Law and Power

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CASTOR AND POLLUX: YOU CAN'T HAVE EITHER SEPARATELY

Of course, Castor and Pollux are in the heavens as stars. But this is a later naming. They were well known to the Romans as gods and we still find temples dedicated to them. A striking thing, however, is that they seem to have no separate personalities whatever. Literally, you never find one without the other.

It is this kind of literal and complete union that we ascribe to law and morals, and, for that matter, law and power. Neither one of this foursome can justly appear separately, although, of course, they do in our usual use of language, and most people think of them as separate. But is this true? Do we not come closest to the strange phenomenon that we call law by thinking of law as action? Of course, no brief definition is satisfactory in every way. We merely say that this way of looking at things comes closer than any other brief statement to presenting the crucial characteristics of law. We find that legal rights always have some kind of action as the starting point. Some one gets punched in the nose, or he delivers the deed, or he signs the contract, or perhaps he refuses to do some particular act. In any case, it is his action that gives rise to claims against him by others, or claims by him against them.

Of course, one can give what seem to be exceptions to this. Thus an act may result in new liabilities in another in which it seems no action at all was undertaken. But this is also an indication of action, or perhaps his failure to protest is a kind of non-action. Of course, nonaction may involve more significant action than action itself. A voluntary act always involves morals in our view. Also, nonaction does if it is voluntary. For our purposes this decision, to do or not to do a responsible act, is an effect of moral judgment. It is a moral act and hence a part of morals in the most vital sense. Consequently, we think of law with morals, not law and morals.

Of course, in another sense, there is a vast field of action that is not directly controlled by law. One can plan certain things or
not on his farm without future regulation. He has reasonable freedom of locomotion in traveling about as he thinks best, and, in this country at least, this freedom is not restrained. This activity, unregulated in a significant sense by law, we call power. Some would call it freedom, or individual rights, or some other name. We also speak of law and power rather than law with power, because a considerable area of our activity is covered by power uncontrolled by the state; in a way there is a correspondence in law and morals, since morals may apply where you don't have legal regulations. We prefer, however, to speak of law with morals where the law operates, and power with morals where these are separate from legal regulations. We also speak of law and power, since this covers the area outside the reasonable restraints of law (power) in a fairly separate sense from the area covered by legal regulation. Morals, however, go to the quality of action, and hence we speak only of law with morals and then (separately) power with morals. There is, at least, a mistaken emphasis when we think of activity controlled by the law in a totally separate field from activity controlled by the individual rights and power of the person himself. It is so easy for one to think that he runs his own factory, subject only to certain laws and regulations of the state, while his income tax he concedes is handled by state law to which he is subject. We sometimes fail to give conscious recognition to the indirect, if not direct, importance of both individual power and state law in delimiting each other. Thus, in a neighborhood where refuse is kept off the streets, ashes and garbage efficiently handled by other means, there is no occasion for state law to intrude. Yet if these things are not done voluntarily, as in some slum neighborhoods, the very things that are handled unobtrusively and with apparent freedom in a well-managed neighborhood will come to endanger health and minimum standards of public order in some congested neighborhoods, so that laws under the police power must be used to protect the citizens themselves. There is no such thing as liberty in the sense of abdication of all part in community life with deterioration of minimum standards of living for everyone. Of course, it is better and usually more successful for individuals freely to carry us to higher standards of living; but if they steadfastly insist on degradation and destruction both for themselves and for others, then in the name of self-preservation some public action must be taken.
It is in this sense that we say that the power of the individual, though separate if he exercises it wisely, is not separate in the sense of arrogant and crucial destruction of everything. The individual's power exercised under the law is not separate from the part regulated by the law. Perhaps even more important in the vast field of apparently individual action is our system of private rights and private property. Usually private property is the best way to insure high quality of living and high performance, rather than to depend on the blighting effect of putting everything under the control of governmental bureaucracy. But there is no license to do wrong to anybody anywhere. There is a periphery of state action which is exercised or not in some measure according to the vigor and merit of private action and personal power. We can put it this way: morals are a necessary part of the law where the law operates and, of course, perhaps more important where they are individual and the law does not directly operate. Some personal rights and power are happily present even under legal regulations, and of course, they are dominantly, almost exclusively present in the vast field we have outside of legal regulation. But this presupposes the voluntary and even vigorous cooperation of persons in their moral duties and their efficient activities in this field of personal power and happily free from state intrusion. We rely upon education, religion, various cultural activities to keep up the high standards of our free people. But we must recall again the true aphorism, that eternal vigilance is the price of liberty, meaning not only eternal vigilance of tyrants on the outside, but also eternal vigilance against our own laziness, or indifference to duty within the mighty power of which we are so proud and with which we can do so much more than state control can do if only we are worthy of these opportunities. Law and power, then, are not separate within the separate areas. There is a little of the other in each area. But perhaps more sweepingly important is that the vast area of power with individual rights, as we happily think of it, is not separate from the more limited field of legal regulation. Each area in a sense makes the other area possible. They are not eternally separate and should not have a narrow jealousy based on their apparent separation. The vigorous life of each is found in vigorous living in both areas, with the eternal moral consciousness that the soldier cannot throw down his arms and go home in the presence of the enemy. All of us, whether in free activity or somewhat regulated by the law, must continue to do
our part with more than perfunctory activity. Even our magnificent use of modern regulation with dominant rights and power in the individual will not make glorious success from decadence. We justly speak of our government and our laws as expressing incidental devices which we as citizens use in the masterly efforts of our own accomplishment.

Perhaps in more technical terms this means that we do not think of the law in an artificial sense of a totally separate system. And the same goes for what we think of as our free exercise of power. The laws lose their meaning if we do not see that they are incident to individual activity; and individual activity may tragically slip into mere sloth or selfishness and ridiculous inefficiency if it does not renew its own vigor and prevent the encroachment of legal control by the magnificent exercise of its own job and its own powers.

**VALUES IN LIVING**

Most statements of value are by philosophers, not judges or businessmen or people in other walks of life. They state values in terms of norms, and they fix the content of the value in logical terms. Thus, many state the object of effort is happiness, and then they proceed to prove (or think they prove) that happiness as a matter of logical reasoning is the best object of human effort. But these rules or norms often have only vague relation to the facts, yet the proof of their merit relies on an assumption of factual reality for the accuracy of these norms. This, it seems, along with other difficulties, tends to an assumption of truth on a purely logical basis in terms of abstractions, without careful checking of these abstractions to see if the facts justify them: in other words, to see if they are truthful, whether in actual experience of living or in a truthful statement of either abstractions or facts that have not been experienced. And perhaps most of the professional philosophers who have worked on abstract norms alone as a basis for their system of values have been men who dealt in positivism or in terms of experience in what they call an “objective” character. They do not deal with ideas as facts, and especially they do not deal with moral ideas. They speak largely in terms of the present psychology and for that matter psychiatry also, in which moral ideas are omitted. All is stated in terms of instinct or impulses, and these in turn along with variations of mental activity are put objectively, in
terms of behavior patterns, in which they feel there is no room for moral opinion in reaching results.

Our approach is quite different. We do not seek to construct a logical system at all. We think of law and conduct as a way of walking, not a way of talking. Thus we define value as that which furthers worthy living. We also define evil as an insufficiency of the Good. Consequently, a particular law or moral practice may further the Good in some indirect or other sense, although it seems to be helping evil. What we justly call evil may well have some consequences that further the Good. And of course, incident to this, humans cannot hope to have a very truthful knowledge of all the consequences of particular laws or acts. We hold fast, however, to our idea of action as the criterion of law, and the idea of action also as the criterion of value and the Good, and truth. Indeed, our whole thought is in terms of action, and our conclusions are tested by their consequences in action. This in turn gives us the same approach and, it might be said, the same basic tests for both law and individual conduct.

Nearly all the great philosophers have talked about the Good as the end of life in some sense. Plato seemed to think it was reality, and Aristotle thought it was the promotion of good conduct by actual people, with the understanding that justice in the elevated sense and the Good as an ultimate desideratum could be thought of interchangeably.

We think at least that the important difference between all statements of the Good in various philosophical systems of the past and our own view is that we divide up the Good, just for purposes of striving for them and talking about them so that we can more accurately fix on what they mean while others have a single definition of the Good, such as reality or good conduct. We think of the Good as divided into seven parts for these purposes only. Quite differently, we think the Good may well be divided under different circumstances with different headings and that reasonable flexibility in new interpretations is to be both expected and desired. We also think that the Good transcends the power of human description. It is an idea toward which men can work in fuller understanding; but could not hope to achieve completely. For these limited purposes then we suggest the following seven divisions:
(1) Liberty (change)
(2) Equality (justice)
(3) Self-realization for everything
(4) Beauty (truth, self-restraint)
(5) Particular accomplishment
(6) A dynamic element with respect to all phases of the Good, which means that the several parts also involve courageous struggle.
(7) Creative conscience or consciousness as it may be defined, including the over-all element of redeeming love. (It is understood that the last two are implicit in all the others).

We must say at once that while seven bases for evaluating court decisions and personal conduct (by law and power), beginning with personal judgment, include always and everywhere the human conscience to guide us to the Good. But we do not end with this subjective approach. We deal with presuppositions and jural postulates in our way of living, and we think of our subjective tests (the seven just given) as a means of evaluating these objective ways of life. For instance, by rather general consent, matters of health and safety are important interests in the law. Security of the individual against needless uncertainties is also a reasonable interest of the law. We would want to further all legal interests to secure both a vigorous and rich life for everyone, but we would evaluate the important and the reasonable expectation of accomplishment through enforcing these legal interests when we consider them morally in terms of the seven phases of the Good we have mentioned. In a word, we do ultimately pursue the Good, and it is in terms of the Good that we desire to use and strengthen particular legal interests. Thus, not even health is an ultimate end of life. We would not favor health if it led to degradation in a particular case through ignoring the more immediate needs of freedom if these would lead to the Good in the richest, fullest sense, while health alone under the particular circumstances would not.

Von Jhering was rather definitely the source of "legal interests," though he did very little to develop it, and the use of legal interests now is so greatly expanded beyond his pioneer
work that the two hardly seem to be the same thing. The Ger-
mans have been the developers of legal interests on the technical
side, though in the application doctrine as a part of judicial and
legal technique to the problems of the law, Roscoe Pound in this
country has been by far the dominant figure. The German
*interessen* has developed philosophically, both as an interpreta-
tion of individual rights and of general policy in a social, po-
litical, or economic sense. Von Jhering himself merely made a
legal interest a somewhat expanded presentation of a legal rule,
so that we considered law to be not only the rule but its fair
implications and periphery. This would be our view also. Quite
definitely we think the more extensive interpretation of legal
interests—what is often called social interests—should be cov-
ered by our seven parts of the Good. Among the Germans of
recent years, there are those who roughly adhere to this view
of Von Jhering and there are others who include these general
interpretations of public policy. We think we are the only ones
who proceed on a frankly ethical basis including judgments for
the future in both deciding legal rules for the future and fixing
upon personal conduct, especially in view of changing conditions
of both law and morals from time to time.

This construction gets us into some trouble, but then we think
law and life are one, both legal and ethical; or, if you like, we
think all life is one, that part of life regulated by the law, and
that part which we often call power as against law. In this
second part of power, we feel the pressure of moral values even
more strongly than under legal restraints, since the individual
has the power to do good or evil in this field.

