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THE RÔLE OF SUBSTANTIVE LAW AND PROCEDURE IN THE LEGAL PROCESS

THERE seems to be a general assumption today that the "Science of Law" is not adequately performing its function in the judicial process. When a great lawyer can voice the general opinion of the bar in stating that the confusion and uncertainty caused by a vast mass of decisions and principles is growing worse from year to year,¹ it is inevitable that various conflicting attitudes toward this science should take the place of a former uncritical acceptance. The conflict may be described, somewhat inadequately,² in a few phrases:

(1) A struggle to preserve old creeds against a growing skepticism;

(2) An unconstructive skeptical attitude, either amused or discouraged, which proposes nothing;

(3) An enthusiastic search for eternal verities through new methodologies on which there is no agreement.

This situation makes the law today the most fascinating of the social sciences.³ Nevertheless, from the point of view of the prac-

¹ Elihu Root, quoted in *American Law Institute Is Organized* (1923) 9 A. B. A. J. 137.

² The impossibility of making accurate generalizations about schools of legal thought today is shown by Llewellyn in *Some Realism about Realism—Responding to Dean Pound* (1931) 44 HARV. L. REV. 1222. One may nevertheless be permitted to give one's general impressions.

³ "Our times may well come to be named, by future dealers in half truths, the Tired Age. Disillusionment is a mood of fashion as much as a form of *ennui* after

tical administration of justice, the undermining of old values seems to the writer to be one of the factors in a certain loss of prestige of the courts. In institutions, just as in individuals, the loss of self assurance is always followed by a loss of power. And if certain institutions, such as the courts or the church are not supported by a generally accepted creed or philosophy, they lose the peculiar prestige and respect to which they owe their influence.⁴ Thus our modern skepticism about substantive law has brought us face to face with an ancient paradox which may be expressed in this way: If courts — or at least persons who deal with courts — did not so firmly believe that justice was dispensed according to the inexorable dictates of impersonal logical science, our machinery for the administration of law would not exist as we know it today. Just as an individual must cherish dreams and illusions, so also must his judicial institutions.

For this reason judges, at least while they are speaking from the bench, must talk of substantive law as a scientific body of principles which govern society. This unquestionably has a profound effect not only on the attitude of society toward them, but also on their attitude toward the problems which they attempt to solve. A free people resents government by individuals. They insist that they will only obey the self-imposed restraints which they see fit to impose on themselves. The method by which courts are supposed to eliminate the personal and arbitrary element from their decisions is supposed to be found in a science of substantive law. Without such a conception the present power and prestige of an independent judiciary would be difficult to maintain.

In the discussion which follows, the writer assumes without argument that the work of most legal scholars will be directed

the war's great effort. Whatever the cause, our politics are devoid of ardor and social reform has lost its romance. Such being the mental climate, one would expect jurisprudence to be in the doldrums and to earn its title as the dreary science. Alas for these generalizations about the main currents of thought! The waters of law are unwontedly alive. New winds are blowing on old doctrines, the critical spirit infiltrates traditional formulas, philosophic inquiry is pursued without apology as *it becomes clearer that decisions are functions of some juristic philosophy.*" (Italics mine.) Frankfurter, *The Early Writings of O. W. Holmes, Jr.* (1931) 44 HARV. L. REV. 717.

⁴ Cf. COOLEY, *SOCIAL PROCESS* (1927).

toward preserving and insuring the efficient operation of an independent judiciary as we know it today. That there are other fields in which legal scholarship is needed is unquestioned. But the particular task of restating substantive law, whether in text books, articles, or by the American Law Institute is certainly directed toward that end. If that kind of study is to be effective in guiding an existing institution which claims to be applying precepts, standards, and principles of substantive law, it becomes necessary to understand just what part this conception of substantive law plays in the operation of that institution. The problem is not philosophical, but entirely practical.

THE FUNCTION OF THE CONCEPT OF SUBSTANTIVE LAW

To look at the concept of a science of substantive law as a practical factor in the operation of courts, requires a shift of emphasis from the study of legal doctrine to a study of the operation of an institution — which is a difficult shift for a lawyer to make. He has been trained to assume that substantive law governs society, and that courts were only set up as incidents to its enforcement. We may illustrate this by an analogy. If one attempted to study the Mormon colonization of the West by centering attention on the rules, standards, and principles found in the Book of Mormon, on the assumption that Brigham Young was its humble instrument, the resulting picture would be somewhat distorted. Certainly the creed had a profound effect on the movement. Without it, or some other philosophy, we would have had simply a group of persons engaged in agriculture or trade. But the effect of the Book of Mormon could hardly be estimated by logical deduction from its principles. An objective examination would be necessary for either information or reform. Yet it would have been difficult for a devout Mormon of that day to make that examination. In the same way it is not easy for the legal scholar to make the court the center of his study and to consider the doctrines of substantive law only as factors in preserving its power and independence, in determining its attitude, and in furnishing it with a method of expression.

In spite of its difficulty, this shift of emphasis from doctrines to courts needs to be made if we are either to understand, reform,

or restate any part of our judicial system. It can not be made by judges engaged in the actual operation of a system. It must, therefore, be done by scholars who are, or at least should be, studying that system objectively.

