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ON ABSOLUTISMS IN LEGAL THOUGHT*

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In the reaction against mechanical jurisprudence, against the complacent manipulation of legal concepts in utter disregard of the facts of social life, it is well to be on guard against throwing out the baby with the bath. Granted that traditional concepts like *rights, titles, contracts, etc.,* have been grossly abused, it ought still to be clear that without the use of concepts and general principles we can have no science, or intelligible systematic account, of the law or of any other field. And the demand for system in the law is urgent not only on theoretical but also on practical grounds. Without general ideas, human experience is dumb as well as blind.

It is important also in any intellectual enterprise to remember that there must always be a certain difference between theory and practice or experience. A theory must certainly be simpler than the factual complexity or chaos that faces us when we lack the guidance which a general chart of the field affords us. A chart or map would be altogether useless if it did not simplify the actual contours and topography which it describes. In advanced physical science all concepts and laws refer to ideal conditions which can never be completely realized. Thus the law of the lever tells us what would happen if we had an absolutely rigid body in the form of a purely geometric line, and the law of falling bodies states what would happen in a perfect vacuum. Neither of these conditions is perfectly attainable on earth. Similarly, it is not necessary that the principles or theoretic assumptions of legal science shall be found to be fully realized. No science offers us an absolutely complete account of its subject matter. It is sufficient if it indicates some general

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pattern to which the phenomena approximate more or less. For practical purposes any degree of approximation will do if it will lead to a greater control over nature than we should have without our ideal pattern. But for theoretic purposes we need the postulate that all divergences between the ideal and the actual will be progressively minimized by the discovery of subsidiary principles deduced from, or at any rate consistent with, the principles of our science.

From the foregoing there follows the necessity of two opposed attitudes. In the first place we must not forget that our fundamental principles are after all only assumptions; and that to persist in them despite factual evidence to the contrary may be foolhardy or Quixotic. On the other hand we must have faith, courage, and persistence in our first principles. When the facts of experience seem to be in opposition we must not forget that what are generally regarded as facts may be only the blind assumptions of unreflective experience, and that the progress of science generally consists in showing that our theory can give a new and more adequate interpretation of the so-called facts. The Copernican astronomy naturally comes to our mind as an example of a theory that succeeds even though it seems at first to go counter to the universally observed fact of the motion of the sun around the earth. Our generation has also seen a remarkable instance of this in the way in which Einstein's theory of relativity has made its way despite what seemed to be established fact. The man who abandons a theory at the first difficulty which it encounters will never achieve anything in science. For in science as in everything else achievement depends upon the persistence which overcomes obstacles.

These reflections suggest a certain caution in attempting to refute legal theories on the ground that they do not seem to be in agreement with fact. These theories may have enough vitality to overcome the difficulties which seem to us fatal. It is, however, always relevant and useful to point out that such a theory is inadequate, that it leaves out certain necessary considerations. This is a relatively easy (though necessary) task because incompleteness is an inevitable characteristic of theory as well as of factual knowledge generally. What has been called absolutism in the intellectual realm is the confidence in our intellectual constructions which makes us refuse to consider the further qualifications necessary to make our general proposition true. This seems to be unavoidable. The process of qualification is laborious and seemingly endless. Practical needs and our vital and psychic economy demand absolute (*i. e.,* unqualified) answers, and make us cling to what sounds or seems to us simple. From this tendency it would hardly be possible to escape if it were not that diverse needs breed cravings for differing and opposing absolutisms. In confronting such opposites with each other we come to see the need of more adequate formulations.

To illustrate this need is the task to which the following pages are devoted. While the outer form of my exposition will thus be almost entirely critical, its substance will, I hope, be found to be eirenic. I wish to follow the good scholastic method of Gratian's *Decretum* as well as Abelard's *Sic et non,* of trying to save the truth in opposing views by drawing the proper distinction which enables us to harmonize them.

I. Logical Phase of Legal Absolutism

Absolutism in Definition

Let us begin by considering the vices of legal absolutism from the point of view of logic. The first manifestation of absolutism that suggests itself is the complacent assumption that there can be only one true or correct definition of any object. This assumption underlies the traditional controversies as to the nature of law and Kant's [1] famous reproach to jurists on this score. Yet on consulting any scholarly dictionary we can readily see that few words in common use have only one meaning. This should warn us that in controversies as to the proper definition of a term, the contestants, while using the same word (definiendum) may be really concerned with different things (definiens). Consider, for instance, Maine's [1a] criticism of Austin's [2] definition of law as an imperative or command of the sovereign. In substance Maine's objection is that there are communities in which there is no one who habitually issues commands that are generally obeyed, and yet conduct in them is governed by some law. Now the word *law* is, doubtless, used to denote the customs according to which the members of certain primitive communities generally conduct their lives. But this is no objection at all to Austin's analysis of the law found in classical Rome and in modern civilized states. In the latter we certainly do find law-making bodies which abrogate certain customs, such as rebating or over-certification, and create new ones, such as those connected with income tax returns. It is not necessary for my present purpose to defend the complete adequacy of Austin's theory, but merely to note that Maine does not really refute the given definition when he shows that the word *law* is also used in another sense than that employed by Austin. Of course, the objects of these two senses are connected, and one may well contend that law in Austin's sense could not exist without law in Maine's sense, that is, that there could be no sovereign whose orders are generally obeyed unless there were certain more general customs actually prevailing, so that the phenomenon to which Austin refers is thus sociologically derivative and not primary. But while this statement may be true, those who make it are generally guilty of the genetic fallacy of the identification of a thing with its cause or condition. Law may be derived from custom but is

1. Kritik der reinen Vernunft (5th ed. 1797) 759A note.
1a. Maine, Lectures on Early History of Institutions (1875), lectures 12 and 13.
2. 1 Austin, Lectures on Jurisprudence (2d ed. 1869) 15, 118, 120.

obviously not identical with it. The law which is studied in our law schools, administered in our courts and about which men consult lawyers or agitate in the political forum for legislative changes is not the same as custom. The late Mr. Carter, who identified law and custom,[3] had the courage of his confusion and argued that judges are experts in the customs of the various subjects on which they have to rule. But no one else has taken that consequence of the theory seriously. Yet, the failure to distinguish clearly between law and custom underlies all the assumptions of Ehrlich's *Living Law*.[4] There are obviously many practices which actually prevail but are not recognized or enforced by the legal machinery, *e. g.*, the practice of tipping waiters; and there are, on the other hand, laws regulating acts which are in no significant sense customary, *e. g.*, the rules governing testamentary dispositions or equitable conversion. Indeed legal prescriptions through legislation are necessary precisely because custom proves inadequate to regulate our social relations satisfactorily.

Following Ehrlich, my friend Professor Llewellyn has argued with great force that court litigation represents only the pathology of law, the divergence from the normal practice. The converse of that proposition, however, cannot well be denied. Modern business practice is undoubtedly moulded by past and expected court litigation, by legislative enactments and by administrative orders. That is what gives point to political struggles to control the organs of government.

Law as custom and law through deliberate legislation are thus both realities and we cannot by an arbitrary definition disprove the existence of one or of the other. The important thing is rather to unravel their actual interrelations, and that cannot be done by a mere definition.

It may seem rather trite, but it is important to insist that while there is an arbitrary element in all definitions, the question of their truth or correctness cannot be altogether dismissed. If we ignore the facts of actual historic usage, a definition is a resolution to use a word as a sign or symbol for a certain object and involves no necessary assumption that the object exists in nature. If we do not like a word in common use we can always invent a new one to denote the particular object we have in mind. In organizing a theoretic system such as geometry we are also free to choose our indefinables and our definitions will then vary according to this choice. We cannot, however, safely ignore the question of consistency in our use of words and this involves (1) attention to the meanings which our words in fact actually convey to our public and to ourselves and (2) the fact that definitions must serve a definite function in any scientific system.

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3. CARTER, LAW: ITS ORIGIN, GROWTH AND FUNCTION (1907) 79.
4. EHRLICH, GRUNDLEGUNG DER SOZIOLOGIE DES RECHTS, c. 21.

(1) There can be no doubt that departures from general usage do lead to inconsistencies and confusion. For common usage is a habit and the resolution to use a word in a new sense is, like any other resolution, more easily made than kept. In point of fact, therefore, whenever we define a word like law, crime, marriage, person, or the like in a manner that departs from current customary usage, we sooner or later unwittingly fall back on the common use and thus confuse the meaning of our terms. Regard, therefore, for common usage is a counsel of prudence or practical wisdom.

Unfortunately, however, common usage reflects common modes of thought which are generally vague and unprecise and often grossly inconsistent. Thus we commonly speak of legislatures passing laws and at other times assert that such a law when not enforced is not a law at all. Obviously this is, when taken literally, nonsense; and we can extricate ourselves from such positions either by making a sharp distinction between statutes and laws or by defining law independently of enforcement. In this way we are led to technical definitions which depart from common usage by introducing more precise limitations or distinctions.

(2) Definitions, while not absolutely necessary in pure mathematics, are practically indispensable in all sciences or responsible discourse. They can help us to grasp more clearly the fundamental ideas or patterns in any field of study and thus serve to create a definite point of view or perspective for the organization of our subject matter. In this respect some definitions are certainly more helpful than others.

From this point of view we must condemn all definitions of law (or of parts of it, *e. g.,* the criminal law) as that which is right, just, expresses the will of the majority, safeguards the social welfare or security, *etc.* For the historic complaints so bitterly and persistently made against the law raise issues of fact which cannot be properly disposed of by a mere definition. When any one says that an unjust law is not a law, that a legislative enactment is not a law unless it is the will of the majority, or that a provision of the criminal code is not a law if it does not in fact promote the safety of the community, he is resorting to a violent use of words to escape the problem of considering the factual elements in the case.