In a word, the field of individual morals or power, which
the law at least directly does not restrain, is peculiarly dear
to us. There we have opportunity for individual growth and
individual interpretation that makes for manhood and character,
where regulation at every turn tends to crush and debase a
person. For instance, what if the state planned all the houses
in some city, as it often does? Even in our capitalistic countries,
these new subdivisions constructing an entire city complete with
stores, schools, churches, as well as homes and other facilities,
do not involve the individual planning of each home owner, ex-
cept in rather minor variations that are largely incidental to
the main plan. But generally, in our country it is still possible
for a young couple to save their money for years, while they are
thinking and planning together to build their own home eventually. When that home is built, both husband and wife have gained strength and dignity and, no doubt, real development of artistic skills in creating that home themselves. Of course, one must count over against this the work of the architect and the interior decorator and others. Granting this, however, there is a net vigor and independent power for a great number of home owners who put themselves into their homes in many ways. Surely, the economies and the other advantages of mass production must go hand in hand with the real good of the individual, and not in a crass indefiniteness to whether he grows or becomes a mere automaton which is dehumanized and debased. Depend upon it, if we crush the individual, this grandiose social structure will collapse and perhaps then we will indeed have tragedy of the ancient Greek sort: the individual never will rise again and there never can be life at all that is worthy of the name.

It seems that postulates should go particularly with the claim of the plaintiff. They are often called “postulates of the time and place” or “postulates of civilization.” They are labels for general practices in an objective sense that people in our times can fairly rely on incident to their legal rights and their way of life. Like legal interests, they go beyond legal rules, but they are more extensive and perhaps less definite than legal interests of civilization in the German *interessen* of Heck, but they go beyond our legal view of interests, and while they are less extensive than our seven divisions of the Good they introduce an objective test for the law, rather than the subjective ethical approach of the Good. We suggest that they go particularly with the plaintiff, because in bringing his suit, he alleges he is injured according to some test or some standard. Thus, he may feel that he is injured in the breaking of a particular rule of law, or in his further rights under a legal interest, or in the violation of these more general objective phases of the legal order, mainly the legal postulates of the time and place. On the other hand, legal assumptions go more directly to the defendant’s position like legal postulates that set forth the legal order which applies to both plaintiff and defendant and all people. But the assumptions seem by implication and the fair meaning of that word to carry the notion of what the defendant can use of that broader interpretation to justify his position. We would suggest the following tentative elements for the postu-
lates and the assumptions, but, as in other interests, we would not want these to become crystallized as unchangeable without any danger of introducing any real uncertainty in the law. We are safe in leaving our statements open to reinterpretation later.

**POSTULATES**

1. Truth will be respected in the sense of not unjustly deceiving people to their injury.

2. A common good with the social side of individual interests shall be furthered in every practical and just way.

3. People should claim their individual rights only in the sense of worthy development for the future and the dignity of man.

**ASSUMPTIONS**

1. People will want to enforce their legal claims with the least burden to others and in a spirit of true fraternity.

2. Whether in personal injuries or in the breaching of agreements, defendant will want to restore the actual loss, so that the claimant will not suffer because of the wrongdoing of the defendant.

3. The interests of persons, whether litigants or not, should be before the court, even though they are not put in issue by either plaintiff or defendant, if they bear on the issue before the court and are appropriate for decision at that time.

By power we mean the field of voluntary action not directly controlled by law. Here there are usually conflicting interests of some kind, though in large measure it may be possible to satisfy apparent conflicts with substantial fulfillment of the desires of both. In the ownership of land, for instance, the airplanes can generally traverse priority on land without interfering with the real enjoyment of the owner. The owner in turn can develop his land as fully as he likes, without requiring that airplanes should keep out of his air space. But there come points of conflict where, for instance, the airplane flies too close to the ground or drops things from the sky to injure those on the land. On the other hand, the landowner can erect unnecessary building apparatus to interfere with air transport, or can send
up flame or gases to make air travel hazardous. Kant might say that the reasonable self-assertion of the airplane is unlimited except by the reasonable self-assertion of the landowner or perhaps protected with other legal interests. But this doctrine of Kantian free self-assertion in transcendental philosophy or the more usual form in the law of conflicting legal interests is surely superficial and insufficient. The claims of both contestants may be wrong and lead to evil results. Thus you may not serve the Good at all, although you do make a good job of adjusting these actual conflicts between the plaintiff and defendant. The furtherance of the Good may be something that neither party has requested and neither party would favor. The claims of both parties may not be well chosen to advance the Good. Therefore, the theory of legal interests in the law is usually qualified by cultural standards in which legal interests of individuals also further the advantage of society. Legal postulates of the time and place and assumptions or other qualifications of claims may further be used to interpret and justify one legal claim as against the other.

But even this second advance, which roughly is as far as legal theory goes now, is surely not enough in our approach and not enough for the needs of the law. Essentially it interprets everything in terms of present culture and present experience, which of course in some degree is always past experience and past culture. The present is instantly the past as soon as you say "present" or perhaps sooner still as soon as the idea has passed, though it was not even spoken. We have then the problem of serving the Good through law by giving the best effects we can to the claims of both litigants. But in this must be realized the experience of the past. This includes a theory of legal interests, legal postulates, and legal assumptions. This means not only the reasonable expectancies (often fixed rules of law) and the cultural values of the past, but the ethical insights (different views of the Good). This last may mean pure speculation about the future which never was on land or sea.

Within the scope of the law, it is usual to talk legal interests, legal postulates, and legal assumptions. Of course, many other paraphernalia are used in different ways, but these three at least are rather generally employed, and they are ones that suit our purposes. Also, let us say at once that we think ethics is a necessary part of the law, at least to this extent: the parties
themselves must choose whether they will do an act involving a liability, and the judges must choose in preferring one side against the other. In making these choices a moral judgment necessarily is involved. Thus, we would never favor law and morals, but always law with morals, if we were to separate them at all. Still more strange, perhaps, we take the view that there is no great difference between law and morals or law and power generally. For instance, the great Petrazycki makes a basic point that morals are directed to the individual, while law is always bilateral. Even if it is criminal law, it is still bilateral because it is between the citizen and the state, while rules of law always involve at least two persons, actual or artificial if there is to be a lawsuit at all, or if there are to be rights and duties in any legal situation. But we feel that this is artificial in its minuteness. It makes distinctions that do not exist. The difference between ethics apart from conduct of legal restraint, and conduct within elements of legal liability, is one of degree or aspect rather than kind. Thus, very much to his honor we think Petrazycki feels there are legal values in our duties to animals and our duties in the field of manners, although these do not fit his definition. One would surely think of them technically in the field of non-law, or personal power, or legally non-regulated conduct. He has to explain them a good deal to get them within his overall concept of law. True, indirectly there are elements of legal liability from man's relations to animals and his relations from manners uncovered by the law. Yet also they peculiarly fit the non-legal field. At once there is a question; it seems better to talk of law and non-law as matters of degree or emphasis.

Happily also, this approach enables us to use substantially the same analysis and the same nomenclature in both law and general morals. It avoids the need for complete rethinking when we have an account or a rule that does closely follow under both headings.

It may be asked, how can we talk legal interests in a non-legal field? Of course, we must change the analysis somewhat, although still asserting their essential unity. In a non-legal field it would be largely ethical and cultural interests, but there are many matters in the legal field where we fairly have to consider ethical and cultural interests as well as legal ones in the conventional sense. The scope of individual action is greater in the non-legal field, from the very fact that it is not clearly and
significantly controlled by law. Many individual activities are conceded to be in the non-legal field, which hardly, if ever, crop up in the strictly legal field.

Wittgenstein has been greatly honored for his system of stating norms that shall be logically accurate, without any possible exception to these statements. But we fear this atmosphere of infallibility sometimes encourages error rather than prevents it. Wittgenstein is very careful to state at the outset that he assumes the facts justify the statement which is then considered for its logical accuracy. Perhaps particularly in the interpretation of the subject and the predicate. But he assumes the truth of these statements before he discusses their logical use at all. The chief difficulty perhaps in philosophy is the truth of the statement in view of the facts. Especially in the field of ethics, statements are assumed in a normative sense, although they are not true in a factual sense.

We think this is a serious fallacy in practice in most of the well-known ethical systems. For instance, Kant begins, assuming only abstractions that are separate from the factual world. Then, for instance, he takes up the question of punishment and says that in abstract truth, the punishment must be attributive, proportional to the offense. He points out that this punishment in logic should be what is really needed in view of the offense. Thus, any mercy in reducing the punishment would be unjust to the criminal himself, since he needs exactly this punishment for his own real advantage.

But this assumes the factual accuracy of Kant’s abstract test of the greatest free self-assertion in each, compatible with a like right in others. Kant does not even discuss the workability of this test in view of the facts that confront the judge and the criminal.

It seems that practically all the other ethical thinkers fall into this hazard to some degree. For instance, Duguit repudiates ethics entirely for a basis for law, saying dogmatically that the sole test for law is whether or not it furthers social solidarity. That leaves out ethics or morals entirely, since social solidarity may occur on an evil plane as well as a good one. Even the classical thinkers like Plato and Aristotle postulate reality or the just and the Good in such fixed abstractions that one does not know their intended course for the law. This is inevitable
because they do not, and perhaps cannot, give factual content to their abstract tests. The worst offenders may be those in modern times who state ethics and law in terms of happiness or pleasure or utility. They glibly assume that one of those abstract tests alone contains within it in daily application all the needed tests for the good life. We don't think pleasure is a workable test for any good result, but we certainly wouldn't think that such a test would fit every possible case from the mere assertion of this universal test alone.

Indeed, it often comes down to a "special pleading" in the popular use of that phrase. For instance, Spencer and Bergson based their philosophical approach on evolution in one form or another. But they thereby assumed that their particular abstractions on the single test met the factual needs of all situations in the field of law or ethics. They give no evidence for this. They just assume that the facts will back up their pet abstraction, and they ignore any questioning of this whatever.

Surely our approach is both more humble and more practical, if nothing else. We give seven divisions of the Good, not just one test. We say that the Good transcends all the seven so as to give room for peripheral insights, and finally we assert merely these seven as convenient labels for what will be expressed in the actual ethical judgments, based on the actual problem on the facts. We can then collect what the judgments are on that case, as we find them in the law reports. Then we have agreements or differences on the results, although the particular norms and the particular interpretations of the facts may differ.

It does seem that this method of ours is so different from the recognized ethical systems of the past that we must begin from our approach, and not from some futile restatement and reargument of other approaches which cannot fairly justify or overthrow our view, since they do not deal with the same methods or problems at all.

We hope to use the seven divisions of the Good to test both law and conduct by experience and by prior interpretations of the Good, much as we build up the common law through judicial decisions in which our view of trespass, for instance, is developed from one decision to another. In keeping with this, we decide whether there has been wrongdoing by court decision in which
judges have taken part. They may each have different backgrounds and different ethical or religious views, but they agree on whether justice requires recovery against a wrongdoer in a particular case of alleged trespass. Under our seven divisions of the Good applied in actual court decisions, we would in time have judicial decisions as to what equality, liberty, and the other five meant in a particular case. This would give us agreements in results even though judges differ in their private ethical and religious views. It would enable us to build up standards under our seven divisions of the Good which we could apply in the law courts, and which individuals in private conduct could apply, based for them on ethical writings and community practices and individual opinions for matters of exercise and power not directly controlled by the law.

This notion of Kant’s that the criminal is entitled to his punishment, if taken in an arbitrary sense, is one of the darkest phases of his absolute idealism. Not only does it have the hazard of abstractions that never touch the factual world at all, but it has the added danger of thinking of punishment also in an abstract way, in the sense that it is really disconnected from reform or correction or protection of society, or any other civilized and decent view of punishment. Kant really does think to pretty low levels in his notions of punishment. Punishment has many ideas within it. To name three easy ones, it includes in most common sense thought, first, punishment in the sense of correction or reeducation for useful living. Then would come punishment in the sense of confinement, so that the criminal is prevented from doing further injuries to society, at least for a while. And thirdly, it is punishment in the sense that because of the burden of the punishment, he is deterred from committing other criminal acts, in addition to the improvement of his character under the first element and in addition to his isolation from society during his confinement, as we have noted in the second element.

