer, "Classicism and Romanticism in the Law," 15 *U.C.L.A. Law Review* 915 (1968); Hans Welzel, *Naturrecht und Materiale Gerechtigkeit*, 4th ed. (Göttingen, 1962), pp. 209–219.

[56] Werner Maihofer, *Recht und Sein* (Frankfurt, 1954); Maihofer, *Naturrecht als Existenzrecht* (Frankfurt, 1963).

[57] Erich Fechner, *Rechtsphilosophie*, 2d ed. (Tübingen, 1962); Fechner, "Ideologische Elemente in positivistischen Rechtsanschauugen," 1970 *Archiv für Rechts- und Sozialphilosophie* (Beiheft No. 6) 199.

[58] Georg Cohn, *Existentialism and Legal Science*, transl. G. H. Kendal (Dobbs Ferry, N.Y., 1967).

guished from purely empirical or logical) factors in the law, but it takes a skeptical attitude toward endeavors designed to build a system of natural law based on absolute and immutable norms.

The influence of phenomenology and existentialism is also manifest in the work of the influential Mexican legal philosopher Luis Recaséns Siches (b. 1903). He believes, with the German philosophers Max Scheler and Nicolai Hartmann, that values are ideal objects which do not exist in space and time but which can nonetheless claim an objective and a priori validity.[59] Values such as truth, goodness, beauty, justice, and security belong to this realm of ideal things; they are not given to us through experience or sense perception, but contact with them is made through intuitive processes. Man is a citizen of two worlds, the world of nature and the world of values, and he endeavors to build a bridge between these two worlds.[60]

The law, according to Recaséns Siches, is not in itself a pure value but is a system of norms designed to realize certain values. Its primary purpose is to achieve security in the collective life; men created law because they wanted to have certainty and protection for their personal and property relationships. But while Recaséns Siches regards security as the primary aim of the law and the chief reason for its existence, it is not to him its supreme end. The highest and ultimate goal of the law is the realization of justice. However, while security and inviolable regularity are part of the very concept of law, this is not true of justice.[61] If the legal order does not represent an order of security, then it is not law of any sort; but an unjust law is nevertheless a law.

It is the task of juridical valuation, according to Recaséns Siches, to find the criteria of value which should be taken into account in molding the content of the positive law. He believes that the supreme value which ought to inspire all lawmaking is the protection of the individual person. He emphatically rejects the philosophies of transpersonalism and collectivism, which see in man an instrument to produce works of culture or to serve the ends of the state.[62] To him, the function of law is to guarantee liberty, personal inviolability, and a minimum of

[59] See Max Scheler, *Der Formalismus in der Ethik und die Materiale Wertethik*, 3rd ed. (Halle, 1927); Nicolai Hartmann, *Ethics*, transl. S. Coit (London, 1932), Vol. I.

[60] Luis Recaséns Siches, "Human Life, Society, and Law," in *Latin-American Legal Philosophy*, transl. G. Ireland *et al.* (Cambridge, Mass., 1948), pp. 18–26, 39.

[61] *Id.*, pp. 118–123.

[62] *Id.*, pp. 320–329. See in this connection the discussion of Radbruch's philosophy of law *supra* Sec. 34.

material comfort to the individual, so that he can develop his own personality and fulfill his "authentic" mission.[63]

Section 39. *Concluding Observations*

In the preceding chapters, some expanses of the jurisprudential universe have been traversed, while others have remained unexplored. Although only a fraction of the innumerable legal theories advanced by thinkers since the early days of civilization have been discussed, a great number of heterogeneous and conflicting views of the law have crossed our path. No substantial amount of agreement seems to have been reached by the legal philosophers as to the ends to be achieved by legal control and the means by which such control ought to be exercised. Must we, then, despair of discerning the ultimate truth concerning the law and give up the search for the ideas and principles which should guide the administration of justice? Is it possible for the jurisprudential scholar to do more than express a merely personal preference for some legal ideal that has caught his imagination and appeals to his emotions? Is there any rational thread running through the perplexing multitude of legal theories which were reviewed in the preceding chapters?

It may be observed that the large majority of these legal theories were normative in character in the sense that they were concerned with the paramount objectives to be pursued by social control through law. In other words, they dealt with the "ought" rather than with the "is" of the legal life. This characterization would be applicable to most theories of natural law, to the philosophy of transcendental idealism, to utilitarianism, and to certain versions of sociological jurisprudence. A colorful variety of standpoints were propagated by these diverse schools of jurisprudence with respect to the proper goals and ends of legal regulation. Equality, freedom, conformity to nature or God's will, happiness, social harmony and solidarity, the common good, security, promotion of culture—all of these and some others have at various times and by various thinkers been proclaimed as the supreme values of the law.[1] Is there any possibility of making a rational choice between these seemingly inconsistent views? Or must we conclude that these points of view signify nothing but the subjective and irrational

[63] "Society and the state must recognize the individual's moral autonomy and never treat him merely as a part of the social whole. A member of society, the individual is at the same time superior to society, because he is a person, which society can never be." Recaséns Siches, "Juridical Axiology in Ibero-America," 3 *Natural Law Forum* 135, at 155 (1958). A summary of his thought in Spanish is given by Recaséns Siches in *Panorama del Pensamiento Juridico en el Siglo XX* (Mexico City, 1963), Vol. I, pp. 488–547. See also his *Tratado General de Filosofía del Derecho*, 2d ed. (Mexico City, 1961).

[1] See the instructive list of "top values" in Arnold Brecht, *Political Theory* (Princeton, 1959), pp. 303–304.

predilections of their authors, with the consequence that no objective validity can be attributed to them?

On more sustained consideration, the picture does not appear to be as black as would seem to be true at first sight. If we accept the thesis that "truth is the summation of man's experience at any given moment," [2] and that the truth of the past may reveal itself to us as a partial and incomplete truth in the light of our new and wider experience, we shall gain a better perspective for appraising the history and present status of legal philosophy than if we pursue this task on the assumption of the nonrational character of valuation. The law is a large mansion with many halls, rooms, nooks, and corners. It is extremely hard to illuminate with a searchlight every room, nook, and corner at the same time, and this is especially true when the system of illumination, because of limitations of technological knowledge and experience, is inadequate, or at least imperfect. Instead of maintaining with the logical positivists that most of the historical philosophies of law must be branded as "nonsense" from a scientific point of view,[3] it would seem to be much more appropriate to argue that the most significant of these philosophies form valuable building stones in the total edifice of jurisprudence, even though each of these theories represents only a partial and limited truth. As the range of our knowledge increases, we must attempt to construct a synthetic jurisprudence which utilizes all of the numerous contributions of the past, even though we may find in the end that our picture of the institution of law in its totality must necessarily remain incomplete.

Proceeding from similar methodological and epistemological premises, Jerome Hall has made a strong plea for present-day scholastic efforts to create an "integrative jurisprudence." [4] He has castigated the "particularistic fallacy" in jurisprudence, especially the attempt to separate from one another value elements, factual elements, and form elements in legal theory. What is needed today, in the opinion of Hall, is an integration of analytical jurisprudence, realistic interpretations of social and cultural facts, and the valuable ingredients of natural-law doctrine. All of these divisions of jurisprudence are intimately related to, and dependent on, one another.[5] In Germany, the legal philosopher Erich Fechner, in pursuance of similar aims, has made a worthwhile attempt to trace the influence of numerous "ideal" and "real" factors

[2] Hyman Levy, *A Philosophy for a Modern Man* (New York, 1938), p. 309.

[3] See *supra* Sec. 24.

[4] Hall, "Integrative Jurisprudence," in *Studies in Jurisprudence and Criminal Theory* (New York, 1958), pp. 25–47; see also Hall, "Reason and Reality in Jurisprudence," 7 *Buffalo L. Rev.* 351, at 388–403 (1958). On Hall see also *supra* Sec. 38.

[5] Hall, "Integrative Jurisprudence," p. 44.

upon the development of the law and to demonstrate the connections and interrelations between these multifarious elements of the legal order.[6]

Such ideas and efforts should be deemed sound and constructive. Our historical experience has taught us that it is impossible to explain the institution of law in terms of any one single, absolute factor or cause. A number of social, economic, psychological, historical, and cultural components as well as a number of value judgments influence and condition the making and administration of the law. Although a certain social force or ideal of justice may exert a particularly strong impact upon a legal system at a particular period of history, it is impossible to analyze and explain legal control generally, either in terms of one exclusive sociological factor (such as power, national heritage, economics, psychology, or race) or in terms of one exclusive legal ideal (such as liberty, equality, security, or human happiness). The law is a complicated web, and it is the task of the science of jurisprudence to pull together the various strands which go into the making of this intricate fabric. Inasmuch as this task is one of immense dimensions and difficulties, a certain division of labor among jurisprudential scholars becomes an inescapable necessity for a proper performance of the task.

A few examples will suffice to exemplify the partial usefulness as well as the over-all inadequacy of single-track, one-dimensional theories of law. As far as the ends of legal control are concerned, it is becoming increasingly clear that equality, freedom, security, and the common good ought not to be hypostatized into absolutes which, singly and in isolation, figure as ultimate and exclusive legal ideals. All of these values, in combination and reciprocal dependence, must find their proper place in the building of a mature and developed legal system.[7] It would likewise be one-sided to contend that either reason as such or experience alone should be the lodestar guiding the administration of justice. As Pound has aptly stated, in the life of the law "reason has its part as well as experience. Jurists work out the jural postulates, the presuppositions as to relations and conduct, of civilized society in the time and place, and arrive in this way at authoritative starting points for legal reasoning. Experience is developed by reason on this basis, and reason is tested by experience." [8]

The historical school of law has made a significant contribution to

[6] Fechner, *Rechtsphilosophie: Soziologie und Metaphysik des Rechts*, 2d ed. (Tübingen, 1962).

[7] This position will be elaborated in Part II.

[8] Roscoe Pound, *Social Control through Law* (New Haven, 1942), p. 112.

legal knowledge by teaching that the national genius of a people may have its share in the creation of a great legal system.[9] It can hardly be denied, for example, that the Romans possessed a capacity for building a legal order characterized by rationality and coherence, which the Greeks, another gifted nation, lacked in considerable measure. English practical judgment and an intuitive sense for the exigencies of concrete situations contributed to the growth of the only legal system which was destined to become a true rival of the Roman law. The historical school erred, on the other hand, when it elevated national consciousness and peculiar national traits to the rank of the principal moving force in legal evolution. The historical school cannot adequately explain why Roman law, several centuries after its decline in the world of antiquity, was revived in a new and different civilization. Nor can the historical school account for the fact that the legal systems of Germany and Switzerland were transplanted to countries like Turkey and Japan and were made to work satisfactorily in those countries. These shortcomings of the historical view stem from an insufficient appreciation of the rational element in law, an element which makes it possible for one nation to utilize the legal system of another if this system is well constructed and serves the economic and social needs of the adopting nation. A truly great legal system will have qualities which raise it above the limitations of national traits and render it, at least in some measure, universal in spirit and practical value.

The Marxian doctrine of law, according to which the productive system of a society forms the substructure and base of its legal system, has demonstrated the close relation which exists between economics and law.[10] But this doctrine has paid insufficient attention to other elements of legal evolution. Power relations, basic biological facts, ethnological data, religious convictions, ideologies and value systems, and, last but not least, the plain dictates of reason must also be assigned their proper place in an adequate sociological analysis of the institution of law.[11] Furthermore, the Marxian doctrine has attributed a wholly disproportionate weight to the class aspects of legal control and has underemphasized the fact that the law very frequently represents an accommodation and adjustment of conflicting group interests.[12]

The positivist view, which identifies law with the commands of the sovereign, has brought to light a characteristic of law in the modern

[9] See *supra* Sec. 18.
[10] See *supra* Sec. 21.
[11] See Fechner, *supra* n. 6, pp. 53–111.
[12] See Pound, *Interpretations of Legal History* (Cambridge, Mass., 1930), pp. 92–115.

nation-state that can by no means be ignored. In its analytical version, positivism has also made us aware of the fact that a careful elucidation of legal conceptions from a technical-dogmatic point of view may beneficially affect the clarity and consistency of the legal order. On the other hand, the tendency of analytical positivism to divorce law from its psychological, ethical, economic, and social foundations, carried to an extreme by Hans Kelsen,[13] has imparted to us a misleading perspective with respect to the degree of autonomy and self-sufficiency that can be achieved by a legal system. We have to recognize that law cannot thrive in a hermetically sealed container, and that it cannot be blocked off from the nonlegal life around it without harmful consequences for the legal system.[14]

Furthermore, analytical positivism, especially in the form in which it was cast by Kelsen's Pure Theory of Law, has greatly exaggerated the character of law as a system of external compulsion. It has failed to give sufficient recognition to the observation of Hermann Heller, a German teacher of public law, that "in order to secure its power and the foundations of the social order, no government can rely solely on its compulsive apparatus. It must always strive for legitimization, i.e. it must attempt to incorporate the citizens into a community of will and values ready to respect its claim to power; it must also try to justify this claim to power by adherence to ideals, and to secure the inner acceptance of this claim by the subjects in the form of a recognition of normative duties." [15] When the legal sociologist N. S. Timasheff described law as "ethico-imperative coordination," he was referring to the fact that in any workable legal system there is a combination of organized power and group conviction for the purpose of securing effective realization of certain patterns of conduct.[16] It is quite wrong to overaccentuate the power element and to underrate the ethical and societal components in law.

Legal realism in its various versions has had the merit of correcting the one-sided normative and often conceptualist orientation of analytical jurisprudence by calling our attention to the frequent intrusion of subjective-emotional elements and environmental predispositions into the adjudicatory processes.[17] But legal realism has tended to give an insufficient weight to the role of legal rules and legal doctrine in the practical life of the law. It has sometimes (especially in the theories of Jerome Frank) offered to us an overdrawn picture of judicial arbitrari-

[13] On Kelsen see *supra* Sec. 26.

[14] See *infra* Sec. 46.

[15] *Staatslehre* (Leiden, 1934), pp. 87–88. On this problem see also *infra* Sec. 59.

[16] See *An Introduction to the Sociology of Law* (Cambridge, Mass., 1939), pp. 15, 245–248.

[17] See *supra* Secs. 32 and 33.

ness and cadi justice, and it has failed to provide us with a blueprint for maintaining that degree of rationality and consistency of law which is within the human powers of achievement.

Most unfortunate has been the overskeptical attitude exhibited toward the ultimate values of the legal order by certain representatives of positivism and legal realism, most notably by Hans Kelsen and Alf Ross.[18] Both of these men have regarded the problem of justice as a pseudoproblem, incapable of being intelligently approached by any effort at rational analysis. According to Ross, for example, the words "just" and "unjust" are entirely devoid of meaning for purposes of evaluating a legal rule or legal order. "Justice is no guide for the legislator." [19]

In reality, the problem of achieving justice in human relations is the most challenging and vital problem of social control through law, and it is one that is by no means impervious to the method of rational argument.[20] The use of this method does not demand unanimity or universality in the reaching of conclusions concerning the justice of a legal measure. It only demands that the problem be approached with detachment and broadmindedness, and that the relevant issues be appraised from all angles, with consideration of the interests and concerns of all people or groups affected by the regulation. An important guide for the rational evaluation of the justice of a law or set of laws is furnished by the status of our scientific knowledge with respect to the psychological, biological, or social assumptions underlying a piece of legal regulation.[21] No law dealing with racial relations, for example, can be just if it rests on a racial theory which the most advanced findings of biological science have demonstrated to be untenable.

The search for justice is unending and beset with many difficulties. It is, on the other hand, aided by certain objectively verifiable factors, such as the existence of cultural uniformities of valuation which draw their roots chiefly from the fact that affirmation of life strongly preponderates over life-negation in the history of the human race.[22] There is no reason for the jurisprudential scholar to shy away from probing into the foundations of a just legal order, even though the task may necessitate side excursions into the field of philosophical anthropology and other nonlegal disciplines. Concern for the "good society" cannot

[18] See *supra* Secs. 26 and 33.

[19] Alf Ross, *On Law and Justice* (Berkeley, 1959), p. 274.

[20] The connection between justice and rationality is discussed *infra* Sec. 48. On the problem of rationality in ethical science see also Morris R. Cohen, *Reason and Nature* (Glencoe, Ill., 1931), pp. 438–449.

[21] On the relationship between justice and truth see Brecht, *supra* n. 1, pp. 404–416.

[22] See *infra* Sec. 50 and Edgar Bodenheimer, "The Province of Jurisprudence," 46 *Corn. L. Q.* 1 (1960).

be disavowed by social science, and it should not be relegated by it to the politicians and legislators preoccupied with the pressing practical problems of the day. If the search for justice and reasonableness in law is abandoned by the best minds on the grounds that justice is a meaningless, chimerical, and irrational notion, then there is danger that the human race will fall back into a condition of barbarism and ignorance where unreason will prevail over rationality, and where the dark forces of prejudice may win the battle over humanitarian ideals and the forces of good will and benevolence.

There is one further comment to be made on the one-sidedness of many legal theories of the past. A partial explanation of this shortcoming must be sought in the historical conditions of their origin. Every historical epoch faces certain major problems of social control that require the resourcefulness of the best minds for solution. Many of the absolutist philosophies of law with which we have become acquainted represent attempts on the part of legal thinkers to call the attention of their contemporaries, perhaps in overdramatized fashion, to certain acute and burning problems of their day. Thus, in an era in which inequality in the social order was very marked and led to strong discontent threatening the foundations of society, the stress in the legal philosophy of perceptive thinkers was laid on the need for greater equality, although apologists of the *status quo* were not absent from the scene. In a social order endangered by chaos and anarchy, emphasis on order and legal security must be expected, as evidenced by the legal philosophy of Thomas Hobbes. An age of political absolutism may tend to accentuate, within the limits set by political control or even in disregard of these limits, the antidespotic elements in the law.

It is not possible to overcome the limitations of these precedents altogether. Following this historical introduction, no attempt will be made to delve into all of the numerous subjects and issues which may properly be said to fall into the domain of jurisprudence. In accordance with an almost universal tradition, dictated perhaps by necessity, a selective approach to the problems of jurisprudence will be chosen. Although a strong endeavor will be made to avoid one-sidedness and dogmatism in the presentation, the focus of the inquiry will be centered on those aspects and characteristics of the law which seem to warrant special attention and privileged consideration in our own time.

PART II

THE NATURE AND FUNCTIONS OF THE LAW

X

THE NEED FOR ORDER

Section 40. *Introduction*

The institution of law is analyzed in this work in terms of two basic concepts which are indispensable to an understanding of its formal structure and substantive objectives. These two basic concepts are order and justice. For purposes of analytic clarity, the relation of law to these two notions will be discussed in separate chapters. It will be shown later, however, that many significant contacts and cross-connections exist between the order element in law and the function of legal arrangements to promote justice in human relations.[1]

In the chapters which follow, a distinction will be made between order and security. The term order will be used in describing the formal structure of legal systems, especially the propensity of the law to employ general rules, standards, and principles in discharging its task of regulating human affairs. Security, on the other hand, will be treated as a material value which justice in social relations must seek to promote. Security, thus conceived, relates to the content of legal norms concerned with the protection of human beings against acts of aggression, spoliation, and depredation and, to a less urgent degree perhaps,

[1] See particularly *infra* Sec. 55.

with mitigating the effect of certain hardships, vicissitudes, and hazards incident to human existence.[2]

The concept of order, as used in this work, implies the existence of some measure of uniformity, continuity, and consistency in the operation of natural and social processes. The notion of disorder, on the other hand, indicates the prevalence of discontinuity and irregularity, an absence of intelligible patterns which manifests itself in the occurrence of unpredictable jumps from one state of affairs to another.[3] History shows that, wherever human beings have created units of political or social organization, they have attempted to avoid unregulated chaos and to establish some form of a livable order. This proclivity for orderly patterns of social life is by no means an arbitrary or "unnatural" striving of human beings. It will be shown in the next section that it is deeply rooted in the whole fabric of nature, of which human life is a part.

Section 41. *The Prevalence of Orderly Patterns in Nature*

An observation of the macrocosmic world around us reveals that it is not a whirlpool of chaotic, unpredictable events but exhibits significant uniformities and patterns of organization. At least in those manifestations of external nature which affect living beings on this planet decisively in their daily concerns, order appears to prevail over disorder, regularity over deviation, rule over exception. Our earth follows its course around the sun in an essentially fixed orbit and under conditions which have permitted the existence of life for millions of years. There is a dependable alternation of seasons, enabling men, during the food-producing seasons, to provide and store for the times of the year in which the soil is barren. The components of the physical universe, such as water, fire, and chemical substances, have certain more or less unvarying characteristics which permit us to rely on their permanent properties and to predict their effects in utilizing them for human purposes. Thus, water cooled below a certain temperature becomes a solid, and heated above a certain temperature turns into steam. Our entire control of nature is predicated on the existence of a number of determinate, often mathematically calculable, physical laws on whose uniform operation we rely in building tunnels, navigating ships and airplanes, controlling floods, and harnessing electricity for industrial and other purposes. The physical processes of living beings are likewise

[2] On the relation between justice and security see *infra* Sec. 53.

[3] A good analysis of the notions of order and disorder is found in Iredell Jenkins, "Justice as Ideal and Ideology," in *Justice* (NOMOS vol. VI), ed. C. J. Friedrich and J. W. Chapman (New York, 1963), pp. 204–209. For a discussion of the drawbacks of an overemphasis on order see *infra* Sec. 67.

subject to a number of laws. The normal metabolism of the human body, for instance, takes place according to an orderly system whereby only as many cells are produced as are required for the replacement of worn-out or damaged ones. Most illnesses show typical symptoms and follow characteristic courses; if this were not true, all medical therapy would rest on guesswork or on purely fortuitous success in treatment.

It is conceivable, on the other hand, that the normal "lawfulness" of natural events is subject to exceptions, or breakdowns in the orderly movements of nature. While such breakdowns may themselves come about through the operation of certain hitherto undiscovered laws, they appear to our incomplete understanding as cataclysmic events upsetting the normal order of things. Whole species of living creatures, like the Saurians of prehistoric times, have become extinct without a clearly ascertainable cause. The metabolic mechanisms of the living body may be disrupted by the disorderly, wasteful growth of cancerous tissue, which ignores all normal bounds. Illnesses that defy classification may befall the human body, or known forms of sickness may take an unusual and unforeseeable course which sets at naught long-established therapies and well-tested cures. We cannot even reject as wholly unimaginable the notion that, over a span of many millennia, the laws of nature themselves may be subject to change.

As long as the irregular and totally unpredictable occurrences in nature do not predominate over the recurrent regularity of physical phenomena, human beings are able to plan their lives in reliance on the foreseeable course of events. In order to visualize what the effect of the opposite state of affairs would be, one need only contemplate a general suspension of the laws of gravitation (with the result that matter would freely move around in space in all imaginable directions), or an interruption of the regular orbit of our planet (with the result that it would aimlessly roam around in space, perhaps colliding with other celestial bodies, or becoming removed from its life-sustaining source, the sun).[1] These examples show that the predominant regularity of the processes of nature is deeply beneficial to human life. In its absence, we would be living in a mad and deranged world, in which we would be tossed

[1] Amusing illustrations of what a discontinuous and lawless universe might look like are found in Henry Drummond, *Natural Law in the Spiritual World* (New York, 1889), pp. 38–39.

See also Rudolf Arnheim, "Order and Complexity in Landscape Design," in *The Concept of Order*, ed. P. G. Kuntz (Seattle, 1968), p. 153: "If there were no order in nature we could not profit from experience since what we have learned in the past serves us only if like things persist in looking alike and if similar consequences follow from similar causes."

around like puppets by a whimsical and wholly uncontrollable fate. All human attempts to lead a rational, meaningful, and purposeful life would be thwarted and frustrated in a chaotic universe.

It would seem that the foregoing account of lawfulness in nature is by no means inconsistent with the corrections and sometimes far-reaching revisions to which the classical theory of physics was subjected in the course of the twentieth century. Newton and other classical physicists regarded the law of causality in nature as absolute; they viewed the world of matter as free from all chance, and they were convinced that everything which happens in that world is conditioned by strict necessity.[2] The experimental findings in quantum physics, however, have strongly suggested the existence of indeterminacies and random occurrences in the microscopic processes of nature.

Some of the great innovators in modern physics, while admitting the validity of the latter-day empirical evidence, have refused to draw from it the theoretical conclusion that physical laws lack the element of inexorable certainty and uniform operation which was ascribed to them by classical physics. They have attributed apparent instances of lawless or acausal behavior in nature to the limitations of human powers of perception and the imperfections of our measuring instruments.[3] Another group of scientists has come to the conclusion that the movements of single atomic and subatomic particles appear to be governed largely by chance, and that law arises only as a statistical phenomenon in observing and predicting the average behavior of large aggregates of particles. According to this view, the new physics gives us laws of probability rather than strict and unvarying causal laws, leaving a margin of uncertainty in most physical phenomena which deal with only a small number of particles.[4]

An intermediate position between these two opposing theories has

[2] Ernst Zimmer, *The Revolution in Physics,* transl. H. S. Hatfield (New York, 1936), p. 5; David Bohm, *Causality and Chance in Modern Physics* (New York, 1957), pp. 36–37.

[3] Max Planck, *Where Is Science Going* (New York, 1932), pp. 99 ff. Planck says, on page 100: "I have not been able to find the slightest reason up to now, which would force us to give up the assumption of a strictly law-governed universe, whether it is a matter of trying to discover the nature of the physical or the spiritual forces around us." See also prologue by Albert Einstein, *id.*, p. 11, and the conversations with Einstein and other physicists reported by Werner Heisenberg, *Physics and Beyond,* transl. A. J. Pomerans (New York, 1971), pp. 80, 104–105.

[4] Niels Bohr, *Atomic Theory and the Description of Nature* (New York, 1934), p. 4; Bertrand Russell, *Philosophy* (New York, 1927), p. 294; Hermann Weyl, *The Open World* (New Haven, 1932), pp. 46–48, 51. Erwin Schrödinger, *Science and the Human Temperament,* transl. J. Murphy and W. H. Johnston (New York, 1935), pp. 41, 143–147, also inclines toward this position.

recently been proposed by some natural scientists. According to this position, it is not necessary to abandon or restrict the notion of causality in nature to the extent advocated by the protagonists of a purely statistical theory of physical laws. It is assumed that causal laws are in effect on a wide scale in atomic and subatomic processes, but that these laws lack the absolute necessity ascribed to them by Newtonian physics. They are sometimes interfered with by what appears to our understanding as chance contingencies arising outside the context in which these laws operate. Where large aggregates of particles are involved, however, such chance fluctuations tend to cancel out in such a way that the uniformities observable on the macroscopic level will often approximate the ineluctable necessity of deterministic laws.[5]

It would seem that neither of these three positions implies a denial of the view that order prevails over disorder in those large-scale operations of nature which affect the course of our lives and activities on this planet. The proponents of a statistical theory of physical laws are quite willing to concede that the movements of the planets, electrodynamic phenomena, as well as energy and momentum principles, lend themselves to extraordinary accuracy in forecasting future occurrences. In some other areas, however, small and irregular departures from law are actually observed.[6] Thus, even if it is necessary to deny absolute determinism because "nature exhibits loopholes in its uniformity and inflexibility," [7] the predominantly law-governed character of physical phenomena may still be affirmed.[8]

Section 42. *Order in Individual and Social Life*

As in nature, order plays a significant role in the life of human beings.

[5] This position was elaborated by Bohm, *supra* n. 2, Chs. I, IV, and V. Bohm's view is to some extent supported by Louis de Broglie in his Foreword, *id.*, pp. ix–x and by Max Born, *Natural Philosophy of Cause and Chance* (Oxford, 1949) pp. 3–4.

[6] See Schrödinger, *supra* n. 4, pp. 45, 145–146. Cf. also Friedrich Waismann, "Verifiability," in *Essays on Logic and Language*, ed. A. Flew (Oxford, 1955), p. 131.

[7] Jerome Frank, *Fate and Freedom* (New York, 1945), p. 145, who was inclined to magnify the element of chance and "free will" in nature. See in this connection also Frank, " 'Short of Sickness and Death': A Study of Moral Responsibility in Legal Criticism," 26 *New York University Law Rev.* 545, at 618 (1951).

[8] In biology, too, the operation of the laws of heredity is complemented and to some extent counteracted by random forms of gene mutation. There are many unsolved problems. Theodosius Dobzhanski, *Genetics and the Origin of Species* (New York, 1941), p. 8, observes that "nobody is audacious enough to believe himself in possession of the knowledge of the actual mechanisms of evolution." More recently, the same conclusion was reached by Ludwig von Bertalanffy, *Robots, Men, and Minds* (New York, 1967), pp. 80–88.

Most people follow certain habits in the conduct of their individual lives and organize their activities and leisure time in a certain way. In family life, certain patterns or customary ways are usually observed by the members of the family group. Meals are taken at certain hours; some chores are assigned to certain members of the family; some time is set aside for common family activities.

The volume of ordering, scheduling, and organization increases when we enter the world of commercial, industrial, and professional activities. The division of labor system results in the allocation of circumscribed tasks to the members of corporations, associations, and institutions engaged in such activities. Policies are devised governing the hiring and dismissal of employees. Fixed working hours are observed by most members of organizations. Production schedules are put into effect by industrial enterprises; procedures for the making of sales are followed by department stores and food markets. In colleges and universities, rules or general policies are enunciated governing admission of students, setting requirements for graduation, defining the employment conditions of faculty personnel, and establishing a framework for the administration of the institution.

In the society at large, the scope of normative regulation assumes even larger dimensions. It comprises, among many other subjects, the basic structure of family units, the making of contractual agreements, and the acquisition, disposition, and descent of property. The legal order also proscribes certain palpable manifestations of antisocial behavior such as acts of violence, larceny, and the grosser forms of deceit. Many societies enact basic laws which define the procedures of political decision-making and the fundamental rights of the citizens. As societies progress and become more populous, diversified, and complex, the measure of regulatory social control tends to increase. In a modern civilized state, the number of official and unofficial prescriptions designed to insure a smooth and orderly running of the major social processes is exceedingly large.

Even in aggregations of men haphazardly thrown together, there is a strong tendency to set up legal controls in order to keep the group from falling apart. It has been observed, for example, that prisoners of war will rapidly establish certain rules of conduct to govern life in the camp, sometimes without any initiative or intervention on the part of the camp administration.[1] Shipwrecked people cast ashore on an uninhabitated island will almost immediately proceed to fashion some improvised system of "law" and "government." In the frontier settle-

[1] See Helmut Coing, *Die Obersten Grundsätze des Rechts* (Heidelberg, 1947), p. 19.

ments of the American West, where nonorganic communities composed of people of very different backgrounds arose in isolation from the processes of organized government, voluntary associations were frequently created for the purpose of keeping law and order.[2]

The human striving for order is, however, often impeded by occasional and sometimes thwarted by pervasive manifestations of disorder. Such instances of disorder and disturbance of law appear to occur more frequently in the life of the human species than in inorganic nature. Men can be safely sent to, and returned from, the moon with the aid of computers whose correct operation is to a large extent insured by reliance on some unvarying laws of macrocosmic physics. The plannings of men in political, social, and economic life, on the other hand, are often interfered with by unpredictable turns in the sequence of events.[3] Disruptions of an existing order loom as a possibility in times of war or severe stress, and even within the framework of an effective order of law breaches of norms occur with considerable frequency. Far-reaching or sudden changes in the law may upset the expectations of men who have placed their faith on the status quo in conducting their vocational or personal affairs.

It cannot even be asserted that the search for order in human affairs is universally conceded to be a worthy objective of individual or social effort. There has always existed the "bohemian" type of personality who disdains pedantic orderliness and prides himself on the spontaneity and unregulated impulsiveness of his mode of life.[4] Especially some great creative artists have preferred the "romantic" way of existence to the planned and often routinized activities of the average citizen.[5] Furthermore, youth movements have arisen in the second half of the twentieth century in many countries which have openly proclaimed the superiority of spontaneous and improvised life-forms, responsive to sentiment and strength of emotions, over love of order and principled rationality. Rebellion against law and order is, and always has been, a facet of reality, although the extent and force of this rebellion

[2] See Frederick J. Turner, *The Frontier in American History* (New York, 1947), pp. 343–344.

[3] On the possible advantages of temporary states of disorder in accomplishing improvement and progress see Iredell Jenkins, "Justice as Ideal and Ideology," in *Justice* (NOMOS vol. VI), ed. C. J. Friedrich and J. W. Chapman (New York, 1963), pp. 207–214.

[4] For a discussion of the differences between "classical" and "romanticist" styles of life and their impact on attitudes towards law see Edgar Bodenheimer, "Classicism and Romanticism in the Law," 15 *U.C.L.A. Law Review* 915 (1968).

[5] Radbruch has shown that famous poets, writers, and musicians have often given expression to their aversion to the institution of law. Gustav Radbruch, *Einführung in die Rechtswissenschaft*, 11th ed. by K. Zweigert (Stuttgart, 1964), pp. 257–261.

has varied in different nations and under different historical circumstances.

In spite of the existence of opposition to the notions of law-controlled conduct and regulated social life, a study of history seems to reveal a preponderance of ordered over anomic forms of life.[6] Traditions, habits, entrenched customs, patterns of culture, social and legal norms have under ordinary circumstances served to contain the streams of the collective life within reasonably stable embankments. The Romans epitomized this aspect of social reality by the phrase *Ubi societas, ibi ius.* (Wherever there is a society, there is law.) The question should be raised as to where we can find the psychological roots for this human bent towards an ordered and structured existence.

Section 43. *The Psychological Roots of the Need for Order*

The proclivity for ordered relations among men may be traced chiefly to two inclinations or impulses which appear to be anchored deeply in the psyche of human beings. First, there is a human predisposition to repeat experiences or arrangements which in the past have been found to be satisfactory. Second, human beings tend to react unfavorably to conditions under which their relations are controlled by whim, caprice, and arbitrary power rather than by a reasonably stable determination of reciprocal rights and duties. The order element in law might also have an aesthetic component, which finds a related expression in the enjoyment of symmetry in art and rhythm in music; this hypothesis will not, however, be pursued further. Finally, the quest for order has a mental (noetic) ingredient which is not primarily psychological in origin but rooted in the structure of human thinking.[1]

The predisposition of living organisms to repeat earlier experiences was analyzed in a late work of Sigmund Freud.[2] He supported his thesis by examples from animal life and then proceeded to show that the conservative, past-oriented attitude also has a firm anchorage in the instinctual equipment of the child.

> Children will never tire of asking an adult to repeat a game that he has shown them or played with them, till he is too exhausted to go on. And if a child has been told a nice story, he will insist on hearing it over and over

[6] The term "anomic" derives from "anomie," a concept used by the French sociologist Emile Durkheim to denote a state of normlessness or unstructured growth. Emile Durkheim, *Suicide,* transl. J. A. Spaulding and G. Simpson (New York, 1951), pp. 15, 258, 271.

[1] The human need for thinking in terms of concepts and classifications is discussed *infra* Sec. 79.

[2] Sigmund Freud, "Beyond the Pleasure Principle," in *The Complete Psychological Works of Sigmund Freud,* transl. J. Strachey (London, 1955), XVIII, 34–43.

again rather than a new one; and he will remorselessly stipulate that the repetition shall be an identical one and will correct any alterations of which the narrator may be guilty.[3]

The desire to repeat earlier experiences is, in Freud's opinion, normally not as pronounced in the adult life of an individual as it is in the stage of childhood. Under the pressure of "external disturbing influences," [4] the human being is often pushed into the renunciation of habit and the acceptance of novelty and change. Freud was nevertheless convinced that the urge "to restore an earlier state of things" always remains present, with varying strength, in the later phases of human development and constitutes a manifestation of the inertia inherent in organic life.[5]

Although it is possible that Freud was prone to overemphasize the conservative, past-oriented bent in the psyche of men (the "compulsion to repeat," as he sometimes called it [6]), there can be little doubt that the force of inertia is strong in human individual and social life. Many men are creatures of habit; they are willing to accept the status quo without much grumbling or questioning, although a change in the existing state of affairs might well be beneficial to them.

But this human bent for continuity is not necessarily a symptom for mere stubborn inflexibility. It is probably rooted in the (conscious or unconscious) realization that without reliance on past experience we could not orient ourselves in this world and perhaps not even survive.[7] The child prefers a structured, predictable world to an unstructured, disorderly world because he would feel unsafe and helpless if that which he has learned and experienced in the past would not provide any guide to what happens in the future.[8] As we grow older, we are better able to distinguish between desirable and undesirable experiences and to discontinue the latter ones. Also, we usually become resourceful enough to cope with, and even enjoy, a certain amount of disorder. And yet, as Maslow has pointed out, "the average adult in our society

[3] *Id.*, p. 35. Young children, for the most part, also seem happier to see a familiar than an unfamiliar face.

[4] *Id.*, p. 38.

[5] *Id.*, pp. 22–23, 36–38.

[6] *Id.*, pp. 22–23, 35. Freud included the urge for order "by which it is ordained once for all when, where and how a thing shall be done so that on every similar occasion doubt and hesitation shall be avoided" in this category. *Civilization and Its Discontents*, transl. J. Riviere (New York, 1949), p. 55.

[7] On the beneficial aspects of order and continuity see Rudolf Arnheim, "Order and Complexity in Landscape Design," in *The Concept of Order*, ed. P. G. Kuntz (Seattle, 1968), pp. 153–154.

[8] Suggestive comments on the safety needs of the child are found in Abraham H. Maslow, *Motivation and Personality*, 2d ed. (New York, 1970), p. 40.

generally prefers a safe, orderly, predictable, lawful, organized world, which he can count on and in which unexpected, unmanageable, chaotic, and other dangerous things do not happen." [9]

It can hardly be disputed that there exists a connection between the inclination of human beings to favor continuity in the arrangements of life and their propensity to observe rules in their mutual relations. Whenever human conduct is controlled by legal norms, an element of recurrent regularity is introduced into social relations. A source of authority originating in the past is in a repetitive manner used as a guide to private or official action. Such adherence to regularized modes of behavior imparts to societal life a substantial measure of orderliness and stability.

Freud noted that the human predisposition towards ordered forms of life finds an explanation in the need of the human neurological system to save energy and reduce mental tension.[10] This thought furnishes us with a further answer to the question why rule-observance plays such a pronounced role in private, vocational, and governmental decision-making. If a certain way of coping with a problem has produced a satisfactory result, it is likely to be followed in the future without much further reflection.[11] An incessant rethinking and overthrowing of the modes of organizing one's activities and solving recurrent problems would place an undue and, in the long run, unbearable strain on the human resources of vitality. In the words of Morris Cohen, "all human beings have limited energies for the undertaking of anything that they have not done before." [12] Of course, when the accustomed ways of doing things have, in the course of time, become obsolete and inadequate, an effort will usually be made to replace them by more adequate and effective ones; and yet, experience has shown that the force of inertia often puts obstacles even in the path of sorely needed reforms.[13]

The tendency to subject social intercourse to the governance of rules has a further psychological foundation in the aversion of human beings to arbitrary treatment by their fellowmen. Employment relations, for example, would be governed largely by the employer's whim, caprice, or changing moods unless his employees' duties, as well as their rates of compensation and working hours, were fixed with a reasonable amount

[9] Maslow, *supra* n. 8, p. 41. Friedrich Nietzsche, who believed that men should "live dangerously," was scornful of this attitude.

[10] Freud, *Civilization and Its Discontents,* pp. 55–56. Freud added the observation that there are also many people who manifest a contrary leaning towards untidiness and sloppiness in their life and work. *Id.*, p. 56.

[11] See the comments on the psychological basis of *stare decisis infra* Sec. 86.

[12] Morris Cohen, *The Meaning of Human History* (La Salle, Ill., 1947), p. 59.

[13] For a more detailed treatment of the inertial component in law see Edgar Bodenheimer, *Power, Law, and Society* (New York, 1973), pp. 34–49.

of definiteness. Adherence to rules imparts a certain degree of predictability to human affairs, so that men will usually be in a position to know what is expected of them and what kinds of action they should avoid in order to protect themselves against adverse consequences.

It should be emphasized, however, that the governance of rules in human social relations does not, in and by itself, provide a safeguard against oppressive forms of domination. Even though the existence of rules is apt to eliminate extreme manifestations of caprice and bias in the treatment of human beings, the possibility remains that the rules are harsh, unreasonable, and inhumane in their content and operation. The order element in law, although it operates as a brake on arbitrary forms of power rule, is therefore not in itself sufficient to guarantee justice in the social order.[14]

Section 44. *Anarchy and Despotism*

There are two types of social pattern which are characterized by the absence of institutional devices for the creation and maintenance of orderly and regularized governmental processes. These two types are anarchy and despotism, in their pure and undiluted forms. While we hardly know of any societies which have (at least for any considerable length of time) operated on either a purely anarchic or totally despotic basis, a consideration of these extreme and "marginal" forms of political or social existence is helpful for an understanding of the nature and functions of law as an agency of social control.

Anarchy means a social condition in which no man is subject to the authority and command of another man or group of men. The philosophical basis of the anarchist creed is the postulate that "the primary obligation of man is autonomy, the refusal to be ruled." [1] Where anarchy reigns, there is no government which imposes obligatory prescriptions upon the members of the community; the affairs of men are supposed to be regulated solely by means of voluntary agreements and not, under any circumstances, by the use of coercive authority. In the words of Proudhon, "the government of man by man (under whatever name it is disguised) is oppression." [2]

Anarchist doctrine has appeared in individualistic as well as social versions.[3] The German writer Max Stirner advocated the untrammeled right of each person to follow his impulses and do whatever he desires.

[14] See *infra* Secs. 45 and 55.

[1] Robert Paul Wolff, *In Defense of Anarchism* (New York, 1970), p. 18.

[2] Pierre-Joseph Proudhon, *What Is Property,* transl. B. R. Tucker (Princeton, 1876), p. 272.

[3] A survey of anarchist theories is found in George Woodcock, *Anarchism: A History of Libertarian Ideas and Movements* (Cleveland, 1962), pp. 37–235.

He exalted the purely egoistic individual who realizes himself in combat with the collectivity and does not shrink even from violent crime as a means of accomplishing his aims.[4] The majority of anarchist thinkers, however, grounded their view of the best society on a socialized image of man. Proudhon, Bakunin, and Kropotkin were convinced that men were essentially good and community-minded, and that only the state and its institutions had corrupted them. They believed that human beings were imbued with a deep instinct of solidarity, and that after the forcible destruction of organized governments they would be able to live together under a perfect system of freedom, peace, and harmony. In place of the coercive state, there would exist a loose association of voluntary groups; everyone would be permitted to join the group of his choosing and to withdraw from it whenever he wished. Leo Tolstoy, too, believed in the possibility of a noncoercive society in which all members were united by the bonds of mutual love and fraternity. Cooperation and reciprocal aid, instead of ruthless competition, would become the supreme law in such a society.[5]

It is extremely unlikely, however, that the complete elimination of the state or other form of organized government would bring about an undisturbed, harmonious association between men. Order in human affairs, unfortunately, is not self-executing. Even if we assume that the majority of men are by nature social-minded and good, there is bound to be a noncooperative, aggressive minority against whom force may have to be used as an *ultima ratio*. A few unbalanced or criminal elements can easily disrupt a community. Recent statistics have shown that high economy prosperity—such as is envisaged by the anarchists as a foundation of their ideal society—does not in and of itself solve the problem of criminality. Irrespective of economic conditions, "men are of necessity liable to passions," [6] and even the normally rational individual may, under the spell of an uncontrolled impulse, commit an act that society cannot tolerate. Apart from the area of law enforcement, the view that "all authority is equally illegitimate" [7] will not enable a society to cope with many other tasks whose discharge is incumbent upon its members or functionaries. For example, in the management of governmental departments and productive enterprises, the exercise of authority and the issuance of commands will sometimes be necessary to insure effective results.

[4] Max Stirner, *The Ego and His Own*, transl. S. T. Byington (New York, 1963).
[5] On the ideas of Proudhon, Bakunin, Kropotkin, and Tolstoy see Woodcock, *supra* n. 3, pp. 106–235.
[6] Benedict Spinoza, *Tractatus Politicus*, transl. R. H. M. Elwes (London, 1895), ch. i. 5.
[7] Wolff, *supra* n. 1, p. 19.

It also cannot be assumed that a social pattern based on an anarchic form of liberty would bring about an equality of the opportunities and conditions under which men live and work.[8] There is a great deal of historical evidence that absence or weakness of organized government may easily produce states of hierarchical stratification or economic dependency. The prevalence of near-anarchy during certain periods of late antiquity and the early Middle Ages, for example, resulted in the formation of feudal forms of social order in which the freedom of the lower classes in society was severely limited. The convinced anarchist might reply that such phenomena should be attributed to the special sociological contingencies of a remote past, whose recurrence could be obviated by deliberate policies aiming at the improvement of human nature. At this juncture of mankind's history, the burden of substantiating this hope cannot be discharged with facility.

The extreme opposite of anarchy in social life would be a political system in which one man holds an unlimited, tyrannical sway over his fellow men. If the power of this man is exercised in a totally arbitrary and capricious way, we are confronted with the phenomenon of despotism in its pure form.

The pure despot issues his commands and prohibitions in accordance with his free and unrestricted will and in response to his casual whims or passing moods. One day he will sentence a man to death because he has stolen a horse; the following day he will perhaps acquit another horse thief because the man, when brought before him, tells an amusing story. The favorite courtier may suddenly find himself in jail because he has beaten the pasha at a chess game, and an influential writer may suffer the unforeseen fate of being burned at the stake because he has written a few sentences displeasing to the ruler. The actions of the pure despot are unpredictable because they follow no rational pattern and are not governed by ascertainable rules or policies.

Most of the historically known forms of despotism have not exhibited these extreme features of a purely arbitrary rule because firmly ingrained community or class customs ordinarily have been respected by the despot, and the property and family relations of private persons have usually not been disturbed. Moreover, a government invested with unlimited powers may give some direction to its actions by the enunciation of a political ideology which spells out at least the basic goals of governmental policies. However, the degree of predictability of official action supplied by such an ideological framework may be extremely limited. A good example is provided by a law enacted by the

[8] This assumption is made by Proudhon, *supra* n. 2, pp. 41, 228, 238, 264, 268, 272, 278.

revolutionary Eisner government, which was in power in Bavaria for a short period of time after World War I. The law read as follows: "Every violation of revolutionary principles will be punished. The measure of punishment is left to the free discretion of the judge." [9] While it was generally known that the political ideology of the government called for the establishment of a workers' republic and the creation of a socialist economy, the instability of the shifting specific "principles" directed toward the achievement of this general goal necessarily caught many unsuspecting persons in the meshes of this exceedingly vague statutory enactment. A prohibitive degree of uncertainty was also created by a penal law passed in Nazi Germany in 1935 for the purpose of implementing the political and racial ideology of the Hitler regime. This enactment authorized the judiciary to punish persons in analogy to existing laws if "the healthy sentiment of the people" called for such punishment.[10] This catchall phrase gave latitude to the judicial authorities to proceed against dissenters and members of disfavored groups without guidance by ascertainable standards.

These two examples are designed to show that a discretion which is practically indistinguishable from a grant of arbitrary power may be conferred upon a governmental organ in the outer garb of the law. It may be stated as a sociological truth that an increasing introduction of vague, rubberlike, overbroad, and imprecise provisions into the legal system (especially in the area of political criminal law) heralds an abdication of law in favor of some form of despotic rule. Such a condition will inevitably promote a feeling of danger and insecurity among the people.

> It is decisive for the behavior of the subjects within a despotic power structure that they cannot count on the behavior of the dominators as being in conformity with the general commands; for these commands do not bind their authors, and strict obedience to a general order issued yesterday may, today or tomorrow, call forth anger and revenge on the part of the dominators. Every individual must be aware of the passing whims of the dominators and try to adjust his conduct to them. Troubled and insecure must be the ordinary state of mind of the subjects in a power structure of this type.[11]

But there is a way to avoid such a condition. It is the way of the law.

Section 45. *The Element of Generality in Law*

Law, being essentially a restraint upon the exercise of arbitrary power,

[9] Quoted by Max Rümelin, *Rechtssicherheit* (Tübingen, 1924), p. 40.

[10] Statute of June 28, 1935, *German Official Legal Gazette* (*Reichsgesetzblatt*) 1935, pt. I, p. 839.

[11] Nicholas S. Timasheff, *Introduction to the Sociology of Law* (Cambridge, Mass., 1939), p. 216.

is hostile to anarchy as well as to despotism. To avoid the anarchy of numerous conflicting wills, law limits the power of private individuals. To avoid the tyranny of an arbitrary government, law curbs the power of the ruling authorities. It seeks to maintain a mean or balance between the two extreme forms of social life described in the preceding section, by introducing order and regularity into the dealings of private individuals as well as the operations of governmental organs. A complete and fully developed system of law would be equidistant from the two opposite poles of anarchy and despotism. By an effective system of private law, it would attempt to delimit the spheres of action of private individuals or groups so as to avoid or combat mutual encroachments, aggressive interferences with the liberties or possessions of others, and social strife. By an effective system of public law, it would endeavor to define and circumscribe the power of public officials in order to prevent or remedy improper tampering with guaranteed private spheres of interest and to forestall a tyrannical rule of whim. Thus, law in its purest and most perfect form would be realized in a social order in which the possibility of an arbitrary or oppressive use of power by private individuals and by the government has been successfully obviated.[1]

The attempt of the law to introduce ordered relations into the dealings of private individuals and groups as well as into the operations of government cannot be accomplished without *norms.* The term norm is derived from the Latin word *norma,* which means rule, standard, or yardstick. It is the hallmark of a norm—in the sense in which the notion is relevant to the legal process—that it contains a generalized pronouncement or directive which authorizes, prescribes, prohibits, or regulates human actions and conduct. The customary use of the term does not include a purely individualized and *ad hoc* disposition of a single, particular situation.[2]

It has been asserted that "if the leader of a small community decided each case not by rules but by his subjective sense of justice, few would go so far as to say that there was no law in the community."[3] This

[1] For an elaboration of the relation between power and law see *infra* Sec. 60.

[2] Kelsen describes the concrete command or order contained in a judicial decision (as distinguished from the statutory or judge-made rule applied in the case) as an "individual norm." Hans Kelsen, *The Pure Theory of Law,* 2d ed., transl. M. Knight (Berkeley and Los Angeles, 1967), p. 19. In a similar vein, Ross speaks of "singular" or "occasional" norms, such as a command addressed to John Smith to pay on demand a certain sum of money to James Brown. Alf Ross, *Directives and Norms* (New York, 1968), pp. 100, 110–112. This expanded use of the term norm, which is contrary to the etymological derivation as well as ordinary linguistic usage, has not been adopted in the present work.

[3] George W. Paton, *A Textbook of Jurisprudence,* 4th ed. by G. W. Paton and D. P. Derham (Oxford, 1972), p. 75.

statement cannot be accepted without qualifications. If the leader's "subjective sense of justice" manifested itself in such a way as to produce uniform decisions in essentially similar cases, a normative content would in fact have been imparted to his adjudications, and the standards of decision followed by him would soon become known to the community. If, on the other hand, the leader's subjective approach to the administration of justice resulted in irrational, whimsical, and totally unpredictable decisions, it is likely that the community would view this condition as the antithesis of an order of law. Law and arbitrariness, as we have seen, are opposites. As Sir Frederick Pollock correctly pointed out, "An exercise of merely capricious power, however great in relation to that which it acts upon, does not satisfy the general conception of law, whether it does or does not fit the words of any artificial definition. A despotic chief who paid no attention to anything but his own whim of the moment could hardly be said to administer justice even if he professed to decide the disputes of his subjects." [4]

The close connection between law and the notion of generality has often been noticed by philosophers and legal authors. "Law is always a general statement," said Aristotle.[5] Cicero emphasized that law was a *standard* by which justice and injustice are measured.[6] Several famous Roman jurists quoted in Justinian's *Corpus Juris* expressed similar opinions. Papinian described law as "a general precept." [7] Ulpian pointed out that legal prescriptions are not made for individual persons but have general application.[8] Paul, cognizant of the fact that legal rules usually apply to an indeterminate number of situations, observed that "to that which happens only once or twice, the legislators pay no attention." [9] At later periods of time, St. Thomas Aquinas spoke of law as a "measure and rule of acts," [10] and Jean-Jacques Rousseau remarked that "the object of laws is always general." [11]

A number of English and American writers have taken the same position. Thomas Hobbes understood by "civil laws" those *rules* which

[4] Pollock, *A First Book of Jurisprudence*, 6th ed. (London, 1929), p. 34.

[5] *The Nicomachean Ethics*, transl. H. Rackham (Loeb Classical Library ed., 1947), Bk. V. x. 4. Cf. also *Politics*, transl. E. Barker (Oxford, 1946), Bk. III, 1286a.

[6] *De Legibus*, transl. C. W. Keyes (Loeb Classical Library ed., 1928), Bk. I. vi. 19.

[7] Dig. I. 3. 1.

[8] Dig. I. 3. 8.

[9] Dig. I. 3. 6. Paul (Paulus) was one of the jurists of the late classical period of Roman law.

[10] *Summa Theologica*, transl. Fathers of the English Dominican Province (London, 1913–1925), Pt. II, 1st pt., qu. 90, art. 1.

[11] *The Social Contract*, transl. G. D. H. Cole (Everyman's Library ed., 1913), Bk. II, ch. 6.

the Commonwealth had imposed on its subjects." [12] John Austin held that only a command which "obliges *generally* to acts or forbearances of a *class*" is a law.[13] He pointed out that if Parliament prohibited the exportation of corn, either for a given period or indefinitely, a law would be established. But an order issued by Parliament to meet an impending scarcity, stopping the exportation of corn *then shipped and in port*, would not be a law, though issued by the sovereign legislature.[14] Sir Frederick Pollock said: "The sum of such rules as existing in a given commonwealth, under whatever particular forms, is what in common speech we understand by law." [15] That the concept of law presupposes the existence of rules has also been emphasized by John Chipman Gray,[16] Edwin W. Patterson,[17] H. L. A. Hart,[18] Lon L. Fuller,[19] and Charles Fried.[20]

The norms used by a legal system in guiding private and official conduct are of considerable variety. They may appear—as many of the preceding quotations demonstrate—in the typical form of *rules*, which may be described as modes of normative control characterized by a substantial degree of precision, concreteness, and definiteness. They may take the shape of *principles*, general pointers designed to insure fairness in the administration of justice which are broader and more vaguely formulated than rules, and which are often subject to far-reaching exceptions.[21] The processes of the law are also sometimes guided by *policies*, which may be defined as standards of decision aiming at the achievement of some determinate social, economic, or ideological goal.[22] Customs and community convictions also play a role in

[12] *Leviathan* (Everyman's Library ed., 1914), ch. xxvi.

[13] *The Province of Jurisprudence Determined*, 2d ed. (New York, 1861), p. 15.

[14] *Id.*, p. 11. This use of terminology leads to the result that special acts of a legislature, such as granting a pension or passport to a particular person or allowing an exemption from a tax law to a particular corporation cannot be regarded as law in the true sense. See Edgar Bodenheimer, "Separation of Powers and the Steel Seizure," 6 *Virginia Law Weekly Dicta* 103 (1955). Some of these special acts constitute dispensations from general laws, and most of them fit easily into the category of executive (as distinguished from legislative or lawmaking) measures.

[15] Pollock, *supra* n. 4, p. 8.

[16] *The Nature and Sources of the Law*, 2d ed. (New York, 1921), pp. 84, 161.

[17] *Jurisprudence* (Brooklyn, 1953), pp. 97–116.

[18] *The Concept of Law* (Oxford, 1961), pp. 15, 21.

[19] *The Morality of law*, rev. ed. (New Haven, 1969), pp. 46–49, 53.

[20] *An Anatomy of Values* (Cambridge, Mass., 1970), p. 124.

[21] On the distinction between rules and principles see Ronald M. Dworkin, "The Model of Rules," in *Law, Reason, and Justice*, ed. G. Hughes (New York, 1969), pp. 13–24.

[22] Dworkin, *supra* n. 21, p. 14, defines policy as "that kind of standard that sets out a goal to be reached, generally an improvement in some economic, political, or social feature of the community."

the life of the law. All of these additional standards of conduct and decision-making share with legal rules the attribute of generality. They consist of patterns or yardsticks for shaping or judging human behavior in a multitude of instances rather than of transient and specific directions for dealing with a single, individual situation.[23]

For semantic as well as functional reasons, it seems desirable to insist that the element of generality is an important ingredient of the concept of law. First, this approach produces a linguistic uniformity in the use of the term law.[24] In the physical sciences, the word law is reserved for the description of uniform causal patterns or at least statistical regularities in the operations of nature, and it is not applied to unusual events inexplicable in terms of repetitive experience. There is a great deal of merit in preserving the basic connotation of a linguistic symbol for all or most of the uses of the term. Tolstoy pointed out, "The only means for the mental intercourse of men is the word, and, to make this intercourse possible, words have to be used in such a way as to evoke in all men corresponding and exact concepts. But if it is possible to use words at random, and to understand by them anything we may think of, it is better not to speak at all but to indicate everything by signs." [25] Although this goal of semantic uniformity can seldom be reached in full measure, there appears to exist no convincing reason why the term law should be employed in the social sciences in a sense which differs very materially from its meaning in the natural sciences. We should fully concur in Justice Cardozo's statement that "as in the processes of nature, we give the name of law to *uniformity of succession.*" [26]

Second, in imparting to human-made laws a meaning coterminous with that of physical laws, we not only retain consistency in the use of a linguistic term but also impress upon the mind a very important functional characteristic of societal law. By applying a uniform standard of adjudication to an indefinite number of equal or closely similar situations, we introduce some measure of consistency, coherence, and objectivity into the legal process which promotes internal peace

[23] A discussion of the various types of norms serving as sources of adjudication is found *infra* chs. XV and XVI.

[24] It is of interest to observe that, as a matter of history, there was a close connection between the origins of Ionian philosophy, inaugurating the scientific description of physical laws in Western civilization, and the birth of the constitutional city-state showing the faint beginnings of the rule of law in society. See Werner Jaeger, *Paideia: The Ideals of Greek Culture*, 2d ed. (New York, 1945), I, 110.

[25] "On Life," in *Complete Works of Count Tolstoy*, transl. L. Wiener (Boston, 1904), XVI, 233.

[26] Benjamin N. Cardozo, *The Growth of the Law* (New Haven, 1924), p. 40 (italics mine).

and lays the groundwork for a fair and impartial administration of justice. As Morris Cohen has well said, "The law cannot abandon the effort at consistency. We must remember that the law always defeats the expectation of at least one party in every lawsuit. To maintain its prestige, in spite of that, requires such persistent and conspicuous efforts at impartiality that even the defeated party will be impressed." [27] Without the restraining influence of rules, standards, and principles, the pressures on judges and other officials for a disposition of cases on a subjective basis would become unbearably strong.[28] Furthermore, because of the generality of law, "men can be enabled to predict the legal consequences of situations that have not yet been litigated, and hence can plan their conduct for a future which is thereby rendered less uncertain." [29] If law would consist solely or primarily of individualized *ad hoc* dispositions, it could not fulfill its function of imparting structure to social life and to guarantee to human beings a certain amount of security, freedom and equality.[30] It is therefore not surprising to find that the empirical materials with which historical, sociological, analytical, and comparative jurisprudence has dealt have for the most part consisted of legislative, judicial, and customary rules, principles of public policy, standards of proper social conduct, and techniques of adjudication.

It is clear, on the other hand, that a legal system does not exhaust its significance in the recognition and promulgation of rules, principles, and other norms forming the prescriptive structure of the law. A process of concretization and individualization takes place in the application, implementation, and enforcement of legal norms. A general rule providing that a person guilty of a breach of contract shall be liable in damages may become a source for a concrete judicial decision

[27] Morris R. Cohen, "Law and Scientific Method," in *Law and the Social Order* (New York, 1933), p. 194.

[28] The proposals by Jerome Frank for an "unblindfolding" and a greater "individualization" of justice must be assessed in the light of this danger. See Jerome Frank, *Courts on Trial* (Princeton, 1949), pp. 378 ff., 423. While Frank recognizes the desirability of general rules as pointers or guideposts, he wishes to inject a large dose of judicial discretion into all or most legal rules, making them as pliant as possible. It would seem that his approach overestimates the scope of "uniqueness" in legal controversies, although one may go along with him in recognizing the necessity for certain areas of discretion in the adjudicative process.

[29] Patterson, *supra* n. 17, p. 97. See also *id.*, pp. 101–106 for an account of the advantages of generality in law.

[30] See *infra* Secs. 51–53. The sociological constellations under which the element of generality in law is deemphasized in legal theory and an attempt is made to blur the line between law and governmental discretion are excellently analyzed by Franz Neumann, "The Change in the Function of Law in Modern Society," in *The Democratic and the Authoritarian State* (Glencoe, Ill., 1957), pp. 42–66.

ordering *A* to pay $1000 to *B* for his failure to perform a contractual commitment. An enactment authorizing the establishment of legal services for indigent persons will become implemented by the opening of legal aid offices in various communities. A statute granting social security benefits to persons over 65 years of age is carried out by specific administrative decisions awarding monthly sums of money to qualified applicants. A penal law defining in general terms the elements of a robbery is enforced in an individual case by the arrest of a person suspected of having committed this crime and perhaps, at a subsequent stage of the proceedings, by the filing of an indictment.

John Austin took the position that the term law should be restricted to the general pronouncements of the sovereign power and withheld from specific court judgments and administrative determinations.[31] On the other hand, it has also been argued that the law consists of the sum total of individual decisions handed down by courts and administrative agencies.[32] For reasons already discussed, the Austinian position appears preferable. When we study the "law" or "legal norms" in effect in a country, we have in mind the rules, statutes, regulations, and other general precepts designed to control private and official conduct. The application, implementation, and enforcement of the law should be distinguished from the normative structure which constitutes the backbone of the law.

A legal system in its actual operation cannot, of course, be fully understood and analyzed without reference to the concretizations of the normative structure which take place in the daily work of courts, law enforcement agencies, and administrative organs. Whether an abstract legal proposition is effective in shaping human conduct or providing a source for legal decision-making can only be determined by observing the law in action.[33] Whether a certain enforcement practice is proper and lawful, whether it should be upheld or invalidated by the courts, can only be ascertained by measuring the practice against the normative standards set up for the guidance of official action. Thus, the glance of the student of a legal system must necessarily wander back and forth between the "rule" part of the law and the execution of the rules in the work of the courts and other law-related agencies.

It may thus be stated that a legal system, in its totality, is an amalgam of generalized norms and individualized acts of application and en-

[31] Austin, *supra* n. 13, p. 12.

[32] Jerome Frank, *Law and the Modern Mind* (New York, 1935), pp. 46, 128; Frank, "Are Judges Human," 80 *University of Pennsylvania Law Review* 17, at 41 (1931). The same approach is implicit in Justice Holmes' characterization of law as a prediction of what courts will do *in fact*. See *supra* Sec. 31.

[33] See in this connection Harry W. Jones, *The Efficacy of Law* (Evanston, 1969), pp. 3–5, 9–12.

forcement. It has a normative as well as a factual side.[34] The normative structure may be said to constitute an aggregate of "oughts," in the sense that the norms demand compliance but are not always observed or carried out in actual life.[35] A penal law prohibiting larceny, for example, prescribes that a person who appropriates a chattel belonging to another *ought* to be punished; it does not declare that, as a matter of fact, he *will* be punished, because we know from experience that he may escape detection or be acquitted for lack of sufficient proof. On the other hand, the apprehension and arrest of an offender by a policeman, the issuance of an injunction against an unlawful labor practice, the levying of execution into a debtor's property by a sheriff are factual occurrences in the world of empirical reality.

The normative and factual aspects of the legal order condition each other and interact closely with one another. There would be no legal system in any meaningful sense of the term in the absence of either of these elements. If the "oughts" contained in the prescriptive part of the law remain on paper and do not influence human behavior, law becomes a myth rather than a reality. If, on the other hand, neither private persons nor the officers of the government are guided in their actions by any rules, principles, or maxims of socially desirable conduct, then arbitrariness rather than law becomes the reigning force in society.[36] Thus existence as well as a substantial degree of observance of the normative system are an indispensable prerequisite for the rule of law in society.

It may be concluded from the preceding observations that a legal system acts as a mediator between social ideals and social reality. In terms of average social experience, it may be said to hover in a twilight zone between normativity and actuality.[37] To the extent that it makes claims for desired behavior which are disappointed by disregard of its

[34] This has been strongly emphasized by Jerome Hall, *Living Law of Democratic Society* (Indianapolis, 1949), chs. II and III; Hall, *Foundations of Jurisprudence* (Indianapolis, 1973), pp. 153–168; On Hall see also *supra* Sec. 38.

[35] See Kelsen, *supra* n. 2, pp. 6, 10, 76–78. On the other hand, it is also correct, from a different perspective, to describe a system of legal norms as an "is," in the sense that it represents the law actually in force in a country, as distinguished from an ideal body of law devised by some philosopher as a blueprint for a perfect society. See, for example, Gray, *supra* n. 16, p. 94.

[36] Karl Llewellyn, in the first edition of his *Bramble Bush* (New York, 1930), p. 12, stated that what the officials of the law "do about disputes is, to my mind, the law itself." He corrected this statement in a later edition (New York, 1951), p. 9, in the realization that it did not take proper account of the standards and norms designed to shape and control official conduct in an endeavor to prevent arbitrary and oppressive actions.

[37] See in this connection Mario Lins, *The Philosophy of Law: Its Epistemological Problems* (Rio de Janeiro, 1971), pp. 37–38. It might be added to his observations that a realized or partly realized ideal has become an empirical part of social reality.

standards and rules, it remains a normative postulate. To the extent that it is observed and enforced in the political and social life of a community, it becomes an effective molding force for actual human behavior, on the private as well as official level.

Section 46. *The Striving of the Law for Independence and Autonomy*

In order to endow the law with logical consistency, predictability, and stability, highly developed legal systems strive to create an autonomous apparatus of legal concepts, legal techniques, and legal norms. There prevails, at least during certain important epochs in the life of a legal system, a tendency to set up the law as a self-sufficient science, resting completely on its own foundations and insulating itself from the external influences of politics, ethics, and economics. The law during this period of its development attempts to fashion the course of its growth primarily from within and to deduce answers to legal questions as much as possible from the logic of its own notions and concepts. By building up a technical apparatus and an internal organization, creating a special caste of legal experts characterized by specialized training and knowledge, and elaborating an indigenous legal technique and method, the law seeks to guarantee and preserve its own autonomy. This does not mean that the law stands still or fails to develop and improve, but an attempt is made to make it lead a life of its own. Thus, the facts of a legal controversy are often rendered amenable to judicial cognition and analysis only after having been molded to fit the requirements of the technical system. The idea underlying this process is apparently that the law shall be freed from exposure to political or other outside pressures, immunized against dependence on fluctuating economic currents, removed from the impact of transient social trends, and armored by a protective covering against the danger of improper bias and personal administration of justice.[1] The insulation may also come in part from the inertia of those of the judiciary and the legal profession who are content to work with the tools at hand and refuse to look beyond at the world at large.

This endeavor to enthrone the law as an untouchable goddess residing in a sealed-off enclosure can be observed in certain periods of Roman as well as English legal history. As Fritz Schulz pointed out,

[1] See Rudolph von Jhering, *Der Geist des Römischen Rechts*, 8th ed., Vol. II, pt. 1, pp. 19–22. The most elaborate attempt to portray the legal system as an autonomous, self-contained body, separate and apart from the social and economic forces which are operative in creating and modifying it, is Hans Kelsen's *Pure Theory of Law*, 2d ed. transl. M. Knight (Berkeley and Los Angeles, 1967). On Kelsen see *supra* Sec. 26.

"Private Roman law as portrayed by classical writers attains an extraordinary, almost logical, definiteness. The number of juristic conceptions which play a part in it is comparatively small, as all which pertain to special or non-Roman variations are set aside. The legal rules take on the character of apodictic truths, as any limitations imposed by public law or extra-legal duties are ignored." [2] A highly technical system of pleading was evolved during the period of the formulary procedure in Rome, with the result that the stereotyped and thoroughly formalized rules of pleading often did not comport with the demands of life and common sense.

In English law, too, some attempts to establish a "pure" system of law, characterized chiefly by the virtue of internal self-consistency, may be observed in the course of its history. As F. W. Maitland pointed out, "Our old lawyers were fond of declaring that 'the law will suffer a mischief rather than an inconvenience,' by which they meant that it will suffer a practical hardship rather than inconsistency or logical flaw." [3] In the period when the common-law system of actions and pleading reached its culmination, the needs of justice and utility were often sacrificed to the postulate of undeviating consistency with established principles and the rigidities of legalistic-technical orthodoxy. The history of the action of ejectment in England and the United States is a good example of the long-continued use of fictional devices, wholly divorced from the utilitarian objectives of the action, in order to preserve continuity of doctrine regardless of the changing needs of remedial justice.[4]

The attempt to confer upon law the status of an autonomous discipline is meritorious as long as it is not carried beyond certain permissible limits. The law should neither be identified with politics nor become drowned in a whirlpool of ephemeral expediency.[5] Many of its institutions are designed to protect the security of rights and expectations against tampering by powerful forces that seek to weaken the integrity of the legal structure for reasons of public or private advantage. In order to accomplish this objective, the law must be able to resist the im-

[2] *Principles of Roman Law*, transl. M. Wolff (Oxford, 1936), pp. 34–35.

[3] Introduction to *Publications of the Selden Society*, XVII (London, 1903), xviii–xix (Vol. I of the Yearbooks of Edw. II).

[4] On the history of ejectment see William Blackstone, *Commentaries on the Laws of England*, ed. T. M. Cooley (Chicago, 1899), Bk. III, pp. 200–207; William S. Holdsworth, *A History of English Law*, 3rd ed. (Boston, 1925), Vol. VII, pp. 10–13.

[5] Judith N. Shklar, *Legalism* (Cambridge, Mass., 1964), pp. 143–144, stresses the role of law as a political instrument without, however, carrying the fight against legalism to an extreme position. Cf. Shklar, "In Defense of Legalism," 19 *Journal of Legal Education* 51 (1966).

pact of political or economic pressures that seek to convert might into right. This does not mean, however, that the legal fabric can remain untouched by the play of social forces that shape and transform the texture of life in society. More particularly, the law cannot escape the effect of changes in the moral and social consciousness of the community. A juristic dogmatism which sets out to prove the inevitability of a legal result without any regard to its ethical and practical consequences is often self-defeating and deceptive.

While a system of concepts and rules is necessary in order to guarantee the reign of law in society, it must always be kept in mind that such rules and concepts were created in order to meet the needs of life, and that care must be taken lest life be unnecessarily and senselessly forced into the straitjacket of an overrigid legal order.[6] Law cannot be reduced to a system of mathematics or scholastic logic. While its normative standards and generalizations will prevent the law from becoming excessively fluid or fleeting, its arrangements are subject to periodic appraisals in the light of the necessities of human social life and the requirements of fairness and justice. Thus, the autonomy of the law can be a partial one only. An attempt to keep the law completely insulated from the external social forces beating against the armor by which the law seeks to protect its internal structure will necessarily be doomed to failure.

[6] See *infra* Sec. 79.

XI

THE QUEST FOR JUSTICE

Section 47. *The Protean Face of Justice*

The order element in law is concerned with the adoption by a group or political society of certain rules of organization and standards of conduct. These rules and standards are designed to give pattern and structure to the amorphous mass of human activities and thus to avoid unregulated chaos. Thus understood, the concept of order relates to the forms of social life rather than to its substance and quality. A description of the structural properties of a legal system tells us nothing about the content and pragmatic consequences of the norms and institutional arrangements which make up the fabric of the law.

The order function of law takes care lest arbitrary and wholly unpredictable ways of dealing with human beings exert an unsettling effect on social life. It must be realized, however, that the adoption of orderly, well-defined rules guaranteeing a certain security of expectation is hardly sufficient to create a satisfactory mode of social existence. This is true chiefly for the reason that elimination of randomness in human relations provides no safeguard against a regime of unreasonable, unworkable, or oppressive rules. A family might put into effect an or-

der according to which all family decisions are entrusted to the youngest child and are to be faithfully obeyed by all members of the family. A state might adopt a legal system in which judges are selected on the basis of the amount of property they possess or in which bribery and fraud are rewarded, while integrity is proscribed. A government might subject an unpopular or disfavored minority to clearly articulated and evenhandedly enforced deprivations and disqualifications.

It is the notion of *justice* which directs our attention to the fairness and reasonableness of the rules, principles, and standards that are the component parts of the normative edifice. While order, as we have seen, focuses on the formal structure of the social and legal system, justice looks to the content of legal norms and institutional arrangements, their effect upon human beings, and their worth in terms of their contribution to human happiness and the building of civilizations. Speaking of justice in the broadest and most general terms, it might be said that justice is concerned with the fitness of a group order or social system for the task of accomplishing its essential objectives. Without pretense of offering a comprehensive definition, it might be suggested that it is the aim of justice to satisfy the reasonable needs and claims of individuals and at the same time promote productive effort and that degree of social cohesion which is necessary to maintain a civilized social existence.[1]

It is by no means to be assumed that this description of the general meaning of justice will be accepted by everyone who has given thought to the subject. Even those favorably inclined toward the basic idea underlying the formula might interpret the "reasonable needs and claims of individuals" in widely divergent ways. They might also disagree on the means of serving the common good by promoting productive effort and the extent to which social cohesion is required or desirable.

Justice has a Protean face, capable of change, readily assuming different shapes, and endowed with highly variable features. When we look deeply into this face, trying to unravel the secrets hidden behind its outward appearance, bewilderment is apt to befall us. On the theoretical level of philosophy, many diverse and discrepant views of "true" justice, often claiming absolute validity, have been set forth by thinkers and jurists in the course of the centuries. On the pragmatic level of societal orders, many different approaches have been taken towards solving the problem of the "good society." A brief review of influential theories and historically significant social systems exhibiting inconsistent attitudes towards the accomplishment of justice may be helpful in pointing up the perplexing dimensions of the problem.

[1] For a more detailed analysis of the concept of justice see *infra* Sec. 49.

Plato, in his *Republic*, fashioned a doctrine of the just commonwealth strongly imbued with collectivistic ideals. In his view, justice consists in a harmonious relation between the various parts of the social organism. Every citizen must do his duty in the place where he belongs and do the thing for which his nature is best adapted. Since Plato's state is a class state, divided into rulers, auxiliaries, and the producing class, Platonic justice signifies that the members of each class must attend to their own business and not meddle with the business of the members of another class. Some people are born to rule, some to assist the rulers in the discharge of their functions, and others are destined to be farmers or artisans or traders. A man who attempts to govern his fellow men when he is only fit to be a farmer or craftsman must be deemed not only foolish but also unjust. The rulers of the state, assisted by their aides, must see to it that each person finds his proper station in life, and that he adequately performs the duties of this station. The idea underlying this concept of justice rests on the assumption that an individual is not an isolated self, free to do whatever he likes, but a dependent member of a universal order who must subordinate his personal wishes and preferences to the organic unity of the collective whole.[2]

A different approach to the problem was taken by Aristotle. In his opinion, justice consists in "some sort of equality." [3] In the distributive aspects of its meaning, justice demands that the things of this world shall be equitably allotted to the members of a community according to the principle of proportionate equality. Equal things shall be given to equal persons, unequal things to unequal persons. The standard which Aristotle proposed for the measurement of equality was that of merit and civic excellence. If *X* is twice as deserving as *Y*, his share should be twice as large.[4]

Although Aristotle emphasized equality as a yardstick of justice, he was nonetheless willing to tolerate wide inequalities in the social structure. He accepted the rule of the truly superior man, if such a person could be found to govern the commonwealth. He defended the institution of slavery, although with some misgivings and qualifications. He deemed the dominion of the male over the female in the organization of the family to be natural and necessary. Thus his notion of propor-

[2] Plato, *The Republic*, transl. A. D. Lindsay (Everyman's Library ed., 1950), Bk. IV and *supra* Sec. 2.

[3] Aristotle, *The Politics*, transl. E. Barker (Oxford, 1946), Bk. III. 1282b.

