

THE NORMATIVE, THE LEGAL, AND THE LAW-JOBS: THE PROBLEM OF JURISTIC METHOD*

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PEOPLE who get interested in "sociology" "of law," whatever they prove to mean by either term, seem to find themselves caught in a tidal current that runs toward the troubled waters of a *Grundlegung*, an "Introduction," a "Foundations," a "What it will be about when I get around to really dealing with it." Max Weber, Ehrlich, Timasheff, de la Grasserie and the strange Jerusalem have all found their published efforts expended on introducing their subject, and only in Weber do the lines of the actual prospective building become at all clear. In part, at least, this is because Law is commonly conceived as a discipline whose very subject-matter is made up of norms for conduct, or imperatives, or rules for conduct, or correct dogmatic propositions, whereas sociology as a pre-science is a discipline which involves as its essential subject-matter sequences and

* The substance of this paper began in the summer of 1927, as a manuscript on Mechanisms of Group-Control, annotated chiefly with sociological material and material from American law. The analysis there detailed, however, had blurred the distinctions between intra-group and inter-group relations and reactions, which was fortunately discovered in time to keep it from publication. A second version became a major portion of my Leipzig lectures on Sociology of Law in 1931-32. It was annotated especially to, and tested against, materials from German law and legal history. A third reworking, this time with special attention to the fuller monographs on primitive law, became the theoretical framework for E. Adamson Hoebel's field studies on the law-ways of the Comanche and Shoshone Indians (1933-1934), and, finally, for his field work (1935-1936), in which in 1935 I had the luck to share, on the exciting law-ways and juristic method of the Cheyenne. The results of this last are presented in LLEWELLYN AND HOEBEL, LAW-WAYS AND THE CHEYENNE (in press). Meantime, other bodies of material involving the testing of the ideas, or of ideas closely similar, in particular areas have been published: my own PRÄJUDIZIENRECHT, my study on divorce, a succession of studies on contract, the bar, the growth of Sales law, Hall's THEFT, LAW AND SOCIETY, Goebel's FELONY AND MISDEMEANOR, Harper's THE ENGLISH NAVIGATION LAWS. And I have had the benefit of the manuscript of Malcolm Mason's lovely book on the struggles among rival legal buddings in Tudor England, and of numerous suggestions from my colleague Patterson. The one superb publication directly on the whole field is of course Max Weber's RECHTSZOLOGIE, which few seem to read, and none to use.

The constructs I use are *sociological* constructs, aimed at clarifying happenings and problems in the world of behavior. So, for instance, "authority" does not refer to any

orderings of actual behavior. The two realms of thought and discourse mix no more comfortably than oil and water; and efforts at *Grundlegung* are a fairly necessary result.

This is another of them. But it will give up in advance any effort to get at any sociology "of Law." The lines of attack of a social pre-science of human behavior are adapted, so far as I can discover, only to dealing with human behavior. So that in attempting to bridge between sociology and the legal, it is human behavior in the realm or in the aspects which we regard as legal with which I am concerned, and with those patterings of semi-recurrent behavior we know as legal institutions: courts, the office of judge and the like. This particular *Grundlegung* is a little one, with a narrow ultimate objective. It heads up in the sociological reasons for, underpinnings of, and nature of *juristic method*; it being my firm belief that one has to explore the behavior-situation, its needs, and its quirks, before one can build really satisfactory doctrine or practices to deal with those quirks, those needs, or — to any satisfaction — with that situation. Our doctrine and practices rest on past exploration of this sort, exploration long past, and currently renewed only case by case as one case after another arises. Betterment of the doctrine and practices will rest on re-

efflux of a "normative system," but to the basic situation which exists when Jones says "Go," and Smith goes, as distinct from that in which Smith does not go; and the drive of de facto authority of this sort to provide itself with felt "rightness" or rightfulness is regarded, again, as a behavior-drive observable among men-in-groups.

Two further points probably need mention. The one is that certain major points at which philosophy and ethics impinge upon the picture have been noted; and that one service which the analysis aims at is to clarify both the bearings of that impingement and the tool-stuff and working conditions of juristic work in furtherance of ideals.

The second is that such words as "drive" and "urge" are used in the paper as descriptive of observable behavior phenomena, not as indicating underlying "forces" which "explain" it. I have not been particularly careful to cast the analysis in terms conforming to the modern metaphysics of physics, nor in terms of the better work in semantics, nor in terms of the sound perception that behavior is wisely seen always as an interaction in a moving situation. I have tried to bear in mind the lessons properly derived from all of these; but the linguistic outlay required to express the material of this paper in terms at all accurate under those approaches seems to me like the outlay required to work up by way of five-decimal logarithms alleged "figures" which are trustworthy not even in the first decimal. The discipline has progressed to the place where one can wisely use any available technique to further objectivity of seeing and of statement; but we do not yet *know* enough about what we are looking at to warrant the more painfully elaborate expression of our inaccuracies. I have tried to keep the thinking of the paper abreast of the better level of working thought in the social disciplines, and of the better level of working thought in matters legal. I have tried to keep its terms a little clearer and its organization a little tighter than our knowledge of the data justifies, because constructs should not only organize what seems to be known but should also open leads for inquiry. But I have tried also to keep doubts live to be felt and to keep vaguenesses from being masked by words of simple-seeming solidity on the one hand or of an objective-sounding terminology which runs too far beyond the data, on the other.

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exploration undertaken in more sustained and cumulative fashion — it being also my firm belief that in these last few decades American juristic method has been subjected to an ever-increasing load, without equivalent study of how the method might be tuned up to better carry the load.

I have also been restless at the curious blankness with which men from other social disciplines face any legal matter or any talk of law. Of all the social disciplines it stands most isolated. My own guess is that that is because the law-men mainly think doctrine and talk a language which runs in terms largely of correct doctrine — which is to exclude communication and contact with any premises except the premises of correct doctrine. But underneath all doctrines there lie problems, and those problems seem to me a proper study for all men of the social disciplines, and an illuminating one. They extend through all group-living, in any type of group. They are a meeting-ground on which *exchange* of ideas and knowledge is possible between the men of law and the men of the social disciplines. And that, if true, also warrants its bit of *Grundlegung*. So do what I conceive to be certain inherently recurrent aspects of men's ways of going at some of those problems. For the store of record, of knowledge, and of light which the law-men have heaped up has no business to be kept locked away from the other social disciplines. Traffic in ideas, like traffic in goods, runs best when there are return-loadings. And just as anthropology has recently begun to discover that it can not only contribute to, but can learn from, the other social disciplines, so the social disciplines are due to discover that modern work in the legal field is not only a market for their product but a rich productive area. One thinks of ancient mines, once worked and valued, since lost, now relocated — and waiting.

ON CERTAIN WORDS: ESPECIALLY LAW-WAYS AND LAW-STUFF

The legal discipline has, I repeat, always been focused on Law, or Rules of Law and the like, and its current vocabulary makes discussion of behavior difficult to carry on without inviting misinterpretation. This paper touches only incidentally on Rules of Law; its focus is upon certain ways in which people in groups behave. I have therefore been driven to invention of some words which will, I hope, serve to avoid confusion. Most of these — such as “law-job” — are explained at appropriate places in the text. Two, however, run throughout, and need a word of explanation in advance. “Law-ways” is used to indicate any behavior or practices distinctively legal in character, flavor, connotation, or effect: procedures for cleaning up trouble-cases, the use of tribunals, the enactment of legislation, the practice of policing. The having and using of formulated rules of law is a law-way, too. The having and using of a formal Code is a law-way which we do not have. A Rule of Law is not a

law-way, not behavior, but a formulation with meaning and authority. Whereas using such a Rule, thinking in terms of such a Rule, observing it, applying it, construing it: those are law-ways. One needs, however, the wherewithal not only to distinguish the behavior aspects (along with the relevant attitudes) from the Rules of Law, but the wherewithal to lump the two, and to include in the reference such other things as tribunals, or specialized law-personnel. For the broad inclusive term I have chosen "law-stuff," and have used it to mean any phenomena in the culture which relate discernably to the legal; it includes rules of law, legal institutions of any kind, the presence and activity of lawyers, judges, jailors, law libraries and their use, courts, "habits" of obedience, a federal system: in short, to repeat, anything in the culture whose reference is discernibly legal, when that anything is being viewed under that discernibly legal reference. "Law-stuff" is used also to include anything which is discernibly *incipient* as law-stuff. What keeps this from being as meaninglessly broad as all outdoors is the orientation. "East," for instance, is also as broad as all outdoors, but it is not for that reason a meaningless or unusable concept.

Thus far there has been no effort here to indicate a meaning for "legal." And I wish it were possible to avoid such indication; but it is not. For "legal" is in common usage set not only against "economic, political, social, industrial-technological" — which is the general bearing of the use of the term in this paper — but it is also in common usage set against "illegal," so as to mean "lawfully according to law"; and it is also set against "moral," so as to mean "according to law, but not really 'right'"; and it is also set against "equitable," with the familiar connotations. Now if Law and all the relevant vocabulary were not a fighting matter as well as a confused one, it would be possible to make one's own definitions, stick to them, and still hope for understanding. But it is a fighting matter.

Let me therefore put "legal," and keep it, *in quotes* when the reference is to that phase of life and problem and behavior of men in groups which is set against the economic or religious or recreational. Let me *capitalise* it, as Legal, when the reference may be to the content or system or correct consequences of our high Rules of Law. This will not wholly do my work, for much of the time I shall be dealing with incipient or half-way material which is beginning to be distinctively "legal," but has not yet taken on all the attributes which things "legal" strain to acquire. I shall use some coinages to refer to one or another of the major incipient or part-way areas. For instance, in regard to the bare skeleton of authority and enforcement, where regularity and right are largely lacking, I shall speak of the "skelegal"; and where felt right is present in a penumbra between recognizable Law and clear morality or etiquette or decency, I shall speak of the "jurid." And where an incipient practice is yet unpredictable in detail, and is interrupted, as is our own

judicial practice of distinguishing a precedent which needs to be distinguished, which our judges waver between doing and not doing, I shall speak of "law-wavers" which might be in process of becoming real law-ways. All of this part-way material, this penumbral stuff which does not answer to yes-or-no, but only to a how-much of intensity or regularity or clarity, I can then lump as the "legaloid," and many things will be much easier to say clearly, and briefly, and without misconstruction.

"Normative" is here used in the ethical sense, as indicating an expressed judgment of rightness. "Norm" I have avoided where possible; where used, it is used not in the statistical sense or in the sense of the "normal," but as an equivalent of "normalization" or "correct standard." As will be seen, I find it necessary to distinguish sharply the ethical or moral, or the individual's felt rightness, from the *imperative* of a "legal" system (whether it be "skelegal" or right legal); a matter which becomes of peculiar importance when the "Or else!" of a "legal" system has passed through a stage of threat of *some* consequence to a stage of specific and limited threat. To that I beg attention, because so much discussion of "rules of law" has run (to my mind very loosely) in terms of "norms and the normative" that one seeking to distinguish "You must, or else! . . ." from "You should, really . . ." needs to make such a purpose explicit.¹

NORMATIVE GENERALIZATION

To see that something is *right*, or that something is *a* right, is to generalize. There is no practicable way, in ordinary life, to get at the notion of rightness without having, somewhere in your mind, a *general* picture or pattern which the case in hand fits into and fits under. You do not have to put the standard into words; you do not have to see it and know it as being a standard; it can be as vague as "somehow." But it is there: the *sensation*, if that be all it is, that somehow "cases like this ought to be dealt with this way," or that action like this is out of line with what action ought to be *in general*. Even to see a thing as right "simply" because you want it so, rests on a more general tacit proposition that what you want has extra claim to be considered.

Now setting up normative generalizations is creative action. To "see" a pattern is to make a pattern, and to make it a "right" pattern is to project it into the on-coming future. Being creative action, this normative generalizing can fasten on *anything* for its base, and can move from that base in any range and any direction. Even a fairy story — a single fairy story — can call up a normative generalization about the right behavior of mice and pumpkins, and of fairy godmothers and princes

1. The word "custom" is nowhere used; it is too blunt and confused to serve in careful analysis.

who have been experienced only in a newly created imaginary environment. The possibilities of normative generalization are limitless; the idiosyncratic actualities are almost so. The history of minority parties, freak sects, social and political dreamers, and paranoia, suggest the range. Some relatively few of these actual normative generalizations acquire peculiar social significance. They become accepted in a group, and by it. They prevail. They control behavior. People who are found at odds with them have trouble with that group, be it a family or a nation.