But there is a limit to everything. Punishment in the sense of revenge, with a sadistic emphasis, would have a degrading effect on respectable people who are supposed to run the country, somewhat in the sense that slavery may work more injury on the masters than it does on the slaves. But here we must watch the limits of this approach. We would say that you can’t punish a criminal merely to reform him or to protect society or to
change his future conduct. We would not approve punishment unless there is some wrongdoing which is a just occasion for action against the criminal. Up to this point we approve Kant's distinctions. But granting he has done wrong for which there is a particular punishment, then the interpretation of punishment itself would be within the three elements we have just mentioned.

This part of an approach to penology is very moderate. Thus, you use medicine apart from punishment with a view to getting a patient well, but you don't feed him medicine if he is not sick in the first place. The element of repression is not punishment to the extent that if he does these wrongful acts, we insist, as it were, that he take the cure whether he wants to or not. We would not so insist if he had not broken the law and incurred the nonpenalty under the law.

This cure, as it were, which he must endure, is almost always unpleasant and distasteful, although we trust not cruel. And this repressive side of punishment, though aimed at reeducation and protection of others in its effect, does bring us to a somewhat separate element which is undoubtedly a part of handling things by way of criminal procedure. This element is the deterrent effect of the existence of criminal penalties for those who have not yet broken the law, but might do so if it were not for the penalties that would come to them.

But this separate element at once involves us in complications. Perhaps in most cases, and often very much to our surprise, these published penalties do not deter crimes in others. This unexpected result is perhaps for two reasons. First, as so often happens, the criminal is not thinking of the penalties at all when he commits the offense. He acts on immediate provocation. Indeed, this is quite normal, both psychologically and pragmatically for the usual human being. Secondly, he often commits the offense in a kind of bland indifference to the penalties. They do not deter him in the least, although he is fully conscious of them. Perhaps the final paradox is, that if the penalties are extremely severe, they prove to have less rather than more effect in deterring crime.

There is, for instance, a famous illustration that when the common law hanged culprits for picking pockets of even a few shillings, there was a kind of bravado among pickpockets to
attend public hangings of convicted pickpockets and then pick the pockets of those who attended. This is a part of the psychological folly of hoping to end crime by increasing the penalty. At least much more important than the severity of the penalty is the certainty of conviction.

What we have said is perhaps the bones of our approach to the law. Others might call it the structure, but we eschew that word “structure” because it reasonably holds connotations of a system or organization of legal matter, and this is exactly what we do not want to create or discuss. We take the popular phrase for the law itself, namely, that law is a way of walking, not a way of talking. Thus we can have ways of doing things, but not a logical and analytical system which becomes a requirement in itself, rather than in interpretation of actual conduct.

On the conduct side, however, perhaps the chief pitfall is in judgments by judges or others showing what they think should be done in judicial decision or personal conduct for the future, as against judicial decision and personal conduct relative to past experience, especially in the sense of existing culture and general standards. This latter is what Comte substantially meant by relativism, and he was fairly the originator of the relativistic doctrine as well as the originator of the very term “sociology” along with the basic methods and affirmations of that science. “Tout est relativ; voilà le suel principe absolu” was his famous phrase. In this broad approach which has found rather extensive use even in such great judges as Cardozo and Learned Hand, we cannot join. Relativism in the sense of interpreting general words—for instance, like “good moral character” as those words are fairly understood in that situation at that time, is highly conscientious and illustrative of judicial restraint, but it is not sound practice. A judge and a person must do more than interpret the mores around him. He must use the customs and the culture of his time, but he must remember that his decisions necessarily operate in the future. Thus the least he can do is to strive for an interpretation worthy of this future and equal to the work of this future, which necessarily must be somewhat different from present and past culture and experience. This is inevitable since in the factual world all facts are necessarily different from each other, and the facts of the future are strikingly different from the past. Thus the wisdom and the conscience of the judge and of all human beings guiding their con-
duct must dare to think for new situations (not just the past), no matter how conscientiously they feel the interpretation of the past is important in this fixing of the interpretation of the future. They must use the culture and experience of the past as they think it is wisely interpreted, but they must always remember that the future is necessarily different and hence there must be some original, humble contribution of their own in all these estimates, so as to meet the future adequately, which can never be done by the past in a literal sense. And of course, we remember, for these purposes and in sober fact that there is only past and future. There is no present. What we call the present is a special variety of the past, or perhaps a special and limited guess of the immediate future. There is the old illustration: the moment you say "present," it is the past.

Perhaps we should add that this estimate of the future is what gives dignity and honor to judges and men generally. It goes to all our estimates and conduct of life. It is something that the judge cannot abdicate and remain a man at all.

Confusion comes in this when Mr. Justice Holmes is sometimes called a relativist. But this in a very different sense, so that it seems regrettable for statements to be made about him in these terms at all. It is said that Holmes is a relativist because his legal and moral principles to be applied in the future take account of the actual facts and situations that will be involved. But this includes Holmes' own wise and brilliant needs of the future, and it is all the better that he has in mind the situations that will be involved and applies his ideas to specific situations, avoiding the grave dangers of absolute abstractions. But this is not the relativism of Comte or Cardozo or the generally accepted use of that term which we have discussed. This is the very wise and daring thought for the future with the use of the past which we so admire.

In using these devices of the law—rules, interests, postulates, suppositions, divisions of the Good—we must practice eternal vigilance. Our sixth division of the Good deals with a dynamic element and, of course, there is a dynamic quality in the seventh division with these inexpressible elements added to it. But they do not guarantee action at all. A kind of slow degeneracy seems to attack individuals as well as nations, almost as if a personal devil were involved. The elusive quality of confident and humble action in the face of failure and dangers may prove beyond the
reach of some persons or some nation just for the moment or just for a brief period. Perhaps under slightly different circumstances there would be ample courage and imagination. But for the moment the best efforts of the best people seem futile to bring them into effective action. They elude effort perhaps only long enough to ruin hope of ultimate accomplishment. This is enough to defeat what one might call the thousands or millions of years of the past in building resources or capacities for further human achievements. It seems at least that one whole course of advance has been stopped and that any amount of effort through any number of years has been futile.

This indescribable creativeness has slipped away and left only the absence of life and the absence of achievement in all its gloom and destruction. Everything we mention and every particle of everything we mention must have this indescribable element we call life if we are to go forward either in law or in power—either through authoritative action on the outside or the fiery dynamo of conscience inside. And what is life has always defied the scientists and philosophers. Perhaps it always will and always should in our scheme of things. But in some way we must thrust for it and we must always recognize that it is an inarticulate part of everything that we do describe.

The human race itself seems to have only limited periods of creativeness. A particular country will have a debauch for reasons that none are wise enough to understand fully, and then slip into brief or long periods of what can hardly be described in milder terms than degeneracy and failure. Perhaps in dealing with it this is our limit. This amazing power of transforming apparent death by life, this seeing far beyond what seems to be the limit of our grasp, is a necessary part of everything and must be fought for and kept vivid at any cost.

If we talk of the divisions of law and power under the seven divisions of the Good, we are talking and thinking subjectively. This causes us no great concern about objective reality, since when we think in experience itself—the way people live and do things everyday—the subjective side does come first. Thus we think equality or freedom or unity, and then we seek and use actual experience of these things. This pursuit of the Good in all its phases, of course, uses social and economic wealth for the sustenance and strength of the people and their health and education and daily living. But we tell the truth when we put
the idea of these things first and the finding and the using of particular instances of them, second. The objective world and what's inside your skin are, of course, both used and are interdependent. The beautiful picture gives you an experience of beauty, and the capacity inside for enjoying this and reverencing it leads to action in creating more beauty and creativeness elsewhere. Instances of the legal interests in health, security, economic freedom, educational strength, all these we experience in the fields of both law and power under the divisions we have just named (legal rules, legal interests, and the others) but it is the consciousness (conscience, if you will) inside your skin, as we use language, that enables us to evaluate these things and to act—perhaps in fear and despair, but still to act.

**HUMAN EQUIPMENT**

The equipment of men for handling both law and power is amazing. Perhaps it was admiration for what human beings could do that really impelled Plato and Aristotle to their speculations in the first place. Perhaps Shakespeare has expressed it best: "What a piece of work is man; how noble in reason, how infinite in faculty." When we think of human powers in this sense, perhaps we put the mind first and then the brain. But surely we think of the mind in a more fluid and all-pervading sense than we do of the brain. By our conventions in speech, if nothing else, we give a definite, substantially physical content to the brain and we place it as something that the mind uses while remaining free of any control by the brain in the total powers of the mind itself. Thus the structure of the brain, if you like a physically scientific question, is also a very real one for people, both as lawyers and as individuals. This does not in any way mean to give special significance to the brain. It merely means to observe it as best we can and try to increase our knowledge of its just place in the whole scheme of things.

To begin with, consciousness, perhaps briefly in the sense of creating new opinions that do not flow in strict causation from the past as changes in the physical world are said to do, is of the first importance as a process that at least seems to take place largely in the physical brain. Lord Cambridge (E. D. Adrian) has explored the physical side of the brain. He finds that probably this faculty of consciousness or indeed conscience or fixed values for the future (thought in somewhat these basic phases),
is located to some extent at least in the connection between the anterior frontal cortex and the dorsomedial nucleus of the thalamus. Recent experiments by other medical and physiological scientists make this area larger or smaller according to their various findings. They give the striking comment that this region, in any case, seems much larger than this thinking process requires. This seems a most important finding in connection with every interpretation of the brain. Of course, it may mean that this apparently needlessly large area is really used in thinking in ways we don't understand. But, it means, if nature itself has supplied a larger area than is used by any significant process, that this would be contrary to the usual pattern, in which man's physical equipment seems to change largely to meet his changing needs, and not to exceed them in the first place. Perhaps there is some hidden explanation in this whole matter. Perhaps in a practical sense it means there is great reserve of physical elements there which can ultimately be used for the thought and power of man. If we do have this reserve of ultimate power operating through the mind with the use of the brain, it is encouraging as perhaps no other discovery of modern times has been. Does it not seem far to excel the significance of the atom bomb or any other kind of such control over atoms as we have now or may indeed have in the future? In a most definite way, it seems to point to the almost unlimited control of matter by spirit without using either of these terms in a primitive or separatist sense.

Kant gave it as his opinion that the study of the starry heavens above and the moral law within were the subjects most significantly worthy of the efforts of man. Perhaps if we change "moral law" to "moral power," and trench strongly on this tentative assurance of great reserve equipment for the mind and spirit, we will have a view of human powers in which this power of spirit should be moved to first place even above the starry heavens themselves.

In a word, the mind itself, the human spirit and the universe in all its phases—everything, excepting only the supernatural—is the true province of the lawyer and the true province of man everywhere. If we deny this ultimate inclusiveness, we will in the end impair our most particular rules and the most practical even of the administrative side of the law. In this approach, therefore, we consider other elements which do not seem to fit
precisely in the divisions we have already suggested. One thinks at once of humor (or at least some of us do) and then we move on to judgments, which perhaps should come first because they seem to be just another way of stating what consciousness and conscience do for us.

We are told that one touch of nature makes the whole world akin. And again that the essence of humor is cruelty, but we don't believe it. Too much goody-goodyness is offensive. Since it is an excess in itself, perhaps any of it is offensive. But we still think that humor itself leads to the Good; and, if this makes you sick that is your lookout. Straight off, let's admit that at least the second test is false. Perhaps satire is based largely on cruelty though even this is to speak in hyperbole. When Horace wrote his satires he was in large measure writing what we might now call realistic essays or something close to a realistic novel. It may be that one can use cruelty in any form of writing, and that it is somewhat involved in much so-called humor. But this is a far cry from saying that cruelty is indigenous to humor in an inevitable sense.

No: humor is the protagonist against falsity or pretentiousness. Thus it brings us to the Good, though by indirect and very attractive ways rather than in a prosaic and direct manner. Humor is the good friend of kindliness and pricks the bubble of the pompous not in cruelty but in devotion to the Good. Indeed, humor has a merciful and healing effect on the pompous calf himself and brings him back to kindly living in the most effective and the gentlest way that may be possible.

