

JUSTICE, POWER AND LAW

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“Yet law-abiding scholars write; Law is neither wrong nor right,
Law is only crimes Punished by places and by times. . . .”

W. H. AUDEN, *Law Like Love*.

The life of every reflective undertaking is in its grand antinomies, in the interplay between forces separate and inseparable, cooperative and irreconcilable. In jurisprudence the conflicts tend to copy those of general philosophy. Freedom in lawmaking is set off against determinism, stability against change, the ideal against the positive. But one deeper antithesis recurs most persistently of all: justice and power.¹ Woven in contradiction and concomitance, justice and power confer upon law much of its shape, texture and warmth.

Justice or righteousness as the source, the substance and the ultimate end of law is a very ancient concept. The view is at least as old as Leviticus and the geniuses of Athenian enlightenment. It continued under Stoic influence through the decadence of the Roman republic and early empire, assumed a pseudo-Christian guise by the time of Justinian's compilation, flourished amid the brutalities of mediaeval Europe and became, in Aquinas' skillful hands,² authenticated theology. Early in this honorable career, justice found itself interlaced with natural law,³ following the critical aristotelian analysis of man as part of nature, his society as an organism within the gross universal movement. Natural law and its justice were free of time and place, like human rationality the same always and everywhere.⁴ Positive legislation drew its force from the principles of this higher constitutive code, and lost authority whenever it violated them. Thus natural law could be made to sanction revolutions as diverse as the British of 1688, the American and the French. Only a justice above positive law might rationalize the defiance of temporal power and the overthrow of sovereigns.⁵

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1. The voluminous literature of the subject is classified in Pound's invaluable *OUTLINES OF LECTURES ON JURISPRUDENCE* (5th ed. 1943) 4-15. It is ably summarized in W. FRIEDMANN, *LEGAL THEORY* (1944) 18-62, 135-51. Probably the first systematic treatment was in the discourses of Motse.

2. *Summa Theologica*, I-II, pp. 90-108, trans. *BASIC WRITINGS OF SAINT THOMAS AQUINAS* (Pegis, ed. 1945) II, 742-805.

3. Natural law theories have many diverse, even contradictory points of departure. For examples, see J. HALL, *READINGS IN JURISPRUDENCE* (1938) 50-55.

4. CICERO, *DE LEGIBUS*, I. VI. 19, I. XIV. 42, II. IV. 9 (Loeb trans. 1928) 319, 343, 381.

5. LOCKE, *SECOND TREATISE OF CIVIL GOVERNMENT* (1690).

Implications of these familiar doctrines go deep into property institutions, political structures and basic civil rights. They are equally profound in the shaping of international law. Similarity of positive codes, as European history of the last century has shown, does not make for understanding or peace between nations, unless enriched and strengthened by mutual subscription to meta-codal principles, such as fair dealing or adherence to pacts. Only a general agreement on what constitutes justice (or at least the just attitude) can support effective international law. Municipal law, though inscribed in identical terms, will mean different things on different sides of a frontier which is not merely national but moral.⁶

In the United States, the position has been substantially affected by a written constitution. So long as that document was considered the engraved tablet of natural law—elemental and eternal—judges must turn to nature to find the exposition and add the gloss. The law of nature appeared to furnish some highly convenient answers, to have anticipated some peculiarly complex and novel issues, and too often to have favored established interests. More recently, explicit reference to natural axioms has become rare; nature is suspect. But so much remains of the liberal principles which natural law thinking (of the eighteenth century) conferred on the written constitution, that judges need not often look farther. This has proved comforting, for it permits the desired result to be attained without doctrinal dispute. Judges may speak of “due process”, “equal protection”, “general welfare”, “reasonableness”,—all somehow cleansed of natural rights or higher law. But would the decision be the same if twenty-four centuries had not preached indwelling justice?

Distrust of the law of nature is predominantly modern. True, some more sophisticated of the ancients, having heard much mouthing of “*ex aequo et bono*,” might mutter “*cui bono?*”⁷—but the tide of skepticism did not rise noticeably until the 17th century.⁸ It had been observed that the laws of nature were either too general to offer much help in concrete cases or too specific to claim universal and absolute authority.⁹ Equality, for instance, might appear an inspiring maxim, but how could one determine the equals as between this particular merchant and this manufacturer, this vendor and this purchaser, this heir and this creditor? If natural law had a neat categorical principle

6. W. FRIEDMANN, *op. cit. supra*, note 1, 250 *et seq.*

7. CICERO, *DE RE PUBLICA*, III. VIII. 13-XI (Loeb trans. 1928) 193-201; XENOPHON, *MEMORABILIA*, I, II, 40-46 (Loeb trans. 1923) 31-5.

8. “Justice is subject to dispute; might is easily recognised and is not disputed. So we cannot give might to justice, because might has gainsaid justice, and has declared that it is she herself who is just. And thus being unable to make what is just strong, we have made what is strong just.” PASCAL, *PENSÉES SUR LA RELIGION*, no. 298.

9. Modern instances are *Ives v. South Buffalo R. Co.*, 201 N. Y. 271, 94 N. E. 431 (1911); *Coppage v. Kansas*, 236 U. S. 1 (1915); *Pierce v. Society of Sisters*, 263 U. S. 510 (1925). See also *Calvin's Case*, 4 Coke 1, 77 Eng. Rep. R. 377 (1608).

for Titius' immovables in Rome, what value could that exhibit under the idiosyncratic tenures of Graeco-Roman Egypt,¹⁰ the manorial customs of Norman England or the Soviet system of collective farms? The law is busy with individuals, with the here and now; it must get on with its work of answering and sending litigants away. What Aquinas said was lofty enough, but it did not decide the case. Moreover lawyers and judges could quote these vague maxims for any position whatever, for revolution and reaction, plutocracy and community of goods. Natural law might be nailed to anyone's mast. It was, in fact, so universal that it could never be found.

The heaviest blow to natural justice came, characteristically enough, from within, that is, not from denial but from reinterpretation. The author of destruction was Hobbes. Natural law is the embodiment of specific assumptions as to the character of man, and in general draws its authority from those assumptions. If man be by nature all cannibal—tearing, destroying, devouring except when restrained—then ultimately he must turn to sovereign force for the most elementary protection, and organized society becomes a technique for muzzling wolves. Natural law had posited original virtue (whether by birth or divine grace); Hobbes could find only original viciousness. Thus justice, to live at all, must seek the aegis of sovereign constraint.

From this point it was only a step to accepting power as the substance of legality. The view of man again dictated the view of law. If, as Bentham thought, humanity is the weathercock of pleasure and pain, then legislation can keep the wind blowing in the right direction.¹¹ The effectual way to serve utility is by law, that is by sovereign command. All talk of nature and natural rights was mere polemics, if not downright abuse.¹² The law is what the organ of state power directs: obedience is induced by promises of pleasure and, more frequently, by threats of pain. Moreover, as Austin showed somewhat later,¹³ one may agree with Bentham's analysis of law without sharing his ebullient optimism.

Now law qua command has at least one dialectic advantage: the command, hence the law, can be found. Positive enactments and decisions are there to be read, and it matters little that Continental theorists have looked primarily to the former, which Anglo-saxons have neglected for the latter. Different organs may speak for the sovereign; all in speaking issue commands—the only law there is. Each nation its own sovereign, each sovereign his own commands, each set of commands a distinct legal system. During the past half century as atti-

10. R. TAUBENSCHLAG, *THE LAW OF GRECO-ROMAN EGYPT IN THE LIGHT OF THE POPYRI* (1944) 167 *et seq.*

11. BENTHAM, *THE LIMITS OF JURISPRUDENCE DEFINED* (Everett, ed. 1945) 138 *et seq.*

12. *Id.* at 83-4.

13. *THE PROVINCE OF JURISPRUDENCE DETERMINED* (1861).

tudes toward society and the integral man became tougher and more cynical, the command analysis grew progressively popular. At its extreme, it rationalized every ruthlessness, every abandon and misanthropic contempt. Bentham wished man to be liberated by legislation: his insights were made to serve the ends of bondage. This, of course, did not make them false in themselves.

The doctrine has already undergone a number of refinements. In the first place, if law be command, whose command is it? The modern world seemed to offer no instance of sovereign power completely monopolized by a single individual. Everywhere, even in the most compact tyrannies, state power was divided and parceled out; in the countries which analytic jurisprudence knew best, the differentiation was perhaps greatest. This engendered a sizeable literature on sovereignty, its nature and location, which lost in profit as it grew in size.

