ON THE GOOD, THE TRUE, THE BEAUTIFUL, IN LAW*

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PROLOGUE

In the first two lectures of this series, I tried to show the succession of overemphasis on one, another, and ever another vital phase of the institution of law, in presenting what the thinker, his public, or both, took to be a rounded view of the whole; and I suggested that the needs of a man within himself, and of his times around him, made the swing from exaggeration to exaggeration all but inevitable.

* The text represents the last two of four lectures read at the University of Chicago in the spring of 1941. Changes made since are minor. The substance of the first lecture, “Ancient Issues and a Forgotten Institution,” is somewhat indicated in my paper in My Philosophy of Law 181 (1941). The second lecture, “On the Problem of the True, in Law,” dealt with differences between objectively verifiable truth, and truth of other kinds, and with the need for keeping them distinct; it dealt also with the problem of finding and stating true law, in those areas of flux which are so troubling, and attempted a reconciliation between Fuller’s position and my own. It also introduced a certain non-existent legal philosopher who has been of much service to my thinking; he will be met here in the Prologue.

It is plain that the subject-matter is hardly scratched in these lectures. The material for one needed companion piece, which might be called “On the True, about Law,” has appeared in The Theory of Legal “Science,” 20 N.C.L.Rev. x (1941). A second companion piece, which might be called “On the Problem of Official Truth,” has not been written and would deal with the perennial problem when action, or settlement, is imperative, and data, or the needed “forms,” are inadequate or absent. Again, the present lecture requires to be accompanied by one on “The Esthetics of Legal Craftsmanship,” with discussion at the very least of advocacy and counseling; and by one on “The Esthetics of Substance,” which lap over interestingly upon technical efficiency, on the one hand, and upon the Good, on the other. Indeed, if I were arranging a more complete set of lectures, I should be inclined to place the one on “The Esthetics of Substance” at the end, because it not only must draw so vigorously upon the True and the Good, but also, on pain of utter failure, must work the three phases into harmony. And I am rather clear that in a fuller presentation, there would have to be included under “The Good,” a study of “Justice, Efficiency, and Warmth,” developing not only the problem of finding the first, and of weaving the three together, but also that of finding a symbol for law of very different character from that of a large, cold, figure, distant, blind and carrying a sword—a symbol earth-rooted and friendly as an oak.

While the lectures here presented purport to offer nothing but a point of view, they do purport to offer a point of view carefully considered and carefully phrased. And they both evidence and hope to persuade of my conviction that any sound socio-jurisprudence turns on analysis of what the institution of law is for, and how it goes round, with one’s fighting convictions on the former never allowed to interfere with accurate observation of the latter.

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That, I take it, is why no flesh-and-blood philosopher about law, or of law, can really be trusted to maintain balance in his any effort to present a picture of the whole. Let him touch law, and he touches, of necessity, and then of necessity responds to, a deflecting need of his own here and now. Hence I crave your indulgence to introduce a philosopher who is not flesh and blood, and never has been. He is a Euclidean result of a set of non-Euclidean axioms about what an ideal philosopher of law should rightly be. He came into his own type of existence as a test and check-up, in an effort to keep personal vagaries and the needs of my own here and now from too greatly distorting my efforts at a picture of the whole. And, having lived with him for a couple of years, I find him assuming an un-controllable way of his own, with results by turns shocking, dazzling, and trite, as various unforeseen consequences of the axioms of his being proceed to discover themselves.

To philosophize about law for our use, such a philosopher had to be rooted soundly in the human, and had both to know our own system intimately and to be apart from it. Plainly, also, he had to be intimate, in firsthand experience, with a homely, well-worked simple system of law adjusted to a largely pre-industrial economy such as gave all Western law its basic concepts. No less plainly, he had to be familiar also, and thoroughly familiar, with the code-trend, with the intellectualization and systematic thoroughness of Continental legal work. He had to know British thinking from its formal side, which nowhere found finer expression than in Queen Anne’s time, with Swift, and he had to understand it, again, from the side of its humanitarian and democratic rebellion and form-bursting, of which Carlyle serves almost as an incarnation. He had to pierce all sham, yet he had to have a rich understanding for form, ritual, for the significance peculiarly to law of the garb of means which requires to be laid upon reason, goal, or meaning. He had to know us and our law, as I have said, yet to have no silly, easy urge to lump us indiscriminately with the British, as “the Anglo-American.”

So far I had gotten when it dawned upon me that there had already appeared in the literature a somewhat fantastic figure, one Diogenes Jonathan Swift Teufelsdröckh, whose name and whose style were a curious mélange of echoes of Carlyle and Swift; whose works were given as including a treatise on The Roots and Powers of the Doctorate, who himself held five-powered J.U.D.’s—surely a guaranty of proper Continental schooling—but who had lived and taught his life out in Nempenusquam, of which no man has ever heard, and which could only be some Leichtenstein or Andorra on the untouched fringes of the modern scene. If such a person
proved to be the grandson of his namesake, the great Philosopher of Clothes," and if he had devoted his life to applying the Science of Things in General more particularly to law, we should begin to have the outlines of the very man we were seeking.

There were, however, about this fantastic Teufelsdrockh certain things which would not fit at all. There was no coherence of style in the major paper in question. But the perfect philosopher of law had to be a sound artist; he had indeed to be an eager artist, though never so eager as to forego balance. The paper showed humor, without which balance in law would be superhuman; but it showed little sympathy, it did not show an understanding patient with all men's vagaries, such as must belong to the perfect philosopher of law. Thus the Teufelsdröckh of a pair of vagrant papers§ began to change form, began to gather other attributes, as a necessary consequence of rather inevitable axioms. It is clear, for instance, that the required sympathy and human breadth, merged with the required drive toward the Ideal, would, if left to themselves, yield us a saint, not a philosopher. Our man, to become the ideal philosopher, had need of a weakness: a touch of intellectual snobbery would let him see men, and understand them, and feel for them, without losing the urge to think it all through, without exhausting his energy on immediate personal healing of abuse. Again, the qualities thus far named will give us no philosopher of law at all, but a general philosopher, or a prophet, or if he turns to dealing with the world direct, a leader into action. Hence our man had to have a bit more (in W. I. Thomas' terms) of the "wish for security" than of either the "wish for new experience" or the "wish for recognition;" and he had to have at the same time something of a farmer's earthiness; else his mind would never settle adequately to those practical

† Diogenes Teufelsdrockh, Sartor Resartus. The common attribution to Carlyle is not unlike the Baconian theory of Shakespeare.

§ Jurisprudence, the Crown of Civilization—Being Also the Principles of Writing Jurisprudence Made Clear to Neophytes, 5 Univ. Chi. L. Rev. 171 (1938); The Universal Solvent of Jurisprudence; or The Riddles Contradicted and the Contradictions Unriddled, 8 Harv. L. Revue 1 (1940).

If I were forced to, I could make a rather cogent case that the Crown rests on an actual MS of Teufelsdrockh, manhandled here and there by some American editor in the manner at once of those who tack bawdy—"comic" stanzas onto Frankie and Johnnie, and of Garrick's rewriting of Shakespeare. The fine core is still clear. The paper, for the initiate, is half-satire, yet contains a true description of the "veil" dealt with in the Solvent, which hangs between the High or Inner Jurisprudence and the vulgar, and performs its own function—one which Arnold has described, though incompletely, in his Symbols of Government (1935). The brief Solvent, on the other hand, is, save for a printer's error or three, unmistakable Teufelsdrockh, as anyone can see who compares it with the passages quoted hereinafter.
engineering problems on whose continuing solution good law turns, or to their long-range study, rather than their dangerous practice.

Such are the axioms about attributes which set themselves to work, and lesser human qualities grew up about them, merged with them. I may have thought out the axioms. I suppose I did. But I did not think out Teufelsdröckh. He happened. He is still happening. He sheds light for me on problems I had never thought to look into. He produces perspectives I should never think of looking for, myself. I have come to admire him intensely. I learn from him. I cannot always agree with him; I lack the qualities which make up the perfect philosopher of law, and that leads to differences in judgment even when I can see why he must view some matter as he does. I am, too, both materially more of an experimenter and much more of a believer in the common man than any such passionate devotee of technicians' "safe" craftsmanlike leadership and control could ever be. But in the main, I find that Teufelsdröckh persuades me; and when he puts a matter better than I can, I have felt free to quote him. As I quote him, I understand what novelists and dramatists have told us, of figures who go their own way, refusing to fit into any scheme or plot laid out for them—"writing themselves," at times to the serious inconvenience of their "author." And I understand with an intensity new to me the wonders of geometry.

I. ON THE BEAUTIFUL: FORM AND STYLE

BEAUTY in things of law has been slighted as if by law; and where not slighted, has been seen off-center and in spiraled distortion. Law, men have thought, is a thing of words, and literature is the appropriate art to measure by; and how shabby does the resulting measurement appear, when "art" in things of law is seen or sought in an image or a turn of phrase stuck on or stuck in. Such is a common run of thinking among those who have meditated upon law as being thus a matter of words: an ill-advantaged distant cousin of belles lettres, too doltish, for the most part, to be hungry for improvement. The horrible mark of this, even after Holmes had shown modern Americans what style could be in legal writing, was the persistent misconception of Holmes' aphorisms as mots: removable singlenesses which, if anything, gained by dislodgment from a context of mere "law." It is my belief that Holmes himself, in later life, half-held this feeling; the true artist in him fought it, always, in his actual work; his vision laid out wholes, not bits, his mind and pen made vivid the whole vision. But his climate of appreciation of the 'teens and
'twenties was for mots—"plums"; Holmes had appreciation for that climate.

I shall recur to Holmes, whose major lesson to the beautiful in things of law I find in another aspect of the "five-word jewels." Here I want to move on to the tale told of Stendhal, the shaping of personal style in a writer of lay material by ceaseless study of the packed simplicity of Napoleon's Code. That code contains no ornament or imagery. The beauty of language which it holds is functional beauty, the beauty of dam-race and turbine.

The same code introduces, however, another partially sound but mis-twisted view of esthetics in things of law, one much more widely held by lawmen—who have too rarely given more than casual thought to beauty in words. This other view of legal esthetics sees law not as a matter of language in general, but as a matter of rules cast into language. The rules of law, you remember, have become to most, today, the thing of law; language, then, but clothes and serves them. The rules, and the concepts which build into and are built out of them (for the process runs, willy-nilly, both ways), are to stand together; they are to merge into majestic harmony; they are to be a structure. Structured beauty becomes thus the esthetic goal—an intellectual architecture, clean, rigorous; above all, carried through in sharp chiseling to body out the predetermined plan, in every vault, in each line, into each angle. The great monument to this esthetic ideal is the German Civil Code, read not as it stands on the page, merely, but read also against the German theories of construction and dogmatics which were in vogue for a decade after its adoption. It is a type of legal esthetics little practiced among us. Langdell's amazing theory of consideration and unilateral contract is not only the most familiar American example, but the one most clean of line, most bald of eye-deflecting cover: the consideration needed to support a promise must be bargained for; it must be the precise something bargained for; the something bargained for must be precise. Acceptance and the provision of consideration coincide like equal triangles, superposed, and, superposed, exclude all variant dimensions of "conditions." If "an act" is called for by an offer, that very "act," complete, and nothing else or less, though by a hair, is what is needed. Only the other party to the bargain can accept; only "he" can give consideration; only "he" acquire rights. Nothing could be more simply stated, more rigorously thought, more tightly integrated, more fascinatingly absurd to teach, more easy to "apply."

