

Permanent Problems of the Law

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THE PERMANENT PROBLEMS OF THE LAW

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We must avoid at the outset that academic pitfall, the etymological fallacy. It is natural to suppose, because the word "lawyers" is derived from the word "law", that the same sequence obtained in the things these words denote, that law existed first and that thereafter lawyers were raised up to apply and interpret it. I venture to think that this is not true and that law came into being out of the presence of lawyers in the community. In every community there are inevitable conflicts between individual and individual, between group and group. At some time, somewhere, a deciding vote is cast which temporarily settles the conflict in favor of one side or the other. That deciding vote is cast by a lawyer. The accumulation and the rationalization of his decisions is the law, or as we shall have occasion to see, was the law.

If this comes with the air of a paradox, it is because certain dramatic aspects of the operation of legal machinery or certain stock metaphors have been so long insisted upon that they are permanently associated in our minds with law itself. When the word is uttered, we see twelve jurymen and a black-robed judge determining for a trembling wretch before them the dreadful issue of life and death. Or else a large assembly debating a proposed measure and answering a roll call. Or perhaps a figure with a flowing beard emerging nebulously out of the sky and handing two tablets of stone to a somewhat irritable old gentleman on the top of a mountain. All these things are, strictly speaking, irrelevant. The results they reach can be effected in other ways and have in fact in human history been effected in a great variety of ways. Law is as easily thinkable and as fully operative with or without a policeman, a courtroom, a legislature, or a divine revelation.

In other words law is more than police, or to state it accurately, police as such has nothing whatever to do with law. The exercise of police functions is a fact, like so many other facts. Reduced to its lowest terms, it may be described as follows: Several men physically seize a person, hold him in confinement, beat or torture him, hang

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him or strap him to an electric chair. Or merely threaten to do all or any of these things. The question is not whether they have or have not done so or threatened to do so, but whether the doing was lawful or unlawful. Law enters when this question is asked—and answered. When a sheriff does these things upon the happening of certain conditions precedent, in a prescribed way, in a particular place, and at a specific time, they may be lawful. When a gangster or a mob does them, they are unlawful. At least we say so, here and now. But the question might be answered differently in other communities and at another time. And what we are prone to forget is that under all circumstances these events are only one group among many, and it is far from being certain that it is in matters like these that the question of lawfulness or unlawfulness was first presented. On the contrary, it is likely enough that many legal decisions had been made and much law had therefore already accumulated before anyone thought a situation like the one described a proper one to examine for its lawfulness.

Instead of "lawful", modern lawyers are likely to use the word "right", which they stole from the moralists. This however, is only fair retaliation, for the word which ancient moralists used for "right" was stolen from the lawyers. There is accordingly an association between law and morality, if only as the victims of each other's pilferings, and we have long been asked to suppose that at one time the two were identical. That may be so. However, we cannot go back so far into the authenticated history of our civilization that we can find a time when lawyer and moralist really were quite identical. The differentiation took place very early. It may be that among certain modern primitive people no such differentiation has taken place, or else that it has taken place in such a way that we do not recognize it. But the association of the lawyer and the moralist has been so close that in regard to a number of situations the decisions of the two—we can be fairly certain—will be the same. Just so, other deciding agencies in our institutions, when they are developed, may come to identical results. We may say, for example, that to knock down an inoffensive stranger in the street is immoral, irreligious, illegal, unmannerly, and a serious inconvenience to traffic. And we may also describe it in such a way as to obviate the necessity of making any one of these decisions.

Obviously I am using "lawyer" in a larger sense than that of a person making his living by advising other men and appearing in court on their behalf. I am using it in the sense of a man who busies himself more or less habitually with the question of whether a given event

is lawful or unlawful; and it makes little difference whether he is called a lawyer, a judge, a commissioner, a notary, a governor, a president, a king, or a pater-familias. I use the word because "jurist" is pretentious and "law-man" is not English. In our particularly highly specialized system, the most striking and important type of the law-man is the judge, and he exudes law by the nature of his being.

Now, if we live in a community, it is a prime necessity to know what the law is. The least of our acts, the most personal and self-regarding, are either lawful or unlawful, legally right or wrong. There is no such thing as a legal act as such. To go to sleep in one's bed is as much and as little of a legal act *per se* as signing a deed. We may be sleeping on stolen sheets, in a room for which the rent has not been paid, and during a time in which we have agreed to patrol the streets as a night watchman. In that case, our sleep is unlawful. And if these suppositions are untrue, the determination that our sleep is lawful, is also a legal decision.

It is plain that we assume that most of the million acts we do daily, most of the million events in which we find ourselves participating, are lawful acts, lawful events. We are not conscious of making this assumption any more than we are conscious of the rules for walking when we walk, or the rules for speaking when we speak. The last furnishes a specially close analogy. There is a right and a wrong way of uttering every sound and putting these sounds together. We have learned to utter them and put them together rightly, by having been corrected when we made mistakes. We grow up in consequence with the unconscious assumption that there is right which competent authority will not declare to be wrong, and in our mature experience we consciously make that assumption, whether we always test it out or not. If we have never seen the word "autochthonous" before, we will accent it as we accent "monotonous", correctly assuming that we shall find it so indicated in our dictionary.

Now, that is precisely what law is. It is a prediction of what the law-man will say on the specific question, if it ever comes before him. And the two permanent problems of the law are those which deal with this situation from its two aspects—our relation to the judge and his relation to us. There are many other problems of law, and they may or may not be solved, but whatever other problems of law are solved, these in all likelihood will never be. There is nothing logically impossible—there is no conceptual difficulty—in a solution. None the less, we may safely say that the solution will probably not be found at all, until some time after the human species is cast into

the scrap-heap, and the Demiurge of *Genesis I* starts again with better material.

I shall take the judge's problem first. His business, his sole business, is to decide the lawfulness of an act or an event. How he reaches his conclusions concerns him less than it concerns us. But what does concern him is what the event or act is.