The command itself proved little more certain than its source. Leaving aside all question of judicial and administrative interpretation, one may still fail to discover a clear command in most rules of law. Who is commanded to do what, for example, by the Statute of Wills? Here was a real logical difficulty, augmented by the even graver psychological dilemma: that most law is not subjectively felt to be a command. It might be termed a hypothetical command—"If *A* injures *B* in such and such a manner, the judge shall require *A* to make restitution"; but the rule of law appears primarily a mandate to the judge (or perhaps to the sheriff). Of course, with the practice of sufficient ingenuity, declarations of very great variety can be transposed into some sort of imperatives; symmetry can be achieved. But this is mere exercise in grammar. So extended, the command theory progressively loses its productivity, as theories always do beyond the margins of convincing insight.

The position has been further weakened by its extreme nominalism. It had no way to account for the resemblances among legal systems, that is, no way in terms of an utterly capricious sovereign will. If law is not shaped by justice, ethos, the socio-economic matrix, but by a mere series of commands, then how do the sovereigns happen so often to will the same? Of necessity, the reply would allude to similarities in economic structure and social circumstance, coincidences of history and religious faith, or participation in an ancestral juristic tradition. But if these are the explanations, where is the free unfettered sovereign will? It seems largely determined, as indeed it should be. A wholly free will in a finite world is a fair definition of insanity.

These troubling qualifications of Austin's doctrine have not led to its rejection. Instead, they have induced an attitude of extreme positivism resolved not to inquire into the principal assumptions of the theory. The business of the jurist, we are told, is to look at the law as given and to study its day-to-day operations. Other considerations

are matters for politics, sociology or ethics;¹⁴ jurisprudence is to be the science that explains the relation between a judge's digestion and his decision and between traffic signals and reckless driving.¹⁵ It may alternatively concern itself with tabulation of the interests which law seeks to satisfy. If, however, all the various interests, once identified, are arrayed together in democratic parity, so as to indicate no preference of one over the other, every kind of command can be legitimated. Criticism is smothered under the weight of scholarly description.¹⁶

In the twentieth century, sheer power enjoys a respect bordering on idolatry, and legal philosophers participate freely in the general worship. Beside the cynic, the disillusioned and the callous, there is the "pure" scientist insisting that in jurisprudence all "political" considerations are irrelevant.¹⁷ Irresponsible force threatens to occupy a field abandoned by those who might restrain it. Thus, in the antinomy between justice and power, the latter characteristically enough needs no expositor or advocate; it is justice that must demonstrate reality in the law.

Enough has been said of the two forces to indicate their fundamental contradictions.¹⁸ These serve to warn that limited principles have been extended beyond the boundaries of validity. Now, as a fresh analysis is to be attempted,¹⁹ expectations had better remain modest. An ancient antithesis does not easily submit to smooth neatness; it will always show a couple of cowlicks.

II

The stubborn survival of some sort of faith in *natural* justice should point to a nucleus of truth. Errors, whether sincere or interested, were committed; pretensions became far too extravagant. Natural law sought to decide controversies in which it had no role, to offer absolute

14. The most determined attempt to amoralize jurisprudence is, of course, that of Kelsen and the Vienna School, ably criticized in FRIEDMANN, *LEGAL THEORY* (1944) 107-11.

15. Compare Moore and Callahan, *Law and Learning Theory: A Study in Legal Control* (1943) 53 *YALE L. J.* 1, with M. R. Cohen's critique of positivism in the social sciences, *A PREFACE TO LOGIC* (1945) 162 *et seq.*

16. *Interessenjurisprudenz* has at least explicated the multivalence of individual men, overcoming various sweeping social dichotomies.

17. See KELSEN, *GENERAL THEORY OF LAW AND STATE* (1945).

18. As Cyril Connolly says, "Truth is a river that is always splitting up into arms that reunite. Islanded between the arms the inhabitants argue for a lifetime as to which is the main river." *THE UNQUIET GRAVE* (1945) 103. The arguments, if they do no more, may reveal the plurality of the streams, their contours and their ultimate confluence.

19. Meaning only that an attempt has been made to think matters through, without conscious borrowing. The conclusions reached below bear resemblances to certain of HUME, *AN ENQUIRY CONCERNING THE PRINCIPLES OF MORALS* (1740); J. S. MILL, *UTILITARIANISM* (1863); and the earlier DEL VECCHIO, *IL SENTIMENTO GIURIDICO* (1908); but there are important differences in approach and final valuation. As Peirce says, "The great facts have always been known." *THE PHILOSOPHY OF PEIRCE* (Buchler ed. 1940) 293.

answers where only the tentative or relative would serve. It was guilty of the Duchess' fallacy in *Alice in Wonderland*: it insisted that everything must have a moral in a universe full of the irrelevant, the inane, the neutral, the fatuous and the frolicsome. To make matters worse, its principles proved hopelessly discrete. The evolutionary connectedness of human life and of man's relations is the root-fact of law; a collection, however ideal, of static, discontinuous maxims simply could not perform the task. Justice, as *The Republic* unintentionally demonstrated, was not to be captured in a formula. Nevertheless, it somehow remains a word of magic evocations.

One clear occasion of these difficulties was the resort to rigorous deductive reasoning, the derivation of rules from ambitious axioms. Here it is proposed to pursue a different route. Perhaps the mind does contain self-evident truths concerning justice, from which legal norms less obvious in their nature may be deduced; we shall, all the same, feel safer in trusting to experience and observation. What is given in experience appears, of course, less orderly and consecutive, but it at least offers a point of return in the cycle of ratiocination. As general propositions concerning law must ultimately succeed or fail in terms of their verifiable consequences, they can best be obtained in the very marketplace where they are to be realized upon. Justice is, of course, an ideal value of highest rank; but its positive embodiments are so thoroughly alloyed with other values and interests that it can never be refined out. Generalizing from particular rules and judgments will not avail, for how are we to know that the instances selected are themselves wholly "just"? The lofty abstract concept lurks somewhere beyond our discernment; it offers no incarnation which may be trusted as quite unmixed and pure. Thus we might be left entirely without empirical guidance, were it not for the sense of injustice. This sense is clearly and frequently manifested; it is a familiar and observable phenomenon. Its incidences reveal the genesis and biologic purpose of justice in human affairs. Hence an attempt will be made here to disclose the ideal value in the functioning of the sense of injustice.²⁰

Instance A. Five men who had met to dine together are brought before a judge, on the complaint of the same police officer that each of them parked his automobile one hour overtime in the same block. All plead not guilty but offer no evidence or explanation. The testimony of the policeman is uniform as to each alleged offense. The judge

20. I speak of the "sense of injustice" rather than the "sense of justice," (1) because I think the former more accurate, indicating the reaction caused by real or imagined injustice, (2) because it seems expedient to escape all the overtones and associations of natural law writings on "justice," and (3) because the phrase which I have preferred seems to point more clearly to what is active and vital in this kind of human experience. When later "justice" is mentioned without further qualification, it is intended to signify the active remedying or forefending of what would evoke the sense of injustice.

acquits three, fines one one dollar and sends the fifth defendant to jail for ninety days. This evokes the sense of injustice.

Obviously, in a given ethos all five might have been acquitted; alternately, all might have been convicted and punished in some appropriate manner. Regardless of the individual dispositions, the inequalities arbitrarily created arouse the sense of injustice, for equal treatment of those similarly situated quoad the issue before the court is a deep implicit expectation of the legal order.

Now equality is in general the creature of positive law.²¹ Courts and legislatures establish classes of humanity, categorizing for one or another purpose the duties and rights which they desire to effect, to destroy or to qualify. Thus before a court, those only are equal whom the law has elected to equalize.²² The point is that inequalities must make sense. If decisions differ, some discernible distinction must be found bearing an intelligible relation to the difference in result. The sense of injustice revolts against whatever is unequal by caprice.²³ The arbitrary, though indispensable to many of law's daily operations, is always suspect; it becomes unjust when it discriminates between indistinguishables.

As human integers, men are indistinguishables. This natural fact imposes a limit on the classificatory discretion of positive law. The sense of injustice does not tolerate juridic classes by which the integral status of man is violated. Legal slavery, for example, was doomed to disappear everywhere, for no other reason than that a slave is a man. Here we recognize one of the fixed stars of jurisprudence: nature has made man a prime which positive law cannot justly differentiate.

Why does the sense of injustice call actively for equality? One explanation is that equal treatment of all within a recognized class is a necessary attribute of any legal order; the very concept of law requires this minimal regularity. In terms of pure intellection, such an analysis appears quite persuasive, but it can hardly account for the sense of injustice. One does not become outraged and furious merely because some decision has violated a dialectic pattern. The true reason must go considerably deeper, below the threshold of intuition. It must make clear why the humble and illiterate, the drawers of water and hewers

21. The instance given is advisedly extreme; but so extensive is the operation of positive law on this issue of equality, that we should have to add that all five men were duly licensed to drive and that none of them had a previous unfavorable record.