[4] Aristotle, *The Nicomachean Ethics*, transl. H. Rackham (Loeb Classical Library ed., 1934), Bk. V. iii. 6. From distributive justice Aristotle distinguished corrective justice. If a member of the community has encroached upon the rights, privileges, or property of another member, corrective justice will return to the victim that which belonged to him or compensate him for his loss. *Id.* Bk. V. iv. On distributive and corrective justice see also *infra* Sec. 49.

tionate equality was not inconsistent with social stratification and the recognition of privilege.[5]

A much more egalitarian view of justice was advocated by the American sociologist Lester Ward. Justice, in Ward's opinion, consists in the "enforcement by society of an artificial equality in social conditions which are naturally unequal." [6] He favored the adoption of a social policy designed to achieve an unlimited equalization of opportunity for all members of a community or state. Every individual, regardless of sex, race, nationality, class, or social origin, was to be given a full chance to make good in life and lead a worthwhile existence. It was Ward's belief that this condition could be achieved only by deliberate educational schemes aimed at equalizing intelligence among the members of the upper and lower classes in society. Ward was convinced that intelligence was unrelated to class origin and depended strongly on environmental factors, especially on access to all available sources of information and on opening up to all persons the heritage of past wisdom and the treasure of present knowledge.[7]

More far-reaching schemes for the equalization of resources and economic status were propounded by Karl Marx and Frederick Engels. They decried the existing disparities in the level of income and proposed public ownership of the means of production as a remedy for economic inequality. Furthermore, they envisaged the possibility of a future order of society in which men would be truly equal in the sense that all their individual needs could be fulfilled.[8]

A fundamentally divergent attitude toward justice was taken by the English philosopher and sociologist Herbert Spencer. The supreme value he linked to the idea of justice was not equality, but *freedom.* Every individual, Spencer argued, has the right to reap whatever benefits he can derive from his nature and capabilities. Each man should be allowed to assert his selfhood, acquire property, carry on a business or vocation of his choosing, move freely from place to place, and express his thoughts and religious feelings without hindrance. The only limitation upon the exercise of these rights and freedoms which Spencer wished to recognize was the individual's consciousness of, and respect for, the unimpeded activities of other men, who have like claims to freedom. The liberty of each is to be limited only by the equal liberties of all. This conception of justice was cast by Spencer into the mold

[5] Aristotle, *supra* n. 3, Bk. III. 1284a; Bk. I, 1253b–1255b, 1259b.
[6] Lester F. Ward, *Applied Sociology* (Boston, 1906), p. 22.
[7] *Id.*, pp. 93–103, 281.
[8] See particularly Karl Marx, *Critique of the Gotha Program,* ed. C. P. Dutt (New York, 1966), p. 10.

of a celebrated formula: "Every man is free to do that which he wills, provided he infringes not the equal freedom of any other man." [9]

Immanuel Kant took a position similar to that of Spencer. He, too, used the concept of liberty for the purpose of appraising the adequacy and worth of a legal system. Proceeding from the premise that liberty was the only original, natural right belonging to each human being, he defined justice as "the aggregate of those conditions under which the will of one person can be conjoined with the will of another in accordance with a universal law of freedom." [10]

Most of the theories discussed so far made either equality or freedom the focal point for approaching the problem of justice. A Scottish philosopher, William Sorley, claimed that no satisfactory doctrine of justice could be developed without finding a place for both equality and freedom in the scheme of societal organization. He pointed out that liberty and equality may easily come into opposition, since an extension of liberty does not necessarily promote human equality. A social system fixing upon freedom from interference with private activity as the chief principle of governmental policy may produce a highly inegalitarian form of society. An exclusive emphasis on equality, on the other hand, might remove the stimulus for excellence which aids the progress of civilization. Sorley sought to bring the ideal of freedom into harmony with a constructive form of equality by proposing the following basic maxims of social policy: (1) The development and direction of human mental and physical powers by a system of universal education; (2) providing such access to the materials and instruments of production as would give suitable employment to people; and (3) creating physical and social surroundings which will aid, not hamper, individual development.[11]

The theory of justice developed by John Rawls constitutes another attempt to combine the values of freedom and equality in an analysis of the meaning of justice. Rawls' conception of justice is composed of two cardinal principles: (1) each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others; and (2) social and economic inequalities are to be arranged so that they can reasonably be expected to be to everyone's advantage, and in such a manner that the positions and offices to which they attach are open to all. These two principles are not, however, to be accorded equal weight in social policy: the first principle has priority over the second.

[9] Herbert Spencer, *Justice* (New York, 1891), p. 46. On Spencer see also *supra* Sec. 20.

[10] Immanuel Kant, *The Metaphysical Elements of Justice*, transl. J. Ladd (Indianapolis, 1965), p. 34.

[11] William S. Sorley, *The Moral Life* (Cambridge, Eng., 1911), pp. 95–113.

This means that liberty can be restricted only for the sake of liberty itself, and that the claims of social and economic equality must yield ground if their realization is not likely to lead to an increase in the total amount of liberty for all.[12]

Freedom and equality are not the only lodestars that have been proposed as the principal guiding lights for lawmakers entrusted with the creation of an adequate legal order. The view has also been expressed that maintenance of the general security must be the predominant thrust of legislative effort. Such elevation of security to the rank of a supreme legal value has, for the most part, not been advocated in the name of justice, but under some other motto, such as utility or the public interest. If justice, however, is understood in a broad sense as the endeavor to build, through the use of legal devices, a social order fit for human beings to live in, then the achievement of security lends itself to treatment under the heading of justice.

The legal philosophy of Thomas Hobbes is a prominent example of a security-oriented approach to the problem of political and social justice. According to Hobbes, the fundamental law of nature to be heeded by the sovereign power is the preservation of peace, wherever peace can be achieved, and the organization of defense, whenever peace is in jeopardy. To protect the security of life, property, and contract constitutes for Hobbes the foremost task of legal ordering; liberty and equality are to be subordinated to this overtowering objective of political action.[13] In a similar vein, Jeremy Bentham declared security to be "the principal, indeed the paramount, object" of social control through law, while liberty and equality were assigned a secondary position in his scheme of thinking. Legal regulation, in his opinion, was to concentrate its attention particularly on the protection of the person and the inviolability of property rights.[14]

It may be gathered from this survey that a confusing variety of theories of justice have been propounded by philosophers and legal thinkers in the past and present. The confusion is not likely to be diminished in strength when we turn from the blueprints and speculations of the writers to the historical scenes of political and social action. The conceptions of justice which have had an impact on community-building in different nations and different epochs are of a baffling heterogeneity.

[12] John Rawls, *A Theory of Justice* (Cambridge, Mass., 1971), pp. 60–61, 204, 244, 302. On Rawls see also *supra* Sec. 38 and Charles Fried, *An Anatomy of Values* (Cambridge, Mass., 1970), pp. 61–74.

[13] Thomas Hobbes, *De Cive*, ed. S. P. Lamprecht (New York, 1949), ch. I, 15; ch. II. 2. On Hobbes see also *supra* Sec. 10.

[14] Jeremy Bentham, *Theory of Legislation*, ed. C. M. Atkinson (London, 1914), I, 123–126, 154.

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Although it may be argued that the architects of empires and nation-states were actuated by the will to power rather than by considerations of justice, the fact should not be ignored that dissimilar social and economic systems have been vigorously defended by distinguished spokesmen and have found acceptance with large numbers of people. In appraising the hierarchy of values prevalent in these systems, it might be observed that feudal orders have assigned a prominent place to the notion of security, while they have downgraded the importance of liberty and equality. The overlord sought to protect his feudal estate against attacks and depredations by enlisting the cooperation of his vassals at a time when the police power of the state was weakly developed. The vassals, on their part, obtained a measure of security and assistance from their lords in return for a pledge of loyalty and services.

The age of liberalism and capitalism, without denying the importance of security and certain forms of equality (such as equality of rights and opportunities) has regarded the promotion of freedom as the foremost task of governmental policy. In socialist countries, an attempt has been made to work towards a leveling of income and property status, with the ultimate (but deferred) aim of achieving an equal satisfaction of needs. A similar multiplicity of viewpoints is found in the political realm. Many different forms of government such as democracy, benevolent autocracy, patriarchal monarchy, and hereditary aristocracy have been able, under certain historical and sociological conditions, to discharge the tasks of political organization with some degree of success and to command the loyalty of citizens or subjects.

In the light of this pluralism of possibilities and alternative solutions, is it necessary to resign oneself to the position of the skeptic who believes that conceptions of justice are entirely a matter of individual preference or transient community consensus? [15] Is it possible to make any assertions about justice that can claim to have any degree of objective validity? Can we make an informed and judicious choice between different and inconsistent approaches to the problem? In a more basic formulation, can the idea of justice be deemed a legitimate object of rational inquiry, worthy of sustained attention by jurisprudential thinkers and social scientists? The section which follows is devoted to a discussion of this question.

Section 48. *Justice and Rationality*

The protean character of justice is presumably one—although not necessarily the only—reason why some modern legal philosophers have

[15] Albert A. Ehrenzweig, *Psychoanalytic Jurisprudence* (Leiden, 1971), pp. 194–201, inclines toward this position.

taken the position that theories of justice represent no more than the irrational preferences of their protagonists. Kelsen, for example, has stated that the content of justice is not amenable to rational determination, and he has attempted to support this thesis by the following line of argumentation: According to a certain ethical conviction, human life is the highest of all values. Consequently it is, according to this view, absolutely forbidden to kill a human being, even in war, or as a measure of atonement for a grave offense. There exists, on the other hand, another ethical conviction, according to which the highest value is the interest and honor of the nation. Consequently everybody is, according to this opinion, obliged to sacrifice his own life and to kill other human beings in times of war, and it is also deemed justified in the collective interest to inflict capital punishment as a sanction against criminal conduct.

It is impossible, according to Kelsen, to decide this conflict regarding the justice of killing human beings in a rational, scientific way; it is our feeling, our emotion, or our will which will produce the decision.[1] It is also not possible, in the view of Kelsen, to identify in a cognitively meaningful manner the other supreme values which a just order of social life should attempt to promote. One person may regard the guarantee and enhancement of individual freedom as the foremost goal of legal ordering. Another person may pronounce the achievement of equality to be the chief obligation of lawmakers. A third one may have a strong preference for security, being willing to sacrifice liberty and equality, if necessary, to the fullest realization of this value.[2]

These examples show, according to Kelsen, that the norms which are used as standards of justice vary from person to person, from group to group, and they are often mutually irreconcilable. It is impossible to establish the truth of the value judgments underlying these norms on the basis of empirical facts. Rational inquiry cannot validate the social goals which justice is supposed to serve; all it can do is to determine what means are necessary or conducive to the accomplishment of these ends of human effort. Kelsen reaches the conclusion that conceptions of justice must, under these circumstances, be viewed as irrational ideals.[3]

[1] Hans Kelsen, *What Is Justice?* (Berkeley and Los Angeles, 1960), p. 5.

[2] *Id.*, pp. 5–6, 228.

[3] Kelsen, *General Theory of Law and State*, transl. A. Wedberg (Cambridge, Mass., 1949), p. 13. The emotive theory of value judgments which underlies Kelsen's conclusions is discussed by Richard Brandt, *Ethical Theory* (Englewood Cliffs, N.J., 1959), pp. 205–231. See also Rudolf Carnap, "Philosophy and Logical Syntax," in *The Age of Analysis*, ed. M. White (Boston, 1955), pp. 216–220; Alfred J. Ayer, *Language, Truth, and Logic* (London, 1950), pp. 107–108; Charles L. Stevenson, *Ethics and Language* (New Haven, 1944), p. 13; Stevenson, *Facts and Values* (New Haven, 1963), p. 142. The irrational components of jus-

A similar approach to the problem was taken by Alf Ross. A statement to the effect that a certain norm or social system is "just" or "unjust" is, in his opinion, entirely devoid of descriptive meaning. Such a statement expresses no verifiable judgment and cannot even be the subject of rational argument. "To invoke justice is the same thing as banging on the table: an emotional expression which turns one's demands into an absolute postulate." [4]

Any attempt to deal with the questions posed by Kelsen and Ross must take as its starting point a consideration of the meaning of the term rationality.[5] The intellectual history of Western civilization offers a great deal of authority in favor of the proposition that a judgment or conclusion can qualify as "rational" only in the event that it is based on certain, infallible, and indubitable knowledge. This proposition was defended with great vigor by René Descartes. In his view a proposition, in order to be rational, must rest on an insight similar to that of a mathematician. Only that which is known with absolute certitude and incapable of being doubted belongs to the realm of rational cognition.[6] Immanuel Kant followed Descartes by stating in an unequivocal formulation that "every rational conclusion must impart necessity." [7] This position has found many adherents in the twentieth century. A modern American thinker, Brand Blanshard, for example, has said that for the philosopher reason "commonly denotes the faculty and function of grasping necessary connections." [8] Luis Recaséns Siches equates the logic of the rational with the logic of mathematical physics, which provides us with unquestionable forms of knowledge.[9]

There exists, however, a broader conception of rationality which embraces the entire field of inquiry in which we seek convincing grounds for our opinions and proofs for our conclusions.[10] In the sphere of

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tice are strongly emphasized by Albert A. Ehrenzweig, *Psychoanalytic Jurisprudence* (Leiden, 1971), pp. 149–153, 203–204.

[4] Alf Ross, *Law and Justice* (Berkeley and Los Angeles, 1959), p. 274.

[5] Webster's Dictionary defines rationality as "the quality or state of being rational."

[6] René Descartes, *Philosophical Works*, transl. E. S. Haldane and G. R. T. Ross (Cambridge, Eng., 1931), p. 3. See in this connection Marjorie Grene, *The Knower and the Known* (New York, 1966), pp. 64–91; Chaim Perelman, *The Idea of Justice and the Problem of Argument* (London, 1963), pp. 119–120.

[7] Immanuel Kant, *Schriften zur Metaphysic und Logik* (Wiesbaden, 1958), p. 565.

[8] Brand Blanshard, *Reason and Analysis* (La Salle, Ill., 1962), p. 25. Blanshard himself holds that the discovery of necessary connections is "the prime office of reason." *Id.*, p. 422.

[9] Luis Recaséns Siches, "The Material Logic of the Law," 1965 *Archiv für Rechts- und Sozialphilosophie* (Beiheft Nr. 41), p. 277.

[10] See G. J. Warnock, "Reason," 7 *Encyclopedia of Philosophy* 84 (New York, 1967); James Ward Smith, *Theme for Reason* (Princeton, 1957), pp. 6–7, 23–25; Ilmar Tammelo, *Survival and Surpassing* (Melbourne, 1971), pp. 35–49; Stuart

valuation, a rational argument or judgment in this broader sense is one which is based (1) on a thorough consideration of all factual angles which are relevant to the solution of a normative problem and (2) a defense of the value judgments implicit in the normative solution in the light of historical experiences, psychological findings, and sociological insights. A rational argument and judgment of this character may be neither deductive nor inductive nor strictly compelling from a logical point of view. It may nevertheless carry a high degree of persuasiveness because it rests on the cumulative force of reasons derived from heterogeneous but (frequently) connected areas of human experience. The effectiveness of the argument is usually increased by pointing up the practical consequences which a choice between different goals or the adoption of alternative courses of action would entail.[11] An argument of this type is differentiated from a rationalization of an emotional urge by the spirit of detachment and impartiality with which the search for a solution is pursued, although we must recognize that there are limits to the objectivity of which human beings are capable.[12]

This broader view of rationality is preferable to a narrow-gauged identification of the concept with the discernment of necessary truths. First, the broader view is in consonance with ordinary linguistic usage, which refuses to limit the scope of rational propositions to those obtained with the aid of a quasi-mathematical logic. Second, the restrictive understanding of the concept relegates to the sphere of feelings, emotions, and arbitrary, volitional preferences many judgments and conclusions which properly belong to the domain of reason.

If the extended notion of rationality is adopted, the door is opened widely to rational inquiries about issues of justice. Such inquiries may revolve around two different sets of problems. They may be concerned with the discussion and determination of matters of empirical fact that have a bearing upon the answer to normative questions of justice. They may also address themselves to axiological issues requiring the making of choices between conflicting or potentially conflicting values of the social order. The remaining part of this section will

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Hampshire, "Fallacies in Moral Philosophy," 58 *Mind* 466, at 473-475 (1949); Chaim Perelman, "Justice and Justification," 10 *Natural Law Forum* 1, at 3-5 (1965).

[11] The need to inquire into social objectives in terms of the consequences likely to be entailed by them was emphasized by John Dewey, *Logic: The Theory of Inquiry* (New York, 1938), pp. 502-503. Cf. Charles Fried, "Reason and Action," 11 *Natural Law Forum* 13 (1966).

[12] For a more elaborate discussion of the function of reason, in the extended sense of the concept, see Edgar Bodenheimer, *Treatise on Justice* (New York, 1967), pp. 34-39. See also *infra* Sec. 75.

deal with the uses and possible limitations of reason in coping with these two sets of problems.

When two or more persons have disagreements on questions of justice, the resolution of the dispute often hinges on a correct determination and appraisal of empirical data. At a time when women were excluded from participation in the political process and barred from access to the higher institutions of learning, such disqualifications were often defended as reasonable upon the assertion that women are not the intellectual peers of men. When women proved their competence in many areas of vocational and scientific endeavor, this factual justification of the discrimination became shattered. To take another example, whether it is just or unjust to prohibit the smoking of marijuana depends significantly on the extent of the deleterious consequences produced by the use of the drug. If it is proved that these do not exceed the harm resulting from the consumption of alcohol, it becomes difficult to defend a policy of criminal sanctions in one area but not in the other.

It is, of course, not always possible to establish a factual proposition by completely adequate evidence. For example, in trying to resolve the controversy with respect to the need for reducing television programs depicting violence, it has been found difficult to verify the incidence and extent of damage done to children by the showing of such programs. Furthermore, in appraising the probable impact and consequences of some proposed normative regulation, it often becomes necessary to rely on prognostications and estimates lacking in impeccable certainty. In spite of the possible existence of such conclaves of doubt or conjecture, it is clear that the determination of disputed questions of fact is accessible to rational methods of investigation.

There is a second class of controversies about justice in which the solution to the problematic situation depends upon the making of value judgments rather than upon the ascertainment of relevant factual data. Even in this domain of axiological evaluation and choice, there are situations when reason clearly prescribes the course of action to be taken. This is the case when the claims for recognizing an ethical postulate become so strong and compelling that it would be absurd to negate, repudiate, or reverse this postulate. "Suppose," says McCloskey, "someone adopted as an ultimate, irreducible principle, the principle 'Promotion of the maximum suffering for mankind is obligatory,' or 'It is obligatory to kill as many human beings as possible': we should judge him insane no matter from what culture group he came." [13]

[13] H. J. McCloskey, *Meta-Ethics and Normative Ethics* (The Hague, 1969), p. 140. A number of thinkers believe, with McCloskey, that intuition, direct in-

These examples of totally unacceptable principles of social ordering are based on the realization that the large majority of human beings desire to live rather than die from violence, and that they react adversely against actions of others causing them bodily or mental suffering. The almost universal adoption, within the confines of organized societies, of legal norms prohibiting indiscriminate killing and the infliction of grievous harm confirms this psychological truth. Rational insight into the basic traits of human nature provides a well-nigh irrebuttable argument in favor of the normative protection of certain values, held in common by human beings, which are anchored to the foundations of a tolerable human existence.[14]

There are, however, many problems of justice which do not lend themselves to clear-cut answers in terms of right and wrong. Even though no legislator can, as a matter of general principle, disaffirm the value of life, the question remains whether human life is an absolute value which must be protected at all costs. Are there other values, superior to it under certain circumstances, whose realization may justify the sacrifice or termination of human life? May a society justly demand of its members that they risk their lives in fighting wars waged in order to vindicate the national honor or to insure the victory of an ideal held high by the nation, such as freedom or social justice? Can the death penalty be defended as a means for protecting the collective security against serious crimes? Should the medical profession be permitted to terminate human life by euthanasia in case of an incurable illness?

In the opinion of Kelsen, set forth at the beginning of this section, questions of justice involving judgments with respect to basic values are not amenable to a rational solution. However, before ultimate choices between conflicting values are made, a great deal of rational groundwork can often be laid by inquiries into historical experience and forecasts of probable consequences. Is the death penalty, in the light of its potential deterrent effects as measured by available crim-

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sight, or intellectual perception permit human beings to recognize some principles of social action as unjust and wrong. See, for example, Alfred Ewing, *Ethics* (London, 1953), pp. 137–143; Henry Sidgwick, *The Methods of Ethics* (Chicago, 1907), pp. 96–104, 199–216; Brand Blanshard, *Reason and Goodness* (London, 1961), pp. 91, 96. For a general discussion of this viewpoint and further references see Brandt, *supra* n. 3, pp. 187–202.

[14] Viktor Kraft has developed the theme that some goals of social action are common to most men, and that this community of ends forms the pivot of rational moral theory. Many of his observations are also applicable to the problems of justice. See Kraft, *Rationale Moralbegründung* (Vienna, 1963), pp. 45–47, 57–58 and *Die Grundlagen der Erkenntnis und der Moral* (Berlin, 1968), pp. 114–118. For a further discussion of this subject see *infra* Sec. 50.

inological data, a more adequate means for protecting the community than other modes of punishment? Are the emotional predispositions of human beings such that its abolition would bring about increased hazards of private vengeance, as some have argued? Is it necessary to proscribe euthanasia because of demonstrable dangers of abuse? Can wars waged for national or ideological aims be justified in the atomic age when we balance the wholesale destruction and loss of life likely to be caused by them against the consequences of a radical renunciation of the use of force?

Even when the participants in such discourse have reached substantial agreement on the empirical underpinnings and pragmatic implications of suggested answers, emotional predispositions will in some cases tip the balance in favor of a certain solution. Strong rational arguments against war and revolution may have no effect on the ideological fanatic who wishes to see the world converted to the way of life espoused by him. Deep-seated religious feelings may determine a person's attitude toward abortion and euthanasia. Inborn psychological traits or the prevailing cultural atmosphere may cause an individual to prefer security to freedom, when conflicts arise between these two values in the context of some proposed normative regulation or legislative program. It should also be taken into account that many persons simply do not respond well to rational argumentation, especially when it assumes a complex character, and are likely to be carried away, in making judgments and reaching conclusions, by their irrational impulses or prejudices.[15]

It is the upshot of this analysis that questions of justice in the social order lend themselves to a far-reaching extent to rational debate and detached consideration, provided that the term rationality is not limited to judgments expressing logical necessities or self-evident verities. The view of Kelsen and Ross that conceptions of justice must be regarded as irrational ideals can therefore not be accepted. It is true, however, that in problematic situations calling for a choice between, or a ranking of, ultimate values, the residual impact of irrationality often cannot be wholly eliminated from the process of reaching a final decision.

Section 49. *The Conceptual Scope of Justice*

A famous definition of justice, set forth in Justinian's *Corpus Iuris Civilis* and attributed to the Roman jurist Ulpian, reads as follows: "Justice is the constant and perpetual will to render to everyone that

[15] Smith, *supra* n. 10, pp. 208–209, points out that this is one reason why rational argumentation in the field of ethics has so often in history been bolstered or even displaced by religious dogma or ideological authority.

to which he is entitled." [1] At an earlier period of Roman history, Cicero had described justice as "the disposition of the human mind to render to everyone his due." [2]

There is an emphasis in these two definitions on the subjective aspect of justice. Justice is identified with a certain attitude of the human mind, a willingness to be fair and a readiness to give recognition to the claims and concerns of others. The just employer is willing to consider the reasonable demands of his employees. The just judge is determined to eschew partiality and bias toward one party in a lawsuit. The just lawgiver is disposed to pay attention to the interests of all persons and groups whom he is under a duty to represent.

The willingness to give everyone his due is an important and generally valid ingredient of the concept of justice. In its absence, justice cannot flourish in society. As was clearly seen by Aristotle, justice is a social virtue which is concerned with relationships between persons. "Justice alone is the 'good of others,' because it does what is for the advantage of another." [3] In order to function effectively, justice calls upon men to liberate themselves from their exclusively self-regarding impulses.

It is obvious, however, that the mere cultivation of a mental attitude of fairness and concern for others is not, in and by itself, sufficient to bring about the reign of justice. The good will to do justice must be implemented by practical measures and institutional means designed to achieve the goals of a just society. When St. Thomas Aquinas described justice as " a habit whereby a man renders to each his due by a constant and perpetual will," [4] he improved on Justinian's definition by making it clear that justice presupposes a pattern of behavior as well as a certain mental predisposition. A contemporary Swiss theologian, Emil Brunner, combined the mental and institutional components of justice in the following formula: "Who or whatever renders to every man his due, that person or thing is just; an attitude, an institution, a law, a relationship, in which every man is given his due is just." [5]

The Aristotelian categories of distributive and corrective justice designate the chief proving grounds in which the *suum cuique* principle

[1] Dig. I. 1. 10.

[2] *De Finibus Bonorum et Malorum*, transl. H. Rackham (Loeb Classical Library ed., 1951), Bk. V. xxiii. 65–67.

[3] *Nicomachean Ethics*, transl. H. Rackham (Loeb Classical Library ed., 1947), Bk. V. i. 17; see also Plato, *The Republic*, transl. A. D. Lindsay (New York, 1950), Bk. I, 341–342.

[4] *Summa Theologica*, transl. Fathers of the English Dominican Province (London, 1913–1925), Pt. II, 2d pt., qu. 58, art. I.

[5] *Justice and the Social Order*, transl. M. Hottinger (New York, 1945), p. 17.

is tested in political and social action.[6] There is also a region of contractual justice to which the scope of the concept extends in some particular situations. Finally, there is an area of individual action toward a fellow man in reference to which linguistic custom sometimes uses the terms "just" and "unjust." These various instances in which the notion of justice is applied require further elaboration.

Distributive justice is primarily concerned with the allocation of rights, powers, duties, and burdens to the members of a society or group.[7] The range of the problems falling within this category of justice is extremely wide, and only a few examples can be given. Should all members of a community who have reached a certain age be granted the right to vote and hold public office, or should these rights be reserved to certain restricted classes of persons? Should people be allowed to speak and assemble freely without hindrance and limitations? What should be the rate of remuneration for work and services? Who should be the heirs of a person who has died intestate, and in what proportion should they share in the assets of the estate? Should people over a certain age be entitled to a pension or other special benefits, and how should such benefits be computed? What system of taxation should be used to insure an equitable distribution of the national income? What kind of a system of prohibitions and penalties should be instituted to protect the public peace and safety? It will easily be seen that the problems of justice presented in these examples are usually dealt with by authorities endowed with powers of a legislative character.

Herbert Hart has sought to limit the notion of distributive justice to cases of arbitrary discrimination. "The general principle latent in [the] diverse application of the idea of justice," he said, "is that individuals are entitled in respect to each other to a relative position of equality or inequality." [8] A just law would, in this view, be one which treats like situations alike; an unjust law allocates rights and duties unequally without a plausible ground.

This notion of justice is too narrowly confined. It is true that the unequal treatment of persons or groups who should be treated in the

[6] The Latin phrase *suum cuique* means "to everyone his due." On the Aristotelian distinction between distributive and corrective justice see *supra* Sec. 47, n. 4.

[7] Aristotle used the term primarily with regard to the distribution of honors (such as political offices) and wealth. See *Nicomachean Ethics*, Bk. V. ii. 12. There is no reason, however, for excluding the distribution of burdens from its scope. St. Thomas Aquinas used the term "legal justice" to designate the system of duties and obligations imposed upon individuals for the benefit of the social whole. See *supra* n. 4, Pt. II, 2d pt., qu. 58, art. 5. Jean Dabin follows this terminology. See *supra* Sec. 35.

[8] H. L. A. Hart, *The Concept of Law* (Oxford, 1961), pp. 153–155.

same manner poses conspicuous and grave issues of justice. Distributive justice does not, however, exhaust its significance in the postulate of nondiscrimination. Neither semantic usage not any other weighty consideration militate against speaking of injustice when basic freedoms are denied to all members of a community, when the government fails to provide elementary guarantees of safety and security, when everybody is taxed at a confiscatory rate. The task of providing opportunities for people to reach their potential and obtain the occupational position in society for which they are best fitted is also within the province of justice. A just order of society must minister to human needs other than the need for equal treatment.

In democratic countries, distributive justice is usually dispensed by a legislative body elected by the people. In nondemocratic nations, this power may be vested in an oligarchic council or autocratic ruler. In some societies, the judiciary partakes in the prerogative to dispense distributive justice to the extent that judges are granted discretion to lay down general rules. In ancient Rome, the head of a family was given broad authority to issue directives and decree sanctions controlling the conduct of family members and slaves. In medieval society, the customary law of the manor often determined the rights and obligations of lords, vassals, and serfs. In the community of nations, international law has been instrumental in defining and delimiting the powers of states.[9] Problems of distributive justice, such as the fixing of wage rates and working hours, may also arise in private organizations. In schools and universities, such problems may become acute in regard to the fairness of grading systems and the proper distribution of scholarship funds.

Corrective justice comes into play when a norm of distributive justice has been violated by a member of a community. It will then become necessary to make amends for a wrong or deprive a party of an unjustified gain.[10] Corrective justice is usually administered by a court or other organ invested with judicial or quasi-judicial powers. Its chief fields of application are contracts, torts, and crimes. A breach of contract will be rectified by a judgment decreeing the payment of damages, unless some other remedy (such as specific performance) is provided. A proper award of compensation will also be the duty of a judge or jury in cases where intentional or negligent injuries have been inflicted by a tortfeasor. In the field of criminal law, issues of correc-

[9] The doctrine of the "unjust war," for example, which has a history dating back to Roman times, imposes limitations on the right of nations to resort to war as an instrument of national policy. See Arthur Nussbaum, *A Concise History of the Law of Nations*, rev. ed. (New York, 1954), pp. 10, 35–37, 110–111.

[10] Aristotle, *supra* n. 3, Bk. v. iv.

tive justice are presented in determining the sentence to be imposed upon a convicted offender.

There is also room for applying the concept of justice, in a more narrowly circumscribed acceptation, to the sphere of contractual arrangements between individuals, groups, or states.[11] In the normal situation, questions of justice will not arise in a contractual context when two or more parties, of their own free and uncoerced will, assume certain obligations towards each other. It may happen, however, that one party withholds from the other information relevant to the formation of a contractual intent or makes deliberate misrepresentations in order to induce acceptance of an offer. It may also occur that a party to a private agreement or international treaty uses a superior position of power to force its terms upon the weaker party. Furthermore, an organization acting as a bargaining representative for workers, employees, or other groups may negotiate a collective agreement in disregard of essential interests of those it is under a duty to represent. In such situations, the resulting contract or treaty, although it is in form voluntary rather than authoritatively imposed, may bear the taint of injustice.

There is a last signification of justice which is of a more marginal character than those already discussed. It plays a conspicuous part in the writings of Aristotle but has not disappeared entirely from contemporary discourses about justice. "The term unjust," said Aristotle, "is held to apply both to the man who breaks the law and the man who takes more than his due, the unfair man. Hence it is clear that the law-abiding man and the fair man will both be just." [12] In these passages, the terms justice and injustice are not limited to the legislative imposition, judicial interpretation, and contractual stipulation of norms. They are extended to the realm of individual conduct and used to characterize unlawful and unfair acts of one person directed against a fellow man. A man who cruelly beats a child may be declared unjust according to this broad understanding of the word.[13] The same appellation may be applied to a man who callously disappoints an expectation which, by his words or actions, he has raised in another person.

[11] The idea of contractual justice figures prominently in John Rawls's *A Theory of Justice* (Cambridge, Mass., 1971). Rawls, however, uses this notion primarily in the sense of a social-contract theory of law and government, as expounded by Locke, Rousseau, and Kant. See *id.*, pp. 11, 16. Understood in this broad sense, contractual justice embraces much of what is treated in the present work as legislative justice.

[12] Aristotle, *supra* n. 3, Bk. V. i. 8. This meaning of justice will be deemphasized in the treatment of the subject in the sections which follow.

[13] Hart, *supra* n. 8, p. 153, rejects this extension of the word unjust, but it would not seem to offend against natural linguistic usage.

With the possible exception of the last example, the *suum cuique* formula would seem to cover all the questions of justice mentioned in the preceding discussion. The common bond connecting these questions consists of an endeavor to evaluate the actions of governments, organizations, or individuals in the light of the consideration whether these actions deprive human beings of something to which they are entitled, or whether they withhold something from them to which they have a claim. The further question as to what duties and burdens should be imposed upon the members of a community is also within the purview of the *suum cuique* principle.

Because of its connection with entitlements, claims, and obligations, the concept of justice stands in close relation to the notion of law.[14] Refinements and changes in the community's feelings of justice are frequently the precursors of legal reforms. When the conclusion was widely reached in eighteenth-century Europe that it was unjust to force men by the use of torture to confess to crimes of which they had been accused, an ultimately successful movement was initiated for the passage of laws granting a privilege against self-incrimination. When the sentiment became strong in nineteenth-century America that it was inequitable to deny workingmen injured by the negligence of their fellow servants a right of action against their employers, a demand arose for the enactment of workmen's compensation laws.

The line of demarcation between justice and morality becomes visible at this point. Exhortations which urge human beings to be generous, charitable, considerate, and helpful to their fellow men are not meant to be implemented and enforced by legal norms. Such moral postulates are designed to be carried out in practice by voluntary, uncoerced acts. When claims of justice are raised, on the other hand, they are for the most part addressed to those who have power to control human conduct by means of binding norms supported by sanctions.

It is implicit in the foregoing considerations that the entitlements and obligations with which justice is concerned are often a goal of future action without present anchorage in the positive law. Justice is a standard with which the law should be brought into harmony.[15] This

[14] The etymological origin of the term justice (*iustitia*) supports this connexion. *Iustitia* is derived from *ius*, which in early Roman law meant a solemn claim, raised in a formal proceeding, that a certain action was permitted by the laws or customs of the community. See Max Kaser, *Das Altrömische* Ius (Göttingen, 1949), pp. 22–32.

[15] "If we were to ask that mythical creature, the man in the street, for a quick, unprepared definition of 'justice', the answer we would almost surely get would be roughly this: 'justice is what the law ought to be.'" Iredell Jenkins, "Justice as Ideal and Ideology," in *Justice* (NOMOS vol. VI), ed. C. J. Friedrich and J. W. Chapman (New York, 1963), p. 203.

does not mean that justice is no more than a pure ideal or fanciful wish-dream. It is, of course, entirely possible that the claims of justice may have found extensive realization in the actual law of the state or other community.

This approach to the problem of justice is by no means generally accepted. Those authors who, like Kelsen and Ross, stress the irrational character of justice are inclined to assign a narrow compass to a "meaningful" notion of justice. Justice, in this restricted denotation, becomes a synonym for legality. In Kelsen's view, justice is "the maintenance of a positive order by conscientious application of it." [16] It is just for a general rule to be firmly applied in all cases where, according to its content, it should be applied. Ross takes a similar position. "The idea of justice resolves itself into the demand that a decision should be the result of the application of a general rule. Justice is the correct application of a law, as opposed to arbitrariness." [17] If this view is taken, the enforcement of an abhorrent law is just as long as this law is applied consistently without respect of persons.

This identification of justice with legality cannot be accepted. It is wholly at variance with the ideas which mankind from the early days of civilization has associated with the notion of justice. Everywhere and at all times the positive law of the state has been the target of criticism on the ground that some of its precepts have failed to meet the criteria of justice. Not only in the Platonic-Christian tradition, but in other cultures as well,[18] justice has been portrayed as a higher law with which the actual law of the community should be brought into consonance. Universal linguistic usage is violated if the concept is identified with strict enforcement of the positive law, regardless of its contents.[19]

Although justice is a measuring rod for the goodness of laws, it is not the only criterion used in determining whether a particular enactment is desirable or undesirable. The fashioning of a legal system presents many technical problems which must be solved chiefly on grounds of expediency, utility, and practicality. The distribution of subject-matter jurisdiction among the various courts of a political unit, the

[16] Hans Kelsen, *General Theory of Law and State,* transl. A. Wedberg (Cambridge, Mass., 1949), p. 14.

[17] Alf Ross, *On Law and Justice* (Berkeley, 1959), p. 280.

[18] For an account of the views on natural law and justice in the Jewish, Moslem, Hindu, Buddhist, and Chinese traditions see *University of Notre Dame Natural Law Institute Proceedings,* ed. E. F. Barrett (Notre Dame, Ind., 1953), Vol. V.

[19] The desirability of paying attention to the common usage of words in philosophical discussions is emphasized by Ludwig Wittgenstein, *Philosophical Investigations,* transl. G. E. M. Anscombe (Oxford, 1953), pp. 6 (No. 10), 20 (No. 43), 48 (No. 120), 49 (No. 124).

forms in which motions are made in the course of a trial, the administrative organization of government departments are samples of such technical problems. It is the need for orderly arrangements and procedures, rather than the quest for justice, which lies at the bottom of policy-making in these areas of the legal system.

In spite of the fact that justice is not the only value vital to legal ordering, the range of meaningful applications of the concept is extremely wide. The postulates of justice comprise, among other things, vigilance against unreasonable discriminations, prohibition of injury, recognition of basic human rights, providing opportunities for occupational self-fulfillment, imposition of duties to safeguard the general security and the effective discharge of necessary governmental functions, a fair system of rewards and penalties. All these postulates are in some way related to the common needs of human beings. Some of these needs are so basic and elementary that their disregard by the legal system poses problems of special urgency and gravity. These problems will form the theme of the next section.

Section 50. *Justice and Natural Law*

In the history of jurisprudential thought, the idea of justice has often been linked with the concept of natural law. So deeply is the evolution of human thought on justice enmeshed with inquiries concerning the existence and significance of an assumed "law of nature" that no adequate theory of justice can afford to ignore this enduring problem. A discussion of the problem of natural law faces, however, the initial difficulty that this concept has meant different things to different thinkers. Especially the relation between natural law and justice has been the source of much disagreement among philosophers and jurists.

To Aristotle, a rule of justice was "natural" if it had the same validity everywhere.[1] He did not take the position, however, that all rules of justice were of this character. Especially those of distributive justice depended, in his opinion, on shifting criteria of human equality and inequality.[2] St. Thomas Aquinas followed a similar approach. He viewed natural law as a set of realistic barriers which the universal and ineradicable traits of human beings, including their rational impulse of sociability, impose upon the powers of lawmakers. His conception of justice, on the other hand, was of a much broader scope.[3] Proceeding

[1] Aristotle, *Nicomachean Ethics*, transl. H. Rackham (Loeb Classical Library ed., 1947), Bk. V. vii. 1.

[2] Aristotle points out, for example, that the standards of equality are different ones in democratic, oligarchic, and aristocratic societies. *Id.*, Bk. V. iii. 7. See also *supra* Sec. 3.

[3] See *supra* Sec. 6.

from different philosophical perspectives, a twentieth-century legal scholar, Herbert Hart, arrived at similar conclusions. He regarded natural law as a bundle of universally recognized principles which have a basis in certain elementary truths concerning human beings. "Reflections on some very obvious generalizations—indeed truisms—concerning human nature and the world in which we live, show that as long as these hold good, there are certain rules of conduct which any social organization must contain if it is to be viable." [4] His conception of justice, on the other hand, went farther by including criteria of normative rightness which are responsive to varying conditions in the development of legal systems.[5]

There have also been many authors, in ancient and modern times, who have taken a less restrictive view regarding the contents of natural law. Especially during the Age of Enlightenment, *ius naturale* was often understood as a complete and ready-made system of rules in consonance with the requirements of justice.[6] The apogee of this approach was reached in the philosophy of Christian Wolff, who deduced an elaborate political and legal system from what he conceived to be invariable and everlasting postulates of natural reason.[7] To this absolutistic method, Rudolf Stammler opposed in the twentieth century the idea of a "natural law with a changing content," denoting by this phrase a set of principles of justice which reflect the contingent needs of a particular nation at a particular time.[8] More recently Justice Cardozo—again in a relativistic manner—identified natural law with standards of justice and fair dealing prevalent among reasonable men, who are mindful of the habits of life in their community.[9]

There exists a third approach to the subject which is directly opposed to the first view set forth above. According to this third approach, natural law is a term of encompassing breadth, while justice occupies a relatively small space in the legal universe. To Johannes Messner, natural law signifies an intricate pattern of individual and social responsibilities, some of an absolute, others of a contingent character,

[4] H. L. A. Hart, *The Concept of Law* (Oxford, 1961), p. 188.
[5] Id., pp. 155–156.
[6] See *supra* Ch. III.
[7] See *supra* Sec. 9.
[8] See *supra* Sec. 34. Cf. Franz Wieacker, *Zum heutigen Stand der Naturrechtsdiskussion* (Cologne, 1965), pp. 14, 20, 23. Wieacker means by natural law the criticism of positive enactments, based on suprapositive principles of justice which are adapted to changing historical conditions.
[9] Benjamin N. Cardozo, *The Nature of the Judicial Process* (New Haven, 1921), p. 142. Jerome Frank also chose to identify natural law and justice, but proposed at the same time to abandon the use of the former term in favor of the more customary and descriptive word justice. *Courts on Trial* (Princeton, 1950), p. 365.

which are derived from human nature and analyzed by him for their bearing upon a large number of interpersonal relations and the institutional means designed to regulate them.[10] To justice, on the other hand, he ascribed the narrow connotation of a habit to respect existing claims and conduct oneself in harmony with the rights of others.[11] In the opinion of Alfred Verdross, natural law is the sum of rationally discernible principles of social ordering which comport with the dignity of human beings and are required to make possible their coexistence in society. Not all of its tenets are, in his view, comprised in the notion of justice, but only those which have for their subject-matter the problems of civil equality.[12]

In spite of these divergencies and disagreements among the philosophers of natural law, it is not impossible to reduce their teachings to a common denominator. There is consensus among these authors that natural law consists of principles and axioms which are entitled to recognition regardless of whether or not they have found formal expression in the positive law of a state or other community. As Philip Selznick has pointed out, it is "the chief tenet of natural law that arbitrary will is not legally final": an appeal to higher principles of justice is always allowable from the decrees of a lawmaker.[13] However indefinite, elusive, or contradictory the various historical versions of natural-law thinking may be, this basic axiom would seem to lend a certain bond of unity to them.

There would, indeed, appear to exist some minimum postulates of justice which, independently of the will of a positive lawgiver, need to be recognized in any viable order of society. Some of these requirements must be traced to the physiological constitution of men. Others are grounded in psychological traits which are common to human beings. Again others are derived from the noetic part of the human makeup, that is, from man's reasoning faculties. The validity of these elementary precepts of legal ordering is attested by the fact that they have found recognition, in some form or other, in all societies that have

[10] Johannes Messner, *Social Ethics*, rev. ed. transl. J. J. Doherty (St. Louis, 1965), pp. 217–218 and *passim*.

[11] *Id.*, pp. 314–315.

[12] Alfred Verdross, *Statisches und Dynamisches Naturrecht* (Freiburg, 1971), pp. 13–15. René Marcic takes an even narrower view of justice by equating it with conformity to legal norms. Natural law, on the other hand, is to him a suprapositive law which corresponds to the structure of being in its various manifestations. *Rechtsphilosophie: Eine Einführung* (Freiburg 1969), pp. 125–135, 175–177. See the suggestive review of Marcic's book by Ilmar Tammelo, 6 *Sydney Law Review* 436 (1971).

[13] See Philip Selznick, "Sociology and Natural Law," 6 *Natural Law Forum* 84, at 100 (1961). Cf. also Robert Gordis, "Natural Law and Religion," in *Natural Law and Modern Society*, ed. J. Cogley (Cleveland, 1962), p. 244.

emerged from the crudest state of barbarism.[14] None of these principles, however, should be regarded as a categorical absolute incapable of being made subject to limited exceptions.

Biological necessity demands of men a certain amount of food and sleep; nature has also endowed human beings with sexuality. It may be said, therefore, that laws prescribing a starvation diet for all members of a community or certain groups among them, laws providing a normal working day of twenty hours, or laws prohibiting sexual intercourse between men and women are repugnant to the "law of nature." In times of serious famine, however, men may have to accept the necessity of insufficient nutrition. In a collective emergency, they may have to forego an adequate amount of sleep for a certain period of time. The acknowledgment of human sexuality does not militate against celibacy requirements for priests or members of a monastic order.

Turning from the physiological to the psychological needs of human beings, it may be stated first that the large majority of men have an extremely strong desire to preserve their lives.[15] Since the lives of men are often endangered by the hatred, jealousy, or envy of other men, it becomes necessary to outlaw homicide in order to prevent fratricidal strife within a group likely to lead to its disintegration. Modern anthropologists are in agreement that no organized human society has permitted the killing of group members without some form of justification.[16]

It is true, on the other hand, that some societies have considered it right and proper to put to death old people or infants in order to save food or limit the size of families under conditions of scarcity.[17] Others have approved of the ritual sacrifice of members of the community in order to placate the gods and thus rescue the society from their wrath. Some cultures have decreed the burning of widows to symbolize the

[14] Regarding the proof of natural law, Cicero said that "universal agreement is the voice of nature," and that "in every inquiry the unanimity of the races of the world must be regarded as a law of nature." *Tusculan Disputations*, transl. J. E. King (Loeb Classical Library ed., 1950), Bk. I. xv. 35 and xiii. 30. Hugo Grotius rested the verification of natural law, first, on agreement of its principles with man's rational and social nature and, second, on cultural consensus. *The Law of War and Peace*, transl. F. W. Kelsey (Oxford, 1925), Bk. I. ch. I. xii.

[15] The will to live can, of course, be overcome by a stronger motive, such as the determination to fight to the death for the victory of a religious or ideological cause.

[16] Edward Tylor, *Anthropology* (New York, 1916), p. 412; Edward Westermarck, *The Origin and Development of the Moral Ideas* (London, 1906), I, 331; Margaret Mead, "Some Anthropological Considerations Concerning Natural Law," 6 *Natural Law Forum* 51, at 52 (1961); E. Adamson Hoebel, *The Law of Primitive Man* (New York, 1968), p. 286.

[17] Thomas E. Davitt, *The Basic Values in Law* (Philadelphia, 1968), pp. 49–50.

indestructible unity of husband and wife. In modern societies, abortions have been authorized under certain safeguards in order to alleviate the pressures of the population problem. Although these examples seem to confirm the relativity of legal norms and institutions, they do not affect the truth of the fact that, as a matter of general principle, the intentional killing of an innocent person has been considered reprehensible and blameworthy by all or nearly all societies.[18] This is in itself an important exemplification of a "natural" social law. Destruction of life in times of war has, of course, occurred on a large scale in civilized as well as less civilized cultures. We have to keep in mind, however, that the natural-law doctrine is concerned with certain essential contents of intragroup legal systems, while war—in spite of certain attempts to regulate some of its rigors—is basically an extralegal phenomenon.

Another fact of general experience is the desire of men to protect their bodily integrity and receive some modicum of respect for their personalities.[19] The functioning of a social order would be severely impaired if the law would sanction assault and mayhem, and if it would put the honor and reputation of men wholly at the mercy of their neighbors. The infliction of intentional or reckless injury and the spreading of defamatory statements is therefore generally proscribed, but here again exceptions must be noted. Hurting a person may be justifiable or at least excusable in instances of self-defense or for the purpose of avoiding grievous harm. The protection of libel and slander laws has been reduced, in the United States, for public officials in the interest of free comment on their character and habits.[20]

Men also react adversely to deception and misrepresentation, at least where it is strongly prejudicial to their interests. All societies have imposed some requirements of good faith in living up to the terms of contractual agreements and have outlawed serious forms of fraud.[21] On the other hand, certain sharp practices not involving an extreme degree of dishonesty are not necessarily interdicted by the law.

[18] A special problem is presented when the law refuses to interfere with the killing of slaves by their master. The law of the Roman Republic is often cited as a typical example. This legal system took the position, however, that it was the prerogative of the head of the household to lay down the law for family members and slaves. Whether and under what circumstances a slave could be put to death was often regulated by the autonomous law of the household. On slavery and natural law see also *infra* Sec. 51.

[19] The esteem needs of human beings are discussed by Abraham H. Maslow, *Motivation and Personality*, 2d ed. (New York, 1970), pp. 45–46.

[20] *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Whether the reduction of protection is too far-reaching is a subject of controversy.

[21] Ralph Linton, "Universal Ethical Principles," in *Moral Principles of Action*, ed. R. N. Anshen (New York, 1952), p. 657.

In the area of property relations, it has been shown that almost all societies have recognized private property in tools, utensils, ornaments, and other articles destined for personal use. The only exceptions have been a few completely collectivized societies which proceeded to communize all goods under the inspiration of a religious or ethical idea but which were unable to preserve this system for long.[22] Here again human psychology provides a clue to the well-nigh universal protection of property in consumptive goods. Apart from the probable existence of a possessive instinct, human beings wish to extend their personalities and character into the objects with which they surround themselves and thereby to create an external sphere of their freedom.[23] It is therefore no accident that social orders, by punishing theft, have endeavored to guard this area of human emotional concern against invasion.[24] All the aforementioned cross-cultural patterns and congruences led a leading modern anthropologist, Clyde Kluckhohn, to ask the question: "Is there not a presumptive likelihood that these moral principles somehow correspond to inevitabilities, given the nature of the human organism and of the human situation?" [25]

The dictates of human reason impose further limitations upon completely free volition in lawmaking. It must be kept in mind that human nature includes the faculty of reason, and so these dictates may therefore be regarded as "natural" in a different sense. The rational component of natural law is to a large extent rooted in the cognitive capacity of human beings, which recognizes the social dangers resulting from man's irrational and destructive impulses and the necessity for controlling these impulses through the agency of the law.[26]

For example, because of the strong passions engendered by sexual relations and the possible social disadvantages attendant upon their

[22] *Id.*, p. 655.

[23] This thought is pursued further in Edgar Bodenheimer, *Treatise on Justice* (New York, 1967), pp. 162–163.

[24] Even Edward Westermarck, a proponent of ethical relativity, has conceded this fact. *Ethical Relativity* (New York, 1932), p. 197. See also Franz Boas, "Methods of Research," in *General Anthropology*, ed. F. Boas (Boston, 1938), p. 677.

[25] Clyde N. Kluckhohn, "Ethical Relativity: Sic et Non," 52 *Journal of Philosophy* 663, at 675 (1955). See also *id.*, p. 676: "Some needs and motives are so deep and so generic that they are beyond the reach of argument: pan-human morality expresses and supports them." Cf. May and Abraham Edel, *Anthropology and Ethics*, rev. ed. (Cleveland, 1968), pp. 27–31.

[26] Man's aggressive and antisocial tendencies are, of course, also a part of his nature. Natural-law thinking does not attempt to deduce the necessity of certain norms from a consideration of human nature as a whole, but isolates for its purposes those components of human nature which incline men towards socially desirable behavior. This theme is developed by Edgar Bodenheimer, "The Case Against Natural Law Reassessed," 17 *Stanford Law Review* 39, at 45–49 (1964).

unregulated indulgence, all societies (except perhaps a few early and very primitive ones) have evolved definite rules governing sexual behavior. Incestuous relations between close relatives are punished everywhere because of their inherent tendency to disrupt family unity.[27] The vast majority of societies frown upon complete sexual promiscuity and recognize marriage as a social necessity, although the form which marriage takes may be monogamy, polygamy, or (in rare cases) polyandry.[28] Practically all societies regard adultery as undesirable and prohibit rape, although the definitions of these offenses vary in different cultures.[29]

There are also some principles relating to the legal process which impress themselves upon the human mind as dictates of natural reason. One of them is the principle that a person who has not broken the law should not be convicted of a crime.[30] A second one requires that in a legal contest between two parties both sides should be given an opportunity to be heard.[31] A third precept insists that a legal system must provide impartial tribunals for the protection of rights and the redress of wrongs, and that no one should be the judge in his own case.[32] It is highly doubtful whether any exceptions to these principles could be conceived which would escape censure as violations of elementary justice.[33]

All of the foregoing examples have presupposed the existence of human traits so constant and persistent that they are likely to serve as a foundation for certain universal or near-universal normative pat-

[27] See Adamson Hoebel, *Anthropology: The Study of Man*, 3rd ed. (New York, 1966), p. 334; George P. Murdock, *Social Structure* (New York, 1949), pp. 284, 297. A few societies have allowed some narrowly restricted exceptions. In Egypt, Hawaii, and the Inca Empire, marriage between brother and sister of royal lineage was required in the belief that the royalty was divine and that marriage with ordinary mortals would cause a corruption of the royal blood. Hoebel, *id.*, p. 334.

[28] Linton, *supra* n. 21, p. 652; Hoebel, *supra* n. 27, pp. 331, 362.

[29] Linton, *supra* n. 21, p. 651; Davitt, *supra* n. 17, pp. 54, 59; Hoebel, *supra* n. 16, p. 286.

[30] This principle is discussed by H. L. A. Hart, *Punishment and Responsibility* (New York, 1968), pp. 76–83.

[31] See Hedley H. Marshall, *Natural Justice* (London, 1959), pp. 5, 53–59, 184.

[32] In *Dr. Bonham's Case*, 8 Co. Rep. 113b (Court of Common Pleas, 1610), Sir Edward Coke declared the last-mentioned principle to be a requirement of "common right and reason."

[33] The maxim that no one should be a judge in his own case is not fully observed in the United States when, in controversies between individuals and administrative agencies, appeals from an administrative determination are handled by a quasi-judicial organ set up within the framework of the agency. However, some further review by a regular court of law is usually provided and, at least in the federal system, the fact-finding requisite for the final agency determination is often done by an independent hearing officer.

terns.[34] What these unvarying components of the human organism are is not always free from doubt. Some psychologists believe that jealousy and competitive aggressiveness are permanent features of human nature, while others disagree. Any conclusions concerning the basic necessities of lawmaking which rest on a contemplation of man's essential nature should be made subject to reconsideration and revision in the light of advances achieved in the biological and psychological sciences, resulting in deeper and more penetrating insights into the mysteries and complexities of the human personality.

While there are elements in the human constitution that are common to cavemen and highly civilized men, there are others which are clearly not static and immutable. The growth of civilization brings in its train changes in human reactions and refinements of moral sensibilities that cannot remain without influence on the law. It is a consequence of this fact that the *tolerance level* of natural law is subject to variations in the course of social and legal development.

For example, exceptions from the prohibition of homicide which might have been considered justifiable in earlier times would be considered intolerable in a modern civilized society. Illustrations are the killing of the aged, the exposure of weak or unwanted children, the burning of widows. While early law often imposed strict liability for the commission of serious offenses, advanced legal systems tend to require some form of culpability (*mens rea*) as a condition of criminal conviction.[35] There were times when the death penalty or other severe kinds of punishment were imposed for relatively slight offenses;[36] today capital punishment, when it is not outlawed altogether as a violation of civilized justice, is usually restricted to a few crimes of extreme gravity. It is also true that the minimum degree of security which the inhabitants of a modern state will insist on receiving from their government concerning their persons and property is considerably higher than that which can be expected in a society where individual and collective survival present an everpresent and perplexing problem. It must be concluded that the minimum requirements of justice indispensable for a viable and functioning legal system are not in all respects the same in advanced and less advanced societies.

When a violation of the basic principles of natural law has occurred

[34] There exists, thus, in the domain of natural law a strong empirical tie between fact and norm, between the Is and the Ought.

[35] There are still sectors of liability without fault in Anglo-American law but they do not include felonies and other grave offenses. See the discussion of strict liability by Jerome Hall, *General Principles of Criminal Law*, 2d ed. (Indianapolis. 1960), pp. 325–359.

[36] Leon Radzinowicz, *History of English Criminal Law* (New York, 1948), I, 1–40.

by the enactment of a lawmaker, it becomes legitimate to raise the question whether the offensive law is valid and binding. It was demonstrated in the historical part of this book that most of the advocates of natural law—among them St. Thomas Aquinas, Grotius, Pufendorf, Locke, even Hobbes—were in agreement that in cases of outrageous infractions of decency a right, or even a duty, of private and judicial resistance to the obnoxious law should be recognized. This position considers the elementary norms of natural law as "law" in the genuine sense of the term and places them more or less on a par with precepts and mandates embodied in a written constitution which also condition the validity of positive enactments.[37] It will be argued later that this view has much to recommend itself as long as it remains confined to monstrous, inhuman, and palpably unconscionable decrees of a lawmaker.[38]

The theory here advanced holds that the words "justice" and "natural law" should not be used as synonyms. The natural law forms merely the rock bottom layer of a system of justice, comprising those minimum standards of fairness and reasonableness without which there can be no viable order of law. The concept of justice, on the other hand, also includes norms and principles which a particular political and social system regards as just, whether or not these norms and principles have found express recognition in a formalized source of law.[39] Finally, there is a third and top layer, consisting of blueprints for a better and more ideal order which the positive law of the state has fallen short of achieving. The concept of justice, in this view, is concerned with the pressing and immediate as well as with the more remote and ultimate ends of legal ordering.

Section 51. *Justice and Freedom*

Among the needs of men for which a just system of law must make adequate allowance, freedom occupies a prominent place. The desire for freedom is deeply ingrained in human beings. It is innate in the child, who has a strong urge to do whatever the mood of the moment suggests to him and often chafes at restrictions imposed by parents or educators.[1] The adult human being feels joy in moving about as he

[37] Under the present constitutional law of the United States, a statute or decree which shocks the sense of justice of the people would probably lack validity under the due process clauses of the fifth or fourteenth amendments. In that event it would not be necessary to raise the question of its validity under natural-law theory.

[38] See *infra* Sec. 58.

[39] The nonformalized principles of justice which play a part in the decision of cases are discussed *infra* Sec. 74.

[1] F. R. Bienenfeld, *Rediscovery of Justice* (London, 1947), pp. 21–22.

pleases and in using his bodily and mental powers to the fullest. The value attributed by men to freedom is attested by the fact that imprisonment is everywhere used as a criminal sanction, and the threat of it is generally considered an effective means of deterrence from the commission of unlawful acts. It is also significant that slave owners in Greece, Rome, and elsewhere held out emancipation (that is, release of the slave into liberty) as the supreme reward for loyal service. "All men are naturally bent on liberty and hate the state of slavery," said Julius Caesar.[2]

Entire philosophies of law and justice have been erected around the concept of freedom. "The end of law is not to abolish or restrain, but to preserve and enlarge freedom," asserted John Locke.[3] Jefferson was convinced that liberty was an inherent and inalienable right of human beings. "Man is born free; and everywhere he is in chains," Rousseau exclaimed.[4] Kant declared that freedom was "the one sole and original right that belongs to every human being by virtue of his humanity."[5] Herbert Spencer took a very similar position.[6]

The pleas of these philosophers in favor of freedom have not remained unheeded in the political practice of nations. In many countries of the world today, the law has recognized certain basic liberties of the citizens. These include usually the right of free expression, the right to free assembly, the right of free movement, the right to acquire property, and the right to enter into contractual agreements. These rights have often been given constitutional protection in the sense that at least the core of these rights may not be infringed by legislative or executive acts.

When we study the history of nations and civilizations we find, however, that freedom has by no means been viewed by all political and social systems as a natural and basic right of every human being. Large masses of men and women were reduced to slavery in the ancient world, and the institution did not vanish from Western civilization until relatively recent times. The Middle Ages practiced a less radical type of bondage known as serfdom. Certain twentieth-century dictatorships have seriously curtailed the freedom of movement and self-expression of their citizens. Must we then conclude that freedom, although we may cherish it as a desirable and praiseworthy goal which

[2] *The Gallic War*, transl. H. J. Edwards (Loeb Classical Library ed., 1917), Bk. III. 10.

[3] *Of Civil Government* (Everyman's Library ed., 1924), Bk. II. ch. vi, sec. 57.

[4] *The Social Contract*, transl. G. D. H. Cole (Everyman's Library ed., 1913), Bk. I, ch. i.

[5] *The Metaphysical Elements of Justice*, transl. J. Ladd (Indianapolis, 1965), pp. 43–44. See also *supra* Sec. 15.

[6] On Spencer's theory of justice see *supra* Sec. 20.

all systems of justice should endeavor to attain, can in no sense be regarded as a "natural right" of men and an indispensable ingredient of every legal system?

The question of whether freedom is or is not a necessary attribute of the human personality occupied the minds of the Greek and Roman philosophers at a time when slavery was practiced on a very wide scale. Aristotle, assuming that some men were by nature destined to be masters while others were born to be servants, came to the conclusion that for servants the condition of slavery was both beneficial and just.[7] Being aware, however, that the actual practice of slavery in his time was not controlled by this criterion, he added the reservation that "it is easy to see that those who hold the opposite view are also in a way correct," and his entire position with respect to slavery was in fact ambivalent.[8] Quite obviously, even if his cardinal premise as to the division of mankind into masters and servants, leaders and led, were sound, it would not carry with it as a logical corollary the proposition that servants must be divested altogether of human personality and be degraded to the status of mere "chattels." For some of the Stoic philosophers and jurists of a later period of antiquity, Aristotle's doubts regarding the justification of slavery became a certainty. Florentinus declared that subjecting a person to the dominion of another was "against nature." [9] Ulpian held that "so far as the civil law is concerned, slaves are not considered persons; but this is not the case according to natural law, because natural law regards all men as equal." [10] This position prepared the ideological ground for the gradual amelioration of the status of slaves in the Roman Empire and the eventual demise of the institution in the Europe of the Middle Ages.

As was pointed out at the beginning of this section, the desire for freedom is undoubtedly a characteristic trait of human beings generally. Toynbee remarks that "man cannot live without a minimum of freedom, any more than he can live without a minimum of security, justice, and food. There seems to be in human nature an intractable vein . . . which insists on being allowed a modicum of freedom, and which knows how to impose its will when it is goaded beyond endurance." [11] People have a strong desire to realize the po-

[7] *The Politics*, transl. E. Barker (Oxford, 1946), Bk. I. 1255a.

[8] *Id.*, Bk. I. 1255a and b. See also *Nicomachean Ethics*, transl. H. Rackham (Loeb Classical Library ed., 1947), Bk. VIII. xi. 7: "There can be no friendship with a slave as slave, though there can be as human being."

[9] *Dig.* I. 5. 4.

[10] *Dig.* I. 1. 4. See also *Inst.* I. 2. 2: "Wars have arisen, and captivity and slavery, which are contrary to natural law, as according to natural law all men were originally born free."

[11] Arnold Toynbee, *An Historian's Approach to Religion* (London, 1956), p.

tentialities of their personalities and to make productive use of the powers with which nature has endowed them.[12] In the words of Hocking: "It is objectively 'right' that an individual should develop his powers, whatever they are." [13] A high civilization benefiting the largest possible number of human beings can only be built if the energies of men are not bound by oppressive shackles. The development of initiative, the fostering of mental resourcefulness, and the release of creative talent have contributed greatly to cultural growth and progress. Under these circumstances a statement to the effect that some measure of liberty should be held to constitute a "natural right" of men is not at all devoid of positive meaning.[14]

If this conclusion is accepted, neither slavery nor serfdom can be defended from the point of view of justice. These institutions can only be explained in terms of possible or probable economic necessity and as historical stepping stones in the endeavor to create greater and richer civilizations.[15] Aristotle saw quite clearly that slavery was a concomitant of a technically undeveloped society which had not as yet solved the problem of production satisfactorily. He said: "There is only one condition on which we can imagine managers not needing subordinates, and masters not needing slaves. This condition would be that each [inanimate] instrument could do its own work, ... as if a shuttle should weave of itself, and a plectrum should do its own harp-playing." [16] Thus he felt that in a developed technology automation and labor-saving devices could take care of the monotonous, mechanical part of production, so that men might be able to get along without human machines.

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245. It might be observed in this connection that, according to the testimony of many historians of antiquity, a large number of slaveowners treated their slaves like human beings and allowed them a certain amount of freedom. When the treatment of slaves on the large agricultural estates became cruel and oppressive in the late Roman Republic, slave uprisings and even protracted slave wars were the consequence. See Michael Rostovtzeff, *A History of the Ancient World*, 2d ed. (Oxford, 1930), II, 118.

[12] The desire for self-perfection and its frequent obstruction by human inertia is discussed *infra* Sec. 64.

[13] William E. Hocking, *Present Status of the Philosophy of Law and of Rights* (New Haven, 1926), pp. 71–72. It would seem necessary, however, to restrict this axiom to the use of the *constructive* powers of men.

[14] To state that there is a natural right to freedom does not mean that it has everywhere been granted. Although wide cultural consensus was made a test of natural law in Section 50, it was also pointed out that there is a dynamic element in natural law which evolves slowly in the course of cultural improvement.

[15] This thought is developed in greater detail in Edgar Bodenheimer, *Treatise on Justice* (New York, 1967), pp. 106–109.

[16] Aristotle, *supra* n. 7, Bk. I. 1253b.

If, from the point of view of justice, we decide to recognize a right to freedom rooted in the natural inclinations of human beings, we cannot, however, construe this right as absolute and boundless. It has been the experience of free societies that all liberties are liable to abuse by unscrupulous individuals and groups, and that they must therefore be subjected to certain restraints in the interest of the public weal.[17] In the absence of such restraints, all men would become potential victims of excesses in the use of freedom. Anarchic political freedom may turn into states of dependency upon private usurpers of power.[18] Unlimited economic freedom may result in the rise of monopoly.[19] Men have, for these and other reasons, usually been ready to have their freedom subjected to certain socially beneficial controls. Their willingness to accept restraints, which stems from the social tendencies of human nature, is as natural as their desire for freedom of action, which has its roots in the self-assertive side of the human personality.[20]

A large part of the constitutional history of the United States can be understood only if it is interpreted as an attempt on the part of the United States Supreme Court to create a workable equilibrium and synthesis between the two polar notions of liberty and governmental authority. In the words of Chief Justice Stone:

> Man does not live by himself and for himself alone. There comes a point in the organization of a complex society where individualism must yield to traffic regulations, where the right to do as one will with his own must bow to zoning ordinances, or even on occasion to price-fixing regulations. Just where the line is to be drawn which marks the boundary between the appropriate field of individual liberty and right and that of government action for the larger good, so as to insure the least sacrifice of both types of social advantage is the perpetual question of constitutional law.[21]

The character of the synthesis between liberty and restraint has varied throughout the history of this nation. It must necessarily differ

[17] See Alfred N. Whitehead, *Adventures of Ideas* (New York, 1933), p. 63: "A few men in the whole caste of their character, and most men in some of their actions, are antisocial in respect to the peculiar type of any society possible in their time. There can be no evasion of the plain fact that compulsion is necessary, and that compulsion is the restriction of liberty." See also Oscar and Mary Handlin, *The Dimensions of Liberty* (New York, 1966), p. 23.

[18] See *supra* Sec. 44.

[19] For an extreme view of political and economic libertarianism see John Hospers, *Libertarianism* (Los Angeles, 1971).

[20] For example, it is not unnatural for men to assume burdens, duties, and responsibilities. They are, in fact, often desired and form part of the hallmarks of true humanity. For a statement of the view that human beings do not necessarily want a maximum of freedom see Carl J. Friedrich, "The Dialectic of Political Order and Freedom," in *The Concept of Order*, ed. P. G. Kuntz (Seattle, 1968), pp. 350–351.

[21] Harlan F. Stone, "The Common Law in the United States," 50 *Harvard Law Review* 4, at 22 (1936).

according to whether a commonwealth goes through a period of peace or war, prosperity or crisis, disciplined morality or moral disintegration. But while no generally valid precepts or panaceas for reconciling freedom and restraint can be offered, it might be possible (since the results of considerable experimentation with free forms of social organization are available today) to summarize certain conclusions regarding this problem which are likely to be concurred in not only by the large majority of Americans but by informed observers in other civilized communities in the modern world as well. These conclusions (which are not in any sense meant to be exhaustive) are the following: Men have no right to slay or hurt their fellowmen. Speech cannot be tolerated which untruthfully defames others.[22] A society will not countenance public solicitation of crime and violence. The use of private property in a manner which seriously and unjustifiably harms or discomforts other members of the community must be curbed. Freedom of transaction should not be extended to include agreements repugnant to morality or prevailing public policy. The conduct of business by means of practices which are regarded as thoroughly unfair by other businessmen or the community at large should be subjected to legal restrictions. Freedom to engage in certain vocations which require special skill ought to be confined to persons who have undergone the requisite professional education and training. Freedom to build should be made subject to certain restraints imposed in the interest of public safety and public convenience. The right of free motion should be regulated by traffic laws. The right of parents to bring up their children may be terminated in case of child neglect or serious mistreatment. While the details and the manner of operation of such limitations on freedom will vary considerably in different civilized countries, there would seem to exist nearly universal agreement today as to their necessity or desirability.

No discussion of freedom can be complete which fails to recognize that the ideal of freedom has a negative as well as a positive component. Freedom does not only consist in the removal of external restraints and exemption from arbitrary control. It also embraces the opportunity to develop one's natural gifts and acquired skills in the service of the great enterprise called human civilization. Freedom in this sense can be described as "the conditions necessary and sufficient for the formation of a purpose, its translation into effective action through organized cultural instrumentalities, and the full enjoyment of the results of such

[22] See Shakespeare, *Othello*, Act III, sc. 3, line 155:

> He that filches from me my good name
> Robs me of that which not enriches him,
> And makes me poor indeed.

activity." [23] A man may be completely free from coercive or other harmful restraints, from physical or legal fetters placed on his freedom of movement or expression, but if society affords him no opportunity for useful work and constructive activity consonant with his abilities, he will not have the sense of being a truly free man. Hence freedom to pursue and attain purposes is as much a significant and vital aspect of the concept in its essential meaning as freedom from external impediment.[24]

Negative freedom from interference may sometimes come into irreconcilable conflict with the positive freedom of realizing one's personal and social capacities. A law forcing parents to send their children to school and keep them in school until they have reached a certain age does not promote freedom from restraint on the part of parents as well as children; but there is little doubt that such a law is beneficial to freedom of self-realization and enlarges the opportunities of children in later life, especially their freedom of vocational choice. A fair employment law limits the freedom of employers to choose their employees but may enlarge the chances of members of minority groups to find remunerative work. Inasmuch as individual development needs to be aided by cultural institutions and social effort, the advancement of positive freedom is widely held today to be within the province of the law as a tool of the general welfare, even though this may entail some sacrifice of the negative right to be free from restraint.

There are other situations where law has been used to accommodate conflicting freedoms or to balance the value of freedom against competing goals of the social order. A statute prohibiting hotel or restaurant owners from discriminating against Negroes restricts the liberty of such owners to serve whom they please, but it widens the freedom of Negroes to patronize accommodations and eating places of their own choice; such a statute also takes a step toward granting them

[23] Bronislaw Malinowski, *Freedom and Civilization* (Bloomington, Ind., 1960), p. 25. John Stuart Mill's definition of freedom as "doing what one desires" comprises both the negative and positive components of freedom. *On Liberty*, ed. C. V. Shields (New York, 1956), p. 117.

[24] Some authors have taken the position that the term freedom should be limited to freedom from constraint, while the positive freedom to pursue purposes and actualize one's potentialities in a proper social setting should be denominated by some other word, such as "opportunity." See Friedrich Hayek, *The Constitution of Liberty* (Chicago, 1960), pp. 11–13, 16–17; Carlton K. Allen, *Aspects of Justice* (London, 1958), pp. 117–118. This view has been challenged. Lon L. Fuller, "Freedom—A Suggested Analysis," 68 *Harvard Law Review* 1305, at 1306–1307, 1312 (1955); Carl J. Friedrich, "Rights, Liberties, Freedoms," 1964 *Archiv für Rechts- und Sozialphilosophie* (Beiheft No. 40) 109, at 114–117. On the problem see also Christian Bay, *The Structure of Freedom* (Stanford, 1958), pp. 57–58; Harry W. Jones, "Freedom and Opportunity as Competing Social Values," in *Liberty* (NOMOS vol. IV), ed. C. J. Friedrich (New York, 1962), pp. 227–242.

equality with white people.[25] The freedom to erect billboards alongside of highways has been curbed in the interest of preserving scenic beauty. Laws against water and air pollution have restricted the freedom of manufacturing operations in the interest of public health. Conservation measures have erected certain barriers against the exploitation of natural resources. Draft laws have been enacted for purposes of national defense. While it may still be argued that the legal system maintains a presumption in favor of freedom, at least in normal times, the increasing complexity of modern life and the clashes of conflicting social forces have made it necessary for the law in some instances to portion out freedoms or limit them in the public interest.

Section 52. *Justice and Equality*

It was pointed out in the preceding section that the law has been an important force in the promotion of freedom, and that at the same time it has been instrumental in limiting its range. The law has performed a similar duality of function with respect to equality. It has played a prominent historical role in furthering the equality of men and groups of men; at the same time it has maintained and sanctioned many inequalities.

Equality is a polymorphous concept which carries a number of different meanings. Its referent may be the right of political participation, the system of income distribution, the social and legal position of disfavored groups. It includes in its scope the equality of legal treatment, the equality of opportunity, the equality of basic human needs. It may also be concerned with the protection of equivalence between obligation and counterobligation in consensual agreements, with the adequacy of compensation or restitution in making amends for a wrong, and with the maintenance of a certain degree of proportionality between offense and penalty in the administration of criminal justice. In order to gain a proper understanding of the relation of law to equality, some preliminary observations regarding these various types of equality are called for.[1]

One kind of equality is implicit in the very concept of law. It was

[25] Locke declared that it was the purpose of law to increase liberty. See *supra* n. 3. Bentham, on the other hand, stated that "no law can ever be made but what trenches upon liberty." *The Limits of Jurisprudence Defined,* ed. C. W. Everett (New York, 1945), p. 139. Cf. also Bentham, *Of Laws in General,* ed. H. L. A. Hart (London, 1970), p. 54. The example above in the text shows that one and the same law may enlarge the liberty of one group and curtail that of another.

[1] For an able explanation of the various denotations of the concept see Felix E. Oppenheim, "Equality," 5 *International Encyclopedia of the Social Sciences* 102 (New York, 1968). On the history of the equality concept in political thought see Sanford A. Lakoff, *Equality in Political Philosophy* (Cambridge, Mass., 1964).

pointed out earlier that there can be no genuine order of law without rules, although a legal system does not exhaust its significance in the promulgation and enforcement of rules.[2] A rule of law groups people, things, and events into classifications and deals with them in accordance with some common standard. For example, a statutory rule to the effect that a parent must provide support and education to the children in his custody imposes a uniform set of obligations on all parents covered by the provision. It is expected that the rule will be applied consistently to all cases falling within its purview. Under this presupposition, the rule promotes equality of treatment with respect to parents. All of them are subjected to certain duties, although the actual extent of the support obligation will vary with the circumstances. Inasmuch as all societies observe rules or general standards, some modicum of equality is realized everywhere by the very operation of a normative system.[3]

Legal equality, thus conceived, means no more than that "all who are alike in the eyes of the law be treated in a fashion determined by law." [4] As will easily be seen, this facet of the rule of law contains no intrinsic safeguards against the adoption of arbitrary or unreasonable classifications. If a legislature passes a law making left-handed persons ineligible for public office, formal equality is preserved as long as the law is enforced with even-handed objectivity against all who possess the classifying trait.

A step upwards on the equality ladder is reached when lawmakers are enjoined from making unreasonable distinctions in their enactments.[5] In that event, the validity of a law is made subject to the requirement that equal persons and equal situations must be treated equally or at least similarly if they are in fact equal or similar under the prevalent standards of justice. This principle would render inoperative an enactment denying the right to public office to left-handed individuals, unless the community was convinced of a causal connection between left-handedness and vocational incompetence. As will be shown later, the substantive limitations placed on legal differentiations by the equal-treatment axiom are very imprecise and wholly contingent

[2] See *supra* Sec. 45.

[3] "All rules, by definition, entail a measure of equality. . . . To enforce a rule is to promote equality of behaviour or treatment." Isaiah Berlin, "Equality," in *The Concept of Equality*, ed. W. T. Blackstone (Minneapolis, 1969), p. 17.

[4] Chaim Perelman, *Justice* (New York, 1967), p. 24.

