

INDIANA LAW JOURNAL

Volume 30

WINTER 1955

Number 2

PROCESS AND PATTERN: THE SEARCH FOR STANDARDS IN THE LAW*

CHARLES EDWARD WYZANSKI, JR.†

When invited to speak at this semi-centennial celebration, I was asked to "discuss recent developments and future prospects" of the law. This I have understood as a suggestion that my address should be not on some particular doctrine of substantive law, but rather on changes during the twentieth century in the general approach of jurisprudence. My subject, *Process and Pattern*, was chosen with deliberate reference to the titles of two famous books of the last generation of scholars, Mr. Justice Cardozo's *The Nature of the Judicial Process* and Professor A. N. Whitehead's *Process and Reality*. For it is my purpose to indicate that, while retaining much of the scientific attitude and the spirit of realism which characterized the opening decades of this century, the leaders of our profession recognize that they must assume a more humanistic or philosophical role today. Within and without the universities men are returning to the ancient Greek view that the law not merely should be a technique for settling strife on the basis of all the relevant facts, but also should mould men and teach a scale of values.¹ The law is both the interpreter and the designer of the durable fabric of social purpose.

In approaching my topic, I shall start with the state of jurisprudence in the early years of the twentieth century, and then I shall turn to what I regard as the opportunities now opening up both in the world of scholarship and the world of affairs.

May I begin with a story that has troubled me since I first heard it, a tale which is by no means entirely fair to the total outlook of either of its chief participants, but which reveals one of their moods more effectively than many less dramatic episodes. About 1915 Mr. Justice Holmes

* An address at the Fiftieth Anniversary of the Graduate Schools of Indiana University, April 30, 1954.

† United States District Judge for Massachusetts.

1. See KITTO, *THE GREEKS* 94 (1951): "[W]e find it hard to think of law as a creative, formative agent, but this was the normal Greek conception." Compare Hall, *Unification of Political and Legal Theory*, LXIX *POL. SCI. Q.* 15, 16 (1954) quoting Aristotle "that the constitution is 'a way of life.'"

invited a then young United States District Judge, Learned Hand, to accompany him as he rode toward the Capitol to sit on the Supreme Court of the United States. As they approached their destination, the District Judge left the carriage and, waving farewell, called out, "Do justice, sir." Sharply he was summoned back by his revered master, "Sonny, you don't understand my job; it is to apply the law."

This reminder, like the Justice's famous address on "Natural Law" and the first half of his essay on "The Path of the Law," had a second point, much needed when it was made.² As we are constantly reminded by the law of negligence, fraud, and restraint of trade, for example, the law is different from morality even though the common vocabulary of the two different disciplines often suggests otherwise. The maintenance of this distinction is not only intellectually but politically important to those who reject arbitrary despotism and understand the premises of a constitutional democracy. For the judge should not suppose he has a roving commission to do what he fancies is good. A completely free judge is the symbol not of a free society but of the rule of the elect.

Moreover, Holmes was concerned that at the outset of his course the student should learn that the Anglo-American law approaches all questions of substantive right through the avenue of procedure. Maine was perhaps the first to discern this truism. Maitland showed its English application by his historical review of the ancient writs issuing out of Westminster.³ Holmes, as a judge, was to drive the message home: "Legal obligations that exist but cannot be enforced are ghosts that are seen in the law but that are elusive to the grasp."⁴ The New Dealers were much later to profit by this lesson when they translated hoary platitudes regarding labor's so-called right to organize and the public's so-called right to know about enterprises in which they had invested money into the legally effective machinery administered by the National Labor Relations Board and the Securities and Exchange Commission.

But there were also grave risks in this realistic and almost cynical phase of Holmes' teaching. The first was that it concentrated attention on certain limited types of rules applied by appellate courts. Even in these tribunals of last resort, it is not quite true that the law is settled without reference to justice. Sometimes when the letter is clear the result is so repugnant to what the judges regard as the community policy

2. This and the succeeding sentences borrow heavily from Howe, *The Positivism of Mr. Justice Holmes*, 64 HARV. L. REV. 529 (1951); Hart, *Holmes' Positivism—An Addendum*, 64 HARV. L. REV. 929 (1951); Howe, *Holmes' Positivism—A Brief Rejoinder*, 64 HARV. L. REV. 937 (1951).

3. See MAITLAND, *THE FORMS OF ACTION AT COMMON LAW* (1936). Compare MAINE, *EARLY LAW AND CUSTOM* (1883).

4. *The Western Maid*, 257 U.S. 419, 433 (1922).

that they feel free to make an exception, though if the judges are prudent they will emphasize that they are not exercising a dispensing power founded on pure sympathy. Either they will express the exception in terms of the law's intent or they will say that the exception rests on a principle more generalized than the distressing circumstances of a particular case of hardship.⁵ At other times when the law is silent and the case had not been expressly foreseen by the legislature or by an earlier court enunciating a broad rule, the judge is directly faced with the need of framing a precept consistent with his understanding of what the legislator would have thought just. Although the American judge lacks the power given by the 1907 Swiss Civil Code to apply the rule which he would establish if he were acting as legislator,⁶ he has sometimes been thought under a duty to fill gaps in a statute by inserting a provision consistent with what he supposes the authors of that statute would have desired.⁷