It seems simple enough. And it is in fact as simple as the problem of truth, which every philosopher knows is ridiculously easy. Every act or event is necessarily a past act when it comes before the judge. All he has to do is to reconstruct it exactly as it took place.

Quite obviously this cannot really be done. Events are unique, and no imagined or imitative reconstruction will precisely reproduce them. And yet somehow or other it must be attempted, because plainly we cannot expect the judge to decide the lawfulness of an event, unless he knows what it is. What are the means at his disposal? They are easily described. He must rely on statements of persons as to what they did, statements of persons as to what they saw, statements of persons as to what they thought. And if there are objects presented to him—written documents, certificates of various sorts, he must depend on statements as to when, by whom, and how they were made.

If this were all, his difficulties would be great but still not portentous. They are our own in so many of the affairs of our lives. We too must act on reports of other men, though our responsibilities are slighter. But the reports are presented to the judge under conditions which make dealing with them peculiarly hard. Not only are those on whom he must rely often gravely deficient in memory, in power of observation, in capacity to state what they remember, but they present their account under circumstances which give many of them every motive to lie, since they will profit by some versions of the past event and lose by others. He must therefore correctly estimate the desire of his informants to tell the truth and then correctly estimate their ability to do so. And this desire and ability are not matters which can be classed as either absent or present, but may vary by minute gradations from almost zero to almost one hundred per cent.

Is the problem soluble? In imagination, surely. Our psychologists may some day become expert enough to establish infallible indicia of intention in this matter. The various forms of lie detectors that have from time to time been offered to judicial bodies may become really effective. It is true that a certain amount of skepticism is legitimate on this subject. But, even if they were all completely trustworthy,

they would provide only half a solution, or somewhat less than half. It is not enough to know whether a man is lying, but it is necessary to have some means to compel him to tell the truth. I see nothing to indicate the way in which those means may be arrived at. But, leaning again heavily on the psychologist of the future, I am not prepared to deny that some sort of physiological or psychological pressure may some day be established which will create in any one an irresistible propensity to describe a past event as accurately as he can. Then all that will be necessary will be for the eugenists to have developed a race in which all the senses have a maximum potentiality of development, and for the educators to have trained all men in habits of constantly observing everything carefully and rapidly and in clearly and fully expressing the results of their observation.

Perhaps we can estimate the likelihood of this prophecy being fulfilled by noting the methods which have actually been used by the judge to make sure of the event he is judging. I cannot profess to exhaust them. They are the source of what are called legal technicalities—a word in bad odor among many classes of men who are abjectly fond of their own technicalities. We might, I think, be a little patient with the efforts of judges in this direction, if we recall the staggering nature of their problem. But I must add that judges have often had little notion of just how appallingly difficult that problem was, and by an intelligible compensation they have professed to find it easy, which anyone can do who resolutely refuses to note difficulties—a procedure not unknown in other phases of human activity.

The favorite and most widespread of the methods used to secure a correct description by human witnesses of a past event is some form of ritual—which we may call magic or religious as we please. The last relic of that in our methods is the oath. As we use it in England and America it is a purely vestigial institution. It has a little more of its ancient character on the Continent, but a few generations back there were many European communities in which it retained its character of a ritual which compelled truth—literally evoked it from even a reluctant witness. Only one of two conflicting statements was sworn to, and what was sworn was true. That is to say, when we deal with supernatural sanctions, the best way of being sure that they are effective is to assume it. There can be little question that the assumption was often correct. People who are honestly afraid of becoming accursed will not lie, if a lie carries a curse. And it was only when the existence of what the Middle Ages called “stout swearers” came to be too evident to be ignored, that our courts in practice, if not always in theory, reluctantly abandoned ritual as a means of insuring an accurate reconstruction of the fact to be judged.

Oaths are of course only one type of ritual. There were many others—ordeals, oath-weighting or compurgation, wagers of battle, spaeman's-spells, and witch-finding machinery. They are pathetic indications of the human mind's disinclination to face the practically impossible without evasion. Essentially they were attempts to materialize ghosts. As in other cases, the ghosts stayed comfortably in the churchyard, and the ectoplasm seen uncertainly in the air often turned out to be stuffed pillow-slips fixed up by a fraudulent medium. And they had a varying fortune. In the history of our own judicial institutions their use rose and fell at different stages, nor do they ever seem to have been the exclusive means employed to discover the truth. In those ancient societies of which we have the most documents—the Mediterranean communities between 400 B.C. and, let us say, 200 A.D.—ritual was sparingly used and seemed on the verge of disappearing. Judges solved this problem and failed to solve it—somewhat as we do.

Faced with an insoluble problem which he none the less is imperatively required to solve, what shall the judge do? Prudence, inertia, and common sense suggest several counsels. He may throw up his hands completely. Or else he may simplify it by discarding the obviously impossible or most difficult elements—for no problem is quite simple—and by confining his attention to those which he feels he can deal with more successfully. Or else he may grit his teeth and do the best he can by as complete a scientific investigation of the whole matter as his resources permit.

Let me illustrate. Two automobiles driven by A and B collide. The acts of A and the acts of B have both contributed to cause the event we describe as a collision. It is highly likely that one of the two has contributed more acts or more important acts. It is highly unlikely that either A or B knows all the circumstances which led up to the collision and still more unlikely that either will tell them all, if he thinks he will be prejudiced by the telling. In most cases, no one else knows anything about the matter at all. Under these circumstances the courts in many jurisdictions will wholly decline the task of reconstructing the past event. They will say that they refrain from judging because they cannot find out the thing to be judged.

