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The Matrix of Positive Law

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IT IS THE INTENTION of this paper to sketch, in broad but systematic outline, a general theory of positive law. This will entail, as its first and major step, the placement of law within the total environment from which it emerges, as an element of which it operates, and from which it derives its nature and functions. All of the contents that law deals with, and all of the ends that it serves, have both their original and their eventual loci in extralegal sources: they issue from and refer to things, forces, situations, needs, and purposes that are independent of and prior to law itself. As an explicit and organized mode of administering man's affairs, law is a late emergent that serves generally to extend and refine the reach of already existent ideas and institutions.

This insight has been too long and too widely recognized to be now announced as a discovery. It has served as the common point of departure for radically divergent lines of thought: the schools of historical, sociological, and psychological jurisprudence, the adherents of natural law doctrine, the legal pragmatists and realists, those who regard law as an instrument of political power and those who view it as an agent of policy-formulation—all of these, and indeed all but the most severely pure formalists, agree in looking beyond the law for the meaning and drift of legal concepts. It is now a virtual truism that law inherits its facts, its goals, and its problems from a larger context.

However, the controlling factor in such investigations is that of the "context" that is taken into consideration. And here I would suggest that recent thought, especially in this country, has not carried this extralegal search far enough. These various inquiries have contributed greatly to our knowledge both of the multiple facets of law and of the intricate interplay of law with life. But they have also been too specialized, too narrowly confined, and too isolated from one another: so their collective outcome is rather a series of fragments than a finished picture. This complaint is very frequent in the recent literature. And there is always joined to it the plea that what is now required is an examination that will reach deeper in its scrutiny of the origins of law, will look farther for its final ends, and will be more systematic in its analysis of the necessary structure of the legal order. In short, it is being said

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on all sides that attention has for too long been concentrated on the relations of law with the various sciences that are relevant to it, and that what is now needed is a serious and sustained cultivation of the philosophy of law.[1]

This essay is intended as a step in that direction. I am assuming that the ultimate "context" of positive law is quite simply and inclusively the human enterprise as a whole; and I am assuming that this enterprise is conducted within the framework and under the conditions defined by that even more inclusive whole, reality or the universe. This is the context by reference to which I mean to envisage law, and from which I shall derive it. I shall, then, seek to exhibit positive law as a specific development within a far larger process. If it were possible to cut through the pejorative senses of contemporary usage, and recover the classical meaning of the concept, this essay could be described as an exercise in natural law: that is, as a search for the principles, grounded in the objective order, that define the conditions of man's being and well-being, and so determine the origins, the functions, and the ends of law. In this undertaking, it is no part of my intention to rely upon intuition or pure reason, to reach toward any absolute or eternal dogmas, or to depict a supramundane "code" of law. I do not think that these were the intentions or the techniques of any of the great adherents of natural law; and in any event, they certainly are not mine.

It is evidently impossible, within the confines of an article, to develop such a theory as this in detail, or to plot the passage from the general principles of law, with which I am here concerned, to the concrete body of legal rules and concepts. So the present undertaking is directed not to the full apparatus of the law, but strictly to its matrix. My efforts will be centered on a philosophical analysis of the circumstances from which law issues, of the facts and forces with which it deals, and of the values that it is meant to further. I think that if these matters can be given a concise and systematic statement,

1. A thorough documentation of the expression of these sentiments would require an article to itself. Perhaps the most often quoted statement of the view is Holmes's dictum that "we have too little theory in the law, rather than too much." *The Path of the Law,* 10 HARVARD LAW REVIEW 457 (1879). Huntington Cairns argued the point fully in THE THEORY OF LEGAL SCIENCE (1941). Jerome Frank, in the preface to the 6th printing (1949) of his classic LAW AND THE MODERN MIND, urged the same view. The following articles, besides their intrinsic merits, contain voluminous references to the literature: Jerome Hall, *The Present Position of Jurisprudence in the United States,* 44 VIRGINIA LAW REVIEW 321 (1958), and *Reason and Reality in Jurisprudence,* 7 BUFFALO LAW REVIEW 351 (1959); Lon L. Fuller, *American Legal Philosophy at Mid-Century,* 6 JOURNAL OF LEGAL EDUCATION 457 (1954); Edgar Bodenheimer, *A Decade of Jurisprudence in the United States of America: 1946-1956,* 3 NATURAL LAW FORUM 44 (1958); F.S.C. Northrop, *Philosophical Issues in Contemporary Law,* 2 NATURAL LAW FORUM 41 (1957); Myres S. McDougal, *Law as a Process of Decision,* 1 NATURAL LAW FORUM 53 (1956). I have argued this same point quite fully in an earlier article, *The Matchmaker: or Toward a Synthesis of Legal Idealism and Positivism,* 12 JOURNAL OF LEGAL EDUCATION 1 (1959), esp. at 7-17 and 28-32.

then legal action will be guided by a sharpened awareness of its total obligations and consequences. Finally—and this is the only tenet to which I would stubbornly cling—I think that progress can be made in this direction only if explicit and precise hypotheses are enunciated, so that by their criticism and correction the truth can gradually be approximated.

I

The questions that arise at the inception of such an inquiry are fundamental and general. What is positive law? What is its essential nature; its structure; its content? Even more importantly, and less obviously: *Why* is positive law? What conditions call it into being, and what purposes lead it on? What problems must it solve, and what difficulties does it encounter? To deal adequately with these questions, we must look beyond the confines of mature legal systems, back to the historical circumstances from which law emerged; and even back of these to the metaphysical and moral conditions in which law is ultimately grounded.

The interpretation of law that is here to be proposed in answer to these questions rests upon two metaphysical assumptions, one jural or legal postulate, and one fact. I shall first give very brief separate statements of these elements of my theory, and then bring them together and draw out more fully their collective meaning and implications for law.

The two metaphysical assumptions — or general philosophical principles — on which I rely are *the postulate of the uniformity of nature* and *the theory of evolution*. The first of these asserts that there is a single embracing reality, which is complex and variegated but still coherent throughout its parts or domains; that there are basic forces and conditions that pervade existence; that there is a single pattern of connectedness that runs through the universe, binding all things into a single systematic scheme of things; that there are general principles and structures that hold good everywhere in nature, while manifesting themselves in different specific guises in different regions of nature. This postulate advises us to be prepared for continuities in nature, rather than radical disjunctions; to look for the gradual transformation of structures and processes, of ideas and institutions, rather than their sudden initiation; to expect that all modes of existence are contained within one set of broad and flexible categories, rather than a congeries of narrow and rigid concepts. Above all, this postulate teaches us that man and society are parts of the panorama of nature: and this means that human institutions — including law — inherit their major problems and purposes from the general condition of man.

The second of my assumptions, the theory of evolution, asserts that man, along with all living creatures, is the outcome of organic evolution; that the common problem with which nature confronts life is that of adaptation; that man has been fashioned by the continuing necessity to adapt himself to the demands of the environment and the conditions of life. The whole of the human enterprise, therefore, in its psychic and social as well as its organic aspects, and including man's higher and distinctively human activities as well as those that he shares with other creatures, is most adequately conceived as a massive process of adaptation.[2] This means that the human psyche and human culture have become what they now are, and have developed their present structures and functions in response to the conditions of life. Mind and society play very significant roles in the answer that man gives to the challenge of life. The operations of mind, and the social and cultural institutions in which these issue, are the principal instruments that man employs to come to grips with the world and to solve the problem of adaptation as this occurs at the human level. Prominent among these institutions is positive law. So it would seem that the most realistic manner in which to get at the roots and the matrix of law is by an examination of its source and development as an adaptive agent.

We are well accustomed to the idea that law is a means to an end, and that its operations are governed by its purposes. But we need to be reminded that law is a solution to a problem even long before it is a means to an end, and that its purposes are themselves a reflection of the conditions that it faces and the demands that these impose. Obviously in its first occurrence, and prominently throughout its career, positive law is retrospective rather than prospective: its concern goes more to repairing the inadequacies of the actual than to preparing the realization of the ideal. This is to say that the essential structure of the legal order is determined far more by pressing necessities than by beckoning goals. Law is practical before it is visionary. And its visions must always be tempered by reality if they are to be fruitful. The future is uncertain, so must be approached experimentally. We can never be sure of what ends are best, or what means are most effective, until we have put them to the test.

But we can be sure of the tasks that are committed to law. Law arises because certain features of the human situation require it. And these requirements can be discerned by an analysis of the human condition and the human potential, as these emerge in the course of becoming — or evolution. I think

2. I have argued this thesis at length, and developed its implications on a broader scale, in a recent book, ART AND THE HUMAN ENTERPRISE (Harvard University Press, 1958). See esp. ch. I-III and XII.

that by an inquiry into these matters we can define quite exactly and systematically the essential tasks of law. And this certainly is the indispensable basis for an intelligent consideration of the many — and often competing — values and purposes that are proposed as the goals of law.[3]

The jural postulate that I shall accept and analyze is this: *Law is a principle of order.* There are two reasons that recommend this idea as a point of departure: it is almost universally accepted as an unquestioned and uncriticized truism; and it has rarely, if ever, been systematically elucidated and developed. One encounters this notion everywhere in legal literature, and almost always it is stated as a self-evident fact that requires to be neither substantiated nor explained. This is a postulate in the true sense that a vast amount of legal thinking depends upon it and virtually no legal thought seeks to go behind it.[4] Since the argument of my theory rests very heavily on this notion that law is a principle of order, I should like to cite the literature rather widely, to the end of establishing its ubiquity in legal discussion. These citations will at the same time serve to exhibit at least the general core of meaning that the postulate carries.

Hans Kelsen introduces his now famous general theory of law in these words: "Law is an order of human behavior. An 'order' is a system of rules."[5] Ehrlich, looking for the essential element of law on which to base his sociological theory, rejects the traditional ideas that define law by reference to the state, or the courts, or the fact of compulsion, and then says: "A fourth element remains, and that will have to be the point of departure, i.e., the law is an ordering."[6] Justice Cardozo, reflecting on the nature of the discipline that he practiced with such consummate tact, speaks in a similar vein: "The study of law is thus seen to be the study of principles of order revealing themselves in uniformities of antecedents and consequences. . . . As in the processes of nature, we give the name of law to uniformity of suc-

3. I have here stated these postulates quite briefly and abstractly, for reasons of economy. Their relevance and implications for law will soon be developed in detail.

4. The most notable exception to this practice with which I am familiar is Huntington Cairns in his acutely perceptive book, THE THEORY OF LEGAL SCIENCE (University of North Carolina Press, 1941). But Mr. Cairns' treatment runs in quite a different direction from my own: he is concerned chiefly with the sociology of disorder, while my principal interest is in the metaphysics of order.

Reference should also be made to a most stimulating and suggestive article by K. N. Llewellyn (which came to my notice only after the present paper was written), *The Normative, the Legal, and the Law-Jobs: The Problem of Juristic Method,* 49 YALE LAW JOURNAL 1355 (1940). Professor Llewellyn's approach and treatment are again quite different from the present analysis, but certain of the conclusions are very similar. Cf. esp. pp. 1373-1395 of the article cited.

5. HANS KELSEN, GENERAL THEORY OF LAW AND STATE 1 trans. Wedberg (1945).

6. EUGEN EHRLICH, FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW 24 trans. Moll (1936).

cession."[7] Max Weber bases his quite different studies on the same insight: " 'Law,' as understood by us, is simply an 'order system' endowed with certain specific guarantees of the probability of its empirical validity."[8] Gustav Radbruch's neo-Kantian analysis is based on this same postulate:

> The validity of positive law, then, is based upon the certainty which it alone possesses; or, circumscribing the sober term "legal certainty" by weightier verbal formulae, upon the peace it creates between conflicting legal views, upon the order that terminates the struggle of all against all. . . . Justice is the second great task of the law, while the most immediate one is legal certainty, peace, and order.[9]

Jhering, very similarly, defines law as "the form of the security of the conditions of social life."[10] Vinogradoff adopts this same position, and expands it somewhat:

> Man is an essentially social being. . . . We can go a step further: if social intercourse is a requirement of man's nature, *order* of some kind is a necessary condition of social intercourse. . . . It is evident that laws take their place among the *rules of conduct* which ensure social order and intercourse.[11]

Cairns, in the work referred to above, is yet more explicit and detailed on this point:

> Order is omnipresent, so far as appears to us, in nature and human thought. . . . Order is a necessary condition of human social life, and it is impossible to imagine a society in which order of some sort does not exist. . . . Law is primarily a system of order, a system of purposefully controlled human conduct. . . . The rules of law which obtain in any society operate to establish a system of order in that society.[12]

Ross, expounding the views of the Scandinavian realists, gives this same postulate a central place:

> Such a demand ("That the norms of the law shall be formulated by means of objective criteria") results from the character of the law as a social, institutional order as opposed to the individual moral phenomena. Without a minimum of rationality (predictability, regularity), it

7. BENJAMIN N. CARDOZO, THE GROWTH OF THE LAW 37, 40 (1924).
8. MAX WEBER, ON LAW IN ECONOMY AND SOCIETY 13 trans. Shils and Rheinstein (1954).
9. GUSTAV RADBRUCH, LEGAL PHILOSOPHY 118 trans. Wilk (1950).
10. RUDOLF VON JHERING, LAW AS A MEANS TO AN END 330 trans. Husik (1913).
11. PAUL VINOGRADOFF, COMMON SENSE IN LAW 12-13 (1913). Italics in original.
12. HUNTINGTON CAIRNS, THE THEORY OF LEGAL SCIENCE 14, 15, 55, 135 (1941).

