

## THE FUTURE OF LAW

ROSCOE POUND †

A PROMINENT American educator is reported to have said, not long since, that the only necessary professions which might be expected to endure into the society of the future were medicine and engineering. Society could not go on without them. But the rest, and he included law in this residue, were unnecessary. They were superfluous and so to be classed as disappearing professions. Whether this was because he conceived of the society of the future as not governed at all, or as governed without law, or as governed by laws but without lawyers, he did not make clear. Each of these ideas has been urged at one time or another in the history of political and legal thought. Philosophical anarchy had many followers in the last century and it was not easy for the metaphysical jurists of that time to escape it as the logical result of their theory of freedom. More than one era of religious enthusiasm has looked forward to an ordering of society without law. From antiquity every Utopia which has been devised has been made to operate without lawyers. Today the idea of a society operating without law, and so without lawyers, is much urged by those who scoff at Utopias and think of themselves as peculiarly in touch with reality. We may well be asking ourselves, therefore, how far such ideas are well founded. We may ask ourselves whether there is reason to think, as anything more than a pious hope, of a civilized society without law or a complex developed society without lawyers. We may inquire whether we need have misgivings that we law teachers are concerned with a futile and superfluous business which is soon to be outgrown in a better social order.

There is nothing new in the idea of arbitrary application of the force of politically organized society by commands without law. A discussion scarcely different from that which goes on among writers on jurisprudence and politics today raged between types of Greek philosophers in the fifth century B. C. They argued, as men are doing today, whether men's disputes were adjusted and their claims and desires harmonized in action by arbitrary precepts arbitrarily applied by those who wielded power, or rather by precepts of general application grounded on principles of reason and justice. Antisthenes said, in effect, that what men

---

†University Professor at Harvard.

had taken to be behind social control in the Greek city state was a result of precepts existing by enactment or custom. Socrates, on the other hand, said social control was a discovering of the reality in relations—that is, of the ideally significant; it was something found, not made. In the seventeenth century Hobbes said that what was right and what was wrong was a matter determined by rules set by the ruler of a politically organized society to his subjects. Grotius, on the other hand, said that reason showed us what the ideal man would do and would not do—what was right and what was wrong—and a law was a rule of civil conduct morally and so legally binding to that which was right.

A generation ago the economic determinists revived Antisthenes' way of thinking in a new form. They told us that what men had been calling justice was only the will of the dominant social class, dictated by its self-interest, imposed upon those on whom it was able to impose its authority. Hence law was a body of precepts formulating that will. In the same spirit the realists of the moment, as they call themselves, tell us that it is all no more than a matter of what those who wield the authority of politically organized society choose to do. What they do is law because they do it. Likewise today Lundstedt declares that rights are what the law teaches men to claim; men's claims are not the basis of the legal order but the results of it.

All this is a complete negation of what men had sought to do and had believed they were doing from the time of the contact of Stoic philosophers and Roman lawyers to the rise of the economic interpretation in the latter part of the last century. It throws over the ideas of the classical Roman jurists, as well as those of the classical jurists of the modern world, and rejects the conception of a government ruling according to law, which Anglo-American jurists inherited from the Germanic law and American courts have carried out to its logical limits in their version of the characteristic common-law doctrine, the supremacy of the law.

Looking back over 2300 years of this "realism," from Antisthenes to Lundstedt, the advocates of what we may call the "hard boiled jurisprudence" are alike not only in the hard-headed position they assume but also in a confident dogmatism—an assurance that they alone are in touch with reality while all the rest of the world is groping in error and illusion and superstition. But as one looks back upon the corresponding 2300 years of idealism from Socrates to Stammler and Del Vecchio, the advocates of a jurisprudence grounded on reason and ideals of justice are seen to have been quite as dogmatic in assuming that they were thinking on a higher plane and in accord with the eternal verities. At any rate if there is nothing more to law than what the realists see, it is not worth preserving and we may look forward to its eventual

disappearance with feelings of relief. The best prophet of the future is the past. Without assuming dogmatically that the one position is more or less "real" than the other, or the one way of thinking on a higher or a lower plane than the other, let us turn to history. What does the history of social control, and more specifically the history of social control through politically organized society, tell us as to the relation of law to civilization? Does it indicate anything as to the probable future of the legal ordering of society and of the systems of authoritative precepts by which that order is maintained and carried on?