One factor urging powerfully in the direction of such socially significant normative generalization may be thought of as *quantitative*. If interlocking behavior gets patterned in fact, with a resulting back-and-forth of adjusted action and adjusted expectation, deviations will bother; generalizable pictures of rightness and of rights are pretty well bound to result. This does not depend on anybody wanting such patterns to develop, or planning them, or preaching them, though any or all of these things may happen. It does not even depend on people knowing that they have fallen into behaving along such patterned, interlocking lines, or that they have fallen into patterns of action and attitude which "strain" toward some particular line of normatizing. Often enough it takes a trouble-case to crystallize perception that the right pattern is there, in actuality or inescapably foreshadowed, when you come to think about it. This type of socially significant normative generalization is in original and eternal process of emergence from the mere living of any group, whether the case be one of a newly-wed's first failure to get home in ample time for dinner, or be one of a police force discovering that it will not be allowed to strike. Such interlocking behavior, however it comes into being, sets up originally, and eternally keeps setting up, *one line* of normative generalization, and does so in significant quantity (as to frequency, as to regularity, as to likeness among various relevant persons) so that it acquires a significant chance for acceptance by the relevant Entirety. I shall speak of this as direct, primitive normation, based on direct, primitive sense of justice.²

A second factor urging in the direction of socially significant normative generalization may be thought of, in contrast, as *qualitative*. The stress, the spectacular and memorable drama, the brain-sweat, of a trouble-case, though it be an utterly unique one, drives by its whole quality toward generalization; and this doubly, if the trouble-case becomes, as many do, the *occasion* for awakening to, and voicing, normative drives which have been building unnoticed. You can see this hypothetically if you will imagine that there never before has been a corrupt judge and one judge is suddenly discovered as corrupt. The theretofore unthinkable instance will crystallize a now conscious norm against corruption in judicial office;

2. By "primitive" I mean without need for organs of expression or for careful deliberation; I do *not* mean outmoded or displaced in any modern or sophisticated culture.

and if anything is done about it, the doing will become "the" procedure. History bears the marks of the phenomenon wherever some one baffling case of outrage has produced a "general" statute which no man passing it expected ever to see really needed. Our concern with this is three-fold. First, trouble-cases must be seen as having peculiar power to become jumping-off points for socially significant normative generalization. They are "naturals" for precedent-production. Second, and by the same token, they are cases in which a uniqueness which may be accident or misfortune (or may be planned or prophetic) is yet hard to keep from being mixed into the basis of the normative *generalization*. And this means that occasional individuals concerned in trouble-cases may acquire a shaping power over their society. For a basic problem of juristic method is the disentangling of long-range policy-issues from the person, from the circumstance — and indeed from the particular issue-drawing and the particular lines of advocacy — which happen to accompany the emergence of the matter into group attention. Achievement of such disentanglement is rare. If accomplished, the accomplisher has set his mark on his society.

The third matter in this connection is that the trouble-cases form a line which may become, which *tends* to become, a line apart. If they ever come to stand on their own footing, memorable and so relatively unchanging, known in clear outline and so remembered, perhaps even a special object of the peculiar lore of specialists in trouble-cases — then the lines of normative generalization which they bring forth will have a likely chance to come into divergence from those of the direct, primitive normation which moulds ever freshly on whatever come to be the practices of life. In such case, the trouble-case stuff will offer a further and independent germ of the "legal"; this time as distinct not only from any other aspect of the culture but as distinct also from the primitively and directly just.

But one is not done with socially significant normative generalization by merely examining its two most frequent and most inevitable bases or foundations in life-stuff. For, as we have seen, such generalization is a *creation*. It is creative in its selection of life-stuff to work with and from; it is creative in what it does with the selection. Here are three farmers each of whom has borrowed to finance his working season and met with pest or drought, and each of whom has given as security his car, furniture, leasehold, and prospective crop. One lender takes the car and furniture, and turns out the farmer; one gives his farmer time; one forgives the debt. You can generalize and normatize from any of these, or you can imagine something fourth or fifth, and further, and generalize from that. Your generalizing normation will be creative also in the direction and scope, in the *range*, you give to the generalization: will it deal with "cotton-farmers," with "debtors," with "persons making

contractual engagements," with "failure of crop," or with "unforeseen difficulty"? Will you introduce other limitations or extensions: "tenant-farmers," "white tenant-farmers with more than six minor children who have occupied the premises at least three successive years"? In these same illustrations I have sought to bring out what one may call color or flavor of available normative generalizations, and direction as well as scope. The lines of choosing significant factors can, in our instance, drive in the direction of permanency of relation, or peaceableness, or celibacy, or agricultural development, or race-selection. What concerns us is to hammer home two things. The first is that every normative generalization contains *some* quantum of idealization, of projection beyond the actual. The idealization may run only to the desirability of unchanged persistence of some particular variety of given condition; it may run to change so great that what results is empty crying in the wilderness. No matter: an ideal is set up. The second thing is that normative generalizations do not make themselves. *Somebody* makes them. With luck or skill, he may indeed voice just what everybody feels. Again no matter: *somebody* had to voice it, before everybody could effectively feel it, for action.

Which brings us to the somebody who — in action or in speech — does this voicing. For in the voicing he gives form, shape, color, range, direction, to a normative generalization, as, so to speak, he throws its hat into the ring. The spokesman either hits or muddles what he is trying to communicate. He either lays an issue on the nose of the need or fills the woods with dragged red herring. He either has prestige of birth, wealth, position, or he has not. He may hold a key to more ready acceptance by voicing what most feel, or by the luck of events which focus interest on him. This gets complex to say, but it is not complex to see. The man either has skill or he has not. A good cause can be lost, or a bad one won, by the manner of issue drawing and of advocacy; and a cause which wins tends to put over for the future the very shape and color of the particular normation which it has come in the course of the struggle to embody. Not for nothing, in our modern law-life, do counsel search for the "favorable" or "advantageous" test-case to carry up; not for nothing do they delay here, settle there, while the "right" case is being found, and made ready, and pressed. Let me sum up these aspects of the individual's direct effect as those of his skill and his desire and his luck.

These processes of normative generalization — always in some degree wishful, idealizing — I hold to be part of man-in-culture. Together with them, and informing them with fuel and content, go two other urges each of which I hold to be always present in enough individuals to have impact on the Entirety. The one is the urge to use available social machinery to serve personal, sub-group or other ends which are ends at

odds with interests of some other members of the Entirety. As applied to normative generalization, this means the persistent production of generalizations selected for their basis, and shaped for their content, color, and direction, to serve *some*, and against *others*. This may take vicious lines, in the view of right-minded men. Or the serving of some against others may appear as a device to "restore" balance and serve social health, as is urged on behalf of the rightness of relieving respectively the taxpayer and the unemployed. The "against others" may be quite direct, as in a dispute over boundaries or water rights, or a shift in the terms and advantages of a competitive struggle, or it may go less directly, as by reduction of the available pie by capture of one slice for Jones.

The contrasting urge can be roughly indicated as an urge to seek the welfare of the Entirety concerned. I refer here not to any net effect "as if by an invisible hand," nor to the mouthings of the hypocrite. I refer to the persistent recurrence in every culture of persons consciously and actively concerned about the common-weal. For these too bring forth normative generalizations; and those which they bring forth play on and against the products of the others.

Thus far we have looked into certain processes of normative generalization, their nature, and something of the bases and machinery of the ones most likely to become socially significant. These processes exist, persist, recur, whether or not there is anything in the culture of the group which can be spotted as distinctively "legal" in character. They are part of the living of man-in-groups. They are part of what generates the "legal." They affect the work of the "legal." They help effect change in it. And we have noted the persistent drive of interest in the use or twisting of institutions to individual or sub-group advantage; and the recurrent drive also, for the common-weal.

We turn now to something of the *form* which things "legal" tend to take, of those formal aspects which, when they have once developed into recognizability, enter thenceforward into the workings of men-in-groups in quite peculiar ways. When those have been examined, we shall come to what I see as the *law-jobs* common to all groups and cultures; those jobs around whose doing, those functions around whose fulfillment, one finds the most significant organization of normative generalization, of other law-stuff, such as procedures, and of the legal crafts and all the work and personnel of law.³

3. It is of course vital to clarity that the level and context of discourse be kept clear. I shall therefore attempt, when a complex great-group (a "society") is in question, to distinguish the specific Law and Law-stuff of the Whole from the specific by-law and by-law-stuff of any designated sub-grouping within the whole. It is in light of the functional similarity that the institutional differences and the conflicts gain clarity. The uncapitalized phrasings, "legal" and "law-job" and "law-way," I reserve for general applicability to the functional aspects common to groups of all kinds and sizes.

THE "LEGAL"

Normative generalization is part of what goes to generate and to make up the "legal"; it is not the whole. The generalization must also be somehow accepted, it must be somehow effective on men's behavior or consonant with men's behavior. It must be more; it reaches beyond the *normation* of oughtness into the *imperative* of mustness. The "legal" has to do with ways and standards which will prevail in the pinch of challenge, with rights and the acquisition of rights which have teeth, with liberties and powers whose exercise can be made to stand up under attack. Let there be no doubt about this: you can have law-stuff, undeniable law-stuff, which is neither right nor just; when you are put to the choice, you will know the "legal" from the right or just because the "legal," when insisted on, is what prevails, and the right or just will have to suffer accordingly.

But the "legal" is not brute power exercised at odds with, or without reference to the going order. That exercise of power which is to be "legal" (not necessarily "lawful") is exercise of power as part of an *order*, and as part of a *system* which is recognized by or in the Entirety concerned. The minimal *normative* generalization which suffices is that, as the order or system stands, exercise of power as part of or flowing from the system ought to be recognized as authoritative or conclusive; which is a different thing from right, or even from rightful under the Law. In our system, the wrong order or judgment of the court is the classic example. Other systems a-plenty hold the same of executive action.

Now this statement will not satisfy the moralist or any of half a dozen varieties of legal philosopher; but most of the matters such thinkers have in mind we shall be dealing with in due course. Here it is vital to see the possibility of the emergence of a "legal" structure (at need, "skelegal") which makes its own claim to *its own variety* of oughtness, regardless of the "inherent" rightness or justice of its any part or of its net weight: its claim to observance, obedience, authority, effectiveness because, but merely because, it is the effective expression of the *recognized going order* of the Entirety concerned.

And it is vital to see, second, and as a corollary, that wherever there is no single, unified, clearly perceived and recognized and centered structure making such a claim and making it effectively, then we shall be faced with rival lines and structures of the "legal," each one budding or semi-developed, and all in competition or at war for ultimate expansion and dominance. For the "legal" (like the Legal which is a phase of it) persists in driving toward exclusivity, toward systematization, toward integration. It must. Of its nature, it purports to be final and conclusive. Rival finalities drive toward some type of working integration, within any *felt* Entirety. Coke's war on the prerogative courts, the war of King's

Court law on local law, the struggle between federal control and states' rights, or between Reichsrecht, Landrecht, Stadtrecht — these are not only struggles over patronage and power, they are also instances of drives inherent in "legal" stuff.

In this, as in general, a drive need not of course mean accomplishment, or full accomplishment; in which aspect it becomes quite intelligible that a judgment may be and is "law" for the parties even when it is a wrong judgment "under The Law"; even a wrong and out of kilter detail takes its dominant color from the System to which it belongs. So also the System itself may be slow to work out observable integration: consider the technical difficulties still met in describing our own American Legal system as a Legal unity, or the problem of governmental departments working "uncoordinated." Indeed, once a society has become both really complex and at all mobile, a truly full integration of its legal stuff, even when one strips the "legal" down to the bare "official-Legal," becomes impossible. The *concept* of a coherent and ordered unity does serve as an ideal to unchain constant effort; it serves also as a fictional frame of discourse within which particular partial reconciliations and hierarchical integrations are constantly worked out, in appellate courts, the lawmen *talking* always, while they handle this conflict or that one, as if there could be but one right answer, and as if that one single right answer had already been in some manner predetermined by the system. This talk is fiction. The unity which a legal system has (in a mobile and complex society) is not an intellectual or intellectualized unity of actually prevailing doctrine. The doctrine at hand is always somewhat pluralistic, instinct with diverse and warring premises of growth. The unity which exists is like the unity of an organism — it is as real as is the unity of a society, that net working something which makes the society observable *as* a society; its unity is also of that same nature, with blurred spots and welters, with semi-disorganizations sometimes perhaps just barely held in check, but whose net balance yet yields a Whole. Any legal controversy is worked out not only against a dim ideal picture of a Whole, but also (to the extent that the tribunal is permitted to act *for* the Whole) as if that Whole were, so far as affects the case in hand, also a rationally intellectualized and systematic whole of doctrine. Thus the ideal, and the fictional frame of discourse, daily serve their purpose; for it is by means of them that the pluralistic, vari-tendencied system is kept at work on the digestion or assimilation of the constant in-flow of new law-stuff and new trendings into it from the readjusting areas of the culture. If the "legal" did not in some degree manage to unleash and channel such drives for internal tidiness, the influx of new stuff from the living world around it would prove overwhelming. And a main present problem of our own system — I refer here to our system on the strictly official-

Legal side—is that it has come to limp increasingly under a rate of absorption and digestion long fallen below its rate of intake.