22. One of the characteristics of evolution in the law is the progressive subtlety with which new equalities and new differentia are discovered, all in continual processes of reclassification. This sort of dynamic taxonomy now transcends the typing of individuals and begins to embrace economic groups such as unions and associations. Equality is an ephemeral status frequently lost before occasion arises for it to be recognized in court.

23. For example, Scripture fails to tell us just why Cain's sacrifice was rejected, Abel's accepted. Experts have come to the conclusion that the story has been distorted and that, in effect, it was Abel who killed Cain! L. FINKELSTEIN, *THE PHARISEES* (1938) 351 *et seq.*

of wood can hate injustice with a burning hatred. The roots of this demand for equality will be exposed when we come later to describe the sense of injustice as a general phenomenon.

Instance B. Two shoe-factory employees, carrying a large amount of money, are waylaid, robbed and fatally injured. The incident occurs during a period of intense public feeling against radicals of every kind. Subsequently, a shoemaker and a fishpeddler are charged with the crime and, though entirely innocent, are convicted on flimsy circumstantial evidence. The fact that the fishpeddler is an avowed anarchist influences the decisions of the trial judge, the jury, the appellate court and an advisory commission appointed by the governor. After languishing in jail for seven years, the accused are executed. This is felt to be unjust.

Here the sense of injustice attaches itself to the notion of desert. The law is regarded as an implement for giving men what they deserve, balancing awards and punishments in the scale of merit. As general merit is so difficult of admeasurement, legal action is usually expected to relate to particular merit, that is, to the right, duty or guilt acquired in a specific circumstance. Sometimes, because of its own clumsiness, the law cannot fulfill this function. Then it may convict a murderer for a murder he has not committed, or a gangster for failure to report his income. In such case, the legal subterfuge does not evoke a keen sense of injustice, for desert has been somehow accorded.²⁴ Thus, not merely the truth or falsity of a verdict, but its relation to desert is the criterion of approval.

Nothing can so heartily satisfy this sense as an incident of "poetic" justice. That he who lives by the sword shall die by the sword, who digs a pit for his neighbor shall fall therein, who builds a high gallows for the innocent shall hang thereon—all these denouements seem peculiarly fitting. But the law cannot so variously adapt the punishment to the crime; it has a limited stock of beneficences and sanctions, limited by the need of legislative control over the inventive imagination of judges. Poetic justice, rare enough as it is, is also imperfect, for even the wholesale malefactor can die but once. The sense of injustice does not call for such dramatic or individualized awards. It adjusts to familiar imperfections. What it cannot stomach is the use of law to raise up the guilty or to punish the innocent.

Instance C. Defendant is convicted of treasonable utterances by which he successfully sought to impair the morale and obedience of combat soldiers in time of war. The sentence of the court is that he be compelled to submit to a surgical operation on his vocal chords, so that thereafter he may only bark like a dog. This affronts the sense of injustice.

24. Compare Instance D *infra*.

Here the main concern is with human dignity. From early times, cruel and unusual punishments have been relegated to the discretion of deity or destiny; law has pulled away from vengeance and humiliation. Vicious and debasing punishments are felt to dishonor the court and the humanity whose authority it wields. Forty stripes were the ancient limit, not so much in the interest of the criminal as of the general respect for man.²⁵ On the same theory, the alien visitor was entitled to legal safeguards. In Athens, it was an execrable crime *erranti viam non monstrare*,²⁶ because the erring stranger even in atomized Hellas, had a residual status as a man.

Human dignity is one of the tacit assumptions of the law.²⁷ It expresses itself generally in the deep distinctions among accidental, innocent intentional and guilty intentional conduct.²⁸ Motives count because man is assumed to be primarily rational, free of will and capable of choice. When he acts accidentally, he is regarded as the mere instrument of external forces; when he acts intentionally but in good faith, guilt may attach within circumscribed areas: only evil purpose will invoke mortal guilt. No one judges Oedipus as he does Nero though each intentionally killed a person who was his parent.²⁹

Positive law, building upon this dignity, may make it expensive. Thus the ancient Pharisees held that it precluded vicarious responsibility in law, *e.g.*, liability for the acts of a slave.³⁰ And, in our own times, dignity has been held incompatible with requiring collective action in employee relations or prohibiting child labor. The sense of injustice is not so easily taken in: it can penetrate the masquerade.

Instance D. An important patent litigation is pending before an appellate court of three judges. One of them, having received a bribe from appellant's attorney, succeeds in persuading his honorable colleagues to join with him in deciding for appellant.

Here we have an example of injustice involved in the operation of the judicial process. The nature of that process requires certain famil-

25. DEUTERONOMY 25.3. It was reduced by the rabbis to a maximum of thirty-nine. Tract Maccoth III. VI, in 9 (xvii) M. L. RODKINSON, *BABYLONIAN TALMUD* (1916) 48; II CORINTHIANS XI. 24.

26. CICERO, *DE OFFICIIS*, III. XIII (Loeb trans. 1928) 323.

27. The development of Roman tort law may be attributed in substantial part to assimilation of Greek standards of human dignity. See BUCKLAND, *ROMAN LAW* (1932) 589 *et seq.*; TAUBENSCHLAG, *THE LAW OF GRECO-ROMAN EGYPT IN THE LIGHT OF THE PAPYRI* (1944), 329 *et seq.* Compare our own recent discovery of the right of privacy, still inadequately safeguarded.

28. This is likewise an example of "desert." The facets of justice frequently overlap and interpenetrate. See p. 355 *infra*.

29. This reference was lifted baldly from Hume (*op. cit. supra* note 19) who I thought had originated it until, as usual, I found the archetype in Aristotle (Nicom. Ethics 1135a). *THE BASIC WORKS OF ARISTOTLE* (McKeon ed. 1941) 1015.

30. FINKELSTEIN, *op. cit. supra* note 23, 283-5.

iar attributes and procedures, such as impartiality, notice, fair hearing and judgment of defined issues predicated upon identifiable evidence.³¹ Of course, the judicial process, even when ideally applied, does not lead to ascertainment of all the truth, for there are subliminal values in most disputes which not even the most thorough hearing will disclose. Nor does it lead to judgments of perfect wisdom: the law cannot so individualize its operations as to meet the idiosyncrasy, the irreducible uniqueness of each case. Patterns are developed in the light of the repetitive aspects of litigation, and much that protrudes beyond the pattern must be ignored. But whatever its pragmatic limitations, the judicial process is required to exhibit a fair effort at finding truth and exercising wisdom. Without that effort—involving notice, hearing and deliberation—it loses its rank as process, it becomes gross will. Informed by this view, the sense of injustice protests all the more angrily against abuse of legal procedures to serve oppressive or vindictive ends.

Instance E. Workmen engaged in excavation dig up some ancient Pythagorean manuscripts and turn them over to the owner of the land. Their contents, hitherto unknown, excite much discussion, which reaches the ears of the city magistrate. He borrows the manuscripts, reads only the table of contents, and determines that the text will have a tendency to undermine established religion. Thereupon the legislature is consulted and, after hearing the magistrate take oath that the books ought not to be read or preserved, decrees that they be publicly burned.³² This is felt to be unjust.

The concern in this instance is with the authorized functions of government, its right of censorship and relation to freedom of inquiry. There is hardly a conceivable function which government has not arrogated to itself at one time or another, under pretext of divine authority, public welfare or bald caprice; and judgments of propriety on this score are almost completely relative.³³ Yet censorship of thought somehow remains the most obnoxious of all such interferences, perhaps because it eventually prevents all intelligent amelioration of government itself, perhaps because it insults and degrades the rational claims of the citizen.

What powers men delegate to their governments depend on what they think of themselves and of their needs.³⁴ Recognized needs may

31. Compare FRIEDMANN, *LEGAL THEORY* (1944) 50.

32. This instance was taken almost literally from LIVY, XL. 29 (Bohn trans. 1915) 1885-6.

33. A negative instance would also have been appropriate, that is, one of the failure of government to fulfill functions which custom or circumstance rendered obligatory. Failure to provide opportunity for productive employment of those able to work might illustrate the case.

34. N. M. KORKUNOV, *GENERAL THEORY OF LAW* (Modern Legal Philosophy Ser. 1922) 371-6.

call for severe abnegation, especially in times of public emergency. But if the citizenry thinks well of its own intelligence and wisdom, it will bridle at censorship; it will struggle for access to facts and to ideas. Men who do not respect human capacity will raise no such objections. They will feel no loss in being closed out from what they cannot use. Thus, here again the view of law parallels closely the view of man.