Another example is the law of the c.i.f. contract, which Lord Wright has recently held up to admiration as perhaps the most "elegant" of our legal
institutions. It is in my mind—though I may be unjust to Wright's shrewd juristic insight—that what stirs his praise is the logical clarity, the singleness, the sharpness of line, in the law governing this once standard contract for overseas commerce. The patterned succession of the seller's proper actions, as he arranges, as he ships, as he sends forward promptly the batch of documents; the neatly matched mortising of the due steps by the buyer, honoring the draft when the documents are presented, then paying the freight in cash before outturn of the merchandise, proceeding then, and again promptly, to inspection of the merchandise itself, until which all the built-up seeming rights stand subject to possible defeat; the courtly grace with which the steps and rights of one intervening banker, or two, or three, are laid out as in a minuet—this, I say, is what I suspect Wright to have primarily in mind when he speaks of "elegance" in the law of this institution. What concerns me is that the aspects of that elegance are two; that but one of the two is basic to legal beauty; that that one is utterly basic, while the other is either an efflux or a tool, and, lacking the one, would be a simulacrum. It is not the structure, however sweet of logic and of line, that is the essence. Langdell's construct points that moral: magnificent in conception, impeccable in workmanship, it yet would not function; men do not, and courts will not, work according to that pattern. And that, in things of law, bars beauty. The history of the Langdell conception is one of a delighted welcome by law-teachers, which continues still, while piece after piece of the integrated whole continues to be junked; the holes consume the structure. The c.i.f. construct, on the other hand, has proved in test after test as surely, as cleanly, as smoothly gauged to the work it had to do as any legal engine man has yet designed. As a result, or as a means, a logical clarity is present, too. But the prime test of its legal beauty remains the functional test. Structural harmony, structural grandeur, are good to have, they add, they enrich; but they are subsidiary. So is ornament. Legal esthetics are in first essence functional esthetics.

If, with this in mind, one turns back to Holmes, the "five-word jewels" take on another significance. One ceases to be content to see them arranged on the walls of a museum. One begins to smoulder when any man quotes one of them, and does not give the source; when, in this wonder-world of words, in which a part can be taken and the whole yet left intact, a man hides from us the location of the whole monument which he has plundered. For Holmes' opinions are not mere jewel-cases; nor are they merely structured prose. They drive to a point; they drive to a policy;

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1 Introduction to Thayer, Cases on the Law Merchant (1939).
they drive to technical accuracy, to justice in the case in hand, to right
guidance for the future. Love them, or leave them, it is rare that you can
miss in any of them any of these attributes. Their beauty is functional;
the prose is clean by the nature of the man, but it is thrice clean because
hewn powerful to purpose. Carven pillar and keystone sing, but the song
is the song of the arch they hold and bind. Else—as occasionally—there
is a mot; no more.

So it comes about that right craftsmen of the law can discover that
they have "been talking prose all their lives"—which means, in this in-
stance, that they have been doing legal poetry. They have been artists,
they are artists, art is of the essence of their daily work. The search after
ornament alone, apart from function, is for the single worker in the law a
search after false gods; footless, but relatively harmless, because it com-
monly hurts few except the searcher. The larger-scale search, that after
structured harmony of rules, alone, is also a search after false gods. This
time, however, it is a tragic search. "For," wrote Teufelsdröckh,2 "a
Structure of Rules, however majestic in Simplicity or Grandeur, in logical
Design and Harmony—such a Structure, if it be once accepted into a legal
System, must house People and the Work of People. If its Beauty be a
Beauty for the Eye only, or of the Mind only, if it be not in first instance a
working Beauty in and for the People and the People's Needs, then it is
false. It is falser than mere false Architecture. False Architecture, save
when it crashes, is but Waste, Inconvenience, or Hypocrisy. But a
Structure of legal Rules, howsoever fair of Face, must function well or be
an active Evil to the Men and Work it houses."

This "housing" figure is not to be taken lightly. The esthetic phase of a
legal system is cognate to architecture as it is not, for instance, to painting,
and as it rather rarely is to music. Architecture and engineering strike
most closely home—perhaps because both look so directly and so ines-
capably to use. Indeed, in regard to the rule-structure of a developed
legal system, it is fascinating to follow the semi-analogue of one of those
medieval cathedrals whose building reached across the centuries. In the
law—at least in our own—there has never been an original entire plan by
any master-architect; but that I think highly probable also in regard to
many of those cathedrals which rested content over generations with a
choir. In any event, for structured rules and structured stone alike, one
finds unit after unit, set up aforetime, in a "style" whose reason has lost
meaning to the later user, but whose form will bind him still. I do not, of

2 Quotations are not herein referred to particular works. That would serve no purpose,
until the fuller story of Teufelsdröckh's life and works becomes available.
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course, mean here by "style" an individual's manner of handling words or work, as when one speaks of the style of Swift, or of El Greco's early style. I mean the pervading unmistakable manner of a period, the period-style of a craft—and I shall argue that style in that sense is not only applicable, but important, to work in law.

And as with a medieval cathedral, work done in an older period-style persists beyond its own day. One finds shift of plan, sudden, irreverent, even rebellious—old wall, old stone, old ornament, being pressed into "modern" service, in a new design. Too, change small enough in scope can sometimes alter an entire aspect, as when the fourteenth century chapel-rows were built between the buttresses, and window and wall pushed outward to make great, smooth space—the buttresses, as the phrasing goes, "drawn in"; or when Gothic vaulting was made to upheave a nave designed for the balanced measure of the Romanesque; or ornate plaster masked upon ancient stone or brick or varicolor, and the horizontal whirl of baroque, in every image, thrown in to force upon eye-lifting Gothic an almost jazz-like rhythm.

Such things one meets a-plenty in a case-law system to which no master-architect has ever set a hand: the cases of a few years can make a Constitution seem made over. One meets, in law, too, the impatient, relentless, clamor for modernity—whether need or fad. One meets, in law, too, the intrenched insistence upon the unchanged immediate past—whether dead or living. One meets also in law the romantic trend, the urge to cure the immediate past by recourse to the "good" past, more remote. Consider—if I may now with decorum avoid certain more burning contemporary issues whose smoke obscures a larger scene—consider a certain body of rules of law on contract. One ancient form, the signed promise with a seal, persisted long. Being ancient in style and architecture, its rules of law were at once revered and scorned, respected as of peculiar dignity, turned to irreverent everyday uses, decried as intolerable trickeries. State after state demolished the structure as outmoded, as in the way of progress; they did this, for the most part, hastily, scrappily, putting nothing in its stead. Other states maintained the structure with some piety, though with disquiet. Now the most modern reformers are putting forth designs for rebuilding the signed promise with a seal in all of its ancient solemnity, but freed of its ancient, hidden, tortuous passages—

3 Compare Symposium on Consideration, 41 Col. L. Rev. 777 et seq. (1941). Contrast the Uniform Written Obligations Act with the New York statutes dealt with by Hays, Formal Contracts and Consideration: A Legislative Program, 41 Col. L. Rev. 849 (1941), and Revised Sales Act, Second Draft, Section 3(2) and Alternative Section 3-C. Also see Havighurst, Consideration, Ethics and Administration, 42 Col. L. Rev. 1 (1942). [See Fink, Obviating the Necessity for Consideration in Amendatory Agreements, 9 Univ. Chi. L. Rev. 293 (1942).—Ed.]
somewhat as highly utilitarian yet traditionalized dormitories *can* rise in a sufficiently sophisticated “college Gothic.”

All of this is a phantasy; it will be unwarranted digression if it does not serve to drive home at once the conglomerate, the disunified, the eternally groping, nature of our own structure of legal rules, and one other thing: the fact that the shaping of rules of law, like that of buildings, changes what can only be called pervading style, from era to era.

“Style” in art, is a term abused; it is badly defined, badly described; it is treated lightly as explanation for what it does not explain; it is vaguely “explained” by factors which do not explain it. Nonetheless, the term says something, and it says something for the aspect of the law. That aspect changes. It changes, as I see it, in first instance in regard to the *ways of thinking and working in the legal crafts*. Style-change, in any art, stands in some intimate, as yet not surely fathomed, relation to the ways of at least some important section of the people. Such a change, in matters of law, will of necessity show in the attitudes and shifting ways of thought and work of the craftsmen before it shows in the resultant structured rules. Again, by looking to the going institution of law, to petty process in the men’s work within the institution, one gains light on its recorded word.

This holds, indeed, throughout art: pervading style, and style-change, will be understood, if at all, by way of the craftsman and of the craftsmen. But for the legal field it holds peculiarly; save for an Eycke von Repgow, and his *Sachsenpiegel*, where one man’s sole creation came to print itself for centuries on half a nation, save for a Mansfield, the individual craftsman’s work is slow to leave a mark. And since in case-law the structured rules, once built, can persist almost as do built parts of a cathedral, the craftsmen’s attitudes and ways of work may change, and change again, yet leave great portions of the prior builted structure almost untouched. What will best show the style of an era, are of course the parts fresh-built in that era. But what must not be forgotten, is that even while those parts are building, the other parts are largely being used in the style of that building.4 I beg leave to insist again that the craftsmen’s ways of

4 Compare the warranty-picture in New York after 1870, Llewellyn, Courts, Quality of Goods, and a Credit Economy, reprinted from 36 Col. L. Rev. 699 (1936), 37 Col. L. Rev. 341, 365, 371 et seq. (1937); and compare especially the bill of lading cases of the 1880’s when forward contract-thinking had drowned the “feel” of courts for the factorage market. Llewellyn, Horse Trade and Merchants’ Market in Sales, reprinted from 52 Harv. L. Rev. 725, 873, at 894 et seq., esp. 901 et seq. (1939). Or observe the horse-sense view of rewards first undercut by the conception that recovery without intentional acceptance is “anomaly,” and then struggling, in the newer drive back toward horse-sense, to develop new lines of recovery.
using their materials mean as much or more to the result as do the materials themselves. I beg leave to repeat also that in style, as in service, it is the craftsmen who mediate between the people and the structured rules and forms of law. For a broad contrast, consider the general German temper, in all fields, of building a broad premise (often enough half-mystical) and following it then with rigor into the most untoward conclusion; consider then the American temper of empiricism, of case-to-case thinking, of loose ad hoc wording, of sudden revision of premise whenever a consequence comes to be perceived as unwanted. Is the broad, controlling manner of German law, pervading lesser style-change from Savigny’s pounds of pages on Possession through to 1931, in its contrast to our own broad, pervading, manner of case-law and spasmodic statute, to be considered in any fairness as a phenomenon of law alone?

I shall want to recur to style in the American legal institution, but this reference to the German should not be allowed to slip away without a reminder of one other exciting parallel between rule-structure and physical building: the fact that the art of either is conditioned by, or, as the case may be, encouraged by, the available technology. What materials are there, to work with? What skills in using those materials have been devised, have entered into general use in the crafts? What is available need not of course make its way into general use, over indefinite periods (as, steel, glass, pre-fabrication); for all that, its presence seems to urge somewhat toward its utilization. But whatever depends for use on devices still technically unavailable, that simply cannot get built—or, if sought to be erected, will not stand.

In things of law, the worded rule is one such technical device. Writing, and again printing, are others. But a fourth lies in man-stuff which is reckonably at hand, and so in the organization and tradition of that man-stuff: most particularly, therefore, in the available quantity and kind of official personnel. If one turns, for example, to the tidy pre-Hitler working out, in the German rules, of how to handle tender, one finds the problem which lies at the root of our own confusion solved by way of a technical device which the American simply does not have at hand to call on; it lies outside the field of rules of law proper; it consists in a trustworthy, skilled, cheap, relatively non-political bureaucratic machine, there on call. You set up an appropriate office, and there the refused tender can be deposited. All risk can then pass in comfort from the debtor; “payment” by him can

5 Someone at the Contracts Round Table at the Association of American Law Schools in 1941 likened the invention of transferability of contract-rights, notably credits, to the invention of the wheel, in regard to its importance and effects on our institutions.
happen in complete clean severance from payment to the creditor. That severance once achieved, a tidy mind can proceed to work out all the other problems—and is invited to begin. But without that severance of payment by from payment to, I submit that even a tidy mind will find itself faced with alternatives none of which are tidy. As the development of rib and buttress, and the development again of skilled masonry, conditioned the emergence of Gothic vaulting, as the substitution of chisel and chisel-skill for adze let both relief and shadow vivify stone sculpture, so the development of unified legislative control, or of effective administrative techniques and personnel and institutions, condition the vaulting of puzzled spaces in the law. Teufelsdröckh's image is more homely: A suction-pump, or one law-official lifting by himself, can raise water or the work of law but a scant single atmosphere; nor can the flow be ever enough to serve a people. A water system, or a legal system, demands the force-pump, demands channeling pipe that can take the stronger pressures: personnel toughened and hardened in a schooled tradition; advanced techniques that rest on prior patient study and experiment.