Now things distinctively and recognizably “legal,” — law-stuff, law-personnel — rarely appear in any group or culture full-blown and at one stroke. Even when six Americans gather together and promptly frame a written “constitution” for their new group, it is rare for that “constitution” to have much living connection with what comes to be the group’s going law-stuff. Certainly in the simpler cultures a society possesses first of all just “what is being done,” a general matrix; the pearl of the “legaloid,” and then of Law, is secreted slowly, around some irritation. The major lines which may be hit upon seem to include the line of slowly specializing personnel and the line of slowly specializing procedures to handle grievance or dispute. But whether one approaches the matter with his eye primarily on effective practices (or semi-practices) which avoid conflict, or primarily on effective norms (or semi-norms) which guide non-litigious conduct, or primarily on trouble-case procedures (or semi-procedures) and results, or primarily on authoritative (or semi-authoritative) personnel who handle trouble (judges, *e.g.*) or declare or create either norms (prophets) or imperatives (kings)—in any case he must expect to find law-stuff beginning in *instances* of behavior, or of speech (which, incidentally, is also behavior), or of effort at normative generalization whose expression is behavior. Such instances are instances before they can be made practices, they are one-man stuff before they can become accepted, they are experiments and indeed deviations before they can even tend to become standard and institutional. *One germ* of law-stuff, then, precedes the phase or feature of *regularity*. It does not concern me whether, until some regularity is achieved, some one may prefer to see the stuff as *pre-legal*. What does concern me is that the student of the “legal” must wrestle with how the “legal” comes into recognizable being as a something discernibly different from just what is going on, in general. If one cannot distinguish the “legal” from what goes on, in general, one puts his finger on no law-stuff which he can know to be such: incipient *institutional specialization* is a pre-condition to study.

One line of such specialization centers, as we have seen, on the emergence of *authority in persons*. Another line centers on the emergence of *authority in patterns* of behavior and of norms for behavior; and especially around the trouble-case. Each line has to make its way into recognizability. And nature offers man no compulsion to take either road, first, or either road, alone.

But these are attributes to be looked for and seen in terms not of yes-or-no, but of more-or-less, of significant enoughness. “Regularity,” *e.g.*, means not one hundred percent regularity; it means, as a minimum, enough of regularity to allow of prediction which is more than coin-

flipping, plus some drive (which may be checked or counter-balanced) for more of regularity to develop. And "the legal" under immediate discussion is a very bare-bones kind of legal stuff; pre-law ways, if you will; law-ways, in any event, which may be very far from the finished and polished product of the jurist's art in a developed modern state. Yet even such crude law-stuff is complex enough in its clustered constitution.

AUTHORITY IN PERSONNEL OR ACTION OR IMPERATIVE

There follows an attribute or cluster of attributes which can be lumped as an element of *authority* (the "skelegal"), but which it helps clarity to treat as a cluster, and to break down:

(a) There is a necessary element of *effectiveness* or existence in and as a part of the Entirety concerned: some quantum of de facto obedience to or acquiescence in a mandate or ukase, or in a disposition of a trouble-case. If a recognizable system has emerged, this calls only for effectiveness, in some quantum, of its mandates or dispositions in general, despite some tolerance for individual cases of ineffectiveness. Though the jurisdiction of the Supreme Court over controversies between States lay long in a sort of penumbra here, controversies were submitted, and the judgments took color also from effective enforcement of other judgments.

(b) There is an element of *supremacy*: in the pinch the "legal" must prevail as against any competing standard or authority. More accurately, the *system* of which it is a part must be prevailing; for occasional doubt or even pitched-battle defeat of the "legal," in detail, is well within the concept's range of tolerance.

(c) There is an element of *enforcement*, of sanction, of perceptible teeth to call into play against the challenger. This goes to the heart of things. But here, too, tolerance is wide. Three-quarters of the offenders may go scatheless, if all have fear, or are driven into secrecy. Brandy smuggling in England during the blockade against Napoleon met real public support; but when the King's men rode, the caught smuggler suffered: a fine instance of the partial character enforcement can have without losing its meaning. And would any man argue that "nullification" of the capital penalty in larceny cases at the same period meant "no law"?

(d) There is an element of recognition that what is done or commanded or set as imperative or as norm is part of the going order of the Entirety concerned; not merely acceptance, but an attitude about the *why* of this acceptance: an element of *officialdom*. The attitude toward "why" need not go to approval; but it must go to recognition of the existence of a going system. This, as has been indicated, distinguishes legal outrage (wrong, biased, "technical"; perhaps colored as if rightly lawful)

from *illegal* (contra-legal) outrage, legal tyranny from brute power, a corrupt administration from an Al Capone (the City or State being taken as the unit of discourse); or taking a smaller unit of discourse, it is what distinguishes an Al Capone felt as semi-permanent (say, as The True Big Shot within the relevant group) from a momentarily successful muscled-in.

Now if the "legal" ("skelegal") developed in a group or culture contains something of these elements but no more; and especially if there is developed the authority-cluster without the regularity-cluster to be next discussed, then pro tanto there would be presented the legal régime we know as *tyranny* (benevolent or otherwise); for it would then be using authoritative personnel, uncontrolled.

REGULARITY OF PATTERN

But equally insistent in their drive toward emergence are a cluster of attributes we can term *regularity*. Again the cluster is better broken down: first, into three types of de facto regularity of behavior (lawways or "law-wavers"); and second, into the attachment of obligatory quality to imagined and projected regularity in each such type of behavior, (moving through the "jurid" up to the imperative). The imperative may creep in upon behavior already largely regular in fact, or it may jump far ahead of behavior, as a means to lining behavior up, or the two may mix.

(a) Behavior Aspect. There is, first, then, some degree of regularity in what we may follow Vinogradoff in thinking of as non-litigious behavior, especially in what Malinowski has stressed as conflict-laden situations. The degree of regularity needed is: enough to be perceived, so that it can be adjusted to — so that it can both found expectations and lay a basis for their recognition: call it *going expectations*.

(a) Imperative Aspect. There is the relevant imperative generalization about the obligatory character of behavior according to the relevant pattern (be the latter derived from life, or projected). I am not at this point concerned with what the reader is likely to be thinking of: Jellinek's "the normative power of the actual." Such regularity as is described under "(a)—Behavior Aspect)" will indeed produce normative generalization, sense of rightness, claim of right. That is one germ of law-stuff, original and eternal; and I have no intention of forgetting it. It may, it often will, coincide exactly with, and lead into, the *imperative* generalization I have here in mind. But when such highly desirable coincidence fails, then it is the imperative mustness, not the normative oughtness, which is the subject-matter here. The latter is commonly enough the fuel and the directive; the former is the machinery which not only fur-

thers, but *limits*. What we are dealing with, therefore, is: "This is what you do, or else! . . ." And again: "This, it is safe to do. . . ."

(b) Behavior Aspect. There is a similar element of regularity in the ways of getting at a grievance or dispute, in the manner of articulating a rebuke, and the like: a quantum of *procedure*.

(b) Imperative Aspect (1). Companioning this (or running ahead of it) may be a relevant imperative generalization. This matter may grow quite complex, with available alternatives at odds one with another, and little clarity as to preference, in either the law-stuff or the ethics, with a resulting competition of *devices* which resembles somewhat the competition between rival *authorities*. Consider in our own history the decline of debt, as against *indebitatus assumpsit*.

(b) Imperative Aspect (2). This line of imperative generalization takes on a phase and flavor of peculiar importance if it binds not only the litigant, or his self-help representative, but also any official in authority. The question of degree is of course vital. Thus Pound uses as a favorite example of justiciation "without law" that kadi who is nonetheless "bound," *inter alia*, by the Koran, and, though remotely, by his superior. But it needs note here, as also in regard to scope of remedy, that the "imperative" addressed to the official, while more than merely normative, remains commonly in a "jurid" state far less sharp of sanction than that addressed to the "law-consumer."

(c) Behavior Aspect. There is, finally, an element of regularity — as to kind, as to minimum, as to maximum — in the ultimate outcome of adjustment of a grievance or dispute of some particular character; a regularity which is, in the main, slower to emerge than is some recurrent patterning of grievance-procedure, but is also one persistent in its emergent drive. Call it a quantum of *certainty of the scope of remedy*.

(c) Imperative Aspect (1) and (2). Here, too, imperative generalization appears, and here too it reaches peculiar importance if it lays its control also upon any relevant official in authority; at which point the Legal (by which I mean here to include much more than formulated Legal doctrine) completes its magnificent bridge into the political.

If these regularity-factors add themselves to a régime of authoritative personnel, they substitute pro tanto a régime of "government controlled by Law" for one of "tyranny" or benevolent "despotism." I say "pro tanto" because the occurrence in life of either of these ideal-types, in purity, verges on the inconceivable.

If no authoritative personnel is present, the aggrieved serving for instance as a self-redressor, then the "legal" becomes clearly recognizable in the culture to the degree that ways and imperatives of the

kind described take on themselves the aspects of authority by legitimizing and limiting legitimate action toward redress.

On the other hand, if the regularity-elements not only gain the upper hand, but get out of hand, there results the wooden, externalized, graceless and cumbersome inadequacy summed up as legalism. That the "legal" may yield effectiveness, as we shall see, it is well-nigh indispensable for a culture to develop some type of personnel for the purpose. That it may yield bearable legality instead of legalism, or what will be felt as acceptable, rather than as arbitrary, requires that to the elements of pure form thus far discussed there be added *certain minimum matters of substance*.

(a) The content and substance of the norms and activities of the imperative System, as a whole, must be felt by the Entirety concerned to serve that Entirety reasonably well: a quantum of *general satisfaction*. The tolerances here are huge, but they have limits.

(b) The manner and substance of working out particular matters must remain somewhat understandable, as a proper part of a reasonably proper system, to the persons interested directly or in sympathy or as observers.

Legality thus seems to me marked by one type of *result* of the working of things "legal" when those things contain some quantum of the elements of regularity; that type of result is the result which gives moderate satisfaction. Legalism is marked by unsatisfactory results, by wooden arbitrariness, as compared to the tyrant's arbitrariness of whimsy or temper. A primitive with much time, much patience, much fatalism, and no comparative study of alternative possibilities may find results satisfactory with which an observer rooted in a legally more artistic culture may grow impatient. But however subjective the judgment of what distinguishes legalism from legality, three objective phenomena remain which make the terms worth saving. One is that when men feel the imperative system to be too much and too persistently out of gear with what they want from it, they hold back, they even kick up. Another is that in all cultures judgment frequently diverges widely about the system as a whole, which may be taken as blessed with proper legality, and about particular details, which may yet be seen as "technical," "legalistic," and, briefly, outrage. The third, as the curious and lovely Cheyenne material makes clear, is that when juristic art and method happen to be abreast of their function, there is no need for legalism, in anybody's definition of that term, to raise its head.

PHILOSOPHICAL CAVEAT AND EXCURSUS

With this I close the immediate discussion of the "legal," having touched hardly at all upon components of rightness or justice. That calls

for a word in justification. I think the function of justice better seen and served by getting the bare "legal" thus set off. Many feel otherwise.

The cynically minded have always seen government and law as humanly given institutional devices by use of which some persons proceeded to get more of what they wanted. The idealistically minded have always seen Government and Law as imperfect means, humanly conditioned, but always driving, and always to be driven, toward a finer life for the Entirety and its almost-every member. Both have been rather obviously right. Every term used in connection with things legal reflects, in its common use, both views, both facts. At the one end, Law is flavored with what prevails, and even courts are courts "of law, and not of justice." A retroactive confiscatory decree inflicting penalty and visiting wholesale declassification of status, say for accidents of birth, is law, and that is that; but even such a decree is carefully made general, is put forth and administered in regular form, is "Justice under Law" as the books define the term, and is promulgated in the name of the public good. At the other end, Justice-in-result itself is flavored by the long-range view, and is contrasted with softheaded sentimentality; and the "political" criminal may be accorded admiration and a tear, but must be put out of circulation for mistakes in his procedure of attempted restoration of a commonwealth to its finest purposes. For the most part, the Legal System As Is, or any part of it, and The Purpose of a Legal System, or of any part of it, vary from each other within limits of tolerance, of endurance, of possible reform. Readjustment may be relatively imperceptible as it occurs, as in the gradual judicial rekindling in unobserved places which has been so busily at work in our highest state courts over a generation; or it may be by similar processes which happen to be more carefully observed, as in the Supreme Court's taxation decisions of recent years; or it may be by way of political struggle and legislation and administrative policy; or it may take the ultimate form of war or revolution.

In all of this there are two major lines of approach for him who is concerned for his society, two major lines which seem in the heat of any controversy to be at odds. They are not at odds, in purpose. They may be at odds, at times, on means.

The one line, for purposes of reform, readjustment and health, seeks to make capital of the law-man's feeling and the layman's feeling that nothing is *True Law* which is not Just; and seeks thereby to deprive unjust Law or any part of it of the color and cover which it, and action "under" it, lay claim to as being a part, still, of the Legal System. This holds on the regularity side of the legal, in attacks on legalism, and it holds again, in attacks on what are seen as arbitrary or unjust decrees or regulations or administrative practices. It holds, on the authority side, in addition, as to particular acts of governing personnel, or irregu-

larly introduced regulations or practices or decrees. The line of approach is to fuse and confuse, either deliberately or unconsciously, justice with law, regularity with right, and so to war on the unjust as unlawful, on the irregular as wrong. This line (if you do not like it) represents a capitulation to the inertia of the mind of lawman and of laymen, or (if you like it) a capitalization of that inertia, throwing the weight of the appeal of the felt just and right into the balance, to make the Law As Is (or as most think it is) *become* the Law That Should Be, the merely "legal" become the rightly Legal. Let me call this the line of legitimate fusion and confusion. I see the adoption of it as a politically dictated choice, a classification of ideas and terms adopted for purposes of more immediate persuasiveness. Its philosophical foundation lies in a belief that to discuss Law at all is to move any reader in favor of what is discussed as being Law, so that there rests on a thinker an obligation to put forward as being Law — even for purposes of discussion — only that which he would urge and approve. There is much to be said for the pragmatic force of this position.