The law about which we shall be concerned in what follows is that with which judges, lawyers and law schools are concerned, *i. e.,* with rules of conduct determinable by courts. That is what we commonly have in mind when we speak of the law of bankruptcy, divorce, *etc.,* in any state; and our discussion of what is involved in a definition of law is thus only an illustration or paradigm of what is involved in the definition of any legal institution of property, contract, and the like, on which actual decisions depend.

Absolute Divisions

The craving for greater simplicity and definiteness than our material naturally offers shows itself also in the desire for clear-cut absolute divisions.

Now the simplest mode of division is that into two mutually exclusive parts such as we have when a line divides a surface into two mutually exclusive areas. This type of division (dichotomy) is especially prominent in the law where the aim is to narrow every issue down to a yes-or-no answer. Let me refer to one of these divisions to illustrate my general thesis, namely, that between criminal and civil law.

As regards substance and as regards procedure the civil and the criminal law overlap so that it is impossible to say with absolute precision where one begins and the other ends. As to substance, few today will venture to assert that all criminal acts involve greater moral turpitude than the frauds and other acts which constitute torts. Nor can we maintain the old view that the criminal law deals with acts which endanger the common welfare while the civil law deals with what is of interest only to private individuals. The general social interest in the maintenance of proper family relations, of proper industrial relations and the like, is certainly as great as that involved in the protection offered by large parts of the criminal law against various misdemeanors. Indeed, are not the same interests often protected in both ways, and are there not many acts which are both civil and criminal wrongs? As to the difference of procedure, it is easy enough to call certain procedures criminal and others civil, but not easy to define the difference. The layman who generally thinks of crimes as serious felonies like murder and robbery, naturally says that criminal prosecutions are brought by officers of the state who are in duty bound to do so, whereas a private action is brought by an individual at his option. But leaving aside the classic common-law forms of private prosecution for criminal offenses and the fact that in England the Attorney General can still prosecute certain cases of tort, we still face the fact that an action for the collection of land tax, or other obligation to the government, may take the form of a civil suit. Despite all sorts of theoretical differences, such as the different degrees of evidence required, such civil actions do not in effect differ very much from prosecutions to enforce penalties for certain misdemeanors. Nor can the sentence which results from criminal procedure be always sharply distinguished from the judgment in a civil action. To be sure, no civil action any longer terminates in death or imprisonment as the old Roman and Teutonic law often did. Yet even today, imprisonment for certain kinds of debts, for non-payment of alimony, and for contempt of court often grows out of civil procedure. Nor are the fines of the criminal law necessarily more severe than the civil damages that are frankly recognized as punitive. Consider, for instance, the triple damages paid by the Danbury union hatters under the Sherman Anti-Trust Law.[5] In some cases this meant the loss of home and all of a life's savings. Can we doubt that this was a punishment more severe than that for many misde-

5. Lawlor v. Loewe, 235 U. S. 523 (1915).

meanors? Men sometimes prefer to go to jail rather than pay certain fines, and the appointment of receivers to take charge of one's business is sometimes regarded as even worse.

These doubts cannot of course wipe out the direct and indirect differences between criminal and civil actions; but the point I am making is that the existence of such differences, like the existence of the varieties of a species, does not necessarily establish a rigid dichotomous division. Similar considerations hold in regard to the dichotomous divisions between public and private law, between substantive and procedural law, between judicial and administrative law.

We may carry over this distrust of dichotomous division to the distinction between what is and what is not law. Looking at the matter externally after the courts have decided, we can say what is and what is not the law in the given case. But can we be so certain as to the cases not yet decided? The actual element of uncertainty as to what the courts will rule cannot be denied. Some English statutes have become part of our common law, while others have been rejected as inapplicable to American conditions. Have all such issues been decided? There are many obsolescent statutes concerning which there is no evidence or little evidence as to whether the courts will hold them applicable to modern conditions. There are other situations where doubt exists because there is no way of bringing the issue before any tribunal competent to settle it. What is the status of the clause in the Constitution directing Congress to apportion representation according to the latest census?[6] Is it law or is it a prescription of political morality, like the duty or custom of a British Cabinet to resign after an adverse vote in the House of Commons? Again where are we to draw the line between a law and administrative order; *e. g.,* is a post office regulation a law?

The foregoing and similar doubts indicate that while theoretically we can and must define the law or branches of it in certain ways and draw logical conclusions from them, the actual situation is not as simple and as clear-cut as our dichotomous divisions make it appear.

On Self-Evident Principles

Though the majority of our lawyers deny the relevance or necessity of any theory, it is not difficult to see that their view of the law involves a set of absolutes. The principal one of these absolute assumptions is that the law is a closed or complete system of rules, so that no matter what case comes up from the hurly-burly of life, an answer can be deduced with absolute certainty from the principles embodied in statutes or in previously decided cases. This view, however, obviously ignores the fact that the law is not at any one time completed but is always being modified in the process of judicial decision. Not only is the common law what the judges have made it but this is

6. U. S. CONST., Art. I, § 2.

also largely the case with our statutory law, of which constitutional law is a special instance. Gray seems to me to have shown this in an historically irrefutable way.[7] Against this it has been urged that if there is no law before the judge decides, the action of people and even of the judge is lawless; and this our critics regard as a *reductio ad absurdum.* This argument is, however, itself an illustration of logically vicious absolutism. It assumes that there either must be a complete law for every decision or else there is no law at all. But why not admit the fact that while judges are bound more or less by previous decisions, by general opinions, and by all the factors that Gray calls "sources of law", they also have after all the sovereign power of choice, and that in many cases they might have decided contrary to the way in which they actually did without their decisions ceasing to be, or to make, the law? Indeed, the arguments against Gray's position involve a confusion between formally possible and actual law. By giving the judge authority to make law there will always be law, but only after the judge decides. This clearly does not mean that actual legal decisions are so completely determined by previous law that the judge is a mere phonograph or automaton without opinions or sympathies of his own (based on his limited experience) that determine how he shall decide.

The insufficiency of the actual or existing law to determine completely all the issues that come up has been hidden by the use of certain maxims or principles as self-evident axioms. It is hard to see how we can avoid relying on such maxims if we are to start and get somewhere. Yet, on examination, they turn out to be largely illusory. Consider, for instance, the seemingly self-evident principle that no one can acquire a right by committing a wrong. Yet one who obtains property by theft does acquire the right of possession against everyone except the owner, and even against the latter after a certain lapse of time. We think it self-evident that no government has a right to take the property of Peter and give it to Paul. That, we say, would not only be robbery but also a treacherous betrayal of trust, since government is instituted for the protection of property as well as life, *etc.* And yet we do, in fact, take property from Peter, in the form of taxation, and give it to Paul in the form of a pension or the education of his children or general public protection against typhoid; and few really think that this is unjust, although Peter may be a bachelor on principle and immune to typhoid. Our courts also speak as if legislatures cannot delegate their legislative powers, yet that is altogether unavoidable whenever laws have to be interpreted and applied in the course of administration.

The appeal to self-evident principles is part of traditional philosophy and especially of the Scotch intuitionism which has influenced legal thought in this country to a much larger extent than is generally realized. This intui-

7. GRAY, THE NATURE AND SOURCES OF THE LAW (R. Gray's ed., 2d ed. 1921) 170-189.

tionism attempted to settle controversies by appeal to maxims as self-evident. It assumed that we know *a priori,* independently of all experience, that the axioms of Euclidean geometry are absolutely true in the physical world, just as according to Kant and the Romantic philosophers, we also know the *a priori* absoluteness of the law of gravitation, the laws of Newtonian mechanics, and the laws of other physical phenomena. In the same way it has been supposed that we know absolute rules or principles of law. But the fact that the people who agree on these principles draw different consequences from them shows that their agreement is merely verbal, that they use the same verbal form to denote different things.

The misleading appearance of definiteness in maxims may be seen historically when we remember that the framers of the Declaration of Independence with its ringing note about all men being created free and equal had no objection to slavery and that those who objected to the principle of taxation without representation continued to oppose granting the suffrage to those having less than a certain amount of property or to women who had property. Many good people today still repeat the latter principle, though they are violently opposed to allowing resident foreigners, illiterates and others the right to representation, even when the latter are taxed very heavily.

Courts frequently express indignation against class legislation and declare it unconstitutional as not offering to all the "equal protection of law." But the fact is that nearly all legislation is class legislation. Any law that begins with the statement, "Whoever does so and so," for example, steals something over the value of five shillings, obviously creates a penalty for a certain class of individuals, and protection for others. So do laws which recognize differences between men and women, between infants and adults, and the like. I suppose that those who object to class legislation object to unjust privilege. They do not wish to see certain classes of people receive advantages or disadvantages because of their position or status rather than because of what they do. But the actual effect of legislation always does advantage certain people more than others. It is unavoidable. I suppose that we shall all agree that a law debarring red-headed men from practising law would be a discrimination not relevant to any socially desirable end. But in actual cases where statutes have been declared unconstitutional as class legislation the legislature did see a very real connection between the distress of a given class and the remedy needed in that particular situation, while the courts have relied on verbal abstractions without any realization of the actual facts necessary to determine the concrete meaning of such abstractions.