I hope we shall none of us be so obtuse as to speak of the justice or injustice of this action. Justice has nothing to do with it. Justice is concerned only with our attitude to the judge's judgment about a certain happening. We cannot predicate "just" or "unjust" of an event which we cannot describe; and that is the position in which the

judge finds himself. To be sure, there are judges who profess a capacity to do what is here declared to be impossible. In most cases they have mistaken the nature of their problem. Generally, they resort to legal fictions. We cannot go into the question of legal fictions at present, except to state dogmatically that legal fictions are concerned wholly with that with which in our immediate discussion we have nothing to do, with justice. So, for example, if instead of two automobiles in collision, it had been two ships, the same judge who declined to judge the car-collision which he states he cannot reconstruct, would have no hesitation in judging the ship-collision. In America, he will often assume as a fact that the acts contributed by A and B in the latter case were precisely equal in number and importance, and he will draw certain inferences from this assumed fact.

Now, he does not really think that his assumption is a correct description of what took place. Indeed, if we examine it closely, he is not judging the collision at all, although he pretends to do so. What he is really judging—what he has judged in advance—is a wholly different thing. It is the situation which resulted after the collision took place. By the great weight of probability, one of two men has been more injured in person and property than the other. This fact is more easily susceptible of determination than the facts which led up to the collision. He believes he has determined it, he judges it to be unjust, wrong, unlawful and does whatever he is empowered to do to correct it. Why he determines it to be unjust is the second problem of the law, which we shall deal with later. The curious fact is that the judge often imagines and says that he is basing his judgment on the collision and the acts which produced it. Actually in most instances, he does not care in the least how the collision took place.

Resignation in the face of an impossible problem is the part of prudence. A picturesque incident may illustrate the futility of any other course. Suppose two people, husband A and wife B, are killed in a common disaster, drowned in the same ship-wreck. It is important to know whether A died before B, or B before A. The third possibility that they both died at exactly the same second is so improbable as to be practically out of consideration. What did the courts do? Being eager to find out what actually took place, they applied what without apology I insist upon calling the scientific method. They went into their experience of men and events. Some of them declared that, A being probably the physically stronger, probably lived the longer. Others declared that A, being probably

a dutiful husband, protected B to the last and surrendered opportunities of safety to her. In that case B probably survived A.

With nothing certain except the fact of the disaster and the fact of the deaths, what else could they have done? To be sure, a seance or a Ouija board would give further information, but it might lack authority. And yet one is not surprised to learn that both determinations of the past fact, although arrived at by eminently scientific means, seemed highly unsatisfactory. Both have been abandoned, and almost everywhere in their place courts have accepted as a description of the event the one which has not one chance in a million of being true, *viz.*, that both A and B died at exactly the same time.

This is a legal fiction. That is to say, it was invented to create a result which was determined in advance to be just. In this case the just result was the distribution of property among certain groups who, except for this legal fiction, would not get it. That is all very well, but if courts had resigned themselves to it earlier, when they found the task proposed impossible, this just result might have been earlier achieved.

Courts have resigned and do resign the investigation of facts, not only when the investigation is impossible, but also when it is difficult. In the latter case, it is likely that the court's self-restriction is due in part to other causes besides the one they assign, but the difficulties, real or apprehended, certainly play a part in the court's attitude. And, again, the court will decline to examine certain situations because they think it undesirable to do so. Sometimes this undesirability is mere squeamishness. Pudicity is one of the engaging qualities of our American courts. It is not an Anglo-Saxon heritage, since English courts are wholly devoid of it. An English lawyer and gentleman wrote a book with the title, *Incestuous and Adulterine Bastardy*. An American would scarcely dare do so.

But in matters of this sort, touching on family affairs, English and Continental courts have removed certain things from investigation. The rule of the Roman law was *pater est quem nuptiae demonstrant*. After many centuries of uncertainty, the rule of the modern Continental law was formulated in the French Civil Code, *la recherche de la paternité est interdite*. English and American law, without aphoristic formulation, had a somewhat similar rule. That is to say, the fact of physical paternity would in a large number of cases not be investigated at all, although a great many social results depend on that fact, and biologists regard it as a matter not wholly devoid of importance. The reasons here are those which were the impelling cause for the creation of legal fictions. The mere process of

investigation will create results which are judged in advance to be unjust, and investigation is therefore inhibited.

Ritual breaks down. Resignation is a declaration of impotence. None the less the judge must, in most instances, attempt the reconstruction of the past fact which he is obliged to judge, the judging of which indeed makes him that which he is. Since magic will not serve him, and he cannot cry off except in a few groups of cases, he has nothing left but the methods of science, which to some extent he has always used, and which, in our systems, he may soon have to use exclusively.

How can he make a man tell the truth? How can he know when he is telling it? He knows something of men in their various groups. He will have to know a great deal more. He knows something of psychology. He will have to know far more. But, however much he knows, he is now, as he will be then, applying scientific methods, well or ill. Statements are made to him. He must judge of these statements by the appearance, the reputation, the classification of the man who makes them. He must draw on his own knowledge of how such things happen, on the statements of other persons as to how such things happen.

As compared to other scientists, he is at an enormous disadvantage. The latter are given large sums of money, unlimited time; the world is ransacked for their raw materials and their *corpora vilia*. No one thinks of restricting them, except in Tennessee, Mississippi, and Arkansas, and no one, except again in those states, looks upon them with suspicion or dread. And even in those enlightened communities, it is only the biologist who is under a ban. It is far different with the judge. Nobody can possibly love him. All the world hates an umpire.

And the judge has to carry—in part deservedly carry—an odium not his own. He has kept bad company for thirty centuries and more, with hierophant and soldier and statesman. Throughout that time, the prevailing government of Western communities has been oligarchy, that is, the control of the large unprivileged group by a smaller privileged group. The judge has generally been an oligarch—vested with functions which made him an instrument of the dominant group, in the intervals between making his judgments. And there has therefore from time immemorial been heard the bitter cry that he wrested the judgment of the poor in order to find favor with their masters, being himself one of the masters. And as a rule, he wrested judgment, not by declaring an act to be just or unjust in fantastic or arbitrary fashions, but by determining things to be false which were true and things to be true which were false.