It is not, however, my position, and I want to make that fact very clear. My faith is a different faith. I proceed upon the assumption that clear seeing and clear statement, to the extent to which it can be achieved, is a long-range greater gain. I hold the hard authority-aspect of the legal imperative, and the hard regularity-aspect, to be worth isolating for work and note, that they may be seen sharply as Not Enough for any decent system to rest content with. I deny, flat, any inherent tendency of hard seeing to drown the drive for the good and for the better. I hold the responsibility for working toward the Right and the Just within the hard legal frame to be better pinned on the official if it becomes common knowledge that to be Legal is not enough. I hold the jurists' job to remain undone until we can discover and make clear how far our officials *can* be controlled, and how far not, and, until we then devise means to control them effectively where they can be controlled, to be to give them some guidance in the remaining area, and to help them distinguish the arbitrary from the wise. The most fruitful angle of approach to accomplishing this task which I can see, is to *defuse* and *de-*confuse the merely authoritative, the merely regular, the merely incidental to the accepted System, from the Just or the Right, and to get into spotlighted pillory so much of Law as has no business to be Law, so much of the Legal as should be made Unlawful, so much of Jumble as should be made into clear, guidesome Leads. I have no quarrel with any who may find the other road the wiser one, for their own efforts. But I hold the hard eye to be one most effective, though not the only, servant of the jurist's conscience and ideals; and I hold the dulling of conscience and ideals among too many men of law to be a result not of

hardening of the eye, but, in good part, of a confused tradition that if it is Legal, it is *therefore* Right enough.

Nor can I find any way for getting into clarity the issues of policy about Law which emerge out of events at home and abroad over these latter years, save by recanvassing the work and material and function of things legal afresh and from the barest bed-rock upwards.

THE LAW-JOBS

The formal legal, the law-stuff and the law-ways, travel paths of their own, once they specialize out into recognizability. Upon them, in conflicting service of particular parts and of the whole, play human interests and normative generalizations which are thrown and followed into the ring by men. All of this takes meaning, takes shape, takes body under the eye, if it be set against those law-jobs whose sufficient doing goes to the very continued existence of a society as a society, of a group as a group.

The law-jobs are in their bare bones fundamental, they are eternal. Perhaps they can all be summed up in a single formulation: such arrangement and adjustment of people's behavior that the society (or the group) remains a society (or a group) and gets enough energy unleashed and coordinated to keep on with its job as a society (or a group). But if the matter is put in that inclusive way, it sounds like mere tautology — almost as if one were saying that to be a group you just must be a group. Whereas what is being said is that to *stay* a group, you must manage to deal with centrifugal tendencies, when they break out, and you must manage, preventively, to keep them from breaking out. And that you must *effect* organization, and that you must *keep* it effective. And that you must do all this by means which do not choke off, but elicit, your necessary flow of human energy.

Thus, for purposes of study, it is wiser to break down The Law-Job into lesser phases — doubly so, because to a very considerable extent the major lines of institutional machinery which men have hit upon for getting "the" job done have proved to focus interestingly around certain of the particular phases. Of these there are four around which matters legal group themselves rather illuminatingly:

- I. The disposition of trouble-cases.
- II. The preventive channeling and the reorientation of conduct and expectations so as to avoid trouble.
- III. The allocation of authority and the arrangement of procedures which legitimize action as being authoritative.
- IV. The net organization of the group or society *as a whole* so as to provide direction and incentive.

There are two preliminary matters. The first is to make unmistakable that the law-jobs hold, as basic functions, for *every* human group, from a group of two persons on up. They are implicit in the concept of "groupness." In any community or society which may be taken as a larger unit, the law-jobs therefore appear at least doubly: once for the big unit, and again for every sub-unit within the big one; and again, of course, for every sub-sub-unit within a sub-unit, "etc. ad inf." This requires to be made explicit, because the "Law"-concept of modern thought goes only to that great unit called the State or to such other *political* whole as may come in question. But in a functional view a newly wedded couple, a newly formed partnership, a two-child casual play-group, have each, *qua* group, the problems to deal with which are here our concern; and the aspects which those problems take on in the modern State are clarified and not obscured by observing them within such simpler groupings, taken as each, for the moment, a *unit* of observation. To put simple examples: with the arrival of a first child at talking age, certain portions of family by-law are simply forced into facing the juristic problems of *verbal* form; and the problems of "construction," "distinction," "true meaning," "underlying principle," and relation to the accepted general rightnesses, come promptly into being, nor can any arbitrary telling of the child to hold his tongue take them out of being. Or again, in any modern family in which graver matters are put up to father, or "told" to him, a three person group suffices to produce the differentiation and the conflict between a formal Legal system of the Whole Three, and the far-ramified by-legal system, of lesser and local jurisdiction, of the mother-child sub-unit. Father's precedents on the occasional matters put up to him raise promptly the control-problems of a distinctive "superior" set of imperatives. So that law-jobs and law-ways, I repeat, go to the essence of *any* group; and the presence of a larger and more inclusive one does not at all displace their functioning within sub-units. It may of course importantly condition problems within sub-units: under The Law of our modern State, wife-beating is no longer privileged and wife-desertion may have consequences visited upon it. But such alteration of conditions no more does away with fundamental family by-law problems than the condition of embarrassing war between neighbors does away with the internal problems of a neutral "sovereign" state. Indeed, it is when one marks out sharply *what group-unit* one is dealing with as being the Entirety concerned, that such a concept as "social control" loses its amorphousness and becomes manageable. Pick up any discussion of that topic and observe the sharpness which emerges if one carries in mind persistently such queries as "Control *of* whom, *by* whom, *for* what and in the context of what Entirety? Is this an intra-group case or an inter-group case? If the latter, how well organized a larger Entirety is there in the picture?"

The second preliminary matter is another which runs through all our law-jobs. Each alone, and all together, present first of all a basic aspect, one of pure survival, a bare-bones. The job must get done *enough* to keep the group going. This is a struggle for continued existence. It is order, in the pinch, at whatever expense to justice. Beyond this, there is to each job a double aspect which we may call the questing-aspect, a betterment aspect, a question so to speak of surplus and its employment. On the one side, this questing aspect looks to more adequate doing of the job, just as a doing: economy, efficiency, smoothness: at the peak, esthetically satisfying grace in the doing of it. On the other side, the questing aspect looks to the ideal values: justice, finer justice, such organization and such ideals of justice as tend toward fuller, richer life. It no more does to forget the bare bones over these latter things than it does to forget these things over the bare bones.

THE TROUBLE-CASE

I. The phase of the law-jobs which repays study first and fastest is the *adjustment of the trouble-case*: offense, grievance, dispute. Roughly described, this is garage-repair work on the general order of the group when that general order misses fire, or grinds gears, or even threatens total break-down. Around this aspect law-stuff becomes most easily, most quickly and most unmistakably observable; in the handling of this job lies also the testing of whether methods and manners of "control" which may have been thought to be law-stuff are or are not such. Finally, in any group or culture, the doing of this job gives off eternally, as by-product, new material for the doing of the other law-jobs. As to the *general order* of a group or society, it is just conceivable that adjustment of trouble cases might be purely repair work, and nothing more (though I have not yet met such a situation), but as to the *law-stuff* of the group or society, such adjustment of trouble-cases is a continuously creative feeder.

Typically, the trouble is minor trouble, "individual" trouble; in itself and case by case, bearable trouble. Typically, it would disrupt continuance of group-life only if sufficiently multiplied, sufficiently cumulative. This holds, even, of most homicides. The tighter the group, the more there is in its order of the traditionally accepted or of intensity of emotional binder, the tougher is its resistance to disruption from this quarter; yet picking up one's marbles and going home remains a symbol of factional strife which may mean bolt, divorce, or civil war. So that while adjustment of the trouble-case has a surface appearance not of life-saving so much as of life-easing, yet the elimination of conflict and grievance which has broken out remains a significant basic *line* of need and of activity, whether the individual instance correspond to bruised finger or to emergency operation. For enough unhealed breaches between

members break the group, and tensions, left alone, build up potential toward explosion.

The bare-bones aspect of this law-job is plain enough: get enough of it done to leave the group a group. One or another member or faction can be cut down or cut off, and the group be still "the" group; bitterness can seethe; the line of adjustment may prove to be merely that what Big Fist wants, he gets. But if the group stays a group and neither explodes nor dribbles into disintegration, then this bare-bones survival-need is met. The questing aspects of the matter, on the other hand, run into reaches which few societies have penetrated in their High Law save in the person of some occasional transcendent judge. To adjust trouble cases with speed, smoothness, deep permanency, minimum outlay of effort and disruption of other activities — and, on points of fact, with accuracy — this is still a quest. Nor is it less a quest, still, to reach felt immediate justice in the settlement, or to reach in or via the settlement the line of long-range social health, or to combine either of these with a modicum of speed and economy.

Of this law-job, especially in its interaction with the second, more hereinafter. Here, let me point out merely its peculiar importance for the study of any but the most developed legal cultures, and its corrective importance for the study even of those; for when Rules branch and spread to form a quasi-world of their own, it is the trouble-case which tests which are the Rules that prevail in lawyers' lives instead of lawyers' legend.

CHANNELING

II. *Preventive channeling and shift of orientation.* The second phase centers on the effective channeling, preventively and in advance, of people's conduct — and attitudes — toward one another. Its importance lies peculiarly in areas of patent or of latent conflict of interest: in the arrangement of participation in the scarce and desirable, from physical things on through to power and prestige. This — as in marriage, and property-rights — has always been easy to see. But no less important is the avoidance of hitches in the coordination of life and work; for in any organized action, a slip of expected performance, a break of rhythmized timing, can produce conflict by its mere disruptive disturbance. In general, the job is that of producing and maintaining a going order instead of a disordered series of collisions; it is this order on which the first job does garage-repair work. The function includes, to repeat, not only the channeling of overt behavior but the channeling of expectations, norms and claims. It includes too the provision of such clarity as a culture affords as to what free play and leeway is permitted, or is not only permitted but actively protected — for the range and kind (and direction of urge) of

free play and leeway in a set of structured ways, legal or other, is of as much significance as is the structure.

We meet in this channeling task a matter which is curiously easy to feel accurately in the particular but which taxes the ingenuity to state accurately in the general. It is this: that patently, as one must remember, the "legal" cannot exhaust the whole nature of a culture: the lines of factory-operation under industrial technology are, for instance, in one aspect technological, and insofar not "legal." Those same ways also involve governance, and can be studied with profit from that angle alone. They relate to education; they relate to the use of leisure. In somewhat the same way, however, there is almost no part of culture which is not *also* "legal" in nature (whatever else it is as well), in that a failure of any person to perform or to hold still *as and when expected* will be an occasion for grievance and conflict — as is forthwith made plain by any slip-up or slow-down or sit-down in the operation of the factory referred to, under the same machine technology. This is all quite apart from rights to division of the product. The intellectual task is to get stated the aspect and quantum of the "legal" that lies in those phases of culture which, so long as they present no hitch or trouble, seem to the observer wholly something else than "legal." And the "legal" aspect may well be conceived as lying in, almost confined to, so much of the patterning of behavior, attitude and expectation, as *prevents conflict* — conflict about anything: not, therefore, in the ways of making shoes or bottles or books, but in the ways of keeping some of the makers off others' toes and necks and tempers while such things are being made. Plainly, this means that the "legal" ("legaloid") fairly infests the culture. So it does, indeed; for some "legal" aspect is mixed into any coordinated action.⁴

The next difficulty is even more perplexing. Side by side with preventive channeling of behavior in men's life and work together goes creative, organizational *rechanneling* of such behavior. The child grows up, and starts to work. A man and woman marry. Some one is promoted, or elected to an office. A command is given. A contract is made, or there is death and succession. So long as such *rechanneling* is relatively rare in incidence upon a life; so long as the new patterns entered on are themselves clear, and largely understood, relatively permanent, prepared in fair part by anticipation; so long, *rechanneling* amounts only to the other side of the same coin, and is conveniently grouped, as it is grouped here, along with channeling *ab initio*. If it be true that *re-orientation* of behavior and expectations brings the "legal" aspect peculiarly to the fore, that only makes it easier to see: thus, the new is a bit more likely to meet challenge, expectant heirs may readily conflict, and the like; the as yet unhabituated is more likely to produce knocks and bumps, as the

4. But, as indicated, any other basic aspect of culture will be found, no less, to have a similar infesting quality: the economic, or the phase of governance, for example.

new man gets "broken in"; if the shift is at all individuated to desire, the lines of advance individuation are likely to fail of provision for one or another trouble-making contingency.

