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THE GOAL OF LAW

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If there is such a thing as a method of law, there must be, if we stick to etymology, a goal. "Method" means a path or a progress. Where does this path lead us to? What are we attempting to reach as we go forward in the path of the law?

There really has never been any doubt about the answer, except in the case of those persons who speak, as some extremely eminent persons do, of "pure law." I confess I have never been able to imagine what "pure law" could be, because the more I examined the idea, the less it looked like law to me. I should say the same for "pure morals" or "pure economics" or "pure sociology." All these things deal with the relations of human beings, and if the term "pure" is added to the word, it can only mean that we are discussing law and morals and economics, as though the elements involved were not human beings, but imaginary entities, the abstract man, the *homo iuridicialis* the *homo economicus* and so on. Unfortunately such entities do not exist. To discuss their relations is, I suppose, quite possible. It is a kind of mathematics and pure enough in all conscience. The result is ingenious and interesting. But whatever else it is, it is not law, nor morals, nor economics nor sociology.

If we go back to law, which is always about human beings and really about nothing else, the goal has for many centuries been declared to be justice, about which I shall have much to say in this paper. As a matter of fact, there is a famous and ancient formulation of this statement made by an eminent Roman lawyer of the second century A.D., one Publius Iuventius Celsus. His words are *ius est ars boni et aequi*, and they can be translated as "Law is the technique of justice," or "of equity," which in this

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context means the same thing. You will find this Latin sentence engraved in marble or stone or bronze on more than one court house or similar edifice in the United States and elsewhere.

It is true that when this statement is made, we are likely to encounter either the open derision of laymen or, what is even harder to bear, some trite and silly facetiousness about the incompatibility of law and justice. Unfortunately the layman's sneer is occasionally supported by a kind of half-cynical self-depreciation on the part of lawyers, who are afraid of being charged with a greater moral responsibility than they wish to bear. They often protect themselves by saying that "justice" is a vague word, that it involves arbitrary and emotional criteria, that it can not be precisely defined.

Well, it is a hard word to define, and I have no intention of defining it. But there are a great many other hard words in the law which lawyers do not hesitate to use. "Contract" is a hard word, and so is "tort" and so, above all, are words like "negligence" and "reasonable" and all these words are constantly on the lips of lawyers who have no qualms whatever over the fact that they could not "define" them, since "defining" means indicating the precise limits which include just these terms and no others. I think we shall find that "justice" is in most instances recognizable without difficulty and on the whole, gives us less trouble than a great many other legal words.

Celsus who used the formula was by no means a philosopher or moralist, but a hard-headed and somewhat technical lawyer. He doubtless thought he was uttering a truism, not propounding a subtle paradox, and it *is* a truism. Law must be a device for obtaining justice or it has no excuse for existing. Indeed, it is historically demonstrable that except by announcing justice as its goal law could never have come into existence.

The difficulty, of course, is not to determine whether it is true, but to get a little closer to what it means. The temptation is irresistible—you have noted that I have already yielded to it—to speak of these facts in metaphors. "Goal" is a metaphor and "technique" is another. So, for that matter, was "method" originally. Some more elaborate metaphors in this connection have a wide currency that comes from frequent repetition. "Justice," it has been said, "is the port to which the ship of the law is being guided over the vast sea of human experience."

And Josef Kohler said: "Not so. It is the star by which we steer."

Both of these are fine pictures, which we may cherish and use, provided we remember that they are figures of speech. Nor are they the only figures of speech which, unless we are careful, we may mistake for sober reality. Almost inevitably we find ourselves personifying "Law" and "Justice" and creating something very like allegories in which "Law," depicted as an armed knight, goes questing, let us say, for "Justice" who could so easily put on the garb of a distressed maiden. Or, perhaps, "Law" is the troubadour, Blondel, wandering from dungeon to dungeon till his imprisoned king sings the answer to his song and so discloses his presence. I suppose we would be adding a touch of absurdity, if we thought of the "Law" seeking "Justice" in Darkest Africa and ultimately greeting it with something like "Dr. Livingstone, I presume."

But after all, Law and Justice are not persons, any more than they are ships or ports or stars, and they equally are not disembodied forces acting like gravitation or electricity of their own motion and in their own directions. They are words and they are words used by men who have some purpose in using them. What our job is, is not to define the words, but to try to understand the purpose—really, the purposes—for which they were and are used.

It turns out that even the separation of the two terms, so far as we have separated them, is merely a convenience of exposition. It is all very well to speak of law as the technique of justice, or of justice as the goal of law, but it would be just as correct to turn the phrase upside down, and say that justice is not merely the goal and result of law but its source and that it enters into every stage of the process of the operation of law, as well as at the final stage when it becomes a test for determining whether the operation has really been successful in producing law.

What we must be careful about is confusing the operation of law with one of its elements, which is what we call "legal procedure." In this there is a succession of connected acts culminating in a result called a judgment. There is certainly nothing more legal than a judgment, but neither the judgment nor the procedure which results in it, is identical with the law. If

we must attempt to describe the law—and we can describe it without defining it—we can say it is a complex of ideas, or a complex process of intellectual operations and that in this complex in one way or another the notion of justice must enter. If we use the touchstone of justice and we find that some part of the complex does not react, we regard that part as a foreign body to be removed at the first opportunity. You see once more how hard it is to discuss these things without using figures of speech.

I have said that I shall have much to say about “justice.” My purpose is not merely that of presenting views on the subject but, also of accustoming lawyers to use the word. Fear of words is one of the commonest of modern weaknesses and it is nowhere more apparent than among persons who loudly announce that they are concerned only with facts or principles and that they are loftily indifferent to mere words. Since, however, the connection between law and justice is not only of the most intimate sort, but is in fact a sort of imperfect fusion, lawyers are prone to compensate by using almost any partially synonymous term, when they find it necessary after all to apply the test by which law is to be made satisfactory to their minds. They will say that a legal result to which they have been tentatively brought or which is suggested in argument, is not “fair” or not “reasonable” or not “equitable” but they will boggle at saying that it is not “just,” although that is precisely what they mean.