More significantly, the Holmes' statement deliberately ignored the extent to which the application of law is entrusted to bodies other than appellate courts. Whenever a jury is used, the law, in most states and even in the federal courts under the current interpretation of the Seventh Amendment to the United States Constitution, self-consciously allows laymen a wide margin of freedom to temper the rules, or, if you please, to tamper with the rules, in the light of laymen's views of justice. Thus no hornbook statement of any rule of law is of much value unless the practitioner is fully aware whether its enforcement rests upon a judge acting alone, or upon a judge and jury together. This crucial distinction is not destroyed, though for a novice it is sometimes blurred, by modern devices purporting to consolidate the rules governing actions at law and suits in equity.

A corresponding latitude is enjoyed by prosecutors in selecting criminal cases for presentment, by grand juries in indicting, and by trial judges in imposing sentences, in prescribing equitable remedies,⁸ and in exercising the unappreciated but vast discretionary powers to govern the methods

5. Cf. authorities cited in *Latva v. Nicolls*, 106 F. Supp. 658, 662-663 (D. Mass. 1952).

6. PATON, *JURISPRUDENCE* 166 (1946); FRIEDMANN, *LEGAL THEORY* 221 (2d ed. 1949).

7. See *Vermilya-Brown Co. v. Connell*, 335 U.S. 377, 388 (1948); *United States v. Klinger*, 199 F.2d 645, 648 (2d Cir. 1952); and *Textile Workers Union v. American Thread Co.*, 113 F. Supp. 137, 141 (D. Mass. 1953).

8. Cf. *United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass. 1953).

in which each individual case is presented for decision.⁹ The whole amorphous body of administrative law is encased in the current views of justice and sound policy held by the ruling group, as every intelligent voter realizes when he casts his ballot either to continue or to replace an administration in office. This year's alterations in anti-trust, labor, financial, and governmental employment policies offer vivid reminders.

Furthermore, many who read Holmes forget, what he did not, that in daily life the law becomes operative much less through court decisions than through the thousands of unrecorded acts of individuals, some proceeding with the advice of counsel, and many more proceeding on the basis of their own understanding of their rights and duties. While this "living law," to use Ehrlich's celebrated phrase,¹⁰ may not have quite the coercive force of judicial decrees, it is of tougher fibre than mere custom, etiquette, or ethics. The actor views it as his required compliance with a community imperative. His compliance is not merely a reflection of, but, to some degree, a self-enforcement of, what he understands to be the rule of law. Conversely, a rule of law actually enforceable in court tends to be not merely a reflection but also an enunciation, of the standard with which most men voluntarily comply.

What I have said so far about the relation of law to the community's notions of justice is, of course, in no sense novel. Nor would it have shocked any practitioner of the last half century. But it does suggest that there were more serious shortcomings than he perhaps realized in the teaching methods which were introduced by Dean Christopher C. Langdell, the pioneer of the casebook form of instruction. For Dean Langdell avowedly proceeded on the theory, "[f]irst, that law is a science; secondly, that all the available materials of that science are contained in printed books. . . ."¹¹

These postulates are so transparently false that unless severely limited no first rate jurist could have accepted them, or did accept them. And yet it took more than thirty years before the law teachers openly revolted from the orthodox casebook based exclusively on appellate cases. But that revolution occurred a generation ago and no instructor worthy of his salt now tries to teach any branch of law exclusively from the published reports. Individual instructors may differ in the degree to which they supplement court law with material drawn from economics, politics,

9. Perhaps an extreme example of this last power is a judge's action in setting for separate trial the issue of liability (as distinguished from damages) in automobile accident cases. See *Reilly v. Maine Freightways*, C. A. 51-852 (D. Mass., Sept. 24, 1952).

10. See EHRlich, *FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW* *passim*. (Moll's transl. 1936).

11. See HURST, *THE GROWTH OF AMERICAN LAW* (1950), from which this is quoted, *id.* at 185.

sociology, and other behavioral sciences, in the extent to which they employ historical and philosophical sources, and in the use they make of hypothetical cases, drafting problems, governmental reports, private publications, statutes, regulations, articles and even bar association speeches; but every modern teacher defines the subject matter of the law far more broadly than did Langdell.

The law teaching of the middle of the twentieth century differs from the law teaching of the late nineteenth century less in its attitude toward what the law should be than in its attitude toward what the law is.¹² The recent trend has made us better able to identify the best of claims which compete for legal recognition; it has made us more precise in defining their nature. We are somewhat better informed of their history. We can more readily dissociate emotional from rational aspects. We are not quite so much prisoners of a deceptive verbalism, for we have learned much from the logicians, though most of us take our Wittgenstein or Quine through the medium of a Cohen or a Bart. And from Dewey and Ryle or from the kind of general talk which circulates in academic communities we have become aware that legal thinking like other problem solving is neither exclusively inductive nor exclusively deductive, but that the development of theory and of fact proceed apace, though sometimes theory seems to move a step ahead in tentatively testing the ground which is to be explored.