Therefore, when we find judges sharply hedged in by rules of procedure and theories of evidence, we should be tempted to find in that fact evidence of the doubt and suspicion under which the judge rests. He cannot be allowed a free search for truth, for fear he will find falsehood and declare it to be truth with oppressive intent. Institutions like the jury have been twisted into means of thwarting him. Originally the jury was a body of expert investigators to assist the judge. It developed in relatively recent times into a body of judges whose functions limit and restrict, and in America, gravely hamper, the judge proper. As the descendants, physical or spiritual, of the unprivileged group gained greater control, the fear and jealousy of the judge increased, and every attempt to make his primary problem easier for him, is now obstructed by a passionate disbelief in his desire to solve it.

And yet it is impossible to maintain the suggestion that the artificial restrictions in which the truth-finding machinery is enmeshed are based upon the traditional and ingrained fear of the judge as an instrument of hostile political power. At a time when in England and Europe judges were more nearly instruments of power than they have been since, procedure was far more complicated than it is now. And in England, where judges still retain in position and power much of the glamor of their former association with a ruling caste, there is a foolish and cumbersome law of evidence which checks determination of the facts in a hundred ways, while in Germany, where judges were and are hardly distinguishable from the mass of other functionaries, these restrictions had been wiped out in favor of "free proof"—"*Freie Beweisführung*." No, procedure and evidence, which at every step place hurdles and hazards in the way of a scientific attempt at reconstructing a past event, which make the impossible still more impossible, are not due to the historic position of Western judges, but to what may be called an historic accident, if we like, as long as we remember that the accident was strongly affected by the nature of the problem itself.

I have said that law arises when some one is asked to determine the lawfulness—that is the rightness—of an event, necessarily a past event. That could be done and was done in a thousand ways from time literally immemorial. But at a certain special stage in the history of Western society the way in which it was done was to call upon the judge to umpire a contest. His task was not to determine truth, but to decide who had the best of a competition—a competition that was not originally one of argument, though it soon became one. The place and time of this event can be set with fair

probability at Rome somewhere in the fifth or fourth centuries, B.C. We need not trouble ourselves to examine the historic reasons for its importance, except to note that it coincided with the first partial severance of the functions of magistrate and judge. We may say it created the profession of judge, and that may explain a great deal. In the fullest development of the Roman system, between Augustus and Alexander Severus, 31 B.C.—240 A.D., this notion grew by leaps and bounds, obscuring but never quite displacing that other method in which the undifferentiated magistrate-judge investigates truth, on his own as it were, without reference to which of the disputants has presented the better side.

The concept of a trial as a debate and the judge as an umpire got a renewed currency when, in the eleventh century, a general revival of intellectual interests gave an especial stimulus to the spread of Roman law. It colored the judicial function in even those countries in which, like Spain, inquisitorial methods seemed far more natural. For many modern lawyers it is difficult to conceive of a trial as anything else, although the words "trial" and "verdict" might have called attention to the fact that these things professed to be something quite different.

What endeared the debate concept of the trial to lawyers was the fact that it solved their problem by shifting it from the sphere of the impossible to well within the range of the practicable. In spite of a general belief in the efficacy of ritual, capable men could see that somehow a ritual which could move gods and constrain nature was not certain in its effects when it attempted to force men to tell the truth against their own interest. But many a man could tell which of two versions of an event was the more probable, and any man who was properly coached could tell which of two recited formulas was in complete accord with a standard which he had access to. Truth therefore became something ultra-modern—it was relative.

The difficulty is that although we are dealing with one problem only, and one that has nothing to do with justice, we know that ultimately we shall have to struggle with another problem—one that does concern justice—and it troubles us in advance. To resign in the face of the impossible and to substitute for what we cannot do something we can do, may be the part of prudence, but we have not quite dared to say openly and frankly that the solution of the second problem is just as good for our purposes as a solution of the first. We know that once the law-man utters the words "just" or "unjust," very serious concrete consequences are likely to follow. As long as the consequences deal with questions of property—as they will when

the questions before the judge are: Did A deliver certain goods on a certain day? Is this the signature of B? Has package X a confusing resemblance to package Y?—we are not much exercised over what will happen when judgment is made. But suppose the question is whether A strangled B, or administered arsenic to him, or forged B's name? Although we professedly do not look to the end, we cannot ignore the consequences which will flow from one decision or the other. Can we leave the question of truth in the state of deciding whether A's attorney or the District Attorney makes up a more plausible version of the event? That is precisely the way in which criminal trials as well as civil trials seem to a very large number of fellow citizens, law-men, and laymen. It surely is not satisfactory.

It is for this reason that on the Continent a distinction has been made between formal truth and substantial truth. Cynics may imagine that the distinction is like that between fresh eggs and strictly fresh eggs. However, that is not really so. Formal truth means merely relative probability as between two competing versions of a past event—versions supplemented by the ordinary facts of human experience with which the judge must be credited. There is often a question whether the judge may further supplement the elements of his reconstruction by special personal knowledge of the incident itself. It cannot often happen that he will have such knowledge, and if he has, the general belief is that he is disqualified to be judge.

Formal truth, in the Continental theory, is all that is necessary in civil actions, civil actions being in the main those in which the questions debated will have property consequences only. In other matters, in criminal actions especially, substantial truth is required; that is to say, we must use every means available to determine what actually did happen, whether or not the District Attorney and the accused man have themselves offered us the elements necessary to determine it. A famous and apparently authentic incident which occurred in Malta during the eighteenth century is quoted by Dean Wigmore.¹ Early one morning a judge happened to see from his balcony a man pursued and killed by his pursuer. The murderer fled, dropping his knife. Immediately afterward, a baker passing on his morning round of deliveries, found the body, bent over it, and picked up the knife by which the man had been killed. In doing so, his hands and clothing were stained with blood. In this condition he was found by the watch, arrested, charged with murder, and brought before the judge. His account of his movements was halting, confused, and incredible. The judge deemed it his duty to disregard

¹WIGMORE, PRINCIPLES OF JUDICIAL PROOF (1913) 271.

his own observation which of course had not been duly presented as evidence, condemned the man, and ordered his execution. Which was done. When by several confessions the facts ultimately became known, the Grand Master of the Knights of St. John, who were the rulers of Malta, dismissed the judge and condemned him to pay a substantial annuity to the family of the baker.