Our difficulty comes when we are dealing with a culture both complex and mobile of relations. If the possible lines of re-orientation are highly diversified, there is call for the specialist, to advise. If in addition the possible lines are capable of shrewd tailoring to particular desire, then the problems flood upon the specialist: there are techniques (contract, conveyancing), but there are also limits to their use; there are contingencies of which or in the handling of which only the specialists' lore accumulates accessible knowledge (corporate indenture forms and experience); and contingencies to be guarded against mean contingencies to be so guarded against that, in the eventual pinch, the guarding will *work*. In such a culture, the interest, the attention *and the building of tool-stuffs* by the legal specialists will concentrate upon the side of *shift* of orientation of relations, rather than upon any "normalities" of relation. The color of the culture derives in one main part from the degree and kind of mobility, variety and individuation of the working relations. Indeed, the preconditions of such a culture (commerce, market, industry, finance) set up so huge a variety of "normalities" according to the diverse types of specialized effort that little is left to be "normal" for everybody: with us, today, for instance, "public utilities" have trouble getting into activity, and trouble, once in, in getting out; but the ordering of any such line of activity is a whole field of its own whose technicians, managers and financiers live among legal stuff as foreign as Tibet to most of us. It is symptomatic that in the curriculum now in vogue to train our Legal specialists the relations which a person is born into are dwarfed by the concentration upon those which look toward being created by continuing shifts of orientation: contracts and all their sub-specialties: sales, negotiable instruments, insurance, vendor and purchaser, suretyship; trusts, wills, property arrangements, mortgages; corporations, corporate finance, reorganization, trade; labor relations.

Hence if one were setting up an analysis for study peculiarly of *modern* cultures-as-wholes, shift of orientation would loom as large, as a law-job, as does general channeling; and for the specialist in the modern Legal it would loom larger. A general and basic functional analysis does indeed bring light to the phenomena of modern official Law, reminding us, for instance, that the more articulately elaborate the recorded machinery of The Law gets to be, the more essential to health of the system is the careful provision, as part of the system, of a penumbra of those legally recognizable, but not yet clearly "recognized" lines of normation which I have called the "jurid"; and reminding us that if we try (as we do) to provide such a penumbra by way of a dozen different make-shift *and quite uncoordinated* devices (from admission of usage

in commercial cases on up) we shall then find it working only sometimes, and missing often enough when it is most needed. But despite all such suggestion from the basic, there is no obscuring the fact that quite peculiar problems open as soon as the mere *quantitative* aspect of legal tool-stuffs turns them into a semi-independent world of their own, with upwards of a hundred thousand and a half of lawyer-specialists, and other hundreds of thousands of semi-specialists at work in office-forces, governmental administration, police departments; and with authoritative books enough to outrun the eye and drown the mind. Thus no analysis which is capable of general use for all groups can, unmodified, get into perspective all the official Law phases of a developed modern society. That once admitted, however, I yet insist that no quantity of modern technical complexity alters the nature of the basic functional problems, nor does it cause them to disappear. I insist, indeed, that the restatement of them in bald form helps more to organize the modern technical welter for seeing and for study than can any organization which takes our modern institutional forms as its major foci. But that, as Kipling taught, "is another story."⁵

Let me sum up this second law-job, then, (or, for developed and mobile Law-systems, these two "second" law-jobs) as that of *preventive channeling and of shift of orientation*, of behavior, attitude and expectation.⁶ The bare bones and the double questing aspects speak here largely for themselves, save in this: that high efficiency in preventive channeling ("discipline," if you like it; "regimentation," if you do not) competes, as an ideal, with large leeways ("license"; "liberty") and creative use thereof ("captain of industry"; "industrial pirate").

5. Still another story, which does require mention, but which I cannot here develop, is this: the *upkeep* aspect of group-organization on which an analysis of the "legal" centers (including the established leeways) is that very heart and focus of social mechanisms in which "social organization, disorganization, reorganization," "social statics and dynamics," "social tradition and social change" meet to work in common ways on common ground, the differences being in first instance differences in the net resulting unbalance or balance, and the available corrective procedures being only adaptations and see-saw-ridings of the always continuing identical processes. *The "legal" is thus the needed keystone to integration of fundamental sociological theory.* "Old mines, once worked and valued. . . ."

6. Be it noted that the emphasis here is primarily upon the channeling and shift among smaller units—the individual, or the sub-group, in their relations to other individuals or other sub-groups; the emphasis is on the life-career of person or enterprise or transaction, seen from its own end; not on the net organizatory efforts of a whole complex society when taken as a whole. The distinction is artificial enough, but it is still worth making; for enterprises or individuals can learn to keep off one another's toes, and still leave such things as a continuing or cyclical depression which raises problems of a wholly different order or level of organization or reorganization. To use J. M. Clark's neat illustration: an enterprise can meet certain problems of labor overhead by simple, and quite peaceful, lay-off; not so, a nation.

This approach to law-stuff and law-ways via the law-jobs sets certain venerable problems in interesting perspective. When the official imperatives for behavior (say fresh-baked legislation which is meeting resistance) are proving inadequate as channeling devices, but are yet serving as effective standards for the official disposition of trouble-cases; or when they are channeling well for one section of the population, but not for another; or when "bargain-days" (prohibition in our courts) or deliberately evasive "enforcement" (the petty capital felonies in England about 1800) are substituting different, "off-the-record," standards in most of the official disposition of trouble-cases — such conditions yield readily, under such an approach, to analysis and description. It becomes easy to state that a given officially announced imperative or body of imperatives are indeed "Law" for the handling of trouble-cases, but are not serving their channeling purpose as to laymen well, or at all. It becomes easy to state that they are not serving their channeling purpose even as to the official staff, yet are still "Law" whenever the spotlight may pick out some particular trouble-case before an official tribunal. It becomes feasible also to find words for some of the halfway stations beyond which so many efforts at control by official Law never get. It should not be possible, in these post-Max Weber days, to forget that when official law-stuff becomes a conscious device for innovation (instead of a semi-"automatic" starching of patterns of conduct already given in tradition) it then operates in terms of a variegated interplay between its aspect merely as a part of something (The Law; That Man's Policies) which colors it, and occasional direct judgments on its own particular wisdom, and the *seeming likelihood* that, as new Law-stuff, it will bite any relevant person who may be tempted to disregard its promise or its threat.

Weber's development of such ideas suffers somewhat from the multiplicity of his usage of "rational," but the results are clear enough, and they do need remembering because they come closer than has any other analytical framework to linking intelligibly the background of general tradition, the sharper-edged calculative thinking which works so remorselessly into a money-economy (or indeed, into any mobile society), the fixity of doctrine (in dogmatic discourse), the change of doctrine (which occurs in actual process of argument and decision), and the engineering problems of new channeling of behavior by way of official Law.

One cannot boil down writings which are themselves a distillate; but one can pick three aspects for emphasis:

(1) The new statute or regulation, these days, has to communicate itself largely by way of words. Words are at least *central* to the communication, even to an official staff.

(2) Along with communication, there goes a problem of persuasion, of energy-unleashing, and one of coordinating such unleashing. "The

official staff," these days, are themselves almost as hydra-headed as a public. And "the" likelihood that the new regulation will take hold as having teeth, or indeed on the side of persuasion of relevant laymen, depends in good part on its producing an effective similarity of reaction within "the" official staff. Again, "the" official staff itself is split fifty ways, in function and organization (from courts through to field inspectors), and in desire — to say nothing of skill. Companioning this, goes the divergent relative pulling power of the new regulation in its aspect simply as being part of The Legal System (or of somebody's Program; or of something enforced by persons toward whom there is a clearly built-up attitude: Cossacks). For some (perhaps most for judges) membership in The Legal System lends per se a tremendous power. Pound has noted the attempts of early law-making to borrow the flavor of the immemorially or supernaturally sacred Source and System for innovating measures, so as to first move and then hold "the" public; and our own Constitution and Founders have had their share of novelties fathered upon them. To others, these days, and at the opposite extreme, others who have seen enough of Law-as-an-Imperative to think overly much in terms of Law-*merely*-as-an-Imperative, of government as an interferer, and of own urge or income as a clear good, while The Whole is hid behind The Politicians or The Cops — to such, the matter can shape up in terms of what the chance can be held down to, that the new regulation will show teeth. It can appear simply as a bother, to be avoided or evaded or wangled out of or endured. What is of peculiar importance, in this many-tendencied modern society in which sight of the Whole gets lost, is that those who respond to mere traditional presumption in favor of a measure are likely to be the passive ones. They count, but they seldom count actively. Whereas those most likely to move on the calculative basis — not Holmes' "bad" men, but just sophisticated persons who have seen enough of Law's Personnel to doubt their sanctity — are the very persons whose channeling is the crux.

(3) From this there results a perception not only that the new regulation has its way to make, in terms of accomplishing an effective channeling of conduct; but that its way is a complex way, and begins *inside* the official staff; and it becomes materially easier to see, to foresee, and to both describe and plan to counter its possible undercutting.

But above all, Weber's approach makes clear what goes to the essence of sound analysis: the jobs to be done are jobs to be done; modern complexity of institution serves merely to highlight processes which require to be gone through, in some fashion, in any group. *The jobs, therefore, get themselves done after some fashion* always — or the group simply is no more. Hence if the officially announced imperatives fail to put themselves over, one must look elsewhere for the doing of the jobs. Consider the family in which father keeps announcing rules and then forgetting

them. Hence to see a Legal regulation which is not working is promptly to face a problem of further inquiry: what *is* working? and how?

If all the machinery happens to run in coincidence, so to speak in parallel hook-up, then the normative and the imperative drive together. But when the various portions of the machinery diverge, the matter becomes difficult. We have various familiar formulations which hint at this: Law must not diverge too far from Custom, or from The Folkways, or from Morals; obedience to Law is best learned in the Home; and the like. And the sociologists and psychologists bring the scene into somewhat sharper focus when they look into divergent pulls and patterns at work in the individual's formative years, or thereafter. What we need to see in approaching our modern and complex society is that Custom, Morals, Folkways, the ways of The Home and the like, are not, with us, each a unit; nor are backgrounds in general a unit, nor the normative patternings and strains generated by living in the various backgrounds (*e.g.*, city white-collar, city work-shirt, farm). What this comes to in the matter of delinquency and predatory crime is one problem which opens; and it is complex enough, in all conscience. But unless I am much mistaken, even that problem gains its by-product of light from an attempt to move beyond it and to examine what the situation is in the *non-criminal* field when the machineries for channeling conduct diverge.

For, first of all, divergent patterns not only stir prejudice and enmities, as various We-groups draw together and, in the ancient manner of the primitive human tribe, misconceive, slander, fear and hate the Others-groups, and *typify them by their worst examples*; but divergent patterns also stir in some folk a comparison, an intellectualization about received tradition, and an increase of that "rational" type of direction of conduct which when we think it fine we call wisdom, when we think it skilful we call intelligent and resourceful, and when we think it unaccompanied by sound objectives we call merely expedient following of the main chance. The only voice of the Whole, in the welter, is the voice of the prophet (who has neither authority nor hall-mark) or that of The Law; and both mass and detail of The Law are too complex to understand, and often quite dubious as to their Whole-serving, if understood. I do not think criminologists have paid adequate attention to the strain which unfamiliarity with law puts upon the faith of the simple in The Law, nor to the strain which over-familiarity with it puts upon the self-restraint of the shrewd. In any event, with power organized behind the official-Legal, official imperatives become for anybody with a purpose, high or low, a force to get channelled to his aid. And when the multiple lines of the normative diverge among themselves, and most of them therefore diverge of necessity from the official imperatives, normation which candidates for acceptance and mint-mark as officially imperative is anybody's business, in the service of his desires — be they high or low. Protagonists

of divergent normations then struggle to capture the backing of the *system* of imperatives; and that is a struggle for power, and by way of power and strategy. The protagonists struggle also to persuade relevant persons that such capture will serve the commonweal; that is both a tactic for capture and a tactic for more effective operation after capture. But its very basis is a reinforcement of our observation that the official imperatives in any system at all developed are themselves to be viewed always as means, not as ends. The "rule" of the legal philosopher, the "code" of the sociologist, remain, as applied to things legal, *imperative* and *limited* in nature, and remain in service always of normations derived from outside themselves. Except, of course, as *some* order (almost *any* order) continues to be the bare bones essential of group life.

The task which opens here is, plainly, not merely that of channeling behavior, but of selecting the lines along which it is to be channeled—a task chosen as part of our fourth focus for seeing the law-jobs. The logical over-lap is apparent. But so is the value, I hope, of the difference in emphasis. What concerns me here is to make explicit, before leaving the focus of channeling (especially, but by no means exclusively, that of channeling into *new* ways), a matter not unimportant merely because it is obvious: to wit, that the lines the channeling is to take will in part condition the effectiveness of the channeling.

THE SAY

III. The third phase which it seems convenient to mark off for special treatment centers on allocation and exercise of authority or jurisdiction, within a group, and of legitimatizing action as being authoritative; let me call it the job of *arranging the say, and its saying*. There occur doubts as to what to do, in drought, or war, or petty crisis; there occur disputes as to what to do, and as to whose say is to go. To get these matters settled in advance, and to get settled also what procedures must be gone through in order to legitimatize a decision and give it standing, and what the limits are on any person's authority—this is a matter of peculiar importance. It differs from ordinary channeling of conduct in looking to allocation rather of powers than of rights, to indication of the person and the procedure rather than the substance.