And don't tell us that this is an abandonment of the law as well as of common sense. Think what the world would be if there were no humor — if there were none of this magic to heal wounds and curb the oppressor. It is a part of our blood and bone and it is impressed in every rule of law we have. The law would have to be so different if it were not aided by this amazing force. We ourselves would need a strangely different way of life if humor were not there to make our present life possible. And perhaps the most revealing part of it is its illusive quality; so that even the critics rarely attack it directly and no one is so literal as to claim he understands it. We are told that the wind bloweth where it listeth, and in an illogical analogy we sometimes think of those phrases of Goldsmith where we try ineffectively to identify humor: "And thou sweet poetry, thou loveliest
maid . . . thou guide by which the nobler arts excel; thou nurse of every virtue. . . .” Thus what he ascribes to poetry, we apply to humor.

But if we try to capture it even by the gentler means that eschew definition, humor eludes us. It is in the awkward futility of a young colt, and the crinkles around the eyes of an old codger smoking his pipe. It is nothing, if you like, and then again it is indispensable to the breath of life itself. But, offensive as it may be to hobble it by label, it does indeed achieve the Good when the heart blood itself might fail.

We say that morals is what the conscience does through its judgments. It is a strange and often new idea to think of the conscience in both a spiritual and an almost physical sense. At least parts of the brain are used by the mind and the spirit to turn out judgments of our consciousness or our conscience. Part of the factory that turns out these judgments is actually in operation inside of us. And judgments are comforting things in that they so obviously transcend our own petty systems and our conventional arrogance into putting things into pigeonholes and then saying that we have settled the matter for all time. The judgment on a particular problem may involve elusive factors that we have not put into words and indeed that we are too stupid to put into words. But nevertheless these very important elements do go into the sum total of the judgment and we are conscious of this.

Yes, you have guessed it! This, too, goes to the Good, for too much direct comment on the Good is presumptuous on the one hand and very crude on the other. But in this, in mercy, the judgment saves our humor, and our gaiety, and our modesty, and our sanity. It enables us to use many factors which we desperately need for the job at hand, long before we can identify them ourselves, and still longer before we could separate them and find them.

Our judgments express our conscience and all of the understanding and freedom that this means. The word has taken on somber tones which are indeed false. By judgments we live in gaiety and freedom and gentler understanding. We use in daily actions that greater part of life which we cannot put into words.

While the notion of a judgment (assessing value) is cheerful and a device of high quality in that it enables us to use so much
that we cannot separately label, it also seems akin to a particular source of strength, namely, self-restraint. This, of course, is tied to the Kantian notion of duty and his view that conduct is not meritorious unless it springs from a sense of duty. If you do the Good happily because of your own unforced devotion to it, this, according to Kant, is not a moral act. Morals in this sense must come from conduct that is carried out because of a sense of duty, not because of a love of the Good. To us, this seems forced, and perhaps similar to the other Kantian universals that flow from his too-rigid allegiance to abstractions as in his view that punishment is not only deserved for sin but is justly demanded by the sinner, and hence should never be changed by mercy. Restraint is not the pathway to morals in the sense of a more elevated achievement than the free love of the Good. More accurately perhaps, it is like fear of the Lord, being the beginning of wisdom but not its fulfillment. In these terms, the love of God, as it were, parallel to the love of the Good, would be the fulfillment.

In his *Ode to Duty*, Wordsworth expresses this: “Stern daughter of the voice of God! O duty! . . . There are who ask not if thine eye be on them . . . Glad hearts! . . . Who do thy will and know it not.”

We have discussed the deficiency of the humanists in urging only restraint to the excesses that selfishness and vanity and all the evil emotions can bring on the human race. Evil as they are, all these emotional excesses are active compelling forces. The trouble with the humanists, and indeed most of the mere systems of ethics, has been a failure to counter these active forces of evil with active forces of Good. The philosophers lack the fiery dedication and the crusaders lust for battle. Restraint has no aggression in it, no sacrificial zeal to fight to the death, not merely exercising restraint at every turn.

In keeping with this we have considered restraint as a part of beauty, justice which is one of our divisions of the Good itself. Thus restraint is no longer a negative thing but partakes of the aggressiveness of the Good, and is like the other parts of the Good that it is engendered with the dynamic and devotional forces. There are times, of course, when justice requires restraint and one’s energies must go to holding back excesses. But if the furtherance of equality, the rights of others, beauty itself in the sense of proportion and understanding, must take the ag-
gressive side and struggle for these things both in promoting them positively and in curbing everything that tends to weaken them, restraint can be thought of as a positive force that calls out all the aggressive energies of the persons involved. For instance, when some element of individual liberty is being crushed by selfish zealots who are acting really in their own selfish interests rather than for the common good, then restraint of such conduct requires the most aggressive and fervent action to make this restraint successful, and to protect the right as against the wrong.

Perhaps the word “restraint” in this connection is more often used in the sense that each individual should restrain his own exuberance in which he sometimes mistakes his alleged good motives and really indulges his evil ones. Thus the vulgar extrovert and demagogue should exercise restraint themselves. But this too fits the qualities we have mentioned that restraint itself is a part of the Good and it usually and properly involves the energies and the devotion that are implicit in every phase of the Good.

“Man is naturally good and that it is by our institutions alone that men become wicked.” — Jean Jacques Rousseau.

“Nothing is more certain than that our manners, our civilization, and all the good things that are connected with manners and with civilization, have, in this European world of ours, depended for ages upon two principles; and were indeed the result of both combined; I mean the spirit of a gentleman and the spirit of religion.” — Edmund Burke.

On these two statements, the war between the romanticists and the humanists has been fought for more than a hundred years. The battle is still going on and much of the territory is still in dispute. Perhaps, however, we can remove some factors on the ground that they are no longer incident to the ultimate victory. First, the romanticists admit that the goodness of man is not held back solely or principally by modern civilization. They admit that there is evil in man and that devices of restraint in civilization are often very helpful in curbing this evil. Perhaps one of the matters chiefly in dispute still is the just nature of “restraint.” Is restraint a purely negative thing, a kind of mechanical break that does not have human or dynamic forces within it? Perhaps both the romanticists and the humanists now agree that restraint must be a more active human thing than the
original humanist definition. It is like the element of love itself in a sense of limiting one's activities rather than expressing them. Some indeed have intended to equate restraint with the "ought" or self-control of the moral life. Granted that it may have these characteristics in particular matters (as we have said somewhat of right and wrong already), it is still a phase of the Good as right and wrong are "subordinate parts of the Good." Thus, in particular cases we can love the Good by hating certain manifestations of evil for the moment and in particular difficulties, rather than to stress the transcending beauty of Good itself.

We would agree that we should stress moral qualities rather than humanitarian or supernatural. We would agree that the control of evil stressing it by most religious and moral systems is very necessary, and that emphasis on the positive side of the Good is not always and in particular ways, the best way to control evil. But generally it is so; and to the humanists, in putting restraint as the co-equal of affirmative action, or even its superior — this is going too far. One overcomes evil with Good. The thing to stress is the active part of the battle, not merely its systematic description. Restraint does little good unless it be used in the service of the Good through the power of love. It is the active element of conscience that produces the peculiarly separate elements of love and the Good. It is the force of conscience acting through human judgment that wins the battle. Part of the Good is to have some control and humbly exercise some restraint. But if it goes no further than this in the service of the Good, it is likely to fail. Perhaps the main defect with ethical systems, and with humanism insofar as it constitutes such a system, is that the quality of devotion and sacrifice are absent. Mere ethical systems in the coolness of preferability of affirming one ethical principle as against another, this is too inactive, too lacking in fiery aggression, to win the battle over evil. We not only admit but affirm that this battle is always with us and may well be lost unless the most heroic efforts are exercised.

We have mentioned that the great humanistic doctrine of self-restraint must find a place separate from the love of the Good as we understand it. The love of the Good from its very name means a free allegiance, not usually including this sense of duty or self-restraint, and the curbing of the tendency of wrongdoing from Kant's doctrine that the ethically good is based on a sense of duty not on a voluntary allegiance to the Good. There is, of
course, grave danger of slipping into Rousseauvistic naturalism, if we do not have restraint even on allegiance to the Good, when this is expressed unwisely or insincerely and self-indulgently. This element of restraint we subsume under our method of judgment where we also lodge much of the naturalistic element that has loomed so dominantly in philosophical thought in classical and medieval times. Judgment seems to turn both on reasoning and on a sense of fact. The determination of facts has often been called not rational but emotional, on the ground that it is based on preference and preference goes to the satisfying of the emotions. It does seem, however, that many questions of facts and their interpretation through judgment may have very slight, if any, emotional content while the chief element is logic for other conventionally grouped rational factors. We feel that the reason can be subsumed under judgment, though there in large part it will be mixed with emotion. Reason, as it has been used, is surely too vague a term, especially when it was merged with moral qualities as in much of medieval philosophy. These great philosophical schools were impressed by what they thought the reason did, and they made reason in a purely rational sense dominant beyond the scope assigned to reason in modern times. The same magnificent content, of course, is there, but to distribute it under more intelligible and accurate names seems desirable.

For one thing, the word "power" covers many meanings which the word "will" is now used to represent. Then there is, of course, the problem of the expression "will to power," but this might be put to one side on the ground that it is an incidental instance. The meaning of power can be transferred to will for many purposes while the phrase "will to power" can be shifted to "drive for power," and indeed this latter would be more accurate.

Among the modern humanists, Emerson is held in high regard on the theory that he goes beyond the intuition of naturalism, and rises to the higher level of moral insights through by what is called "the higher intuition." Our approach through the "love of the Good" is perhaps like the higher intuition, not that it goes beyond non-humanistic naturalism, but in our comment already, we feel that the devotion in the love of the Good in turn goes beyond any concept of the higher intuition that has been expressed.

Restraint, of course, deals with the older term of self-denial.
But, like most virtues, if pressed to excess, self-denial can be a negative defeatist approach. Indeed, in some people it becomes a positive vice. Their solution for almost every difficulty is to withdraw or give up their own efforts, although their minimum duty to others, as well as to themselves, fairly requires them to go on, not stop or go back. From the law itself, we are often told that a strong judge as well as a good judge takes jurisdiction in order to meet actual needs of litigants, which is entirely compatible with Holmes' principle of judicial self-denial. Briefly, this last means that the courts are careful not to go beyond the proper province of the law itself in rendering their decisions. It does not mean they are weak or ineffective in meeting the actual and proper legal need when it comes before them.

The medieval emphasis upon devotion somewhat in the sense of withdrawing from the world rather than meeting its needs perhaps is a danger almost equal in virulence with the Kantian principle that ethical value lies in acting from a sense of duty, a kind of restraint, rather than from a devotion of the Good in a positive sense. The unwise extreme on the other side is to let free devotion to the Good crowd out some element of restraint entirely. There are situations in which evil or excessives even from good motives must be curbed. Otherwise, we drift into all the excessives of Rousseauism at its worst. On the other hand we tend dangerously to a futile way of life without the zest and necessary force of aggressive action, if we fail to see that devotion to the Good in an active sense is the complete desideratum to which restraint, self-denial, self-control carry only part of the burden and lead us only part of the way.