In our own history of the last hundred years or so, one can distinguish with some clarity three marked style-periods. Pound has noted them, with that singular flair of his for feeling, and commonly enough for charting, significant currents where another would find nothing but a waste of waves. And I should like to do honor here to his insistence, over the years, on the presence of periods in our law—an insistence which, wherever it has chanced to carry into the teaching of doctrine in the day-by-day undergraduate classroom, adds to case-study a new dimension of richness, of time-perspective, and of process.6 Pound has distinguished a "formative era," roughly the first half of the last century,7 a period of "maturity of law," centering from perhaps 1880 to 1900,8 and a modern "sociological" period, involving new movement,9 but threatened these latter days (as Pound has come to see it) by absolutism and associated evils.10 The se-

6 For which reason alone I should have thought that Jurisprudence would have been seen these many years as essential to right undergraduate work in law study.

7 Not nearly so well handled, to my mind, in the book of that name as, say, in the exaggerated but powerful paper in i Acta Acad. Univ. Juris. Comp. 183 (1928).

8 Discussed, e.g., Pound, Fifty Years of Jurisprudence, 50 Harv. L. Rev. 557 (1937), 51 Harv. L. Rev. 444, 477 (1937).

9 Compare Pound, The Scope and Purpose of Sociological Jurisprudence, 24 Harv. L. Rev. 591 (1911); 25 Harv. L. Rev. 140 (1912), and repeated shorter references since.

10 These fears are voiced in perhaps the most sustained manner in Pound, Contemporary Juristic Theory cc. 1, 2 (1940). On which see my review in 26 A.B.A.J. 876 (1940).
quence "movement-consolidation-movement" holds, without question. Beyond that, I find myself differing from Pound's analysis almost in the measure in which I have learned from it. But his setting of thought has been "stages" of legal history, or else sequences of so-called "schools" of jurisprudence. Mine, here, is period-style.

The first style to be discussed, which I shall center on the later 1830's and earlier 1840's, is in every sense an "early" style; Pound's "formative" suggests this well enough, though the term is chosen with reference more to the now body of doctrine than to the then method, and if Pound does not talk of style, he nonetheless inescapably communicates about this period both the presence of one and its flavor. It was, however, a style in its own way quite as "mature" as that of the following period, if mature is to mean ripe in effectiveness, vigorous in coping with new tasks, wise against tough problems; indeed, such lines of maturity in workmanship are attributes of an "early" style, when it is carried by the powerful craftsmen of a powerful people, once that style has passed beyond groping and has begun truly to shape. "Formative," I repeat, goes thus to content of American legal doctrine, in the first half of the last century, not to the method of the law crafts at that time.

One can follow that craft-method in the opinions, often also in the reports of argument; one can conclude much about craft-method from the relatively clean-running statutory texts. Systematized law they do not present; craftsmanship they do. Directness, fluidity, vigor, and a surpassing average rightness are the marks. Reason is tool, method, goal.

To make clear what I mean, let me now differ most explicitly with my brother Radin in his recent unwise equating of "reason" and of "logic" in legal work—an equating curiously at odds with the wise insistence in the same book on the prime importance of rules being laid down for the "future." In a developed system, well provided with authorities, reason and logic, as they appear in action, are more likely than not to be at odds. "Reason" in law-work always implies more than reasoning; it implies the

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22 Contrast the sweet-running craftsmanship of the American Factors Acts of the 1830's with the strictly comparable "negotiability" clauses of those anti-wildcat-warehousing statutes of the 1870's which came up for construction in Shaw v. Railroad Co., 101 U.S. 557 (1879).

23 Radin, Law as Logic and as Experience (1940). I agree with most that Radin has to say about law "as experience"; save that his insistence on the second-hand character of any "experience" law can make contact with is, to my mind, the chasing of paradox materially too far. The matter is significantly similar for any contact of man with "experience"; it is the problem of reaching the Ding an sich, coupled with the problem of meanings, and law is not peculiarly worse off than other disciplines. An initially good point can be pressed to where it loses virtue.
use of Reason in choosing premises which have a reason, and the use of Reason in judging of the reasonableness of any outcome or any goal. "Reason" is thus the main guide and measure by which, "experience" works its way into legal results, whereas "logic," in legal work, tends powerfully to take authoritative premises as given and to reason simply thence. So that I speak here not of true logic—of which there was plenty—but of "Reason" as the dominant tool, method, and goal of the 'thirties and 'forties, because it was the constant recourse to "Reason" to determine the premises for logic which gave fluidity, power, directness, and direction to the style. It was craftsmanship in the on-going use of both true logic and the rightest Reason the craftsman could manage, coupled with the relative access of even a single individual, in those days, to some fair understanding of the whole going society, which gave the style simplicity. I note one other thing which has been altogether too little stressed: the progressives of the legal system of the 'thirties and 'forties were, the bulk of them, strong conservatives in general politics. The schooled men, the skilled men, the "safe" men—these had at this period a heaven's building job to do for the legal system. The "best" men, the most "solid" men, of bar and bench were in their daily work, in good part, in creative alignment with the surely felt unambiguous needs of the country. Such a conjunction has not occurred again (though something comparable seems to be happening in government, today\textsuperscript{24}). In any event, I

\textsuperscript{24} Conversation about this with Evan Haines and Peter Dawson elicited some extremely interesting suggestions. Haines noted that leadership of the men of law, responsible and conscious leadership, persisted in their attitudes even while it was waning in their powers; that, when the Jacksonian wave was followed by the election of judges, and then by the dominance of industrial and financial leaders, both external and internal foundation for courageous sustained creativeness tended to slip away; and he noted, again, that in a real sense the legislative and administrative attitude of today had again become one of conscious and responsible leadership to get done needed things which, seemingly, only law and government could get done, for the whole-of-us.

Dawson reached for currents common to the Western World, and noted especially the misinterpretation of the situation in France, if one drew his views on French judicial practice, say at mid-century, from the formalistic doctrinal writings. And both men raised the question whether at the present juncture, in regard to the appellate bench, we were not reaping important benefit from the combination of solid horse-sense and drive for justice with a sufficient relative ignorance of the full range of our tangled law to keep horse-sense from being frustrated by a feeling of the mere mass of the Augean mess. It seemed to all of us that one thing which stamped Cardozo's private-law work with the mark of greatness was the intellectual power and the relentless industry displayed, when he had found a light-giving answer in a particular area, in straightening out and clarifying the entire body of precedent which had lain, confused, behind. So that in the current work of the appellate courts, in general, one felt much less the conscious leadership of the whole which typified the '30's and '40's of the last century, than a recapture of that way of Reason which was submerged in the formal period. But I see courts re-emerging as one focal point of leadership. Compare my forthcoming The Common Law Tradition.
mistake both my sociology and my esthetics if that conjunction a century ago does not go some distance to account for the unity of the legal style of the period, for its superb sureness of line, and for its passionate, though restrained, simplicity. For let me remind that period-styles as such need not reflect "the people." Nor did the style of our law-work in the 'thirties in any vital measure reflect that tidal wave that had swept Jackson into power. A style needs a sufficient public; no more. Does any person have the illusion that Louis Quinze furniture reflects the "France" of Louis Quinze? But a style in work of law must reflect not only an unremitting but also a sensitively accurate concern for general welfare, or else go wooden. No craftsman can long escape the essential nature of his medium, and the material of law loses life fast, in selfish interest. It may retain power; life, no.

Two caveats I should now like to lodge. A "style," though strongly marked, is not a uniformity; it is, as it meets the learner in the craft, a set of pressures channeling technique and imagination, a set of pressures which have come (rarely by design) to interlock into a sensible whole. But some resist, some escape; those who are not craft-schooled may vary widely. Thus you will find in the same volume opinions with the clean, clear lift of Laon Cathedral—and with Laon's imaginative daring—from the New York Supreme Court, and, from the senatorial Court of Errors and Appeals, opinions with the polysyllabled fanfare of the public oration of the day. It is the former which mark the age, for me. If you will not go with me in that, then let me state the claim more modestly, to meet your prejudice: the lasting law-work of that era, the best work, the distinctive work, has the style I have described; and the craftsmen had it when they wrought that work.

The other caveat is this: borrowing from England there was, in substance and in technique; and in that aspect the concept of "reception" of the English common law has real meaning. But the style of the then English law was borrowed not at all, and no talk about "reception" must be allowed to obscure that fact. The American work was not that satirized by Dickens, nor that in which Parke satirized himself. In commercial law, which is the only nineteenth century English Law I have followed carefully along its time-dimension, the period in question has in England...

Pound misleads on this; and he misleads severely, in regard to the effect of civil law writers. What was doing the work was informed horse-sense, in the highly skilful manipulation of available, many-tendencied, precedent material. Almost regularly, save perhaps for Story's work in Conflicts, the references to the civilians are grace-notes of rhetoric, not sources of light. The real test of this last is the essentially non-citizen character of that basic legislation of the period which Pound and I both admire. There, despite a free hand, the work is a common-law type of work.
rather the aspect of the American period next to be described; whereas between say 1860 and 1880 the English style moves for a time into Blackburn's relative flexibility. Their style is hardly, however, even then, a simple or "early" one: there is more of rationality, less of direct "Reason," in the work; there is craftsmanship, sound craftsmanship, functional craftsmanship, and more "elegant" craftsmanship than in our early style, but there is little passion: Amiens, not Laon or Chartres. I do not, indeed, understand why the disciples of idealism in our law leave unremarked the passionate quality of our period of the style of Reason: restrained, but burning. One's admiration for Blackburn is intense, but Cowen must be loved—as, later, Scrutton must. "Law's true Peaks," Teufelsdröckh observed, "bring both far Vision and a throbbing Heart. That is their Glory. But a schooled, a sure, a steady Hand is needed. And," he continued, "lone Climbers fall."

The next style in our own legal system which becomes pervasive enough, distinct enough, to be clearly seen as such, seems to me that which characterizes Pound's period of "maturity of law"—which he sees as a period of "consolidation and development of the received materials." The characteristics are well enough known to all of us: authoritarian, formal, logical. If the 'thirties and early 'forties have the flavor of Gothic-in-growth, this period centering on the last decades of the nineteenth century can be likened best to English Perpendicular. And Pound seems to me off perspective with the "development" part of the above phrasing; the characteristic of the period is indeed consolidation, but it is a consolidation by cutting down, rather than by development. Lawrence v. Fox, for instance, had got off to a very good start on third-party beneficiary; the office of Vrooman v. Turner was then to limit the implications so far as authority would in any way allow. That was in 1877. Charitable subscriptions, again, had done fairly well in the earlier period; Presbyterian Church v. Cooper, in cold alleged regret, then managed to squeeze all life out of each earlier case. That was in 1889. The very growth in the documentary sales cases was a growth in terms appropriate, and almost calculated, to rigidify the rule of exact performance for the future. It did.