As the first job finds centered around its doing such institutional devices as tribunals, legal procedure, advocacy, peace-makers and jails; as the second finds centered about its doing such institutional devices as rules of substantive law, statute books, law publishing houses, sanitary inspection departments, traffic lights, preventive policing generally—and most of usage, and much of education; so this third task or function finds centered on its doing the "constitutions" of states and of minor interest-

groups, and in general the institutional devices for allocating authority to persons or bodies *and* for fixing the time or manner or procedure whereby their say, when said, is to gain standing as being *the* say: the legislature must be "in session" (though with the clock turned back); the two houses must concur, by vote, and with a quorum; the bill must have been "read" the proper number of times.

Now choosing what the say shall be, and many phases of putting into operation a decision when made, are matters commonly and rightly thought to be matters rather of governance than of law; the case is clearest when no one has any idea whose say is to go, and both what we think of as law and what we think of as governance appear only in embryo, as in primitively emergent leadership. The legal gets into the picture here, to the degree of advance regulation. It gets in, further, to the degree to which forms, procedures, ideologies, limit, or even direct, the exercise of authority. Both substantive law and the liberties of the subject are indeed "secreted in the interstices of procedure," insofar as procedure limits the exercise of authority. The legend of the vase of Clovis makes a double point: a simple soldier could defy the King when the King sought to abrogate the ancient Law by singling out his own prospective share of the booty; but the King on the next inspection could find that particular simple soldier's equipment "untidy" enough to warrant spearing without mercy — and to pay off the grudge. A King who has to wait for an inspection, however, is a limited King; add an independent tribunal to determine the facts and he becomes a limited King, indeed. These are commonplaces. But there is a third line of limiting that King. It is no less real and it ought also to become a commonplace. That is by a tradition of what kind of action or exercise of authority is "kingly," and of what kind is unworthy of the kingly *office*. Such traditions are law-stuff, though they be not written; there is another legend, of an argument of one Nathan before one David, which makes that point; and our own society knows a standard phrased as "conduct unbecoming an officer and a gentleman." Form, procedure, occasion, tradition of the office, authoritative materials — none alone, nor all together, suffice to make the saying independent of the sayer; but insofar as any or all of such regulatory ways and/or norms reduce the idiosyncratic factor, insofar as they raise the effective character of the office and lower the effective influence of the office-holder, they increase the element of the "legal," and reduce that of governance-apart-from-the legal.

Let me recur now to a feature, especially of the tradition of the office, which is very hard to state but is real with a reality whose conception is the glory of the "legal," as its misconception is the terror. It is this: the "legal" which surrounds and affects the expression of the "say"

drives to prop up inexperience and ignorance, to check stupidity, to thwart personal waywardness, to choke off corruption. This is accomplishable, in part, by forms which control and limit and by authoritative base-lines which control and guide. But in no skilfully built legal structure is the factor of movement, and of need for movement, or the factor of justice in effect, and of need for justice in effect, disregarded. That is simple enough to see. What is not so simple to see, what is more vital, what is the very sap, is this: that whereas a leeway of the holders of authority to *be* right is of necessity within a legal structure a leeway to *be* wrong, yet a leeway to *do* right is *not* a leeway to *do* wrong. The matter is clear if one will look to the *job* in hand, and see, beside its bare bones, its questing aspect. The heart of it is, that blindness and woodenness and red tape and sheer stupidity are desperately bad; and the reason is, because they *cut our institutions down, in effectiveness, to those institutions' own structured measure* by depriving us of the salvaging guidance which the men-in-office ought always to be *adding* to the best we have been able to build in the way of *explicitly structured* (as distinct from implicit and *unspoken*) institutional framework. But malevolence, distortion to wrong ends, abuse for profit or favor: these, though within the leeways left open by the institutional structure, are what theology might liken to sins against the Ghost of the Law; they take the very salvage-leeway itself and turn it to disruption.

Somewhere in every "legal" structure — big or little, crude or developed — there is implicit, not necessarily a spirit moving in these terms, but a claim to hold such a spirit, and a recognition of duty to make good thereon. This goes not to detail, nor, at a pinch, even to sometimes wide special areas. But it does go to the Whole of the system in net effect and especially in net intent. It is at this point that an imperative system and the net effect and intent of its authoritative staff make necessary contact with justification of themselves. And if there were no other reason, that would be enough to warrant singling out arrangement of the say and of the manner of its saying as a separate focus.

This I put forward here not as an ethical demand upon the system (though it is that); I put it forward in this context as a sociological fact, not negated by the most cynical egocentric who ever ran a "skelegal" system on fear and "arbitrary" force. If you prefer, I can rephrase and put it forward as a construct, as an element conceived to be always and strongly present in urge, even though in some few particular situations it may be so countered by other factors as not to appear overtly. But what I mean is that I believe that construct to reflect the facts with accuracy. I hold this to be one of some few drives and urges in behavior (among them, the drive toward habit and toward precedent) which are so almost universally observable as to put solidity under a belief that

where not overt they are not absent, but only countered and drowned from overt appearance in the individual instance.

The overlap of this say-focus upon trouble-disposition and upon channeling is obvious enough. The trouble may be about who has the say, as has happened from time to time among our own States as to who "was" the Government, and as is still happening in regard to jurisdiction to tax. On the other hand, the disposition of trouble-cases via official personnel is an employment of say-allocation and of say-procedure. And, as has been mentioned, the very regularization of the who and the partial regularization of the how and when of the say, are channeling devices for trouble-avoidance — though they have always been sanctified as Constitution. But the test of the value of the focus must come from whether using it turns up cross-lightings of material which promise hope of developing what one may call not common sense, but less-common sense, a more ordered and effective body of sense, *un*common sense, about the problems concerned.

This "legal" problem runs throughout the society; and through all manner of groups. The allocation of authority in enterprises will serve to illustrate, or the conflict between the AFL and the CIO, or indeed jurisdictional union disputes. The question is one of *de facto* authority, first of all. It will of course not do to fail to recognize the vast differences between "proper" and "improper," "lawful" and "unlawful" *de facto* allocation of say. But neither will it do to see these as resting in any such dichotomy as being a dichotomy with sharp-drawn lines: the "king's favorite" may, for instance, stand in a recognized status which tomorrow will be that of "prime minister," or may occupy a spotlight of public scandal, or may be anywhere in a twilight between.

Let us then sum up this particular law-job, thus: advance allocation (certainly *de facto*; preferably, and always in urge, also *de jure*) to say the say which will go, in case of doubt or emergency; together with any fixing of procedures which legitimize the say, and any explicit or tacit limitations (or guidances) which cut down authority's effective leeway: as that a judge must decide after due trial and under the law. But we must be remembering that in this area, of all areas, flux is the essence of history, that today's usurpation is often enough tomorrow's constitution while today's renewed exercise of indubitable ancient constitution is often enough the signal for explosion. In no area of law-stuff is power more likely to run at partial odds with right. In none is legality more likely to run at partial odds with wise ultimate policy, or with the immediately decent, on the one hand; or with the arbitrary, or, again, with the immediately personal and political, on the other. In none is a possible precedent as big with consequence if it does become a precedent. While the scope of matters in this area varies from the national or tribal down into those of the single family, all of these things

hold good, as concerns whatever may be the particular unit, the particular Entirety, which may be concerned.⁷

NET DRIVE

IV. *Integration, incentive, direction, net.* The fourth focus of law-jobs goes to the whole net effect of the other three, as performed. The reason for choosing it as a distinct focus is that to do so brings out into an emphasis otherwise too easy to let drift away, the *positive*, the constructive, side of the "legal": the net organization around something, toward something: the Whither of the net Totality. It is doubly necessary to bring that into emphasis, because it is presupposed by the pervading, though implicit, drive of Law-officials (and indeed of political movements) for something felt, dimly or clearly, as Balance in the Total Legal, as well as for something felt as Health. Planning of the Whole has been too much for us, but tinkering is both furthered and fought, always, under the tug and torsion of some *feeling* for the Whole.

So that we can well take as a fourth focus the organization of the Entirety into some type of coordination which also unleashes enough incentive to get that enterprise carried on, and leaves the group-members sound enough to carry it on; along with which one must put the net shaping of direction of the enterprise toward one Whither rather than another.

However loose and vague such a description may appear, however joyous of infinite leeway and infinite variety, eluding all grasp, it nonetheless says something; as the seemingly tautologous statement of the total law-job said something; and as the statement that a society, or a Legal System, has its own variety of living unity says something. And I conceive it as peculiarly a *law*-job focus because the legal system of a group (not its Legal doctrine, merely, but its going whole) seems to me to be inescapably one place, and the main place, in which men face group-responsibility for shift in direction, and rekilter to achieve a re-adjusted net result or recapture of balance. The prophet labors also in this matter, and the blinder upshot of individual efforts, unplanned as a totality, sets conditions which may be too yeasty for conscious "legal" effort to handle. But, in the first place, modern techniques of organization, communication and striking power have made clear that the *possible* effective reshaping power of conscious "legal" effort reaches far beyond what a Savigny, a Carter or a Sumner believed. Sumner's favorite illus-

7. No Constitutional question of jurisdiction was ever more delicate or puzzling than that presented when Christmas is at Grandma's, and Grandma has said the lid is off, and Father thinks the children are getting out of hand, and Grandma is not Father's mother.

On the self-legitimizing drive of de facto power, and its corrective drive, see p. 1394 *infra*.

tration of the abortive reforms of Joseph II can be seen more clearly, today, as involving a piece of defective technique rather than, necessarily, an impossible objective; for some reason, the normally hardheaded and hardeyed Sumner did not meditate upon Chaka and the Zulu, nor upon Ignatius Loyola's amazingly effective devices for the reshaping of personality and creation of a tightly integrated organization. One can no longer throw important social reorganization out of the window as being a job not doable by conscious revision of the "legal" system; one can today only challenge whether such reorganization is worth the price, or raise doubts as to whether other and unforeseen evils may not in the long run attend its doing. But the would-be sociologist of the "legal" must see as a law-job that coordination, direction and incentive-unleashing which it has been demonstrated that the "legal" *can* vitally effect, and must therefore see as a law-*choice*, at the least as a law-*way*, the leaving of such matters largely to other devices.

This, too, is of course not new, but old insight, merely forgotten over the laissez-faire ideology. Consider mercantilist policy, or Jonathan Swift's scorn for a system of law-stuff which failed to include the phase of incentive as well as that of regimentation and deterrence.

To give the topic perspective: on the bare-bones side, one remembers that if there be not adequate integration and efficiency in the doing of the other law-jobs, the costs rise too high for tolerability or the results drop too low. We are told that villages by the hundred were simply "lost" in the wars of the Thirty and the Hundred Years. And order laid on with too heavy a hand threatens to crush out life — one thinks of the later Roman agricultural enterprises. Our imagination faces similar possibilities, today, as to the international law-job.

The second matter of perspective goes to the questing aspects, and raises particularly the question of whether provision of direction is not a matter rather of leadership, governance, and the man, than in any reasonable sense a law-job. As always, the individual feeds his work into the scheme, as the scheme feeds itself into his work. But if the achievements of governing (or of other leadership) are to serve beyond the man's life; indeed, if they are to handle, even during a life-time, a group big enough to call for large-scale *delegation* to subordinates — then it is not only other *men* which they call for, but it is also law-stuff into which they must be incorporated. They call for what Alexander accomplished more effectively in his army than in his civil administration. Adjudication is familiar to any case-lawyer as showing the mark of the man, and familiar to him also as building law-stuff. But the same holds of the policy shaping of any governing persons; and never has a grander symphony been written on the theme than what I cannot help thinking of as Maitland's Pollock and Maitland, in regard to the effects on English King's law of particular English kings. It is a *culture's*

law-job to get such law-stuff built and rebuilt workably and well, and to fuller ends: to make and to place and to support the necessary men.

And it is here, it seems to me, that one key-inquiry lies as to the interaction of "man," the individual, and "culture," the surrounding super-individual structure and welter of behavior and ideological tradition of his fellows. For I grow as clear that some individuals in key-position and at key-moments have tremendous shaping power as I do that mass-reactions of the "growth"-sort may have their own lines of semi-irresistibility. The reason why the "legal" may prove of peculiar general importance is that the "legal" shows a higher general likelihood of key-position than do most other phases of culture, other than political leadership. And I cannot avoid the conclusion that the reason why key-position effect has been now over-stressed (the "Great Man theory") and now almost denied ("Volksgeist" and its successors) has lain in a desire to see as a constant process what is better seen in terms of a greater or less degree of *likelihood* of significant shaping of the Whole from some key-position. The same holds of the likelihood of law-stuff finding itself in key-position: *most* law-stuff, in a complex culture, of course washes down-stream like salmon-spawn; but what of that?

If it be true, however, that law-stuff "drives" for key-position, and that political leadership "drives" also for key-position, then in this aspect of general coordination and direction, the two must be found driving toward coalescence. That seems to me well-nigh inherent in two aspects of a culture each of which, willy-nilly, comes under persistent urge to purport to speak for the Entirety, and, in some measure, to make the purport real.