The writer will therefore attempt to examine our judicial organization in order to ascertain the part which "substantive law" and "procedure" are playing or may play in its operation. It is necessary at the outset to point out that in considering "substantive law" we have in mind only that science of arrangement and interpretation peculiar to courts, and not the various other forms of social compulsion⁵ which exist in every society whether it has an independent judiciary or a despotism. There are thousands of rules, statutes, institutional habits, directions—some actively enforced by all sorts of agencies, others dead, others occasionally invoked—existing under every form of government.⁶ They are often called "law." They are, however, not that science of law with which law schools and legal scholars are concerned when they study bodies of learning such as torts, contracts, trusts, equity, all bound together by the clasp of jurisprudence. We may be permitted to ignore the social compulsions of other institutions when we are examining courts, because those institutions are no part of the peculiar machinery of the courts and are only an incidental part of the study of "law."⁷ The substantive law which is being restated for the guidance of judges does not deal with the changing mass of directions and rules which harass every organized society, but with a science of fundamental principles peculiar to courts. Other departments of the government get along without these concepts. No organized body of

⁵ See Moore and Hope, *An Institutional Approach to the Law of Commercial Banking* (1929) 38 YALE L. J. 703.

⁶ Moore, *Rational Basis of Legal Institutions* (1923) 23 COL. L. REV. 609. Here Mr. Moore sets out the importance of institutional habits as distinguished from legal principles.

⁷ For some purposes any definition of "substantive law" which puts the entire emphasis on the so-called "science of law" and ignores definite directions and institutional habits would be too narrow. For the purpose of an objective examination of courts, however, we wish to deal with the peculiar conceptions which are incident to an independent judiciary. A rule receives very different treatments when applied by an executive and applied by a court. We are examining the conceptions which cause the difference in treatment, not the rule itself. ". . . decisions are functions of some juristic philosophy." See Frankfurter, *loc. cit. supra* note 3.

learning concerning rules of the Postmaster General's department in action is ever opposed to those rules in books. Realists and fundamentalists do not clash over how the United States Steel Company is applying its rules, standards and principles, with which it is bountifully supplied. With the rules and directions which exist in every form of government or social control we are not here concerned. We are only examining the function of that science of law, usually referred to as substantive law, and its inseparable partner, procedure, which has its peculiar utility in connection with courts.

In examining our judicial institutions objectively, instead of classifying doctrines, we will classify the persons connected with them according to their functions. For our purposes, we propose a division into (1) lawyers, (2) judges, who sometimes sit as "courts," sometimes as "commissions," and sometimes as "bureaus," and (3) legal scholars. We find them all working in a sort of verbal haze which deepens as we approach the courts, becoming almost impenetrable when we reach the legal scholars. Lumped together these individuals make up our machinery for the administration of justice, as opposed to the mere enforcement of rules and the determination of disputes. We will consider them separately in their relation to the concept of substantive law and its handmaiden, procedure.

The Lawyers. It is not so hard to understand what the lawyers are doing, in spite of the fact that they use a rather complicated language, and disappear from time to time into the haze to attempt to obtain the blessing of the judges on their completed work. Their mode of speech may be involved but their objects are generally quite understandable. They are advising people how to trade, to build, or to live so that their neighbors may not be able to invoke higher governmental authority against them, and in this pursuit they invoke many formulae and incantations which unfortunately are not uniformly successful in obtaining the desired result. However, it is easy to see at least what they are trying to do, and to know whether they have succeeded or failed at it, because their object is usually the very definite one of helping a particular individual in a particular thing. But when they become engaged in an effort to fulfill their duty as "officers of the court" their objectives become vague, and it is difficult to tell

what they are doing or even what they are aiming to do. Such efforts, generally confined to public meetings, result in speeches like the following, reported from an annual meeting of the American Bar Association:

“America looks to the bar today for leadership, as she has always looked. It was the lawyers who led us in our struggles for independence. . . . And it has been the lawyers who, not only upon the bench, but at the bar, in the legislature and in executive positions, have moulded our institutions to meet the changing life of our people. The charge that they have allowed the law to become antiquated and obsolete cannot be sustained. While changes are needed in procedural law, these changes are already in process of realization and much has already been accomplished. Great problems confront the nation, but the bar of America will rise to meet them, as it has always risen in the past.”⁸

It seems, at first sight, extraordinary that any body of busy men should take so much responsibility on their shoulders. Yet that they are constantly doing it is attested by the fact that speeches of this tenor and effect made during the last century would fill hundreds of volumes and that no meeting of any bar association ever occurs without at least one being made. The net results on institutions other than courts of this assumption of general responsibility are somewhat doubtful, but the fact that the bar sincerely feels it is very significant in its effect on the judicial system, from articles on jurisprudence in law reviews down to learned discussions in “jurisdictional” terms on the omission of the details in the service of summons.⁹

As we study these speeches we are impressed with the thought that we have read something like them before. It occurs to us that they sound strangely like the confident exhortations of ministers of the gospel fifty or one hundred years ago, when the church was too confident and sure of its purpose to examine that purpose to see whether it was capable of reduction to intelligible terms. It is not the preaching of the modernist, full of doubts and

⁸ Parker, *Social Progress and the Law* (1930) 16 A. B. A. J. 701, 707.

⁹ Without the mystical concept of a “court” which induces such speeches it would be impossible to build up a reverential attitude toward such a thing as the “jurisdictional nature” of process, which still exists in defiance of common sense, and which is independent of any particular statute governing process. For example, see BOWERS, *CIVIL PROCESS AND ITS SERVICE* (1927) Preface.

wavering over his own concepts. It is the assertion of men who know that all right-thinking people must necessarily agree with them.

Compare a great lawyer speaking on the recall of judicial decisions, on the assumption that such a thing was impossible in a civilized community, with Reverend Samuel Miller, speaking at Princeton, nearly one hundred years before.