In common with other behavioral sciences we have been great gatherers of facts. Groups of scholars, aided by foundations' grants, have statistically studied torts, crimes, types of contracts, and business arrangements. Federal and local agencies regularly prepare tabular reports on courts and litigation. Administrative agencies collect, and to some degree, analyze practices in specialized industries or areas. Consequently we have a plethora of detail as to the frequency with which certain interests are manifested, and we are not without clues as to the pressures and strengths they represent. Indeed current practices in all fields of the law have been surveyed and tabulated in the way which the country as a whole now associates with that sociologist who is perhaps the most world-renowned member of the Indiana faculty.

Like Professor Kinsey and the FBI, most of us have not purported to evaluate except in terms of frequency, strength, power, or like materialistic measures, the material which we have gathered. Many of us at one time would have said that it was not our business to attempt the task. We might have described the law, as, with Professor Schumpeter's endorsement, Mrs. Robinson described economic theory, as "a box of

12. Compare POUND, *THE SPIRIT OF THE COMMON LAW* 212-214 (1921).

tools,"¹³ thus implying that the problem of ultimate standards is either insoluble or should be referred to some other discipline. An illustrative, if apocryphal, legend recites that when one of his students suggested that a proposed solution of a law problem was immoral, a Harvard professor rejoined, "I know nothing about that question. You had better take it to a member of the faculty of the Divinity School."

This former indifference, if not hostility, toward problems of ultimate value had its understandable justification. It was to some degree a response to the loose thinking of earlier generations, to their vagueness which stood revealed when one conscientiously sought to apply any proclaimed set of values to an urgent concrete problem. It was an attack upon hypocrisy, for the facts gathered by the legal scientists, like the facts gathered by other social scientists, uncovered the wide differences between the practices men endorsed by conduct and those they merely countersigned with words. It was also an attitude attributable to the widening scope of scholarship which had undermined the parochial framework of the dogmatist. For every man as he learns of the standards of other peoples knows that what had seemed to him inevitable is a reflection less of human nature than of specialized nurture. Are we not all initially attracted by the sophistication of Herodotus, who after reciting that Darius found that no money would tempt the Greeks "to eat the bodies of their fathers when they died," and that no sum would induce that race of Indians "called Callatians . . . men who eat their fathers" to "burn (as did the Greeks) their fathers at their decease," concluded that positive or customary "law is the king o'er all"?¹⁴

Yet this relativism, superficially attractive on first impression, is now everywhere subject to scrutiny. The reasons for taking a second look are so patent that it is hardly necessary to state them. We live in a world where so many revolutions are occurring simultaneously that we clamor for stable principles to which we can anchor faith. Many of these revolutions trace their causes to modern technology. Industrial advance has had effects more profound than the raising of the standard of living, the increase in leisure, the acceleration of communication, the promotion of travel, the movement of populations from country to town, the specialization of jobs, the transformation of the characteristic incidents of property,¹⁵ and the authority newly vested in a managerial class. Although each of these changes by itself profoundly dislocates pre-existing equilibria, it is their combined effect which is so disturbing.

13. See SCHUMPETER, *HISTORY OF ECONOMIC ANALYSIS* 15 (1954).

14. HERODOTUS III, § 38.

15. See HALL, *THEFT, LAW AND SOCIETY passim*. (2d ed. 1952).

In each separate nation the picture presented, as Walter Rathenau so aptly phrased it, is one of "the vertical invasion of the barbarians." This epigram is not a mere manifestation of social or intellectual snobbery. Graphically it draws attention to the undeniable fact that the masses have come to power before they have been trained in the standards of a civilization in whose administration they quite rightly want to have a predominant share. And what has happened within the several nations may happen as between the nations. For was not Paul Valery prophetically perceptive when, in 1919,¹⁶ he stated that by developing modern technology the Europeans and Americans have shifted the balance of power to peoples not responsive to Greek, Jewish, and Christian traditions? "[T]he classification of the habitable regions of the world tends to become such that brute size, numbers, and statistical elements—population area, raw materials—will at last exclusively determine this classification of the compartments of the world. . . . We have been fools enough to make forces proportional to masses."¹⁷

More ominous than these outward alterations in the power structure, but in part attributable to them, is the recurring question whether we have not in the last few generations placed too exclusive reliance upon science and its methods. This doubt stirs among the scientists themselves. Erwin Schrödinger in *Nature and the Greeks* observes "the disconcerting 'openness' of the outlook gained from experience alone" and the necessity of a scheme of value to close the gap in which man finds himself "in order to raise his confidence in life and strengthen his natural benevolence and sympathy towards his fellow creatures."¹⁸

A like attitude is displayed in the humanities where there is a new willingness to search for some standard other than accurate portrayal of the superficial realities of daily life. Basil Willey, in *The Seventeenth Century Background*,¹⁹ writes:

It was not the fault of the early scientists that their methods and their abstractions were mistaken for philosophies, but none the less this is what tended to happen. Few to-day (and I believe still fewer to-morrow) can really wish to revive scholasticism *in toto*; as an account of reality it is far too exclusively intellectual and rational. But its great value must be preserved somehow: its testimony to the primacy of the 'truths' of religious experience. We may not want these 'truths' theologically and

16. See *La Crise de l'Esprit*, reprinted in *Varietes* I, 11, 56 (Gallimard ed. 1924), translated by Malcolm Cowley in *VARIETY* 1-24, under the title *The Intellectual Crisis* (1927).

