Vanderbilt Law Review

Volume 14
Issue 1 *Issue 1 - December 1960*

Article 2

12-1960

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THE FUNCTION OF LEGAL PHILOSOPHY*

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For twenty-four hundred years—from the Greek thinkers of the fifth century B.C. who asked whether right was right by nature or only by enactment and convention, to the social philosophers of today, who seek the ends, the ethical basis and the enduring principles of social control—the philosophy of law has taken a leading role in all study of human institutions. The perennial struggle of American administrative law with nineteenth-century constitutional formulations of Aristotle's threefold classification of governmental power, the stone wall of natural rights against which attempts to put an end to private war in industrial disputes for a long time dashed in vain, and the notion of a logically derivable superconstitution, of which actual written constitutions are faint and imperfect reflections, which was a clog upon social legislation in the nineteenth and the first decade of the present century, long bore witness how thoroughly the philosophical legal thinking of the past is a force in the administration of justice of the present. Indeed the everyday work of the courts was never more completely shaped by abstract philosophical ideas than in the nineteenth century when lawyers affected to despise philosophy and analytical jurists believed they had set up a self-sufficient science of law which stood in no need of any philosophical apparatus.

In all stages of what may be described fairly as legal development philosophy has been a useful servant. But in some it has been a tyrannous servant and in all but form a master. It has been used to break down the authority of outworn tradition, to bend authoritatively imposed rules that admitted of no change to new uses which changed profoundly their practical effect, to bring new elements into the law from without and make new bodies of law from these new materials, to organize and systematize existing legal materials and to fortify established rules and institutions when periods of growth were succeeded by periods of stability and of merely formal reconstruction. Such have been its actual achievements. Yet all the while its professed aim has been much more ambitious. It has sought to give us a complete and final picture of social control. It has sought to lay down a moral and legal and political chart for all time. It has had faith that it could find the everlasting, unchangeable legal reality in which we might rest, and could enable us to establish a perfect law

* Reprinted with the special permission of the author and of the Yale University Press from Pound, *Introduction to the Philosophy of Law*, ch. 1 (rev. ed. 1954).

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by which human relations might be ordered forever without uncertainty and freed from need of change. Nor may we scoff at this ambitious aim and this lofty faith. They have been not the least factors in the power of legal philosophy to do the less ambitious things which in their aggregate are the bone and sinew of legal achievement. For the attempt at the larger program has led philosophy of law incidentally to do the things that were immediately and practically serviceable, and the doing of these latter, as it were *sub specie aeternitatis,* has given enduring worth to what seemed but by-products of philosophical inquiry.

Two needs have determined philosophical thinking about law. On the one hand, the paramount social interest in the general security, which as an interest in peace and order dictated the very beginnings of law, has led men to seek some fixed basis of a certain ordering of human action which should restrain magisterial as well as individual willfulness and assure a firm and stable social order. On the other hand, the pressure of less immediate social interests, and the need of reconciling them with the exigencies of the general security and of making continual new compromises because of continual changes in society have called ever for readjustment at least of the details of the social order. They have called continually for overhauling of legal precepts and for refitting them to unexpected situations. And this has led men to seek principles of legal development by which to escape from authoritative rules which they feared or did not know how to reject but could no longer apply to advantage. These principles of change and growth, however, might easily prove inimical to the general security, and it was important to reconcile or unify them with the idea of a fixed basis of the legal order. Thus the philosopher has sought to construct theories of law and theories of lawmaking and has sought to unify them by some ultimate solving idea equal to the task of yielding a perfect law which should stand fast forever. From the time when lawgivers gave over the attempt to maintain the general security by belief that particular bodies of human law had been divinely dictated or divinely revealed or divinely sanctioned, they have had to wrestle with the problem of proving to mankind that the law was something fixed and settled, whose authority was beyond question, while at the same time enabling it to make constant readjustments and occasional radical changes under the pressure of infinite and variable human desires. The philosopher has worked upon this problem with the materials of the actual legal systems of the time and place or with the legal materials of the past upon which his generation had built. Hence in closer view philosophies of law have been attempts to give a rational account of the law of the time

and place, or attempts to formulate a general theory of the legal order to meet the needs of some given period of legal development, or attempts to state the results of the two former attempts universally and to make them all-sufficient for law everywhere and for all time. Historians of the philosophy of law have fixed their eyes chiefly on the third. But this is the least valuable part of legal philosophy. If we look at the philosophies of the past with our eyes upon the law of the time and place and the exigencies of the stage of legal development in which they were formulated, we shall be able to appreciate them more justly, and so far as the law of the time and place or the stage of legal development was similar to or different from the present to utilize them for the purposes of today.