Early American judges who thought it beyond the power of the legislature to take the property of A and give it to B also said it would be monstrous for a legislature to be able to declare the wife of A to be no longer his wife. But that is exactly what divorce laws do. I do not wish to argue the

merits of divorce laws. I am merely calling attention to the fact that what horrifies people when abstractly stated may not horrify them in actual cases. Maxims are social coin and have a social value and vogue apart from their concrete meaning. But from the point of view of logic or semantics, it is an error to think of the meaning of a *legal proposition* as something completely independent of its consequences. The analysis of the facts in a situation is not only necessary in order to know what law is applicable, but the process of application develops the very meaning of our legal propositions.

If the foregoing embodies any truth we cannot pretend that the United States Supreme Court is simply a court of law. Actually, the issues before it generally depend on the determination of all sorts of facts, their consequences, and the values we attach to these consequences. These are questions of economics, politics, and social policy which legal training cannot solve unless law includes all social knowledge.

Consider Marshall's argument for the power of the courts to declare acts of Congress unconstitutional.[8] The argument starts from the clause that the Constitution is the supreme law of the land, and assuming it is self-evident that the Court is the sole interpreter of the law, concludes that the Court alone can decide what is constitutional. That this argument is not altogether as rigorous as it sounds may be seen from the fact that the Court has refused to decide what the Constitution means by a "republican form of government." It said in effect: "That is for Congress and the Executive to determine." Some things in the Constitution, then, though law, may be interpreted by Congress rather than by the courts. Indeed, Marshall's argument from the fact that the judges swear to obey the Constitution might well be turned against him with the query, Do not the President and the members of Congress also swear to act in accordance with the Constitution?

The pretence that every decision of the Supreme Court follows logically from the Constitution must, therefore, be characterized as a superstition. No rational argument can prove that when the people adopted the Constitution they actually intended all the fine distinctions which the courts have introduced into its interpretation. Nor can we well deny the fact that judges have actually differed in their interpretations, that Taney's was not that of Marshall, and that Brandeis' views are different from those of McReynolds. A sense of humor, if not of courtesy, would prevent a majority of the court from applying the term unreasonable to those interpretations of the Constitution by legislature and executive which seem reasonable to a minority of the court.

Nihilistic Absolutism

The foregoing and other abuses of logic in the law are in line with similar abuses in other fields which have been characterized as "vicious intellectual-

8. Marbury v. Madison, 1 Cranch 136 (U. S. 1803).

ism." A reaction against this has naturally been provoked and has taken diverse forms. There has been the appeal to intuition, to common sense, to justice, to history, to the empirical facts of human behavior, or to the supposed facts of our sub-conscious or unconscious thought. It is interesting to find some of these facts drawn from the mushroom science of psychoanalysis and other sources that will hardly stand up under any scientific or legal rules of evidence. All of these forms of anti-intellectualism, however, concern us here only to the extent that they lead to a nihilistic absolutism according to which there can be no logical certainty in the law at all. In the main this has been supported by the nominalistic dogma that there can be no law other than the actual individual judicial decisions, which have physiologic causes such as the state of digestion, *etc.*, but no logical determinants. I cannot here examine in detail the metaphysical assumptions of this dogmatic nihilism, which no one has ever carried out consistently because it is practically impossible to carry out any universal denial of the existence of universals.

I may, however, call attention to some obvious difficulties in such absolute denials. We select judges from those who have studied law and we expect them to obey it. How are we to discriminate between proper decisions and judicial tyranny or even corruption, if there are no rules at all to tell us whether the judge has acted within the law? Again, it is well to say that the judge is or should be guided by the facts in the case and not by *a priori* principles. But what does that mean? What facts we are to regard as relevant in a given case depend upon certain general conceptions or principles of connection. When we say a certain issue is to be settled empirically, that it depends upon the facts, it is always relevant to ask, In what way does it depend? If we cannot answer the last question, the problem of effective administration of the law has certainly not been solved.

The logical positivists or nihilists at times contend that they are not responsible for the popular expectation of justice or of certainty from the courts; and I am not arguing that any contention is untrue because it would be inconvenient if that were the case. It is, however, relevant to note that these realists do not believe in the consequences of their theory. They do not, and cannot, think that it would make no difference whether the judge did or did not know any law. Nor would they, I suppose, contend that everything that a judge says or does is law. If, however, certain acts of the judge are beyond his judicial power the determination of the latter is itself dependent on a legal rule determining his proper scope.

In any case, the historical fact is that the stream of judicial decisions has a continuity, and judges in deciding actual cases are to some extent influenced by the logical demands set by the prevailing conception of what the law is or ought to be. The law is not in fact a completed, but a growing

and self-correcting system. It grows not of itself but by the interaction between social usage and the work of legislatures, courts, and administrative officials and even legal text writers. In this growth the ideas which people have of what the law is and how it *ought* to grow are not without influence, though obviously inadequate for complete control of all future decisions. The logical error of absolutism is the same in the revolutionary as in the conservative camp—the love of undue simplicity. Metaphysically this shows itself in the assumption of absolute linearity of determination between universals and particulars, principles and actual decisions. But from universals alone we can not determine particulars, and the latter obviously cannot completely determine the former.

In the historic process, there is no absolute beginning. When we come to reflect we find ourselves *in medias res*. We try to extract from past decisions rules to guide the future ones, and we test the appropriateness of these rules by the consequences to which they lead. As these consequences are evaluated differently by different people, such a process cannot rule out all differences of opinion based on differences of experience or temperament, but if consistently carried on it promotes greater order and understanding.

For dialectic or purely formal purposes, as in mathematical or logical considerations, we cannot dispense with absolute accuracy. When, however, we come to descriptions of nature, or prescriptions for human conduct, we cannot attain such absolute precision and we have to expect imperfection, though we must hold the ideal of perfection with sufficient tenacity to realize that our actual achievement has fallen short of it. This recognition of the necessity of the ideal and our inability throughout time to achieve perfection, is the condition of intellectual and moral sanity. It enables us to evaluate some concepts as more definite than others. The concept of disorderly conduct, for instance, is not as definite as that of usury or illegal rate of interest. The progress of the law involves the attainment of greater definiteness as well as greater flexibility. The problem of reconciling these two demands is difficult and we can seldom attain perfect satisfaction. But we have to learn to live in our imperfect world. We should not, in the language of Tourtoulon, throw to the dogs all that is not fit for the altar of the gods.[9]

The foregoing criticism of logical absolutism in the law holds equally well of its ethical content. But before considering the latter it is well to glance briefly at the conflict between those who view the law as an ideal system and those who view it as completely in the field of natural existence.

9. TOURTOULON, PHILOSOPHY IN THE DEVELOPMENT OF LAW (Modern Legal Philosophy series, 1922) 348.

II. The Real and the Ideal in the Law

The law of any country is imperative in that it orders people to do or refrain from doing certain things. Obvious as this may seem it has been vehemently denied by many influential jurists on diverse grounds. One such denial takes the form of the assertion that the law is only a system of hypothetical judgments as to what will follow in certain situations. This seems a typical instance of a purely verbal issue. If I have the power to evict you from my house what real difference does it make whether I order you out directly or tell my servant that he will see you to the door? Yet it is a mistake to ignore the importance of verbal differences in the law as in theology or in other vital social affairs. For different phrases have, because of their associations, different emotional tone and do not therefore equally fit the diverse temperaments which enter into social issues. Thus authoritarians naturally prefer the imperative terminology which is very distasteful to those who like to think that their work is scientific and that science deals only with facts of existence.

Be that as it may, the sharpest issue on the question of legal method or the nature of the legal system is that between those who view the law as a natural phenomenon, and those to whom it is an eternal ideal to which external human conduct ought to conform. The latter view is most emphatically expressed by Kant,[10] according to whom the law tells us not what empirically exists but what is categorically imperative on all societies at all times. Instances of such imperatives are the property right of the first occupier,[11] and the duty to execute a murderer.[12]

We cannot here discuss the metaphysical foundations of this dualism; but from a juristic point of view it has encountered difficulties which it has not been able to overcome. None of its specific imperatives have been able to maintain their absoluteness. The right of the first occupier has become highly questionable in a society where it has relatively little application; and the whole *lex talionis* has been attacked as for the most part impossible of application and too brutal in those few cases where it can be applied. The main objection to all these imperatives is that as specific directions they are altogether arbitrary, that they take norms which happen and prevail among certain peoples at certain stages and set them up as valid everywhere for all times. Kant assumed that the conscience of all rational beings demands them. But this, like all arguments based on the authority of intuition or of unanimous consent breaks down the moment you challenge it.

In reaction against this kind of absolutism, positivistic jurists insist that only if we restrict ourselves to the realm of factual or historic existence can

10. Kant, The Philosophy of Law (Hastie's ed. 1887) 82 *et seq.*
11. *Id.* at 82-83.
12. *Id.* at 198.

our inquiry be called scientific. Therefore a science of the law must study only what is and have nothing to do with what ought to be. This leads to a difficulty which positivists generally pass over, namely the fact that the law does not declare or describe what exists, but rather commands or prescribes what should be done. The existence of a law of natural science can be refuted when we can show that a single phenomenon fails to conform to it, but a law in the juristic sense does not lose its claim or validity when any one acts in ways contrary to it. For the *validity* of such a law is a logical inference from certain recognized legal principles and as such does not depend upon people drawing it always, or in a majority of cases. If the Volstead Act [13] forbids the sale of alcoholic liquors, actual sales will not abrogate it. Whether it is law or not depends logically on whether it does or does not follow from the Eighteenth Amendment to the Constitution.

