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THE REVIVAL OF NATURAL LAW

by

Roscoe Pound

I

WHAT IS NATURAL LAW?

PHILOSOPHICAL jurisprudence which was all but extinct fifty years ago has revived and taken the lead in the present century. It came under a cloud in the latter part of the nineteenth century, surviving only in Scotland, in Italy, and in the writings of teachers in some Catholic faculties. For the most part, it was swallowed up by the then dominant historical jurisprudence. Stammler's attack upon the method of the historical school in 1888, and Stammler's first book in 1895, taken up by Saleilles in France in 1902, led to a revival of what was called juridical idealism, a revival of philosophical jurisprudence, and as it soon came to be called, a revival of natural law. The important movements of the time in the science of law are social philosophical, deriving from philosophy of law, sociological, deriving ultimately from the positivist sociology, or realist deriving from neo-Kantian epistemology combining with economic or psychological determinism. More recently, sociology has been affected by this philosophical revival. In France, since the first world war a

neo-Thomist foundation has been found for a sociological theory of state and law, and in Spain a sociological theory has been set up on the basis of the encyclical of Leo XIII, deduced by neoscholastic method and attacking equally the neo-Kantian right and the neo-Kantian realist left. Even analytical jurisprudence, which from the beginning had rejected philosophy, and has rigidly excluded the ideal element from law, in its latest form has tied to neo-Kantian epistemology. This reaction from the nineteenth-century rejection of philosophy has gone forward in spite of the first world war and the ideas growing out of post-war disillusionment, in spite of the ideas spread by the Russian revolution, and in spite of the disturbing influence of the present war.

We have learned that entire certainty and objectivity in the judicial process cannot be assured by providing a detailed rule in advance for every case that can arise. We have learned that much has to be left to legal reasoning and that a choice has to be made as between starting points for such reasoning which are of equal authority, often without any legal precept requiring choice of one rather than the other. We have learned that rules cannot be framed with such precision and such exact prevision of all the circumstances to which they will have to be applied that no question will develop as to their meaning. We have learned that many things, with which the legal order has to do, do not admit of rules but must be left to standards admitting of individualized application according to circumstances. But all this does not mean that we have been driven to admit that the judicial process must of necessity be carried on without law — without authoritative guides to decision developed and applied by an authoritative technique. Along with precepts and technique there are received ideals, received pictures of the end or purpose of social control, of an ideal social and legal order adapted to that purpose, and of ideal precepts adapted to maintain the ideal legal order. Choice of starting points for legal reasoning is made in the light of these ideals. They

are decisive of interpretation. They are decisive of the application of legal standards. Even more they furnish a measure of values for determining what interests to recognize, how to delimit recognized interests in view of others which conflict with or overlap them, and how to choose from among the many possible ways of securing an interest when recognized and delimited.

Philosophical jurisprudence has studied the philosophical basis of legal institutions, legal doctrines and legal precepts and sought to reach fundamental principles of universal law through philosophy. Applied to particular systems of law it has sought to organize and formulate their ideal element, that is, the ideas of the end of law, of the ideal social and legal order, and of what legal precepts should be in the light of those ideas, which have been traditionally received and have become no less authoritative than the traditional precepts and technique. Thus philosophical jurisprudence has sought to give us a critique of the positive law, a starting point of juristic development, doctrinal writing, and judicial finding of law, and a guide to lawmaking.

While today the task of philosophical jurisprudence is thought of as the less ambitious one of organizing and criticizing the ideal element in systems of law, in the past it has been thought of as discovery of an ideal body of universal fundamental law of which the positive law of the time and place is declaratory, and to which that positive law ought to be made to conform in detail. This postulated universal fundamental law, reflected immediately in the ideal element in systems of positive law has, since the time of the Roman jurists of the classical era, gone by the name of natural law, natural being used in the sense of antiquity to mean "ideal." Nineteenth-century writers in Continental Europe often used philosophy of law and natural law as synonymous. But they are not so of necessity. Natural law is a presupposition of one type of philosophy of law — the oldest, longest continued, and most persistently enduring type, and the one with the most notable achievements to its credit in legal history.

Although the term and the idea for which it stands go back ultimately to Greek philosophers of social control and came to us in juristic theory by way of Roman law, for our present purpose we may begin with the contact of theologian philosophers and law teachers in the Italian universities of the thirteenth century. Philosophers are confronted with problems of a time and place. They work out solutions. Those solutions are put universally by them or their disciples and become general philosophical doctrines. The principle of Germanic law, that the ruler was bound to act by law, in the phrase attributed to Bracton that the king ruled under God and the law, came in contact with the idea found in the authoritative Roman law books that the state creates law instead of merely recognizing it. Germanic law conceived that law was a quest for the truth and justice of the Creator. The *Corpus Juris* laid down that what the emperor willed had the force of a law. Gierke tells us that this conflict of ideas led men to take up once more the distinction of natural law and positive law which had been dormant after the classical era of Roman law. Positive law was the creature of the sovereign, but all sovereigns were under natural law. Thomas Aquinas made over this philosophical theory to bring it into accord with theology. Natural law had two foundations. Since there were two kinds of truth, revealed truth and discovered truth, the foundations were revelation and reason. Truth was revealed to us directly. It was discovered by us through reason. After the Reformation, Grotius, following the Protestant jurist theologians, considered reason a "sufficient basis," but he admitted the twofold foundation, as indeed authors generally did until the end of the eighteenth century. James Wilson in 1790 so argued in his law lectures in Philadelphia. But from the beginning revelation was unable to contribute much toward the questions of real difficulty with which jurists and judges and lawmakers were confronted. The broad lines on which revelation pronounced were universally admitted. Logical deduction from the broad propositions of universal morals could do but a small part of

the work of guidance of jurist and lawmaker to universally valid principles. Hence in practice natural law, at any rate what I shall presently call positive natural law, has had to rely upon reason. The basis in revelation has stood as an additional ground in such matters, for example, as murder, where reason and revelation are said to concur.

By the last half of the eighteenth century, the separation of natural law from theology, so far as the lawyer-jurists were concerned, was complete in form, as it had been in substance since Grotius. God was merely invoked supplementarily in setting forth a rationalist ideal law. For example, Rutherford, a clerical commentator on Grotius, tells us that laws are of two kinds, voluntary, derived from will, and natural, derived from reason. Voluntary law may be divine (revelation) or human (positive). It will be noted that this takes the revealed commands of God out of the category of natural law and makes them a divine positive law. The law of nature is made up of the precepts which reason (not will) addresses to mankind. As Burlamaqui (written about 1747, published 1774) put it, natural law must be deduced from the nature, that is, the ideal, of man. The aggregate of the principles it prescribed were to be considered as so many laws (*lois*) making up the law (*droit*) of nature. Already the law of nature was getting to be something more than a matter of ideal fundamental principles. It was developing into rules. Also Burlamaqui laid down that the nature of man had three main features, understanding, will, and liberty. Thus natural law was coming by way of reason to the ideal of freedom or liberty which the nineteenth century reached by way of metaphysics. Wolff (1750) founded the obligation of natural law on the "essence and nature of man and of things." This proposition as to the nature of things came from the Roman lawyers in their account of property. The nature of things was the ideal with reference to human use of them. Thus the nature of a horse was not to run wild, but to be used by a man.

To sum up the characteristics of the natural law of the seventeenth century: (1) It rests on reason postulated as something given. By an effort of reason one could identify the ideal precept dictated by reason. As to this, we must bear in mind the practical problem to which the theory was addressed. On the Continent, jurists had to take account of the law of the Glossators and Commentators, postulating the legislative authority of the *Corpus Juris*, and the local feudal or Germanic customary law, postulating the intrinsic authority of custom. In England, there was the common law in the stage of the strict law, postulating a common custom of the realm with intrinsic authority as such. These were out of line with the needs of an age of expanding trade and commerce, opening up of the new world, and exploitation of natural resources newly discovered on every hand. Reason applied to an idealized picture of the society of the time gave a good critique and a good instrument of development of the positive law. It was a good yardstick of growth. So we get a second characteristic: (2) In reality, seventeenth-century juristic thinking finds reason in an ideal of the social order and traditional law of the time and place. Roman law was taken to be embodied reason. This idea persisted into the nineteenth century. English equity adopted the doctrine of the Roman law as to legacies upon impossible or illegal conditions precedent, although the common law employed a different rule for all other cases, and thus equity gave us an anomalous rule, proceeding from a historical accident, which is analytically indefensible but has persisted because it was Roman until some recent codes have abolished it. Again, Lord Westbury advised the student of English equity to "absorb the Pandects." Roman law was also taken to be declaratory of a universal *ius gentium*, a law of nations, so that the precepts of Roman law governing the relations of heads of Roman households with each other and of adjoining Roman landowners could become international law. (3) A third characteristic was identification of law and morals. The social control that ought to be morally, it was held, must

be the law that is. (4) Finally, the natural law of the seventeenth century was both creative and organizing. It was both a means of finding new precepts and of reshaping old ones and a means of organizing what had come down from the past and what was newly found.

In order to understand eighteenth-century natural law we must note certain characteristics of eighteenth-century thought in general. In the latter part of the century, political and legal thought begins to show signs of becoming stagnant. It is true in the last third of the century there was the important creative work of Lord Mansfield in *quasi* contract and in commercial law, under the impetus of natural law. But the movement of the time was toward stability and organization of what had been worked out in the natural-law overhauling of the strict law. Out of this grew the urge for codification on the Continent. Reason was to yield complete and perfect codes, each detail of which was to declare an ideal precept of the law of nature. There is very little in Rutherford's *Institutes of Natural Law* (1754-1756) that is not in Grotius. As compared with Grotius and Pufendorf, there is a greater emphasis on the working out of detailed final rules and less on principles and the philosophical basis of natural law. This is characteristic of the century. One reason for this in Rutherford, however, is that the legislative reform movement was to begin in the next generation and there was need of more detail, for example, in ideal rules as to succession to property. The colonies in America were already trying to make far-reaching statutory changes, and there were foreshadowings of agitation in England. Blackstone's seven canons of inheritance of land are so arbitrary that any thinker upon ideal law was tempted to try his hand at an ideal scheme.

A second characteristic of eighteenth-century thought about natural law is the bringing in of happiness as the basis of the system. This takes us over to Bentham and to the English utilitarians of the next century. All that is lacking

is Bentham's table of pains and pleasures. Third, there is a clear-cut distinction between rules of natural law which oblige and those which do not, foreshadowing the nineteenth-century distinction between positive law and morals. There were held to be moral duties which nature did not make compulsory. They did not admit of being carried out into exact rules. For example, morals called on men to be charitable. But natural law did not prescribe how and when and in what exact way. It is noteworthy, however, that this proposition was confused with legal precepts recognizing or establishing liberties.

Summarily stated there are three characteristics of the natural law of the eighteenth century: (1) It is becoming organizing rather than creative; it seeks to organize the positive law in preparation for codes through an idea that reason dictates a complete ideal body of detailed rules. (2) It insists on natural rights and even sometimes seems to derive natural law from natural rights instead of vice versa. (3) It seeks to find a basis in the nature of things as well as in the nature of man. It is interested in property where the seventeenth century was more interested in contract.

Perhaps the most significant characteristic is the coming in of the idea of happiness and rise of a hedonist natural law. There comes to be a fundamental assumption that the end sought by man is happiness leading to a happiness ethics and utilitarian natural law.

It was a commonplace of the eighteenth-century British school of psychologists that happiness was the greatest possible happiness with the least possible pain. Also the contemporary British writers on moral philosophy (ethics) held that the end of action was happiness. This may be found in Hartley on Man (1749) and in Hume (1750). On the Continent, Helvetius (*De l'esprit*, published 1758) held that all human faculties might be reduced to physical sensation, and that self-interest, founded on love of pleasure and fear of pain was "the spring of judgment, action, and affection."

The phrase "the greatest happiness of the greatest number" came to Bentham (who gave it its modern currency) from Helvetius by way of Beccaria and Priestley.

Beccaria (*Dei delitti e delle pene* — On Crimes and Punishments, 1764, a book of great influence, translated into all the languages of Europe) took the idea and the phrase from Helvetius. He pronounced as the end of lawmaking the greatest happiness of the greatest number and proposed a scale of crimes and a corresponding scale of punishments. Bentham found the phrase in Priestley's *Essay on Government* (1768) and tells us it appealed to him when he read Priestley as a fundamental discovery. Bentham put Hume's theory in Beccaria's formula. Also his table of pains and pleasures was preceded by Hartley and by Beccaria.

After the middle of the eighteenth century, the happiness theory was generally taken up by writers on natural law. Vattel (1758) put a fundamental end of happiness as the starting point. In his *Preliminaires* he puts it thus: "Now in studying the nature of things and of man in particular one can deduce therefrom the end which one ought to follow in order to obtain the most perfect happiness of which he is capable." Rutherford argues that the basis of the general agreement of men as to the main lines of natural law is to be found in happiness. He says it is an undoubted truth that all men are desirous of happiness. Hence: "Whatever rules . . . are by our own nature and the constitution of things made necessary for us to observe in order to be happy, these rules are the laws of our nature." Again, he says: "Though his [i. e. man's] own particular happiness be the end, which the principles of his nature teach him to pursue, yet reason, which is likewise a principle of his nature informs him that he cannot effectually obtain this end without endeavoring to advance the common good of mankind; but must be contented to enjoy his own happiness as a part of the general happiness, or not enjoy it at all." This seems a way of putting what Duguit puts as social interdependence through similar-

ity of interest. But notice how reason now seems to have been pushed into a secondary place. We start from happiness. Reason shows us an obstacle in the path and how to avoid it.

According to Bentham the criterion of lawmaking is utility, that is, ability or tendency to promote happiness. Utilitarianism is a doctrine of utility, i. e. power of producing happiness, as the moral and juristic and legislative yardstick. Something of the sort, under the name of expediency or advantage, may be found also in Grotius. If, however, we compare Grotius and Bentham, we find that Grotius's natural law is not founded on expediency alone. He says that natural law is re-enforced by expediency or advantage. In his *Prolegomena* he put it thus: "Advantage is the occasion of civil law, for the association or subjection [of men in or to politically organized societies] . . . was at first instituted for the sake of some advantage, and accordingly they who prescribe laws for others in doing this aim, or ought to aim, at some advantage." Whewell, in what seems the zeal of a utilitarian to find Bentham's ethics and jurisprudence in Grotius, translates the term translated as "advantage" by "utility." The latter term is a good translation, were it not that in such connections "utility" has acquired a Benthamite connotation which makes the translation misleading.

Although Bentham declaims vigorously against natural law, his theory of legislation is a carrying out of one type of natural-law thinking which developed in the eighteenth century, namely, a hedonist ethical natural law, a system derived from the idea of happiness. For jurisprudence he maintained two principles, or starting points for reasoning, one that every one, as a general proposition was the best judge of his own happiness, and the other that the law ought to extend the sphere and enforce the obligation of contract. For political theory he added a principle that every man was to count for one and no man for more than one. This last principle should be compared with the Hindu doctrine that a Brahmin is entitled to five times as much happiness as other

men, and with Radbruch's idea of a subordinating law as contrasted with a coordinating law which treats all men as equal. Bentham's first book was published in 1776, but his *Theory of Legislation* was published in French in 1820 and first translated in 1830. In the result which he reaches as to the end of law he belongs in the nineteenth century. A disciple gave up philosophy of law in founding English analytical jurisprudence. But utilitarianism had the same rationalist foundation as eighteenth-century natural law and, as has been said, developed one phase of eighteenth-century doctrine.