We know Greek law from the beginnings of a legal order as pictured in the Homeric poems to the developed commercial institutions of the Hellenistic period. In its first stage the kings decide particular causes by divine inspiration. In a second stage the customary course of decision has become a tradition possessed by an oligarchy. Later, popular demand for publication results in a body of enactment. At first enactments are no more than declaratory. But it was an easy step from publication of established custom to publication of changes as if they were established custom and thus to conscious and avowed changes and intentional new rules through legislation. The law of Athens in the fifth and fourth centuries B.C. was a codified tradition eked out by legislation and individualized in its application through administration of justice by large popular assemblies. Thus in spite of formal reduction to writing it preserved the fluidity of primitive law and was able to afford a philosophy for Roman law in its stage of equity and natural law—another period of legal fluidity. The development of a strict law out of codified primitive materials, which in Rome happily preceded the stage of equity and natural law, did not take place in the Greek city. Hence the rules of law were applied with an individualized equity that reminds us of the French *droit coutumier*—a mode of application which, with all its good points, must be preceded by a body of strict law, well worked out and well understood, if its results are to be compatible with the general security in a complex social order. In Athens of the classical period the word νόμος, meaning both custom and enacted law as well as law in general, reflected the uncertainty with respect to form and the want of uniformity in application, which are characteristic of primitive law, and invited thought as to the reality behind such confusion.

We may understand the materials upon which Greek philosophers were working if we look at an exhortation addressed by Demosthenes to an Athenian jury. Men ought to obey the law, he said, for four

reasons: because laws were prescribed by God, because they were a tradition taught by wise men who knew the good old customs, because they were deductions from an eternal and immutable moral code, and because they were agreements of men with each other binding them because of a moral duty to keep their promises. It was not long since that men had thought of legal precepts as divinely revealed, nor was it long since that law had been a tradition of old customs of decision. Philosophers were seeking a better basis for them in eternal principles of right. In the meantime in political theory, at least, many of them were the agreements of Athenian citizens as to how they should conduct themselves in the inevitable clashes of interests in everyday life. What was needed above all was some theory of the authority of law which should impose bonds of reason upon those who enacted, upon those who applied, and upon those who were subject to law in such an amorphous legal order.

A sure basis of authority resting upon something more stable than human will and the power of those who govern to impose their will for the time being was required also for the problem of social control in the Greek city-state. In order to maintain the general security and the security of social institutions amid a strife of factions in a society organized on the basis of kinship and against the willfulness of masterful individuals boasting descent from gods, in order to persuade or coerce both the aristocracy and the mass of the low born to maintain in orderly fashion the social *status quo,* it would not do to tell them that law was a gift of God, nor that what offended the aristocrat as a radical bit of popular legislation enacted at the instance of a demagogue was yet to be obeyed because it had been so taught by wise men who knew the good old customs, nor that Demos chafing under some item of a class-possessed tradition was bound by it as something to which all citizens had agreed. The exigencies of the social order called for a distinction between νόμος and τά νομιζόμενα —between law and rules of law. The *Minos,* which if not actually a dialogue of Plato's seems clearly Platonic and very close to Plato in time, is taken up with this distinction and gives us a clue to the juristic problems of the time.