**CHANGING LIMITS FOR POWER**

Ethics is a systemization of morals and morals is a worthy furtherance of the Good. It must turn on ultimate individual judgment, but it presupposes all manner of objective elements, including especially the needs and difficulties of others. This is not because the purpose is to further happiness in others in a direct sense, although our hearts are unfailingly thankful when happiness does result. But we want for them as we want for ourselves, with happiness a matter of grace, a lovely thing that not only cannot be commanded, but cannot be pursued, that is, we want for others more fervently than we do for ourselves just the chance to serve the Good.
As for the separate existence of a priori concepts, which has been so violently asserted and attacked through the ages, with a recent fervent assertion of them by Kelsen, perhaps we may limit our comment merely to this. A priori concepts, in the sense of norms, are not totally separate from the rest of the universe in the sense that they have no connection whatever with the rest of the universe. Let us admit that they are mere relationships with no physical existence. Hence, they are in the field of Sollen rather than Sein. But by the very fact that they are relationships, they impliedly state themselves that there is something else to which they are the relationship. You can’t have relationships between the “nothingnesses.” For instance, earlier in life, Russell said that a priori concepts were separate, and undertook to “prove” this by claiming that a relationship to a relationship was not verified by facts at all. But we thought this was folly, because his very proof postulated facts in the situation somewhere and thus necessarily made his a priori concept related to those facts at least indirectly. Now Russell seems to say that a priori concepts are still separate because they turn on logical language. This is a withdrawal from his more embracing statement that we have just given, but logical statements in turn deal with existences in the universe and these, whether tangible or intangible, are facts. And it applies to purely imaginary statements, because ideas are facts and the imaginary assertion itself gains its attractiveness from its interpretation of facts.

We have preferred the love of the Good as the test of ethics rather than the sense of duty. An added comment on this would be that the sense of duty is a particular affirmation of one’s interpretation of the Good. Some things we follow because they represent the Good to us. Occasionally these things also are presented to us as a sense of duty. Thus, the particular thing is confirmed by its appeal to the “ought” as well as our judgment of the Good. But all ethical values must come under the Good, and these often present themselves without this separate sense of duty.

Thus we can reasonably think of Kant’s test of duty as an a priori concept confirmed by the experience of many people. It amounts however, to a summary of the Good in the particular case. That is, the Good in fact is the objective, extensive thing, while the a priori label which we put on it covers on the “ought” and in this sense only a part of the Good. Moreover, it is the
“outside” in a very real sense, since we feel that Good is a factual thing which we can reasonably approach in our observations, but duty is subjective in the sense that honorable people devoted to the Good will not always have the same reaction which is called “the sense of duty” to the same part of the Good. The puritanical branch of all religions is said to habitually act under a sense of duty much more than others though surely the Good itself will not vary merely because of this special habit of a particular group. Indeed those who emphasize biography might say that Kant’s fervent devotion to the sense of duty may be explained in part by his Scotch ancestry and their puritanical emphasis as well as his German associations with their pietistic emphasis.

The duty emphasis rather than the goodness emphasis is a particular construction which describes the subjective attitude of certain persons. Thus, quite justly it is an a priori concept varying with the persons and not with the factual content, while the Good is the extensive one that can be verified in fact. We would go on to the conclusion that the sense of duty can be verified in fact only to the extent of the experience of individuals and not to the extent of the observation of the thing itself.

We have said “value is an attribute of action that furthers the Good.” We have also said that the Good “is that which furthers worthy living.” What are morals, or if you like the technical, objective science that we call ethics? I would say morals is living the Good, while ethics is a description of this, or objective tests of this, usually in the form of a complete system. Thus we speak of the Aristotelian ethics or the utilitarian ethics.

The philosophers, especially the recent crop, seem more devoted to abstractions than the most hidebound variety in past ages. It seems somewhat true as is often charged that the philosopher has to have a definite system to fight for or against in order to make a living. Thus if you are in the dry goods business you have to have shirts and neckties and underwear or go out of business. The philosopher has to have something to juggle in a clever way, or no one will read his books or go to his lectures. This is surely one of the reasons why our philosophers do not share the leadership to the kingdom of heaven. They claim lack of such leadership is due to their honesty and moderation. No doubt the worthy men are not conscious that it may be due in part to their cowardice and falsehood.

Not under this banner of attack, but in a very humble spirit we would suggest that an ethical system is the great philosophical
indecency, somewhat as the late Mr. Wells said that a kingdom in Greece where the early republics had lived was an historical indecency. In other words, it seems to debase the good things beyond the point of public tolerance.

On the analytical side, of course, there have been a number of rather rigid assertions to which truly first-rate men have given themselves. In a sense, Kant's whole distinction — between the moral law based on a sense of duty, and the other factors that influence human beings which may be intellectual and physical but are not moral in this ultimate sense — was fundamental to his thinking and perhaps to all philosophies since his time. He felt, if an action was to be truly moral, it must spring from a sense of duty only and not from an unconscious and unqualified love of the good or of truth or of beauty. Thus, Kant felt that mercy, being a denial of punishment that was based on duty, could not be approved. The moral law required the punishment. Hence, to show mercy was to break the moral law. In our view, this is morals, crazy to the point of fanaticism. Such views might be held by those who inflicted torture in the name of religion, but they could not be held by one who saw morals from the point of view of action, not as a rigid system to be literally obeyed, but as a human and practical means to lead the good life in fact day by day. Except for thought itself, surely morals is the most convincing instance of action in terms of rich living.

Somewhat in the Kant manner, perhaps most modern philosophers have made a sharp distinction between the sense of duty and the sense of personal preference. Thus, in the field of general morals, Wordsworth in his Ode to Duty gave first place to a natural and unrestrained love of the good life, but he added that that kind of devotion in everyday human beings almost always broke down at times. Then he felt that duty came in to carry you in the good life when heart and mind might fail. We would go along with this as an interpretation of morals in the sense of living the Good rather than as a moral system. For instance, Broad says that he doubts that the sense of right can be expressed fully in devotion to the Good. We think it can. And we think he is really not talking about the same thing when he uses right (or duty) as against the Good. We think right has a connotation of battling, of fiery action in support of the Good. It differs from the Good in its quality of activity, not in its content. After a fervent dispute with oneself, a person may come
up with the fervent assertion, “This is right and I am going to fight for it.” He probably does not use similar expressions about the Good. For one thing, probably his feeling about the right has been about a rather definite and particular issue. It is easier to be definitely determined on a particular thing than to feel equally about the Good which we generally consider in its many aspects. Note that the Good itself is action, but it is a more complicated and varied presentation than most assertions of right.

Our approach to duty, the sense of moral obligation, is similar to our view of right. One sees the Good perhaps not in its most appealing forms but nevertheless one is convinced it should prevail. Thus he follows the Good in this instance in spite of many temptations not to follow it (St. Christopher crossing the river). But the sense of duty is an exercise of the Good under trying circumstances. It is not strictly a separate ethical concept and it is not antagonistic to the Good. Thus we would say that both duty and right are names we apply to special aspects of the Good. They are not separate or antagonistic.

One very important approach to action is the distinction between action perhaps on the level of systems in an objective sense, meaning just doing something toward it as a formula, and action in a subjective sense. Thus the glories of objectivity here come down to futility. “The mind is the seat of empire.” No doubt, as that statement is intended, we have insisted that whatever else happens, the individual must never abdicate his own judgment on right and wrong. But action that leads to accomplishment ties in the objective with the subjective in a way that is both merciful and victorious. This is action as it were, in the field of action, and without this there is no hope.

Most theories of ethics are stated objectively in the sense that a certain moral view is postulated on the ground that it does represent the actual view of most people or the usual view of the person himself. Thus they begin with a universal postulate in terms of existing opinion.

These, in turn are usually hedonistic, with perhaps a rather generous utilitarian coloring. Now all this type of thinking lends itself to norms, and norms, in our view, lend themselves to follies and the strange vanities that come to people who rely on logic and abstractions, at least when they do so in a substantial sense and in disregard of common sense.
We have put ethics, like everything else, in terms of action. Action, of course, can be bilateral and we are quite happy to recognize common experience in that goodness cannot be pursued alone. You have to be good with regard to something (hence there has to be an objective element). Also, goodness without relation to other people seems possible enough so far as logic goes, but it does seem an unnatural situation and unthinkable in a practical sense. We have mentioned that one of the most necessary and surely one of the most attractive forms of serving the Good is in helping someone else by mere blunder perhaps from following a course that will deprive him of his own greatest service to the Good. This is not intrusion, or self-righteousness. It is the highest and the most elementary form of serving your brother, or not living to yourself alone, or any other way you want to put it. To serve the Good is the greatest happiness. Thus perhaps on the negative side we can talk in terms of happiness, not in the sense of happiness for ourselves or happiness for others as a direct objective, but merely to lend a hand if nothing more when an emergency comes up, and some fine person will take the wrong road, perhaps from pure blunder or pure ignorance if we do not serve his need.

But in a more technical sense, ethics or morals is indeed bilateral. Ethics is in the field of action and action must be incident to some objective and usually the objective means other activities, and most vitally, other people. For instance, take the specific case of little children. Most children's stories that are really popular with the children themselves deal amazingly with moral questions. Here, some older people, who do not want to burden the children with moral talk, fall into fantastic blunders. The children are not burdened with moral talk that is honest and understandable. They delight in it, naturally and freely, without any urging of any kind. Of course, they like adventure and they like excitement. But these are of the essence of morals. Surely things don't have to be dull in order to be moral. Even the saints are said to be very cheerful and imaginative people. Children are naturally concerned about what is fair and what isn't and about what is the right thing to do in different situations. And why shouldn't they be? Obviously, success and happiness in their way of life turns upon whether they meet situations satisfactorily or not. The very idea of fairness or approval in their problems is constantly present in the sense of ethics and morals.
Of course, Del Vecchio talks about the sentiment of "justice." But this is not "sentiment" the way the professional philosophers use it when discussing ethics. They mean to prove the existence of a particular ethical view by submitting that a person of worthy outlook or perhaps the average person, or the vast majority of right-thinking persons agree on a particular ethical view. By this means they hope to prove the actual existence and the merits of the ethical view they identify.

Not only Spinoza and Hume but apparently all later philosophers on this subject disagree somewhat with each other but they all seem to agree on the general method. Somewhat illogically, we might add here that they all are not committed expressly to hedonism as an ultimate test but they all do seem to give an amazing emphasis to the test of happiness or perhaps the greatest good of the greatest number in the total scheme of things.

It seems to us that identifying particular divisions or standards of ethics by these tests of sentiment or opinion either in individuals or in groups is artificial. We have found and have built our thinking upon what we suppose to be a fact, that there is in this world either now present or in material from which it can be secured, a tendency to the Good or a preference for the Good. Beyond this, we think the selection and classification of ethical cataloging is a matter of temporary arrangement or habit and has not permanent separateness.

But we would make this distinction clear: while we think the analysis of ethics is a matter of listing the opinions of competent people as in the case of judges and in their judicial decisions from time to time, we do not think that these factual catalogings are a final determination of the existence of the material thus catalogued. Once more, we think we must use objective material for our guidance to keep us conscious of the world around us and keep us humble and keep us sane. But in the ultimate judgment, we think the individual must make the choice and give the decision and in the ultimate sense, we think this is subjective, it is inside his skin, and as a man in any sense he cannot abdicate.

There are many ways in which power can be exercised for good without the indulgence of mere caprice. For instance, under the Uniform Trust Distribution Act, a trust that is run inefficiently with loss of the corpus to the beneficiaries may be distributed under court order. Where the directors of a closely held
corporation do not pay dividends and do not pay substantial wages to most employees while they do pay exorbitant salaries to themselves as officers, the courts have now gone very far enterting minority stockholder suits to prevent all these excesses. Incidentally, a great deal is now done by voluntary action, without any legal compulsion at all. For instance, many large corporations now advertise that they will pay an equal sum to that paid by any employee up to $1,000 to that employee's college. Well, voluntarily to lay yourself open to unlimited gifts within these very extensive limits would have been thought straight insanity only a few years ago.

Somewhat differently are the vast sums that industry now sets apart for research, in which they often pay higher salaries and embark on more ambitious plans than our great universities or the government itself. The line of demarcation under power that you can exercise within your legal rights and what is compelled by the law itself is again quite different now from what was formerly the case.

This again holds in international affairs. We do indeed give billions to the Western democracies that were so devastated in the late war. These are magnificent gifts without any strings attached and should be honored for the great service they render and the generosity and faith they manifest, to a degree unthinkable even a few years ago. Yet granting all this, in building up foreign economies we may indeed be building our own strength on a different plane and our own material profits and advantage so that it does work to the Good in ways that would have been thought contradictory or pure folly within the very recent past.