Historically there have been shifts in our attitude to the words which embody legal valuation. At one time, terms like “just” and “justice” were associated with a more or less mechanical notion of compensation or retribution. They suggested a kind of stern insistence on equivalence in dealing with human conduct, especially if it was wrongful conduct. Phrases like reaping what one has sowed, having measured out to you the measure which you have meted, and, still more strikingly, to be hoist by one’s own petard, all these phrases which are variations of the notion of talion or retaliation, seemed simple and undeniable justice. They occur in this sense and with this connotation in the New Testament as well as the Old, and one could say, and did say, that this justice was quite fair and equitable.

But there was also—and at the same time—a parallel notion of “equity” or “fairness” in which less than an exact equiva-

lent was deemed a better means of securing a right result. It was this notion of "equity" which in Christian Europe became established as a corrective of "justice." It was associated with "clemency" or "mercy," with a consideration of human frailty, with allowance for adverse circumstances, with a *locus poenitentiae*, a chance for repentance. And it expressed itself in a famous Latin proverb which was deliberately put in the form of a paradox, *summum ius summa iniuria*, which may be paraphrased as: "The extreme of justice is the extreme of injustice."

But today there has been a new shift and all these terms of valuation, "just," "equitable," "fair," "reasonable," "right" are treated as practical equivalents. They are the criteria of whether the determination of what is lawful satisfies the conscience, or at least, the sense of propriety, of the person judging. One of our greatest difficulties is that so much of our discussion of such matters consists of quotations of quotations of quotations, in which words, which have been used for three millennia and undergone all these semantic shifts are placed side by side on a single temporal level.

Whatever the terms are, we know what we are doing with them. We are attempting to evaluate the conduct of men, and being lawyers, we do it in a particular way. We create a huge systematized body of typical fact situations in which men are involved and in which some acts and abstentions are declared to be right and the failure to act or abstain, wrong; and another set in which certain acts and abstentions are declared to be right, but in which the failure to act or abstain is equally right, or, at any rate, not wrong. And "right" and "wrong" are in this context words which mean "in accordance with justice" and "in violation of justice."

I have said that justice in many instances can be recognized at once, and it is as well to get down to cases, even if we must begin with quite general ones. Certainly we shall meet with little dissent if we say it is right to keep a contract and at least *prima facie* wrong to fail to keep it. If one has an option, on the other hand, it is quite right to exercise it but equally right to decline to do so. It is quite right for the owner of Blackacre to order trespassers off his land and wrong for the trespasser to be on it. But it is equally right for the owner to permit any person to use Blackacre. And if John Doe has a right of way

over Blackacre, it is quite right for him to walk across it, but equally right for him to omit doing so.

These and many more striking situations which I shall take up later, are unmistakably right or wrong, just or unjust. There are literally hundreds of thousands of them, perhaps hundreds of millions, and their enumeration, generally in a connected and systematized form, constitutes most—not quite all—of what we mean by law.

But if we could enumerate all of them, there would still be a difficulty, and it is a major one. The words “wrong” and “right,” “just” and “unjust” are legal words, but they are not exclusively legal. As a matter of fact, moralists and ethical teachers claim that primarily they are their property, and they often resent use of them by anybody else. If we go back to what I have given as unmistakable instances of acts—hereafter I shall regularly include abstentions under “acts”—which are legally right and just, it is fairly clear that they are also morally right. But we do not have to go far to find a schism between these closely related fields of thought.

If a man has a fertile farm, he has a right to cultivate it, which is another way of saying he is acting rightly or justly when he does so. And subject to crop-regulations he may grow what he pleases on it. He also is acting rightly when he fails to cultivate. And legally he is still acting rightly if he fails to cultivate it, although there is at that moment a real need for all the crops that can be grown. Would that also be morally right or just? The answer will be somewhat uncertain, and it will be difficult to attain certainty. But on the question of the legal rights, there will be no uncertainty whatever.

The reason for this is that in the case of law, we have a particular way of determining whether an act is right or not. We have an institution, called a court, which will either say so, or can be assumed to say so. And this statement will settle the matter.

Not only will the court, if asked—it must, to be sure, be asked in a certain way—answer the question, but it cannot help doing so. It cannot refuse to answer. If it says loftily, as it sometimes does, that it will take no notice of the case, because it is too unimportant, or slightly offensive—courts talk that way about things like gambling or marriage-broker's commissions

and such matters—what it is doing is deciding for the defendant. Or, in other words, it says the situation presented to it is legally right as it stands.

But in regard to moral right, we have in the first place no assurance of finality and there is no compulsion on anyone to decide it at all. We cannot dispute a court's judgment of what is legally right. So long as the judgment remains unreversed or unrevokable by a higher court there can be no doubt about the legal right involved. But judgment about the moral right, depends for its acceptance on the authority of the person judging and may be disputed or qualified by anybody who questions that authority.

I have given an example in which the divergence between the moral judgment and the legal judgment of exactly the same situation, is slight. There are many situations in which it is more marked. Let me say here, first of all, that the divergence is not caused by the court's indifference to the moral aspects. It almost never disregards moral considerations. And, secondly, we must note that while there are cases in which morally an act may be wrong, while legally right, there are much fewer cases—there are some—in which an act is morally right and legally wrong.

In these overlapping groups of judgments, the single and simple distinction is the one I have indicated. We have a definite way of reaching a final judgment in law. In morals we cannot get the same assurance of finality. Except for that finality, it would be practically impossible to distinguish a moral judgment from a legal judgment. We could not derive that distinction from the fact that some moral judgments which we accept contradict legal judgments of the same action, for we frequently find two legal judgments of closely similar actions contradicting each other, while remaining final legal judgments for the persons concerned.

Justice, I may here repeat, has entered in to the formation of the legal judgment at every stage of the process by which it was arrived at. But, as has already been indicated, it comes in again at the end, after the legal judgment has been arrived at and especially if it has been merely tentatively arrived at. It judges the judgment, or proposed judgment.

The legal expert on the bench who makes the legal judgment

is a member of the moral community as well as of the legal one. The two, of course, cannot be separated and historically never were separated. It is impossible for him—literally impossible—to avoid making a legal judgment. It is next to impossible for him to avoid making a moral judgment. And if he makes the two and finds that they disagree, he will almost certainly make an effort to reconcile them.