Two efforts have recently been made to face this. One is by the younger American jurists who follow Holmes' dictum [14] that the law is merely the set of predictions as to what the courts will decide. Looking at the law externally, this statement is unexceptionable, at least in the context in which that great jurist stated it. The dictum, however, does not say anything about the law in the process of making, *i. e.,* how legal problems appear in the course of argument before a court or in the deliberations of a judge when he has to decide. For obviously the problem of the court is not to predict what it will do but how the case should be decided. This is also the problem of the systematic jurist or the critic of any particular decision. Any decision may be criticized on the ground that it is not consistent with the principles generally recognized or embodied in specific statutes or in repeated previous decisions that have created habitual expectations in the community. It would be disastrous for the progress of the law, therefore, if the dictum in question coupled with another misleading dictum,[15] that experience and not logic is the life of the law, were to lead to the neglect of the requirements of consistency in the law. It must be insisted that courts must not only decide individual cases, but must develop the legal system in such a way that people may generally know their rights and duties, what they may or may not do in recurrent situations.

As a system the law is developed through logical and technical methods of interpretation and analysis, whereby recurrent and relevant elements are recognized in the cases before us, and the decision made to fit as far as possible the reasonable expectations of those who have considered the law and the given case. It is not necessary to assert that this is what actually happens in every decision. It is sufficient for our present purpose to main-

13. 41 STAT. 305 (1919), 27 U. S. C. A. § 1 *et seq.* (1927).
14. Holmes, *The Path of the Law* (1897) 10 HARV. L. REV. 457-8.
15. HOLMES, THE COMMON LAW (1881) 1.

tain that the actual law is not a pure chaos but is more or less systematic and hence that the ideal of logical system is an actual operative demand or imperative in the process of lawmaking by courts, jurists, and to some extent even by legislators.

A more elaborate attempt to deal with the normative element in the law is that of Kelsen,[16] who maintains a sharp distinction betweeen existing social facts and what is logically demanded by the postulates of legal system. By isolating this element of validity from all questions of existence, Kelsen eliminates all descriptive sociology from his pure jurisprudence. To do this he has also to eliminate all human beings, the sovereign legislators, judges, administrators and legal subjects. No one can make law or administer it except one who is legally authorized to do so. State officials then have no existence as officials except as creations of the law. The whole sovereign state thus disappears and becomes merely a system of legal obligations. Kelsen likens this disappearance of the state from jurisprudence to the disappearance of the soul or consciousness from psychology. But Kelsen not only eliminates the soul but also the individual subjects. Like Cassirer and other Neo-Kantians he wishes to have a world of function without substance—a grin without a cat. We cannot, according to Kelsen, speak of the citizen obeying or disobeying the law. For the latter contains not orders to the individual citizen but only declarations to its officials as to what consequences follow certain acts. The law is thus not a command by any natural person or group to other human beings, but only a self-contained system of propositions.

No one who has followed Kelsen's work can help admiring his keen ingenuity and resourcefulness. He has undoubtedly done good service in piercing the shallow pretensions of positivistic sociologists who think that from a premise that is merely descriptive of what people do we can logically deduce what they should do. But his pure jurisprudence would be an altogether homeless ghost if he did not insist that all law must be positive, *i. e.*, actually prevail in an existing society. Here he involves himself in fundamental inconsistencies. Consider the case of official groups like the United States Congress, the Supreme Court, or ordinary juries that fail to carry out a specific legal provision. From his purely logical point of view, Kelsen must assert that the law is not changed when it is in fact disregarded or disobeyed by its officials. Yet, as a positivist, he cannot assert the existence of any law that does not prevail or is not applied in definite time and place. His admission that a revolution (which is a social phenomenon) may change the legal system shows the impossibility of eliminating all reference to existence from even the most abstract theory of what can significantly be called law.

16. KELSEN, ALLGEMEINE STAATSLEHRE (1925), particularly 16-21.

From these and similar difficulties we can escape if we get rid of the nominalistic prejudice in favor of atomic facts, and recognize that in the world of reality existence and the relations which constitute its logical implications are inseparable. The law as a system is an ideal. And as an ideal it denotes not a number of existing decisions but something by which actual legal decisions can be determined and criticized. But it is also an historic reality in the sense that it is a logical determinant of the existing law, so that we can speak of the legal system of a given country, *e. g.*, of Sweden, and compare it with the legal system of another country or with that of the same country at another time. Legal system is a form or pattern which helps us to analyze, understand, and judge the official conduct of administrators, judges, and lawyers and the acts of others who are influenced by such conduct.

The foregoing considerations enable us to avoid not only the absolute dualism between an eternal ideal and a changing phenomenal order but to avoid also the Hegelian absolutism which ignores the distinction and brutally identifies the ideal with the actual.[17] Hegel does this not only by identifying the actual (Prussian) State with the absolute but by trying to reduce history to a purely logical process. Now it is doubtless true that the categories of logic are applicable to the historic process—history would be meaningless without them. But the material evidence on which we must construct our view of history is fragmentary and contains too many irrelevancies to justify absolute conclusions. Our best efforts can give us results which are only probable. We must therefore conclude that while existence and validity cannot be absolutely separated they cannot be absolutely identified. They are, like the two sides of a window pane, inseparable though never identical.

While logical relations are not, as such, events in time, our ideas of what ought to be can and do exercise effective influence. But we must remember that our ideals of what ought to be do not have corresponding objects as do our true ideas of what exists. Also the relation between acts and ideals by which they are to be judged is different from that between a physical event and its generalization. The same physical event may be governed by quite different legal norms. A box of shoes, for instance, leaves one place and arrives at my house. The physical path thus taken may be determinate; but whether I shall be obliged to pay for them or not is not thereby determined, but depends on legal norms or principles.

One may thus view the task of the law as the setting up of norms to govern the world of actuality. But these norms themselves are historically conditioned. They depend upon considerations as to what happens most

17. HEGEL, PHILOSOPHY OF MIND (Wallace's Trans. 1894) 147-159; PHILOSOPHY OF HISTORY (Sibree's Trans. 1894) 9-20, 475-477; PHILOSOPHY OF RIGHT (Dyde's Trans. 1896) 240-248, 278, 283, 313, 341-350.

frequently under similar conditions and upon estimates as to the probable effects of certain regulations. In this sense we may say that the law selects certain norms or patterns of conduct and tries to repress extreme variations from them. It may be argued that in doing this we are continuing on the higher or conscious level the biologic process of natural selection. But without involving ourselves in the difficulties of the concept of natural selection when applied to social policies, we can certainly insist that law develops through conscious activity determined by reasons or ideals as to that which ought to be.

In this connection we may well take note of the classical controversy as to whether the law rests on reason or on force. It is interesting to note that the former view was pressed with the greatest vigor by the most typical English lawyer, typical, in his practical distrust of system and rational theory. I mean, of course Lord Coke. In an argument with King James—we have only Lord Coke's own report [18]—he urged that law was nothing but reason. When the King asked, "Have I not reason too?" Coke replied with the dodge that law is not natural but artificial reason acquired by studying the law of England. The reply to this was made by that great, though perhaps untypical, English philosopher, Hobbes, who observed that what Coke decided was law not because he had more reason than anyone else but because the King made him judge.[19] Now, who is King or has the power to appoint judges and enforce their decisions is not purely a matter of reason but involves an element of force. Force is an element in all government or legal systems. It may take subtle forms. The rulers may govern in the name of God, the Constitution, the will of the people, or the interests of the proletariat. But ultimately they must be able to exert some kind of physical compulsion. At any rate, that is what they do in modern states. Hobbes put it brutally when he said that in the law, if nothing else turns up, clubs are trumps.[20] This is of course very crude, for, as has often been remarked, you can do everything with bayonets except sit on them, and government must have a seat of authority. For the most important element in the efficient enforcement of governmental orders is that people should have the habit of obedience. This habit can be acquired by other means than bayonets. Consider, for instance, the way in which people obey priests, doctors, or their own young children, or the way in which an audience obeys the directions of a speaker or magician to look to one side of the room, to raise their hands, and the like. These psychologic influences of suggestion, of arousing awe or respect or psychologic fear, if not love, cannot be ignored in communal organization. Still, in the end some element of brute

18. *Prohibitions* del Roy, 12 Co. 63-65 (K. B. 1612).
19. HOBBES, LEVIATHAN (4th ed. 1894) 125-6.
20. 6 HOBBES, ENGLISH WORKS (Molesworth's ed. 1840) 122.

force is necessary to regulate a complex system of social relations and to remove recalcitrant obstruction.

The vice of absolutism to be eliminated here as before is the undue simplification of the issue. The anarchists say that law rests upon force and they trace all obedience to it. They admit that the policemen, the sheriffs and the militia are relatively few. But to the question how these few can control the vast majority, they answer that through superior organization and arms the ruling class can prevent effective opposition. Now it cannot be denied that a great deal of obedience to the law is brought about through sheer fear, so that when the police are away, as happened during the police strike in Boston in 1920, the number of thefts and robberies increases. Moreover, conventional moral prohibitions are notoriously weaker when the temptation to deprive another of what is morally his due can be satisfied without legal hindrances. That is the very reason why some laws are created. Nevertheless, it is obviously not true that the state rests on the policeman's club or soldier's bayonet. The proof of that can be seen in the fact that if a vote were taken today in any of our states as to whether the police force should be completely abolished or not, the number who would vote for abolition would probably be negligible, despite the cry for relief from the burden of taxation. The maintenance of police and militia then rests upon the will of the great majority in point of fact. The majority may resent many of the laws as monstrously unjust, and they may tolerate others for no other reason than because they do not know how to get rid of them. And yet the whole system of laws with the necessary machinery of enforcement is felt to be a necessity. And if by some accident it disappeared overnight, it would very soon be restored. This does not mean that any system of laws is as good as any other. But it does mean that we generally obey the law not only from fear of punishment for its violation but because we prefer to live under a system involving some compulsion. There are many reasons for this preference. We may note in passing that men and women prefer to obey in most cases rather than take the trouble of thinking. We may see the situation concretely in the case of traffic laws. Do traffic laws rest on the force of the police or on the will of the people? The anarchistic theory says that either such laws are not necessary or that they do not have to be enforced because it is obviously for the interest of everyone to have them and to obey them. Yet the fact is that without the police force, traffic rules, no matter how reasonable, would not be always obeyed by the very people who urged their enactment.