Kant's *Critique of Pure Reason* struck at the foundation of the rationalist natural law of the seventeenth and eighteenth centuries. As a result, philosophical jurisprudence turned to metaphysics and a metaphysical natural law developed at the very end of the eighteenth century and flourished in the nineteenth century. Since the Greek philosophies of social control, men have sought to find some unchallengeable source of the authority of law. The Middle Ages found it in authority. The seventeenth and eighteenth centuries found it in reason. The nineteenth-century metaphysical jurisprudence found an unchallengeable fundamental datum in the conscious ego. It postulated the impossibility of such an entity's denying itself. The conscious ego could not contradict the one thing it had to admit in all thinking, namely, its own existence. For juristic purposes this was worked out into a basic idea of freedom, an idea of free exercise of one's will. A person was an entity whose will was effective to realize itself. Compare a free man with a slave, with a domestic animal, with a watch. Where reason had been the significant feature of a man, the metaphysical jurists substituted will. Personality, the possession of a will, became the significant idea in juristic theory. If one who has a will cannot exert his will upon things which have no wills and so no liberty to be respected, he is not free. It is involved in the very idea of freedom that material things with no wills are to be

owned. Personality involves liberty and property. Such was the metaphysical juristic creed.

Fichte, in 1796, puts the method thus: A rational being cannot posit himself as such with self-consciousness without positing himself as one among other rational beings who are to themselves what he is to himself. I cannot ascribe to myself all the freedom which I have postulated, since I must find place for other free beings and must ascribe to them the same share which I claim myself. In prescribing my own liberty I also leave freedom for others. Hence the conception of law is the conception of the necessary relations of free beings one to another. As the activities of rational beings conflict, freedom in its ultimate meaning is only possible if activities are restricted within certain limits and the sphere of freedom is equally shared among them. But as we have posited men as free, these limits cannot lie outside of freedom. By reason of freedom itself all must have resolved not to destroy the freedom of those engaged in other activities. Thus we get to the result which the eighteenth century would have called by the name of "social compact" — a logical presupposition of civilized society. The rule of right and law, says Fichte, is limit your freedom through the conception of the freedom of all other persons with whom you come in contact. It gets down to the agreement of the rational being with his own nature. "I must necessarily," he continues, "think of myself in the society of people to whom nature has united me." Here by nature he means not the ideal but the facts of external nature, showing the effect of the rise of the physical and natural sciences. But, he goes on, "I cannot so think of myself without limiting my freedom by their freedom. Otherwise my conduct is inconsistent with my thought and I am inconsistent with myself." Thus the social order is made to rest not upon the intrinsic moral force of a promise or a compact, but on the logical necessity of not contradicting oneself. Law is derived from freedom or liberty by this logical-metaphysical method.

Metaphysical natural law in the nineteenth century has four characteristics: (1) Instead of identifying law and morals it contrasts them. In this respect the metaphysical jurists were anticipated by Thomasius (beginning of the eighteenth century) who insisted on distinguishing law and morals as might have been expected in the codifying tendency of the time which led to an idea of positive law as an authoritatively imposed declaration of natural law by a superior reason and hence to an imperative theory of its obligation. Some have gone so far as to say that metaphysical jurisprudence opposed law and morals. This proceeds on a misunderstanding of Hegelian opposites, which are often contrasts. But something like opposition was furthered by the exclusion of all ideal element in law by the analytical school and the historical school. (2) The metaphysical jurists substituted freedom (liberty) for reason as the fundamental. (3) They made the individual free will the basis of all juristic development and systematizing of the law. (4) They stood for an ethical idealistic interpretation of legal history and so of law. The nineteenth century was the age of history as the two preceding centuries had been the age of reason and the Middle Ages had been the age of authority. It was natural that metaphysical jurisprudence should be affected by history.

In the fore part of the nineteenth century there was a transition from a contractual theory of law to a historical theory. It had been suggested by Blackstone. He conceived of the written law as consented to by representatives in Parliament and so as something which men through their agents had contracted to abide. But he conceived of the unwritten law as made up of immemorial customs, that is, in effect, as resting on a historical basis. This should be compared with Hale in the seventeenth century who thought of the common law as a body of statutes "worn down by time" and a statute as in the nature of a contract. Blackstone was unable to decide whether the unwritten law was binding as declaratory

of natural law, as he suggests in one place, or was binding because of the consent implied in the customary course of popular action, as he suggests in another place. In James Wilson's lectures (1790) the transition has gone further. Consent by a legal transaction (the social compact) is giving way to consent by a custom of popular action. With Kent (1826) natural rights have a historical content and the theoretical basis is in transition from natural law to history. In Story's writings (1833) the transition is complete from a contract basis of rights and contract basis of government to a historical basis confirmed by a constitution which declares natural rights with a historically given content.

A number of types of natural law developed in the last century. In Continental Europe the dominant type was metaphysical ethical. Another type was metaphysical historical. In America, we developed a political type deriving a measure of values and a criterion for making and finding law from the nature of free institutions or of free government or of American institutions, using "nature" in the sense of "ideal." All of these types, however, were affected by the ideas of the metaphysical school.

In the course of the century Hegel's doctrine of reality in the idea, of the inherent power of the idea to unfold or realize itself, and of history as the record of such unfolding, fitted so well with the ideas of the historical jurists that at the end of the century the metaphysical and the historical schools came together. Miller in 1884 wrote: "A positive law in its wider sense may be defined as the expression of the idea involved in the relation of two or more human beings." Lorimer said (1880): "The proximate object of jurisprudence, the object which it seeks as a separate science [i.e. separate from ethical] is liberty. But liberty being the perfect relation between human beings, becomes a means toward the realization of the ultimate object which it has in common with ethics." While philosophical jurists were thinking in this way, Hegelian influence on legal history led the

historical jurists to conceive of the development of law in terms of the unfolding of an idea of liberty, a doctrine which Maine (1860) put concretely as a progress from status to contract — a progress from legal systems in which rights and duties and liabilities attached to or flowed from one's position in society or before the law to systems in which rights and duties and liabilities flow from free exercise of the will, i.e. from willed undertakings, willed relations, willed aggressions and willed culpable conduct. Spencerian positivism arrived at the same result by another route. Spencer argued that the savage was bound by a multitude of tabus and that the progress of civilization had been a continually increasing setting free of the individual to act on his own judgment. Accordingly, he laid down a fundamental "law of equal freedom" substantially the same as Kant's formula of justice and adopted Maine's doctrine of progress from status to contract as affording a basis for finding laws of legal development and a criterion of lawmaking.

To Ahrens (whose *Cours de droit naturel* was one of the most popular books on philosophical jurisprudence of the last century, going through twenty-four editions in eight languages) all rights and all legal principles were to be derived from the idea of personality, as Hegel derived them from the idea of freedom or liberty. But it should be noted that each idea comes down at bottom to the individual free will as the fixed starting point. It followed, as Kant had shown at the beginning of the metaphysical school, that the compulsion exercised by politically organized society must always be justified for each exercise of it. It was *prima facie* wrong. As Beudant put it in 1891, law was at best a necessary evil, since it involved restraint upon liberty and was abstractly incompatible with liberty. It could only be justified where it could be shown to bring about more liberty than it defeated. The idea of justice which obtained throughout the century was put in its final form by Kant at the beginning (1796): "Right and law [one word, *Recht*] compre-

hends the whole of the conditions under which the voluntary action of any one person can be harmonized with the voluntary actions of every other person according to a universal law of freedom." The legal order is a condition, not, as we think today, a regime or process. It is a general condition of a maximum of free individual self-assertion. The problem of law is the reconciling of wills in action not for each case by administrative adjustment on a thory of cases as unique, but by a universal principle permitting of a maximum of freedom. So completely did this idea govern in the last century that Acollas at Paris (1889) and James C. Carter in America (1907 — written 1905) put the matter, the one from a neo-Rousseauist and the other from the historical standpoint, as Hegel did in 1821. Law, says Acollas, is "the aggregate of rules which give rise to the use of social force to coerce the man who encroaches on the liberty of others." The sole function both of law and of legislation, says Carter, is "to secure to each individual the utmost liberty which he can enjoy consistently with the preservation of the like liberty to all others. Liberty . . . is the supreme object. Every abridgment of it demands an excuse, and the only good excuse is the necessity of preserving it. Whatever tends to preserve this is right, all else is wrong." Indeed, Acollas goes so far as to derive solidarity from liberty instead of liberty from solidarity [i.e. social interdependence] as in most recent French discussions of the subject.

Bentham, in reaction from Blackstone, showed the greatest antipathy to natural law. Yet he reached through utilitarianism the same results, as to the end of law and the criterion of lawmaking, as the nineteenth-century natural law. He was so opposed to subjecting the will of one to the will of another otherwise than under the guidance and restraint of "standing laws" that he sought to work out a system of legislative individualization where today we turn to administration.

Such was the course of development of natural law in juristic thinking from the thirteenth to the end of the nineteenth century. But, some of you will have been saying, was everything which has borne that name in juristic writing in truth natural law? Grotius sought to demonstrate natural law both *a priori* and *a posteriori*. He said that proof *a priori* consisted in demonstrating the necessary agreement of a proposition with rational nature — with the rational ideal. Proof *a posteriori* was had by establishing (if not with absolute assurance, at least with probability) something as believed to be part of the law of nature among all nations or among all that are more advanced in civilization. In other words, he identifies the *ius gentium* with *ius naturale* as did some of the Roman jurists. In this we get by one path a natural natural law and by another a positive natural law — that which is so universally established among men or so generally established among them in a time and place that we draw the ideal from it instead of drawing it from the ideal. The one is drawn from outside the law. The other is an idealizing of the institutions, doctrines and precepts of the time and place more or less under the influence of the first.

Grotius says that when men at different times and in different places affirm the same things to be certain it must be referred to some universal cause. It may be that a correct conclusion has been drawn from the ideal. It may be that common consent is behind the agreement. But common consent rests ultimately on nature which holds promises inviolable. The former, he says, “points to the law of nature, the latter to the *ius gentium*” — not the law of nations but the principles or precepts recognized by all civilized peoples. For, he goes on, “whatever cannot be deduced from certain principles by a sure process of reasoning, and yet is clearly observed everywhere, must have its origin in the free will of man,” i.e. in a free assent with the sanction of natural law behind it. It was thus that Grotius could found international law — a law of nations founded on the free will of man in

the form of a *ius gentium* recognized by all civilized peoples. But we cannot fail to note how much of it is a positive natural law. How completely philosophical theories of law are likely to be a putting universally of what the jurist sees in the system of law in which he was trained is illustrated by a remark of Acollas that "law properly so called only considers man in his relations with other men." This is an assumption that the Continental idea of setting off of private law, as the subject of jurisprudence, from public law as a subject of the science of politics, is something necessary and universal. But in our Anglo-American legal system we have from the beginning refused to set off a public law in this way.

It is common to read about rules of natural law. But is it right to do so as to natural natural law? Are we to say "rules" or should we say "principles," i.e. starting points for legal reasoning? Why did seventeenth-century and especially eighteenth-century jurists seek detailed "rules" of natural law? Apparently it was because of the idea of law as an aggregate of laws, an idea drawn from the treatment of the *Corpus Juris* in the universities from the twelfth to the sixteenth century as a body of *leges* — sections of a statute. Thus we got in effect natural natural law, a body of ideals or ideal principles, and positive natural law, a body of ideal rules; really an ideal form of the system of precepts with which the jurist is familiar, that is, in which he was trained. This idea of rules of natural law was general in the eighteenth century. In Wolff (1750) the rule idea has quite superseded the principle idea. He uses *lex, loi* instead of *ius, droit*. In Rutherford (1754) the rules of natural law overshadow their nature. Burlamaqui argues for rules of natural law rather than for a law of nature. He argues that reason shows that men ought to govern their conduct by rules. Rules are a means toward obtaining happiness and are directed by reason. Here rules almost precede reason in the argument. The same idea of a complete body of rules for an ideal legal system was held by the framers of Frederick the Great's

code, by the framers of the eighteenth-century Austrian projects, and by those who drafted the French Civil Code.

Positive natural law of this sort had an unhappy result. It led to faith in a body of rigid, immutable dogmas. Taking an ideal form of the positive law in which jurist or judge or legislator has been trained for a universal, immutable natural law, has had much to do with bringing philosophical jurisprudence and philosophy of law into disrepute, especially in the English-speaking world. The attempt in the eighteenth century to make natural law a body of ideal detailed precepts good for all men in all times and all places was an extreme development of positive natural law. If a body of detailed rules was called natural law it thereby became *ex hypothesi* universal and immutable.

It was the worst feature of positive natural law that it made the principles and institutions of the positive law a critique of that law. Natural law was the basis of the validity of positive law. But this easily came to mean that an ideal form of the positive law was the basis of its validity. Acollas says: "Natural law is identical with ideal law; it is the ideal law in itself, ideal law in all the divisions of the science of law and in all its details. Translated into formulas by competent authority it becomes positive law." This was a characteristic doctrine of the classical law of nature school. All positive law was declaratory of natural, i.e. ideal law. It got its real authority and meaning from the principles of natural law, i.e. from the ideal starting points for legal reasoning, of which it was declaratory. If the lawmaker mistranslated, either the positive law was futile or the court or jurist must correct it. Curiously, Austin argues on this basis in his essay on interpretation. The legislator may fail to declare the natural principle with logical completeness. That calls for extensive interpretation. He may fail to declare it with logical exactness. That calls for restrictive interpretation. Blackstone put the proposition in an extreme form and thus helped to fasten upon us in the last century an idea, urged by the historical

school on another ground, that an ideal form of the traditional common law was the legal order of nature. Partly we must attribute this to the emphasis on stability in the maturity of law in the last century. Already in the latter part of the eighteenth century the creative force of natural law tended to be spent juristically even if not yet in the courts. But while the creative force was becoming spent, natural law thinking was far from at an end. It held its own in American constitutional law for another century at least.

A consequence of natural law thinking was the doctrine of natural rights. These rights according to Grotius and his commentator, Rutherford, were moral qualities of a person, demonstrated by reason, making it just or right for him to have certain things or to do certain things. The eighteenth-century writers worked them out in great detail as did Herbert Spencer as late as 1892. The metaphysical jurists deduced them from the idea of liberty. Kant, however, was cautious. To him, there was only one innate right — “the birthright of freedom.” To use his language: “Freedom is independence of the compulsory will of another, and in so far as it can co-exist with the freedom of all according to a universal law, it is the one sole, original, inborn right belonging to every man by virtue of his humanity.” But it was not difficult to deduce derivative natural rights from the formula of freedom limited by the like freedom of others according to a universal law. This is in effect what Spencer does in his book on Justice. The only result of Kant’s reduction of natural rights to one seems to have been that there has to be a deducing from freedom as to every asserted detailed claim.

In a succeeding lecture I shall speak of the unhappy features of these ideas of natural rights in nineteenth-century American law. But there was a good side to the positive natural law; both the natural law of the formative era from the Revolution to the Civil War and the metaphysical natural law of the era of stability after the Civil War. It called upon us to put our positive law at its best. It was not content with

an analytical doctrine of a body of logically interdependent precepts nor with the historical doctrine of the culmination for the time being of a course of development beginning with some oracular pronouncement in a fourteenth-century Year Book. Even if its critique of the positive law became at the end of the last century too much after the manner of Baron Munchausen's pulling himself out of the swamp by tugging at his own long whiskers, it did preserve some consciousness of an ideal element in a time which was rejecting all ideals and taking what is called "the law that is" or "pure fact of law" as self-sufficient. It did furnish guidance in the choice of principles and analogies. It did guide interpretation and the application of standards. If we feel that in the last two decades of the nineteenth century it often guided into a wrong path, yet it was the path of the thought of the time which without guidance would have been likely to have been taken blunderingly or, if not, for a season there might have been an unguided groping which would have impaired the legal order grievously.

There is a task of positive natural law, or of something like it, even if in achieving the task it must proceed with more caution than in the past and must not over-confidently identify itself with a postulated eternal, immutable, universal natural natural law.

II

REASON AND FORCE

In the *Cyropaedia* Cyrus who was at school in training to become King, gives an account of his last lesson. We are told that one of the boys in the school, who had a coat too small for him, gave it to one of his companions smaller than himself and forcibly took in exchange the latter's coat which was too large. The preceptor made Cyrus judge of the resulting dispute and he decided that the matter should be left as it was since both parties seemed to be better accommodated than before. Upon this the preceptor pointed out to

Cyrus that he had been wrong for he had been satisfied with considering the temporary convenience of the thing, whereas he ought first to have considered the justice of it.