[5] This is the purpose of the equal protection clause of the Federal Constitution, as interpreted by the United States Supreme Court. See Joseph Tussman and Jacobus Ten Broek, "The Equal Protection of the Laws," 37 *California Law Review* 341 (1949).

upon the social philosophy dominant in society at a particular time. The equal-treatment principle, in and by itself, does not rule out the oppressive treatment of disfavored groups in a community.[6]

A further post on the road toward equalization is reached when certain factors such as race, sex, religion, national origin, and ideological conviction are declared to be inadmissible criteria of legislative differentiation. The implementation of this policy may lead to an allocation of basic rights to all members of a community, such as the right to life, liberty, property, education, and political participation. A social order based on equality of rights has taken a long step towards the elimination of discrimination if the grant of equal rights is matched by respect for these rights by the organs charged with the administration and enforcement of the law.

It is possible, however, that the recognition of basic rights may merely offer a formal as distinguished from an effective opportunity for the exercise of these rights. The right to establish a business may be impeded in its realization by the existence of monopolistic or semi-monopolistic conditions in certain sectors of the economy. The right to acquire property may be severely reduced in its potential scope when the chances to make a decent living are not open to all who are willing to work. The actual implementation of a right to education depends upon the existence of a sufficient number of educational institutions and upon the financial terms offered by them.

A society may meet the problems arising from a discrepancy between formal and actual opportunities by supplementing the equality of basic rights with a guarantee of the equality of basic needs.[7] This may entail the granting of privileges to disadvantaged persons to take care of primary urgencies. Policies aimed at this objective might include the enactment of minimum wage laws, the institution of a system of welfare, or the adoption of a guaranteed family income plan. If the benefits resulting from such programs are adequate only to prevent the most extreme forms of destitution, it is likely that more far-reaching demands will be made for a reduction of the most glaring economic inequalities.

The forms of equality discussed so far were concerned primarily with the allocation and distribution of rights, powers, and benefits through legislative action. There remains for consideration the area

[6] See Julius Stone, *Human Law and Human Justice* (Stanford, 1965), p. 326.

[7] See L. T. Hobhouse, *The Elements of Social Justice* (New York, 1922), pp. 112–115, 122–125; John H. Schaar, "Equality of Opportunity, and Beyond," in *Equality* (NOMOS vol. IX), ed. J. R. Pennock and J. W. Chapman (New York, 1967), p. 242; A. M. Honoré, "Social Justice," 8 *McGill Law Journal* 77, at 91–93 (1962).

of *commutative equality*.[8] In dealings of exchange, for example, some degree of equivalence between promise and counterpromise, between performance and counterperformance is demanded by the human sense of justice under certain circumstances. As a general rule, the parties to a contract determine the value of their respective performances by an exercise of their private autonomy. If, however, there exists a substantial inequality of bargaining power, or if one party misrepresents to the other the value of goods to be sold or services to be rendered, the law will tend to insist on the restoration of a reasonable equivalence. Problems of proportionate (as distinguished from mathematical) equality will also arise when a party is obligated to compensate another for a loss or to make restitution of a benefit unjustly received. Last but not least, a substantial disparity between an offense and the penalty imposed for its commission will violate the feeling of justice of the average man.

Where do we find the psychological roots of the human sense of equality? We have to assume that they are diverse and cannot be brought upon a common denominator. One of its sources is the human urge for respect. Where persons deeming themselves equal to others receive unequal treatment at the hands of the law, they will have a feeling of degradation, of disrespect for their personality and common humanity. Another force supporting the push of the law towards equality is the human desire to be free from domination by others. Although human beings may be willing to serve masters or leaders by voluntary submission, they will normally abhor a coercive reduction or annihilation of their selves. The struggle for emancipation of classes, races, and the female sex, which occupies a prominent place in legal history, is evidence of this psychological fact. The quest for commutative equality, on the other hand, stems probably from a sense of proportion, which is also conspicuous in other areas of human concern, especially in the aesthetic realm.[9]

Since revulsion against discrimination is at the core of the equality postulate, this problem requires further consideration. "The sense of injustice," said Edmond Cahn, "revolts against whatever is unequal by caprice." [10] It is not true, as has sometimes been asserted, that what is "capricious" depends wholly on the personal and irrational reactions of individuals and therefore is unamenable to rational analysis. Profes-

[8] This area largely corresponds to what Aristotle called "corrective justice." See *supra* Secs. 47 and 49.

[9] For a fuller discussion of the psychological sources of the quest for equality see Edgar Bodenheimer, "Philosophical Anthropology and the Law," 59 *California Law Review* 653, at 671–675 (1971).

[10] Edmond N. Cahn, *The Sense of Injustice* (New York, 1949), p. 14.

sor Jean Piaget, in his studies on the moral judgment of children, found that, while the children's ideas on fairness and unfairness differ to some extent according to the age and experience of the child, the majority of the children in the same age group evince the same general attitude towards questions of right and wrong, and that the development from one attitude to another follows a fairly definite pattern.[11] Bienenfeld has pointed out in an able study that the feeling of justice is innate in the child and deeply rooted in his sense of personality.[12] In his opinion, this sentiment manifests itself in an essentially similar way in all or most children. The child demands equality with his brothers and sisters, although in a more advanced stage of his development he will understand inequalities of treatment if they are rationally explained to him. A child will rebel in his innermost soul against discriminations felt by him to be arbitrary and whimsical. His reactions in this respect are not basically different from those of a social group in which differentiations are created that the members of the group regard as wholly unjustified or oppressive. In the words of Bienenfeld, "it is the degree of impartiality in respect of quarreling children and their contradictory basic desires that makes for peace or disharmony in the family. Similarly in society, co-operation will be promoted by impartiality and impeded by discrimination." [13]

It cannot, of course, be contended that there has existed in history a universal agreement on what does and what does not constitute unreasonable discrimination. While it is unlikely that in any nation or epoch of history the people would make eligibility for public office dependent on whether the candidate was left- or right-handed, differences in terms of birth, wealth, race, and sex have been regarded as highly material in some social units and as immaterial in others. The Romans, for many centuries, granted certain privileges to the citizens of Rome which they denied to the inhabitants of the far-flung provinces. The Middle Ages, emphasizing inequality over equality, built a hierarchical structure of society predicated upon a complex gradation of ranks and entitlements. Many democracies in the nineteenth century considered the differences between the sexes so fundamental as to justify an unequal treatment of women with respect to suffrage and other legal rights. In countries recognizing in principle the idea of general equality before the law, men of property and wealth sometimes enjoy actual privileges and some immunities from legal sanctions.

[11] Jean Piaget, *The Moral Judgment of the Child*, transl. M. Gabain (London, 1932), pp. 197 ff.
[12] F. R. Bienenfeld, *Rediscovery of Justice* (London, 1947), pp. 18–27.
[13] *Id.*, p. 26.

Thus the question of whether certain factual differences between human beings warrant a differentiating treatment by the law has received diverse and inconsistent answers in the course of history. Such divergences of opinion lend apparent strength to the argument that the notion of justice is not amenable to rational cognition and, even if not wholly subjective, represents at best a social convention or at worst a forcible imposition of standards by a ruling class.[14]

It is believed that such skepticism concerning the possibility of any objective inquiry into the requirements of justice mistakes some surface appearances for a deeper truth. It is undoubtedly correct to say that the concept of justice includes a large *relative* component which makes its necessary for us to interpret and appraise systems of justice in the context of their historical, economic, and social setting. But this does not mean that the ideal of justice at a particular time is nothing but a product of arbitrary social conventions, accepted perhaps by the people on the basis of ruling-class propaganda attempting to demonstrate the eternal reasonableness of the existing social system.[15] The degree of equality and inequality accorded to people and groups is often contingent upon objective conditions of production, on more or less uncontrollable social realities, on the general state of social evolution, and on the existing level of knowledge and understanding. Trial and error, experimentation and failure, progress and retrogression will affect and modify our ideas as to what should be treated equally and unequally. The examples which follow are designed to illustrate the dependence of notions of justice upon the harsh, limiting facts of reality, as well as the revision of such notions in the light of enlarged knowledge and a more rational appraisal of human potentialities.

At a time when technology was not sufficiently developed to provide educational facilities for more than a highly limited number of persons, it was not necessarily capricious to restrict all forms of advanced education to male persons on the ground that the women were needed at home. Villeinage, a condition in which the agricultural laborer is bound to the soil, appears unjust to us; yet there is a serious question whether the Middle Ages could have achieved maximum productivity in agriculture under a system of free mobility of agricultural labor. It should also not be forgotten that compared with its predecessor, chattel slavery, villeinage represented an advance in the

[14] Cf. *supra* Sec. 48.

[15] The position that justice does not rest on reason but on "artifice and human convention" was taken by David Hume, *A Treatise of Human Nature*, ed. L. A. Selby-Biggs (London, 1888), p. 496. It can, of course, not be denied that people may be strongly influenced in their attitude toward justice by teaching, indoctrination, and the general spirit of the times. See *infra* Sec. 55.

promotion of justice. A system of food rationing, such as was in effect in several European countries after World War II, under which workers performing the heavy tasks of physical reconstruction were given larger rations than people engaged in other and less exhausting work, would be considered improper under conditions of affluence. It can be defended as reasonable and just in a time of famine and food shortage when the rebuilding of homes and other essential facilities had to be made the first order of business.

The sense of justice will usually assert itself when an existing inequality, due to a change in condition or an advance in scientific knowledge or human understanding, is felt to be no longer necessary, justifiable, or acceptable. Thus, when it became clear that women were capable of intellectual achievements as great as those of men, the struggle for equal participation of women in the political, professional, and educational life of the community received a strong impetus and resulted in the breaking down of many legal and extralegal barriers that had previously stood in the way of female equality. In the fifth century B.C., the plebeians in Rome revolted against the exclusive rule of the patricians on the ground that the existing political inequalities had no basis in social reality, and that the plebeians were just as fit to participate in government as the aristocratic elements of the population. The French Revolution was waged against discrimination by the feudal class against the middle classes; the American Revolution directed its force against what was felt to be an unjust treatment of the colonies; and the European Chartist movement of the 1830's fought for granting the franchise to the laboring classes because it was regarded as untenable to deny voting rights to people solely on the ground that they had little property. The elevation of the living standards, levels of intelligence, and cultural needs of a disfavored race will bring about a struggle on its part for emancipation and equality of rights. In such struggles the victims of discrimination have often won the sympathy and support of outsiders, including members of the ruling group, whose sense of justice was aroused by the unequal treatment devoid of rational justification. Nothing aids the cause of a group subjected to an inferior status more effectively than showing that there exists no factual basis for unequal treatment.[16]

It may therefore be said that the battle for justice is in many instances waged for the purpose of removing a legal or custom-approved inequality for which there is no foundation in fact and reason. From the beginnings of recorded history all great social struggles and reform movements have raised the banner of justice against cer-

[16] See in this connection *Brown v. Board of Education*, 347 U.S. 483 (1954).

tain inequities of the positive law that were felt to be in need of correction. Frequently the success of a new idea of justice is insured by an advance in psychological or sociological knowledge which demonstrates that the lines governing the classification of persons, groups, and things for the purpose of equal or unequal treatment by the law must be redrawn in order to redress a political or social wrong.

Although the struggle for the emancipation of previously disfavored groups has occupied a conspicuous place in legal history, it has never resulted in the achievement of complete equality among men. A society of absolute equals is probably incompatible with the unequal distribution of natural gifts and capacities among human beings.[17] Equality of decision-making power, for example, becomes of dubious value when some members of a group called upon to undertake a program of action possess a technically superior knowledge of the subject matter which is crucial to the exercise of sound judgment. In an army, common soldiers for obvious reasons cannot be given a power of command equal to that of officers, or be given the right to overrule military orders by majority vote. In other organizations, too, whether they are private or governmental, persons with special qualities and competence often need to be given authority to frame policies and issue binding directives. Moreover, although men should have enough equality to enable each person to reach the station for which he is best fitted, an optimum use of talent may be unfeasible without the stimulus of unequal recompense for unequal achievements. These thoughts suggest some of the reasons why—regardless of the form of the political, economic, and social system—conditions of absolute equality have never been established in human society. It is likely that such conditions could only be brought about by setting up a despotism which would see to it that outside the ranks of the rulers no man could rise above any other man.

Section 53. *Justice and Security*

While freedom and equality have figured prominently in jurisprudential theory as significant components of the notion of justice, this is not true to the same extent for the value of security. While the quest for security has been brought into focus in discussions of the need for order, it has been underemphasized as a relevant factor in the achievement of justice. The attempt will be made to demonstrate in this section that an important link exists between security and justice.

One reason why security has been assigned a backstage seat in the

[17] See Johannes Messner, *Social Ethics*, rev. ed. transl. J. J. Doherty (St. Louis, 1965), p. 330; Berlin, *supra* n. 3, pp. 22–25.

theory of justice must be sought in the fact that one of its roles in the legal order is of a merely secondary and derivative character: Security serves to stabilize and render as enduring as possible the enjoyment of other values, such as life, property, liberty, and equality.[1] The law seeks to protect life and limb; it endeavors to guard family relations from aggressive disruption from outside; it provides redress against violations of property rights. Furthermore, the law has played a role in creating safeguards against civil disorder and (by recognizing the legitimacy of defensive wars) against foreign invasions. These various security objectives of the law are epitomized in Hobbes's apothegm: "The safety of the people is the supreme law." [2]

The law has also performed an important security function in confirming and perpetuating gains in freedom and equality which nations, groups, and individuals have obtained by means of political struggles. The law has served as a stabilizer of rights and as a damper on uncontrolled power. Its charters of liberty and equality have aimed at making sure that rights conceded today would not be taken away tomorrow.[3]

The connection between order and security becomes manifest at this point. It was shown earlier that the operation of law in the forms of rules, precedents, and structured procedures imparts a measure of constancy and continuity to life in society.[4] In a similar vein, the security objective of the law—which is concerned with firm protection of material needs and interests rather than with the fashioning of orderly legal techniques—seeks to reduce the frequency of indiscriminate change insofar as it jeopardizes the performance of socially necessary tasks. "Human welfare demands, at a minimum, sufficient order to insure that such basic needs as food production, shelter and child rearing, be satisfied, not in a state of constant chaos and conflict, but on a peaceful, orderly basis with a reasonable level of day-to-day security." [5]

In addition to its utility as a tool of implementing and consolidating other values of the legal order, the promotion of security also serves some meritorious purposes of its own. This becomes particularly evi-

[1] See Christian Bay, *The Structure of Freedom* (Stanford, 1958), p. 19: "Security refers to the actual or perceived probability of the extension over time of the enjoyment of other values."

[2] Thomas Hobbes, *De Cive*, ed. S. P. Lamprecht (New York, 1949), Pt. II. xiii. 2.

[3] Examples are the Magna Carta of 1215, the Petition of Rights of 1689, the United States Constitution and many other modern constitutions. See in this connection Edgar Bodenheimer, *Power, Law, and Society* (New York, 1973), pp. 55–59.

[4] See *supra* Sec. 43.

[5] *Law and Order Reconsidered: Report of the Task Force on Law and Law Enforcement of the National Commission on the Causes and Prevention of Violence* (Washington, 1970), p. 3.

dent when we consider the needs of the child. Recent psychological studies have made it clear that children in their formative years thrive best in an atmosphere of protectiveness which, although it should not go beyond reasonable limits, requires some measure of fixity, steadiness, and rhythm in home life.[6] Family disintegration and separation of parents may do considerable damage to the mental equilibrium of the child and upset his feeling of belonging. If he is frequently moved from one home to another, his psychological health and sense of identity may become adversely affected. Justice to the child may make it imperative for the law to take its best interests into account in regulating the field of marriage dissolution or in providing reconciliation and counseling services.

Although the need for security decreases as the individual moves towards maturity, it will accompany him in some form or other throughout his life. It has already been mentioned that human beings desire protection of life, limb, property, and freedom. They also appear to retain a need for belongingness, which is a concomitant of the sense of security.[7] Some safe haven is essential to them if they wish to avoid loneliness, isolation, and alienation, whether it is their family, a political or social group, or a cause with which they can identify. Such wants cannot in all respects be gratified by legal means or legal institutions. The law can, however, be helpful in structuring the cultural framework in which an individual can find that measure of inner steadiness which is necessary for his mental well-being.[8]

There is another rubric of security which is gaining increasing attention and recognition in the civilized world. Certain hazards, risks, and vicissitudes are incident to human life in general or to conditions of life in modern technological societies in particular. The most important ones among them are old age, illness, accidents, and unemployment. It is the purpose of the *social security system* to mitigate the economic hardships often connected with these contingencies. The chief branches of this system are old age insurance, health services, workmen's compensation, and unemployment insurance.

The needs of human beings which these services are designed to meet are brought forth by the industrial age rather than by human nature as such. Old age insurance was hardly required in the period of agricul-

[6] See Abraham H. Maslow, *Motivation and Personality*, 2d ed. (New York, 1970), pp. 39–41; Erik H. Erikson, *Childhood and Society*, 2d ed. (New York, 1963), pp. 138, 412; Andrew S. Watson, *Psychology for Lawyers* (New York, 1968), pp. 196–197; James S. Plant, "A Psychiatrist's Views of Children of Divorced Parents," 10 *Law and Contemporary Problems* 807, at 812–814 (1944).

[7] On the belongingness need see Maslow, pp. 43–45.

[8] The psychological roots of the need for security are discussed in greater detail in Edgar Bodenheimer, *Power Law, and Society*, pp. 34–49.

tural civilization, since there was usually some wing in the farmhouse to shelter aged relatives; but modern city life and the mobility of the younger generation often make it difficult to create a satisfactory home for the senior citizens. Medical expenses were of moderate size in earlier times; but in this day and age the cost of health services and medications is often prohibitive for the average family. Industrial accidents have greatly increased with the rise of technology; it is generally held that the risk of permanent or temporary disability should not be imposed upon the workman, regardless of whether or not he could have avoided the accident by due care. Unemployment was not a large-scale phenomenon in former times; it is a problem requiring serious public attention today. The notion of social security in its various manifestations has gained widespread acceptance because it is felt to be in consonance with contemporary postulates of justice.[9]

Although there exists, in Pound's words, a "social interest in the general security," [10] the security value, like the values discussed previously, is not an absolute in the sense that its realization is under all conceivable circumstances beneficial for the individual and society. A certain amount of security is necessary for men to preserve their mental health, abate debilitating forms of fear and anxiety, and maintain the nervous equilibrium. If, however, the urge for security becomes all-encompassing, there is danger that human growth will become arrested or impeded. Some degree of stress, risk, and uncertainty often operates as a stimulus to achievement.[11]

These general statements will be substantiated by a few examples. The constant apprehension of a man that he might lose his employment because of the capricious disposition of his employer may create deleterious tensions; but a job security without limits may be a spur to inadequate performance. Living within a closed ideological system may promote stability of conduct and a comfortable cushion for beliefs and convictions; but the inflexibility of such a system will hinder free inquiry and stifle original thought. Strict adherence to legal norms originating in the past allows men to pursue a safe and predictable course in planning their personal and business affairs; it may, on the other hand, thwart needed or desirable changes in the legal order.

[9] A more detailed account of the relation between justice and social security is found in Edgar Bodenheimer, *Treatise on Justice* (New York, 1967), pp. 97–100.

[10] Roscoe Pound, "A Survey of Social Interests," 57 *Harvard Law Review* 1, at 9 (1943).

[11] Kurt Goldstein would appear to go too far when, in view of this fact of experience, he characterizes security as a non-value. See his "Reply to Professor Weisskopf," in *New Knowledge of Human Values*, ed. A. H. Maslow (Chicago, 1970), p. 248.

Security thus has a Janus-faced countenance. A reasonable stabilization of the conditions of life is necessary, lest anomie and chaos tear a society apart. Yet stability must often make room for adjustment. An exclusive emphasis on security, in individual as well as social life, may lead to stagnation and eventual decay. There are times when, paradoxically, security can be preserved only by change, while the refusal to promote change will result in insecurity and social disruption.

Section 54. *Justice and the Common Good*

It was pointed out in the preceding sections that the furtherance of freedom, equality, and security by the law is actuated by deep-seated tendencies in human nature. At the same time the view was propounded that none of these three values lends itself to limitless recognition and protection. It was suggested that an anarchic libertarianism, an absolute egalitarianism, and a change-resisting preoccupation with security are self-defeating goals of social policy, because they may easily produce the opposite of what their realization was meant to accomplish.[1]

In assigning to freedom, equality, and security the role of paramount values in the theory and practice of justice, no intention should be implied to minimize the significance of other values worthy of being promoted by a legal order. For example, the lawmakers may wish to turn their attention to aesthetic concerns by prohibiting the erection of billboards on certain scenic roads or by outlawing other defacements of natural beauty. They may decide to embark on a public health program going beyond the provision of financial security in case of illness. They may come to the aid of the human desire for knowledge by passing laws in support of education.[2] In all of these three areas, however, much progress can be made by non-legal action, while the lawmakers can hardly escape the task of wrestling with the fundamental problems of freedom, equality, and security.

In trying to cope with these problems, the lawmakers will find that conflicts often arise between these three values. A law designed to protect the general security may necessitate the curtailment of freedom. For example, a gun control law may be conducive to the reduction of violence, but it will at the same time interfere with the right to purchase and possess firearms. A law which aims at the increase of individual freedom may tend to lessen the public's security from crime.

[1] Arthur Kaufmann, "The Ontological Structure of Law," 8 *Natural Law Forum* 79, at 87 (1963), says: "It is a paradoxical but fundamental principle that every point of view, carried to its extreme, turns into its opposite."

[2] With respect to the last two examples, it might be noted that the values of "well-being" and "enlightenment" are included in the value system propounded by Lasswell and McDougal. See *supra* Sec. 37.

Thus a statute outlawing all arrests without warrant would facilitate the escape of offenders caught in a criminal act. In the economic field, an antitrust law has in view the maintenance of competitive equality, while it works to restrict the freedom of business enterprises to merge or collaborate. Conversely, a statute authorizing the creation of combines and conglomerates would promote the freedom and autonomy of business operations but at the same time enhance economic inequality.

A legal system aiming at justice will attempt to create a workable synthesis and reconciliation of freedom, equality, and security. This is a task fraught with immense difficulties, and no master plan has as yet been discovered which can claim to represent "absolute justice" in the achievement of this objective. A large number of variables and contingencies will have to be taken into account in the endeavor to find concrete solutions. The approach to a reasonable adjustment between the three values cannot be the same in all nations, in all stages of the historical development of a nation, and under dissimilar political, social, and economic conditions.

In the history of civilization, there have been certain nations that have given preference to freedom over other values. In England, the seeds of freedom were planted early, even in feudal times, and they sprouted into an impressive system of civil liberties after the English Revolution.[3] In the United States, the promotion of freedom was carried even farther than in England. On the continent of Europe, on the other hand, especially in Germany during the last few centuries, a tighter balance was maintained between freedom and security, especially the security of the state. A strong emphasis on security, especially the security of property and contract, is also noticeable in the law of ancient Rome during its classical period. In our own day, the notion of equality (especially economic equality) has become the watchword in the ideology of socialist countries.

It is also true that the relation between freedom, equality, and security has varied considerably in the history of individual nations. For example, England went through a feudal stage in which freedom and equality were severely restricted, while security against internal and external enemies was provided in the first place by a closely-knit manorial system which included a non-governmental military organization.[4] When the nation entered the epoch of capitalism, a strong emphasis was

[3] See Bernhard Schwartz, *The Roots of Freedom* (New York, 1967).

[4] However, in England the central power gained ascendancy over manorial autonomy earlier than in other feudal societies. See Frederick W. Maitland, *The Constitutional History of England* (Cambridge, Eng., 1931), pp. 143–144, 161–164. On the characteristics of feudalism in general see François L. Ganshof, *Feudalism*, 3rd ed. transl. P. Grierson (London, 1964).

placed on economic freedom and the availability of political choice. At a later period of English history, the phenomenon of poverty produced political and social movements aimed at the increase of economic equality. Many other nations went through similar stages of development.

Even within a particular social and economic framework, fluctuations in the conditions of society require adjustments in the priorities assigned to the realization of fundamental rights. In times of crisis, disruption, and war, individual freedom may suffer substantial curtailments for the sake of national security, while equality may yield ground to the exercise of leadership. In times of peace and prosperity, freedom and equality may have a better chance of being given close attention by the framers of governmental policy. Whatever the relation between the key values of the legal order may be in the context of a particular sociological setting, there usually exist a number of workable alternatives for balancing and ranking the goals of societal organization.

The conclusion must thus be reached that every social order faces the task of allocating rights, defining their limits, and harmonizing them with other (potentially conflicting) rights. The term "common good" is a useful conceptual tool for designating the outer limits which must not be transgressed in the allocation and exercise of individual rights lest the commonwealth suffer serious harm.[5] It is one of the chief concerns of justice to create a proper balance between individual rights and the good of the community. In particular reference to freedom, equality, and security, it was shown in the preceding sections that the individual's demands for their realization are rooted in deep-seated needs and inclinations of the human personality, while at the same time there exists a public interest in certain limitations on the scope of these values. *Justice requires, under these circumstances, that freedom, equality, and security be accorded to human beings to the greatest extent consistent with the common good.*[6]

[5] The term "outer limits" is meant to suggest that the granting of a substantial sphere of individual rights is in itself an essential condition of promoting the common good. Cf. Vera Bolgár, "The Concept of Public Welfare," 8 *American Journal of Comparative Law* 44, at 47 (1959): "The legal definition of public welfare is . . . the extent to which a given society accepts regulation by law in the sphere of individual rights and, conversely, the extent to which these rights, if violated, are given protection by law."

[6] See in this connection the *Universal Declaration of Human Rights,* adopted by the United Nations General Assembly on December 10, 1948, Art. 29 (2): "In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."

The italicized statement in the text is not intended as an exhaustive definition of justice. Other aspects of justice are discussed *supra* Sec. 49.

A detailed analysis of the concept of the common good is attended with great difficulties. Many different elements and considerations must necessarily enter into the elucidation of the concept. Nevertheless a few general principles for determining the content and scope of this basic notion can perhaps be stated.

First of all, the common good or public welfare cannot be identified with the sum total of the desires and demands of individuals.[7] We know from experience that some interests of individual persons are antagonistic to the interests of the political community, and that men are capable of actions harmful to the public weal.[8]

Second, it is inadmissible to identify the common good with the policy decisions of the public authorities. Government officials may misconceive the community interest, may make serious mistakes in framing and executing public policies, and may lead the ship of state to ruin and disaster. It would therefore be unrealistic to consider the wishes, conveniences, and actions of the ruling authorities as automatic expressions of the common good regardless of their consequences for society.

In order to arrive at a conception of the common good which, presumably and presumptively, would comport with the true interests and aspirations of mankind, it would appear necessary to introduce the idea of *civilization.* A general determination of the content and scope of the common good must start from the insight that an individual can have a full and satisfying life only if he makes a contribution in some measure to that great enterprise called "the building of civilizations." The erection of stately and livable cities, the cultivation of the soil in order to secure the means for sustaining life, the production of goods designed to reduce the hardships or increase the amenities of life, the invention of devices for transportation and communication in order to promote traffic and intercourse between men and to give men access to the beauties of nature, the search for knowledge and the fostering of the spiritual powers of men, the creation of great works of literature, art, and music—these endeavors have through the centuries aroused the admiration of men and harnessed their energies at the highest level. As

[7] Such an identification was proposed by Jeremy Bentham who said: "The interest of the community then is, what?—the sum of the interests of the several members who compose it." *An Introduction to the Principles of Morals and Legislation* (Hafner Library of Classics, 1948), Ch. I. iv.

[8] For example, an individual may have an interest in making an easy gain by putting upon the market an adulterated product, or he may wish to sell a drug dangerous to health. Bertrand Russell has shown that Bentham's view rests on an erroneous psychology. "Freedom and Government," in *Freedom: Its Meaning,* ed. R. N. Anshen (New York, 1940), pp. 260–261. For a fuller discussion see Edgar Bodenheimer, "Prolegomena to a Theory of the Public Interest," in *The Public Interest* (NOMOS vol. V), ed. C. J. Friedrich (New York, 1962), pp. 205–217.

Gustav Radbruch has wisely observed, history has always judged nations and peoples by the contributions they have made to culture and civilization.[9]

Our concept of civilization would be too narrowly delimited, however, if it were held to comprise only the material, technological, intellectual, and artistic elements of human culture. It must also be held to include the ethical aspects of human social life, whether they manifest themselves in religious or secular form. In the words of the educator Friedrich Wilhelm Foerster:

> The whole gigantic enterprise of technology, with all the as yet unimaginable consequences of atomic discoveries, requires for its success much more than a mere scientific and material apparatus; this enterprise makes such tremendous demands upon the social and ethical culture of the living person, who is supposed to harmonize the various functions of the giant machinery and to prevent their misuse, that in reality all technology represents a lost cause unless a spiritual and moral rebirth comes to its succor. Technology without ethics would be like a living being without soul and without a conscience.[10]

A materially and intellectually advanced civilization will be unable to guarantee the "good life" unless it has also taught men to temper self-interest by self-restriction in the interest of others, to respect the dignity of fellow men, and to devise proper rules for coexistence and cooperation on the various levels of group life, including the international community.

If it is true that the principal goal of mankind should be the development of all constructive forces latent in man, the crucial question as to the proper relation between individual and social effort in this process of building civilizations arises at the outset. Quite obviously the individual cannot attain the self-realization to which his nature impels him as an isolated being in a social vacuum. Without the framework of a social system affording him opportunities for productive effort he cannot develop his powers to the fullest. On the other hand, the human personality is much more than a functional element in an organized group endeavor. Those tasks which make a social order worthy of being called a civilization can never be executed by a group or collective entity as such; their fulfillment requires the cooperation of creative individuals. Thus, there must be an active interplay between

[9] "Legal Philosophy," in *The Legal Philosophies of Lask, Radbruch, and Dabin*, transl. K. Wilk (Cambridge, Mass., 1950), p. 97. For further observations on the concept of civilization and its relation to justice see Edgar Bodenheimer, *Treatise on Justice* (New York, 1967), pp. 66–75.

[10] *Die Hauptaufgaben der Erziehung* (Freiburg, 1959), p. 163 (translation mine).

individual and social effort in the building of civilizations. Under favorable conditions, for example, where there is a new and rich continent to develop, the degree of individual effort may far outweigh the volume of group control of the societal processes. Under unfavorable conditions, as, for instance, when natural resources or human manpower are scarce in a country or when a community or nation is threatened by external enemies, a strong collective effort may be necessary to insure survival or growth. A general formula for the right proportion between individual initiative and collective direction can, therefore, not be given.

While there must be interplay between individual and social effort, there need not be full congruence or coordination between these two. Historical and sociological experience would seem to demonstrate conclusively that advancement in culture, science, economics, and political forms has often been due to the ideas, teachings, or actions of individuals dissenting from and at odds with the generally accepted beliefs of the community. A social authority which is intent solely upon preserving its own power and prestige and which suppresses all individual attempts at social criticism and all challenges to group purpose, will stagnate and be unable to carry out the aims which, according to the thesis here advanced, alone will justify the existence of a coercive social power. There must be room for cooperation as well as for healthy tension between the individual and the group within the social order.

These broad outlines of a general frame of reference within whose confining limits the notion of the common good would have its operating radius leave innumerable questions unanswered. Many of these questions cannot be answered generally and abstractly. The needs of society cannot be the same under different historical and sociological conditions. As pointed out before, in times of crisis, stress, and war, the public welfare usually makes more stringent and burdensome demands upon individuals and groups than in times of peace and prosperity. It is believed, however, that a general determination of the concept according to which the measures designed to realize the public good should be directed towards the task of securing the productive use of all human faculties and capabilities comports with the aspirations of the large majority of men in our age.[11]

[11] Alfred Verdross defines the common good as follows: "*Bonum commune* is neither the sum of the goods desired by individual persons nor the advantage of a human collective whole but the aggregate of the things of value produced in a community through the collaboration of individuals which must exist in order to enable human beings, by effort and labor, to shape their own life so that it comports with the dignity of the human personality." *Abendländische Rechtsphilosophie*, 2d ed. (Vienna, 1963), p. 272 (translation mine).

XII

LAW AS A SYNTHESIS OF ORDER AND JUSTICE

Section 55. *The Relation between Order and Justice*

The attempt has been made in the two preceding chapters to demonstrate that a legal system, in order to fulfill its functions properly, must aim at the creation of order as well as the realization of justice. This assertion might perhaps be questioned on the ground that no human institution can serve two masters at the same time. This may be true where the two masters pursue entirely different objectives, give inconsistent and irreconcilable orders, and find themselves at cross-purposes almost every time they embark on a certain course of action. Where, on the other hand, the two masters strive for the same major goals, cooperate in the pursuit of these goals, and do not part ways except on relatively infrequent occasions, service for one of them does not exclude service for the other. In a healthy legal system the values of order and justice are not normally at cross-purposes; on the contrary, they are locked together in a higher union. A legal system that cannot meet the demands of justice will be unable, in the long run, to provide

order and peace for the body politic. Justice, on the other hand, cannot be accomplished without an orderly system of judicial administration which will insure the equal treatment of equal situations. Thus the maintenance of order is to some extent conditioned by the existence of a reasonably sound system of law, while justice needs the helping hand of order to perform some of its essential functions. The required synthesis of the two values may be summed up in the statement that law aims at the creation of a *just societal order.*

If there is not even a minimum of ordered regularity in the administration of justice in a country, it is desirable to avoid using the term "law." [1] This situation would obtain if there were no rules, standards, or general principles providing guidance for private and official conduct, no formalized procedures for resolving conflicts, and total unconcern by courts of law for what they decided the day before. A dispensation of "justice without law" [2] would perhaps be possible if judges were sages or saints who by intuition or infallible instinct would always find the correct decision in each individual case. It appears unfeasible in an imperfect world in which men are liable to make serious mistakes of judgment.

Justice, as we have seen earlier, requires the equal treatment of equal or substantially similar situations. Since there may be serious differences of opinion among the various judges in an organized community as to what situations require like decisions, the recognition of a body of binding standards of adjudication is well-nigh indispensable for the proper discharge of the judicial function. Even a single judge would hardly be able to administer justice fairly, impartially, and even-handedly without the help of such standards.

The human desire for some degree of normative guidance is so strong that a system of adjudication which relies exclusively on the free and unfettered intelligence of its judges has rarely been instituted in historical reality. This does not mean, however, that normative guidance has always been provided by formalized rules, statutes, ordinances, or precedents. The canons of conduct lending a modicum of consistency to the administration of law may be of a social, ethical, or religious character, they may rest on usage and custom, or they may be shaped by the intrinsic logic of the social institutions which prevail in a particular society. Even Plato, who in his earlier writings went far in decrying

[1] This is also the position of Lon L. Fuller, *The Morality of Law,* rev. ed. (New Haven, 1969), p. 39.

[2] Roscoe Pound, *Jurisprudence* (St. Paul, 1959), II, 352–374. Justice without law, according to Pound, is "justice according to magisterial good sense, unhampered by rule." *Id.*, p. 367.

the use of fixed and circumscribed norms in the judicial system,[3] desired his judges to be bound by the social and moral philosophy of his ideal commonwealth, whose contents he laid down in considerable detail in his *Republic*.

At the opposite pole of a system of adjudication without law stands an orderly, well-articulated body of rules which fail to correspond to the commmunity's sense of justice. The equality of treatment achieved by such a body of rules would be experienced by the people as an equality of mistreatment. Except in a society of robots, it would be extremely difficult for the public authorities to maintain and enforce a legal system permeated with grievous injustice. Since men will not stand long for social conditions they feel to be totally unreasonable and unbearable, a legal order without a substantial anchorage in justice will rest on an unsafe and precarious basis. As John Dickinson has said: "We come upon the need for not merely a system of fixed general rules, but of rules based on justice, or, in other words, on a regard for certain demands and capacities of human nature. Otherwise the system would not be workable; offending ingrained proclivities and standards of judgment, it would be continually violated and so fail to yield the certainty which is the excuse for its existence." [4] The natural-law tradition of ancient and modern vintage has tended towards the position that a normative system wholly or largely devoid of justice does not deserve the name of "law." [5]

It might be objected that for many centuries large aggregates of human beings have endured the oppressive condition of slavery, and that in other historical instances the lower classes have frequently borne poverty, disease, and substandard conditions of life without protest or resistance. The answer, as far as slavery is concerned, must be that the law of slavery delegated unlimited authority over the slaves to the master, and that the treatment to which the slaves were subjected depended entirely on the "law" laid down by the master for the slave estate. The history of Roman slavery teaches us that during those periods in which the treatment of slaves on the large agricultural estates was frequently cruel and inhuman, public order was sometimes seriously disturbed by slave uprisings and even protracted slave wars.[6] With respect to the second argument, it is undoubtedly true that large masses of people have sometimes humbly accepted misery, suffering, and deprivations by virtue of religious or other beliefs in the inevitabil-

[3] See *supra* Sec. 2.

[4] *Administrative Justice and the Supremacy of Law* (Cambridge, Mass., 1922), p. 122.

[5] On the validity of legal norms see *infra* Sec. 58.

[6] See *supra* Sec. 51, n. 11.

ity and God-given necessity of the existing order of things. Assuming that this belief was unjustified and that these disfavored classes could actually have been accorded a greater share of rights and benefits than they were permitted to enjoy, the example proves merely that the sense of injustice contains a subjective ingredient which requires consciousness of unreasonable discrimination as a condition of its emergence. The possibility of molding the sentiment of justice by teaching or indoctrination is one of the factors which render justice subject to certain historical and psychological contingencies. Where, on the other hand, the feelings of justice of substantial numbers of people have been thoroughly aroused, some form of vigorous social action has usually been the consequence.

Thus far we have considered only the outermost polarities of justice without order and order without justice. The large majority of viable legal systems have avoided both extremes and found some workable synthesis between these two values. Even then there will be occasions when order and justice will part company.

It may happen, for instance, that a judge in a litigated case will come to the conclusion that the application of a rule laid down in an earlier case will not do full justice to one of the parties. He may nevertheless decide to follow the precedent because the other party has relied on its continued validity, or because he sets great store by legal certainty and stability. In that event a conflict arises between the key values of the legal system which is resolved in favor of an orderly, predictable administration of the law. This problem will be discussed later in connection with the doctrine of *stare decisis*.[7]

On the other hand, it may also happen that a judge or other organ connected with the administration of the legal system will determine that orderly continuity must in a particular case yield to imperative requirements of justice. In that event the customary generality of law is sacrificed in a concrete situation to the need of dispensing an individualized justice. A departure from, or relaxation of, fixed norms is deemed necessary in the interest of justice, while order tends to favor regularity and invariant adherence to rules.

This problem was recognized by Aristotle, who pointed out that "there are some cases for which it is impossible to lay down a law, so that a special ordinance becomes necessary." [8] The solution which he proposed for the disposition of such cases was as follows: "When therefore the law lays down a general rule, and thereafter a case arises which

[7] See *infra* Sec. 86.

[8] *The Nicomachean Ethics*, transl. H. Rackham (Loeb Classical Library ed., 1947), Bk. V. x. 4.

is an exception to the rule, it is then right, where the lawgiver's pronouncement because of its absoluteness is defective and erroneous, to rectify the defect by deciding as the lawgiver would himself decide if he were present on the occasion, and would have enacted if he had been cognizant of the case in question." [9] We must be conscious, however, that such a judicial engrafting of an exception or qualification upon a previously existing rule of law may in many cases be no more than the initiation of a new normative standard to be applied to all similarly situated cases in the future. The judge finds that the classifications and differentiations made by the existing law are too crude or sweeping, and that they should be replaced by more refined and highly restricted generalizations.

Examples of this process can be found in English as well as Roman law. Thus, when the English Chancery for the first time granted specific performance of a contract, it did so on grounds of equity or conscience, because the chancellor felt that the common-law remedy of damages could not adequately compensate the plaintiff for the harm inflicted on him by the defendant's breach of contract. However, as soon as specific performance was granted as a matter of course in other and similar cases in which the remedy at law was found inadequate, the original equitable departure from the letter of the common law became transformed into a "rule of equity jurisprudence." By the same token, when the Roman praetor permitted new actions and defenses in instances where the ancient *ius civile* was found defective because of its rigidity and narrowness, such innovations became incorporated into a separate body of law known as *ius honorarium.* Such developments throw a great deal of light on the nature of law as a vehicle of what might be called *progressive differentiation,* that is, an increasing adaptation of the classifications and distinctions of the law to the boundless complexities and variations of life. Sir Henry Maine was fully justified when he characterized the two great historical systems of equity jurisprudence as instrumentalities of legal growth and law reform.[10] But it must be kept in mind that this evolution of equity jurisprudence furnishes evidence in favor of, and not against, the essentially normative character of law.

The term "equity" may, however, also be used in a different and more restricted sense. An equitable decision may be one that is neither based on an existing rule of law nor designed to inaugurate a new sequence of precedents. Its sole aim may be to do justice to the parties in a case characterized by a configuration of facts unlikely ever to be

[9] *Id.*, Bk. V. x. 5. On Aristotelian equity see N. D. O'Donoghue, "The Law Beyond the Law," 18 *American Journal of Jurisprudence* 150 (1973).

[10] *Ancient Law,* ed. F. Pollock, 4th ed. (New York, 1906), pp. 27, 67.

repeated in reality in the same or a similar way. As H. G. Hanbury has well said: "Every legal system must at times find the peculiarly hard case that cries aloud for relief, the case which no judge could decide according to rule without putting an intolerable strain on his own conscience." [11] In view of the historical connotations associated with the Anglo-American system of equity jurisprudence, it might perhaps be desirable to use a term other than equity to describe this aspect of the judicial process. The Germans speak of *Billigkeit;* we might possibly adopt the Greek word *epieikeia* or the phrase "individual equity" to identify the phenomenon. Whatever terminology is chosen, this judicial vehicle for accomplishing justice, since it lacks the normative element typical for legal regulation, should clearly be distinguished from "law" in the proper sense, a distinction which Aristotle lucidly drew in his *Nicomachean Ethics.*

While the number of occasions calling for the application of *epieikeia* may not be as large as is sometimes believed, most legal systems have developed some mechanisms to cope with the problem. The Romans granted their emperors broad prerogatives in dispensing from the law. Whenever the emperor (or the jurists advising him) felt that the application of a statutory or other rule would lead to an inadequate or iniquitous result, he had the power to set aside the rule for this particular case. The same kind of dispensing power is exercised by the Pope under canon law. Under the American legal system, the judge is given discretion to "balance the equities" in certain types of situations; the judge in most states is given power to consider individual circumstances in the award of custody of minors and the distribution of property in divorce cases; the power of pardoning possessed by the chief executive is essentially the power to minister equity or grace where extenuating factors were not, or could not be, sufficiently taken into account by the court; and juries have sometimes corrected rigidities and inadequacies in the law by exercising what Judge Frank has called "fact discretion." [12] As long as the power to mete out *epieikeia* is kept within narrowly confined and reasonable bounds and is not used to an extent destructive of the normative system, it might be safe and desirable to invest the judge with such a power even in those legal systems which do not entrust the judges with the prerogative to effect substantial innovations in the body of the law.[13]

Apart from the cases in which an individualization of justice becomes

[11] *Modern Equity*, 7th ed. (London, 1957), p. 4.

[12] Jerome Frank, *Courts on Trial* (Princeton, 1950), p. 328. For an extensive treatment of rule departures by juries see Mortimer R. Kadish and Sanford H. Kadish, *Discretion to Disobey* (Stanford, 1973), pp. 45–69.

[13] A further discussion of this problem is found *infra* Sec. 76. See also Kadish and Kadish, pp. 85–91.

necessary, disparities between the claims of order and justice may arise in another context. An existing legal system may be felt to be just, or at least tolerably reasonable, by the community as long as it satisfies the basic needs and demands of the people. By virtue of a change in economic or social conditions, technological advances, governmental mismanagement, or deterioration of a ruling elite, this state of general satisfaction may give way to discontent and a widespread conviction that the existing legal order should be displaced by one better adapted to the people's sense of justice. If a piecemeal adaptation of the law to newly arising conditions and problems cannot be made because of inertia or resistance to needed change, a social crisis or revolution will sometimes bring about a substantial reform or overhauling of the legal system which will close or at least lessen the distance between the two paramount goals of the law.

The investigations pursued so far with respect to the nature of law have a bearing on the question of existence or nonexistence of a legal system. Maurice Hauriou has stated that law possesses a form and a matter. Its form is that of rules and judicial acts administering them; its matter is the content of these rules aiming at the realization of certain values.[14] A social order entirely devoid of the formal element in law would not, as was pointed out earlier in this section, qualify as a system of law; [15] but the basic requirement of generality does not exclude an occasional departure from rules and principles in the interest of individual equity and a reservation of areas of administrative and judicial discretion.

A total disregard by a social system of one of the principal material values embodied in the concept of justice would also militate against characterizing it as a legal system. This would be the case, for example, if a society would provide no security to its members against attacks on their lives, bodily integrity, and personal possessions.[16] Furthermore, a social system whose members would be deprived by the authorities in control of any semblance of freedom and individual rights would be a society based on unlimited power rather than law. The fact that social systems practicing slavery treated the slaves as chattels rather than human beings attests to the fact that some measure of freedom is deemed to be an indispensable attribute of personality and therefore a necessary ingredient of justice.[17] A failure, finally, to recognize with

[14] Hauriou, "Classical Method and Juridical Positivism," in *The French Institutionalists*, ed. A. Broderick (Cambridge, Mass., 1970), p. 125.

[15] See also *supra* Sec. 45.

[16] On the relation between justice and security see *supra* Sec. 53.

[17] The thought that the recognition of slavery by a legal system means the carving out of an area of social life left vacant by the law of the state, which may

Aristotle that justice requires "some sort of equality," at least in the sense of a postulate of equal treatment of persons who, under the prevailing views of the time and place, are in an equal or essentially similar position, would convert political and social action into a cluster of arbitrary, *ad hoc* measures inconsistent with what the common man, in the ordinary use of language, means by "law." [18]

The existence or nonexistence of a legal system is not, on the other hand, conditioned by the structure of priorities assigned to the three fundamental components of justice. An order of law may be security-centered, egalitarian, or dedicated to the maximization of freedom, as long as the complementary and competing values are not disregarded to an extent which destroys or seriously undermines the integrity of this order.[19] Since all three values have deep roots in human nature, the achievement of a sound balance between them would be the mark of a truly successful legal system.

Section 56. *Stability and Change in Law*

"Law must be stable, and yet it cannot stand still." [1] These words of Roscoe Pound are the expression of a lasting and irrefutable truth. A legal order completely devoid of stability would be nothing but a cluster of *ad hoc* measures designed to cope merely with the ephemeral exigencies of the moment. It would lack cohesion and continuity. In consummating transactions or making plans for the future, people could never be sure whether the law of yesterday would still be the law of tomorrow. "Law as a guide to conduct is reduced to the level of mere futility if it is unknown and unknowable." [2] Conditions of excessive fluidity and chronic instability, resulting in day-to-day changes in the law, are therefore incompatible with the very idea of law.

Stability and certainty alone, however, are not sufficient to provide us with an effective, vital system of law. Progress also has a justified

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be filled by the autonomous law of the slave estate, is developed by Edgar Bodenheimer, *Power, Law, and Society* (New York, 1973), pp. 134–139. The denial of personality to the slave (which may, however, be rectified by the actual treatment accorded to him by his master) was declared by the Stoic philosophers to be contrary to the natural law. See *supra* Sec. 4 and René Marcic, "Sklaverei als Beweis gegen Naturrecht und Naturrechtslehre," 14 *Oesterreichische Zeitschrift für Oeffentliches Recht* 181 (1964).

[18] On the equal-treatment principle see *supra* Sec. 52.

[19] See *supra* Sec. 54 on the relative ranking of the basic legal values. It was pointed out there that the priorities allocated to them depend on economic factors, historical and sociological conditions, and national characteristics.

[1] Pound, *Interpretations of Legal History* (Cambridge, Mass., 1923), p. 1. See also Jean Beetz, "Reflections on Continuity and Change in Law Reform," 22 *University of Toronto Law Journal* 129 (1972).

[2] Benjamin N. Cardozo, *The Growth of the Law* (New Haven, 1924), p. 3.

claim upon the law. A legal system which is out of gear with the necessities or demands of the day and which perpetuates the transient ideas of a past epoch has little to recommend itself. In a fluid world, law cannot function effectively if it is conceived solely as an instrument of permanence.[3] Some reconciliation must be brought about between the contradictory forces of mobility and rest, conservation and innovation, constancy and change. Law, being the cement which holds the social structure together, must intelligently link the past with the present without ignoring the pressing claims of the future.[4]

Most changes in the law have been slow and gradual. They have been restricted to special aspects of legal institutions, or to matters of detail within a particular framework. The affected sectors of the legal order were altered only in part, while much of their previous structure remained intact. The non-total, incomplete character of most legal reforms furnishes an explanation of the fact that stability and change tend to interlock and interpenetrate in the life of the law.

The problem of legal statics and dynamics is closely related to the subject discussed in the preceding section. Insofar as the law strives to promote the social value of order, it is bound to pay homage to the ideas of continuity and stability. Order in social life, as we have seen, is concerned with the establishment of patterns for human action and conduct, and such patterns cannot be accomplished without assimilating the behavior of today to that of yesterday. If the law did not act as a brake on incessant and indiscriminate change, chaos and confusion would be the result, since nobody could anticipate the tidings and events of the next day. The doctrine of *stare decisis* and the observance of enacted statutory norms are therefore apt instruments for the promotion of order.[5]

The pursuit of justice in the administration of the law, on the other hand, may sometimes call for considerations of a different character. While the doctrine of precedent, born of the desire for order and regularity, demands that a fact situation which in the past has been decided in a certain way should be decided in the same fashion today, the equality contemplated by justice is not necessarily an equalization of

[3] Lord-Chancellor Hardwicke said in *Walton v. Tryon,* 21 Eng. Rep. 262 (Chanc. 1753): "Certainty is the mother of repose and therefore the law aims at certainty." Walter Gellhorn comments on this statement, "Not even Lord Hardwicke would have exalted stability above every other conceivable desideratum." "The Legislative and Administrative Response to Stability and Change," 17 *Vanderbilt Law Review* 91 (1963).

[4] See Cardozo, pp. 1–3, 143–145; Harry W. Jones, "The Creative Power and Function of Law in Historical Perspective," 17 *Vanderbilt Law Review* 135, particularly at 140 (1963).

[5] See *infra* Secs. 85 and 86.

past and present decisions. Justice, under certain conditions, will postulate an equality in space rather than an equality in time. It is just to treat two persons, groups, or situations equally which under the current standards of society deserve equality of treatment. Thus, conflicts between *stare decisis* and justice will arise whenever the value judgments of the past no longer comport with those of the present. In such cases, the difficult task of maintaining a salutary equilibrium between respect for precedent and deference to justice is presented to the organs of judicial administration.[6] A good example of the existence of such a conflict and its solution by judicial action is offered in the case of *Oppenheim v. Kridel*,[7] where the New York Court of Appeals held that a woman may maintain an action for criminal conversation against her husband's paramour. The common-law precedents, resting on the doctrine of the married woman's disability to bring suits, had limited such actions to husbands. The court rejected these precedents on the ground that social, political, and legal reforms had changed the relations between the sexes, so as to put men and women on a plane of equality.[8] In the School Segregation Case, the United States Supreme Court repudiated an earlier decision upholding segregation of races on the ground that contemporary notions of racial equality rendered its continued validity nugatory.[9]

To reconcile equality in point of time, that is, the application of prior decisions to equal or essentially similar situations, with spatial equality, the equal treatment of persons and things which under the social philosophy of the present should be dealt with alike, is a task of considerable difficulty. It involves the proper gauging of the speed with which the law should be adapted to the fluctuating currents of the day and also an appraisal of the permanence and finality of newly emerging social ideals or trends. Some other things must also be taken into account when a court is confronted with the task of discarding an earlier judicial doctrine; among them are, for example, the degree of faith that has been placed by a party to the suit on the continued force of the rule embodied in the precedent, as well as the effect of the court's reversal of position on legal relations and transactions not involved in the litigation at hand but contracted in reliance on the earlier rule.

The order function of law reflected in the twin doctrines of precedent and compliance with statutes has a tendency to freeze and stiffen

[6] See Cardozo, *The Paradoxes of Legal Science* (New York, 1928), pp. 29–30.
[7] 236 N. Y. 156, 140 N. E. 227 (1923).
[8] The case is discussed in Cardozo, p. 105.
[9] *Brown v. Board of Education*, 347 U.S. 483 (1954).

the law, and to preserve the social and economic *status quo*. It promotes the retrospective and inertial forces inherent in the law and makes the institution of law to some extent resistant to change. It is not easy to remedy this shortcoming entirely from within the legal system, through judicial action. Relief often comes from the outside, either through the exercise of political power to improve the law through legislation, or by setting up a system of equity as a complement and corrective to the system of law in the strict sense. It is instructive and revealing to note that the Romans as well as the English developed special procedures and institutions of equity as an antidote to the formalism and inflexibility of their strict law, and for the purpose of rectifying the deficiencies resulting from the conservatism of the orthodox body of law.[10] Such procedures demonstrate the force of *justice* in the law, that is, of a largely teleologically directed force which acts to keep the law in balance with the conscience of the community.

In conclusion, it might be observed that both the backward pull and the forward push are essential to the proper working of any legal system.[11] The relative strength of the past-oriented and future-oriented forces in legal development varies in different epochs of the history of a nation. An ideal system of law would presumably be one in which the necessary revisions of the law were brought about at the appropriate time by orderly procedures and with a minimum of hardship upon those who might become innocent victims of the change.

Section 57. *The Imperative and the Societal Elements in Law*

Those jurisprudential writers who regard the maintenance of order and internal peace as the exclusive or foremost task of the law will be inclined to look upon the law as a mandate or command from the government, designed to realize and guarantee the effectuation of these goals. Without some range and coordination of governmental action, it is difficult to maintain public order, especially in a complex and differentiated society. Government, however, always involves the employment of directive and, if necessary, coercive power by a minority of the population. It is usually impossible to obtain the consent of every member of the community to those measures of social control which affect their interests and well-being, and the enactment of such measures must therefore be committed to a smaller body endowed with

[10] On Roman and English equity see Henry S. Maine, *Ancient Law*, ed. F. Pollock, 4th ed. (New York, 1906), pp. 55–69.

[11] For a more elaborate discussion of this problem see Edgar Bodenheimer, *Power, Law, and Society* (New York, 1973), Sec. 5 and Ch. II.

special authority and prerogatives. John Austin and his followers designated the organ vested with the right to exact obedience to its enactments "the sovereign," and the commands issued by the sovereign power constituted for them the substance and heart of the law.[1]

There exists, however, another school of legal philosophy, founded by Eugen Ehrlich, whose representatives regard the law as an aggregate of the arrangements, daily usages, and principles of justice observed by the members of a society rather than as a body of commands issued by the organs of sovereignty.[2] To them, the law as lived by the people, finding reflection in their marriage arrangements, property dealings, inheritance dispositions, and in the internal laws of their groupings and associations, is of greater significance for an understanding of the legal order than a study of the ways by which the government enforces its commands through court judgments (which are regarded by Ehrlich as exceptional occurrences). This sociological school tends to emphasize those elements in the institution of law which render it apt to serve as an instrument for the spontaneous, noncoercive adjustment of the mutual claims and demands of ordinary men living together in society and entering into various kinds of relations with each other.

In passing judgment upon these two opposing theories, one is not forced to accept the conclusion that they are necessarily incompatible or exclusive of each other. Government, in issuing its laws and decrees, may heed and observe the basic dictates of justice; its formal codes may essentially be a reflection of the prevailing convictions of the people. On the other hand, many of the arrangements, customs, and practices of the community may be in perfect harmony with the promptings of public order. Hence, an absolutistic theory which links law either exclusively with government and order or identifies it onesidedly with the folkways of the people and their ideals of justice cannot be said to portray reality correctly.

There is, however, a strong possibility that a gap may occur between the decreed law of the government and the living law of the people. The populace may refuse to accept portions of the imposed law and attempt to evade it wherever possible. Conversely, the government may refuse to accept the prevailing folkways and attempt to change them by force if necessary. In that case, a dispute may arise as to whether governmental command or popular conviction represents the "true" law.

In a democratic system, the potential gap between governmental

[1] On Austin and the analytical school of law see *supra* Sec. 25.
[2] On Ehrlich and the sociological school of law see *supra* Sec. 28.

fiat and societal interest is assumed to be reduced to a narrow margin by a mode of popular election of legislative bodies under which the primary obligation of the elected representatives is seen in the faithful representation of the interests of the governed. It is postulated that the law as enacted by the legislators should do no more than to record and register the wishes and needs of the people. In the reality known to us, this postulate is not always lived up to in democratic states. The legislators may misconceive the desires of the people or sacrifice them to the special interests of economically powerful groups. They may enact laws which they regard as necessary in order to strengthen internal security or to meet an emergency, but which severely curb and restrict the rights and freedoms of the population and do not for this reason meet with popular approval. In nondemocratic forms of society, the possibilities for a discrepancy between governmental policy and the wishes and feelings of the people are greatly multiplied; it may happen that the machinery of the state is employed chiefly for the purpose of maintaining and solidifying the existing political regime, with only scant attention being paid to the reactions of the masses to the enacted measures or to the intrinsic justice of the legal order.

A discriminating philosophy of law will recognize that under no political or social system is law either wholly governmental or wholly societal. Such a philosophy will hold that law arises from the tensions and adjustments between society and its rulers, and that the institution of law represents a subtle interplay between imperative and sociological factors, with one of the two elements frequently prevailing over the other in different nations and in different phases of their history. Some modus vivendi between the government and the people must be found in order to preserve the integrity and effectiveness of the legal system. If the government is too far ahead of what the people are ready to accept, or if, conversely, a forward-moving nation is held back by a retrogressive-minded government, the legal system, in whole or in part, is headed for trouble.

The ideal situation is attained when the norms of the lawgiver conform completely to the value judgments and genuine interests of the entire community, but political reality often falls far short of this ideal. It may be that the lawmakers are the representatives of a group of conquerors who impose their system of value judgments upon the masses of the conquered. It may be that they are the agents of an economically or politically dominant group whose views on desirable social policy are colored by class bias or class interest. There exists also the possibility that the governmental leaders are high-minded reformers resolved to elevate the ethical standards of the community or to rem-

edy a retardation of development caused by stubborn adherence to obsolete custom.[3] It might be observed in connection with this last possibility that it would be shortsighted to hold that the positive law enacted by the government can under no circumstances do more than faithfully reflect and record popular opinion and custom. The instrumentality of positive law may legitimately be used to overcome social inertia and pave the way for basic readjustments in the mode of living of a people.[4]

When we reach the extreme borderline situations in this area of "ethico-imperative coordination," [5] we may come to a point where we may be stepping outside the proper institutional limits of the law. If there is a complete lack of normative direction by the appointed organs of government, we may be confronted with a condition in which law has dissolved into anarchy; [6] this may be true, for instance, in a situation where different classes or factions in society espouse and practice totally irreconcilable forms of "living law." If this occurs, law may entirely or largely disappear, and a battle or civil war of antagonistic groups may temporarily displace it.

The other extreme would be presented in the case of a totally despotic order of society. In such an order, the law might—at least in part—be filled with a content which completely lacks reasonableness and which large groups of the population regard as unacceptable. If the degeneration of law into oppressive tyranny reaches a degree of repugnance to the people's sense of justice which can be described as unbearable, the problem of the validity of such totally unjust legal measures comes to the fore and calls for a solution.[7]

Section 58. *The Validity of Legal Norms*

A statement to the effect that a norm of law is valid means that it is binding upon those to whom it is addressed. Since it is of the essence of law as a guarantor of social peace and justice that its precepts are, as a general rule, endowed with an obligatory force, the problem of validity is one that goes to the roots of the legal process. If a valid law imposes duties or prohibitions, it is entitled to obedience and compliance on the part of those to whom the obligation extends. If it grants

[3] These various possibilities are mentioned by Max Rheinstein in "Sociology of Law," 48 *Ethics* 232, at 235 (1938).

[4] In India, for example, the government by positive enactment set about to accelerate the demise of an outworn caste system.

[5] According to Nicholas S. Timasheff, this is the chief issue confronting the law as a political and social institution. *Introduction to the Sociology of Law* (Cambridge, Mass., 1939), pp. 15, 235–248.

[6] See *supra* Sec. 44. As pointed out there, such situations are rare.

[7] See *infra* Sec. 58.

rights or powers to private individuals, such rights and powers must be respected by other private individuals and protected by the judiciary in case of tampering. Furthermore, a valid law must be carried into execution by those agencies to whom the enforcement of law is entrusted.

The validity of a legal precept must be distinguished from its efficacy in the social order. In the words of Harry W. Jones, "a constitutional, statutory, or case-law precept has *efficacy* in a society to the extent that the actual behavior of the people who compose the society, both officials and the generality of private citizens, conforms to the standards which the precept directs or authorizes." [1] The problem of efficacy thus relates to the question whether the norms of law are actually observed by those persons to whom they are applicable. An inquiry into validity, on the other hand, seeks to determine whether a legal norm is *entitled* to observance, whether private individuals or public officials *ought to* comply with it.[2] It is entirely possible that, in some sectors of the legal order, a hiatus may develop between the validity and efficacy of a legal enactment. For example, a statute upheld as constitutional by the courts may fail to be operative in actual life as an effective standard of social behavior.[3]

From a purely behavioristic perspective the problem of validity poses a number of puzzles, because it deals with the theoretical existence or non-existence of a legal norm rather than with perceptible human conduct relating to its observance or enforcement in the world of factual reality. The Scandinavian legal realist Alf Ross, in order to circumnavigate some of the quasi-metaphysical riffles of validity, has made an attempt to reduce the problem to an essentially psychological dimension.[4] In his view, a conclusion to the effect that a legal norm is valid refers to the behavior attitudes of judicial decision-makers. Those

[1] Harry W. Jones, *The Efficacy of Law* (Evanston, Ill., 1969), pp. 3–4. For other discussions of the distinction between validity and efficacy see Hans Kelsen, *General Theory of Law and State*, transl. A. Wedberg (Cambridge, Mass., 1949), pp. 29–37; Eduardo García Máynez, "The Philosophical-Juridical Problem of the Validity of Law," in *Latin-American Legal Philosophy*, transl. G. Ireland *et al.* (Cambridge, Mass., 1948), pp. 462–463, 477–478.

[2] Jones makes the observation that the line of distinction between validity and efficacy becomes blurred only when discussion turns on the issue whether statutes can lose their validity by desuetude, i.e., prolonged non-observance conjoined with non-enforcement. *Id.*, p. 9. For a discussion of the desuetude problem see *infra* Sec. 78. On the problem of validity in general see also Jerome Hall, *Foundations of Jurisprudence* (Indianapolis, 1973), pp. 54–77; George C. Christie, "The Notion of Validity in Modern Jurisprudence," 48 *Minnesota Law Rev.* 1049 (1964).

[3] Jones mentions as an illustration a New York statute barring strikes by teachers, sanitation men, and other public employees. *Id.*, p. 11.

[4] On the philosophy of Ross in general see *supra* Sec. 33.

norms are valid which are actually operative in the minds of the law-administering officers and applied in legal controversies because they are felt by them to be socially binding.[5]

The concept of validity espoused by Ross rests on certain "hypotheses concerning the spiritual life of the judge," namely, that part of his mental activity in which he is motivated by the normative ideology of his community.[6] At this point of his argument, Ross departs from an orthodox behavioristic interpretation of judicial conduct, which would restrict itself to a purely external observation of judicial patterns of action. He insists that it is necessary to understand the *internal* reactions of judges, in the sense that the norms of the law are experienced by them (in a personally disinterested manner) as binding directives of their community.[7]

The chief pragmatic significance of this approch to the validity problem consists, according to Ross, in the fact that it provides a basis for making predictions to the effect that a rule of law will be applied by a legal tribunal in a future legal decision.[8] But Ross does not, as Justice Holmes had done, equate prognostications of what courts will do in fact with the phenomenon of law as such.[9] His own attempt at eliminating the traditional dualism between ideality and factuality of the law consists in an identification of valid, effective law with certain behavior attitudes of judges which stem from their mental reactions to the normative structure erected in their community. Ross believes that by this construction he has removed the validity problem from the realm of the normative "ought" and planted it firmly into the soil of the empirical "is" of human attitudes and mental experiences.[10]

The approach of Ross to the phenomenon of validity cannot be regarded as a satisfactory solution of the problem. The answer to the question whether or not a legal norm is valid does not, entirely or primarily, depend on an analysis of "disinterested behavior attitudes" [11] on the part of judges and the motivations behind these attitudes. First of all, the range of the validity problem is not confined to the sphere of judicial decision-making. This issue may also have to be faced by a private individual who has been asked to comply with a legal command deemed by him to be unconscionable. Second, it would seem

[5] Alf Ross, *On Law and Justice* (Berkeley, 1959), pp. 18, 35.
[6] *Id.*, p. 37.
[7] *Id.*, pp. 73–74; Ross, *Towards a Realistic Jurisprudence* (Copenhagen, 1946), pp. 77, 81.
[8] Ross, *supra* n. 5, pp. 35, 40–41, 44.
[9] On Holmes's view of the law see *supra* Sec. 31.
[10] Ross, *Towards a Realistic Jurisprudence*, p. 92. On the relation between the ideal and factual elements in the law see *supra* Sec. 45.
[11] Ross, *supra* n. 5, p. 77.

that a fathoming of the mental reactions of judges likely to prompt a certain decision in this area of the law is not the final touchstone of validity or invalidity of a norm. It may happen, for example, that such a decision, even though it attains *res judicata* effect, is generally adjudged by the legal profession to contain an erroneous pronouncement (which in the course of time may for this reason be overturned). The most serviceable test of validity and invalidity of a norm would seem to be the reasonableness and persuasiveness of the opinion dealing with the matter, its consonance with applicable rules and principles, and its compatibility with the spirit and value patterns of the legal system as a whole.

Ross believed that by his construction he had removed legal validity from the domain of normative ideality and converted it into a phenomenon of reality.[12] When the mental operations leading to a declaration of validity or invalidity are analyzed in detail, it will be discovered, however, that they often call for normative and axiological conclusions involving judgments of value and a search for standards of rightness.[13] The dualism between the realm of values and the world of facts cannot be eliminated by the semantic device of classifying normative "ought" propositions as psychological behavior attitudes.[14]

As Herbert Hart has shown, there exist in all developed legal systems a set of rules establishing an official machinery for the authoritative identification of the valid and obligatory precepts of the system. He denominates these rules by the term "rules of recognition" and distinguishes them from the "primary" rules of social behavior which govern the relations of men in society and differentiate rightful acts from wrongful ones.[15]

Some of the rules relating to the validity of legal norms are of a purely formal-technical character and often admit of an easy and almost mechanical determination with respect to compliance or noncompliance. The constitution or statutory law of a country may provide that a proposed bill must be read three times before a legislative assembly, be passed by a majority vote in both houses of the legisla-

[12] Ross, *supra* n. 10, p. 90.

[13] The account of particular problems of validity which follows will furnish a number of examples. It is quite possible that Ross himself would not challenge the statement in the text, since he does not entirely deny that the legal process includes elements of a normative "ought." But he tends to minimize this element by attempting to reduce legal phenomena to an essentially sociological and psychological "is" dimension. This view does not do full justice to the complexity of the legal process. See *infra* Sec. 82.

[14] See in this connection the detailed and persuasive criticism of Ross's views by Jerome Hall, "Reason and Reality in Jurisprudence," 7 *Buffalo Law Review* 351, at 372–380 (1958).

[15] H. L. A. Hart, *The Concept of Law* (Oxford, 1961), pp. 89–93. See also *supra* Sec. 27.

ture, be signed by the chief executive of the state and published in an official compilation of laws. If these formal requirements are met, the law is deemed valid regardless of the nature of its contents.[16]

Even in the technical area of decision-making procedure, difficult questions of an axiological, evaluative character may at times arise. The United Nations Charter provides in Article 18 that decisions of the General Assembly shall be made by a majority of the members present and voting. Decisions of this Assembly on "important questions," on the other hand, require a two-thirds majority of the members present and voting. It is obvious that a determination to the effect that a matter on the agenda of the Assembly presents an "important question" will sometimes call for the making of value judgments of a complex and potentially controversial character.

There are countries organized on a federal basis in which the validity of laws depends not only on observance of certain formal lawmaking procedures but also on compliance with certain rules of legislative jurisdiction. Certain areas of social concern are reserved to regulation by the federal legislature while others are entrusted to the lawmaking bodies of the political subdivisions. Thus, in the United States the regulation of interstate and foreign commerce is placed in the hands of Congress, while the state legislatures possess broad powers in determining the rights and obligations of the citizens in the fields of torts, contracts, and domestic relations. Where this system prevails, the rules pertaining to the validity of laws are not of a purely formal nature but declare certain subject-matter areas to be beyond the jurisdictional bounds of a legislative body.

The constitution or fundamental norms of a country may go a step further and condition the validity of laws on compliance with certain criteria which are deemed to represent fundamental principles of justice in the social order in question. The United States Constitution provides, for example, that no person shall be deprived of life, liberty, or property without due process of law, and that no state shall deny to anybody the equal protection of the laws.[17] It also prohibits Congress from abridging the freedom of speech and from passing *ex post facto* laws.[18] The West German Constitution of 1949 declares that the "dignity of the individual" shall at all times be protected by the law.[19]

[16] British statutes, for example, are rendered valid by compliance with certain technical rules of Parliamentary procedure. Royal assent is purely *pro forma*. See William Geldart, *Elements of English Law*, 7th ed. by D. C. M. Yardley (London, 1966), pp. 3–4.

[17] U.S. Constitution, 5th and 14th Amendments.

[18] *Id.*, 1st Amendment and Art. I, sec. 9.

[19] *The Constitutions of Europe*, ed. E. A. Goerner (Chicago, 1967), p. 137.

It was argued by Herbert Hart that the purpose of rules of recognition designed to provide tests of legal validity was to increase the certainty and clarity of the law; he pointed out that in early and undeveloped legal systems the dividing line between legal rules, moral obligations, and social customs was often invisible.[20] If it is the chief objective of rules of recognition to facilitate the authentication of obligatory legal rules, then purely formal tests of identification have great superiority over substantive criteria looking to the *content* of legal prescriptions. It is usually easy to determine whether a bill has been read three times at a legislative session, whether it has been passed by a majority of those voting, and whether it has been signed by the Chief Executive. The certainty of authentication begins to decrease when the validity of a law also depends on compliance with limitations of a jurisdictional nature. For example, setting the commerce and taxing powers of the Federal Government apart from those of the states has resulted in the creation of subtle distinctions and non-too-definite criteria in the adjudications of the United States Supreme Court.

The facility with which valid rules of the system may be differentiated from invalid or unconstitutional ones reaches a low point when considerations of due process or the postulate of protecting the dignity of the individual enter into the process of determination. Here the autonomy and self-sufficiency of clear-cut rules is jeopardized by the need to resort to indeterminate and shifting standards of evaluation. Adjudicating whether or not a statute or other legal measure comports with the mandate of "due process" often involves highly sophisticated normative considerations which may require the making of intricate judgments on the compatibility of prescriptions on different levels of the legal hierarchy, a balancing of conflicting social values, and the assignment of priorities among these values.[21] In this domain of constitutional law, the attempt of Ross to reduce the problem of validity to a factual interpretation of judicial psychological attitudes meets particularly serious obstacles.

The most sensitive and controversial area of legal validity is reached when the legal standards determining the binding force of norms are sought for in general principles of justice not specifically enunciated in the positive law of a country. During the Middle Ages, for instance, the Church authorities, supported by many civilian authorities, refused to acknowledge the validity of state laws considered to be in contra-

[20] Hart, pp. 90, 92.

[21] The evolution of broad-gauged and changing standards of due process is described by Edgar Bodenheimer, "Due Process of Law and Justice," in *Essays in Jurisprudence in Honor of Roscoe Pound*, ed. R. A. Newman (Indianapolis, 1962), pp. 463–496.

vention to the divine or natural law.[22] Theoretical support for this position was furnished by the authority of prominent fathers of the Church. St. Augustine had said that a law that was not just was no law at all.[23] St. Thomas Aquinas declared that "a human law . . . in so far as it deviates from reason, it is called an unjust law, and has the nature, not of law but of violence." [24]

In our own time, the view that an unjust law is not a law is rarely held by legal philosophers or judicial tribunals. There are obvious drawbacks connected with this theory. A determination that a legal enactment "deviates from reason" can often not be made with firm assurance, and there may be wide disagreement as to the fairness and reasonableness of a particular piece of legislation. A broad recognition of the right to ignore, nullify, or disobey an unjust law would under these circumstances subject the certainty and authority of the legal system to an unbearable strain and burden. As the Spanish scholastic philosopher Francisco Suarez remarked, "a presumption must be made in favor of the lawgiver . . . because the subjects, if this presumption in his favor did not exist, would assume an excessive license to disregard the laws, since the latter can hardly be so just that it is impossible for them to be treated as doubtful, by some individuals, apparently for plausible reasons" [25]

It may, however, happen that an oppressive regime enacts rules into law which utterly defy all civilized standards of decency. Suppose, for example, a government orders the extermination [26] or sterilization [27] of an unpopular religious, racial, or national minority, sanctions the lynching of persons by mobs, commands (like King Herod in the New

[22] See R. W. and A. J. Carlyle, *A History of Medieval Political Theory in the West* (New York, 1903–1936), II, 32–33, 78–79, 96–98, 105–108. The jurisprudential foundations of this position are explained by Walter Ullmann, *The Medieval Idea of Law* (New York, 1946), pp. 35–39, 53–57.

[23] "The City of God," Bk. XIX, ch. 21, in *Basic Writings of St. Augustine*, ed. W. J. Oates (New York, 1948), II, 497; *The Free Choice of the Will*, transl. R. P. Russell (Washington, 1968), Bk. I, ch. 5.

[24] *Summa Theologica*, transl. Fathers of the English Dominican Province (London 1913–1925), Pt. II, 1st pt., Qu. 93, art. 3. St. Thomas was not willing, however, to recognize an unlimited right of resistance against all unjust laws. See *supra* Sec. 6. For a general discussion of the medieval scholastic position see R. Darrell Lumb, "The Duty of Obeying the Law," 1963 *Archiv für Rechts- und Sozialphilosophie* (Beiheft No. 39) 195.

[25] *Selections from Three Works of Francisco Suarez*, transl. G. W. Williams (New York, 1964), Bk. I, ch. IX, par. 11. See also Morris Cohen, *Reason and Nature*, 2d ed. (Glencoe, Ill., 1953), p. 25: "If every individual refused to obey any law that seemed to him immoral, the advantages of a state of law over anarchy would be lost."

[26] See Book of Esther iii: 13.

[27] Memoranda found in Germany after World War II disclosed plans by some Nazi hotheads to sterilize the whole Polish nation.

Testament) the killing of innocent children,[28] or compels persons at the threat of torture to inform on close relatives who have criticized the government. If (as will usually be the case under a tyrannical regime) no bona fide legal procedures for challenging the authority of such utterly iniquitous laws are available,[29] a right to resist the application and execution of such commands ought to be accorded to legal officials as well as private citizens.[30] The exigencies of legal security demand, however, that this right be limited to extreme and inextricable situations in which an outrageous wrong is being committed by the government. Furthermore, the person making use of the right of resistance must be held to the risk of having misjudged the stringent prerequisites for the legitimate exercise of this right.

The West German Supreme Court in the post-Hitler period went one step further and adjudged that in the case of totally obnoxious and unbearably unreasonable commands by the state the right to resist their execution may under certain circumstances become transmuted into a legal duty not to obey such mandates.[31] The Court held in one case that a decree stating that any bearer of arms was placed under a duty to execute any "deserter, coward, or traitor" without necessity for a hearing violated basic canons of "natural law" and could not with impunity be observed. A statute or other official act, the court declared, "reaches the ends of its bounds at a point where it comes into conflict

[28] Matth. ii: 16.