> would be impossible to speak of "a legal order," which presupposes that it is possible to interpret human actions as a coherent whole of meaning and motivation and (within certain limits) to predict them (Chapter I).[13]

Max Rheinstein, in analyzing the problem of just law, makes this postulate the basis of his treatment:

> Recognizing that there exist wide divergencies even within the Great Tradition, we can still say, however, that *the just law is that which reason shows us as being apt to facilitate, or at least not to impede, the achievement and preservation of a peaceful and harmonious order of society,* in whatever shape this peaceful and harmonious order is visualized in detail.[14]

In a very different context, Sir William Anson begins his classic analysis of contract in these words:

> The object of law is order, and the result of order is that men can look ahead with some sort of security as to the future. Although human action cannot be reduced to the uniformities of nature, men have yet endeavoured to reproduce, by law, something approaching to this uniformity.[15]

Sir John Salmond, echoing Blackstone across the centuries, opens his systematic treatment of law in this way:

> In its widest sense the term law includes any rule of action, that is to say, any standard or pattern to which actions (whether the acts of rational agents or the operations of nature) are or ought to be conformed.[16]

Hooker, speaking against the positivists and voluntarists of his day, begins his argument thus:

> They who are thus accustomed to speak apply the name of *Law* unto that only rule of working which superior authority imposeth; whereas we, somewhat more enlarging the sense thereof, term any kind of rule or canon, whereby actions are framed, a law.[17]

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13. ALF ROSS, ON LAW AND JUSTICE 281 (1959).
14. Max Rheinstein, *What Should Be the Relation of Morals to Law,* 1 JOURNAL OF PUBLIC LAW 287, at 298 (1953). Italics in original.
15. WILLIAM ANSON, PRINCIPLES OF THE ENGLISH LAW OF CONTRACT 1 (2nd American ed., 1907).
16. JOHN SALMOND, JURISPRUDENCE 20 (10th ed., 1947); BLACKSTONE, 1 COMMENTARIES 38.
17. RICHARD HOOKER, ECCLESIASTICAL POLITY, I, iii, 1.

St. Thomas Aquinas had stated this same view, with a slightly different emphasis:

> Law is a rule and measure of acts, whereby man is induced to act or is restrained from acting; for *lex* is derived from *ligare,* because it binds one to act. . . . Consequently, law must needs concern itself mainly with the order that is in beatitude. . . . Law is nothing else than an ordinance of reason for the common good, promulgated by him who has the care of the community.[18]

And long prior to any of these inquiries, Justinian had invoked this postulate in announcing the *Corpus Juris Civilis:* "Of all subjects none is more worthy of study than the authority of Laws, which happily disposes things divine and human, and puts an end to iniquity."[19]

I have purposely cited authorities of widely different interests and persuasions, with a view to providing a broad basis for my claim that the proposition, "law is a principle of order," does occur pervasively as a postulate of legal theory.[20] In addition to this elemental point, these quotations also reveal — though rather loosely and largely by indirection — the common core of meaning that legal thought attaches to the notion of "order." As I have said, this concept is nowhere explicitly and systematically explored, and it will be one of my chief concerns to make good this hiatus of inquiry. For jurisprudence, "order" has the status of a primitive term. As such, it is deemed to be beyond the reach of definition or analysis; but the ostensive meaning that it is assumed to contain and intended to convey is clear. The notion of order embodies our recognition of pattern and regularity in nature. It refers to the fact that we discern some thread of connectedness and uniformity that runs between discrete objects and occurrences. When we say that order holds or is exemplified, we mean that we are in the presence of some stable body of relationships, some systematic structure, such that we can count upon a temporal recurrence of antecedents and consequents and a settled spatial arrangement. In minimal terms, order means continuity

18. St. Thomas Aquinas, Summa Theologica I-II, 90, 1, 2, 3.
19. Constitution "Deo Auctore." Quoted from A. P. d'Entrèves, Natural Law 19 (1951).
20. It reaches, in fact, much farther than legal theory. In whatever context the concept of "law" is employed, it is defined by reference to the notion of "order." Thus, A. N. Whitehead, speaking primarily as a metaphysician and considering the nature of law in the broadest sense, sums up his conclusions in the form of this equivalence: "The notion of Law, that is to say, of some measure of regularity or of persistence or of recurrence . . ." Adventures of Ideas 139. And Karl Pearson, speaking as a philosopher of science and at the outcome of a detailed analysis of the various meanings of "law," comes to the same conclusion: "In the conception of order or sequence, therefore, we see the historical origin of law in all its senses . . ." The Grammar of Science 83 (Everyman ed.).

and predictability. And to assert that "law is a principle of order" on this level, is to define law as an organized body of statements that describes the structure of things and so enables us to anticipate the course of events. Jurisprudence transforms this view only slightly when it identifies positive law as a prescriptive body of rules or norms rather than a descriptive body of statements. This is a familiar interpretation, and is clearly present in many of the citations given above.[21]

But more than this is obviously intended by most, if not all, of the authorities quoted above. For they assert not only that order is an actual characteristic of the scheme of things, but also an eminently desirable and even indispensable one. And they recognize, in addition, that order is never more than relative: *disorder* is an equally real characteristic of the world, especially in the human context. "Disorder" means that the pattern and regularity of events blur and dissolve; that uniformity of recurrence is interrupted; that the accidental and unforeseeable intervene in the course of events. And from this it results that man can no longer plan and predict with confidence. When and to the extent that this occurs, these authors declare, it becomes necessary for men to take steps to secure and preserve the order that is threatened. Order now becomes an ideal goal as well as an actual fact — something to be accomplished as much as a *fait accompli*. And to assert on this level that "law is a principle of order" is to define law as an instrument through which men seek to ensure in human affairs a regularity and uniformity of conduct that will enable them to anticipate and rely upon a settled course of events, a stable pattern of relationships. In a word, law is here regarded as a principle that determines — in the double sense of defining and guaranteeing — a rule of order, a uniformity and regularity, that would not otherwise exist.[22] This is the content of the jural postulate that law — here meaning positive law — is a principle of order.

This latter discussion has unavoidably anticipated the identification of the fourth and final element on which my argument is to be based. This

21. It is of course best known as embodied in the writings of Holmes and Gray; and, with a radically different specific basis and meaning, in the work of Kelsen.

22. This theme of the dual status and role of law runs throughout the literature, and is found in most of the authors quoted above. Law carries the double sense, and has the double task, of being both a measure and a sanction. The very words "order" and "rule" convey both of these meanings, and emphasis continually shifts—often without notice—from one of them to the other. Law is both a norm of order and a force for securing it. Theoretical jurisprudence has usually centered its attention on the first of these aspects. The latter was at the focus of the work of Jhering. It has been stressed more recently by Cairns; and, in a more limited and practical fashion, by the legal realists. The thesis that law has as its principal function to "etablir un ordre durable" and to protect this against the disorderly dynamism of life and of other social forces, is argued with great brilliance and thorough documentation in the successive works of Georges Ripert, particularly in Les Forces Creatrices du Droit (Paris, 1955). See esp. ch. I and II.

consists in the fact — the empirical datum — that *positive law is a strictly human phenomenon.* It does not, at least in an institutional sense, occur outside the human context. There are other regions of nature — other realms of existence — where the behavior patterns of individual entities, and the relations between them, are established and maintained without the intervention of positive law. Indeed, as we have seen, order is omnipresent in nature: wherever we look, we find regularity of arrangement, uniformity of occurrence, and a pervasive and systematic connectedness that holds things and events together. There obviously are some real forces or factors that operate to produce this condition of order wherever it occurs. But it would be universally agreed that below the human context this is done without any conscious, purposeful, and organized effort on the part of the entities concerned: that is, it is effected by other means than those of positive law or similar explicit agencies. With reference to most regions of the world, when we say that "law is a principle of order" we mean this in only a descriptive sense: such laws as the "laws of nature" or "scientific laws" we regard as elucidating an order that is primordial and pre-established. We do not think of these laws as creating or maintaining the order that they describe.

All of this changes radically in the human context. Here, when we say that "positive law is a principle of order," we mean more than that positive law merely describes an order of events that is already simply there. Of course, we do mean this: a mature legal system, securely embedded in its society, does describe quite accurately the usual course of happenings in all those areas of life with which it deals. The behavior of persons, the relations that hold between them, the transactions in which they engage, the results that follow upon various courses of action: very much of this is "described" by the relevant bodies of positive law, and so can be "predicted" by a sufficient acquaintance with this law. In short, law does trace a pattern of antecedents and consequences — of causes and effects — that usually holds; so it can be employed to plan arrangements that can be expected to lead to desired outcomes and avoid undesired ones. It is in this sense that law is a "fact," in Olivecrona's usage. And this is all that the "bad man" of Holmes's famous example is interested in, just as he would be similarly interested in the laws that describe the tensile strength of iron bars and hemp rope. But we nevertheless conceive of positive law as standing in quite a different relationship to the events it predicts than do scientific laws. For when we say that positive law is a principle of order, we mean that it has the additional tasks of defining, prescribing, and forwarding the pattern of order that should be established. Positive law is an institution that definitely does have a re-

sponsible role in creating and maintaining the order that it also describes. And these apparently are tasks that confront only man among all the inhabitants of nature.

This fact that positive law is a strictly human phenomenon is so obvious and familiar that it is difficult to take it seriously and scrutinize it for its significance. But I think, and shall immediately seek to show, that it is actually of the highest importance, especially when taken in conjunction with the other three elements of my argument: the doctrine of the unity of nature, the theory of evolution, and the postulate that law is a principle of order.

Highlighted against this background, this fact suggests very strongly that changes of a crucial sort take place at the human level, producing novel conditions and problems, and that positive law arises as a means of dealing effectively with these unique circumstances. If we accept this conclusion as at least tentatively justified, then the vital and fruitful question that should occupy inquiry is not "What is law?" but rather "Why is law?" Our investigations must follow a line that is primarily genetic and teleological, with substantive and formal matters occupying only a secondary role: for law is functional before it is technical, and the necessary structure — the inner logic — of legal systems is to be sought in the conditions that engender them and the purposes that animate them. And let me emphasize again that I am not here referring particularly to the relations of law with actual social, economic, psychological, and political circumstances, which are relatively superficial and transitory. Rather, my concern is primarily with fundamental metaphysical issues, and then with factors of a broad cultural and anthropological character. The first step in this undertaking is to identify the central problems it confronts, and so to isolate the precise questions that we need to ask. To this end, we must bring together the four elements that have heretofore been discussed separately, and must make explicit their collective meaning for legal theory. Accepting these basic tenets, what can we reasonably infer about the origins and the functions — the beginnings and the ends — of positive law?

It follows from the postulate of the unity of nature that man is an element within the embracing context of reality, sharing its essential attributes, subject to its determining conditions, and related to its other parts. But it is also to be remembered that man exhibits significant specific differences that mark him off as a distinct type of entity occupying a distinct niche within reality. From this postulate it also follows that positive law is a special agent whose function it is to procure in the human context the same general effect that

is produced elsewhere in nature by other instrumentalities. Positive law is not an isolated or solitary phenomenon; it is not absolutely unique in either its characteristics or its functions; it is not an artificial and arbitrary human construct. On the contrary, it must be regarded as having close affinities with other agencies that occur in the human context, and even with forces and factors that operate in other regions of nature. And once again it is to be remembered that positive law exhibits important specific features that differentiate it from similar phenomena to which it is related.

If we now join to the postulate of the unity of nature the principle of evolution, we can carry the argument an important step further. For it now follows that man is a temporal development, or emergent, within the processes of nature. Due to a complex concatenation of circumstances — which will soon be analyzed in detail — man develops distinctive faculties and capacities, exercises powers that are not found in any other creature, and stands in a unique relationship both to the environment and to the other members of his species. As a result of these changes, man disposes of potentialities and confronts problems that do not occur in any other context of nature. But man must still meet the demands of the natural order in general, as well as those posed by his special status and attributes: that is, he must satisfy the conditions of life if he is to survive and make his way toward the realization that is open to him. And if nature does not furnish ready-made the instruments that are necessary to this end, then he must devise them by his own ingenuity.