Cyrus's decision was a characteristic offhand decision of justice administered by the king in person. It was simply a crude bit of social engineering. It sacrificed more than it secured. It was obviously expedient that each boy should have a good fit. But Cyrus did not take the trouble to look deeper and see what other claims than the claim of the larger boy to a larger coat might be involved. Hence he ignored the interest of the smaller boy in his personality, his claim to be secure in his dignity and sensibilities, his claim as a human being that his will should not be subjected arbitrarily to the will of his larger schoolmate, and the claim of the smaller boy to hold his coat, rightfully acquired, till he could grow into it. Even more Cyrus ignored the interest of society in the general security and the interest of society that everyone be able to live a truly human life and to that end that his person and his will be respected. Perhaps a judge might have had formulas at hand that would have led him instantly to a better bit of social engineering. But the common sense of an experienced magistrate might have led him to a better decision also, and thus the result would have been reached without consciousness of the census of interests and the weighing and valuing of interests by which the sound decision is to be justified.

Here we have the conflict of reason and force which underlies the whole conception of natural law.

Cyrus as a prince had behind him the force of politically organized society. He could employ force to adjust the relations and order the conduct of his schoolmates. What more was needed? Was his command of force self-sufficient? Or indeed, must there be reason behind the exercise of force, guiding its application according to some rational pattern? Does the political organization of society, on the one hand, involve only force, or, if it is convenient to have rules

for the exercise of force, do those rules simply represent the will of those who exercise the power of the society for the time being, or, on the other hand, not only is the exercise of force guided and to be guided by rules but do those rules represent experience developed by reason and reason tested by experience?

It is not, undoubtedly, that we may dispense with force. Only the extreme philosophical anarchists of the last century expected to bring about that. In the world as it is, reason must be backed by force even if force must be tempered and directed by reason.

There was a time when men believed in capricious gods, who used lightning and tempest and pestilence angrily and arbitrarily. When Apollo was angered at Agamemnon for the affront offered to Apollo's priest, he smote a whole army with a plague. Indeed, primitive men lived in constant fear of their gods; and, as their gods clearly enough were imagined in the image of themselves, it is manifest that their conception of power was one of something to be exercised impulsively, off-hand, and to no reasoned measure. But men came to see that there was an order in the universe. The orderly succession of day and night, the orderly and predictable return of the seasons, the orderly and predictable phases of the moon and appearance and reappearance of the planets, in short, the predictability of the operations of nature — as a Greek philosopher put it, that fire burns and water flows and the sun rises and sets in Persia, in Greece, and at Carthage — showed that the physical universe, at any rate, was subject to an orderly rule. The physical order was a rational one. As St. Thomas Aquinas put it, there was a *lex aeterna*, the reason of the divine wisdom governing the universe.

Then, too, in time men became conscious of a moral order to the same predictable pattern. The conduct of the righteous man is orderly and predictable. He is constant in all his relations, domestic, social, business, and political. We know today what his conduct will be tomorrow. His word is as good

as his bond. It is not necessary to resort to force in order to secure fulfillment of his promises. We say he is reliable. We know we can rely upon his making good the reasonable expectations he creates. We say he is trustworthy. We can repose confidence in his conforming to principles of action. On the other hand, we say of the unrighteous man that he is unprincipled. His conduct is not governed by rational precepts. He is unreliable. We cannot be sure today what he will do tomorrow. He is untrustworthy. We cannot safely repose confidence in his course of conduct. He is not constant in his domestic or social or business or political relations.

Thus there seemed to be a moral order, analogous to the physical order; and here men got the idea of law as something different from laws, which might be mere arbitrary commands. The Psalmist saw this. As he reflected on the regularity and predictability of the physical order and the regularity of the moral order, he exclaimed in a magnificent passage in the psalm De Profundis "*propter legem tuam sustinui te Domine*" — because of thy law have I abided Thee, O Lord. The Greek philosophers of social control saw this also. The practical problem with which they were confronted was how to promote stability in the Greek city-state, perennially torn by the struggle between the demos and the oligarchies. If the force of politically organized society was self-sufficient, if it was nothing but a question of who wielded that force for the time being and of his ideas for the moment of self-interest or whatever appealed to him as a motive, there was nothing to mitigate the struggle by which Greek political life was vexed until the regime of city-states collapsed. But the philosophers saw the way out in law. The political order and the legal order were to be patterned to the physical order and the moral order. The justice which those who exercised the force of the state administered was to be administered to a rational plan. It was to be administered to the measure of an ideal. As they put it, there was a just by nature, that is by the ideal, and not simply a just by

convention and enactment. From that time until the present century this analogy of law as the order of the physical universe has been a mainstay of philosophical jurisprudence.

But there have always been those who denied that there was any ideal plan behind the exercise of social control by those who wield the power of a politically organized society. To put the matter in the Greek phrase, they hold that there is no such thing as the just by nature. They insist that justice as a regime is wholly a matter of convention or enactment. Ever since the Greek philosophers of the fifth century before Christ began to think out theories of social control, some have put the whole emphasis upon reason or an ideal plan discoverable by reason while others have denied that there was any such ideal plan and have put the whole emphasis upon force. Socrates is reported to have said that law was the finding out of reality. It was the discovery of the true plan to which men's relations were to be adjusted and their conduct was to be ordered. It was, as one might say, law by nature, using nature in the Greek philosophical sense of the ideal. The Sophists, on the other hand, said there was in reality no conformity to any such ideal plan. Men came to do certain things and not to do certain other things by habit or custom, very likely because they thought some things were approved by capricious gods and other things offended those gods, and came by enactment to require some things and prohibit others, either on the same superstitious basis or because some command or prohibition suited the self-interest of those who had the power of commanding and prohibiting and of enforcing their commands.

Homer spoke of the chiefs in heroic Greece, the military and political leaders of politically organized societies, as shepherds of the people, and the idea of the shepherd protecting the sheep was continually invoked in antiquity. *Dominus regit me*, the Lord shepherds me, said the Psalmist. Yes, said the Sophist Thrasymachus, but the shepherd protects the sheep in order to shear them for wool and slaughter

them for mutton. In the same way, he said, the king shepherds his people in order to exploit them for his own purposes.

From that time we have the contrast in legal and political thinking between law and laws; between, on the one hand, a legal order in which relations are adjusted and conduct is ordered by a reasoned systematic and orderly application of the force of a politically organized society and, on the other hand, rules imposed by way of command which have validity because they are commanded, or even ordering of conduct without rules at the will of officials. As it has been put in this country today, law is neither a regime of systematic application of force to achieve justice nor an aggregate of laws. It is simply whatever is done officially in the exercise of the force of a politically organized society.

By Cicero's time the old customary law of the city of Rome, the Roman strict law, was coming to be inadequate to what was becoming a world state where there had been a city state. Sextus Aelius had set forth the old strict law in his *Tripertita*. But, said Cicero, we don't need any Sextus Aelius, any jurisconsult steeped in the old tradition, to teach us universal principles — principles of adjusting relations and ordering conduct which must be the same in Rome and at Athens. If there was the strict law of the old Roman city, there was also the law of nature, the ideal law of the civilized world. To the classical Roman jurists, law was what is right and just backed by the force of the state. It was moral authority backed by political authority; an idea which has persisted in the languages of Continental Europe among the people which have taken their law from Rome.

In the later Middle Ages, the universities taught the *Corpus Juris Civilis* as the law of Christendom, thinking of it as a body of legislation resting on the authority of an emperor whose will had the force of a statute. The seventeenth and eighteenth centuries, on the other hand, thought

of a natural law, resting on the authority of reason, as behind and above this positive law and declared by it.

Today we have the same contest between what are at bottom various forms of the same ideas. Different social philosophical or neo-idealist theories of law see a plan behind the legal order. The social utilitarians see social advantage, not class or individual advantage, much less arbitrary command or power of enforcement without guidance or direction by reason. The right wing neo-Kantians find the plan in the ideals of an epoch. If we cannot have an eternal, immutable, universal natural law, at any rate we can have a natural law, that is, an ideal law, with a changing or growing content. We can have, as they see it, a natural law which gives us an ideal plan to bring out the best of the positive law, which yet can change and grow as the social order changes and grows. The neo-Hegelians find such a plan in the jural postulates of the civilization of the time and place. They seek to formulate the presuppositions of civilized life in the time and place. For example, it is a presupposition of life in the civilized world of today that others will not commit intentional aggressions upon us. It is not necessary for us to go about armed to resist attack, to keep below the sky line for fear enemies will discover us, or to make a wide detour around the corner of a street lest a lurking assassin assail us. It is a presupposition that we may assume that others with whom we deal in the everyday intercourse of society will make good the reasonable expectations which their promises or conduct create. The economic order rests upon this presupposition. Credit, confidence in the good faith of those with whom we enter into transactions, is behind every significant institution and operation of business and industrial activity. Division of labor is possible because we may rely upon others to carry out the undertakings that permit us to devote ourselves to some specialized activity which is dependent upon other specialized activities of our fellow men. Again, it is a presupposition of life in civilized society today that we may

control for beneficial purposes what we have discovered and appropriated, what we have created by our own labor, and what we have acquired under the existing social and economic order. Subject to some limitations it is assumed that we may possess these things and hold, and if need be, reclaim possession of them, that we may exclude others from use of them, that we may dispose of them or of the use of them to others, that we may use them as we like, and that we may enjoy and dispose of their fruits. Likewise it is a presupposition that others who are acting or are maintaining things will do so with due care so as not to cast an unreasonable risk of injury upon us. We may go about our lawful occasions day by day in an assured confidence that, at any rate, we shall only have to encounter a minimum of risk from the negligence of others. Effect is given to these jural postulates by legal precepts requiring reparation of injury caused by acts which on their face are injurious to others unless they can be justified by reference to some other jural postulate, by legal precepts enforcing performance of undertakings and dealing in good faith, by legal precepts securing possession, recognizing transfers and protecting liberties of using and enjoying property, and by laying down standards of conduct from which men depart at peril of liability for resulting damage. It may be conceded that these jural postulates are reached by scrutiny of the body of legal precepts which obtain among civilized peoples today. In that respect they give us a positive natural law. But they give us a program for criticizing and developing that body of precepts. They give us a program of positive natural law drawn to one of natural law yet claiming no more than to reflect the civilization of the time and place.

Or, to take a different line, the neo-scholastics by subjecting social life as a moral phenomenon to the scrutiny of reason find certain starting points for reasoning about the adjustment of relations and ordering of conduct which may be regarded as given us (as *donnés*) as bases of criticism,

of lawmaking, and of interpretation and application of precepts. When carried into detail they may give us something not very different from the neo-Kantian ideals of the epoch or the neo-Helegian jural postulates of the time and place or even as the social utilitarian social advantage. In each case we get a positive natural law because if, as Thomas Aquinas would tell us, we are seeking discovered truth through reason, yet the discovery is limited by the materials of the civilization whose institutions and presuppositions and ideals we scrutinize. But it is a natural law. It gives us an ideal, a picture of the social order and so of the legal order as it ought to be, toward which we may strive to make the body of authoritative precepts more effective for what are pointed out as the ends of social control.

Thus far we have been proceeding in the line of Socrates. In contrast today, however, and with a mouth speaking great things, there is realism, as it boastfully calls itself, not the philosophical realism with which the medieval philosopher made us familiar, but a neo-realism, as Mr. Justice Cardozo called it, developed in the line and keeping up the tradition of the Sophists. It denies that there is law in the sense in which jurists had used and understood that term from the days of the classical Roman jurists. It seeks to appropriate the good will of that name to a theory which puts the emphasis upon force, that rejects reason, and regards whatever is done by officials as law because it is done officially.

From the twelfth to the sixteenth or even to the seventeenth century, jurists, as in antiquity, had held to an ideal of the legal order as having for its end an orderly maintenance of the social *status quo*. Not only was this ideal set forth in the books which the later Middle Ages held authoritative, it accorded thoroughly with the inner order of the relationally organized society of the time. The breakdown of relational organization, the rise of a society of individuals engaged in free competitive self-assertion, the discovery of the new world and consequent era of adventurous exploita-

tion of natural resources and development of new lands were followed by a juristic ideal of a legal order having for its end the promotion and maintenance of a maximum of free individual self-assertion. Security, which had been thought of in terms of security of social institutions, came to be thought of as security of individual freedom. Both in the Middle Ages and from the seventeenth to the nineteenth century, maintenance of the general security was taken to be something involved in the very idea of law. In the nineteenth century it was developed into a scheme of individual rights. What we now regard as other social interests, were put as policies by which exercise and enforcement of individual rights were to some extent limited or guided. But these policies were taken to be on a distinctly lower plane. Moreover, the general security was thought of in the last century chiefly in terms of security of acquisitions and security of transactions.

As there came to be no more great areas open to discovery and settlement, as adventurous exploitation of natural resources ceased to be generally possible, as science and invention made it possible to maintain large populations in smaller areas, the rise of great urban industrial centers raised new problems of individual life. New demands came to be made upon politically organized society of which the legal order had to take account. Accordingly, the center of juristic thought gradually shifted from the social interest in the security of acquisitions and the security of transactions to the social interest in the individual life. More and more legislation and judicial decision and juristic thinking became concerned not merely with security of individual free self-assertion against aggression or imposition of unreasonable risks, or disappointment of reasonable expectations of economic advantage or restrictions upon spontaneous initiative, but above all with securing to each human being opportunities, physical, mental, social, economic, and political, and securing to each fair or even equal conditions of life. This rise to

paramountcy of the social interest in the moral and social life — one might even say the human life — of the concrete individual man, resulting in the movement which we speak of as the socialization of law, has of necessity profoundly affected both of the two lines of juristic thought which we have seen from the beginning — the line of Socrates and the line of the Sophists. In the line of Socrates it has led to the different types of social philosophical jurisprudence spoken of above, replacing the metaphysical and historical jurisprudence of the last century. In the line of the Sophists it has led to the different types of self-styled realism which are so vocal in the political and juristic writing of the time.

Reaction from the metaphysical and historical jurisprudence of the last century led, in the latter part of that century and the fore part of the present century, to three movements in juristic thought, represented today by three fairly distinguishable schools. Out of the metaphysical school and the metaphysical type of historical school there grew a social philosophical school. Out of the influence of the rising science of sociology upon historical jurisprudence there grew a sociological school. Out of the influence of economics and psychology and neo-Kantian relativism upon analytical jurisprudence there grew the realist schools.

Ultimately the so-called realist theories of today derive from the economic interpretation of history urged by Karl Marx. When he put forth his critique of political economy, in 1859, the Hegelian philosophy of history was dominant. Reality was in the idea. For the social sciences the significant phase of the idea was liberty. History was the record of the unfolding or realizing of that idea in the evolution of civilization. This idealistic interpretation was applied to legal history. Legal history was the record of the unfolding, by an inherent power of self-realization, of the idea of liberty in legal institutions, legal precepts, and legal doctrines. Conscious lawmaking by legislation was futile. Laws were restrictions upon liberty and so were at bottom an evil even if a

necessary evil. A law could only be justified by showing that it would promote liberty by resulting in more abstract liberty than it defeated. In one way and another all the schools of philosophical jurisprudence came to this result. Marx's philosophical starting point was Hegelian. He assumed that reality, i.e. significance, was in an idea, but he identified the idea differently. History was not the record of the unfolding of an ethical idea of right or a political idea of freedom. It was a record of the unfolding of an economic idea of the satisfaction of material human wants. For a generation this economic interpretation of history attracted little or no notice. But in the last decade of the nineteenth century it took hold in Continental Europe and in the first decade of the present century it came to America. In jurisprudence it took the form of what is called economic determinism.

That much legislative lawmaking is shaped by pressure of classes or groups exercising political control is evident at once. It is not to be doubted either that the ideal element in law — the positive natural law of the time and place — will be shaped in the long run by the conception of justice, the idea of the end of law, entertained by a politically dominant class. There is abundant proof of this in legal history. But while laws may and frequently do express group or class pressure of the moment, law, which is a taught tradition of experience of adjusting relations and ordering conduct, put in order by jurists and teachers and developed by reason, has always been resistant to pressure of self-interest contrary to the traditional ideals of justice and at variance with principles derived therefrom. Juristic economic determinism quite ignores this check upon group or class economic self-assertion. It teaches that every item of judicial and administrative action, every item of juristic shaping of the taught tradition, is a necessary, an inevitable result of the self-interest of a dominant social and economic class.