We may recall the statement in Plowden² according to which Henry V put a question of this nature to Chief Justice Gascoigne, who declared that he would not acquit on information which he had obtained outside of the trial. Professor Thayer³ points out that the issue was a moot point among canonists and civilians. He might have added that the casuists were busy with it as well, and that the great weight of authority, including St. Thomas Aquinas, was on the side of the judge.

The judge, it is evident, had correctly ascertained the formal truth of the question, which under present theory prevailing on the Continent was less than what he should have done, although such formidable support as Augustine, Ambrose, and Gregory could have been cited on his behalf. We shall do well to recall that under our system judge and jury in criminal and civil matters alike would now—it was not certainly so two centuries ago—be required to disregard information obtained as this Maltese judge obtained it. And we may also note that, except for the quite casual and accidental presence of the judge on that balcony that particular minute, the application of the most rigorous scientific investigation would probably have resulted in exactly the same judgment.

Now, an investigation into substantial truth involves, in a certain measure, the inquisitorial method. Against this there is an Anglo-American tradition which cannot well be disregarded. "Inquisition" is after all practically the same word as "research", and the only alternative to research in attempting to discover facts, past or present, is casting dice. If we do not desire research in this matter, it is certainly in part due to our rooted distrust of the researchers, and it is not easy to see how this distrust can be obviated completely. Certainly it will not be obviated by changing somewhat the class of men from whom the researchers are selected. In a society of Houyhnhnms there would be no such distrust. But when half of those who enter a court-room fear that they will not get justice, and the other half fear they will, we may say that the atmosphere is not that in which the best scientific methods of research can be readily applied.

²(1816) 1 Plowd. 83.

³THAYER, PRELIMINARY TREATISE (1898) 291, n. 2.

This may then conclude our examination of the first of the problems of the law. It is in its nature insoluble. I suppose we shall do best by it if we recognize that fact and get as close to a solution as we can—approach it by an asymptote, if I may use a word treasured up since my courses in sophomore mathematics. The all too human desire of pushing the hard problem aside for an easier one and calling the solution of the latter a solution of the former, may be forced upon us, but it will do us less harm if we are consciously aware of what we are doing.

The second problem of the law has to do merely with justice.

When the law-man, having first reconstructed his past fact, declared it to be lawful or unlawful, just or unjust, it was so because he so declared it, since a definition of lawful or unlawful is merely a statement of such a declaration. To say that he was mistaken has no real meaning. The only mistake that there can be is as to what he said or whether he said it.

You will notice I have confined myself to past time, and I wish to say that I have done so only by the exercise of considerable self-restraint. On the assumption that we know exactly what the judge said, the only significant statement that we can make is about past law, past lawfulness. If we know what was lawful, can we also speak with any assurance about what is lawful, present lawfulness?

Perhaps we can—at any rate, to some degree. But we shall be able to do so only if we know exactly what we are asking. When we ask what is lawful now, what is the law, what does the question amount to? Is it lawful to omit raising one's hat in the street to a lady, to vote the Democratic ticket, to drink whiskey, to destroy our own property, to destroy our neighbor's property? The popular conception is that somewhere there is a book like a huge encyclopedia which gives the answers to all these questions, and that most of the answers have been voted on by some authoritative body. The only reason that we can't all use this book is that the answers are badly arranged and there is no index. So we pay large sums to lawyers to look it up for us.

I think I am not exaggerating the popular conception of what the law is, and I hope I am not robbing any one of a fond illusion when I say there is no such encyclopedia. I should like to say further that if the several hundred thousand volumes which an American lawyer would have to read in order to be sure that he had read all the books on law—on his law—were read through with the utmost care, it is highly unlikely that the answers to all these questions will be found there.

Yet the question is not only a perfectly sensible one, but eminently practical. We say of some of these proposed acts that they certainly are lawful or certainly unlawful. We mean naturally that we are pretty sure, in advance, of what a judge would declare, if the question were put to him. Of others, we say we do not know, because we are not sure—not by a good margin—of what the judge would say.

Present lawfulness is a prediction. It is not a prediction of what in the future will be lawful. It is a prediction of what a judge will or would say about a present situation—present in contemplation, if not in fact. When it reaches the judge, it will be a past situation and be judged as such. We must therefore prophesy how it will be judged, and at our peril, we must prophesy correctly. The second problem of the law, therefore, is to learn how to prophesy accurately.

Obviously, as I have said before, this does not concern the judge at all, but us. He need have no qualms in advance. When the ghost of the past event is evoked before him, he will characterize it as unlawful or lawful, and it will be what he says it is—or rather it will have been what he says it was. He is quite infallible. And he must characterize it. I do not mean merely that it is his duty to do so. I mean that it is impossible for him to fail to do so. If he shuts his eyes and averts his face and cries out that he will not judge, he has already judged. He has declared it to be lawful by not declaring it unlawful. There is nothing legally indifferent, nothing intermediate.

But we who must concern ourselves with what is at any minute lawful must know now how he will characterize it. How shall we find out? In one respect it is far easier than the other problem. There are fewer men involved, and they are not, as in the case of determining past events, very much interested in putting difficulties in our way. It is merely a question of behavior. Under a given stimulus—in this case, the postulated reconstruction of a past event—how will the judge react?

Let us take the extreme case—an absolutely capricious judge, one who decides lawful or unlawful by tossing up a coin. Every prophecy has in that case exactly fifty per cent of a chance of being right and no more, and no accumulation of experience will, one might say, increase these chances one iota. Yet, conceivably research into the habitual force with which the coin is tossed, the weight of the coin, the resistance of the air may help us. It is after all not absolutely a matter of chance, but it approaches very closely what we might call the perfection of uncertainty.