"We must choose between having prescribed rules of right conduct, binding in every case so long as they exist, even though there may be occasional inconvenience through their restraint upon our freedom of action, and having no rules at all to prevent us from doing in every case whatever we wish to do at the time. . . . A sovereign people which declares that all men have certain inalienable rights, and imposes upon itself the great impersonal rules of conduct deemed necessary for the preservation of those rights, and at the same time declares that it will disregard those rules whenever in any particular case it is the wish of a majority of its voters to do so, establishes as complete a contradiction to the fundamental principles of our Government as it is possible to conceive. It abandons absolutely the conception of a justice which is above majorities, of a right in the weak which the strong are bound to respect. It denies the vital truth taught by religion and realized in the hard experience of mankind, and which has inspired every constitution America has produced and every great declaration for human freedom since Magna Charta—the truth that human nature needs to distrust its own impulses and passions and to establish for its own control the restraining and guiding influence of declared principles of action."¹⁰

The Reverend Miller in 1826 said:

"EXODUS, XXXII. 26.

*"Then Moses stood in the gate of the camp, and said,
Who is on the Lord's side?"*

"When this solemn question was asked, the camp of Israel was in a very awful situation. *Moses* had been in the Mount, conversing with God, and receiving the Law from His lips, forty days and forty nights. . . . O what an amazing scene was here! That the very people who, a few weeks before, had witnessed the wonderful displays of Divine

¹⁰ Quotation from Root in Thayer, *Recall of Judicial Decisions*, Sen. Doc. No. 28, 63d Cong. 1st Sess. (1913) 9. The writer hastens to point out that he means no criticism of such a speech. Another kind of speech would not have had its effectiveness. It is the fact that such speeches are effective which illustrates our attitude toward courts.

power on their behalf, in *Egypt*, and at the *Red-Sea*; and afterwards the still more terrific wonders of Mount *Sinai*, with *the thunderings, and lightnings, and voices and earthquake* . . . that this very people should so soon have forgotten all their signal deliverances, and all their solemn vows, and begged to be placed under the guidance of a dumb idol,—presents an example of infatuation and depravity, as enormous as it was degrading.”¹¹

The similarity between these two utterances is that each is adapted to the end of making the audience assume a reverential attitude toward a human institution. In the first it was the court, in the second, the church. Neither can be subject to analysis. Why should a court be so much more careful of our freedom than an administrative tribunal? Is there really less freedom in this country where it has been said that we have a bill of rights, but no rights, than in France where they claim more individual rights, but no bill? Such inquiries are beside the point. The important thing is the existence of this attitude toward our judicial institution; because all that a human institution can ever be, is a group of individuals plus an attitude. With such an attitude substantive law begins.

The Judges Sitting as Courts, Commissions, and Bureaus. Leaving our examination of the lawyers and penetrating deeper into the haze where the judges are found, we discover that certain things, which might seem elsewhere unimportant, assume a very deep significance. The name under which the judges assemble seems to control their temperaments and make them reasonable or unreasonable as the case may be. For example, if they sit as a bureau all of the bar, and even the public outside the bar, view the situation with alarm. A few bureaus are necessary, perhaps, in a complicated civilization, but if the bureaus increase in number and power, we suddenly find that without knowing it we have created a “bureaucracy,” which is one of the worst fates that can befall a free people.

The distinction between bureaus and courts is important. Courts are bound by precedent, and bureaus are bound by red tape. Of course courts are forced to follow precedent even when

¹¹ Miller, *The Evidence and Duty of Being on the Lord's Side* in 1 THE NATIONAL PREACHER (1826-28) 97.

it leads to absurd results because of their solemn obligation not to do anything in the future very much different from what they have done in the past. But bureaus in allowing themselves to be bound by red tape do so out of pure malice and lack of regard for the fundamentals of freedom, because they have taken no oath not to violate the rules and analogies of the past. Therefore they are much worse than courts because courts only act unreasonably when they can't help it, and bureaus act unreasonably when it is in their power to do differently. This is brought out very clearly in a recent editorial, *Bernt Balchen Discovers Bureaucracy*:

"According to a ruling of the department of labor Bernt Balchen, Admiral Byrd's pilot in the flight over the south pole, cannot receive his citizenship papers. Balchen, a native of Norway, declared his intention in 1927. It is held that he has failed to meet the condition of five years' continuous residence in the United States. The Byrd antarctic voyage took him out of the country, although he was on a ship flying the American flag, was an invaluable member of an American expedition, and in a region to which there is an American claim because of the exploration and occupation of it by Americans, this region being Little America.

"The bureau of naturalization explains that it cannot proceed on the assumption that Little America is American soil. That would be trespass on international questions where it has no sanction. So far as the bureau is concerned, Balchen was out of the country and technically has not complied with the law of naturalization. The upshot is that, unless a way of modifying this opinion is found, a man whom the country would like to have as a citizen cannot soon become one simply because he took an invaluable part in an enterprise of which the country is proud."¹²

This editor had a definite notion of the superiority of judges sitting as *courts* over judges sitting as *bureaus*. While, of course, instances can be found where courts have acted just as outrageously, a close examination of such decisions always shows, nevertheless, either that they were forced into such action by a greater principle, such as the one against judicial legislation, or against hard cases being allowed to make bad law, or else that they were wrong according to the principles of the common

¹² Chicago Tribune, June 24, 1931, at 10.

law, in which case the decision does not count and we may ignore it.

If, on the other hand, the judges sit not as a bureau or department but as a commission with quasi-judicial powers, the danger is not so great. Nevertheless it represents a tendency which deserves careful scrutiny, and we must be at all times cognizant of just where it is leading us. The suspicion that has greeted commissions, to which have been entrusted matters of public importance, never quite disappears until the commission is firmly established, and the dangerous tendencies of such movements are constantly talked over for a long time afterward.