One could devote a whole series of lectures to showing how completely this exclusive interpretation of all the phe-

nomena of the legal order, all the precepts in the body of authoritative grounds of or guides to judicial determination, all the single items of the judicial process have behind them as their one sole cause and determining force the economic self-interest of a dominant class. On the contrary, an outstanding phenomenon in legal history is the extent and steadfastness with which positive natural law, seeking a higher end, has resisted the pressure of groups and classes in power.

A single but very significant example must suffice. Those who have urged an extreme economic interpretation have put the business man, using the term in a large sense to include those of our population engaged in great operations of commerce and industry, as the dominant economic class in America in the last quarter of the nineteenth century. No part of the law was of such vital interest to this class as the law of corporations. Every large-scale operation of commerce and industry came to be carried on through incorporated enterprises. The corporation was *par excellence* the business device of the time. If any branch of the law would respond fully and at once to the demands of a dominant economic class it certainly should have been the law of corporations. But when we look into that branch of the law, as developed by the courts and expounded by the jurists of nineteenth-century America, we see at once that it was governed not by the idea of a business device to be made to serve the wants and achieve the purposes of the leaders of commerce and of industry but rather by an older idea of a state-granted monopoly or of an entity existing in the Middle Ages by Papal charter or royal charter or immemorial custom, of which the king and so today the state must be jealous, which the courts must be vigilant to keep narrowly within their granted or customary powers. So far has this attitude been carried that a corporation formed to build and rent a great office building in one of our largest cities was ousted of its franchise after the building had been built because under its statutory

charter a corporation could only own land to the extent of the needs of its primary business. It could not make the owning of land its business. Every grievance of the American laborer against American law of the last century can be matched by quite as real a grievance of the American business man. In each case, demands of an insistent class which went beyond the received ideal of justice met with obstinate resistance.

There is an element of truth in the economic interpretation which is not to be ignored. It has done a real service in the science of law when not pushed to extravagant lengths. What we are concerned with here, however, is the founding of the whole structure of juristic theory upon such a foundation. It cannot be wise social engineering to teach courts and administrative agencies and legislators and jurists that all they can do and hence all they need try to do is to formulate the self-interest of a dominant class.

If the first type of juristic realism, namely, economic determinism, rejects experience and would substitute class self-interest, the second type, in chronological order of development, namely, psychological realism, rejects reason. The rise of psychology in the present century could not but affect the social sciences profoundly. The psychological sociology urged by Ward at the beginning of the present century set the science of society in a new path and made itself felt in the rapid development of sociological jurisprudence in the last generation. But the influence which carried forward the type of realism which had its origin in Marx's theory of legal history was Freudian psychology. In the nineteenth century, by way of reaction from the rationalist natural law of the seventeenth and eighteenth centuries, reason had been reduced to a subordinate place in juristic thought. The metaphysical school put liberty in the first place. Hence reason, which restrained the free action of the will could not be at the foundation of jurisprudence. Yet it served to restrain certain free action in the interest of a greater total

of free action and so had its place. So, too, the historical school saw the idea of freedom realizing itself in experience and rejected reason as a basis. As Mr. Justice Holmes put it, expressing the doctrine as Savigny might have done, "the life of the law has not been reason, it has been experience." Nevertheless, the historical jurist had no doubt that what was made manifest in experience was then systematized and developed and applied through reason. Reason still stood over against arbitrary force as securing liberty or as formulating and determining the application of what had been learned through experience of adjusting relations and ordering conduct. Freudian psychology struck a heavier blow at reason. It found the true motivation of human behavior in the wish. Men did what they wished to do and then, wishing to appear rational and to seem to be governed by reason and to adhere to principle, realized that wish by conjuring up specious reasons after the event and persuading themselves that their action had proceeded from the reasons or had been directed by the principle. It cannot be denied that here was a significant discovery. Deep-seated, subconscious or unconscious wishes play a significant role in men's behavior. But it is exactly because of this that law is needed to hold down these wishes and prevent them, so far as possible, from shaping the action of those who wield the power of politically organized society. As we look at the history of civilization the significant thing is, not that the Freudian wish does explain much of official behavior, but that law in the sense of the body of authoritative guides to decision has achieved so much in the way of a check. Psychological realism, however, looks only at one side of the matter and reaches a dogmatic general conclusion. It conceives that it is impossible in the psychological nature of man to have objective or impartial determinations. The wishes down at the bottom of each of us — what, I suspect, the Puritan would have called original sin — are the true explanation of judicial and administrative action, no less than of the conduct they order and regulate, and dictate legislation and

juristic thought. Then the judicial or administrative or legislative or juristic wish to appear rational is satisfied by conjuring up pretended reasons in the authority of law or of a constitution or of a system of juristic principles. Here, again, we have the invitation to those who exercise the power of political society to give up all thought of objectivity and impartiality. Such ends are impossible of achievement. Then why vainly strive for them or foolishly deceive ourselves into thinking we are seeking them? The wish will determine what is done, so why not let it operate with no hypocritical pretence of objective and impartial determination according to law. Indeed, it has been urged in defense of administrative action without hearing both sides that administrative agencies (perhaps in expressing the self-interest of a dominant class) have sometimes been set up to be unfair. The Sophists would have accepted this teaching as their own.

American juristic realism, or neo-realism, as Mr. Justice Cardozo styled it, has culminated in a skeptical relativism in which economic determinism and psychological realism have joined to them neo-Kantian epistemology and Einsteinian relativist physics. The one, as developed juristically, throws out all consideration of what ought to be. There can be no relation of law and morals. Law, morals, and justice cannot be reconciled. Each, when developed logically, negates the other two. We cannot demonstrate any ought-to-be behind legal precepts and so are left to postulate an ultimate political power and to rest our whole legal edifice thereon. The other, as applied to juristic theory by analogy, throws out all system and order and connection among legal precepts or items of judicial or of administrative action. Each precept is an example of exercise of a power of command and stands by itself. Each determination is a unique exercise of a power of adjusting relations and ordering conduct, growing out of its unique circumstances and independent of any antecedent principle. There are varying degrees of approach to this extreme by those who profess the neo-realistic doc-

trine. But at least one recent writer has not hesitated to go so far and, at any rate, entire separation of law and morals, a cult of the single rule, and cult of the individual case, are more or less general and characteristic. Thus we are back again to the doctrine of the Sophists. Law and right and justice are not matters of ideal. They are matters of enactment or of what is coming to take its place in the government of today, administrative orders.

One need have no quarrel with Kant's theory of knowledge and yet refuse to go to the extreme of the juristic skepticism of the neo-Kantian left. Granted that we do not know the world outside of us exactly as it is, but know rather each of us a mental creation of his own made of his own perceptions and his own experience, yet our perceptions and experiences are sufficiently alike, especially with generations of civilized life behind us, so that, if we do not believe truth may be discovered by reason, we may admit likeness enough in the general picture or mental creation of civilized society and a moral life, however derived, which is more significant and so more real than individual differences of detail. So it is, too, as to Einsteinian physics. It is true nothing has been so upsetting to political and juristic thinking as the growth of the idea of contingency in physics. It has taken away the analogy from which philosophers had reached the very idea of law. The idea of chance as having a place in the phenomena of physical nature, the idea of jumps and breaks in these phenomena instead of the orderly sequence of cause and effect and inexorably operating laws which had governed in physics down to the present century, had a bewildering effect. But physicists tell me that thinkers in the social sciences are more disturbed by these ideas than they are. Physicists are by no means ready to give up law and order in the universe. Perhaps here also our juristic realists carry things too far. They are skeptical of everything but their own skepticism. They think of everything as relative except relativity.

In Continental Europe juristic realism has taken the form of phenomenalism. Reality in the social sciences is to be found in phenomena. The phenomena of the social and political order, and so of the legal order, have their sufficient explanation in their own phenomenality. We do not need to look for connections or underlying principles or ideas. A truly scientific attitude requires us to confine ourselves to discovering what the phenomena are. All consideration of what they ought to be is unscientific and to be avoided. It is futile to criticize the operations of nature. They are phenomena, to be accepted as such. When Margaret Fuller wrote, "I accept the universe," Carlyle, hearing of it, exclaimed, "my God, I should think she might." In the same way, we must accept the phenomena of official behavior. It would be most convenient for human purposes of the calendar if a month could consist of exactly four weeks of exactly seven days of exactly twenty-four hours each, and the year could consist of exactly twelve such months, with no inconvenient extra days or extra hours. But the phases of the moon and the revolutions of the earth around the sun are otherwise arranged and we must take them as they are. So it is, as the phenomenalist thinks, with the phenomena of politically organized society. We cannot ascribe praise and blame, attribute goodness or badness, to the phases of the moon or revolution of the earth. It is equally unscientific to ascribe praise and blame to the phenomena of government. Good and bad, right and wrong, are only subjective opinions of no scientific value. Such qualifyings of phenomena are out of place in scientific thought. Law is no more than what is done officially, and qualifyings of it as in accord or not in accord with the individual opinion of the observer belong to the unscientific past. Such teaching is eminently suited to the rise of political absolutism throughout the world and must be satisfactory to autocrats and dictators. But here again an analogy has been pushed too far. If criticism is out of place in the natural sciences, it is the purpose of the social sciences to find the materials and work out the

method of criticism. We do not doubt that a man by taking thought cannot add a cubit to his physical stature. But men by taking thought have in the history of civilization added many cubits to their moral stature — and that is what we are talking about in the social sciences.

As a result of these sorts of thinking styling themselves realism, there is now a widespread teaching of the disappearance of law. Marx held that law was a product of class organized society, something required by property and trade and commerce, which would disappear in the society of the future when property was abolished and trade and commerce went with it. In such a society there would be no classes and hence no law would be called for to keep one in subjection to another. Today law is thought of by many as a hindrance to effective government which is to bring about a maximum satisfaction of material human wants. Hence with the development of efficient administration law, in any other sense than whatever is done officially, is to disappear. This idea goes along with the rise of absolute government throughout the world. To autocrats and dictators law is anathema. To them, it is unthinkable that those who exercise the power of a politically organized society are to rule, as the medieval lawyer put it, under God and the law. Indeed, a leading realist of today tells us that a democracy in the very nature of things must be an absolute democracy. Constitutional limitations and laws imposing checks upon officials are superstition. They are myths or pious wishes. A constitutional democracy, such as we have deceived ourselves we have been living under for a century and a half, is a contradiction in terms.

What is put in place of law by those who would have it disappear in a society set free from political and legal superstition? In the last century the philosophical anarchists, who would reject law because it involved force, sought a regime of voluntary agreement between man and man. They carried the abstract individualism of the time to an extreme and

called for leaving all adjustment of relations to free arrangement between those concerned. As the legal order leaves much freedom to men to determine their relations by contracts and settlements of trusts and conveyances and wills, so it should let them make their own law for themselves by agreement as each conflict or overlapping of interest arises. But the whole movement in political thought has been away from the idea of a minimum of government and maximum of individual free self-assertion which this doctrine presupposes. Moreover it postulates the inviolability of promises and agreements. It rejects Hobbes's proposition that covenants without the sword are of no avail. In the realist theory of contract a promise is a prediction. Put realistically, a promissory note would read: "For value received I predict that ninety days after date I shall be willing and able to pay John Doe or order five hundred dollars." When men are thinking thus, no more is heard of philosophical anarchy.

Another substitute for law, preached by the late juristic adviser of the Soviet government in Russia, may be called administrative absolutism. There is to be no law, or rather only one rule of law, namely, that there are no laws but only administrative ordinances and orders. This doctrine has been urged throughout the world with the rise of absolute governments and has been making headway in the English-speaking world with the rise of administrative agencies controlling every form of enterprise and activity. As urged by its Russian advocate, it proceeds on a fallacious assumption that all controversies arise from ownership. But even if ownership is done away with, there may still be controversies over possession. Every one can't use everything he wants to use exactly when and where he may want to use it. Any lawyer who has seen what happens when two or three farmer neighbors own a threshing machine in common can picture the controversies which can arise when all things are owned in common. Nor can all injuries to personality be attributed to disputes over ownership. Assault and defamation may arise

from hatred, envy, or malice growing out of athletic or literary or even scientific rivalry. Moreover, we must not overlook human resentment of arbitrary subjection of one will to the will of another. It is significant that the Russian jurist who urged a regime of administrative orders is no longer with us. He was eliminated in the "purge" a few years since. If there had been law at hand, and not merely administrative orders, he might have lost only his job and not his life as well.

A different substitute has been urged in Italy and was for a time much preached in some Latin countries. In the corporative state the unit is not to be the individual human being, the moral unit whom natural law made into the legal unit. The unit is to be the occupational group. Economic realism rejects morals as a superstition. Hence the unit must be economic, not moral. The goal is said to be an adjustment of relations with respect to each case as it arises, as something unique, by a committee of the occupational group, where the parties are of the same group, or by a general committee in which all groups are represented, where the parties are of different groups. Such a regime has been often promised but has not as yet been put in effect. I suspect it proceeds on a fallacious assumption that we are all of us for every purpose and once and for all in some one group and that economic. To make but one suggestion, religious groups have shown the greatest endurance in social history. Men will fight for their beliefs no less than for their pocket books.

Finally, generally in Continental Europe and increasingly in the English-speaking world, where it is an exotic, jurists are urging a regime of "subordinating law" — to replace what we have known as law and is to be called "coordinating law." Public law is to be a regime which subordinates the individual to the official instead of treating them as each subject to the law of the land, as our Anglo-American law has done; and does this so that the official may subordinate the interests of some to those of others instead of treating

all men as equal before the law, as "coordinating law" sought to do in the past. Force is to be used to a plan of preferring some to others in an autocratic polity, supposedly somehow for the general good, which the official, or the head of the hierarchy of officials, knows better than any one else. Often this is preached in the name of science. The official, as a scientific expert, understands our real needs and wants better than we do ourselves. In such a theory there are no individual rights. Laws are threats. Rights are an illegitimate inference from the threats made by those who exercise the authority of a politically organized society. I claim my watch because the "coordinating law" has taught me to claim it. Perhaps one might ask whether labor unions recently claimed to conduct a sit-down strike because the law had taught them to, or whether having claimed this independently of law the legal order had then to do something about the claim?

What do we come to as a result of such a discussion? Are we not saying over again in different ways what men have been saying since Socrates and the Sophists differed as between ideal and force? I submit that law has proved itself in the history of civilization; that it has an element of precept and technique and one of received ideals, representing immediately reason applied to what experience has shown to be workable adjustments of relations and orderings of conduct; and that the whole history of civilization is one of increasing subjection of conduct, both of rulers and of ruled to reason, even if in the case of the ruled reason is backed by force. The ideal element gives life to the precept element and enables law to bring about a regime of justice. It gives us the distinction between law and laws.

III

NATURAL LAW IN LEGAL HISTORY

This is a large subject. It is large enough for a course of lectures in itself. One might speak of the achievements of

natural law in the classical era of Roman law. He might speak of it in the liberalizing and modernizing of the civil law in the seventeenth and eighteenth centuries. He might speak of it in the liberalizing and modernizing of our common law in the development of equity and the absorption of the law merchant. He might speak of it in its great achievement, the founding and development of international law. Each of these subjects calls for a lecture, if not for a book. Something must be left out. Hence I shall confine myself to what chiefly interests us in the United States today, namely, natural law in Anglo-American legal history.

Theories of natural law are important in American legal history and in American law of today for no less than four reasons: (1) Natural law is the philosophical theory of our bills of rights. (2) It was a force of the first moment in the formative era of our law. (3) It persisted in American law books well into the latter half of the nineteenth century. (4) As a theory of natural rights it played a decisive role in American decisions with respect to the constitutionality of social legislation down to the second decade of the present century.