17. *Id.* at 30-31 in the French edition; *id.* at 22 in the English translation.

18. SCHRÖDINGER, *NATURE AND THE GREEKS* 4 (1954).

19. WILLEY, *THE SEVENTEENTH CENTURY BACKGROUND* 23 (1934).

metaphysically expressed; but we do want to be able to experience reality in all its rich multiplicity, instead of being condemned by the modern consciousness to go on

‘viewing all objects, unremittingly
in disconnection dead and spiritless.’

And even so convinced an “immoralist” as John Maynard Keynes, having by 1938 abandoned the pseudo-rational view of human nature which he had once held, recognized “that civilization was a thin and precarious crust,” and that it depended on “traditional wisdom or the restraints of custom,” and that among the values deserving “contemplation and communion” are “those concerned with the order and pattern of life amongst communities and the emotions which they can inspire.”²⁰ And nowhere more than in the law is there a demand that we address ourselves to the subordination of the world of fact to the world of value. No one trained in the Anglo-American tradition who paused to consider what “law” was as administered by Hitler’s judges, or who has tried to grasp the essential theories of Soviet jurisprudence, could remain entirely satisfied with a positivist, empirical approach to his profession.²¹

Less dramatically than foreign events, domestic developments require a further consideration of the nexus between law and justice. In America law has altered its nature in part because it is changing so much faster than it did in Holmes’, or Gray’s, or even in Cardozo’s generation. When those giants thought and wrote of law they were living in a stable society where the judges were regarded (perhaps over-generously) as the chief formulators of the more important legal rules. But we live in an age where the preponderant impact of law traces itself to swiftly acting legislatures and their administrative creatures. We have entrusted the law to bodies of men who, unlike judges, are not acting under partly declared and partly subconscious adherence to established traditions of justice, to canons of professional competence and discipline preserved by the bar, and to accustomed limitations of judicial office. The new authority does not find itself so specifically enveloped by an acknowledged realm of value. For this new authority it becomes imperative, unless we are to go in the direction of Nazi Germany and Soviet Russia, to make a determined effort to uncover, restate, amplify, and provide for the growth of value standards.

Now it is much easier to assert that the law is subject to the overriding sovereignty of justice, or to assert that law is a mere province in

20. KEYNES, *TWO MEMOIRS* (1949). The quotations are pieced together from the second memoir, *My Early Beliefs*, at 98, 99, and 101.

21. See McILWAIN, *CONSTITUTIONALISM: ANCIENT AND MODERN passim* (revised ed. 1947).

the realm of ultimate value, than it is to find, or even to sketch in outline, the approach to justice or value. There are those who have an answer phrased in terms of revealed religion. But this is an avenue which for most men is available only if they have been led to it by early training, by subsequent emotional crisis, by capacity to suspend rational doubt, or by some extraordinary variety of experience which engenders faith. Moreover, the modern educated believer in revealed religion, while satisfied to take as an absolute his church's view of the framework of society, finds that revelation offers few principles governing modern problems of the individual and the group. What his church prescribes, if it speaks in detail, is a canon law which like the civil law is largely traceable not to divine revelation but to human construction, contrivance, and, in the best sense of this misunderstood term, casuistry. Much the same concession of the degree to which man rather than God had prepared the pattern would have to be made, it seems to me, by those who assert their allegiance to "natural law," at least in the sense which the term was understood by early eighteenth century Americans who derived through Grotius, Puffendorf, and Vattel what then was available of Greek, Roman, and Mediaeval jurisprudence.

But some may say that there is testimony that all men under God will in time achieve the same basic standards. Is this thesis corroborated by the studies of the anthropologist, who has mastered the structure of comparative societies? It is true that Professor Kluckhohn and others have made promises that their work will in time yield, though it has not yet produced, a scale of universal values. They assert that despite disparities in detail every culture revolves around one central core of virtues prized by man no matter where found or reared.²² I have no wish to be counted as an absolute pessimist on this prediction, but I shall be surprised if A. N. Whitehead and Morris R. Cohen are not right in believing that while we should continue to study the values held in common by all societies and ages, we cannot expect that the corpus will be found large enough for much practical application or precise enough to justify the preference of one value to another.²³

Revelation, natural law, comparative science hardly take us beyond the threshold when we face the concrete case. Can society validly muster into military service a conscientious believer in pacificism? Can it validly

22. See Kluckhohn, *An Anthropological Approach to the Study of Values*, a communication delivered to the American Academy of Arts and Sciences, February 14, 1951.