Instance F. Relying on a series of formal charters, colonists set out from their homeland and, despite fearful perils and hardships, succeed in building the beginnings of a new pioneer society. They organize local governments and militia, open courts and schools, construct highways, harbors and trading centers. Fighting back the savage aborigines, they hew down forests, plough and plant the land, and establish their councils of self-rule. Just at the dawn of their success, the home legislature, thousands of miles away from their new problems and free mores, passes a decree that it has the right to bind the colonies in all cases whatsoever. The sense of injustice is outraged.

In this instance, normal expectations have been disappointed—a species of injustice which embraces many varied actions of legislatures and courts. Any retroactive change in substantive law would, of course, furnish a conspicuous example of such disappointment, for the law itself creates expectation of the consistency and continuity of its own operations. But expectations may arise from other sources, such as the moral views and practices of the community and its economic fabric. Positive law may be unjust in breaking not only its promise of regularity but likewise its promise of adequacy and utility. What is the law good for, if it is deaf to patent needs?

One of these is the need for evolutionary change in the law itself. There is a legitimate expectation that courts and legislatures will discern what is useful and good in new occasions. The sense of injustice may find offense in a regularity which is slavish as in an inconsiderate change. In the former case, the provocation seems lighter, for the expectation has not been weighted with reliance and the direction of legal progress remains debatable. A prestige of legitimacy attaches to the known law, rebuttable only by show of intolerable wrong. At times, there arise revolutionary needs which demand a clean sweep of the established and sanctified, and will not permit vested rights to stand in the way; but in the usual situation law can fulfill its function best by seeing that contracts are performed, social standards enforced and relations sustained whose creation it invited. Thus it is that judges in moving the law forward, case by case, are always impeded; attitudes and reliances have intervened between the precedent and the attempt to improve it. Positive law as it progresses must weigh the utility of the new rule against that of confidence and certainty. The sense of injustice warns against either standing still or leaping forward; it calls for movement in an intelligible design.

These instances prick out the contours of our topic. The sense of injustice may now be described as a general phenomenon operative in the law. Among its facets are equality, desert, human dignity, conscientious adjudication, confinement of government to its proper functions, and fulfillment of common expectations. These are facets, not categories.³⁵ They tend to overlap one another and do not together exhaust the sense of injustice. They should be thought of as facets, each partially shaping the outlines of the others in an almost fluid continuity. They do not resemble a neat row of discrete ice-cubes, or even the rigid mold that shapes the cubes; for they are only aspects, not parts of the sense of injustice.

Are these aspects ethical in their nature? They are, for they posit certain explicit values in the realm of human conduct. But they are not merely ethical: as they enter into the shaping of positive law, they acquire a special direction and form qualified by the past history and present felt needs of the juridic system, and modified again by the factor of sanction. An ethical impulse to which legal sanctions have been attached, is not quite the same as it was; its content and intensity must shrink to the size of its new responsibility.

Are these aspects of justice universal? Hardly. The claim might be made that they are limits which the variables of positive law tend to approach, and as we presently consider the sources of the sense of injustice, that claim may gain some support. It must be remembered, however, that most of these aspects pertain to the operation of law rather than to its substance, and that positive rules contribute much to the body and meaning of equality, legitimacy of expectations and so forth. The universal element would thus appear exceedingly narrow, restricted to inescapable natural dimensions such as the integral status of man.

Concepts may be real without being universal. In any sound pragmatic sense, principles are real so far as they have meaningful consequences. Of course, their rank may be made to vary with their universality; but loftiness of rank is all too often achieved by means of dilution and excessive thinning. Our interest here is rather in the real qua efficacious. Utterly universal operation of one cause would crowd out all others; it would destroy the dynamism of nature and level human life to monotony. Insistence on perfect universality can lead only to an ultimate colorless abstraction "sans everything". In the finite world whereof we speak, efficient causes are finite and plural; finite effects suggest and indicate finite causes. The justice that we know is neither completely universal nor categorically right; by that token, it is real in human affairs. It makes a practical difference.³⁶

35. Hence not to be regarded in the same light as Stammler's principles, derived in the true Kantian manner. *THE THEORY OF JUSTICE* (Husik trans. 1925) 158 *et seq.*

36. To discuss all the axiological issues involved would require too extended a digres-

Nor need we view the sense of injustice as dangling beneath some hypostatic framework of natural law, itself suspended from divine law in a chain of infinite regress. The law of nature may exist, may not exist or may linger in the limbo of doubt for purposes of this inquiry, whose movement is forward to consequences, not backward to origins. We study the sense of injustice, not as a product or effect, but as an operative cause in the law. Thus it is that Ockham's razor³⁷ excises natural law from our present interest; it does not excise the sense of injustice unless all phenomena of positive law could be explained without it.

Finally, the sense of injustice is no mere generic label for the concepts already reviewed. It denotes that sympathetic reaction of outrage, horror, shock, resentment and anger, those abnormal secretions of the adrenals which prepare the human animal to resist attack. Nature has thus predisposed all men to regard injustice to another as personal aggression. Through a mysterious and magical interchange, each projects himself into the shoes of the other, not in pity or compassion merely, but in the vigor of self-defense. Injustice is transmuted into assault; the sense of injustice is the implement by which assault is discerned and defense is prepared.

Justice thus acquires its public meaning, as those in a given ethos perceive the same threat, experience the same reaction. It is possible to speak of justice without utter relativism or solipsism, just because of this astonishing interchangeability within man's imagination. If man did not through his essential endowment recognize oppression of another as a species of attack on himself, he would be unready—in the glandular sense—to face the requirements of juridic survival. In fine, the human animal is predisposed by nature to fight injustice.

This predisposition like other natural endowments is designed to end in action. The individual man stands at the center of all things, bound by the perspective predicament to his own brief time and narrow place. The sense of injustice gives him a lengthening tether so that he may wander away from self and its setting. But tethered he remains. His survival does not require that the sense of injustice encompass infinitude; at a certain distance from the center in sympathy and circumstance, his reaction will shade off into contemplation, cool appraisal and ultimate indifference. There are wrongs which retain only literary concernment.³⁸

sion. Some of the most trying problems are indicated in F. KAUFMANN, *METHODOLOGY OF THE SOCIAL SCIENCES* (1944) cc. IX and XV. Our purpose here is necessarily more restricted. We seek to show that "Man is the measure of all things" is in jurisprudence not a sentiment of sceptical despair but a vigorous affirmation.

37. See B. RUSSELL, *A HISTORY OF WESTERN PHILOSOPHY* (1945) 472. Some of William's applications of his principle to theological entities are mentioned in ERDMANN, *A HISTORY OF PHILOSOPHY* (1922) 513.

38. Locke speaks similarly of controversies such ". . . as whether our King Richard

Thus Iphigenia and her sorrows, though interesting, may seem rather remote. Not that our awareness is necessarily lulled by mere disparity of culture, law or ethical tradition; for Socrates' fate haunts the imagination forever. The criterion is whether the circumstances permit imaginative interchange. If the specific threat be such as to project itself out of history and into the radius of possible experience, it becomes real, it calls for action. For example, corrupt judges and mob passion are ominous in every age.

The experience of the sense of injustice is of a social nature, enlarging the calculus of individual chances. What may or may not affect the particular human being in his own small ambit will inevitably, in the course of sufficient time, touch someone somewhere. That is why the jural status of each is felt to depend upon a just order of increasingly wide extension.

The sense of injustice now appears as an indissociable blend of reason and intuition, evolutionary in its manifestation. Without reason, it could not serve the ends of social utility, which only observation, analysis and science can discern. Without intuition, it would lose its sympathetic sensibility and its cogent natural drive. It is compounded, indissolubly, of both and can subsist on neither alone. For sheer rationality without an intuitive fundament would usually degenerate to extreme scepticism and doubt; while intuition, uninformed by reason, would serve up only the illiterate gropings of animal faith. Together reason and intuition support our juridic world. Through them men may learn to identify their own interests with those of an unlimited community, no longer doubting in philosophy what they do not doubt in their hearts.³⁹

Is the sense of injustice right? Certainly not, if rightness means conformity to some absolute and inflexible standard. There is nothing so easy or mechanical about it. Blended as it is of intuition and reason, its correctness in particular cases will vary greatly, for how can we know that the intellect has understood and that sympathy has comprehended every last relevant factor? Who will measure the limits of inquiry or affix the seal of completeness?