Among the many things that we have perhaps neglected hitherto is not only the various forms of mental activities that seem to be so different from our usual concepts of time and space, but also the more readily acceptable and cognizable new experiences in relationships. With amazing freedom we still work together for mutual wealth, where hitherto we would be told that one side would profit and the other lose. This phase of relativism is transcendant and good. This, of course, has nothing to do with the moral abdication in which you accept the standards of the past regardless of whether or not they are equal to the needs of the future.

When we think of the one and the many and the amazing
values that are involved in these infinite relationships we have
to think again of international affairs as they have never been
before and perhaps of the world in the future which though we
cannot foresee it, we can be humbly certain that it will be very
different even from what we have now.

For instance, now we build up the Western world from its
terrible devastation with our billions—a munificence that has
never occurred before. And though we did not do it for this pur-
pose, yet building up the Western world industrially was and is
necessary to the vigor of our own economy.

On a national plane, we happen to be passing through doubts
just now about the soundness of the bull market. Whatever all
the factors may be, it is now pointed out that the price of stocks
may not be due entirely to the fair value of the business inter-
est of all kinds that make the strength of these companies, but
partly at least to the fact that there has been a very clever,
though perhaps honest and wise effort to get the small investors
everywhere to buy common stocks. Nothing of the kind has ever
occurred before. Even the terrible boom and smash of 1929 in-
volved the rich and the professionals along with a mere sprink-
ling of small investors.

The Securities and Exchange Commission itself involves
action only where there is an actual misrepresentation at least
in the matter of the prospectus as covered by the statute. But
the common investor is in no position to interpret this prospectus
intelligently. Often financiers themselves are deceived although
no actual false statement is involved. All manner of forces may
be at work to force stocks up far beyond what the assets and
advantages of the corporations themselves justify. The present
bull market may involve serious inflation for which perhaps old
people with their fixed investments will suffer most in extent
and most in the cruelty of the consequences. Price-fixing and,
correspondingly, rise in wages and other items may lead to infla-
tion. These, however, are fairly open to public observation and
frequently involve bitter and open contests perhaps between the
laborers on one side and the propertied interests on the other.
But such a thing as an artificial rise in stocks, without violating
the present statutes at all, may well lead to a crazy and ruinous
inflation far beyond the usual factors or other elements we have
mentioned.
So far as power goes in private law, it must deal with great flexibility and not much in the field of rigid rules whether statutes or otherwise. The very nature of our capitalism presupposes this initiative and freedom. It goes to the effectiveness of our whole system, though it is very dangerous. It is enforced mainly by self-interest or self-energy, not legal rules. Hence much more than in the narrow scope of the law, it relies on moral values.

But perhaps the chief thing for us to note is that while it has this dangerous individualism, it also has fantastic dependence on the activities of others. We all act independently, but if we don’t act in some way or other we all lose. Perhaps in a few words, it is the glory and the danger of freedom. This gives the precious element of initiative, giving the healthful flow of the main stream of the river, and not the disease-infested waters of the adjoining values which enjoy only stagnation.

It is seen at once, however, that this freedom which we have put first involves action by everybody. By way of paradox we can say that freedom itself, as it were, in its own dedication must be freedom for others too, if it is to exist at all. And the others in turn must exercise this freedom or it will die for the first group because of their own non-action. The particular difficulty with us is that we have no precise rules to compel this exercise and since we are dealing with freedom, it is a contradiction in terms to talk about compelling freedom. Surely this is one of the ultimate difficulties of our life and perhaps an ultimate reason for saying soberly that the good life is never separate from any vital living and that the pursuit of the Good in this freedom is our final hope. Intermittently, and with all our defects, we must love the Good and we must fight for it. The brotherhood of man is perhaps most magnificently seen in that everyone must do this, the less worthy and the cowards along with the others or no one at all can do it in the end. You can’t sell shoes to slaves who don’t wear shoes. You can’t operate an airline if no one has the money or the need to travel on it.

So far as this irresponsible use of freedom goes, we seem to have at least a partial solution already in the field of international law. For two hundred years or more from Grotius’ great book in 1625, it was assumed that the sovereign had absolute independence and equality and that these amazing powers could be used capriciously. Recently, this has been much questioned by the ablest men in international law. Now it is usual to say
that sovereignty is absolute, proportioned to the needs under the circumstances, but not beyond this. The real needs of a country can be protected by the absolute freedom and equality of the sovereign. But it does not follow that the sovereign can injure others from pure caprice, and without reasonable correlation to protecting his own needs at all. Thus we see, in international law, where we do not have the enforceability of private law, and hence the problem of pure power more nearly confronts us, we have a very definite basis for fixing the limits of freedom, even though particular legal rules do not obtain. In dealing with power in private law, perhaps this is a good starting point, which preserves freedom without limiting initiative. We doubt if this ever can be reduced to fixed rules or rigid norms of any kind. There must always be a proper admixture of freedom. But the basic assumption that all must try to share in the standards of a common life whatever these mean for each particular people or each particular industry or place, this it seems we can assert in some degree, and this in turn will make reasonable activity possible for everyone. No one will quit from mere laziness or cowardice. We do indeed use the elements of the good life to make freedom itself possible for all of us in spite of the possibility of its abuse.

And it's not quite as gloomy as it seems. Freedom in an evil sense is not altogether easy to practice if your habits are good in practicing dependable cooperation. There are many ways that help the little businessman from folding up and going to pieces. Our whole world is permeated with goodness and these things help the weak to do their part in spite of all the claims of selfishness. Lady Macbeth protested against the goodness of this very thing when she said, "Had he not resembled my father as he slept, I'd have done it." For us as well as for her, we must note the plain fact that she didn't commit the murder and that something in that face tied her to the cultural triumphs of the ages and stayed her hand in spite of herself.

It isn't only the professed hedonists who trench strongly on pleasure and happiness as a test of ethical conduct. We find it not only in Spinoza and in almost all other modern philosophers, but there is a good deal of it in the classic ones such as Aristotle and Plato and even the earlier Greek philosophers.

Put very generally, it does seem to be the method of almost everyone to test ethics largely by whether they produce what is
called pleasure or happiness. For instance, the utilitarian theory of the two Mills and of some great legal philosophers, of the greatest good of the greatest number, is surely in substance the test of pleasure or happiness. Substantially speaking, the test seems to do credit to those who urge it, in that it is a very practical and direct effort to benefit people, rather than what you might expect from philosophers in asserting an abstract principle.

But the thing won't work. You don't make a man happy by feeding him strawberries and cream three meals a day. You probably make him sick and rather soon you kill him by that process. Nor is it fair to say that a denial of the hedonistic theories really amounts to some severe duty theory that might work for a puritan or a misanthrope, but is not kindly and full of true sympathy for others. No, the pleasure-happiness test must be rejected because of its own deficiencies and in spite of the most friendly and general will to bring every good to others.

The trouble is that pleasure-happiness just doesn't bring happiness or pleasure in any dependable sense. There was the woman of Samaria who went for water, surely a desirable thing. But she was told that if she drank of that water she would thirst again. It was important for her to drink water from which she would never thirst but which would be in her a well of water springing into everlasting life. If you seek pleasure or happiness directly, it usually eludes you. Some say it always does, and the apparent exceptions are cases in which you pursue a thing which has other elements of the Good in it, and these are the ones that give it continued force, not the pleasure-happiness part for its own sake.

Many philosophies are largely devoted to ways of stating pleasure-happiness so that a worthy system of ethics can be based on it. But this is a chimera. It is the good life that we seek in which we really include the right as well as duty, in spite of Kant's objections and the objections apparently of most everyone else. Happiness therefore comes to us when we pursue the Good, but we have noted it comes indirectly by grace, as the religious people say, not by right, as the politically and morally minded tend to express it. And why not? If we love the Good because of the pleasure in it, what a revolting baseness that would be. If we are told that the philosophers would have to invent Good if there were none, couldn't someone say that we
would have to invent the doctrine of grace, in the name of humility, and freedom from self-righteousness and the graciousness which is indigenous to the very life of a gentleman or a lady, even if the religious folk had never mentioned it?

Some seek to escape the baseness of a hedonistic philosophy, by saying that the individual does not seek his own happiness in a selfish or crass way. He unselfishly seeks the happiness of others. But even this won't do. In his *Portrait of a Lady*, Henry James points out that one must be modest for others as well as for himself. One cannot seek happiness directly himself, nor further such an ambition in others. In one case you debase yourself; in the other you debase others, and you end up on the ashpile either way. In every sense one is entitled to the chance to fight for the Good. There is no selfishness or baseness in that, and the lowliest person, the one with the most faults, is entitled to that amazing richness of life.

We would put it this way. Each seeks the Good for himself and others. That surely is a brief statement and an unqualified one. What is the Good, is something upon which we do not always agree. Even on this, however, if we compare the opinions of people without trying to state it in an actual formula, it is amazing how close we come to agreement so far as particular action goes, regardless of our theory. Here again, of course, this seems fortunate to us who follow the action theory of law and ethics. Time and again, as if by miracle, if we take the doing rather than the talking, if we take the action rather than the system, there comes agreement, and the difficulties disappear.

There are, of course, different views of the pleasure-happiness objective. They often speak of egotistic happiness as against community happiness. But what we have said indicates very briefly our view that either method of happiness as a pure objective holds within itself futility. It might be called an ultimate proof of the brotherhood of man, first that others have to give you the happiness and, second, that you can't even seek it yourself.

Seeking happiness won't do, and even seeking accomplishment for its own sake has a smug prosaicness that is offensive. Surely, there is not need to growl at the world because of the marvelous completeness that is found in both the one and the many, the individual and the group. Without talking dualism, from the
marvelous unity that comes from considering the one and the many together, as a unit, not a dualism, we are able to reach results that do indeed seem free from all dross yet would be depressingly mediocre to say the least, if it were not for these apparently contradictory and irreconcilable elements.

Perhaps a primary misconception in making pleasure-pain the test is that it covers other elements that are the important ones, although these are in effect hidden by the pleasure-pain label or, if you prefer, subsumed under it. All sorts of useful and worthy purposes that ethics can properly serve are present and are properly there, but are subordinated to this blatant pleasure-pain test. The pleasure-pain test in a direct sense simply won’t work. The enjoyment of pleasure and the avoidance of pain are both good and compatible with worthy living in every sense. It’s merely that you rob yourself of pleasure and freedom from pain rather than secure them, if you pursue them directly. Modesty, humility, sense of humor, if you like, require that you proceed indirectly.

This is not merely some affectation or some pretense, in which you really want something but have not the forthrightness or the honesty to say so. It is one of the many cases in which we do work indirectly in this world. We have already noted as poor Hegel saw so clearly that a capacity may lodge in one person but it is always, as he said, “realized” through activity with others. You can’t enjoy a game of baseball if you are the whole audience and all the players yourself. You cannot be a great orator if there is none to listen to you and nobody expresses an opinion of any kind about your efforts. The greatest artist must in some way have his pictures honored in the mind and heart of the humble layman. All this tends to break down selfish precedence and to strengthen a kindly and wise equality. Of course, we hope, however, that this is not interpreted on the base side so that we tend to glorify mediocrity at the expense of excellence.

Our approach therefore, will not be to deny pleasure-pain achievements in this indirect sense. Indeed, we will try to increase it where in any case, it has been unjustly minimized. But we will talk in terms of pursuing the actual Good both directly and indirectly. This can be done in human affairs, without defeating any worthy purpose or introducing any base element. Of course, in saying we pursue the Good directly and indirectly, we mean that we must proceed tactfully and adroitly using highly
indirect methods even here where this will be most considerate and effective. It is often the indirect service that is most effective though it may not always further the self-esteem of the less worthy. It is sometimes pointed out that since the Diety Himself furthers his ends through particular individuals, it is highly honorable for any individual in turn to use the same method. Of course, all this is said with full consciousness of the zest and good cheer that comes from one's completing his own job with the just satisfaction that goes with it.