Now, what is the other extreme? Evidently it is a judge who does not toss up a coin, but whom we know so well, all of whose physical

and mental habits we are so sure of, whose tendencies are so clear and uniform, that there can be no doubt in our minds about his answer. This is certainly the perfection of certainty.

The facts, of course, lie between these two extremes. Judges do not often toss up coins—although there are rumors that every now and then that is what a jury or judge will do. But the truth is not an Aristotelian mean. Judges have always declared, and those who have systematized their utterances have vehemently asserted, that they strive as far as possible to avoid the former extreme and to approach the latter. And the rest of us have with equal vehemence demanded of judges that they not merely approach that extreme but attain it, and we have done our best to constrain them to do so. To be sure we have demanded of judges not only that their judgments shall be certainly predictable, but that they shall be just. It may well be that these two things are mutually exclusive. But we are not yet ready to introduce the concept of justice.

Let us remember that it is our problem which we are discussing and not primarily the judge's problem. From very ancient times, we have used one device to make sure of what the judge will say. There are a great many things that we have ordered him to say. I say "we" advisedly. There is in every country, organized on a basis familiar to us, a certain governmental machinery. "We" in this case means the members of the community acting through the governmental machinery. We have told the judge what he ought to say in certain more or less generalized situations. We call these statements of what the judge ought to say "statutes", laws in a specific sense. They are generally, but not always, the deliberate pronouncements of a legislature. In terms, they are addressed to us. Actually, however they are addressed to the judge, and they contain implicitly a peremptory instruction to him that he declare events lawful or unlawful as they fall within the classes so designated in the statute.

If the statute is perfectly clear, if the class of situations described as lawful or unlawful is sufficiently limited, our prophecy in regard to that particular event has a high degree of probability. But those are two large "ifs". The statute may not be clear; the class may be so large that there is a very serious question whether a given event comes within it. The French Civil Code of 1804 and the German Civil Code of 1900 are two of the best examples of statute-making that were ever attempted. And in regard to both of them there are thousands of questions—in the case of the former, literally hundreds of thousands of questions—about some of their provisions. In every case the questions are elementary ones. What do these words

actually mean? Does this particular situation come within the general one or not?

Giving orders, then, to the judges as to what situations are lawful and what are not, has certainly helped the accuracy of some of our predictions. But only of some. It has not solved by itself our problem, even when the utmost care has been taken to make the statutes clear and comprehensive. In fact the more comprehensive the statutes are, the less they solve our problem, because the new statement of our problem, "Does a given situation, hypothetically reconstructed, come within the enumerated class?", is only a slightly disguised form of the original question, "Is the given situation lawful?" The more limited and special the statute (the worse it is, according to some standards of legislation), the better it is as a guide to prophecy. A statute declaring that a person at fault must repair the damage he has caused tells us very little. A statute providing that all persons who between January 1, 1894 and January 1, 1895 worked in the County of Oneida, State of New York, on the Erie Canal with their own equipment of not less than one mule-drawn barge, are entitled to three thousand dollars compensation, each, without deductions of any kind—that is a statute which enables us to prophesy a result fairly accurately.

Therefore, if we have not succeeded in predicting the judgment of a judge by ordering him to judge in certain ways under certain conditions, we had better find out how he will act if we leave him alone. Let us call in science. Plainly the scientific procedure is to find out first how judges have acted. Fortunately we have been keeping records for the last few hundred years of how judges in certain communities have acted. That is a great help. To make it available for scientific prediction we should however have to postulate that all judges are alike, that every judge acts uniformly, that new situations as they arise are exactly like, or almost exactly like, old situations already judged. These three postulates are not true.

But they are not all completely false. All judges are not alike, but they often show a great many common elements. For several generations in England, it was safe to assume that all judges were landowners, that they had all read Plato's *Republic* and Aristotle's *Nicomachean Ethics*, that they all had studied mathematics as far as conic sections, that they knew the Bible, were members of the Church of England, and were not prohibitionists. To know so much is to know a great deal about a man and is of great assistance in conjecturing what he would say in a given situation. Judges in England are still somewhat alike although not altogether of the pattern described.

Judges elsewhere exhibit greater variety; yet everywhere in Western communities, the class of potential judges forms a small percentage of the adult male population and is not wholly without a certain homogeneity.

These facts, which helpfully narrow our examination of the men whose judgments we must know in advance, are largely supplemented by other facts. One of them is a psychological fact and may be called conservatism, timidity, or inertia, depending on the point of view. A judge must determine the lawfulness of a past situation. If he took his task with desperate seriousness, he would investigate anew in every case the source and fountain of lawfulness in all its bearings, whatever it turns out to be. That is certainly a hard task and far too much to expect from any man if it can be avoided in some simple way. And of course it often can be. It can be avoided in part by following precedents. In that case it is only necessary to determine the degree of resemblance of the specific past event to be judged with another past event already judged. If the resemblance is very close—so close as to be almost immediately evident—the judgment is more than half made at once.

In many places, a duty is imposed on the judge to follow precedents. Our jurisdiction is one of those places. It is not a particularly felicitous notion—the imposition of this duty. It is what is called a duty of imperfect obligation, because even where it is recognized as a duty, nothing can be done about it, if the judge declines to do it. Secondly, there is not much point in ordering a judge to follow precedent when there is a resemblance, unless you also order him to find a resemblance. It really operates as a duty only when the resemblance is so striking that it needs some effrontery to deny it. Then, further, the duty is never made absolute. It is qualified by exceptions and conditions. The net result is that the situations in France where such a duty is specifically denied and in Anglo-American states where it is asserted, is very nearly the same. We may count on unmistakable precedents being generally followed for a better reason than because of a duty which cannot be enforced if violated, and which can scarcely be stated precisely, the reason being that it is much easier to follow an unmistakable precedent, indeed any precedent, than to decide the case independently.