In the history of natural law in relation to the effect of the doctrine upon positive legal precepts and institutions, two aspects have to be noted. On the one hand, natural law has operated as a guarantee of stability. On the other hand, it has operated as an instrument of change. Law governs life and the essence of life is change in continuous adaptation to a changing environment. But the economic order calls for stability. Hence achieving and maintaining a balance of stability and change is one of the chief problems of the legal order. Because of the need of change there is a perennial need of a critique of the body of authoritative legal precepts of the time and place. Because of the need of stability change in law must have a guide. A force to bring about change is needed. But there is no less need of a directing force in car-

rying out change. Men have assumed to find such a force in reason and have called reason applied to this problem natural law.

Classical natural law in the seventeenth and eighteenth centuries had three postulates. One was natural rights, qualities of the ideal or perfect man in a state of perfection by virtue of which he ought to have certain things or be able to do certain things. These were a guarantee of stability because the natural rights were taken to be immutable and inalienable. (2) The social compact, a postulated contract basis of civil society. Here was a guide to change. (3) An ideal law of which positive laws were only declaratory; an ideal body of perfect precepts governing human relations and ordering human conduct, guaranteeing the natural rights and expressing the social compact.

As to the social compact, we must not fail to note that it was only a postulate. Blackstone criticizes it as a supposed historical event. But that was not the proposition. It was taken that civil society presupposed such a compact. We could not think of the one without logically putting the other at its foundation. In Grotius's *Prolegomena* there seem to be two main uses of such a compact, first, to furnish a basis for the binding authority of laws and, second, to furnish a measure, critique, and creative instrument for making laws. In Pufendorf it seems reasonably clear that the social compact is thought of as something logically presupposed by the institution of property which is assumed as an unchallengeable starting point as Grotius makes a like assumption as to civil society. In Grotius's theory, civil society logically presupposes a sequence: Human nature, i.e. the ideal of man, natural law, i.e. the ideal of precepts to which the ideal man will conform, and civil laws, i.e. precepts authoritatively established by the lawmaking organ of a politically organized society to the pattern of natural law. The social compact comes logically between natural law and civil or positive laws. It is the immediate basis of the validity of positive

laws. But the validity of the compact derives from a fundamental principle of natural law, *pacta sunt servanda*. The intrinsic moral authority of a promise is taken as the unchallengeable starting point. The social order, so reason tells us, depends upon the performance of promises.

With Hobbes and Locke and Rousseau, the social compact is looked at from a political standpoint. With Hobbes it is the basis of the despotic power of the sovereign. With Locke and Rousseau it represents a fundamental charter which sovereigns must observe on pain of revolution. It is the basis of the right of revolution, proclaimed in the Declaration of Independence, a right which James Wilson in 1790 insisted should be taught as one of the principles of constitutional law. With Grotius, the social compact is looked at from a juristic standpoint. It is a mode of giving the sanction of natural law to positive law. It constitutes the charter with reference to which the sovereign is to legislate and to judge. Blackstone's introductory lecture is founded on Grotius. It brought the ideas of Grotius to American lawyers, both before the Revolution and in our formative era after the Revolution, in what to them was very near an authoritative form.

In Bentham's critique of natural law in his *Principles of Morals and Legislation*, and in his *Theory of Legislation*, he looks at the doctrine of natural law from a political standpoint. In his *Theory of Legislation* he habitually uses the term "natural" not in the sense of "ideal," as it was used by writers of the law-of-nature school, but in the sense of primitive as distinguished from artificial or acquired. Thus in that work he speaks of "nature" as an "unknown legislator." Again, he says: "If Nature has made such and such a law, those who cite it so confidently . . . must take the view that she had reasons for doing it." Continuing, he says that what is natural in man is certain inclinations, and that it is just because of these natural inclinations that it is necessary to have laws. It is, he says, against man's natural in-

clinations that it is necessary to have the most repressive laws. Bentham here is thinking of the primitive man; Grotius was thinking of the ideal man. Bentham did not see what "nature" meant to jurists of the law-of-nature school. It did not mean a legislator who made a law. It meant an ideal from which we see how a law ought to be made. To Bentham law presupposes a lawgiver — a political lawmaking authority. But the law-of-nature school looked at it from a moral standpoint. They thought of a moral duty to do what the moral ideal indicated, and of the precept of the political lawgiver as an attempt to realize that idea.

American lawyers knew Grotius's doctrine by way of Blackstone. They were well read in the writings of the law-of-nature school on the Continent. Their ideas had been formed and had entered into a tradition of teaching before Bentham's writings were published or had become accessible in this country. Thus the natural law of Grotius and of the Dutch and French publicists and of Beccaria — the natural law of the law-of-nature school in Continental Europe — got established in our formative era.

Austin says of the natural law of the Roman jurists: "The philosophy which they borrowed from the Greeks, or which, after the examples of the Greeks, they themselves fashioned, is naught." But, whatever we may think as to its intrinsic nothingness, no one can look at the development of American law from the Revolution to the end of the last century and say truthfully that it wrought nothing.

Until the Civil War, the American law student began by reading Grotius, Pufendorf, Vattel, and Burlamaqui. Many also read Rutherford. These books or some of them were generally prescribed in the curricula of law schools in the first half of the last century. Next, the American law student read Blackstone. Indeed, Blackstone's Commentaries were a subject of examination for admission to the Harvard Law School as late as the second decade of the present century. But the introductory part of Blackstone is founded on Gro-

tius. Moreover, most of those who came to the bar in the last century were trained in the offices of practitioners. The tradition among practicing lawyers of prescribing the eighteenth-century writers on natural law to students to be read before Blackstone was strong and persistent, as shown by the biographies and memoirs of American lawyers of the eighteenth and first two thirds of the nineteenth century. Thus natural law entered into our nineteenth-century legal thought beyond what the present generation of law students has any idea of. The seventeenth and eighteenth-century publicists, as we used to call them, have not been read in America now for two generations. Few students any more read Blackstone. Hence there is general misunderstanding today of many things which our nineteenth-century law took for granted. Many things that seem strange in the judicial decisions of the first decades of the last century have that appearance because the books did not set forth in express terms what it was assumed everybody accepted, and judicial decision started from postulates then known and generally received which have become forgotten. The English political writers, Hobbes and Locke, played much less part in our legal-political thinking than the natural-law juristic writing on the philosophy of law and politics.

Sir Frederick Pollock argues that the metaphysical jurisprudence, the metaphysical natural law of the nineteenth century, had no effect in the law in England or America because the treatises of the metaphysical school are not cited in the nineteenth-century reports or text books. But the influence of German metaphysics upon the education of those who became lawyers in England and America is manifest. Bryce tells how, when he went to Germany to study Roman law, inspired by his Scottish and Oxford training with the notion that in order to study a subject rightly one must study its metaphysics, his first thought was to inquire what book to read on *Rechtsphilosophie*. He was referred to Röd-er's *Naturrecht*. And if, as he tells us, the law teachers of that

time had ceased to advise reading of such treatises, the whole system of the Pandects, or modern Roman law in the last century, was permeated with the ideas of metaphysical jurisprudence. As to English education in the second half of the century, it will be enough to refer to Green's Principles of Political Obligation (lectures at Oxford in 1879-1880), an excellent statement of political and juristic theory from a Hegelian standpoint.

As to American education in the latter part of the nineteenth century, one may refer to the autobiography of Lincoln Steffens, describing study at the University of California and in Germany in the 70's and 80's. There was a steady current of students to Germany in the second half of the century, especially of those who were preparing to go into teaching. The effect of metaphysical jurisprudence was due both to teachers in our colleges and to our text writers. As to college and university teachers of legal history, philosophy, and politics, most of those whose influence was noteworthy, e.g. Henry Adams at Harvard, Burgess at Columbia, Royce at Harvard, Small at Chicago, and Howard at Stanford and Chicago, studied in Germany in the heyday of Hegelian philosophy. As to text writers, Lord Lindley's Jurisprudence, which was widely read in England and followed by English writers of books for students, was in part based on a German text on the Pandects. Anson on Contracts, the beginner's text in England and America, was based on Savigny and taught the will-jurisprudence of the metaphysical-historical school. Hammond, the editor of what is juristically the best American edition of Blackstone, studied in Germany and got from Sohm's Institutes of Roman Law the ideas of law which he sets forth in the footnotes to Blackstone's introduction.

That the courts did not cite the books of the metaphysical school proves nothing. Until very recently it was settled judicial usage not to cite anything but law reports, statutes, and text books by those who were or had become judges.

As it was put, authority came in law sheep binding. Nothing else was proper to be cited. The reference to Adam Smith by Mr. Justice Field in the Slaughter House Cases is all but unique and shows his independence rather than a practice of such citations.

Let us note some of the ideas which came into our juristic thinking through metaphysical natural law. They are well stated in the lectures on the Philosophy of Law by Miller, Professor at Glasgow, published in 1884. Miller criticizes legislation of the type familiar today, which aims at securing at least a minimum human life to certain classes, because it abridges an abstract individual freedom. It is taken to be immaterial that such legislation in action may produce a concrete freedom. It is taken to be a question of an abstract rule in relation to abstract freedom. Again, he holds that, to use his own words, "the whole operation of preparing contracts, agreements, settlements, conveyances and such deeds, is framing a code for a greater or smaller group of persons. A marriage settlement or a will is equivalent to a private act of Parliament regulating the succession of a particular person or persons." In other words, liberty of contract is liberty to make law for oneself. Put into action, this becomes the doctrine of the first New York Workmen's Compensation Case. Liability without fault, as between employer and employee, negates this liberty. Hence it is arbitrary, unreasonable, and unconstitutional.

Again, Miller objected to British legislation of 1882 which restrained alienation of land by Irish tenants turned suddenly into owners. He said it "reversed the natural order of growth of legal forms," and added that as the tenants made into owners became conscious of freedom they would demand freedom of contract. He predicted a course of legislation removing restrictions upon free contract and free entering into legal transactions and legal relations of every kind. All the social legislation of the last five decades throughout the English-speaking world belies his prophecies.

But reading Miller and remembering that he is merely putting in readable form what the metaphysical-historical jurists were teaching and philosophers and historians were inculcating in college students before they began to study law, it is easy to understand why courts were so dogmatic a generation ago in holding so much of social legislation unconstitutional. It seemed unreasonable as going counter to the inevitable course of legal development. The constitutional provisions as to due process of law were taken to be declaratory of the metaphysical doctrine. That doctrine furnished the courts with a philosophical view of the picture of the society of our formative era which served for the ideal element in constitutional law. The whole movement in the present century has been toward regulation of everything rather than toward freeing individuals from regulation. Nineteenth-century natural law fought a long and obstinate rearward action against this movement. Miller deduces contract from liberty. "It is through contract," he says, "that man attains freedom." Master and servant, landlord and tenant, are to be left to determine their own rights and duties or they are not free. The working classes, he tells us, "escape one slavery to fall into another." So he prophesied that the trade union would prove a passing phase of industrial organization and that the workers would "rise above them." What would he say now after two generations?

We must remember that while metaphysical-historical school was dominant in the latter part of the last century and for some time in the present century, all the nineteenth-century schools came to the same result as to the end of law. Miller from the Hegelian standpoint preaches the same doctrine as Carter from the standpoint of Savigny and Maine, i.e. from a historical standpoint, as Bentham from a utilitarian starting point, as Spencer from a positivist standpoint. The criterion of lawmaking is removal of restrictions on free individual activity. They speak as if the whole and inevitable course of legislation was set forever in that direction.

Miller wrote in the spirit of the time in which he had been trained, the time of the English legislative reform movement which followed the teaching of Bentham. He assumes that that movement showed the course of the unfolding of the idea of freedom. Hence it expressed a permanent line of development.

As was said above, Miller's generalizations have been refuted by the course of English legislation since 1865 and of American legislation since 1880. There has been a revival of usury legislation in England and the United States in the present century; in England the Money Lenders Acts of 1902 and 1925, in America Small Debtors' Acts, or as we put it picturesquely, Loan Shark Laws. In both countries there has been a steady growth of restrictions as between landlord and tenant. In both countries there has been workmen's compensation legislation. In both countries labor legislation has gone a long way toward regulating every feature of the relation of employer and employee, and taking away individual freedom of contract. In the United States, every manner of enterprise is now subjected to regulation by administrative agencies. Nineteenth-century natural law, so far from furthering or taking part in this movement, hindered and held it back from beginning to end.

Nineteenth-century natural law has no necessary relation to the idea of a fundamental law as we find it in American constitutional law. Indeed, historically that idea antedates seventeenth and eighteen-century natural law.

Before 1688, English lawyers held to an idea of a fundamental law above and beyond all lawmaking and all laws. Three elements had entered into the development of this idea. One was the separation of spiritual from temporal jurisdiction, at the bottom of the whole organization of medieval society. It was involved in the very structure of society that lawmaking of the temporal power was impotent in the domain of spiritual jurisdiction. Hence when Parliament enacted how the seal of a monastery should be kept and how

bonds binding the ecclesiastical corporation should be sealed, providing a different rule from that adopted by the law of the church, the English judges were impelled to hold that the statute was "impertinent to be observed." Also when Parliament sought to meet the difficulty of alien priories, ecclesiastical foundations in England which were appanages of ecclesiastical foundations in France — a very awkward situation during the Hundred Years' War — by seizing them into the king's hands and enacting the king into an ecclesiastical person, the English Court of Common Pleas in the reign of Henry VII refused to give effect to the statute, holding that only the Pope, the head of the church, could make the king a parson. Another element was the Germanic idea of law above all agencies of government, expressed in the phrase attributed to Bracton, that the king ought not to be under any man but under God and the law. Back in the Salic Law we find that when the Count was appealed to for justice he must undertake to give relief or be subject to the feud as a wrongdoer, but when he undertook to administer justice if he went beyond what the law prescribed, then, too, he was liable to the feud or to buy it off, since he was equally a wrongdoer as if he had done nothing. In the reign of Edward III there are two significant cases in the Court of King's Bench. In one of them the court allowed cattle taken in distress for the king's taxes to be replevied from the king's deputy collector because he distrained them without a warrant. In the other, the court refused to recognize the king's letter addressed to a sheriff, directing him not to execute the court's writ against an outlawed defendant, because the king, although he could pardon offenders under the Great Seal, could not interfere with the course of justice in the courts by a private letter to the sheriff.

Seventeenth-century courts and judges in England asserted down to the end of the century a doctrine that even acts of Parliament were subject to fundamental law and would not be given effect when challenged in the course of

orderly litigation if they ran counter to "common right and reason." In *Bonham's Case* (1610) Dr. Bonham was fined by the College of Physicians, under authority of an act of Parliament for practicing medicine without sufficient knowledge of medicine and was imprisoned for not paying the fine and practicing notwithstanding the order of the College. In an action brought by the doctor this was held a false imprisonment for which he could recover. The court held that a statute could not make a man judge in his own case. Sir Edward Coke, the oracle of the common law, said that an act of Parliament against common right and reason would be adjudged void by the common law. Again, in *Day v. Savadge* (1615) it was held by the Court of Common Pleas that the corporation of London would not be allowed to prove a custom in its own favor by its own certificate even though the custom and mode of proving it was confirmed by Parliament. It was said to be "against common right and reason and against natural equity" to allow them "their certificate wherein they are to try and judge their own case." In 1695, Lord Holt, Chief Justice of the King's Bench, one of the greatest judges in English history, said of the courts and judges that "they construe and expound acts of Parliament and adjudge them to be void." The series of cases of this sort comes to an end with the *City of London v. Wood* in 1701. This was an action of debt in the Lord Mayor's Court (held before the Mayor and Aldermen of London) on a bye law made by the Mayor and Aldermen, under authority of an act of Parliament, to recover for the city a forfeiture imposed by the Mayor and Aldermen. A judgment for the city was reversed as error, following *Bonham's Case*. Lord Holt said that the pronouncement of Coke in *Bonham's Case* was true on the point that Parliament could not make a man a judge in his own case. "An act of Parliament," he added, "can do no wrong [i.e. no legal wrong] though it may do several things that look pretty odd . . . but it cannot make one that lives under a government judge and party." Holt in both of the cases spoke after 1688. The Revolution of

1688 has long been held to have settled the absolute supremacy of Parliament in the British polity. But 1695 and 1701 were too soon for lawyers to have learned this. Holt laid down what he had been taught and all the lawyers in the contests between the courts and the Stuart kings believed as a legal tradition from the Middle Ages. As late as 1765, Blackstone was not clear about this. The English courts no longer recognize a fundamental law. But the doctrine of the English lawyer passed into American law and our constitutions declare themselves the supreme law of the land. Much logical acrobatics have been employed to explain away the medieval cases and to show that Coke and Hobart and Holt did not mean what they plainly said. But the American lawyers of the eighteenth century and of the formative era took them at their word and the doctrine of a fundamental law to which even legislation must give way established itself in the very beginnings of our polity.