Evidently, he can do that in two ways. In the case of the moral judgment, he may question the authority by which it was made. And he may do that all the more readily, since the mere fact that he has found his legal and moral conclusion in contradiction, indicates, as I hope we shall see, that the moral judgment is not quite crystallized. Or else, if he feels that the moral judgment is, or should be, unassailable, he will examine the legal judgment again, if it is still merely a tentative judgment, and make an effort to recast it in order to avoid the contradiction.

But we must remember that both legal and moral judgments are complex and by no means simple operations. In neither case, is the judgment reached by inspection, as mathematicians says, when they derive one equation from another without taking the trouble to work it out. If it could be so reached, it would be extremely unlikely that the two judgments would be in discord. In most situations involving what we call serious crimes, murder, arson, rape, theft, mayhem, the moral judgment that the acts are wrong is as immediate as the legal judgment to that effect. But in much less sharply marked situations, moralists as well as legal experts must do a great deal of searching and weighing and balancing before they arrive at what seems a satisfactory result.

Cases in which the moral and the legal judgment seem at first blush in disagreement are sometimes called "hard cases" by lawyers, and those lawyers who do not like to take much moral responsibility have, in order to justify themselves—it will be noted that they feel they need justification—invented the surly maxim: "Hard cases make bad law." If we leave out of account for a moment the fact that this begs the question, these gentlemen may be referred to my Lord Blackburn, whom I should be inclined to call the greatest common-law judge of the nineteenth century, and certainly no sentimentalist. Blackburn declared

that whatever value the maxim had, was more than neutralized by the much more obvious fact that bad law made hard cases.

We take for granted that on a great many matters of legal dispute, something could be said on both sides. The thousands—the tens of thousands—of volumes of reports are evidence of that fact, since they are nearly all reports of cases that have got to the appellate courts which implies that generally there was something to argue about. The open and shut cases are usually not appealed. We are, however, prone to forget that situations in which something could be said for or against a decision in what is morally right, are by no means uncommon.

These situations used to be called “cases of conscience” and they were treated just like cases of law. They were submitted to more or less professional authorities who not only decided them but published their decisions in books which made up the literature of “casuistry” a term that has acquired a wholly unfair color of depreciation. And, just as in law-cases, the authorities, the acknowledged and authenticated authorities, did not always agree. We remember the lines of Pope:

Who shall decide when doctors disagree
And soundest casuists, like you and me?

The “doctors” here are “doctors of divinity” and not of medicine, as is almost always the case when the word was used alone in England up to the nineteenth century.

If we examine these books reporting “cases of conscience,” we find that the similarity between them and reported cases at law is very close indeed. It was usual to state the facts—a real situation but presented in a more or less generalized form—to give reasons first for the side ultimately rejected, and then to give more fully the reasons for the other, the prevailing side. In both instances, authorities are quoted and these authorities were graduated in weight and persuasiveness, just as in the case in law reported.

Now, the legal expert on the bench, the judge, is also a moral expert, a casuist, no matter how much he fights shy of this designation. He almost certainly will make a moral as well as a legal appraisal of the situation he is asked to judge as right or wrong, just or not just. He will be better satisfied if the two judgments agree than if they do not. And he realizes that he knows more about what is legally right than what is morally

right. If he has thought about the matter at all, he knows that in moral arguments as well as in legal arguments a certain weight is given to tradition, and even to consistency—at least, it is clear that casuists, like judges, are troubled by obvious inconsistency. But he probably, and correctly, thinks that tradition and consistency should be given more weight in law than they need be given in morals.

If, therefore, he has tradition and consistency on his side in the legal judgment, he will be less perturbed than he otherwise would be, if it turns out that his moral valuation would not agree with it. We may remember that like all of us, the judge has an appreciable inferiority complex when confronted with moral concepts. And he has likewise in mind that a legal judgment may well have consequences, quite practical consequences. The awareness of that works back on the judgment itself.

I shall come back to these two considerations. But I should like first to call attention to what is so often forgotten, because of the tendency of human beings to see things as black and white, or, to speak with the logicians, to confuse contradictories with contraries.

One really should not speak of right and wrong in the law, but of wrong and not-wrong, unjust and not unjust. And similarly in cases of conscience, it is quite likely, and frequently happens, that the situation is morally neutral. Either doing or not doing a certain act may be called “not wrong.” And in the law, the tradition of right judgment was often based on convenience or utility. Morals may really not be involved at all. In some cases, the legal tradition seems to have arisen rather casually, but is none the less an established tradition in spite of that fact.

There are many illustrations that can be given. Let us take a situation in which a claim is made by the owner of stolen property which has got into the hands of a person who has bought it in ignorance of the theft. Either of these persons could make a morally justified claim to the article. If we had no legal tradition, if we were applying what is sometimes absurdly called “cadi-justice” or “fireside justice,” we could say that a decision for either side would be just, or sufficiently just to leave no conscientious scruples in our minds.

But the point is that we do have a legal tradition. And in

accordance with it, we prefer the owner to the bona fide possessor, although in other matters we are inclined to favor that ubiquitous darling of the common law, the B. F. P. The French Civil Code has decided differently in effect by requiring the owner, if he insists on his property, to reimburse the holder. In doing so the French Code broke with the Roman law tradition which, like that of the common law, believed that ownership had a better right to protection.

One could, of course, make a case for the change instituted by the *Code Civil*. Of the two claimants, both innocent victims of a thief, the owner is not unlikely to have been guilty of a slight negligence, which cannot be imputed to the present possessor, especially if there has been a number of intermediate transfers. But what had perhaps more weight with the framers of the Code was a feeling that if a man had acquired property in a fashion that did not suggest any impropriety, it facilitated commercial transactions if he was allowed to keep it. In the law merchant, dealing with negotiable paper, this notion is controlling.

I mention, merely by the way and not as a serious compromise, what a very young man once suggested to me as a solution. Why should the loss not have been divided? Why could it not have been held that the owner gets the property back, if he pays half of what the B. F. P. can show he has given for it, with additional adjustments that may be needed? It is an interesting proposal. I can only say that I know of no legal system that permits it. But I could not convince my young friend that the suggestion had no merit.