Statutory limitations, a tendency to follow precedents, a general similarity of social type and education among judges, all these things tend to make uniform and regular the caprice of judges and therefore to render their judgments predictable. If we can combine and classify and rationalize the precedents,—and that itself is the

purpose of some statutes—and if we then are mindful of the barriers that are imposed on judges by the group to which they belong (it will not do, for example, to expect an old type of conveyancer judge to see any resemblance between the sale of an estate and the sale of a bolt of woolen cloth), we ought to be measurably on our way toward the solution of our second problem.

And we have added another element to assist us in our prophecies. We have ordered the judge—the final judge—not only to judge the situation, but to tell why he has so judged, and we treasure up and print his reasons, which we call opinions. In most cases the judge tells us what statute he thinks contains the type situation of which this is a special form, or what precedents have situations remarkably like the one before us. Sometimes the judge hoists us on our own petard by setting forth his reasons in eighty or more printed pages. Ten are common. And it is not certain that the longer the opinion the more lucid the reasoning, the more evident the similarity of the cases compared.

It has turned out in practice that the announcement of the reasons has weakened the force of precedents rather than strengthened it. But in any case all the elements that have moved in the direction of making the judge's judgment scientific because predictable, have been thrown into confusion by the intrusion of another element, from the point of view of science, an incalculable and hence mischievous element, namely, justice.

I do not know what justice is, nor how the moral sentiment we call by that name arose, nor when it became differentiated from the general category of virtues. I have carefully read what wise men have said about it, men who knew exactly what it was. The difficulty is that, when their statements left the Nebula of Orion and got within a few million miles of this earth so that I could partially understand them, they seemed to me either self-contradictory or to contain a proposition of the form: "Justice is the quality of being just", or "Justice is that which produces just results." Both statements are quite true.

There is a famous doctrine that it is better that law should be certain than that it should be just. No one has ever clearly stated why it is better or for whom, but it is evident that it would be easier for almost everyone concerned if there were more cases than there are in which the judge would feel constrained to act in a readily predictable way. But I suppose that one of the most serious of the reasons for the maxim mentioned is our distrust of our standards of justice and of our capacity for applying them. In spite of vociferated

conviction of an advocate or a partisan in the justice of his contention, he no doubt has qualms enough in the bottom of his soul, and he would feel safer in most cases if formal justice was on his side rather than substantial justice.

And the first of the problems of the law, the impossible problem of accurately describing a past event, has a distinct bearing on the last of our problems, that of justice. We should far more readily apply the moral standards of general conduct to the making of legal judgments if we were quite sure that we really knew what it was we were judging. The hard creditor who demands the tenor of his bond against a needy and unfortunate debtor has from time immemorial encountered the condemnation of moralists, but there are many cases in which the demand is the last resource of a long-suffering investor against a shifty swindler. And we may be sure that the debtor will always cry "oppression", and the creditor will always profess that he is barely maintaining his livelihood. Certainty of judgment is therefore better than justice, for the simple reason that justice depends on certainty about the facts and this we cannot hope to have. It would amply repay investigation to examine those numerous cases in which courts have declared themselves unable to depart from a strict and hard rule in favor of an equitable exception and to see whether at the bottom their decision is not grounded on their confessed inability to determine in every case all the relevant facts.

But there is such a thing as justice. And not only the very wise know what it is, whether they are or are not able to state it satisfactorily, but everybody else, all men and women and most children, know what it is. "That ain't right" is one of the earliest judgments a child will make. Similar judgments are made constantly, freely, with supreme confidence by every one, and nothing is resented so much as the suggestion that any sort of experience or information or mental training is necessary to make a person competent to render this judgment.

It is a commonplace, on which I shall not insist, that the concrete results of popular and learned judgments about justice have been somewhat inconsistent. Everything that some of us regard as palpably and unmistakably unjust has at some time or place been declared to be just—slavery, torture, the killing of innocent persons for the faults of others, the wholesale massacre of entire communities, the deliberate disregard of solemn promises, the seizure of other people's goods. It is evident that if we collect and arrange the judgments about justice, we cannot rationalize them, because they often flatly negate each other.

We shall do a little better if we limit our inquiry in time and space. But we must make the limits very narrow indeed. Most of the things I have enumerated would, one might suppose, be quite generally condemned here and now, in the United States. But we should be mistaken if we thought that judgment was universal. I have heard educated men defend slavery as a present institution. Torture is freely practiced and privately defended as a means of eliciting confession and is freely advocated as a punishment for crime. There are numerous exceptions to the general rule that promises be kept and other people's property respected. A concrete criterion for surely distinguishing just things from unjust has not been devised, if we demand of justice a validity *quod semper quod ubique quod ab omnibus*.

We must accordingly draw the melancholy inference that we dare not demand this of justice, that justice varies with time and place. And since time and place are constantly changing, it is impossible to state in advance what will certainly be called just, because the time and place of the event to be judged—a different time and place from the one we know—must enter into our judgment. If, therefore, we ask of a judge's judgments that they be surely predictable and also that they be just, we are asking what are strictly speaking contradictory qualities.

Perhaps we are now in a position to see what justice has to do with law. We judge the judge's judgments. We make a valuation of them, and justice is our standard of valuation. We may properly describe it as a sliding scale. To speak strictly, it is we who apply it just as it is we who seek to predict the judge's judgments. We not only wish them to be just, but every now and then—as in some state constitutions—we order them to be just. And without such statutory commands, we expect them to be and are very honestly shocked if they are not.

But we are not the only ones who are shocked. The judges too are shocked. Whether they are ordered to or not, they also very much desire to render just judgments. In part they desire to do so because they know it is expected of them. We cannot suppose they wish to flout or antagonize the rest of their fellow citizens. But in an even larger part, they desire to judge justly because, in such training as they have had, they have absorbed enough of the history of their profession to know that it was the desire for justice which created them. Judges make law. Justice makes judges.