A third element in establishing the doctrine of a fundamental law in America was the general reading of Continental treatises on natural law in this country before the Revolution and fusion of that idea with the idea coming down from the Middle Ages and developed by the seventeenth-century judges. It had been said in *Doctor and Student*, an important book in the history of English equity (temp. Hen. VIII): "If any general custom [i.e. course of judicial decision] were made directly against the law of God, or if any statute were made directly against it . . . the customs and statute are void." This is a theological philosophical version of what the American lawyers found in Grotius and Blackstone, and in an authoritative law book bore out the ideas they derived from Coke and Holt. In the controversies between the colonists and the home government which led to the Revolution, colonial lawyers took a leading part and the doctrine of fundamental law they drew from Coke, and of natural law they drew from Blackstone and the Dutch and French publicists, was their chief reliance in argument.

Arbitrary rule to the Privy Council, of Governors and Councils, and of colonial legislatures wielding plenary, undistributed, governmental powers, led to general acceptance of the idea of a law superior to statutes and administrative ordinances and orders. It has been urged of late that the bills of rights, except where certain kinds of legislation such as bills of attainder are expressly prohibited, were not intended to apply to legislation. It has been said that price-fixing statutes and wage-fixing statutes were common in England and in the colonies at the time of and before the Revolution, and hence the constitutions cannot have meant to forbid them. What they did mean, however, as history shows abundantly, was to forbid arbitrary and unreasonable lawmaking "against common right and reason." There had been every kind of arbitrary lawmaking in the colonies, which often did not have complete control of their own legislatures. For example, Virginia prohibited the smoking of North Carolina tobacco. Such statutes were among the things people were afraid the national government would enact when they demanded a bill of rights in the federal constitution. It does not prove that Americans after the Revolution wanted things done to show that they were done in the colonies. The royal governor and council were often the whole government and in any case were the upper house of the legislature. The purpose was to preclude the arbitrary and unreasonable and the real question is not what was deemed reasonable then but what is arbitrary and unreasonable now.

Nineteenth-century England rejected natural law, although the influence of metaphysical-historical jurisprudence and of Bentham's utilitarianism preserved something very like it beneath the surface in such things as attempts to fit the common law into the will theory of contracts. The doctrine of supremacy of the law was still applicable after 1688 to the ministers of the crown and preserved something of the medieval idea of fundamental law. But natural law had its fullest development in the application of constitutional guarantees and bills of rights in nineteenth-century America.

In content, eighteenth-century natural law in America was not substantially different from what it was at the time as set forth in Grotius and Pufendorf, Vattel and Burlamaqui, Rutherford and Blackstone. In the nineteenth century, as has been said, the natural-law method of the preceding centuries was reshaped by metaphysical jurisprudence. Its content with us in the nineteenth century was the result of persistence of eighteenth-century philosophy, the new metaphysical natural law, historical jurisprudence, which was Hegelian in its interpretation of legal history, and Spencerian positivism, which, purporting to be based on observation, had done its observing in the pages of Maine's *Ancient Law*. Consequently, it put liberty as the fundamental idea, meaning by liberty the maximum of individual free self-assertion. That was the highest good. The criterion of lawmaking was whether a measure would or would not promote abstract liberty. Restrictions on liberty had to be justified and could only be justified by showing that they promoted liberty more than they abridged it. Law was a necessary evil — evil because it restrained freedom; necessary because without it there could not be a concrete freedom. What was most characteristically American, however, was the fusion of absolute natural rights with the immemorial common-law rights of Englishmen, as expounded by Coke in his *Second Institute* (commentary on *Magna Carta*), in rights guaranteed under constitutions. Thus we got peculiarly American doctrines, such as liberty of contract and right to pursue a lawful calling as natural rights, or forbidding imposition of liability without fault, or development of the separation of powers on a basis of natural rights, or deduction of a natural right of testamentary disposition and of acquiring property by succession.

After the Civil War, natural law and natural rights took on a Hegelian historical cast. As one American writer put it in 1887, the principles of natural law had gradually unfolded with the progress of the "moral and social unfold-

ment of society." As a result of this unfolding we are told that we have "a large body of legal conceptions existing in the minds of men independent of legal enactment. By common consent they are designated by the term rights (*jura*) and by a very general consent as natural rights. They are universally recognized to the extent to which men's minds are unfolded." We are then told that the part of positive law which gives effect to these rights is immutable. This postulates an eternal, immutable bill of rights as part of the constitution of the moral universe.

Just at the time when the book quoted from was being written, our state courts were holding statutes against payment of wages in orders on company stores and statutes as to hours of labor unconstitutional as arbitrary and unreasonable infringements of a natural right of free contract. Was it that the minds of state legislators were not unfolded, or was it that they were more unfolded than the minds of those trained in the metaphysical-historical natural law? The author argues that historically these natural rights antedate all formulated law. The history of natural rights is the history of the unfolding of the idea of liberty. He reads nineteenth-century abstract individualism into primitive institutions. Spencer argues the same way, chiefly on the basis of the writings of Sir Henry Maine in which the materials which Spencer observes have been selected and interpreted from a Hegelian political-idealist standpoint. But is not individual natural rights, it is rather the social interest in the general security which we must see as the moving force in the beginnings of systems of law. Men seek security of the peace and of social institutions. Also, but that is included in the general security, they seek to avoid incurring the wrath of the gods. Moreover, early law thought largely in terms of kin or neighborhood groups rather than of individuals, witness frankpledge (responsibility of the neighborhood), the seizure of the nearest kinsmen of a murderer in

Anglo-Saxon law, and avSponéwia (reprisals by seizing not more than three of the murderer's kinsmen) in the laws of Draco.

Another idea, which is to be found in the Declaration of Independence, was fully developed in nineteenth-century American juristic thought, namely, the setting off of society against the individual with natural rights, secured by natural law (or by a constitution declaratory of fundamental law) as a buffer. It was conceived that securing natural rights was the very purpose for which all organic laws were set up and all statutes were enacted. In the Declaration of Independence this is a natural-law statement of the contests between the courts and the crown in seventeenth-century England and between the colonies and the home government in seventeenth and eighteenth-century America. This identification of natural rights with the liberties assured under the bills of rights, so that the latter are both positive-legal and natural, is peculiarly American and is the form taken by natural rights in this country at the end of the nineteenth century. The idea, as I have said, came from a union of Coke's common-law (or immemorial) rights of Englishmen with the seventeenth and eighteenth-century natural qualities of men. The two ideas may be seen side by side in Blackstone. A typical case construing the bills of rights as declaratory of nineteenth-century metaphysical jurisprudence is *People v. Marx*, 99 N. Y. 377. In that case, Rapallo, J. said: "The term liberty as protected by the constitution is not cramped to a mere freedom from physical restraint of the citizen, as by incarceration, but is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by the Creator, subject only to such restraints as are necessary for the common welfare." Mere expediency would not justify interference with natural rights.

Connecting the doctrine of separation of powers with natural rights was a nineteenth-century attempt to put a philo-

sophical explanation behind a product of political experience. Separation of powers and a written constitution were ideas of the Puritan Revolution born of experience of the arbitrary conduct of administrative agencies of the Tudors and Stuarts. It is not uncommon today to speak of the doctrine as a mere eighteenth-century fashion of political thought. Aristotle laid it down as a logical proposition of politics. Montesquieu mistakenly thought he saw it in the British constitution of his time and gave it currency. We may admit this and yet must insist that there was a very different reason for the eagerness and unanimity with which it was taken up and put, along with a bill of rights, at the foundation of all the constitutions adopted by the states, often on the morrow of the Declaration of Independence, as the first act of autonomous statehood. Something more than fashion was behind this, and something more than fashion led to inserting the doctrine and the bill of rights in every state constitution since adopted. In truth, the separation of powers was taken up because of experience of centralization of political power in the proprietors and their agents, and of experience of complete centralization of governmental powers in the Privy Council and consequent want of any effective distribution and check or balance in the colonial governments.

In the proprietary colonies the proprietors and their agents wielded all the powers of governors, lawmakers and judges as well as of owners. In one case when a judgment had been rendered in the Town Court at Savannah, the defeated litigant wrote a letter to the Trustees in London complaining of the court's action. The letter having been read by the secretary, the Trustees without more, voted that the secretary write a letter to the governor on the spot directing him to order the court to reverse the judgment. Under the provincial regime, all the ultimate power was concentrated in the Privy Council at Westminster. All legislation had to be submitted to it for approval or disallowance, and it might disallow any act within five years and even if not

disallowed might later in its judicial capacity hold an act not disallowed invalid as in conflict with the provincial charter. It had full executive power and control of administration, issuing instructions to the royal governors and requiring of them full reports of all administrative action. It was the ultimate court of appeal from provincial courts and jealously guarded its appellate jurisdiction from attempts to limit the time for taking appeals or to preclude expensive appeals in causes where relatively little was in controversy. Within the Province the royal governor and his council (often appointed by him) were the upper house of the legislature, the supreme executive, subject to the instructions from Westminster, with immediate control of administration, and until well into the eighteenth century in some colonies and down to the Revolution in others, the highest court subject to appeal to the Privy Council. In the locality the magistrates, usually chosen by the central government, were an administrative body, sometimes also a probate court, a court of appeal from single justices of the peace, and a court of first instance. Experience of government under such a regime educated Americans to believe in separation of powers. But the resulting faith was reenforced by ideas of natural law.

One of the first fruits of natural-law thinking applied to written constitutions was a doctrine that courts might refuse to recognize and give effect to a statute as in contravention of fundamental law without any express constitutional prohibition of or limitation upon the precise type of statute. It might be in contravention of natural law or, as Coke put it, contrary to common right and reason. It might contravene the social compact, i.e. be out of line with the court's picture of an ideal American free society in the new world. It might be in derogation of natural rights. There was some reason for this in the earlier attitude of American legislatures. The legislative was the first department to develop in the colonies. The executive down to the Revolution was ap-

pointed by the crown. Courts began a real development in the last decade of the seventeenth century, but on the whole, were not well constituted until well into the eighteenth century. Then, as the courts were developing came the effects of the Revolution of 1688, and later the effects of the French Revolution and notions of legislative omniscience. There was legislative granting of new trials, legislative reversal of judgments, legislative grant of a continuance to one party in a case pending in court, legislative probate of wills after rejection by the courts, legislative fixing of the details of administering particular estates, legislation admitting a particular person to the bar, and acts of attainder and bills of pains and penalties, i.e. legislative conviction of crimes. The courts did not have an easy task in putting an end to such things, and the doctrine of a fundamental law and the pronouncements of Coke and Holt were not a little help in the contest. For a time, as the legislatures were going too far on one side, the theory of judicial power went too far on the other.

As late as 1831, the Supreme Court of Tennessee, citing *Bonham's Case*, said there were principles of justice which no government could disregard, and hence it did not follow because there was no restriction in the constitution prohibiting a particular act of the legislature that the act was therefore constitutional. In an earlier case in which the legislature undertook to dispense a creditor from the provisions of the statute of limitations against a particular debtor, a state court declared that the statute was "manifestly contrary to the first principles of civil liberty and natural justice and to the spirit of our constitutions." In 1889, a writer on jurisprudence said that consistency to theory would require that any law which violated a well-settled principle of natural justice should be void, and added that such in effect was the established doctrine. In time, the courts were able to deal with the sort of legislation above described partly on the basis of express constitutional prohibitions construed

in the light of an ideal American polity, partly by invoking the provisions as to separation of powers, and especially by giving the phrase due process of law its historical meaning and adopting Coke's teaching in the Second Institute as to the meaning of chapter 39 of Magna Carta. The courts were then, in the last quarter of the nineteenth century, ready to reject the doctrine that statutes could be denied validity simply on the ground of conflict with natural law.

Thus seventeenth and eighteenth-century natural law gradually disappeared from our constitutional law. But nineteenth-century metaphysical natural law hung on till well into the present century in the doctrine that liberty involved free contract as a natural right so that restrictions on the power to contract were arbitrary and unreasonable unless based on natural incapacities or imposed to maintain the general safety, health, or morals. Until after 1909, legislation forbidding employers from interfering with membership of their employees in labor unions was held invalid. Legislation prohibiting imposition of fines upon employees, where provided for in the contract of employment had been held invalid. Where the parties were natural persons, legislation providing for weighing coal in order to fix the compensation of miners was held invalid in many states. Legislation as to hours of labor was held bad as to labor of adult males unless the work was of a dangerous or unhealthy character. One important state court said that the legislature could provide what should be a day's work as to the labor of adult males in the absence of a contract, but could not prevent the parties from fixing the hours as they chose by agreement. Also one court held that legislation could not prohibit contracts by railway employees to release their employers in advance from liability for personal injuries. For a long time state courts had been holding statutes against payment of wages in orders on company stores to be invalid. But later a distinction was made as between corporate employers whose power to contract was derived from the state, and individual

employers whose power to contract was derived from nature. The courts in other cases, however, considered that the right of free contract of the laborer was impaired and asked what there was in the condition or situation of an abstract laborer to disqualify him from contracting as to the form or amount of the reward of his labor.

Some of the courts spoke as if freedom of contract was one of the immemorial rights of Englishmen which had become identified with the natural rights of man. But from the beginning, equity had interfered with the free making of contracts. It had relieved against penalties and forfeitures contracted for. It had forbidden agreements clogging the equity of redemption. It had set aside contracts by sailors disposing of wages or prize money, if unfair. It had set aside contracts with heirs and reversioners. It had refused to enforce hard bargains. It had required assurance of counter-performance in bilateral contracts, and its doctrine of conditions implied in law when one side of such a contract was sued on had been taken over by the courts of law. In other words, there was no immemorial liberty of contract. The idea was one of the metaphysical natural law reenforced by Bentham's doctrine that each man was the best judge of his own happiness, and by teaching of the classical political economy.

Along with liberty of contract the courts in the last quarter of the nineteenth century insisted upon the "right to pursue a lawful calling" as a natural right secured by the guarantee of liberty against arbitrary or unreasonable interference and assumed that all interference was *prima facie* unreasonable. Historically, this right was derived from the common-law aversion to monopolies, an aversion which Coke had derived from Magna Carta. Mr. Justice Field said that "the common businesses and callings of life, the ordinary trades and pursuits, which are innocent in themselves and have been followed in all countries from time immemorial, must . . . be free in this country to all alike upon the same conditions."

He added that this was an essential element of freedom. Here we have historical natural law to a picture of pioneer society where everyone of necessity had to be equal to everything. The immemorial rights are natural rights. But was there a recognized right to pursue a lawful calling in the Middle Ages?

Both the idea of liberty of contract as something not to be interfered with, and the idea of the right to pursue a lawful calling were reenforced by the historical doctrine of progress from status to contract. Any interference with either right seemed a reversion to status and an arbitrary turning back of the wheels of progress.

Another result of the metaphysical natural law, toward which the nineteenth-century historical jurisprudence cooperated, was judicial objection to statutes imposing liability without fault, of which Workmen's Compensation Acts are a conspicuous example. These statutes were at first held invalid as arbitrary and unreasonable, and in the Arizona Workmen's Compensation Cases in the Supreme Court of the United States there was dissent that it had always been "the sense of the law and the sense of mankind" that liability resulted from culpability. Historically this was a mistaken statement. Liability at common law flowed at first simply from causation of injury. Statutes came to be upheld which in the interest of the general security imposed criminal liability where there was no criminal intent. But in the period of the law of nature school it came to be a general principle, where rules had not been settled otherwise, that as liability morally should depend upon culpability, the moral principle was to be a legal doctrine. Accordingly, Sir Frederick Pollock regarded absolute liability for trespassing cattle and for injuries by wild or vicious animals as historical remnants due to disappear from the law, and prophesied that the rule in *Rylands v. Fletcher* would be swallowed up in exceptions. His prophecies have not been verified in the event and in achieving its task of a balance be-

tween security and justice the law has had to maintain the common-law categories of liability without fault and add some new ones. It is suggestive that the Court of Appeals of New York which was willing to add by judicial decision the case of blasting operations carried on without negligence, was unwilling to allow a new category to be added by legislation.