But we must be more precise as to what it is about which we are talking. What is the "law" which is to disappear or be superseded? "Law" is a term with more than one meaning. One meaning is the legal order (*ordre juridique, Rechtsordnung*), a special phase of social control through the force of politically organized society; the régime of ordering human conduct and adjusting human relations through a systematic application of the force of a politically organized society. The term had been used in that sense by Rousseau and by Kant and is so used very generally by social-philosophical jurists of today. Another meaning is the body or system of norms or precepts, and the technique of developing or applying them, by which the judicial and administrative organs of such a society feel bound to be and, on the whole, are guided in the application of that force. This has been the prevailing meaning from antiquity to the present generation. A third meaning is used, or at least assumed, by many of the realists of the present generation. They are skeptical as to the second meaning, taking the body of precepts to be illusory, and so apply the term to the judicial and administrative processes. There is a suggestion of this use of the term in a famous definition in the Digest of Justinian. Except for that, it is wholly recent.

Let us look at each of these meanings of "law" in relation to our question.

I need not point out that a paramount legal order is a modern form of social control. As compared with kin-organization and religious organization, the political organization of society was long feeble and limited in its jurisdiction. In antiquity it waged a hard struggle to prevail over kin-organization. In the Middle Ages it shared control not unequally with religious organization. Today it sometimes struggles with powerful voluntary organizations. But since the sixteenth century all other forms of organization have functioned in subordination to it and the scope of its authority seems to be extending rather than diminishing. In Western industrial society the last of kin-organizations, the household, is losing legal significance and discipline of children is coming to be in the cognizance of juvenile courts. Whether property dedicated to religious worship is being used according to the tenets of the organization endowed has come to be passed on by courts of equity. Expulsions

from clubs and unions and trade organizations are reviewed by judicial tribunals. Nor does the vitality of the legal order seem to be connected with or dependent on any particular economic organization of society. It grew strong under kin-organization. It prevailed over religious organization in the relationally organized society of the Middle Ages. It established a substantially complete paramountcy under the individualist competitive organization which culminated in the nineteenth century. If, as some believe, the latter is about to be superseded by some sort of occupational group organization, there is nothing thus far to show that such an organization can maintain itself without a legal order,

Jurists of the nineteenth century identified law in all its senses so thoroughly with the régime of free competitive acquisitive self-assertion, characteristic of that century, that many assume that in order to attack that economic régime they must also attack law.

What, then, of the second sense of the term "law"? How as to the body or system of norms or precepts and the technique of developing and applying them which has gone by the name of law since the writings of Greek philosophers? Law in this sense may be looked at from more than one standpoint. We may think of a body of authoritative norms of conduct, or of decision, or of administrative action, or of counseling those who seek advice. According to the function which has the most economic significance in the time and place, men have defined laws from one or another of these standpoints. Or instead we may look at law in this sense from the standpoint of how the norms or precepts come into existence or acquire their authority. Thus we may have a legislative theory of them, as a body of commands of a sovereign. In origin this is a theological-political theory. It goes back to a conception of a supernatural lawgiver, a magnified Justinian, legislating for the universe, and of human lawgivers in His image. Recent theories of laws as threats are only modifications of this. Or we may have ethical-rationalist theories of these norms or precepts as a body of formulations of reason declaratory of right and justice, or historical theories of them as a body of formulations of experience of life carried out into formulations of experience of adjustment of human relations, or consensual-political theories of them as a body of agreements of men in a politically organized society as to how they should live together in that society.

My argument does not depend upon acceptance or rejection of any of these theories as the one necessary foundation of a science of law. But it may be well to notice two theories of law chiefly urged today by those who are skeptical as to the significance of law in the second sense of that term. Recent analytical jurisprudence has tended to think of law in this sense as a body of threats. A law is a threat of some particular application of the force of politically organized society in case a certain situation or state of facts comes, or is brought to the notice of,