[29] Where institutional channels for the obliteration of objectionable law exist, there are good reasons—in the absence of highly unusual conditions, such as complete or almost complete lack of independence on the part of the judiciary —for regarding these channels as exclusive means of redress against injustices committed by the legislator. See in this connection René Marcic, *Rechtsphilosophie: Eine Einführung* (Freiburg, 1969), p. 280.

[30] On the right to resistance see John Locke, *Two Treatises of Civil Government* (Everyman's Library ed., 1924), Bk. II, chs. 18–19 (a treatment of the subject which influenced Thomas Jefferson when he drafted the Declaration of Independence); Giorgio del Vecchio, *Justice*, ed. A. H. Campbell (New York, 1953), pp. 157–158; François Gény, *Science et technique en droit privé positif* (Paris, 1924), IV, 125–137; Richard A. Wasserstrom, "The Duty to Obey the Law," 10 *U.C.L.A. Law Review* 780 (1963).

The related problem of civil disobedience, which in the United States is often intertwined with potentially unconstitutional exercises of legislative power, will not be discussed here. This author has stated his basic position in 21 *Virginia Law Weekly Dicta* 1 (1969). For good introductory treatments see Morris Keeton, "The Morality of Civil Disobedience," 43 *Texas Law Review* 507 (1965); Mark R. MacGuigan, "Civil Disobedience and Natural Law," 11 *Catholic Lawyer* 118 (1965).

[31] The decisions of the West German courts dealing with the validity of Nazi legislative and judicial acts are discussed by Edgar Bodenheimer, "Significant Developments in German Legal Philosophy since 1945," 3 *American Journal of Comparative Law* 379, at 387–391 (1954); Heinrich Rommen, "Natural Law in Decisions of the Federal Supreme Court and of the Constitutional Courts in Germany," 4 *Natural Law Forum* 1 (1959); H. O. Pappe, "On the Validity of Legal Decisions in the Nazi Era," 23 *Modern Law Review* 260 (1960).

with generally recognized principles of international law or natural law, or where the contrast between positive law and justice becomes so unbearable that the positive law, being 'wrongful,' must yield to justice." [32] Such a position imposes high standards of moral responsibility on persons who, by the very nature of the conditions under which the duty of resistance becomes operative, may find themselves under an exceedingly strong pressure to comply with the unconscionable command. It would seem that great wisdom and understanding of human nature must in such circumstances be displayed by the judges, and that the character and severity of the compulsion exercised to insure compliance should be taken into account by them in adjudging liability for failure to resist the unlawful decree. It must be realized, on the other hand, that unless we are ready to produce a generation of robots who will render slavish and unquestioning obedience to even the most tyrannical and inhuman regime of gangsterism, the exercise of critical judgment in carrying out monstrous commands ought to be required of a responsible human being, even though he may thereby incur the risk of severe deprivations. Legal science can do little more in this area than propose some broad standards for dealing with such problems and leave the details to the judicious consideration of such situations in the light of their particular facts.

A position that differs in some substantial respects from that advocated in this section was taken by Herbert Hart. Starting from the premise that a sharp distinction must be maintained between law and morality, he concluded that the law must be held to embrace all rules which are valid by virtue of the constitutional or statutory tests established by the positive legal system, regardless of the intrinsic justice of these rules. He maintained that nothing could be gained by adopting a narrower concept of law excluding offensive rules, even though the degree of their immorality may have reached extreme proportions.[33] He did not declare, however, that legal rules which are totally repugnant to justice or the moral sense of men must necessarily and under all circumstances be observed. He suggested that, although such rules are law, there may be a *moral* right or even duty to disobey them.[34]

[32] Decision of the Bundesgerichtshof dated July 12, 1951, 3 *Entscheidungen des Bundesgerichtshofes in Zivilsachen* 94, at 107 (1951). The Supreme Court's formula is similar to Gustav Radbruch's statement that a statutory enactment may lose its validity "when the contrast between positive law and justice becomes so unbearable that the positive law, being 'wrongful' law, must yield to justice." *Rechtsphilosophie*, 4th ed. by E. Wolf (Stuttgart, 1950), p. 353. On Radbruch see *supra* Sec. 34.

[33] Hart, *supra* n. 15, pp. 100, 205.

[34] *Id.*, pp. 203–207. See also Hart, "Positivism and the Separation of Law and Morals," 71 *Harvard Law Review* 593, at 616–617, 620 (1958). For a criticism of Hart's position see Lon L. Fuller, "Positivism and Fidelity to Law—A Reply to Professor Hart," *id.*, pp. 648–657.

There may be situations in which this view will lead to undesirable consequences. According to Hart, although a private individual may be justified on grounds of higher justice in refusing compliance with an abhorrent enactment, a court must punish this man for disobedience of the law. Quite obviously, we cannot give the judges, as trustees of the legal order, the right to deny application of a law on the ground that the law, though valid, was morally opprobrious. Thus it would seem that, under Hart's theory, a man who has incurred the death penalty for refusing to execute a formally valid command of an insane despot to kill large numbers of innocent people must be punished by a court even after the despot has been deposed, unless the iniquitous law has been repealed with retroactive force or a legislative amnesty has been granted. But a repeal or amnesty may not be immediately forthcoming. Furthermore, it would seem desirable to grant the judiciary the right to disregard or oppose monstrous commands of the sovereign even during the period of despotic rule, if the judges can muster the courage to take such a hazardous step.

The position of Hart that a law is a law if it meets the tests provided by the positive "rules of recognition" of the state is prompted by his belief that the overriding purpose of such rules is to strengthen the certainty and stability of the legal system.[35] But there are also good reasons for holding that the criteria of legal validity should not be altogether dissociated from the fundamental standards of justice.[36] If it is the purpose of law to make existence on this planet livable for human beings and to aid them in the satisfaction of their basic needs, one may be justified in questioning the validity of certain laws in the event that, in the context of the relations between a government and its citizens or subjects, "the superior power uses its power for the reduction or destruction of the inferior power." [37]

This conclusion can be supported even from the point of view of legal certainty so strongly emphasized by Hart. The purpose of declaring a legal rule to be valid is to insure effective compliance and enforcement. This purpose cannot be achieved if large numbers of people consider the rule to be thoroughly unreasonable or unjust. In that event, observance as well as enforcement of the rule are often jeopardized and partially nullified. In Nazi Germany, many respectable and

[35] See *supra* n. 20.

[36] United States Supreme Court Justice Robert H. Jackson indicated his concurrence with this view in *The Supreme Court in the American System of Government* (Cambridge, Mass., 1955), p. 5. Under the United States Constitution, the due process clauses of the 5th and 14th amendments build a bridge to the natural-law concept by making it possible for the judiciary to strike down wholly unreasonable and arbitrary laws. See *supra* n. 21.

[37] Paul Tillich, *Love, Power, and Justice* (New York, 1954), p. 88.

normally law-abiding citizens acted in disregard of laws imposing severe penalties for giving aid and comfort to members of persecuted minorities. A high-minded and responsible man like Ralph Waldo Emerson wrote in his diary that he would not comply with the prescriptions of the Fugitive Slave Act,[38] and he did not stand alone in taking this position. When the efficacy of a rule or set of rules is threatened by moral resistance, its validity may become an empty shell. A legal system faces total or partial disintegration unless the formal orderliness of its arrangements is complemented by deference to essential postulates of justice.

Section 59. *The Significance of Sanctions*

It has been suggested in the preceding section that a distinction must be drawn between the validity of the law and its efficacy. It was pointed out that an inquiry into validity seeks to determine whether a certain rule of conduct qualifies as a legal rule entitled to observance and enforcement. Efficacy, on the other hand, involves the question whether a rule of conduct is factually operative in the social order, whether it is complied with by its addressees and carried into effect by the public authorities.

The problem of sanctions is one that pertains to the area of legal efficacy. Sanctions are provided in order to guarantee the observance and execution of legal mandates, to enforce "behavior conforming to the established order." [1] The sanctions recognized by a legal order are usually of a diversified character. In primitive societies, they may take the form of self-help or social ostracism. In developed legal systems, the administration of sanctions is, as general rule, entrusted to the organs of political government. Among the means of coercive law enforcement are punishment by fine or imprisonment, the imposition of damage awards which may be carried out by executions into the property of the judgment debtor, the ordering by a court of specific acts or forbearances at the threat of a penalty, the impeachment and removal of a public officer for dereliction of duty. As Kelsen has pointed out, the sanctions characteristic for developed legal orders go beyond the exercise of merely psychological pressure and authorize the performance of disadvantageous coercive acts, namely, "the forcible depriva-

[38] F. Lyman Windolph, *Leviathan and the Natural Law* (Princeton, 1951), p. 30.

[1] Hans Kelsen, *General Theory of Law and State*, transl. A. Wedberg (Cambridge, Mass., 1949), p. 15. See also John Austin's definition in *The Province of Jurisprudence Determined*, 2d ed. (New York, 1861), p. 6: "The evil which will probably be incurred in case a command is disobeyed, or (to use an equivalent expression) in case a duty be broken, is frequently called a *sanction*, or an *enforcement of obedience*."

tion of life, freedom, economic and other values as a consequence of certain conditions." [2]

There are some definitions and theories of law which assign to coercibility through sanctions a more far-reaching role than that of a means for promoting the effective observance and execution of legal mandates. Some of these definitions and theories come close to regarding the provision of coercive sanctions as an essential condition of the very existence and validity of law. The anthropologist E. Adamson Hoebel, for example, defined law as "a social norm the infraction of which is sanctioned in threat or in fact by the application of physical force by a party possessing the socially recognized privilege of so acting." [3] The sociologist Max Weber declared that an order will be called *law* "if it is externally guaranteed by the probability that coercion (physical or psychological) to bring about conformity or avenge violation, will be applied by a staff of people holding themselves specially ready for that purpose." [4] Several legal philosophers have taken the same position. It seemed to Edwin W. Patterson that "every law has in some sense a legal sanction," and that "sanction is a necessary characteristic of a body of law and of every legal provision." [5] Giorgio del Vecchio declared that the concepts of coercibility and law were logically inseparable: "Where coercibility is lacking Law, too, is lacking." [6] Hans Kelsen described the law as "a coercive order" and "an organization of force." [7]

If these statements must be interpreted to mean that the attachment of a sanction is a *conditio sine qua non*, an essential criterion of the existence and validity of a legal norm, it becomes necessary to take issue with this assertion. There are in every legal order norms which possess a facilitative rather than mandatory character. Included in this category are norms which grant rights to individuals, confer powers on organizations, and assign spheres of policy-making discretion to government agencies. No sanction will attach to the nonexercise of the right, power, or discretion accorded by the law. Examples of norms

[2] Kelsen, *The Pure Theory of Law*, 2d ed. transl. M. Knight (Berkeley, 1967), p. 35. Jerome Hall has pointed out that the laws of some states also recognize psychological sanctions, such as reprimands and adverse publicity, and that one should generally not overemphasize the use of physical force in a theory of legal sanctions. "Legal Sanctions," 6 *Natural Law Forum* 119, at 122 (1961). See also his elaborate discussion of sanctions in *Foundations of Jurisprudence* (Indianapolis, 1973), pp. 101–141.

[3] *Anthropology: The Study of Man*, 3rd ed. (New York, 1966), p. 440.

[4] *Max Weber on Law in Economy and Society*, transl. E. Shils and M. Rheinstein (Cambridge, Mass., 1966), p. 5.

[5] *Jurisprudence: Men and Ideas of the Law* (Brooklyn, 1953), p. 169.

[6] *Philosophy of Law*, transl. T. O. Martin (Washington, 1953), p. 305.

[7] Kelsen, *supra* n. 1, pp. 19, 21; *supra* n. 2, pp. 33, 54.

which may be viewed as sanctionless in this sense are provisions authorizing persons to transfer ownership by conveyance, to dispose of property by will, to vote in a political election, to speak without restraint on matters of public interest.

To this argument, Kelsen has replied that "norms that do not in themselves stipulate coercive acts (and hence do not command, but authorize the creation of norms or positively permit a definite behavior) are dependent norms, valid only in connection with norms that *do* stipulate coercive acts." [8] Thus, a permissive provision allowing acquisition of ownership by transfer or assignment from the owner becomes implemented by the imposition of coercive sanctions upon third persons who disturb the transferee in his possession. The grant of a right to vote to certain individuals depends for its effective realization on the establishment of an enforceable duty on the part of other individuals and government officers not to interfere with an exercise of this right. The delegation of rule-making power to an administrative body becomes meaningful only through a concretization of this authorization, that is, the issuance of rules which in the case of noncompliance by its addressees will be enforced by the imposition of a penalty.

There is a certain artificiality inherent in this attempt by Kelsen to maintain the universality of the coercion theory of law. Herbert Hart has persuasively pointed out that rules conferring rights and powers on certain persons must be looked at from the point of view of those who exercise these rights and powers.[9] If this is done, it becomes clear that the pertinent authorization is an enabling norm, and not a coercive norm. Moreover, it cannot be said that norms granting freedom of speech or the right to vote to the citizens of a country are dependent for their *validity* on other norms restraining or punishing people who attempt to interfere with the exercise of these rights. It is possible, on the other hand, that the *efficacy* of these rights may be jeopardized unless tampering with them is met by sanctions; this will be true where a mood of intolerance prevailing in the population generally or in certain activist political groups results in frequent attempts to nullify the untrammeled expression of opinion or political choice.

There are in most legal systems, in addition to the norms authorizing the exercise of rights and powers, other norms which lack the element of coercive enforcement. Duties of consortium flowing from

[8] Kelsen, *supra* n. 2, p. 58. His position is supported by Albert A. Ehrenzweig, *Psychoanalytic Jurisprudence* (Leiden, 1971), p. 48, who speaks of "hidden" sanctions behind the grant of rights, powers, and legal capacities.

[9] H. L. A. Hart, *The Concept of Law* (Oxford, 1961), pp. 40–41.

the marriage relationship may fall in this category. Constitutions sometimes contain provisions which cannot be enforced against certain high officials.[10] Statutes or judicial decisions may recognize a doctrine of sovereign immunity which prohibits suits against the state for tortious acts and breaches of contracts, although an (often ineffective) remedy may be available against the individual officer responsible for the act.

One must under these circumstances concur in the statement by Alf Ross that "compulsion cannot be a necessary part of the concept of law in the sense that every rule of law must be sanctioned by compulsion." [11] Ross raises the further question, however, whether or not a system not based on compulsion *on any point* could qualify as a legal system. He answers this question in the negative, on the basis of his conclusion that compulsion is a "necessary integral part" of the institution of law *as a whole*.[12]

This proposition, although it is challengeable in the specific formulation in which it was cast by Ross, possesses a greater degree of validity and persuasiveness than the view that availability of a sanction is the distinguishing mark of every legal norm. A legal system unequipped with the teeth of enforceability may prove ineffective to restrain noncooperative, antisocial, and criminal elements and may therefore fail to carry out its basic functions to maintain order as well as justice in society.[13] This explains why all mature and highly developed legal systems attempt to achieve a maximum degree of legal compliance by putting the coercive machinery of the state at the disposal of the law-administering agencies and officials. While early legal orders are characterized by incomplete frameworks of governmental sanctions and frequent reliance on self-help by injured individuals and groups, the forward march of the law is accompanied by a pronounced tendency to guarantee the efficacy of those legal norms which establish binding obligations by the creation and maintenance of official procedures for their execution and enforcement.

This view, however, must be differentiated from the one which sees in politically organized coercion the *conditio sine qua non* and the chief criterion for the existence of a body of legal rules. This latter view ignores the fact that the primary guaranty for the efficacy of a legal order must be its acceptance by the community, and that compul-

[10] The inadequacy of the sanction theory as applied to the English Constitution has been shown by Arthur L. Goodhart, *English Law and the Moral Law* (London, 1953), pp. 13–17.

[11] *Towards a Realistic Jurisprudence* (Copenhagen, 1946), p. 111.

[12] *Id.*, p. 112.

[13] In this sense, Jhering's statement that law without compulsion may be compared to "a fire which does not burn, a light that does not shine" (*supra* Sec. 23) deserves approval.

sive sanctions can merely form a secondary and auxiliary guaranty. A reasonable and satisfactory system of law will be obeyed by most members of the community because it serves their interests, is respected by them, or at least does not arouse in their hearts any feelings of hostility or hatred.[14] Compulsion is used only against a noncooperative minority; in any normal and effectively working commonwealth the number of lawbreakers against whom sanctions must be employed is much smaller than the number of law-abiding citizens.

The objection might be raised against this thesis that there are legal systems or portions of legal systems which are not accepted as reasonable and just, and which are complied with by the citizens only out of fear that forcible sanctions might be employed against them in case of disobedience. It is likely, however, that in such a situation acts of sabotage and resistance against the legal order will be widespread and will gradually undermine the foundation and strength of this order. Even if this should not be the case, the duration of such an order cannot be expected to be long, since it is extremely difficult for a minority of governmental officials to force an unacceptable system of law upon the bulk of the population. As Freehof has said: "Police power is, of course, essential, yet never quite sufficient. If a large percentage of the citizens decided to be violent, as has happened repeatedly, the police power is helpless. The true source of order still comes from within. It is conscience which makes citizens of us all." [15] Coercion is meaningless, and threat of coercion impotent, if a majority of the citizens are unwilling to obey the law.

Let us assume the existence of a society in which social solidarity prevails at a peak level, with the consequence that the use of coercive force by the ruling authorities has been reduced to an insignificant extent. The members of the community observe the law habitually because by education, persuasion, and personal experience they have come to believe in its salutary effects.[16] To assert that the law has disappeared in such a society because the use of governmental force has become unnecessary would evince a misconception of the functions of law.[17] The chief function of law is not to punish or repress,

[14] It is useful in this connection to recall the typical reasons for law-observance enumerated by Eugen Ehrlich. See *supra* Sec. 28. On the motives for submission to law in primitive society see Bronislaw Malinowski, *Crime and Custom in Savage Society* (Paterson, N.J., 1964), pp. 15, 22–49.

[15] Solomon Freehof, "The Natural law in the Jewish Tradition," 5 *University of Notre Dame Natural Law Institute Proceedings* 15, at 22 (1953).

[16] There have been some small, homogeneous societies, whose members were inspired by common ideals, in which this degree of solidarity was approached.

[17] In accord: Lon L. Fuller, "Human Interaction and the Law," in *The Rule of Law*, ed. R. P. Wolff (New York, 1971), p. 183.

but to provide normative arrangements conducive to human coexistence and the satisfaction of certain basic needs. The more the necessity for compulsive sanctions decreases, the better fulfills the law its objective of strengthening social peace and harmony.

We are justified, therefore, in taking the position that the necessity for primary reliance on governmental force as a means for carrying out the mandates of the law indicates a malfunctioning of the legal system rather than an affirmation of its validity and efficacy. Since we should not define a social institution in terms of its pathological manifestations, we should not see the essence of law in the use of compulsion. As Paton has aptly said: "Academic preoccupation with the sanction leads to a false view of law. The idea of health does not at once suggest to our minds hospitals and diseases, operations and anaesthetics, however necessary these things may be to maintain the welfare of a community. The best service of medicine is the prevention of disease, just as the real benefit of law is that it secures an ordered balance which goes far to prevent disputes." [18] Just as medicine operates at its optimum level when it becomes unnecessary to cut into the human body, the law registers its greatest triumphs when painful interferences by the authorities with the life, liberty, and property of the citizens are reduced to a minimum.

One of the most challenging testing grounds for the sanction theory of law is the field of international law. John Austin denied the legal character of international law on the ground that its rules and principles are not laid down by a sovereign political superior, and because no legal sanctions are prescribed which guarantee compliance with its precepts.[19] Hans Kelsen challenged the validity of the second proposition on the ground that, under international law, coercive acts in the form of reprisals, economic boycotts, and resort to war are authorized under certain conditions as a reaction against international derelictions.[20] He considered it immaterial for the purpose of establishing the legal nature of international law that these sanctions, in most instances, are administered by the state which has suffered the wrong rather

[18] George W. Paton, *A Text-Book of Jurisprudence*, 3rd ed. by D. P. Derham (Oxford, 1964), pp. 74–75.

[19] Austin, *supra* n. 1, pp. 114, 127–129, 177.

[20] Kelsen, *Principles of International Law*, 2d ed. by R. W. Tucker (New York, 1967), pp. 18–39. On the general problem of sanctions in international law see Josef L. Kunz, "Sanctions in International Law," 54 *American Journal of International Law* 324 (1960); Myres S. McDougal and Florentine P. Feliciano, *Law and Minimum World Public Order* (New Haven, 1961), pp. 1–96, 261–383; Wolfgang Friedmann, "National Sovereignty, International Cooperation, and the Reality of International Law," 10 *U.C.L.A. Law Review* 739 (1963); Hart, *supra* n. 9, pp. 208–221.

than by a superior and impartial international agency or international government.[21] Common to both these points of view is the disposition to regard sanctions as an essential ingredient of all law; they differ merely in their conception of the type of enforcement procedure which is held to fulfill the requirements of a legally relevant sanction.

An appraisal of international law as a body of genuine law will have to proceed from a recognition of the fact that no system of international law can be effective which does not rest on the acceptance of its prescriptions by the international legal community, or at least the majority of its members. It should be emphasized that the bulk of the customs and treaty provisions controlling international relations are for the most part observed because it is in the interest of the nations concerned to preserve their peaceful existence and to court international goodwill by adhering to them. This does not mean that international law has not frequently been violated by nations on grounds of egotistical interest, desire for self-aggrandizement, and occasionally for reasons of national survival. But the fact of such violations would compel us to deny the character of international law only if the frequency of the breaches were such as to render the entire system ineffective and utopian. Such a far-reaching conclusion cannot be drawn on the basis of the available evidence. As Jessup and Moore have shown, the rules of international law have more frequently been observed than flouted.[22] Even if there are hectic periods in history where turbulence, social unrest, or national aggressiveness drown out the human desire for peace, such periods always alternate with other epochs in which international order is relatively stable and violations of international law form the exception rather than the rule.

It must, of course, be admitted that the deficiencies in the enforcement procedures of international law detract greatly from its usefulness and effectiveness as a pacifier of nations. In this respect, international law has sometimes been compared with primitive law, which is also lacking in efficacious sanctions administered by a government. But these considerations merely help us to understand that international law is an inchoate and weakly developed system of law; they do not force us to the inference that it is no law at all.

It might be observed in conclusion that the problem of legal sanctions in general is tied in with the order function of law as well as with

[21] Under the United Nations Charter, centrally organized sanctions administered by the Security Council are provided in Arts. 41 and 42. Their use is limited to the purpose of maintaining or restoring international peace. Disagreements among the big powers have frustrated the success of this system of collective sanctions.

[22] See Philip Jessup, "The Reality of International Law," 18 *Foreign Affairs* 244 (1940).

its purpose of promoting justice. Legal enforcement measures are designed to implement and strengthen the orderly, consistent, and efficient administration of the law. If justice is lacking in the legal system, reliance on the use of governmental force may become perverted into a paramount policy objective of an unpopular government. On the other hand, a just and satisfactory legal system that has captured the allegiance of all in thought and actions would not be in need of sanctions. The imperfections of men and institutions make it doubtful that this ideal condition will ever be attained. As long as substantial numbers of lawbreakers exist in organized societies and in the community of states, the law cannot dispense with compulsive enforcement as an *ultima ratio* of its operational effectiveness.

XIII

LAW AS DISTINGUISHED FROM OTHER AGENCIES OF SOCIAL CONTROL

Section 60. *Law and Power*

Although the role of law as a regulator of human relations has been large and decisive in the history of organized societies, it is unlikely that in any such society the law has functioned as the sole agency of social control. There are other instrumentalities for guiding or directing behavior which serve to supplement or partially displace the accomplishment of social goals by means of the law. Among them are power, administration, morals, and custom. Analytical distinctions between these four additional tools of control cannot always be drawn with sharp precision. Power overlaps to some extent with administration, and morality sometimes blends with custom. It is also not always easy to segregate the law conceptually from its rival agencies. The difficulty becomes conspicuous when we consider the relation between power and law.

The concept of power has not been identified with uniform consistency. "Power may be defined as the production of intended effects," said Bertrand Russell.[1] Harold Lasswell and Abraham Kaplan declared that "power is participation in the making of decisions." [2] In the view of Max Weber, power is "the probability that one actor within a social relationship will be in a position to carry out his own will despite resistance, regardless of the basis on which this probability rests." [3]

Neither the first nor the second definition place the law into necessary opposition or conflict with the concepts of power which underlie these definitions. A "production of intended effects" is accomplished when a legislative body passes a valid law, or when a judicial tribunal issues a final and binding judgment. Power in this broad sense is also needed and exercised for purposes of effective law enforcement. There is also no doubt that participation in the making of decisions forms an important part of the functions of men who make or administer law.

A closer question is presented when we view the law in the light of Max Weber's notion of power. It is certainly true that mandatory and prohibitory legal precepts are expected to be enforced against recalcitrant and resistant members of society. It cannot be said, however, that the overcoming of resistance by the addressees of the law is the characteristic hallmark of legal control. It was pointed out earlier that a workable, effective system of law must rest on widespread acceptance, and that the existence of considerable discontent and opposition indicates a morbid rather than normal state of the law.[4] Furthermore, as will be shown later, a certain antithesis between power and law is revealed when the resistance offered to the power holder is provided by limit-setting norms of law.

In order to see the relation between power and law in its proper perspective, it is necessary to focus attention on power in its pure, undiluted form. Power in this sense aims at the attainment of unqualified dominion over human beings. A holder of absolute power seeks to impose his will without restraints upon those subject to his control. High-handed dictates, issued *ad hoc* in response to momentary moods or exigencies, rather than principled action induced by the long-range needs of the governed, are a conspicuous element of this form of rule.[5]

[1] *Power: A New Social Analysis* (New York, 1938), p. 35.

[2] *Power and Society* (New Haven, 1950), p. 75.

[3] *The Theory of Social and Economic Organization,* transl. A. M. Henderson and T. Parsons (New York, 1947), p. 152. Weber adds that "all conceivable qualities of a person and all conceivable combinations of circumstances may put him in a position to impose his will in a given situation." *Id.,* p. 153.

[4] See *supra* Sec. 59.

[5] Bertrand Russell, *supra* n. 1, p. 41, calls this form of power "naked power." Its presence is indicated when power "results merely from the power-loving

Power understood in this absolute sense stands in contrast to the notion of law. It is one of the cardinal functions of law to circumscribe and restrain power, private as well as public. Where law reigns, brakes are placed upon the untrammeled exercise of power in the form of rules which bind the power holder to a certain course of conduct. By using the technique of promulgating standards of behavior designed to guide future actions, the law reduces the scope of *ad hoc* decisions which follow no pattern and therefore cannot be predicted.

It is possible, of course, that the constitutional or statutory law of a country vests an absolute power in an organ of government. This would be the case, for example, when plenary authority is given to the officers of a secret police to deal in any suitable manner with persons suspected of endangering the safety of the state. In that event, however, the law has sanctioned a sphere of unlimited discretion devoid of legal standards and restraints. The United States Supreme Court has wisely recognized that actions which cannot be judged by the application of normative criteria present nonjusticiable political questions outside the domain of the law.[6]

In the reality of social life, power and law rarely appear in their pure forms. The emergence of a social power wholly free from normative restraints tends to be a phenomenon of short duration and indicates a state of extreme crisis or malfunction of government. When this contingency occurs, it rarely takes the form of totally arbitrary rule striking out without warning in different directions without any kind of rational plan. It is also true, on the other hand, that the law will usually not pervade and regulate all aspects of human activity.[7] There will always be open areas of power and discretion into which the law will not, or only incompletely, penetrate. The typical state of affairs in a political commonwealth is characterized neither by the reign of unlimited power nor by an airtight norm-control.

A social order in its typical condition will reveal some interpenetration of power and law. There have been states in which private relations between citizens were rather minutely regulated by law but in which the public power was subject to few if any restraints. The Prussia of Frederick the Great, the France of Napoleon, the Byzantine Empire of Justinian may be mentioned as examples. The early law of Rome stopped at the threshold of the home and accorded to the *pater-*

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impulses of individuals or groups, and wins from its subjects only submission through fear, not active cooperation." On the subject of despotic power see also *supra* Sec. 44.

[6] *Coleman v. Miller,* 307 U.S. 433, at 454–455 (1938).

[7] The drawbacks of overregulation are portrayed *infra* Sec. 67.

familias a large amount of discretion to deal with his wife, children, and slaves. In nineteenth-century America, the power of employers in hiring and dismissing their employees, setting their wage rates, and regulating their employment conditions were subject to few restrictions. In our own day, the President of the United States enjoys large discretionary powers in conducting the country's foreign affairs.

Where an autonomous sphere of power exists, the power holder may be willing to submit to voluntary restraints of a legal character. Absolute rulers like Alexander the Great, Marcus Aurelius, Justinian, and Frederick the Great, without yielding all of their ample prerogatives, were willing to exercise their sovereign authority within some framework of legal rules. Employers in nineteenth-century America often entered into contracts for labor and services. The President of the United States may by executive order define the conditions under which he will use his plenary powers in some area of foreign relations.

There are other examples of an interplay between power and law. Irruptions of power into the administration of justice may, for example, occur in the field of law enforcement. Wealthy citizens in ancient Rome sometimes bought favors from officials or procured exemptions from civic burdens, and the owners of landed estates in the imperial period often resisted the enforcement of laws by the central administration. Such occurrences are not unknown in modern civilized states. Enforcement activities in the fields of criminal and tax laws sometimes bypass influential members of the community, and the law on the books is not always congruous with the law as practiced in action. There are enclaves of ill-controlled power even in societies intent upon being governed by the rule of law.[8]

An observation of the characteristic features of power rule in the building and operation of societies will make it clear that power represents the dynamic and fluid principle in social relations. In its uncontrolled form it may be compared to free-flowing, highly charged energy, which is often destructive in its effects. The exercise of power is frequently marked by ruthlessness and impatience of restraints;[9] where it reigns unchecked, it is apt to produce tensions, frictions, and precipitous change. Furthermore, in a social system where power has an unlimited sway, the tendency will often be toward oppression or

[8] Some observations on the interpermeation of power and law are found in Julius Stone, *Social Dimensions of Law and Justice* (Stanford, 1966), pp. 589–592.

[9] Because of this fact, Jakob Burckhardt stated that "power is of its nature evil, whoever wields it." *Reflections on History*, transl. M. D. H. (London, 1943), p. 86. Martin Buber has pointed out that this thought holds true only for power conceived as an end in itself, and not necessarily for power used as a means for the attainment of a goal other than maximation of power. *Between Man and Man*, transl. R. G. Smith (New York, 1965), p. 153.

exploitation of the weaker members of society by the stronger ones. In an international system dominated by power politics in its unscrupulous form, the big nations will be inclined to impose their will upon the smaller members of the international community and to pursue their aims by expansion and conquest, if necessary.

The law, on the other hand, by setting barriers to the unlimited exercise of power and attempting to maintain a certain social equilibrium, must in many ways be viewed as a restrictive force in social life. In contrast to the aggressive and expansionist tendencies of naked power, the law seeks compromise, peace, and agreement in the political and social sphere. An important device by which a developed legal system will often attempt to forestall the rise of oppressive power structures is the dispersion and consequent balancing of power by a wide distribution of rights among individuals and groups. When such a structure of rights has been erected, the law will strive to protect it from serious disturbances and disruptions. The reduction of social tensions which the law seeks to bring about would be largely illusory and of little value if the adjustments and arrangements made through legal control were of an entirely temporary and fleeting character. Law, wherever its reign is securely established, will seek to avoid indiscriminate, chaotic, and perpetual change and to surround the existing social system with certain guarantees of continuity and durability.[10]

This endeavor of the law to produce a certain amount of stability in the social order imparts to the institution, to some extent, the antidynamic properties of inertia. This observation provides us with a valid explanation of the fact that the law often lags behind the times, as many of its critics have noted.[11] The truly far-reaching changes in the legal order usually come from the outside, through the exercise of political power by means of legislative action, and the more incisive these changes are, the greater the role of power in effectuating them is likely to be.[12] It is quite doubtful, for example, whether the Napoleonic Code, which made a radical break with a feudal past, could have been enacted into law without the pressures exerted by a strong executive.

In times of crisis and social change, new groupings or alignments of interests will press for recognition of their claims, and the law in such

[10] See *supra* Sec. 56. For a more extensive analysis of this phenomenon see Edgar Bodenheimer, *Power, Law, and Society* (New York, 1973), Sec. 5.

[11] On the time lag in the law see *infra* Sec. 67.

[12] According to Hannah Arendt, "the law can indeed stabilize and legalize change once it has occurred, but the change itself is always the result of extralegal action." "Civil Disobedience," in *Is Law Dead*, ed. E. V. Rostow (New York, 1971), p. 229.

periods can save itself from breakdown only by exhibiting a large degree of flexibility and adaptability. The dynamic forces operating in human social and political life will always strive to tear into the protective armor with which the law surrounds existing institutions and spheres of interest; differently expressed, power is constantly tugging at the substance of the law. While the law, as we have seen, seeks to establish barriers against the undiluted rule of power, we must also recognize that power is sometimes apt to set limits to the attempt of the law to make social life reasonably stable and to protect it against disruptive change.

It is understandable, in the light of these facts, that those who glorify power, struggle, and conflict will have a skeptical attitude towards law. Friedrich Nietzsche, for example, an outstanding exponent of a power philosophy, assigned a highly secondary role to the law. The essence of life was to him the unremitting and relentless fight for power, and he maintained that the vital exertions of the will to power should not be unduly curbed by legal restrictions and inviolable norms.[13] Law was relegated by him to the task of securing temporary states of armistice between contestants for power, preparatory to the initiation of a new phase in the dynamics of eternal conflict.[14]

In evaluating Nietzsche's position, it can hardly be denied that the will to power is often a strong impelling force in individual as well as social life. In individual life, the power impulse may manifest itself in many forms, depending upon the particular qualities of the individual; it may direct its force to the attainment of political and social influence, the acquisition of money and property, or the conquest of women. In the life of societies, the struggle of groups, classes, and nations for power and dominance accounts for many decisive events in the pageant of history. In our own day, the role of power in the relations between nations is amply demonstrated. Unchecked political power is one of the most dynamic and aggressive forces in the world, and the danger of its abuse is an everpresent one. As the German historian Friedrich Meinecke has pointed out, a person invested with power is exposed

[13] See Nietzsche, "Genealogy of Morals," in *Basic Writings of Nietzsche*, ed. W. Kaufmann (New York, 1968), p. 512: "From the highest biological standpoint, legal conditions can never be other than *exceptional conditions*, since they constitute a partial restriction of the will of life, which is bent upon power, and are subordinate to its total goal as a single means: namely, as a means of creating *greater* units of power. A legal order thought of as sovereign and universal, not as means in the struggle between power-complexes but as a means of *preventing* all struggle in general . . . would be a principle *hostile to life*, an agent of the dissolution and destruction of man, an attempt to assassinate the future of man, a sign of weariness, a secret path to nothingness."

[14] A detailed account and critique of Nietzsche's philosophy of law is presented in Edgar Bodenheimer, *supra* n. 10, especially pp. 1–34, 49–61, 189–190.

to a constant temptation to misuse it, and to overstep the boundaries of justice and morality. "One can describe it as a curse that lies on power—it cannot be withstood." [15]

Granting the tremendous significance of the power concept for any description of political and other societal processes, it must nevertheless be noted that there has been a tendency in recent times to overrate the role which the power drive plays in the conduct of human affairs. A considerable number of men, among them some of the most valuable servants of mankind, have acted from motives other than the will to acquire or increase power. They may have acted for the sake of serving the public good or under an impulse of sympathy with the burdens and sufferings of their fellow men. This has been true not only of the great religious and ethical leaders of mankind, but also of some of the most outstanding political leaders. If such men, in order to be able to accomplish their purposes, have sought to gain power over other men, the acquisition of such power was to them only a secondary aim, an instrumental means subservient to the attainment of worthier objectives.[16] One may fully agree with Meinecke that those who hold power in their hands are tempted to expand it beyond the limits set by justice and morality. One need not concur in his conclusion that the "curse that lies on power" is an inevitable one.[17]

It would also appear that Nietzsche committed an error when he hypostatized the will to power into the supreme and dominant principle governing human life in general. In the lives of many human beings, the will to obtain and expand power plays no conspicuous part. They seek to conform to the prevailing patterns of social existence and are content to occupy a modest position in the societal order as long as that position enables them to satisfy their basic wants. They are often unwilling to accept changes in their way of life which would require a greater expenditure of effort and energy. The tendency to save energy is as much a part of the physical and psychological reality of human existence as the opposite tendency to expend it.[18]

[15] Meinecke, *Machiavellism*, transl. D. Scott (New Haven, 1957), p. 13, Cf. Montesquieu's views on power *supra* Sec. 11.

[16] Excellent observations on the use of power in the service of higher aims are found in Buber, *supra* n. 9, pp. 150–151. Erich Fromm has said that the lust for power conceived as a goal value is not rooted in strength but in weakness. *Escape from Freedom* (New York, 1941), p. 162. A similar position was taken by Alfred Adler, *Individual Psychology*, transl. H. L. and R. R. Ansbacher (New York, 1956), pp. 111–114.

[17] For a critical analysis of Lord Acton's remark that "power tends to corrupt and absolute power corrupts absolutely" see Arnold A. Rogow and Harold D. Lasswell, *Power, Corruption, and Rectitude* (Englewood Cliffs, N.J., 1963), pp. 1–2, 32–35.

[18] See *infra* Sec. 64.

More important perhaps, where the will to power manifests itself on the social scene, it is met, countered, and checked by an organizing principle of equal or even superior weight and strength—the will to law. While the will to power has its roots in the desire to dominate other men and subject them to one's influence and control, the will to law stems from a human inclination opposing this impulse, namely, the desire to be free from the arbitrary domination of other men. The institution of law, in one of its most significant aspects, may be viewed as an instrument to check and curb man's appetite for power. It would seem fair to state that, in a considerable number of civilized societies, the endeavor of the law to build fences against an oppressive expansion of power (private as well as public) has met with a reasonable degree of success.

Section 61. *Law and Administration*

Administration is an exercise of power in a concrete situation for the accomplishment of a private or public purpose. It may be distinguished from power in the broader sense by the fact that it usually relates to the management of an estate, corporation, government agency, or other form of private and public enterprise. A landowner administers his estate by giving orders for the proper cultivation and conservation of his land. The executor of a will takes measures aiming at the disposition and liquidation of the estate of a deceased person. An officer in charge of the affairs of a corporation is concerned with useful and expedient actions for promoting its business; he gives order to the employees, draws up plans for production, hires and fires workers. These are examples of private administration. Where administrative measures are taken in the public interest by government officials, we enter the sphere of public administration. Decisions and actions relating to the conduct of foreign affairs, the building of roads and dams, the preservation of national parks, and the operation of regulatory agencies are typical examples of public administration.

What is the relation between public administration and law? This problem was discussed by two German teachers of public law, Georg Jellinek and Paul Laband. According to the theory of Jellinek, the purely administrative activity of the state does not fit within the concept of law. He argued that the creation of executive organs by the state, the administration of governmental property, and the issuance of instructions and orders to the state officials are outside the field of the law. In his view, not everything which is put in the form of a statute should be considered as an act of law. For instance, a statute ordering the building of a canal or railway by the state, providing for

the establishment of a university, granting relief to the inhabitants of a flooded community, or organizing a governmental expedition to the Antarctic is regarded as an administrative rather than a legal measure by Jellinek. No rule can be law which operates only within the administration itself and which does not create any obligations or rights for anyone who is outside the administration.[1] Such rules have as little to do with law as an instruction by a private individual regarding the management of his household or estate. All law, said Jellinek, is conditioned by relations between two or more persons.[2] Only a rule that delimits the sphere of the free activities of persons in their relation to each other is a legal rule.[3]

In this view Jellinek was supported by Laband. Law, according to Laband, consists in the "delimitation of rights and duties of particular subjects against each other: by its very nature law presupposes a plurality of persons who may come into collision." [4] There is no room for law, according to Laband and Jellinek, so long as the sphere of volition of the administering state, or of any other natural or legal person, does not come in touch with some other sphere of volition, thereby making possible a mutual encounter, a clash, or a compromise between various wills. The state, to the extent that it is concerned with the exercise of free discretion in administering its affairs, may be judged as a political and ethical phenomenon, but not as a legal configuration. The state enters the domain of law only when it grants rights to private individuals or when it delimits its own free sphere of activity by imposing obligations towards private individuals upon itself.[5]

Starting from wholly different philosophical premises, the Soviet jurist E. B. Pashukanis reached conclusions very similar to those of Jellinek and Laband.[6] Pashukanis distinguished between legal rules on the one hand and social-technical rules on the other. All law, he asserted, is conditioned by the existence of separate and conflicting private interests. It is the typical instrument of social control in a society of private, isolated commodity producers who exchange their products by way of contract. Law, according to Pashukanis, is out of place in a society where there are no conflicting individual interests requiring adjustment. In a socialist society undefiled by the clash of

[1] Georg Jellinek, *Gesetz und Verordnung* (Tübingen, 1887), pp. 240 ff. See also Paul Laband, *Staatsrecht des Deutschen Reiches* (Berlin, 1901), Vol. I, p. 168.

[2] Jellinek, *System der subjektiven öffentlichen Rechte*, 2d ed. (Tübingen, 1905), p. 193.

[3] Jellinek, *supra* n. 1, p. 240.

[4] Laband, *supra* n. 1, p. 168.

[5] Jellinek, *supra* n. 2, p. 195.

[6] See the instructive article by S. Dobrin, "Soviet Jurisprudence and Socialism," 52 *Law Quarterly Review* 402 (1936).

contradictory interests, he argued, legal rules will be replaced by social-technical rules. These constitute the typical form of regulation in a social organization in which a "unity of purpose" prevails. Pashukanis illustrated his theory by the following examples:

> The juridic norms of the responsibility of railways presuppose private claims and private isolated interests; whereas the technical rules of railway movement presuppose a single purpose—the attainment of maximum hauling capacity, let us say. The treatment of a sick person—to take another example—presupposes a series of rules, both for the patient himself and for the medical personnel; but inasmuch as these rules are established from the point of view of a single purpose—the restoration of the patient's health—they are of a technical character.[7]

Other examples of merely technical regulations, according to Pashukanis, are plans of production in a collectivized economy, mobilization directives in wartime, and instructions given to members of the Jesuit order by their leaders. Arrangements of this character do not involve the adjustment or adjudication of conflicting private claims but aim at the accomplishment of a collective purpose. In the words of Pashukanis, "The more systematic the development of the principle of authoritarian regulation (which excludes any inkling of a separate and autonomous will), the less ground there is for the application of the category of law." [8]

A different approach to the problem was taken by Hans Kelsen. In his earlier works, he recognized no significant distinctions between administration and law and suggested that practically every act of public administration was at the same time an act of law.[9] He arrived at this conclusion by stretching the term law to cover any variety of compulsive norms or measures originating in an organ of the state. What we call administration, he argued, can for the most part not be distinguished functionally from legislative or judicial activity. Public policy is pursued in all these instances in an identical fashion, namely, by achieving a desired condition of affairs by attaching to its opposite an act of compulsion. The state, being the agency which administers compulsion is a "King Midas in whose hands everything he touches is converted into law." [10] In his later writings, Kelsen drew some distinctions be-

[7] Pashukanis, "The General Theory of Law and Marxism," in *Soviet Legal Philosophy*, ed. J. N. Hazard, transl. H. W. Babb (Cambridge, Mass., 1951), p. 137.

[8] Pashukanis, p. 154. On Pashukanis see also Lon L. Fuller, "Pashukanis and Vyshinsky," 47 *Michigan Law Review* 1157 (1949); Edgar Bodenheimer, "The Impasse of Soviet Legal Philosophy," 38 *Cornell Law Quarterly* 51 (1952).

[9] Kelsen, *Allgemeine Staatslehre* (Berlin, 1925), p. 242. On Kelsen see also *supra* Sec. 26.

[10] *Id.*, p. 44.

tween legal and administrative activity, but took the position that these differentiations did not express genuine differences of functions, but merely a (historically conditioned) dichotomy of separate bodies of officials.[11]

To those who see in law a limitation rather than an exercise of power, Kelsen's refusal to distinguish clearly between law and administration is unacceptable. Public administration unrestrained in its power to pursue its objectives by any and all means considered expedient by the officials of the government is the antithesis of law. It is pure power rule. In the words of Mr. Justice Frankfurter, "Discretion without a criterion for its exercise is authorization of arbitrariness." [12] Administrators who do as they please and who are not bound by "considerations capable of rational formulation" [13] cannot be said to operate within a framework of law. In the law state, the administrative activity of the government takes place within a context of rules or standards, and the administrator, before making a policy determination or individual decision, must check to see if his action moves within the orbit of discretion allowed to him by the law.

This leads us to a discussion of the problem of administrative law. What is the nature and function of this branch of law? On this question the opinions of legal authors seem to be widely divergent. Berle characterized administrative law as "the law applicable to the transmission of the will of the state, from its source to the point of its application." [14] Other writers have described administrative law as the "law of statutory discretions." [15] These definitions fail to distinguish between public administration and administrative law. Administrative law is not primarily concerned with the transmission of the will of the state in any of its forms. It is concerned, in its most essential manifestations, with the *limits* which are set to the exercise of this will. It is not correct to say that it is the task of administrative law to enumerate and describe the discretionary powers vested in government officials and administrative agencies. Administrative law is principally interested in the *restraints* which the legal order has placed on the exercise of such discretion. This does not mean, however, that a statutory provision which contains a grant of administrative power without at

[11] See Kelsen, *The Pure Theory of Law*, 2d ed. transl. by M. Knight (Berkeley, 1967), pp. 262–267.

[12] *Brown v. Allen*, 344 U.S. 443, at 496 (1952).

[13] *Id.*, p. 497.

[14] Adolf A. Berle, "The Expansion of American Administrative Law," 30 *Harvard Law Review* 430, at 431 (1917).

[15] John Willis, "Three Approaches to Administrative Law," 4 *Selected Essays on Constitutional Law* 35, at 36 (1935); J. A. Corry, "Administrative Law in Canada," 5 *Proceedings of the Canadian Political Science Association* 190 (1933).

the same time limiting or circumscribing the exercise of this power thereby forfeits the quality of an act of law. In order to determine whether the public administration of a country is controlled by legal restraints, the system of public law *as a whole* must be consulted. If the executive and administrative organs of the country follow regular procedures in discharging their functions, if their activities are governed by rules which impose certain checks upon the exercise of unrestricted discretion, and if certain safeguards exist against an abuse of power by these agencies, then there is a system of administrative law in effect in this country. It should be emphasized that the rules controlling discretion do not necessarily have to emanate from the legislature or the judiciary; they may be the product of the rule-making activity of the executive or administrative agency itself. However, it is hard to conceive of an effective system of administrative law capable of preventing an arbitrary abuse of power by government officials which does not provide for at least a limited review of their actions by the courts or some other impartial board or tribunal.[16]

Jellinek and Laband took the position that rules and regulations operating within the administration itself and merely affecting the internal distribution of governmental powers should be excluded from the province of the law. This view lacks persuasive force. A system of organization which sets the functions and competence of one agency apart from those of other agencies and defines their respective operational spheres, thereby preventing intragovernmental friction and conflicts of jurisdiction, would seem to be well within the proper frame of reference of the law. There also would seem little merit in using a term other than law to designate the rules and regulations of organizations in which "unity of purpose" between regulators and regulated prevails, as Pashukanis suggested.

In the nineteenth century, the emphasis in American government was almost exclusively on the legal restraints designed to keep administration within confined bounds. The discretionary domain in administration was held down to an unavoidable minimum. As Roscoe Pound pointed out,

[16] F. J. Goodnow defines administrative law as "that part of the public law which fixes the organization and determines the competence of the administrative authorities, and indicates to the individual remedies for the violation of his rights." *Comparative Administrative Law* (New York, 1903), p. 8. Felix Frankfurter gives the following definition: "Administrative law deals with the field of legal control exercised by law-administering agencies other than courts and the field of control exercised by courts over such agencies." "The Task of Administrative Law," 75 *University of Pennsylvania Law Review* 614, at 615 (1927). These definitions bring to light important elements in administrative law. See also Kenneth C. Davis, *Administrative Law Treatise* (St. Paul, 1958), Sec. 1.01.

Law paralyzing administration was an every-day spectacle. Almost every important measure of police or administration encountered an injunction. . . . What in other lands was committed to administration and inspection and supervision in advance of action we left to the courts, preferring to show the individual his duty by a general law, to leave him free to act according to his judgment, and to prosecute him and impose the predetermined penalty in case his free action infringed the law. It was deemed fundamental in our polity to confine administration to the inevitable minimum. In other words, where some people went to one extreme and were bureau-ridden, we went to the opposite extreme and were law-ridden.[17]

In the twentieth century, especially in the thirties, the pendulum swung to the other side. A great number of administrative agencies charged with supervision of various areas of the economic and social life grew up in quick succession. A certain tendency developed to take away or curtail judicial review of the actions of these agencies. The low estimate of administrative power in the nineteenth century gave way to a high praise of its blessings in many quarters. Pound, in an interesting comparison, likened this "recrudescence of executive justice" to the rise of equity jurisprudence in sixteenth-century England. He pointed out that equity started its career as a form of executive justice, as a movement away from the law courts; later, however, it became a well-established part of the law. "The common law survived and the sole permanent result of the reversion to justice without law was a liberalizing and modernizing of the law." [18] He expressed his conviction that a similar development would take place in regard to the new administrative justice in the United States, and the events of the last few decades would seem to bear out his prediction. An integration and absorption of administrative law into the total body of the public law appears to be in the making.

An increase in administrative control has been inevitable and necessary in the United States in order to achieve efficiency in the management of public business in the face of a complicated industrial world. In a complex society where numerous conflicting interests are in need of adjustment and where the public welfare must be preserved against antisocial and disruptive trends, there is an impelling need for regulation by direct government action.[19] Certain dangers inherent in administrative control must, however, be clearly recognized and met. A system of public administration interested solely in results and unconcerned with human rights may lead to autocracy and oppres-

[17] "Justice According to Law," 14 *Columbia Law Review* 1, at 12–13 (1914).

[18] *Id.*, p. 21.

[19] See on this point John Dickinson, *Administrative Justice and the Supremacy of Law* (Cambridge, Mass., 1927), pp. 10–15.

sion. The example of some totalitarian states proves clearly that a purely administrative state may have little regard for the dignity of the human personality. Administrative discretion must therefore be subjected to reasonable limitations in order that the rule of law may be maintained in society.

Where to draw the line between administrative discretion and legal restraint cannot be determined by a simple formula. The exercise of a substantial margin of discretion may be absolutely essential to the effective accomplishment of some important social purpose.[20] On the other hand, it will be possible in many instances, by way of statute or administrative regulation, to define beforehand the ways and means through which the administrative purpose is to be executed and to inform the public of the typical operations of the agency. Furthermore, however large the undefinable area of discretion granted to the agency may be, an individual affected by its actions should, as a general rule, have some form of recourse to an impartial tribunal in the case of arbitrary abuse of such discretion.[21] As long as efficiency in government is not considered an ultimate end in itself, the realization of adequate safeguards for the protection of human rights must be looked upon as an essential postulate of an enlightened administrative justice.

Section 62. *Law and Morality*

While power, in the general and specific manifestations in which it has been discussed in the two preceding sections, is neutral towards value and disvalue and may actualize itself in beneficial as well as deleterious forms, morality is a value-impregnated concept relating to certain normative patterns which aim at the augmentation of good and reduction of evil in individual and social life.[1] In its bearing on the attitude of an individual towards himself, the moral imperative has been defined as the summons to develop one's potential in a socially responsible manner, to realize one's creative powers to the fullest, and thus to attain true happiness and inner contentment.[2] This "mo-

[20] That there are areas of administration in contemporary government where allowance of a broad amount of discretion is desirable or indispensable is argued by Kenneth C. Davis, *Discretionary Justice* (Baton Rouge, 1969), ch. I and *passim.*

[21] A series of exchanges of view on the control of administrative arbitrariness between Raoul Berger and Kenneth C. Davis is found in 65 *Columbia Law Review* 55–95 (1965), 114 *University of Pennsylvania Law Review* 783–833 (1966), and 51 *Minnesota Law Review* 601–654 (1967).

[1] Paul Tillich has pointed out that in the United States the term morality has, under the influence of Puritanism, frequently taken on an exclusively sexual signification. *Morality and Beyond* (New York, 1963), p. 22. But a much broader use of the term, such as underlies the discussion in the text, is also widely accepted.

[2] See, for example, Tillich, *id.*, p. 20: "The moral imperative is the demand to become actually what one is essentially and therefore potentially." Tillich empha-

rality of aspiration," as Lon Fuller has called it,[3] has only a remote and indirect relation to the law, as will be shown later.[4] It is more common, however, to apply the term morality to the interpersonal relations of men, where encounters and collisions may occur between self-assertive wills and clashing emotions. The aims of morality in its social signification are directed towards increasing social harmony by diminishing the incidence of excessive selfishness, noxious conduct towards others, internecine struggle, and other potentially disintegrative forces in societal life. These objectives are by no means foreign to the purposes of legal arrangements. The question arises, therefore, how the respective spheres of morality and law can be distinguished and delimitated from each other.

According to an influential theory, the distinction between law and morals is found in the fact that the law regulates the external relations of men, while morality governs their inner life and motivations. This theory was first announced by Thomasius[5] and subsequently elaborated by Kant;[6] it has since found acceptance with numerous students of jurisprudence.[7] Since it is common to identify this view primarily with the name of Kant, we shall hereafter refer to it as the "Kantian theory."

According to this view, law requires external compliance with existing rules and regulations, regardless of the underlying motive, while morality appeals to the conscience of man. The moral imperative demands that men act from praiseworthy intentions, above all from a sense of ethical duty, and that they strive after good for its own sake. A modern advocate of this doctrine, the Hungarian jurist Julius Moór, summarizes thus:

> The norms of morality do not threaten the application of external means of compulsion; no external guaranties for the enforcement of their postulates are of avail to them. The guaranty of their enforcement rests exclu-

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sizes that this goal should be pursued in a responsible manner, namely, in the realization that one needs to become "a person within a community of persons." *Id.*, p. 19.

[3] *The Morality of Law*, rev. ed. (New Haven, 1969), p. 5.

[4] See *infra* Sec. 64.

[5] Christian Thomasius, *Fundamenta Iuris Naturae et Gentium* (Halle, 1705), Bk. I, ch. I. 4–6.

[6] Immanuel Kant, *The Metaphysical Elements of Justice*, transl. J. Ladd (Indianapolis, 1965), pp. 13–14, 19–21.

[7] See, for instance, George W. Paton, *A Text-Book of Jurisprudence*, 3rd ed. by D. P. Derham (Oxford, 1964), p. 67: "Ethics must consider the motive for action as all-important, whereas law is concerned mainly with requiring conduct to comply with certain standards, and it is not usually concerned with the motives of men;" Hermann Kantorowicz, *The Definition of Law*, ed. A. H. Campbell (Cambridge, Eng., 1958), pp. 43–51; Rudolf Stammler, *Theory of Justice*, transl. I. Husik (New York, 1925), pp. 40–41.

sively within the soul of the individual concerned. Their only authority is grounded on the insight that they indicate the *right* way of acting. Not outward physical compulsion and threats, but the inner conviction of their inherent rightness will bring about the realization of moral norms. Thus the moral command appeals to our inner attitude, to our conscience.[8]

Law, on the other hand, says Moór, demands an absolute subjection to its rules and commands, whether a particular individual approves of them or not, and is characterized by the fact that it always applies the threat of physical compulsion. Morality, according to this view, is autonomous (coming from within man's soul), while the law is heteronomous (being imposed upon man from without).

The view that law relates exclusively to external conduct, while morality is interested in inner motivation by a "good will" cannot be accepted as a generally valid explanation of the relation between these two agencies of social control. This relation is more complex, ambiguous, and fluid than is suggested by the Kantian thesis.

First of all, the law is often concerned with the disposition of the mind of a person whose actions are to be judged by legal norms and standards. In criminal law, for example, the proof of a guilty mind (*mens rea*) is an essential prerequisite for the punishment of the majority of crimes. It is also true that the kind and severity of the penalty will often depend on the motives and intentions which induced the accused to commit the crime. Premeditated murder is usually punished more harshly than a homicide committed in the heat of passion. The law of torts, too, often pays attention to the subjective psychological springs of human actions. A jury may be authorized to impose punitive damages for an intentional battery or assault, while this power may be nonexistent in case of an injury inflicted through negligence. In several states of the union, the truth of a libelous statement will not exculpate the maker of the statement unless it was published with good motives and for justifiable ends. In other areas of the law, the presence of *bona fides* may be the precondition for the recognition of rights, and disadvantageous consequences may attach to an exercise of rights motivated by pure malice or spite.[9] In the law of unfair competition, where a man opens a business not for the sake of financial gain but with the sole and exclusive intent to

[8] *Macht, Recht, Moral* (Szeged, 1922), pp. 15–16 (my translation).

[9] See A. H. C. Chroust, "Law and Morals," 25 *Boston University Law Review* 348, at 354 (1945). Erection of spite fences and malicious interference with percolating waters are examples in United States law. Sec. 226 of the German Civil Code provides that the exercise of a right is unlawful if its sole purpose is to injure another person. See also *id.*, Sec. 937, requiring *bona fides* as a prerequisite for the acquisition of a prescriptive right.

drive another person out of business for reasons of personal animosity, the malevolence of the motive may give rise to an action in tort.[10]

While motivations and states of mind are frequently important from the point of view of the law, it is conversely true that morality is not disinterested in actions. Good intentions unaccompanied by moral acts, or praiseworthy motives resulting in unintended consequences of an immoral or harmful character, can hardly be looked upon as meaningful manifestations of social morality.[11] Although the attitude and disposition accompanying the doing of an act may have an important bearing upon the evaluation of the act from a moral standpoint, the moral code of a society will usually demand more of a person than cultivation of a pure heart. It will often bring the force of public opinion to bear upon individuals in order to induce them to convert good intentions into morally commendable deeds. Immoral behavior may be met by the sanction of popular condemnation, even though the act in question may stay within the authorized precincts of the law. Although the law does not put a man in prison for a failure to exercise the moral virtues of charity and forbearance, a person whose actions persistently violate the moral sense of the community may find it difficult to remain a self-respecting member of his group.

A study of the historical development of moral ideas makes it quite clear that the primary source of moral commands cannot be found located in the autonomous reason of individuals.[12] Ethical systems owe their origin to the strong desire of organized groups to create tolerable conditions of social existence. Tenets of social morality are devised in order to curb intragroup aggressiveness, reduce predatory and unconscionable practices, cultivate concern for one's fellow men, and thereby increase the possibilities of a harmonious coexistence. In the words of Kurt Baier, "moral rules are universal rules designed to override those of self-interest when following the latter is harmful to others." [13] Although the inculcation of proper mental attitudes is an important means for the achievement of this objective, the main purpose of moral precepts is to induce socially desirable *actions*. Social

[10] See *Tuttle v. Buck*, 119 N.W. 946 (Minn., 1909); *Dunshee v. Standard Oil Co.*, 132 N.W. 371 (Iowa, 1911); *Boggs v. Duncan-Shell Furniture Co.*, 143 N.W. 482 (Iowa, 1913).

[11] " 'Dictates of the heart' are meaningless unless they affect first the arm-and-leg action of the individual, and then institutions." William E. Hocking, "Ways of Thinking about Rights: A New Theory of the Relation between Law and Morals," in *Law: A Century of Progress* (New York, 1937), II, 257.

[12] B. F. Skinner's statement to the effect that "autonomous man . . . is the happy exception" would appear to be true in its application to individuals who build their personal moral code independently of the heteronomous impact of societal beliefs. See *Beyond Freedom and Dignity* (New York, 1971), p. 20.

[13] *The Moral Point of View* (Ithaca, 1958), p. 309.

morality may with good reason be looked upon as the recognition of an objective hierarchy of values which are to guide the conduct of human beings towards one another in a given society.

Within this hierarchy of moral values, we may distinguish two categories of postulates and principles. The first category consists of requirements of social ordering which are deemed indispensable, necessary, or highly desirable for an effective discharge of the tasks an organized society has to cope with. Avoidance of violence and injury, the keeping of faith in the performance of agreements, regulation of family relations, and perhaps some degree of loyalty towards the group may be counted among these basic requirements. The second category of moral norms includes principles which add greatly to the quality of life and the establishment of closely knit bonds among men, but which demand more of human beings than is regarded necessary for the preservation of the essential conditions of social existence. The values of generosity, benevolence, charity, unselfishness, and loving kindness belong to this second category.

Those tenets of moral rightness which are considered basic and imperative for social intercourse will be endowed in all societies with an obligatory character of great strength. This strengthening of their binding force is accomplished by converting them into rules of law. The prohibition of murder, rape, robbery, and physical assaults, the ordering of relations between the sexes, the interdiction of fraud and bad faith in the conclusion and performance of consensual agreements are examples of such transformations of moral ideas into legal prescriptions.

The history of the law discloses a distinct trend to insure compliance with the basic requirements of proper conduct by the establishment of organized community sanctions, including the possible use of force, but the existence of an official system of sanctions is not, as we have seen, a *conditio sine qua non* of legal control. Bronislaw Malinowski has shown, for example, that there are rules in primitive society which must be regarded as legal rules because of their strong obligatory force, but whose observance is guaranteed chiefly by the reciprocal self-interest of the parties concerned.[14] In international law, it may be the national interest or regard for world public opinion rather than fear of sanctions which bring about compliance with treaties and customary rules.

Those precepts of morality, on the other hand, which stand outside the network of legal rights and duties are characterized by an obliga-

[14] *Crime and Custom in Savage Society* (New York, 1926), pp. 22–23, 39–45. Malinowski's findings are discussed in greater detail *infra* Sec. 63.

tory force of lesser strength. Although it cannot be said that behavior actuated by sympathy, benevolence, and concern for others is purely a matter of subjective choice and discretion (the religious ethos of a society, for example, may make moral demands upon individuals), it is nevertheless true that the degree of autonomy accorded to men in matters of pure morality is greater than the sphere of free volition allowed by regulatory norms of law. There is an element of spontaneity and voluntariness in the dispensation of charity and neighborly love which is in fact essential to the moral quality of such conduct. I may feel a moral obligation to release the debt of a person in financial straits, but the debtor has no right to demand such generosity on my part.[15] It s a corollary of this fact that purely moral postulates are not covered by whatever enforcement system is available for the vindication of legal rights.

Although it can be presumed that all or most societies distinguish legal rules from moral precepts in some fashion, the boundaries between these two categories of social norms cannot always be drawn with sharpness and precision. The blurring of the lines was probably most pronounced in primitive society. As Herbert Hart has pointed out, no articulated "rules of recognition" were available at that stage which served to identify certain rules as "legal" in contradistinction to other types of norms, such as moral or religious taboos.[16] Even the sophisticated civilization of the Greeks does not seem to have provided a workable segregation of legal rules from moral postulates. There is every reason to believe that the unguided lay juries which administered justice in the Greek popular courts did not in their minds perceive a clear distinction, in all cases, between what was legally prohibited and what was morally opprobrious.[17] In Rome, the special characteristics of legal control emerged for the first time in history in their essential contours; yet the definition of law by Celsus, *Ius est ars boni et aequi* (Law is the art of the good and equitable) is couched strongly in the language of morality.[18] The chancellors in medieval England administered equity according to the dictates of their conscience, which had been shaped by the prevailing moral ideals and the religious

[15] Leon Petrazycki has used the term "unilaterally binding norms" to designate obligations which are not matched by a corresponding right to their performance. *Law and Morality*, transl. H. W. Babb (Cambridge, Mass., 1955), pp. 45–49. For a criticism of Petrazycki's view see Kantorowicz, *supra* n. 7, pp. 50–51.

[16] H. L. A. Hart, *The Concept of Law* (Oxford, 1961), pp. 89–93. On rules of recognition see also *supra* Sec. 58.

[17] See, for example, Robert J. Bonner and Gertrude Smith, *The Administration of Justice from Homer to Aristotle* (Chicago, 1930), II, 301–306. It is also significant that the Greek word *nomos* comprises legal as well as moral norms.

[18] Dig. I. 1. 1.

doctrines of the Roman Catholic Church. The judges of the common law often imposed punishment for crimes in cases where they felt the perpetrator had outraged the moral feelings of the community and in the absence of a statute clearly defining the elements of the offense.

The natural-law theory of the Enlightenment period prepared the ground for a modern movement to emancipate law from morality. Thinkers like Grotius, Pufendorf, Hobbes, and Locke separated jurisprudence from moral-theological doctrine and sought to investigate the peculiar character of law.[19] Thomasius and Kant expressed the trend of their times when they relegated to the realm of individual conscience those principles of morality that had not been incorporated into the law. The positivistic legal doctrine of the nineteenth century attempted to carry this tendency to its consummation. John Austin emphasized the need for eliminating ethical value judgments and moral reasoning from the application and enforcement of the law.[20] Hans Kelsen bluntly declared that, in his view of the positive legal order, "the concept of law has no moral connotations whatsoever." [21] More recently, Herbert Hart has offered a defense, with some qualifications, of the positivistic insistence on separation of the two agencies.[22]

It bears emphasis that the separation doctrine is generally not extended to the *making* of law. Justice Holmes, for example, who was a protagonist of the doctrine, declared that "the law is the witness and external deposit of our moral life." [23] The makers of the law are frequently influenced by traditional or novel ideas of social morality. It is not only true that the most basic tenets of this morality are almost inevitably received into the body of law, as was pointed out earlier. It should also be noted that there is a wavering line of demarcation between those moral principles which become part of the law and those which stand outside its orbit. Up to this day, for example, the common law has not recognized a legal obligation to assist another human being who is in grave danger of life or limb. Thus a physician is under no duty to answer the call of one who is dying and might be saved; no one is required to play the part of a good Samaritan and bind up the wounds of a stranger who is bleeding to death, or to cry a warning to one who is walking into the jaws of a dangerous ma-

[19] See *supra* Secs. 8–11.

[20] *The Province of Jurisprudence Determined*, ed. H. L. A. Hart (London, 1954), pp. 184–191.

[21] *General Theory of Law and State*, transl. A. Wedberg (Cambridge, Mass., 1949), p. 5.

[22] H. L. A. Hart, "Positivism and the Separation of Law and Morals," 71 *Harvard Law Review* 593 (1958). See also Hart, *supra* n. 16, pp. 195–207.

[23] O. W. Holmes, "The Path of the Law," in *Collected Legal Papers* (New York, 1920), p. 170.

chine.[24] At some time in the future, in consonance with developments in other countries,[25] the duty to give aid to someone in serious peril may perhaps, within certain reasonable limitations, pass from the domain of common morality and decency into the realm of obligatory law.[26]

In the law of unfair competition, some changes accomplished in recent times by courts and legislatures must be attributed to a sharpening and refinement of the moral sense, accompanied by a conviction that the business community must be protected against certain reprehensible and unscrupulous trading practices by means more effective than moral disapproval. Thus in a reversal of earlier trends in the law, the pirating of news from a competitor by a well-known news-gathering agency was condemned by the United States Supreme Court,[27] and there have also been new developments in the field of deceptive advertising.

Conversely, it may happen that certain acts previously deemed to demonstrate a degree of immorality requiring legal proscription are taken out of the domain of law and relegated to the sphere of individual moral judgment. In England, for example, homosexual acts between consenting adult males were removed from the reach of the criminal law,[28] and similar legislation was adopted in the state of Illinois.[29] The crime of attempted suicide was abolished in England,[30] and a far-reaching liberalization of abortion has occurred in the United States.[31] A decriminalization of extramarital intercourse has been accomplished through nonenforcement of penal provisions. It might also be noted that in a number of American states actions for breach of promise to marry, and suits for alienation of affections, have been abolished, with the result that conduct once subject to tort sanctions

[24] See William L. Prosser, *Handbook of the Law of Torts*, 4th ed. (St. Paul, 1971), pp. 340–343.

[25] See the comparative survey by F. J. M. Feldbrugge, "Good and Bad Samaritans," 14 *American Journal of Comparative Law* 630 (1966).

[26] Of interest in this connection is a Colorado statute creating a new category of accomplice "during the fact" who is defined as "a person who stands by, without interfering or giving such help as he may in his power to prevent a criminal offense from being committed." *Colo. Rev. Stat. Ann.* 1963, Ch. 40, Sec. 1–12.

[27] *International News Service v. Associated Press*, 248 U.S. 215 (1918). This decision gave an impetus to further developments in that branch of business torts which is concerned with the unjustifiable appropriation by one person of commercial values created by another.

[28] *Sexual Offenses Act*, Eliz. II, Pt. II, ch. 60 (1967).

[29] *Ill. Ann. Stat.*, 1972, Ch. 38, secs. 11–2, 11–3.

[30] *Suicide Act*, 9 & 10 Eliz. II, ch. 60 (1961).

[31] See *Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973); *Laws of New York*, 1970, Ch. 127; *Hawaii Rev. Stat.*, 1971 Supp., Sec. 453–16.

has been removed to the domain of moral evaluation.[32] In the literature of England and the United States, a lively debate has been carried on in recent years about the extent to which morality should be enforced by means of legal regulation.[33]

If there is such close interplay between law and morality in the making and unmaking of law, where do we have to seek the thrust of the doctrine which insists on separation of these two agencies of social control? Why did John Austin criticize Lord Mansfield for importing moral considerations into some of his judicial opinions? [34] What was the reason behind Justice Holmes's suggestion that it might be a gain "if every word of moral significance could be banished from the law altogether"? [35]

Remarks of this character are designed to oppose and combat a confusion of legal and moral standards in the administration and enforcement (as distinguished from the making) of positive law. If the line between legal rules and moral postulates is invisible or severely blurred, the certainty and calculability of the law are bound to suffer. The organs charged with the administration of justice are then put into a position in which they can enforce whatever moral principles they deem to be in accord with the prevailing collective ideology.[36] Spheres of freedom guaranteed by the law would become subject to invasion by the rival agency of morality. Such an invasion would be facilitated by the fact that moral standards are usually formulated in a more general and less precise way than the majority of legal rules.[37] Legally defined rights could be cut down and legally circumscribed duties extended by reference to moral principles whose

[32] See Homer H. Clark, *The Law of Domestic Relations in the United States* (St. Paul, 1968), pp. 15–22, 267–268.

[33] See Patrick Devlin, *The Enforcement of Morals* (London, 1965); Eugene V. Rostow, "The Enforcement of Morals," in *The Sovereign Prerogative* (New Haven, 1962), pp. 45–80; H. L. A. Hart, *Law, Liberty, and Morality* (Stanford, 1963); Jerome H. Skolnick, "Coercion to Virtue: The Enforcement of Morals," 41 *Southern California Law Review* 588 (1968); Sanford H. Kadish, "The Crisis of Overcriminalization," in 374 *Annals* 157 (1967); Herbert L. Packer, *The Limits of the Criminal Sanction* (Stanford, 1968), Pt. III; Rolf E. Sartorius "The Enforcement of Morality," 81 *Yale Law Journal* 891 (1972).

[34] Austin, *supra* n. 20, pp. 190–191.

[35] Holmes, *supra* n. 23, p. 179.

[36] The analogous application of criminal statutes, which was authorized in Hitler's Germany and early Soviet law, makes it possible for the courts to punish conduct not specifically outlawed by the penal code but deemed contrary to the political and moral ideology of the state.

[37] Gustav Radbruch quotes a remark by the Swedish playwright August Strindberg to the effect that men have always tended to keep their moral codes as vague as possible. "Legal Philosophy," in *The Legal Philosophies of Lask, Radbruch, and Dabin,* transl. K. Wilk (Cambridge, Mass., 1950), p. 78. See also Samuel E. Stumpf, *Morality and the Law* (Nashville, 1966), p. 223.

ambiguous scope would make it impossible or difficult for the citizens to anticipate their impact and adjust their conduct accordingly. The same result would be accomplished by keeping the legal code itself so loose and flexible that the collective ideology could always be used as a lever to produce results desired by the authorities in power.

Inasmuch as the promulgation of ascertainable standards identified as legal commands or prohibitions is an essential ingredient of the rule of law, there is a plausible axiological conviction behind the demand that law and morals be kept apart in the administration of justice. Yet, there are definite limits to the extent to which this demand can be realized and implemented in the judicial process. Its realization would perhaps be possible if legal rules and principles could be so clearly and unambiguously formulated that no reliance on extralegal conceptions would ever become necessary in the adjudication of controversies. We know from the experience of centuries that such a degree of clarity and certainty cannot be achieved by any legal system. It is also highly questionable whether a legal order could altogether dispense with the use of broad concepts carrying moral connotations, such as good faith, *mens rea* (guilty mind), and unconscionable conduct.

Where there is ambiguity and doubt in the law, the ethical convictions of the judge as to the "rightness" or "wrongness" of a certain solution will often have a decisive bearing upon the interpretation of a statute or the application of an established rule to a novel situation.[38] As Justice Cardozo has stated, judges will stretch a point here and there "in response to a moral urge." [39] In a similar vein, Justice Frankfurter has said that "the function of the judiciary is not so limited that it must sanction the use of the federal courts as instruments of injustice in disregard of moral and equitable principles which have been part of the law for centuries." [40] A reliance on moral ideas may also occur when courts, in overruling a precedent, depart from the doctrine of *stare decisis*.[41] Furthermore, as pointed out earlier, a judge may become confronted with the moral dimension in the law when he is called upon to enforce an enactment which is totally repugnant to the community's sense of justice.[42]

[38] A thorough and valuable discussion of the moral element in judicial decision-making is found in Stumpf, Ch. 1.

[39] Benjamin N. Cardozo, *The Paradoxes of Legal Science* (New York, 1928), p. 43. See also *infra* Sec. 77 for further comments on this problem.

[40] *United States v. Bethlehem Steel Corp.*, 315 U.S. 289, at 312–313 (1942).

[41] See *infra* Sec. 86.

[42] See *supra* Sec. 58.

There exist, of course, broad areas of the law in which moral ideas do not play any conspicuous part. The technical rules of procedure, the regulation of negotiable instruments, the enactment of traffic rules, the details of the governmental organizational scheme would generally fall into this category. The guiding notions of legal policy in these areas are utility and expediency rather than moral convictions.

It appears from the foregoing exposition that law and morality represent distinct normative orders whose spheres of control overlap in part. There are domains of morality which stand outside the jurisdictional boundaries of the law. There are branches of law which are largely unaffected by moral valuations. But there exists a substantial body of legal norms whose purpose it is to guarantee and reinforce the observance of moral imperatives which are deemed essential to the well-being of a society.

Section 63. *Law and Custom*

Customs are habits of action or patterns of conduct which are generally observed by classes or groups of people. They may relate to dress or to etiquette or to rites surrounding important events of life, such as birth, marriage, or death. They may also pertain to the conclusion of transactions or the fulfillment of obligations.

There exist customs in every society which are concerned with the less important aspects of social life.[1] Most societies have certain usages with respect to the kind of dress one is expected to wear on various occasions. It is the custom in many countries to give wedding presents to friends and relatives. Well-established customs are observed at burials and other solemn ceremonies. When a custom of this type is violated, society usually reacts by showing social displeasure or disapproval; and if the norms of social intercourse are repeatedly or constantly violated by some person, he may soon find himself outside the pale of society.

There may be other kinds of customs which in a more definite and stringent sense are regarded as the specific duties and obligations of men. Such customs may regulate the obligations of marriage and the upbringing of children, the transmission of property at death, or the modes of consummating and fulfilling agreements. Such customs do not pertain to the sphere of social formalities, outward decorum, or aesthetics; rather, they are concerned with the serious business of society, the work that must be accomplished in order to secure and guarantee satisfactory conditions for collective life. There is every likelihood that such customs will become absorbed and incorporated

[1] See James C. Carter, *Law: Its Origin, Growth, and Function* (New York, 1907), pp. 120, 138.

into the body of the law, and their violation might be met by the typical sanctions employed by the legal order, including perhaps the use of direct constraint by governmental authorities. The term customary law will hereafter be used to designate customs which, although they have not been authoritatively promulgated by a legislative or judicial body, have become transformed into rules or arrangements to which a legal character is attributed.