In the domain of private law, the nineteenth-century metaphysical natural law had an unhappy effect for the greater part of the last century in leading to a persistent endeavor to force the common law into the mold of the will jurisprudence of the Pandectists. In the law of contracts, the text books sought to introduce Savigny's theory of giving effect to a will or wills directed to a possible and permissible result in place of the objective theory of the common law. There was an attempt to reduce duties of restitution to contract so that courts had to argue as to liability of an insane person for necessities furnished and consumed and to decide whether a judgment was protected by the contract clause of the federal constitution. Indeed, an English court held that a quasi contractual obligation could not be imposed upon a corporation unjustly enriched by an *ultra vires* contract. In the law of public utilities there was for a long time attempt to build the law upon the legal transaction of professing a public calling or the legal transaction of dedicating property to a public use, and to impose liability upon the theory of a contract of carrier and passenger to use due care rather than on a tort theory of negligence. Happily, all this has been outgrown.

But all of the blame for the unfortunate legal developments in the last century is not to be borne by natural law, or even by positive natural law. As to the separation of powers, much of the blame is to be laid upon the general tendency of the last century to seek to reduce everything to rigid rule and lay out rigid lines of classification. It was thought necessary that every detail of governmental power

be referred once and for all exclusively to some one department of government. It was not till the second decade of the present century that we came to adopt the wise proposition of Chief Justice Marshall that there might be powers of doubtful classification as to which it was a legislative function to assign them to either of two analytical or historically proper departments.

Again, in the cases as to due process of law, a large part of the blame is to be put on faulty analysis and that same tendency to seek to reduce everything to rule. The fault is not in interpretation of the term "liberty" nor in giving "due process of law" the historical interpretation derived from Coke's Second Institute, which clearly enough was the source from which the phrase in our bills of rights was taken. It is not the interpretation that has been at fault, but the attempt to treat a standard as a rule — to reduce the applications of a standard to a body of rules analogous to rules of property. As a result, reasonableness was treated as abstract reasonableness whereas application of a standard must be governed by circumstances and hence the reasonableness to be sought should be concrete. The Supreme Court of the United States came to this view in the *Adamson Law* case in 1916.

Moreover, much that is good in the development of our law in the last century is to the credit of natural law. It meant a measuring of the seventeenth-century English law by the ideal of American government or of American free institutions, that is, by an ideal American society of our formative era. If that ideal is no longer useful, it served well in its day.

IV

THE FUTURE OF PHILOSOPHICAL JURISPRUDENCE

This University affords a congenial atmosphere in which to discuss such a subject. Neo-scholastic philosophical jurisprudence and even a neo-scholastic sociological jurisprudence

have been the most active types of what may be called the right wing of the science of law since the last world war. Whatever may be going on in law schools generally, the schools of the church have kept to the path of Socrates, and their teachers have been in the front rank of those who refuse to turn off into the path of the Sophists.

Jurisprudence cannot dispense with its philosophical side. It cannot give up philosophical method. But philosophical jurisprudence needs a creative method as its foundation. The give-it-up philosophies which are advertised to save us from a dry analytical system of traditional formulas are likely in the end to strengthen the hold of such formulas because the economic order (unless, indeed, there is no longer to be one and the law is to disappear with it) is incompatible with adjustment of relations and ordering of conduct by unguided good intentions, and human beings have always proved restless under the subjection of one to the arbitrary, or what he takes to be the arbitrary, will of another. In every era in which for a time there has been a reversion to justice without law, the older type of hard and fast formal body of rules has proved popular, and an ordering and systematizing of what has been imported into the law from without has reshaped the imported element to the model of the strict law. Not the least curious phenomenon in legal history is what often looks like the perverse objection of men to liberalizing of the strict law and resistance to liberalizing of it on the part of those who are politically liberal.

Let me give a few examples. Trial by jury was objected to by the author of the *Mirror of Justices*. He felt it was a grievance that parties were compelled to submit to this mode of determining issues, and wished to recall the old mechanical modes of trial. The commons in England sought in no less than ten Parliaments before the seventeenth century to arrest the development of equity. The Long Parliament came very near abolishing the Court of Chancery. Certainly, Jefferson will be universally accounted a typical liberal.

Yet Jefferson recommended in a letter to Tyler that Virginia adopt the common law of England as of the first year of George II so as to eliminate what he called Mansfield's innovations. But those innovations have since been regarded as modernizings and liberalizings which went far to enable the common law to go round the world and to maintain itself wherever it was taken.

If at the moment it is held liberal to reject the whole idea of law, or to apply the term to what is done without law as we had thought of law in the past, one may suspect that in the rise of absolutism throughout the world the fundamental conflict of liberalism and autocracy (which believes in laws rather than in law) will lead to a revival of faith in law, unless, indeed, a form of absolutism is to employ the good will of the term liberalism in order to complete absolutism's conquest of the world.

As I have said heretofore, the immediate task of philosophical jurisprudence is to organize, systematize, and criticize the element of received ideals in the positive law of the time and place. But to do its work effectively it must work to some end and behind its immediate task there is one of finding and formulating that end. Between that ultimate task, which, if you like, may be referred to what I have called natural natural law, and the immediate task, the neo-Hegelians put an intermediate one of discovering and formulating the jural postulates of the time and place. This task might be referred to positive natural law.

Let us take that position for a moment and ask ourselves what are the jural postulates of the civilization of today? It is not difficult now to formulate the jural postulates of the civilization of the last century. I have essayed this on more than one occasion, and my colleague, Professor Hocking, has pronounced that in so doing I have succeeded in part, at least, in laying hold of what are presumptively propositions referable to natural natural law. But when one looks at the law of today, at the course of development it seems to

be taking, and at the attitude of the civilization of the time toward new types of claims that are exerting pressure upon the legal order, it is manifest that the scheme which I worked out for the immediate past will require much supplementing, if not much revision, in order to serve for the law of even the immediately impending future.

No less than eleven significant changes in the law, which have developed in the past fifty years, must be taken into account by the philosophical jurist of today.

One which goes back much further, but has had a marked revival and development all over the world in the present century, is limitations upon the assertion of rights and liberties and exercise of powers with reference to the motive and purpose of asserting or exercising them. The French speak of this as repression of the abusive or anti-social exercise of rights. It is enough in this connection to compare the attitude of the law toward the spite fence or the spite well in the last quarter of the nineteenth century with the twentieth century codes or the course of decision with respect to such things today. For example, in a case within my personal knowledge fifty years ago, a farmer had put a dam across a "draw" on the prairie where it emptied into a creek running by his land. Surface water came down the draw after rains and was stopped by the dam and formed a small pond on the land, which was used to water stock. Ill will arose between the farmer and a neighbor through whose land the draw ran higher up. Thereupon the neighbor put a dam across the draw just inside the boundary between the two tracts and, having no use for the intercepted surface water, dug a ditch to the creek to carry it off. Half a century ago this was said to be *damnum absque injuria*. Today it would be reasonably certain to encounter an injunction.

A second change, closely related, is to be seen in limitations on the use of property, on the *jus utendi* and *jus abutendi* of an owner — his liberty of using and his liberty, if he liked, of destroying it. It will suffice to instance zoning

laws, which the courts a generation ago were loath to allow; anti-billboard laws, which a generation ago were thought only to be justified by the extent to which there was danger that the billboards blow down or fall down or catch fire and endanger the public safety; and the growing recognition of a social interest in aesthetic surroundings. A generation ago Sir Frederick Pollock could deny that the law took account of such things, and comparing the English with the French, quote Tom Hood's lines:

"Nature which gave them the gout
Only gave us the gout."

But today the Supreme Court of Massachusetts recognizes such an interest and rests legislation against hideous outdoor advertising upon it, and we find a Canadian administrative official arguing that cutting down of a clump of trees so as to depreciate seriously one of the most beautiful views in the vicinity of the Dominion capital would be "a trespass upon the public right."

Third, one must put the steady growth of limitations on free contract, already discussed in another connection, and the changed attitude of the courts toward these limitations since 1916.

Fourth, legislation has been increasingly imposing limitations upon the *jus disponendi* of the owner. In the last century this power was regarded as of the very essence of property. Ownership necessarily presupposed it. Yet for a long time many jurisdictions have required that the wife join in conveyance or mortgage of the family home although from the beginning and before marriage it may have been the sole property of the husband, and now some states require that the wife join in a chattel mortgage of the household furniture although acquired by the husband before marriage, with his own earnings. In many jurisdictions also there is a requirement that the wife join in an assignment of the husband's wages.

Fifth, there has been a steady growth of restrictions on the power of a creditor or injured party to obtain satisfaction. This has been true both in our law and in the law of Continental Europe. The Roman law had a few mitigating devices. The common law exempted a person's clothing from distraint, and on a writ of *elegit* saved the execution debtor half of his land and his beasts of the plow. But the general attitude of the law in the last century was expressed in the saying that the creditor might pursue the debtor *usque ad saccum et peram* — even to his shirt and trousers. This was asserted as against the Roman doctrine of the *beneficium competentiae* (reservation in certain cases of enough to enable the debtor to live) in a standard treatise on French law in the second decade of the present century. Such ideas have given way everywhere. In America, we have long had homestead exemptions and increasingly liberal personality exemptions. In recent times, statutes providing for judgments to be paid in installments, statutes governing foreclosure of mortgages requiring the mortgagee to credit a fair valuation of the mortgaged property, not merely what it brings at forced sale, before enforcing the debt secured, or even cutting off deficiency judgments and limiting the creditor to the property, or what it will bring at foreclosure sale, and in times of stress moratorium statutes, have become general. There has been a growing tendency to insist that the creditor must take part of the risk instead of the debtor, if not that the whole risk be put upon the creditor instead of on the debtor.

Sixth, there has been a growing tendency to change *res communes* and *res nullius* into *res publicae*. According to the Roman law certain things such as running water and the shore of the sea were *res communes*. No one could own them but every one could use them, or at least the use of them belonged to or could be appropriated by certain individuals. Certain other things were *res nullius*. They belonged to no one until some one reduced them to his possession and then

they belonged to him. Wild game was in this category. In the present century there has been a strong tendency to regard running water and wild game as *res publicae*. Constitutional provisions declaring that they are "owned by the state in trust for the people" are not uncommon. Wherever there is scarcity of water or danger of extermination of wild game, these things are now held to be assets of society which are not capable of private appropriation or ownership except under regulations which protect the general social interest. Such ideas have changed the whole water law of the western states. So, too, legislation against use of natural gas in manufacture so as to waste a large part where the whole could be used beneficially for heat and light in municipalities has been upheld as a legitimate interference with use of private property. Similar restrictions upon taking out of oil on private property will occur to you at once. All of this is referable to a recognized social interest in the conservation of natural resources.

Seventh, there has been a radical change in the law with respect to parent and child — a growing recognition of a social interest in dependents where formerly the law thought only of the natural rights of the parent. Mark Twain satirized the nineteenth-century law in *Huckleberry Finn*. Huck Finn's father was the village drunkard. He left Huck to shift for himself and live in an empty hogshead, and had little more to do with him than to give him an occasional beating. But when he heard that Tom Sawyer and Huck Finn had discovered a hidden treasure and that Huck had an income of a dollar a day, he returned from a long absence to assert his natural rights. Application was made to the county judge to appoint a guardian. But the judge said, no. He would rather not separate families. The father was the natural guardian. Courts no longer make the natural rights of parents the basis of decisions as to custody. The individual interest of the parent, which used to be almost the one thing regarded, has come to be almost the last thing regarded as

compared with the social interest. The interest of the child is thought of as a social interest in the full development of the child. Compulsory education is of long standing. In recent times, Juvenile Courts, Courts of Domestic Relations, and Child Labor Laws, have gone far to limit the claims of parents to the child's services and even to limit exercise of the parent's privilege of correction. Courts have gone far also in finding emancipation of children engaged in money-making employment.

Eighth, there has come to be a tendency to increased imposition of liability where there has been no fault. The nineteenth-century theorists regarded common-law liabilities irrespective of aggression or negligence as historical survivals from the regime of composition to buy off caused injury. So far was this carried that statutory impositions of such liability were at first regarded as arbitrary and unreasonable infringements of liberty. But in the present century there has been more and more creation of statutory offences without *mens rea* in spite of the obstinate attempts of teachers of criminal law to put them in a distinct category and refuse to give them a place in the scheme of criminal law. Likewise both legislation and judicial decision have greatly extended civil liability irrespective of aggression or negligence. Most of these extensions are directed to the general security. Such, for example, is the basis of the doctrine of the family automobile, derogating from the common-law rule that the parent is not liable for the torts of the child unless done by his procurement or attributable to his negligence, and also from the common-law rule that a principal is not liable for the torts of a servant not in the course of his employment and while on a frolic of his own; of liability for culpable operation of one's car by one to whom it is lent or let without any fault of the owner; and in England, of liability without fault for the wrongful acts of those who hire accommodations in a tourist camp. In another class of cases liability without fault is being imposed to relieve those less able to bear a loss

where it is considered that some one without fault is in a better position to shift the loss ultimately to the public as part of the overhead of some enterprise. Here the typical case is workmen's compensation. In that subject there has been a steady extension of liability until the mere fact that one who is employed has incurred an injury seems to be coming to suffice to sustain a claim for compensation. Perhaps it should be noted that in these cases administration has been moving toward what Continental writers call a subordinating law.

Ninth, a tendency has arisen to impose upon public funds the burden of losses incident to the operation of agencies of politically organized society. This tendency in civil-law countries began with certain French legislation which has been widely copied. In Roman law, the parent was liable for the wrongs done by his child. The French civil code, in the days of private boarding schools, extended the liability to teachers *in loco parentis*. Then came the regime of public day schools and the teachers, now public functionaries, objected to that liability. Accordingly, the government took it over and further legislation extended the governmental assumption of liability to injuries generally where due to the agencies of government. We have not gone far in this direction in the common-law world. But a few cases are noteworthy. There are some signs of provision for the serious results of mistaken conviction of the innocent. There is a tendency to hold public charities liable for certain injuries in the course of their operation. There has been at least some relaxing of the rule as to non-liability of a municipal corporation for injuries done in the exercise of its governmental as distinguished from its corporate functions. We are not willing today to treat injuries due to the operation of agencies carried on for the benefit of society as risks of life such as tempest and flood and fire and pestilence, to be borne wholly by the luckless individual on whom they chance to fall.

It should be noted that the liability of which I have just spoken is something very different from the common-law liability of the public official himself for acts contrary to law beyond his legal authority.

Tenth, we must take account of a tendency to read reasonableness into the obligation of contract, not as a matter of interpretation, but even to the extent of making contracts and transactions over the parties to the pattern of what the legislature or the court considers fair. Some time ago the courts in New York began to treat contracts upon condition precedent in this way where the condition called for the certificate of a particular architect as to completion of work on a building according to certain plans and specifications or for the certificate of the buyer's lawyer as to the legal validity of securities in a contract to purchase them. At common law the general holding was that if the architect or lawyer refused the certificate in good faith, even if mistakenly or unreasonably, the condition was not fulfilled. But the New York courts came to hold that if a reasonable architect or reasonable attorney would give the required certificate that will suffice. Again, where an offer is such that acceptance calls for continuous action or for a series of acts, the courts now treat it as one looking to a bilateral contract and treat entering upon the act or series of acts as a promise to carry the act or series to conclusion, so as to preclude the unfairness of revocation before acceptance is complete. These doctrines should be compared with what was taught on the subject in law schools fifty years ago. Above all, however, we should note how this reading of reasonableness into the obligation, even if the parties made an unreasonable bargain, enabled the courts to uphold the housing laws during the shortage after the first world war. A covenant to surrender at the end of the term was subject to legislative provision extending the time without impairing the obligation of the contract, and this reading in of reasonableness was the ground, too, in the Minnesota moratorium case.