Another example may be seen in Aristotle's well-known discussion in the *Nicomachean Ethics.* It is significant that Greek thinkers always couple custom and enactment; things which today we contrast. These were the formal bases of legal authority. So Aristotle considers, not natural *law* and positive *law,* but what is just in itself—just by nature or just in its idea—and what derives its sole title to be just from convention or enactment. The latter, he says, can be just only with respect to those things which by nature are indifferent. Thus

when a newly reconstituted city took a living Spartan general for its eponymus, no one was bound by nature to sacrifice to Brasidas as to an ancestor, but he was bound by enactment and after all the matter was one of convention which, in a society framed on the model of an organized kindred, required that the citizens have a common heroic ancestor, and was morally indifferent. The distinction was handed down to modern legal science by Thomas Aquinas, was embodied in Anglo-American legal thought by Blackstone, and has become staple. But it is quite out of its setting as a doctrine of *mala prohibita* and *mala in se*. An example of the distinction between law and rules of law has become the basis of an arbitrary line between the traditionally antisocial, penalized by the common law, and recently penalized infringements of newly or partially recognized social interests. Although the discrimination between what is just and right by nature and what is just because of custom or enactment has had a long and fruitful history in philosophical jurisprudence and is still a force in the administration of justice, I suspect that the permanent contribution of Greek philosophy of law is to be found rather in the distinction between law and rules of law, which lies behind it and has significance for all stages of legal development.

Roman lawyers came in contact with philosophy in the transition from the strict law to the stage of equity and natural law, and the contact had much to do with enabling them to make the transition. From a purely legal standpoint Greek law was in the stage of primitive law. Law and morals were still largely undifferentiated. Hence Greek philosophical thinking of a stage of undifferentiated law and morals lent itself to the identification of the legal and the moral in juristic thinking which was characteristic of the classical Roman law. But the strict law obviously was indifferent to morals and in many vital points was quite at variance with the moral ideas of the time. The Greek distinction of just by nature and just by convention or enactment was suggested at once by such a situation. Moreover the forms of law at the end of the Republic and at the beginning of the Empire invited a theory of law as something composite, made up of more than one type of precept and resting immediately on more than one basis of authority.

Cicero enumerates seven forms of law. Three of these are not heard of thereafter in Roman juristic writing. Evidently already in Cicero's time they belonged to the past and had ceased to be effective forms of actual law. The four remaining, namely, statutes, resolutions of the senate, edicts of the magistrates, and the authority of those learned in the law, come to three—legislation, administrative edicts, and juristic reasoning on the basis of the legal tradition. And these

correspond to the three elements which made up the law. First, there was the *ius ciuile:* the Twelve Tables, subsequent legislation, interpretation of both, and the traditional law of the city. Second, there was the mass of rules, in form largely procedural, which was contained in the edicts. The growing point of the law had been here and to some extent growth was still going on through this means. Indeed this part of the law reached its final form under Hadrian. Third, there were the writings of the jurisconsults. The growing point of the law had begun to be here and this was the most important form of law in the classical period from Augustus to the third century. This part of the law got its final form in the *Digest* of Justinian. Of the three elements the first was thought of originally as declared and published custom. Later it was thought of as resting on the authority of the state. It was obviously local and peculiar to Rome. In form it rested on the legislative power of the Roman people, supplemented by a mere interpretation of the legislative command with only the authority of customary acceptance. In Greek phrase it rested on convention and enactment. The second purported to be the rules observed by civilized peoples, and on points of commercial law may well have been an approximation thereto. Apart from this, however, according to ancient ideas of personal law, the rules which obtained among civilized peoples were eminently a proper law to apply between citizen and noncitizen. In Greek phrase it was law by convention. The basis of the third was simply reason. The jurisconsult had no legislative power and no *imperium.* The authority of his *responsum,* as soon as law ceased to be a class tradition, was to be found in its intrinsic reasonableness; in the appeal which it made to the reason and sense of justice of the *iudex.* In Greek phrase, if it was law it was law by nature.

As the rise of professional lawyers, the shifting of the growing point of law to juristic writing, and the transition from the law of a city to a law of the world called for a legal science, there was need of a theory of what law was that could give a rational account of the threefold body of rules in point of origin and authority, which were actually in operation, and would at the same time enable the jurists to shape the existing body of legal precepts by reason so as to make it possible for them to serve as law for the whole world. The perennial problem of preserving stability and admitting of change was presented in an acute form. Above all, the period from Augustus to the second quarter of the third century was one of growth. But it was revolutionary only if we compare the law at the end of the period with the law of the generation before Cicero. The jurisconsults were practical lawyers and the paramount interest in the general security

was ever before their eyes. While as an ideal they identified law with morals they did not cease to observe the strict law where it was applicable nor to develop its precepts by analogy according to the known traditional technique when new phases of old questions came before them. Hence what to the Greeks was a distinction between right by nature and right by convention or enactment became to them a distinction between law by nature and law by custom or legislation. The Latin equivalent of τό δἰκαιον (the right or the just) became their word for law. They said *ius* where Cicero said *lex*. And this convenient ambiguity, lending itself to identification of what ought to be and what is, gave a scientific foundation for the belief of the jurisconsults that when and where they were not bound by positive law they had but to expound the reason and justice of the thing in order to lay down the law.