23. See Price, *The Permanence of Change: Dialogues of Whitehead*, 193 *THE ATLANTIC MONTHLY* 67, 70-71 (April 1954); and Morris R. Cohen's questions at the end of his contribution to *MY PHILOSOPHY OF THE LAW* 31, 43-44 (1941), published by the Julius Rosenthal Foundation.

restrain a man's freedom of movement on the basis of parentage? Is it contrary to justice to deprive men of liberty or even of life for conduct which their subordinates participated in without their direction, assent, or knowledge? Is there an area of thought or belief which, regardless of the circumstances, a moral society will leave private from any inquiry whatsoever? Is there a natural right to hold, or deal with, or transfer property? May one justly ever be required to work without profit, or contrary to his conscience?

Those of you who easily answer these queries do not, I suspect, draw upon doctrines revealed by Heaven, or recited in Grotius, or reported by Margaret Mead. Perhaps you have had a peek at the recent reports of the decisions of the Supreme Court of the United States and take those as your gospel. More probably you have been drawing upon a set of basic premises characteristic of our particular civilization, and it is about these that I want now to speak. What are the premises from which we proceed when we are faced with a problem of evaluation? To this question I have no simple, direct answer. And yet I have an approach which I shall try not so much to define as to adumbrate.

Every great society in its total structure, and perhaps most transparently in its law, tends toward a pattern of purpose. That is, it looks for something more than the maintenance of peace inherent in the phrase "law and order," the mere making of decisions as a substitute for ordeal by battle. There is no guarantee that the design of power in a particular society is divine in origin or result. Indeed, may I reverently suggest that an enlarged concept of God is most consistent with the supposition that He allows man to shape his own purposes. For it is fully consonant with God's glory to believe that man is entrusted with choice as to ends as well as to means. God remains free to supersede man. Nature remains free to spawn new forms of existence who may design their own purposes.²⁴ But, while man lives, he is haunted by visions of what he and his immediate society may become. He seeks to make his and his fellows' lives more comprehensive, comprehensible, and consistent. And he finds in the quest for these goals his deepest satisfaction.

The pattern which any particular society develops is an ideal response to its own past history, present problems, and possible future. It reveals growth of experience and, if the society is an open society, it makes room for adventurous insights as they become available. Being so enveloped by the spell of a historic past and the mystery of an oncoming creation, it makes no pretense to set the standard for another people or another age.

24. See SHERRINGTON, *MAN ON HIS NATURE* c. XII, especially at 287-288, 293-294 (Anchor Press 2d ed. 1953).

Each civilization draws its positive prescriptions against a background of its own ideals.

Under my suggested approach to the problem of value, it is plain that if we would increase our awareness of standards of justice, the first part of our task is to search more deeply into our past not for the sake of repeating it, but for discerning direction.²⁵ For with us, as with every people, "tradition defines the present."²⁶ Though, I should add that, when we look to the past we must be scrupulous in reading it as it was, not as we would have it to support a present thesis.²⁷

When we turn to the past of our people we can, of course, find articulated creeds, like the Declaration of Independence and the Constitution of the United States.²⁸ These are fine red threads in our pattern. But this lecture must not degenerate into a laudatory recital of landmark documents or decisions. Regretfully I must pass, without paying them their due tribute, those individuals whose "story is . . . woven into the stuff of other men's lives."²⁹ This omission of individual names I particularly deplore. For I have long thought that the biographical part of history is the most instructive approach to ethical problems, and I have regarded not the least important of the assets of the law teacher the literature about English and American lawyers, judges, and teachers. Our professional *biographia*, in description of details, in its presentation of a pragmatic philosophy, and in alternation of emphasis between the real and the ideal will brook comparison with the data available to the practitioners and teachers of any other discipline. But in this address I am proceeding somewhat more abstractly in my search for the standards that measure American law.

To marshal these standards into a decalogue would be artificial. Yet I may secure a large measure of agreement if I state not exhaustively but illustratively some of the dominant tendencies. Almost the first characteristic of our law is its distrust of what used to be called "pure reason." Our law, unlike many other juristic systems, gives precedent and prescription, not planning, a dominant place. Our forbears saw how limited is the capacity of any one man or group of contemporaries fully to understand a society, to analyze its structure, to uncover its unspoken assumptions, to articulate its ideals, to plan its future. More than this, our law recognizes that pure reason tends to minimize the degree to which

25. See SCHUMPETER, *op. cit. supra* note 13 at 4.

26. See PERRY, PURITANISM AND DEMOCRACY *passim*. See also a quotation from Lord Bowen in MACMILAN, LAW AND OTHER THINGS 129 (1938).

27. See Goebel, Book Review, 54 COL. L. REV. 450 (1954).

28. See MYRDAL, AN AMERICAN DILEMMA c. 1 (1944).

29. THUCYDIDES II c. 43.

organic growth rather than deliberate construction is the secret of social stability.³⁰ Future times will little respect that which cares little about times past.³¹ Or as D. H. Lawrence put it, "[a]nything worth having is *growth*: and to have growth, one must be able to let be."³² Thus one canon of value in our law is respect for tradition and time.