Eleventh, it remains to speak of a breaking away from the purely contentious idea of litigation, a turning of courts from forums exclusively for deciding controversies into bureaus of justice. In every direction there has been a movement in the present century toward preventive justice. Municipal and small-cause courts have been set up with officials to tell parties in search of relief what the tribunal can do for them and what not, and with women secretaries to advise women in delicate cases. Public defenders have been provided to set off public prosecutors. Above all, there has been a general and wholesome adoption of declaratory judgment procedure, and courts are becoming so organized that the relations of parties may be adjusted completely in one proceeding in one court instead of piecemeal in a number of independent proceedings in different courts.

What are we to conclude from these changes as to the jural postulates of the civilization which is coming to be, if it has not actually come?

One very significant point is the different understanding of security, which Bentham put as a chief end in the maturity of law. To the nineteenth century it meant that every one was to be secured in his interests against aggression by others, and that others were to be permitted to acquire from him or exact of him only through his will that they do so or through his breach of rules devised to secure others in like interests. To insure security in this sense, the maturity of law insisted upon property and contract as fundamental ideas. Thus the Massachusetts Bill of Rights provides: "Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty, and property according to standing laws." Not the least part of security was held to be security against imposition of liability unless one had undertaken something or had acted culpably. Today men seem to mean that politically organized society is to relieve them of all anxiety or worry by assuring them a comfortable existence, or even more an existence to their in-

dividual satisfaction, instead of only securing them in opportunities to provide for their own competitive existence. There are always extravagances at the beginning of new movements. Perhaps we have one of the sort here. But we may consider in this connection the slogan of the orthodox socialist of the last century: "From every one according to his powers, to every one according to his needs." One need not say that everything here depends on who decides what his needs are and on what principle the determination proceeds. It sometimes looks today as if the proposition was turning to one of: From everyone according to what can be squeezed from him, to everyone according to his own estimate of his wants. At any rate, legal shifting of loss from those upon whom it chances to fall to those better able to bear it is marked in legislation and in administrative justice.

Very likely it is too early to predict what will grow out of this. But two new postulates seem to be more and more assumed:

1. Everyone is entitled to assume that the burdens incident to life in society will be borne by society.
2. Everyone is entitled to assume that at least a standard human life will be assured him — not merely equal opportunities of providing it or attaining it, but immediate material satisfactions.

When people are thinking in this fashion, it becomes necessary to get back to the question of what is the end or purpose of social control and so of the legal order? Men first thought of it as a simple one of keeping the peace. Whatever served to avert private vengeance and prevent private war was an instrument of justice. Greek philosophy soon got beyond this crude conception and gave us instead an idea of harmonious maintenance of the social *status quo*, of keeping each man in his appointed groove in the social order and thus preventing friction with his fellows. In Plato's ideal state the individual is not to find his own level for him-

self by free competition with his fellows. Every man is to be assigned to the class for which he proves himself best fitted, so that a perfect harmony and unity will characterize both the state and every person in it. Aristotle considered that justice demanded a unanimity in which each would keep within his appointed sphere. Roman jurists accepted this idea and passed it on to the relationally organized society of the Middle Ages, to which it was well adapted. But a change took place at the end of the Middle Ages and went forward in the sixteenth and seventeenth centuries so that the nineteenth century came to hold that the end was to insure a maximum of free individual self-assertion. Where antiquity and the Middle Ages had thought of a stationary society in which each was to do his duty in the class in which he found himself placed, the modern world came to think of a society in constant flux, in which everyone was exerting himself in free competitive and acquisitive self-assertion to make for himself a better place.

William James tells us that the progress of thought is a continual search for the more inclusive order. In these conceptions of the end of law we have a case in point. If the end of law is to keep the peace, why keep the peace? The Greek philosophers answered, in order to uphold the social order. So, they said the end is to maintain the social *status quo*. But men asked, why maintain the social *status quo*? The answer was taken to be, in order that men may exert themselves freely by developing a division of labor that makes for mastery over external nature. So, it was said, we are to maintain the social *status quo* to promote freedom. But, it was said again, why promote freedom? Now we seem to be answering, because it is one of many human wants. So men have come to think of harmonizing human wants in action instead of human wills in action. It will have been noted that in all this thinking about the end of law there is a constant idea of a conflict to be avoided or adjusted. We are to keep the peace among contenders, we are to maintain a *status quo*

which is under continual attack, we are to harmonize conflicting exertions of will or conflicting willed activities, we are to reconcile or harmonize conflicting wants. We seek some plan of achieving these things. But why do we seek to achieve them?

According to the neo-Hegelian doctrine, law is realizing the idea of civilization, an idea of raising human powers to their highest possible unfolding. One might compare this with Krause's idea of human perfectibility and an end of furthering human perfection. But Krause's follower, Lorimer, thought that perfection was to be found in complete individual liberty. The neo-Hegelians think that civilization involves increasingly complete control over external or physical nature and over internal or human nature — the most complete control we are able to develop by organized society. There are, therefore, two means toward civilization: (1) Free, spontaneous, individual initiative and self-assertion, and (2) ordered cooperation. If these are logically opposed, we have the situation familiar to Hegelian logic in which we must unify them. The neo-Hegelian seeks to do this by the idea of civilization, in which they may be kept, as one might say, in balance, so that each may achieve the most that is possible toward control over nature. The balance is brought about by reason and experience. Perhaps these also have to be kept in balance, as one might say in a reasoned balance. After all, we have here much the same idea as the ultimate idea of St. Thomas Aquinas — the reason of the Divine Wisdom governing the universe. Or we have very much what Bishop Wilson, of whom Matthew Arnold writes, had in mind: A systematic adjustment of relations and ordering of conduct in order that reason and the will of God prevail.

But we are not confined to the neo-Hegelian approach. Let us try the social utilitarian approach, or one developed by sociological jurisprudence from the social utilitarian theory of interests.

As an illustration of the task of the legal order, consider the crowd in front of the ticket window of a movie theatre

at the first showing of a new and much advertised picture in which leading popular favorites appear. Very likely more are seeking to get in than can be accommodated. Certainly, everyone cannot have the seat he most wants. If those seeking admission did not line up or were not lined up in some way, it might not be possible in the scramble for many to get in. The entrance would be choked and many would be injured. By ordering the satisfaction of the wish to get in we satisfy the most we can with the least friction and waste. This ordering may result from customary recognition that lining up and taking one's turn is the thing to do, or it may be constrained by a policeman. In either event social control makes it possible to do the most for the most people. The central tragedy of existence is that we all, as the saying is, "want the earth." But while there are very many of us, there is only one earth. So the means of satisfaction have to be made to go round as well as they can. Claims or demands or desires conflict and overlap. Hence it becomes necessary to compare interests, and this must be done on the same plane. Otherwise, we answer our question in advance in the way in which we put it. A great deal of nineteenth-century juristic thinking was vitiated by speaking of individual interests as rights and of social interests as policies, so that one category was subordinated to the other by the very names given them.

Nor can the valuing and limitings of interests in order to adjust them to other interests be done offhand for each case. All experience has shown the need of formulation of these adjustments in principles and general rules.

An example of the part which these authoritative formulations play in guiding the judicial process may be seen in a case which occurred in an oriental country subject to the common law. A law prescribed penalties for passing within a certain distance in front of a religious procession or making noises along the line of such a procession. Another provision in the law imposed a penalty for interfering with the fire brigade responding to an alarm of fire. It happened that

such a religious procession was moving on a street and at the same time the fire brigade, responding to an alarm, was proceeding on a cross street toward the intersection. The fire brigade, clanging bells and blowing sirens, sought to cross immediately ahead of the procession, and, as the neighborhood was one in which religious animosities ran high, outraged partisans of the procession sought to overturn a hose wagon. They were prosecuted at the instance of a rival sect, while the firemen were prosecuted by adherents of the sect whose procession was interfered with. Each relied upon a section of the law. For the fire brigade it was argued that the public safety was the highest law and hence that the section giving it the right of way should prevail. For those who had sought to vindicate the claims of the procession, it was argued that duty to God was the supreme concern to which all else should give way. Happily, there was a rule in the English common law that where there are inconsistent provisions in a statute, the one last in order shall be taken as the last expression of the legislative will and shall govern. On that ground the firemen prevailed. Here it was necessary to have an authoritative ground of decision which both parties could accept without derogation from their dignity. Reason tested by experience and experience developed by reason give us solutions of such cases where otherwise the wisdom of Solomon would scarcely suffice.

Thus we must find rules or make formulas in advance of controversy, so far as possible, which will satisfy all parties that they have not been stepped on by others, even though they may not satisfy logical criticism as to the basis claimed as their reason. Often even an arbitrary formula will achieve order. But in the end there must be behind each formula a census of interests and a weighing and valuing of those involved. Good social engineering requires formulas which will conserve as much as may be of the whole inventory of claims with a minimum of friction and waste. Here at any rate is a practical plan in terms of the end of law conceived in terms

of securing interests. On the whole, this represents what experience has taught courts and lawyers. There is a valuing in terms of the end of law as one of achieving a maximum satisfaction of men's wants or claims or desires to have things and do things.

It will be seen that this includes more than Grotius's qualities of men whereby they ought to have things or be able to do things. It is not so much that we are to look primarily to qualities of individuals — as in schemes of natural rights — as that we must look at actualities of social life in civilized society and adjustments of desires or wants or claims which make that life possible. Also this approach includes more than the reconciling of wills in action, proposed by Kant. It includes not only wills but the claims or wants or desires which are behind the wills in action and motivate them.

Put as a practical program, the legal order requires selection of the interests to be recognized and secured, delimitation of those which are recognized in view of others also recognized, and selection of the means of securing those recognized and delimited. This program will be governed, consciously or unconsciously, by a measure of values. Is it to be a measure of values outside of and constraining those who exercise the authority or wield the power of politically organized society, or one in terms of the maximum efficiency of officials exercising that power as an end in itself? Is individual freedom the end or political organization of society the end, or is there something above each in which they can be unified? Men in the past have believed they could discover a measure of values. But now we are taught by the give-it-up philosophers that this cannot be done. The quest of a measure of values is said to be futile — to be hopeless. To use for a moment the terminology of the medieval jurist-theologians, we may not expect one to be found either in revelation or in reason or in both. We are told that we cannot have divine guidance, so we are to be driven to the human autocrat or autocratic bureaucracy — a postulated superman or hierarchy of supermen.

Mr. Dooley defined pragmatism as the philosophy which tells us when a lie is not a lie, and he added that it told us a lie was not a lie when it worked. If we accept the pragmatist's test of the truth — what will work — and a judging of doctrines by their results in action, perhaps it is as easy and profitable to believe in the God the skeptics tell us we can't prove as in the superman their own skepticism must compel them to admit cannot be proved either.

If we are to come to the regime of subordinating law, which some predict, subordination will require a measure of values, a plan, a well-reasoned ideal element no less than did coordinating law; unless, indeed, subordinating law is to be applied by a regime of administrative absolutism, unless there is to be a regime of force initiated by impulse and motivated by the personal emotions and individual inclinations of particular officials for the moment. Our American constitutional democracy, with its separation of powers, bills of rights, and checks and balances, was set up to preclude such a regime. Men had smarted under it in sixteenth and seventeenth-century England, and in seventeenth and eighteenth-century America. There was instead to be a fundamental law, a supreme law of the land, and behind it was the idea of a discoverable measure of values in an ideal of free institutions. It cannot be insisted too much that the bills of rights have a continually increasing importance in view of the rise of absolute political ideas throughout the world.

But the most widespread form of social philosophy of today will tell you that I am kicking against the pricks. Justice and morals and law are irreducible contradictions. They cannot be reconciled. When we follow out any one, we negate the others, and the net result is that, so far as any help from philosophy goes, we might as well give up as the philosopher himself does. This is not a new attitude in the history of human thought. Greek philosophy in the Hellenistic era, an era which had much in common with our own, took a like course. The Peloponnesian War had exhausted the Greek city-states.

All Greece had fallen into the hands of Philip and had been swallowed up in the empire of Alexander. An age of independent city-states with more or less democratic polity was succeeded by one of great military empires ruled autocratically. The mark of the thinking of the time was disillusionment, just as that has been the mark of the thinking of the time since the last world war. Epicureanism and skepticism were exactly the philosophies we should expect to grow strong in such an era.

Epicurus was wholly indifferent as to the form of political organization. He thought of justice not as a regime, of public justice not as a phase of social control by politically organized society, but as something variable involved in men's relations and dealings with one another, to be looked at from the standpoint of the individual happy life. He held that the wise man would shun public life. If the ruler was wise, then the wise man seeking to live a happy life need have no fear of being disturbed by him. If the ruler was a tyrant, then the wise man, like Br'er Rabbit, would "jes' lie low" and so escape the tyrant's notice and live an undisturbed life of happiness.

Pyrrho, the founder of the skeptics, held that it was not possible to have certain knowledge. We could only form individual opinions. Hence the right attitude toward all things was one of imperturbability. We must suspend judgment about things and make the best of them. The wise man did not pronounce judgments about things nor seek to promote causes or establish or disestablish institutions, as to which he was as likely to be wrong as to be right. The highest good was a condition of undisturbed passivity, a making the best of things as they came.

In Rome, after three generations of civil war, these give-it-up philosophies became fashionable. Under the empire what use was there for any philosophy of politics or social control? Philosophy responds to practical problems of life and puts its solutions of them in universal forms. The prob-

lem of that day to the cultivated Roman was how to live in those distracted times. The skeptic who told him to keep cheerful and avoid taking sides, and the Epicurean who told him to be imperturbable and inconspicuous, seemed to offer practical solutions put in philosophical form. In the same way in the give-it-up political and legal philosophy of today all ethical and rational element in lawmaking or judicial decision or administrative determination is eliminated. Everyone must proceed upon his individual system of values, which he cannot demonstrate to anyone else, and need not demonstrate to himself. It is with moral values as Yellowplush said about spelling — every gentleman is entitled to his own. Certainly, there is need of a philosophy which will give us faith that we can do things and so enable us to do things.

But, after all, law is a practical matter and the lawyer can find comfort in his having long employed a practical means of adjusting competing, conflicting, and overlapping interests. This is perhaps the answer to neo-Kantian relativist skepticism. Einstein has shown us, I have no doubt, that we live in a curved universe. There are no planes or straight lines or right angles or perpendiculars, and parallel lines very likely meet this side of infinity. But we do not for that reason give up surveying as a practical activity. If its postulates are ultimately mistaken, they approximate to the truth sufficiently for practical purposes. So it is with our legal measure of values.

We may concede, if the skeptic insists, that value is relative to something. Perhaps value in jurisprudence is relative to civilization. Proximately it is relative to the task of the legal order, to the task of enabling men to live together in civilized society with a minimum of friction and a minimum of waste of the goods of existence. What accords with the jural postulates of the civilization of the time and place has juristic value. If it will work in adjusting relations and ordering conduct so as to eliminate or minimize friction and waste, it is a valuable measure for a practical activity. Until philos-

ophers enable us to do better, lawyers may do much with this practical measure developed by reason from experience.

Yet men will go on seeking the more inclusive order. They will go on asking, if interests are adjusted, adjusted to what end? Is skeptical realism, which proves that an answer is impossible, and so relegates us to the superman or hierarchy of supermen, any more able to prove that an adequate superman or body of supermen is any more possible? Experience of the history of civilization gives much more ground for belief in the ability of reason to find the measure of values than of the ability of politics to produce the superman.

Philosophy has been the leader in every great creative era in law in the past. I am unwilling to believe that after ages of achievement in civilization we are now to give up and say *vanitas vanitatum, omne vanitas* — vanity of vanities all is vanity — that philosophy has been an illusion, a superstition, a pious wish, and will have nothing for us in the future. That would be an absolute conclusion which no skeptical relativist can consistently urge upon us.

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