It now also follows that positive law is similarly a temporal development within nature: that it emerges gradually out of the same circumstances as man, and develops concurrently with him; that it is a reflection — a creation — of his faculties and capacities, a means to administer his new-found powers and sustain the novel position in which he stands. In short, positive law is an instrument of the type we just remarked as necessary: an instrument through which man is aided in realizing his special potentialities and solving his special problems. It is required if man is to take advantage of his unique status and attributes rather than being overwhelmed by them. Positive law is a natural occurrence, at first largely unconscious and spontaneous, that arises as a means to procure in human affairs the same generic conditions and outcome — though with important specific differences — that are procured elsewhere in nature by other forces and agencies. In short, on the basis of these two principles of the unity of nature and evolution, one is led to suspect a continuity of essential character and function between positive law and other modes of law — such as laws of nature or scientific laws, laws of instinctual behavior, laws of imitation, natural law, moral law, cus-

tomary law — that drive in the same direction and toward the same ends.[23]

Now, we have already seen that the notion of *law,* in whatever of its manifold senses and references, is always closely associated with the notion of *order.* This is as true of its use in the human context as in any other. Indeed, we think of large areas of this context as exhibiting the same sort of "order" and exemplifying the same types of "law" as those that we en-

23. This notion of the continuity of positive law with other modes of law, and of positive law as being somehow derivative from and a further development of other more ultimate and protean modes of law, is by no means novel. It is frequently encountered in the literature of both jurisprudence and philosophy. I have treated this question in some detail in an article soon to be published, "The Modes of Law" (Essays presented to Paul Weiss, now in preparation). I do not want to interrupt my present argument to analyze this notion or to trace its history; but a few citations will exhibit its presence in the thought of men of varied intellectual persuasions. Cardozo, in speaking of "the analogy between the law which is the concern of jurisprudence, and those principles of order, the natural or moral laws," says: "If once I figured the two families as distant kinsmen, . . . I have now arrived at the belief that they are cousins german, if not brothers." THE GROWTH OF THE LAW 34, 36 (1924). Blackstone speaks similarly: "Law, in its most general and comprehensive sense, signifies a rule of action; and is applied indiscriminately to all kinds of action, whether animate or inanimate, rational or irrational. Thus we say, the laws of motion, of gravitation, of optics, of mechanics, as well as the laws of nature and of nations." 1 COMMENTARIES 38. Montesquieu voices the same idea: "Les lois, dans la signification la plus étendue, sont les rapports nécessaires, qui dérivent de la nature des choses; et, dans ce sens, tous les êtres ont leurs lois." L'ESPRIT DES LOIS 1. Karl Pearson develops the same idea in a more scientific manner and greater detail:

> . . . tracing historically the growth of civil law, we find its origin in unwritten custom. The customs which the struggle for existence have gradually developed in a tribe become in course of time its earliest laws. Now, the farther we go back in the development of man, through more and more complete barbarism to a simply animal condition, the more nearly we find customs merging in instinctive habits. But the instinctive habit of a gregarious animal is very much akin to what Austin would have termed a natural law. The laws relating to property and marriage in the civilized states of today can be traced back with more or less continuity to the instinctive habits of gregarious animals. THE GRAMMAR OF SCIENCE 77.

We find another advocate of this idea, where by many it might be the least expected, in John Austin. He writes:

> Every act or forbearance that ought to be an object of positive law, ought to be an object of the positive morality which consists of opinions or sentiments. Every act or forbearance that ought to be an object of the latter, is an object of the law of God as construed by the principle of utility. But the circle embraced by the law of God, and which may be embraced to advantage by positive morality, is larger than the circle which can be embraced to advantage by positive law. Inasmuch as the two circles have one and the same center, the whole of the region comprised by the latter is also comprised by the former. But the whole of the region comprised by the former is not comprised by the latter. THE PROVINCE OF JURISPRUDENCE DETERMINED 163, ed. H.L.A. Hart (1954).

But perhaps the most stunning statement of this idea is contained in the final lines of Holmes's famous essay, "The Path of the Law," which do not seem to be widely familiar and certainly are not often quoted. The concluding sentences run as follows: "The remoter and more general aspects of the law are those that give it universal interest. It is through them that you not only become a great master in your calling, but connect your subject with the universe and catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law." These are but samples, for this theme of the continuity of law is ubiquitous. Thinkers have paid it abundant homage. But they have not dignified it with serious intellectual scrutiny. They have celebrated it in passing, but they have not paused to draw out its full meaning and implications. It is just this that I mean to do, in accord with the twin principles of the unity of nature and evolution.

counter in other regions of nature. We treat many of man's physiological and neurological characteristics and modes of action in strict physical and biological terms, assimilating them with no hesitation into the field of "natural science." That is, we assume that the regularities and uniformities that we find here are inherent in the structure of man as a living and sentient creature; and we accept the "laws" of neurology, pathology, and other such disciplines as being altogether on a par with those of physics and chemistry. The same holds true even well up into the areas of human phenomena that are studied by the psychological and social sciences. Admittedly, the uniformities of structure, continuities of relationship, and regularities of behavior that we find in these areas are less constant than in others; and our assertion and employment of them are subject to important qualification. But it is nevertheless widely felt that man's emotional and intellectual processes — indeed, his psychic activities as a whole — take place in settled if intricate ways and in accord with general principles; that men react to situations and respond to one another along common lines; that human motives and actions are subject to definite forces and unfold in patterns that are at least roughly if not altogether precisely ascertainable. We accept the fact that order is quite simply an ingrained characteristic of large parts of the human domain, exhibiting itself in regularities of human behavior and uniformities of human relationship without any conscious or organized control on the part of men, and even in defiance of such control. We regard this order as being somehow produced and supported by a variety of forces or factors: instinct, reflex, stimulus and response, conditioning, imitation, habit, and so forth. And we express this order through laws that are empirical descriptions of observable structures and sequences. In short, in many areas of the human context the relation of *law* and *order* appears to be the same as in those other contexts of nature that we refer to as "subhuman." [24]

But this is not the whole story. For again as we have seen, disorder is also a prominent characteristic of the human context. We find as a simple matter of fact that much of man's behavior is vagrant and variable; many human relations are unstable; men indicate by word or deed that they will act in one way and then act in another; men waste their powers in worthless pursuits, dissipate their talents to false purposes, and fail of the realizations and values they should achieve; excessive friction and inefficiency often mark

24. The vexed metaphysical questions of the real status of "laws of nature" and the relation of such laws to the order they describe need not concern us here. I have discussed the problem in the article referred to in note 23, *supra*. There is an interesting treatment of the question, and of the alternative theories proposed to deal with it, in WHITEHEAD, ADVENTURES OF IDEAS ch. VII and VIII (1933).

men's common undertakings; individuals assert their private interests against the interests of the group. I do not pretend that this is either an exhaustive description or an adequate explanation of disorder. And I would particularly wish to avoid the usual implication that disorder is inherently and utterly undesirable, a condition that is pregnant only of evil and not at all of good. An exact analysis of this concept, of the factors responsible for it, and of the treatment it requires, will be offered shortly. For the moment, I am merely calling attention to the fact that disorder does appear in the human context in all of these and many other guises. Further, it is apparently only in the human context that disorder becomes a conspicuous feature; and it is only man who is at once challenged and equipped to deal purposively with it.

One further step will now bring me to the crux of the argument that is woven of my four original strands. When, and to the extent that, disorder appears, it immediately and obviously threatens to disrupt or destroy the pattern and regularity that are as necessary in the human context as they are elsewhere in nature. It also, less directly and obviously, produces a situation that is full of promise for man. So the most basic and persistent problem that man confronts is the dual one of maintaining the "order" that is the necessary matrix of human careers while at the same time exploiting the advantages that "disorder" offers. It is the occurrence of this problem that differentiates man from the rest of nature and that stands at the origin of the massive phenomenon that we call culture. Confronted with disorder, man must take steps to correct and utilize this. Notable among these steps is the institution of positive law.

I can now state quite briefly and baldly the major hypothesis that is suggested by the conjunction of the four elements with which my argument started: *Positive law is a supplemental principle of order that arises and develops in the human context when other agencies and forces become inadequate to the conditions and the challenge that man confronts.* According to this hypothesis, positive law is called into being by certain peculiarities of human nature and the human situation; and its task is to assure a stable and fruitful order in which men can plan securely, can carry on effective transactions among themselves and with the world, and can reap the benefits that are latent in their nature and position. In short, positive law is an instrument that man creates as a means to promote the realization of potentialities that nature opens before him but does not automatically secure to him. It will be my principal task from now on to develop and support this hypothesis.

I indicated earlier that the lines of inquiry I have been following come to a head in one vital problem: Why is positive law? The present hypothesis

makes clear that this problem is properly subdivided into two more specific questions:

1. What is order? What referents does this concept require, and what meanings does it attach to these? What is the systematic structure of the "order" that—as is universally assumed—it is the basic function of positive law to secure and further?

2. What are the changes that take place at the human level—in human nature and the human situation—that require positive law as a supplemental principle of order?

I shall now deal with these questions in turn.

II

I have previously called attention to the strange failure of legal and jurisprudential thought to submit the notion of "order" to systematic analysis. When the question of the meaning of the term arises, the standard procedure is first to identify this meaning by reference to various roughly synonymous terms, such as "stability," "uniformity," "regularity," "security"; then to give several examples of the areas of human affairs in which "order" is at once necessary and precarious, such as sexual and family relations, property, protection of the person; and finally to cite the factors in human nature and in surrounding circumstances that cause "disorder," such as greed, lust, selfishness, carelessness, scarcity, and so forth. Such a treatment is usually adequate for the solution of immediate practical problems, where the nature, the cause, and the corrective of some actual social disorder are apt to be—or at least to appear—quite obvious. And since law is a pre-eminently practical science, concerned with the evils of the day and willing to take these as more than sufficient, it is understandable why legal thought has not felt the need to scrutinize more closely the concept of "order."

But such a treatment is not adequate as the foundation of legal theory. What is required for this purpose is an investigation that is more profound in its quest for elements that are really basic, more precise in its identification of these elements, and more systematic in its analysis of the relations in which they stand. The ultimate setting of positive law is the framework of reality; the entities with which law deals, the conditions that give rise to it, the functions it serves, and the problems it faces, all derive from the structure and processes of reality. Positive law certainly deals with a context of a quite special type: men living in groups. But this context is a specification within the embracing framework of reality as a whole. So we must begin with a strictly metaphysical inquiry.

With this orientation in mind, what do we mean by the term "order" when we say that "law is a principle of order?" I would suggest this answer:

Order refers to *regular and determinate sequences* that are exhibited in *the behavior* of *distinct entities* that are so related among themselves as to constitute *organized wholes.*

The underlined items in this statement are, I think, the four constituents that are necessarily entailed by the concept of order. When these constituents occur, then we have the type of situation or state-of-affairs that is "orderly" and "lawful." This is the context that is required if "order and "law" are to be meaningful concepts. These terms presuppose a plurality of distinct entities; a unification of these into a series of higher-order entities; energy expended, activity engaged in by these entities; and all of this taking place in a way that is characterized by uniformity and regularity. "Order" is the name by which we identify this general condition. "Law" is the name we give to that type of proposition that formulates the structures and relationships, the sequences and similarities, the constancies and recurrences, that are contained within this condition and make up its specific details. So law is a principle of order in the sense that laws are propositions that refer to and explicate the lines of connection that run through orderly contexts. Thus, the laws of motion formulate the ways in which physical objects moving in a common space act upon and react to one another. The laws of genetics plot the courses through which genes and chromosomes are recombined in the act of sexual reproduction that issues in a new individual. The laws of grammar and syntax depict the procedures that men are required to follow in talking and writing if they are to create a world of shared meanings. The laws of morals lay down the norms and patterns of conduct to which men who share a common humanity should conform in their treatment of one another. The laws of contract define the rules that men in any particular society must follow in making and executing agreements.[25]

It will now be useful to give more abstract and generalized names to these four elements that form the context of order and law; that is, to identify them by terms of art that can be precisely defined. So I shall refer to the plurality of distinct entities as *the Many;* to the wholes—the complexes, or fields, or groups—of which these entities are parts as *the One;* to the activities in which these entities engage—the flux in which they are caught up—as

25. The various statements in this paragraph, employing such terms as "refer to," "formulate," "depict," "should," "must," and so forth, are purposely and systematically ambiguous as regards the relation of "law" to "order." That is, they are intended to leave open the question whether "law" describes "order," or prescribes it, or produces it, or evaluates it, or is merely a convenient device for understanding it. This problem will be touched on somewhat more fully in the next section. And cf. notes 23 and 24, *supra.*

Process; to the uniformities and regularities that run among these entities as *Pattern.* These are the basic categories that define the concept of order and constitute the matrix of law, and that must therefore be subjected to a closer scrutiny.

But before entering upon this task I would like to pause for a moment to confirm this analysis by reference to the work of previous legal theorists. For though these thinkers have usually centered their attention on concrete and specific problems of order, they have still caught glimpses of the abstract and universal nature of order as the general and pervasive object of legal thought and action. Having discerned this, they have not sought to follow up and develop their vision, because it has not seemed to them to be necessary or relevant to their more limited and practical concerns. What particularly interests me is the fact that their insights—reported quite casually and as though they were merely a recording of the self-evident—agree point by point with one another and coincide with the analysis I have just suggested. I will here give only a few quotations to illustrate this.