Yet though our people are believers in the organic character of law, we are mindful that durable power depends not upon the coercion exercised by the past, but upon the inherent persuasiveness of the present structure. Therefore, it is essential to understand the reason of past decisions, and to be prepared when the reasons will not command contemporary assent to discard the established practice, and to start afresh. Moreover, every decision of a specific controversy should wait upon notice to adverse parties and an opportunity to them to be heard.

Of the political beliefs which are embedded in our history and which still evoke our full allegiance most men would agree that the chief was liberty. Now one must concede that at times, for example in the Declaration of Independence, our leaders have spoken of liberty as though it were a natural right. This is to equate it with the "right to resist," to quote Royer-Collard's celebrated expression. But it is only in times of revolution that we have talked with such ungoverned boldness.³³ The root nature of our constitutional democracy makes us appreciate that in the legal field there is no liberty for one without restraint upon another. Liberty is the room which exists through the building of walls. Liberty inheres in a social process. Emphasis in that process is upon those "wise restraints which make men free."³⁴ It is because of this controlling concept that the Fifth and Fourteenth Amendments to the United States Constitution have acquired such paramount stature. It is for this reason that, analytically, the jurist who must consider whether official interference with private liberty is warranted inclines to frame an opinion addressed less to the degree to which the government has interfered with the individual than to the plausible grounds which the government had for its action. Though I hasten to add that no judge ought to decide any case of official impairment of liberty without considering both ends of the stick. Yet it is revealing to contrast what I have suggested is the orthodox judicial approach to official action with the judicial position taken in

30. See KEYNES, *op. cit. supra* note 20.

31. KENNEDY, SALISBURY 5 (1953).

32. Quoted in WILLEY, *op. cit. supra* note 19, at 38.

33. See Learned Hand in *Dennis v. United States*, 183 F.2d 201, 206-207, 212 (2d Cir.), *aff'd* 341 U.S. 494 (1950).

34. Quoted from the form of citation used by President Conant in awarding the degree of Bachelor of Laws at Harvard. Compare Whitehead quoted by MACMILLAN, *op. cit. supra* note 26, at 17-18.

purely private matters. For when governmental interest is absent, and one private person interferes with another, the courts regard the interference as *prima facie* unlawful, and the interferer does not enjoy the benefit of any presumption of propriety. Nor is he exculpated if he has merely rational or plausible grounds for his conduct. He escapes only if society speaking through the judges or legislation determines that the end he seeks to further is, in a particular connection, more valuable than the liberty of the man who was damaged by his interference.

The pre-eminence of liberty as an Anglo-American politico-legal value is perhaps nowhere better revealed than in our failure promptly to raise to its parity the sister concepts of equality and fraternity. If we take equality to mean equal justice before the law, or more broadly to mean equal opportunity under law, the system of Anglo-American law, at least until recently, met the standard only in its most formal or negative aspect. That is, a person was not refused the right to proceed because of race, creed, color, sex, economic status, or, generally, alienage. But the law did not proceed affirmatively to offer legal, financial, or administrative assistance. The courts were there for those who could afford them. As the witty English judge said, "The court, like the Ritz Hotel, was open alike to the rich and the poor."³⁵ Whatever contentions were presented to him were decided by a more or less passive judge, and then, of course, only if the matter were within his jurisdiction. He was, to be sure, the "governor of the trial," but a governor who did not frame the issues, or call for new evidence, or carry the inquiry beyond the point chosen by the parties, or appoint lawyers to assist him, or recruit experts to help him understand unfamiliar ground which had been bounded by other disciplines.

But the last score of years has seen another current gathering momentum. In the criminal field, the courts appoint counsel for the indigent, regularly receive from sociologically trained probation officers recommendations for sentencing, and sometimes appoint medical witnesses. In ordinary civil cases, the law, through administrative agencies bearing much of the financial burden and expending much of the effort needful to discover and present evidence, now extends aid to injured workmen, to employees discriminated against while engaged in organizing labor unions, to aggrieved customers of utilities, and in some cases to deceived purchasers of securities. By the promise that a successful litigant will recoup two or more times the amount of his damage as well as a reasonable attorney's fee, the law offers a helping hand to the workman paid less than a minimum wage, the tenant or purchaser who is

35. *Cf.*, POUND, *op. cit. supra* note 12, at 211-212, quoting Maule, J.

charged more than ceiling prices, and the victim of a monopoly or restraint of trade. In cases where a man claims he has been discriminated against in employment or education because of his race, color, or creed, some states now have procedure through which, without expense to himself, his claimed right to equality can be vindicated.

One may, of course, deplore as unduly egalitarian this trend, especially when its cost is translated into increased taxes assessed upon the affluent and the most successful. It is a further march along the road, which A. V. Dicey so disparagingly described in *Law and Opinion in England*, and which, in a quite opposite mood, R. N. Tawney applauded in monographs such as *Equality*. But, apart from one's personal preference, a candid historian must state that equality of opportunity has historically moved into the forefront of values esteemed by our society.