It must be borne in mind that "nature" did not mean to antiquity what it means to us who are under the influence of the idea of evolution. To the Greek, it has been said, the natural apple was not the wild one from which our cultivated apple has been grown, but rather the golden apple of the Hesperides. The "natural" object was that which expressed most completely the idea of the thing. It was the perfect object. Hence the natural law was that which expressed perfectly the idea of law, and a rule of natural law was one which expressed perfectly the idea of law applied to the subject in question; the one which gave to that subject its perfect development. For legal purposes reality was to be found in this ideal, perfect, natural law, and its organ was juristic reason. Legislation and the edict, so far as they had any more than a positive foundation of political authority, were but imperfect and ephemeral copies of this jural reality. Thus the jurists came to the doctrine of the *ratio legis,* the principle of natural law behind the legal rule, which has been so fruitful both of practical good and of theoretical confusion in interpretation. Thus also they came to the doctrine of reasoning from the analogy of all legal rules, whether traditional or legislative, since all, so far as they had jural reality, had it because and to the extent that they embodied or realized a principle of natural law.

Natural law was a philosophical theory for a period of growth. It arose to meet the exigencies of the stage of equity and natural law, one of the great creative periods of legal history. Yet, as we have seen, even the most rapid growth does not permit the lawyer to iguore the demand for stability. The theory of natural law was worked out as a means of growth, as a means of making a law of the world on the basis of the old strict law of the Roman city. But it was worked out also as a means of directing and organizing the growth of law

so as to maintain the general security. It was the task of the jurists to build and shape the law on the basis of the old local materials so as to make it an instrument for satisfying the wants of a whole world while at the same time insuring uniformity and predicability. They did this by applying a new but known technique to the old materials. The technique was one of legal reason; but it was a legal reason identified with natural reason and worked out and applied under the influence of a philosophical ideal. The conception of natural law as something of which all positive law was but declaratory, as something by which actual rules were to be measured, to which so far as possible they were to be made to conform, by which new rules were to be framed, and by which old rules were to be extended or restricted in their application was a powerful instrument in the hands of the jurists and enabled them to proceed in their task of legal construction with assured confidence.

But the juristic empiricism by which the *ius ciuile* was made into a law of the world needed something more than a theoretical incentive. It was a process of analogical development by extension here and restriction there, of generalization, first in the form of maxims and later by laying down broad principles, and of cautious striking out of new paths, giving them course and direction by trial and error. It was a process very like that by which Anglo-American judicial empiricism has been able to make a law of the world on the basis of the legal precepts of seventeenth-century England. Such a process required something to give direction to juristic reasoning, to give definite content to the ideal, to provide a reasonably defined channel for juristic thought. This need was met by the philosophical theory of the nature of things and of the law of nature as conformity thereto. In practice jurist-made and judge-made law have been molded consciously or unconsciously by ideas as to what law is for; by theories as to the end of law. In the beginnings of law men had no more ambitious conception than a peaceable ordering of society at any cost. But the Greeks soon got a better conception of an orderly and peaceable maintaining of the social *status quo*. When the theory of natural law is applied to that conception, we get the notion of an ideal form of the social *status quo*—a form which expresses its nature, a perfect form of the social organization of a given civilization—as that which the legal order is to further and maintain. Thus judge and jurist obtain a guide which has served them well ever since. They are to measure all situations by an idealized form of the social order of the time and place and are so to shape the law as to make it maintain and further this ideal of the social *status quo*. We shall meet this idea in various forms throughout the subsequent history of

the philosophy of law. It constitutes the permanent contribution of Rome to legal philosophy.