Cardozo epitomizes his conception of law in these terms: "Law is the expression of a principle of *order* to which *men* must conform in their *conduct and relations* as members of *society.*"[26] Whitehead, speaking of law in a broader and more general sense, repeats this thought: "The notion of law is that there are *many things* in *the world,* whose *behaviour* towards each other always exemplifies *fixed rules.*"[27] Cairns echoes the same formula: "In this *complex whole* [society or culture] *the behavior* of *human beings* is ordered in accordance with the requirements of the *relations established in the structure.*"[28] Vinogradoff speaks in the same terms: "I think we may say that the aim of law is *to regulate* the attribution and exercise of *power* over *persons and things* in social *intercourse.*"[29] Llewellyn, in the article previously referred to, expresses the same idea:

> The law-jobs are in their bare bones fundamental, they are eternal. Perhaps they can all be summed up in a single formulation: such *arrangement and adjustment of people's behavior* that the *society (or the group)* remains a society (or a group) and gets enough *energy* unleashed and coordinated to keep on with its job as a society (or a group).[30]

Finally, Austin's famous imperative definition of law, when it is taken in

26. GROWTH OF THE LAW 140. In this and the immediately following quotations I have italicized the crucial terms.
27. ADVENTURES OF IDEAS 51 (1933).
28. THE THEORY OF LEGAL SCIENCE 18 (1941).
29. COMMON SENSE IN LAW 36 (1913).
30. 49 YALE LAW JOURNAL 1355, at 1373. This article is especially valuable for its discussions of what is involved in the doing of these "law-jobs." See *supra* note 4.

its entirety and not cut off after the first clause, is seen to be cast in terms of these same four elements: ". . . law is *a command* which obliges *a person or persons,* and obliges generally to *acts or forbearances* of *a class.*"[31]

The equivalences among the key terms in these definitions, and their correspondence with the more abstract concepts that I have identified above, are, I think, too clear to require comment. These quotations offer persuasive evidence that the present explicit and generalized analysis of "order," and so of "law" as an adjunct of "order," exposes an interpretative schema that is deep-rooted and pervasive—if usually only implicit—in a great deal of legal theorizing. It seems that whenever one thinks about law in a sufficiently persistent and coherent manner, and whatever the approach may be, this thinking is cast in terms of the categories of Many—One—Process—Pattern. What I intend to do is to take this schema very seriously and to analyze it closely for the insight and understanding it can yield.

The thesis that I am advancing, stated very explicitly, is that these categories of Many, One, Process, and Pattern represent the ultimate dimensions of being, or reality. The difficulty that is at once encountered in developing this thesis is that of presenting the meaning and content of these categories in a manner that is neutral and general. They must be introduced and treated serially: but this serial arrangement does not indicate any order of precedence, since these categories are equally basic and significant. Further, they must at first be described in very general terms, as indicating pervasive aspects or attributes of reality that take on different concrete forms in different contexts of the real. That is, each of these categories embodies mind's recognition of an ultimate and protean dimension of the universe. And these dimensions assume various specific characters, and exhibit distinctive features, in various local regions of nature.

Since these categories are so broad and fundamental, they permit of various interpretations, both as regards their individual characteristics and the collective structure that they form. Philosophers identify and describe these dimensions of being in different ways, and they advance different theories of the relationship in which they stand to one another. It is largely differences on these points that constitute different metaphysical doctrines. These differences then reverberate further and exert a strong, if largely subterranean, influence on legal theory. That is, I would suggest that the various schools of jurisprudence are most basically distinguished by the interpretations, and especially the relative emphases, that they place on these several categories.

31. 1 LECTURES ON JURISPRUDENCE 98.

Each school tends to select some one of them, to find in it the essential reference of law, to assign to this essential feature a certain definite character, and then to reduce the other categories to this chosen item. As I now give brief and general descriptions of these dimensions, preliminary to their detailed analysis, I will at the same time mention the legal doctrines and schools of thought that seem to me to be closely associated with each. This has great and obvious dangers, especially at this early stage of the analysis. But it should serve to make somewhat clearer the character of these dimensions; and it will certainly bring closer to home the legal relevance of this abstract metaphysical analysis.

The category of the Many embodies mind's recognition of the existence within nature of a plurality of distinct entities. Reality is composed of actual particular things and occasions, each having a determinate character and asserting itself in definite ways. Wherever we look in the world, we find ourselves confronted by a manifold. In the human context, this means that society is a mass of individual men, each of whom is a unique person intent upon the pursuit of his own career. Men are viewed as egoists and rationalists, and society is regarded as only a convenience. Where this dimension is emphasized, positive law is conceived as a passive and neutral public device, having no intrinsic purposes or structure of its own, that stands exclusively at the service of, and is activated only by, private interests. The function of law is to facilitate the achievement of personal ends and the execution of mutual agreements. (Classical liberalism. Legal individualism. Emphasis on rights and liberty. The era of private law, free contract, and liability only for fault. Theories that stress the element of will.)

The category of the One embodies mind's recognition that reality exhibits a hierarchical arrangement. All things exist and occur as parts or episodes of some larger whole. Actual particulars are elements within systems, and their character and behavior are strongly conditioned by the positions they occupy within these. Throughout reality, things must accommodate themselves to one another and must be subordinated to the interests of the wholes, or Ones, of which they are parts. In the human context, this means that the group is an entity in its own right, having a foundation in reality and a career through history. Men are viewed as both needing and needed by society, which they nevertheless resist through ignorance and willfulness. Where this dimension is emphasized, positive law is conceived as an instrument that the social whole creates to serve its own interests and purposes. Here, the function of law is to guarantee the integrity and effectiveness of the One, or State: to this end it coerces men and organizes their efforts. (Imperative theory of law. Public law dominates private law. "Socialization du droit." This position

proliferates subspecies, depending upon the manner in which the group and its interests are conceived: *raison d'état;* the welfare state; the garrison state. Doctrine of social solidarity. Stress on duties and equality.)

The category of Process embodies mind's recognition that reality is fluid and dynamic, an arena of becoming. The universe is charged with energy: the being of things is their power, the modes of activity through which they express and assert themselves. Wherever we look in the world, we find things engaged in complicated processes of expenditure and transfer of energy in various forms. In the human context, this means that men-in-society (or a group and its members) constitute an enterprise rather than an entity: individual life is a striving; and group life is a series of exchanges, whether competitive or cooperative, of efforts and their products. Where this dimension is emphasized, positive law is conceived as a technique through which the diverse interests and forces at work in society are at once fostered and regulated. Here, the function of law is to promote the manifold transactions that are necessary to maintain society as a going concern. (Legal stress is now laid on factual situations and outcomes as much as on abstract relations and obligations. Arbitration procedures become prominent. Law seeks to facilitate those arrangements that are spontaneous and efficient. Legal realism. Social engineering. Historical and sociological jurisprudence—with radically different interpretations of the "forces" to which law should be sensitive and responsive. Jurisprudence of interests.)

The category of Pattern embodies mind's recognition that reality exhibits structure and stability. The universe is an intricate but coherent web of connectedness, in which every particular thing is of a definite kind, occupies a settled place, and sustains constant relations with other particulars. Though things are unique, similarities run among them; though each pursues its own course, they follow common paths. Wherever we look in the world, we find things interacting with one another in ways that are extremely complicated but still exhibit marked uniformities and regularities. In the human context, this means that society is a system of relationships through which status and function are assigned and the course of events is assured. Where this dimension is emphasized, positive law is conceived as a body of rules that defines courses of conduct, determines rights and duties, and establishes sanctions. Here, the function of law is to prescribe a nexus of antecedents and consequences, such that men can anticipate the outcomes of their actions and can plan accordingly. (Stress is now placed on the formal and technical aspects of law, as it is only through these that law can effectively fill its role as a conserving and stabilizing force. Law conceived as a normative rather than a descriptive discipline. Doctrine of the logical plenitude of the law. Analytical

jurisprudence. Pure theory of law. Legal conceptualism. Law as reason.)

This analysis, I would claim, exhibits the real meaning of "order" and so the real structure of the matrix of "law." Law always occurs within and has reference to a context in which there are many distinct entities, in which these entities assert themselves in action and exchange energy and carry on transactions among themselves, and in which there are definite patterns of regularity and uniformity. That is, law always has to deal with a Many, a One, a Process, and a Pattern. These categories depict the ultimate dimensions of being, define the framework of all becoming, and so constitute the matrix of law in all of its modes as a general "principle of order." It is through a closer analysis of these categories that the exact nature and functions of positive law are to be found.

One further point must be emphasized now, though I shall explore it more fully in the concluding section of this paper. This is the fact that these dimensions are intimately connected with and interpenetrate one another. The world is at once a manifold, a universe, an arena of change, and a structured system. The same is true of society. Every particular thing is at once a unique entity, an element in various larger wholes, a locus of energy that is engaged in constant transactions with other things, and an item that occupies a definite place in a scheme of relationships. The same is true of men. This fact is vastly important for legal theory. For it means that positive law cannot deal with individual men, with the state, with social processes, or with human relationships in isolation from one another. Any action that positive law takes with respect to any one of these dimensions is inevitably going to reverberate throughout the others, and it is essential that these repercussions be anticipated.

III

We can now turn to our second crucial problem. What occurs at the human level that occasions the development of positive law as a supplemental principle of order? On the strength of the original postulates on which my argument is based, we can logically infer that certain significant changes gradually take place in evolution, finally marking off human nature and the human situation as a distinct local context of reality; that these changes place man in a novel condition, and confront him with a radical challenge; and that positive law slowly emerges out of this condition and in response to this challenge. Further, relying on the preceding analysis of order as the framework of reality, we can infer that these changes occur within the dimensions of the Many, the One, Process, and Pattern. The problem now is to discern the precise character of these changes. That is, we need to trace the

exact genesis of positive law if we are to understand its structure and functions. And let me again emphasize that it is the metaphysical even more than the historical genesis of law in which I am interested.

The first step toward a solution of this problem is to call attention to the obvious and familiar fact that these pervasive dimensions of being take on different specific characters, and exhibit distinctive features, in various regions of nature: e.g., in the inorganic realm, the organic, the vital, the psychic, the social. The universe clearly does contain different sorts of entities, of wholes, of energy, and of structural relationship. Whether we are thinking in the field of physics, chemistry, biology, psychology, anthropology, mathematics, or political and legal science, our thought and the laws it frames are cast in the mold of Many—One—Process—Pattern. But the precise meanings of these categories change radically as we move among these realms.

It is equally obvious and familiar that in most of these realms the characteristics of the entities, their modes of behavior, their organization into wholes, and the relations among them are established and maintained without the intervention of positive law. There are manifold realms of existence where positive law has no footing. Moreover, even mature legal systems do not take the whole of the human context within their purview. No one has ever equated law with life.

These extrahuman and human contexts in which positive law does not appear are often extremely complex. The billions of atomic particles in a piece of radium move in their orbits, react with one another and with the environment, and live out their collective career of radioactive decay, all in a thoroughly orderly manner. A multitude of individual organisms, belonging to hundreds of plant and animal species, inhabit a common ecological region, share in its resources, compete with and contribute to one another, and together constitute a delicately balanced whole. The thousands of ants or bees in a single nest or hive maintain the group economy, raise successive generations, pursue their distinct lives and cooperate in many enterprises, engage in mutual help and common work. The cells that compose a newly conceived human fetus—a fertilized egg—grow, reproduce and multiply millions of times, develop into specific organs and perform highly specialized functions, and are coordinated with the greatest fineness and economy to issue in a mature human being.

Furthermore, many of man's most vital activities and affairs are beyond the reach of positive law. The very idea of passing laws to standardize pulse and metabolism rates; to exclude female issue from the inheritance of blue eyes; to require the full-term human fetus to give proof of certain minimal mental and physical assets before it could be born; to establish statutory

limits to the age at which infants can or must walk and talk; to prohibit organic degeneration below designated limits; to define standards of parental and filial devotion—any of these proposals would strike us as satire after the manner of Samuel Butler. Yet, as a little reflection will reveal, we successfully employ law as a means to ends very similar to these in other closely related areas of human affairs. Even where it figures so prominently and importantly, positive law is only a supplemental principle of order, and there are definite limits to legal effectiveness. These are facts that we often forget, always to the detriment of both law and life.

Now, all of the contexts discussed above obviously contain the elements of Many—One—Process—Pattern. They satisfy the conditions indicated by the concept of order, and they clearly exemplify the presence and operation of some mode or modes of law. But this certainly is not positive law. There undoubtedly are some real forces and factors that are responsible for securing in these contexts the state-of-affairs of order. And it is commonly agreed that below the human level, and even quite widely at this level, this is done without any conscious, purposeful, or organized effort on the part of the entities—atoms, molecules, cells, molar bodies, organisms—that exist in these contexts. As to how this is done, and through what agencies, there is radical disagreement. We here enter the arena of metaphysical debate. The responsibility would be variously assigned to the Divine will and intellect, the inherent nature of things, the primordial principles of being, a pre-established causal nexus, and so on. Fortunately, this dispute about ultimate explanations need not concern us here. My immediate interest is sheerly descriptive, and goes in two directions: toward discerning the significant changes that take place in the dimensions of being as evolution proceeds toward the human level; and toward identifying the essential characteristics and structures of the human context—in which positive law arises—as distinguished from other contexts of nature, where order is a function of other modes of law.

The answer that I propose to these problems can be stated quite briefly, as to its essence, and then elaborated. It consists in the hypothesis that the process of becoming as a whole, including that segment of it that we know as "organic evolution" and that culminates in man, passes through three main stages of development, which I shall designate as *Necessity, Possibility,* and *Purposiveness.* As this process unfolds, gradual but important changes take place in each of the dimensions of being: that is, significant and characteristic alterations do occur in time in the entities that compose different regions of reality, in the fields or systems or environments or milieus in which these exist, in the processes in which they take part, and in the pattern of

relationships that runs among them. This is the very meaning of evolution, or becoming. These changes accumulate, interplay upon one another, and finally eventuate in man and the human condition. This is obvious matter of fact, as a happening. The hypothesis just suggested is simply an attempt to discern the general course and the principal phases of the process through which it has happened.