The truth, then, is that only the love of absolutism or undue simplicity prevents us from seeing that the actual facts fit into neither theory. Men do want the traffic laws and also want to disobey them. They are rational at certain times and realize that the demand for safety and ease of communi-

cation demands these rules be enforced and they vote taxes for such enforcement. Yet, they will occasionally be tempted to violate these laws. A realistic view of human nature need not hesitate to admit this irrationality of human nature against which we take some precautions in our rational moments. We all know that we are subject to certain temptations and if we are wise, we take care to arrange our lives so as to minimize the possibilities of such temptation.

III. Ethical Absolutism in the Law

The relation between law and ethics cannot be adequately described either by identifying them or by saying that they are completely independent. There are obviously legal rules that are contrary to the general feeling of right and wrong in a community and yet are undoubtedly part of the law. If that were not the case, there could be no such thing as an unjust law and no protest against injustice by prophets or reformers who represent the conscience of the community. An unjust law does not cease to be a law because it is unjust, although it *ought* to cease to be a law. On the other hand, there are many rules of morality which find no support in the law. Only confusion, therefore, results from identifying the two and then on other occasions treating them as independent. This unfortunately is what we find in the decisions of our highest courts. On some occasions we are told: this is a court of law and not of social ethics. But at other times judges argue: this cannot be the law, for it would be unjust, *etc.*

Since the prevailing traditional view regards morality as consisting of authoritative and absolute rules, theories which conceive the law as part of morality thus share in the absolutistic tradition. This may be seen most clearly in its extreme form, to wit, in the Kantian view of law as a branch of Sittlichkeit, or social ethics. Just as "thou shalt not kill" is a categorical imperative to the individual, "thou shalt kill the murderer" is a categorical imperative to every organized community. Even if a society is to be dissolved, the last murderer in jail must be executed. The view that punishment is a matter merely of preventing crime or reforming the criminal is thus consistently characterized as an immoral evasion of the duty to punish. Similarly, does Schopenhauer condemn all equity which would soften the absolute rigor of the law.[21]

In our own country the morally absolutistic view of the law is embodied in the orthodox theory of our bills of rights and of the nature of our common law which, as has been frequently pointed out, rests on the classical theory of natural rights. The law is a body of principles laid down by nature or the author of nature. It has been revealed in the free

21. 2 Schopenhauer, The World as Will and Idea (Haldane & Kemp's Trans. 1896) 412-413.

institutions of the Anglo-Saxons since they inhabited the German forests (if not in the classical Roman law to which Grotius and others appealed). These principles are often referred to as the unwritten law, the unwritten constitution, or the law behind the law, revealed in the conscience of mankind. Only judges on the bench, however, can pronounce its specific legal consequences.

In its classical form, the theory finds few defenders today among those who call themselves political scientists, and there is an almost universal condemnation of it among our progressive thinkers. Indeed, the emphasis of legal scholarship since the French Revolution has been predominantly on the historical note, on the fact that the law changes and that therefore there cannot be any one set of rules valid for all times and for all societies.

This criticism, however, is obviously too sweeping and overreaches itself. Granted that law, like every phase of human life, changes with time, it does not follow that such changes are devoid of historical continuity. We do not lose our individual identity because we grow older and sometimes sadder and wiser. Looking at the matter quite empirically, we should say that no matter how far back we trace legal systems, we find human nature and social organization presenting certain common patterns so that the law of family life today closely resembles in many respects the law of the Romans, Greeks, Hebrews and Egyptians, just as the fundamental relations between husband and wife, parents and children are still the same. There are variations doubtless between ancient and modern conditions. But there are also variations of family life in the United States today and it is by no means certain that the latter variations are less than the former. Nor is the rather superficial criticism of the historical school against the doctrine of natural rights conclusive when we look at the law as a body of prescriptions regulating our social life. Some of the rules of hygiene laid down by Hippocrates are still applicable today. Why not some legal rules? The adherents of the modernistic school insist upon historical relativity. There is no ideal best government, they say, valid for all societies. What is the best government depends upon local and historic circumstances. Quite so. But is it not necessary to ask: How and upon what circumstances does the ideal depend? Some people say that that government is best which works best. But what is to be the criterion as to what does work best or better than another?

The term "natural law" has been identified by Dean Pound and others with the idealized law of the time and place. Now, our ideal is, as we pointed out before, always conditioned by the circumstances under which we live. But let us note that natural law is often also an idealization

of the opposite to that which prevails. Where inequality or privilege exists, natural law demands its abolition.

Pound does not sympathize with the lawyer who, opposing the reception in this country of the English common law against strikes, argued that it is contrary to the rights of man and that considerations of this kind are more important than an historical inquiry as to the usages of ancient Romans, Britons, *etc.* Now, I confess at once that my sympathies are with the lawyer who argued thus. It is easier to analyze our present conditions and judge how for good or ill they are affected by certain rules than to find out what were the ancient social conditions that called for or tolerated an old law. Theoretically, however, the dilemma does not present mutually exclusive alternatives. The social value of modern rules against strikes may conceivably be illumined by historical considerations, and the understanding of ancient rules may be aided by a clear idea as to the fundamental values that the law aims to serve or ought to.

This critical attitude to the usual objections against the classical doctrine of natural rights does not of course dispose of the case, but it calls attention to the need of a closer examination of the issue.

The beginning of wisdom seems to me here as heretofore to keep in mind the distinction between that which is true generally or for the most part (which can be evidenced only by history) and that which necessarily holds always and everywhere without qualifications (which requires logical proof). Thus, the rule against lying may be viewed as a maxim to be generally observed because experience shows it to be requisite for that mutual trust without which many social relations are impossible or not worth while. Kant, however, in the retirement of his study definitely asserts it as an absolute rule: we may not tell a lie under any circumstances, not even to save a human life. This has appeared to many as the *reductio ad absurdum* of moral absolutism. Kant himself weakens his absolutism when he comes to apply it to the legal field. For he allows some exceptions to the duty to execute the murderer, and this opens the door to the doubt as to whether the number of exceptions might not be increased. Of course every proposition becomes absolute (*i. e.,* in no need of further qualifications) if it states all the conditions which will make it true. But in matters of fact, and especially in human relations, absolutely complete knowledge is unattainable. In the simpler issues of medicine, for instance, we can tell only what prevails generally, not what is absolutely true in every case. Much less are we in the position to determine the more complicated question as to what is ethically required in every concrete case. The law indeed does not attempt that. Recognizing the imperfection of its tools, it cannot hope to attain absolute justice. It serves its human purpose if it minimizes the amount of injus-

tice in the community. Probably few if any laws fail to effect some injustice in special cases, but we are satisfied if on the average, they seem to do more good than harm. Thoughtful people do not expect absolute perfection from human effort. But we must faithfully and persistently *keep the ideal before us,* not only to incite even greater effort, but to keep us from falling into the deadening idolatry of the actual. Unfortunately most of the servitors of the law cannot escape the general human tendency to exalt their occupation and thus to set up the law as the object of supreme or absolute respect. Such respect may be useful in our routine or customary life. The law, however, is not the end of life but a means to facilitate the process of living; and it is folly to devote all of our attention to instruments. Certainly the law cannot be the supreme principle if we believe that it may be changed by the will of the people to make it more in harmony with their vital needs.

Legalism, the belief in the supremacy of law, cannot recognize the right of revolution. If the constitution is regarded as law, then a people can have no legal right to change it except in the way in which the constitution itself provides, no matter how onerous such a process may be. The logical consequence of this would have been to prevent the people of Rhode Island from ever changing their constitution or charter which contained no provision for amendment. Yet, the moral right of the people to make such a revolution is the very basis of our legal system. For the establishment of the United States Constitution was itself a revolution, *i. e.,* an illegal setting up of a new form of government. Indeed, it was legally more revolutionary than the Declaration of Independence. For in the latter the colonists claimed that the King of England had forfeited his sovereignty by committing illegal acts. But in setting up the United States Constitution as binding if three-quarters of the states accepted it—thus completely ignoring the Articles of Confederation which prescribed unanimous consent—no pretense of legality was alleged except the tacitly assumed right of the people to set up a new plan of government whenever they deemed it conducive to their general welfare.

An interesting manifestation of this absolutistic legalism is the view that the people of the United States can never amend the Constitution to deprive a state (without its consent) of its equal representation in the Senate. Never, never, no matter what conditions may arise, can unpopulated Nevada be deprived without its consent of the right of having as much representation in the United States Senate as states that have more than 100 times its population—a situation which in England before 1832 was called the "rotten borough system." But this idea that we can forever bind all future generations is an illusion which meets with the bitter mockery of history.

