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"'What is truth,' said jesting Pilate, and would not stay for an answer." So wrote Bacon in his essay on truth. It was as natural for Bacon to assume that Pilate was jesting, when he read the fourth Gospel with seventeenth-century spectacles, as it was for Pilate to say what he said quite in earnest when he saw through first-century spectacles the saying of Jesus that he had come into the world to bear witness to the truth. Bacon knew that there had been philosophers who, as he put it, counted it a bondage to fix a belief. But, he said, the philosophers of that sect were gone. They were, however, thoroughly in fashion in the first century, and any educated Roman of Pilate's time would have been likely to make the same remark to one who spoke with assurance about truth.

A radical change had taken place in thought between the classical Greek philosophy and the philosophy current at the end of the Roman republic and the beginning of the empire, just as one had taken place between the beginning of the Christian era and the time when Bacon wrote and again between Bacon's time and the advanced (as they consider themselves) thinkers of today.

Pilate spoke in an era of skepticism and disillusionment. The Peloponnesian War had exhausted the Greek city-states. All Greece had fallen into the hands of Philip and had been swallowed up in the empire of Alexander. That empire had fallen apart and was fought for by Alexander's generals and successors. The Hellenistic world was not one for idealist philosophies. The same may be said

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of Rome at the end of the republic and the beginning of the empire. The time was one of political breakdown and civil war. Three generations of civil war had exhausted the social organization of the time quite as the Peloponnesian War had exhausted the Greek world of the classical period. Disillusionment and unsettled conditions, and autocratic governments had turned men to skepticism and Epicureanism, which seemed to tell men how to live in distracted times. These became prevailing types of thought, and like the philosophies current today were philosophies of give-it-up. The Epicureans held that the only certain knowledge was that which we got through the senses. The highest good was the individual happy life. Justice was something variable and nothing more than an expedient toward happiness. The skeptics held that it was impossible for us to know anything about the nature of things and so the right attitude toward all things was one of imperturbability. Neither the senses nor reason could give us certain knowledge. We must suspend judgment about things and make the best of them. Only the skeptic who had suspended all judgment was able to look at things with an absolute calmness, unruffled by passion or desire. There was no possibility of positive judgments as to good or evil. If you saw bandits holding a man up or a mob seeking to lynch an innocent man, Epicurus said get out of the way unless on a balance of pains and pleasures you could make out that interference would in the end promote your happy life. The skeptic said suspend judgment and hold off. The bandit or the lynching party were as likely to be right and as likely to be wrong as are you. Pilate spoke in that spirit.

Bacon wrote in the era of extravagant faith in reason that followed the Renaissance. The era of discovery and colonization and rise of great centralized political organizations, and of the beginnings of modern science and expansion of trade and commerce, was no time of disillusionment. Men were confidently assured that they could know all things and solve all problems through reason. Epicureans and skeptics were extravagant sects which had disappeared forever. Pilate's question was a bad jest.

In the present, after reason and faith in the possibility of knowledge attained through reason had ruled from Bacon's time to the end of the last century, we find ourselves in another era of disillusionment. The social philosophy of today gives up. Rela-

tivism teaches that all we can know is an individual mental creation made of our individual perceptions and experience. Our ideas of what ought to be are purely subjective. They are valid only in our individual systems of thought and cannot be proved to any one else. There is an irreconcilable antinomy between law and morals and between social control by politically organized society and justice. What-ought-to-be is a pious wish, a superstition, an unscientific, subjective picture unrelated to reality. Judgments of good and bad, ascribings of praise and blame are subjective and unscientific. We postulate an ultimate political power and all derives from it. Constitutional limitations are contradictions in terms. A pure science does not trouble itself about subjective ideals of balance and guaranteed liberties and rights. Rights are no more than inferences from the exercise of the force of politically organized society by state officials. Law is no more than what those officials do. Epicurus and Pyrrho and Carneades have come back with new names but with the same social, political and ethical philosophy.