The distinction between a bureau which is a very bad sort of thing and a commission with quasi-judicial powers which is well enough in its place is that the commission, while not exactly a court, nevertheless is more like a court than it is like a bureau. Therefore if we are very watchful of these commissions and see that the inevitable mixing up of the three great branches of the government—the executive, legislative, and judicial—occurs only on lower levels, and in comparatively minor matters such as the valuation of railroads, the fixing of rates, workmen's compensation, banking, taxation, trade regulation, zoning, immigration, irrigation of arid lands, drainage, insurance, and similar things which do not involve the great principles of freedom—as, for example, a suit for libel and slander, replevin, or criminal conversation does—we may escape this new form of despotism. It is particularly important, however, to have a law court in the background ready to keep in check each commission which has been given quasi-judicial powers, because in this way the powers which had become so muddled when passing through the commission, again become separated and run in clear and separate streams and everything becomes less arbitrary and personal and more subject to the fundamental rules of law. Thus it is that, in examining the individuals of our judicial system who are acting as judges, we find that a jarring note is struck when they sit as a commission and not as a court, but that with proper vigilance the thing is being kept fairly well under control.

Turning our attention to those judges who are sitting as "courts" because they are the most mysterious part of the whole judicial institution, we find it difficult to tell just what they are

doing which makes them so different from other bodies. Of course they are settling disputes, but many other persons are engaged in this, such as officers of business corporations, bureaus, government officials — in fact almost everyone occupying a position of financial or business power over others has his part in the settlement of disputes. It is not even clear that they are settling the most important disputes because the more important lawyers seem to spend very little time with them, and statistical examination of what courts do discloses the fact that much of their business involves rather trifling matters. They are also spending a very large part of their time forcing recalcitrant people to perform their obligations by means of judgments and executions, but many other persons are doing that, in different ways, including policemen, departments, bureaus, and officers of various kinds. They are establishing a procedure and following precedents in settling these disputes, but so is everyone else who conducts continuing activity along these lines. These are all the common functions of many institutions and certainly no system of courts has a monopoly on them.

Yet in spite of the comparative unimportance of what they do, courts appear to have found a way of doing it which has brought them overwhelming prestige and respect. They seem to have induced the feeling, even among persons who know nothing of court methods and have never been inside a court room, that there they will find protection. Even when they fail miserably to give protection to someone who seeks it, such is their demeanor and attitude that he — or at least his friends — feel that it was not the fault of the court that protection failed. Perhaps it was the fault of the legislature, perhaps of the jury — at least the court did the best it could, and had it done otherwise it would have, in some mysterious way, imperilled the whole system of protection to others. Commissions, composed of experts, can be violently criticized by editorial writers. But if the matter is appealed to a non-expert court, sitting on the same question and using the same criteria, it appears to be settled in the only way possible under the law. Our quarrel is, then, with the law, which we must respect until it is changed, and not with the court which applied it.

Courts are protecting the liberties of Englishmen though in 1927 they committed approximately five thousand persons to jail

for non-payment of debt.¹³ The imprisonment was the fault of the law and not the court. It is true that the Parliament in 1869 had abolished imprisonment for debt, but this did not include judgments which the debtor had the means to pay yet wilfully refused to pay. The difficulty that it was entirely too easy for the creditor to establish the fact that the debtor had the means to pay, is only a procedural fault for which no court can be held to account.¹⁴ It must simply do the best it can with procedure as it finds it. Therefore the Rt. Hon. Lord Hewart of Bury, Lord Chief Justice of England was quite right in ignoring such details as this when he wrote his book on *The New Despotism* in which he pointed out the dangers from the arbitrary actions of men who judge cases sitting as bureaus instead of as courts, and who thus are creating a new form of despotism in England.

“The paradox which is in course of being accomplished is, indeed, rather elaborate. Writers on the Constitution have for a long time taught that its two leading features are the Sovereignty of Parliament and the Rule of Law. To tamper with either of them was, it might be thought, a sufficiently serious undertaking. But how far more attractive to the ingenious and adventurous mind to employ the one to defeat the other, and to establish a despotism on the ruins of both! . . . The old despotism, which was defeated, offered Parliament a challenge. The new despotism, which is not yet defeated, gives Parliament an anaesthetic. The strategy is different, but the goal is the same. It is to subordinate Parliament, to evade the Courts, and to render the will, or the caprice, of the Executive, unfettered and supreme. The old King, as Rudyard Kipling sings in ‘The Old Issue,’ sometimes reappears under a new name.”¹⁵

It appears from this that bureaus, even though given absolute power to enforce the decrees of other persons in the government, do not use that judgment in enforcing them which is so character-

¹³ CRIMINAL STATISTICS, ENGLAND AND WALES 1927. This figure does not include imprisonment for non-support or bastardy cases. Including these cases the total is 12,132. See *Imprisonment for Debt* (1923) 68 SOL. J. 178, (1928) 72 *id.* 676.

¹⁴ For a description of the procedural method by which imprisonment is accomplished, see PARRY, *THE GOSPEL AND THE LAW* (1928) c. V. In 1918 during the war only 206 persons were imprisoned on the judgment summons process. It is significant to point out that the author of this spirited attack on the process blames the “law,” rather than the courts.

¹⁵ HEWART, *THE NEW DESPOTISM* (1929) 17.

istic of courts. They do not, on the one hand, check the government in its wilder flights of regulatory fancy, nor on the other hand are they able to carry out the decrees of the government efficiently because they are too bound down by that particularly absurd form of rule and precedent known as red tape. Courts, on the contrary, do not concern themselves with red tape, but only with procedure and substantive law. Both may sometimes be antiquated, but that is never the fault of the court, whereas the red tape is always the fault of the bureau. Applying this principle to the cases of the persons imprisoned for debt, we at once see that if it had been done by a bureau it would have been an annoying invasion of personal liberty accomplished in an arbitrary way. When it is done by the court even those in jail realize that it is not the fault of the court, but the fault of the legislature which forced this procedure on the court. Thus it appears that even when courts refuse to protect the freedom of individuals they do it for such high motives that everyone should respect them for it.