A distinction may well be urged between the right of the people to change their legal system, and their right to pass laws which are inherently

or intrinsically unjust. This would be a purely academic issue if it were not for our prevailing assumption that our judges are the only ones qualified to tell what is due process or justice in any given social situation. I do not wish at this point to challenge a proposition which is generally discussed in an *a priori* fashion but which requires for its verification an appeal to actual instances. How many times have the people of the United States actually been saved by the judiciary from injustice at the hands of the legislature and executive? And how often have judicial interventions themselves produced injustice?

As history cannot prove any absolute rule, let us then briefly face the question as to what is justice in the law, and whether its dictates are absolutely certain as is so often assumed.

Since the dawn of history the bitter cry for justice has filled the human scene. But though in every discussion of any social question, all parties appeal to it, we rarely come across systematic attempts to answer the question, What is justice? And even in specific issues, for example, what is a just wage, a just price, a just claim to national independence, we find few attempts to clarify the fundamental principles assumed. Different parties all claim justice on their side. It has been said that the Romans never made war without making certain that justice was on their side. This did not prevent them from conquering all their neighbors. Nor did it prevent others from denouncing the Romans as unjust oppressors.

This diversity of views as to justice has bred a certain despair, that there is no such thing as justice and that the word conveys only diverse emotional opinions. But such a negative attitude is so contrary to the currents of practical life that the reaction to it intensifies the authoritarian view. The latter often takes the form of a claim to know by an immediate super-rational intuition or revelation what is absolutely right. Is there any way of avoiding this dilemma between the absolutism of denial and that of brute affirmation? I suggest that there is.

Suppose that we start with admitting that questions of justice are largely matters of opinion. Does it follow that all opinions are equally bad? Do not some opinions have a little more evidence in their favor than others? And is it not the quest of science to find evidence to enable us to choose the best available opinion? That is certainly not a view that can be rejected by those who believe that we can talk about sociology and psychology as sciences. The notion that science starts with absolute facts cannot receive serious attention from those familiar with the actual procedure and history of the most advanced physical sciences. We always start with vague perceptions and hypotheses or guesses, and progress consists largely of critical analysis of our hypotheses, deductions from them, and a constant checking of their consequences by appeal to perception (and a correction of our perception by theoretical considerations). Now it may be objected that ethical judgments,

or judgments as to what ought to be, cannot by their very nature be tested by any appeal to objective facts of existence or perception. That, however, is only partly true. In its nearsighted view of what constitutes existence this objection ignores the rational element in things which makes science possible. It is a radical error—indeed an established superstitution—to suppose that science is concerned only with brute facts of existence. That would rule out pure mathematics from the realm of science. The fact is that knowledge of nature or physics becomes in a significant sense scientific only when it embodies mathematical elements in the form of deduction from principles or hypotheses, and these mathematical or logical elements denote relations of order of all objects. Now just as physical science may be viewed as an effort to organize our judgments of nature into a coherent or rational system, so ethics may be viewed as an effort to organize our moral judgments of what ought to be into a rational system. For just as we may be mistaken as to the actual physical constitution of things we may also be mistaken as to what ends we really think worthy of achievement. This shows itself tragically in the bitter disappointments which we often feel when we achieve what we thought worthy of effort. I do not therefore wish to minimize the difficulty in the formulation of a theory of justice in the law. To apply it in actual cases clearly presupposes all our knowledge of nature and man in his social relations. Nevertheless, it is a task which is as unavoidable as it is of vital importance. And those social scientists who think that they can avoid it by restricting their view to what actually exists have repeatedly been shown by history to be guilty of crypto-idealism, *i. e.*, of setting up the existing forces or their own view as that which *ought* to prevail. Clearly, therefore, we may start with theories or opinions as to what is just, and by submitting them to the critical tests of logic or scientific method discriminate between their more and their less tenable elements. In this way we may not attain absolute truth, but we can make progress at least in the clarification of our ideas.

Let us begin with the simplest conception of justice involved in the popular view of a just price, or a just wage. If we examine this closely, we find that the just thus designates the expected, the usual, or the customary and that, indeed, is in effect the answer of scholastic common sense. Now, it is easy enough to see the inadequacy of mere custom. For there are not only unjust customs, such as slavery and exploitation, but in a heterogeneous society or in one that is changing, what is just for one group at one time is not just at another time. Still, it is a mistake to leave out the element of custom from the constitution of justice, as so many modern writers are inclined to do. This shows itself in the inability of moral philosophers to appreciate the importance of prescription. Why should anyone who has acquired property unjustly, get a good title after twenty or thirty years?

The answer is that usage develops expectations and that the shock to general expectations is itself an evil.

Similarly, justice cannot be satisfactorily identified with any one abstract principle like equality, liberty, or the like. What is equal protection to employer and employee, for the powerful American Tobacco Company and the small storekeeper? We need not repeat the burning irony of Anatole France: "The law in its majesty draws no distinction but forbids rich and poor alike from begging in the streets or from sleeping in the public parks." Equality is meaningless under unequal conditions. And yet we do resent certain discriminations against us. Few of us, I imagine, really care to serve on juries or to hold public office. And yet, if a law were passed to disqualify us because of our race, religion or philosophic occupation, we should naturally resent the discrimination.

A similar analysis applies to the view that justice consists essentially in respecting human liberty or freedom. The word liberty has become a symbol around which have clung some of the most generous human emotions. We have been brought up to thrill with admiration at the men who say, Give me liberty or give me death. But the philosopher asks whether all those who are devoted to liberty mean the same thing. Does liberty, or freedom, for instance, involve free trade? Does it involve freedom to preach race hatred or the overthrow of all that we regard as sacred? Many who believe in liberty characterize the freedom which they are not willing to grant, as license, and they do it so often that one may be inclined to think that what we really need is less liberty and more license. Moreover, there is a confusion between the absence of legal restraints and the presence of real freedom as positive power to do what we want. The legal freedom to earn a million dollars is not worth a cent to one who has no real opportunity. It is fashionable to assert that men want freedom above all other things but a strong case may be made out for the direct contrary. Absolute freedom is just what people do not want; and to follow some leader, master, or mistress, or some cause that demands unqualified submission, is a deepfelt need. Orthodox Judaism, Islam, the Catholic Church, and Calvinism are not the only illustrations of the extent to which men feel liberated when they submit without question or qualification to authority. Consider the agonies of those in doubt as to the precise rules of etiquette. How relieved they feel when some good book or newspaper columnist tells them what to wear, how to order certain foods in public places and other conventionally accepted ways of doing things. The need for authority is the need for relief from the great burden of being in a state of freedom and having to think and to decide. It is much easier for most of us to let someone else take the responsibility and do the thinking and deciding for us.

But when all this is said, we all grow indignant and feel hurt to our very bones when the brutal dictatorship of a Mussolini or a Hitler deprives men of their right to express their views freely. Freedom, especially in its negative sense as the absence of restraint, will certainly not exhaust the content of what we mean by justice. But it is certainly an indispensable element in it.

An attempt to solve the problem of justice that seems to include all the elements is that of Plato, whose view might be summed up as saying that justice is the health of the body politic. Just as a body is healthy when every organ functions properly, *i. e.,* to the degree that it reënforces rather than hinders the functioning of all the other organs, so a state or an act is just when it ministers to the general harmony of all social functions. A healthy heart is one that will supply enough blood to all the organs of the body, but not too much. So, a just social claim is one the satisfaction of which will make for the reënforcement of the various activities which constitute communal life. This is in harmony with the Hellenic ideal of everything according to measure.

Despite the fact that this view has been before mankind for over twenty-three centuries and has stimulated many minds throughout the ages, it has not proved altogether satisfactory. The criticisms of it are familiar but I shall refer to only two points: (1) the assumption of the commensurability of all social values, and (2) the optimistic assumption that we can attain the wisdom which will enable us by law to prevent injustice.

(1) It seems quite obvious that actual social conflicts cannot be readily settled by the Platonic formula. What, for instance, would be a just solution of the problem between Ireland and England or between the Ruthenians of Eastern Galicia and Poland? On one hand we have the principle of self-determination. Every group, we say, is entitled to express its own genius in language, religion, and political institutions. On the other hand, the need of common security, of preventing artificial economic barriers, is also essential, if men are to have real opportunities for free development. It is easy to say, let us have a free federation of independent groups. The real difficulty in the way of this is the difficulty of determining how much economic advantage should outweigh national pride. Indeed, the commensurability of human values is a will o' the wisp, so long as we have no ideas of a common unit wherewith to measure them all.

The problem of weighing or evaluating interests appears unduly simple in the utilitarian maxim of the greatest good to the greatest number. This assumes (a) that every individual is to count for one, and (b) that it is always possible to compare and measure different human goods. Both of these assumptions may well be questioned.

(a) That in a just legal system the interests of any one individual count for no more than the similar interests of any other individual is apt

to appear as an eternal self-evident truth to those who accept the democratic faith. But critical reflection must note that in moral relations individuals and communities are not fungible but highly individualized. We may subscribe to the equalitarian doctrine when it is abstractly formulated. But few of us really accept the view that the welfare of four hundred million Chinese ought to outweigh the similar interests of one hundred and twenty-five million Americans. Nor can the obligation of providing employment for twenty thousand people in Arkansas take precedence over the task of providing employment for a few members of our own family in Maine. Differences of time also enter. While we recognize our obligations to the generations following us and feel that we ought not to impoverish the country which we are to leave to them, we do not feel that remotely future generations have the same claim on us as have our contemporaries, our children and immediate successors. We sometimes justify this on the ground that we do not know what the situation will be in the remote future and cannot therefore make provision for it. And there is doubtless some truth in this. We can look after the interests of others only when we can imaginatively put ourselves in their place. That is why we are generally more ready to help an individual stranger when we see him injured than to contribute to a general hospital fund. The fact remains, however, that in general we do not feel as much moral obligation to those who are remote from us in time or social grouping as we do to those with whom we can identify ourselves in some common interests. Nor can I see how it can possibly be proved that we ought not to feel that way. We cannot appeal to moral principles unless their obligatory character can be felt.