Evidently, even if a common-law judge was of the opinion of the French Code, he would not act on it. The maintenance of a tradition—there being no doubt of the existence of the tradition—seems quite definitely to the legal expert, a powerful factor in justice, and especially when the tradition itself is about as morally satisfactory as the contradictory would be. This is a situation in which the tradition has weight by itself and not, as is often the case in legal precedents by a kind of estoppel against the court, on the theory that persons had relied on the existence of the tradition. It could not be said that the owner of the property had allowed it to be stolen, on the faith of the

rule and that it would therefore be unjust to change the rule without warning.

Now let me give another example in which two victims of a wrong made contradictory claims for justice. A specific case which occurred in California in pioneer days will serve as well as another. It has melodramatic quality.

Deputy, the owner of a piece of land in San Bernardino County was kidnapped by one Stapleford on July 29, 1858, who with his confederates took him to a lonely mountain cabin near Ventura and demanded that he sign a deed transferring the land to him, Stapleford. On his refusal, Deputy was chained to the floor by a leg, manacled, and then freed from his chains long enough to have a halter placed around his neck and to be pulled up over a beam on the cabin. Half-strangled, he was let down and, since he still refused, he was pulled up twice again. In the intervals of hanging he was whipped with a rawhide. Finally in fear of imminent death, he signed the deed. He was held captive in the cabin while Stapleford rushed back to the city, recorded the deed and a little later sold the land to a Mrs. Willis for a substantial sum, i. e. four thousand dollars. Deputy ultimately left the cabin and made his way back as best he could. He promptly sued to recover his land claiming, as he well might, that the deed was void for duress. Mrs. Willis asserted that she was a bona fide purchaser. Stapleford and his accomplices had, I need hardly say, absconded.

This is what Mr. Justice Baldwin said in refusing the land to Deputy.

It is to be regretted for the sake of public justice, that the alleged outrage, in which the claim of the plaintiff to the relief he seeks in the bill had its origin, cannot be redressed by the restoration of the property of which he was lawlessly deprived.¹

Was the decision just morally or legally? Well the traditional legal rule here is as clear and definite as in the case of theft. Duress avoids such transactions as between the parties themselves. But if a bona fide purchaser appears, the common-law, differently from the case of theft, prefers him to the former owner, just as it would have done if Deputy had been induced by fraud, to make the deed. The rule is the same as at Roman

1. Deputy v. Stapleford, 19 Cal. 302 (1861).

law, *coactus voluit tamen voluit*. "He expressed his will under compulsion, but he did express it."

I have heard lawyers and professors of law utter indignant protests at this case, even when they admit the existence of the traditional rule. And those laymen to whom I have told it, uniformly condemn the decision. Evidently, their indignation is directed against Stapleford and against a time and place in which such things could happen. But equally evidently, if Mrs. Willis was in fact a bona fide purchaser, we have the same situation as before. We have two innocent victims of a peculiarly villainous wrong-doer, and to favor either one would not be unjust. In such a case, it can also not be unjust to follow a traditional and established rule.

Laymen, I have stated, hearing of this case are all on Deputy's side. And whenever I have presented the theft case to laymen—intelligent and experienced laymen—they generally side with the owner and accept the decision, although by no means unanimously. I do not think that what governs their reaction is a general partiality for owners as against possessors. The reason may be psychological. The dramatic elements in the coercion case induce a ready identification with the victim. But on the whole, the reason for the layman's reaction is based on a question of fact. They doubt the bona fides of Mrs. Willis. She might, of course, despite her claim, have been aware, or perhaps she ought to have suspected how Deputy's signature was got on the deed. In that case, Deputy would have got his land back. And we realize suddenly that all we know about her good faith is her statement. Not only that, but it is true that in most instances, such good faith must be assumed, if it is asserted, until the other side can prove its absence, which is usually quite hard to do. To be sure, the champions of Deputy forget that all we know about the outrage perpetrated on him is what he has told us. We should like to believe him, just as Judge Baldwin seems to have done. But even he inserted an "alleged." There is, as you know, much virtue in the word "alleged." And Mrs. Willis' counsel called attention to the fact that Deputy had allowed forty-one days to elapse, before bringing this action to avoid the deeds. Stapleford, unfortunately is not available as a witness and in any case would scarcely have confirmed Deputy's story. And this brings us to one of our basic difficulties.

The law for lawyers appears, as I have said, as a system of type situations. Many of them we know, or, at least, discuss by means of tags which as a rule are single words, like duress, fraud, theft and so on. In most cases, what is conjured up in our minds by the tag is more or less like a line-drawing of a picture, involving persons, but, let us say, faceless persons. When we are confronted with a story, in which persons appear who are anything but faceless, we almost instinctively put them into one or the other of these outlines, or else we say that they do not fit into them.

Unfortunately, when the story is told, it is what is unpleasantly called a dead dog. It is a story about the past—sometimes long past—and in the coercion case, there is no way to reconstruct the past except by the statements of parties who have a definite interest in reconstructing it in a particular way. And if both parties told what each believed to be the truth, we know that they could at best only give us fragments of what actually took place. A complete reconstruction is impossible and yet this impossible task must be undertaken by the judge, or at the common-law, by the jury under the judge's guidance.

The legal rule that in coercion cases, the bona fide purchaser is preferred to the person coerced, must at one time have seemed quite just to the community in which it grew up. In the case of fraud, where the same rule prevails, we have abundant evidence in European folk-lore, that a person who lets himself be swindled is regarded as a fool, who is entitled to little sympathy. A tougher age than ours thought much the same of the man who yielded to menaces.

We have grown much softer. Suppose a modern jury is told by the judge that if both Deputy and Mrs. Willis are telling the truth, the whole truth, they must decide for her. But they know that if they can find any evidence—it need not be much—that Mrs. Willis might have had some inkling of the facts, they could decide that her purchase was not bona fide and give the land back to Deputy. If this is what they would like to do, they would be inclined to find evidence in things and circumstances which would not ordinarily seem convincing to them. They would quite honestly believe that something was present—in this instance, knowledge on Mrs. Willis' part—which they did not really have adequate reason for believing.