16 A less familiar, but much closer, analogy, is that of German brick Gothic in the fourteenth and especially the fifteenth centuries: a vibrant, independent, provincial-national offshoot, bourgeois and half-secular in flavor and with strong democratizing tendencies, striking out along new lines conditioned both by new material (brick) and new conditions, at a time when the French "center of diffusion" had gone into formalism. Bechtel, Wirtschaftsstil (1930), makes, on the whole, an impressive case in terms of tangible process, about this "Sondergotik."

17 20 N.Y. 268 (1859).
18 69 N.Y. 280 (1877).
19 112 N.Y. 517, 20 N.E. 352 (1889).
That process ran through the 'eighties. Authority was authority; logic was logic; certainty was certainty; heart had no place in legal work; esthetics drove in the direction of cold clarity. Now cold clarity is not achieved by that type of work which extends, which develops, prior implications when they need it; esthetically clean poles with esthetically clean lines (if that is what you want) are made by neatly smoothing the growth-branches off. I do not want to go psychoanalytical in a discussion of a period-style in American law; nor have I any intention of putting forward here a theory of why, in general, periods of formalism recur in law and flourish. But I do think it odd enough to call for speculation, that with the American economic world in almost frenzied expansion, and with systematization dominant in no other branch of our intellectual life of which I know, the craftsmen of our law should have been swept by this particular esthetic urge.

In general, one expects intellectual tides, and tides of action, to show somewhat similar effects in the various aspects of life and thought. Eddies challenge to study. Here speculation cannot rest with the prevalence of a severely positivistic legal philosophy, because a philosophy does not just prevail of itself; it displaces a prior philosophy; it has to get itself accepted. Once accepted, indeed, it enters as an independent factor; but why was it accepted? Nor can I accept any semi-conspiracy theory, which would find the formal way of work best fitted to rapacity, though I do feel strongly that, once the way of work got under way, the lawyer for the exploiter and developer took to it like the skunk to little chickens. I cannot avoid the feeling that, with religious fundaments under known fire from biblical criticism on the one side, from the Darwinian controversy and, later, Spencer on the other, those older lawyers who sat upon the bench found comfort in a next most solid foundation; that they preferred authority to expansion, preferred a way of law which brought clarity and approached system, though at the price of lopping off the growing branches. And I am far from clear, in addition, that such a way of law did not provide a comfortably solid foundation in what was beginning for the first time to become an economic world which a single busy man had to see that he could no longer compass with his mind. I find it difficult to forget Henry Adams' disgusted withdrawal from dirty politics into history—into the period of his fathers, then into the unified thirteenth century. I find it difficult to forget Holmes' labors over Kent, and over legal history, and over system,

20 There is a passage from Holmes to Pollock explaining Holmes' delight at finally having found a chance to prune off an anomalous (highly sensible) excrescence. But the point made rests on feel and result of the mass of the cases.
giving himself a known and tested (and rather tight, growth-proof) foundation, before he emerged at forty to match himself against events—and at least one passage argues that such preliminary labor had been a conscious need. I note that Holmes himself in non-constitutional doctrine was of the clarifiers from within the legal system, one of the very slow to move; and that in constitutional doctrine his stand was in essence one against the innovating expansion of "due process" law. I remember his suggestion that that particular expansion might well reflect a fear of socialism, and I remember then my own puzzlement when I began to discover common law cases somehow similar in tone and flavor, which long antedate the constitutional cases. What was going on was a consolidation and withdrawal into a formal shell of fixed authority; and, I repeat, it was a cutting down, not a "development," of prior doctrine.

I am quite unwilling to "explain" this in that "private" law field which (despite the much talk of the constitutional lawyers) set the dominant tone of the period—I am quite unwilling to "explain" this by the mere philosophy of laissez-faire. I am ready to hook it up with such a philosophy, if I can find the way; the fact of relation is, I think, perceptible. But to see that the two fit well together is not to solve the problem of process, the problem of how it happened. The formal style, I repeat, had a better and different style to displace, before it could itself become dominant. Here I face my ignorance. May I speculate? May I guess at a touch of breakdown in the transmission of the older craft-style, in the 'sixties, or even as a delayed result of Jacksonianism? May I guess at a "best" bar beginning then to specialize in clients (industrial clients who needed steadiness of law) and so coming to lose somewhat the earlier constant appeal to Reason and to select, among the earlier techniques, chiefly those which rested flatly on authority? This does not satisfy me. The manner and detail of the process are one of the most puzzling unexplored and vital problems of our law. This we can say: laissez-faire does discourage legal inquiry into policy and does discourage deliberate urge to reshape in terms of policy. It does encourage a feeling for minimum interference, and for clarifying predictability. Out of urges thus initiated, the creative impulses could turn toward tidy structure—what is there left for them to work on? But some of the results remain distinctly queer, in such a view.

21 The opinion in Vegelahn v. Guntner, 167 Mass. 92, 44 N.E. 1077 (1896), is an expression of unwillingness to create. The two main creative phases of Holmes' work on the Massachusetts court seem to me to be his work in constructive conditions and in criminal law, in both of which fields his thinking in The Common Law had arrived at a systematic base which made the non-sense in the law seem the anomalous. Contrast the story in bailments, or in conflicts, or in the consideration phase of contract.
Prima facie, for instance, laissez-faire does not too directly encourage a way of dealing with commercial materials judge-made and largely already on the books which is not only formal, but almost anti-commercial, in effect. Laissez-faire moved onto the stage in clarity rather with "liberty of contract" and the due process clause. As against prior case-law, these represented not contraction, nor yet continuance, but inventive expansion of the range of doctrine. Laissez-faire, or "business-industrial" thinking, and fear of disturbance of an order seen as good, produced also an enormous creative expansion of prior doctrine in the injunction field—be it anti-labor, or anti-government. In a word, where either economic philosophy entered more unmistakably, or the ideal of a society rightly and happily centered on "business" opportunity, or (as commonly) the two as brothers, they entered to induce expansion of doctrine in a manner at odds with the general style of the period. Powerfully felt policy could do what heart could not, and break the bonds of form. The elaboration of the defenses against the injured workman is doubtless in part also apt, to point that moral; but again the matter is not a simple or a clear one: there is a touch of perverse logic in the development of the common law defenses which fits with style, pure.

Now here belongs an observation of some moment, because the marks of what one may call the authoritarian or formal style are with us still. Under the early style, with right Reason plainly dominant, the outcome of a particular case at law can be moderately certain in the bulk of instances, and can and will at the same time give guidance in words, for the future, which is moderately clear. It is the felt reason of the situation which is stated; the rule and its application shift, at need (as they should), with any shift in reason; shift can then be moderately well forefelt, if not foreseen. Again, and under the formal style, certainty both in outcome and in verbal guidance can be had; the court states its position, and then refuses to budge, for whatever cause, save to whittle away "anomaly."

But what produces confusion, persistent and inevitable, is to act in terms of the felt reason of the situation—i.e., in the early style—but to talk in terms of the formal style. That confusion was introduced, as a practice, in the creative phases of the time-span here under consideration:

Soia Mentschikoff suggests here that Commerce is a mediating and central line of work, encouraging a broad view and a responsible control; but that Industry is met in specialization and leads readily to failure either to see or to feel for the whole; that this is the era of Industry; and that judges learn, like other lawyers, in terms of the problems of their prior practice, and of the thinking of their times. The cases I have in mind have as their archetype, Shaw v. Railroad Co., 101 U.S. 557 (1879), note 12 supra. For an effort at explanation, see Llewellyn, Horse Trade and Merchants' Market in Sales, note 4 supra.
the due process and injunction lines of expansion. And so long as any part of that confusion of style in law continues, in the courts, so long will litigants have unnecessary uncertainty, lawyers have both uncertainty and wholly impolitic leeway, and courts have more work, and more baffling work, than there is call for. Courts will, also in consequence, go wrong, under pressure of work, more often than they need to—and they will harvest less solid satisfaction from their labor. For esthetically satisfying work is a vital return to the craftsman. Either of the styles described, pure, can yield that return to its disciples. The mixture does not, nor can it.\(^3\)

The work of the craftsmen of the law, other than judges, in this formal period, I do not know in detail. What I gather of it, fits what has been said. Since law in an era of terrific change would not stand still—whether as institution or as doctrine—both practical work and theoretical thought under the Formal Perpendicular had of necessity to be somewhat confused. Carter's book\(^2\) is a belated monument to that. Yet the precision of concept and the rigor of logic which marked the work of a Holmes and a Gray and a Langdell are not, it seems to me, to be wisely attributed either to a single teaching institution or to scholar's seclusion. I believe them to have been rather of the time. Field's drive to codify seems to me to have been a thoroughly appropriate stylistic expression; what stood in the way—apart from J. C. Carter—was that men had neither the training nor the time to check up on an attempted "systematization" on so vast a scale. The historical scholarship of the period, on the other hand, I take to be neither causative of the style, nor too important a factor in it, nor even a true expression of it; it seems to me rather a derivative and a parallel. It is not like Coke's "historical" work; it is a work of the schools, not of the bar or the bench or the political arena. Nor were scholars enjoying any large place in the legal sun. Still, if anomalies and asymmetrical forms are to be ironed out, history may help get rid of them; if it does not, it at least puts some explanation under them; meantime, it does stay put, whereas the disturbing economy does not. One may delve for love, but he is likely to delve also in relation with the dominant intellectual currents of the field at the time, and with the interests of his brethren.

\(^3\) This is developed in Llewellyn, The Common Law Tradition.

\(^2\) Carter, Law, Its Origin, Growth and Function (1907). Consider his difficulty with "custom," when specialized practice is under discussion, and the consequent confusion in dealing with the interaction of the specialized practice of the courts, and that of some relevant body of laymen. This, though his initial attack ought, as against formalism, to have furthered clarity.
In contrast with the two styles described, a third not only is emerging, but has emerged, today. Its groping period seems to me largely over. Its causes I take to be, first, the unwieldy complexity of modern life; second, the perception that the rules of law built in the formal period out of the pruned-down materials which had then been at hand cannot cope with the problems heaped up by two succeeding generations, a half-perception also that the techniques of law built in the formal period are no adequate techniques for that transition or reform which for three decades and more has been in process. The third cause is a slow awakening to the fact that the relative balance of the 1830's and 1840's has slipped increasingly so far away—both as to the fact of balance and as to its foundation—that there are great gaps which need vaulting, great backward areas which need development, large-scale work to be done. And a fourth, if I am to list things, would be the perception that specialized, skilled, powerful units professionally on the job can be dealt with only by other powerful, skilled, specialized units also professionally on the job.

The basic element in the new style is thus conscious and overt concern about policy. The preposition has been carefully chosen. For concern, and conscious concern, with policy has been a part of work in law from the beginning—even when that concern extended only to the duty of "standing on" the precedents or producing, by vigorous surgery on the precedents, a doctrinal symmetry. But policy today opens neither to uninformed right Reason nor to mere tradition; policy has become a thing to worry over. Such worry, once, was for the queer case. No longer is that so. If, now, you should find such conscious and overt concern about policy non-typical of today's run-of-the-mine advance sheet, or of today's run-of-the-mine work of the law office, you might be right enough. Half of the law-work of the country may, indeed, still be going on in a style corresponding to the two-story-and-basement brown-stone front, in rows, or to the well-gim-cracked small-town frame house of my birth. But if you should undertake such a mental canvass as a test of whether we are living a new style in law, then you would be missing not only that it is the characteristic, with forward thrust, that marks a strong young style; you would be missing also that one focal point of style in law has shifted from judges and from lawyers in practice to legislators and to lawyers in government. The other focal point is still the appellate bench, as I have tried to show elsewhere; but the appellate bench has not yet voiced its new style clearly, and the bar is not as yet responding to it. Rather is it out of that growing center of legislation and administration, with taxation as the dominant single channel of contagion, that changes in style of law are spreading through the
crafts of legal practice. Conscious concern about corporate policy had been building, as a style-factor, independently; but conscious concern about relation to the governmental policies of all-of-us has to add itself, when taxes bite.