Before expanding this hypothesis, two preliminary remarks are in order. First, the categories of Necessity, Possibility, and Purposiveness are here employed in a purely descriptive sense, not an explanatory one. I am using these concepts merely as names to summarize the essential characteristics of different types of situations that are generally familiar to us in different contexts of nature. I am not positing any esoteric forces that produce these situations. This matter can be put most exactly by saying that these terms designate *regimes,* or states of affairs, that actually hold and can be empirically described. Secondly, these situations are not radically distinct or sharply separated from one another. The sets of characteristics designated by these categories pervade reality and are compresent throughout nature; there is continuity in evolution, and these situations, or regimes, merge into one another. But as these characteristics are present in different proportions, various regions of nature become significantly different. The immediately important meaning of this fact is that all three of these factors pervade the human context, and man is subject to each of them. I shall deal more fully with this point in the concluding section of this paper. There would be little point in trying to lay down exact and arbitrary definitions of these categories. Instead, I shall describe the changes that are brought about in the dimensions of the Many, the One, Process, and Pattern as the contexts in which they occur exhibit a predominance of Necessity, Possibility, or Purposiveness. That is, I shall trace the movement and the transformations that take place as these conditions are superimposed on one another.

Those regions of nature of which we say that "necessity holds" or "determinism prevails," and of which the fields of physical and chemical phenomena are the most familiar examples, exhibit the following general conditions.

The outstanding feature of the dimension of the Many is the *similarity* of things of the same kind. Throughout great parts of reality the natures of things are relatively simple, and their powers are correspondingly limited. The structure of a molecule, a stone, a star, and even a plant is such that its range of variation is restricted. So the distinctive individual character of any entity

counts for very little as compared with its class characteristics. Things of the same type, or kind, exhibit the attributes of the type in such a uniform manner that they can without serious distortion be regarded and treated as identical. Individual differences are no doubt real among all things, but here they are so slight and unimportant that they make no real difference.

Under this regime, the significant feature of the dimension of the One is the *subordination* of things to the milieus of their existence. Each entity has its status and function largely defined for it and imposed on it by its position within its context: that is, by the whole of which it is a part. Physical bodies are dominated by the fields in which they occur; biological structures are absorbed in the organisms to which they belong; and these organisms in turn are closely dependent upon their environment. In these regions, things have little power over their surroundings and slight influence on the arrangements under which they live. The integrity of separate things is eroded, and their effectiveness undermined, by the massive pressures that are brought to bear upon them by their surroundings.

Under such conditions, the Processes that take place are largely describable in terms of *action and reaction*. The behavior of things is determined by the external forces that bear upon them and by their own inherent characteristics, so that things release energy but do not direct it. It is antecedent events and prevailing conditions within the field, rather than the active intervention of separate entities, that control the actual occasion. We acknowledge this state of affairs even in the human context in such phrases as "stimulus and response," "instinct," "conditioning," "habit," and "the weight of circumstances." In other contexts, where Necessity prevails, things are caught up in processes that they can neither guide nor arrest: they can only submit. Here, individual initiative and spontaneity have little scope in the face of the chain of events.

Finally, the Pattern that pervades such contexts is characterized by extreme *rigidity*. As things come into existence they take their places in a system of relationships that is already prepared for them, and they are henceforth held fast in this web. Consequently, encounters between similar things under similar conditions follow regular courses and lead to roughly identical results. The structure of the field or environment in which they exist dominates separate things, defining the relations in which they stand to other things and the courses they are to follow. Even in the human context, we have now been made vividly conscious of the lasting influence exerted on us by the surroundings in which our early years are passed. Elsewhere in reality this effect is all but absolute: things inherit with existence an environment that forges indissoluble links between them and a horde of other things.

This monolithic pattern leaves no opening for the private plans or mutual arrangements of individual entities.

These four conditions — similarity, subordination, action-and-reaction, rigidity — which are summarized under the category of Necessity, nowhere hold absolutely and without qualification. But they are an accurate description of the state-of-affairs that is exemplified throughout the region of the inorganic, well up into the domain of life, and even in significant portions of the human context. The outstanding characteristics of a great part of nature are sheer persistence and recurrence: things simply endure through their allotted intervals, they are replaced by closely similar things, change is uniform and sequential, and origination is a rare event. If we generalize the Newtonian concept, we might say that in these contexts inertia holds sway. We can further say that in all regions of nature, including the human, inertia plays a prominent part and Necessity is an important factor.

But however pervasive these conditions may be, they certainly do not by themselves provide an adequate account of the human situation, nor of that of many other creatures. As evolution moves toward the human level a new factor, which I have termed Possibility and which is present throughout nature, becomes dominant and introduces significant changes into each of the dimensions of being. The concept of Possibility refers to and summarizes certain concrete facts that compel our attention. Probably the basic recognition that is embodied in the term is that of a loosening or easing of the conditions of Necessity, with the result that individual entities as such are able to participate more meaningfully and effectively in the course of events. Possibility, in common usage, carries with it the idea of alternatives that are open; of variation; of future outcomes that are not predetermined; of flexibility and change, spontaneity, and novelty; of relations that are defined and can be altered by the things that stand in these relations; of room for arrangements to be made at the discretion, and in the interest, of those who are immediately concerned. This rather vague but widely felt meaning will at once be rendered more precise by an analysis of the outcome of this new regime in each of the dimensions of the Many, the One, Process, and Pattern.

But two preliminary remarks must be made, lest the transition from the regime of Necessity to that of Possibility be seen in false perspective.

In the first place, it must be stressed that Possibility is present throughout reality, tempering the conditions of Necessity as these were described above. Every individual thing is unique, it asserts itself, it exerts an influence, and it makes a difference to its surroundings. Such modern scientific findings as those of genetic mutations and quantum phenomena have accustomed us to

these ideas, and have made us aware that "pure" or "absolute" Necessity is an abstraction. Possibility does not appear suddenly or *ex nihilo:* it has a foothold throughout reality, and it extends its sway gradually.

The second point to be stressed is that Necessity is equally present throughout reality, and there is no region of nature in which this regime is not largely exemplified. Even in the human context, the conditions I have summarized under the concepts of similarity, action-and-reaction, subordination, and rigidity, always make themselves felt and sometimes dominate the situation. These two points can be summed up in one conclusion: the regime of Possibility does not supersede that of Necessity, but only complements and modifies it. By tracing this movement and its outcome, we can move appreciably closer to a systematic view of the essential characteristics of man and his place in nature, and so of the conditions that give rise to positive law.

In the dimension of the Many, the basic outcome of Possibility is *Differentiation.* The higher forms of life — especially man — develop complex structures and specialized functions, and become capable of a wider range of activity. So individual differences become vastly more important. Members of the same species share a common nature, and exhibit many similar attributes, but the room for variation is greatly increased. Individual men differ in their capacities and temperaments; they are sensitive to varied interests and seek varied careers; they develop different skills and put these in the service of different purposes. The human endowment is extraordinarily plastic. This plasticity has two important consequences: first, it means that the inherent powers of men are generalized, thus permitting of various realizations within a wide common ambit; second, it means that these powers do not develop and come to fruition automatically, but require training and discipline in order to mature properly. As differentiation and complexity proceed, the potentialities of things become greater but also more precarious. In this course, the individual gradually emerges as the primary locus of existence and value.

The immediate repercussion of this in the dimension of the One is to transform subordination into *Participation.* Men, in the life they make and share together, are not mere parts of wholes: they are members of groups. The essence of this relationship is its unresolved ambivalence: throughout the human context, the individual is conscious of his personal identity, jealous of his integrity of character and freedom of action, and concerned with his own affairs; and so he thinks of the groups to which he belongs as devices for the furtherance of his own purposes, whether through exploitation or protection. But it is equally true that he feels himself closely tied to these groups by complex bonds of sentiment, reciprocity, imitation, and obligation;

and so he thinks of himself as an element in the larger designs and destinies that they represent. That is, men regard their groups both as instruments to their personal ends and as continuing common undertakings that deserve their allegiance. The meaning of participation resides precisely in this ambivalent attitude and this reflexive relationship. To participate is to share in the decisions that the group takes and in the goods — in the widest sense of that term — that it has available. It is also to cooperate in group efforts even if we disapprove of them, and to contribute to the needs of the group. In a word, participation means that individuals must stand to the group as both ends and parts, the group to individuals as both means and whole. This is obviously a subtle, intricate, and fragile relationship; after thousands of years it remains at best a theoretical paradox and a tenuous reality.[32] But it poses a problem that cannot be evaded: the One, in becoming the human group, requires to be transformed into a vehicle for the conduct of a mutual enterprise.

In the dimension of Process, the basic outcome of Possibility is *Self-determination*. As the capabilities of things increase, they are able to enter more effectively as separate and distinct agents in the causal process. The nexus of action-and-reaction is loosened, alternatives open up, there is room for spontaneity within the actual occasion, and the individual takes a larger part in determining the course of the events in which he is engaged. This movement culminates at the human level. Men can store energy in the present and direct its use in the future; they can select the transactions they mean to carry on; they can control or change their environment; they can plan and persevere. So men attain to a measure of independence from the pressure of circumstances, and can themselves determine what they are to do and be. Life becomes a career to be forged instead of a destiny to be fulfilled.

Finally, Possibility introduces into the Pattern of relationships that holds among men a large degree of *Flexibility*. Men, like all other things, are born into a system of relationships that is antecedent to them. Existence places them immediately in certain surroundings, brings them into intimate contact with other features and inhabitants of these surroundings, and ties them to these in a complex web of connectedness. In the human context, however, this web of connectedness is open, fluid, and only generally defined rather than being closed, rigid, and minutely determined. Its broad structure is of course established and transmitted through time by what we call custom, tradition, the social order, and the group way of life. But this social structure

32. I have discussed this particular problem quite fully in two previous papers: *The Analysis of Justice,* 57 ETHICS 1 (1946); *Ethical Values and Legal Decisions,* 12 OHIO STATE LAW JOURNAL 36 (1951).

does not absolutely engulf men from the moment of birth: it exerts only a general influence over their training and development, and it requires only that they occupy some status and perform some function. Within broad limits, the system of social relations leaves men options and provides them opportunities to select their goals and to conduct their separate and joint undertakings as they themselves deem best. The supremely important result of this flexibility is that men can enter into private agreements through which they define what their relations are to be, what transactions they are to carry on, what outcomes they are to seek. In short, the social environment is not only a milieu of existence, but also — and much more — a medium through which men can pursue their separate careers and arrange their mutual enterprises. Within broad limits, the details of the social order are left quite vague, are always variable, and are continually being reshaped.

Possibility, as a name for these four outcomes, is a *fait accompli* with which man is confronted. It is something that simply happens to man, without any intention or effort on his part. Indeed, it is exactly this series of happenings that prepares the human context and inaugurates man as a distinctive kind of creature. But once Possibility has occurred, and has made itself felt on an appreciable scale, then it must be seized and exploited. The most immediate and compelling consequence of these conditions is the shattering of the type of order that has hitherto prevailed, and that I have described in terms of Necessity. This does not mean, it must be remembered, that Necessity is superseded and expelled from the human context: it is merely supplemented, and so modified, by the emergence into prominence of characteristics that have all along been present but hitherto inconspicuous. Though this transition takes place very gradually, its cumulative outcome is spectacular. When and as men become differentiated and self-determining participants in flexible social groups, the nexus of sheer persistence and recurrence is disrupted, and inertia gives way to initiative. Spontaneity, uncertainty, conflict, and change enter prominently onto the scene. This means that the situation that issues from Possibility is fraught with both advantages and dangers. It opens the way to further radical developments. But it also threatens confusion and incoherence. Possibility opens the door of disorder upon a new realm of both positive and negative values. So it at once demands supplemental principles of order. Positive law arises gradually as one of these, among many others. In this sense, Possibility is the ultimate ground, the essential precondition, of positive law.

The most significant feature of Possibility is that it requires that a proper use be made of it. It challenges man to give it a form, a content, and a

direction. Man replies to this challenge with *Purposiveness.* When the action to be taken in the present is not rigidly determined by the past and by surrounding circumstances, then it must either be left to accident or defined by reference to the future. The first of these courses is certainly not unknown to us: we often hesitate, vacillate, and resign the direction of events. But the second is at least as familiar, and far more significant: we do as a matter of fact deliberate upon and intervene in the course of events, in order that this may lead to certain outcomes and consummations that we have in mind. Purposiveness, as the name for this process of deliberation and intervention, is man's response to Possibility, through which actualizations are chosen, prepared, and brought about.

Purposiveness thus recognizes and identifies the fact that in much of the human context the present state of affairs is permeated by future considerations. A good deal of human conduct embodies an intention, direction, and destination that lie beyond itself. So Purposiveness entails the ability to envisage the future; to discriminate within this various alternatives; to choose among these sensitively and intelligently; and to muster one's resources behind the realization of the alternative chosen. Activity is purposive just to the extent that it is controlled and directed, in a coherent and persistent manner, toward some possibilities and away from others.

Nature has conferred upon man a situation that offers him great opportunities. But these are not realized either automatically or haphazardly; if they were, they would be not opportunities, but either fates or accidents. If man is to exploit the opportunities that Possibility presents him, he must, instead of succumbing to them, choose purposes with care and pursue them with diligence. It is only by such Purposiveness that man can rescue his life from necessity and protect it against chance.