Fortunately we appear able to dispense with such a seal, accepting in its stead the assurances that come from inner conviction and from juridic experience. The sense of injustice is right in so far as its claims are recognized in action. Its logical justification must be found in its efficacy, for it succeeds in fact precisely to the extent that relevant circumstances have been understood, felt and appreciated. Like other biological equipment it endures because it serves, and serves better

the Third was crooked or no; or whether Roger Bacon was a mathematician or a magician.' *ESSAY CONCERNING HUMAN UNDERSTANDING*, IV. XX. 16 (1690) 192.

39. A paraphrase of two unrelated sentences of C. S. Peirce. *THE PHILOSOPHY OF PEIRCE* (Buchler ed. 1940) 163, 229.

through progressive adaptation. So despite all blunders and insensibilities, the sense of injustice is on the right side, the side of fallible men. Offering a common language for communication and mutual defense, it reduces the perils of isolation. It affords some warrant of a progressively better legal order, and thus makes law a vehicle of persuasion. Plato has said that the creation of the world is the victory of persuasion over force;⁴⁰ the instrument of that victory is justice.

III

If the drafts already drawn in the course of this study have been honored, credit has been extended on two attractive grounds. In the first place, the sense of injustice presupposes all the richness and diversity of experience, and all the skills which develop with accruing wisdom. Part of this experience is intuitive, a circumstance which lends intimacy and human warmth to the whole. Part is rational, permitting growth, progression, cumulation. Together these demonstrate themselves in consciousness and memory; they are known because felt. Hence the exposition has derived from very familiar data which it is difficult not to trust.⁴¹

Moreover, the sense of injustice has been kept in its place. We have not forgotten that the Romans often appointed a dictator simply to drive a nail into the temple-wall⁴² or that heriots continued until this generation in English property tenure.⁴³ While insisting that justice is significant in the compound of the law, we have not been so blind as to treat the two as interchangeable. There are great realms of justice outside of positive law; there are wide areas of positive law where justice is of weak or indifferent influence. But as justice without law is often ineffectual, law without justice is quite unthinkable. A system of utterly unjust law could exist in the imagination only and could serve none but casuistic purposes.

40. Using Dr. Whitehead's summary of various sentiments in the Timaeus (particularly at 48A). WHITEHEAD, *ADVENTURES OF IDEAS* (1937) 105. See also *THE LAWS*, IV, 718 B-723D (Loeb trans. 1926) 300-318.

41. "Philosophy ought to imitate the successful sciences in its methods, so far as to proceed only from tangible premises which can be subjected to careful scrutiny, and to trust rather to the multitude and variety of its arguments than to the conclusiveness of any one. Its reasoning should not form a chain which is no stronger than its weakest link, but a cable whose fibres may be ever so slender, provided they are sufficiently numerous and intimately connected." PEIRCE, *op. cit. supra* note 39 at 229.

42. LIVY, VII. 3, VIII. 18 (Bohn trans. 1889) 450, 528. The custom was supposed to have stemmed "from the memory of the more aged, that a pestilence had formerly been relieved, on the nail being driven by a dictator." Cf. FRAZER, *THE GOLDEN BOUGH* (1 vol. ed. 1937) 44, 127.

43. The lord's archaic right to seize the best beast or other chattel of a deceased tenant was adjusted and disposed of by the Law of Property Act, 1922, 12 & 13 Geo. V, c. 16, § 140. In the New England, heriots had been prohibited by Article 10 of the Body of Liberties adopted by the Massachusetts General Court in 1641.

Now, of course many wrongs have been committed in the name of justice. It has received much hypocritical lip-service and has furnished a convenient motto for fools and rascals. The positive effectuality of the sense of injustice can hardly be established by quoting judicial protestation, however eloquent. The evidence needed here must be more empirically convincing. If the sense of injustice is a real causal factor in the daily operation of law, some sign of its consequences must be discerned, for in them will reside its validity and meaning. These consequences may be taken at random, illustrating the scope of the causation, or systematically, indicating its pervasiveness.

For example, the aspect of equality shows itself in the proposition that no human being, however exalted, may lawfully cause the death of an unoffending neighbor, however insignificant, even to save his own life.⁴⁴ By like token, where indictment or trial calls for the judgment of equal citizens, a procedure which violates equality will be unlawful and void.⁴⁵ The status in jeopardy is prime, that is to say, not reducible. Implications of this status may be extended, so that life comprehends livelihood: thus discrimination by labor unions⁴⁶ or employers⁴⁷ as between human integers may be prohibited in positive law. It is because new valuable equalities are constantly uncovered that the term acquires meaning and rises above forensic incantation.

Without further multiplication of examples, mention of one or two striking instances of positive justice may illustrate sufficiently its lively inventiveness. The first of these relating to the aspect of desert, presented an occasion of great international moment. At the end of the European phase of World War II, the sense of injustice everywhere called for the punishment of those who had committed wholesale wrongs in preparation or conduct of war. "The feeling of outrage grew in this country, and it became more and more felt that these were crimes committed against us and against the whole society of civilized nations by a band of brigands who had seized the instrumentality of a State."⁴⁸ Confessedly lacking precedent, positive law had here either to innovate or to confess its impotence. It innovated, holding that the "test of what legally is crime gives recognition to those things which fundamentally outraged the conscience of the American people and

44. *Queen v. Dudley*, 14 Q. B. D. 273 (1884); *United States v. Holmes*, 26 Fed. Cas. 360 No. 15,383 (C. C. E. D. Pa. 1842) furnish colorful instances. As Rabba said, "Rather than slay another, thou must permit thyself to be slain; for how dost thou know that thy blood is better than his, perchance his blood is better than thine?" Tract *Pesachim*, ch. II, in 3 (V) M. L. RODKINSON, *BABYLONIAN TALMUD* (1916) 37.

45. *Powell v. Alabama*, 287 U. S. 45 (1932).

46. *Steele v. Louisville & N. R. Co.*, 65 Sup. Ct. 226 (U. S. 1944).

47. Fair employment practices commissions have been among the positive gains realized during World War II. See also art. 123 of the Constitution of the U. S. S. R.

48. Justice Jackson's epochal report as Chief of Counsel for the United States, N. Y. Times, June 8, 1945, p. 4, col. 5.

brought them finally to the conviction that their own liberty and civilization could not persist in the same world with the Nazi power".⁴⁹ It would be supererogatory to comment that these phrases coincide with our description of the sense of injustice, its perception of wrong as a species of attack and its intuitive marshaling of defense. Desert could be satisfied though precedent, statute and convention were lacking.

Another stimulating instance is afforded in *Bridges v. Wixon*⁵⁰ where new light was cast upon the aspect of human dignity. In the *Bridges* litigation, the Supreme Court considerably narrowed the proposition that primal guilt can be acquired by mere association. Since human beings are unique and individual entities, each may claim to be tried and judged on his own acts and pronouncements, severed from those of all others. This is merely the legal facet of a millennial dilemma in morals, for at the same time, each human being is also a cell in the social organism and in the complex tissue of its members, operating always as a socius with others, never through himself alone. Qua citizen, his capacity to act at all is a social power, drawn from affiliation. Thus he is simultaneously all selfness and all otherness. The graph of his legal duties and responsibilities is no simple one; in the *Bridges* case, the decision could not properly have followed either axis of reference without regard to the other. Bridges was neither a monad in isolation, answerable for itself alone, nor a fungible portion of some organization, equivalent to any other portion. Human dignity could be respected only by regarding him to some extent as both. Such was the Court's view: he was held not guilty by association, because the evidence of association was too flimsy and tenuous; but the majority of the Justices would not exclude vicarious liability as such.

The sense of injustice is thus an active, spontaneous source of law, contributing its current to the juridic stream. It makes a practical working difference in legislatures, courts and administrative bodies. Justice is useful to society, for the reason, among others, that it gives men a sense of physical and psychic security. Every positive act of justice represents not only the absence of attack but the bulwarking of habits, techniques and standards which safeguard against attacks to come. This is a prime social beneficence. It furthers solidarity at the very seat of all centripetal impulses—the imaginations of men. We need not therefore rest content with a shallow utilitarianism, nor assert that the useful is the just, that law is just only because it is socially useful. Justice has a nobler claim to regard. The law becomes useful in being just, for justice creates and confers utility. Justice is a source,

49. *Id.*, col. 4. See also Mr. Justice Jackson, *Report of War Crimes Committee and Statement*, N. Y. Times, Aug. 9, 1945, p. 10.

50. 65 Sup. Ct. 1443 (U. S. 1945).

not a mere by-product of the useful; injustice, by like token, is pragmatically unwise and wasteful.