This, again, is not to be taken as exclusive. De facto leadership may depart from the official-political, wandering underground to the boss in the back-room, or wandering wholly elsewhere, until we meet "figure-head government." For, as indicated above, the law-jobs get themselves done; but the official-Legal and official-Political need not be the mechanisms of their doing. One can note, indeed, in this coordination matter as in the matter of justice, that the provision of a twilight, of a flux and an overlap between the official and The Rest accords with social lubrication (as it accords also with a democrat's view of social health): if the jobs are too sharply in official hands, things creak as loudly (though in different key) as they do when the jobs have slipped through the fingers of the *roi fainéant*. But, above all, as one observes any line of going social institution, one observes also, first, that it participates in performance of a huge body of functions other than the one or ones primarily attributed to it in common thinking; and second, that "its" functions are in process of being helped into performance by many other going social institutions. It was astounding to me, for instance, in a canvass of Contract, to discover how much governmental work Contract

was doing, and how much of the commonly supposed work of Contract was being done by such "other" institutions as association, property, industrial technology, and accounting—to pick a few. An analysis of the work of marriage-and-the-immediate-family brings out similar results. So that the "law"-job of coordination, direction and incentive (could we lump these as the "Net Drive"?) is being worked at also by religion, and by prevailing folk-philosophy, and by "economic organization," and by "education," and by "patriotism." But so long as it be clear how peculiarly the job in question *partakes* of the "legal," and *how much* of it, for purposes of the study of man-in-culture, must be dealt with together with other matters "legal," the overlaps with "other" phases of culture do not disturb.

On the contrary, they illumine. For save in quite extraordinary instances conscious production of Net Drive has been too big a job for man to handle with full success on a large scale; and the major effective device, whether for conscious creation or without it, seems to me to have been the throwing of large—though vague—blocs of desired Net Drive into ideal pictures accompanied each by an emotionally stirring symbol. Whether the symbol be a personality-model (Lincoln) or an emblem (the Cross, the Flag) or a slogan with some more or less intellectualized content ("*salus populi suprema lex; quid principi placuit legis habet vigorem; sic semper tyrannis*" make a nice interacting trio), in any event the bloc of Net Drive symbolized is an expression of *one phase* of actual life in the society, heavily idealized, heavily charged with a philosophy of felt rightness and heavily charged with emotional incentive. How vague or how clear, how far capable of the wilder forms of manipulation, how broad or how narrow in the range of person, class, or profession on whom its pull is effective—this differs.

But what is of immediate moment to us is, first, that such a symbolized bloc of Net Drive always takes in *something* from outside the immediately Legal (though it be nothing but the blinder esthetic and formal urges which substitute a Parke "strong opinion" for true *elegantia juris*); and second, that it is especially by way of such symbolized blocs that the men of law rework their structure and reshape it in direction, coordination, and incentive. It is true that those jurists whose eye has been on the decision of cases, on right doctrinal casuistry, or on cleanly intellectualized systematics, have grown properly impatient with maxims, brocards, and other outflowing and edgeless policy expressions; especially impatient, I suspect, because the nice and accurate mind can be driven wild by muddy and untrammelled slinging of such maxims as excuses for decisions not thought through. But their uselessness as effective major premises for syllogistic determination of the correct precise answer on the authorities does not mean that they lack driving power or lack even considerable *guiding* power; it is such conceptions as that the intention

of the parties must control, or that this is a Christian country, or that taxation is a "necessary evil" rather than "the price of civilization" which mediate their quantum of general coordination to our Legal System, even as the law-men mediate the Legal System to the people. It is quite beside the point whether you do or you do not like any particular big or little bloc of Net Drive which is thus made to spread its strength and flavor. The point is that it is by way of these emotionally charged ideological configurations that the job is chiefly done. They run from such partly Legal ideas as Contract, Trust and Due Process, through those expressions of Legal Principle which are also expressions of antepenultimate social policy, on into such vague, pervasive, but forceful pictures as The Business Man as a sort of embodiment of the *vir justus et honestus* of America, or of Government as somehow different from and vastly better than any official. They are of course self-inconsistent in their working; in two hands the same one may produce differences which startle. It is that same Nazi legal ideology which in many points of confiscation, declassing, criminal trial, etc., has set our teeth on edge, which in the hands of Heinrich Lange could produce a reworking of contract doctrine which is probably the most enlightening job of the century in that field. That is the way of emotionally charged symbols whose intellectual content, in any particular context, is so vague as to call for the user to *ad lib*. And it reinforces the occasional crucial character of the individual who happens to hold key-position for The Law in any situation in which The Law happens to be occupying key-position for the culture: *i.e.*, when *his* normative generalizations become *imperatives* and those imperatives prove then to be imperatives which *count*.

There is one matter for final mention, in the interest of perspective: it is under this Net Drive focus that one can most readily pick out that phase of the Justice ideal which looks to long-range welfare of the Entirety. There is also Justice as even-handedness under Law, a conception looking toward impartiality and disregard of power, friendship, political influence, favor and the like; this, when one does not like it, is thought of as dry legality or even legalism. There is Justice as "fair" and wise individuation of the handling of the case—the ideal of the juvenile court—which is maudlin, or kadi-justice, if you do not like it. There is the many-flavored Justice, compounded of all of the above in thus far quite unreckonable mixtures, which is the "Justice under Law" our courts aim to afford. There is social Justice, which is the reformer's desire to see the worse-off be helped. Only the first of these is the Justice ideal appropriate to the context of this Net Drive job: level-headed, far-visioned, thinking for the whole—with *each* of all other phases of Justice coming in for, but held down to, its due share of influence.

JURISTIC METHOD: THE FIFTH LAW-JOB

If what has been written above had been written with adequacy, there would be no point in continuing. Put it together, and the problem of juristic method is set. Men deviate from the anticipated, or anticipate what others do not think they have business to anticipate, or clash otherwise, and there are cases of trouble. In furtherance of desire or interest, in the service of self or group or the Entirety concerned, to gain backing or to avoid pressure, men put forth normative generalizations which rest always in part on something in the culture, and move always to suppression or neglect of some other things in the culture. Decisions are reached, and some of those decisions become determinative of what can be expected. Out of them, out of action which they stimulate, out of the work of any specialists who emerge as men of trouble-settlement or of governing, régimes of authority bud and grow, tending into some working unity. The pressure toward regularity, and the pressure of the anticipable to be felt as right, is steady. The law-jobs of trouble-handling, of channeling, of say-allocation, of the Net Drive, all need doing, and they all drive toward the emergence of some type of institutional machinery (ways *and* personnel *and* ideology about both) which can be seen as different from just who is there and just what is done and what is thought or felt, in general. With the emergence of the perceptibly "legal," as a body of ways, people and ideology, there emerges at once the problem raised by any institution and its staff: the problem of keeping the institution and its staff in hand and on their jobs. Institutional ways and ideology tend to grow hard, wooden, tend to crystallize upon their own premises, tend to be patterned in further operation on their own past rather than on their living function; or they tend to be turned to service of their staff rather than of the people. Exactly comparable tendencies bud in the staff, the personnel. In the main, machinery "legal" in character, and personnel "official" in character, have best potentiality for accomplishing the "law-jobs." But rarely, in any culture, and never in a culture both developed and mobile, can official "legal" machinery and personnel accomplish the whole of those jobs. What is wanted is an on-going optimum balance, keeping in the hands of the official "legal" machinery and personnel, and well-handled by them, so much as they can best handle. This problem, seen as reaching over all the law-job foci, or seen if you will as one phase of the play of the fourth upon the first three, I take in any event to be worth isolation for study. I shall call it the problem of *juristic method*, that of the *ways* of handling "legal" tools to law-job ends, and of the on-going upkeep and improvement of both ways and tools. The bare-bones aspect carries one just far enough to scrape along, and that not in the individual case, but in the large. The law-suit which followed the burning of Njal not only broke into battle, but had been foreseen as likely to; yet the battle itself took place

with friends of the rightful litigants standing by to "stop the fighting when you have slain as many as you can pay for." Iceland at the turn of the first millenium shows juristic method, here, with not too much spare meat on the bare bones.

"Juristic method" is likely, to a modern, to connote the task, or the ways of doing the task, of determining disputed questions of Law under the relevant prevailing authorities: the task peculiarly of the appellate court, reviewing on "The Law," or of the jurist at work on the elaboration of his dogmatics. And the work of the appellate court is indeed one point on which such an analysis as the present ought properly to focus, and together with the trial court's work, it is close to the center of my own interest. The general job of juristic method, however, as here conceived, does not presuppose of necessity the existence of any tribunal at all; it is illuminated by such an institutional figure as that queer Ifugao cross between a hired advocate and a mediator, the *monnikalon*, with his persuasion, his browbeating, his swellings of claims and driving of adjustment bargains. On the other hand, juristic method as here conceived extends over into reform legislation and especially into the still largely unspoken skills and multiform traditions of the official craftsmen of the Law. In a society with little "legal" differentiation, the task of juristic method and its ways of doing tend to be hidden in the mere handling of the trouble-cases. In a society with high differentiation inside the Legal, the specialization of some craftsmen or bodies on one or another phase which seems peculiarly one of juristic method threatens to hide the fact that each last part of the work of law continues to have its share in the problem. Thus primitive legal institutions, with the extreme difficulty they commonly encounter over problems of fact, ought to remind us that solution of such problems is a tough law-job, and that solution of them to satisfaction calls for juristic method and art; when we then recur to our own conditions, with legislative findings of fact, the jury, and the administrative semi-tribunal, for instance, or with a jury verdict in capital cases reviewable on the facts by the Court of Appeals, and the Court of Appeals by a pardoning governor, we ought to find that with us, no less, juristic method goes still to questions of fact.

So also it does to questions of grievance-adjustment, though both Law and fact may happen to be clear. I may say that in whole cultures (as distinct from formative groups within a culture), it is the grievance-case (as distinct from fact-dispute which is rarish in a close-knit face-to-face community, or from trouble over what is right, or is Law) which shows every sign of being, along with emergent leadership, the major matrix of the "legal." The institutions, as they first shape, much more commonly than not are cast in the mould of devices for *grievance-handling*; disputed matters of fact can lie over, almost indefinitely, with little institutional attention or can develop their own, independent lines of

handling; disputed points of right, which, once determined, tend to be points of Law, seem most commonly attended to first as a sort of by-product of the grievance-handling machinery. But let a *tribunal* come into recognized existence, and the three types of trouble tend to merge in the doing of its business; and, once merged, they seem to be hard indeed to disentangle. And, of course, as tradition builds, the aspect of what is Law moves steadily into the forefront of attention — until it gets too close to the eye to let the rest be seen.

The first problem as to juristic method has to do with its available leeway for error. And here one has two phenomena to note which are puzzling to describe. The first is the extraordinary degree to which a System colors and covers its own blobs. Unless the case comes as the cumulation of a whole line of prior error or abuse, or unless circumstances (commonly political, and sometimes adventitious) have flavored it *as if* it presented such a cumulation, the leeway for error, abuse, even outrage in the individual case would be alarming if one conceived of it as available for deliberate exploitation. The test of this is in the cumulative effect of the work of a strong and long-lived judge (Mansfield) or of strong and skilful picking and pressing of selected cases by a particular interest (the old Anti-Boycott Association) or of strong and sustained executive pressure (the English kings and the Capetians). The other side of the same picture lies, however, in the no less extraordinary degree to which a System, on its regularity side, drives to cure its own past abuses by regularizing them. First, it tends to make them not only Legal, but right: the brute might or fraud or corruption which yields present outrage can generate not only the imperative of Law; but it can, and it drives to, generate future "right" as to its results, and often even as to its manner: by power first, but then by recognition, repetition, expectation — and so into tradition, until authority is backed by morality. At the same time, and under the same processes, the legitimized is being driven toward the limited: legal, yes, right, yes, but legal and right only so far, and only when done in such a way. This double process of absorption and sanation of abuse and outrage, once they have been accomplished, is one of the major stumbling-blocks in communication between the world of Law and the world of sociology; for the world of Law-as-doctrine can and must encompass at any given instant of time only a very limited quantum of the process. A limited quantum it must encompass, for doctrine is not to stand stock still; but that quantum is very limited, for Law's office while it is still Law is to hold within due bounds even action which is pregnant with future Law.

The second boundary of leeway for juristic method, that of tolerance for *cumulative* misdoing of the job, may be very wide indeed, if the cumulative process goes by inches, but is likely to shoal off suddenly if the cumulation begins to attract attention from those who count *and if*

an organizing spearhead appears. But the more important aspect of it seems to me to be the powerful tendency never to let error in juristic method carry the legal system down to the bare-bones level, but to react first by "turning the rascals out," or attempting some type of system-reform, or both.