These doubts do not of course do away completely with the principle that where all other considerations are equal the interests of the larger number ought to prevail. Unequal distribution of wealth is generally felt to be unjust. But note that only when formulated dialectically or hypothetically can our principle be said to have absolute claims. In actual situations no one interest can be isolated and it is always doubtful whether in fact all other interests *are* similar.

(b) Those who talk freely of measuring human interests seldom examine critically the implications of the process of measurement and the conditions under which it is feasible. The modern analysis of what is involved in the addition of magnitudes shows that it is meaningless to speak of complete measurement unless we can (α) identify a standard unit capable of indefinite repetition, (β) define some operation by which we can determine that two magnitudes are equal, and (γ) define some operation which will give meaning to the sum of two or more magnitudes. These conditions have been met neither by the old hedonists who talked glibly about a hedonistic calculus —as if there were any inherent meaning in saying that one pleasure is three

times as great as another—nor by the recent social scientists who identify measurement with certain crude statistical procedures.

It may be urged that while these conditions for the measurement of extensive magnitudes are not easily met in the realm of social interests, we can and do measure pleasures as intensive quantities, by the simple test of preference. Now it may be true that the more we know about people the more we can predict their preferences, and this is even more true of groups of people. But the fact remains that human preferences are proverbially inconsistent or highly variable in time, varying according to incalculable subjective factors. When will people revolt? When they are driven to it by intolerance and oppression, say some. But others with plenty of historic instances at their command, urge that oppression degrades people and robs them of the will to assert human rights. Human preferences do not seem to be the resultants of a few simple causes, but rather of a large number, no one of which can be isolated on a large scale and measured under experimental conditions. Where we deal with fungible goods as in the realm of economics, we can measure the intensity of demand. But how much or how strong a desire for economic gain will outweigh taboos against forbidden food, working on the Sabbath, making graven images, and the like? We are inclined to expect more coherence in human purposes than is actually there, because in our intellectual craving for simplicity we attribute to human life some one all-controlling purpose, such as self-preservation or the like. But this is seen to be illusion when we remember our many preferences which lead to dissolution and death.

We need not disparage the work that has recently been done on the measurement of emotion and social attitudes. So far as it rests on psychophysical tests, it seems in the realm of verifiability. But when we go on to the social implications of these measurements we are not on such firm ground. Most studies of this sort are statistical, generally based on the answers given to questionnaires by various selected groups such as children in the movies, students in the classroom, and the like. These groups are selected because they can be readily induced to take the trouble to supply such answers. But one can well doubt whether these replies represent any characteristic that will repeat itself with any constancy. Nor is there much evidence that the replies of other people would be the same as that of our selected group, no matter how much care we have exercised to choose at random. There will always be characteristics of our group which we do not have in mind, *e. g.*, the particular neighborhood, social class, temporary fashion, or response to some special condition of the experiment; and our inability to eliminate the fallacy of selection vitiates all our statistical generalizations.

Justice Cardozo has suggested a rather simple hierarchy of social values, to wit: moral, economic and aesthetic, which the law should protect in the order named.[22] Does this mean that no amount of economic interest can outweigh a moral duty? That would logically follow from the absolutistic conception of morality. No community, however, no matter how enlightened, ever takes that position. Thus there can be no higher moral obligation for a community than to prevent whenever possible the killing of human beings. Yet, measures for the protection of life can not be free from economic scrutiny, and certain costs will always be regarded as prohibitive. It may not be amiss to note in passing that those philosophers who hold that respect for human personality is absolute and the very basis of ethics, have not generally condemned wars in which countless human beings are destroyed to defend the economic interests of their country.

It may of course be argued that moral duties are not on a par with economic interests but are rather the supreme principles which determine which of a number of conflicting social interests shall in any given case prevail. But this does not solve the difficulty of how much of economic value may be disregarded in protecting specific moral standards of family life, of public conduct, *etc.* The very idea of attaching a money value to these interests is shocking and yet the duty to husband our economic resources cannot be ignored. There are limits to the economic expense which we are willing to incur to improve the administration of justice, but we are far from having arrived at any principle to enable us to do it rationally. And since in practical life we dispose of such issues by questionable resolutions we leave dissenters entirely unconvinced.

Similarly, we may well question whether economic interests should prevail over aesthetic ones, and many today condemn the extent to which our American courts have carried this doctrine. Recent thought has come to realize that the traditional Anglo-American view dictated by our business men is based on a very superficial conception of life and social needs. Aesthetic needs are basic and grow out of our fundamental instincts which are often of greater vital urge than ordinary economic ones. Certainly a major part of humanity thinks cosmetics and beautiful clothes worthy of economic sacrifice, even at the expense of adequate food. If we were to accept categorically the superiority of the economic over the aesthetic, we should allow the progressive uglification of our roads as well as city streets and the subordination of the scenic beauty of Niagara to the interests of electric power. But that is hardly a self-evident requirement of justice.

For years I have followed with close interest and great hope the movement of *Interessenjurisprudenz* in France, Germany, and in this country,

22. CARDOZO, THE PARADOXES OF LEGAL SCIENCE (1928) 57.

and I regret not to be able to see as yet any substantial progress toward the solution of the problem of determining with some degree of definiteness the relative weights which different social interests should have in the legal system. Still the effort at some kind of systematic evaluation of these interests is inescapable. The possibility of intelligent choice depends on it. Possibly we shall in the course of time be able to elaborate better technics of measurement than seems feasible to us today. But it is well to realize the difficulties in our way even when we must strain our utmost to overcome them.

(2) The second objection to the Platonic theory of justice is that it is too optimistic in its conception of the capacity of law to bring about the proper social order. Throughout history there have been those who regard it as absurd to attempt to make people better by law. The law, they say, is essentially an iniquitous thing, something which is the outgrowth of fraud and violence. The monks of the fourth century felt that way when they assumed that the union between the Christian religion and the Roman state would disappoint the hope of the world by corrupting the church. The law, they said, is the crucifixion of that ideal which frees man in his inner soul. In modern times this view of the law as necessarily a restraint or bondage permeates our revolutionary as well as our conservative ideology. Consider, for instance, the philosophy of Karl Marx. Most people think of Marx as a socialist and naturally suppose him to be in favor of an organized state and, therefore, some legal system. But if you read him carefully, you find that he agrees with the anarchists that the state is essentially evil. A state or legal order is simply the enslavement of one class by another. In his challenging book on *Political Parties,*[23] Robert Michels points out that governments are inevitably oligarchic because government is a special function; and those in charge of it naturally develop special capacities and interest and put these interests first. Thus every government regards the attempt to overthrow it as the most serious of all crimes. Communist Russia in this respect follows the example of the Czarist government. Ordinary murder is a matter of eight or ten years at hard labor, but an attempt to overthrow the government is a capital offense. That is characteristic of most governments. The point that Michels makes, then, is that so long as you have government, you will always have a group that has special interests, and they will necessarily think of their special interests as more important than all others. Therefore, law will always be basically unjust, and you cannot hope to make it just so long as it is administered by human beings.

To some extent, the philosophy which existed in this country in the eighteenth and for the most part in the nineteenth century, was based upon

23. MICHELS, POLITICAL PARTIES (1915) 11.

this anarchistic conception of law and justice. John Marshall, in his life of Washington, says in effect that the mere fact "that power might be abused was a conclusive argument against its being bestowed." [24] Therefore, they instituted a government of limited powers, so that the abuses would be limited. This is a sentiment which Mr. Shaw described some time ago when he said that the United States Constitution was based upon the anarchistic theory that the best government is that which does not function.[25] I submit that this is very largely true, historically. It was the view of Jeffersonian and Jacksonian democrats who fought against the rule by the squirearchy of the Eastern border. These backwoods farmers were discriminated against in respect of legislative representation. People living far from the seat of government in a sparsely settled land cannot expect much from government regulation. The less government, the less oppression. This philosophy of an agricultural country has been used by the great manufacturing and financial interests to oppose social legislation and it has thus remained our national philosophy. Thus when a law is declared unconstitutional most people feel that no harm has happened. There is a popular view that so long as Congress is in session and is enacting laws, the people have reason to be afraid, and when Congress is adjourned, people can rejoice. That view was frequently expressed by our representative national philosopher, Mr. Will Rogers. I am not here discussing the merits of this view. I merely wish to indicate the large rôle it has played in our history. Though it originated as a revolutionary philosophy, it has become an argument of those who wish to defend their interests against the popular will expressed in legislation.

Against this pessimistic view of the inevitable injustice of man-made law we may urge the same objection as that against other forms of absolutism or undue simplicity. In actual life the fact that different classes have conflicting interests does not prevent their also having interests in common. Even the most unjust ruler may have an identity of interest with those he rules. Santayana has put this in the form of a parable which I sometimes take the liberty to repeat in a slightly modified form.[26] Imagine a wolf cunning enough to realize that, as the supply of sheep may become rather uncertain, he had better become a shepherd. He guards the flock, leads them to green pastures, and sees to it that they multiply so that he has an abundant supply. His interest as a ruler, while antagonistic, is also intertwined and for many purposes identical with that of the ruled. And that is more or less true under nearly all forms of government. There always are differences between the interest of the ruler and the ruled but also identities.