officials. Certainly this is one way of looking at them. Yet I can not but feel that the English analytical jurists are quite right in holding that they are threats only because tribunals and officials are expected to and normally will act in accordance with them. So also of the prediction theory of the nature of a law; a theory urged by Mr. Justice Holmes which has had much vogue of late. Really a law is not a prediction, but rather, as Mr. Justice Cardozo has pointed out, a basis of prediction, and laws are bases of prediction and on the whole very reliable bases of certain prediction because tribunals and officials are expected to, feel bound to, and will normally act in accordance with them. Indeed one would not need to notice these theories specially were it not that the Neo-Kantian left, which is very strong in the science of law of the moment, carrying Stammler's later logicism to the extreme, has come to think of law as something quite as arbitrary as the law conceived of by the economic determinists. Laws are threats, and the law making and law enforcing agencies of a politically organized society may threaten anything. Spiropoulos, indeed, says we may set up any postulates we like. Arbitrary of arbitraries, all is arbitrary. For a season, post-war political and legal thinking, regarding reason and principle and rule as illusions, turns to absolutism. But legislative absolutism is nothing new and, except for constitutional limitations judicially enforced in the United States, has not been supposed to be incompatible with law. And as to administrative absolutism, it has obtained again and again in times and places of high legal development, as in the Roman Empire after Diocletian, the French monarchy of the age of Louis XIV, and the Napoleonic empire.

Thus far I have assumed with the analytical jurists that law, in the second of our three senses, is a body of laws and hence that theories of a law are sufficient theories of law. In truth, however, there is more in law in that second sense of the term than any of the analytical theories take account of. I have already taken the liberty of adding to the analytical conception of a body of laws an element of technique of developing and applying them — an element of a technique of finding in or from them the grounds of deciding particular controversies or reaching particular determinations. One must go even further. Without going so far as the historical jurists who would include all social control under the term "law," or as Ehrlich's sociological theory of law as the inner order of groups and associations, or Malinowski's anthropological theory of primitive differentiation of obligatory norms of conduct — confining ourselves to what Austin calls matured or developed law, and from the strictest analysis of it, we must recognize alongside of laws and as part of law not only a technique but a taught tradition of doctrines and ideals which make it possible for laws to function effectively — which make it possible to achieve justice by means of them. Mature or developed

law postulates more than a state, a politically organized society with an authoritative lawmaking organ and permanent tribunals. It postulates also a profession of lawyers, not merely advocates and agents for litigation, but doctrinal writers and teachers developing and expounding and handing down a taught tradition. It is the rise of such a profession of lawyers, giving us law as well as laws, which is the significant event in legal history.

In Roman law the turning point came with the development of the juriconsult, counselor and teacher. The enduring part of the Roman law, the part which has been a quarry for lawgivers and jurists ever since, was his work. The modern Roman law is the product of juristic academic teaching, and no modern code would achieve its purposes if it were not developed and expounded and applied in the light of that taught tradition. We commonly think and speak of the English common law as the work of the judges in the king's courts. But the Inns of Court, societies of lawyers — practitioners, teachers, and students working out and handing down a taught tradition — go back almost to the beginning. It was this development and teaching of a tradition which made the work of the common-law courts possible. So, too, in the United States. The common law which we received and made the basis of the law in all but one of our states was not legislative. It was the English tradition given shape for our conditions by teachers and doctrinal writers whose labors bore fruit in a settled course of judicial decision. It is the future of such taught traditions of which we must be thinking.

Turning now to the third meaning of the term "law" — the judicial and administrative processes — skeptical neo-realism insists on giving law this meaning because by doing so it can eliminate from its science of law all questions of what ought to be, all disputes as to canons of value, all system and principle and reason. Thus the realists bring us to an objective observation of what actually takes place judicially and administratively, assuming that it actually takes place as a series of independent actions, as a matter of individual courses of behavior. To them law is whatever is done officially. The officials may do as they choose. What they choose to do, when they do it, becomes law. But it is not meant by this that it becomes something binding on them or on other officials in another case or on another occasion. What will be done in that case or on that occasion will be an independent bit of judicial or administrative behavior. There is nothing but a process of judging and administering.

No one conversant with legal history can deny that there have been recurrent eras in which for a time men resorted to justice without law while a taught tradition was being reshaped or eked out to the exigencies of a social or economic transition. In Anglo-American legal history the

rise of the Court of Chancery is a conspicuous example. It should be noted, however, that the equity of the Court of Chancery crystallized into a taught tradition and was merged in the taught tradition of the common law. Legal history abounds in other examples. Moreover today in the United States, where administrative boards and commissions have multiplied in the present generation and have seemed at times to be operating according to the realist theory, the older commissions are developing a crystallized practice and course of determination in all ways parallel to the process that went on in equity. The reports of the Interstate Commerce Commission, and those of more than one state industrial commission, have come to resemble reports of common-law tribunals and to be used in the same way as those of the latter.