It has often been asserted that law and custom were entirely undifferentiated in early society, and that the drawing of a line between social custom and customary law was the product of a long and gradual legal evolution. The anthropologist Bronislaw Malinowski disputed this view. He attempted to show that even in early society some rules of custom stood out from other social rules in that they were felt to represent the definite obligations of one person and the rightful claims of another. "On a close inquiry," he said, "we discover a definite system of division of functions and a rigid system of mutual obligations, into which a sense of duty and the recognition of the need of cooperation enter side by side with a realization of self-interest, privileges, and benefits." [2] He pointed out that it is not the sheriff who stands ready to enforce such rights and obligations in primitive society; they are usually self-enforcing because men need the good will and the services of others. A man requires a boat in order to fish, but he can obtain it only if he delivers part of the catch to the owner of the boat. The native who shirks his obligations knows that he will suffer for it in the future.[3]

Thus it is Malinowski's thesis that primitive society recognized the distinctive character of legal rules, that is, rules invested with a definite binding obligation. He maintained further that these rules were not necessarily enforced by modes of constraint resembling modern legal sanctions; the psychologically dictated necessity of reciprocal observance was the chief guaranty of compliance. There is much in Malinowski's argument which is highly suggestive and persuasive. Whether the rules of law in primitive society formed as well-defined a category within the general body of custom as he seems to assume may, however, to some extent remain subject to doubt and debate.

There is substantial agreement among legal historians and anthropologists that primitive law was to a large extent based on customary rules which were not promulgated by a legislator or formulated in written form by professionally trained judges.[4] With regard to the

[2] Malinowski, *Crime and Custom in Savage Society* (New York, 1926), p. 20.

[3] *Id.*, pp. 22–32, 41–42, 58–59.

[4] Paul Vinogradoff, "Custom and Law," in *Anthropology and Early Law*, ed. L. Krader (New York, 1966), p. 19; T. F. T. Plucknett, *A Concise History of the Common Law*, 5th ed. (Boston, 1956), pp. 307–308; Max Gluckman, *The*

origin of this primitive customary law, however, a number of different points of view have been set forth.

According to an influential opinion, customary law arises as soon as certain usages and customs felt to be legally obligatory are generally and continuously observed among the members of a family, group, tribe, or people. No formal recognition or compulsory enforcement of these usages and arrangements by a superior authority is regarded as necessary for the formation of customary law. In this view, law in early society arose out of the nonlitigious customs of everyday life which were approved by public opinion. "It is not conflicts that initiate rules of legal observance, but the practices of everyday directed by the give and take considerations of reasonable intercourse and social cooperation." [5] This view rests upon a theory of law which draws its chief support from the jurists of the historical school, especially from Savigny and Puchta.[6] The historical school of law assumed that in early society rules of law were not imposed from above, but grew from below as a result of the physical and mental collaboration and the mutual relationships of the members of a community. According to Savigny, customary law arose from the social arrangements of the people, consolidated by tradition and habit and conforming to the legal consciousness of the people; it did not, in his opinion, originate through the decrees of a governmental authority.

The general correctness of this view may in some respects be open to doubt. It presupposes a democratic structure of primitive society, in the sense that only those rules of conduct which arose out of the legal consciousness of the entire group attained the force of law. Modern research into primitive society has revealed that, at least in numerous instances, its structure was patriarchal rather than democratic. It is very likely that many sibs or *gentes,* especially in the Indo-European world, were ruled in an authoritative and patriarchal manner by one man, who sometimes had the power of life and death over the members of his group. If we believe in the existence of such ancient patriarchal authority, it is possible that the rules of conduct in primitive society were sometimes determined by its autocratic chief, or at least that only those customs and usages which met with his approval could become part of the legal fabric.

Judicial Process Among the Barotse of Northern Rhodesia (Manchester, 1955), pp. 236–237; J. C. Vergouwen, *The Social Organization and Customary Law of the Toba-Batak of Northern Sumatra* (The Hague, 1964), pp. 140–141.

[5] Vinogradoff, *Historical Jurisprudence* (Oxford, 1920), I, 368.

[6] On Savigny and Puchta see *supra* Sec. 18. The view that law comes out of the mores of the people was also propounded by William G. Sumner, *Folkways* (Boston, 1907), pp. 55–56.

In many instances, the early monarchic system gradually gave way to the rule of a caste or aristocracy.[7] It may have been a council of chiefs or elders or a college of priests. It is likely that this aristocracy became to some extent the agent for the administration of customary law. Some customs might have been unsettled or in conflict, and the uncertainty or conflict would have had to be resolved by some authoritative decision. Even Vinogradoff, who was, by and large, an adherent of the Savigny-Puchta theory, admitted that "we are . . . driven to assume . . . that there was a conscious activity of elders, priests, judges, witans, or experts of some kind directed towards the discovery and declaration of what is right and just." [8] This aristocratic caste tended to monopolize the knowledge of the law. Since writing was not known, some other effective means for the preservation of the customs of the community had to be employed. By confiding the recognized modes of conduct to the memory of a small group of men who transmitted their experience from generation to generation, a certain stability and continuity in the development of customary law was insured.

In one important respect, however, the historical school was right. Only such customs as suited the general way of life of early society and the economic requirements of the epoch could be administered by the chief or ruling aristocracy. No authority can, for a long time, enforce rules or arrangements which are contrary to the social necessity of the time and place. If we look at the problem from this point of view, Savigny's opinion that law arises from the legal consciousness of the people contains an important element of truth. In order to function successfully, the administration of rules of conduct requires some degree of cooperation and support from the community in which the rules are operative. "Laws repugnant to the notions of right of a community or to its practical requirements are likely to be defeated by passive resistance and by the difficulty of constant supervision and repression." [9] Thus, it may be assumed with good reason that there was a continuous interaction between popular sentiment, usage, and practice on the one hand and the activity of authoritative interpreters on the other in the operation of early customary law.[10] It is also likely that the basic pattern of law-ways in existence

[7] See Henry S. Maine, *Ancient Law*, ed. F. Pollock (New York, 1906), pp. 10–11.

[8] *Common Sense in Law* (New York, 1926), p. 165.

[9] Vinogradoff, "Customary Law," in *The Legacy of the Middle Ages*, ed. C. G. Crump and E. F. Jacobs (Oxford, 1926), p. 287.

[10] This is the view of Carleton K. Allen, *Law in the Making*, 6th ed. (Oxford, 1958), pp. 123–126.

in early society was rarely interfered with even by powerful rulers.[11]

Some writers have taken the view that only those customs and usages which were enforced by some governmental authority can be considered as legal rules.[12] Others have gone further, regarding as law only those rules of conduct whose observance was guaranteed by the infliction of penalties affecting the person or his property.[13] These views will be critically examined in a later section dealing with the problem of customary law and the significance which this form of law retains in our modern age.[14]

[11] Robert M. MacIver, *The Web of Government*, rev. ed. (New York, 1965), p. 50.

[12] John Austin, *The Province of Jurisprudence Determined*, 2d ed. (New York, 1861), pp. 22–24, 148; G. T. Sadler, *The Relation of Custom to Law* (London, 1919), p. 85; Thomas E. Holland, *The Elements of Jurisprudence*, 13th ed. (London, 1924), p. 58.

[13] Munroe Smith, *A General View of European Legal History* (New York, 1927), p. 285.

[14] See *infra* Sec. 78.

XIV

THE BENEFITS AND DRAWBACKS OF THE RULE OF LAW

Section 64. *The Channeling of Creative Human Energies*

Man is so constituted by nature that his creative faculties and energies are not fully absorbed or used up in his efforts to preserve his own life and reproduce new life. There is a reserve of excess energy in him, without which the great collective enterprise which we call human civilization would be impossible. If man's resources of energy were exhausted and consumed in his struggle to find food and shelter, protect himself against the dangers of nature, and reproduce his kind, there would be no energy left for the higher-minded, cultural activities, which go beyond satisfying the bare, immediate necessities of life. It is this surplus strength flowing into cultural activity which, perhaps more than anything else, distinguishes man from the lower species of life.[1]

[1] Max Scheler, *Man's Place in Nature,* transl. H. Meyerhoff (Boston, 1961), Chs. II and IV; Arnold Gehlen, *Der Mensch,* 6th ed. (Bonn, 1958), pp. 60–65, 385–400. On the idea of civilization see also *supra* Sec. 54.

It is true, as Franz Alexander has demonstrated, that the urge of the human being to actualize his potentialities to the fullest degree in the service of the manifold tasks of civilization is opposed and impeded by the contradictory "principle of economy," which causes men to save energy and to relax ambition as soon as the necessary conditions for their existence are safeguarded.[2] Initiative is often stultified by inertia, active creativity by regressive indolence, productivity by sloth. Since the tendencies towards growth and effort on the one hand and inertia on the other are both inherent in individual and social life, the former must be stimulated by every available reasonable means in order to bring to fruition the constructive and creative potentialities of the human race. It is more and more recognized by modern psychologists that true happiness for human beings can be achieved only if the capacities of the total human organism (including its mental and emotional branches) are realized to the fullest possible extent.[3] The lack of an integrated social system able to satisfy all the various aspirations of the human body and mind may cause serious psychological frustrations among the masses of the people, which may lead to disintegration of the social order, with all its concomitant effects.[4] Man's cravings are not satisfied by procuring food and shelter and by reproducing his kind. He desires to participate in some worthwhile undertaking to which he can contribute his particular gifts, whatever their nature and extent may be.[5] Individuals must therefore be given an opportunity to fulfill the higher purposes of life, that is, to develop their capabilities and talents to be of service to humanity.

In the great endeavor to build a rich and satisfying civilization,

[2] Alexander, *Our Age of Unreason* (Philadelphia, 1942), pp. 199–200.

[3] Kurt Goldstein, *Human Nature in the Light of Psychopathology* (Cambridge, Mass., 1951), pp. 112, 140 ff, 171, 221–223; Erich Fromm, *The Sane Society* (New York, 1955), pp. 67–69.

[4] If the goal of channeling man's surplus energies is not successfully accomplished by the social order, there is danger that these energies will be deflected into socially undesirable and destructive pursuits. Participation in an adventurous gang engaged in criminal activities may serve as a substitute for desired but frustrated cooperation into a worthwhile and challenging enterprise. Membership in a secret organization operating under rituals inspiring awe or fear may attract individuals whose lack of moral directives makes them amenable to misuse for antisocial ends.

[5] "All men are 'idealists' and are striving for something beyond the attainment of physical satisfaction." Fromm, *Man for Himself* (New York, 1947), p. 49. The logotherapy of Viktor Frankl has strongly emphasized the need of men to activate their energies in the service of causes deemed meaningful by them. *Man's Search for Meaning* (New York, 1963), pp. 154–155, 164–175; *The Will to Meaning* (New York, 1969), pp. 31–49. For a full account of Frankl's ideas see Joseph B. Fabry, *The Pursuit of Meaning* (Boston, 1968).

the institution of law plays an important and indispensable part. The law cannot, of course, directly initiate or promote the erection of the edifice of civilization; it cannot order people to be inventors or discoverers, to contrive new ways of city-building, or to compose good music. But it can make an indirect contribution towards achieving the "good life" in society by establishing the conditions in whose absence the higher tasks of human social organization could not be discharged.

The success of a social system depends largely upon its ability to direct the surplus energies which are not absorbed by economic or sexual pursuits into socially desirable channels. This can be achieved only if the base of the entire structure is so solidly constructed that the top layers may be superimposed without causing the collapse of the foundation. Only a society which has set up a working system for the primary satisfaction of basic wants can afford to direct or encourage activities which are designed to enrich and embellish the material and spiritual world in which we live and to satisfy the urges of all human beings to participate in a great undertaking.

In order to insure that the creative powers of men are directed toward the worthiest goals of civilization, important groundwork has to be done. Care must be taken that the energies of men are not consumed or dissipated in constant friction with their neighbors, in private warfare between individuals and groups, or in perpetual vigilance and preparation against aggressive and predatory acts of antisocial individuals. Unless society guarantees a certain amount of security to individuals and groups, they will be unable to devote themselves to the more comprehensive aims that are within the reach of human cooperative effort.

The beneficial effect of the law upon society stems to a considerable extent from the fact that it creates and maintains a sphere of security for individuals in certain basic conditions of life.[6] The law protects the life, bodily integrity, property transactions, family relations, and perhaps even the subsistence and health of the members of the body politic. It makes it unnecessary for people to set up private systems of protection against invasions of their privacy. It promotes the growth and maturing of human personalities by creating ordered conditions beneficial to the development of their mental and spiritual powers. It curbs physical or social adventure by those whose nature drives them to seek mastery and arbitrary power over others. By stabilizing (within the limits set by the unruly aspects of human nature) certain

[6] Rudolph von Jhering, *Law as Means to an End*, transl. I. Husik (New York, 1925) stressed (but overemphasized) the objective of legal regulation to secure the conditions of social life. For a discussion of other goals of law and justice see *supra* Secs. 51, 52, 54.

basic layers of conduct, the law helps to free the performance of the higher tasks of civilization from constant attention to problems on the lower levels which may interfere with an adequate discharge of these higher functions.[7] Furthermore, the law sets up institutional frameworks to provide means and proper environments for carrying out the manifold political, economic, and cultural tasks which a progressive society must successfully accomplish in order to achieve satisfaction of the demands of its members. By performing these functions, the law helps the creative, life-affirming powers latent in the social body to flow into constructive channels, and it thereby proves to be an indispensable instrument of civilization.[8]

Section 65. *The Promotion of Peace*

In the domestic affairs of nations, as well as in the international arena, law has aimed at serving as an institutional device for substituting aggressive force by peaceful forms of human relations. The past history of mankind demonstrates clearly that thus far the law has been more successful in curbing fighting within organized groups than in controlling warfare between such groups.[1]

As was pointed out in the preceding section, a chaotic state of society in which individuals or groups would be engaged in constant strife, attempting to harm or annihilate each other, would not be conducive to developing in men those constructive faculties whose affirmative exercise is a condition of human happiness and cultural growth. The entire energies of men, in such a state of affairs, would be applied to self-protection and the devising of destructive means for warding off aggressors or committing aggressive acts. The psychology of human beings is not so constituted as to make likely the existence of an endless and perpetual condition of social struggle. Almost all societies have succeeded in establishing various means of coexistence among their members and in creating institutions designed to promote harmony and peace within the social unit.

In this human endeavor to form orderly and peaceful "polities," the law has played a vital and leading part. Law is an instrument for the rational distribution and limitation of power in society. If it undertakes this task successfully, the law makes a significant contribution

[7] Gehlen, pp. 69-70.

[8] The role of the law in the building of civilizations was emphasized by Joseph Kohler, *Philosophy of Law*, transl. A. Albrecht (New York, 1921), pp. 4, 22, 58–62. On Kohler see *supra* Sec. 28.

[1] See Derek Freeman, "Human Aggression in Anthropological Perspective," in *The Natural History of Aggression*, ed. J. D. Carthy and F. J. Ebling (London, 1964), pp. 109–119.

to social cohesion and the security of life. A healthy system of law will allocate rights, powers, and liabilities according to a plan which takes account of the capabilities and needs of individual persons as well as the concerns of society as a whole. The legal system of a social body also sets up machinery for the adjustment of conflicts arising between various members of the unit, including in many states conflicts between these members and their government.

While domestic law strives to safeguard intragroup harmony and cooperation, international law pursues the same aim on a transnational or world basis. It seeks to reduce the causes for international strife by fashioning norms and procedures to facilitate political and economic intercourse between nations, to adjust disputes and grievances among them, and to protect the nationals of one country residing under the temporary sovereignty of another country. It will be generally conceded, however, that because of the incomplete character of its normative system, and certain serious weaknesses in its processes of enforcement, international law has not been greatly successful in eliminating the sources of international friction and in composing severe differences between nations.

In a world threatened with atomic destruction, this deficiency in the rule of law must be cause for grave concern. In the words of Ranyard West, "the trouble of modern society springs less from the individual self-assertiveness of its individual members than from its failure to master collective aggressiveness." [2] At this juncture of history, it is a matter of speculation whether a remedy for banishing international war will be found in the future. Some distinguished students of human nature have expressed considerable doubt regarding the possibilities for a satisfactory solution. Sigmund Freud, for example, was convinced—at least in the later periods of his life—that the sociable and creative impulses of human beings are fully matched and counteracted by a negative force, the "death instinct," which finds one of its outlets in the human desire for aggression and destruction.[3] This powerful drive, Freud believed, stands in the way of an abolition of war. He expressed some hope, however, that the progress of culture and "the justified dread of the consequences of a future war" might result within a measurable time in putting an end to the waging of war.[4] More recently, the German ethologist Konrad Lorenz came

[2] *Conscience and Society* (New York, 1945), p. 153.

[3] Freud, *The Ego and the Id*, transl. J. Riviere (London, 1949), pp. 54–57; Freud, *Civilization and Its Discontents*, transl. J. Riviere (London, 1930), pp. 85–87, 97–103.

[4] Freud, "Why War?" in *The Standard Edition of the Complete Psychological Works of Sigmund Freud*, ed. J. Strachey (London, 1964), XXII, 201, 207–215.

to the conclusion that "intraspecific fighting" is common to animals and men, but like Freud he did not rule out the possibility of devising some effective controls on man's bellicose impulses.[5]

Freud's hypothesis of a universal human impulse of aggression was questioned by Erich Fromm. In his opinion, the destructive forces in human nature are not primary and appetitive but come to the fore only in frustrating circumstances. "The degree of destructiveness is proportionate to the degree to which the unfolding of a person's capacities is blocked . . . If life's tendency to grow, to be lived, is thwarted, the energy thus blocked undergoes a process of change and is transformed into life-destructive energy. *Destructiveness is the outcome of unlived life.*" [6] If this theory is correct, it does not, of course, throw a great deal of light on the likelihood of future wars. Nations, like individuals, may become faced with frustrating situations if they encounter strong hostility in the surrounding world.

Bronislaw Malinowski addressed himself specifically to the question whether the instinct of warfare was implanted in the human genetic system. He answered this question in the negative. "Human beings fight, not because they are biologically impelled, but because they are culturally induced . . . War is not the original or natural state of mankind." [7] If war came from an innate biological urge, he said, it would most certainly occur at the earliest stages of anthropological development, where these inclinations manifest themselves in their most direct and uninhibited way. War does not, however, exist among the most primitive groups.[8] Later, when intertribal fighting makes its appearance, it is only an occasional affair and remains on a small scale. Such wars may break out when one organized group feels threatened in its interests and security as a collective unit by the actual or anticipated interference of other units. Hunger may also drive an aggregation of human beings to the warpath. Fighting in these cases does not take place for its own sake, but under the impulses of fear, anger, or desperation. While wars of conquest occur at later stages of development, they are, in Malinowski's opinion, conducted because

[5] *On Aggression,* transl. M. K. Wilson (New York, 1966), pp. 48–50, 237, 276–277, 284. Robert Ardrey speaks of the "probability that man is an 'innate killer,'" and also assumes a compulsive drive to gain territory. *African Genesis* (New York, 1961), p. 168; *The Territorial Imperative* (New York, 1966), Ch. 8. For a strong criticism of the views of Lorenz and Ardrey see M. F. Ashley Montagu, "The New Litany of 'Innate Depravity' and Original Sin Revisited," in *Man and Aggression,* ed. M. F. Ashley Montagu (New York, 1698), pp. 3–17.

[6] Fromm, *Man for Himself* (New York, 1947), p. 216. See also the comprehensive work by Fromm entitled *The Anatomy of Human Destructiveness* (New York, 1973).

[7] Malinowski, *Freedom and Civilization* (Midland Book ed., 1960), pp. 279, 280.

[8] *Id.*, pp. 277–279.

they are economically and politically profitable and not because human beings are driven into them inexorably by a supposed "animal of prey" constitution of human nature.[9] Some support for this theory can be found in the fact that the Roman Empire was able to preserve peace for two centuries, and that many nations in the modern world (among them Switzerland and the Scandinavian countries) have not commenced wars for a considerable period of time.

The course of future history will provide the final answer to this perplexing question. Even if a unification of the globe should some day be achieved, this would not exclude the possibility of destructive civil wars waged between some constituent units of a world state. We cannot be entirely sure whether there will not always be a sufficient number of strong-willed, power-hungry leaders able to capture the militant instincts of men and thus to render permanent peace a utopian dream. There would not, however, at this time appear to exist a preponderance of psychological evidence tending to show that aggressive violence is a primary, ineradicable trait of the majority of human beings, and that mortal struggle to the bitter end must be the inevitable fate of mankind.

Section 66. *The Adjustment of Conflicting Interests*

In a society which leaves any leeway for the exercise of individual initiative and self-assertion (and it may be doubted whether there has ever been a society which for any sustained period of time has been able to eradicate completely these natural impulses of human beings), there will necessarily be conflicts and clashes between contradictory individual interests. Two persons may covet the same property and may have taken steps to obtain it which have entangled them in a serious dispute. Several persons may have entered into a partnership and encountered disagreements in the management of the enterprise or in the computation of individual shares of gain or loss. One person may have injured another person and may have been exposed to a claim for damages on the part of that person, but may have denied his obligation or responsibility to make good the other's loss.

Societies are not, however, troubled only by contradictions and conflicts between the interests of individuals (or groups of individuals). There may also arise incompatibilities between the interest of a single individual or group of individuals on the one hand and the interests of society viewed as an organized collective unit on the other. The government may wish to build roads or erect structures in places

[9] *Id.*, pp. 278, 280, 282, 286.

occupied by a private owner. It may wish to impose curbs and restrictions in the interest of internal security or national self-preservation that infringe upon the freedom of individuals to act or speak. In wartime, organized society may have to go as far as to require individuals to sacrifice their lives for the sake of the collective whole.

It is one of the chief functions of the law to adjust and conciliate these various conflicting interests, individual as well as social. This must be done, in part at least, by the promulgation of general rules assessing the weight of various interests and providing standards for their adjustment. Without certain general yardsticks of a normative nature, organized society would flounder around in uncertainty in determining what interests should be regarded as worthy of protection, what the scope and limits of their guaranty should be, and what relative rank and priority should be assigned to various claims and demands. Without measuring rods of this type, the adjustment of such interests would be left either to chance or happenstance, with fatal consequences for social cohesion and harmony, or to the arbitrary fiat of a group having the power to enforce its decisions.

Interests, as we have seen, may be either individual or social. Among the *individual* interests may be counted the interest in one's own life, in private property, freedom to make contracts, and freedom of expression. The *social* interests requiring recognition and protection by the legal order and which in part overlap with the individual interests mentioned were classified and described by Roscoe Pound.[1] Among the interests to be encouraged and promoted, according to him, are the following: interest in general security, which includes safety from internal and external aggression and public health; security of social institutions, such as government, marriage, the family, the religious institutions; social interest in general morality; conservation of physical and human resources; interest in general progress, especially economic and cultural advance; and, last but not least, social interest in individual life, requiring that each individual be able to live a human life according to the standards of the society.

The most difficult question arising in relation to these individual and social interests is their relative ranking and importance if all of them cannot be satisfied at the same time. What determines or should determine the value judgments that may have to be made in assigning preferences and priorities to one or another of the interests mentioned?

[1] See his "A Survey of Social Interests," 57 *Harvard Law Review* 1 (1943). An account of Pound's theory of interests is given in Edwin W. Patterson, *Jurisprudence* (Brooklyn, 1953), pp. 518–527. A detailed discussion of the role of law in the adjustment of conflicting interests is found in Julius Stone, *Social Dimensions of Law and Justice* (Stanford, 1966), Chs. 4–6.

This raises the problem of a "valuation of interests." Is the interest in general security superior to the individual interest in property protection and maximum self-development? Does the social interest in conservation of natural resources prevail over the individual interest in full exploitation of private property, such as oil property?

Pound himself declines to commit himself to a rigid canon of evaluation. His approach to the problem is pragmatic and experimental. The jurist should be aware of the nature of his responsibility and should do the best he can on the basis of the best information he can get. The final goal, as Pound sees it, is the satisfaction of as many interests as is possible with a minimum of sacrifice and friction.

It is indeed not possible to undertake, by the methods of philosophy, a generally valid and authoritative ranking of the interests entitled to recognition and protection by the law. This does not mean, however, that all interests must be regarded by jurisprudence as necessarily being on the same plane, and that no qualitative evaluation is ever feasible. The interest in life, for instance, being the normal precondition for the safeguarding of other interests (especially all individual interests), will be entitled to claim precedence over the interest in property. The interest in health would appear to rank above the interest in pleasure or entertainment. In the case of a legitimate war, the interest in the preservation of the commonwealth would have precedence over human life and property. The protection of the natural resources of a country for the sake of future generations would appear to be superior to the desire of an individual or group to gain wealth through the exploitation of such resources, especially at a time when maintenance of a proper ecological balance conditions the survival of the human race. This last example shows that the special historical and sociological contingencies of an age may prescribe or necessitate particular priority rankings among social interests, even though there may be little merit in an attempt to establish a permanently valid or rigid value hierarchy for the legal order.

Adjustments of competing interests, and the assignment of priorities among them, are often undertaken by means of legislation. However, since legislation is general and prospective, a statutory enactment may be insufficient to solve a concrete case in which a clash of interests has occurred. In that event it may be necessary to determine the relevant facts and render a decision as to which of the opposing claims is entitled to recognition.

The process of decision-making in this area may take on several forms. The law may, as a matter of principle, adopt a black-and-white approach and respond to the adverse pleadings in a litigated case ex-

clusively by the device of upholding the claims of one party and denying those of the other. This has been the traditional preference of the common law. For example, in a personal injury case when both parties are guilty of negligent conduct, the common law has refused to sanction a compromise solution which would reduce the size of the plaintiff's recovery proportionately to the measure of his own negligence; it has instead insisted on denying recovery altogether to a claimant guilty of any degree of contributory negligence.

In Anglo-American equity jurisprudence, on the other hand, this rigid attitude has not prevailed. A court, in a proceeding governed by equity, may issue a conditional decree requiring the plaintiff to do justice to the defendant, in some form or other, as a prerequisite for obtaining the relief requested by him. Equity has recognized that there may be varying shades of gray in the relative positions of the parties, that both of them may be partly right and partly wrong, and that therefore a compromise or mutual adjustment may be preferable to an "either-or" solution.[2]

In recent times, increasing resort has been had in many countries to the processes of arbitration, which involve the submission of disputes to persons standing outside the regular court system. The submission may be entirely voluntary, depending on the free and mutual consent of the parties, or it may be compulsory, if consent is enforced by a legal enactment.[3] In both instances, the arbitrators are commonly given a large measure of discretion in adapting their awards to the particular circumstances of the case.

The device of mediation is distinguished from arbitration by the fact that arbitrators issue awards which are generally binding and enforceable, while mediators merely bring the parties together and help them reconcile their differences by a voluntary settlement. In Confucian China, mediation was favored strongly over litigation, and this preference has to a considerable extent been preserved in contemporary China.[4] Other Eastern countries, such as Japan and the Soviet

[2] See Henry L. McClintock, *Handbook of the Principles of Equity*, 2d ed. (St. Paul, 1948), pp. 55–56, 387–393. See generally Ralph A. Newman, *Law and Equity* (New York, 1961).

[3] In various American cities (among them Philadelphia, Rochester, San Francisco, and Sacramento), systems for the compulsory arbitration of moderately sized claims have been put into effect. See Josephine Y. King, "Arbitration in Philadelphia and Rochester," 58 *American Bar Association Journal* 712 (1972).

[4] See Jerome A. Cohen, "Chinese Mediation on the Eve of Modernization," 54 *California Law Review* 1201 (1966); K. C. Woodsworth, "Family Law and Resolution of Domestic Disputes in the People's Republic of China," 13 *McGill Law Journal* 169, at 174–175 (1967); F. S. C. Northrop, "The Mediational Approval Theory," 44 *Virginia Law Review* 347, at 348–351 (1958). Cf. also Edith B. Weiss, "The East German Social Courts: Development and Comparison with China," 20 *American Journal of Comparative Law* 266, at 272–284, 289 (1972).

Union, have also adopted various types of mediation procedures.[5] A trend in the same direction, in some areas of social relations, can be observed today in the Western world.[6]

The question may be raised whether arbitration and mediation, because of the great flexibility and informality of their procedures, signify a contraction of the sphere of the law. To the extent that arbitrators and mediators, in making their decisions, are governed by basic rules and principles of law, this need not be the case.[7] It can be assumed that they will be so guided in many instances, especially when these basic rules at the same time mirror the conceptions of justice prevailing in the particular society.[8] Furthermore, within the limits of the strictly mandatory provisions of the positive law, arbitration and mediation will sometimes lead to the adoption of private norms regulating the future conduct of the parties and thus bring about a special kind of legislative law.[9]

Section 67. *The Drawbacks of the Law*

Although the law is an indispensable and highly beneficial institution of social life, it possesses—like most institutions of human making—certain drawbacks which, if they are insufficiently attended to or wholly ignored, may evolve into serious operational difficulties. These shortcomings of the law stem in part from its conservative tendencies, in part from an element of rigidity inherent in its formal structure, and in another part from the restrictive aspects connected with its control functions.

[5] On Japan see Dan F. Henderson, *Conciliation and Japanese Law* (Seattle, 1965); Max Rheinstein, *Marriage Stability, Divorce, and the Law* (Chicago, 1972), pp. 118–119. On the Soviet Union see Dennis M. O'Connor, "Soviet Procedures in Civil Decisions," 1964 *University of Illinois Law Forum* 51, at 82–84, 94–100, reprinted in Wayne R. LaFave, *Law in the Soviet Society* (Urbana, 1965), pp. 82–84, 94–100.

[6] Family counseling and marriage therapy represent efforts of reconciliation designed to prevent family breakups and divorces. In pre-trial proceedings in civil cases, the judge will often assume a mediating role aiming at a settlement. See Harry D. Nims, *Pre-Trial* (New York, 1950), pp. 62–68, 133–134; Arvo Van Alstyne and Harvey M. Grossman, *California Pretrial and Settlement Procedures* (Berkeley, 1963), pp. 167–172.

[7] On the other hand, if the award of an arbitrator is nothing but an expression of personal reactions and *ad hoc* responses to the concrete fact situation, without any reliance on general pointers and standards, it should be characterized as an act of "justice without law" (if a just result is in fact accomplished). On the concept of justice without law see Roscoe Pound, *Jurisprudence* (St. Paul, 1959), Vol. II, pp. 352–359. On the element of generality in the law see *supra* Sec. 45.

[8] Since failure of an effort at conciliation may result in submission of the case to a court of law, a prudent mediator will have to take into account the legal rules by which such court would presumably be guided in its decision.

[9] This aspect of mediation is discussed by Lon L. Fuller, "Mediation: Its Forms and Functions," 44 *Southern California Law Review* 305, at 308–312, 318–319, 326–328 (1971). On autonomic lawmaking see *infra* Secs. 70 and 71.

Hans Morgenthau has said that "a given status quo is stabilized and perpetuated in a legal system" and that the courts, being the chief instruments of a legal system, "must act as agents of the status quo." [1] Although this statement pays insufficient attention to the complex interplay between stability and change in the life of the law,[2] it contains an important ingredient of truth. By setting forth the social policy of a particular time and place in constitutional and statutory precepts, or by making the precedents of the past binding, or presumptively binding, on the judges of the present, the law evinces a tendency towards conservatism. This tendency is rooted in the nature of a law as a system of rules not subject to change from day to day.[3] Once a scheme of rights and duties has been created by a legal system, perpetual revisions and disruptions of the system are, as much as possible, avoided in the interests of freedom, security, and predictability.[4] But when the established law comes into conflict with some fluid, pressing forces of social growth, a price may have to be paid for this policy of stability. "Society changes, typically faster than the law." [5] In times of social crisis, the law has frequently broken down, making room for discontinuous and sometimes cataclysmic adjustments.

The problem of the "time lag" in the law may manifest itself on various levels of the legal system. A constitution which is very detailed and specific in its provisions, and not easily amendable, may under certain circumstances operate as a fetter on progress and change. A legislature may be impeded in its task of reform by influential groups which have a vested interest in the maintenance of things as they are. Furthermore, legislative procedure is often slow and cumbersome, and legislators are prone to attend to issues of immediate political advantage more expeditiously than to the revision of outmoded codes or the modernization of tradition-clogged judicial law. Judges, for the most part, innovate rarely, hesitantly, and interstitially. They may follow antiquated precedents even though they have power to overrule them.[6]

[1] *Politics Among Nations*, 4th ed. (New York, 1967), p. 418. See also *id.*, p. 413: "A court of law cannot help being a defender of the status quo formulated in legal terms."

[2] See *supra* Sec. 56 and *infra* Secs. 86 and 88.

[3] As the late Justice James H. Wolfe of the Supreme Court of Utah once remarked to me, the law requires "some temporary permanency."

[4] This aspect of the law is discussed *supra* Sec. 43.

[5] Harry W. Jones, "The Creative Power and Function of Law in Historical Perspective," 17 *Vanderbilt Law Review* 135, at 139 (1963).

[6] In the United States, courts have made a relatively wide use of their innovative powers during the last few decades. Against this record stand the frequent occasions on which it has become necessary to change the judge-made common law by statute, the original hostility of the United States Supreme Court to regulatory social legislation, and the restrictive interpretations placed by courts on basic reformatory laws, such as workmen's compensation acts, during the early periods of their operation.

Related to the conservative bent of the law is a certain rigidity innate in its normative framework. Since legal rules are couched in general, abstract terms, they sometimes operate as straitjackets in individual situations. The aversion expressed by Plato in some of his works to the notion of law is rooted in this characteristic feature of normative arrangements; general rules, he thought, could not do justice to human relations because of their infinite variety and complexity.[7] Aristotle pointed out that the law, although an indispensable social institution, may by its generality and universality cause hardships in individual cases; he proposed, therefore, that in certain well-defined situations a correction of law by means of an individualized equity be permitted.[8] Even more radical, apparently, was the antipathy of Confucian ethics to legal rigidity, which manifested itself in a strong preference for mediational justice.[9] Confucianism discouraged a litigious attitude, characterized by a desire to vindicate rights accorded by the legal order to the fullest extent, as distinguished from a willingness to compromise and meet the adversary half-way in a spirit of amicable forbearance.[10]

A third potential drawback of the law stems from the restrictive aspects of normative control. Norms are designed to combat and forestall anomie, that is, structureless growth that may produce a social jungle without discernible pathways guiding the steps of human beings. Since there is always a danger that institutions serving beneficial purposes may be employed beyond the legitimate bounds of their functions, it may in some historical situations happen that regulation turns into overregulation, and that control becomes transformed into repression. If the checks and balances provided by the legal order to restrain private and public power become unduly tight and unbending, some salutary forms of expansion and experimentation may become stifled. It was Nietzsche's fear that the restrictive character of the law-ways of social organization would always produce this result.[11] Although many reasons exist for rejecting the eccentric dynamism of his power philosophy, one must at the same time acknowledge that he posed a problem that should not be ignored.

There are historical instances which exemplify an overuse of legal control functions. The late Roman law of the Dominate period interfered with the activities of private individuals in every conceivable

[7] See *supra* Sec. 2.

[8] See *supra* Sec. 55 and *infra* Sec. 76.

[9] On mediational justice see *supra* Sec. 66.

[10] In the United States, a plea in favor of the conciliation approach was put forward by Albert A. Ehrenzweig, *Psychoanalytic Jurisprudence* (Leiden, 1971), pp. 277–281. See also the suggestive article by John E. Coons, "Approaches to Court-Imposed Compromise," 58 *Northwestern University Law Review* 750 (1964).

[11] See *supra* Sec. 60.

way, including the field of occupational choice. Artisans, handicraftsmen, and other workmen were not only bound to their jobs, but their calling was even made hereditary: the son was forced to do the same kind of work as his father.[12] At a later time, the Code of Frederick the Great of Prussia was characterized by a minute regulation of the life of the citizens, extending to some intimate details of their domestic relations.[13] In nineteenth-century America, public administration was sometimes hampered by an overrestrictive use of the law which tended to paralyze needed discretionary exercises of governmental power.[14]

Some of the above-described shortcomings of the law can presumably be avoided by a wise and judicious use of norm-setting authority. This applies particularly to the danger of overregulation. It must be realized, however, that in certain sociological situations, when anarchy and disintegration threaten the social body, the temptation to employ repressive methods of legal control becomes strong. The endeavor to stem the centrifugal forces operative in society and bring about a greater degree of social cohesion may swing the pendulum over to the other extreme of enforced stagnation and conformity.

Other drawbacks of the law are inextricably connected with the essential character of the institution and represent the reverse of the coin of its beneficial components. "Where there is light, there is shadow." The conservative, past-oriented aspects of the law insure a degree of continuity, calculability, and stability which makes it possible for people to rely on established, preannounced rules of conduct in planning their activities and avoid collisions with others due to a lack of foreseeable modes of human behavior. Furthermore, the shock effects of constant, indiscriminate change appear to be such that they can be borne by human beings only within the limits set by their physiological and psychological constitution. Some rationing and staggering of change is probably a necessity, except perhaps in highly abnormal periods of history.

The rigidity of the law, which stems from its formal structure of general rules, could be avoided by a wholesale individualization of the system of justice. For reasons discussed earlier in this work, an *ad hoc* disposition of legal controversies, renouncing reliance on principles and responding intuitively to the peculiar facts of each case, would not

[12] See Michael Rostovtzeff, *Social and Economic History of the Roman Empire*, 2d ed. (Oxford, 1957), Vol. I, ch. xii; Wolfgang Kunkel, *An Introduction to Roman Legal and Constitutional History*, transl. J. M. Kelly (Oxford, 1966), pp. 127–134.

[13] On the general features of this code see Franz Wieacker, *Privatrechtgeschichte der Neuzeit*, 2d ed. (Göttingen, 1967), pp. 334–335.

[14] See Roscoe Pound, "Justice According to Law," 14 *Columbia Law Review* 1, at 12–13 (1914). See also *supra* Sec. 61.

be in consonance with the best interests of society.[15] An increased use of mediational or arbitral justice would reduce some disadvantages of legal inflexibility, such as the "all-or-nothing" and "winner-take-all" philosophy of typical adversary litigation. It would produce many voluntary or court-imposed compromises resulting in "the apportionment of right and duty between opposed litigants by a court [16] according to a quantitative standard that is not limited to the favoring of one party to the exclusion of his adversary." [17] It can be safely assumed, however, that a developed legal system will have to recognize many situations in which the answer to a litigant's claim must be a clear-cut "yes" or "no." It is also necessary to realize that the processes of conciliation require a cooperative attitude on the part of opposing parties which will not be present in all cases.

The truly great systems of law are those which are characterized by a peculiar and paradoxical blending of rigidity and elasticity. In their principles, institutions, and techniques they combine the virtue of stable continuity with the advantages of evolutionary change, thereby attaining the capacity for longevity and survival under adverse conditions. This creative combination is very difficult to achieve. It requires statesmanlike acumen on the part of the lawmakers, a sense of tradition as well as sagacious discernment of the trends and needs of the future, and a training of prospective judges and lawyers which accentuates the peculiar and enduring features of the technical juridical method without losing sight at the same time of the claims of social policy and justice. These qualities can be acquired and developed only in a slow and painful process through centuries of legal culture.

[15] See *supra* Sec. 55.
[16] Or, as an alternative, by a mediator or arbitrator.
[17] Coons, *supra* n. 10, p. 753.

PART III
THE SOURCES AND TECHNIQUES OF THE LAW

XV

THE FORMAL SOURCES OF THE LAW

Section 68. *Introduction*

After attempting in Part II to determine the nature of law and to ascertain and describe its functions in human social life, we shall turn now to questions of a somewhat more technical character. We must investigate the apparatus of tools, methods, and techniques of which the institution of law avails itself in order to carry out its social goals most adequately and effectively. An investigation of this type is well within the province of jurisprudence, which is devoted to the general theory and philosophy of the law, since it is concerned with issues of methodology, modes of reasoning, and processes of interpretation common to the various fields of the law, rather than with the treatment of problems, principles, and rules pertaining to specialized areas.

We shall inquire here into the formal sources of the law, and take up next what we propose to call its nonformal sources. This use of terminology, inasmuch as it does not follow a commonly accepted pattern, requires some explanation and justification. First of all, since the term "source of law" has thus far not acquired a uniform signification

in Anglo-American jurisprudence,[1] a few words must be said about this concept itself.

John Chipman Gray, an influential American jurist, drew a sharp distinction between what he called "the law" on the one hand and "the sources of the law" on the other. To him the law consisted of the rules authoritatively laid down by the courts in their decisions, while he looked for its sources to certain legal and nonlegal materials upon which judges customarily fall back in fashioning the rules which make up the law. Five such sources are listed by Gray: (1) acts of legislative organs; (2) judicial precedents; (3) opinions of experts; (4) customs; (5) principles of morality (including axioms of public policy).[2] Other writers have taken a different approach and have equated the sources of the law with the official, authoritative texts from which formulated legal rules usually derive their force: constitutions, statutes, treaties, executive orders and ordinances, judicial opinions, and rules of court.[3] In Civil Law countries, legislation, customary law, and (under certain circumstances) treaties are often declared to be the only sources of law.[4] The phrase has also been used in another sense to identify certain bodies of law which have served as traditional reservoirs of legal rules and principles, such as the common law, equity, the law merchant, and the canon law.[5] Others again have designated as sources of law literary materials and bibliographical repositories of the law, as, for instance, statute books, judicial reports, digests of case law, treatises, encyclopedias, and legal periodicals.[6]

Here, the term sources of law will be given a meaning which bears some similarity to Gray's definition, but differs from it in several important respects. First, for reasons to be set forth later,[7] the line of demarcation which Gray drew between the law and its sources has

[1] For an enumeration of the various senses in which the term has been employed in legal literature see Thomas E. Holland, *The Elements of Jurisprudence*, 13th ed. (Oxford, 1924), p. 55, and Roscoe Pound, "The Sources and Forms of the Law," 21 *Notre Dame Lawyer* 247–248 (1946).

[2] Gray, *The Nature and Sources of the Law*, 2d ed. (New York, 1921), pp. 123–125. Gray's view is followed, with some modifications, by Edwin W. Patterson, *Jurisprudence* (Brooklyn, 1953), pp. 195 ff. On Gray see also *supra* Sec. 25.

[3] These are called "legal sources" by John Salmond, *Jurisprudence*, 11th ed. by G. Williams (London, 1957), pp. 135–136, who, however, adds custom to the list.

[4] See, e.g., L. Enneccerus, T. Kipp, and M. Wolff, *Lehrbuch des Bürgerlichen Rechts*, 14th ed. by H. C. Nipperdey (Tübingen, 1952), I, 144 ff.; this view is criticized by Hans Kelsen, *General Theory of Law and State*, transl. A. Wedberg (Cambridge, Mass., 1949), p. 131.

[5] See, e.g., Edmund M. Morgan, *Introduction to the Study of Law*, 2d ed. (Chicago, 1948), pp. 40–47; Charles H. Kinnane, *A First Book on Anglo-American Law*, 2d ed. (Indianapolis, 1952), pp. 258 ff.

[6] See W. S. Holdsworth, *Sources and Literature of English Law* (Oxford, 1925).

[7] See *infra* Sec. 72.

not been adopted. For purposes of the ensuing discussion, we mean by the term "law" the aggregate and totality of the sources of law used in the legal process, in their connectedness and interrelatedness. Second, while we agree with Gray in identifying the sources of law with the materials and considerations upon which legal decisions may legitimately be based, we consider these sources relevant for the making of legal decisions of *any* type, and not only those rendered by the courts. Third, the number of legal source materials which we believe should be recognized in the legal order has been materially increased beyond those in Gray's list.

It appears proper and desirable to divide legal sources into two major categories, to be designated as *formal* and *nonformal* sources. By formal sources, we mean sources which are available in an articulated textual formulation embodied in an authoritative legal document. The chief examples of such formal sources are constitutions and statutes (discussed below under the general heading of legislation), executive orders, administrative regulations, ordinances, charters and by-laws of autonomous or semiautonomous bodies and organizations (discussed below under the general heading of delegated and autonomic legislation), treaties and certain other agreements, and judicial precedents. By *nonformal* sources we mean legally significant materials and considerations which have not received an authoritative or at least articulated formulation and embodiment in a formalized legal document. Without necessarily claiming exhaustive completeness for this enumeration, we have subdivided the nonformal sources into standards of justice, principles of reason and considerations of the nature of things (*natura rerum*), individual equity, public policies, moral convictions, social trends, and customary law.

The avowed positivist will be inclined either to dismiss the nonformal sources as irrelevant for the legal process or to relegate them to a decidedly secondary position in the framework of judicial administration. We agree with the second position to the extent that where a formalized, authoritative source of law provides a clear-cut answer to a legal problem, the nonformal sources need not and should not, in the large majority of instances, be consulted. An exception may become necessary in certain rare and extreme situations where the application of a formal source of law would clash with fundamental, compelling, and overriding postulates of justice and equity.[8] Where a formalized legal document reveals ambiguities and uncertainties making alternative courses of interpretation possible—as is so often the case—the nonformal sources should be resorted to for the purpose of

[8] See *infra* Secs. 74 and 76.

arriving at a solution most conducive to reason and justice. And where the formal sources entirely fail to provide a rule of decision for the case, reliance on the nonformal sources becomes, of course, mandatory.[9]

Section 69. *Legislation*

In its most significant present-day sense, the term "legislation" is applied to the deliberate creation of legal precepts by an organ of government which is set up for this purpose and which gives articulate expression to such legal precepts in a formalized legal document. These characteristics of legislative law distinguish it from customary law, which manifests its existence through actual observance by the members of a group or community unaccompanied by authoritative approval by a governmental organ (at least until it receives formal recognition in a judicial decision or legislative enactment).

Legislation as described above must also be differentiated from normative pronouncements emanating from judicial tribunals. The verbal expression of a legal rule or principle by a judge does not, as we shall see,[1] have the same degree of finality as the authoritative formulation of a legal proposition by a legislative body. Furthermore, although it has often been asserted that adjudication, as well as legislation in the strict sense, involves the deliberate creation of law by an organ of government, it must be kept in mind that the judiciary is not an organ set up primarily for the purpose of making law. Its main function is to decide disputes under a pre-existing law; and although, because of the necessary incompleteness and frequent ambiguity of this pre-existing law, the judiciary has never been able to restrict itself exclusively to its primary function and has always found it necessary to augment and supplement the existing law by something which may not inappropriately be called judge-made law, such law-creating functions of the judges must be held to be incidental to their primary functions.[2] While the very reason for the existence of a legislature is the making of new law, this is by no means true for the courts; the creation of new law is for the judge an *ultima ratio* only, to which he must resort when the existing positive or nonpositive sources of the law give him no guid-

[9] More detailed observations with respect to the hierarchy of sources and their interrelation will be found in the text below.

[1] See *infra*, Sec. 72.

[2] As Justice Holmes pointed out in *Southern Pacific Ry. Co. v. Jensen*, 244 U.S. 205, at 221 (1917), judges find themselves under a necessity to legislate, but "they can do so only *interstitially*" (italics mine). For a more elaborate discussion of the problem see *infra* Sec. 88.

ance, or when the abrogation of an obsolete precedent becomes imperative. Because of this essential difference between legislative and judicial lawmaking, the term "judicial legislation"—although it conveys a meaningful thought if properly understood—should be used with care, or perhaps be avoided altogether.

Another typical feature of a legislative act, as distinguished from a judicial pronouncement, was brought out in Mr. Justice Holmes's opinion in *Prentis v. Atlantic Coast-Line Co.*[3] As he pointed out in this opinion, while a "judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist," it is an important characteristic of legislation that it "looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power." These passages must be understood as elucidating certain *normal and typical* aspects of legislation rather than stating a *conditio sine qua non*, an essential condition, of all legislative activity. The large majority of enactments passed by legislatures take effect *ex nunc*, that is, they are applied to situations and controversies that arise subsequent to the promulgation of the enactment. It is a fundamental requirement of fairness and justice that the relevant facts underlying a legal dispute should be judged by the law which was in existence when these facts arose and not by a law which was made *post factum* (after the fact) and was therefore necessarily unknown to the parties when the transactions or events giving rise to the dispute occurred. The Greeks frowned upon *ex post facto* laws, laws which are applied retrospectively to past-fact situations.[4] The Corpus Juris Civilis of Justinian proclaimed a strong presumption against the retrospective application of laws.[5] Bracton introduced the principle into English law;[6] Coke and Blackstone gave currency to it;[7] and the principle is recognized today

[3] 211 U.S. 210, at 226 (1908); see also *Sinking Fund Cases*, 99 U.S. 700, at 761 (1878).

[4] See Paul Vinogradoff, *Outlines of Historical Jurisprudence*, II (London, 1922), 139–140; cf. Elmer E. Smead, "The Rule Against Retrospective Legislation: A Basic Principle of Jurisprudence," 20 *Minnesota Law Review* 775 (1936).

[5] *Code* 1, 14, 7: "It is certain that the laws and constitutions regulate future matters, and have no reference to such as are past, unless express provision is made for past time, and for matters which are pending." S. P. Scott, *The Civil Law* (Cincinnati, 1932), XII, 87.

[6] Henry de Bracton, *De Legibus et Consuetudinibus Angliae*, ed. G. E. Woodbine (New Haven, 1940), III, 181.

[7] Edward Coke, *The Institutes*, 4th ed. (London, 1671), p. 292; William Blackstone, *Commentaries on the Laws of England*, ed. W. C. Jones (San Francisco, 1916), vol. I, sec. 46.

in England as a basic rule of statutory construction.[8] In the United States, *ex post facto* laws in criminal cases and retrospective state laws impairing the obligation of contracts are expressly forbidden by the terms of the federal Constitution;[9] in other types of situations, a retroactive legislative infringement of vested rights may present a problem of constitutional validity under the due-process clause of the Constitution.[10]

The principle of nonretroactivity of laws is not always carried to its ultimate conclusion, and certain types of retroactive laws are countenanced or at least tolerated by legal systems. In the United States, for instance, curative statutes designed to validate technically deficient legal proceedings, acts of public officials, or private deeds and contracts have frequently been upheld by the courts, although such statutes operate on past facts or transactions.[11] Likewise, the principle of nonretroactivity is usually not applied to laws of a procedural character. This means that in civil and even in criminal cases a defendant is ordinarily not entitled to be tried in the exact mode that was prescribed at the time when suit was brought or when the offense was committed.[12] The conclusion must be reached, therefore, that although a legislative act presumptively and in the large majority of cases operates *in futuro* only, it would be improper to assert dogmatically that nonretroactivity is a necessary prerequisite of all legislation.[13]

A more controversial problem concerning the essential nature of a legislative act arises in connection with the question of whether such an act must necessarily be of a *normative* character, that is, whether it must in a generalized fashion oblige persons to a certain course of conduct. It has been widely asserted that a law in the true sense of the word must contain a general regulation, and that a disposition which merely deals with an individual, concrete situation cannot qualify as a law or legislative act. The imposing array of jurists and political philosophers who can be cited in support of this view has already been presented.[14] In the practice of legislatures, the important difference between a generalized regulation and an individual command or dis-

[8] Carleton K. Allen, *Law in the Making*, 6th ed. (Oxford, 1958), p. 447–454.

[9] Art. I, secs. 9 and 10; see *Calder v. Bull*, 3 Dall. 386 (1798).

[10] Fifth and Fourteenth amendments.

[11] For a listing of American cases see 50 *American Jurisprudence*, sec. 479. See also Charles B. Hochman, "The Supreme Court and the Constitutionality of Retroactive Legislation," 73 *Harvard Law Rev.* 692, at 703–706 (1960).

[12] See, however, the case of *Thompson v. Utah*, 170 U.S. 343 (1898), where retroactive application of a law reducing the number of jurors in a criminal trial from twelve to eight was denied on the ground that it would deprive the defendant of the valuable right to have his guilt determined by a certain number of persons.

[13] The problem of retroactive lawmaking by judges will be dealt with elsewhere. See *infra* Sec. 86.

[14] See *supra* Sec. 45.

position found recognition in Rome in the distinction between a *lex* and a *privilegium*,[15] in Germany in the distinction between legislative enactments in a material and a formal sense,[16] and in the United States in the distinction between a general and special (private) act of Congress. An example of a special act of Congress would be a legislative enactment granting relief to A (but not to other similarly situated persons) for property damage, permitting B to immigrate to, and become a resident of, the United States, declaring Y to be the natural-born child of X, or granting Z a personal exemption from a tax law.[17]

It would seem highly desirable to reserve the term "law" or "legislative act" in the strict sense for enactments of a general or normative character, and to exclude from the scope of the concept enactments which exhaust their significance in the disposition of a concrete case or single-fact situation. The mere fact that both types of enactments proceed from a duly constituted legislative assembly does not furnish sufficient reason for using an identical nomenclature for them. Inasmuch as the predecessor of the English Parliament, the *Curia Regis*, and the antecedents of legislatures of other countries often indiscriminately combined legislative with various nonlegislative functions, remnants of these nonlegislative functions have been retained by such legislatures up to our own day. Thus the House of Lords in England has the power to decide judicial cases in the last instance, and the American Senate has the power to try impeachments of the President, Vice President, and all civil officers of the United States. Although such appellate decisions and impeachments are entrusted to a legislative body, they have always—and properly—been viewed as an exercise of the judicial function rather than as legislative acts.

The proper classification of governmental acts may become one of great practical importance under a system in which a general division of powers into legislative, executive, and judicial is regarded as one of the cornerstones of the political structure. But one must be aware that the line between a general law containing a normative regulation and a special act dealing with a particular, concrete situation cannot always be drawn with accuracy and ease. The line is clear when we compare an act of Congress conferring the Congressional Medal of Honor on a distinguished war hero with a law defining the responsibilities of persons guilty of negligent driving; it becomes indistinct in situations

[15] See Rudolf von Jhering, *Law as a Means to an End*, transl. I. Husik (New York, 1924), p. 256, n. 44. The *privilegium* was a disposition restricted to a particular individual.

[16] Thus the granting of an appropriation to a governmental agency for a certain year or for a particular purpose is regarded as law in a merely "formal" sense.

[17] State constitutions in the United States commonly prohibit such special laws.

where an individual act of a legislature—for instance, the grant of a franchise to a public utility—does not exhaust its significance in the grant itself, but creates rights and obligations on the part of the grantee which may persist far into the future. A general discussion of jurisprudence cannot undertake a thorough investigation of this borderline area; to the extent that the problem may become a practical one, it would furnish an interesting topic for detailed consideration.[18]

In conclusion it should be noted that those countries which operate under a written constitution deemed to have the force of law recognize a particular high-level form of legislation which is superior to other, ordinary forms of legislation. Constitutions are frequently created by constitutional conventions specially set up for this purpose, and their provisions may usually be amended only under procedures which make a revision or change more difficult than in the case of regular legislative acts. A constitution is viewed as the fundamental law of the state or country, and in many instances it contains norms designed not only to determine the organization, procedures, and competences of legislative and other governmental organs, but also mandates which control the permissible contents of ordinary legislation. Thus, for example, the United States Constitution provides that Congress shall make no law abridging freedom of speech or of the press.[19] The highest court of the United States has held that guarantees of this character must not be construed as mere moral exhortations addressed to the Congress, but that they form binding and obligatory norms of the law. The Constitution is thereby elevated to a source of law superior to ordinary legislation.

Section 70. *Delegated and Autonomic Legislation*

In a modern, highly developed state, the tasks confronting a legislative body are so manifold and complex that they cannot be performed in all of their details and technical minutiae without putting an exorbitant burden and strain on the shoulders of such a body. Furthermore, some types of legislative activity in the area of specialized government regulation demand such a thoroughgoing acquaintance with the organizational and technical problems existing in the particular field that they can be discharged more adequately by a group of experts than by a legislative assembly lacking the requisite specialized knowledge. For these and other reasons,[1] modern legislatures frequently delegate some

[18] Georg Jellinek's *Gesetz und Verordnung* (Tübingen, 1919), contains a valuable discussion of the problem.

[19] First Amendment.

[1] The various reasons speaking in favor of delegation of certain legislative functions to special agencies are summarized in *Report of the Lord Chancellor's*

legislative functions to an administrative agency of the government, to a bureau or commission, or to the chief executive of the state. It may also happen that a legislature will entrust certain legislative undertakings to the judiciary. In the United States, for example, the Congress has charged the United States Supreme Court with the task of prescribing rules of procedure for use in the federal district courts,[2] and the legislatures of a number of states have passed similar enabling acts.

Far-reaching delegations of legislative power by Congress to the President of the United States and to various executive and administrative agencies have taken place in recent decades. There was a time in American legal history when the United States Supreme Court took the position that Congress cannot surrender any part of its legislative powers.[3] If any significance still attaches to this pronouncement, it probably does not extend further than the proposition that Congress cannot abdicate its legislative functions in a broadly defined area of governmental regulation unreservedly and *in toto*.[4] When Congress, on the other hand, delegates rule-making authority to an executive or administrative organ in a relatively narrow field of regulatory activity, the United States Supreme Court will be disinclined to impose upon the national legislature the duty to give specific policy directives to such agencies as to how they should execute their appointed task.[5] Although the Court has said that Congress should provide the administrative body with intelligible "standards," some pointers contained in power-conferring statutes which the Court has upheld as meeting this requirement were in fact so broad and vague that they furnished the agency in question with a minimum of normative guidance.[6] On

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Committee on Ministerial Powers (London, 1932), pp. 51–52, and *Report of the U. S. Attorney General's Committee on Administrative Procedure* (Washington, 1941), p. 14.

[2] Act of June 19, 1934 (28 U.C.S.A. § 2072). It might be argued that this authorization represents merely the recognition of a power deemed inherent in the courts under the common-law tradition.

[3] See, for example, *United States v. Shreveport Grain and Elevator Company*, 287 U.S. 77, at 85 (1932): "That the legislative power of Congress cannot be delegated is, of course, clear"; *Field v. Clark*, 143 U.S. 649, and 692 (1892): "That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."

[4] In *Schechter v. United States*, 295 U.S. 495 (1935), the United States Supreme Court invalidated a sweepingly broad delegation of power to the President to promulgate detailed codes to govern all business subject to federal authority. On this case see Kenneth C. Davis, *Administrative Law Treatise* (St. Paul, 1958), I, 100–101.

[5] See Davis, pp. 81–99.

[6] Thus the following delegations of power have been upheld by the Court: (1) A statute conferring upon the Secretary of Agriculture the power to de-

the other hand, a trend appears to be developing in the more recent decisions of the Court towards insisting that the *agency itself* should fashion ascertainable principles for the exercise of its functions, and that the reservation of unstructured areas of discretion may pose a constitutional problem under the due process clause of the Federal Constitution.[7]

As mentioned above, the United States Congress has frequently conferred powers upon the chief executive to promulgate measures of a legislative character. Thus the President of the United States has been authorized to proclaim embargoes in the event of foreign wars, and to issue detailed regulations concerning trading with the enemy in wartime. The President usually exercises his delegated lawmaking functions either in the form of proclamations or executive orders. Whether or not he possesses, in addition to the specific powers conferred upon him by Congress, any inherent or implied legislative powers to cope with an emergency is at this time, in the absence of a controlling judicial decision, not free from doubt.[8]

Delegated legislation must be distinguished from *autonomic* legislation, even though the lines of demarcation between these two types of legislation sometimes become clouded. By autonomy we mean the power of persons or organizations other than the government to make laws or adopt rules essentially similar in character to laws.[9] Thus the ancient Roman *paterfamilias* was endowed with comprehensive powers to lay down the law for the members of his household and his slaves, including the power to provide severe punishment for acts of house-

termine what are "just and reasonable" charges for the services of stockyard brokers, *Tagg Bros. and Moorhead v. United States*, 280 U.S. 420 (1930); (2) A statute empowering the Administrator of the Office of Price Administration to fix prices which "in his judgment would be generally fair and equitable and will effectuate the purposes of this Act," *Yakus v. United States*, 321 U.S. 414 (1944); A provision authorizing the Federal Radio Commission to grant licenses "as public convenience, interest or necessity requires," *Federal Radio Commission v. Nelson Bros. Co.*, 289 U.S. 266, at 285 (1933).

[7] Davis, *Administrative Law Text*, 3rd ed. (St. Paul, 1972), pp. 46–52. On the situation in England see Carleton K. Allen, *Law and Orders*, 3rd ed. (London, 1965). The West German Constitution of 1949 permits delegations of legislative powers as long as the "contents, purpose and scope" of the authorization are determined by law (Art. 80).

[8] In *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, at 587 (1952), Mr. Justice Black stated: "In the framework of our Constitution, the President's power to see that the laws are faithfully executed, refutes the idea that he is to be lawmaker." It is not at all certain, however, that this statement, in its unqualified form, represents the view of the majority of the justices who participated in the decision. See Bernard Schwartz, *Constitutional Law* (New York, 1972), pp. 148–150. For a further discussion of the question see *infra* Sec. 75.

[9] Carleton K. Allen, *Law in the Making*, 6th ed. (Oxford, 1958), p. 529; John W. Salmond, *Jurisprudence*, 12th ed. by P. J. Fitzgerald (London, 1966), pp. 123–124.

hold members he considered reprehensible. Since his autonomous powers preceded those of the state, it would be improper to say that the state merely "delegated" a certain sphere of legislative activity to the head of the family. It is a more correct interpretation of the phenomenon to point out that in early times, when state power was still weak, the autonomy of family units was a primary and unquestioned fact. Only gradually and in the course of time did the public power of the state supplant or restrict the private power of individual family groups governed by their head. State power in later times often intervened for the purpose of protecting the wife, children, and slaves of the chief of the household from an arbitrary and high-handed exercise of his prerogatives.[10]

The Roman Catholic Church, during the Middle Ages, enjoyed a high degree of lawmaking authority, and there were periods of history when its independence and sovereignty competed with, or even surpassed, that of the secular state. Even today, churches in many parts of the world possess autonomic powers to regulate their own affairs and, since the state often claims no right or intention to enter the field of ecclesiastical activity, the scope of self-government enjoyed by churches cannot, as a general proposition, be said to owe its existence to a mere delegation of powers by the state.[11]

Furthermore, private corporations and other associations are today invested with the power of enacting articles of association and bylaws for the regulation of intracorporate relations, and the courts will often recognize such articles and bylaws as determining the claims and obligations of members of such associations. Labor unions regulate the rights and duties of union members, often in a minute fashion; industrial producers have in some countries organized themselves nationally or internationally into associations which regulate output, supply, and prices, often without legislative authorization or recognition by the government. Professional associations of lawyers and doctors have also developed a considerable body of autonomic law, in the form of rules of discipline and professional ethics. It may even be reasonable to argue that, if a modern family father promulgates a family code assigning definite chores to the various members of the family or determining the amount of allowances due to the children, this would amount to an exercise of a right to legislate automatically within a certain sphere. The purpose of such a family code is essentially the same as that of a code for a larger group of human beings, namely, to provide for a measure of order and to attempt to guarantee justice by

[10] See *supra* Sec. 4.

[11] In accord, with respect to the Church of England, Allen, p. 529.

the adoption of rules of uniform and equal application to those to whom they are addressed.

The existence or potential existence of such enclaves of autonomic legislation in contemporary society stems from the fact that even a modern state which has appropriated a tremendously large share of legislative powers is not in a position to make laws with respect to everything and everybody. There are still numerous areas left vacant by governmental law which must or can be filled by the exercise of private or semiprivate lawmaking powers. The mere fact that these unoccupied areas exist today by leave and permission of the state and could within the limits of the constitutional system be filled in by public regulation, does not deprive those areas of their autonomic character as long as a substantial amount of private power to regulate within their bounds is left intact by the general law of the state.[12]

Section 71. *Treaties and Other Consensual Agreements*

A treaty is an agreement entered into by countries, nations, or other legal persons recognized in international law. If only two nations or other international persons are the contracting parties, the treaty is called bilateral; if more than two are involved, it is usually called multilateral. A multilateral treaty adopted by a large number of countries and designed to codify important phases of their mutual relations is sometimes referred to in modern legal literature as an act of international legislation. This terminology need not be objected to if the essential difference between treaty-making and ordinary legislative processes is kept in mind. The typical legislature of a modern nation-state may pass laws which a minority of the legislators are unwilling to approve, and these laws will bind everybody subject to the jurisdiction of the legislating body.[1] Norms imposed by multilateral treaties, on the other hand, ordinarily bind only those countries which have manifested their approval by signing the treaty or otherwise adhering to it.[2]

[12] Lon L. Fuller very appropriately speaks of the "miniature legal systems" found in labor unions, professional associations, clubs, churches, and universities. "Human Interaction and the Law," in *The Rule of Law*, ed. R. P. Wolff (New York, 1971), p. 171. On contracts as a source of law see *infra* Sec. 71.

[1] See Arnold D. McNair, "International Legislation," 19 *Iowa Law Review* 177, at 178 (1934).

[2] An important exception is contained in Article 108 of the United Nations Charter, which provides that "amendments to the present Charter shall come into force for all Members of the United Nations when they have been adopted by a vote of two thirds of the members of the General Assembly and ratified . . . by two thirds of the Members of the United Nations, including all the permanent members of the Security Council." This introduces a qualified-majority principle into the amending process.

The question arises—and may become intensely practical under certain circumstances—whether a treaty entered into between two or more nations according to proper legal procedures constitutes a genuine source of law. In England, a treaty affecting private rights or requiring for its enforcement a modification of common law or statute must have been converted into an act of municipal legislation by Parliament in order to be binding upon the national courts.[3] With respect to such treaties, the only question that arises is whether the treaty is a source of law within the domain of international law. In other countries, such as the United States, where a validly executed treaty normally becomes operative without a domestic enabling act (United States Constitution, Art. VI), the question presents itself in its broader aspects.

Two answers have been given to this question. According to the first, a distinction must be made between lawmaking treaties and other treaties. The distinction is based on the fact that some treaties establish new general rules for the future international conduct of the signatories or modify or abolish existing customary or conventional rules, while other treaties do not have this purpose. It is held that only lawmaking treaties may be referred to as representing a source of law.[4] The distinction is rejected by Hans Kelsen, who believes that it is the essential function of *any* treaty to make law, "that is to say, to create a legal norm, whether a general or an individual norm."[5] According to this view, there exists no valid distinction between a treaty which establishes a network of reciprocal rights and duties between nations for an indefinite period of time and one which transfers title to a ship in consideration of an antecedent debt.

According to the general position taken here with respect to the nature of law,[6] Kelsen's view is not considered tenable. The term "law," in deference to an impressive tradition and prevailing common usage, and in view of the functional characteristics of law, should essentially be limited to norms of action or conduct which contain an element of generality. The phrase "individual norm," as was shown earlier, is a contradiction in terms.[7] It should be concluded, therefore, that an agreement by which the United States turns over some battleships to

[3] See L. Oppenheim, *International Law*, 7th ed. by H. Lauterpacht (London, 1948), I, 38; J. L. Brierly, *The Law of Nations*, 6th ed. (New York, 1963), pp. 89–90.

[4] See Oppenheim, I, 26–27; Brierly, pp. 58–59.

[5] *Principles of International Law*, 2d ed. by R. W. Tucker (New York, 1967), p. 457.

[6] See *supra* Sec. 45.

[7] *Ibid.* It was pointed out, however, that the general norms of the law become concretized and individualized in judicial decisions and acts of law enforcement.

the Commonwealth of Australia in exchange for an air base on Australian territory is devoid of normative elements. It is a fully executed transaction, leaving in force no continuing rights or obligations on the part of the contracting nations; the obligation to do nothing inconsistent with the grant [8] follows automatically from the general principles of the law of property and does not have to be read into the agreement as an independent obligation created by its terms. However, a treaty which mutually binds its signatories to allow freedom of religion, freedom of movement, and freedom to engage in commerce and trade to the nationals of the other participating countries, lays down certain general rules of conduct which clearly have the quality of law. A treaty of this type may, therefore, be properly classified as a lawmaking treaty. This interpretation is supported by Article 38 of the Statute of the International Court of Justice, which designates as sources of law only those international conventions, either general or particular, which establish *rules* expressly recognized by the contesting states.

It must be realized, however, that the borderline between general regulation and individual action often becomes indistinct and blurred when concrete situations have to be faced. Obviously no difficulty would be presented by an agreement whereby the governments of two countries obligate themselves to exchange for a period of ten years all inventions pertaining to the peaceful use of atomic energy. A treaty of this kind would clearly be a lawmaking treaty. But should the same label be attached to an agreement by which the government of country A agrees to turn over to country B within a period of six months an invention concerning a certain missile in return for the payment of a stipulated price? And what would be the character of a treaty by which State A, as reparation for a denial of justice inflicted on a national of State B, agrees to pay an indemnity of $100,000 in two annual installments? In the last two cases, while rights and obligations of an executory character are created, these rights and obligations are single and particular, as compared with the general and more lasting obligations established in the treaty providing for an exchange of atomic energy inventions. Do the two last-mentioned agreements, then, create law? It may not be possible to give a sweeping theoretical answer to this question. Whether the term "lawmaking treaty" should be extended to the twilight area where the difference between a norm and an individual act becomes indistinct may well depend on the concrete nature of the legal problem in the context of which the distinction becomes relevant and material.

These considerations ought to help us in understanding the implica-

[8] Cf. *Fletcher v. Peck*, 6 Cranch 87 (1810).

tions of certain distinctions made in the laws of some countries between treaties and agreements of a non-treaty character. The United States Constitution, for instance, provides that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur." [9] It is, however, widely conceded in the constitutional theory and practice of the United States that, notwithstanding this provision, the President of the United States may enter into a variety of other agreements with foreign powers, either on his own responsibility or with the prior or subsequent consent of a simple majority in both houses of Congress. The latter types of agreements are referred to as executive agreements, or, in the case of a participation by Congress, as executive-congressional agreements.

Where should we draw the line of demarcation between treaties and other international agreements? There is no unanimity of opinion on this question. There are writers who would allow a very broad scope to the powers of the Senate in the treaty-making area and would confine presidential authority in this sphere to relatively minor matters.[10] Others would go a little further and permit the President to handle international matters of rather substantial importance "if there can be shown an undisputed practice of long standing on the part of the President to make certain types of executive agreements." [11] The radical view has also been advanced that presidential and executive-congressional agreements have become interchangeable with treaties in diplomatic practice and law; according to this position it is in most instances within the discretion of the President either to submit an international agreement to the Senate for ratification as a treaty or to conclude it either in reliance on his own extensive powers in the field of foreign relations or with the consent of a majority in both houses of Congress.[12]

As stated in this unqualified form, the theory of interchangeability of treaties and executive agreements cannot be accepted. First of all, when

[9] Art. II, sec. 2.

[10] See Edwin Borchard, "Shall the Executive Agreement Replace the Treaty?" 53 *Yale Law Journal* 664 (1944); Borchard, "Treaties and Executive Agreements: A Reply," 54 *Yale L. J.* 616 (1945).

[11] Henry S. Fraser, "Treaties and Executive Agreements," *Sen. Doc.* 244, 78 Cong., 2 sess. (1944), p. 26; cf. also Charles C. Hyde, *International Law*, 2d ed. (Boston, 1945), pp. 1416–1418.

[12] Wallace McClure, *International Executive Agreements* (New York, 1941), pp. 5, 32, 343, 363; M. S. McDougal and A. Lans, "Treaties and Congressional Executive or Presidential Agreements: Interchangeable Instruments of National Policy," 54 *Yale L. J.* 181, 534 (1945). For a discussion and criticism of the views of McDougal and Lans see Raoul Berger, "The Presidential Monopoly of Foreign Relations," 71 *Michigan Law Rev.* 1, at 35–48 (1972).

the Constitution gave power to the President to make treaties with the advice and consent of two thirds of the Senate, its framers presumably did not wish to leave compliance with this mandate to the pleasure of the chief executive. Second, the Constitution in another provision clearly recognizes a legal distinction between treaties and other types of international agreements.[13] Third, the authors of the Constitution, who were strongly convinced of the desirability of establishing a general (though not ironclad) system of separation of powers, wished to place the exercise of legislative powers to the widest possible extent in a representative assembly, and for this reason they repudiated the English constitutional rule which vested the lawmaking power in the international field in the British Crown. It ought to be conceded to the protagonists of the interchangeability theory, however, that in the context of a grave international crisis the President should have authority to use the instrumentality of executive agreement as a full substitute for a treaty for purposes of coping with the emergency, provided there is no time to have the matter debated and put to a vote in the Senate.[14]

If the presidential prerogative to consummate, without consent of the Senate, international agreements requiring the form of a treaty is deemed restricted to severe crisis situations, it becomes necessary to identify the foreign policy objectives which, in normal times, make implementation by treaty necessary. It can be safely assumed as being in concordance with the general ideas guiding the framers in allocating powers under the constitutional scheme that participation of a qualified majority of the Senate in matters of international concern was to be limited to those important and momentous acts which involve the exercise of *lawmaking* powers. It may be asked, however, why the fathers of the Constitution, if this was their objective, did not express their intention unmistakably in the constitutional text by drawing a distinction between lawmaking treaties on the one hand and treaties dealing with matters of an executive and administrative nature on the other, confining the necessity of Senate consent to the former. The answer may well be that in their minds treaties and lawmaking treaties actually were synonymous terms. The leading men in the constitutional convention were quite familiar with the work of the Swiss diplomat and international jurist Emmerich de Vattel, whose treatise on the law of nations had become a pervasive influence in the international theory and practice of the United States and was frequently cited in the writ-

[13] See Art. I, sec. 10, which provides that "no State shall enter into any Treaty, Alliance, or Confederation," while permitting the states, with the consent of Congress, to enter into any *agreement or compact* with another state, or with a foreign power. See also *Holmes v. Jennison,* 14 Pet. 540, at 571–572 (1840).

[14] For further comments on presidential prerogative see *infra* Sec. 75.

ings of the founding fathers.[15] Vattel had distinguished between treaties and other international agreements as follows:

Sec. 152. A treaty, in Latin, *foedus*, is a compact entered into by sovereigns for the welfare of the State, either in perpetuity or for a considerable length of time.

Sec. 153. Compacts which have for their object matters of temporary interest are called agreements, conventions, arrangements. They are fulfilled by a single act and not by a continuous performance of acts. When the act in question is performed these compacts are executed once and for all; whereas treaties are executory in character and the acts called for must continue as long as the treaty lasts.[16]

These passages identify treaties with executory undertakings which are of some magnitude and call for continuous or at least repeated acts of performance; whereas agreements of a transitory, temporary nature which can be executed by a single act are excluded from the purview of the concept. It is highly likely that the framers, when they regulated the treaty power in Article II, section 2 of the Constitution, contemplated Vattel's interpretation of this power and sought to limit Senate participation to international compacts establishing reciprocal rights and obligations on more than a short-term basis. This approach to the problem would as a general rule leave executed agreements, such as an exchange of goods, and executory agreements of a minor nature, transient interest, or short duration, and not involving the imposition of substantial legal obligations on the United States, in the hands of the President, to be dealt with by means of an executive agreement.[17]

Critics of this view of the treaty power might argue that according to it the President of the United States could probably consummate any executed transaction, including a cession of federal territory to another country, without the constitutional necessity of securing the approval of a representative body. Whatever the answer to this question in the light of the treaty power might be in a concrete case, the objection would be devoid of merit. In exercising his executive powers, the President is subject to numerous constitutional restrictions other

[15] See A. C. Weinfeld, "What Did the Framers of the Federal Constitution Mean by 'Agreements or Compacts'?" 3 *University of Chicago Law Review* 453 (1936); David M. Levitan, "Executive Agreements," 35 *Illinois Law Review* 365, at 368 (1940), with citations of pertinent sources.

[16] *The Law of Nations or the Principles of Natural Law*, transl. C. G. Fenwick (Washington, D.C., 1916), p. 160.

[17] Also into this category would fall the executive agreement entered into in 1940 between the United States and Great Britain, by which the United States transferred certain overage ships and obsolescent military materials to Britain in exchange for naval and air bases. See opinion of Attorney General Jackson of Aug. 27, 1940, 39 *Op. Atty. Gen.* 484 (1937–1940). The opinion is largely in accord with the position taken in the text.

than those established in the treaty-power clause. The most important of these is the Fifth Amendment, which prohibits the President from depriving any person of his liberties or property without due process of law. Furthermore, the Constitution of the United States was ordained for the purpose, among others, of forming "a more perfect union";[18] this declaration of principles imposes an obligation on the President to preserve and strengthen the American union, rather than to weaken it or reduce its size. It should also be considered that the threat of impeachment for misfeasance in office will normally operate as an effective deterrent to presidential acts detrimental to the fundamental interests of the nation.