The next feature of the modern style which strikes one could be called factuality; it could be called realism; it could be called technological contact. Its essence is the supplementation of legal authority on the one hand, and of ordinary common sense on the other, with such technical data of fact and expert opinion as are available, or can in the time at hand be made available, to inform a judgment. In legislation, in advocates' work, and in work of courts, in counseling, above all in administration, this comes to the fore. It is a vital style-factor; it changes the whole relation of a legal craftsman to his work and to his society. Instead of being the expert, by mere command of his own craft in command of all crafts, he becomes one expert, in immediate command only of his own craft—otherwise a co-worker. It pays to think over courts' emotional resistance to the earlier administrative tribunals in terms of this.

Meantime, a paradox appears. Precisely in the circumstance of losing both dominance and competence to command by mere virtue of his craft, the man of law embarks upon larger-scale, more powerful, legal creation than ever in our history. The statute in the new style is no minor change, no mere detailed corrective. It vaults areas on a scale heretofore undreamed of; it does not codify and mildly reform on the basis of past legal experience; it brings forth at one stroke a policy, a measure, a whole new field of operation, an appropriate administrative machine, and blanket provisions for what (the nicer distinctions of constitutional law to the contrary notwithstanding) is in effect continuing large-scale delegated sublegislation. And here I should like to recur to a point made earlier, in regard to the conditioning of legal building, as of architecture, by the available technological wherewithal. A legal vaulting that presupposes an adequate administrative machine, with adequate administrative personnel—trained, restrained, skilful, diligent, forceful, tactful—such a vaulting does presuppose just that kind of personnel. You cannot span with stone what you can span with steel. You cannot span with flawed steel what you can with right steel. You cannot disregard outthrust; you cannot forget internal stress. Beauvais rose overproudly—and it crashed. And American legal building in the modern manner strikes me, thus far, as paying altogether inadequate attention to that engineering discipline on which a permanent magnificence of legal architecture must depend: the creation of adequate traditions and machinery for training and holding and con-
continuously breaking in an adequate supply of right personnel. The feature
of scale remains, however, characteristic. Nor is the reference alone to
federal legislation of the last years; consider, for example, the style of
work, in private counsel's hands, which used to go into arranging, captur-
ing, and controlling a railroad receivership, or which still goes into legal
planning for a national market. Or consider, in these days when the
"dwindling of states' rights" is so much talked of, the expansion of state
government, and the problem of building personnel—which means, of
building craft-traditions—to handle that expansion.

There is a further matter to be noted before we leave the point of scale;
it goes again to the heart of style in legal work. In the early style, the work
of law is in command of the community; it is so felt; the doing shows it. In
the Authoritarian Perpendicular, whether or not the courts are to be
viewed as retreating into formalism to escape coping with events beyond
their compass, the counselor is certainly to be viewed as sliding steadily
into the position of a hired hand. The position of a corporation lawyer in
1910 was not a noble one. Scale alters that position; it reverses that trend.
In legal creation, and in specialized administration, the man of law does
indeed need to draw on co-workers, independent experts, and becomes and
remains insofar himself a dependent worker. The men being equal of abil-
ity, however, there is no question, once the work gets well under way on
the great scale, as to who moves into command. Initial dependence of the
man of law yields then, even in the most technical field, to dominance of
the one craft that speaks for the Whole and to the Whole. That craft no
longer stands alone and sufficient, but it holds command. By force of
scale of legal work, then, the modern man of law regains his soul. And
one thing for which the private lawyer of tomorrow will be grateful to the
government lawyer of today, when spitting bitterness has come, a bit, to
mellow, is that increasingly, in the modern battle with the government,
counsel are ceasing to take orders from their clients. They give the orders.
At the worst, they consult as equals.

Conscious concern over policy, technological contact, scale—these seem
to me more than likely of continuance through the next generation. A
fourth characteristic, not yet so clear to see, seems to me no less so: a
craftsmanship conscious and articulate in a new way, a craftsmanship
along lines explicitly communicable, whether in advocacy, or in counsel-
ing, or in legislation, or in administration—or, yes, in judging. Though,
as I see it, an outgrowth primarily of pressing maladjustment and of
large-scale needs, this articulate craftsmanship can, and in my view will,
carry over into daily, even petty, work. At least with regard to advocacy
and counseling, such a conscious tradition was not undeveloped under the
early style: apprenticeship and circuit riding favored it, though I find
little evidence that it was ever systematized. In any event, it died, as
training moved into the schools and as these latter came to center
thought on rules of law alone. But men who these days shudder at its
recrudescence, as being the begetter or the spawn of cynicism, should
take heart as they remember that such a tradition of conscious craftsman-
ship was what sustained bar and bench in our high “early” period.

If an alleged style be indeed a style, its dominant characters should
show some unified relation. These do. There is the faith, courage, drive,
and conscious quest for balance in the whole, which they have in common
with the early style. There is a daring of scope, and an exploration of
“outside” as well as “inside” material for light on why, whither, how,
which are new—save for Mansfield. The unifying feature seems to me to
be the clear-eyed wrestling with the possibilities and problems of great-
bodies, as units—be they private groups, or governmental, or great scat-
tered unorganized rucks of like-circumstanced persons—this, in a system
whose whole conceptual tradition is still that of friends A and B and C.
From this feature all else flows. The feature itself flows—a touch be-
latedly—out of the time. And infusing the whole is—a feature that had
been missing within the law-crafts, save for individuals, under formalism,
a healthy feature, a feature proper to all law that lives and serves. As in
the great days of the style of Reason, passion informs the modern style
again: faith and vigor in a “calling.”

I had not intended to spend so much space on this matter of period-
style. Yet the concept has a striking-power, a range, and an ignoredness,
which warrant the space. What would not be warranted, would be failure
to follow through a bit further the functional evaluation of esthetics in the
institution of law, and also to indicate some places at which it ceases to be
an adequate line of evaluation.

In the first place, as I attempted to bring out in the second lecture, a
functional evaluation moves as does no other line to knit together prob-
lems and results in regard to the True, the Beautiful, the Good. This
would be a purely intellectual value, a reconciliation for mental peace

25 The perception is slowly growing more general, as the smoke of the fireworks blows away,
that the so-called “realistic” line of work is in essence a new and sound drive into more effec-
tive legal engineering techniques; not in any way a philosophy of law, but useful in the more
adequate service of any philosophy of law. This has been clear from the start. Llewellyn,
Some Realism about Realism, 44 Harv. L. Rev. 1222 (1931).
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alone, if the problems posed by the True, the Beautiful, and the Good were merely problems of an intellectual tradition—if they were that type of received issue which men have disputed over for centuries because truth lies on both sides, the question never having cut to essence. I find no such situation here. Taking, so far as I am able, a child’s fresh view of matters legal, starting over, as best I can, from bed-rock up, with all legal questions re-forming in consequence, I seem to find these three lines of philosophical inquiry still standing firm as vital aspects of man’s quest. On the side of philosophy I am of course entirely unlearned. I have tried there to come as a dilettante should, conscious of technical ignorance and eager to be shown; conscious also, however, that technicians can go haywire, and so, insistent on being shown. It seems to me that I have been shown. Hence the knitting together, in law, of the three great lines of inquiry seems to me a high virtue of the functional evaluation.

That knitting is obvious. There can be no test by effect, no working test, without inquiry into situation, process, and result in fact. Determination of the True becomes thus an inherent part of search for the Beautiful. But again, neither can there be test by effect, without inquiry into purpose against which to measure that effect, nor can there be such inquiry, without search for the Good. It is a fortunate field to work in, this of law, in which the three great ultimates so dearly merge.

One thus gets here, as one does not in most fields of esthetics, some help in evaluating one style as against another. With working adequacy to go by, it becomes clear that a formal style will grade high in beauty only where conditions are stable enough, and the concepts and rules of law are, in addition, surely enough hewn to the conditions, to make results fit ongoing need. In our own law the best example I think of lies in many of the provisions of the Negotiable Instruments Law in regard to charging secondary parties; yet even here, the courts had to reach into purpose to do justice when checks were put into new standard banking channels of collection; and the rules on protest stand out rigid and obstructionist in supervening metropolitan conditions. A formal style, in a word, is foredoomed, sooner or later, to become a bad style, and lawyers will have to groan under fiction, spurious interpretation, and their progeny at once of

27 I got particular stimulus from Pepperel Montague, The Ways of Things (1940), reading which set off this series of lectures. There is an old debt to Dewey, and another to Morris R. Cohen, and, for me, a more recent one to Aquinas. On application of natural law postulates, compare Llewellyn, One "Realist’s" View of Natural Law for Judges, 15 Notre Dame Lawyer 3 (1939); Brown, Natural Law and the Law-Making Function in American Jurisprudence, 15 Notre Dame Lawyer 9 (1939).
confusion and of discretion which escapes accountability. "Vouloir guignoler la noblesse de la robe" was Teufelsdröckh's expression of his scorn, "c'est finir par se guignoler soi-même." Which I suppose one can render: A theory or a people which seeks to put law's high ministers on puppet-strings ends up itself a puppet in their hands. What grows very clear is that in the high flux of our latter nineteenth century the formal style was an esthetic aberration. Law out of harmony with life, ways of law which grind gears with law's society, cannot have right beauty. Not the rules, but the living institution, not mere certainty for lawyers, but certainty plus justice for the folk law is to serve, define the need.

When one turns to the modern, the case is not so simple. Too much depends, there, on variant conceptions of the Good. Too much depends, also, on whether a great-scale measure be taken first in terms of grandeur of conception and soundness of intent and largely of design, or first in terms of such disturbing lines as mar its rhythm, or of worry over whether the man-material will bear up under the outthrust and the strain. For myself, I hold this modern style to be one of unfolding loveliness, its lines of self-restraint perceptible, challenging, and, rightly handled, ready of development from its own sound premises.\(^2\)

With the idea of functional evaluation I have no desire to take over into legal esthetics the exaggerations, and to my mind absurdities, of those extreme "functionalists" in architecture and related arts who hold no form, no piece, no ornament to be esthetically legitimate which is not, with maximum economy and efficiency, a working portion of the thing designed. I hold another, and I hope a saner, view. I hold, first, that even under such a bare "efficiency" conception of functional esthetics, purpose is yet an inherent part of any functioning structure; and so, that whatever expresses purpose, expresses also an inherent part of function. Thus, to recur to the Gothic Cathedral, sculpture and glass-painting did not require to help hold up the edifice to be a right esthetic part of it. I hold, moreover, that man's love of play, and—yes—of loveliness, is as rightly satisfied as is his desire for work well done, or for economy, or for clean form. And objects of use are those which grow closest to the heart. Thus the only esthetic rule which I recognize about adornment in relation to function is that adornment is best when it can be made to serve function, and is bad when it interferes with function; beyond that, the quest for richness of beauty and meaning seems to me a right quest. You may call these prejudices; to me, they are considered values. But whether you like

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them or not, in general, you will have difficulty in dodging their applicability to things of law.

Consider the single legal rule. Its esthetics are functional, in the strictest sense. It has room for not one jot of ornament; and the measure of its beauty is the measure of its sweetness of effect. Spencer's approach to style in terms purely of economy and efficiency seems to me to have application to one sole type of literature: to wit, stripped technical discourse. That is the rule of law. In it, a waste word is not waste only; it is peril.

But Spencer's approach does not exhaust the esthetics of the individual rule of law. Besides economy and efficiency, the rule of law requires rightness. The situation must be rightly grasped, the criterion rightly seen, the effect neatly devised to purpose, else neither clarity nor economy of language can serve true beauty.