Now, this is not to say that law is predetermined to move ever closer toward justice. There may be such a tropism, but in the available conspectus (legal history being relatively quite brief) it certainly appears irregular and spasmodic. The sense of injustice calls for progressive exhibition of human wisdom. Hence until some demonstration can be made of accumulation, not to say evolution in that respect, the movement of law toward justice will remain a matter of faith and resolution, rather than of scientific fact. What matters most for the practical concerns of men, is that justice be done in the particular case or group of cases.

Justice and the Analytical Approach.

A systematic view of justice in positive law would require something more than the very vital, but none the less random instances considered above. Its approach might be analytic or institutional. The analytic approach is addressed to the implements of legal process, for example, rules of law, and seeks to illumine the interplay between them on the one hand and justice on the other.

Rules are one of law's attributes. The legal evaluation of any set of circumstances depends upon the application of a considerable body of rules. Often this application is elliptic, for lawyers and judges tacitly assume the axioms of the law and its established propositions. A cumulative network of precedent and corollary may lie behind the simplest determination. The process is an indispensable one, given the limitations of judges in intellect and wisdom, the brevity of human life, the repetitiveness of transactions and the necessity of planning for the future. Rules are the charts of the law, by their very existence keeping most affairs out of the courts and conferring safety and meaning upon the relations of men. Through summation of past dispositions as the current law, rules create psychological values of belief, faith and security; but it must be conceded that they frequently fail as guides to the outcome of particular incipient cases. They are better histories than prophecies. Men being the believing and conservative creatures that they are, find legal history, if sufficiently recent, an adequate assurance of tomorrow's decision; men being the venturesome creatures that they are, generally accept the risks involved.

The rule, viewed in utilitarian terms, is an implement of economy. It lifts the burdens of judges and reduces the unknowns for litigants and for those who wish to avoid becoming litigants. In terms of a more ambitious analysis, the rule is an embodiment of the principle of equality. It furnishes the juridic machinery by which equal situations are equally adjudged. Thus legal propositions represent something

more than a technique of useful regularity; they serve to fulfill one of the functions of abstract justice.

But here again an antinomy arises, of twofold nature: an antinomy within regularity and within justice, each functionally related to the other.

The antinomy within regularity is an all too familiar one. Without assuming that a judge's decision follows simply from his childhood fixations or his basal metabolism (a shallow type of cynicism), we must grant that rules do not decide cases. Literature and experience to this effect are too voluminous for detailed recapitulation here. Cases there may be in which the aleatory element is infinitesimal, but they are relatively few and their outlines are simple; that is to say, not simple but simplified, for the rule may be preserved in operation by a ruthless refusal to consider available differentia. Simplicity in law facts is not given but achieved.

For the generality of litigation, much depends on choice of facts on the one hand and choice of rules on the other. Since testimony and documents are susceptible of various appreciations, the judge and jury are free within astonishingly wide limits to choose their facts. And as rules of law, particularly in cognate fields (e.g., contract and tort) compete with one another to control the disposition of the case, decision may well involve a choice of rule. This explains that not infrequent phenomenon: decision based on a ground which neither side had briefed. Of course, the choices are not unrelated, for facts are found with a view to the ultimate application of some legal rule. Thus, the combined choices make up an appreciation of the whole controversy; and as this appreciation is the complex performance of mortal minds, it must remain contingent, at least partly free, hence at least partly unpredictable. But then, what of the security which rules of law were supposed to confer?

There is likewise an antinomy within justice, pertaining to the system of rules. We noted above that legal principles serve certain valuable functions of justice, such as equality and the fulfillment of legitimate expectations. This much is true, but it is also true that rules of law may be unjust, unequal and oppressive. Justice in a particular class of cases may collide head on with the established rule. Rules at best are like windows over the landscape; at some line or other they must excise the balance of the scene, perhaps its most significant part. At worst the rule may operate as an impenetrable blind, closing out all perception of the actualities of the case. On the other hand, to avoid the rule is apparently equivalent to denial of justice, for legitimate expectations will be frustrated. When rules, the supposed emanation of justice, absorb the reverence which is rightfully due to their source alone (a process all too familiar in theology), how can the dilemma be resolved?

Perhaps both of these antinomies arise out of a fallacious belief that

rules are the law. Legal rules of a synthetic nature, that is, those which limit and define the rights and duties of men and the procedures by which they are enforced are not the law, but its instruments. We say, by way of ellipsis, that the law is changed when a rule of law has been changed; such an identification of the institution with one type of its working tools generally does no harm. But the contradictions which we have just considered show that the ellipsis may lead to an impasse in theory.⁵¹ The implement appears to conflict with the very purpose it was designed to effectuate. This is because the function of the implement has been misunderstood.

Rules are indeed implements of justice in law, but not of justice alone. We have said that justice is only one element in the legal compound, amalgamated there with a variety of other human interests, some lofty enough, some rather earthy. Through the machinery of rules, each of these impulses seeks maximum satisfaction. The rules change and accommodate themselves not merely with the flux and movement of historic forces but with new and subtle equilibria among these interests. Thus the sense of injustice may outweigh a professional desire for symmetry, or may itself yield, at least temporarily, to the bulk of some economic demand—whose validity it will adjudge sooner or later. All these motions are conveyed into legal action through the conduit of rules. Out of their interplay arise the pre-suppositions and conceptual jargon of lawyers and judges.

This is not to say that justice is no more valuable to law, than, for example, the desire of courts to rationalize their decisions. It is first and most potent. The many other interests which combine to form what we call law, turn to justice for their sanction and draw from it their more enduring strength. Men in the mass are never long content to shrug their shoulders and sigh "*dura lex sed lex*"; security in human affairs is one of law's most vigorous impulses, but it cannot be held forever at the cost of justice. As Aristotle pointed out, justice in the general sense embraces all the other virtues;⁵² though we speak of it here in the particular (juridic) sense, its status as theoretic gravamen of the others remains. Justice is to security and legal logic as bedrock to the foundations and flying buttresses of a cathedral. Thus in the appreciation and choice of fact and controlling law, the sense of injustice is a dependable criterion, though concededly not the exclusive one. Justice is what judges and juries try to serve, despite the narrow channels which have been dug for them and their own all too human frailties. So limited, they generally do what they can to select facts and law toward a conceivedly just result. In the process, the rule of law may be slowly transmuted, perhaps by using the familiar tech-

51. Excessive nominalism appears to be the occasion of this fallacy.

52. Nicom. Ethics, 1129b, in *THE BASIC WORKS OF ARISTOTLE* (McKeon ed. 1941) 1003.

niques of distinction, legal presumption or exclusion from evidence. The sense of injustice thus assists propositions of law to find their application in particular cases, while it expands or erodes the propositions themselves. For law is an institution whose action in human affairs necessarily involves its own evolution. The only static law is inoperative law.

In the reign of Henry II, proceedings on the writ of right for recovery of land resulted in intolerable delays, some on dilatory pretexts of poor health or the King's business, others on successive vouchers to warranty.⁵³ Now the granting of these delays was the established rule, derived from obvious principles of fairness; for a sick man could not be expected to fight and an owner whose title was challenged should certainly be enabled to bring in his vendor. But ill health might linger, defendant's vendor might vouch his vendor to warranty, and the champing plaintiff was not immortal. Meanwhile the land he claimed was held by another; he had paper instead of soil. The sense of injustice—here in relation to the judicial process—came into play and transformed the rules. That the Crown needed to ascertain precisely where liability lay for military service and for taxes may have expedited the solution, but could not alone account for its later dignity and permanence. The justices invented an appropriate proceeding. They conducted a simple inquest on the issue of anterior possession and awarded interim possession accordingly.⁵⁴ The status quo was restored, provisionally but effectually. The provisional gradually became the permanent, as the expense and delay involved in trying paper title became detached from the practical advantages of possession. Thus possession or seisin eventually acquired that fundamental role in the common law which it still enjoys. The sense of injustice had, perhaps in collaboration with other impulses, changed the rule of law and called a new juridic institution into being.

In this manner the Ought of law goes far to determine the Is; the forms and functions of legal norms vary with their ends. Of course, it is not always within the power of courts to mold propositions or their application to the felt needs of the community.⁵⁵ The task may be such that only a statute will suffice. Creation or restoration of a fitting proportionateness among various economic groups is usually a matter for the legislature. But the considerations involved remain much the same, and the sense of injustice may be as assertive and evocative in

53. I follow here Jenks' somewhat simplified narrative. *SHORT HISTORY OF ENGLISH LAW* (5th ed. 1938) 49-50. A slightly different emphasis is given in 2 *POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW* (1895) 44-49. See also *PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW* (1940) 321.