If our methods were different, the jury need not have reconstructed the past in a way which, on reflection, they might even admit was not likely to have been correct. Our procedure requires decisions to be retrospective, although we know that the past cannot really be made present. But conceivably our procedure might disregard the past and consider only the present—which is really the immediate future. In that case, assuming that the jury believes both Deputy and Mrs. Willis, the question would be whether, of the two, the much abused Deputy or the comfortable Mrs. Willis, the former is not more entitled to the land than the latter. I venture to think that a modern jury—like most persons I have consulted—would have preferred Deputy, although when the rule about duress was made, the average lay-member of the community would have preferred the bona fide purchaser. If we assume that we at the present time evaluate the justice of the final judgment differently from the way it was evaluated in ancient Rome and much less ancient England, we should have to say that our ideas about what is just, have changed.

Time may have no effect on natural justice which by definition is immutable. I do not reject natural justice as a concept, but I fear my notions about it would not be acceptable to many persons who have discussed it. A great many ideas about what is just have lasted a long while and are likely to last for centuries, if not millennia, longer. But words like “eternal” and “immutable” do not convey much meaning to me, and about many situations that are or were unhesitatingly declared to be just, I find that time does have a marked effect. And this gradual change, while it is still in the process of changing, not only affects the law, but affects the facts. The ancient maxim declares that facts make the law: *ex facto ius oritur*. The law which moves toward justice as its goal, sometimes does not hesitate to make facts which will enable it to reach justice.

It is in matters of the penal law that the law is most frequently tempted to make its own facts if it is to result in justice—which, let us remember, is the same as saying if it is to be law in any complete sense. And in these penal matters, our legal experts do not have even as much leeway as they did, in the situations just discussed. In those situations, either decision could be defended as just and in both instances, in our common law

systems, it was a tradition, not a legislative command that decided the matter. But penal law nowadays is almost wholly a matter of statute. When the statutes are old, they are not infrequently based on moral valuations that are quite different from those of today.

We know that in the eighteenth and the first third of the nineteenth century, England had a savage penal law. Thefts of articles which were worth a few shillings were punished capitally. And, as we know, this penal law was not a vestige of ancient barbarism, but was created by a relatively recent series of statutes of the seventeenth and eighteenth centuries. Nor did these ferocious statutes shock either the average citizens or those who might be supposed to be the moral guides of the community. Most persons would have said that as between hanging a thief and feeding and keeping him in idleness in a prison which was often more comfortable than the slum from which he came, it was more in accordance with justice to hang him.

But there were juries and judges who found this severity heavy on their conscience. When the facts were not really in dispute, they sometimes discovered a way out by finding that a valuable jewel was worth only ninepence and so saved a poor wretch from hanging.

We need of course not go back to the eighteenth century for examples. The newspapers have been full of examples in the last few months of what is described as mercy-killings. A young woman shot her father in order to spare him continued pain from an incurable disease. A physician in New Hampshire injected several cubic centimetres of air into the veins of a patient, painfully and slowly dying of cancer. The law so far as it is recorded on the statute books or in the decided cases is quite clear on the subject. These acts do not fall within the category marked "justifiable homicide" and they do come within the category marked "murder." When the categories of justifiable homicide and of murder were established, there can be no doubt what the moral valuation of such mercy-killing would have been.

At the present time there is considerable doubt. The public is in two minds about their moral valuation. Certainly a very large group holds that these acts are murder and some of them hold this view as an inference from an unshakable religious

dogma. But it is equally certain that many do not hold these acts to be murder.

We know what happened. In one case, a jury found that the daughter was insane at the time. I do not believe that they really thought she was insane. In the other case, the jury found that the patient was already dead, when the air was injected. I gravely question whether all the members of the jury really believed that. I say the jury found these facts although under our procedure, a jury need make no finding of fact in such a case at all, as juries are required to do in some countries of Continental Europe. We in the United States merely infer these findings. In any case, the jury was asserting a moral valuation of an act which was not the valuation which existed when the statute was made, but which has not yet crystallized sufficiently so that it is likely to be asserted in a statute, although proposals to do so have been urged and are being urged.

The illustrations which I used first found Smith and Robinson, John Doe and Richard Roe, before the court, making contradictory claims about what was just. In all cases, however, each limited his claims to what was just for him, as against his opponent. In the penal cases, justice is more generalized. Whether the defendant shall suffer or not, is not measured by the conflicting claims of another person — although there usually is another person affected—but by something we call “Society,” i.e. a personification of a large group of persons, and the “justice” of punishment is stated to depend on the harm or absence of harm done to the basis of social living.

This personified entity called “Society” will enter the picture to some extent, whenever we speak of justice and it is well to remember that, being a personification, “Society,” or “the Public” or any similar group-term, is not a real person, at any rate, not as real as actual flesh and blood persons. It is a conventional shorthand for the fact that flesh and blood persons are found only in socially organized groups and that the conditions which make social living possible or convenient, or which improve or injure this way of living, are important values. When we developed the concept of “crime” as we did from at least four separate sources, we used it as a means of identifying acts of individuals which reduced or to some extent destroyed the conditions of satisfactory social life. We find it just to try to pre-

vent such acts and to eliminate temporarily or permanently those individuals who do them or are likely to do them. This aspect of justice loomed so large in medieval times that the term "justice" was not infrequently used as a synonym for the gallows.

One of the advances in the growth of this particular aspect of justice which we hoped we had made, was that to be just punishment must be individual, and not by groups. That one man shall suffer for the fault of another, has seemed the very essence of injustice. This idea is ancient enough, but it was by no means universal and has had to make headway against the opposing notion which can best be symbolized by such phrases as "group-guilt" or shall we say? "guilt by association."

In ancient and primitive society, guilt by association, especially if the association was one of the oldest, if not the oldest one—to wit the family in its largest sense—was taken as a matter of course. It was very common in Greek society, even when the Greeks had reached a degree of civilization which in some respects is still unparalleled, while in another ancient society, that depicted in the Bible, we see this ancient notion in existence at one stage, and then see it displaced at another and higher stage.