Whether Spencer's concept of economy extends to cover a certain other aspect of the esthetics of the single rule of law, I shall not try to determine. I refer to what was mentioned earlier: elegantia. Tersely, elegantia is simple grace in larger structure, each detail serving. It suits economy. I feel another something in it. I can conceive a thoroughly economical legal filing system which lacks grace and proportion. But here the dominant interest is again a caveat. Let me put it thus: a graceful structure of doctrine can intoxicate—as Langdell's has. But if it does not serve sense, it remains bad legal esthetics. Per contra, to seek merely to serve sense, case by case, will yield a welter. A welter also is plainly unesthetic.

The larger whole of rules must thus serve not only the immediate, but the larger need: sense, finder-value, balance—as well as relative precision. That is, to be esthetically satisfying. Here, there is a range of creative effort which no individual rule can offer.

And still, in regard to the rule of law itself, there remains an esthetic aspect undiscussed. It will be urged in the next lecture that right law must be intelligible, intellectually accessible, to the people whom that law is to serve, whose law it is, the law-consumers and the citizen "makers" of the law. "Function," conceived purely in terms of the staff of legal technicians, could indeed be achieved by language which would carry no meaning or wrong meaning to such laymen. But as I have tried to develop elsewhere, even the high temporary effectivenes which can be had by skilful black-art language is unsound, because it cannot be relied on to

29 A phrasing which it was a delight to find David Riesman using, too. Proceedings, A.A.L.S. (Dec. 30, 1941).
continue effective. Only the rule which shows its reason on its face has ground to claim maximum chance of continuing effectiveness; so that to satisfy, in this, the lay need of relative accessibility, of friendliness and meaningfulness of the reason, is at the same time to do a functionally more effective job on the side of pure technique. There is thus no need, in widening one’s view of what the function of rules of law is, to risk confusion on the marks of beauty. Quite the contrary. For to see the wider function, is to find the road back to that rightest and most beautiful type of legal rule, the singing rule with purpose and with reason clear, whose nature, whose very possibility, the Formal Perpendicular has led our legal thinkers to forget—almost to deny.

I have said nothing of ceremonial and symbol, of ritual beauty, of emotive symbols. I have said nothing of the esthetics of certain legal arts I deeply love: counseling, advocacy, teaching of prospective lawyers. I have said almost nothing of the esthetics of judging, and nothing of the writing of opinions. Instead, I have dealt chiefly with rules of law, and with structures of such rules. Is this because, though of the realist persuasion, I find myself driven back to the Rules as in truth the essence and the center? I trow not. When I get opportunity, I hope to show how infinitely richer in esthetics are the crafts of law than rules can ever be. No, I have stayed here with the rules of law because they make the vital point which a cut-in at any other place would leave obscure: that the foundation of any legal esthetics is service to function.

Perhaps there is another point almost as vital: one comes to the soberest, the allegedly dullest portion of the whole institution of the law, and finds both Beauty and a theory of it. Is it not fair to conclude, then, there can be no part of our institution of law which may not yield fresh light, if one knocks at it asking, there also, after Beauty?

II. ON THE GOOD, IN LAW

The threshold question as one knocks at the door of the Good in the institution of law, or for that institution, is that of the ethical or moral neutrality of the inevitable and of the impossible. In law, the inevitable and the impossible are doubtless to be taken as ethically neutral,

30 See Llewellyn in My Philosophy of Law 181 (1941); Llewellyn, The Common Law Tradition c. 4.

|| This lecture is shorter than the preceding one not because I conceive the problem of the Good to be a simpler problem, but because the Good, in law, is at least a familiar problem, with a familiar vocabulary, whereas discussion of the Beautiful, in law, must, these days, build from the ground up.
as setting given conditions and given limits of action. Work in law is work within and under a given system of severely limited leeways; the Good, as the judge sees it and must do it, for example, is a Good whose most striking single element is the need to stay within the limits laid down for him as an official, and as that particular kind of official known as judge. The Good, again, for our legislators, is limited, this side of revolution, by their duty to our Constitution. The Good, even for the revolutionary, remains dream, not law-work, so long as it remains beyond his powers. "The Good in Law," says Teufelsdröckh, "roots in the good Earth of the Possible."

Yet the inevitable and the impossible are not ethically neutral for law or even in law. Teufelsdröckh continues: "The Possible for Law, however, must include much that is not at the Moment possible wholly, or at all. Law's Purposes and Law's Ideals stand, and should stand, as Kelsen sees, in constant Tension with Law's Acceptance—but also with Law's Accomplishment. The Art is to keep that Tension at its Maximum, this side of Snapping. The Cable of the System, moreover, can carry Tensions which would snap single Strands; Strands which remain long almost purely hortatory thus can have their Uses."

This comes to the proposition that the purposes of a particular legal measure can often wisely far outrun either the measure or its execution, but that in each case both execution and measure need rigorous attention, and that high judgment is called for before any gap gives warrant for being left too large.33

There is, however, another reason for being loath to allow the inevitable or the impossible to count as ethically neutral. That reason goes back to our test for Truth.32 "Inevitable" and "impossible" are terms whose use in dealing with practical life, as contrasted with their use in dialectic, requires application in a world only partially explored. Our only test of what in fact falls under either category is either experience, which is inadequate, or intuition, which is unchecked upon. Take the problem of the reshaping of human nature. In the sixteenth century Ignatius Loyola devised means

31 Those portions of the Bill of Rights which gather around the concept of toleration and the ideal of active tolerance offer well-nigh a perfect illustration. The ideal remains almost wholly unachieved; even the measure, "toleration," is hardly approached in practice. Yet enough is accomplished to keep the ideal in effective tension with both the society and its legal system. Not only does the ideal remain live, a heritage of our more sober moments to influence our wilder ones, but the ideal lures us toward its own greater actualization in our lives, and in our spirit. This despite the patent fact that to make the ideal a truly working part even of our legal system is flatly impossible into the indefinite future.

for utterly remaking an adult personality, given that the individual was not unwilling to cooperate. In the early nineteenth century the Zulu Chaka devised and put into execution the remaking of a governmental, military, and social system, and of the people within it, without regard to any man's unwillingness to cooperate. This was so impossible that William Graham Sumner himself forgot to wrestle with its implications. In the twentieth century, that ancient monopoly known as Chinese literacy was cracked wide open, in a fashion which all informed men had known to be impossible, by a series of moves as skilful and as undreamed of as anything in the history of natural science. Within a decade and a half Hitler has invented and put into execution measures for the mass-remaking of the culture and the whole youth of a modern nation—a thing, again, well known to be impossible. Chaka and Hitler both centered up their work by way of what men know as the institution of law. Loyola and Hu Shih used other means. Now what such remodeling of human nature can cost, is not my problem here. I am dealing only with that shift of the impossible into the possible which keeps the "impossible" of today within the field of ethical significance.

The lesson I draw is that objectives may be attainable tomorrow which seem impossible today, and, by the same token, that the inevitable of today may not be inexorably inevitable tomorrow. It would, for instance, when I began law study, have been regarded as inevitable that the best brains among outgoing graduates should all be drawn into the service of private clients, while government made out, save for occasion, with staffs overladen with political hacks. That inevitability has, seemingly, vanished—and without giving notice.

Hence the problem of the Good for the law has no limits which I can see. And yet it is the more vital to keep that problem separate from the problem of the Good in law, for this latter must be wrestled with in direct lawyer's terms: i.e., in terms which include always the problem of the feasible working measure whose tension with the existing remains this side of snapping, or of reaction.

By the same token, the initial and more pressing inquiry about the Good falls within the field of the foreseeably feasible.

In another place, I have attempted to group the major jobs of law in

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23 The team-combination of a scholar like Hu Shih, a popularizing orator like Jimmy Yen, and the selfless labor of a whole generation of the intellectuals of New China, to spread the Thousand Characters through isolated country villages, is a saga as epic as it is unbelievable.

34 Llewellyn, The Normative, the Legal, and the Law-Jobs, 49 Yale L. J. 1355 (1940); see also Llewellyn and Hoebel, The Cheyenne Way cc. 10, 11, 12 (1941), reviewed by Redfield, 9 Univ. Chi. L. Rev. 366 (1942).
any group or in any society around five, or perhaps better six, significant themes. There is first of all the cleaning up of those grievances and disputes which societies secrete as surely as babies produce a diaper-problem. Intimately related, but distinct, is the problem of channeling conduct in situations fraught with potential tension and conflict, so that, negatively, grievances and disputes are avoided, and, positively, men's work is geared into team-play. In any mobile society, the needed rechanneling along new lines is hardly less important. The fourth great job centers around allocation of that say which in case of doubt or trouble is to go, and around the procedures for making the say a binding and official say. The fifth, altogether too little studied as a job of law, has to do with producing a net organization and direction of the work of the whole group or society, and in a fashion which unleashes incentive. And, as the last, I suggested the job of juristic method, that of building and using techniques and skills for keeping the men and machinery of all the law-jobs on their jobs and up to the jobs.

Now each of these things I take to be a good, if the existence of groups or societies is a good. And in each of them, I sought to distinguish, first, a bare-bones aspect which was the minimum condition of the group's continuance as a group. What concerns me here is that these basic bare-bones needs must be met, before we can get on at all into any other aspect of the Good, for law. To start with high goals is to risk forgetting this; it is no good thing to forget. The matter bites, these days, when the high goals seem threatened. The reason for careful thought is obvious: when basic needs which have been forgotten raise their heads suddenly, men who have forgotten those needs are likely in turn to lose their heads, and panic lightly sacrifices high goals to the moment. But if men steadily keep in mind the bare-bones needs, even amid security, then threat to security

35 Let me insist again that any approach either to the sociology of law or to the philosophy of law which goes to bat purely in terms of the restrictive or repressive phases must miss some of the most significant aspects. Again, the conception of institution is the key. Rule by rule, case by case, one sees one thing, and it is chiefly repression or restriction. But complex, geared wholes of such rules, concepts, practices, lead and drive in directions, to positive accomplishment. They build teams of indirect or direct cooperation. Take “Contract,” or Taxation plus Budget. A fortiori does this hold of the whole going legal system. I think it touching that realistic workers, who see these greater structures, should have been mistaken by critics for decisionistic atomizers, merely because they cannot regard a rule as effectively prevailing in our courts unless it effectively reflects and guides decisions.

36 Consider the problem of taxation, that of mobile status, and that of pressure to team up in corporation, union, or political group, in their bearings on this matter of unleashing incentive. Or consider the utility, now that a reserve of trained drafted men is available, of a regime taking all officer-candidates from the ranks of those who have gone in at the bottom.
brings with it no cause for panic, because it brings up no forgotten problem; it calls then only for shrewder planning and for resolution and for the due measure of temporary decrease in individualistic elbow-room.

In addition, as to each of these lines of the job of law in a society, I sought to distinguish two aspects, beyond the bare-bones problems, of questing for the Good. The one I may call here the technician's quest: it looks to effectiveness of legal machinery—including in machinery the rules of law; it looks to efficiency, and to reduction of cost, waste, and undesired by-product; it looks, at its peak, to smoothness up to the point of grace, to order up to the point of beauty. And I did not say before, and should like to say here, that the eternal ideal of this technician's quest, rightly understood, heads up in a simplicity which transcends complexity, and which can make once more accessible to the people at large a contact with, an understanding of, a warmth for that institution of law which is theirs, and of which they are a part. This is a good in law which is afar off, still. It is one, too, that has been sought through centuries by many, and sought thus far in vain. It has been sought, I think we are beginning to see now, by the wrong road. One of the most amazing results, indeed, which seems to be emerging from two decades of realistic work over our law, is the glimmering of a road toward the kind of essential technical simplicity which may yet bring law home to law's people. I shall recur to this. For it will not do to let right technique in law appear to be a minor or collateral good.

The other phase of questing for the Good, in the doing of the eternal law-jobs, has to do with what I suppose most people think of first. I have not put it first, because it is too important that these other phases be not overlooked. But it is time now to come to the use of the institution of law to work toward what one conceives as the Good for a Society, and as the Good for its constituent people.