It is a bit shocking to some people to find how large a place happiness as a test of ethical devices takes in the thought of even the most conscientious and devoted philosophers—men like Kant and Sidgwick, for instance. But here again we differ directly. We would say that happiness is never the test in a direct and positive way. It is often involved indirectly and we may wisely direct our conduct with a view to securing this indirect happiness for others and, in carefully diluted form, for ourselves. We are amazed, however, that these highly moral, pious people put such great stress on happiness in a direct sense, and simply forget all about serving the Good for its own sake, and treating happiness as something that comes by grace, not by right. How is it possible for the religious people, who talk so much about grace, to forget all about it when they are pursuing the very objects of the good life? Have they no sense of modesty, no consciousness of their own defects, if nothing else. When these people are in the army, do they batter the commander-in-chief with demands for various heroic medals, even when they have not been within gunshot of the enemy, on the ground that these would make them happy?

The hedonist theory is unsound because one pursues happiness, which is repulsive no matter how it may be justified. Happiness must come incidentally. It cannot be pursued. You can pursue the Good so long as it is not for your own vanity or your own advantage. Then if you do not pursue her, happiness comes as a matter of grace, if at all.

We suspect the same is true of the Good. It is unpleasant to think of one's pursuing the Good in the sense of some advantage or vanity of his own. This is tied up with self-righteousness and all the extremely unpleasant associations of one's favoring his own salvation. But it is not only the pursuit of happiness for its own sake that we reject. It is the pursuit of the Good, if this
is done for vanity or selfishness. One must indeed love the Good and not let the right hand know what the left hand is doing. Then indeed there is freedom, and the dross of our living slips away.

We say evil is an insufficiency of the Good. Another way of saying this, of course, is that evil though often extremely attractive is not for long. It always proves disappointing in the end. Poor Macbeth learned the cruel truth of this, and Faust even more so. "If ye drink of this water ye shall thirst again." And poor mortals have foolishly doubted this from the beginning of time, and then sometimes paid heart-breaking consequences to learn its truth all over again. Everything must serve the Good. Law and power serve it in different ways but in their different though interdependent ways they must serve or perish.

This is why we state that law and power are not separate. Wise law at least does not make slaves of men; hence, there is some power under law, within the law. Even where power seems unregulated, as we have noted, it really is regulated very greatly, first, by that sphere of law that clearly controls, and, second, by the operation of the human conscience in free exercise of power unregulated by the obvious and formal law. In keeping with this, the divisions of the Good apply to both law and power. Otherwise, law becomes tyranny and power becomes license and self-destruction. This way of thinking gives strength and dignity to both law and power. It frees us from the fear that we are acting from selfish motives or mere animal impulses that are too limited in their objects to serve the Good in its true purposes. It gives us strength and confidence under both law and power and it uses custom as well as conscience, and interpretation as well as strict rules to serve in the total work of law-power, using all the forces available for the good life.

Before considering the more detailed content of the division of the Good, and separate particularly from the seventh division which involves dedicated love itself, we would state an element which goes to all these forces, though in a sense is separate from them, in a very general use of words, somewhat as we have spoken of humor and judgment in the armory of living. We mean the practice of the power of the Good. Somewhat similar thought has been expressed with greater fervor elsewhere by the mystics and the religious people, to name only two. We evidently use a somewhat similar expression on the more humble, practical claim of daily living and the pursuit of truth. In a sense we would
like to avoid intruding on higher thought even in this limited way. But it is necessary to the scope of these ideas themselves. It is proper in their field and cannot be ignored. This practice of the power of the Good especially deals with the eternal vigilance that is needed for the preservation of the Good, much as we have been told that it is needed for the preservation of liberty. It means, perhaps more particularly, that everlasting striving for quickening of energies and insights, remembering that the future is pressing on us every second, and degeneracy and death are the wages of those who are not renewed, also every instant of winning these unrelenting battles, is meeting the future that no one has met before. The Good in its seven divisions would involve for most purposes all manner of practical things as well as recreating intentions. But the cruel quality of practical doing day by day is essential to every other phase of the Good. A civilization goes to pieces not only for lack of worthy purposes but also for lack of technology to support the demands of high living in practical affairs. Thus one must live the presence of the power of the Good in all its phases.

"Pain is not more strange than beauty." What about death? This too is not difficult in the light of the Good. Death is merely part of living. If we venture to identify reality at all, then surely it is in living considered in the sense of spirit, of the mind of man, which involves the active conscience, and not some physical thing in a separate sense only.

**LOVE OF THE GOOD**

Association of ideas and evaluation as they are parts of thinking go to the higher capacities of the brain and the higher achievements of the mind. These we think of as the less sensuous phases of the brain and the more creative rather than pure physical phases of the mind. But the capacity "generalization," in the sense of elementary and almost mechanical phases of the intellect, trenching pretty strongly on the logical side of intellect, is indigenous not only to the higher animals and man, but, in some form, to the lower forms of life themselves. K. S. Lashley states this as a matter of well-established physiology and others assume it without serious qualifications. Does this mean that the "active" reason, so accentuated in medieval times and, of course, greatly honored both in ancient and in modern thinking, is really not so important after all? No—decidedly No. In a word, the
answer to this possible contradiction between the physical students of the brain and the thinkers in philosophy is that the philosophers and their allies right back to ancient times have included morals and the intuitions of religion and ethics whether in the mystical language of Pascal and William Blake, or the more formal statements of religion within the scope of their term “reason” or “active.” But the intellect, largely in the sense of logical deductions along with the logic by “analogy” in recent times, seems to be quite common in brain activities right down to the lower animals.

It is for this reason also that the venture was to stress “judgment” rather than reasoning in our earlier comments on the place of judgment in fixing law and power and in handling facts in connection with universals. A judgment by its very definition involves the handling of abstractions and facts together, with conclusions that depend on both. This puts the finding of fact, as well as the intuitive and moral forces in the position of honor and deep reverence which they deserve, while it enables them to work justly and sensibly with reasoning in the sense of “generalization,” and the use of universals and logic in connection with valuation of facts and intuition.

Power may be thought of in many ways. We have considered it in connection with law and in connection with judgments. Perhaps it is best now to consider it incident to the Good, since the Good demonstrates both law and power and is our guide throughout the universe. The Good furthers power or, more usually, power furthers the Good, on the same basic values as law furthers the Good and the Good furthers the law. We have noted two forms of power. One is power incident to selfish advantage which is found so much in modern psychology through the consideration of impulses and instincts. But power devoted to selfless accomplishment, power devoted to the Good for its own sake, as against the selfish advantages of persons, is an approach not found in modern psychology or physiology, or for that matter apparently in modern scientific and social thinking anywhere. Thus we do not think in terms of behaviorism and certainly not in the current practice so universally followed in treating the social sciences as “behavior sciences.” To call a whole science, or any phase of daily activity behavioristic is to be guided by mass results at the best, not by individual moral efforts. But the mass or the group is not a separate item. It does not exist apart
from individual people who make it up. And, in our view, there is always a moral element when an individual acts at all. But the behavioristic approach for groups as well as individuals is merely to observe the results of group action, not to consider the moral quality of the acts of individuals that make up those groups; and we think to disregard or in any way slight or minimize this vital moral element is fatal to man's stature and does indeed lead to group and national and world deterioration as well as for failure for the individual himself.

If we consider power in its place in the furtherance of the Good, we have the approach that goes along with our similar view of the law in a group of values that applies to both law and power. Power by individuals and power by nations must be judged in its furtherance of the Good, for instance, in economic and political activities both nationally and internationally. Power may be judged in part by the prosperity and health of people and nations. But we do not place this test of prosperity and health directly. Even health and all manner of worldly goods are not ends in themselves. To say so would throw us back to a materialistic or hedonistic system of values. Here and everywhere we seek the Good though, of course, material things, particularly in the instance of health and good standards of living, greatly further the good life if well used. But we never leave the valuing out of it. We think the pursuit of virtue in the sense of the Good is the test, not a high standard of living, or seeking of the individual for health or other particular advantages for their own sake.

Worse than this, we think that people do not themselves truly seek material advantages or happiness or even a worthy intellectual life as final ends. We are glad to discuss and evaluate the content of the different divisions of the Good, but only because people—everyday plain people—do seek the Good themselves in preference to any other ends.

There is this qualification: wholesomely, within their proper spheres, impulses and instincts furthering selfish ends, serve the richness of life. They give us self-preservation for one thing and good sense in the practical forms of living. But hand in hand with these selfish advantages for individuals and groups, there is indeed, and in practice by actual ordinary people, a devotion to the Good in this unselfish sense which they do seek along with the selfish advantages that sometimes blind them to their own
preference in furthering the Good as against the claims of impulses and instinct. Finally, of course, selfish advantages, when kept in proper restraint and directed to proper ends, also further the Good in the unselfish sense.

For each age is a dream that is dying
Or one that is coming to birth.

It is true that mere patterns of living are often unconscious, and acquiesced in by a whole people for an entire age, although they are not really believed by the leaders of that age nor do they represent actual patterns of culture. For instance, what we like to call the Age of Moliere, or most people call the Age of Louis XIV, covered many good things of the spirit as well as incredibly base things of decadence. The thing one must watch is that the dominant note of the Age (the good spiritual things) continued beyond the success of the Age in every real sense. Thus the marvelous quality of Racine carried the Classical period of France long after actual and definite decadence had set in in military, social, governmental, industrial, and most other phases of life. Furthermore, the recovery from this decadence, as well as the mere intellectualism of the eighteenth century, had set in largely through the philosophes and partly through Rousseau and Voltaire considerably in advance of men like Hugo, Lamartine, de Musset and others who ushered in the Romantic century. In a word, we must watch the good or evil that is actually operating as well as the forces that seem to be in control at any one time. We must watch the Age, whether it is dying or coming to birth.

To meet this at once in the law, the Middle Ages involved a relational society with many phases of common or relational ownership, that superficial thinking might even call socialistic. And this continued into the Renaissance in different countries so far as legal rules went, although title to property had come to be individualistic. The grocer had to own the corner lot outright, and the villager had no right to pasture his cattle on the "common land." There are ample signs on the other hand at present, that although individual property had its heyday about 1900, we are now well into a new kind of relational society which the courts are only beginning to interpret.

Incident to these ideas about the assumptions of a whole people on the ways of doing things, it seems that in our approach in thinking in moral terms and in terms of action rather than in
terms of static ownership of physical property, we are more like-
ly to judge accurately of these basic outlooks at different periods
than if we think more literally and slavishly in terms of physical
property.

A second point of view is somewhat similar to this first one.
If we think of physical things in their use and what they can do
for us, rather than the literal things themselves, we are better
able to adjust actual legal rules of the past to changing condi-
tions for the future. Perhaps most of our rules throughout the
law were set in rather permanent form not later than 1900. But
then perhaps this was the heyday of the industrial revolution,
although its earlier formulation was about 100 years before that.
Now we have introduced many relational ideas qualifying private
property, but we have only the older, individual, ownership
framework in the law to deal with these new relational factors.
If we saw property as use and advantage, we could more easily
adjust to the use and advantage under our recent relational so-
ciety while we continued to use the individualistic rules of 1900.
Then we would not have to fight over technical change in these
rules. True, the property remains the same, but our rules could
be interpreted to mean use or advantage, not ownership of fixed
property in a dead sense. Thus the rules involve no real change
if we give them quite a different interpretation under our rela-
tional society. We always intended them in terms of advantage
and use. We are now using them in terms of advantage and use,
though the content of these two tests have themselves changed.
But we expected this or some other change to happen from the
beginning of the rules themselves.