From this we may reach our final definition of just what courts, commissions, and bureaus are.

1. A court is a body of judges whose decisions are either: (1) right, (2) caused by the fault of someone else (usually the legislature), or (3) unfortunate but unavoidable accidents due to the circumstance that no human system can be perfect.

2. A bureau is a body which, if it happens to make a wrong decision, has no one to blame but itself, and if it happens to make a right decision, offers us no assurance that it will do so again.

3. A commission with quasi-judicial powers is half-way between a court and a bureau.

Our next investigation naturally leads us to inquire what peculiar talisman judges who sit as courts possess which gives them such advantages over judges who sit as bureaucrats. This question does not detain us long because the answer is on everyone's lips. The courts represent the supremacy of "law." It is judges sitting as courts who guarantee us a government of laws and not of men, whereas judges sitting as bureaus or as executives are always trying to substitute a government of men and not of laws. The former is, of course, the better form of government because the laws are based on fundamental principles which gradually expand to meet changed conditions, whereas very few individuals

can be trusted with such power. Therefore the medal given by the American Bar Association for conspicuous service in American jurisprudence has for its motto "To the End that this shall be a Government of Laws and not of Men." In presenting that medal for the first time in 1929 the distinguished speaker said:

"It seems to me those words have been aptly chosen because they epitomize the whole service of Chief Justice Marshall whose head appears upon the medal. They represent the views of every man who renders conspicuous service to the cause of American jurisprudence, and in the last analysis, they typify the ultimate purpose and end of the American Bar Association itself."¹⁶

It is obvious that our belief that courts are the chief guardians of the supremacy of law is the reason why we adopt such a respectful attitude toward them. Yet this supremacy of law is a vague and very hotly contested phrase, on the meaning of which there is no agreement. It appears that two of its functions are: (1) to protect us from the tyranny of the majority and (2) to make results of disputes more logical and predictable.

The first has something to do with the interpretation of a written constitution which is supreme in this country. However, it is not clear that this written constitution itself is the real protection from the tyranny of the majority because courts in England furnish the same kind of protection without a constitution.

In this country, of course, the constitution is above the courts, yet, curiously enough, if at the same time we had not placed the courts above the constitution we are led to believe some form of tyranny would have developed. It is also interesting to note that courts, because they represent the supremacy of law, protect us from the tyranny of the majority, even though in most instances the judges are elected by the majority. Bureaus, on the other hand, are usually appointed, but because they do not represent the supremacy of law they are less likely to respect the rights of an individual against a majority than an elected judge. In France the chief bulwark of liberty is the "*droit administratif*" but this apparent paradox is explained by the Lord Chief Justice of England in his book on the dangers of administrative law as follows:

¹⁶ (1929) 15 A. B. A. J. 747.

“The system of so-called administrative ‘law’ in this country has little or no analogy to the ‘droit administratif’ of the Continent, and is an indescribably more objectionable method. . . . In a word, the ‘administrative tribunals’ of the Continent are real Courts, and what they administer is law, though a different law from the ordinary law.”¹⁷

The second feature of the supremacy of law, which is to make results of disputes more logical and predictable by the application of principles or the development of principles, is ordinarily referred to as the common law. It is a science of reconciling principles and precedents in an orderly way so that one will grow out of the other. Thus nothing absolutely new should come from a court without the aid of the legislature, and such new principles as appear should be the logical development of older ones applied to new cases. It appears, however, that very many new problems can be solved so much better without the aid of this science that administrative tribunals are formed just to escape it, and the area to which this science is applicable is being made smaller and smaller. This happened once before when courts of equity began to grow up against the substantive law of the time. Now that equity has become part of the substantive law, a new court seems to be necessary. However, such general theories of the function of substantive law, as well as its more comprehensive systems of methodology seem to be the peculiar province, not of courts and lawyers, but of a third body of persons whom we have designated as legal scholars. It is interesting to note that no other human institution except the church, has any comparable body of learned expounders.

The Legal Scholars and Substantive Law. Legal scholars, insofar as they are concerned with the concept of substantive law, appear to be doing two things.¹⁸ First, they are explaining what law

¹⁷ See HEWART, *THE NEW DESPOTISM* (1929) 45.

¹⁸ The statements which follow, of course, do not attempt to be accurate but rather to set out a popular notion which still affects much legal scholarship, particularly that portion of it devoted to clarifying doctrine by logical analysis. An accurate general statement of what legal scholars are doing is, of course, impossible because they are doing so many things. It is, however, the writer's belief that the statements which follow are fairly descriptive of an attitude which is often instinctively taken. Subjects like torts or contracts are usually so separated intellectually from jurisprudence in textbook thought that an instinctive conventional approach is adopted in the former which may be denied in the latter subject.

is — its nature and sources. Second, they are engaged in various forms of restatement of its varied concepts. Back of all the different kinds of restatement seems to be the assumption that substantive law is designed to govern human conduct outside of courts, instead of being a method of classification in the course of the legal process. Their declared intention seems to be a search for predictability. They are creating formulae which are supposed to be equally useful in all of the following situations, which are included in the general term law: (1) for the purpose of classifying past decisions in books so that they will be readily available as analogies; (2) for the purpose of guessing the result of a dispute on which no suit has been started; (3) for the purpose of writing a brief in a case where two logically unanswerable briefs are possible; (4) for the purpose of aiding the trial court in making a record in such form that a reversal is difficult; (5) for the purpose of giving analogies and terms to an appellate court which is writing an opinion; and (6) for the purpose of guiding human conduct outside of courts apart from the settlement of any particular dispute.¹⁹