Judges then, wishing to do justice, must apply to the several judgments which they may possibly render regarding the lawfulness

of a reconstructed event, a moral standard. They certainly will prefer to select that judgment which they, in common with us, can characterize as just. They are as competent as we are to apply this standard. Unfortunately, they are no more competent.

The name given to the standard by which we evaluate judgments varies somewhat. It is called the rule of right reason, pure law, natural law, right law, as well as justice. But these terms cannot really be distinguished. It is true of all of them that as soon as any concrete formulation of them is made it ceases to command universal assent.

For that reason, the attempt to make a concrete formulation has been abandoned by those who set up theories of justice. Instead, we find purely formal concepts of justice. It is the "natural law with changing content" of Stammler which leans consciously upon Kant. Or it is a theory which defines justice as the paramount interest of the collective group—a theory which professes to derive from Hegel. Both are in sharp contrast with the natural law of the seventeenth and eighteenth centuries and their revived continental forms of the nineteenth and twentieth. Both again have in common the principle that no specific human relation or situation is *per se* just or unjust but becomes so only as it furthers or hinders the ideal of either system—the irreducibly autonomous, good, individual will or the fullest growth of the collective unit. That is, the judge ought to ask himself before he judges, "Will this declaration of lawfulness hamper the free exercise of a good individual will? If it does it is unjust." Or in the other case, he ought to ask, "Will this situation which I am about to declare lawful lead to a larger development of the corporate unit without regard to individuals as such?" It is curious that the answers to these questions in the case of both Kant and Hegel and many of their followers led to a preference of an absolute monarchy over English parliamentary institutions, that both Marx and the defenders of Prussian bureaucracy believed they were Hegelians, and that the "Let-Be" pamphleteers of England as well as an influential group of German socialists call themselves Kantians.

We seem to have traveled a long distance from the judge as we know him, a somewhat overworked person who must assure himself of a past event in which two wrangling litigants were concerned and then, within the limits imposed on him by statute and precedent, must make a judgment that will satisfy in a general way the moral standards of his fellow citizens. He is not given to the study of Kant and Hegel, nor to overmuch consideration of philosophy. Have all these theories of justice, the formal formulations, this

revived natural law, this determination of paramount interests, any value for him? I am not sure they have not. There are Kantians and Hegelians in the world who never heard of either Kant or Hegel. Or perhaps it would be more sensible, as well as respectful to say, that there are tendencies in legal decision which, if rationalized and systematized, would fit fairly easily into the systems of legal theory which have in recent times adopted these names. So "public welfare" is Hegel speaking by the lips of Mr. Justice Holmes, and "vested rights" is Kant speaking by the lips of Jessel, Master of the Rolls. In American constitutional law perhaps it was Kant and not Stephen Field who laid a magic finger on the due process clause, and Hegel who countered with the police power. It will not do to suppose that theories which receive their best and most comprehensive development in the hard books of abstract thinkers were not in a vague and inconsistent fashion applied independently by practical persons who have no fondness for abstraction. A great many judges have of themselves noted the inconsistencies of the notion of justice and have groped for a formula that turns out not unlike that of Stammler or of Kohler, or del Vecchio, Radbruch, Kelsen, Gény or Erich Kaufmann.

But their problem—and their problem is in this case also our problem—would not be solved, even if their unsystematic and incoherent efforts had the mathematical unity of a finely interrelated philosophic system. The authors of such systems have not always shown the clearest good sense in their judgments of events. We have seen that Kant's and Hegel's political judgments do not commend themselves unreservedly to our approbation. I wonder whether even zealous Kantians would have accepted their master's judgment on a disputed laundry bill. Natural law—that is justice with changing content—saves philosophic consistency, but without some method of estimating the direction and rapidity of the changes, it will not satisfy the sentiment of justice.

It is well to remember that it is a sentiment. It is strongly charged with emotion. That ought to need no argument to prove. Within the last few years I have heard a number of celebrated cases discussed by members of a learned faculty—the case of Loeb and Leopold, of Hickman, Sacco and Vanzetti, of Sinclair, of Colonel Stewart. In almost every instance what was expressed was a strong emotion, and this emotion was described as a desire for justice. In two of these cases, this desire for justice was a raw vindictiveness scarcely disguised. In the others, it was somewhat more complicated, but in all alike it could be fairly described as a sympathetic identification on

the part of the person judging with some of the persons affected, the families of the victims, the defendants, or their prosecutors. In the oil cases, there was another motive. We were defending our system against the charge that rich men may do with impunity what poor men may not.

If that is the attitude of men whose training in excluding emotion from their intellectual processes is far greater than the average, we cannot expect the generality of the public and the generality of the judges to be very different. Justice as a sentiment will, in most cases, be determined by the same sympathetic identification, not necessarily with either one of the litigants, but with some person or some group involved. Our sense of justice will therefore not be satisfied unless the judge is a person very much like us. He cannot be like us completely, unless he is unlike a great many other people. And since our community is far too heterogeneous to permit the comfortable assumption that our fund of common characteristics will secure an extensive common sentiment of justice, we are not well advised if we make conformity to our sense of justice too prominent an element in our demand on the judge.

But nothing will tempt us to forego it completely. We shall almost certainly continue to increase—very slowly to be sure—the mechanism for making the judge's action scientifically predictable, and we shall also continue to cling desperately to the elements which prevent it from being predictable. If we do so, the problem of which I have spoken—the second problem of the law—is also insoluble. Again it is not a logical impossibility which confronts us, but merely so high a degree of improbability that we can treat it as an impossibility. It is conceivable that an almost complete standardization of the human species may be effected, and with it there will be a standardization of the sense of justice. By that time no doubt the other scientific postulates will have been fulfilled.

I hope the day may be long deferred. An unstandardized and unscientific sense of justice is a high price to pay for liberty—but not too high.