No extended discussion will be undertaken with respect to the question of whether agreements other than treaties, such as collective bargaining agreements, industrial agreements for the exchange of patents and technical information, and other types of contracts between private persons or between private persons and the government, may under certain circumstances be regarded as sources of law. It follows logically from the general position taken here on the nature of law that such agreements, insofar as they contain provisions of a normative character, may properly be so viewed.[19] There would seem to be no reason, for example, why a collective bargaining agreement, constituting an accord which governs the hiring, discharge, wage rates, working hours, and disciplining of employee groups, should not be deemed a source of law just as much as a labor code enacted by a legislature which deals with exactly the same subjects. It must be kept in mind that a valid collective bargaining agreement may serve in court suits as well as arbitration proceedings as the sole legal foundation for the recognition and adjudication of substantial rights and obligations on the part of employers and employees.[20] Other types of agreements regulating the mutual conduct of the parties and forming a continuing basis for reciprocal rights and duties may likewise be included in the class of formal sources of the law.

[18] See Preamble to Constitution.

[19] See *Kirkpatrick v. Pease,* 101 S. W. 651, at 657 (Mo., 1906): "[A] contract is but a law unto the parties thereto." The French Civil Code states in § 1134: "Contracts legally made have the force of law for those who made them." (My translation). On autonomic law see also *supra* Sec. 70.

[20] Apparently in recognition of this fact, the United States Supreme Court held in *Steele v. Louisville & Nashville R. R. Co.,* 323 U.S. 192 (1944) that a collective bargaining agreement entered into between railroad companies and a union of railway firemen could not discriminate against a minority of the employees covered by the agreement. The court felt that collective bargaining representatives are clothed with powers similar to those of legislators and must therefore observe certain restraints imposed upon those empowered to make laws for others.

Section 72. *Precedent*

It is today the prevailing opinion in the Anglo-American legal world that a decision of a court of law—especially of a court of last resort—which explicitly or implicitly lays down a legal proposition constitutes a general and formal source of law. It must be kept in mind, however, that this view, while it is rarely disputed in our own day, has by no means always been accepted in Anglo-American legal theory. A doctrine ascribing authoritative force to a precedent is to some extent grounded on the assumption that court decisions are a source of law because judges are entitled to make law in much the same sense in which the legislator is empowered to create law; but this idea was rejected by some of the greatest Common Law judges and legal authors. Sir Matthew Hale, for instance, a famous English seventeenth-century judge, said: "The decisions of courts of justice . . . do not make a law properly so-called (for that only the King and Parliament can do); yet they have a great weight and authority in expounding, declaring, and publishing what the law of this kingdom is, especially when such decisions hold a consonancy and congruity with resolutions and decisions of former times, and though such decisions are less than a law, yet they are a greater evidence thereof than an opinion of a many private persons, as such, whatsoever." [1] Lord Mansfield remarked in the eighteenth century: "The law of England would be a strange science if indeed it were decided upon precedents only. Precedents serve to illustrate principles and to give them a fixed certainty. But the law of England, which is exclusive of positive law, enacted by statute, depends upon principles, and these principles run through all the cases according as the particular circumstances of each have been found to fall within the one or the other of them." [2] He also said: "The reason and spirit of cases make law, not the letter of particular precedents." [3]

Sir William Blackstone, the well-known legal author and judge of eighteenth-century England, made the following observations on precedents:

> The only method of proving, that this or that maxim is a rule of the common law, is by showing that it hath been always the custom to observe it.

[1] Matthew Hale, *History of the Common Law*, 4th ed. (London, 1739), p. 67. Cf. the view of Thomas Hobbes, a nonlegal writer: "No man's error becomes his own Law; nor obliges him to persist in it. Neither (for the same reason) becomes it a Law to other Judges, though sworn to follow it. . . . Therefore, all the Sentences of precedent Judges that have ever been, cannot altogether make a Law contrary to naturall Equity." *Leviathan* (Everyman's Library ed., 1914), ch. xxvi.

[2] *Jones v. Randall* (1774), Cowp. 37.

[3] *Fisher v. Prince* (1762), 3 Burr. 1363.

But here a very natural, and a very material, question arises: how are these customs or maxims to be known, and by whom is their validity to be determined? The answer is, by the judges in the several courts of justice. They are the depositaries of the law; the living oracles who must decide in all cases of doubt, and who are bound by an oath to decide according to the law of the land . . . And indeed these judicial decisions are the principal and most authoritative evidence, that can be given, of the existence of such a custom as shall form part of the common law.[4]

In the United States, Justice Joseph Story declared that "in the ordinary use of language, it will hardly be contended that the decisions of courts constitute laws. They are, at most, only evidence of what the laws are, and are not, of themselves, laws. They are often reexamined, reversed, and qualified by the courts themselves, whenever they are found to be either defective or ill-founded, or otherwise incorrect. The laws of a state are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof, or long-established local customs having the force of laws." [5] James Coolidge Carter stated emphatically that a "precedent is but authenticated custom." [6]

All these statements suggest that, in the opinion of their proponents, it is not the precedent itself, but something behind it or beyond it which gives it its authority and force. The agency which validates a judicial decision, according to this view, is not the will or fiat of the judges, but the intrinsic merit of the principle, or the reality of the custom which has become embodied in the decision. It is clear, as Sir William Holdsworth has pointed out, that "the adoption of this point of view gives the Courts power to mould as they please the conditions in which they will accept a decided case or a series of decided cases as authoritative. If the cases are only evidence of what the law is, the Courts must decide what weight is to be attached to this evidence in different sets of circumstances." [7] In accordance with this position, Chancellor Kent argued that a former decision need not be followed later, "if it can be shown that the law was misunderstood or misapplied in that particular case." [8] This position is basically incompatible with the view that a precedent forms a source of law, unless the latter term is used in a loose and untechnical sense.

This approach to the problem of precedent was made the target of a scathing attack by a number of authors. John Austin, following the

[4] *Commentaries*, vol. I, secs. 82–83.
[5] *Swift v. Tyson*, 16 Pet. 1, at 17 (1842).
[6] *Law: Its Origin, Growth, and Function* (New York, 1907), p. 65.
[7] "Case Law," 50 *Law Quarterly Review* 180, at 185 (1934).
[8] James Kent, *Commentaries on American Law*, 14th ed. by J. M. Gould (Boston, 1896), I, 648. Cf. also the quotation from Justice Story *supra* n. 5.

lead of Jeremy Bentham,[9] castigated what he called "the childish fiction employed by our judges, that judiciary or common law is not made by them, but is a miraculous something made by nobody, existing, I suppose, from eternity, and merely *declared* from time to time by the judges." [10] Sir John Salmond also contended that judges unquestionably make law and that one should recognize "a distinct law-creating power vested in them and openly and lawfully exercised." [11] John Chipman Gray maintained that judges customarily make law *ex post facto*, and that the rules laid down in their decisions are not only sources of law but the law itself.[12]

The relative merits of these two theories, which may be termed the declaratory and creative theories of the judicial process, respectively, will be discussed elsewhere.[13] At this point they are of relevance only insofar as they may throw some light on the problem of the sources of law. Attention should be called to the statement by Holdsworth that "when we talk of the binding force of judicial decisions, we do not mean that all of the words used by the judge, still less all of his reasons, are law." [14] The letter of a particular precedent, that is, the verbal formulation into which the rule or principle of a case is cast does not, under the Anglo-American system, enjoy the same degree of authority as the words employed in a statute. As will be shown later,[15] judicial formulations of rules are frequently revised and restated by the courts in subsequent cases presenting the same or a similar problem. A judge may hold that the statement of a rule of law in an earlier case was too broad, too narrow, incorrect, or inartistically phrased. If the judge is bound by the precedent under the doctrine of *stare decisis*, he will attempt to reconstruct the principle of policy underlying the earlier case and to apply it in the case before him, regardless of the exact words used in the first case. In consideration of this fact, it has been said that a precedent is not a dogmatic formula, but only an "illustration of a principle." [16] In other words, it is the reason or principle of public policy supporting the decision which counts in applying the doctrine of *stare decisis*, and not the formulation of a *regula iuris*.

[9] Bentham, *A Comment on the Commentaries*, ed. C. W. Everett (London, 1928), p. 190.

[10] Austin, *Lectures on Jurisprudence*, 5th ed. by R. Campbell (London, 1885), II, 634.

[11] "The Theory of Judicial Precedent," 16 *L. Q. Rev.* 376, at 379 (1900).

[12] *Nature and Sources of the Law*, pp. 100, 84, 94–95, 104.

[13] See *infra* Sec. 88.

[14] W. S. Holdsworth, *Some Lessons from Our Legal History* (New York, 1928), p. 17.

[15] See *infra* Sec. 87.

[16] Allen, *Law in the Making*, 6th ed. (Oxford, 1958), p. 213.

And yet when we compare an unarticulated principle of public policy, hovering, so to speak, over the social scene, or an unconfirmed axiom of reason allegedly dictating the solution of a legal problem, with a legal principle of policy or maxim of justice which has been judicially recognized, confirmed, and cast in the form of a normative pronouncement, the difference would seem to be so conspicuous as to merit recognition in a doctrine of legal sources. Where the principle was previously in doubt and led an uncertain existence, it now becomes solidified in a judicial decision. Furthermore, it also bears emphasis that many judges, especially lower-court judges, will not be inclined to go behind the verbal expression of a principle found in an earlier case. They will often accept the precise language used in the precedent and apply it in a subsequent case without any critical analysis or re-examination. Regardless of how broad or vague or undiscriminating the statement of the law in the earlier case may have been, it will frequently be carried over into subsequent decisions as representing the true "rule of the case." [17] In this way some rules of law which initially should perhaps have been formulated in a less apodictic and categorical form ultimately have become part of our legal heritage through repetition and unquestioning reception into the body of the law.

In the light of these considerations, issue might be taken with the declaratory theory insofar as it suggests that a precedent is not a source of law while a legal principle correctly stated therein may be regarded as such. It would seem preferable to consider the recognition of a vaguely conceived principle in a judicial opinion, coupled with the fact that a concretely formulated rule or principle will often be accepted as authoritative in later cases, as sufficient warrant for the inclusion of precedents among the formal sources of the law. On the other hand, the substantial freedom with which judges have frequently and properly handled earlier decisions throughout most of the history of the Common Law makes it necessary to use the term source of law, as applied to precedents, with greater caution and in a weaker and more restrictive sense than is appropriate in the case of statutes or constitutional provisions.[18]

According to the theory prevailing in the Civil Law countries a judicial precedent is not to be regarded as a formal source of law.[19]

[17] See on this question Karl N. Llewellyn, *The Bramble Bush*, rev. ed. (New York, 1951), pp. 67–68; see also *infra* Sec. 87.

[18] The operation of the rule of *stare decisis* in the Anglo-American system and the judicial methods used in handling precedents will be discussed *infra* Sec. 86; cf. also *Mason v. American Wheel Works*, 241 F. 2d 906, at 909 (1957) and *Barnette v. West Virginia Board of Education*, 47 F. Supp. 251, at 252–253 (1942).

[19] The reasons are discussed by D. K. Lipstein, "The Doctrine of Precedent in Continental Law," 28 *Journal of Comparative Legislation and International Law*

In these countries, the instrument of codification has been used to a larger extent than is true for the countries of the Anglo-American legal tradition, and the statute is regarded as the chief source of law to which the judge must pay homage. Thus Justinian's mandate that "cases should be decided on the basis of laws, not precedents" [20] is, as a general proposition, still recognized as controlling. Even a judge of a lower court may depart from a judgment of a higher court—unless special provision is made in the law of a particular country for giving an authentic effect to certain classes of higher-court judgments—if he believes that the higher court misinterpreted a statutory provision in an earlier case. It should be noted, however, that this freedom of the judge toward previously decided cases obtains more in theory than in practice. The *de facto* authority of a court decision, especially of a court of last resort, is a very high one, and the weight of such precedents increases in proportion to the number of decisions reiterating and reaffirming the principles enunciated in them. A series of decisions containing identical statements of legal propositions carries an authority almost equal to that of an Anglo-American court decision or series of court decisions. It is of interest to observe that in Germany, for instance, the supreme court has held that an attorney disregarding a decision published in the official reports of the court makes himself liable to his clients for the consequences.[21]

In the light of such developments, some civil-law writers have argued that judicial precedents should be formally recognized as authoritative sources of law,[22] but this view has not as yet been widely accepted. An intermediate position that has gained a considerable amount of currency on the European continent maintains that a course of judicial action that has persisted for some time and has found more or less unqualified approval within and outside of the legal profession may become crystallized into a norm of customary law and thereby acquire the full force and effect of law.[23]

(3rd ser.) 34 (1946). See also Charles Szladits, *Guide to Foreign Legal Materials: French-German-Swiss* (New York, 1959), pp. 136–138, 165–167.

[20] Codex VII. 45. 13.

[21] See Ernst Rabel, "Civil Law and Common Law," 10 *Louisiana Law Review* 431, at 441 (1950).

[22] Josef Esser, *Grundsatz und Norm* (Tübingen, 1956), p. 23, with further citations.

[23] See Enneccerus, Kipp, and Wolff, *Lehrbuch des bürgerlichen Rechts*, I, 168; François Gény, Méthode d'interprétation et sources en droit privé positif, 2d ed., transl. Louisiana State Law Institute (Baton Rouge, 1963), pp. 336–338.

XVI

THE NONFORMAL SOURCES OF THE LAW

Section 73. *Introduction*

It was one of the cardinal errors of legal positivism that it limited its theory of the sources of law exclusively or almost exclusively to those which we have termed formal sources of law. This shortcoming must be attributed to the fact that legal positivism considered law as a command of the state and for this reason looked for its sources primarily to those formalized precepts and mandates which had been promulgated or issued by a legislature, a constitutional convention, a court, or an administrative agency. Some positivist writers, however, especially on the continent of Europe, were willing to allow a modest place for nonlitigious customary law in their theory of sources; this was a concession to the historical school of law, which for a long time enjoyed a tremendous authority and prestige on the Continent, especially in Germany.[1]

[1] Hans Kelsen, a consistent positivist, maintains that customary law is a form of law if and only if the written or unwritten constitution of the state sanctions its law-creating force. Thus he upholds the necessity of an explicit or implicit state com-

As long as positivists and analytical jurists were convinced that the positive legal order was a complete, exhaustive, and logically consistent body of norms providing an answer to any and all legal problems with which a court might become confronted, the cardinal issues of legal methodology seemed to have found an easy and satisfactory solution. When this belief in the self-sufficiency of the legal order broke down in the nineteenth and the early part of the twentieth century, a serious dilemma presented itself to positivist thinking. If the formal sources of the law sometimes failed the judge, if there were cases for which the legal system would have no answers, what means were available to legal decision-makers to supply the deficiency? We shall discuss the solutions for this problem proposed by two representative advocates of legal positivism, John Austin and Hans Kelsen, and weigh the merits of their arguments.

John Austin said that all the judge can do in situations where the positive law offers him no guidance and advice is to act as a legislator and create a new rule fit to dispose of the problem satisfactorily. In making such a new rule, Austin said, the judge may derive it from "any of various sources: e.g., a custom not having force of law, but obtaining throughout the community, or in some class of it; a maxim of international law; his own views of what the law ought to be (be the standard which he assumes, general utility or any other)." [2] Such judiciary law, in his opinion, must necessarily be *ex post facto*. The judge applies the newly fashioned rule to transactions and events that have occurred in the past, which may easily lead to situations where men, to their surprise and dismay, "find themselves saddled with duties which they never contemplated." [3] John Austin deplored this condition and recommended extensive codification of the law as the most desirable expedient for coping with the difficulty.[4]

A similar though not identical position toward the problem of gaps in the law was taken by Hans Kelsen. He realized, like Austin, that the positive law, as embodied in its formal sources, does not contain an express answer to all of the manifold questions which may have to be faced by a court of law. There may be instances where one party makes a claim or demand upon another party in a lawsuit and the judge finds that the positive law is silent about whether the claim or demand

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mand. See his *General Theory of Law and State*, transl. A. Wedberg (Cambridge, Mass., 1949), p. 126. On the historical school of law, see *supra* Sec. 18.

[2] *Lectures on Jurisprudence*, 5th ed. by R. Campbell (London, 1885), II, 638–639. On Austin's position toward judicial legislation see W. L. Morison, "Some Myth about Positivism," 68 *Yale Law Journal* 212 (1958).

[3] Austin, II, 653; see also *id.*, pp. 633–634, and I, 218, 487.

[4] *Id.*, pp. 653 ff., 663–681.

should be allowed. There may be other instances where the point in litigation might possibly be covered by a statute or rule of law, but the statute or rule of law is so vaguely or ambiguously worded that its applicability to the case at hand is not clear and free from doubt. Kelsen deals with these two situations separately.

Where the legislator is silent about whether a certain cause of action is maintainable, this silence must be construed, in Kelsen's view, as a denial of the claim. This solution is dictated to him by his conviction that no person can demand of another person an act or course of conduct to which that other person is not obliged under the rules of the positive law. "In obliging persons to a specific behaviour, the law permits, outside of these obligations, freedom." [5] Kelsen adds that the positive law may, of course, authorize the judge to allow the claim in such a case if equitable considerations make it appear desirable to him.[6] Such an authorization is construed by Kelsen as a leave granted to the judge to decide the case *contrary* to the law. "The actually valid law could be applied to the case—by dismissing the suit. The judge, however, is authorized to change the law for a concrete case, he has the power to bind an individual who was legally free before." [7]

In the second situation where two or three interpretations of a norm are possible, leading to different results, what guides are available to the judge in determining which of these two or three solutions is the correct one? Kelsen answers that the law provides the judge with no guides whatsoever. "From a positive law standpoint, there is no criterion on the basis of which one out of several possibilities can be selected. There is no method, which could be characterized as positively legal, by which out of several meanings of a norm only one can be shown to be 'correct.'" [8] Thus, within the framework permitted by the language of the norm, *any* construction of the norm is legally proper, regardless of whether it leads to an unreasonable, unjust, or even absurd result.

It is submitted that the theories of Austin and Kelsen do not reflect the realities of legal life accurately, and that they should be rejected on the ground that they are dangerous and misleading. It is not correct, as John Austin says, that a judge may seek the answer to a case unpro-

[5] Kelsen, "The Pure Theory of Law," 51 *Law Quarterly Review* 517, at 528 (1935). The same position is taken in *Pure Theory of Law*, 2d ed., transl. M. Knight (Berkeley, 1967), pp. 42, 242–243.

[6] An example of such an authorization is Article 1 of the Swiss Civil Code, which permits the judge to decide cases unprovided for by statute or customary law according to the rule "which he himself would lay down as a legislator."

[7] *General Theory*, p. 147. See also *Pure Theory*, 2d ed., p. 244.

[8] "Pure Theory of Law," p. 526. A similar formulation is found in *Pure Theory*, 2d ed., p. 352.

vided for by formal law simply in his own convictions, based perhaps on considerations of social utility or "any other" considerations. There are guides other than formal law available to the judge, as will be shown in following sections, and although these guides are less concrete and direct than many rules of the positive law, they are greatly preferable to reliance by the judge on his own uncontrolled discretion. It is also not true, as Hans Kelsen asserts, that the silence of the lawgiver with respect to the existence or nonexistence of a cause of action in a case pending before a court must be construed as a negative norm disallowing the plaintiff's claim. Without any specific authorization by the lawmaker, courts have often fashioned new remedies in analogy to existing ones and have granted relief where the denial of a remedy would have appeared unconscionable to them. Examples of cases allowing a form of redress not authorized by a positive norm are Lord Mansfield's decision in *Moses v. Macferlan*,[9] extending the boundaries of quasi-contract, and the United States Supreme Court's decision in *International News Service v. Associated Press*,[10] making an epochal innovation in the law of unfair competition. As to Kelsen's further assertion that, from the point of view of the law as such, *any* interpretation of a statute or other legal source warranted by the words of the norm must be considered correct, it should be stated that conscientious judges for the most part have not heeded this advice, but have considered it their duty as organs of the law to adopt an interpretation consonant with reason, equity, and the spirit of the legal system.

The interpretative nihilism to which a radically conceived legal positivism may easily lead makes a theory of the nonformal sources of the law not only desirable but imperative. We know today that the positive system established by the state is inescapably incomplete, fragmentary, and full of ambiguities. These defects must be overcome by resorting to ideas, principles, and standards which are presumably not as well articulated as the formalized source materials of the law, but which nevertheless give some degree of normative direction to the findings of the courts. In the absence of a theory of the nonformal sources, nothing remains outside the boundaries of fixed, positive precepts but the arbitrariness of the individual judge. If the judge, where the formal law fails him, could make law according to *any* considerations he regards as desirable, as Austin suggests, court decisions would frequently depend on whether the judge was politically conservative, liberal, or radical, whether he believed in tradition or reform in lawmaking, whether he was a friend of capital or labor, whether he favored strong or weak government, or on whatever else his idiosyncratic

[9] 2 Burr 1005 (1760).
[10] 248 U.S. 215 (1918).

convictions might be. This would be an intolerable condition which would undermine the beneficial authority of the law and in the course of time lead to a judicial crisis.

Some groundwork for a doctrine of nonformal sources was laid by Roscoe Pound in his trail-blazing article "The Theory of Judicial Decision." [11] His constructive suggestions may serve as the basis for a more elaborate attempt, undertaken here, to classify the nonformal sources, analyze their character and the scope of their legitimate use, and explain their relationship to the formalized sources of the law.

Section 74. *Standards of Justice*

In discussing the question whether and to what extent considerations and principles of justice have a direct and practical bearing on the administration and application of the law, two separate and not necessarily related problems must be distinguished. The first is the problem of whether justice may be regarded as a source of law *praeter legem* (besides the written law). Is it proper or even mandatory for the judge to resort to notions of justice in cases where the positive sources do not provide an answer to the point of law to be adjudicated, or where its provisions are vague or susceptible of different interpretations? Second, Do situations ever arise where the judge is justified in employing principles of justice *contra legem* (against the written law)? In other words, does the judge, in certain cases, have the power to refuse to apply a positive norm of law on the ground that a fundamental injustice would be perpetrated by the application of the norm? The first problem is a common and ubiquitous one in judicial administration, and a substantial amount of case law is available to illustrate its significance and ramifications. The second problem will arise rarely and only in cases bearing unusual features, and jurists of the positivist creed will deny that even in such instances the problem is one that deserves serious consideration.

The first problem comes up, for example, when a plaintiff in a law suit makes a claim which he is unable to substantiate by the citation of a statute or precedent directly in point. Is the court, under certain circumstances, justified in allowing him redress on the ground that the attainment of justice between the parties demands the granting of the remedy to the plaintiff? Or is it preferable to hold, with Kelsen, that the absence of express recognition of the claim by the positive law

[11] 36 *Harvard Law Review* 641, at 643, 652, 655, 657, 807, 948 (1923). Pound says on p. 655: "Courts and jurists have always proceeded on the basis of something more than the formal body of legal precepts for the time being." See also his "The Ideal Element in American Judicial Decision," 45 *Harv. L. Rev.* 136 (1931) and Ronald M. Dworkin, "The Model of Rules," in *Law, Reason, and Justice*, ed. G. Hughes (New York, 1969), pp. 22–24.

must be construed as a determination by the legislator that the claim will not lie (unless express authority is given to decide according to equity)? [1]

There are a number of judicial decisions, especially under the Anglo-American system of law, where the courts, without any special authorization by the positive law to decide the "unprovided case" according to considerations of equity, have granted relief in novel situations on grounds of "natural justice and reason." There is, for example, the case of *Moses v. Macferlan,* which has already been mentioned,[2] in which the English Court of King's Bench under the leadership of Lord Mansfield enlarged the scope of quasi contractual remedies. Lord Mansfield stated in this case that a recipient of money "which ought not in justice be kept" was obliged "by the ties of natural justice and equity" to refund it. In another instance, the case of *Pavesich v. New England Life Ins. Co.,*[3] the Supreme Court of Georgia permitted the plaintiff to recover damages for violation of a hitherto unrecognized right of privacy, on the ground that the right was founded in the "instinct of nature" and entitled to be regarded as a legal right under the conceptions of natural justice. And in *Woods v. Lancet,*[4] the New York Court of Appeals permitted an infant to recover damages for injuries sustained while in his mother's womb during her ninth month of pregnancy. The court overruled earlier precedents for the declared purpose of bringing the common law into accordance with the needs of justice.

In ancient Roman law, the praetors sometimes granted *actiones in factum* for the purpose of meting out justice in an individual case where neither the Roman civil law nor prior praetorial edicts provided a remedy.[5] In a modern Roman law jurisdiction, Germany, the highest court has inaugurated certain causes of action for which no direct authorization in the provisions of the Civil Code can be found. Thus, the court has sanctioned the principle of liability on the part of a person who, after making an offer or entering into contractual negotiations with another person, has committed a negligent or otherwise culpable act in connection with such offer or negotiations, regardless of whether an agreement was finally reached (*culpa in contrahendo*). The same court has devised a nonstatutory remedy for certain cases of malfeasance in the performance of contractual agreements.[6]

In cases not involving the granting of remedies in novel situations,

[1] See *supra* Sec. 73.
[2] 2 Burr 1005 (1760); see *supra* Sec. 73.
[3] 50 S.E. 68 (Ga., 1905).
[4] 102 N.E. 2d 691 (N.Y., 1951).
[5] See H. F. Jolowicz and B. Nicholas, *Historical Introduction to the Study of Roman Law,* 3rd ed. (Cambridge, Eng., 1972), p. 407; Rudolph Sohm, *The Institutes,* transl. J. C. Ledlie, 3d ed. (Oxford, 1907), p. 258; *Dig.* 19. 5. 1.
[6] See Philipp Heck, *Grundriss des Schuldrechts* (Tübingen, 1929), pp. 123, 118.

reliance by the judges on conceptions of justice is perhaps even more common. Such adjudications can be found in the Anglo-American and other legal systems. In *Valentini v. Canali*,[7] for example, an infant sued to recover money he had paid on a contract to rent a house and to buy furniture. The claim for a refund was predicated on the assumption that contracts entered into by infants for the supply of goods are totally void under statutory law. The plaintiff had occupied the premises and had used the furniture for some months. The British Court of Queen's Bench refused to permit the action, pointing out that "when an infant has paid for something and has consumed or used it, it is contrary to natural justice that he should recover back money which he has paid." In *Maclean v. The Workers' Union*,[8] the Chancery Division of the English Supreme Court of Judicature maintained that under "the principles of natural justice" a person against whom proceedings for expulsion from a private organization had been commenced must be given a reasonable opportunity to be heard, so that he can defend himself against the charges leveled against him and explain his conduct.[9] In 1792, the Supreme Court of South Carolina voided a legislative act transferring a freehold from the heir-at-law of a certain man and vesting it in a second son, on the ground that such a statute was against "common right and reason." [10] The Supreme Court of Utah held in 1944 that it could issue a letter of prohibition barring a lower court from proceeding in a matter in which the lower court had jurisdiction, for the purpose of preventing some "palpable and irremedial injustice." [11]

In the area of conflict of laws, general considerations of fairness and justice have played a particularly important part in developing this branch of the law.[12] Thus, in *Banco Minero v. Ross*,[13] a judgment of a Mexican court was denied recognition because in the opinion of the court, although material questions of fact were raised by the record, the defendant was arbitrarily and unjustly denied the right to present his defense. Sometimes the courts of one country have applied a rule of

[7] 24 Q.B.D. 166 (1889).

[8] 1 Ch. D. 602, at 625 (1929).

[9] See also *Young v. Ladies' Imperial Club* (1920), 2 K.B. 523; *Local Government Board v. Arlidge* (1915), A.C. 120. Cf. Percy H. Winfield, "Ethics in English Case Law," 45 *Harv. L. Rev.* 112 (1931); Peter Brett, "The Rebirth of Natural Justice," 6 *Malaya Law Rev.* 100 (1964).

[10] *Bowman v. Middleton*, 1 Bay (S.C.) 252 (1792); for other examples see Lowell J. Howe, "The Meaning of 'Due Process of Law' Prior to the Adoption of the Fourteenth Amendment," 18 *California Law Review* 583, at 590–594 (1930).

[11] *Olsen v. District Court*, 106 Utah 220 (1944). Some German decisions resting on considerations of justice are discussed by Charles Szladits, *Guide to Foreign Legal Materials: French, German, Swiss* (New York, 1959), p. 171.

[12] This was particularly true during the formative period of conflicts law, when precedents upon which the courts could rely were scarce.

[13] 172 S.W. 711 (Tex., 1915).

law of another country in a case justiciable under domestic law when they found that the domestic law was silent on the question and the foreign rule was in accordance with reason and justice.[14] As Mr. Justice Cardozo has pointed out, many gaps have been filled in the development of the Common Law by borrowing from Roman law or other legal systems.[15]

Considerations of justice may also be thrown decisively into the scale where two principles of positive law or two judicial precedents pointing in different directions and suggesting different conclusions both appear to be, from the point of view of logic, applicable in a case. Mr. Justice Cardozo, in dealing with this question,[16] cited the case of *Riggs v. Palmer* [17] as an illustration of such conflict. The case decided that a legatee under a will who had murdered his testator would not be permitted to take the property bequeathed to him. The terms of the will as well as the statutes regulating the effects of wills and the devolution of property clearly supported the title of the murderer. On the other end of the scale stood the maxim that a person should not be allowed to profit from his own intentional wrong and to acquire property by the commission of a crime. Two judges of the New York Court of Appeals found the language of the applicable statutes so unmistakable and clear that they were unwilling to depart from their wording. The majority held, however, that the letter of the written law ought in this case to yield to the superior force of the equitable maxim. This choice between two competing principles of law was undoubtedly dictated by strong sentiments of justice, which provided the ultimate source for the solution of the problem. "The claims of dominant opinion rooted in sentiments of justice and public morality are among the most powerful shaping-forces in lawmaking by courts." [18]

Courts have also resorted to considerations of justice in interpreting vague and ambiguous clauses in constitutional and statutory documents. Thus in interpreting the due-process clause of the Fourteenth Amendment to the American Constitution—a clause whose language

[14] An example is *Snedeker v. Warring*, 12 N.Y. 170 (1854), where in the absence of English and American precedents on the question as to whether a statue of Washington placed on a pedestal in front of a dwelling house was personalty or realty, the French rule of law was applied.

[15] Benjamin N. Cardozo, *The Nature of the Judicial Process* (New Haven, 1921), p. 123.

[16] *Id.*, p. 40.

[17] 22 N.E. 188 (N.Y., 1889). See the comments by Ronald M. Dworkin, "The Model of Rules," in *Law, Reason, and Justice*, ed. G. Hughes (New York, 1969), pp. 14–15, 21–24, 31–32.

[18] Justice Felix Frankfurter in *National City Bank v. Republic of China*, 348 U.S. 356, at 360 (1955).

conveys little meaning to the uninitiated—the Supreme Court of the United States has held that those guarantees of the Federal Bill of Rights which impose "fundamental principles of liberty and justice" must be observed by the laws and judicial procedures of the individual states as a prerequisite of due process. By virtue of these decisions, the rights of free speech and assembly, the right of free exercise of religion, the right to counsel in capital cases, and the right to a fair trial have been held to be indispensable guarantees of justice under our form of society and government.[19]

The conclusion to be drawn from these examples must be that the notion of justice has been used rather extensively by the judiciary and has played a prominent part in the decision of controversies. This should be characterized as a wholesome and desirable attitude by anyone who regards the law as an institution designed to accomplish peace, stability, and order in society, without neglecting or sacrificing basic postulates and demands of justice.[20] In the cases discussed and other similar ones, judges have not been governed by an irrational, meaningless, and entirely subjective notion of justice, which according to certain positivist writers is the only conceivable content of justice.[21] On the contrary, it is possible to explain the results in these cases rationally and justify them by objective considerations; it can also be assumed that these decisions were accompanied by widespread approval. It is particularly in situations where the scales are heavily weighted on one side and where a strong need for relief is apparent that the courts are willing to allow new claims or defenses on grounds of essential justice and equity.[22]

Of course the task of the judge in arriving at an objective standard of justice and achieving a reconciliation and synthesis of the needs of

[19] See among other cases, *Hurtado v. California,* 110 U.S. 516, at 531–532 (1884); *DeJonge v. Oregon,* 299 U.S. 353 (1937); *Powell v. Alabama,* 287 U.S. 45 (1932); *Palko v. Connecticut,* 302 U.S. 319 (1937); *Brown v. Mississippi,* 297 U.S. 278 (1936); *Moore v. Dempsey,* 261 U.S. 86 (1923).

[20] In accord: François Gény, *Méthode d'interprétation et sources en droit privé positif,* 2d ed., transl. Louisiana State Law Institute (Baton Rouge, 1963), pp. 363–364, 373–378.

[21] See Kelsen, "The Pure Theory of Law," 50 *L. Q. Rev.* 474, at 482 (1934); Austin, *Lectures on Jurisprudence,* I, 218; A. V. Lundstedt, "Law and Justice," in *Interpretations of Modern Legal Philosophies,* ed. P. Sayre (New York, 1947), p. 450.

[22] In the case of *International News Service v. Associated Press,* 248 U.S. 215 (1918), often regarded as a revolutionary innovation in the law of torts, the United States Supreme Court enjoined the unauthorized copying of news by the International News Service from early bulletins and news releases of the Associated Press and selling them to its customers. It is likely that the uneven distribution of the equities in this case had a strong bearing on the decision of the court to recognize the appropriation of values created by another through effort and expense as an actionable tort.

stability and justice is by no means an easy one. In the course of the administration of the law, situations will always arise where the claims of legal certainty will come into conflict with the exigencies of justice and where a clearcut choice must be made between two values found to be in opposition to each other. As a general rule, subject to certain rarely occurring exceptions to be discussed later here and elsewhere,[23] the judge must apply the positive and unambiguous mandates of the constitutional and statutory law, even though he is firmly convinced that these mandates are not or are no longer consonant with basic contemporary notions of justice. This is true not only where a single, isolated provision of the positive law categorically requires a certain solution, but also where a comparison of various positive norms and a consideration of their relation within the framework of the whole system inescapably point the way toward a particular disposition of a legal problem. In other words, where a frame of order has been provided by the positive law, the judge is normally bound by it and cannot depart from it in the interest of justice.

It bears emphasis, however, that the situations in which a legal result can be clearly derived from the logical pattern of the positive system or the general spirit suffusing its mandates are not as frequent as some writers have assumed. A judge will often be in great doubt as to whether he should extend a certain positive prescription to a case not directly covered by it, or whether he should limit it to the situation for which it was originally devised. In such a situation, he should not heed Kelsen's advice that from the point of view of the law it makes no difference whatever whether he resorts to an analogy (an extension of a principle to a related case) or to an *argumentum e contrario* (a conclusion that the facts of a case fall outside the scope of a formulated principle and are therefore not covered by it), but should let considerations of justice weigh heavily in the balance. For instance, a court may become confronted with a question as to whether the principle of sovereign immunity, which may have firm anchorage in the legal system and may clearly be applicable to all official acts of the organs of the state, should be extended to the acts of officials of government corporations. In deciding this question, the realization of the serious injustice caused by the principle in obviating relief against wrongful acts of public officers may legimately induce the court to confine the principle narrowly to situations in which its applicability has been authoritatively established.

Where the positive law has left a problem before the court entirely unsettled, standards of justice must play a prominent part in bringing

[23] See *infra* Secs. 76 and 85.

about a satisfactory solution of the dispute. Unfortunately, the mental processes which lead to the adoption of a rule of justice fit to dispose of the problem in an adequate fashion lend themselves to a very limited general description only. What is due to a party can often be determined only in the light of the circumstances of a particular case. Although an objective rationalization of the result is possible, such a rationalization cannot always be developed in advance in a theoretical and dogmatic way, but must be elaborated in the context of a concrete problem. The desire to allow the fullest scope to the assertion of individual rights may have to be balanced against arguments appealing to the common good and public advantage.[24] Furthermore, considerations of justice are often blended with supporting arguments resting on other informal sources of the law, such as public policies, social trends, customs, and accepted moral standards.[25]

The desire to achieve justice between the parties will sometimes be outweighed in the minds of the judges by the determination to avoid a sharp break with the past. Although good reasons may be available to support the award of a new remedy or the allowance of a new defense, the court may legitimately feel that in the absence of any available analogy to existing remedies or defenses the action asked for would constitute such a revolutionary and unprecedented innovation upon the law that it cannot be undertaken without legislative authorization. Such an argument would carry special weight in cases where the scales of justice are not heavily weighted on one side, or where a number of alternatives for a solution of the problem would appear to be open. Sometimes it may become necessary to prescribe detailed rules or limitations for the enjoyment of a new right or to set up an administrative machinery for its enforcement.[26] In such instances, courts will often take the position that the regulation of the matter must be left to the legislature.

We must now turn to the second question raised at the beginning of our discussion. In an earlier section, the problem of the validity of unjust law was subjected to analysis,[27] and the position was taken that there may be rare, extreme, and unusual situations in which the legality of a positive law may be questioned by a court even in the absence of a written constitution prescribing standards to which legislative acts must conform. Problems of this type will hardly ever come up in a democracy governed by humanitarian ideals, but they may become

[24] See *supra* Sec. 54.

[25] See in this connection Cardozo, *supra* n. 15, p. 112.

[26] See here the dissenting opinion of Mr. Justice Brandeis in *International News Service v. Associated Press*, 248 U.S. 215, at 262–267 (1918).

[27] See *supra* Sec. 58.

acute under either a tyranny or a political and social order replacing a tyrannical regime. In the latter case, the order succeeding the system of dictatorship may be compelled to pass judgment on outrageous acts of violence and brutality committed during the era of despotic rule under cover of the positive laws of the state. As a matter of general principle, it should be held that resort to elementary considerations of justice *contra legem* should not necessarily, in a proper historical setting, be regarded as a transgression of judicial authority. There may be types of laws so utterly repugnant to the postulates of civilized decency that the judge has a right to treat them as non-laws.

The following hypothetical examples may be offered as specimens of legal enactments transcending the bounds of legitimate sovereign power of a state or nation: a law authorizing conviction for crime without opportunity for a hearing in which evidence on behalf of the accused may be presented; a law ordering the extermination [28] or sterilization [29] of an unpopular religious or national minority; a law sanctioning the lynching of persons by mobs; a law—such as the one enacted by King Herod—commanding the killing of innocent children.[30] These would appear to be instances where, as Radbruch says, "the contrast between positive law and justice becomes so unbearable that the positive law, being false law, must yield to justice." [31] It should be noted that in all of the examples given above, certain persons or groups of persons were seriously harmed or likely to be harmed through outrageous disregard of the minimum standards of civilization recognized by reasonable men. There is a fundamental distinction between such laws and statutory enactments in which this element of an unjust affront to the supreme value of life is absent, as, for instance, laws imposing taxes regarded as unduly high by large sections of the population, or laws changing deeply ingrained customs or mores of the people (such as laws abolishing racial or religious segregation). It is not suggested that the principle of invalidity of totally unjust laws could legitimately be applied to the latter categories of laws.

Section 75. *Reason and the Nature of Things*

Reason is the (limited) ability of the human intellect to comprehend and cope with reality. The reasonable man is capable of discerning

[28] See Book of Esther iii:13.

[29] Memoranda found in Germany after World War II disclosed plans by some Nazi hotheads to sterilize the whole Polish nation.

[30] Matt. ii:16.

[31] Gustav Radbruch, "Gesetzliches Unrecht und Übergesetzliches Recht," *Süddeutsche Juristenzeitung* 1946, p. 107, reprinted in *Rechtsphilosophie*, 4th ed. by E. Wolf (Stuttgart, 1950), p. 353.

general principles and of grasping certain essential relations of things, between men and things, and between men themselves. It is possible for him to view the world and judge other human beings in an objective and detached fashion. He rests his appraisal of facts, men, and events not on his own unanalyzed impulses, prepossessions, and idiosyncrasies, but on a broad-minded and judicious evaluation of all evidence that can aid in the formation of a considered judgment. He is also unconcerned with the consequences which discernment of the truth will have upon his purely personal, material interests.

Since the relations of men and things are often complex, ambiguous, and subject to appraisal from different points of view, it is by no means possible for human reason, in the majority of cases, to discover one and only one final and correct answer to a problematic situation presented by human social life. The reasonable man will often find that various ways and alternative possibilities are open to him in judging an event or making a determination as to the right course of action to pursue. This is as true for the legislative and judicial processes as it is in other areas of human collective life. Reason alone will often not enable a legislator or judge to make an inescapable and compelling choice between two or more possible solutions of a problem. It was therefore erroneous on the part of some representatives of the classical law-of-nature school to believe that a universally valid and perfect system of law could be devised, in all of its details, by a pure exercise of the human reasoning faculty operating *in abstracto*.[1]

It cannot be denied, on the other hand, that in the administration of a legal system instances occur in which a particular solution of a problem thrusts itself upon the legal decision-maker with a cogent force impervious to dissent. The nature of things itself (*natura rerum*, in the terminology of the Roman jurists) in these cases dictates the result to a legislating or adjudicating organ. Since we are concerned here with a description and evaluation of judicial source materials, we shall confine our discussion to the judicial process.

The *natura rerum* which furnishes a standard of decision in some cases may be divided into several categories: (1) It may be derived from some fixed and necessary condition of human nature; (2) it may stem from inescapably given properties of a physical nature; (3) it may be rooted in the essential attributes of some institution of human political and social life; and (4) it may be founded on perception of fundamental postulates or premises underlying a particular form of society. Examples of these various manifestations of the nature of things as a normative force will now be given.

With respect to the first class of cases mentioned, the legal inability

[1] See *supra* Secs. 8 and 14.

of an infant to enter into binding agreements and prosecute an action in court without proper representation by a guardian unquestionably is anchored in natural fact. Likewise, the more or less universal rule that an insane person cannot make a legally efficacious promise springs from the psychophysical incapacity of such a person to act responsibly for himself.[2] The right of self-defense was traced by the Roman jurists to an innate drive of human beings for self-preservation.[3] An American court concluded from an analysis of the intimate bond existing between parents and children that, except for very grave reasons, no court could transfer a child from its natural parent to some other person.[4]

An example illustrative of the second category of cases can be found in the ancient Roman procedure for the recovery of property. A strict rule governing the proceedings before the praetor required the presence of the litigious *res* in court. When the question came up for the first time of whether this rule was applicable to immovable property, the *natura rerum* furnished the answer with compelling persuasiveness. The conceivable alternative, to hold the trial on the piece of real estate forming the object of the suit—which was perhaps located many miles away from the city—was far too impracticable to be seriously considered.[5] There are also instances in which certain rules of law impressed themselves upon a community as necessary and inevitable in view of certain natural or climatic conditions prevailing in the geographical area in question. For example, the common-law doctrine of equal riparian rights to the flow and use of water was never recognized in the arid states of the American West. It was replaced by the principle that the first appropriator of water acquired a priority with respect to the beneficial use of such water. The geophysical fact of water scarcity dictated this result, because adoption of the common-law doctrine might have prevented a socially profitable use of water by *anybody*. As the Supreme Court of Utah pointed out, "If that [doctrine] had been recognized and applied in this Territory, it would still be a desert." [6] Furthermore, the common-law principle of liability

[2] *Dig.* XLIV. 7. 1. 12: "It is clear, by natural law, that the act of an insane person who makes either a stipulation or promise is of no effect." S. P. Scott, *The Civil Law* (Cincinnati, 1932), X, 77.

[3] See Ernst Levy, "Natural Law in the Roman Period," *University of Notre Dame Natural Law Institute Proceedings* (Notre Dame, 1949), II, 52.

[4] *People v. Shepsky*, 113 N.E. 2d 801 (N.Y., 1953). See also Justice Lester A. Wade in *State of Utah in the Interest of L.J.J., Minor Children*, 360 P. 2d 486, at 488 (1961).

[5] I owe this example, as well as some valuable general thoughts on the problem, to Helmut Coing, *Grundzüge der Rechtsphilosophie*, 2d ed. (Berlin, 1969), pp. 177–188.

[6] *Stowell v. Johnson*, 7 Utah 215, at 225 (1891).

for trespassing animals was repudiated by the courts of the same area, because the territory was characterized by the existence of large, sparsely settled, and uninclosed lands adjacent to the public domain, and recognition of the common-law principle would "practically deprive the owners of livestock of the right to use the public domain." [7]

In the third category, the essential nature of a man-made institution may be productive of legal norms felt to be necessary and inevitable. The rule, for instance, that a judge who is closely related to one of the parties must disqualify himself from hearing and deciding the cause is inherent in the very nature of the judicial office. This office, in the light of the purposes for which it was created, requires impartiality and personal detachment as conditions for its proper functioning.[8] The general purposes and aims of the universal human institution of government may likewise be a determinative factor in recognizing certain rules or principles relating to the powers residing in the organs of sovereignty. Inasmuch as it is the function of all governments to protect the members of the community committed to their care from serious dangers threatening from within or without, it might be argued that the duty to preserve the community from severe harm must always be capable of being exercised by the government. This consideration would seem to have significant bearing on the scope of the executive powers possessed by the President of the United States. Irrespective of whether a broad or restrictive view of the powers of the chief executive is taken,[9] it should be held that by the very nature of his office he must be able to act in an unprecedented and unanticipated emergency for the purpose of protecting the people of the United States until Congress can be assembled to take the necessary legislative measures to cope with the situation.

The authority of John Locke, who strongly believed in the theory of limited government and the democratic idea of political rule, may be cited in support of the proposition suggested above. He said:

> The legislators not being able to foresee and provide by laws for all that may be useful to the community, the executor of the laws, having the power in his hands, has by common law of Nature a right to make use of it for the good of the society, in many cases where the municipal law has given no

[7] *Big Cottonwood Tanner Ditch Co. v. Moyle*, 109 Utah 213, at 220–221 (1946); see also *Buford v. Houty*, 5 Utah 591, at 597 (1888), affirmed in 133 U.S. 320 (1889).

[8] See Coing, pp. 113, 188–189.

[9] Article II of the United States Constitution is somewhat ambiguous and has been the subject of conflicting interpretations. See Edward S. Corwin, *The President: Office and Powers*, 4th ed. (New York, 1957), pp. 3–5, 147–158. The case of *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952) throws little light on the scope of the executive powers of the President.

direction, till the legislative can conveniently be assembled to provide for it . . . Nay, it is fit that the laws themselves should in some cases give way to the executive power, or rather to this fundamental law of Nature and government—viz., that as much as may be all the members of the society are to be preserved.[10]

The "common law of Nature" is invoked in this passage to support the view that there can be no vacuum in the exercise of governmental powers where the good of the community is vitally at stake. There is every reason, of course, to insist that the scope of such residual powers is limited by the occasion for their exercise, and that their use remains subject to all applicable constitutional restraints.[11]

The decision in the case of *McCulloch v. Maryland*,[12] in which the United States Supreme Court held that the federal government of the United States possesses such implied powers of regulation as are reasonably necessary in order to carry out the constitutional prerogatives expressly conferred on it, may be said to rest in part on similar considerations derived from the nature of things. By the same token, the International Court of Justice has taken the position that the United Nations must be deemed to have those powers which, though not expressly provided in its charter, are committed to it by necessary implication as being essential to the performance of its duties.[13]

Finally, in the fourth category, some norms of law may be gained from contemplation and observation of certain basic functional characteristics of social, political, and legal institutions viewed in the historical and sociological context in which they were created or developed. The structure of the ancient Roman family, for example, was such that the *pater familias* was considered the only member of the family capable of possessing legal rights and duties. The other members of the family, including adult sons, were completely subject to his control and, figuratively speaking, were regarded as part of the father's personality.[14] In the light of these conceptions a celebrated Roman jurist, Paul, argued that, although there was no rule of law prohibiting a father from bringing suit for theft against his son, the nature of the matter presented an insuperable obstacle to the suit "because we cannot bring suit against those who are under our control,

[10] *Of Civil Government* (Everyman's Library ed., 1924), Bk. II, ch. xiv, sec. 159.

[11] The most important of these, under the American system of government, would appear to be the due-process clause of the Fifth Amendment, which prohibits arbitrary deprivations of life, liberty, and property.

[12] 4 Wheat. 16 (1819).

[13] International Court of Justice, Advisory Opinion, April 11, 1949, 43 *American Journal of International Law* 589 (1949).

[14] See H. F. Jolowicz and B. Nicholas, *Historical Introduction to the Study of Roman Law*, 3rd ed. (Cambridge, Eng., 1972), pp. 118–119.

any more than they can bring suit against us." [15] In the same vein, it might be asserted that the prohibition of divorce under the system of the canon law flows directly and immediately from the Roman Catholic conception of marriage as a union for life endowed with the solemn force of a sacrament, and that the prohibition would therefore not necessarily require express recognition in a positive rule of Church law. It might also be mentioned that the once-held notion of the complete unity of husband and wife exercised a strong influence upon the development of the common law of torts and property.

In the case of *Crandall v. Nevada*,[16] the United States Supreme Court deduced the existence of a right of free mobility of persons within the borders of the nation, in the absence of a specific constitutional mandate sanctioning the right, from the basic postulates of a free commonwealth. Likewise, recognition of a general principle of freedom of transaction, subject to certain restraints to be specified by positive law, follows logically from the cardinal premises of a capitalist economy, which derives its strength from a maximum exercise of individual initiative in the operation of private enterprise. In a genuinely feudal society, where the chief political and economic institutions are founded on a personal bond of fidelity between the lord and his vassals, it would be contrary to the fundamental postulates of the social system to permit the free alienation of land by a vassal to a third person, with the consequence that the lord might become saddled with a tenant who is unreliable or a personal enemy of the lord. A socialistic society will consider an antisocial form of the exercise of private rights as incompatible with socialistic ideology and, in cases of legal doubt, will give preference to the concerns of the collective whole over those of the individual.

The German jurist Heinrich Dernburg once made the following observation: "The relations of life, to a greater or less degree, contain in themselves their own measure and their own intrinsic order. This order immanent in such relations is called the 'nature of things.' The thinking jurist must have recourse to this concept in cases where a positive norm is lacking, or where the norm is incomplete or unclear." [17] The examples that have been given here amply demonstrate that courts of law, by relying on the dictates of natural reason or drawing legal consequences from a contemplation and analysis of the essential nature or functional characteristics of human political and

[15] *Dig.* XLVII. 2. 16.

[16] 6 Wall. 35 (1868).

[17] *Pandekten*, 3d ed. (Berlin, 1892), I, 87; cf. also Gény, *Méthode d'interprétation et sources en droit privé positif*, 2d ed. transl. Louisiana State Law Institute (Baton Rouge, 1963), pp. 361–365.

social institutions, have confirmed the availability of *natura rerum* as a legitimate source of law-finding.

Section 76. *Individual Equity*

It was pointed out earlier that the notion of justice, which is one of the guiding principles in the administration of a legal system, does not exhaust its meaning in the command of an even-handed application of legal rules and normative standards to all cases coming within their purview. A set of facts may sometimes arise in a lawsuit which exhibits extraordinary features and does not lend itself to adjudication under a pre-existing rule or to a comparison with previously decided cases. In such instances considerations of justice may, within certain narrowly circumscribed limits, call for a departure from or a relaxation of a fixed norm for the purpose of reaching a fair and satisfactory decision in the case.[1] In the words of the English medieval jurist Christopher St. Germain, "In some cases it is necessary to leave the words of the law, and to follow that [which] reason and justice requireth, and to that intent equity is ordained; that is to say, to temper and mitigate the rigour of the law." [2] In his discussion of the same problem Cicero referred to the maxim *summum ius summa iniuria*, which conveys the idea that a rigorous application of strict and invariable rules of law, untempered by equity, may at times produce undue hardship and great injustice.[3]

In dealing with the problem of individual treatment of unusual fact situations, we are not concerned with the question of whether a court, for the purpose of improving the legal system and bringing it into harmony with justice, may inaugurate new forms of redress or new categories of defenses, or whether it may extend such forms of redress or defenses to cases for which they were not designed at their inception.[4] Here we are interested in finding out whether a court, when confronted with a positive rule laid down by a statute or precedent, may depart from it in a case exhibiting unusual features on the ground that application of the norm in this particular fact situation would result in an outrageous denial of justice.

For the purpose of illustrating the problem, an example given by

[1] See *supra* Secs. 52 and 55.

[2] *The Doctor and Student*, ed. W. Muchall (Cincinnati, 1874), ch. xvi. As was pointed out *supra* Sec. 55, the power of equitable dispensation was termed *epieikeia* by Aristotle. *Epieikeia* is "justice that goes beyond the written law." Aristotle, *The Art of Rhetoric*, transl. J. H. Freese (Loeb Class. Lib. ed., 1947), Bk. I. xiii. 1374a. Cf. M. Rodriguez Ramos, "Equity in the Civil Law," 44 *Tulane Law Rev.* 720, at 727–728, 734–735 (1970).

[3] Cicero, *De Officiis*, transl. W. Miller (Loeb Classical Library ed., 1938), Bk. I, ch. x. 33. See also James Wilson, *Works*, ed. J. D. Andrews (Chicago, 1896), II, 123.

[4] See *supra* Sec. 74 and *infra* Sec. 88.

St. Thomas Aquinas and one drawn from the Roman law will be used with slight modifications. Suppose that in a medieval city there was a statute providing that the gates of the city must remain closed during all hours of the night, and that violations of the rule would be punished by imprisonment. One night residents of the city were pursued by the enemy and sought entrance into the gates. If the gatekeepers opened the gates to them, were they liable to punishment because the law permitted no exception from its command? Or should the judge in this case have recognized an equitable exception from the operation of the statute, on the ground that the lawgiver, had he foreseen this contingency, would most certainly have provided that the gates be opened in such an event? To give a further illustration, let us assume the existence of a rule of law stipulating that the vendor of real property is obliged to disclose mortgages and other legal encumbrances to the purchaser, and that the latter can claim punitive damages for failure to supply the required information. A sells his property to B, notifying him of the existence of certain permanent encumbrances. After six months, A buys the property back from B. B does not inform A expressly of the encumbrances, knowing that A without any question is aware of them. A sues for punitive damages. Should he be able to recover on the basis of the aforesaid rule, although he is clearly abusing the letter of the law?

Many legal systems have developed mechanisms to cope with the problem of equitable corrections of strict law. Under the republican constitution of Rome, the popular assembly could exempt an individual from the operation of a law, a power which in the course of time was usurped by the senate.[5] During the period of the principate, this power passed from the senate to the emperor.[6] Under the rules of Roman Catholic canon law, the Pope possesses the power to dispense from compliance with general laws laid down by the Church, excepting, however, certain immutable principles of natural law.[7] The medieval English kings were similarly invested with the dispensing power.[8] Under our own legal system we permit Congress to grant exemptions

[5] See H. F. Jolowicz and B. Nicholas, *Historical Introduction to the Study of Roman Law*, 3rd ed. (Cambridge, Eng., 1972), p. 34.

[6] *Id.*, p. 333. As the author points out, if the emperor acted in contravention of any rule from which dispensation was possible, he was held to have given himself the necessary dispensation. It was in this sense, and this sense only, that the emperor was held to be *legibus solutus* (absolved from the law) during the period of the principate. Cf. also *Cod.* I. 14. 1, denying the power of dispensation to lower-court judges.

[7] See Matthew Ramstein, *A Manual of Canon Law* (Hoboken, 1948), pp. 109–122; cf. also St. Thomas Aquinas, *Summa Theologica*, transl. Fathers of the English Dominican Province (London, 1913–1925), Pt. II, 1st pt., qu. 97, art. 4.

[8] F. W. Maitland, *The Constitutional History of England* (Cambridge, Eng., 1931), p. 188.

from general laws (such as exemptions from income tax or immigration laws) through "private" statutes. We also tacitly permit our jurors, by their rendering of general verdicts unsupported by technical legal reasoning, to correct rigidities or inadequacies in the positive law by not applying it in a particular case, for example, to correct inequities caused by a strict use of the contributory negligence rule.[9]

In the context of a discussion of the informal sources of the law which may legitimately be resorted to in the decision of legal controversies, our primary focus must be fixed on the power of the judge to apply equitable considerations in the adjudication of law suits. Inasmuch as the traditional Anglo-American system of equity jurisprudence, which in its beginnings was administered as an Aristotelian corrective to the generality and inflexibility of the common law, has gradually evolved into a system of rules which are distinguished from common-law rules or statutory rules only in that they are sometimes phrased in a more elastic form, this historical source of equitable dispensation has to a considerable extent become dried up.[10] We are disinclined to permit our judges to refuse application of a statute on the ground that a serious injustice would thereby be caused under the circumstances of the particular case.[11] Furthermore, upper-court judges are often reluctant today to graft equitable exceptions on to judicial rules, although their latitude in this area is greater than in the realm of statutory law.

As a matter of future policy, it would seem feasible and desirable to reinvest the judge with a limited power to dispense individual equity in unusual hardship cases, regardless of whether the applicable rule of law is a statutory or judicial norm. It is not logical to deny this power to the judge while we grant it to the jury.[12] If juries have a *sub rosa* power to prevent bad law from being applied in a case, there is no reason why the judge should not be able to exercise this power openly in an appropriate situation. This argument becomes particularly impelling in view of the fact that the use of the jury in civil cases seems to be on the decline in the Anglo-American legal system, and that the day may come when it will be entirely abolished in this type of case. There does not appear to be any sound reason for holding that the possibility of reaching an equitable result must depend on the acci-

[9] See Jerome Frank, *Courts on Trial* (Princeton, 1949), pp. 127–131.

[10] See Roscoe Pound, "The Decadence of Equity," 5 *Columbia Law Review* 20 (1905).

[11] The power of equitable dispensation is, however, sometimes exercised by our courts. An example in the law of conflicts is *Roboz v. Kennedy*, 219 F. Supp. 892 (1963). See in this connection P. H. Neuhaus, "Legal Certainty versus Equity in the Conflict of Laws," 28 *Law and Contemporary Problems* 795 (1963).

[12] Cf. Frank, pp. 132–133.

dental factor of whether the case is to be decided by a judge or a jury.

Strong insistence must be made, however, that if we invest the judge with the power to administer individual equity, care must be taken that this power not be used to an extent which would be destructive of the normative system. First of all, the exercise of equitable discretion by the judge must always be subject to appellate review. It must also be made clear that the judge may use this prerogative only in rare situations where the application of a positive rule would lead to a result which the large majority of thinking men would condemn as wholly unacceptable and unreasonable. And in the case of departure from a statutory rule, the judge must be in a position to conclude, on the basis of a study of the background of the statute, that the lawmaker certainly would have created an exception from the rule if he had foreseen the occurrence of the situation. If the power is in this fashion treated as a highly exceptional one, and if the judge becomes thoroughly imbued with the conviction that mere personal disagreement with the positive rule is under no circumstances sufficient ground for the use of the power, the dangers which a recognition of Aristotelian *epieikeia* does hold for an impartial administration of justice would appear to be reduced to that minimum risk to which the exercise of *any* judicial power is exposed.[13]

One distinction must be kept in mind. The case where the judge dispenses from the application of a general norm may be one which appears unique and unprecedented to him. The uniqueness may, however, consist simply in the fact that a similar case has never in the past been before his court or before any other court in his jurisdiction. The case may not be unique in the sense that the situation is unlikely ever to arise again in this or a similar form in the future. The number of cases falling under this second—and more literal—meaning of the term unique would probably always be relatively small as compared with the first group of cases.

If a judge exercises the equitable power of dispensation in a case which has never arisen in the past but which may arise again in the future, he must be aware of the fact that—at least under a legal system recognizing the force of precedents—he may in fact do more than merely decide an unusual case on its own facts in accordance with considerations of equity. He may actually fashion a new normative standard able to govern identical or similar fact situations in the future.

[13] A somewhat more far-reaching power of justified rule departure by the judiciary than the one advocated here seems to be recognized by M. R. and S. H. Kadish, "On Justified Rule Departures by Officials," 59 *California Law Rev.* 905, at 945–954 (1971). For an additional dimension of the problem see, however, *supra* Secs. 58 and 74.

This occurred frequently in the early history of English equity. As was pointed out earlier,[14] when the English Chancellor for the first time allowed the specific performance of a contract, he did so on the grounds of equity or conscience because he felt that the common-law remedy of damages could not adequately compensate the plaintiff for the harm inflicted on him by the defendant's breach of promise. However, as soon as specific performance was granted as a matter of course in other and similar cases, the original equitable departure from the common-law rule (making damages the exclusive remedy) became transformed into a *rule* of equity jurisprudence. A modern example showing the same course of development is the refusal of some American courts to recognize forfeiture clauses in long-term real estate contracts in situations where the vendor would thereby make an unconscionable profit beyond the damages he suffered. In the course of time, much of what had in its inception been an "anti-legal" [15] exercise of discretion, or "justice without law," [16] later formed into a body of legal rules supplementing those of the common law. It is for the purpose of differentiating the historically developed system of Anglo-American equity from the power of equitable dispensation dealt with above that the term "individual equity" has been used here.

Section 77. *Public Policies, Moral Convictions, and Social Trends*

In the case of *Nashville, C. & St. L. Ry. v Browning,*[1] the United States Supreme Court expressed the view that a systematic practice by the state of Tennessee whereby, for purposes of taxation, the property of railroads and other public utilities was assessed at full cash value and all other kinds of property at less than cash value, should be regarded as the law of the state. This conclusion was reached by the court, although the discriminatory practice had not been incorporated into the statutory law of the state. "It would be a narrow conception of jurisprudence," said Mr. Justice Frankfurter, "to confine the notion of 'laws' to what is found written on the statute books, and to disregard the gloss which life has written upon it. Settled state practice cannot supplant constitutional guaranties, but it can establish what is state law." [2] Thus, the court recognized in this case that a settled and consistent practice by government officials, being a reflection of the "public policy" of the state, may be considered a legitimate source of law. Likewise, in the case of *Kansas v. U.S.,*[3] the court, when faced with the question whether the United States without its consent may

[14] See *supra* Sec. 55.
[15] Pound, *supra* n. 10, p. 20.
[16] *Id.*, p. 22.
[1] 310 U.S. 362 (1940).
[2] *Id.*, at 369.
[3] 204 U.S. 331, at 342 (1907).

be sued by a state of the Union, concluded in the absence of a controlling constitutional or statutory norm that "public policy" forbade the suit.

In the case of *In re Liberman*,[4] a condition in a trust arrangement to the effect that the beneficiary should lose the right to the trust fund if he should contract a marriage without the consent of the trustees was held contrary to public policy by the New York Court of Appeals. Here again the public policy concept served as an independent source of adjudication without the support of controlling precedent. In *Big Cottonwood Tanner Ditch Co. v. Moyle*,[5] the Supreme Court of Utah made the following statement: "In view of the fact that Utah is an arid state and the conservation of water is of first importance, it is with great hesitancy that we subscribe to any contention which would make it appear to be more difficult to save water. It has always been the public policy of this state to prevent the waste of water."

The term public policy is not used in an entirely uniform and consistent sense in the above cases. In the Nashville case, public policy is equated with an executive or administrative practice followed by state officials, whereas in the Liberman case the public policy envisaged by the court is in effect rooted in a cultural value pattern favoring marriage and discouraging unreasonable restraints upon it. The term "public policy" is being used here primarily to designate government policies and practices not incorporated into the law,[6] while the mores and ethical standards of the community are being discussed under the headings of moral convictions, social trends, and standards of justice.

For purposes of semantic clarity, it is also necessary to differentiate public policy from what might be called legal policy or the policy of the law. In the field of conflict of laws, for example, it is held that a foreign statute should not be applied by a court if its enforcement would offend against a strong public policy of the forum.[7] In many—though not necessarily all—conflicts cases, the public policy contemplated is the policy of the law, that is, an important normative pronouncement which has been enunciated in a constitutional provision, statute, or precedent and which reflects a strongly held community view as to what is socially good.[8] Pronouncements are found in Eng-

[4] 18 N.E. 2d 658 (1939).

[5] 109 Utah 197, at 203 (1945).

[6] In accord: Edwin W. Patterson, *Jurisprudence* (Brooklyn, 1953), p. 282, who points out that "policy" in its etymological signification refers to plans for governmental action rather than to moral or ethical principles.

[7] See *Loucks v. Standard Oil Co.*, 120 N.E. 198 (N.Y., 1918); *Mertz v. Mertz*, 3 N.E. 2d 597 (N.Y., 1936).

[8] It should be noted, however, that in determining whether or not a given domestic policy embodied in the law is so vital to the maintenance and protection of our legal institutions as to exclude the possibility of recognizing a foreign legal

lish legal literature and court decisions to the effect that in all branches of the law the only type of public policy relevant for purposes of adjudication is the policy of the law, and that the judicial formation of new rules of law founded on considerations of public good should be considered a closed chapter in English legal history.[9] Such views are anchored in a narrow positivism which reserves the fashioning of public policy ideas in the broader sense exclusively to the legislature; they cannot be said to be representative of the current judicial climate in the United States.

Even though it should be held that public policy constitutes a nonformal source of law which may properly be resorted to by the judge where the positive law is ambiguous or silent, the judge should have a veto power against the enforcement of a public policy which is in conflict with fundamental standards of justice.[10] This follows from the general theory advocated here, that justice is an essential ingredient of the idea of law as such, while a public policy sponsored by a government organ does not occupy this exalted status. Although the judge, for the sake of the important value of legal security, must make many compromises and adjustments between justice and the provisions of the positive law, the necessity for such compromises is reduced when we are confronted with a nonformal source of the law which, like public and administrative policy and practice, maintains a secondary place in the hierarchy of legal sources. Public policy, as understood here, chiefly embodies certain axioms of political or social expediency. Expediency, however, represents a value inferior to legal security and justice in the value hierarchy of the legal order.

It is true that in some instances the promptings of expediency become so imperative that they cannot be ignored by the makers or administrators of the law. Thus war, famine, civil strife, shortage of labor, or primitiveness of the productive system may require the tak-

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rule inconsistent with it, the judges must necessarily have recourse to considerations of public good, concerning which the positive law may offer little direct aid and guidance.

[9] For a discussion of this view see George W. Paton, *A Textbook of Jurisprudence*, 4th ed. (Oxford, 1972), pp. 119–122; W. S. M. Knight, "Public Policy in English Law," 38 *L. Q. Rev.* 207 (1922); Percy H. Winfield, "Public Policy in the English Law," 42 *Harv. L. Rev.* 76 (1929); Dennis Lloyd, *Public Policy* (London, 1953), p. 112.

[10] See in this connection *McCarthy v. Speed*, 77 N.W. 590 (S.D., 1898). In this case the court, after laying down the rule that one of the co-tenants of a mining claim may not relocate the claim as against the other co-tenant, made the following comment: "It is contended that the rule herein announced is contrary to public policy, and will result in endless embarrassment and confusion to a class of rights already sufficiently uncertain. We reply that a sound public policy always requires honesty and fair dealing."

ing of expedient or even drastic measures which may be questionable from the point of view of justice. But in such instances the organs of the law should be guided by the determination to carry out the mandates of expediency with the least possible detriment to justice. They should carefully balance the conflicting interests at stake and should not without a critical examination accept the solution which appears to be the easiest and most obvious one.[11]

In the light of these considerations, issue might be taken with the way in which the United States Supreme Court disposed of the case of *Nashville, C. & St. L. Ry. v. Browning.*[12] In this case the court, though recognizing as law an administrative practice under which railroad and utility property was assessed at full cash value, did not discuss the question of whether this discriminatory tax practice was in consonance with basic tenets of justice. While there may have been good reasons for justifying this discrimination, the court accepted the administrative practice without raising the issue of its essential fairness.

The part played by the moral convictions of the community in the development of the law has been discussed in an earlier section.[13] In American law, the ascertainment of moral convictions becomes particularly important in those instances in which good moral character is made the prerequisite for the acquisition of a right or privilege, or where moral turpitude causes a forfeiture of a right or privilege.[14] As a United States district court has observed, "In deciding the issue of good moral character the Court's individual attitude is not the criterion. The test applied, with its acknowledged shortcomings and variables, depending upon time and place, is the norm of conduct accepted by the community at large."[15] It might be observed that, although a court must be careful to avoid substituting its own judgment for that of the community, there may occur exceptional situations where the community norm is totally without rational basis and may for this reason be questioned by a court. Where the judge, for example, becomes persuaded that a popular conviction was produced by misinfor-

[11] The problem is treated in somewhat greater detail in the author's article on "Law as Order and Justice," 6 *Journal of Public Law* 194, at 215–218 (1957). See also Carleton K. Allen, "Justice and Expediency," in *Interpretations of Modern Legal Philosophies,* ed. P. Sayre (New York, 1947), p. 15.

[12] 310 U.S. 362 (1940).

[13] See *supra* Sec. 62.

[14] See, for example, 8 U.S.C. Secs. 1251(a) and 1427(a).

[15] *Petition for Naturalization of Suey Chin,* 173 F. Supp. 510, at 514 (1959). See also *Repouille v. United States,* 165 F. 2d 152, at 153 (1947); Benjamin N. Cardozo, *The Paradoxes of Legal Science* (New York, 1928), p. 37.

A method for ascertaining the moral sense of the community is presented by J. Cohen, R. A. H. Robson, and A. Bates, *Parental Authority: The Community and the Law* (New Brunswick, N.J., 1958).

mation, untruthful propaganda, or irrational emotional appeals, he should be conceded the right to adopt a nonconformist attitude toward the community standard.[16]

Community moral patterns cannot always be distinguished with facility from social trends which exert an impact upon the administration of the law. Taking social trends to mean currents of public opinion which cannot be said to have fully ripened into a well-ascertained standard of justice or fixed moral conviction, we find that such trends have often influenced the judiciary. In a celebrated case,[17] Justice Story took the position that a strong international trend against the slave trade, evidenced by numerous international declarations as well as by some municipal statutes directed against its legality, might justify the judicial recognition of a rule of international law condemning such trade even though the institution of slavery itself had not been outlawed as unjust by some of the leading nations of the world. He made the reservation, however, that the municipal courts of a country should enforce the rule only against those nations shown to be in sympathy with the trend. In the interpretation of most-favored-nations clauses in international agreements, the courts have been inclined to follow world commercial trends away from discriminatory practices toward equality of treatment of all nations affected.[18] In the case of *Woods v. Lancet*,[19] the New York Court of Appeals specifically referred to a trend favoring extension of personal injury liability to prenatal injuries caused by negligent acts, and this trend, in conjunction with considerations of justice, caused the court to abandon earlier decisions denying liability in such instances. In *Universal Camera Co. v. N.L.R.B.*,[20] the United States Supreme Court took notice of a trend in litigation away from the battle-of-wits theory of law suits toward the conception of a rational inquiry into truth, in which the tribunal considers relevant everything probative of the matter under investigation. "The direction in which the law moves," said Mr. Justice Frankfurter, "is often a guide for the decision of particular cases." [21] If the same court, in the famous Dred Scott decision,[22] had recognized the

[16] A somewhat different approach to the problem is taken by Edmond Cahn, *The Moral Decision* (Bloomington, Ind., 1955), pp. 301–310.

[17] *U.S. v. The Schooner La Jeune Eugénie*, 2 Mason 409 (1st Circ., 1822).

[18] Compare *Whitney v. Robertson*, 124 U.S. 190 (1888) with *John T. Bill Co. v. U.S.*, 104 F. 2d 67 (1939).

[19] 102 N.E. 2d 691 (1951); see *supra* Sec. 74.

[20] 340 U.S. 474 (1950).

[21] *Id.*, p. 497. See also Justice Felix Frankfurter, in *National City Bank v. Republic of China*, 348 U.S. 356, at 360 (1954): "A steady legislative trend, presumably manifesting a strong social policy, properly makes demands on the judicial process."

[22] *Dred Scott v. Sanford*, 19 How. 393 (1857).

strength of antislavery sentiments in many parts of the country instead of taking the extreme view that the institution of slavery was sacrosanct, the Civil War might conceivably have been avoided.

It should be insisted that the social trend, in order to serve as a proper gauge in the adjudication of legal problems, should be a strong and dominant trend. If it is balanced by a countertrend, and if the social principle mirrored in the trend is in a state of flux and great uncertainty, courts should be very reluctant to elevate the trend to the status of a controlling rule of judicial action. Furthermore, as in the case of public policies, a court may feel that a prevailing trend is incompatible with fundamental ideas of justice. If a strong and convincing case is made out in favor of such a position, the court is justified in preferring the maxim of justice to the trend. A court, it is true, should make a large allowance for discrepancies of opinion as to what constitutes elementary justice, and it should not resist social progress by stubbornly clinging to notions of justice which may be those of a dying epoch. Nevertheless, some latitude should be granted to the judiciary in balancing fundamental notions of fairness and decency against social tendencies which, although they may be highly conspicuous and pronounced at a particular time, may be no more than ephemeral opinion lacking a solid rational foundation.

Section 78. *Customary Law*

The general criteria which may be used to distinguish law from social custom were treated earlier.[1] The conclusion was reached there that the lines of demarcation between these two agencies of social control are fluid, and that a practice which in one period of history has been viewed as nonlegal in nature may subsequently become elevated to the rank of a legal rule. At this point in our discussion, it becomes necessary to consider the conditions under which such a transformation of custom into law takes place.

A simplified view of the problem of customary law was taken by John Austin. To him a customary practice is to be regarded as a rule of positive morality unless and until the legislature or a judge has given it the force of law.[2] According to this view, habitual observance of a custom, even though accompanied by a firm conviction of its legally binding character, does not suffice to convert the custom into law; it is the recognition and sanction of the sovereign which impresses upon the custom the dignity of law. This position is, of course, neces-

[1] See *supra* Sec. 63.

[2] Austin, *The Province of Jurisprudence Determined*, ed. H. L. A. Hart (London, 1954), pp. 30–33, 163–164.

sitated by the Austinian theory of positive law, according to which law arises from establishment by political superiors, and never from spontaneous adoption of normative standards by the governed. The historical doctrine of law sponsored the opposite view, namely, that law was primarily the expression of the legal convictions and practices of the community.[3]

If we assume with Austin that customary laws are positive laws fashioned by political or judicial legislation upon pre-existing customs, there would be some doubt as to whether a custom could be made the basis for an adjudication of rights and liabilities in an arbitration proceeding conducted by nongovernment arbiters; government approval would be lacking in such a case, except under some far-fetched doctrine of government acquiescence. Furthermore, in a case where the parties merely wish to be informed of their rights, status, and duties under some customary arrangement without litigation, no lawyer could in good faith give such advice except to tell the parties that no legal rights and duties could come from custom in the absence of an authoritative court pronouncement. And when a regular court of law gives its approval to a pre-existing custom and adjudges a person liable to damages because he has violated the custom, the court, in Austin's view, creates new law and applies it with retroactive force to a situation ungoverned by that law at the time when the facts of the case occurred. In all three of these situations the opposite result is often more closely in accord with reality, justice, and convenience. Unless there exists a compelling necessity for bowing to the consequences entailed by the Austinian theory, there would seem to be good reason for establishing a more satisfactory theoretical basis for the recognition of customary law.

The solution of this problem is, however, attended by some serious difficulties, which stem primarily from the fact that members of a community or group practicing a certain custom do it unconsciously, in the sense that they are not engaged in a deliberate attempt to make law. Since the leading systems of law take the position that a custom is not necessarily law simply because it is observed by a community or group of men, there is always some doubt as to whether a custom represents a social usage, a rule of courtesy, or a depository of moral convictions rather than a rule of law. In other words, the legal efficacy of a custom is often uncertain until a legislature or court puts the stamp of legal approval on it.[4]

[3] See *supra* Secs. 18 and 63.