As soon as scientific legal development begins in the Middle Ages the law once more comes in contact with philosophy through the study of both in the universities. What was the need of the time which philosophy was called upon to satisfy? Following an era of anarchy and disunion and violence men desired order and organization and peace. They called for a philosophy that would bolster up authority and rationalize their desire to impose a legal yoke upon society. The period was one of transition from the primitive law of the Germanic peoples to a strict law, through reception of Roman law as authoritative legislation or through compilation of the Germanic customary law more or less after the Roman model, as in the north of France, or through declaration of the customary law in reported decisions of strong central courts, as in England. Thus it soon became a period of strict law. Scholastic philosophy, with its reliance upon dialectic development of authoritatively given premises, its faith in formal logic, and its central problem of putting reason as a foundation under authority, responded exactly to these demands. It is no misnomer to style the commentators or post-glossators of the fourteenth and fifteenth centuries the "scholastic jurists." For it was in large part the philosophy that met the needs of the time so completely which enabled them to put the Roman law of Justinian in a form to be received and administered in the Europe of nine centuries later. While they made the gloss into law in place of the text and made many things over, as they had to be made over if they were to fit a wholly different social order, the method of dialectical development of absolute and unquestioned premises made it appear that nothing had been done but to develop the logical implications of an authoritative text. Men could receive the law of Bartolus so long as they believed it but the logical unfolding of the pre-existing content of the binding legislation of Justinian. It is interesting to note in Fortescue an application of this to the rules of the common law in its stage of strict law. He assumes that these rules are the principles of which he reads in the commentators on Aristotle and that they may be compared to the axioms of the geometrician. The time had not yet come to call rules or principles or axioms in question. The need was to rationalize men's desire to be governed by fixed rules and to reconcile, in appearance at least, the change and growth which are inevitable in all law with the need men felt of having a fixed, unchangeable, authoritative rule. The scholastic philosophy did notable service in these respects and, I venture to think, left as a permanent contribution to legal science the method of insuring cer-

tainty by logical development of the content of authoritatively defined conceptions.

On the breakdown of the feudal social organization, the rise of commerce and the era of discovery, colonization, and exploitation of the natural resources of new continents, together with the rise of nations in place of loose congeries of vassal-held territories, called for a national law unified within the national domain. Starkey proposed codification to Henry VIII and Dumoulin urged harmonizing and unifying of French customary law with eventual codification. The Protestant jurist-theologians of the sixteenth century found a philosophical basis for satisfying these desires of the time in the divinely ordained state and in a natural law divorced from theology and resting solely upon reason, reflecting the boundless faith in reason which came in with the Renaissance. Thus each national jurist might work out his own interpretation of natural law by dint of his own reason, as each Christian might interpret the word of God for himself as his own reason and conscience showed the way. On the other hand, the Catholic jurists of the Counter-Reformation found a philosophical basis for satisfying these same desires in a conception of natural law as a system of limitations on human action expressing the nature of man, that is, the ideal of man as a rational creature, and of positive law as an ideal system expressing the nature of a unified state. For the moment these ideas were put at the service of a growing royal authority and bore fruit in the Byzantine theory of sovereignty which became classical in public law. In private law they soon took quite another turn. For a new period of growth, demanded by the expansion of society and the breaking over the bonds of authority, was at hand to make new and wholly different demands upon philosophy.

Glossators and commentators had made or shaped the law out of Roman materials for a static, locally self-sufficient, other-worldly society revering authority because authority had saved it from what it feared, regarding chiefly the security of social institutions and negligent of the individual life because in its polity the individual lived his highest life in the life of another whose greatness was the greatness of those who served him. In the seventeenth and eighteenth centuries jurists were required to make or shape a law out of these medievalized Roman materials to satisfy the wants of an active and shifting, locally interdependent, this-worldly society, impatient of authority because authority stood in the way of what it desired, and jealously individualist, since it took free individual self-assertion to be the highest good. In England the strict law made for feudal England out of Germanic materials, sometimes superficially Romanized, was likewise to be made over to do the work of administering

justice to a new world. A period of legal development resulted which is strikingly analogous to the classical period of Roman law. Once more philosophy took the helm. Once more there was an infusion into law of ideas from without the law. Once more law and morals were identified in juristic thinking. Once more men held as a living tenet that all positive law was declaratory of natural law and got its real authority from the rules of natural law which it declared. Once more juridical idealism led the jurist to survey every corner of the actual law, measuring its rules by reason and shaping, extending, restricting, or building anew in order that the actual legal edifice might be a faithful copy of the ideal.