Now in this aspect, and with regard to law, there is an inveterate tendency to identify the Good with Justice. Justice, to many, suggests only so much of the Good as it is wise and right to seek by way of law. And indeed, with direct bearing on law, Justice may well be conceived as bounded by what can be achieved by way of law; which is one main reason why, for law, Justice must always be sought under the dire influence of the principle of scarcity: rarely, rarely indeed, is there enough of good and warranted Justice to go round.

Yet it is unwise, even in dealing with law and legal possibilities, to limit...
words too sharply or to constrict the view wholly within the range of lawyers' thinking or of lawyers' work.38 There is another use of the word Justice which obscures the whole picture unless it be dealt with first, and it is a use with its own legitimacy.

The first meaning of Justice which makes sense to me is what I shall call net Justice in the social scheme. It has to do with the organization of the whole society, of which the whole institution of law is for most purposes but an efflux and a voice—though the institution of law is of course also capable of being made one major tool for reorganizing society. This net Justice, as I conceive it, however, does not in first instance voice an appeal to law, not even to change in law. It voices in first instance a yearning that the less pleasant attributes of men-in-groups and indeed of men-as-individuals might disappear, and that something other and better might be substituted for them. It then expresses clearly that aspect of the Good, as the thinker sees it, which has to do with men's equal access to desired things—positions, powers, enjoyments, opportunities—things of which there are too few to meet all desires. Let me say further that as I read and try to think, I have been able to find no ultimate postulate for a thorough demand for such net Justice which does not involve at the same time a revolt against the native inequality of men, and that a through-driving demand for net Justice seems to me capable of philosophical harmony with no view of the world which fails to provide, outside the life we know, either for just causation or for just subsequent balancing of these inequalities with which men continue to be born. Let me say also and promptly, however, that this philosophical difficulty in no way impairs my own drive toward, and faith in the virtue of, a wider net Justice. For one of the things which goes with my own notion of the Good, as with my notion of the True, is that when you get done with all the use of Reason you can manage, you will find yourself still taking the heart of it all on a faith of whose validity you can persuade only another man who shares it.

38 Most illuminating, on this, is Pound's introduction to Gurvitch, Sociology of Law (1942), in which it becomes clear that most of Pound's writing on "Jurisprudence," and some of his less fortunate criticism of others, have rested on his intention of dealing with Jurisprudence from a lawyer's angle, solely. Which, as he points out, has great value, but also has limited value. The sociologist of the legal is concerned with much that comes to interest the lawyer only indirectly, though hard-eyed sociological study of lawyers' and judges' work is at the moment a main key to desperately needed juristic reform. But the doing of such study is, despite that, not a lawyer's job, nor is it done from a lawyer's angle. It is utilization of the results of such study which presents a lawyer's job proper, to be done from a lawyer's peculiar angle. In much the same way, here, I wish to deal with Justice from the angle of a social philosopher, to clear the ground for a more effective treatment of the idea within the area of the "lawyer's" approach.
It seems, for instance, to my limited reason that, if Aristotle is right that it calls for a just man to know Justice, then forthwith all effort to make a so-called rational “science” about Justice be also an objective science becomes futile, since every man of conscience must hold his own perceptions of Justice to be the basic ones.

What makes the concept of net Justice quite at home, however, in my own concept of Justice, is the presence of four attributes. First, it is an aspect of the Good. Second, it has to do with conflict between people and with removing or avoiding or regulating that conflict. Third, it is heavily affected by the idea of fairness, and again by that phase of fairness which we speak of as even-handedness. Fourth, it operates under the sad fact of scarcity: in result, there will not be enough of it to go round, and “solution” will be driven into preferring some to others, or into compromise. This is to me an essential attribute of Justice as man knows it: that there is not enough of it to go round, save when singular skill is joined to singular good fortune.

It is thus clear that I get little help out of Aristotle’s famous discussion of Justice. It helps me little either in philosophy or in practical work. Indeed, I have no hope of meeting any formula regarding the substance of Justice which accomplishes much more than the focusing of issues and then some suggestion about desirable direction, of the nature of “somewhere between East and Northeast.” In regard to net Justice, for instance, it is clear to me that such an ideal as “to each according to his need” requires modification by the ideal of opportunity, training, and power, to some, according not to their needs, but to ours: our need for eliciting sound leadership. Under the fact of scarcity, this throws out even-handedness, in part. I think it not only must, but ought to. And to me the flattening of the idea into “equality of opportunity” seems to be a cover-up that, even when not consciously indulged, verges on intellectual cowardice. Per contra, “fairness,” to me, includes a right portion of favor, of unearned aid or indulgence to those who need it, provided the favor be

39 How it comes about that conflicting claims can yet from any angle of human feeling and direct social justification both or all be just, is developed in the material cited in note 4 supra. The issue is sufficiently pointed in any new marriage, in which an extension by Mr. Hubb into the “legal” order of the new marriage-whole, of the family ways of the house of his birth, plus the men’s ways of his bachelorhood, with “due” adjustment, is commonly just; but so is the extension by Mrs. Hubb into the same new “legal” order, of divergent norms and solutions derived from the family ways of the house of her birth, and from the of-coursenesses among women. It simply obscures the picture to see “Justice” only in the “correct” solution. The eternal problem is the finding of the best solution, when each of the conflicting claims is sociologically, even ethically, justified. If one of them is not justified, or neither is, the problem is vastly simpler.
so handled as not to turn its beneficiaries into laggards, spongers, sluggards. And on this point, I think talk of even-handedness to be mere cover-up of the character just described. I have, in this paragraph, no particular persons in mind. I am attacking points of view in which I was raised, and which, on testing, I find to be unsolid.

Perhaps I can get the matter into focus thus: to pick the state or the nation as the dominant repository of the Good to be sought is to ignore the fact that either consists of human beings. Whereas to pick "The Individual" as the dominant repository is to ignore two other facts: first, that individuals differ vastly, and that there is no "The Individual," save in a way of thinking too hopelessly over-simplified for practical meaning; second, that individuals exist only in the context of a society which is itself a context of groups and needs. The problem of social Justice—net Justice—begins, as I see it, with getting something to be just with; and that is a group-job. It takes precedence. That group-job calls for organization, discipline, leadership, and leaders. The ensuing problem of net Justice looks then peculiarly to the development of the disadvantaged. It looks to that development from two angles: the first angle is that of fairness and of the dignity of human beings; the second angle is that of wisdom, because refreshment out of the undeveloped is the way of hope for all. In this there is nothing concrete, and you could fit the formula, if you want to call it that, about as well to Hitler's state as to ours, or to an ideal democracy. With due hesitation, as I ponder on deep thinkers who have found otherwise, I conclude, thus far, that that is about as far as the available ultimate goals give guidance to concrete applications. I do not find them dictating even such major ways and means as form of government. The democratic way, or so much of it as we either have or want, rests to my mind on preference and on faith. I am content to let it rest on faith. Faith is a good foundation.

What I do find with what I take to be my reason is that even net or "social" Justice does not begin to exhaust the problem of the Good in law. No phase of life which is directed primarily to handling the scarce can exhaust the problem of the Good. And if I am right, that one of the major law-jobs has to do with the net positive driving and directing aspect of the whole institution of law, then over and above any "distributive" net Justice there remains for law that phase of the Good which goes to enrich-

49 On this, nothing officially in "legal" philosophy can remotely compare with Henry Adams, Mont Saint Michel and Chartres c. 13 (1904). Bryce's famous chapter on Tammany is the nearest. And which of the "legal" philosophers has made its implications into one of his foundation-piers?
ment of life, for more of us, or for all of us. Wherein such enrichment consists, I see with clarity only in minor part. For no man does it mean going flabby. That is clear. Clear, too, is that for men of law, this Good includes right pride of craft and joy in craftsmanship.

This last leads into those other and more pedestrian phases of Justice which, though pedestrian, are quite enough to occupy most of the time and strength of legal craftsmen. They are: legislative Justice and Justice in particular cases, Justice, as the phrase goes, "under the law." I am of course not using the word "Justice" here in the bastard and confusing sense of the processes of adjudication or of litigation or of law-administration—say, to sum up that misuse of the word: justiciation.42 I speak instead of a kind of result, a kind of goal to be achieved. I speak of what is with decency, and without confusion, called "Justice": an ideal.

And in regard to legislative search for Justice I wish I might be brief, instead of exhausting most of my remaining time upon it. I much prefer discussing a field more familiar to me: that of search for Justice "under the law."42

Legislative Justice is Justice sought by way of particular and deliberate change of law. I see it in four aspects, three of which, and often the fourth, present—along with the intimately related device of executive discretion—the only machinery whereby practically all-of-us support specialized delegates in efforts to revamp this or that portion of the institution of law in ways supposed to make it work more effectively toward net Justice.

The first aspect of legislative Justice seems to me to move under the ideal of restoration of a Balance, assumed to have been, but assumed somehow to have gotten lost. The men of law say that legislation is prospective; and, with regard to legal effect, this is commonly true. But in the aspect I am mentioning, legislation is prospective, looking backward. If ever there was illustration of Holmes' aphorism, it is here: "Continuity with the past is not a duty; it is merely a necessity."

Now I have no objection to efforts at recapture of lost balance, per se; for I think balance one of the most important ideals of law. Yet looking

42 Pound has sinned for decades, and impenitently, on this point, and he ought to stop sinning. Nothing but confusion to reader and to writer can come of Jurisprudence or Philosophy written with a single word to describe justiciation, a human process for handling trouble by limited institutional means with human officers, and Justice, which is a goal eternal, as intangible as the other is tangible, as free in its nature of human or traditional foibles as justiciation is bound to them.

42 Dealt with in Llewellyn, On Reading and Using the Newer Jurisprudence, 40 Col. L. Rev. 581 (1940), and in Llewellyn, The Common Law Tradition.
merely backward can cripple legislative imagination, and has, and does. To Holmes' aphorism let me add the gloss of Teufelsdröckh: "By Contrast, Vision is a Duty; though also a Necessity, it is that Necessity which Law too often sacrifices to its Twin: to Continuity with the Past."

Yet there are found pieces of legislation which drive not backward by repression, as was the objective of the original Sherman Act, nor into a desired recapture of balance by new devices, as with current schemes to help out agriculture, nor back into balance by setting up a governmental counterweight to concentrated economic power, as with the utilities commissions and the SEC. There are pieces of legislation also which drive plainly forward. In our earlier history, one thinks of internal improvements and of the school systems; later, of emancipation, and of the general incorporation acts; today, one thinks of highways, of social security, and of defense, and of the still halting program for gearing youth into the ways of work and opportunity. It seems to me vital, in any consideration of the Good in law, to keep distinct the urge back into Balance—which is likely enough to be good—from the urge forward into Better—in which lies the hope for a rounded people.

The third line of legislative Justice, which interests me as a man of law peculiarly, and on which each other line depends for its results, is that of improving the machinery for making rights real. If this be not a good, in Law, I know not what a good may be: to make provision and purpose of statute or of case-law come to life, become effective actuality—to take rules of law and goals of law and ideals of law out of the realm of *mere* doctrine, *mere* paper, *mere* words, *mere* dreams, and body them forth among law's people in vibrant realization. It is at this point, in talking of the Good in law, that I am proud to look back over the work of those many scattered and disunited stump-pulling and cabin-raising pioneers of modern law maligned as "realists." For it is hard-eyed realistic technical work that serves to make rights real.