We can now sketch more systematically the nature of Purposiveness by tracing its occurrence and outcome through the four dimensions of the human context. In the dimension of the Many, Purposiveness manifests itself as the quest for *Cultivation.* If Differentiation is to be fruitfully exploited, the integrity of individuals must be guaranteed and their proper development must be assured. Human personalities and careers are not the products of spontaneous maturation, but of careful nurture. Most men have neither immediately discernible abilities nor compelling goals. These are only implicit and amorphous, requiring to be quickened to life and given direction. The plasticity that is such an outstanding human characteristic means not only that any man has varied potentialities; it also means that which of these are to be realized, and to what extent, are matters that depend largely upon the intelligence and perseverance that are brought to bear upon them. If dif-

ferentiation is not cultivated, it must move in one of two directions: it may relapse toward similarity, under the awful guise of mediocrity; or it may issue in a theoretical relativism that denies all standards, and in an actual heterogeneity that shatters the unity of the group into a mass of cliques. So differentiations must somehow be judged, selected, and trained. And the raw potentialities of men must be disciplined and educated. Cultivation represents the organized human effort to reap the advantages of differentiation by providing both the environment and the nurture that will enable men to realize their best potentialities.

In the dimension of the One, Purposiveness manifests itself as the effort to create and maintain *Authority*. Men, in the uses they make of possibility in the pursuit of their own ends, often run counter to one another, waste their energies in friction or inefficiency, and come into open conflict. If these abuses of participation are to be avoided, the behavior of individuals must be regulated and their separate undertakings coordinated. To achieve this, the human group organizes in order that it can act as an entity. The affairs of the group as a whole must be planned, its interests administered, and its decisions carried out, from a central source: it is only in this way that the private lives of men can be made to serve the public welfare. Authority issues from man's recognition that spontaneous mutuality and persuasion must often be supplemented by organized cooperation and force. It serves as a device through which the group seeks to restrain recalcitrant individuals, assign roles and functions, distribute the burdens and benefits of group life, and distill common programs out of separate purposes. This effort, of course, is never completely successful. Authority is corrupted by those who hold it, resisted by those who lie under it, and frustrated by the complexities with which it has to deal. So authority often aggravates the compulsion, exploitation, and incompetence that it is intended to alleviate. But still the challenge must be accepted. For authority is instituted precisely in order that human efforts may be integrated rather than dispersed.

In the dimension of Process, Purposiveness manifests itself as the sense of *Responsibility*. Self-determination means that individuals have a voice in deciding what their actions are to be: they give to the course of events a direction and a content that it would not have had without their intervention. What men decide has repercussions, both for themselves and for others. In short, men make a difference in what is to be. This being the case, it is incumbent upon them to anticipate the outcomes they prepare, to execute these with care for others, and to acknowledge themselves accountable for the differences they make. Man commits himself to future goals: so he must persevere in his efforts and accept their consequences. Furthermore, men

rely upon one another's commitments in planning their courses: so all must adhere to their declared intentions. Man is a responsible creature to the extent that he recognizes and submits to the fact that he is a creative agent. This is evidently a burden that men often assume reluctantly and seek to evade. To combat such dereliction, duties are defined and penalties imposed. This is done on the ground that if men cannot be made responsible, at least they can be held liable. The logic of this argument is compelling, and practical considerations require its adoption. But this is a second-best solution, and our use of it should not be allowed to obscure the further goal. For here society assesses men, after the event, for whatever evil follows from their actions; and the shortcomings of this procedure are familiar. The sense of responsibility inclines a man, before the event, to act in such ways as will issue in good. In sum, Responsibility is the acceptance of both the logical implications and the practical consequences of the self-determination that man exercises.

In the dimension of Pattern, Purposiveness manifests itself as the quest for *Social Coherence and Continuity.* Men are finite creatures, and so are dependent upon the support of their fellows. If the resources that the world makes available are to be effectively utilized, individuals must cooperate with one another and coordinate their efforts. Flexibility has the previously cited advantages of leaving room for individual initiatives and private arrangements. But it also threatens the integrity and effectiveness of the social order. To obviate this, a vast number of separate undertakings must be brought together. This requires planning, whether private or public; and this in turn requires anticipation. If men are to commit themselves to joint and future outcomes, they must have confidence that established arrangements will be maintained, that obligations will be enforced, that intrusions of the arbitrary and the accidental will be eliminated, and that they can be secure of the results of their labors. The social order should be sufficiently pliant and indeterminate to accommodate various and novel undertakings. But it must at the same time be sufficiently organized and stable to assure the security of these undertakings through large reaches of space and time. For without such continuity, the expectations that men found upon their foresight, prudence, and patience will be frustrated.

If we now summarize the results of the preceding analyses, we can comprise at a glance the metaphysical, moral, and human framework of positive law. The regimes of Possibility and Purposiveness, supplementing and modifying the fabric of Necessity (of sheer persistence and recurrence), move through the dimensions of being and gradually inform them with the distinc-

tive characteristics of the human context. Possibility introduces into these dimensions the special features of Differentiation, Self-determination, Participation, and Flexibility. Purposiveness, acting concurrently, orients these dimensions toward the forms of Cultivation, Responsibility, Authority, and Continuity. It is these two processes, and the conditions that are their outcome, that set the stage for the emergence of positive law.

On the basis of these conclusions we can give a more systematic answer to the question that instigated this inquiry: Why is positive law? At an early stage of the investigation I proposed the hypothesis that positive law is a supplemental principle of order that arises in, and is due to, the peculiarities of the human context: its function is to assure man's being and promote his well-being under the conditions that prevail in this context. We now know that these conditions issue from the operation of Possibility and Purposiveness. So the hypothesis can be restated in more concrete terms: Positive law is an organized instrument through which man seeks to refine and discipline his native purposiveness, and so to meet the challenge with which possibility confronts him; that is, to realize the values and avoid the dangers that his situation opens before him.

We have already exposed the basic structure of this problem. Possibility ushers in the peculiar conditions with which positive law must deal: highly differentiated and self-determining individuals, who insist upon participating in the affairs of the groups to which they belong, and who demand a flexible social order that will allow for private undertakings and arrangements. Purposiveness embodies man's recognition — sometimes vague and tenuous, sometimes clear and tenacious — of what these conditions require of him: human potentialities must be cultivated, men must be trained to responsibility, authority must be established, and a stable social milieu must be provided.

It is from this complex of conditions and values that there issue the special materials and forces with which positive law deals, the special ends it should further, the special functions it serves, and the special problems it must somehow solve in its furtherance of the human enterprise insofar as this is committed to its care. This is the matrix of positive law. Consequently, a close analysis of this matrix should be the surest means to a full and precise understanding of the necessary structure — the inner logic, or inherent nature — of law. And this in turn should furnish a model or standard in terms of which we can evaluate and correct actual legal systems. In practice, even at the highest levels, the pressures that bear on law tend to make it a piecemeal discipline, with its vision more or less circumscribed by the immediate issues with which it is dealing. So it is only by conscious reference to such an abstract and systematic matrix that law, as it goes about its separate

concrete tasks, can adequately measure its obligations, anticipate its consequences, and plot its long-range course. The detailed analyses that would lead from these very general principles to the more exact norms, concepts, rules, and techniques that constitute the actual working apparatus of law, and so would complete this undertaking, are obviously beyond the scope of this paper. But it is essential, if this bare schema is to make any show of vitality and relevance, to draw some of its more basic and significant inferences and to indicate their bearing upon the legal order.

IV

A strong emphasis was placed at the start of this inquiry on the point that positive law is fundamentally a solution to a problem, and the purposes it serves are a reflection of the conditions it faces. Consequently, it was argued, the goals law seeks can best be understood by an analysis of the tasks that it is called upon to perform. That analysis has now been completed, and its results embodied in the preceding account of the matrix of law. But this analysis has been carried out on an extremely high level of abstraction and generalization; and, like any such investigation, it has had to reduce its subject matter to sharp categories and to place these within a systematic and rigid schema. So it inevitably has strong separatist and divisive tendencies, threatening to reduce the situation law deals with to a collection of inert and isolated elements. This danger must now be countered by insisting upon the cohesiveness and dynamism of the field in which law operates.

The general point that I want to emphasize and elaborate in what follows is this: that law functions at the focus of tensions that come simultaneously and concurrently from all of the dimensions of being and all of the regimes of becoming as these occur and make themselves felt in the human context. This has two important meanings for law.

The simpler and more obvious of these is that the problems of cultivation, responsibility, authority, and continuity always and everywhere interpenetrate one another. Though these tasks are theoretically distinct, they merge in fact and overlap in the practical difficulties they raise. The real men and the actual human situations with which law deals spread through these dimensions and involve these problems concurrently. Individual men, the activities in which they engage, the groups that contain them, and the relations that run among them — these cannot exist, and so cannot be understood, save as aspects of a single total state of affairs. So it is impossible to deal with these elements, or the difficulties they pose, in isolation. Any failure or unsatisfactoriness that appears in the human condition will at once betray

a lack of cultivation, be a denial of responsibility, expose the discontinuity of the social order, and exhibit the weakness of authority. Each of these shortcomings is both cause and effect of all of the others. And since the difficulties they pose are reciprocal and cumulative, the efforts to repair them must be coordinated. As law goes about its tasks it inevitably touches all of these aspects of the human situation, though its attention is apt to be concentrated on only some one of them. Any steps that law takes, any concepts and rules and procedures that it develops, dealing with one of these problems will bring about repercussions on its treatment of the others. And its neglect of any of them creates a vacuum that spreads through the human context and undermines the whole legal structure. We are naturally tempted to hope that if we can just overcome one of these difficulties, then the others will automatically be corrected. But this hope is as futile as it is inviting. For to act in this way is to treat what are really aspects of a single problem as though they were separate issues.

The second point to be made is that each of the problems with which law deals is itself internally complicated to an extreme degree. The cause and the character of this complexity raise issues that are a good deal more subtle and intricate than those just discussed; so this matter will have to be examined with more care and detail.

The source of this complexity lies in the fact, the importance of which I have several times emphasized, that necessity, possibility, and purposiveness are compresent throughout reality. Purposiveness is not an autonomous and self-subsistent regime, or state of affairs. It does not supersede and abolish the regimes of necessity and possibility. It only supervenes upon these and modifies them with its own characteristics. Just as the dimensions of being interpenetrate one another, so do these phases of becoming. The human context forms no exception to this principle. Man is subject to each of these regimes, and exists under each of these sets of conditions. So if law is to be adequate to its role in the human enterprise, it must be sensitive to the pressures and requirements of each of these regimes alike. This basic thesis must now be expanded and explained.

The injunction that law must respect necessity runs in two directions. In the first place, law must respect — in the bare sense of acknowledging and accepting — the demands and the limitations that necessity sets. There are some things that men cannot do, others that they are impelled to; there are conditions that men will not long abide, others they insist on; there are changes that men welcome, others they resist, and still others they will acquiesce in if skillfully managed. The human potential is marvelously pliant,

but it has inherent orientations and resistances, as well as critical breaking points. It is incumbent upon law to know these and take them into account.[33]

But necessity does more than merely set limits beyond which purposive intervention is ineffective or ill-advised. It also constitutes the substratum of human existence, and so defines the framework within which such intervention acts. The conditions of similarity, action-and-reaction, subordination, and rigidity, as they were defined earlier, are indispensable to man's existence. Man must be able to rely upon them to satisfy his most vital needs; and they serve as the stable and sustaining base for his further adventurings. So law must respect these conditions in the full and active sense of assuring their maintenance and preserving them against the threats of both erratic possibilities and wayward purposes.

A brief glance at each of the dimensions of the human context will establish both the significance of these conditions and the attention that they elicit from law. Unless individual men — the Many — remained essentially similar they would not even constitute a species; and they certainly could not constitute societies. We recognize this, and seek to guarantee what we regard as the essential similarities of men, by appeal to the ideal of equality. This intention appears most basically in the maxim that all men are equal before the law. It becomes a great deal more explicit and detailed when we set out to establish minimum wages, living standards, compulsory education, conditions of labor and leisure, and so forth. All of these efforts embody our awareness that if the quality of men declines too much, or if the discrepancies among men become too great, then the security of the social order is threatened.

In the dimension of Process, the value of the regime of action-and-reaction finds acknowledgment in the historic insistence that one of the prime functions of law is to eliminate the arbitrary and erratic from human affairs, and so to enable men to rely upon uniformities and regularities in human behavior. The weight of the criminal law and the law of civil liability bears heavily in this direction. These devices seek to hold men to established courses by making them expiate or repair the harm they do when they deviate from such courses.

Our general recognition that there must be ways to keep individual careers and claims in decent subordination to group concerns — to the One — is

33. This argument becomes a good deal more familiar and obvious when we transpose it into terms of the concrete "necessities" that a particular legal system confronts in the actual social, economic, and physical conditions in which it operates. I will shortly touch upon this point more fully. For the moment, I am concerned only with necessity in its most general and pervasive form, as an essential ingredient of the human situation and so as bearing upon all law always.

embodied in such concepts as sovereignty, the prerogative, the general welfare, and the public safety. We arm authority with both the ideal of the public interest and the reality of the police power. And we act yet more definitely to assure the cohesion and effectiveness of the group when we apply the notions of status and function, which take legal form in rationing, conscription, eminent domain, condemnation proceedings, allocation of materials, and similar devices.