In the spirit of such a time there are those who tell us that law is an illusion or a superstition or, as some do not hesitate to assert, a hypocritical covering up of the brutal self assertion of a dominant social or economic class, or, as others put it, a camouflage of reason covering up the individual personal wishes of those who for the time being wield the authority of a politically organized society. Such, we are told, is reality. To postulate anything more behind the single items of judicial and administrative action is either delusion or fraudulent misrepresentation.

The question what is law has been the battle ground of the science of law ever since the Greeks began to think about such matters in the sixth century before Christ. Many things have operated to make this a difficult question. But not the least source of difficulty has been that three quite different things have gone by the name of law and men have tried to define all three in terms of some one of them.

Specifically the three meanings are: (1) what jurists now call the legal order — the regime of adjusting relations and ordering conduct by the systematic and orderly application of the force of a politically organized society. This is what we mean when we talk of respect for law, of law and order, and the like. A law-respecting man who has every desire to uphold the legal order, may refuse to hew to some particular rule of law as was true in the northern

states as to the fugitive slave law, or not long ago in some parts of the land under prohibition.

(2) The body of authoritative materials of or grounds of or guides to determination, whether judicial or administrative. This is what we mean when we speak of the law of West Virginia or of comparative law or of the law of property or law of contract.

(3) What Mr. Justice Cardozo has happily called the judicial process, to which today we must add the administrative process — the process of determining causes and controversies according to the authoritative guides in order to uphold the legal order. This is the meaning which many self-styled realists give to the term law today. As one of our well known law teachers has put it, the law is whatever is done officially.

Incidentally, as applied to international relations this is a wonderfully satisfying doctrine for dictators; and applied to the exercise of administrative powers it must be a wonderfully heartening doctrine for bureaucrats. No doubt the doctrines of Epicurus and Pyrrho and Carneades were eminently satisfactory to the rulers of empires in the Hellenistic era and to the emperors of Rome. But the judicial and administrative processes cannot be ignored in any theory of law. If in some future era some reincarnation of Bacon may call the realist theory a jest, certainly we in this time know it is a serious matter as we see it in action all about us.

There are, then, these three ideas, and the three ideas each called by the one term, have done much to confuse discussions of this subject. Definitions are drawn with reference to one meaning, and then are put universally as somehow defining a unit embracing all three.

If the three meanings can be unified, it is by the idea of social control. We might think of a regime which is a highly specialized form of social control, carried on in accordance with a body of authoritative precepts, applied in a judicial and an administrative process.

Most of the controversy has raged about the nature of law in the second sense — the body of authoritative materials of determination of controversies. But here also there is no simple conception. Law in that sense is made up of precepts, technique, and ideals: a body of authoritative precepts, developed and applied by an authoritative technique in the light of authoritative traditional ideals.

When we think of law in the second sense we are likely to think

simply of the body of precepts. But the technique of developing and applying the precepts, the art of the lawyer's craft, is quite as authoritative and no less important. Indeed, it is this technique element which serves to distinguish from each other the two great systems of law in the modern world. Two examples will bring this out.

(1) In the common law, the system of law of the English-speaking world, a statute furnishes a rule for the cases within its purview, but not a basis for analogical reasoning. For that we look to experience of the administration of justice in the reported decisions of the courts.

In the civil law, the system of the other half of the world which builds upon the Roman law, the technique in this respect is wholly different. The civilian reasons by analogy from legislative precepts and regards a fixed course of judicial decision on some point as establishing that precise point, but not as providing a principle — an authoritative starting point for legal reasoning.

Let me illustrate. In Roman law in order that one acquire title to an item of property by adverse possession, it was necessary that the thing be something in which property could be acquired, that it be held under some title, that it have been taken in good faith, that it have been possessed exclusively and adversely, and that the possession have been continuous for the time fixed by law. The Roman law required some just title, even if bad or defective. The French civil code provided instead that in all cases of moveables possession should stand for title. A common-law lawyer would say, this proposition is laid down in the part of the code having to do with acquisition of title to property by adverse possession. Hence its application must be limited to the situation for which it was there enacted. It cannot be made to apply by analogy to other fields of the law. But the civilian, thinking of legislation as an ascertainment and declaration of a principle, does not hesitate to employ a legislative proposition as a starting point for reasoning anywhere in the law.