Such technical work has been, and still is, badly needed. Slowly, and without noticing, we have drifted in three aspects curiously far from what is healthy for any institution of law, and farther from what is healthy for our own. The first aspect is the slow but horribly effective growth of a barrier of ignorance between men and their rights—between men and their law. The second is the slow and almost equally effective growth of a barrier of delay, uncertainty, and expense, that tends to make reality of rights at law a privilege. The last lies in the development, amid most attempts to cure the first two, of an attitude of having it done for you which as little becomes a healthy citizenry as does a hired army.
I have spoken of the complexity of our rules of law and of our procedures of law. I have not spoken of such causes of that complexity as are remediable. I have of course no illusion that the relations of a technologically uncompassable age can be all reduced to words of regulation which open their meaning to a high school junior. Nor have I any illusion that the peculiar legal system we have inherited, of forty-eight largely independent bodies of technically divergent rules of law within a single nation which constitutes a single economy, each of the forty-eight paired differently with the complicating federal forty-ninth—I have no illusion that that inherited legal system is going to boil down readily or soon into a something intelligible to a citizen—or, indeed, to a man of law. But I do not think it needs to. The major fault lies today in our tradition-ridden errors of technique in stating rules of law and in work with them. We work still, we legal technicians, an unpredictable half of the time, and we talk still an unpredictable three-quarters of the time, as if fixed rules of law were all of law, as if all rules were of a single kidney, as if, finally, the reason, explicitly and accountably stated for guidance and for explanation, were not the heart of all sound work in things of law. Now in law, as in all other disciplines, there are to be discovered major lines of guidance which can be stated, which focus the problems of policy for seeing, and which indicate the lines along which their solution is to run. Such “general propositions” of guidance do not indeed “decide concrete cases” by any deductive process, because their edges are unclear, because, also, two or more of them can commonly overlap a situation in conflicting ways. What such lines, when well stated, do, instead, is to make the nature of the controversy clear, and to point up the place and nature of the doubt or trouble, and to suggest lines of wise direction of solution, for consideration. Rules wisely built, clearly phrased, with goal and reason clear, such rules do these things for an advocate; they do these things for a counselor; they do these things for a judge; and they do them in much the same way for all three. No other type of rule does talk the same way to all three. What is in some ways even more important, rules of this right and largely unused type, do these things also for the interested layman, for the law-consumer, for the law-supporter, for the man whose law our law is. Once that man can see clearly “what is up,” and “where the trouble lies,” and why, he can take decision against him, and realize that he has had a fair deal, though he has lost. He can take decision for him without thinking that his lawyer was just good enough to put one over. He can respect and honor the law which his ingrained—I am almost ready to say “innate”—but baffled yearning is to respect and honor now.
But we technicians have become so habituated to the trees of mere authority and rule that we have forgotten how a well-run woodland, intended for a public, needs sign-posts, roads, and maps. Ours is the fault, and on us the burden of the cure. Law is complex and vast, but there are not many fields of law of which any particular citizen needs to know the guiding lines. However, where he knows his stuff, he does need and he feels need to see that the main lines of his law make sense, raise sensible problems, come to decision in terms that talk and make sense in life. This can be done for him. I have been utterly amazed, this past year, after wrestling through the squishy mud of sales law for two decades, at discovering how much sense, for a non-sales lawyer or for a businessman, could come out of rather minor reformulations, once one or another underlying idea got itself out into the clear to be looked at. I find the same thing, wherever I have worked, or have watched the relevant work of others. Technicalities we cannot get rid of. What we can do, is to make the technicalities take shape and meaning around communicable lines of sense.

Today, this is best bodied forth in legislation, when well drawn, with lines of policy that any interested man can understand, made clear, with technical detail left then to be handled flexibly by administrative regulation. I sing no paean. Much of the ensuing administrative regulation makes my hackles rise at its sheer unintelligibility in the worst manner of legal garbage. But we are on our way, and have been, for some time.

The new Sales Act can serve to point the argument. I suggest it not merely because I happen to be more familiar with it, but peculiarly because I want to avoid any misconstruction to the effect that in the foregoing I am becoming mushy, mystical, or vague, or that I am overlooking a lawyer’s job of phrasing clearly, to give clean guidance to a fellow-craftsman. Quite the contrary. I stand on the proposition that the new Sales Act has as its job not only to make its sense and purposes far clearer to the non-specialist and to the interested layman than does the older phrasing of the rules, but that it must also give to counsel and to court a sharper and a more predictable guidance. I am not arguing that Pollock was wholly right when he opined that almost any rule of law could be translated into English which an ordinary man could understand. I am arguing that he was to my knowledge partly right, and that so far as he was right—and that needs testing, case by case—so far as he was right, it is a sad thing for

43 Consider the Beckwith Committee’s work in getting the draft regulations reformulated into relative accessibility of meaning.
the law of any people to leave the translation unattempted. It is a dire thing for the law of a democracy.

It will be observed that I have been concerned in this matter only indirectly with Justice. Justice plays in, and importantly; for it is well for a man to have some direct inkling of his rights, and knowledge goes far in many cases to shape expectation. It is, perhaps, even better that he should have some understanding of why what he manages to get can decently be considered an approximation of Justice. But above all it is a good, above and beyond Justice, for the citizen to meet his law and call it friend—or to see why he wants it different, if he does.

The present inaccessibility of knowledge of the rules, and worse, of even the main lines that organize the rules, plays twice into the other barrier, that of uncertainty and expense. Inaccessibility of knowledge increases both the labor cost and the uncertainty of advice. It does the same, one may add, for decision. By consequence, for the law-consumer, it puts a premium on peculiarly skilled or experienced advice or advocacy in the particular field. To pick the certainly right lawyer is to pay for that rare kind of lawyer. To pick the wrong one is to lose. To just pick, is to gamble on a roulette-number—but with the possibility of winning reduced to one to one. It is a queer drift that has come upon us here. Let me say only this, with Teufelsdröckh: "If Access to Rights must be over a Bridge of Lawyers, and if Lawyers must also live, then there is Thinking to be done about how to keep little Rights, or the Rights of little Men, from being squeezed out of all Chance of Realization by the Charges at the Tollgate." The small claims court is a noble institution—a beginning, reaching toward a good which, this time, is one phase of Justice. Let me say also that the type of legislative Justice which one most hopes for here is merely that type of enabling legislation which would empower a bar, as an organized unit, to take up the problem of truly bringing home—of making known and making accessible to every man—that "Equal Justice under the Law, Within," which from the beginning of government has been the proclaimed counterpart of "Defense, Without." Indeed the drift has been queer which, as to Defense, Without, can give us a Defense Administration, taxes, bond issues, and conscription, as a substitute for Minute Men; but which, as to Equal Justice under the Law, Within, can leave the thing to bank account, or charity, or accident. I have profound admiration for the work of Legal Aid societies. And still, I seem to see here a problem of the Good.

The third point of technical need I want to mention touches again upon that good which is law's contact with law's people. Savigny may not have
phrased a bull’s-eye with his idea of the necessary conditioning of all law by the people’s right-way-of-life, but right law which touches people must live in them. If law does not so live, it goes first technical; it goes then formal and remote. Remote law is not law to love, but law to dodge, or to use. Remote law is law quite all right to evade, or to defraud; it is law which puts pressure on men to reach or fix officials; it is law which is a burden or a bludgeon; it is law which is the cynical tool of pressure-groups—one can almost say: it should be. Remote law is not your law and not my law, it is their law, that they put over on us, and it is up to us to put a counter over if we can. Remote law gets the treatment it deserves. I have but little quarrel with what it gets. My quarrel is instead with law’s getting, with law’s remaining, thus remote. My quarrel is therefore with technicians’ ways which let it get remote.

Once, lawsuits were fought out over the winter about three feet of ground or some petty fifteen-dollar sum. They may have engendered as much bitterness among neighbors as they allayed, but they made law a living institution in the people. Once, despite its due measure of technicality, the scheme of the legal system was close enough to every day experience to let every man have some first understanding of what it was all about. One learned to follow lawyers’ work, when court sat, as the modern American has learned to follow the tactics of baseball. American judicial opinions, moreover, had as a major original function to account, not to a bar only, but to a people. Once, too, almost every lawyer lived a rounded life in a rounded community with a rounded practice, and he was known as wise, not as a black magician; was known as learned, not as merely shrewd; was known as a leader and a friend, first, as a technician, only second.

These things are largely lost, by drift and circumstance. By vision and rethinking, one fair part of them can be recaptured. But it does not recapture them merely to set up an administrative agency to do the veteran’s or the laborer’s legal work for him, or what have you more. When I watch the care, the skill, the patience, with which the Tennessee Valley Authority is knitting the active cooperation of the beneficiary into every least job undertaken for his benefit, I see a lesson in democratic government which carries over into all the work of law. A man’s rights must be accessible, but to be right rights, they must call also for some share on his part in initiating or in working out their procurement, their fulfillment. Else law remains remote, the government becomes an enemy or a dairy-cow, and the morale of official, citizen, and group alike bogs in morass, and pressure-groups become a by-word.
Do not mistake me. I have no quarrel with pressure-groups as such. They can voice need for all-of-us, as well as wish and selfish interest of their own. But the balance to pressure-groups is not and never will be merely other pressure-groups. The further needed balance lies in a citizenry alive, aware, and not habituated to "let George do it all."

Again, do not mistake me. For I have little use for empty cries for change of heart. My argument is that manageable changes in the legal techniques of the legal craftsmen, in phrasing their rules of law and in working with them, in managing their mediation of rights to the law-consumer, in rightly setting up the organs of justiciation or of administration—my argument is that such manageable changes in legal techniques can bring law home again to law's people. As means, or as end, I know no greater single good for law.

For when it comes to ultimate substance of the Good, I repeat that I can find no clarity, or any conviction of reason, or of deduction as to specific matters, from the broad ultimates others have found clear. I put my faith rather, as to substance, in a means: in that on-going process of effort to come closer to the Good, that on-going process of check-up and correction, and further check-up and correction, which is the method and the very life of case-law. "Reason acting on experience"—better: "Reason at work upon experience, to find and state explicit guidance for the future; Reason, responsibly and explicitly accounting for why a rule or principle seems reasonable; Reason, reexamining in the light of reasonableness, on further experience, any and every prior ruling or prior reason given, and then reshaping, reformulating, redirecting, each time need may appear in further reason." That is the common law at its high best. Perhaps because I know nothing better, perhaps because Judicial Justice has been so much discussed, let me leave it at that. But do not let me leave it at that without insisting that when law ceases to be remote, when law comes home, then a process works out among the citizenry of a democracy which is the exact analogue of the common law judicial sequence of self-correction, of judicial review of prior judicial decision—which is, indeed, its twin and needed brother.

If now, you ask me what guarantee I can offer that this my own faith about the Good in this institution of our law is better than another's—what does Reason show me to warrant this particular faith of mine against mistake—I have no answer. Under the common-law tradition, be a man judge, citizen, or scholar, They That Come After have as their office to correct him. When the machinery of work is healthy, and formalism does
not hide on-going reason, They That Come After do their office of correction.

Meantime, a clear faith is a fighting faith. And as for guaranty, I can but rest on an ancient and magnificent summing up: *credo ut intelligam*. Which I prefer to render: *as a result* of my faith, I grasp it with my mind.

For such faith in the essential method of the common-law tradition as that tradition has stood in this country in its best years, and as it has come to stand again—that faith opens a new grasp of our political philosophy. When individual citizens or officers in office, from whatever sequence of divergent absolutes, come to cope as responsible citizens or officers with working out concrete "applications" of their absolutes to the problems of their fellows and themselves, answers are not to be had by deduction, nor out of authority. As in the common law, the new light of the fresh case recolors each problem of "application." One does his best. But the knowledge that review impends from his successors, in the new light of a new fresh problem, must come to any officer or citizen who thinks—new light, too, from a swing of administration, built on other ultimates, or on other immediate views of wisdom. The pragmatic way is no way to reach an ultimate or absolute, but it is the only sound way to *apply* an ultimate, however reached. The finest common-law tradition sums up the manner in which the parties, the generations, the clashing groups of a democracy must work their way to wisdom.