The law of torts, or contracts, or sales, for example, is supposed to give a definite answer in all of these situations. In such situations as it fails to do this, we fall back on the theory that there will always be borderline cases. The object of the various forms of restatement is to limit the number of borderline cases, and in this attempt it involves itself in infinite complications. A restatement has two avowed purposes; first, to furnish a guide to human con-

¹⁹ The perennial dispute as to whether facts and social conditions or doctrine should be the basis of legal study owes its continuance largely to the fact that when we speak of "law" we usually refer to all of these situations at once, without differentiation between them. We might add still others. For example: We often call "law" those protective devices which lawyers use to safeguard a client from all possible trouble with courts; as, for example, the long forms which attempt to protect a sales contract of an automobile from the hazards of the courts of forty-eight states. No one reads the form until trouble arises and then it becomes the stuff out of which legal arguments are made. We also refer to as "law" the ideals which give prestige and authority to courts. That different approaches are necessary in these different situations is indicated by Pound, *The Call for a Realist Jurisprudence* (1931) 44 HARV. L. REV. 697. A somewhat different classification, but with the same idea in mind, is found in Frank, *Are Judges Human* (1931) 80 U. OF PA. L. REV. 233, 259.

duct so that individuals may avoid disputes, and second, to make the result of disputes certain. In doing this, restatements seem on the surface to be concerned with rules. Yet the bulk of their material ignores the rules and devotes itself to principles for the application of rules. Statutes receive little consideration unless they are, like the Statute of Frauds, not rules, but the storehouse of legal argument and analogy. A statute which is sufficiently definite to be a direction and not a logical weapon is ignored.

For example, a statute that a corporation must start with three incorporators is typical of the thousands of directions which are not found among substantive law principles. It is a direction to the secretary of state which anyone can understand. If, however, the secretary of state issues a certificate to two incorporators, and the question arises whether in a particular suit such a corporation can collect a debt, the substantive law appears to justify, and to make inevitable, any result which the court chooses to reach. The actual result of this accomplishment is not predictability of result but predictability of the kind of arguments which will be the intellectual currency in such disputes. Attorneys and courts want to know how they shall talk. Legal scholars regulate this very important field of procedural etiquette and call it substantive law. It is difficult to see how it can be a guide to conduct outside of courts, because laymen neither know anything about it, nor, as Coke pointed out to the King, is it possible for them to know anything about it. The paradox is that, if it were sufficiently simple for them to understand, a bureau or policeman could settle the dispute, and we would not need to discuss the concept of substantive law.

Thus "substantive law," because its formulae and logical processes can never be openly repudiated by a court, may be at times a very rigid master of judicial decision. Courts will not deny the validity of a philosophy which gives them power. Even though a doctrine is only a method of argument, once it is placed under the protecting mantle of substantive law, it can not be treated in a simple and matter-of-fact way to accomplish a result. The only escape from a principle is a greater principle. Commissions dealing with the same problems possess a more elastic power. Our different attitude toward them permits us to offer personal

criticism if they blindly adhere to any verbalism. Hence we can force them to talk about the particular problem involved.²⁰

From this discussion we may attempt to define that concept of substantive law which is peculiar to courts, and the part it plays in the work of legal scholars.

Substantive law, insofar as it is peculiar to courts, is the justification of the attitude that courts are acting impersonally and that their government is one of laws and not of men. It is not an institution which governs society, yet its function requires it always to appear to be. Without an independent judiciary we would have no occasion to use it among our ideals. Something else, such as the Divine Right of Kings, or the Five-Year Plan, would take its place.

Legal writers, scholars, and philosophers furnish the necessary theological background without which no abstraction which gives prestige to a human institution is able to survive.

Two illustrations of the effectiveness of the concept of substantive law in the public mind will suffice. A short time ago the World Court decided against the German-Austrian Customs Union. Newspapers generally regarded this as a political decision and used it to prove that the World Court was not a court at all. Of course the decision was no more political than most court decisions on economic or social problems, but the fact that the court lacked a complicated and generally respected logical science for the interpretation of international affairs made it impossible for it to make the result seem impersonal and inevitable. Hence the criticism was directed at the court, instead of at the unfortunate state of international law.

In West Virginia the board of public utilities was authorized to grant water-power franchises. The question on which the grant was to hang was whether the advantages to the state outweighed the disadvantages. The act allowed appeals first to the circuit court and then to the Supreme Court. The grant of an important franchise under this act became the subject of a bitter political dispute. The action of the lawyers on the commission was characterized as a "public utility grab" in spite of the fact that there was no evidence of anything but the best of faith. On

²⁰ See DICKINSON, *ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW* (1927) 15, n.24.

appeal, the case was heard by a judge without any of the skill in the particular matters which the commission had acquired by experience. Nevertheless when his decision was handed down, criticism ceased. The "law" had spoken, and if the result was undesirable, it was not the fault of the judge. Later the Supreme Court found that the entire act was unconstitutional,²¹ and the fight was transferred to the legislature. Of course it was just as impossible to predict the result before a court as it was before a commission. Yet the notion of the supremacy of a substantive law residing in the court, completely removed the question from the public turmoil of individual criticism.

The science of law peculiar to courts has its utility and effect, as we have seen, in several ways. (1) It gives the court the atmosphere of impersonal and inevitable justice which compels respect. (2) It shifts criticism of the result away from the judge or the court to some body which is supposed to have the power to change the "law." (3) It gives the court a certain attitude toward the problems which confront it by making relevant ancient analogies. (4) It expresses general directions and ideals called principles.