The Bible, as we know, is not a book written at a set time, but is composed of fragments of a great literature which have a range of well over a thousand years. In one of its ancient parts, the Book of Joshua, which depicts the invasion of settled territory by a confederation of rude tribesmen, we are told how Achan took of the spoil of Jericho, "the accursed thing," which had been formally consecrated to God, and how he was put to death and with him, his sons and daughters, his oxen and his sheep. It sounds cruel enough to us, but it was taken as a matter of course, when these things happened, somewhere around 1200 or 1300 B.C., especially if, as in this instance a religious sanction was involved.

But if at that primitive stage, the notion of family solidarity in trespass was still present, it yielded fairly early among the Jews to a rule more in accordance with our notions of justice. We read in II Kings 4: 6, how King Amaziah of Judah about the year 800 B.C. punished the murderers of his father. And the text goes on:

The children of the murderers he slew not, according to that which is written in the book, of the law of Moses, wherein the Lord commanded, saying: The fathers shall not be put to death for the children, nor the children for the fathers, but every man shall die for his own sin.

The "book of the law of Moses" is Deuteronomy 24: 16 and the principle is more emphatically and fully restated in an entire chapter of the prophet Ezekiel, (Chap. 18), who lived about 570 B.C.

If we recall that more than four and a half centuries after Amaziah—obviously still more centuries after Deuteronomy—and more than two centuries after Ezekiel, Plato set forth that in his ideal commonwealth—a little less ideal, to be sure, than the Republic—the children of a traitor and murderer were to be punished as well as the criminal himself, if we have that fact in mind, we may note with gratification that what in the modern world has been taken as one of the bases of our civilization, the Bible, had reached this concept of justice, so long before even the wisest of the Greeks had attained to it.

It is therefore all the more distressing that in the United States a silly group-hysteria has caused the revival of a principle discarded in Judah three thousand years ago. It is true that those condemned "by association" are not put to death, but merely publicly defamed and black-listed as potential traitors. That is no mild punishment and the irresponsible publicists who inflict it, might with profit have their attention called to Deuteronomy, the Second Book of Kings and the book of prophet Ezekiel.

There is, however, another group of situations in which the notion of responsibility has developed, so far as our standards of justice are concerned, in a somewhat different way. Every man, as it is written, shall die for his own sin, and not for the sin of someone else. This, I think, is fundamental and today unquestioned—or ought to be unquestioned—justice. Is it also just that no one shall make good a trespass except the one who causes it?

The law on the subject is considerable and for many situations, we can trace the changes it has undergone, fairly easily. If popular opinion is a test of justice in the matter, it is not too difficult to determine it, even though the situations involved

do not have the emotional connotations of some we have discussed. I have disregarded the discredit into which samplers of public opinion have fallen, because of a notable discrepancy in November 1948, between prognostication and the event, and have put to a casually gathered group of laymen—male and female—the following two questions.

(a) John's minor son, aged ten, seriously injures Richard by throwing a stone at him. Should John be liable for damages?

(b) John's wife, Mary, seriously injures Richard by negligently running over him in her car. Should John be liable?

Almost—not quite—unanimously, this group of adult, intelligent laymen said "Yes" to the first question and "No" to the second, and were a little angry and more than a little annoyed when they were told that the common-law was of the opposite opinion in both instances and that only in the second has the common-law recently—and not everywhere—been changed by statute.

In the French Code which in 1804 generalized what we should call the idea of the tort in two famous sections, 1384 and 1385, it was laid down, first, that any one who causes damage by his fault must pay for it and, secondly, that parents must make good the torts of their children, teachers, those of their pupils while under their care and masters, those of their employees while the latter acted for them. But husbands were relieved from responsibility for the torts of their wives.

This formulation was made while the older common-law was still in force in the English-speaking world. The contrast is curious and striking. It can easily be explained by legal historical tradition. It is not so easy to explain it as a result of social and economic factors. But, as we know, except in the case of children, the law of the two legal areas—common-law and civil-law—have become assimilated somewhat, and the moral judgment is quite the same at the present time.

Of the situations in which one person is required to make good some one else's fault, the most important is, of course, that involving employer and employed. The rule of vicarious liability embodied in the Latin phrase, *respondeat superior*, is pretty generally accepted. It is one which involves a great many complications which I shall not undertake to examine here, but in its broad aspects it seems, I think, to most persons, professional

and lay, reasonably just. But if we ask ourselves why it seems so, we shall find that the justice is taken to lie not in the situation itself, but in an economic fact.

When a servant or employee injures a third person, it is as a rule futile to tell the injured person to demand compensation from the actual tort-feasor. The latter is highly unlikely to have the means of giving it. The employer, however, is not only much more likely to be in a position to do so, but has methods of protecting himself in a way I should like to discuss a little later. This economic factor, I feel sure, is the most probable rationalization of the rule of *respondeat superior*. It is to some extent another example of what I have illustrated before, *i.e.*, of choosing between two victims of a situation in which loss is caused, and placing the burden of the loss upon one rather than the other. But the result is determined not by traditional legal rule, but upon the economic fact that one of the two is more able to bear the burden. There is, to be sure, a social factor involved, since in older stages of our society there is a kind of identification of master and servant that is traceable to the much more complete and more ancient identification of master and slave.

The idea that it is just that a master—who cannot be shown to be at fault—shall make good the injuries in which his servant is at fault, is fairly well established, and quite old, if we assign its origin to the social factor of the quasi-identity of the two. But it is a very recent doctrine that there may be liability without fault of any kind. One of the striking examples of that is the development since the late nineteenth century of workmen's compensation acts.

When in 1804, the French Code Civil in its section 1384 attempted to formulate a general statement of liability, it could scarcely fail to attach liability to fault—someone's fault. In doing so, the codifiers progressed much farther than the common law had done at that time or, as a matter of fact, have done since. But neither in France nor England in 1804, could the situation have been foreseen which created the idea that compensation for damage caused could both be justly required even if it were *damnum absque iniuria*, and justly imposed on a particular person or group of persons who were not demonstrably at fault directly or indirectly, or even who were demonstrably not at fault.