Let us not be deceived by the names "realist" and "realism" which the juristic left applies to itself and to its doctrine. "Realism" is a boast, not a description. The English analytical jurists spoke in the same way of a "pure fact of law" as that with which they were concerned, while others were in the clouds concerned with speculations as to right and justice and ideals. In the same way the positivists spoke of "observed and verified fact" on which they were proceeding, while their contemporaries were playing with philosophical theories. Every school of jurists which has arisen in reaction from some dominant philosophy has thought and spoken of itself in this way. Reality in such a connection means significance. Significance in the judicial and administrative processes is not to be found in occasional aberrant behavior but in the habitual, normal, predictable, reasoned behavior of the tribunals.

Whereas Kant thought of the legal order as a condition, Kohler thought of it as a process, in that respect anticipating recent realism. But the régime and the processes by which it is maintained should not be confused. If we must call the process by the name of "law," our question becomes whether we are to regard law as the application of the force of politically organized society, or of those who apply it in the name and by the authority of that society, no matter how the individual official goes about it, or, on the other hand, we are to think of a systematic and orderly application of the force of such a society, guided by a body of norms or precepts developed and applied by an authoritative technique. Legal history leaves us in no doubt where significance, and so reality, is to be found as between these two ideas.

A society without social control is hardly conceivable. What, then, is to take the place of law, in any or all of the senses of the term? Three substitutes have been dreamed of or attempted: first, a régime of just men deciding each case for itself by the light of nature and according to their individual sense of justice for the time being; second, a régime of free contractual self-determination; and, third, a purely

administrative régime proceeding on the basis of intuition developed by experience. Let us look at each of these.

As to the first, one thinks at once of the wise and just king administering justice in person — of Solomon, of Harun al Raschid, of St. Louis under the oak at Vincennes. The English chancellor, who decided at first *ex aequo et bono*, with no law to guide him, was the representative of a king doing justice personally in exceptional cases. The last representative of this judge-king, I suppose, is the magistrate with a petty jurisdiction, applying his unaided good sense to causes too small to justify the costly and elaborate operations of the ordinary tribunals. But today royal justice is obsolete, equity has long crystallized, and a better system of inferior courts is everywhere replacing the old-time squire. In the formative era of American law more than one Commonwealth tried the experiment of associating lay judges with the law judges or of putting laymen on the bench in their highest courts. It was not long before the exigencies of the economic order led to exclusively lawyer-manned tribunals, even to the extent of choosing lawyers to be lay judges.

Yet the notion of a non-technical justice administered on the sole basis of common sense has a strong appeal to the public. In the United States recently the backwardness of procedure in our chief commercial state and that dilatory, expensive, and capricious institution, the civil jury, eminently unsuited for commercial litigation, has led to a great development of commercial arbitration. Every trade, every craft, every occupation has its organization with elaborate provisions for arbitration of all disputes, and there has been much legislation everywhere providing for enforcement of such arbitration agreements and enforcement of awards. An arbitration association is active in pushing such legislation and in promoting arbitration on every hand. It has records of a very great number of arbitrations. But it persistently refuses to allow study of or access to these records lest a body of precedents might grow up and arbitrators might begin to act uniformly and predictably. Every endeavor is made to insure that each case be treated as unique and that no habit grow up of applying reason to experience. This but repeats the attempts in the beginnings of our polity to have a non-technical lay justice, and recent studies of commercial arbitration in action indicate that in the end there will be the same result.

Those who inveigh against systems of law and would set adjudication more at large, do not appreciate how a change anywhere in a body of norms or precepts for the guidance of tribunals may have effects at many other points and hence how much the stability of the economic order may be disturbed by setting at large the determination of questions which at first sight have no such implications. Consider, for example, a matter which a new type of labor disturbance is likely to bring before



American courts as a pressing and difficult series of questions. For some time it has been apparent that the industrial laborer claims a vested right in his job. Recently the sit-down strike asserts a vested right of the employee in the locus of performing the job. Along with these things comes the legal institution of compulsory collective bargaining. An organization of employees determines who shall be employed. The employer's relation is with the organization only. If these claims and this institution stood by themselves it would not so much matter. But the general security is maintained by two long settled doctrines which proceed on quite another basis. If an enterprise is carried on by means of employees and those employees so conduct themselves as to maintain or create a public nuisance, at common law the employer is criminally liable. He must at his peril so control his employees as to prevent injury or danger or annoyance to the public. So also if the employees, in the course of their employment, injure a third person. The employer is civilly liable for the damage. He must control his employees at his peril. But how can he do this if he has no control of the relation, of the choice of personnel, or even of the terms of employment? What is to become of the common-law safeguards of the public or what is to take their place? No layman, simply because he is wise and just can pass on causes involving such questions in such a way as to maintain a complex social order. No man simply because he is just can decide the many cases where the incidence of liability has to be determined as between persons equally culpable or equally blameless, or as to which the main difficulty is that there are no clearly applicable precepts of morality or settled moral principles.