Rules and definite directions, of course, appear wherever we turn, and whether we are dealing with courts or other bodies. However, there is a great difference between the way these rules are applied when we treat them with the attitude induced by the science of law and when we treat them with the attitude of a bureau or an administrative official. The difference is illustrated in a book by a well known English scholar,²² in which, in different essays, he writes of "The Ratio Decidendi of a Case," referring to such things as contracts, consideration, and torts, and of the English system of taxing costs. The one seems to him to be part of the science of law, to be considered in the light of general theory, fundamental in its nature. The taxation of costs, on the other hand, is treated as a practical problem to which no methodology of the discovery of principles scientifically arrived at is necessary. If we call a summons "process" which is necessary to give the court "jurisdiction," concepts of all kinds troop in, from the difference between "mandatory" and "directory" pro-

²¹ *Hodges v. Public Serv. Comm.*, 159 S. E. 834 (W. Va. 1931).

²² GOODEART, *ESSAYS IN JURISPRUDENCE AND THE COMMON LAW* (1931).

visions, to "presumptions in favor of the judgment of a court of record" and the difference between "direct" and "collateral" attack. If the method of giving notice is not "process," as happens in the case of a motion in the course of the proceedings, then no principles, concepts, or theories appear to trouble us in the books.²³ Illustrations might be multiplied indefinitely. The point is that it is always possible to treat any rule with the attitude induced by substantive law and that the moment we do so a philosophy begins to cluster around it and only men peculiarly learned in the law can talk about it at all. This is what Coke so carefully explained to King James. The King was under the impression that the determination of whether Coke's court or the ecclesiastical commission should deal with a certain case depended on the application of rules which he was quite competent to discuss.²⁴ But Coke pointed out that there was more than ordinary rules here — there was a science of law which depended on more books than the King had had time to read.²⁵ The King might have been able to discuss the advisability of assigning a case to one of two judges, but where the assignment was between a common-law and an ecclesiastical court, it depended on a science of law which was not only above the King but which the King could not even understand. And thus the prestige of an independent judiciary achieved one of its first triumphs.

THE EFFECT OF TOO MUCH SUBSTANTIVE LAW

The function of substantive law as the embodiment of the great ideals of an independent judiciary has today become confused by an attempt to apply it in detail to too many cases. Legal scholars have felt it their peculiar duty to clarify the situation and to combat the skeptical attitude toward the decisions of

²³ By changing the name of a suit to "motion for judgment" in Virginia, the federal requirement for summons was avoided because the notice was not "technically process." *Leas & McVitty v. Merriman*, 132 Fed. 510 (W. D. Va. 1904).

²⁴ We take Gardiner's interpretation of the incident which he states as follows: "James was probably inclined to rebel rather against the yoke of the lawyers than against that of the law. What he wanted was to prevent the common law judges from overthrowing the ecclesiastical jurisdiction." 2 GARDINER, *HISTORY OF ENGLAND* (1883) 39.

²⁵ *Prohibitions del Roy*, 7 Co. 63 (1608).

courts for which that confusion was responsible. The American Law Institute is only part of this continuing effort. Law reviews have been filled with attempts to clarify particular fields. The usual method of attack, however, has been based on the assumption that the confusion was the fault of an untutored judiciary who had failed to reason and reconcile with that nicety which the occasion required. Therefore, if the existing cases are only thoroughly sifted, certain fundamental principles will finally appear which everyone must recognize to be the principles on which appellate courts and trial courts must operate until relieved by the legislature. The discovery of these principles depends on the examination of what appellate courts have said, without any particular regard to its utility. The reason utility can not be a test is that substantive law governs society outside the courts, and can only be changed by legislative enactment (except, of course, that minor gaps can be filled or new principles discovered).

The effect of this notion has been to make our system of judicial logic grow like a snowball. Since so many of our rules are treated with the attitude of substantive law, it has been difficult to talk about the problems involved. An ordinary rule can be treated in the light of its purpose and bent to meet a practical situation. A principle of substantive law can also be modified, but not for practical considerations. A greater principle must always be discovered. It is inevitable therefore that if many of our problems are treated from the point of view of substantive law, the bulk and complexity of the principles of that science should increase beyond a point where any artificial attempt to simplify by restatement is futile.

The only method of preventing the confusion of doctrines and precedents is to treat them as ideals and general directions and to insulate them from the cases which distort them into so many complicated and difficult shapes. This seems paradoxical, yet it is based on the obvious proposition that out of ten selected cases a legal scholar can build a more coherent set of principles than he can out of ten thousand chosen at random. We may illustrate it by calling attention to the success of the English system. Here we find no skeptics undermining its prestige. The supposed superiority of the English judges is heralded with great humility wherever American lawyers gather. This does not mean that

the English judges are really superior, but that the conception of substantive law is giving them a prestige which removes them from individual criticism.

What has happened in England in the years following the Judicature Act is not the sudden substitution of enlightened judges for bigoted ones, but the insulation of the science of substantive law from the practical problem of litigation. Instead of rigidly applying the substantive-law doctrines through the principle of *stare decisis*, as many imagine, the English have been devising practical escapes which separate principles of substantive law from the actual cases which confuse them. This has been done by transferring power to the trial courts and making it difficult for appellate courts to make a written application of doctrines to any case not fought with unusual determination and disregard of expense. Thus substantive law exists at the top of the very practical English system as an ideal exposition of a way of thought and expression.