Is the same true of fraternity? With characteristic perceptiveness compounded with amiable irony, the English novelist E. M. Forster entitled a recent volume of his essays *Two Cheers for Democracy*. His implication seemed to be that he wondered how much the current phase of English and American democracy treasured on a plane with liberty and equality, love of man's neighbor, tolerance of his difference, respect for his non-conformity, and appreciation of what his wayward and sometimes creatively adventurous spirit could do for the common good.

While it may seem that these, the values of fraternity, are not given at this moment a high priority, we ought not to lose our perspective. For one of the essential qualities of American society has always been its generous pluralism. This finds many manifestations: the voluntary associations which we have encouraged, the willingness we have shown to receive peoples of many different racial stocks, the judgment of our literary historians which puts in the first rank not the conventional but the non-conforming essayists, poets, and philosophers.

Indeed no account of the values which our society and our law has prized could omit the respect we have shown for the sturdy, even the ornery individualist. He is the representative Yankee. He is the prototype of Uncle Sam. And, despite recent efforts to confuse us with novel definitions of what is 100% American and what is un-American, there is no likelihood that our law will long forget that dissent is not disloyalty. The power America has achieved in the world rests on its promise of brotherhood resting squarely upon independence—political independence, religious independence, financial independence, personal independence.

This statement of the values of our society is neither exhaustive, nor systematic. Its absence of priorities and preferences may seem to advance us no further than the vague generalities of revealed and natural law

which I depreciated earlier in this lecture. Like them, this set of values lacks the sharpness of edge to cut the intricacies of any specific knotty problem where interests are in competition. And yet are we not warranted in asserting that we have moved beyond pious platitudes where we assert that the American pattern of law recognizes that the base of our law is tradition rather than a logical plan purely responsive to reason, and that when precedents are refashioned and new imaginative doctrines, substantive or procedural, are introduced, the object should be the promotion of individual liberty, equality of opportunity, the removal of irrelevant barriers to self-advancement, and fraternal good will achieved without subordinating difference of dissent? To me there is one incontrovertible proof that there is something more than rhetoric in this kind of statement even before it is elaborated, as I hope it will be by a more competent hand proceeding after patient, detailed study. For even this short statement of means and ends would not suit say Nazi Germany, nor contemporary Russia, nor indeed many Latin American states.

In going this far I have not meant to renege on my earlier assertion that the pattern of American law would not be suitable for all peoples everywhere at all times. Out of history come no absolutes. What we cherish is markedly different from, though in debt to, the choices that have been made by Greek, Hebrew, Roman, Mediaeval, Renaissance, or even French or German civilizations, and, obviously, the differences are far greater if we compare ourselves with the great Asian peoples, or others not in the Western World.

Even if the pattern of our aspirations is not the only one of worth, of durability, and of beauty, it does offer benchmarks for us. The more we contemplate the pattern, the more we give it depth and particularity, the more widely it is appreciated in our community, the more it becomes a conscious foundation for specific decisions by all organs of our society, the sounder will be our social structure. Furthermore, the more meaningful, satisfying, and elevated will our individual lives become. For the recognition of profound purpose, even if it carries no guarantee of divine approval, gives life that special form of goodness and beauty which carries immediate reward

You may say I have strayed a long way from the opening paragraphs. How is what I am now saying related to my animadversions upon the limitations of Mr. Justice Holmes' positivism and Dean Langdell's pseudo-science? So now I shall try to make the connection in the specific terms of the teacher's calling and the judge's calling—on the present occasion I leave aside the practicing lawyer, not because his role is subsidiary, but because I cannot in one lecture cover all aspects of my topic.

If I am right that there is a set of specific values underlying our American legal order, then is it not the function of the members of our law faculties to become the explicit teachers of these values not merely for the benefit of those who are to enter the profession but for all of our citizenry? Some of you may say that the best teachers have always taught their courses with due attention to the ultimate values of which I have been speaking. In analyzing judicial opinions they have made articulate the social, economic, political, and philosophical premises. They have sketched the historical origin of these premises and shown how they have acquired vigor or withered, as the case may be. They have in classroom discussion and in law review articles tested particular legal rules against the very considerations which I have said were basic to our creed of value. And they have not hesitated either to commend or adversely to criticize a doctrine of substantive or procedural law on the basis of its congeniality or repugnance to these standards of justice.

That there is much to this exculpatory plea I shall at once admit. My own experience with gifted teachers—Thomas Reed Powell, Zechariah Chafee, Felix Frankfurter, and Roscoe Pound (though I knew the last named only after my graduation)—requires me to make grateful acknowledgement.

But far as these and other men have gone, they did not quite fulfill what I regard as the task to which the present generation of teachers is summoned. For as the making of law and its administration falls more and more into the hands of persons not trained in law schools, and as the reach of law moves from an almost exclusive concern with the prevention of force and fraud, damages to person and property, breach of contract or agreement, the transfer and devolution of property, and the supervision of corporate and fiduciary relationships, and the law instead becomes the affirmative regulator of myriad aspects of the average man's daily life, it becomes increasingly important that not only law students but the whole citizenry should grasp the philosophy of our law.