Two examples may be given. One of the difficult problems of civil liability arises where an injury results from negligence both of the actor and the person injured. No thoroughly satisfactory rules for such cases have been devised, nor, in all probability, can be devised. Reason applied to experience has indicated certain practically workable rules. No one could hope, off hand, *de novo*, to work out as good, much less better, solutions. Again: Where one man, innocently and in good faith adds his skill and labor to another's materials to produce a new thing, jurists and lawmakers since the classical Roman law have devoted their ingenuity to discovery of a just and practicable rule as to who is to be the owner. The economic order requires that ownership shall not be uncertain. The property must be in one or the other. But the two schools of the classical Roman jurists urged different rules, and Justinian chose a third. The modern codes have not agreed, and the common law authorities have not agreed better. Any rule must be somewhat arbitrary for such cases; yet there must be one rule, uniformly applied in each jurisdiction, if the security of acquisitions and security of transactions, on which the economic order rests, are to be maintained.

I do not overlook the Marxian idea that abolition of private property will do away with the need of law; that law is required only to maintain the position of a socially and economically dominant class, and that with the disappearance of classes, when property is abolished, there will be no conflict of claims and desires requiring legal adjustment. But the Marxian idea postulates, first, that there will always be enough of all the desirable material goods of existence to give each as much as he will desire, so that no contentions as to use or enjoyment can arise. Second, it postulates that there will not be conflicts or overlappings of the desires and demands we catalogue as interests of personality, or that they will be so simple as not to require more than a common-sense determination for each individual case. There is nothing in experience of human relations in a complex society in a crowded world to warrant faith in either postulate.

A second substitute for law, a régime of free contractual self-determination, a régime in which rights and duties were to be fixed and relations adjusted by free agreement of those concerned, was much urged and for a time widely believed in, in the nineteenth century. It was thought that free contract, free self-determination, was the ultimate end of social development; that a progress toward the fullest régime of free contract was indicated alike by history and by metaphysics. This idea presupposes the sanctity of promises; that promises will carry with them their own fulfilment and will need no enforcement. It rejects Hobbes's proposition that covenants without the sword are of no avail. Today we are much less sure of a universe ruled by contract. Recent thought is not willing to hold a promisor to fulfil his promise even to loss of his shirt and trousers — *usque ad saccum et peram*. It expects the promisee to take at least part of the risk. Indeed, some of the realists of today go so far as to rate a promise as a mere prediction, and the growing commercial practice as to cancelling orders suggests this as a view which is gaining ground. Moreover the whole course of legal development in the past fifty years has been away from a régime of free contractual self-determination. There has been a growth of judicial review on legal principles in case of expulsions from clubs and associations and unions. There have come to be legal prescribings of the contracts which may be made and of their form and content, as, for example, standard policies of insurance. There has come to be a great body of prohibitions of certain classes of contracts and of restrictions upon free contract in an increasing number of relations. Reference can be made to the limitations upon contracts of public utilities and upon contracts in the relation of employer and employee. The movement has not been toward a diminished area of the legal order. The scope of law has continually extended. There has not been increasing free self-determination by con-

tract. The scope of free contract has continually diminished and the domain of rules of law has expanded.

Today we hear chiefly of an administrative régime, a régime of official orders for each situation and each controversy, as a substitute for the régime of law and laws judicially applied. Writers on public law from the analytical standpoint began to urge this, as a corollary of their conception of the state, a generation ago. Jellinek and Laband indicated such a theory, and the economic-juristic adviser of Soviet Russia took it over and developed it. In the socialist state, we are told, there is to be no law; there is no law (*droit, Recht*); there is only one law (*loi, Gesetz*); that there are no laws (*lois, Gesetze*), only administrative ordinances and orders. But the setting up of a plan, to which, we are now told by the Russian writers, it is the "sacred duty" of every economic organization, of every soviet manager, and of every toiler to give full support, has shown the futility of such an idea. After all, there proves to be something systematic and orderly to which men are to be held and not a mere series of independent administrative acts.