But the theory of natural law, devised for a society organized on the basis of kinship and developed for a society organized on the basis of relations, did not suffice for a society which conceived of itself as an aggregate of individuals and was reorganizing on the basis of competitive self-assertion. Again the convenient ambiguity of *ius,* which could mean not only right and law but "a right," was pressed into service and *ius naturale* gave us natural rights. The ultimate thing was not natural law as before, not merely principles of eternal validity, but natural rights, certain qualities inherent in man and demonstrated by reason, which natural law exists to secure and to which positive law ought to give effect. Later these natural rights came to be the bane of juristic thinking. Yet they achieved great things in their day. Under the influence of this theory jurists worked out a scheme of "legal rights" that effectively secures almost the whole field of individual interests of personality and individual interests of substance. It put a scientific foundation under the medieval scheme of the claims and duties involved in the relation of king to tenants in chief, out of which the judges had developed the immemorial rights of Englishmen, and enabled the common-law rights of Englishmen to become the natural rights of man, intrenched as such in our bills of rights. Thus it served as a needed check upon the exuberance of growth stimulated by the theory of natural law. It kept a certain needed rigidity in a time when law threatened to become wholly fluid. And this steadying influence was strengthened from another quarter. The Roman jurisconsult was teacher, philosopher, and practitioner in one. As a lawyer he had the exigencies of the general security ever before him in that he felt the imperative need of being able to advise with assurance what tribunals would do on a given state of facts. The seventeenth- and eighteenth-century jurists were chiefly teachers and philosophers. Happily they had been trained to accept the Roman law as something of paramount authority and so were able to give natural law a content by assuming its identity with

an ideal form of the law which they knew and in which they had been trained. As the Roman jurisconsult built in the image of the old law of the city, they built on idealized Roman lines. If Roman law could no longer claim to be embodied authority they assumed that, corrected in its details by a juristic-philosophical critique, it was embodied reason.

Both of these ideas, natural rights and an ideal form of the actual law of the time and place as the jural order of nature, were handed down to and put to new uses in the nineteenth century. In the growing law of the seventeenth and eighteenth centuries they were but guides to lead growth into definite channels and insure continuity and permanence in the development of rules and doctrines. Whether natural rights were conceived as qualities of the natural man or as deductions from a compact which expressed the nature of man, the point was, not that the jurist should keep his hands off lest by devising some new precept or in reshaping some old doctrine he infringe a fundamental right, but that he should use his hand freely and skillfully to shape rules and doctrines and institutions that they might be instruments of achieving the ideal of human existence in a "state of nature." For the state of nature, let us remember, was a state which expressed the ideal of man as a rational creature. If a reaction from the formal overrefinement of the eighteenth century came to identify this with a primitive simplicity, in juristic hands it was the simplicity of a rational ideal in place of the cumbrous complexity of legal systems which had become fixed in their ideas in the stage of the strict law. Thus Pothier, discussing the Roman categories of contract and rejecting them for the "natural" principle that man, as a moral creature, should keep his engagements, declares that the complex and arbitrary system of Roman law, made up of successive additions at different times to a narrow primitive stock of legally enforceable promises, is not adhered to because it is "remote from simplicity." Again the ideal form of the actual law, which gave content to natural law, was not an ideal form of historically found principles, constraining development for all time within historically fixed bounds, as in the nineteenth century, but an ideal form of the *ratio legis*—of the reason behind the rule or doctrine or institution whereby it expressed the nature of the rational human being guided only by reason and conscience in his relations with similar beings similarly guided. Attempts to fix the immutable part of law, to lay out legal charts for all time, belong to the transition to the maturity of law. The eighteenth-century projects for codification and the era of codification on the Continent, in which the results of two centuries of growth were put in systematic form to serve as the basis of a juristic

new start, in form rested upon the theory of natural law. By a sheer effort of reason the jurist could work out a complete system of deductions from the nature of man and formulate them in a perfect code. Go to, let him do so! This was not the mode of thought of a period of growth but rather of one when growth had been achieved and the philosophical theory of a law of nature was called upon for a new kind of service.