Finally, our awareness of the value of a rigid — that is, a settled and stable — pattern of social relations is expressed in the principle that the law must be general, certain, and known. We rely upon law to establish a web of connections between men, to eliminate the accidental and the aberrant from human affairs, and to maintain an elaborate liaison of antecedents and consequences that forms the fabric of society.

Far from being always "harsh" and "niggardly," necessity is a regime that supports human development. Without the conditions it secures, the human enterprise would soon lose all coherence and impetus, and would disintegrate into a series of disjointed episodes. So one major task of the law, as a principle of order, is to serve as a surrogate of necessity, maintaining its inherent values when men too much seek to deny or evade them.

Law stands under an equal obligation to respect possibility. Until quite recently there would have been no need to emphasize this: we have traditionally regarded possibility as an unqualified blessing that should always be promoted, just as we have tended to regard necessity as an unmitigated evil that should be eliminated so far as could be. Possibility was translated into the hallowed concepts of "freedom," "opportunity," and "progress," and so was thought of as an intrinsic and absolute good. This attitude has lately undergone a radical change. As the uses men made of possibility issued in exploitation, corruption, arrogance, and uncertainty — in sum, as they too much undermined the regime of necessity without sufficiently supplementing this with purposiveness — there was a revulsion of feeling and a reversal of practice. Consequently possibility is now often held to be an intrinsic and absolute evil.

Both of these views are mistaken. The value of possibility is real and very great. But this value is also extrinsic and relative: it lies in the initiatives and potentialities that possibility unleashes, the alternatives and advances it allows for, the enterprise and imagination it elicits from men. Possibility can certainly be abused: it can issue in regression as well as progress, the destruction of life as well as its expansion. But it is incumbent upon us to maintain possibility, and to school ourselves to use it properly. For the conditions that it inaugurates are indispensable to the exercise and realization of the full

human potential. Without these conditions, man might make himself secure of much that he now wants; but he would do so at the cost of all further freedom and creativity.

The human and legal significance of these conditions of possibility can again be briefly exemplified. It is through differentiation that men become real individuals, with personalities, goals, and careers that are uniquely their own. Furthermore, differentiation furnishes the variations of talent and interest on which are based originality and specialization, with all of their advantages. Our recognition of the significance of differentiation is enshrined in the rich panoply of natural and civil rights, which figure so largely in our fundamental political and legal documents; it is embodied in more detail in all of the measures that law takes to guarantee the integrity of the person against encroachments from the group, and so to assure men the privacy that is required for effective self-expression and self-realization.

Much the same apparatus witnesses and serves our regard for the values of self-determination. We insist that men be allowed to be themselves, and to devote their energies to their own ends in the ways that they deem best. So we use law as an instrument to minimize the risk that men will be compelled, or coerced, or even unduly influenced against their own inclination and judgment. This attitude is manifested with special clarity in our legal treatment of marriage and divorce, and in earlier corporation law and contemporary labor law. It pervades our legal institutions, both through the constitutional provisions that preserve various freedoms of action to individuals, and in our continuing employment of law to combat private discrimination and official harassment.

We lay a similar stress on the participation of men in the management of society, the basic guarantee of which is found in the concepts of citizenship, representation, and power as delegated and limited. And law acts very explicitly to this same end through all the devices it employs to insure that men will in fact have effective access to government, both to make themselves heard and to secure a fair share of the benefits that society makes available.

Finally, this same general attitude emerges with utmost force in the insistence that the pattern of relations that runs through society be kept highly flexible. This probably reached its apogee in the classic doctrine of freedom of contract, which was a legal fact long before Sir Henry Maine dignified it with historical theory, and which found its strongest statement in the famous provision of Article 1134 of the French Civil Code: "Les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites." But this same intention is embodied in much of the legal apparatus of property, testamentary disposition, and the trust, to mention but a few. All of these con-

cepts and practices rest on the recognition that life requires room for private plans, mutual arrangements, and fluid accommodations.

The preceding specifications of the respect that law owes to necessity and possibility should open the way to a more precise view of the tasks that law confronts as an agent of human purposiveness. Particularly they should give substance to the earlier claim that purposiveness does not displace these regimes, but only supplements and modifies them. We are apt to overlook this, and to regard law, along with other human institutions, as exclusively the creation of our own purposiveness, having no inherent characteristics or limitations other than those that we give to it. So we often act as though we could deal successfully with the problems of cultivation, responsibility, authority, and continuity simply by defining the solutions that we deem desirable and then using the weight of the law and other institutions to impose the terms of these solutions upon men, whether by power or persuasion.

Such a procedure is doomed to failure, for our efforts toward cultivation, responsibility, authority, and continuity must always take account of the regimes of necessity and possibility as they are actually constituted. They must do this for the reason that these regimes supply the materials and set the conditions of our purposive pursuits. What we do at the level of purposiveness, largely through law and other institutions, is to give form, content, and direction to our lives, both individually and collectively. But these activities are dependent upon the stable framework that necessity provides and the fresh potentialities that possibility makes available. Cultivation presupposes both the common substance of humanity and the plasticity of human beings. Responsibility presupposes both individual initiative and a causal nexus through which this can anticipate its outcomes and make itself effective. Authority presupposes men who acknowledge their status and duties as members at the same time that they claim their rights as participants. Continuity presupposes a framework that will maintain its general structure while undergoing changes of detail. These are the presuppositions of purposiveness, and so of all the instruments it employs. The function of purposiveness is to build upon this foundation in a way to promote the realization of the human potential that is bequeathed to it still incomplete.

Consequently, each of the four great tasks of law is in effect a triple task. Since law relies upon the regimes of necessity and possibility, it must take care to preserve their essential conditions. Since it is an agent of purposiveness, it must act deliberately to facilitate the spread of its conditions through the dimensions of the human context. The continuing challenge of law, as of all other human institutions, is to fashion and administer a regime of pur-

posiveness that can direct man's employment of possibility without reinstituting the rigid conditions of necessity.

Space does not permit even a sketch of the substantive and procedural apparatus that law develops and employs to deal with these complex problems. But a brief reference to the content and history of one or two prominent legal concepts may give concrete illustration and support to this still rather abstract argument.

Liability is perhaps the most important notion and technique that law uses in its efforts to fulfill its task with regard to responsibility. There is no way in which law can directly make men into responsible agents: that is, can train and equip them to be sensitive to the differences they make, to anticipate the effects of their decisions, and to take care in carrying these out. But law can quite effectively hold men accountable for the consequences of their actions: it can punish, retaliate, impose damages, and enforce reparations. That is, law can create an apparatus and a set of conditions that will, within limits, induce men to act with forethought and caution, if not with benevolence and concern. Law does this, in general, by creating an artificial order of antecedents and consequences with which to supplement and repair the natural order of cause and effect.

The problem that law now faces is how far to carry this new order. If we are to accept the weight of opinion of legal historians, liability was at times all but absolute, and was certainly strict: a man was held accountable for virtually all of the differences that he produced, however unintended or inadvertent or indirect they might be. Here, law apparently set out to fill up what it regarded as unfortunate lacunae in the causal nexus: if men did not naturally expiate and repair the ills they produced, then law would see that they did. That is, law attempted to preserve the condition of action-and-reaction that characterizes the regime of necessity. In the course of time it developed that this had — or was thought to have — the effect of stifling human energies and efforts: if anything that men did might adversely affect others, and so themselves, then it was best to do nothing. So law then developed the doctrine of no liability without fault. Given the complex interrelations of human lives and actions, men were bound to suffer from the mere fact of the collisions of their efforts and interests, without intention or carelessness on anyone's part. Since enterprise must be encouraged, men were absolved of the consequences of their actions unless these clearly fell within the categories of *dolus* or *culpa*. In short, men were told to exploit possibility. In the course of more time, and with further changes in the conditions of life, this doctrine was found — or thought — to create various and familiar

hardships. So law sought a way to mend these without discouraging enterprise on the one hand or dissolving accountability on the other. Law is still seeking for this *via media,* through such concepts as negligence, liability for risk created, society as the ultimate bearer of risks, insurance, and others.

The concept of the legal person exhibits the play of these same tensions. This notion originally developed as a means to rescue men from a condition in which they were not real individuals, but merely loci of status and function. Men were gradually endowed with rights, protected against interference, and guaranteed a field of action. Then it was found that these persons — whether natural or artificial — were abusing the privileges and immunities with which law had dowered them. So legal action sought to correct this situation by defining more precisely the ends for which and the limits within which the powers of legal personality were to be exercised. Men and groups are natural entities. But all persons are creatures of the law; and law, like any craftsman, is continually trying to improve what it has created. In short, the legal person is never a finished product but always a work in progress.

Contract is probably the most familiar case of this phenomenon of law seeking to preserve the substance of necessity and possibility while informing these with the spirit of purposiveness. Law granted the power to contract only reluctantly and gradually. But once it was gained, its momentum soon carried it to the position of dominance expressed in the above quoted Article 1134 of the French Civil Code. Of course, this apparently absolute freedom was from the first made subject to broad considerations of policy and morality, as in Article 6 of the same Code, which provided that nothing should be done which might contravene "l'ordre public et les bonnes moeurs." And this prohibition was made progressively more precise through rules having to do with good faith, fraud, illicit cause, mistake, unjust enrichment, the protection of weaker parties, and so forth. The cumulative impact of these rules, as interpreted by courts and extended by further legislation, has been to restrict more and more narrowly the freedom to contract. The general technique that is employed in this operation is the substitution of the will of the state (guided by some public policy or program that it has in view) for the wills of the contracting parties (guided by their views of their private interests). This process has now carried so far that commerce and industry have taken organized steps to escape the reach of the law by obviating the need to appeal to it: they in their turn establish substitutes for the legal order in the form of trade associations and private systems for arbitrating and settling disputes. And this continued encroachment of the law has produced the final irony of what the French call *le contrat marché noir,* that strange orphan

of the law that is privately honored, and even enforced, though officially unrecognized and unenforceable.[34]

This discussion of the intricacy of the task of law requires, finally, a reminder of the remarks made at the beginning of this section. The content of every legal concept reflects not only all of the regimes of becoming, but also all of the dimensions of being. Each such concept has its primary source and locus in some one of these dimensions: it has been developed and employed chiefly as a means of dealing with the problem of cultivation, or responsibility, or authority, or continuity. But since these problems overlap, so do the meaning and the reach of these concepts. Whatever their basic reference and objective, they embody a concern for all aspects of the human situation. So we should not be impatient of the ambiguities, the vacillations, and the subtle distinctions that are so characteristic of any mature legal system. These are not at all the loose ends or the incommensurables that they may appear to be. They are rather law's answer to the complications and tensions that it encounters as it goes about its tasks. Legal concepts do not embody eternal truths or absolute values or categorical solutions; so they should never be thought of as static and complete. These concepts are summations of the past achievements of purposiveness, and indications of its present intentions; so they should always be thought of as subject to future correction.

It is, however, quite understandable that law should be continually tempted to escape this complex and volatile task by reducing it to simpler and more static terms. The most obvious temptation that law faces is that of disposing of its problems once and for all by a return to the regime of necessity. Since possibilities are always uncertain in their outcome and unsettling to the established order, their future occurrence would be eliminated by a program projected far into the future and rigorously adhered to. The human scene would be minutely regulated and ruthlessly administered, and law would henceforth be only a passive agent of the status quo. When the fallacies of this procedure are realized, law is then tempted to shirk its problems by installing a regime of pure possibility: law would renounce the task of defining and directing the uses that men are to make of possibility, and would act only as an impartial arbiter of the conflicts that inevitably arise out of the private uses that men determine for themselves. Law here conceives itself in purely procedural and operational terms, and absolves

34. The course of this development in French law is brilliantly traced by R. SAVATIER, LES MÉTAMORPHOSES ÉCONOMIQUES ET SOCIALES DU DROIT CIVIL D'AUJOURD'HUI, esp. in ch. 3 (1948).

itself of responsibility for the content that gains expression and actualization through its forms.

These conceptions of law have had both theoretical and practical ascendancy at various times in the past, and they still exert an influence. But the inadequacy of these ways of dealing with the issues that law faces is now widely recognized, and they are rejected in principle; though I think it can be shown that legal action still falls into these errors in concrete cases, where the theoretical path that it is following is disguised, even from itself, by the maze of facts through which it is treading its way. Instances of this have been suggested in the preceding discussions of various legal concepts.

To adopt the first of the views above would be to maintain that the purposes of law are already so clear and certain that they require no further refinement and permit of no deletions or additions. To adopt the second would be to maintain that these purposes are so personal and arbitrary that they can be neither anticipated nor disciplined. Both of these views depend upon the supposition that it is the function of law to serve purposes that somehow come to it from elsewhere already complete. And this supposition is altogether mistaken. For law does not inherit its purposes ready-made: it has to fashion them. The human purposiveness of which law is an agent is very far from being a completely coherent and lucid force: it is often inchoate and inarticulate. Law is one of the major institutions—though by no means the only one, and I shall turn to this point in a moment—that give shape and direction to this force. So law cannot sit idly by and await the outcome of the interplay of necessity, possibility, and purposiveness as these weave their way through the dimensions of the Many, the One, Process, and Pattern. Since law helps to preside over these regimes, it must take an active role in determining both the contents and the conditions of the major goals toward which they are striving—cultivation, responsibility, authority, and continuity.