A somewhat similar idea has been urged of late in Italy. There men have set up, or are setting up, what they call a corporative state in which the occupational group is to be the unit instead of the individual man. In such an organization of society, we are told, disputes will be adjusted by committees of the occupational group, or, if controversies arise between members of different groups, by a general committee in which the different groups are to be represented. One is reminded of the régime of kin-group discipline and of the king determining disputes between different kin-groups and between kin-groups and kinless men in the earlier societies of antiquity. It is noteworthy that law grew out of this process, and if the process is repeated, law may grow out of it again.

One must admit that there has been a marked growth of administrative justice in the English speaking world in the present century. But in the United States, at any rate, it has not been wholly due to the development of an industrial society. With us, jury trial of civil cases and a hypertrophy of civil procedure have driven men to find simpler and speedier agencies of justice for the time being, just as in Tudor and Stuart England there was for a time resort to administrative tribunals rather than to the courts of law until the latter had outgrown some of their medievalism.

Let me look at the question from another standpoint. The starting point in such a discussion must, I submit, be the idea of civilization; the raising of human powers to their highest possible unfolding, that is, the achieving of a maximum of human control over external nature and over internal nature, or human nature, for human purposes. Thus there are two sides to civilization, a conquest of external nature and harness-

ing it to man's use, and a conquest of internal nature, a restraint of individual anti-social conduct and a constraint to what is required for an effective division of labor, without which no considerable subjugation of external nature is possible. It is true some forms of recent skeptical realism seem to deny the possibility of this subjugation of internal nature. It is thought to be psychologically a chimera. But the whole history of civilization may be vouched to the contrary.

At bottom it is the problem of the legal order to reconcile or adjust conflicting and overlapping human desires or demands or claims so as to secure as much as possible of the whole scheme of human interests with the least friction and the least waste. Indeed this is more than the problem of the legal order. It must be the problem of any order which may somehow, somewhere, sometime arise to supersede it.

Legal history shows a steady progress in two respects, first, in the widening of the circle of recognized interests, and second, on the whole, in an increasing certainty, uniformity and consistency in the administration of justice. The economic order demands stability, but life is change, and the exigencies of life call continually for change in the law which is to be applied to life. The economic order calls for generalized precepts in order to insure certainty, uniformity and consistency without which division of labor and co-operation in great enterprises are not practicable. The individual life calls for an individualized justice. Thus a balance between judicial justice and administration seems to be indicated, and such a balance has been achieved by law.

There have been eras before in which men have thought to supersede law or even more ambitiously to supersede law and government. Today the idea is to supersede law without superseding government. Certainly, if civilization is to be maintained, we can not supersede social control, and law has proved the most effective agency of social control. Colonial New England dreamed for a time of a theocracy. There was to be a code of laws in conformity with the word of God. The philosophical anarchists thought to substitute a régime of contract. Marx believed we could substitute a régime of common ownership. But those who are seeking to carry his idea into practice now find they must maintain it by government and must maintain the government by something increasingly like law. May we not confidently expect that dictators, adjusting relations and regulating conduct by means of administration since they can not administer in person in modern society, will find the rooted human antipathy to having one's will subjected to the arbitrary will of another driving them to require their administrative agents to carry on their functions according to law? The ideal of co-operation, which many now hold is replacing the nineteenth-century ideal of self-sufficient individuals in a society of free competitive self-assertion, does not involve doing away with law. The co-operation will have to be

guided and safeguarded against friction and waste quite as much as the self-assertion.

It is interesting to note that the jurists of the left, the so-called realists, who in the nineteenth century were eliminating force, are now putting the whole stress on force. Civilization involves subjection of force to reason, and the agency of this subjection is law. There is need of ordering. There is need of ordering by men. There is need of holding these men to a reasoned, reasonable, orderly ordering. If we must have authority, we must also have a restrained exercising of authority.

In legal history we have veered from extreme of arbitrary authority to extreme of limited and hampered authority and back again. We have swung from extreme regard for the general security to extreme regard for the individual life and back again. A legal system succeeds as it succeeds in attaining and maintaining a balance between these. But it no sooner discovers how to attain such a balance than the progress of civilization throws the legal order out of balance, and the process must be repeated. When it comes back into balance, by the application of reason to experience, there is a system of law, as there was before, but it is one which has learned to take account of more interests and to give them more security.