The situation was, of course the industrial revolution of the

19th century in which production of consumer-goods or the carrying out of great construction enterprises became a matter of concentration of many thousands of workmen, operating powerful machines. To attempt to fit this situation into patterns connected with such keywords as "negligence" or even "*respondet superior*" produced a socially highly undesirable result, in that everyday tasks without which modern society could not be maintained, threw great burdens on just those groups who were least able to bear them. This was made worse by the astounding case of *Priestley v. Fowler* in England, in which Lord Abinger set up the indefensible fellow-servant doctrine. But on the Continent, where the fellow-servant doctrine was never accepted, the obvious fact that fault, even if present, could almost never be proved by the victim of it, set in motion those movements which ultimately resulted in Compensation Acts—on the Continent incidentally before they were known in the common-law area.

The older among us may remember the outcry which conservatively minded judges and lawyers raised against the new doctrine. In some cases, no doubt, the outcry was motivated by the sympathies felt by these persons for the large property interests which were deemed to be impaired. But in many instances there was a real moral shock at what, abstractly considered, must be admitted to be unjust, to wit that liability should be imposed without fault of any kind. A certain number of judges believed the statutes to be unconstitutional. Mr. Justice Henshaw of California dissented from his brethren in the case of *West Industrial Co. v. Pillsbury* (170 Cal. 686, 732) in the following words, among many thousand other words:

In plain language and stripped of obscuring verbiage this is nothing else than the taking of the employer's property from him without compensation, without consideration and without process of law and giving it to another for his private use.

Mr. Justice Henshaw will carry little weight on the side of morality. He was forced off the bench for taking a bribe estimated at half a million, in the litigation involving the estate of Senator Fair. But he expressed what morally better men than he felt on the subject. For example, Dean Pound is reported recently to have rejected not only this type of liability without

fault, but even the entire body of law centering about the rule of *respondeat superior*.

The establishment of workmen's compensation was the work of statutes and in some jurisdictions where such statutes have not been passed, the fellow-servant doctrine still prevails. But our courts were enabled to judge the justice of the new system when they examined its constitutionality, although they carefully avoided saying in so many words that what was unjust was without due process of law. And certainly it would not be safe to say that any unjust statute would be held void as against due process. But the courts—Mr. Justice Henshaw dissenting—would scarcely have held, as they did, that these statutes were after all within the Constitution, unless they found the result just.

There were doubtless several bases for that finding. There was the practical matter I have mentioned, that an injured workman could almost never prove that fault had been committed. There was the further fact that under modern factory conditions it was not easily possible for workmen to avoid some contributory negligence, which, by ordinary rules, would deprive them of redress. But the most important element in the new valuation was the entry of a new person in the litigation, the person we call the Public, whom we met briefly a little while ago when we called him "Society." And whatever he is called, let us remember, he is not a creature having dimensions, limbs and viscera, but a construct, a symbolic expression, a word—but a highly significant word, pointing to a great many immensely complex interests of a great many flesh and blood persons.

When the court made its valuation of just and unjust in most of the illustrations I have used, it had in mind what was relatively just and unjust between two parties. It was inclined—in fact it was often a matter of duty—for the court to refer its valuation to more general situations and the larger and more general it could make it, the greater satisfaction it got out of it. But in crimes and in such matters as obligation without fault, it professed to consider a new party, "Society" or "The Public." What writ summoned this party before the tribunal? And why should its interests override those of other parties, unmistakably and properly there?

We may leave out of consideration for a moment the fact

that it is Society organized in a special way, i. e. as a political system called the nation or the state, which has created the courts whose judgments we accept as final. We have gone on the assumption that these judgments, although for the most part determined by justice, are not always so determined and that it is open to us to judge a judgment and declare it unjust if by our standards we find it so. The fact that the judge who makes the valuation of conduct on the basis of justice gets his power from this political organization, may compel him to obey the orders of those who speak for the politically organized community, but does not make any interests of the community, either in its political form or in its broader form, superior to any interest of any person or persons.

There are certain public or society interests which are obviously of such value that when they are imperilled, we may find it just to disregard all or any interests of an individual. We do this in the obvious case of crime, as we now understand it. The safety of the lives, persons and property of individuals living in our society is an important interest. If an individual is of such a character that his freedom or his continued existence endangers our lives we find it just to imprison or even to kill him. We must, if we wish to be honest with ourselves, make clear that this danger really is present, but where our lives are involved, we are likely to accept proof which is less than overwhelming. In their different degrees, this is true of all crimes, but even here, we reserve the right to judge by justice whether some acts are properly called crimes.

And just as what affects the basis of "social living"—provided we offer proof that it does—creates an interest which is better than some or all interests of individuals, so we find it just if in the organized state, the fact of organization is treated by judges as a more valuable interest than the interests of an individual. Treason which imperils the fact of political organization is a real crime and there are acts approximating treason which are real crimes and it is a just valuation which says that the freedom and the property rights and in extreme cases, the lives of those who do the acts, properly defined as treason or resembling treason, should be forfeited. Every case is a special one and in every instance we must be convinced that the organi-

zation was threatened and that the acts were done. But this is so for any crime.

Society or the Public has entered these cases as a party on a plea of self-protection, a plea which may be justly allowed, if it can be substantiated. It enters them either as the sole plaintiff, as in treason, or it displaces the victim of the crime, who in ancient society would have been the plaintiff. But as we have seen there are situations in which both the contesting parties remain before the court, but Society nonetheless intervenes and claims that its interests are affected. It throws its interest on the side of one or the other of the litigants and when it does so, it is almost always the case that it determines the judgment. Whether it also determines justice, is what we must examine.

There is a legal theory called the "sociological" one which makes justice always consist of "balancing interests." Whenever the community intervenes, the balance is obviously disturbed. In nearly every instance, the intervention, as in the case of vicarious liability or workmen's compensation, results in profit by one or the other litigant. The difficulty lies in operating this balance.

As usual there is a metaphor involved and one, which is perhaps not the most apt. I fear it is derived from the picture of the blind goddess holding up a pair of scales. But weighing and balancing presume what we simply have not got, a single and available standard of measure. We are told in the Chapter of Holiness (Leviticus 19: 35):

Ye shall do no unrighteousness in judgment, in meteyard;
in weight or in measure.

And again (Deut. 25: 14-15):

But thou shalt have a perfect and just weight, a perfect
and just measure shalt thou have.