[4] A similar observation was made by Justice Cardozo with respect to international law, a branch of the law in which the customary element is particularly strong. These are his words: "International law . . . has at times, like the Common Law

Under the Civil Law system, the chief source of uncertainty in the legal recognition of custom is the requirement, found in a number of Civil Law countries, that a custom must be accompanied by the *opinio juris* or *opinio necessitatis* before a court can carry it into effect as a rule of law. This requirement means that a custom cannot be recognized as a rule of law in the absence of a firm conviction on the part of the members of the community that the custom is legally binding and the source of enforceable rights and obligations. Customs which flow merely from feelings of sympathy or propriety or from habit are not capable of generating law.[5] Quite obviously the nature of the custom often remains in doubt until a court has determined that community conviction as to its legally binding force does in fact exist.

In the area of the Common Law, the uncertainty surrounding the legal enforceability of a custom prior to legislative or judicial recognition is chiefly caused by the assumption of power on the part of the courts of law to deny legal efficacy to a custom on the ground that it is unreasonable. As the New York Court of Appeals has pointed out, "Reasonableness is one of the requisites of a valid usage, and an unreasonable or absurd custom cannot be set up to affect the legal rights of parties." [6] Thus, when Lord Mansfield in the eighteenth century undertook the task of incorporating the customary rules of the continental law merchant into the English common law, he rejected those mercantile and commercial usages which he considered unreasonable or unsuited to the conditions of his time or country. The English and American courts have generally preserved this selective approach to custom.[7] They have, however, been inclined to put the burden of proving unreasonableness on the party disputing the custom and have thereby attached a presumption of reasonableness to customs.[8]

The fact that customs, prior to sovereign confirmation, abide in a condition of uncertainty with regard to their ultimate recognition does not compel us to accept the Austinian position. As we concluded earlier,[9] law can arise in a community by processes other than govern-

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. . . a twilight existence during which it is hardly distinguishable from morality or justice, until at length the *imprimatur* of a court attests its jural quality." *New Jersey v. Delaware,* 291 U.S. 361, at 383 (1934).

[5] See, for example, L. Enneccerus and H. C. Nipperdey, *Allgemeiner Teil des Bürgerlichen Rechts,* 14th ed. (Tübingen, 1952), pt. I, p. 160; Alf Ross, *Theorie der Rechtsquellen* (Leipzig, 1929), pp. 133 ff., 430–431; Gény, *Méthode d'interprétation et sources en droit privé positif,* 2d ed., transl. Louisiana State Law Institute (Baton Rouge, 1963), pp. 243–250.

[6] *Fuller v. Robinson,* 86 N.Y. 306, 40 Am. Rep. 540 (1881).

[7] See *Wigglesworth v. Dallison,* 99 Eng. Rep. 132 (1779); *Wolstanton Ltd. and Duchy of Lancaster v. Newcastle-under-Lynn Co.* (1940), A. C. 860; *Swift v. Gifford,* 23 Fed. Cas. 558, No. 16,696 (1872); *Ghen v. Rich,* 8 Fed. 159 (1881). See also John R. Commons, "Law and Economics," 34 *Yale L. J.* 371, at 372 (1925).

[8] See Carleton K. Allen, *Law in the Making,* 6th ed. (London, 1958), p. 136.

[9] See *supra* Sec. 57.

ment command. Once this is conceded, there is every reason for ascribing legal character to a custom as long as its practice is accompanied by an intent to create relations which are definite, circumscribed, and important enough to produce obligatory rights and duties. We have to realize that an element of doubt and uncertainty attends the existence of many legal relations: we can never be sure how a certain constitutional or statutory rule establishing rights or obligations will be interpreted by a court, or whether a once-adopted interpretation will be overruled or subsequently modified. If we made perfect clarity and infallible certainty conditions for the recognition of a normative standard or arrangement as a source of law, the volume of law in our society would be reduced to an unjustifiably narrow margin.

Some interesting historical instances in which customs practiced as law in a certain field of activity eventually became incorporated into the positive law are found in American mining and water law. To give a few examples, the custom among miners on the public lands of the American West of holding that discovery and appropriation created legal rights to mining claims, and that subsequent development of a claim was the condition for the continuation of the right to the mine, was ultimately recognized by the United States Supreme Court.[10] Mining partnerships, evolved as a special type of partnership peculiarly adapted to serve the mining industry, took the form of customary arrangements in their inception and later received the approval of the courts.[11] In 1866 Congress gave the local customs of the miners on the public lands of the United States the force and effect of law.[12] In the arid states of the West, the acquisition of water rights on the basis of prior appropriation and beneficial use of the water rather than on occupancy of riparian property also had its origin in custom and was subsequently sanctioned by courts and legislatures.[13]

As C. K. Allen points out, "The scope of custom diminishes as the formulation of legal rules becomes more explicit and as a more elaborate machinery is set up for the making and administering of law."[14] Having become absorbed into legislative or judicial law to a far-reach-

[9] See *supra* Sec. 52.

[10] *O'Reilly v. Campbell*, 116 US. 418 (1885).

[11] See *Mud Control Laboratories v. Covey*, 2 Utah 2d 85 (1954). For another case of judicial adoption of a mining custom, see *U.S. Mining Co. v. Lawson*, 134 Fed. 769 (1904)

[12] 30 U.S.C. 51; *McCormick v. Varnes*, 2 Utah 355 (1879); *Chambers v. Harrington*, 111 U.S. 350 (1884); C. O. Martz, *Cases and Materials on the Law of Natural Resources* (St. Paul, Minn., 1951), p. 467.

[13] *The American Law of Property*, ed. J. Casner (Boston, 1954), vol. VIa, p. 170.

[14] *Law in the Making*, p. 126. For an expression of the view that customary law is still of considerable importance in the world of today see Lon L. Fuller, "Human Interaction and the Law," in *The Rule of Law*, ed. R. P. Wolff (New York, 1971), pp. 171–215.

ing extent, custom plays a reduced role as a source of law in civilized society today. This does not mean, however, that its law-producing force is exhausted or spent. Vocational or business customs or even customs of a more general character may be found to govern human conduct on a nonlitigious basis, and such customs may also find their way into the courts of law. Customs of a local character are sometimes asserted in court as derogating from and displacing a general rule of law. The English courts have developed certain tests for dealing with such local variations of the general law.[15] It is held that they cannot be set up against a positive rule of the statutory law. They may not violate a basic principle of the Common Law, and they must have existed for a long time.[16] They must have been practiced continuously and peaceably, and the public must regard the custom as obligatory. And lastly, the custom must not be unreasonable, that is, it must not violate fundamental principles of right and wrong or injure the interests of outsiders to the custom. The courts in the United States have not strictly followed the English tests and have been inclined to ignore particularly the test of antiquity.[17]

A court would be justified (at least according to the view advocated here) in disregarding a custom that violates a basic standard of justice. Furthermore, if a custom runs contrary to a clearly established public policy or a strong social trend, and if the sole basis for the continuance of the custom is habit or inertia, there would be no reason for denying the court the power to repudiate the custom under the traditional test of reasonableness.

In spite of the fact that the significance of customary law as a direct and immediate source of law is not very large today, custom often enters the arena of the law in an indirect way. In determining whether an act was negligent, for instance, a court may have to ascertain the customary standards of care observed by men of average reasonableness. In suits for professional misconduct or incompetence, attention may have to be given to the accustomed ways of proper professional behavior. Business usages prevailing in a certain branch of business may have to be ascertained in order to determine rights, duties, and responsibilities in the field of commercial law. They are particularly pertinent

[15] Allen, *supra* n. 8, pp. 126 ff.; John Salmond, *Jurisprudence*, 12th ed. by P. J. Fitzgerald (London, 1966), pp. 198–203.

[16] It is often stated by the English courts that no local custom can be regarded as legally valid unless its practice reaches back to the beginnings of the reign of Richard I in 1189 A.D. However, if the party alleging the custom can prove that it has existed for a substantial period, such as the time of actual human memory, this will raise a presumption of immemorial antiquity. See Salmond, pp. 201–202, Allen, *Law in the Making*, pp. 130–131.

[17] See Patterson, *Jurisprudence*, p. 227.

to banks and banking, and they may play a significant role generally in the interpretation of commercial contracts and other documents. Customs are also often resorted to in determining the terms of agreements between landlords and tenants.

The last problem to be discussed here is the relation between statute and custom in cases where an antiquated and obsolete statute has given way to a new living law which finds expression in community custom. Suppose, for example, an attempt is made to reactivate, after long nonuse, an old criminal statute which penalizes baseball-playing on Sundays, after general public opinion regarding Sunday activity has undergone a sharp change and it has become quite customary to engage in sports on Sunday. Some Civil Law countries, like Germany, apply the doctrine of *desuetudo* in such circumstances and give the judge the power to ignore the statute on the ground that it has not been used for a long time and has been displaced by a countervailing custom recognizing the propriety of recreational activities on Sunday.[18] In present-day Anglo-American law, the doctrine of desuetude is not as a general rule applied to statutes, and it is held that a statute lives on in full force despite nonuse and cessation of the original *ratio legis*. There would seem to be much reason, however, in favor of a plea for receiving the desuetude doctrine into our legal system.[19] It would appear contrary to fundamental notions of justice and due process to subject a person to criminal liability or civil deprivations under a law which has not been enforced for a substantial period of time and which is obviously at variance with a new and solidly established community opinion. If the enforcement of an antiquated law is thoroughly incompatible with the public interest and the dominating concept of justice, there must be some way of declaring the continued validity of the

[18] See Enneccerus and Nipperdey, p. 165; Max Rümelin, *Die Bindende Kraft des Gewohnheitsrechts* (Tübingen, 1929), pp. 27, 30–31. See also Justinian's *Digest* I. 3. 32. 1, stating that laws shall be abrogated not only by the vote of the legislature, but also through disuse by the silent consent of all.

[19] See *John R. Thompson Co. v. District of Columbia*, 203 Fed. 2d 579 (C.A.D.C., 1953), where the court wished to recognize certain exceptions from the Anglo-American theory. The decision was reversed by the United States Supreme Court. Speaking for the court Mr. Justice Douglas said: "There remains for consideration . . . whether the Acts of 1872 and 1873 were abandoned or repealed as a result of nonuse and administrative practice. There was one view in the Court of Appeals that these laws are presently unenforceable for that reason. We do not agree. The failure of the executive branch to enforce a law does not result in its modification or repeal . . . The repeal of laws is as much a legislative function as their enactment." *District of Columbia v. John R. Thompson Co.*, 346 U.S. 100, at 113–114 (1953). The problem is discussed in greater detail by Edgar Bodenheimer, *Power, Law, and Society* (New York, 1973), pp. 117–121. See also Arthur E. Bonfield, "The Abrogation of Penal Statutes by Nonenforcement," 49 *Iowa Law Rev.* 389 (1964) and L. and W. Rodgers, "Desuetude as a Defense," 52 *Iowa Law Rev.* 1 (1966).

statute repugnant to the notion of due process of law. However, such cases of *desuetudo* should be rare and unusual, and the conviction as to the impropriety of reviving the disused law should be general, palpable, and strong.[20] Where a law has simply been in abeyance for a substantial number of years, although the policy reasons for its existence remain unchanged, a re-enactment of the law by the legislature should not be required; a reactivation of the measure by notice to the public that enforcement will henceforth be resumed would appear to be sufficient in this situation.[21]

[20] On the question of *desuetudo* see also *infra* Sec. 85.

[21] An example would be a city ordinance requiring the leashing of dogs which the city officials have not enforced for many years.

XVII

LAW AND SCIENTIFIC METHOD

Section 79. *The Formation of Concepts*

We have seen that it is one of the essential functions of the law to reduce the multitude, variety, and diversity of human actions and relations to a reasonable degree of order and to promulgate rules or standards of conduct applicable to certain circumscribed types of action or behavior. In order to accomplish this task successfully, the legal order must undertake the formation of technical notions and concepts designed to aid in classifying the multifarious phenomena and events of social life. It thereby lays the basis for subjecting equal or essentially similar phenomena to a unified and consistent regulation or treatment. Legal concepts may thus be viewed as working tools used for the purpose of identifying, by a shorthand description, typical situations which are characterized by identical or common elements. For instance, the often-recurring fact that one person out of anger, spite, or revenge strikes another person or inflicts bodily harm on him is made by the law the referent of the term "battery" and is subjected to certain legal consequences. When one individual promises to another

an act in return for some commitment on the part of the other individual, this is designated legally by the term "contract" and is subjected to an extensive system of norms. If one man intentionally takes away personal property belonging to another, the law applies the concept of "larceny" and decrees punishment for the offender.

Inasmuch as the concepts of the law are products of human language rather than physical objects, the relation of these concepts to the referents which they purport to denote has always attracted the attention of writers. This relation formed the central subject, for instance, of the famous medieval dispute about universals.[1] According to the realist school of medieval thought, there is a parallelism between the general concepts formed by man and the classes of objects in the outer world to which they relate: every generic notion or idea formed by the minds of human beings was believed to have an exact counterpart outside the human mind, that is, in objective reality. The nominalists, on the other hand, argued that nature knows only individual things, and that the generalizations and classifications which are used in describing the world which surrounds us are merely names (*nomina*), convenient symbols of language which cannot be regarded as faithful copies of things existing in reality. The world of the human mind, in other words, must be clearly divorced from the world of objects. In the words of a modern British nominalist, the opposing school of thought has "tended to mistake the structure of discourse for the structure of the universe." [2]

This celebrated dispute, in the sharp and antithetical form which the contentions of the opponents assumed, substantially clarified the epistemological issues involved, but impeded the possibilities of reconciliation. It is undoubtedly true, as the nominalists asserted, that the term "mountain" is an abstraction, a symbol produced by the human mind to designate masses of rock or earth which rise conspicuously above the surface of the earth. In reality, every mountain looks different from every other mountain, and we have therefore with good reason fallen into the habit of identifying almost every individual mountain by a different name. On the other hand, we cannot ignore that there exist in nature large numbers of objects which possess common characteristics and exhibit striking similarities. Let us consider, for example, the

[1] See *supra* Sec. 7. For a good general account of the controversy regarding the nature of concepts see H. W. B. Joseph, *An Introduction to Logic*, 2d ed. (Oxford, 1916), pp. 24–31.

[2] Glanville Williams, "Language and the Law," 61 *Law Quarterly Rev.* 71, at 72 (1945). The nominalistic position is set forth in its pure form by James Mill, *Analysis of the Phenomena of the Human Mind* (London, 1869), I, 260: "It is obvious, and certain, that men were led to class solely for the purpose of economizing in the use of names . . . The limits of human memory did not enable men to retain beyond a very limited number of names."

term "mankind." This is an abstraction used by us to designate the totality of all human beings. There is, of course, no single physical object corresponding to the concept. Nevertheless, the term is not wholly linguistic, mental, or symbolic in character, since it refers to the undeniable fact that a determinate number of living beings exist on this earth who are identifiable by a number of common traits and can be distinguished from other living things.

It was the merit of medieval realism to recognize that nature, in a significant sense, operates through patterns and on a large scale produces classes of nearly identical or at least very similar objects. Philosophy cannot ignore this basic truth. Realism oversimplified the problem, on the other hand, by assuming that the uniformities and differences created by nature coincide completely with the generalizations and distinctions created by the human mind for the purpose of describing nature. The fact was overlooked that our language is not rich and subtle enough to reflect the infinite variety of natural phenomena, the combinations and mutations of elements, and the gradual transitions from one thing to another which are characteristic of objective reality as we apprehend it. In the words of Huntington Cairns, "there are more things in the world than there are words to describe them."[3] Although a sea in most instances can be easily differentiated from a lake, or a mountain from a hill, there occur borderline situations causing difficulty to linguistic classification; for instance, the propriety of calling the Black Sea a sea rather than a lake has sometimes been questioned by geographers. However thorough and discriminating our vocabulary may be, there will always exist in reality shadings and atypical instances which defy sharp and unambiguous linguistic classification. Although many concepts may be viewed as mental images of relations and uniformities existing in the natural world, such mental reproductions of reality are often imprecise, oversimplified, and incomplete.

These general considerations have a significant bearing on the utility of concepts in legal science. This bearing is a twofold one: it relates to the *need* for legal concepts as well as to the *limitations* to which their use is subject.

Concepts are necessary and indispensable instruments for the solution of legal problems. Without circumscribed technical notions, we could not think clearly and rationally about legal questions.[4] Without concepts, we could not put our thoughts on the law into words and

[3] "The Language of Jurisprudence," in *Language: An Enquiry into Its Meaning and Function*, ed. R. N. Anshen (New York, 1957), p. 243.

[4] Max Rheinstein, "Education for Legal Craftsmanship," 30 *Iowa Law Review* 408, at 415 (1945): "The advice to discard concepts in thinking is as meaningless as advice to make music without tones, to talk without sounds, or to see without images."

communicate them to others in an intelligible fashion. The entire edifice of the law would crumble if we tried to dispense entirely with concepts. Since it is one of the first purposes of the law to render human actions and behavior subject to certain normative standards,[5] and since normative standards cannot be established without classifying the types of conduct to which a particular standard shall apply, the close relation between law and concept becomes at once apparent. As was said above, concepts are tools for identifying and classifying the characteristic phenomena of social reality; in the words of Morris Cohen, they enable us "to arrange in order and hold together diverse phenomena because of some real unity of process or relation which constitutes an element of identity between them." [6] No recognizable patterns for judgment and action could be created by the legal system without the accomplishment of this preliminary task of categorization. Not even the faintest approximation to the ideal of legal certainty and predictability of decision could be achieved if we decided to abandon the use of conceptual generalizations in the administration of justice. A system of law resting on subjective reactions alone and repudiating the need for a rational apparatus of analysis would be an absurdity.[7]

It is in the nature of a concept, however, that while it may be clear and definite in its core, it tends to become blurred and indistinct as we move away from its center. Using a somewhat different metaphor, Wurzel likens a concept to a "photograph with vague and gradually vanishing outlines." [8] The relative extent of the focal region on the one hand and the penumbral zone on the other varies considerably with different concepts. As a general rule it might be stated that the more general and abstract a term is, the wider the penumbral zone around the core. However, as a decision of the United States Supreme Court shows, even a term like "candy," which at first sight appears to be quite concrete and definite, may become the source of interpretative difficulties in terms of core and penumbral meaning.[9]

[5] See *supra* Sec. 45.

[6] *A Preface to Logic* (New York, 1944), p. 70.

[7] See in this connection Alexander Pekelis, "The Case for a Jurisprudence of Welfare," 11 *Social Research* 312, at 332–333 (1944).

[8] K. G. Wurzel, "Methods of Juridical Thinking," in *Science of Legal Method* (Boston, 1917), p. 342.

[9] *McCaughn v. Hershey Chocolate Co.*, 283 U.S. 488 (1931). On the problem of the conceptual penumbra generally see Cohen, p. 67; Arthur Nussbaum, *Principles of Private International Law* (New York, 1943), p. 188; Williams, 61 *L. Q. Rev.* 179, at 191 (1945), and *id.*, 293, at 302; H. L. A. Hart, "Positivism and the Separation of Law and Morals," 71 *Harvard Law Review* 593, at 607 ff. (1958). Fuller, in his reply to Professor Hart's article, questions the usefulness of the "core-penumbra" dichotomy on the ground that problems of interpretation do not usually turn on the meaning of individual words. Lon L. Fuller, "Positivism and Fidelity to Law," 71 *Harv. L. Rev.* 630, at 662–663 (1958). This may be true in

When legal concepts are formed and defined, the most typical cases exemplifying the particular concept are usually taken into account, while the boundary cases are not clearly envisioned. The legal concept of domicile, for example, purports to apply to situations where a person is permanently or for a definite time settled at a particular place. But cases may arise where the home of a person is of less permanent character, where good reasons may exist for recognizing it nevertheless as the person's domicile. It is clear that throwing an object upon another's premises falls within the purview of the legal term "trespass." It may be a matter for legitimate doubt, on the other hand, whether the precipitation of artificial rain upon a piece of land against the owner's will is a trespass or whether this act should be subsumed under a different head of Anglo-American tort liability, such as the concept of nuisance. The line to be drawn between a servant and an independent contractor rests on the infinitely variable matter of control, and the line therefore often becomes unsharp and hazy. In all areas of the law we find the hard borderline case, the peripheral situation where the extent of the bounds of a technical concept is problematic, or where two or more different concepts shading into one another may be equally applicable to the facts from a purely logical point of view. Although, as Nussbaum points out, uncertainty of decision within the penumbral region is often diminished by patterns of inherited legal attitudes and techniques,[10] the problems posed by the fringe meaning of concepts are nevertheless frequent and serious.

An important attempt to undertake a systematic and logical classification and arrangement of some fundamental concepts in legal science was undertaken by the American jurist Wesley N. Hohfeld.[11] His aim was to analyze what he called "the lowest common denominators of the law," including concepts such as legal relation, right, duty, power, privilege, liability, and immunity, as well as to expound the logical relations between these notions.[12] Some of Hohfeld's determinations of fundamental concepts became incorporated into the American Restatement of Property.[13] However, Hohfeld's hope that his conceptions might produce a uniform terminology applicable to the most divergent branches of the law[14] fell short of realization. American

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many instances, but legal problems may arise in which the proper solution hinges primarily on the interpretation of one particular term or concept.

[10] Nussbaum, p. 188.

[11] Hohfeld was a professor of law at Yale University who died in 1917 at the premature age of 38.

[12] See Hohfeld, *Fundamental Legal Conceptions* (New Haven, 1923); Arthur H. Corbin, "Legal Analysis and Terminology," 29 *Yale Law Journal* 163 (1919).

[13] Secs. 1–4.

[14] See Hohfeld, p. 64.

courts failed to adopt the classifications which he had propounded and continued to use concepts of right, duty, privilege, and immunity in nonuniform and inconsistent senses.[15] Hohfeld's scheme of concepts must therefore be described as one which to this day has remained in the realm of an unrealized attempt at terminological reform.[16]

It is, of course, theoretically possible to make concrete and clarify legal concepts by elaborate definitions framed by the legislatures, the judiciary, or the community of legal scholars. It was the ideal of a movement in jurisprudence known as the jurisprudence of conceptions to create—mainly through the dogmatic labors of legal scholars—a comprehensive system of legal concepts reified into absolute entities and serving as solid, unvarying pillars for deductive reasoning in a rigid normative structure. This movement was quite influential in continental Europe around the turn of this century, especially in Germany. The most absolutist representatives of the conceptualist school went so far as to assert that the legal concepts were given to the human mind a priori and that they existed in a subconscious form before the legal order was called into being. In other words it was not the legal order which created concepts useful for its purposes, but it was the concepts which created the legal order and engendered the rules of the law.[17] An example of the conversion of a legal concept into a taut normative strait jacket was reported by Max Rümelin.[18] In a well-known German textbook on the law of contracts, the author drew a distinction between sales in which delivery of the goods coincides with the making of the contract (sale over the counter) and sales in which the contract consists of an exchange of promises to deliver and pay. From this classification the author dogmatically drew the conclusion that in a sale over the counter the seller of stolen goods cannot be liable for damages

[15] Examples are given by Edgar Bodenheimer, "Modern Analytical Jurisprudence and the Limits of Its Usefulness," 104 *University of Pennsylvania Law Review* 1080, at 1082 (1956). See also W. W. Cook, "The Utility of Jurisprudence in the Solution of Legal Problems," in *Lectures on Legal Topics* (New York, 1928), V, 338.

[16] For a criticism of the Hohfeldian concepts see Roscoe Pound, "Fifty Years of Jurisprudence," 50 *Harv. L. Rev.* 557, at 573–576 (1937); Albert Kocourek, "The Hohfeld System of Fundamental Legal Conceptions," 15 *Illinois Law Review* 24 (1920). An elaborate discussion of Hohfeld's thinking is also found in Julius Stone, *Legal System and Lawyers' Reasonings* (Stanford, 1964), pp. 137–161.

[17] See Philipp Heck, "The Jurisprudence of Interests: An Outline," in *The Jurisprudence of Interests*, ed. M. Schoch (Cambridge, Mass., 1948), pp. 34, 156. Rümelin, quoting Stammler, says that conceptual jurisprudence "treated concepts which are nothing but reproductions of historically given material, as pure concepts such as the concepts of mathematics." Max Rümelin, "Developments in Legal Theory and Teaching," *id.*, p. 9.

[18] *Id.*, p. 13. Other examples of conceptual jurisprudence are found in Pound, *Interpretations of Legal History* (Cambridge, Mass., 1930), pp. 120–124.

to the buyer for inability to transfer title, since he did not enter into an obligation to deliver the goods.

In our own day, conceptual jurisprudence—at least in its more doctrinaire manifestations—does not enjoy much favor. A large number of judges and jurists would today endorse Mr. Justice Cardozo's observation that the tyranny of concepts is "a fruitful parent of injustice." Concepts are tyrants rather than servants, he said, "when treated as real existences and developed with merciless disregard of consequences to the limit of their logic. For the most part we should deal with them as provisional hypotheses to be reformulated and restrained when they have an outcome in oppression or injustice." [19] But he also recognized that "concepts are useful, indeed indispensable, if kept within their place . . . [They] are values deeply imbedded in our law and its philosophy." [20] If we realize that concepts are valuable instruments of judicial reasoning in whose absence judicial activity could not be accurately executed, and if we avoid at the same time the error of ascribing to them an absolute, eternal reality unrelated to any social purpose they might be designed to serve, we shall have gained the proper perspective in our effort to appraise the utility of conceptual tools in the administration of justice.[21]

Section 80. *Analytical Reasoning*

The concepts fashioned by a legal system enter prominently into the formulation of legal rules and principles. Some legal norms gravitate around one single concept. An example would be a constitutional provision to the effect that "the passing of any bill of attainder is prohibited." Other prescriptions use several legal concepts and bring them into some form of connection or relation with one another. This would be true of a rule to the effect that "a bailor of chattels that are damaged by a third person while in the possession of a bailee is barred from recovery by the contributory negligence of the bailee," or of a prescription that "the doctrine of *respondeat superior* does not apply to a municipal corporation exercising governmental, as distinguished from proprietary, functions." In these examples, terms such as bill of attainder, bailor, bailee, *respondeat superior*, governmental versus proprietary functions constitute legal concepts, as distinguished from

[19] Benjamin N. Cardozo, *The Paradoxes of Legal Science* (New York, 1928), p. 61; *Selected Writings*, ed. M. E. Hall (New York, 1947), p. 287. See also Pound, "Mechanical Jurisprudence," 8 *Columbia Law Review* 605 (1908).

[20] Cardozo, *Paradoxes*, p. 62.

[21] Cf. Josef Esser, *Grundsatz und Norm* (Tübingen, 1956), pp. 6–7, 324; George W. Paton, *A Textbook of Jurisprudence*, 3rd ed. by D. P. Derham (Oxford, 1964), pp. 207–208.

ordinary words of the language, because they are expressions of a technical nature which are usually not intelligible to a layman in their full implications and ramifications within the legal system.

The reasoning processes used in the law are to a far-reaching extent based on rules and principles embodying concepts of varying technicality. In many, perhaps most, cases calling for legal analysis, the rule to be applied can easily be identified and does not stand in competition with other rules.[1] After the facts in dispute between the parties have been ascertained by the court, the facts can be subsumed under the rule by a process of logical deduction. Before this can be done, it may become necessary, however, to interpret ambiguous words or indeterminate concepts forming part of the rule. It may also happen that a general rule covering the facts is not readily available to the judge but may be extracted by the mode of inductive reasoning from a sequence of earlier decisions. There are also many cases where the facts as found by the court do not fit within the semantic frame of an existing rule, but where the device of analogy is used by the court in applying a related rule or similar precedent embodying a general policy rationale appropriate for the decision of the case.

The term "analytical reasoning" is used in this section to designate the use of deduction (sometimes supplemented by interpretation of an equivocal term), induction, and analogy in the solution of legal problems. It is characteristic of analytical reasoning that a premise in the form of a rule or principle is available to the court, although the meaning and reach of the rule or principle may not in all instances be certain, and although a complex process of factfinding may have to precede the application of the rule.

The simplest form of legal argumentation is reasoning by means of a simple syllogism, understood in the Aristotelian sense as "discourse in which, certain things being stated, something other than what is stated follows of necessity from their being so." [2] The following would be an example of an Aristotelian syllogism:

All organisms are mortal
Man is an organism
Man is mortal.

[1] Benjamin N. Cardozo, *The Nature of the Judicial Process* (New Haven, 1921), p. 164: "Of the cases that come before the court in which I sit, a majority, I think, could not, with semblance of reason, be decided in any way but one." See also Roscoe Pound, Book Review, 60 *Yale Law Journal* 193, at 195–196: "Every day practice shows that a great mass of rules are applied without serious question."

[2] Aristotle, "Analytica Priora," in *The Basic Works of Aristotle*, ed. R. McKeon (New York, 1941), p. 66.

In this syllogism, the first line represents the *major premise*, the second line the *minor premise*, and the third line the *conclusion*. This example of a syllogism is unassailable from the point of view of formal logic, which is a science that "exhibits all the relationships permitting valid inferences that hold between various propositions considered merely with respect to their form." [3] Regardless of whether or not the major and minor premises in the above syllogism are materially correct,[4] it is clear that formally the conclusion appears as an unimpeachable inference from the premises.

There are, in the law, many instances where simple syllogistic reasoning provides the solution of a legal question. For example, the United States Constitution provides that no person shall be eligible for the office of President of the United States who shall not have attained the age of thirty-five years.[5] Let us assume that a candidate for the highest office in the land declares that he will have attained the requisite age by the date of inauguration, while this assertion is being contested by a rival candidate. After a court or election board has determined that the candidate's claim is not supported by the evidence, the conclusion that he is ineligible for the Presidency follows with necessity from the application of the major premise embodied in the constitutional provision to the facts of the case.[6] Or let us assume that a statute provides that "a person who appropriates a movable thing belonging to another is guilty of larceny." If the facts found by the court show that *A* has stolen a car belonging to *B* with the intent of keeping it, the inference that *A* has committed a larceny will be drawn by the court with unchallengeable cogency.[7] It is, of course, conceivable that the court was misled by untrustworthy testimony and reached an erroneous conclusion on the merits of the case, but this

[3] R. M. Eaton, *General Logic* (New York, 1931), p. 8.

[4] Whether the major premise is substantively true depends on whether the term "organism" is or should be limited to living organisms. The truth of the minor premise has been questioned by those who regard man as a mechanical engine rather than an organism.

[5] Art. II, Sec. 1.

[6] It might be noted that the term "eligible," as used in the constitutional provision, is not free from ambiguity since it does not specify at what point in the election procedure the candidate must have attained the requisite age. This ambiguity has no relevance, however, to the solution of the case discussed in the text, since it is obvious that the age of thirty-five must have been reached by the time of the inauguration.

[7] Inasmuch as a ready-made rule presenting no problem of interpretation is often available in the context of the facts as found by the court (see *supra* n. 1), Gidon Gottlieb's statement that "reasoning guided by rules is not reducible to a form of deductive reasoning" cannot be accepted if it is intended as a generalization applicable to *all* forms of legal reasoning guided by rules. *The Logic of Choice* (New York, 1968), p. 166. See also *id.*, p. 18.

possibility does not vitiate the fact that the court arrived at its conclusion by deductive reasoning.

A significant variation of the problem would be introduced if *A* had taken the automobile from *B* solely for the purpose of taking a trip from New York to San Francisco and back, and if he had restored the car to *B* after his return. The question would then arise whether this conduct falls within the purview of the term "appropriate," as used in the larceny statute, or whether this concept was meant to exclude instances of a merely temporary use of an object. If another section of the statute, or a binding decision of a court of last resort, had assigned a broad meaning to the ambiguous term, so as to include temporary use, then two major premises are available to the judge—the original statute and its authoritative interpretation—from which a conviction will follow with syllogistic necessity. It might also happen that the legislative history of an equivocal statute might provide an answer to an interpretative difficulty faced by a court, so that a finding of consensus on the part of the legislators as to the meaning of a statutory word, concept, or phrase might offer an auxiliary source for the drawing of a deductive conclusion.

In some cases, no statutory or other ready-made rule is available to a judge to guide him in his decision, but he may be able to distill a pertinent rule or principle from a comparison of a string of earlier decisions with precedential value. In that event, the judge is said to derive a general rule from particular instances by the method of inductive reasoning.[8] Thus, a sequence of cases may show that persons who had purchased food products or drugs in retail stores and had been seriously injured by their consumption were awarded damages against the manufacturers of these articles. From these decisions, a judge may derive a rule to the effect that a manufacturer, even in the absence of privity of contract, is liable in damages to a vendee who has suffered harm from the use of a defective product.

It should be emphasized, however, that the inductive drawing of generalizations from particular cases exhibiting common elements rarely occurs with logical inevitability. If, for example, in a series of products liability cases the purchaser was placed in jeopardy of life by the consumption of defective goods, there would arise the question whether the rule to be extracted from these precedents should be limited to this situation, or whether it should be extended to cases not involving danger of death. If, in all the earlier cases, the purchased articles consisted of food or drugs, there would remain open the ques-

[8] On inductive reasoning see A. G. Guest, "Logic in the Law," in *Oxford Essays in Jurisprudence*, ed. A. G. Guest (Oxford, 1961), pp. 188–190.

tion whether the rule can reasonably be held limited to these categories of products, or whether it should be broadened to include other articles capable of causing harm.[9] Once the judge has formulated in his mind the rule he deems implicit in the earlier cases, he will apply it by deductive reasoning to the facts in the litigated case before him.

Legal rules may have an open-textured character not only in situations where they have been gained by the judge in a process of inductive reasoning from precedents. Even where a rule has been clearly articulated in an authoritative decision or line of such decisions, a court of last resort has far-reaching powers, under the common-law system, to modify a judge-made rule, engraft exceptions upon it, or overrule an earlier case altogether.[10] An equivalent power does not exist, under this system, in relation to statutory rules. But instances may be recorded, under the common-law as well as civil-law systems, where courts have recognized equitable exceptions to statutory prescriptions in order to avoid highly unjust results.[11]

Reasoning by analogy involves the extension of a legal rule to a fact situation not covered by its words but deemed to be within the purview of a policy principle underlying the rule. If there is a rule, for example, that the executor of a will is precluded from bringing actions outside the state of his appointment, it might be extended by analogy to an administrator of an estate. This extension would be predicated on the rationale, held to be implicit in the rule in question, that the authority of court-appointed functionaries to act in a representative capacity should be limited to the jurisdictional limits of the state in which they are performing official acts. Another example of analogy would be the application of a rule, or set of rules, imposing liability for negligent performance of obligations on vendors, purchasers, landlords, tenants, and bailees to other categories of obligors, in the absence of cogent arguments favoring the limitation of the principle to the enumerated groups.

Where analogical reasoning is employed, the broadened rationale or extended principle which forms the basis of the final decision does not impose itself upon the decision-maker with logical ineluctability. From the point of view of logic, the court always has the alternative of resorting to the device of an *argumentum e contrario*. In the first example,

[9] For a more elaborate discussion of this question see *infra* Sec. 87.

[10] The remaking of rules in the process of handling precedents under the common-law system is described by Edward H. Levi, *An Introduction to Legal Reasoning* (Chicago, 1949), pp. 1–6. For a critique of some aspects of Levi's treatment see Edgar Bodenheimer, "A Neglected Theory of Legal Reasoning," 21 *Journal of Legal Education* 373, at 374 (1969).

[11] See *supra* Sec. 76.

the court could take the position that the omission of administrators from the rule barring suits in other states indicates that they should be excluded from the scope of this prohibition. In the second example, the enumeration of specific categories of obligors could furnish the premise for a logical conclusion that no general liability for negligent performance of obligations was intended by the makers of the rule.

Whether or not the analogous application of a rule is legitimate does not depend on deductive logic but on considerations of policy and justice. A fundamental tenet of justice demands that essentially similar situations be treated in the same way by the law.[12] It is the purpose of analogous application of rules to aid in the implementation of this axiom by an equal treatment of cases falling under the same principle of policy. But there may be weighty reasons for ignoring this tenet of justice in some areas of the law for the sake of other postulates deemed superior in importance under certain circumstances. Analogy is prohibited, for example, in the field of criminal law, because the uncertainties connected with its use or nonuse are deemed to be at odds with the need of giving sufficient notice to potential offenders as to what the law allows and disallows. In the Anglo-American orbit, even the analogous application of non-criminal statutes is for the most part frowned upon in order to protect reliance on the wording of a statute as a measure of its foreseeable scope of application.[13]

It has sometimes been asserted that, in contrast to deduction (involving reasoning from general to particular) and induction (constituting reasoning from particular to general), analogy may be characterized as reasoning from one particular to another.[14] Let us assume, for example, that there is a decision granting relief to an individual whose enjoyment of his real property was disturbed by the emission of fumes from a nearby factory. Let us also assume that in a later case involving a disturbance caused by heavy blasting operations the court applies the earlier decision by analogy because of essential similarity of the two fact situations. It is possible that the premise underlying the earlier decision had not been articulated by the court, and that the judge in the second case based his judgment simply on an explanation of the factual similarities without reliance on any explicit rule. This would present the appearance of reasoning from one particular example to another.

Closer analysis will reveal, however, that without the use of some generalization embodying a policy consideration covering both the

[12] See *supra* Sec. 52.

[13] This problem will be discussed *infra* Sec. 85.

[14] Aristotle, *supra* n. 2, p. 103; John Stuart Mill, *A System of Logic*, 8th ed. (London, 1872), p. 365.

earlier and the present fact situation, the court would not be in a position to determine whether the result arrived at in the first case should also be reached in the second.[15] The generalization implicit in the first decision ("Where a residential owner is seriously affected in the enjoyment of his property by emissions of fumes or smoke from and industrial plant, he may recover damages") is extended by analogy to a situation where the noxious interference is caused by noise rather than pollution of the air. The broader policy principle embracing both cases holds that a homeowner is entitled to protection against nuisances interfering with the enjoyment of his property rights. Once this principle has been recognized by the court, its application to the facts of the case does not ensue with syllogistic necessity if the court has power to engraft exceptions upon the principle. The court may find, for example, that the owner bought his property in a section of town devoted primarily to industrial uses, and that he should therefore be deemed to have assumed the risk of disturbances from smoke or noise.

These considerations demonstrate the relatively limited role which formal logic plays in the solution of legal problems. It serves as a vehicle of deductive reasoning when a statutory or judge-made rule which is plain in its meaning or has been clarified by a previous authoritative interpretation is binding on the court deciding the case. On the other hand, when the court has some measure of discretion in interpreting the words of a statute, recognizing certain exceptions from its command, extending or restricting the scope of a judge-made rule, or abandoning such a rule, syllogistic logic is of small use in the disposition of such problems. Even where a deliberate attempt is made to maximize the range of deductive reasoning in judicial administration through the adoption of an inclusive code regulating innumerable detailed situations, the area of vacant spots and ambiguities in the positive legal system will still be comprehensive enough to place a limiting barrier on the operative scope of syllogistic logic.[16] We do no longer believe in the possibility of a jurisprudence of conceptions designed to set up a system of tightly and uniformly defined legal concepts capable of furnishing infallible and mechanically operating yardsticks for the decision of any and all cases coming before the courts. "The law . . . never succeeds in becoming a completely deductive system." [17]

[15] See in this connection the analysis of reasoning by analogy in Rupert Cross, *Precedent in English Law*, 2d ed. (Oxford, 1968), pp. 181–190.

[16] There may be instances, however, where the use of analogy obtrudes itself upon the judge with a well-nigh compelling force.

[17] Morris R. Cohen, "The Place of Logic in the Law," in *Law and the Social Order* (New York, 1933), p. 167. See also Clarence Morris, *The Justification of the Law* (Philadelphia, 1971), pp. 7–8, 89–109.

It would, on the other hand, not be appropriate to deny or minimize the role of formal logic in the law. When Justice Holmes coined his famous apothegm, "The life of the law has not been logic: it has been experience," [18] he was addressing himself to the problem of "*determining* the rules by which men should be governed." [19] He was not discussing the situation where a judge was obligated to decide a litigated case in accordance with a rule of law clearly applicable to it. In cases of this nature, formal logic serves as an important tool of an equal and impartial administration of justice. It enjoins the judge to carry out the legal mandate consistently and free from bias. For example, if there is a statute penalizing bribery of public officials, and it has been determined that a certain individual has committed such an act of bribery, the judge or jury should draw the necessary conclusion demanded by syllogistic logic and refrain from disposing of the case on grounds of favoritism or other extraneous considerations. Although the most troublesome questions of the legal order cannot be solved by deductive logic, this does not mean that logic and experience stand to each other in a relation of contrast or opposition. Unless we falsely identify logic with "clock-work" reasoning acting in total disregard of moral and social considerations, we must conclude that logic and experience are allies rather than foes in the performance of the judicial function.[20]

Section 81. *Dialectical Reasoning*

According to Aristotle, dialectical reasoning seeks "an answer to the question which of two contradictory statements is to be accepted." [1] When the premise serving as a basis for reasoning is clear, well-known, or self-evident, dialectical argumentation is not needed. Reasoning in that event proceeds, in Aristotle's view, by way of apodictic demonstration, which permits us to arrive with unimpeachable certainty at a deductive conclusion. When it becomes necessary, on the other hand, to make a choice between two or more possible premises or fundamental principles, there may be a doubt as to the correct answer to a question "because there are strong arguments on both sides." [2]

[18] Oliver W. Holmes, *The Common Law* (Boston, 1923), p. 1 (italics supplied).
[19] *Ibid.*
[20] In accord: Guest, *supra* . 8, p. 177. See also Leonard G. Boonin, "Concerning the Relation of Logic to Law," 17 *Journal of Legal Education* 155, at 161 (1964): "Perhaps one can avoid the sharp antithesis between logic and experience by saying: 'The life of the law is not logic, but experience as structured by logic.'"
[1] Aristotle, "Analytica Priora," in *Organon,* transl. H. Tredennick (Loeb Classical Library ed., 1949), Vol. I, Bk. I. ii. 24a.
[2] Aristotle, "Topics," in *supra* n. 1, Vol. II. Bk. I. xi. 104b.

In that event, an attempt must be made to find the best answer through dialogue, disputation, critical inquiry, and defense of one point of view against another. Since there are no irrefutable "first principles" which impart certainty to the conclusion, we can often do no more than to grope for the truth by advancing arguments which are plausible, persuasive, and reasonable.[3] In setting forth our reasons, Aristotle says, we may wish to appeal to the general opinion of the masses or that of a majority; we may also prefer to rely on the views of the most enlightened and knowledgeable members of the community. Our task of persuasion is sometimes rendered more difficult by the fact that the various repositories of opinion happen to be in conflict with one another.[4] Once we have established, through the process of dialectical sifting, a workable premise which can serve as a foundation for an acceptable conclusion, we shall apply this premise by an act of syllogistic deduction to the solution of our concrete problem.[5]

In the field of the law, there are three principal situations in which the use of dialectical reasoning becomes necessary for a judge in the resolution of a controversy. These three groups are: (1) novel situations in which no convenient rationale of decision is provided for by the law; (2) situations where two or more competing premises are available for the determination of an issue, among which a genuine choice must be made; and (3) instances in which a rule or precedent covering the case at hand exists, but where the court, in the exercise of a power granted to it, rejects its application as unsound, either generally or at least in the context of the litigated facts. In all these situations, it is impossible for a court to dispose of the controversy by means of an analytic form of argumentation, that is, by deduction, induction, or the use of analogy. In cases of this nature, resort to dialectical persuasion also becomes unavoidable for an attorney trying to induce the court to arrive at a conclusion favorable to his client.[6]

The first group of situations outlined above is concerned with what is often called "the unprovided case." [7] Such a case may arise in a newly added area of the law, such as atomic energy or environmental

[3] Aristotle, *The Art of Rhetoric,* transl. J. H. Freese (Loeb Classical Library ed., 1947), Bk. I. ii. 1355b. 1356 a and b. Aristotle's cautious conclusion that dialectical reasoning yields only probable conclusions differs from the more pretentious notion of Hegel that dialectical thinking will produce a set of indisputable truths regarding the movements of the cosmos and of human society.

[4] Aristotle, *supra* n. 2, Bk. I. i. 100b and xi. 104b.

[5] Aristotle, *supra* n. 1, Bk. I. ii. 24a.

[6] For a detailed analysis of dialectical reasoning, based on English and American case materials, see Edgar Bodenheimer, "A Neglected Theory of Legal Reasoning," 21 *Journal of Legal Education* 373 (1969).

[7] See John Dickinson, "The Problem of the Unprovided Case," 81 *University of Pennsylvania Law Review* 115 (1932).

control. It may also come up in a traditional field, such as contracts and torts, when unusual combinations of facts are presented which do not admit of a convenient use or extension of existing principles. In that event, it may be necessary to bring to the fore the pragmatic considerations or exigencies which should be taken into account in dealing with the hitherto unresolved problem.

A good example of the second type of problem is presented by the case of *Hynes v. New York Central Railroad.*[8] After swimming across the Harlem River, a sixteen-year old boy climbed upon a springboard which projected from a bulkhead on the Bronx side of the river. The board was affixed to land belonging to the railroad. As he was standing at the end of the board, poised for a dive, he was electrocuted by high-tension wires which fell from a pole owned by the railroad and plunged him into the river. In a suit for damages brought by the boy's mother, competing analogies were invoked by counsel on both sides. The attorney for the railroad likened the position of the boy at the time of the accident to that of a trespasser on private land to whom the proprietor owed no duty of due care. The attorney for the plaintiff argued that the space above and below the board was in the public domain, and that the boy should be treated in analogy to a traveler on a public highway. The lower court adopted the analogy proposed by the defendant and dismissed the complaint, while the Court of Appeals accepted the opposing view and reversed the judgment. Justice Cardozo, who wrote the opinion, pointed out that both analogies were logically possible but reached the conclusion that justice and reason called for the imposition of legal liability. A study of the opinion illuminates the complexity of reasoning required in cases where the result cannot be deduced from a clearly applicable legal premise.

The third category of cases listed above comprises two different but related sets of problems. It happens not infrequently that a major premise in the form of a rule is available to the judge, but is considered by him antiquated and wholly out of tune with the realities of the contemporary scene. He may in that event wish to set aside the rule—provided that the legal system accords this power to him—and substitute for it a norm better adapted to the needs of the present. It is obvious that the reasons advanced by him in support of the new rule will constitute an attempt to justify a new normative solution rather than to deduce legal consequences from a given premise.[9]

[8] 131 N.E. 898 (1921).

[9] Cicero said that dialectical argumentation is concerned with *invention of arguments* rather than with judgments of their logical validity. "Topica," in *De Inventione*, transl. H. M. Hubbell (Loeb Classical Library ed., 1949), Bk. I, ii. 6–7. An excellent illustration is the reasoning used in *The Federalist*, where

A related problem arises in cases where the judge chooses to fashion an exception from a preexisting rule, without wishing to set aside the rule altogether. For example, notwithstanding the fact that the Statute of Frauds required contracts for the conveyance of real estate to be in writing, the English Court of Chancery (and its successor courts in the United States) enforced oral contracts of this kind if the agreement had been performed in part by one side.[10] Here again, the court must devise persuasive arguments in defense of a principle of equity which is at odds with a positive rule of law in force.

In all of the three aforementioned categories of cases, the judicial decision-maker becomes confronted with a genuine choice. It is either a choice of a suitable norm to fill a vacuum in the law, or a determination to give preference to one analogy over a competing one, or a discretionary replacement of an outworn rule by a more timely one. It is often assumed that the decision of the judge in such cases is governed by "emotive-volitive" factors, such as an intuitive hunch, an irrational predilection, or a more or less arbitrary fiat disguised by an ex post facto rationalization.[11] This position cannot be accepted. Dialectical argumentation in legal matters is basically rational, although it must be conceded that an intrusion of emotional subcurrents or unspoken prejudices cannot always be avoided.[12]

As Dennis Lloyd has aptly pointed out, a choice made by the judge "is not logical in the sense of being inductively inferred from given premises, but it has a kind of logic of its own, being based on rational considerations which differentiate it sharply from mere arbitrary assertion." [13] It is characteristic of this kind of logic that it is material rather than formal. It is, in the words of John Dewey, "concerned with control of inquiry so that it may yield warranted assertions." [14] It is a discipline which enables us to subject problematic situations to an in-

some of the Founding Fathers of the United States set out to justify a new constitutional scheme.

[10] See William F. Walsh, *A Treatise on Equity* (Chicago, 1930), pp. 395–405.

[11] See Alf Ross, *On Law and Justice* (Berkeley, 1959), pp. 140–141; Joseph C. Hutcheson, "The Judgment Intuitive: The Function of the Hunch in Judicial Decision," 14 *Cornell Law Quartely* 274 (1929); Jerome Frank, *Courts on Trial* (Princeton, 1950), pp. 170–171.

[12] For an elaboration of the view that dialectical reasoning is essentially rational see Chaim Perelman, "Justice and Justification," 10 *Natural Law Forum* 1, at 5, 16–18 (1965). On Perelman's approach see also Julius Stone, *Legal System and Lawyers' Reasonings* (Stanford, 1964), pp. 327–335.

[13] *Introduction to Jurisprudence*, 3rd ed. (New York, 1972), pp. 731–732. See also Richard A. Wasserstrom, *The Judicial Decision* (Stanford, 1961), pp. 23–24; Gidon Gottlieb, *The Logic of Choice* (New York, 1968), pp. 23-31.

[14] *Logic: The Theory of Inquiry* (New York, 1938), p. 4. On Dewey's conception of logic see Edwin W. Patterson, "Logic in the Law," 90 *University of Pennsylvania Law Review* 875, at 889–900 (1942).

cisive probing designed to expose and bring into focus all relevant aspects of a problem and to find reasonable ways and means of solving it.[15] A careful consideration of all arguments speaking for and against the contemplated solution is an important part of this process. The result finally reached will usually gain in plausibility and persuasiveness if it rests not only on one single ground but is strengthened by the cumulative force of a number of reasons.[16]

It bears emphasis that the logic of choice in the law is not restricted to a purely teleological, result-oriented type of reasoning. It is in part a logic relative to consequences, in another part a logic based on antecedents.[17] Wherever possible, a competent judge will use criteria of judgment which are not the product of this uncontrolled will or subjective predilections, but which have their basis in the legal and social order as a whole and in the source materials with which tradition, the mores of society, and the general spirit of the times have provided the judge. Among the objectivized factors which operate as a restraint on the volitional element in adjudication are the firmly established value norms of the culture, the fundamental principles pervading the legal system, the obvious necessities of the situation, and the prevailing guidelines of public policy.[18] In many instances, the elasticity of these sources will make it possible for the judge to take into account the anticipated consequences of his decision.

It should not be assumed that the analytical and dialectical forms of reasoning necessarily present alternatives in the sense that the use of one excludes resort to the other. Quite frequently, both modes of argumentation appear in some kind of blend within the four corners of the same decision. This will be true, for example, in instances where some general principle or other premise for the solution of a legal problem can be found, but where an elaborate, complex, and possibly circuitous course of ratiocination is needed to justify its application to the case at hand.

[15] It might be noted that common linguistic parlance supports this broad use of the term logic. When one person proposes to some other person a plan for dealing with a problem and convinces him of its merits, the latter's reply might well be: "Your idea sounds logical to me."

[16] Lloyd, *supra* n. 13, p. 731. The decision of the California Supreme Court in *Muskopf v. Corning Hospital District*, 55 Cal. 2d 211 (1961) exemplifies the use of multiple arguments in overruling a long-entrenched legal doctrine.

[17] Concerning this distinction see John Dewey, "Logical Method and Law," 10 *Cornell Law Quarterly* 17, at 26 (1924).

[18] See *supra* Ch. XVI. Cf. also Ilmar Tammelo and Lyndel Prott, "Legal and Extra-Legal Justification," 17 *Journal of Legal Education* 412, at 416 (1965). For a discussion of exceptional situations where the judge may be justified in departing from the mores of his society see Bodenheimer, *supra* n. 6, p. 394.

An illustration of an admixture between analytical and dialectical argumentation is supplied by the decision of the United States Supreme Court in *Miranda v. Arizona*.[19] In this case, the Court set out to prove that the privilege against self-incrimination recognized by the Federal Constitution makes it mandatory upon the police to inform persons suspected of crime, as a prerequisite to lawful interrogation, of their right to remain silent and have the assistance of counsel. Since the Fifth Amendment merely says that an accused person, in a criminal prosecution, shall not be compelled to testify against himself, the conclusion that the required warnings must be given prior to interrogation, even though no actual compulsion to speak may be exercised by the custodial officers, could not be derived from the Constitution by an act of direct, syllogistic deduction.

The Court proceeded to show, by a prolonged and elaborate course of reasoning, that the atmosphere prevailing in a police station during interrogations was inherently coercive, so that subtle and indirect pressures tend to be brought to bear upon the arrested person, which may undermine his will to resist and induce him to reveal the secrets of his case. In order to supply an empirical foundation for this finding, the Court quoted extensively from influential manuals used by police officers for the purpose of proving that by various tricks, innuendos, and misleading assertions, interrogated persons are frequently trapped into making incriminating statements, even though these statements might be called "voluntary" according to the traditional understanding of the term. The Court also discussed potential counterarguments to which its holding might be exposed, especially the contention that society's need for effective protection against crime militates against a broad construction of the privilege against self-incrimination. Thus, although the ultimate conclusion reached by the Court was in a sense deduced from a formal source of the law, the course of reasoning pursued by the Court was far removed from the analytic model of argumentation and utilized the typical tools of dialectical persuasion.

Section 82. *The Role of Value Judgments in the Law*

According to Hans Kelsen, a judgment that an actual behavior is such as it ought to be or ought not to be according to a valid norm is a value judgment.[1] As stated in this generality, his position cannot be accepted in its implications for the legal process. Not all acts by which a judge

[19] 384 U.S. 436 (1966).

[1] "Norm and Value," 54 *California Law Review* 1624 (1966); *The Pure Theory of Law*, transl. M. Knight (Berkeley, 1967), p. 17.

subsumes the facts as found by him under a formal or informal source of the law are evaluative in character. Where analytical reasoning is used by the judge,[2] the scope of judicial axiology [3] is either minimal or greatly reduced. Where dialectical reasoning is employed by a court,[4] the range of evaluation of the contemplated result in terms of its righteousness or justice may be very wide but nonetheless subject to limitations imposed by the nature of the social system.

The evaluative factor is excluded from judicial decision-making when a norm which is unambiguous in its core meaning is clearly applicable to the facts of a case. Thus, where a premeditated homicide has been proved beyond a reasonable doubt by uncontested evidence, the conclusion that the defendant has committed murder does not call for the making of a value judgment by the court. Its conclusion in that event is reached by the logical method of syllogistic deduction.[5]

Even when the meaning and scope of a legal prescription are not clear, axiological considerations need not necessarily enter into the process of clarification and interpretation. Suppose, for example, a state or country provides in its constitution that "no person shall be deprived of the equal protection of the laws." When the first case to be adjudicated under this provision comes up in a court of law, a doubt arises whether this provision calls merely for the even-handed enforcement of the laws without respect of persons, or whether it requires beyond this a non-discriminatory content of the laws themselves. Let us assume further that there exists a firmly established norm to the effect that doubts in constitutional interpretation are to be resolved by reference to the intent of the constitutional assembly. If the debates held in that assembly concerning the ambiguous provision reveal clearly that one of the possible constructions was favored by a large majority of the members, no normative discretion is left to the court in performing its function of interpretation. If, on the other hand, no historical, precedential, or other guidance is available to the court for resolving the problem, it will have to rely on its own resources in filling the gap in the constitutional structure. In that event, the court will have to make a value judgment, based on its views of justice and sound policy, as to which interpretation of the clause is preferable to the other.

[2] On analytical reasoning see *supra* Sec. 80.

[3] The term axiology is derived from the Greek word *axios* (valuable) and designates the sphere of evaluative, as distinguished from logical or descriptive, assertions.

[4] On dialectical reasoning see *supra* Sec. 81.

[5] It is possible, however, that an element of appraisal was present in the fact-finding process if it was necessary for the court to form an opinion about the trustworthiness of a witness.

The evaluative element in the judicial process is operative at its maximum level when judges fashion new norms in the unprovided case or discard obsolete rules in favor of timely ones. In such situations, the dialectical reasoning used by judges in weighing the advantages and drawbacks of contemplated courses of action often lacks the relative certainty and sometimes irrebuttable cogency of deductive, inductive, and analogical reasoning. Choices between conflicting interests which are not directed by preexisting norms and principles require the making of value judgments.

Even in the area of creative determination of the law, judicial discretion is usually restricted by the general nature of the social system. As was pointed out in the preceding section, the value patterns of the culture tend to form hedges and moats which bar the free roaming of judicial valuation.[6] For example, in a liberal society recognizing a far-reaching freedom of contract, it would be difficult for a court to invalidate an agreement (in the absence of a positive prohibition) on the ground of repugnancy to public policy and justice, unless a strong case can be made out to show that basic notions of collective morality were violated by the agreement, or that the integrity of the social fabric would be jeopardized by its enforcement.[7] Only rarely are the value judgments pronounced by judges autonomous in the sense that they are independent of the mores, fundamental premises, and social ideals of the time and place.

Advanced legal systems tend to limit the scope of axiological reasoning in the judicial process because decisions based on subjective judicial value preferences normally present a greater measure of indeterminacy and unpredictability than decisions based on formal or informal societal norms.[8] It is assumed that the parties in a litigated case usually do not wish to subject themselves to the idiosyncrasies and undirected reactions of judicial officers. Furthermore, as Karl Larenz has pointed out, judicial subjectivism is not compatible either with the public interest in legal certainty nor with the postulate of justice that equal situations should be treated equally.[9] Even where the methods of arbitration or mediation are used, arbitrators and mediators are usually

[6] It might be said that these barriers to unrestrained law-making by judges are a part of the institutional "is" of a society, as opposed to Kelsen's view that the normative system dwells in the realm of the "ought." See *supra* Sec. 45, n. 35.

[7] For example, a court in a society dedicated to the idea of freedom might take the position that a voluntary agreement to serve as another's slave is incompatible with the fundamental values of the society.

[8] See in this connection Emile Durkheim ,*Sociology and Philosophy*, transl. D. F. Pocock (London, 1953), p. 84: "Social judgment is objective as compared with individual judgment. The scale of values is thus released from the variable and subjective evaluations of individuals."

[9] *Methodenlehre der Rechtswissenschaft*, 2d ed. (Berlin, 1969), p. 133.

expected to pay attention to the fundamental principles of law and public policy of their society.

It would therefore seem safe to state that the principal role which value judgments play in the legal system is that they become incorporated in constitutional provisions, statutes, and other types of norms which operate as objectivized sources of adjudication. In interpreting such sources, the judges will often have to discern the purposes and axiological considerations which underlie their enactment or recognition. Such discernment of valuations immanent in the legal and social system is clearly distinguishable from a volitional imposition of value patterns by the judiciary. Even where the norms embodying some social value judgment were created by the judiciary itself, their adoption may have been induced by the prevalent societal conceptions of justice.[10]

There are however, definite limits to the practicality of channeling societal value judgements into objective and positive sources of law. The ambiguity and vagueness which so often exist at the edges of constitutional provisions and statutory enactments are greatly increased when the courts, in the absence of more clear-cut directives, will have to rely on general principles of justice and public policy. Moreover, it may happen that in such situations a court will have to face a choice between conflicting standards of value. Thus, in the case of *Dennis v. United States*[11] the United States Supreme Court, in upholding the Smith Act of 1940 outlawing the advocacy of revolutionary overthrow of the government, gave preference to the value of national security over the value of freedom of speech and expression. The Court took the position that national security, although not mentioned in the operative clauses of the Constitution, represents an inherent right of governmental self-defense which under certain circumstances must be accorded priority over specifically guaranteed individual freedoms. This was a question to which neither the positive law nor the general value system underlying the constitutional structure provided a definite answer. In such cases, the subjective convictions of individual judges may tip the balance in the resolution of the controversy.[12]

[10] This is the core of truth in the classical conception of the common law, according to which the rules fashioned by courts represent social custom. See *supra* Sec. 72 and *infra* Sec. 88.

[11] 341 U.S. 494 (1951).

[12] A different emphasis, following a change in the composition of the Court, was provided by *Brandenburg v. Ohio*, 395 U.S. 444 (1969), in the context of a state rather than federal law and against a factual setting not involving communist activities. On the relation between the national security interest and civil liberties see generally the comprehensive comment note in 85 *Harvard Law Review* 1130 (1972).

Section 83. *The Aims of Legal Education*

The functions which the law performs for society must necessarily control the ways and means by which lawyers are trained for their chosen vocation. If the chief purpose of the legal system is to ensure and preserve the health of the social body so that people may lead worthwhile and productive lives, then the lawyer must be viewed as a "social physician" [1] whose services should contribute toward the achievement of the law's ultimate goal. That the lawyer engaged in an activity of a legislative character (either as a legislator or as an adviser to lawmakers) is or should be devoting his energies to the promotion of the social good goes without saying. But the existence of unresolved controversies between individuals or groups must also be regarded as a problem of social health, since the perpetuation of unnecessary and wasteful animosities and frictions is not conducive to harmonious and productive living in a community. It may be said, therefore, that judges and lawyers who by their joint efforts bring about a fair and reasonable adjustment of a controversy are performing the task of social physicians. If the dispute were not solved at all, a festering wound on the social body would be created; if it were solved in an inadequate and unjust manner, a scar would be left on this body, and a multiplication of such scars might seriously endanger the preservation of a satisfactory order of society.

One must fully agree with the conclusions reached by Professor Ralph Fuchs to the effect that "today's major need in training lawyers lies in the development of understanding of the institutions and problems of contemporary society, of the lawyer's part in their operation, and of the techniques required for professional participation in solving the major problems with which lawyers deal." [2] Some of the educational tasks which must be taken on in connection with this training must, of course, be delegated to the nonlegal part of the lawyer's academic career. Without a thorough acquaintance with his country's history, the student of the law will be unable to understand the evolution of its legal system and the dependence of its legal institutions on the surrounding historical conditions. Without some knowledge of world history and the cultural contributions of civilizations, he will be at a disadvantage in comprehending major international events that may exert an influence on the law. Without some proficiency in general political theory and insight into the structure and operation of governments he will be handicapped in apprehending and approach-

[1] This term was used by Abraham Flexner in his book *A Modern College and a Modern School* (Garden City, 1923), p. 21.

[2] "Legal Education and the Public Interest," 1 *Journal of Legal Education* 155, at 162 (1948).

ing problems of constitutional and public law. If he lacks training in economics, he will fail to see the close relations between legal and economic questions which exist in many areas of the law. Without grounding in philosophy, he will find it hard to deal with the general problems of jurisprudence and legal theory which are apt to exercise a decisive influence on judicial and other legal processes.

But even during the more strictly specialized phase of the lawyer's education for professional competence, the student must always be reminded that the law is a part of the total life of a society, and that it never exists in a vacuum. It is not a self-sufficient compartment of social science that can be sealed off or divorced from other branches of human endeavor. Many decisions of courts cannot be understood and properly analyzed unless the teacher makes clear the political and social setting in which they were rendered. Many of the older statutes or rules of law may seem strange or even absurd unless we realize that the ideals of justice prevailing at the time of their origin were different from our own.

If this is true, a man cannot be a first-class lawyer if he is merely a legal technician, knowing the machinery of trial procedure and thoroughly versed in the technical rules of the positive law. Justice Brandeis once said: "A lawyer who has not studied economics and sociology is very apt to become a public enemy."[3] And David Paul Brown, a Philadelphia attorney who lived in the early nineteenth century, is reported to have observed: "The mere lawyer is a mere blockhead."

A lawyer who wishes to predict the behavior of judges and other public officials correctly must be able to discern current trends and to see the direction in which his society is moving. The positive rules of the law may always be looked up in textbooks, digests, or encyclopedias if they pass out of the lawyer's memory. But a knowledge of the political, social, economic, and moral forces which are operative in the legal order and determine its course cannot be easily acquired and must be slowly gained by a prolonged and acute observation of social reality. A lawyer, in order to be a truly useful public servant, must be a person of culture and breadth of understanding.

The institutions of legal learning, in addition to giving their students a thorough grounding in the positive precepts and procedures of the law, must teach men to think like lawyers and to master the complex art of legal argumentation and reasoning.[4] But legal education

[3] Quoted by Arthur L. Goodhart, *Five Jewish Lawyers of the Common Law* (London, 1949), p. 31.

[4] See Lon L. Fuller, "What the Law Schools Can Contribute to the Making of Lawyers," 1 *J. Leg. Ed.* 189 (1948); Fuller, "The Place and Uses of Jurisprudence in the Law School Curriculum." 1 *J. Leg. Ed.* 495 (1949).

ought to go beyond these immediate objectives and open up to the students the broadest horizons which can be reached in an encompassing view of the profession. These horizons include the place of the law in a general philosophy of life and society, its ethical aims and their limitations, and the nature and range of the benefits which a society can expect from a legal system impregnated with the spirit of justice. Abraham Flexner once raised the question: "Is it not possible that tensions would be reduced and social evolution achieved with less friction, if our lawyers and judges were not only learned in precedents, but were thoroughly versed in history, ethics, economics, and political science?" [5] The esteem and prestige which a legal system commands in the eyes of general opinion depends to a large extent on the breadth of the perspectives of its functionaries and the character and strength of their sense of responsibility toward the society they serve.

This brief discussion of the aims of legal education may be properly concluded with a quotation from a famous article by Justice Holmes:

> Happiness, I am sure from having known many successful men, cannot be won simply by being counsel for great corporations and having an income of fifty thousand dollars. An intellect great enough to win the prize needs other food besides success. The remoter and more general aspects of the law are those which give it universal interest. It is through them that you not only become a great master in your calling, but connect your subject with the universe and catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law.[6]

[5] Flexner, *supra* n. 1, p. 31.

[6] Oliver W. Holmes, "The Path of the Law," in *Collected Papers* (New York, 1920), p. 202. Note also the following statement by René Dubois, quoted by Daniel Bell, *The Reforming of General Education* (New York, 1966), p. 108: "The persons most likely to become creative and to act as leaders are not those who enter life with the largest amount of detailed specialized information, but rather those who have enough theoretical knowledge, critical judgment, and the disciplines of learning to adapt rapidly to new situations and problems which constantly arise in the modern world."

XVIII

THE TECHNIQUES OF THE JUDICIAL PROCESS

Section 84. *The Interpretation of Constitutions*

Constitutions are destined by their authors to form a fundamental law for the governance of a politically organized group of human beings. A constitutional document sets forth the principles upon which the government of the state is founded. It regulates the division and distribution of the governmental powers among the various organs exercising the sovereignty of the state; it directs the manner in which these powers are to be exercised; and it often contains a chart of the basic rights (and perhaps also the basic duties) which attach to membership in the community for which the constitution is the governing law.

In those countries where the interpretation of the meaning of constitutional precepts is entrusted to an independent judiciary, an exalted task is imposed upon this department of the government. Inasmuch as decisions involving the application of constitutional norms to the problems of government and its relation to the citizens are often fraught with momentous consequences for the well-being and happiness of the polity, the responsibility thrust upon the organs of justice in this area

of judicial administration cannot be discharged without a deep concern for the political, social, and economic impact which a constitutional decision may exert upon the lives of the people and the public weal. What help can general jurisprudence give to the authorities charged with this duty?

There are two cardinal problems in the realm of interpreting constitutional precepts which cannot be solved without some reflection on the ultimate ends of legal ordering. The first is the question of whether uncertainties regarding the meaning of a constitutional provision should be resolved by recourse to the understanding of the provision which was prevalent at the time of its adoption or whether a constitutional provision should be interpreted in the light of the knowledge, needs, and experience existing at the time when the interpretative decision is rendered. The second problem pertains to the recognition or nonrecognition of nonformal sources of constitutional adjudication. It is concerned with the issue of whether the meaning and scope of a positive constitutional command may be interpreted in the light of important principles of policy which have found no direct and immediate acknowledgment in the formal text of the constitution. Our discussion will be limited to these two major problems of constitutional exegesis.

With respect to the first question, the authorities on American constitutional law are sharply divided into two camps. For purposes of convenient terminology, we may describe the view propounded by the members of the first group as the theory of *historical interpretation*, while the second view may be identified as the theory of *contemporaneous interpretation.*

The theory of historical interpretation of constitutional clauses was enunciated with uncompromising frankness by Chief Justice Roger Taney in the case of *Dred Scott v. Sanford.*[1] In that case the United States Supreme Court held that at the time when the Constitution of the United States was adopted, Negroes were regarded as persons of inferior status, not as citizens; that the Constitution did not include them in the term citizens; and therefore that Negroes can have no right to sue in the federal courts under the clause which gives to these courts jurisdiction in suits between citizens of different states.[2] In the course of his opinion, Chief Justice Taney laid down his philosophy of constitutional interpretation in the following words:

[1] 60 U.S. (19 How.) 393 (1857).

[2] On this case see Carl B. Swisher, *American Constitutional Development*, 2d ed. (Boston, 1954), p. 247.

No one, we presume, supposes that any change in public opinion or feeling, in relation to this unfortunate race, in the civilized nations of Europe or in this country, should induce the court to give to the words of the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted. Such an argument would be altogether inadmissible in any tribunal called on to interpret it. If any of its provisions are deemed unjust, there is a mode prescribed in the instrument itself by which it may be amended; but while it remains unaltered, it must be construed now as it was understood at the time of its adoption. It is not only the same in words, but the same in meaning, and delegates the same powers to the Government, and reserves and secures the same rights and privileges to the citizen; and as long as it continues to exist in its present form, it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day.[3]

More recently the same theory of interpretation was advanced by Mr. Justice Sutherland in *Home Building and Loan Assn. v. Blaisdell.*[4] In this case the United States Supreme Court upheld the constitutionality of the Minnesota Mortgage Moratorium Act of 1933, which granted relief to mortgage debtors, on the ground that the severe economic emergency existing in the state when the legislation was passed rendered this exercise of the state's police power reasonable under the circumstances and immune from attack under Article I, section 10 of the Constitution, prohibiting an impairment of the obligation of contracts. In a dissenting opinion, Justice Sutherland pointed out that the contract clause was inserted into the Constitution at a time of emergency for the very purpose of preventing the type of legislation that was passed in Minnesota in 1933. He considered the view of the framers, that *any* relief of debtors was unconstitutional regardless of the existence or nonexistence of an economic depression, as strictly binding upon the court.[5] In another case, Justice Sutherland formulated his theory of constitutional interpretation as follows:

The meaning of the Constitution does not change with the ebb and flow of economic events. We frequently are told in more general words that the Constitution must be construed in the light of the present. If by that it is meant that the Constitution is made up of living words that apply to every new condition which they include, the statement is quite true. But to say, if that be intended, that the words of the Constitution mean today what they

[3] *Dred Scott v. Sanford,* 60 U.S. (19 How.) 393, at 426 (1857).
[4] 290 U.S. 398 (1934).
[5] *Id.,* at 453–455.

did not mean when written—that is, that they do not apply to a situation now to which they would have applied then—is to rob that instrument of the essential element which continues it in force as the people have made it until they, and not their official agents, have made it otherwise.[6]

The opposite theory, the theory of contemporaneous interpretation, was advocated by Chief Justice Marshall in the celebrated case of *McCulloch v. Maryland.* In this case, Marshall declared that the American Constitution was "intended to endure for ages to come and, consequently, to be adapted to the various *crises* of human affairs." [7] The trend of this thought was taken up by Chief Justice Hughes in the Blaisdell case already referred to above, where Hughes repudiated Justice Sutherland's theory of historical interpretation in the following words: "It is no answer to say that this public need [for a moratorium on mortgage foreclosures] was not apprehended a century ago, or to insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time. If by the statement that what the Constitution meant at the time of its adoption it means today, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation." [8] Seconding the views of Justice Hughes, the Supreme Court of Washington once pointed out that "constitutional provisions should be interpreted to meet and cover changing conditions of social and economic life." [9]

In forming a considered judgment on the merits of these opposing arguments, it is well to keep in mind a distinction which Justice Brandeis drew in a dissenting opinion in *Burnet v. Coronado Oil and Gas Co.*[10] In this case Justice Brandeis considered it necessary to distinguish between *interpretation* and *application* of a constitutional provision. The judges of the Supreme Court, including Mr. Justice Sutherland,[11]

[6] *West Coast Hotel Co. v. Parrish,* 300 U.S. 379, at 402–403 (1937). The same position is taken by Thomas M. Cooley, *Constitutional Limitations,* 8th ed. by W. Carrington (Boston, 1927), I, 123–124.

[7] 17 U.S. (4 Wheat.) 316, at 415 (1819). For an interesting study in constitutional interpretation see James B. Thayer, "Legal Tender," in *Legal Essays* (Cambridge, Mass., 1927), pp. 60–90. See also Charles A. Miller, *The Supreme Court and the Uses of History* (Cambridge, Mass., 1969), pp. 149–169, with useful references to the literature on constitutional construction.

[8] *Home Building & Loan Assn. v. Blaisdell,* 290 U.S. 398, at 442–443 (1934).

[9] *State v. Superior Court,* 146 P. 2d 543, at 547 (1944). See also Justice Holmes in *Gompers v. U.S.,* 233 U.S. 604, at 610 (1914), to the effect that the meaning of constitutional terms is to be gleaned "from their origin and the line of their growth."

[10] 285 U.S. 393, at 410 (1932).

[11] See the quotation above from his opinion in *West Coast Hotel Co. v. Parrish, supra* n. 6.

have usually agreed that a constitutional clause, as interpreted in consonance with its original understanding, must often be applied to new conditions and new fact situations which would have been unfamiliar to its framers. Thus, after it has been determined by an authoritative interpretation that the equal protection clause of the Constitution prohibits classifications and discriminations devoid of reasonableness, the question of whether or not a certain discriminatory law violates the clause must be decided in the light of the conceptions of reasonableness prevailing at the time of the decision. After the commerce clause has been construed to preclude the imposition of substantial burdens upon interstate commerce, the question of whether a particular burden on such commerce is substantial enough to warrant judicial interposition must be appraised against the background of the conditions of commerce existing at the time of the dispute. Even on questions involving application rather than interpretation of constitutional provisions, however, the judges may disagree on whether they should feel bound by earlier precedents dealing with substantially identical fact situations.

The chief point of such controversy centers around the area of judicial *interpretation* of the meaning of constitutional precepts. If the framers of the contract clause of the Constitution had intended to bar *any and all* impairments of contracts, may the judges of the Supreme Court later take the position that, for strong and convincing reasons of public order and morality, certain types of impairments may be countenanced? If the framers of the Constitution desired to impose on Congress an absolute incapacity to tamper with freedom of speech and assembly, may the Supreme Court subsequently sanction certain congressional restrictions on free speech and assembly deemed imperative in the interest of national security and self-preservation? Here we are confronted with an issue of clear-cut scope and utmost gravity.

In trying to find a solution for this problem, one may reasonably start from the presupposition that a generation of men intent upon setting up a durable framework of government and societal organization are necessarily handicapped by certain limitations of experience and shortcomings of vision which will be made manifest by long-range operation and functioning of the constitutional system created by them. Such inability to foresee certain consequences and concomitants of a new institutional order is a limitation of perception which even the most gifted and ingenious men are heir to. It would be unwise to assume that the writers of a constitution, even if they represent an august body of experienced men, are unaware of these confining limits of their judgment and desirous of forcing their time-bound interpretation of the Constitution, in every detail and particularity, upon future

generations. It should, on the contrary, be assumed that they would not want to foreclose the people of a later time from solving their problems in their own way, as long as such a solution remains consistent with the general spirit and basic objectives of the constitutional system they fashioned. Inasmuch as they sought to establish an enduring pattern for societal living in the knowledge that social conditions are always in a state of flux and subject to unpredictable contingencies, it would be unreasonable to assume that they regarded the fundamental law they established as a complete petrification of the *status quo* as it existed at the time of the adoption of the law. When Mr. Justice Cardozo declared that "a constitution states or ought to state not rules for the passing hour, but principles for an expanding future," [12] his words may be interpreted as reflecting not only his own views but also those of every broadminded and judicious constitution-maker. It must therefore be concluded that, in situations where a material and substantial change of conditions has occurred, no injustice is done to the founding fathers of the American commonwealth, or of any other commonwealth, if the courts of a later day, instead of ascertaining the intent which these men voiced with respect to the meaning of a constitutional clause in their own day, attempt to determine the intent which these men would presumably have held had they foreseen what our present conditions would be.[13]

This view of constitutional interpretation should, however, be tempered by a qualifying consideration. Even though the enactment of a constitution may properly be construed as a delegation of a mandate to its future interpreters to treat it as a living instrument designed to meet the varying exigencies of later times, this mandate cannot be held to extend to changes which would totally subvert the spirit of the document and transform its precepts into the opposite of what they were originally meant to be.[14] The difference between modification and subversion of a constitutional provision through the process of interpretation may be illustrated by some examples. A constitutional clause guaranteeing freedom of speech and press might be held, under a permissible latitude of interpretation, not to sanction utterances posing a serious threat to the safety of the nation, such as publication of troop ship sailings in wartime, or statements apt to divide the nation into

[12] Benjamin N. Cardozo, *The Nature of the Judicial Process* (New Haven, 1921), p. 83.