SPECIALISTS

The case for the value of developing specialists to handle "legal" stuff, and so to handle juristic method, is quickly made on the basis of primitive culture. Grievance-adjustment, if left to the aggrieved, is hard to hold down to adjustment, in contrast to counter-grievance. The on-going cumulation of the blood-feud is the favorite instance of the writers; this, even when enough balance between the contesting "clans" is presupposed for the matter to work out as a feud. Over-balance of power on the side of the aggrieved, moreover, may mean no limit to "redress" in vengeance-form; over-balance on the side of the aggressor may mean no redress at all. Thus, even in the matter of articulating and directing pressure upon the breaker-over, the grievance-causer, the device of leaving the matter to the aggrieved to handle lacks adequacy. And labor disputes among us pointed this up for decades, and to some extent do still. But more especially does leaving control in the aggrieved lack adequacy on the side of *admeasuring* the adjustment. For admeasurement is a problem of exceeding toughness. Only in terms of the lack of graded extra-pressures to reach the horny-hided can one understand the way in which primitive peoples will simply tolerate aggressive, ruthless abusers of all decencies—until the time comes when a straw or a new bale breaks the back of public patience and an offender moves into a new and awful status, that of him-who-can-no-longer-be-borne; and the group shortly then—as is reported from the Eskimo, the Shoshone, etc.—goes on one man shy. Our own polity knows the problem still, when a family faces the dissolute son or daughter, holding off the only remaining and ultimate step of turning out a child. Admeasurement is a difficult problem, indeed.

No less difficult is *articulation* of pressure when there is no person or group clearly and peculiarly aggrieved or none recognized as so aggrieved. Not only does inertia stand in the way, but "face" stands in the way, and fear. "Face," because no man likes to be officious; what man wants to stick his neck out—to "assume" to be the man "called" to act? Fear, because to touch off group-resentment lightly leads further mob-wise than any man would care to go in cool blood; and a group can turn upon the person who has thus misled them. Malinowski gives a case in point: a young man who called attention to the breach of a formal "incest"-tabu by a girl he loved, with penalties not to be winked at, once the thing got into the spoken open; the girl, by protest-suicide,

then threw the onus of outrage done back upon the informer. The case shows, as any study of group-life will, one social device for articulation of pressure in the general interest; the pulling forward into "voicing" of someone who for some other reason — old grudge, jealousy, envy, political rivalry, general dislike — is glad to seize on any opportunity to jump the particular culprit without personal risk. But that machinery is neither adequate nor is it over-satisfactory. Most cultures do manage one or another standard way of channeling gossip as a pressure, in praise and blame, as the women's: "David hath slain his thousands"; the Eskimo song-duel institutionalizes the same song of ridicule which Iceland made it a crime to publish. But some cases call for more than even this.

As if by raised lightning-rod, *any political authority* which develops in group or culture thus attracts to itself the two tasks of *articulation* and *admeasurement* of rebuke. The question here is of coalescence — by urge not so much of function as of mechanism. Political authority means power, and power is the refuge of the weak aggrieved. Political authority has rivals for power, and rebuke for good cause is a welcome tool against such rivals. Political authority speaks for the whole, and has standing so to speak — and who will then be better qualified to articulate a general, though unfocused grievance, or have so much to gain, so little to lose, by taking the initiative? Political authority must be concerned with the interest of the whole, and so of peace, and so of guiding adjustment, even by the aggrieved, into channels which reduce the chance of counter-grievance. Indeed, if the specialization of personnel into this law-job of the trouble-case take any of the alternative roads — that over the wise old man, the peace-maker, or over the judge, or over the priest, or over the Ifugao combination of advocate and mediator, or over the sorcerer — then such personnel must in turn be regarded as carrying latent germs of ultimate political power. Coalescence of the doing of law-jobs with the work of governing, while not inevitable, is thus nonetheless "natural," not only in function but in process. And I remind of another reason for a persistent urge toward such coalescence. What we think of as political authority is authority tending in fact and in recognized right to be supreme. But what we think of as the legal shows the same characteristics. If there is but a single standard against which to measure rights and rightness, or but a single authority to turn to, it is that single way or standard or authority which we shall have to take as all that the group has in the way of law for the trouble-case — as, in Felix Cohen's term, representing pro tanto "the most fundamental or most effectively organized set of conduct-imperatives." But if, as is much more frequently the case, there are available a variety of alternative procedures or authorities, and there is some range and variety of standards of right and rightness, then it is hard to escape choosing as the "legal" that one which serves as a last resort when others fail, and which, if appealed to before

passing through the others, is recognized as proper to prevail in the pinch. Which means, as stated, that what we think of as "political authority" and the "legal" drive toward generating each the other. But which also makes clear the *points* at which they tend most strongly to coalesce: to wit, the point at which the "legal" takes the shape of *action by authoritative personnel* (the judge, the king, the council, the captain; and on a lesser level: the old peace-maker, the mediator-on-more-than-one-occasion, the skilled-in-law and the like); and the point at which the standard or norm recognized takes the form of one *pronounced by authoritative personnel*. Whereas that line of legal which moves by way of *accepted procedures* not only may emerge independently of political authority, but, as has been noted, tends to become a major device for holding political authority within bounds — "under law." Neither among child-groups nor in primitive cultures nor in formative groups in our own culture nor in the legal history of developed systems do we find evidence that law-stuff shows any preference in emerging into recognition by the route over redress-patterns as distinct from that over the actions of personnel or vice versa. Rather does each tendency seem to be latent always; in the Cheyenne material alone one can follow, in interplay, everything (save sorcery) from vengeance-killing and sudden lynching through to a High Council of extraordinary constitution called into conclave on an unprecedented case.

THE CLASH OF RIVAL LAY-NORMATIONS

The effective articulation and admeasurement of rebuke, however, will not go unchallenged. It needs no rule of law, formulated and accompanied (to hold down officials who might get out of hand) by a régime of *nulla poena sine lege*, nor does it need the presence of a lawyer-tribe skilled in technical defense — it needs none of these things to produce in a human being a feeling that he is entitled not only to be guilty, but to be *found* guilty; that he is entitled to whatever due procedure may be; that he has a right to be afflicted no more than others have been afflicted in like case. There may be no machinery to make his feeling effective, but it is there. Out of predictive observation of what has been done in trouble-cases plus man's interest in his skin, his convenience, his goods, his honor and his vested hates, comes vigorous normative generalization: first, as to "legal" rights to repetition in "like" trouble-cases; and second, as to "legal" rights that there shall be no other and no more than repetition. The presence of law-men may intensify, articulate, give body to such lines of thought, as the tradition of the law-men also will, and as the cumulation of available written records will, again. The ingenuity of law-men can bring forth rules, fictions, lines of application and practice as tortured in shape as a Japanese stunted tree, as artificial, as slow and stubborn to produce. But it is the monopoly of the lore, of the

material, it is trade-specialization in the use of it, which makes such things the peculiar product of the counsellor and advocate. The *lines of thought* are the lines of thought of his client. The lines of thought are found indeed in very little boys who are hurt thrice as badly by a spanking without a hearing when guilty, as by a spanking when innocent if only a fair hearing has gone against them. Literalness where there is a letter, formalism where there is a form, are of the essence of word-magic, and of other magic, and word and other magic are lay, not law-stuff.

Legalism, then, as a drive, must be seen as present wherever and as soon as law-stuff is recognizable as such. It must be seen as in first instance litigant's stuff: it is spawned by litigants and their counsellors, then by transactors and their counsellors, to get the backing of The System to their ends. It is one line of *legal* method; but it becomes *juristic* method only when *accepted* by the solvers who speak for the Whole. In part, perhaps, the litigants themselves come to it by sheer woodenness and ritualism, as modern laymen bind themselves in free will by Emily Post's pronouncements; but ever and again the litigant *shapes* things into woodenness and ritualism under the drive of interest. Lawyers, I repeat, can do all this more delicately and can hang it on a slimmer peg; but they can do it no more stubbornly than laymen. And ambiguous law-stuff can be read and normatized by laymen too in stiff-necked clashing ways.

Against this, and at the other extreme, as soon as the practices of life have begun to slip an inch away from the remembered law-stuff, there emerges normatization on the level of direct, primitive justice: the right, as felt out of the practices of life — duly extended. This also is eternal. And it reaches of course much further than "morals"; it need not be general, it need not be old, it need not be anything beyond what seems, in the light of interest, to be the implication of tendencies *felt* as present in what is *felt* as practice. It will appear under the name of Justice; and how it shapes up for argument, in contrast to the legalistic line, has never been better presented than in Aristotle's *Rhetoric*. But again, it is not juristic method; it is another, a competing line of legal method. And like the other, it is a line which is not only litigant's art but is the form also in which what often is a litigant's deep need is clothed.

Primitive normation needs no machinery, though it can use a spokesman. It rests on desire — a *will* aspect; it rests on need — a *mercy* aspect; it rests on directly felt life-practice — a *justice* aspect. Legalistic normation is by necessity a touch more sophisticated. It rests on life and right not directly, but indirectly, as right may have lain under the prior expression of authority. But it has its own sophisticated claims to being just. There is a type of right and justice which consists in the order of abiding by the old-and-known. There is a type of right and justice in the fairness of treating even formally similar cases in similar fashion.

There is a type of justice in sustaining expectations built (with *or* without "action in reliance") on either of the foregoing.

The conflicts which emerge, even on grievance matters, and *a fortiori* on matters involving questions of what is right, and then, what is the imperative, and then, what is the Legal answer — these conflicts open the fascinating tasks of juristic method. For juristic method has as its task the use of the available law-stuff, or the creation of new, to choose between conflicting needs, to choose between good needs to fill and worse ones, to invent as well as to choose — and to do all this, somehow, in tune with the net requirements of the Entirety, as those requirements shape up in terms of getting the law-jobs done and their questing aspects furthered. Between the claim for favor (often, as juvenile court work will remind, highly legitimate) or for rule-disregarding individuation of the case, and the claim for primitive justice (the absentee evictor) on the one hand, and the claim for the literal pound of flesh on the other, there lies no simple choosing, but a wide field in which there is no easy chart. Where is right legality in place, respecting form in the main with care, yet keeping the substance ever from defeat by form? Where is long-range Justice, the most sophisticated of all lines of normation, to outweigh the claims both of legality and of the immediate justice of the case? Where is strict formalism needed, for security? Where is the case in hand the major matter?

The object of the paper has been to get these lines of problem into their setting, to get clear the complex stuff which goes into them, in their very simplest form, and which is in them still, however heavily they come to us laden with technical machinery or technical camouflage. Under the analysis, for example, it becomes relatively easy to see and to state that the relation of our Legal System to our judges is strikingly different from its relation to persons not entrusted by office with use of juristic method. As to any person in his lay behavior, the System as a body of imperatives is clear, save on its edges, and is limited, even on its edges, and the normatives which accompany it are normatives of purpose: the "or else" imperative aspect has become a separate engineering problem for specialized attention, after the "should" has been spotted, has been decided on, has been phrased for communication. But as to the appellate judge (whom I choose here merely as the classic example of official entrusted with use of juristic method) the *imperatives* of our Legal System, though not absent, are poorly organized, and inexplicit; they are confused and imprecise in application, apart from a few gross matters such as corruption. Reversal, though important, is at most both indirect and a semi-sanction. Effective *control* (whether needing no sanction, or provided with one) by the Rules of Law has a range curiously more constricted than we commonly assume. Effective control by the tradition of the craft and office, on the other hand, has hardly been studied; that

it is there, we know, but we know not its degree, nor its mechanisms, nor its certainty of operation on each chance-met individual officer. The semi-imperative lies thus, at the heart of the System's operation, in an unanalyzed colloidal mixture with the normative; and the problems of juristic method, posed above, not only have no machinery for answer offered by the System, but are not even clearly posed by its working machinery as calling for answer. For the polite convention of legal discourse is still that The Rules of Law, of themselves, not only guide but control. In a culture or group sufficiently unified to keep each officer of juristic method in reasonable fashion abreast, in both knowledge and feeling, of both the Entirety and each of its conflicting parts, this may do. In ours, intelligence and rational study toward guidance are needed, to aid. Our judges' intuition of their duty to Justice has aided much but it still cross-purposes itself. Yet juristic method, while never capable of mechanization, is nonetheless capable of such organization as to somewhat communicate both skills and guidances: what to do with the Rules of Law, and how, when they are judge-made, best to make them? That is the type of problem — one type, only — which the paper has aimed to get into better focus against the welter of normative generalizations and of law-stuff, with the law-jobs of the Entirety pulsing under all.

If one wants to startle himself with light on how little explicit effective direction or guidance Our Legal System offers the judges (taken as a group, to any one of whom a case may come, and from *any* one of whom the answer would, in ideal, be the same) let him look at the judges, for a moment, not as entrusted with the application of the Rules of Law, but as entrusted with the application of juristic method *to* the Rules of Law and *with* them. It is a truer picture.

And may it not be suggested in closing, that if our polity attempted once to go too far in separating and so simplifying the problems of juristic method by depriving our courts of law-making power, yet the judges' tacit correction by way of merely continuing case-law, old style, was an over-correction? The Cheyenne Indians found ways of keeping the individual needs of the individual case from troubling a policy-decision, while yet letting the issues of the individual case inform that policy-decision. For that reason, they were able to do with relative frequency what an American high court finds it is most puzzling to do: to keep the skilled advocate's use of the *atmosphere* of the particular controversy from foisting an unwise general ruling on the community. And the *Sunburst Oil* case makes it clear that some experimentation with such procedure would be constitutional in the courts of these United States.