How our law reasons by analogy is illustrated by the letter of credit cases which developed after our entry into the World War in 1917. In the course of manufacture and export under corporations set up by our government and carried on by letters of credit, a question arose whether a letter of credit could be pledged. On this question recourse was had to an obsolete English practice of equitable mortgage of land by deposit of title deeds. In the absence of a

system of recording conveyances, an owner kept his title deeds and when he sold land turned the title deeds over as showing what he had to convey. He could not expect to sell the land without producing them. But if he had pledged them he could not get them back to produce to a purchaser until he paid the debt. Thus the pledgee of the title deeds had control of the disposition of the land and equity, looking at the substance rather than the form, treated the transaction as equivalent to a mortgage. This analogy was applied to the pledging of letters of credit. The pledgor of the latter could not get his money from the purchaser of the manufactured articles without attaching the latter to the bill of lading. He could not get the letter until he paid the debt for which it was pledged. Hence the pledgee of the letter had a lien on the fund. The civilian would not think of reasoning from a course of judicial decision in that way.

(2) In the common-law system substituted relief is the rule; specific relief is given exceptionally when substituted relief, a money equivalent or money damages, is not adequate to secure the right. Take, for example, a contract to transfer a specified block of shares of stock in a particular corporation. With us the ordinary remedy is damages — an amount of money which will buy the agreed number of shares of that stock on the market, or, if they were to be sold, the money value of the bargain. But in a special case, where it is of real importance actually to have that number of shares of that particular stock, and they are closely held and could not be bought on the market, we should give specific relief and require transfer as agreed. In the civil or modern Roman law it is the reverse. The civilian gives specific relief as a rule; but where it is inequitable or impossible to give specific relief he gives substituted relief instead. The technique in each system is no less authoritative than the precepts which it develops and applies.

Again, there is the ideal element, the body of received, authoritative ideals. This element comes at bottom to the picture of the social order of the time and place, the legal tradition as to what that social order is and so as to what is the purpose of social control, which is the background of interpretation and application of legal precepts, and is crucial in new cases in which it is necessary to choose from among equally authoritative starting points for legal reasoning.

Take, for example, a question in the law of torts upon which the English courts and many of our strongest American courts

differ, on which, however, our American courts are not unequally divided, namely, the question of liability without regard to fault where something which one maintains upon his land, which is potentially liable to get out of hand and do damage, although not a nuisance, yet does escape and cause injury to a neighbor's land. Here we have to choose between the general security, calling for an absolute liability, and the individual life, calling for liability only where there has been fault. Here Professor Bohlen has suggested that the difference between the English conception of land as a permanent family acquisition and an American conception of land as an asset or a place to do things and carry on enterprises, in other words, a different ideal or picture of society, has dictated the starting points for reasoning.

Likewise in interpretation the ideal element is decisive. Massachusetts and Missouri have differed in interpreting exactly the same language in statutes doing away with estates tail. The language not being decisive, the question got down to one of the intrinsic merit of the possible interpretations. But how was that merit determined? Clearly by the ideal in the time and place of what an American social order should be. In New England, the perpetuation of a family had a part in that picture which it did not have in the southwest.

The most familiar cases of the operation of the ideal element, however, are to be seen in the application of standards. Many standards involve an idea of reasonableness. The law enjoins what is reasonable under the circumstances. But there is no authoritative legal precept telling us that this is reasonable and that is not. One does not require any protracted study of decisions of the last generation on due process of law to see that application of the standard of reasonableness was governed by a received picture of a pioneer rural agricultural society, and that a picture of the urban, industrial society of today has been yielding different results.

Nor have we done with the complexities of the subject when we have distinguished the three meanings of law and the three elements in law in the second sense. For the precept element, which is commonly taken for all that we have to consider, is made up of rules, principles, precepts defining conceptions and precepts prescribing standards.

A rule is a precept attaching a definite detailed consequence to a definite detailed state of facts. It is the earliest type of legal precept, and primitive law never gets any further. Primitive codes

are made up of such precepts. For example: In the Code of Hammurabi: "If a free man strike a free man, he shall pay ten shekels of silver."