Just as the problem with which law deals is a synthesis of elements, so is law itself an element of an integrated social context. For law is a participant in a larger undertaking, and is only one instrument among others through which man seeks to master the conditions that are set by possibility and purposiveness. What these processes inaugurate in the first instance is that complex phenomenon that we call human culture. Put broadly, culture is constituted by man's whole conscious and directed effort to develop his own powers and the resources that the world offers, to overcome the difficulties that these set, and so to carry the human enterprise to its proper consummation. This effort proliferates into a great many institutions: family, morality, religion, education, technology, economic and industrial organization, positive

law, and others. Each such institution tends to be primarily concerned with some particular area of human affairs and values, to have a definite sphere of special competence, and to develop techniques that are peculiarly its own. But these institutions overlap and intermingle, they borrow from and depend upon one another, and they are usually at least roughly coherent and complementary in the functions they exercise. Finally, every such institution exhibits a strong inclination to extend its reach and its influence wherever possible.

These facts are important to an understanding of the spirit in which law should conceive itself and its tasks. If law is to cooperate effectively in the conduct of the human enterprise, it must always approach its decisions with three distinct but closely related questions in mind:

1. The question of the conditions of man's being and well-being. This goes to the character of the human situation, the potentialities and the limitations that are inherent in human nature, the demands and the opportunities that are set by the environment. This raises the question of what man can and should do, as distinct from what simply cannot or should not be done. It is, in brief, the issue of the meaning of the human vocation.
2. The question of what can and should be done by institutions—by organized guidance and assistance—as distinct from what can only be done by the individual for himself.
3. The question of what can and should be done by positive law, as distinct from what can be better done in other ways by other institutions.

It is essential to the successful functioning of law that these questions be separated, and that each of them be carefully investigated. The fact that certain things and situations are desired does not establish that they are possible, much less that they embody sound and legitimate purposes. The conviction that men should enjoy certain goods and attain certain ends does not mean that society, through its institutions, either owes these to or can bestow them upon its members. And the knowledge that organized efforts are required to achieve certain values does not entail that this effort devolves upon or is within the reach of law. In brief, to hold that law is an instrument for the achievement of human values is not to urge that law must acknowledge as values all of the claims asserted by men, or that law can promote all of the values that it acknowledges, or that these values can be promoted only by law. Yet these conclusions are frequently drawn, to the detriment of all

concerned. It is only from the triple inquiry outlined above, however onerous it may be, that the proper tasks of law can be distilled. For, as I have argued throughout, law is only a supplemental principle of order.

The final point that must be insisted upon, especially in view of the general tone of this paper, is the quite simple but often neglected one that the problems with which law deals are incapable of any final and absolute solution. This hard truth is rooted not only in the incompleteness of human knowledge, but also, and far more deeply, in the fact that change is an ultimate characteristic of reality. Since we can never foresee in detail the situations and issues with which we will be faced, we cannot define beforehand the ends to be sought, the norms to be applied, the courses to be followed, or the techniques to be employed. To attempt to do so with a set of established principles and concepts, however adequate it may have been to the local past, is to answer questions before they are asked. One might think that the contemporary skeptical and relativistic temper would have rid men's minds of this error. But such has not been the case. Indeed, it almost seems that the more insistent becomes our theoretical credo that there are no right answers, the more frantic become our efforts to achieve final solutions. Such an approach frustrates the ends it intends to serve. Since new possibilities are continually occurring, purposiveness must continue to be originative and adaptive. The only effective answer to uncertainty is creativity.

This means, to be quite explicit and to reiterate a disclaimer entered at the beginning of this inquiry, that it is futile to search for any system or code of law that can be finished and enduring, in the sense of providing a logical schema from which we can derive the correct solutions to whatever problems the future may bring. There undoubtedly are certain principles of both substantive and procedural law that reflect such basic human facts and values that their validity seems assured, unless man's generic nature and situation undergo a really radical change: such, for example, are the rules of equality before the law, that no man should be judge in his own cause, that the law should be certain and general, and the injunction, *honeste vivere, alterum non laedere, suum cuique tribuere.* In no manner do I mean to belittle these truths and other similar ones. To the contrary, I think we make a serious mistake if we dismiss them as banalities that are too vague and simplistic to be effective. For to say that a truth is self-evident is not to say that it is unimportant or even obvious. "Self-evidence" means that a proposition is evident in and for itself once its content has been grasped, felt, and realized: it does not at all mean that it is evident to untutored common sense, either as a theoretical truth or a practical rule. The slightest reflection will make us

aware to what extent not only law, but life itself, depends on the widespread acceptance and practice of such maxims. It will also make us aware that they require a continuing effort of persuasion and protection.

But it must be insisted that even the full catalogue of such maxims does not constitute a set of principles the sheer logical application of which will settle all legal issues that may arise. Even if the task of legal theory were perfectly accomplished, and the broad permanent contours of the matrix of law were accurately depicted, law would still not become a merely logical discipline. For the elements that compose this matrix change, as do all things. And the individual occasions that occur within it, and confront law, vary in infinite and unforeseeable ways. So we cannot, by even the finest and most persistent exercise of intelligence, furnish law with a set of rules that will validate its decisions and guarantee its outcomes. The best that we can hope to do is equip law with an explicit and coherent, but also abstract and generalized, analysis of the structured field in which it operates. This would enable those engaged in the law to reach a better understanding of the actual issues they deal with, to anticipate more adequately the consequences of the various paths open before them, and to measure more delicately the values they must somehow balance. But it would not, even then, generate mechanically any "logical" or "best" solutions.

To this extent legal science will ineluctably remain relativistic and inexact. For the operations of law have to do with actual things that are concrete and particular, and so must escape the grasp—though not the reach—of principles that are necessarily abstract and general. This fact has two important implications for law, which I shall here discuss but briefly.

This means, in the first place, that any particular legal system must be appropriate to the character of the Many, the One, the Processes, and the Pattern that constitute its actual environment, or setting. It is impossible to evolve a system of law that can operate effectively and justly irrespective of the nature of these elements. Law depends upon—and so must be fitted to—the men with which it deals, the state of which it is at once the agent and the overseer, the pursuits and activities and interests that it is to regulate, and the relationships that men have already established with their surroundings and among themselves. As these vary—and they do so to a radical extent—law too must vary. It is feckless to construct a legal system *in abstracto,* to promulgate one *de novo,* or to import one *in toto,* and then expect it to create the kinds of elements that it requires. For law cannot create a Many, a One, Processes, and a Pattern to its own specifications. It inherits these. And though it certainly can, and does, change and mold them, there are limits to its powers in this direction. So a particular system of law can take root and

function successfully only when the cultural milieu is apt to receive it. The historical school is clearly thus far right. Law cannot be exported, in the way technology can, because it requires a far more subtle adjustment to the conditions in which it is to operate, and a far more intimate participation on the part of the people who are to operate it and live under it.

Law is ineradicably relativistic, in the second place, in the sense that any particular legal system depends upon choices that are ultimate and hence logically unjustifiable. The analyses of this paper should have made abundantly clear the complexity of the matrix from which law issues and within which it acts as "a principle of order." Law must reconcile the always different and often conflicting claims of the Many, the One, Process, and Pattern. It must also balance the values that are inherent in the regimes of Necessity, Possibility, and Purposiveness. Even in abstract and general terms, there are various alternative solutions to this manifold of problems: that is, men come to different theoretical conclusions regarding the relative urgency of the tasks, and the relative importance of the goals, that law serves. And I see no way to pass an assured a priori judgment upon the merits of these. One can but await their outcomes: and then these frustrate exact measurement. When we allow for the additional factor of the varying natural, human, and social circumstances in which law acts, dogmatism becomes yet more absurd. Given the complex of values that law is expected to promote, compromises and sacrifices among these are inevitably going to be required. Law has to restrict and handicap its efforts in some of these directions in order to strengthen them in others. Any particular legal system, looked at in this light, represents a set of such ultimate choices. And again I see no way in which one of these can be categorically declared better than all others. That is, I see no way in which the most acute analysis, issuing in the most adequate illumination of these matters, can afford a solution in principle to these value questions. Different legal systems embody different value decisions. Such decisions should certainly be made in the light of principles. But they cannot be made by principles. They must be made by men.

The preceding remarks might be interpreted to mean that any particular legal system simply is what it is, and that there is no way in which it can be criticized by reference to what it ought to be. That is, I might be thought to be espousing the sort of extreme relativism that is attributed—usually mistakenly, I think—to the legal positivists. This is not at all what I intend. I have just insisted upon one sort of "ought" that is applicable to legal systems: they ought to be relevant to and effective in the actual conditions they confront. This can be stated in the form of a principle: If the discrepancies between a body of law and its concrete and local circumstances become too

great, then this body of law is extrinsically inappropriate and inadaptive. This might be called the pragmatic or operational "ought," and it should be acceptable to even the most confirmed legal realists.

But the whole of my analysis has argued for, and tried to exhibit, another sort of "ought" that is also applicable to legal systems: they ought to be responsive to the tasks and faithful to the goals that the ideal of human development imposes upon them. This can again be stated in the form of a principle: If the discrepancies between a body of law and the abstract and enduring matrix that I have been analyzing become too great, then this body of law is intrinsically distorted and incomplete. This might be called the theoretical or formal "ought"; and I see no reason, other than the illicit ones of the excesses of the past and the prejudices of the present, why it should not be equally acceptable. For it merely asserts, to put the matter very generally, that law has a source and a destination that lie beyond itself, and that it can be evaluated in terms of these. That is, this principle asserts that the tasks and goals of law are set by the conditions of man's being and well-being; if any body of law too much violates these conditions, or is inadequate to serve them, then it is to that extent faulty. I think it would be all but universally agreed that both theoretical and practical considerations require that law be subject to such independent conditions and criteria; otherwise we fall into the most vicious errors of the imperative theory, and find ourselves driven to the position that might makes right. My analysis has only sought to exhibit these conditions precisely and systematically, and so to afford a more exact criterion of actual legal systems. It does not pretend to yield any absolute or eternal code. But neither does it mean to issue in a relativism of the here and now. Rather, it hopes to have elucidated a set of principles that can guide and correct, though it can never guarantee, our legal actions.

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It might be objected that the analysis and argument of this paper issue in an interpretation of law that is extraordinarily intricate and fluid. And it might be complained that it is difficult for law to embrace all of the tasks and goals here assigned to it. Both charges must obviously be admitted. The only answer to them is to insist that this is, as a sheer matter of fact, the matrix within which positive law must and does operate. And to substantiate this claim, I think it can easily and convincingly be shown that law does, as a further matter of fact, undertake each and all of these tasks as it goes about its daily work; though all too often, alas, it deals with them separately and intermittently, and as though unaware of their interconnectedness. This

complex involvement of the law has been concretely illustrated, though rather cursorily, in some of the preceding discussions. Since, then, this is the context and the challenge of law, it is well that law be aware of it, so that it can act with a clear and coherent consciousness of its total role.

I would like, in conclusion, to put this matter in another way. It has long been a commonplace that law is a tissue of paradoxes. No one has been more alert to this characteristic of law, or has given it a more central place in his legal thought, than Mr. Justice Cardozo. In the last of his major works, he has this to say on the subject:

> The reconciliation of the irreconcilable, the merger of antitheses, the synthesis of opposites, these are the great problems of the law. "Nomos," one might fairly say, is the child of antinomies, and is born of them in travail. We fancy ourselves to be dealing with some ultra-modern controversy, the product of the clash of interests in an industrial society. The problem is laid bare, and at its core are the ancient mysteries crying out for understanding — rest and motion, the one and the many, the self and the not-self, freedom and necessity, reality and appearance, the absolute and the relative. We have the claims of stability to be harmonized with those of progress. We are to reconcile liberty with equality, and both of them with order. The property rights of the individual we are to respect, yet we are not to press them to the point at which they threaten the welfare or the security of the many. We must preserve to justice its universal quality, and yet leave to it the capacity to be individual and particular. . . . Deep beneath the surface of the legal system, hidden in the structure of the constituent atoms, are these attractions and repulsions, uniting and dissevering in one unending paradox.[35]

We may deplore this situation, but it is futile to deny it and irresponsible to evade it. It is surely better to seek for a comprehensive grasp of the tensions with which law must treat, the paradoxes it must resolve, than to deal with them in isolation. The latter procedure usually raises at least two problems for every one it settles. The former should enable us to anticipate and measure the outcomes we are preparing, and so to act with a larger and a longer view.

The whole intention of the preceding analyses has been to give a systematic exposition of these "ancient mysteries" of the law to which Justice Cardozo paid such eloquent testimony. I would maintain that the results of this inquiry do no more than exhibit what is actually involved in the deceptively simple dictum, "law is a principle of order." When we analyze this apparent truism, this is what we find. I do not think that I have invented complications. I have, I hope, merely exposed those that are usually covered by a too facile acceptance of a familiar formula.

35. BENJAMIN N. CARDOZO, THE PARADOXES OF LEGAL SCIENCE 4, 5, 7 (1928).