54. Referring, of course, to the assises of mort d'ancestor, novel disseisin and d'arrein presentment.

55. See *Screws v. United States*, 65 Sup. Ct. 1031 (U. S. 1945).

one place as the other. Legislators may indeed satisfy it more freely. They feel less trammled by professional inhibitions, and may amputate where judges could only dose. Their errors like the courts' can generally be attributed to inadequate appreciation of relevant factors, inadequate sympathetic interchange, or both. The sense of injustice, however, is never quite dormant in positive lawmaking. It joins the expectation of regularity to a co-equal expectation of progression.

Justice and the Institutions of Law.

If the implements of law respond to impulses of justice, so too do its institutions. Out of all the sprawling paraphernalia of the law, taxation would probably afford the most persuasive example. As tax measures appear to stem so completely from sheer command or sovereign will, whatever traces of justice they may evince will augur well for other legal institutions. Of course, even should the quest of justice in taxation prove successful, it could not amount to a general and absolute demonstration.⁵⁶ Our analysis is one of open ends, which requires us to forego certain charming correspondences; what is true, however, of taxation should apply *a fortiori* to almost all portions of the law. The combined facet of equality-desert⁵⁷ will be described as it shows itself in tax law, leaving the play of other aspects of justice to cursory mention.

Tax systems of modern nations exhibit superficially such profuse variety as to challenge the very possibility of general statement. They do however deal with much the same factual matrix—human beings and their relations to economic goods; and for that very reason the respective systems do resemble one another in many basic respects. A rough pattern can be formed out of the similarities, showing the major outline of taxation but virtually none of its domestic detail.

For example, each individual person has quoad taxation a dual status. As citizen or inhabitant he is a tax unit and as bearer of relations to economic goods he is also a tax unit. The former status is an integral one and imports the sort of elementary equality among individuals which obtains as to their civil rights. It is expressed not quite perfectly in such devices as the poll tax, general sales tax or the Soviet turnover tax. In time of national emergency or war, as the civil status

56. To those who demand apodictic accuracy, Dr. Einstein's famous dictum is a sufficient reply: "Insofern sich die Sätze der Mathematik auf die Wirklichkeit beziehen, sind sie nicht sicher, und insofern sie sicher sind, beziehen sie sich nicht auf die Wirklichkeit." GEOMETRIE UND ERFAHRUNG (1921) 3, quoted KUFMANN, *METHODOLOGY OF THE SOCIAL SCIENCES* (1944) 249n.

57. Manifestations of desert are to be found primarily in what the citizen receives from, not in what he pays to, government; but the two processes are functionally related in jurisprudence as in economics. The generalities presented here are such that desert is reflected in the concept of equality.

of the individual becomes his most critical attribute, these types of tax acquire a special justification. In a more normal economy, however, their importance tends to recede, not merely in the light of practical fiscal considerations, but also because economic status then outweighs the civil in an individual's relations to government.

The equality applicable to economic status is expressed familiarly in ability-to-pay. Economic status is highly differentiable—*e.g.*, as to capital, income, mode of doing business, family grouping, mode of gratuitous transfer or receipt; and the adaptation of ability-to-pay to these and other differentia is indeed a long and winding story. For the present analysis, the motif alone will suffice. Through progressive taxation of economic relations, governments apply that proportionateness which Aristotle found the true substance of justice.⁵⁸ The equality here is that of an ascending rate series. Those equally situated in relation to economic goods are taxed approximately the same, and strenuous efforts are exerted to protect the equality against avoidance schemes and factitious distinctions. Of course, this policy becomes intense wherever taxation is employed not only to raise revenue but also to reduce economic inequalities.

Patently, not all tax systems conform as they should to these criteria of equality. Nevertheless while awaiting the millenium, we are justified in taking note of an imperfect and variable equality which seems to mark the current state of human affairs. Its realness, visible in a multitude of observable consequences, will be doubted only by those who insist on all or nothing. But even they may concede that here again the just confers utility, for ability-to-pay demonstrably brings in the revenues.

Human dignity in taxation is expressed quite generally in subsistence exemptions and in various techniques of self-assessment. Justice in the functions of government may show itself, affirmatively, through use of taxation to destroy or reduce deleterious practices and conditions, or negatively, through exemption of religious practices and communication of thought. Disappointment of legitimate expectations may be avoided by denying retrospective application to tax statutes.⁵⁹ Thus the various facets of justice radiate quite clearly even in the grubby business of collecting taxes. In other fields of law, their light and influence should be at least equally manifest.

Justice in positive law is a profuse theme. Random instances,

58. Nicom. Ethics, 1131a, in *THE BASIC WORKS OF ARISTOTLE* (McKeon ed. 1941) 1010. Aristotle was probably the first to explicate the use of taxation for regulatory purposes. Politics, 1309a, *id.* at 1248.

59. *Hassett v. Welch*, 303 U. S. 303 (1938). Administrative procedure in federal taxation is still in a formative stage. *Dobson v. Comm'r of Int. Rev.*, 320 U. S. 489 (1943), criticized in Paul, *Dobson v. Commissioner: The Strange Ways of Law and Fact* (1944) 57 *HARV. L. REV.* 753.

limited analysis of legal implements and comments upon one particular institution cannot begin to explicate all its vital diversity. The little that has been said may serve to reduce cynicism and to vindicate the sense of injustice as an active maker and shaper of law. It works on a grand scale and within the narrow interstices of procedure. The justice we were looking for was not in the ether, but in the courts and legislatures and in the transactions of men.

IV

At the opposite pole of the antinomy is the concept of power, the ability to cause, modify or arrest motion. Patently, the power of the sovereign is only one species of this kinetic capacity, for human beings are affected by many such influences, inanimate or animate, adventitious or teleological. Floods and droughts have power to change the course of men's conduct, and so too have parents, wives and children, partners and friends, superstitions and syllogisms. Some of these may effect deeper and more lasting motion than any ukase or gestapo. They can penetrate farther into the imaginations of men, which are the primary reservoirs of all social power, including that of the sovereign.⁶⁰

Now it is naive to speak of sovereign power without differentiation. Some powers are exhausted by exercise, which to others brings increase of information and skill. Degeneration of the sovereign and stupid arrogance have often followed from excess of power.⁶¹ Speed and judgment are seen to slacken in accordance with a law of marginal efficacy; and subjects may progressively deteriorate as to zeal or understanding. The power concept is not a simple one. Yet it has gained an uncritical credulity from those who are most skeptical of justice. Absolute reason having shown feet of clay, the disillusioned idealist builds a shrine to absolute caprice. He identifies law with command. But will is not made rational by being rationalized; without reason it remains chaotic as reason without will becomes impotent.

Sovereign power has its competitors in human imagination and its limits in pragmatic effectiveness.⁶² Citizens can always die rather than

60. See ÉTIENNE DE LA BOÉTIE, *DISCOURS DE LA SERVITUDE VOLONTAIRE* (1576); PASCAL, *PENSÉES SUR LA RELIGION* (1670) tit. XXV.

61. Those can best appraise power who have had and lost it. BOETHIUS, *CONSOLAT. PHILOSOPH. II. VI* (Loeb trans. 1936) 207-11.

62. Even Spinoza, who equated justice in law with the positive, said:

"No one, for example, could ever so completely transfer his power, and consequently his rights, to another as to cease himself from feeling as a man; nor was there ever any sovereign power in the world that could dispose absolutely, and at its will and pleasure, of everything belonging to the state and the people. In vain were a subject commanded to hate him who had done him service, to feel no offence at unworthy usage, not to desire escape from solicitude about his personal safety,

obey, and history shows in ample detail that they do. Sometimes they do not die alone, and their willingness to die may have a special power of its own. In any event, as a matter of sheer common sense, the sovereign's capacity to kill those who stand in his way is not tantamount to having his way, for corpses make very poor subjects. The most ruthless of tyrants cannot create expedient deeds out of the nihilism of his will. If he wishes order to further his arbitrary purposes, he must be somewhat orderly himself; there must be method in his willfulness.

Thus it is that the net of regularity entangles not only justice but also power. Exertions of power through the medium of law must apply to rather definite categories of human affairs, to transactions that repeat themselves and by repetition beat out discernible paths. These categories are constitutive to legal power; they prescribe the routes it may travel and the ends it may seek. If law were only sovereign command, it would nevertheless remain a command uttered in the chambers of the given cosmos, with its predeterminations, its habits and heavy inertia.