In the Salic law: "If any one shall have called another 'fox' he shall be condemned to three shillings."

In the Roman XII Tables: "If the father sell the son three times, let the son be free from the father."

Criminal codes are made up in greatest part of precepts of this sort.

A principle is an authoritative starting point for legal reasoning. Principles are the work of lawyers, organizing judicial experience by differentiating cases and putting a principle behind the difference, and by comparing a long developed experience of decision in some field, referring some cases to one general starting point for reasoning and yet others to some other such starting point, or finding a more inclusive starting point for a whole field.

Consider such principles as that where one does something which on its face is an injury to another he must respond for the resulting injury unless he can justify it, or that one who culpably causes loss to another will be held liable for the injury, or that one person is not to be unjustly enriched at the expense of another. In none of these is there any definite detailed state of facts presupposed, and no definite detailed legal consequence is attached. Yet how continually do we turn to such principles as starting points for reasoning. Quasi contract, constructive trust, election, subrogation and the equity doctrine as to merger have been built up by reasoning from the principle as to unjust enrichment.

Or consider how starting from a principle as to the duty of a common carrier the precepts worked out for the carter were extended in one line to the stage coach, to the railroad, to the trolley line, to the auto truck, to the airplane, without calling for new rules as one type of carrier succeeded another. Consider how in another line they were extended to telegraph, telephone, radio, gas, electric light, and power. Then note how lawyers worked out a broader principle as to duties involved in a public service, which has enabled our law to deal with one after another of these rapidly developing agencies of public service by affording a starting point for reasoning.

A conception is an authoritative category into which cases may be fitted so that, when placed in the proper pigeonhole, a series of rules and principles and standards become applicable. Examples

are: Sale, trust, bailment. In those cases there is no definite detailed legal consequence attached to a definite detailed state of facts. Nor is there a starting point for reasoning. There are instead defined categories into which cases may be put, with the result that rules and standards become applicable.

Principles and conceptions make it possible to get along with many fewer rules and to deal with assurance with new cases for which no rules are at hand.

A standard is a measure of conduct prescribed by law from which one departs at his peril of answering for resulting damage. Examples are: The standard of due care not to subject others to unreasonable risk of injury; the standard of reasonable service, reasonable facilities, reasonable rates imposed upon public utilities; the standard of fair conduct of a fiduciary. Note the element of fairness or reasonableness in standards. This is a source of difficulty. As has been said, there is no precept defining what is reasonable and it would not be reasonable to attempt to formulate one. In the end, reasonableness has to be referred to conformity to the authoritative ideal.

Conduct requires standards. It is enough to remind you of one attempt to reduce conduct to rule, the old stop, look, and listen rule. Compare applying this rule to a horse and buggy crossing a single track railroad where trains ran thirty miles an hour with a heavy motor truck crossing a four-line track on which streamlined trains as like as not go one hundred miles an hour. By the time the driver has stopped, got off the truck, looked up and down the tracks, got back on his truck and started up again, the streamlined train may have come four miles.

Still another warning must be given. There are no less than four points of view from which law in the sense of the body of authoritative precepts may be looked at.

(1) First is the standpoint of the lawmaker. He thinks of something that ought to be done or ought not to be done and so of a command to do it or not to do it. Today the realist puts the result from this standpoint in terms of a theory of a law as a threat. It is a threat that, given certain conduct or a certain state of facts, those who wield the force of politically organized society will apply that force in a certain way. This defines law in terms of rules, by no means the most significant part of one element in law used in one of its three senses.

(2) Another standpoint is that of the individual subject to the

precept. He may, no doubt, think of it as a threat. But more commonly he has always thought of it as a rule of conduct, a guide telling him what he ought to do at the crisis of action. This is the oldest idea of a law. It goes back to the codified ethical custom of the earlier stages of legal development.

(3) Still another standpoint is that of the judge called upon to decide a controversy. To him a law is a rule of decision or model or pattern of decision.

(4) Finally, there is the standpoint of the legal adviser. To him the legal precept, especially the principle and the precept defining a conception, is a basis of prediction. Even from this standpoint, however, one must insist that a law or a legal precept is not a prediction, as some realists put it. It is the adviser not the law that does the predicting. As Mr. Justice Cardozo pointed out, it is a basis of prediction.