At the end of the eighteenth century Lord Kenyon had determined that "Mansfield's innovations" were not to go on. Indeed some of them were to be undone. Equity was soon to be systematized by Lord Eldon and to become "almost as fixed and settled" as the law itself. The absorption of the law merchant was complete in its main lines although in details it went on for two decades. Moreover the legislative reform movement which followed only carried into detail the ideas which had come into the law in the two preceding centuries. For a time the law was assimilating what had been taken up during the period of growth and the task of the jurist was one of ordering, harmonizing, and systematizing rather than of creating. Likewise law had been codifying on the Continent. Down to the end of the nineteenth century the codes, whatever their date, in reality speak from the end of the eighteenth century and with few exceptions are all but copies of the French code of 1804. Where there were no codes the hegemony of the historical school led to a movement back to the law of Justinian which would have undone much of the progress of the last centuries. The energies of jurists were turned for a time to analysis, classification, and system as their sole task. Where codes obtained, analytical development and dogmatic exposition of the text, as a complete and final statement of the law, was to occupy jurists exclusively for the next hundred years. We may well think of this time, as it thought of itself, as a period of maturity of law. The law was taken to be complete and self-sufficient, without antinomies and without gaps, wanting only arrangement, logical development of the implications of its several rules and conceptions, and systematic exposition of its several parts. Legislation might be needed on occasion in order to get rid of archaisms which had survived the purgation of the two prior centuries. For the rest, history and analysis, bringing out the idea behind the course of development of legal doctrines and unfolding their logical consequences, were all the apparatus which the jurist required. He soon affected to ignore philosophy and often relegated it to the science of legislation, where within narrow limits it might still be possible to think of creating.

Yet the nineteenth century was no more able to get on without philosophy of law than were its predecessors. In place of one uni-

versally recognized philosophical method we find four well-marked types. But they all come to the same final results, are marked by the same spirit, and put the same shackles upon juristic activity. They are all modes of rationalizing the juristic desires of the time, growing out of the pressure of the interest in the general security by way of reaction from a period of growth and in the security of acquisitions and security of transactions in a time of economic expansion and industrial enterprise.

In the United States, since the natural law of the eighteenth-century publicists had become classical, we relied largely upon an American variant of natural law. It was not that natural law expressed the nature of man. Rather it expressed the nature of government. One form of this variant was due to our doctrine that the common law of England was in force only so far as applicable to our conditions and our institutions. The attempt to put this doctrine philosophically regards an ideal form of the received common law as natural law and takes natural law to be a body of deductions from or implications of American institutions or the nature of our polity. Within a generation the Supreme Court of one of our states laid down dogmatically that primogeniture in estates tail (which by the way is still possible in one of the oldest of the original states) could not coexist with "the axioms of the constitution" which guarantees to each state a republican form of government. More generally, however, the American variant of natural law grew out of an attempt at philosophical statement of the power of our courts with respect to unconstitutional legislation. The constitution was declaratory of principles of natural constitutional law which were to be deduced from the nature of free government. Hence constitutional questions were always only in terms questions of constitutional interpretation. They were questions of the meaning of the document, as such, only in form. In substance they were questions of a general constitutional law which transcended the text; of whether the enactment before the court conformed to principles of natural law "running back of all constitutions" and inherent in the very idea of a government of limited powers set up by a free people. Now that courts with few exceptions have given over this mode of thinking and the highest court in the land has come to apply the limitations of the fifth and fourteenth amendments as legal standards, there are some who say that we no longer have a constitutional law. For how can there be law unless as a body of rules declaring a natural law which is above all human enactment? The interpretation of a written instrument, no matter by whom enacted, may be governed by law, indeed, but can yield no law. Such ideas die hard. In the language of the eighteenth

century our courts sought to make our positive law, and in particular our legislation, express the nature of American political institutions; they sought so to shape it and restrain it as to make it give effect to an ideal of our polity.