That is certainly our difficulty. Can we avoid divers measures, a great and a small? If we insist on a single one, an inch, let us say, or an ounce, the unanswerable question is, how many inches of an individual interest equals how many inches of a communal interest? Or how many ounces? In totalitarian communities, the slightest suspicion of a public interest over-rides any individual interest, whatever its extent. That is surely not our position. And on the other hand, great and extensive com-

munal interests are often plainly present, and to pretend to ignore them or to say that a trumperty claim of John Doe must be satisfied, whatever communal interest is affected, does not make good sense.

Just what is a communal interest? We can readily understand individual interests in litigation. As between plaintiff and defendant, one of the two will or will not have to pay money, give up property, go to jail. Those interests are not difficult to measure or estimate. But how do we estimate a communal interest, since we know that Society or The Public or The Community is not going to jail and will lose neither money nor other property.

What we are really doing is taking the situation created by the judgment between John and Richard and making it general. Which judgment, the one for John or the one for Richard, if multiplied by the number of times it occurs, produces the greatest advantage to the greater number of people? If there is only a slight superiority, we are not likely to think that communal interest is involved. If the superiority in the number of persons, beneficially affected is very great, we can use that fact intelligibly by permitting this substantial superiority to be a determining consideration.

Let me go back to what seems to me to be a special phase of the problem of liability without fault. In the case of *Escola v. Coca-Cola Bottling Company of Fresno*² a girl in a restaurant picked up a Coca-Cola bottle which exploded in her hand and caused her serious injury. The girl was without fault, and there was no direct evidence of fault on the part of the company or the intermediate dealers. However the girl was allowed to recover damages.

I shall omit the methods which the court declared it had followed in reaching this conclusion. Suppose we proceed to "balance interests," understanding by that phrase what I have just suggested. If the judgment in this case is generalized, people who manufacture things for general sale, are liable to any one who without direct proof of negligence is injured by some wholly unforeseen accident in the manufacture of the article. If the case had been differently decided, any one who bought something generally advertised and sold, ran a risk of injury

2. 24 Cal.2d 453, 150 P.2d 436 (1944).

from a danger from which he could not protect himself. If the court decided this case on the basis of communal interest—it did not say that it did, but I believe that this idea strongly influenced it,—it must have had in mind that one decision was of far greater benefit than the other to an extremely large number of persons.

This situation could be regarded as merely a variant of those already discussed as examples of vicarious liability or liability without fault. In all these cases, it is a question of distributing loss and placing the burden on one of the two litigants. But while the distribution in the other cases could have been guided by consideration of justice, in this case it seems to be determined by “communal interest,” as I have sought to define it.

Can we say that communal interest and justice are the same? It is evidently a question of degree. Courts have hesitated to imprison a man for contempt of court, if he refused to work in order to support his wife. They have hesitated less, when it was a question of supporting a minor child. The communal interest exists in both cases but, I submit, it is obviously stronger in the second. It is to the public interest that men shall pay their debts and equally to the public interest that mortgages shall be safe investments. But harsh foreclosures and deficiency judgments are commonly regarded as unjust. We cannot after all identify communal interest with justice, because we can have communal interest without taking moral satisfaction in the fact that the communal interest has been served. Justice, however, requires this moral satisfaction.

I have tried to keep on a mundane plane. Are we leaving it when I speak of “moral satisfaction”? I do not think so. There are many situations in the law in which justice is neutral and the decision gives us no moral satisfaction because of that fact. But it also does not arouse moral dissatisfaction. There are marginal cases in which our conscience speaks with an uncertain voice. But we shall find that where justice is clearly involved and where one decision gives obvious moral satisfaction and the other does not, the law speaking through its formal instruments, the courts, moves toward justice, although it often pretends that it does not concern itself with matters like that.

It is my considered opinion that the suspicion and distrust of the judicial process which is so marked in the general public,

would be vastly reduced if courts explicitly and in set terms indicated both the situation in which justice controlled their decisions and those in which it did not, for the simple reason that decision for either side would be just. This would still leave a residue of cases in which the court, without embarrassment or breach of decorum, could indicate frankly that the conclusion to which it has come is patently unjust but was forced upon it by statute or by a strongly established rule. Courts do all these things occasionally. I should be glad to see it become a regular practice.

Justice both in law and morals has been defined and classified, redefined and sub-classified. I think that all these attempts to make precise what cannot be made precise, are to little purpose. Justice is a communal valuation or rather a series or a complex of such valuations which are sometimes found in conflict when expressed in formulas. These valuations were not agreed upon at a given moment. When the term "justice" was first used, the acts characterized as "just" had been matters of habit and tradition for many generations, just as many other kinds of moral duties had been instinctively performed long before people were conscious either that they were doing them or that they *ought* to do them.

Side by side with the communal valuations which had become traditional, there is in our society another set of valuations. These are part of a definite religious philosophy which at an historically ascertainable period was accepted by our society as an act of faith. It is here that contradictions were particularly found because the communal valuations we should infer from conduct are not those publicly announced as controlling. We have to take into account the unfortunate moral dualism which makes the values we profess higher than the practice we take for granted. We have further to allow for the fact that communal values at the periphery of our area of conduct change under our very eyes and we cannot always be sure of the direction of the change.

The court consists of men like us and their valuations are to a great extent those that we make. But the court is part of a mechanism which must work in a certain way. Those who compose it find sometime that they are committed to giving effect to values that have either been discarded or are in the process

of being discarded. When that takes place, there is no reason why they should not say so. They will do well to get rid both of their fears of being called "moralists" and their shamefacedness at being credited with a conscience. We shall get a better law, in the sense of a clearer as well as a more enlightened one, if courts abandon the pretense that law moves of itself and is directed to no goal except that of completing its own operations.

Neither law nor justice, if I may be permitted to repeat what I began with, is a force or a person or a star or a port. They are both words which indicate a complex of ideas and actions which are illustrated in our imagination by a great many type-situations. We cannot give every aspect of this complex definite outline and permanence of content. There are many aspects which have not changed much for centuries or even millennia, and these are familiar and easily ascertainable. Even here we dare not guarantee immutability and eternity. It is not surprising that there are considerable areas of conduct where our valuations are tentative and our assurance of moral satisfaction in making them, much less than certain. It is one of the penalties of being human.