24. 2 MARSHALL, LIFE OF WASHINGTON (2d ed. 1807) 127.

25. N. Y. Times, April 12, 1933, at 14.

26. Santayana, Little Essays (Smith ed. 1920) Part 5, at 259, Essay #102, Origin of Tyranny.

Now it may well be urged that actual wolves have no wisdom, do not turn shepherds, and that many governors, say in Burma or imperial Rome, were no better. Still, human history shows that no government can last very long if it does not render the people some service. When governments become intolerable men cease to obey or the governor is overthrown. The actual state of society, therefore, is in fact never one of mere conflict or pure opposition but a combination of both war and peace. In time of crisis we are apt to forget the common basis of human life, the touch of nature that makes all men kin. We fight without compromise and without doubts, and if anyone suggests that the other side might have some rights that we ought at least to investigate, we regard him as an enemy or perhaps a paid agent of the other side. Under such conditions, you cannot have what is called enlightened selfishness, or reason, but only an appeal to arms, and an appeal to arms is a return to an uncivil state of nature in which every man is against the other. Such struggles may remove some evil, but it is always destructive; and sooner or later men get tired of war, and then they make treaties of peace. Now I submit that you can view ordinary legislation as treaties of peace between the warring interests of the community. In point of fact, if you watch actual legislation, whether in Harrisburg or Albany or Springfield, what you see is that there are various interests represented in the legislature, say the railroad interests, the employers or the employees, the farmers, or their wives in the W. C. T. U. and others. Each of the various groups is constantly pressing its claims. Others are opposing those claims, and what actually happens is just what happens at any peace treaty. The strongest may get the lion's share, but if the strongest group could get everything through its own power it would have no need of any treaty. The victor makes a treaty of peace only because it is not worth while for him to exterminate the defeated party, *i. e.,* the defeated party still has some fight or resistance left, and it is deemed more economical to make some concessions rather than endure the trouble of fighting to wipe out the will of the defeated party. And that is what happens in legislation. We can view the law as a series of treaties of peace, which will be just only to the extent that the various interests are genuinely represented.

Whether our political system does or does not give genuine representation to all is a question of political analysis into which I cannot go, but I wish to note the fact that merely geographic representation does not guarantee actual representation of the different elements of our population. I would like also, in passing, to protest against the popular confusion between representative and elective government. The knight of the shire, who was forcibly taken by the sheriff to Westminster to vote upon the question of taxes for the king, was not elected by his shire, but he surely was a representative of the other knights to the extent that when he voted taxes, he

represented the interests of all those knights who were similarly circumstanced. He voted for the interests of the knights as far as he could. In that way he was a representative, though he was not elected. On the other hand, men may be elected who are not at all representative. Therefore, if you have in mind the general improvement of the law, you must also have in mind the ways in which the various interests of a community can receive adequate representation.

A naturalistic view of justice as the adjustment or harmony of our interests seems to many people too materialistic. Men like Carlyle call it "pig-and-swill" morality. Justice, they say, is something divinely superior. Even thoroughgoing naturalists may admit an element of truth in the last contention, in the sense that there are enormously great differences between various interests and that in the pursuit of more immediate material interests we are in danger of sacrificing higher, *i. e.,* more subtle and more inclusive ones. But the maxim *fiat justitia pereat mundus* shows the bankruptcy of the absolutistic conception of justice. Kant indeed defends it on the ground that a world that is unjust is not worth preserving.[27] But we may well turn this around and say that a justice that would destroy the world is surely not worth having. It would certainly not serve as a basis for any relatively permanent legal system. To kill the patient in order to follow the rules of hygiene is no more absurd than to ruin a society for the sake of observing a supposed rule of justice. Even the divinely ordained Sabbath was made for man, not man for the Sabbath.

The law is an ancient institution. As is true of other human arrangements, there are people who regard it as divine. They speak of the law as if it all emanated from Sinai. But while there may be some law that emanated from Sinai, surely not all the legislation that we have today, nor all judicial decisions. On the other hand, it is equally absurd to regard all law as essentially iniquitous. Let us recognize that while pure white light and absolute darkness are abstract elements of the human scene the actual colors of life are mixtures. The problem of justice is that of cleansing the social order of its black spots. This is an endless as well as a difficult task because all we do is constantly befouled by our inevitable errors and folly. But life would be unbearable without the effort at purification.

We must also remember that whatever our ideal of substantial justice, it is obviously incomplete unless it includes the ways of bringing it about. A duty that is not executory or would be a duty only under non-existent conditions is hardly a possible ideal for the legal system. Now the process of realization must start with the actual, and it depends for its success on the extent to which we utilize the actual physical and social forces, human nature

27. KANT, *op. cit. supra* note 10 at 196.

and its environment. Furthermore, there can be no just order unless there is also what I have called "formal" justice, *i. e.*, a general determination on the part of those who deal with the law to live up to its spirit, to carry out not only its literal provisions but the ideal inherent in it. Doubtless, the law will never, so long as it is administered by human beings, be free from arbitrary will and brute force. Nevertheless, it cannot function in an organized society without some rational effort at justice as an ideal harmony.

In my attempt to steer a safe course between the Scylla and Charybdis of opposing absolutisms, I am not likely to have escaped serious error and may not even have made my main points tolerably clear. This is not altogether avoidable. If we distinguish clarity from mere familiarity, we can (as Peirce [28] indicated) make our ideas clear only by working out their consequences and that is a task beyond the scope of the present occasion. Our discussion, like most recent discussion in this field, has been critical and programmatic, rather than dogmatic and constructive. Yet I venture to assert that the road I have suggested is bound to prevail precisely because it is not original or novel but expresses the essence of logical or scientific method at the basis of all rational procedure. I am reluctant to use the term scientific in this connection. It has become a fetish to many who prate about it without any more real sympathy than familiarity with the rigorous self-restraint which it imposes. But if scientific method means conscientious accuracy and adequate evidence for one's assertion, some of the modernistic tendencies in jurisprudence and contemporary social science have as long a way to go as some old-fashioned legal doctrines. The former are doubtless naturally provoked by the bland complacency with which the leaders of the American bar keep on repeating questionable propositions as if no one had ever questioned their self-evidence, very much as bad pedagogues try to dispose of questions which they cannot answer by repeating their dogmas in louder authoritative tones. But we shall not get rid of vicious absolutisms by sweeping, unguarded, and unqualified denials. The swing of the pendulum is not the way of progress. The way of understanding and wisdom requires the more difficult task of just discrimination, which is inordinately difficult because it involves a check to our intellectual as well as emotional élan vital. True intellectual vitality, however, shows itself not in letting one's self go or in romantic dreams which come in periods of fatigue, but in that self-critical effort necessary to master our material.

It is well, therefore, before concluding, not only to recognize the natural inevitability of the craving for the absolute, but to pay tribute to its necessary function in maintaining intellectual and moral sanity. It is well to be on guard against the hardly avoidable tendency to regard our impressions as definitive truths that do not require the endless process of qualification. But

28. PEIRCE, CHANCE, LOVE AND LOGIC (1923) 38-59.

although this craving for undue simplicity is a fatal snare, it is folly to try to banish absolute or rigorous logic. While all the material truths which we can achieve at any one time are necessarily incomplete or subject to the qualifications of future knowledge, our procedure must be formally rigorous. The direction and goal of our efforts must be relatively fixed if there is to be any significant race. The absolute denial of all constancy or identity in the world of change and variety would make all assertions meaningless. Those who delude themselves with the naïve faith of finding refuge in "the facts" are the victims of an uncritical metaphysics which assumes that each fact of existence is complete in itself and independent of every other. In truth, however, there is always a nexus which makes things pass beyond themselves, so that when you begin with one fact and wish to explore its nature you find yourself very soon beyond your starting point dealing with abstract conditions and ideal possibilities. In any case we cannot maintain sound intellectual procedure by turning our backs on critical logic; we cannot attain clear ideas as to the nature of the factual or real world by ignoring that obstinate effort to think clearly which is the core of metaphysics; and we cannot arrive at a clear idea of what it is that we really wish to achieve without the clarified vision of the *summum bonum* which is the subject matter of critical ethics. It is doubtless possible to do good work in limited fields without the conscious pursuit of these studies in their traditional forms. It is even certain that traditional errors in these fields have caused most deplorable confusions. Yet in the end, sound methods and adequate ideas are not attained by wilfully shutting our eyes; and those who have thought that they had succeeded in this by banishing logic, metaphysics and ethics from their view of the law have merely imported them in an uncritical and unavowed form.

If reason is viewed in itself as bare logic or necessary order, it seems not only colorless and devoid of warmth but also chilling to our heart's desire. Yet, on reflection we must recognize that just as the healing art is based on a dispassionate study of physiology and pathology, so is rational organization the necessary condition of our attaining our heart's desire. Philosophy cannot by itself solve the specific problems of law and public life. That requires favorable circumstances and more empirical knowledge than the philosopher generally has at his disposal. But by our very endeavor to rise above the struggle of the market place and to cultivate a wider vision, we can soften the rigors of fanatical conflicts and thus help in a measure to bring about that peace based on understanding which is the essence of liberal civilization. Rational reflection is itself a natural expression of human energy without which human life would be brutish and devoid of outlook and genuine inspiration. It is only when law is thus seen as part of the life of reason that the ideal of just law can become a real force for genuine beneficence.