[13] *Id.*, p. 84; Josef Kohler, "Judicial Interpretation of Enacted Law," in *Science of Legal Method* (New York, 1921), pp. 192–193; Lorenz Brütt, *Die Kunst der Rechtsanwendung* (Berlin, 1907), pp. 62–65.

[14] See in this connection the dissenting opinion of Mr. Justice Frankfurter in *National Mutual Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, at 646–647 (1949).

hostile and warring camps, such as incitements to racial or religious hatred and strife. It can be reasonably assumed that the purpose of guaranteeing freedom of expression was to ensure full and even hot-headed debate of all matters of public concern; but the intent to permit disclosure of information likely to benefit an enemy or the dissemination of propaganda apt to engender riots or civil strife need not be imputed to the framers of the guaranty. On the other hand, interpretations of the free-speech guaranty which would enable the legislature to suspend it on slight pretexts or by simple reference to the public interest would clearly violate the spirit and purpose of the guaranty, even though the prevailing views regarding the value of free speech might have undergone a marked change. Only a new constitution or a far-reaching amendment could legalize the new attitude toward free speech under these circumstances. In the same vein, under a constitution based on the general principle of separation of powers, a court's approval of legislation which merges or blends certain governmental powers in a limited field for persuasive reasons and under proper safeguards against abuse may not necessarily transcend the bounds of the judicial interpretative power. On the other hand, an approval of a fusion of powers which would seriously jeopardize the basic principle and undermine its foundations in a broad area of public life would appear to be violative of an essential command of such a constitution. The result of these considerations is that the elasticity and pliability of a constitutional philosophy which permits the agents of interpretation to take account of the changing needs of the time and enables them to cope with new and unprecedented problems must find the ends of its bounds in the necessity for preserving the core and essential integrity of a constitution. Truly fundamental changes must be effected by amending a constitution, not by interpreting it.

The second question to be discussed here is related to the first. It is the question of whether the courts have power to read exceptions or qualifications into unambiguously worded constitutional provisions for the purpose of accommodating such provisions with opposing or at least partially conflicting constitutional principles which are not directly embodied in the text. This has happened frequently in the interpretation of the United States Constitution. For example, Article IV, section 1 of the Constitution requires states to give full faith and credit to the public acts, records, and judicial proceedings of other states. In construing the meaning of this clause, the United States Supreme Court has held that the command of full faith and credit—although enunciated in unequivocal terms in the text of the Constitution—was not all-embracing, so that there may be exceptional cases where a state confronted with the enforcement of public acts or judgments of another

state may prefer its own laws or policies to those of the sister state.[15] The court in these cases has taken the position that the idea of state sovereignty must be held to balance, to a restricted extent, the constitutional command of full faith and credit, although such an interpretation requires a gloss on the Constitution which cannot find its justification in the text of the Constitution itself. In the same way, the Supreme Court has taken the view that the guaranties of freedom of speech, press, and assembly, which are set forth in absolute and unqualified terms in the First Amendment, are subject to the regulatory power of Congress to the extent that a restriction of free expression is necessary to forestall a grave danger threatening some other interest which it is within the constitutional power of Congress to protect. Thus in *Dennis v. U.S.*,[16] it was held that advocation of revolution by communists could be prohibited by congressional statute in order to preserve the national security. The protection of national security is not, however, entrusted to Congress by the constitutive provisions of the fundamental law, and the recognition of this power must be largely derived from nonpositive sources of constitutional law.[17]

Some judges of the United States Supreme Court, notably Justices Black and Douglas, have taken issue with the practice of the court's majority to balance conflicting public interests even in the face of an unambiguously worded command of the Constitution protecting a particular public interest in unmistakable terms. Thus, Mr. Justice Black has taken the stand that individuals, under the First Amendment, "are guaranteed an undiluted and unequivocal right to express themselves on questions of current public interest," [18] and that the court "has injected compromise into a field where the First Amendment forbids compromise." [19] Mr. Justice Douglas declared in 1953 that the command of the First Amendment is "that there shall be *no* law which abridges . . . civil rights. The matter is beyond the power of the legislature to regulate, control, or condition." [20]

The advocates of libertarian absolutism would seem to be oblivious to the fact, however, that "the First Amendment freedoms are vital,

[15] See, for example, *Fall v. Eastin*, 215 U.S. 1 (1909); *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, at 438 (1943); *Williams v. North Carolina*, 325 U.S. 226 (1945); *Alaska Packers Assn. v. Industrial Accident Commission*, 294 U.S. 532, at 547 (1935); *Huntington v. Attrill*, 146 U.S. 657 (1892).

[16] 341 U.S. 494 (1951). See the discussion of the case by Bernard Schwartz, *The Supreme Court* (New York, 1957), pp. 307–319.

[17] The principle finds *indirect* support in Article I, section 8, which gives Congress power to suppress insurrection by the use of the militia, and in the Preamble to the Constitution ("to insure domestic tranquillity").

[18] *Wieman v. Updegraff*, 344 U.S. 183, at 194 (1952).

[19] *American Communications Assn. v. Douds*, 339 U.S. 382, at 448 (1950).

[20] Dissenting in *Poulos v. New Hampshire*, 345 U.S. 395, at 423 (1953). See also William O. Douglas, *We the Judges* (Garden City, 1956), p. 307: "The mandate

but their exercise must be compatible with the preservation of other rights essential in a democracy and guaranteed by our Constitution." [21] Thus, practically everybody will agree that the right to a fair trial by an unbiased and unintimidated judiciary is essential to a free society worthy of its name, although the right is not explicitly phrased in these terms in the text of the Constitution. Experience has shown that this right can easily come into conflict with the freedoms protected by the First Amendment in cases where public pressure of severe proportions is exercised, through the medium of the press or otherwise, in order to make the judiciary amenable to the will of a certain community group. As Mr. Justice Frankfurter remarked in *Pennekamp v. Florida:* [22]

> Without a free press there can be no free society. Freedom of the press, however, is not an end in itself but a means to the end of a free society. The scope and nature of the constitutional protection of freedom of speech must be viewed in that light and in that light applied. The independence of the judiciary is no less a means to the end of a free society, and the proper functioning of an independent judiciary puts the freedom of the press in its proper perspective. For the judiciary cannot function properly if what the press does is reasonably calculated to disturb the judicial judgment in its duty and capacity to act solely on the basis of what is before the court. A judiciary is not independent unless courts of justice are enabled to administer law by absence of pressure from without, whether exerted through the blandishments of reward or the menace of disfavor.

Thus two conflicting values, both of which are embedded in the structure of our constitutional life, are in need of a reasonable adjustment and reconciliation by the judiciary in cases of this type. Similarly, the right of a government to preserve its existence against active attempts to overthrow it by force is one that, in view of the reactions of human nature when faced with a threat to survival, must be recognized, as a matter of general principle, as an inherent right, whether or not it is expressly sanctioned in the Constitution; it might not, however, be unreasonable to regard the right as forfeited where the government has violated its trust by letting its power degenerate into unmitigated tyranny or anarchical disorder. Where the constitutional system involved is that of a free society resolved to preserve the freedom of vigorously criticizing the government, it is axiomatic that the right

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is in terms of the absolute . . . the provision is all-inclusive and complete. The word 'no' has a finality in all languages that few other words enjoy."

[21] Schwartz, *supra* n. 16, p. 232. See also Schwartz, *Constitutional Law* (New York, 1972), p. 252: "The rights guaranteed by the amendment come peculiarly within the preferred-position theory of judicial review, under which restrictions upon personal rights are reviewed more closely than those upon property rights." This position appears to be supported by *New York Times Co. v. United States,* 403 U.S. 713, at 714 (1971).

[22] 328 U.S. 331, at 354–355 (1946).

to suppress revolutionary activities must be confined to conduct which poses a very grave threat to the security of the nation.

In order to form a well-considered opinion on such momentous questions, it is necessary to keep in mind that the positively formulated law of a society can never embrace the "living-law" structure of that society in its totality. A society will always operate on principles which flow from the spirit and character of its institutions and are indispensable to its effective functioning, even though these principles have not received adequate formal expression at the hands of a legislature or constitutional assembly. Although the positive law of the society, in the interests of legal clarity and stability, must normally be given a preferred position as compared with the nonformal sources of the law, there are situations where a mutual adjustment between formal and nonformal sources becomes inevitable. This is especially true in the area of constitutional law, where the entire organized way of life of a nation is affected by court decisions on significant problems and where constitutional values unrecognized in their particular manifestations by the framers of a constitution may be in urgent need of judicial protection at a later stage of the life of the nation. To put it briefly, a written constitution will always be incomplete. It must nevertheless be insisted that a positive rule of constitutional law must be given a very high degree of priority, and that it may be held to yield to an unwritten principle (such as national security, self-preservation, or inexorable necessity) only where the force with which the unarticulated principle makes its claim for recognition in a given situation is exceedingly strong.

Section 85. *The Interpretation of Statutes*

As Roscoe Pound has shown, four different ways may be conceived in which courts may deal with an innovation in the law brought about by means of a statute:

(1) They might receive it fully into the body of the law as affording not only a rule to be applied but a principle from which to reason, and hold it, as a later and more direct expression of the general will, of superior authority to judge-made rules on the same general subject; and so reason from it by analogy in preference to them. (2) They might receive it fully into the body of the law to be reasoned from by analogy the same as any other rule of law, regarding it, however, as of equal or coordinate authority in this respect with judge-made rules upon the same general subject. (3) They might refuse to receive it fully into the body of the law and give effect to it directly only; refusing to reason from it by analogy but giving it, nevertheless, a liberal interpretation to cover the whole field it was intended to cover. (4)

They might not only refuse to reason from it by analogy and apply it directly only, but also give to it a strict and narrow interpretation, holding it down rigidly to those cases which it covers expressly.[1]

The position of the Roman law as reflected in Justinian's Corpus Juris Civilis generally accords with the first method described by Pound. "Not all special cases can be contained in the laws and resolutions of the Senate," said the Roman jurist Julianus, "but where their meaning is manifest in some case, the one who exercises jurisdiction must apply the provision analogously and in this way administer justice." [2] Ulpianus, another celebrated Roman jurisconsult, spoke in the same vein: "For, as Pedius says, whenever anything has been introduced by law, there is good opportunity to extend it by interpretation or at least adjudication to other cases involving the same social purpose." [3] Celsus added the following admonition to these general principles of interpretation: "The laws should be liberally interpreted, in order that their intent be preserved." [4]

The attitude which the Roman law, after attaining maturity, observed toward statutes was carried over into the modern systems of the Civil Law. As a general rule, the Civil Law rejects a theory of interpretation according to which the *words* of a statute, as such, should furnish the sole basis for determining the content of the enactment. It prefers the view according to which the chief aim of interpretation is the ascertainment of the *intent* or *purpose* underlying the enactment in question.[5] The Civil Law is, on the whole, not favorably disposed toward the plain-meaning rule, according to which the words of a statute, if they appear to be plain and unambiguous, must be applied without regard to the sense which their authors intended to convey and without recourse to any exterior aids that might help elucidate their meaning. Furthermore, the Civil Law is much predisposed toward permitting extension of statutory provisions to situations which, although they do not fall within the broadest possible meaning of the statutory language, do fall within the general principle or social

[1] Pound, "Common Law and Legislation," 21 *Harvard Law Review* 383, at 385 (1908).

[2] *Dig.* I. 3. 12.

[3] *Dig.* I. 3. 13.

[4] *Dig.* I. 3. 18. See also Celsus, *Dig.* I. 3. 17: "To know the laws does not mean to be familiar with their words, but with their sense and significance."

[5] There are differences of opinion, however, as to the best means by which such intent or purpose should be discovered. See Arthur Lenhoff, "On Interpretative Theories: A Comparative Study in Legislation," 27 *Texas Law Review* 312, at 326 (1949); François Gény, *Méthode d'interprétation et sources en droit privé positif*, 2d ed., transl. Louisiana State Law Institute (Baton Rouge, 1963), pp. 173–189; Konrad Zweigert and H. J. Puttfarken, "Statutory Interpretation—Civilian Style," 44 *Tulane Law Rev.* 704 (1970).

purpose envisaged by the statute. This method is known as the method of *analogy*. Thus, if a certain kind of action is given by the law to executors of a will, the same action will probably be allowed to administrators of an estate, although not mentioned in the act, if the general purpose of the act is applicable to the latter and no reasonable ground can be discerned for limiting the action to executors. If the law contains no general provisions dealing with liability for negligent performance of obligations, but imposes such liability on vendors, purchasers, landlords, tenants, bailors, and bailees, the principle might be extended to other obligors in the absence of cogent arguments favoring the limitation of the principle to the enumerated categories.

Samuel Thorne has shown that, during certain periods of English medieval history, the position of the Common Law toward the construction of statutes was similar to the general attitude of the Roman and Civil Law.[6] Statutes were frequently extended to situations not expressly covered by them. Conversely, if the application of a broadly phrased statute to a particular complex of facts led to a hardship or injustice, a judge was under no constraint to follow the words of the statute. In the early fourteenth century, the freedom with which statutes were treated by common-law judges was so great that a substantial rewriting of statutory law by the judiciary was not at all uncommon. In the words of Thorne, statutes were viewed as "suggestions of policy to be treated with an easy unconcern as to their precise content."[7] While this freedom of interpretation was gradually curbed and far-reaching extensions of statutory norms came to be looked upon as improper, the emerging doctrine of the equity of the statute still permitted a liberal interpretation of legislation according to its purpose and the use of analogy within moderate limits. The reporter Plowden stated in 1573 that "the intent of statutes is more to be regarded and pursued than the precise letter of them, for oftentimes things which are within the words of statutes, are out of the purview of them, which purview extends no further than the intent of the makers of the Act, and the best way to construe an Act of Parliament is according to the intent rather than according to the words."[8] By also pointing out that "when the words of a statute enact one thing, they enact all other

[6] Samuel E. Thorne, *A Discourse upon the Exposicion and Understandinge of Statutes* (San Marino, Calif., 1942), Introduction.

[7] *Id.*, p. 42.

[8] *Eyston v. Studd*, 75 Eng. Rep. 688, at 694 (1573). See also *id.*, p. 695: "Our law (like all others) consists of two parts, viz. of body and soul, the letter of the law is the body of the law, and the sense and reason of the law is the soul of the law . . . And it often happens that when you know the letter, you know not the sense, for sometimes the sense is more confined and contracted than the letter, and sometimes it is more large and extensive."

things which are in the like degree," [9] Plowden demonstrated that a statutory remedy at that time was deemed to be merely illustrative of other analogous cases that deserved to be governed by the same principle.[10]

In the eighteenth century Blackstone, in his *Commentaries on the Laws of England*, still recognized the doctrine of the equity of the statute in a restricted and cautiously worded form.

> If the Parliament will positively enact a thing to be done which is unreasonable, I know of no power in the ordinary forms of the constitution that is vested with authority to control it: and the examples usually alleged in support of this sense of the rule do none of them prove that, where the main object of a statute is unreasonable, the judges are at liberty to reject it; for that were to set the judicial power above that of the legislature, which would be subversive of all government.

He then added an important qualification to this acknowledgment of parliamentary supremacy: "Where some collateral matter arises out of the general words, and happens to be unreasonable; there the judges are in decency to conclude that this consequence was not foreseen by the parliament, and therefore they are at liberty to expound the statute by equity and only *quoad hoc* to disregard it." [11] The following example is given by Blackstone as an illustration of the judicial power with respect to equitable correction of a statute: "If an act of parliament gives a man power to try all causes that arise within his manor of Dale; yet, if a cause should arise in which he himself is a party, the act is construed not to extend to that, because it is unreasonable that any man should determine his own quarrel." [12] Blackstone observes, however, that the opposite result should obtain if an intent on the part of Parliament to confer the right without exceptions may be properly inferred.

During the nineteenth century, the remaining force of the equity of the statute doctrine was destroyed in England. It is held today that the function of the judge is merely to determine what Parliament has said in its enactment and to apply the words of the statute to the case at hand. It is considered beyond his power to supply omitted particulars (unless, perhaps, the statute would be completely senseless without the addition) or to write equitable exceptions into the statute in hardship cases. The position is taken that the true meaning of the statute

[9] *Id.*, p. 698.
[10] See James M. Landis, "Statutes and the Sources of Law," in *Harvard Legal Essays* (Cambridge, Mass., 1934), pp. 215–216.
[11] Ed. W. D. Lewis (Philadelphia, 1898), Bk. I.91.
[12] *Ibid.*

coincides with whatever the plain meaning of the words conveys to the judicial mind, and that the judge should give full force wherever possible to the literal meaning of the words employed.[13] The judge is directed to gather the intent of the legislature from the words used, even if the consequences of such an interpretation may be mischievous.[14] The duty of the courts is "to expound the law as it stands and to 'leave the remedy (if one is to be resolved upon) to others.' " [15] Even recourse to the parliamentary history of an enactment as an aid to the ascertainment of its meaning is, as a general rule, not permitted.[16]

In the United States, the law of statutory interpretation is in a state of flux. Conflicting tendencies are at work in the courts which make it difficult to formulate any general statements as to what should be considered the prevalent American attitude towards statutes. Karl Llewellyn has shown that the array of interpretative maxims available to American courts contains sets of contraries and contradictories, and that some rule of statutory construction can be found to support practically any result a court might wish to reach.[17] Nevertheless, despite the large amount of uncertainty and confusion presently existing in this branch of the law, certain trends and directions of development are noticeable which may warrant a cautious prediction as to what the future of statutory interpretation law in this country is likely to be.

There was a time in United States legal history when the courts conceived of statutes in the fourth way described by Pound, as set forth at the beginning of this section. Whenever a statute contained a legislative innovation departing from the Common Law, the courts not only refused to reason from it by analogy, but they also interpreted the terms of the statute in the most narrow and restrictive fashion. Their attitude in this respect was similar to that of the English courts

[13] See E. R. Hopkins, "The Literal Canon and the Golden Rule," 15 *Canadian Bar Review* 689–690 (1937). As Professor Hopkins points out, the case of *Altrincham Electric Supply Co. v. Sale Urban District Council* 154 L.T.R. 379 (1936), seems to suggest that, in the opinion of the House of Lords, a court has no jurisdiction to alter the plain meaning of statutory words even when they lead to an absurd result.

[14] See P. B. Maxwell, *The Interpretation of Statutes*, 12th ed. by P. St. J. Langan (London, 1969), pp. 28–29. English courts have, however, at times applied the *Golden Rule*, according to which words need not be given their ordinary signification when such use of the words would produce a great inconsistency, absurdity, or inconvenience. See *River Wear Commissioners v. Adamson*, 2 App. Cas. 742, at 746 (1877) and Maxwell, *id.*, pp. 43–45.

[15] See Maxwell, p. 29, quoting from *Sutters v. Briggs* [1922], 1 A.C. 8.

[16] *Id.*, pp. 50–51. This approach was criticized by the British Law Commission, *The Interpretation of Statutes* (No. 21, 1969).

[17] "Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are To Be Construed," 3 *Vanderbilt Law Review* 395 (1950).

as described by Sir Frederick Pollock in 1882, an attitude which, according to Pollock, "cannot well be accounted for except upon the theory that Parliament generally changes the law for the worse, and that the business of the judge is to keep the mischief of its interference within the narrowest possible bounds." [18]

Today, statute law is on the whole received with less hostility by the courts of the United States and of the several states than was the case in the last century.[19] Remedial statutes conferring rights unknown at the Common Law (such as minimum wage, social security, or workmen's compensation statutes) are often accorded a liberal and broad-minded treatment by the courts, and particularly by the United States Supreme Court.[20] This seems to indicate that the courts have tended to accept the third approach toward statutory construction listed by Pound. It is also the practice of American courts to make free use of committee reports and other materials which might throw light on the legislative history of an enactment.[21] But there is judicial vacillation on the question of whether resort to extrinsic aids helpful in determining legislative intent is permissible in situations where the wording of a statutory provision appears to be plain. Many of the state courts take the position that when a legislative act is clear and, when standing alone it is fairly susceptible of but one construction, this construction must be given to it without an inquiry into legislative history.

United States Supreme Court adjudications involving the plain-meaning rule have not always followed a consistent line. Perhaps the most striking instance of a decision setting legislative intent above the statutory letter is the celebrated Trinity Church case.[22] Congress in 1885 forbade the encouragement of the importation of aliens by means of contract for labor and services entered into prior to immigration. A proviso excluded professional artists, lecturers, singers, and domestic servants, but made no mention of ministers of the gospel. A church made a contract with an English clergyman to come over and serve as rector and pastor of the church. After he had arrived in this country

[18] *Essays in Jurisprudence and Ethics* (London, 1882), p. 85.

[19] See J. B. Fordham and J. R. Leach, "Interpretation of Statutes in Derogation of the Common Law," 3 *Vand. L. Rev.* 438 (1950).

[20] *Fleischmann Co. v. U.S.*, 270 U.S. 349, at 360 (1925); *Jackson v. Northwest Airlines*, 70 F. Supp. 501, at 504–505 (1947); *Judd v. Landin*, 1 N.W. 2d 861, at 863–864 (Minn., 1942); *Hasson v. City of Chester*, 67 S.E. 731, at 733 (Va., 1910).

[21] See Notes, 3 *Vand. L. Rev.* 586 (1950); 52 *Columbia Law Review* 125 (1952).

[22] *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892). For a criticism of the plain-meaning rule see Harry W. Jones, "The Plain Meaning Rule and Extrinsic Aids in the Interpretation of Federal Statutes," 25 *Washington University Law Quarterly* 2 (1939).

and assumed his duties, the government sought to recover the penalty provided by the act. The court refused to interpret the statute literally. Looking to the title (referring only to "labor") and the purpose of the act rather than to its words, the court concluded that all available data pointed to an intent to control only the influx of cheap and unskilled labor from abroad.

In *Chung Fook v. White*,[23] on the other hand, the same court took an extremely narrow and literal position in the interpretation of a legislative enactment. A statute provided that where a naturalized citizen was sending for his wife or minor children to join him in this country, a wife to whom he was married or a minor child born to him after his naturalization, if afflicted with a contagious disease, should be admitted to this country without detention for treatment in a hospital. The court held that the privilege was not applicable to a native-born citizen, since the act (undoubtedly by oversight) mentioned only naturalized citizens. The court said: "The words of the statute being clear, if it unjustly discriminates against the native-born citizen, or is cruel and inhuman in its result, as forcefully contended, the remedy lies with Congress and not with the courts." Notwithstanding such illiberal decisions, it may be stated that the trend in present-day Supreme Court decisions moves in the direction of a purpose-oriented policy of statutory interpretation. In *United States v. American Trucking Association*,[24] the court launched an attack on the plain-meaning rule in its orthodox form in the following words:

> When [the plain] meaning has led to absurd or futile results . . . this Court has looked beyond the words to the purpose of the Act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one "plainly at variance with the policy of the legislation as a whole" this Court has followed that purpose, rather than the literal words. When aid to construction of the meaning of words, as used in the statute, is available, there can certainly be no "rule of law" which forbids its use, however clear the words may be on "superficial examination."

Roscoe Pound has ventured to predict that "the course of legal development upon which we have entered already must lead us to adopt the method of the second and eventually the method of the first hypothesis" (as set forth at the beginning of this section).[25] The likelihood of such a development stems from the fact that codified law is coming to play an increasingly prominent part in our legal system, and

[23] 264 U.S. 443 (1924). See also *Caminetti v. United States*, 242 U.S. 470 (1917).

[24] 310 U.S. 534, at 543–544 (1940); see also *Boston Sand & Gravel Co. v. United States*, 278 U.S. 41 (1928). Sec. 1–102 of the Uniform Commercial Code provides that "this Act shall be liberally construed and applied to promote its underlying purposes and policies."

[25] See Pound, *supra* n. 1, p. 386.

that the suspicion which the common-law judges exhibited toward legislative innovations at an earlier period of our history is on the way to being replaced by a more affirmative attitude toward statutes.

In dealing with codified and statutory law, we know from universal experience that the words of an enactment frequently reflect the intentions and aims of its framers incompletely or inaccurately. When legislators endeavor to express their thoughts in concise yet general terms, situations are almost invariably omitted that were within the over-all intention of the measure; on the other hand, cases are frequently covered by the statutory language for which the lawmakers, had they been aware of the problem, would have provided an exception. Is it necessary or desirable to bind the judges to the words of a statute, even though a literal interpretation might result in an unfair decision which the legislator himself would never have sanctioned if he had been conversant with the facts of the case?

One possible argument in favor of a literal interpretation of statutes is based on the consideration that such a theory of interpretation leads to certainty and clarity of the law. A person who reads a statute in order to acquaint himself with his rights and duties or those of other persons should be able to rely on the text without being compelled to undertake laborious investigations into what was actually in the minds of the lawmakers when they passed the act. This argument would, on first sight, seem to have particular force when applied to a private citizen or businessman who does not have at his disposal facilities for delving into the legislative history of statutes which are of concern to him. But there are answers to this argument. First of all, laymen rarely read statutes; if the content of a statute is vitally pertinent to their private or business affairs, they will usually consult an attorney or some other person acquainted with the problem. Second, even if such laymen read the statute, the import of the language will in a large number of cases either not be clear or, conversely, deceptively clear to them. Many enactments contain technical legal terms which are not necessarily self-explanatory. Even where words of ordinary language are used, such words can often be understood in a broad as well as a narrow sense. It would, under these circumstances, be an oversimplified solution of the problem if statutory interpretation were to be subjected to the test of the ordinary and natural meaning of language as understood by the man of average intelligence.

It might be asserted, on the other hand, that while the interest of the layman in a plain-meaning approach to legislative language cannot justify recourse to a literal theory of interpretation, the interest of the lawyer demands the adoption of this method. Some highly competent

observers have pointed out that inquiry into legislative purpose through the use of the preparatory materials is an endeavor beset with traps and pitfalls, that the discovery of a unified legislative intent is for the most part an illusory and futile undertaking, and that it is therefore preferable, as a general rule, to let the judges find their own solution of an interpretative problem by means of a reasonable construction of the statutory text.[26]

There is a core of truth in the doctrine which counsels restraint in the use of legislative background sources, but its cautioning admonitions have sometimes overshot the mark. It is quite clear that the numerous members of a lawmaking body, or even the members of a legislative committee, frequently do not have a common understanding with respect to the range or purpose of a legislative act, and they may differ substantially on the scope of applicability of a statutory clause or provision. As Harry W. Jones has pointed out, "if 'legislative intention' is supposed to signify a construction placed upon statutory language by every individual member of the two enacting houses, it is, obviously, a concept of purely fictional status." [27] But Jones also demonstrates that by the examination of committee reports and the history of proposed amendments accepted or rejected during the course of the legislative debates it is often possible to discover that at some stage of the process committee members or other interested legislators had in fact come to an understanding on the essential meaning of a given provision or group of provisions.[28] Furthermore, a study of the preparatory materials will often throw light on the general climate of opinion from which the legislative enactment arose, the general social conditions responsible for its passage, and the particular "mischief" which the legislature sought to redress. By disclosing the political, social, or economic purpose which was the driving force behind the bill, such materials will significantly aid in the ascertainment of general legislative intent. It may, however, be conceded that the judge might be justified in refusing to enforce the legislative intent, as discerned by recourse to extrinsic aids, where such intent has remained entirely un-

[26] See Max Radin, "Statutory Interpretation," 43 *Harv. L. Rev.* 863 (1930); Radin, "A Short Way with Statutes," 56 *Harv. L. Rev.* 388 (1942); P. A. Ekelöf, "Teleological Interpretation of Statutes," 2 *Scandinavian Studies in Law* 75 (1958).

For an excellent analysis of this view and a discussion of various other problems of statutory interpretation see Joseph P. Witherspoon, "Administrative Discretion to Determine Statutory Meaning," 35 *Tex. L. Rev.* 63 (1956); 38 *Tex. L. Rev.* 392, 572 (1960).

[27] "Statutory Doubts and Legislative Intention," 40 *Col. L. Rev.* 957, at 968 (1940).

[28] *Id.*, p. 969. Cf. also Felix Frankfurter, "Some Reflection on the Reading of Statutes," 47 *Col. L. Rev.* 527 (1947).

enacted, that is, where it is simply not reflected in the statutory language chosen to effectuate it.

Assuming that the judge, if he is in doubt as to the purported meaning of a legislative regulation, will consult the preparatory work as a clue to the ascertainment of its intent, the question arises of whether he is bound by the views which the legislators held with respect to the enactment at the time of its passage. Must the judge follow the historical understanding of the statute, or is he empowered to decide the case in accordance with the views which the lawmakers would presumably have expressed had they been present at the time of the decision? The latter position was taken by Plowden in 1573:

> In order to form a right judgment when the letter of a statute is restrained, and when enlarged, by equity, it is a good way, when you peruse a statute, to suppose that the law-maker is present, and that you have asked him the question you want to know touching the equity; then you must give yourself such an answer as you imagine he would have done, if he had been present . . . And if the law-maker would have followed the equity, notwithstanding the words of the law, . . . you may safely do the like, for while you do no more than the law-maker would have done, you do not act contrary to the law, but in conformity to it.[29]

The drawback of this approach lies in the fact that a determination of the position the lawmakers would presumably have taken toward the statute at the time of the decision, as distinguished from their views at the time of its passage, is a hazardous undertaking, whose outcome must frequently remain in the realm of guesswork. Furthermore, different legislators might have expressed different reactions if it had been possible to solicit their views concerning the interpretation of the statute at the time of the decision. Should the work of statutory construction be predicated on such uncertain and elusive criteria?

In cases where doubt arises as to the meaning and scope of statutory language, the judges should, as a general rule, ascertain the legislative purpose through the use of all aids and resources at their disposal and give effect to the purpose of the legislation as so found. This rule should prevail even though the social conditions obtaining at the time of the adoption of the statute may have changed somewhat since and the mischief or evil at which it was directed may not be present to quite the same degree at the time the decision involving a construction of the statute is handed down. This may result in a decision which is potentially objectionable from the point of view of fairness and justice,

[29] *Eyston v. Studd*, 75 Eng. Rep. 688, at 699 (1573). For an interesting interpretation of presumable legislative intent in the absence of definite clues see *Ballard v. Anderson*, 4 Cal. 3rd 873, 95 Cal. Rptr. 1 (1971).

but this approach will tend to prevent excessive subjectivity in speculating on legislative intent projected into the future.

Where, on the other hand, the social conditions, mores, and general attitudes which conditioned a certain piece of legislation have undergone a *pronounced, substantial,* and *unmistakable* change since the time when the statute was passed, a different result should be reached. In this situation, the judge should be able to assume with a high degree of probability that this conspicuous and striking change of conditions would not have remained without influence on the makers of the law. Thus, if a statute differentiating between the civil status of men and women was enacted in a period when the legal inequality of men and women was regarded as a necessary and beneficial postulate of the social order, the legislators responsible for its passage were presumably inclined to allow a broad scope to the statute. After the social attitudes favoring inequality of the sexes have given way to the idea of the essential equality of men and women, there would exist good reasons for holding the same statute to the narrowest possible scope of application. If this technique leads to the creation of artificial and discriminatory distinctions, a possible way out of the difficulty—apart from repeal of the statute—would in some situations be to deny it continued validity under the due-process clause on the ground of total obsolescence.[30]

A good case can also be made for restoring the right of judges to supply omitted particulars and to correct obvious instances of excessive breadth in the formulation of statutory rules in situations where such corrective action is essential to produce a fair and sane result in a legal controversy. Thus, it is hard to see why a statute granting a certain civil cause of action to trustees, fiduciaries, and executors cannot be extended to administrators, where no reason for their exclusion from the statutory terms except inadvertence on the part of the legislature can be discovered, and where no unfair result is accomplished by the extension.[31] Conversely, where an application of the strict words of a statute would lead to a totally unreasonable or absurd result, the courts should be allowed to graft an equitable exception upon the statutory rule. Let us assume, for example, that a statute provides that no person may enter the United States without a permit obtained in the country of departure. A woman who has secured the requisite permit lands in the United States with a child born on the voyage.

[30] See also *supra* Sec. 78 on the desirability of recognizing a limited doctrine of *desuetudo.*

[31] That a beginning toward use of this method has been made in some decisions of the United States Supreme Court is argued in Note, 82 *Yale Law Journal* 258 (1972). An extension of statutes by analogy should not, of course, be carried into the criminal field, where fair notice of scope is essential to due process and justice.

Should the immigration authorities be required, in consonance with the unambiguous words of the statute, to admit the mother, but deny entry to the baby? While the answer in this case ought to be clear, it should be insisted that the power of judges to depart from the literal sense of statutes in the interest of fundamental justice must be restricted to strong cases demanding equitable relief, and that misuse of discretion by the judge in writing an equitable exception into a statute should be a ground for appeal.[32]

The position here taken might be criticized for countenancing an undue degree of judicial interference with, and encroachment upon, the powers of legislative bodies. It might be argued that, while the improvement of judge-made law might well be regarded as being within the legitimate prerogatives of the judiciary, the taking of liberties with statutes must be held to constitute an improper arrogation of legislative power by a body of men not endowed with such power.

This line of argument falls short of being persuasive. A reasonable lawmaker is aware of the deficiencies inherent in the products of his legislative efforts. He knows that statutory rules can almost never be phrased with such perfection that all cases falling within the legislative policy are included in the textual formulation while all situations not within the purview of the statute remain outside of its linguistic ambit. Furthermore, a legislative body composed of reasonable men cannot be presumed to insist on retaining an exclusive right to correct minor errors and inadequacies. If such an exclusive right were claimed and granted, the legislature would forever be busy amending its own laws, often in small particulars, which is impractical, since other and more immediate political demands press down upon harassed modern legislators. Even if the necessary amendments are ultimately made, the injustices done in the meantime by judges tied down to a literal interpretation of statutes will remain without redress.

In the light of these considerations, it must be said that a legislature implicitly delegates to the judiciary the power to make certain rectifications in the literal language of statutes, provided that such rectifications are necessary to guarantee essential fairness and justice. As long as this power is exercised judiciously and with restraint, and as long as substantial judicial rewriting of statutes (which was characteristic for certain periods of the English medieval law) is avoided, conferring limited power of equitable correction upon the courts does not entail the destruction of the normative system or of substantial portions of it. When we realize at the same time that the era of literalness in statutory construction was by no means productive of that measure of

[32] See the more detailed discussion of this problem *supra* Sec. 76.

legal security which the advocates of a plain-meaning interpretation had hoped to be able to accomplish, this realization increases the persuasiveness of arguments favoring the reintroduction of considerations of justice into the law of statutory interpretation.

Section 86. *The Doctrine of* Stare Decisis

In an earlier section,[1] the conclusion was reached that judicial precedents, under the Anglo-American system of law, are today regarded as formal sources of law. It was pointed out, on the other hand, that in view of the free manner of courts in dealing with legal rules laid down in earlier decisions (by rephrasing, qualifying, broadening, narrowing, or changing such rules), a precedent must be regarded as a weaker and less authoritative source of law than a statute. We do not empower our judges to rewrite or amend the text of a statute in the same sense in which we permit them to restate or revamp a judge-made legal precept. In this section, the treatment and degree of authority accorded to judicial precedents under our system of law will be subjected to a more detailed analysis. This analysis will be concerned principally with two basic subjects: (1) the meaning and limitations of the doctrine of *stare decisis,* and (2) the effect of the overruling of precedents. The closely related question of how the *ratio decidendi* of a case is to be determined will be reserved for discussion in the following section.

Stare decisis is the most commonly used term for designating the Anglo-American doctrine of precedent. This term is an abbreviation of the Latin phrase *stare decisis et non quieta movere* (to stand by precedents and not to disturb settled points). Stated in a general form, *stare decisis* signifies that when a point of law has been once settled by a judicial decision, it forms a precedent which is not to be departed from afterward. Differently expressed, a prior case, being directly in point, must be followed in a subsequent case.

In a legal system where the rule of *stare decisis* is strictly and consistently applied, a precedent must not be disregarded or set aside, even though the rule or principle for which it is authority may seem archaic and wholly unreasonable to the judge called upon to apply it in a lawsuit. This element of the doctrine has frequently evoked criticism from laymen as well as from lawyers. A famous instance of lay criticism of the doctrine is an often-quoted passage from *Gulliver's Travels* by Jonathan Swift. "It is a maxim among . . . lawyers," says Gulliver, "that whatever hath been done before may legally be done again: and therefore they take special care to record all the decisions

[1] See *supra* Sec. 72.

formerly made against common justice and the general reason of mankind. These, under the name of precedents, they produce as authorities to justify the most iniquitous opinions; and the judges never fail of directing accordingly." [2] Some jurists and judges have likewise charged that the doctrine of precedent produces excessive conservatism.

Since adherence to the doctrine of precedent obviously tends to freeze the law and to preserve the *status quo*, it must be asked what the advantages and meritorious features of the doctrine are. We may list the following five positive factors in support of the *stare decisis* principle:

(1) The doctrine introduces a modicum of certainty and calculability into the planning of private and business activities. It enables people to engage in trade and arrange their personal affairs with a certain amount of confidence that they will not become entangled in litigation. It gives them some basis for predicting how other members of the community are likely to act toward them (assuming that such other members of the community comply with the law). Without this element of calculability, people would be uncertain of their rights, duties, and obligations, and they would be unable to ascertain what they might do without fear of coercive sanctions. Men would never know whether to settle or litigate a dispute if every established rule was liable to be overthrown from one day to the next, and litigation would be increased a thousandfold under such a state of affairs.

(2) *Stare decisis* provides attorneys counseling private parties with some settled basis for legal reasoning and the rendering of legal advice. A lawyer who does not have available to him the benefit of certain tools which are helpful to him in forecasting the probable outcome of litigation is of little use to his clients. In the words of Sir William Jones, "No man who is not a lawyer would ever know how to act and no lawyer would, in many instances, know how to advise, unless courts are bound by authority." [3]

(3) The doctrine of *stare decisis* tends to operate as a curb on the arbitrariness of judges. It serves as a prop for the weak and unstable judge who is inclined to be partial and prejudiced. By forcing him to follow (as a rule) established precedents, it reduces his temptation to render decisions colored by favor and bias. "If the doctrine of precedent were to be abolished in this country (where statutes have a relatively limited scope), the judges would be free to operate according to their individual whims and their private notions of right and wrong

[2] Pt. IV, ch. 5.
[3] *Essay on Bailments*, 4th ed. (London, 1836), p. 46.

throughout the entire area of human relations not covered by statute." [4] Such a condition would not be conducive to the maintenance of respect for the law and the preservation of public confidence in the integrity of the judiciary. One important reason why people are willing to accept judicial decisions as binding is that they are supposed to be based on an objective body of law and on impersonal reasoning free from subjective predilections—even though this condition may not always be fully realized in the practical operation of the legal system.

(4) The practice of following prior decisions facilitates dispatch of judicial business and thereby promotes efficient judicial administration. Following precedents saves the time and conserves the energy of judges and at the same time reduces the costs of litigation for the parties. It makes it unnecessary for the court to examine a legal problem *de novo* each time the problem is presented again. "The labor of judges," said Mr. Justice Cardozo, "would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him." [5]

(5) The doctrine of precedent also receives support from the human sense of justice. The force of precedent in the law is heightened, in the words of Karl Llewellyn, by "that curious, almost universal sense of justice which urges that all men are properly to be treated alike in like circumstances." [6] If A was granted relief last month against an unwarranted interference with his privacy, it would be unjust to deny such relief to B this month if the facts shown by B are essentially the same as those that were presented by A a month ago.[7]

In its relation to justice, however, the doctrine of precedent exhibits a weakness which has often been noted. A precedent controlling the decision of a court may be considered antiquated at the time when the problem arises again for decision. The prevailing notions of justice may have undergone a marked change in the interval between the earlier and the later decision. The first decision, reflecting perhaps the views of an earlier epoch of history, may have denied an action based on an invasion of the right to privacy. The decision may appear iniquitous to a modern judge, since our notions regarding infringement of

[4] Delmar Karlen, *Primer of Procedure* (Madison, Wis., 1950), p. 119.
[5] Cardozo, *Nature of the Judicial Process*, p. 149.
[6] "Case Law," *Encyclopedia of the Social Sciences*, III, 249.
[7] Hocking points out that the principle of *stare decisis* is an ethical principle. Since it is always wrong to disappoint an aroused expectation, ethics demands that authoritative decisions shall be reached and that law shall be stable in its operation. William E. Hocking, "Ways of Thinking about Rights," in *Law: A Century of Progress* (New York, 1937), II, 259.

personal privacy may in the meantime have become more sensitive and refined.

Assuming that there is a close relation between equality and justice, it must be realized that the equality contemplated by *stare decisis* is that between a *past* and a *present* decision. Justice, on the other hand, may require a modification of the standards of equality because of a change in social outlook. While *stare decisis* promotes equality in *time*, that is, equal treatment as between A litigating his case in 1760 and B obtaining a decision in a lawsuit occurring in 1960, justice may be more properly concerned with equality in *space*, with an equal treatment of two persons or two situations measured in terms of contemporary value judgments. Furthermore, the earlier decision may have been rendered by a weak or inept judge, so that considerations of justice and reasonableness might be adduced in favor of its overthrow on this ground.

What can the judge confronted with an outdated or unreasonable precedent do? May he disregard or set aside the precedent on the ground that it is repugnant to our contemporary notions of right and wrong? Or is he compelled to sacrifice justice to stability and adhere to the unwelcome precedent?

Prior to 1966, the highest courts of England and the United States took conflicting positions on this question. The British House of Lords decided in 1898 that it was absolutely bound by its own decisions. This principle was established in the case of *London Street Tramways Co. v. London City Council*,[8] in which the House of Lords ruled that "a decision of this House upon a question of law is conclusive, and . . . nothing but an act of Parliament can set right that which is alleged to be wrong in a judgment of this House." In endeavoring to justify the rule, the Earl of Halsbury, who wrote the opinion in this case, made the following comments: "I do not deny that cases of individual hardship may arise, and there may be a current of opinion in the profession that such and such a judgment was erroneous; but what is that occasional interference with what is perhaps abstract justice as compared with the inconvenience—the disastrous inconvenience—of having each question subject to being reargued and the dealings of mankind rendered doubtful by reason of different decisions, so that in truth and in fact there would be no real final Court of Appeal?" [9] In 1966, however, the House of Lords changed its position. Lord Chancellor Gardiner announced that "Their Lordships . . . recognize that too rigid ad-

[8] [1898] Appeal Cases 375.
[9] *Id.*, p. 380.

herence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose, therefore, to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so." [10]

In the United States, *stare decisis* has never been considered an inexorable command, and the duty to follow precedent is held to be qualified by the right to overrule prior decisions. Although the inferior courts within a certain precinct of jurisdiction are considered bound by the decisions of the intermediate or highest appellate courts, the highest courts of the states, as well as the supreme federal court, reserve to themselves the right to depart from a rule previously established by them. In the interest of legal security, however, they will not lightly make use of this prerogative. "Adherence to precedent should be the rule and not the exception," said Mr. Justice Cardozo.[11] Mr. Justice Brandeis observed: "*Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule be settled than that it be settled right." [12] Nevertheless, the court will sometimes overrule its own decisions when it is necessary to avoid the perpetuation of pernicious error or where an earlier decision is wholly out of step with the exigencies of the time. On the whole, the United States Supreme Court will be less inclined to set aside a precedent which has become a well-established rule of property or commercial law than to overrule a case involving the validity of legislation under the federal Constitution. In the words of Chief Justice Stone, "The doctrine of *stare decisis*, however appropriate or even necessary at times, has only a limited application in the field of constitutional law." [13] In this area, it is particularly important to keep the law in accord with the dynamic flow of the social order, since correction of constitutional decisions by means of legislation is practically impossible.[14]

It would seem that the American attitude toward precedents is preferable to the policy followed by the English House of Lords prior to 1966. Since the maintenance of stability is not the only goal of the

[10] See [1966] *Weekly Law Reports* 1234, 110 *Solicitor's Journal* 584 (1966); W. Barton Leach, "Revisionism in the House of Lords," 80 *Harvard Law Rev.* 797 (1967).

[11] Benjamin N. Cardozo, *The Nature of the Judicial Process* (New Haven, 1921), p. 149. For a view which appears to attribute a weaker force to the doctrine of precedent see Richard A. Wasserstrom, *The Judicial Decision* (Stanford, 1961), Chs. 4 and 7.

[12] *Burnet v. Coronado Oil and Gas Co.*, 285 U.S. 393, at 407 (1932).

[13] *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, at 94 (1935).

[14] See William O. Douglas, "Stare Decisis," 49 *Columbia Law Rev.* 735 (1949); Brandeis, J., in *Burnet v. Coronado Oil and Gas Co.* 393, at 406–407 (1932).

legal order, the judges should be given authority to set aside former decisions which are hopelessly obsolete or thoroughly ill-advised and contrary to the social welfare. "If judges have woefully misinterpreted the mores of their day or if the mores of their day are no longer those of ours, they ought not to tie, in helpless submission, the hands of their successors." [15] The same elasticity should be allowed to the judges with respect to precedents which represent an anomaly, do not fit into the structure of the legal system as a whole, or are at odds with some of its guiding principles. This last point was emphasized by Justice Frankfurter in *Helvering v. Hallock*,[16] where he wrote: "We recognize that *stare decisis* embodies an important social policy. It represents an element of continuity in law and is rooted in the psychological need to satisfy reasonable expectations. But *stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience." In granting courts the right to overrule their decisions, it should be made clear, however, that in exercising this right they should make certain that less harm will be done by rejecting a previous rule than by retaining it, even though the rule may be a questionable one. In every case involving the abandonment of an established precedent, the interest in a stable and continuous order of law must be carefully balanced against the advantages of improvement and innovation.

An unfortunate consequence of discarding a precedent under the still-prevailing doctrine is the retroactive effect of an overruling decision. The problem is well illustrated by the decision in the case of *People v. Graves*.[17] In 1928 the United States Supreme Court decided that a state had no right to tax income from copyright royalties. In 1932 this decision was overruled on the ground that it was erroneous. During the three intervening years Elmer Rice, a dramatist living in New York, had received large royalties from his plays on which he had paid no New York income tax. After the overruling of the 1928 decision, the New York authorities demanded three years' back taxes from Mr. Rice on these royalties. The New York courts, supporting the tax authorities, made Mr. Rice liable not only for the back taxes but also for the payment of interest at six per cent for being late.

The Appellate Division grounded its judgment on the theory that, when a precedent is overthrown, the overruling decision must be

[15] Cardozo, *supra* n. 11, p. 152. See also Walter V. Schaefer, "Precedent and Policy," 34 *University of Chicago Law Rev.* 3 (1966).

[16] 309 U.S. 106, at 119 (1940).

[17] 273 N.Y.S. 582 (Sup. Ct. App. Div., 1934).

viewed as enunciating the law as it always had been, and that the discarded decision must be treated as a nullity. "A judicial decision is but evidence of the law. An overruling decision does not change law, but impeaches the overruled decision as evidence of law. Adopting the theory that courts merely declare pre-existing law, it logically follows that an overruling decision operates retroactively." [18]

Such rulings may lead to hardship and injustice in cases where parties who have been relying upon an earlier decision suddenly find out that the law they had regarded as controlling has been overturned. The courts have tried to avoid such injustices in some instances. In the case of an interpretation of statutes, for example, it has often been held that the construction of the terms of a statute by a court must be read into the text of the statute and becomes in effect an integral part of it; consequently this construction cannot be changed by the court with retroactive effect so as to invalidate or impair contracts made and rights acquired in reliance upon such construction.[19] The principle embodied in such holdings would appear to be capable of broad application, and the United States Supreme Court has expressly given constitutional authorization to the courts of the states to deny a retroactive effect to their overruling decisions, whether or not a statute or a rule of the common law was involved.[20] Regardless of the answer to the theoretical question as to whether a judicial decision is law until such time as it is changed, or merely rebuttable evidence of the law, it would seem to be perfectly sound practice for a court to overturn a precedent but refuse to apply, on grounds of equitable estoppel, the new principle to the facts of the case at hand. This is justifiable at least in those cases where definite proof of reliance by one of the parties upon the old and discarded principle is submitted to the court, and the manner and degree of reliance has been such as to convince the court that the new rule should not be applied in the pending case.[21] In the absence of a type of reliance worthy of being protected, on the other hand, there

[18] *Id.*, p. 587.

[19] *Payne v. City of Covington*, 123 S.W. 2d 1045 (1938); see 21 *Corpus Juris Secundum* 329, with citations.

[20] *Great Northern Railway Co. v. Sunburst Oil and Refining Co.*, 287 U.S. 358 (1932). See also *Warring v. Colpoys*, 122 F. 2d 642, at 645–646 (1941); *Commissioner of Internal Revenue v. Hall's Estate*, 153 F. 2d 172, at 175 (1946); Roger J. Traynor, "Bad Lands in an Appellate Judge's Realm of Reason," 7 *Utah Law Review* 157, at 167–168 (1960); Note, 60 *Harv. L. Rev.* 437 (1947).

[21] See Beryl H. Levy, "Realist Jurisprudence and Prospective Overruling," 109 *University of Pennsylvania Law Review* 1 (1960); Paul J. Mishkin, "The Supreme Court 1964 Term: Foreword," 79 *Harvard Law Rev.* 56 (1965); Walter V. Schaefer, "The Control of 'Sunbursts': Techniques of Prospective Overruling," 42 *New York University Law Rev.* 631 (1967). The highly complex problems that may arise in constitutional cases will not be discussed here.

would seem to be no good reason for not immediately enforcing the new rule enunciated by the court.

Section 87. *The* Ratio Decidendi *of a Case*

The preceding section dealt with the general meaning of the *stare decisis* principle, the policy arguments sustaining it, and the desirable limits of its application. The question before us here is a narrower and more technical one, which arises from the well-established fact that not every statement made in a judicial decision is an authoritative source to be followed in a later case presenting a similar situation. Only those statements in an earlier decision which may be said to constitute the *ratio decidendi* of that case are held to be binding, as a matter of general principle, in subsequent cases. Propositions not partaking of the character of *ratio decidendi* may be disregarded by the judge deciding the later case. Such nonauthoritative statements are usually referred to as *dicta* or (if they are quite unessential for the determination of the points at issue) *obiter dicta.*

Unfortunately, the question as to what are the constituent elements and the scope of the *ratio decidendi* of a case is far from being settled. In the case of *Northwestern Life Ins. Co. v. Wright,*[1] the Supreme Court of Wisconsin stated its conception of the *ratio decidendi* of a case in the following language: "The key note of an adjudication is the ruling principle. The details showing the particular facts ruled by some particular principle are helpful; but, in the end, it is the principle, not the detail circumstances, commonly evidentiary only, which is the important feature as to whether an existing adjudication is a safe guide to follow in a case." It is widely conceded, however, that not every proposition of law formulated by a court in the course of a judicial opinion—even though it may have been the basis of the decision—possesses the authority belonging to the *ratio decidendi.* The principle of law enunciated by the court may have been much broader than was required for the decision of the case before it; and it is well established that in such situations the surplus not necessary to sustain the judgment must be regarded as a *dictum.* This qualification of the theory which identifies *ratio decidendi* with the ruling principle of a case is aptly brought out in the discussions of the problem by Sir John Salmond and Professor Edmund Morgan. Salmond points out that "a precedent . . . is a judicial decision which contains in itself a principle. The underlying principle which thus forms its authoritative element is often termed the *ratio decidendi.*" He then goes on to say:

[1] 140 N.W. 1078, at 1081–1082 (1913).

Although it is the duty of courts of justice to decide questions of fact on principle if they can, they must take care in such formulation of principles to limit themselves to the requirements of the case in hand. That is to say, they must not lay down principles which are not required for the due decision of the particular case, or which are wider than is necessary for this purpose. The only judicial principles which are authoritative are those which are thus relevant in their subject-matter and limited in their scope. All others, at the best, are of merely persuasive efficacy. They are not true *rationes decidendi,* and are distinguished from them under the name of *dicta* or *obiter dicta,* things said by the way.[2]

Morgan defined *ratio decidendi* in a similar fashion as "those portions of the opinion setting forth the rules of law applied by the court, the application of which was *required* for the determination of the issues presented."[3]

A substantially different theory as to what constitutes the *ratio decidendi* of a case was developed in England by Professor Arthur Goodhart.[4] According to him, it is not the principle of law laid down in a decision which is the controlling element under the doctrine of *stare decisis.* In his opinion, the *ratio decidendi* is to be found by taking account of the facts treated as material by the judge who decided the case cited as a precedent, and of his decision as based on these facts.[5] Goodhart submits three main reasons for rejecting the proposition of law theory of the *ratio decidendi.* First, he points out, there may be no rule of law set forth in the opinion of the court. Second, the rule formulated by the judge may be too wide or too narrow. Third, in appellate courts the rules of law set forth by different judges in their separate opinions may have no relation to one another.

Goodhart's theory was, in its basic core, adopted by Professor Glanville Williams.[6] Williams explained that in the light of the actual practice of the courts, however, the phrase "*ratio decidendi* of a case" was slightly ambiguous, because it may mean either the rule that the judge

[2] John Salmond, "The Theory of Judicial Precedent," 16 *L. Q. Rev.* 376, at 387–388 (1900). See also Salmond, *Jurisprudence,* ed. G. Williams, 11th ed. (London, 1957), pp. 222–226.

[3] Edmund M. Morgan, *Introduction to the Study of Law,* 2d ed. (Chicago, 1948), p. 155 (italics mine); see also John C. Gray, *The Nature and Sources of the Law,* 2d ed. (New York, 1921), p. 261; Carleton K. Allen, *Law in the Making,* 6th ed. (Oxford, 1958), p. 247; Rupert Cross, *Precedent in English Law,* 2d ed. (Oxford, 1968), pp. 35–101.

[4] See Goodhart, "Determining the *Ratio Decidendi* of a Case," 40 *Yale L. J.* 161 (1930). A criticism of Goodhart's article is presented by R. N. Gooderson, "*Ratio Decidendi* and Rules of Law," 30 *Can. B. Rev.* 892 (1952).

[5] Goodhart, p. 182.

[6] Williams, *Learning the Law,* 8th ed. (London, 1969), p. 72: "The *ratio decidendi* of a case can be defined as the material facts of the case plus the decision thereon."

who decided the case intended to lay down and apply to the facts, or the rule that a later court concedes him to have had the power to lay down. This is so because, as Williams rightly emphasizes, "courts do not accord to their predecessors an unlimited power of laying down wide rules." [7] This undeniable fact prompted Dean Edward Levi to take issue with Professor Goodhart on the ground that the later judge may quite legitimately find irrelevant the existence or absence of facts which the prior judge considered important. In the words of Levi, "It is not what the prior judge intended that is of any importance; rather it is what the present judge, attempting to see the law as a fairly consistent whole, thinks should be the determining classification. In arriving at this result he will ignore what the past thought important; he will emphasize facts which prior judges would have thought made no difference." [8]

A more radical point of view was advanced by Professors Sidney Post Simpson [9] and Julius Stone.[10] According to their approach, it is erroneous to assume that each decided case has its distinct *ratio decidendi.* They contend that practically each case has implicit in it a whole congeries of possible principles of decision. When a case is decided, no one can be certain which of the possible principles of decision is destined eventually to become the controlling one. In Stone's opinion, if there are ten facts stated in an opinion, as many general propositions will explain the decision as there are possible combinations of these facts. Only a study of a whole series of decisions on a particular problem of the law will to some extent reveal what the fate of a particular precedent has been in the dynamic process of restricting, expanding, interpreting, reinterpreting, and reformulating a prior body of doctrine in the creative work of the courts.

If we ask ourselves what the presently prevailing attitude of the American courts toward the question of determining the *ratio decidendi* is, we must probably conclude that the views of Salmond and Morgan are accepted by most American judges as representing the most satisfactory approach. In other words, most judges will hold that the *ratio decidendi* of a case is to be found in the general principle governing an earlier decision, as long as the formulation of this general principle was necessary to the decision of the actual issue between the litigants. Nonetheless, even though the majority of today's judges may

[7] *Id.*, p. 69.
[8] Edward H. Levi, *An Introduction to Legal Reasoning* (Chicago, 1949), p. 2.
[9] "English Law in the Making," 4 *Modern Law Review* 121 (1940).
[10] "Fallacies of the Logical Form in English Law," in *Interpretations of Modern Legal Philosophies,* ed. P. Sayre (New York, 1947), pp. 709–710; cf. also Stone, *Legal System and Lawyers' Reasonings* (Stanford, 1964), pp. 267–280.

theoretically agree on the basic method for finding the *ratio decidendi*, they may come to widely diverging conclusions in concrete cases calling for the application of this method. As Karl Llewellyn has shown,[11] many judges will be disinclined to examine prior decisions alleged to be relevant with razor-blade sharpness and discernment in order to determine whether the principle laid down by the prior court was, in the exact form in which it was phrased, truly necessary for the determination of the case. They will often seize upon some broad language found in a precedent and treat this language as the "rule of the case," without engaging in an incisive search to see whether the scope of the formulated rule was coextensive with the exact issue that had to be decided by the earlier court. Other judges will take quite the opposite attitude toward former decisions alleged to be in point. They will use a sharp knife to cut past opinions down to what they consider to be their proper size and limits, refusing to recognize the authority of the earlier case as going one inch beyond what was indispensable for the disposition of the issues. In the opinion of Llewellyn, these two views of the authority of a precedent—the broad view and the narrow one—exist side by side. The first method is employed for the purpose of capitalizing upon welcome precedents, the second one is used in order to whittle down or immobilize unwelcome precedents. "The same lawyer in the same brief, the same judge in the same opinion, may be using the one doctrine, the technically strict one, to cut down half the older cases he deals with, and using the other doctrine, the loose one, for building with the other half." [12]

It would seem that, in any judicious attempt to find a solution for the presently rather confused state of the *ratio decidendi* doctrine, two dangers must be guarded against. On the one hand, it would not be desirable to invest a statement of principle originating from the bench rather than from a legislative body with the trappings of quasi-statutory force. Judges, under the pressure of their business, usually do not have the time and leisure to work out with great care and particularity a rule of law which will not only fit the case at hand but at the same time accomplish the dual task of covering by its formulation all instances similarly situated while eliminating all situations which should be excluded from the scope of the rule. The legislator, on the other hand, perhaps with the aid of committees of experts, can thoroughly ponder over the wording, content, and range of a code provision or other statutory enactment and attempt to integrate it into the whole fabric of the positive law. As St. Thomas Aquinas percep-

[11] See *The Bramble Bush*, rev. ed. (New York, 1951), pp. 67–69.
[12] *Id.*, p. 68.

tively observed: "Those who make laws consider long beforehand what laws to make; whereas judgment on each single case has to be pronounced as soon as it arises." [13] It is inadvisable under these conditions to ascribe to rules formulated by judges in response to the stimulus of a specific fact situation the same authority and permanence that is usually accorded legislative norms. We must also take account of the fact that judges, although they cannot avoid laying down rules and principles in order to fill the interstices in the positive legal system, are not in the first place appointed for a legislative task, while the making of rules of law on behalf of the public is the special function entrusted to a legislature. For these reasons it is a sound command of wisdom to attribute to judicial rules a weaker formal authority than is customarily imparted to legislative norms, and to permit their revision, reformulation, expansion, or contraction in instances where they have been found to be ill-conceived, awkwardly phrased, overbroad, or unduly restrictive.

The second danger confronting the *ratio decidendi* doctrine points its threat from a different direction. While the investment of judicial rules with quasi-statutory force would result in an unduly tight and overrigid structure of the precedent system, the adoption of a nominalistic philosophy toward the *ratio decidendi* problem would give rise to the opposite peril of engendering a hyperflexible and semianarchical condition of the legal order. According to what we have found to be the preponderant view, only that part of a legal proposition stated by a court is *ratio decidendi* which was necessary for the decision of the point at issue. If the word "necessary" is construed in a radically restrictive sense as being synonymous with "absolutely necessary," and if a court is always justified in carving down a rule of law found in a judicial precedent to the narrowest range consistent with the fact situation in that case, judicial nominalism will have won the field. An extreme example is offered by Llewellyn.[14] The defendant, a redheaded man named Walpole, riding in a Buick automobile painted pale magenta, caused his car to swerve on the road, and a collision with another car occurred. The plaintiff, Atkinson, was injured in the accident. The court's award of damages to Atkinson was upheld by the appellate court which, in the course of its opinion, laid down a broad rule of law for the guidance of courts in automobile accident cases. If a later court should narrow down the *ratio decidendi* of this case to its particular facts by holding that "this rule holds only of red-

[13] *Summa Theologica*, transl. Fathers of the English Dominican Province (London, 1913–1925), pt. II, 1st pt., qu. 95, art. 1.

[14] *Bramble Bush*, p. 48.

headed Walpoles in pale magenta Buick cars," [15] an example of an improper and dangerous application of the prevailing *ratio decidendi* doctrine is presented. Another instance of a situation illustrative of this inadmissible technique would be one in which a former court had laid down the rule that overhanging branches of a tree may be cut off by a neighbor if they interfere with growth on his land or otherwise cause an inconvenience to him. A later court in a case involving the cutting off of branches of a rosebush by an adjoining landowner rejects the controlling force of the former decision on the ground that, since the former case involved a tree and not a rosebush, and since all that was necessary was the laying down of a rule applicable to trees, the *ratio decidendi* of the tree case did not cover rosebushes.

Under Goodhart's theory, such results would be avoided as long as the first judge had made it clear in his opinion that he regarded facts such as the make or color of a car involved in an accident or the kind of branch overhanging into another's land as immaterial to the decision of the case. But Goodhart's theory of the *ratio decidendi* is subject to two weaknesses which furnish arguments against its adoption. First, judges do not always tell us in so many words what specific facts set out in their opinions they view as material or immaterial. The reconstruction of the facts deemed material by the previous judge is often a matter of conjecture and guesswork, and perhaps the best and safest clue to be used in determining what facts were regarded by the judge as material is his formulation of the proposition of law controlling the case, if one can be found in his opinion.[16] Second, it would seem impracticable to vest the first judge with absolute power to appraise the materiality of facts and bind the second judge by such an appraisal. The first judge may have treated certain facts as relevant which, on a second and closer scrutiny of the situation, and perhaps against the background of a different constellation of facts, may be found to be quite subordinate and secondary in importance.

The correct view of the nature and scope of the *ratio decidendi* must proceed from the premise that it is neither the material facts of the case nor the rule of law as formulated by the court which form the authoritative element in a decision. The controlling question to be asked in determining the weight of a prior decision is whether the rationale of public policy underlying the first decision (which the first court tried to cast into the form of a proposition of law) is equally applicable in the second case. *A later case involving facts similar to*

[15] *Id.*, pp. 66–67.

[16] See in this connection the comments by Gooderson, *supra* n. 4, pp. 893, 899 ff. For a comparative study see Folke Schmidt, *The Ratio Decidendi* (Stockholm, 1965).

those present in an earlier case should, as a general rule, be decided in consonance with the earlier case where both cases fall under the principle of public policy or justice which lay at the bottom of the earlier decision. It is possible, however, that the policy rationale of the earlier case was inadequately or awkwardly stated by the judge, or that the verbal formalization chosen by him in spelling out the principle was either too broad or too narrow. The principle enunciated in the decision should not be broader than necessary to dispose of the legal problem before the court, but broad enough to include situations that cannot on any reasonable ground be distinguished from the facts at hand.

It is the principle in its essential core and properly delimited scope rather than the formalized rule of law into which the principle was cast by the first judge that should be accorded precedential force. Thus, where a court has decided that a legatee who murdered his testator cannot take under the testator's will because "no one may take advantage of his own wrong," a court in a later case involving a negligent killing of a testator by the legatee may hold that the principle contemplated by the court in the earlier case was not in truth as broad as it would appear to be from the verbal statement of the principle. The second court may conjecture that what prompted the first court to decide the case as it did was the consideration that the legatee who had *wilfully* killed his testator should not be permitted to take under the terms of the will. The second court need not assume that the first court meant to prejudge the case of negligent killing or that it had the power to bind future judges by its overbroad formulation of the principle of policy underlying the decision.

According to this view, a case is not controlling as a precedent for the sole reason that similarities and parallels between the facts of the earlier and later cases can be discerned. The *ratio decidendi* must be discovered by relating the facts of the two cases to a principle of legal policy which reasonably covers both situations. In many instances, this principle of policy will not spring into existence as a finished creature the first time it is expressed by a court. It will often have been stated by the court in a tentative and groping fashion, and its true import and scope will not be capable of being ascertained until other courts have had a chance to correct the inadequacies of the first formulation and to graft exceptions, qualifications, and caveats upon the principle. In this way the *ratio decidendi* of a case often develops its true and full meaning slowly and haltingly, and it may take a whole series of decisions involving variations of the situation presented in the first case until a full-blown rule of law, surrounded perhaps by a cluster of exceptions, replaces the tentatively and inadequately formulated gen-

eralization found in the initial decision. In short, a whole course of decisions will gradually mark out the outer limits of a legal principle left indeterminate by the first decision attempting to give form to it.

Section 88. *Discovery and Creation in the Judicial Process*

It was pointed out in an earlier section[1] that the role which the judge plays in the processes of adjudication is the subject of disagreement and debate. Many famous figures in the history of English law, such as Coke, Hale, Bacon, and Blackstone, were convinced that the office of the judge was to declare and interpret the law, but not to make it. Justice Cardozo said, "The theory of the older writers was that judges did not legislate at all. A pre-existing rule was there, embedded, if concealed, in the body of the customary law. All that the judges did, was to throw off the wrappings and expose the statue to our view."[2] The newer theory, initiated by Bentham and carried to a radical conclusion by John Chipman Gray, asserted that judges produce law just as much as legislators do; in the view of Gray, they even make it more decisively and authoritatively than legislators, since statutes are construed by the courts and such construction determines the true meaning of the enactment more significantly than its original text.[3] In our own day the creative theory of law must be regarded as the most widely accepted view of the judicial process, although disagreement may exist with respect to the volume and scope of judicial lawmaking.

In trying to find an answer to the question of whether judges are the makers or discoverers of the law we must, as a first step in the argument, deny that the question can be propounded in this form at all. There are many different types of judicial decisions, and it is impossible to measure all of them with the same yardstick. In order to give a well-considered answer to this question, a number of different situations must be distinguished.

(1) Where there is a well-established common-law rule or an unambiguous statutory rule clearly applicable to the facts of the case, the creative activity of the judge is obviously at a minimum. The judge, finding that no practical alternatives are available under the circumstances, simply applies the rule to the facts of the case. This is so at least where no thought occurs to the judge, or no good reason exists, in favor of changing or overturning the common-law rule or to declare the statute unconstitutional.

[1] See *supra* Sec. 72.

[2] Cardozo, *Nature of the Judicial Process*, pp. 124–125.

[3] Gray, *Nature and Sources of the Law*, pp. 84, 95, 170–172. See also Charles E. Clark and David M. Trubek, "The Creative Role of the Judge," 71 *Yale Law Journal* 255 (1961).

It is true that judges sometimes recognize exceptions to the applicability and operation of statutes. Thus, equity courts have traditionally enforced some agreements technically violative of the Statute of Frauds when there had been substantial part performance, and the court considered it unfair under the circumstances to permit one party to renege on its obligations on the sole ground that the contract was not in writing. It would seem to be largely a matter of verbal disputation whether one argues, in consonance with the newer theory, that the judge in such an instance "makes" new law or whether, in accord with the older view, he is held to "discover" the exception in the true intent of the legislator or in overriding considerations of equity and justice.

(2) There are situations where no precedent or statutory rule is directly in point, but where the court, in trying to arrive at a reasonable solution of the issue at hand, can find indirect guidance from the mass of reported decisions. There are in existence decisions which bear a certain similarity to the case before the court, and which are based on some principle of law which lends itself well to extension to the case under consideration. In such cases, it may be said, the judge discovers the proper law in an analogy which rests on a common social policy connecting the earlier cases with the case at bar. *Ubi eadem legis ratio, ibi eadem dispositio* (where the reason for the law is the same, the disposition must be the same).

(3) Suppose in a western state of the United States, after it has been accepted into the Union, the courts are called upon to decide for the first time what type of water law should prevail in the state. The common-law doctrine of riparian rights regards all riparian proprietors as being on an equal footing; it allows to each a reasonable use of the stream for his own land at any time. The opposing doctrine of prior appropriation, on the other hand, gives priority rights to the first appropriator of the water if he puts the commodity to a beneficial use.

If the court, after carefully weighing the implications and effect of both rules, decides in favor of adopting the prior appropriation doctrine, it might be said that the court fashions new law. If the state is an arid state, however, with few and small streams and little annual rainfall, the "natural law" of the physical conditions of the state makes it practically imperative for the court to prefer the prior-appropriation doctrine to the common-law doctrine. If all persons have equal rights to the streams, nobody will be in a position to do anything useful with the water. It would therefore not be entirely amiss to say that the court in such a case finds the law in the pressing social and economic needs of the region.

(4) There are cases where the judicial choice between two competing lines of authority, or between two persuasive principles of public policy, is a difficult one to make. In constitutional cases, for example, two public interests (such as the right of a free press and the right to a fair trial) may have to be weighed against each other, or a valuable private interest may have to be accommodated with a vital public interest. The courts, in making their decision in such situations, must consider the whole fabric of the social order, its prevailing value structure, and the ideals of justice governing the society in question in order to find the correct answer to a problem involving clashes between conflicting principles or social interests. Frequently a balance sheet of the arguments on both sides of the question will, in the light of a careful analysis of the positive and nonpositive elements of judgment, result in a lopsided preponderance of arguments on one side of the ledger. It could then be said that the judge finds the law in the more cogent or persuasive line of argumentation, but here we are clearly reaching the borderline area between discovery and judicial creativeness.

(5) There are situations where the courts cannot find any guidance in the reported decisions and where an attempt to feel the moral pulse of the community yields no tangible result. The court may have to come to a decision on a technical point of procedure, of bankruptcy law, or of administrative law, without being able to discover the proper answer in the purpose of a statute, in considerations of justice, or in the articulate or inarticulate premises of the social order. Reason would permit the adoption of several valid solutions, and the Gordian knot must be cut somehow by the judges confronted with the problem. In such situations, rare as they may be, the creative or lawmaking ingredient in judicial adjudication is undeniably present.[4]

Our modern legal systems are usually disinclined to give to the judiciary a far-reaching power to make large-scale alterations in the law. The basic rules of procedure, for example, have been largely codified, although the courts through delegation of rule-making (legislative) powers may have had a hand in such a codification. New departments of the law, such as those dealing with workmen's compensation, social insurance, and atomic energy, have usually been launched into existence through legislative rather than judicial initiative. We do not give our judges the power to fix minimum wages and maximum hours for workers and employees; we do not permit them to set up pension systems or to change the rate of income taxation, or to introduce com-

[4] See in this connection Lon L. Fuller, "Reason and Fiat in Case Law," 59 *Harv. L. Rev.* 376 (1946).

pulsory arbitration of labor disputes. As Mr. Justice Holmes once pointed out,

> I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions. A common-law judge could not say "I think the doctrine of consideration a bit of historical nonsense and I shall not enforce it in my court." No more could a judge exercising the limited jurisdiction of admiralty say "I think well of the common-law rules of master and servant and propose to introduce them here *en bloc*." Certainly he could not in that way enlarge the exclusive jurisdiction of the District Courts and cut down the power of the states.[5]

Mr. Justice Cardozo summarized the situation in these words: "Insignificant is the power of innovation of any judge when compared with the bulk and pressure of the rules that hedge him on every side." [6]

Since the chief function of the judge is to decide disputes which have their roots in the past, we cannot, as a matter of general principle, assign to him a full-fledged share in the task of building the legal order of the future. He must, by and large, remain within the framework of the existing social structure and work with the materials which the past and the present have furnished him. This is so because he must take into consideration the reasonable anticipations of attorneys and their clients who cannot be expected to divine the intentions of judges bent on major revisions and reforms of the law. The judge may, within the limits suggested in earlier sections, make alterations and repairs necessary to protect the edifice of the law, or parts of it, from decay or disintegration. He may extend or constrict existing remedies and occasionally invent a new remedy or defense where the demands of justice make this step imperative.[7] For fundamental structural changes in the legal system, however, the judge must usually rely on outside assistance. He cannot himself tear down the edifice of the law, or substantial portions of it, and replace these parts with new ones.

Thus a judge, in making a decision, will in most cases undertake to shape the existing materials at his command rather than to manufacture something entirely novel.[8] In discharging his functions, he will rely on technical legal sources, the general spirit of the legal system, certain basic premises or clearly discernible trends of the social and economic order, received ideals of justice, and certain moral conceptions of his

[5] *Southern Pacific Co. v. Jensen*, 244 U.S. 205, at 221 (1916).

[6] Cardozo, pp. 136–137. See also Edwin W. Patterson, *Jurisprudence* (Brooklyn, 1953), p. 573: "Courts make law but they do not make it out of whole cloth."

[7] For a more elaborate discussion of this subject see Edgar Bodenheimer, *Power, Law, and Society* (New York, 1973), pp. 106–114; Robert E. Keeton, "Judicial Law Reform," 44 *Texas Law Rev.* 254 (1966).

[8] See C. K. Allen, *Law in the Making*, 6th ed. (Oxford, 1958), pp. 292–295.

society.[9] This, in the majority of cases, is for him a natural way of dealing with legal problems, for he is a member of his society and a product of its cultural synthesis. There are always contemporary social forces at work to which the judge will respond in his opinions, and the social and cultural framework of his age will often supply him with standards and rationales of decision. Finding the law, in this sense, does not mean automatic discernment of its true content or the absence of choice.[10] It merely means that judging is generally and essentially not an act of unfettered judicial will, but a conscientious attempt to rest a decision on formal and nonformal source materials that are regarded as legitimate tools of adjudicatory activity.

In taking the position that the judge, in the light of the functions which he performs for society, should not as a general rule be regarded as an architect of a new and better order, we do not by any means wish to deprecate the work and accomplishments of those few and rare judges whom history regards as revolutionaries and trailblazers of social progress. Lord Mansfield belongs to this group of select men, and perhaps Chief Justice Marshall in some aspects of his work may also be included among them. There may be times or historical contingencies where bold and unconventional action on the part of a judge becomes wholesome and beneficial for society. There may be situations where stagnation or decay can be overcome only by a judicial decision-maker who, being convinced that the preponderant values of the community are wholly obsolete or unreasonable, is willing to take risks and is determined to chart a new course into the future. Progress often depends on the courageous, decisive, and antitraditional action of great men. And although we should insist that the major tasks of law reform should be reserved to the action of men or bodies entrusted with the business of legislating, we would be taking a narrow and perhaps philistine viewpoint if we did not, at times, concede to the judiciary the right to lead the moral sentiment of society and to inaugurate, in a judicial decision, a new conception of justice in accord with the highest knowledge and truest insight perceptible to the human mind.

[9] By treating these nonformal sources as genuine sources of law, we are enlarging the range of the area in which the judge is able to "discover" law, as compared with the positivist approach, which regards every judicial act not directly referable to a formal source as an act of lawmaking.

[10] "Notwithstanding all the apparatus of authority, the judge has nearly always some degree of choice." Lord Wright, *Legal Essays and Addresses* (Cambridge, Eng., 1939), p. xxv. See also Wallace Mendelson, "The Judge's Art," 109 *University of Pennsylvania Law Rev.* 524 (1961).

TABLE OF CASES

INDEX OF NAMES

INDEX OF SUBJECTS

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