This despot of whom we speak would find himself restrained by all the competitive motivations of his subjects (ranging from religious conviction to gluttony) and all the trammels of governmental organization (ranging from party intrigues to shortage of carbon paper). He must give his commands to lawyers and judges, subordinating his pure will to all the meshes of semantics. And, worst of all, the men of the law have their established professional habits.⁶³ Perhaps among them there is a Coke, Papinian or Thomas More. If not, the frustrations still continue, for lawyers will doggedly proceed by deliberation, by ratiocination, however weak, and by some species of formalized process. The most venal of them, striving to please him, may construe his decrees too narrowly or too broadly, for he cannot enslave the language in which he speaks. But if the judges are men, they will discover a multitude of fretful ways to cross and defeat his purposes.

Is it then permissible to say that law is mere sovereign will? Not in any sound empirical sense. The statement is moreover hopelessly inadequate, for it explains so little. A will with force behind it can hardly coincide with law—every highwayman wields that kind of

and many other things of the same kind, which follow of necessity from the constitution of human nature." SPINOZA, *TRACTATUS THEOLOGICO-POLITICUS* (London ed. 1862) 287.

63. Article 418 of the Civil Code of the Russian Soviet Federative Socialist Republic limits freedom of testamentary disposition by specifying restricted classes of permissible beneficiaries. New York's Decedent Estate Law, *CONSOL. LAWS OF NEW YORK*, c. 13, § 18, limits the same freedom by requiring certain minimum provisions for the surviving spouse. It is no mere coincidence that these statutes were construed by the respective courts, not to apply to gratuitous dispositions *inter vivos*. Supreme Court R. S. F. S. R. July 9, 1923, pr. No. 12; *Newman v. Dore*, 275 N. Y. 371, 9 N. E. (2d) 966 (1937).

authority. Will and force do not sufficiently restrict the possibilities of the conception. They do not begin to answer the question: what is the sovereign to will?

Is he to will only the increase of his own power? The hypothesis is that it cannot be increased, for it is presumably absolute.⁶⁴ Perhaps he should will its continuance. Well, then, he must find ways to introduce efficiency and dependability, a scheme of order in his great household. His service comes from men, whose bodies must be preserved, whose loyalty enlisted and minds conditioned. He will not wish to be caught in the trap of his people's witlessness.

Some few statutes may relate to the continuance of governmental power, *e.g.*, punishments for interfering with policemen in the performance of their duties or measures of censorship. But most of the grand body of legislation in any country discloses no such direct purpose. It seeks rather to effectuate all those subtle and complex impulses, sensible and archaic, interested and altruistic, which together comprise the law. It responds to millions of large and petty sovereigns, for every holder of property is *pro tanto* a sovereign, capable of enforcing his will upon others through juridic means.⁶⁵ If he has the practical judgment necessary to adapt means to ends, he may remain sovereign.

It has long been fashionable to scoff at the myth⁶⁶ of social compact, but here we have wandered amid the unrealities of an even less credible fantasy. Law is not whatever the sovereign commands. Sovereign power is finite, keeling over whenever the wind in its sails proves too much for the ballast in its hold. It can effect much in the formulation of the social order; how much depends on the appeal made to the human sources of its efficacy, and on the existing forms of positive law.

For as state power goes to the making and modification of law, so also law creates and shapes the power of the state. It prescribes the channels through which energies may flow and its massive institutions stand to block or divert the stream. Law is not merely a logical antecedent to the authority of the sovereign; it reacts with and upon that authority. Even overthrow of government does not end a mature system of positive law; the legal business continues a going concern, busy and self-contained. Revolutionaries may change the given positive law in one or many respects, but its residue will persist, including all the practices and tacit standards which serve as hypothesis of the whole. The Soviet Revolution, most profound of modern times, has caused more radical changes in the map of Europe than in the content

64. We know that the contrary is true in legal history. HOLMES, *THE COMMON LAW* (1881) lectures I-III.

65. M. R. Cohen, *Property and Sovereignty* in *LAW AND THE SOCIAL ORDER* (1933) 41.

66. The point is that Hobbes, Kant and many others who have written of social compact, knew it to be a myth, that is to say, true in a sense above the literal.

of the Civil Code.⁶⁷ Some legal institutions may be erased like old boundary lines, but others are apparently as indelible as the contours of the seacoast; they change in geologic rhythm.

The authority of the state, finite as we have found it, follows an evolutionary pattern, which though by no means a necessary resumé of the life of any particular sovereignty, sums up the progression of state power in general. The pattern is not then a historical formula, but a scheme of biologic growth. Moreover, the highest observable stage of that growth does not guarantee the survival of a state, any more than the evolutionary excellence of man can exempt him from the venom of snakes or the infection of tse-tse flies. Evolution, of course, looks rather to the fitness of the species, which may nevertheless survive or succumb because of extraneous causes. In the case of national states, life may depend upon natural resources, inventions, fortunate emergence of foresighted leaders, traditional alliances, population and climate. All these may obscure but cannot invalidate the evolutionary ascent.

The lowest level of state power is that which requires continuous exercise of force, such as the power of a conquering army. Authority extends as far as the range of available weapons. The occupying troops can make and apply rules of law, but these rules will of necessity relate only to most primitive concerns,—order, food, fuel, quarters. This is power *in invitum*.

The next level may be called submissional power, for it is characterized by the passiveness of the population. This is the stage attained by a despotic polity, whether in relation to the home country or to its colonies. Legal rules may embrace wide areas of human activity, but coming as they do from an alien and intellectually distant source, they often fail to reflect the customs and transactional modes of the people. Thus two bodies of law may exist side by side, one resorted to by castes favored of the sovereign, the other inconspicuously but effectually enforced in popular fora. Submissional power is exceedingly friable; *e.g.*, when Hannibal invaded Italy, the commons in almost every Italian town rallied to his aid.

But when he had reached the gates of Rome, the merchants in the city showed their defiance by buying up the very land on which his army was encamped. The power of such a state is consensual. Its government possesses the consent of the governed. This need not imply democratic or representative techniques, for authoritarian regimes have frequently enjoyed just such support. Here the legal system attains completeness, emanating as it does from a conceivedly

67. Which is still called "bourgeois." The disappearance of the earlier Pashukanis school was a sign of the movement toward justice under law. Gsovski, *The Soviet Concept of Law* (1938) 7 *FORD. L. REV.* 1.

legitimate source. Delegation of power may be explicit in some instances, implied and accepted in others. What counts is that the legislators, elective or hereditary, have constitutional competence.

The consensual stage is the highest attainable for those portions of positive law which laymen would call "technical". Just as state power is confided to the organs of sovereignty, so the organization and maintenance of the legal structure must be assigned to lawyers. The distinction between vested and contingent remainders cannot be determined by popular ballot or by royal lineage. Though a statute or decree be needed to untie the knot, it will be a professional solution to a professional dilemma. Lawyers, understandably enough, like to embrace all areas of law in this kind of procuration, as long as laymen rest content to have them do so. The consequences are obvious: justice is too often subordinated to the positive, progress to regularity.

State power is susceptible of still further evolution—to the assensual level. At this level, authority is exercised with the active concurrence of the governed. They participate in the formulation and weighing of measures, they influence the movement of the law. This is the stage of the enlightened and alert electorate, of vocal public opinion informed and deliberate. It is compatible with and even beneficial to representative government, lifting the quality of delegates, holding them to account, drawing out their best. At the assensual level, major decisions concerning positive law express the considered opinion of the citizenry, the values and standards for which it too is willing to answer. Hence it is that power turns destructively on itself whenever it chokes inquiry and the free play of thought.

Only at this high level is the synthesis possible between justice and power. As the force of the state rises from brutality to consent and ultimately to intelligent assent, it finally attains the same heights as the sense of injustice itself. For the perception of social wrong and the impulse to cure it is a great and potent force. At times, it has proven irresistible.

The sense of injustice does not, however, await this ideal synthesis, the slow triumph of assensual power. On the contrary, it works aggressively toward that consummation. On every level of sovereignty, from the basest to the highest, it influences the thoughts and acts of human beings; even tyrants and their judges cannot make themselves insensible, for they too are men. When they offend, it is justice that is offended, and the awareness of the offense is a prime evolutionary impetus. Once an action is felt to be sanctioned by power alone, the doer becomes less powerful, while action by grace of justice gains in strength. The sense of injustice escorts and admonishes the state on its long road toward assensual power.

Justice and power, then, are both deeply real to law, and both are finite. These truths present the challenge of a pragmatic jurisprudence:

to harness power to social purpose, to refine and develop positive concepts that they may prefigure a worthier commonwealth. "Law exists for men between whom there is injustice."⁶⁸

68. Nicom. Ethics, 1134a, in *THE BASIC WORKS OF ARISTOTLE* (McKeon ed. 1941) 1012.