To take a single instance, though this approach, in a proper
sense applies everywhere: Family law is perhaps the most re-
lational of all. The Middle Ages was the heyday of the estate by
the entirety. There was little personal property or money for
anyone. Most property was land and tied up in family settle-
ments based on marriage. Then during our ages of individual
property, these relational elements broke down, especially in pio-
neer countries like America where the family settlements are
practically unknown. Here, for a long while in the Puritan re-
action in England and in Victorian England of almost a century
in which women took a most secluded role in life, individual own-
ership was fantastically dominant and the men were the ones
who benefited from this power. Now we are less relational than
were the Middle Ages, but the *pater familias* pattern of the early Roman law certainly does not apply today. There are many re-
straints by statute or otherwise on the husband's power to waste the family savings or make none himself. Both wife and husband are now interpreted to serve the family, not to gratify their separate lust for power. This is good sense and good law. But much of the needless reactionary struggle of the courts to crush the married women's separate property acts, in spite of the clear legislation upon which they rest, could have been avoided, if the courts had followed our realistic approach of the use of property rather than its purposeless ownership.

**LIBERTY (CHANGE)**

Liberty, of course, if one attempts to define it, has baffled the ablest thinkers. Liberty, however, along with all the divisions of the Good, we will venture to define rather categorically, not that we presume to solve the real difficulties by this, but that we venture to define only in such general terms that will leave ample room for detailed differences by way of more particular interpretation. Thus liberty we define as freedom in seeking the Good, and we let this stand, whether it is freedom in affecting others or freedom from interference by others. It is no secret that we are going to define all of these divisions of the Good, first, in terms of furthering the Good itself (much as we define *value*), and second, in terms of action always, rather than in terms of some system. One sees at once that stating liberty in terms of the Good meets the difficulty about license rather than liberty and also the difficulty of adjusting liberty to equality. True, even evil may be the object of liberty and still indirectly serve the Good, since we think of evil only as an insufficiency of the Good. The problem of license is avoided by the very fact that our liberty furthers the Good in some sense. As for equality, we think that there is no logical difficulty between liberty and equality although it has caused much dispute. Equality means treating things equally that are equal in every pertinent sense. This leaves room for liberty where, under the circumstances, the issue of equality is not present. If the elements on the merits are not equal in any just sense, then, of course, they are not to be treated equally, and liberty is not impaired by any requirement of equality.

In the case of liberty, perhaps more than in any other di-
vision of the Good, it is crucial to remember our view that these divisions of the Good are not adapted to discussion, much less definition, in fixing logical terms. We are thinking always about these elements in action, and we are discussing them as part of action in the very fact of acting, and not as a logical statement of a system of any kind. Thus liberty, so far as interference goes, means freedom to act in an immediate sense without control by others. The question of ultimate determinism is not thus involved, although if we are pressed to say a word on that too at this time, we would say that there is no logical or factual difficulty between freedom and determinism, although they may well be confusing in practical application. Determinism in our sense (and we think rather generally now as used in the exact sciences) is merely conformity to some method of predictability, although human knowledge may be able to give only a device of intermittent causation or predictability for certain units only. Freedom on the other hand means this freedom for personal action and freedom from outside interference, and entirely consistent with determinism in the sense of the predictability we have just mentioned.

EQUALITY (JUSTICE)

We have just spoken of equality in connection with liberty. Taking that as a comment on equality in a separate sense also, perhaps we can add that one of the difficulties in handling equality is in noting the issue involved in each case. There is the old illustration that when you say a man is brave as a lion you do not mean that he goes on all fours. You are comparing the man to the lion in one respect only. Thus there may be this similarity in the moral or emotional field of courage, without questioning the very many and great dissimilarities in almost every other respect. Frequently then the just requirement of equality will apply to one particular matter in a separate sense, and what one may call the infinite number of other attributes of the subject will involve no issue of the equality at all and will be conceded to require no equal treatment at all. Somewhat as in the case of liberty, we mention again that our thinking of equality is in the field of conduct, in the field of action, in the field of evaluating, in the field of judgments that involve moral issues, not in some fixed system which we think of as static in a substantial sense. Equality then leads us at once to the matter
of justice in a true estimate of values, and, of course, largely ethical issues. It involves equality substantially as that term is used in fixing justice, as it is found in the obvious symbol of the scales of justice showing that they balance, and hence are equal.

As for beauty, here again we state our brief definition boldly, although we hope this does not imply a crass ignorance of the grave difficulties involved. In the Thomistic view beauty is considered to have three elements: wholeness, harmony, and radiance. We greatly admire this, and venture to define beauty in those same terms, adding merely that they must further the Good. This way, if you like, we avoid the old issue of whether beauty can be found purely objectively, or purely subjectively, or perhaps a little of both. We do not use the subjective-objective approach at all. We say the elements of beauty may exist actually in the objective world, whether they be tangible or intangible, but then we say that this definition itself is true in our thought only in the field of action. Part of action is the mind and the activities of men. Thus beauty in the objective sense is necessarily true in some measure because it forms a part of mental activity—it is used by the mind and its bare content must include this bare fact that it is a part of action in this sense.

At the end of our seven divisions we will say summarily that different views as to what the divisions mean in application to particular problems in the law and in the exercise of power will be found in court decisions and in the ethical conduct of individuals and groups, where the legal or ethical views expressed in these judgments may well differ greatly, although those who give their opinions come out with the same answer in the particular case. In a word, we think of the conscience as reaching these judgments and it is what the conscience does, if you will, that we take as our conclusion, although realizing that these results may well be due to the differing views that people have in moral, religious, and any other fields of human opinion.

**Other Phases of the Good**

We must say at once that all the divisions of the Good are important not only as separate desiderata, but perhaps even more as devices for furthering the Good in a single and complete
sense. Thus if there is a particular case for the courts or for personal action, the object is to get the just or right result, that is, securing the Good as a totality. Our divisions are merely for convenient discussion and for convenient lessening of court decisions and judgment of values. For instance, a principal phase of beauty is the esthetic sense which merges into morals and into questions of practicality. Of course, occasionally the courts and individuals have questions of furthering beauty for its own sake. But much more often, the sense of beauty helps one to see a right result in the sense of justice or in the sense of furthering the ultimate Good, without any question of beauty in a separate sense at all. Or again, we can note that beauty is largely harmony or proportion, and these ideas are also justly found in questions of equality and justice.

As for truth, definitions here have been so violently contested. We say merely that truth is conformity to reality, though, of course, some would answer that we are really saying that truth cannot be defined since reality can hardly be given a conventional definition. We would not seriously question this objection, but we prefer not to say that it is undefinable, although we admit our definition may not prove very helpful. The significant approach seems to be one of finding truth or approximating it. Thus, in science, the pragmatic test of truth has many advocates, since it is felt that the universal opinion of science at a particular time on some clearly separate matter should be taken as truth until a different opinion is generally recognized. We prefer to take the pragmatic view as well as others as interpretations of tentative views of truth under particular circumstances, and use the best one in this practical sense, without claiming its ultimate truth at all.

It will also be noted that our tendency to state things objectively, without subjective qualification, but merely state the objective test in terms of action, enables us to preserve liberty, since we introduce the subjective element through the decision of consciousness or conscience in the particular situation. We avoid the dualism in the subjective and the objective and we keep the dignity of the individual in his judgment of the objective fact under the circumstances, leaving him free to use tentative guides or what he considers universal guides as he thinks best.

The divisions of the Good that deal with "self-development
for everything” and “particular accomplishment” are the two that come closest to rules and legal interests and, if you like, the property and personal rights which fill most of our law today and in the past and probably in the future. Of course, an institution cannot have self-development in the sense that an individual can, but it is understood that we mean self-development insofar as it can apply to the particular claimant whether an individual or a group of some kind. Particular accomplishment would cover almost the whole field of the law towards contracts, property, and other divisions of the positive law.

These two differ strikingly, however, from legal rules or legal interests and are justly included in the divisions of the Good, because they are pursued in the furtherance of the Good as well as for their own sake. In spite of all selfish claims, and instances of rather crass conduct at times, everyday people, people with lots of faults also, do have real delight in accomplishment in an unselfish sense. True, under the development the claimant justly wants his own education and his own achievement, and it is good for society that this is true. Thus we are justly told that the selfish, perhaps unpleasant, businessman plays the game ruthlessly but does give employment to thousands of men who would otherwise go hungry. Perhaps they thus serve their brothermen in a practical sense more than the idealist who does little more than talk about it and does not increase wealth or employment. But it is also true that he who seeks his own development might probably feel real satisfaction in the indirect advantage to his community. The contractor who builds the house, the lawyer who arranges the mortgage that makes the house possible, and all those involved in the transaction, also take pride in the final accomplishment in a separate sense, and not because of advantage to themselves.

This, of course, also goes for the sixth and seventh divisions of the Good, the dynamic part and the selfless love. The dynamic part strikingly includes courage and some of the grip of accomplishment that we have mentioned outside these divisions of the Good, pointing out that it is essential to significant life of any kind. These are more than the “self-restraint” we have already discussed and perhaps they especially bring us to a concluding element which, as it were, we do consider primarily in both law and morals.

There is then both selfish ambition which psychologists
usually list under impulses and instincts, and, without saying so directly, indicate are — substantially — submerged in physical nature; and there is also this unselfish love of perhaps the same things but for unselfish motives, which, apparently, both the psychologists and the moralists recently substantially ignore. Quite different from this view in a very extensive use of language, we hold that there is such a thing in experience as love of the Good for its own sake both separate from personal advantage and, in the usual case, paralleling personal advantage. It is wholesome and factual for there to be both personal and selfish love and personal and unselfish love. We even dare to say where this is in the mind and conscience, and as far as the parallel is possible, in the physical body also. We have already noted the definite opinion of the physiologists about the location of consciousness and “arrangement” in the cerebral cortex. What we mean by conscience is this judgment power that some insist on calling consciousness only. We think the conscience, the power to fix judgments on moral issues, is a part of consciousness and thus, in the sense of brain location, is found in the same regions of the cerebral cortex as consciousness itself.

But, if you ask, how do we identify this moral element from the rest of consciousness? First, perhaps we should say again that we think there is a moral element in every decision of the mind. Hence, in this sense the conscience is a part of every phase of consciousness. But to give a separate and perhaps more significant identification of the love of the Good, we say this devotion to the Good for its own sake is distinctly different from the whole field of impulses and instincts that so largely make up modern psychology, in that this love of the Good is selfless, although common to ordinary men and though usually parallel with selfish motives. In our view, this identifies morals as a reachable thing-that-can-be-talked-about, as it has not been separated and identified hitherto.

One sees at once that this makes an approach to living both in law and in power that we have not been able to identify and to talk about before. First, it goes beyond self-restraint in giving us all that is found in self-denial together with devotion to the Good, that goes beyond denial of evil alone. Hitherto, in the field of general standards, where perhaps Emerson’s test of the “higher intuition” has been the best guide that talks more than creativeness and more than self-restraint alone, we in ef-
fect include all these elements; but give the forces of the good life the positive activity, the confidence and zest of a good fight for the good cause, and do not leave this essential side of life (perhaps justly called life itself) to the negative forces alone.

Perhaps we should put this for the moment in the terms of the market-place as it were. Our practical friends tell us that you can’t meet something with nothing. If your armory against futility and degeneration, as well as particular evils is no more than self-denial (good as that is) then you leave the enemy with all the weapons of offense, and futility and stupidity rely only on defense.

One would like to deal with many phases of this at great length. It lends itself to almost infinite variety in its relation to other phases of thought and of action. It is, of course, our hope that this fuller development by many persons and for the indefinite future will in fact occur. Perhaps we may mention only one of these many now. This is a time of great activity by the forces of evil. So-called “brutality” (though often much lower than the brutes so-called) is openly glorified. The most degrading forms of self-indulgence are tolerated if not admired. It is a moderate statement to add that these forces and this tendency will indeed let loose other evils in war and in national and international degeneration. In both law and power, while these methods for action are permanent in their importance and application, the present is an especially significant occasion for their immediate employment.