Can the different ideas reached from these four standpoints be unified? I think they can. They can be unified in terms of the idea from the standpoint of the judge. Judges and benches of judges are expected to and for most practical purposes will follow and decide in accordance with the established precept, and so it can serve as a threat, as a rule of conduct, and as a basis of prediction.

Two other theories of law from a different standpoint require notice. Many today say that law is power, where we used to think of it as a restraint upon power. Social control requires power—power to influence the behavior of men through the pressure of their fellow men. The legal order as a highly specialized form of social control rests upon the power or force of politically organized society. But so far from the law being power, it is something that organizes and systematizes the exercise of power and makes power effective toward the maintaining and furthering of civilization. What the power theory may mean in action has been exemplified in recent times in the identification of international law with power which has been leading to its undoing.

Another theory of today thinks of a law as an authoritative canon of value. Those who say this conceive that it is impossible to prove any moral principles or criteria of ought or measure of valuing conflicting or overlapping human demands. Hence those who wield the force of politically organized society, formulating the self-interest of a socially or economically dominant class, arbitrarily lay down or establish canons of value and constrain the rest of humanity to follow them. Well, I suppose socially and eco-

nomically dominant classes have changed and their self-interest has changed many times since Rome of the first and second centuries. But consider how many precepts formulated by the jurisconsults of that time have governed important relations and ruled important types of conduct ever since.

But, you may say, why do I go into all this so much in detail? Has it any practical importance? Most assuredly it has. The greatest part of the complaint which the administration of justice has been encountering in the present century has grown from the assumption that law has one simple meaning — that we can assume that it is an aggregate of laws and that a law is a simple thing. Treating the standard of due process of law as if it were a rule of property has sorely embarrassed our public law. Every department of the law has been embarrassed by the attempt at a jurisprudence of phrases; by premature formulations of supposed principles. Text writers have often sinned greatly in this connection. The certainty of the legal order has been gravely compromised by supposed overrulings which only overrule a text writer or hasty judicial language while the line of decision remains constant. Law is more than an aggregate of laws. It is what makes laws living instruments of justice. It is what enables courts to administer justice by means of laws; to restrict them to their reason where the lawmaker exceeds his reason and to develop them to the full scope of the reason where the lawmaker falls short of it.

Thinking of law in terms of laws has led to false ideas of our common-law technique and as to our doctrine of precedents. We must remember the short life of rules. Consider the stage coach, the railroad, the trolley car, the auto bus, the airplane. We have not had to make the law over as these changes in the agencies of transportation have succeeded each other. But how many rules applicable to the particular type of conveyance have ceased to be applicable to questions or situations which arise in the courts today. Nevertheless, they are not always nor wholly negligible. When air transportation first attracted attention, many were troubled by the old maxim that the owner of the surface owns indefinitely upwards — *usque ad coelum.* Yet the common law found no trouble here. There was a sufficient analogy at hand in the case of owners of the bed of a stream where nevertheless there is a public right of boating and fishing.

We must ever bear in mind that in law we have a taught tradition of experience developed by reason and reason tested by ex-

perience. One of the significant phenomena in the history of civilization is the vitality of such taught traditions. The civil law is a taught tradition of the universities from the fifth century to the present and connects with an older taught tradition of the schools of jurisconsults. The common law grew up as a taught tradition in the Inns of Court on the basis of the tradition of the courts. It was a taught tradition handed down from lawyer to apprentice from the seventeenth century, and is now coming to be a taught tradition of academic law schools. Both of the two great legal systems of the modern world are taught traditions and so have proved resistant to forces that destroy political institutions. We have in our law such a tradition molded through the technique of the lawyer to the ever-changing circumstances of time and place and so one of the most enduring of human institutions. The last of the Caesars fell two decades or more ago. The work of the jurisconsults contemporaries of the first Caesar still guides the administration of justice in half of the world.

Despite the pronouncements of the self-styled realists, despite the rise of absolutism throughout the world, we may say as Paul did to Timothy, "We know that the law is good, if a man use it lawfully."