Later in the nineteenth century natural law as a deduction from American institutions or from "free government" gave way to a metaphysical-historical theory worked out in continental Europe. Natural rights were deductions from a fundamental metaphysically demonstrable datum of individual free will, and natural law was an ideal critique of positive law whereby to secure these rights in their integrity. History showed us the idea of individual liberty realizing itself in legal institutions and rules and doctrines; jurisprudence developed this idea into its logical consequences and gave us a critique of law whereby we might be delivered from futile attempts to set up legal precepts beyond the necessary minimum for insuring the harmonious coexistence of the individual and his fellows. This mode of thought was well suited to a conception of law as standing between the abstract individual and society and protecting the natural rights of the former against the latter, which American law had derived from the seventeenth-century contests in England between courts and crown. It was easy to generalize this as a contest between the individual and society, and it became more easy to do so when the common-law rights of Englishmen secured by common-law courts against the crown had become the natural rights of man secured to individual men as against the state by the bills of rights.

Others in England and America turned to a utilitarian-analytical theory. The legislator was to be guided by a principle of utility. That which made for the greatest total of individual happiness was to be the lawmaker's standard. The jurist was to find universal principles by analysis of the actual law. He had nothing to do with creative activity. His work was to be that of orderly logical development of the principles reached by analysis of what he found already given in the law and improvement of the form of the law by system and logical reconciliation of details. As it was assumed that the maximum of abstract individual free self-assertion was the maximum of human happiness, in the result the legislator was to be busied with formal improvement of the law and rendering it, as Bentham put it, more "cognoscible," while the jurist was exercising a like restricted function so far as he could work with materials afforded exclusively by the law itself. Not unnaturally metaphysical and historical and analytical jurists at the end of the century were quite willing to say that their several methods were not exclusive but were complementary.

Toward the end of the last century a positivist sociological thinking tended to supersede the metaphysical historical and the utilitarian analytical. All phenomena were determined by inexorable natural laws to be discovered by observation. Moral and social and hence legal phenomena were governed by laws as completely beyond the power of conscious human control as the movements of the planets. We might discover these laws by observation of social phenomena and might learn to submit to them intelligently instead of rashly or ignorantly defying them. But we could hope to do no more. Except as he could learn to plot some part of the inevitable curve of legal development and save us from futile flyings in the face of the laws by which legal evolution was inevitably governed, the jurist was powerless. Many combined this mode of thought with or grafted it on the metaphysical-historical theory and fought valiantly against the social legislation of the last decade of the nineteenth century and the first decade of the present century with this reinforced juristic pessimism as a base. Superficially it appeared that the Greek idea of the naturally just, which in its Roman form of natural law and its eighteenth-century form of natural rights had made for a creative legal science as long as such a science had existed, had at length exhausted its possibilities.

Today, however, we hear of a revival of natural law. Philosophy of law is raising its head throughout the world. We are asked to measure rules and doctrines and institutions and to guide the application of law by reference to the end of law and to think of them in terms of social utility. We are invited to subsume questions of law and of the application of law under the social ideal of the time and place. We are called upon to formulate the jural postulates of the civilization of the time and place and to measure law and the application of law thereby in order that law may further civilization and that the legal materials handed down with the civilization of the past may be made an instrument of maintaining and furthering the civilization of the present. We are told that observation shows us social interdependence through similarity of interest and through division of labor as the central fact in human existence and are told to measure law and the application of law functionally by the extent to which they further or interfere with this interdependence. For the era of legal self-sufficiency is past. The work of assimilating what had been received into the law from without during the period of equity and natural law has been done. The possibilities of analytical and historical development of the classical materials have been substantially exhausted. While jurists have been at these tasks, a new social order has been building which makes new demands and presses upon the legal order with a multitude of unsatisfied desires.

Once more we must build rather than merely improve; we must create rather than merely order and systematize and logically reconcile details. One has but to compare the law of today on such subjects as torts or public utilities or administrative law with the law of a generation ago to see that we are in a new stage of transition; to see that the juristic pessimism of the immediate past, which arose to save us from taking in more from without while what had been taken already remained undigested, will serve no longer; and to see that the jurist of tomorrow will stand in need of some new philosophical theory of law, will call for some new philosophical conception of the end of law, and at the same time will want some new steadying philosophical conception to safeguard the general security, in order to make the law which we hand down to him achieve justice in his time and place.