We should do well to recall those earlier days when law teachers and law book writers were the avowed instructors not merely of budding professionals but of all educated men. Blackstone delivered to the students at Oxford the lectures on which his reputation rests, and which, when published, became an essential part of every well-stocked private library. When Mr. Justice Wilson began his course of lectures on the law he spoke so as to attract to his audience laymen, including even President George Washington. Story's *Commentaries* were read at Williams College during the time of Mark Hopkins;³⁶ Kent's *Commentaries* were

36. See SWISHER, STEPHEN J. FIELD 18 (1930).

part of the regular undergraduate curriculum at Nashville, West Point, Harvard, and Yale,³⁷ and Rawle's treatise was studied at West Point and no doubt at numerous liberal arts colleges.

Of those prospects for the future development of the law about which I have been requested to speak is there one more promising than this as yet unfulfilled challenge to parallel these achievements of Story, Kent, and Rawle? Our times address this question to the law teachers of the nation. Have they not already an awareness of the ultimate standards of our law, are they not now seeking to sharpen and refine their statement, and can they not soon put them before a larger public so that our whole society may move with greater sureness in the direction of the ideals which have evolved from our past and will continue to evolve in unforeseeable directions in the future? Let them bear in mind de Tocqueville's aphorism, "Laws cannot rekindle an extinguished faith, but men may be interested by the laws in the fate of their country."³⁸

An almost equally fascinating challenge is presented to the judge. As has been observed by virtually all recorders of our social psychology and structure, the judiciary has from the outset enjoyed a peculiar prestige in America. The opportunities created by a written constitution, the security of judicial tenure, the extent to which the press has reported judges' opinions, charges, and extemporaneous remarks from the bench have all given the judiciary extraordinary opportunities to mould public opinion.

At times this judicial opportunity was plainly abused. And there are many who would say that the good judge today is the man who restricts his jurisdiction, curbs his speech, refrains from deciding or otherwise commenting on more than the narrowest point upon which a case can turn, and defers so far as he possibly can to determinations made by legislators, executive agencies, juries, and other wielders of power.

The counsel that judges should adopt such self-denying ordinances has much to commend it. Those of us who sit upon a bench can always listen sympathetically to the repetition of Lord Bowen's witticism. When asked to join in a petition to Queen Victoria which recited that the judges were conscious of their shortcomings, Bowen moved an amendment so that the petition should read, "conscious as we are of one another's shortcomings."

37. See HORTON, JAMES KENT 302 (1939).

38. 1 DE TOCQUEVILLE, DEMOCRACY IN AMERICA 93 (Bradley ed. 1948). See generally the section entitled *Political Effects of Decentralized Administration in the United States*, 1 *id.* at 85.

There is no judge who is not aware of the ordinary clay of which his judicial brethren are made; how often their elevation was due to a quirk of fate; to what extent they are still affected by the subtler forms of prejudice they had at the bar, or in politics; how soon they fall out of step with the advance of younger men; the degree to which the pressure of their work or sometimes their native or acquired indolence, prevents them from deepening their intellectual resources or studying either the bookish or practical clues to an understanding of expanding horizons. All who know anything of the bench at any period in history recognize that judges never were selected from a cross section of the population, and so in that sense were not and never become representative of the community. Their speech comes from a preferred source, that rarely transcends its origins. So it is easy to understand why many prudent observers prefer to have the judge continue to play a restricted and subordinate role.

But there is another side to the coin. I concede that in terms of veto power the judge would do well to move with gravest caution. I have no desire to see the bench become a third chamber. And I deprecate the frequent resort to the Fourteenth Amendment or other constitutional provisions to invalidate deliberate choices made by other bodies at least as well informed and often otherwise as competent as a single judge or set of judges.

However, this is not an either-or situation. We judges are not required to choose between, on the one hand, silent acquiescence in, and, on the other hand, reversal of the fiats of other men. We not merely enter judgments; we write opinions, give charges to grand and petit juries, and instruct all classes of men, parties, witnesses, lawyers, court appointees, petitioners for citizenship, and sometimes even the lay public that attends our sessions. Most important, we can send matters back for further consideration of factors originally neglected. Thus we are invited to occupy the role of critic and commentator. Here in one respect lies our greatest opportunity. For are we not in one aspect the most independent individuals that our civilization knows? Are we not, therefore, *ex officio* among the best qualified representatives of the values we proclaim? As we expound the law, we state its purpose; we draw attention to its conformity to or departure from accepted principle.

These are opportunities which must not be abused. A critic in any field would do better not to acquire a reputation for intermeddling or harshness. He is to hear before he decides; he is to preserve and not abrogate the rule of law. He is to foster fraternal sympathy, tolerance, and adventurous experimentation. If he observes these cautionary coun-

sels, a judge may become more than the oracle of the law. He will be a craftsman perpetually besieged by dreams of beauty in his work. Like the poet and the painter, he may use the process of his art to develop a pattern stretching from that which is to that which should be the structure of his society.