The ways in which this has been accomplished are interesting. First, that vast mass of principles which are treated in America from a substantive law point of view under the name of pleading and the various steps before trial, are removed from the logical interpretation of appellate courts by the simple device of interposing a master between the litigant and the judge.²⁶ In criminal cases the complicated substantive science loses its importance because the court of criminal appeal may treat cases individually and even increase the penalty, instead of sitting solely as a court of error.²⁷ Third, the heavy imposition of costs makes appeal difficult. The attorney who thinks that a principle of substantive law is wrongly applied by a lower court must gamble very

²⁶ 23 HALSBURY, *THE LAWS OF ENGLAND* (1912) 135; Higgins, *English Courts and Procedure* (1916) 11 BULL. AM. JUD. SOC. 40 *et seq.*

²⁷ "The Act provides that the Court of Criminal Appeal shall allow an appeal against conviction if it thinks the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported by the evidence or resulted from a wrong decision on any question of law or if it thinks that on any ground there was a miscarriage of justice. In all other cases it must dismiss the appeal and in this connection it is provided that even though the court is of the opinion that the point raised might be decided in favor of the appellant it may still dismiss the appeal if it considers that 'no substantial miscarriage of justice has actually occurred.'" HOWARD, *CRIMINAL JUSTICE IN ENGLAND* (1931) 280.

heavily on his judgment if he wants it reviewed.²⁸ Finally, only selected cases are collected in the reports which make up the libraries of available citation. Six hundred and ninety-seven volumes make up the relevant material for legal argument.²⁹ We are left to guess how many inconvenient cases from the point of view of symmetry are buried under this important procedural device.³⁰ What is left after all these selective processes constitutes the "substantive law." Of course the cases are more easily reconciled because one hundred cases can be reconciled in a much less complicated way than a thousand. Thus, in England substantive law performs its function as a philosophical guide divorced from actual cases. Power is transferred to trial courts, and to judges who are not dignified by that peculiar name. Judicial realism is dormant as realism always is when a creed is fulfilling its function.³¹ The very practical matters which determine litigation are

²⁸ "As the costs in even a simple appeal may easily amount to £100 or £200 it is obvious that a litigant will hesitate before taking this step." GOODHART, *ESSAYS IN JURISPRUDENCE AND THE COMMON LAW* (1931) 215.

²⁹ "Perhaps the reason why the English Lawyer is not dissatisfied with the present system is that the 'myriad' precedents do not exist. The English cases to 1865 are reprinted in the *English Reports* in about 175 volumes. The semi-official *Law Reports* from 1865 to the present date occupy about 450 volumes. Thus 625 volumes make up a complete working library." GOODHART, *op. cit. supra* note 28, at 57.

³⁰ "Only a small proportion of the decided cases are reported each year; unless a case deals with a novel point of law — and novelty is strictly construed — it will rarely find its way into the *Reports*. . . . It is hardly surprising to find that the English lawyer has no difficulty in digesting the annual reports, and that he does not, therefore, demand a change in the established system." GOODHART, *op. cit. supra* note 28, at 57.

Of course English writers would deny the statement that this selective process is ever used as a method of avoiding inconvenient cases. The writer, however, believes that a selective system of printing cases inevitably cuts down the possibility of encumbering legal principles with qualifications and exceptions, even though this is not the conscious intent.

³¹ "A search through the English periodicals since 1900 does not show a single article or note by an English lawyer in which the system has been adversely criticized. No modern English poet has arisen to denounce the English Law as Tennyson did seventy years ago:

'Mastering the lawless science of our law,
That codeless myriad of precedent,
That wilderness of single instances,
Through which a few, by wit or fortune led,
May beat a pathway out to wealth or fame.'

GOODHART, *op. cit. supra* note 28, at 56-57. The writer contends that the reason the poets of today are silent is because the English have devised procedural escapes

taken care of in a practical way. Criticism of decisions in the way American decisions are criticised in our law reviews, does not exist.

It is this ability of the English to keep an ideal from too close contact with reality which explains the prestige which they are able to throw around their institutions. There is little positive evidence that results in English courts are better than in ours, if we take into consideration the intricate tasks which our courts are facing. The evidence is only of a dignified process where the dividing line between procedure and substantive law is so placed that it increases the area of procedure and simplifies the judicial expression of principle.

In France the code stands as the ultimate symbol of substantive law. The work of commentators who are more interested in principles than in reconciling all the cases is given great weight. And finally, cases which make these principles stand out are selected as precedents. The gap between the code and its principles and the actual results is a matter concealed in the double trial afforded by the lower courts, which provides opportunity to treat the practical problems of litigation in a practical way. Whatever the demerits of the French judicial system, at least it has not become verbally cumbersome.

In this country the Supreme Court of the United States, in dealing with constitutional problems, has, in recent years, been rapidly escaping from the position of the humble instrument of constitutional doctrine, and is being studied and recognized as a great judicial institution. This has been accomplished by a change of attitude which permits us to study the Court, operating through the language of the constitution, instead of the constitution, with the Court appearing as an incidental agency of enforcement. The skepticism of Mr. Justice Holmes and Mr. Justice Brandeis, which recognizes, on the one hand, that doctrines do not govern society, and, on the other, that they can be used wisely and skilfully in governing the Court, is the kind of skepticism which creates great institutions. In this they have been aided by a few interpreters who have broken down the attitude which created the old conventional course in constitutional law of fifteen years ago. As

from the consequences of too rigid application of the rule of *stare decisis*, rather than because of any sudden change in the nature of English judges.

peculiarly effective in accomplishing this I may cite Frankfurter and Powell of Harvard, and Hamilton of Yale. Frankfurter by centering his attention first on the problem to be solved,³² and then on the Supreme Court as an institution, as in *The Business of the Supreme Court*³³ — Powell by his penetrating wit, which is never used merely for the purpose of being funny, and which illuminates like flashes of lightning, as in his “An Imaginary Judicial Opinion”³⁴ — and Hamilton, with his beautifully phrased constructive philosophy in which the utility and future possibilities of the formulae of constitutional law in the hands of an enlightened judge are demonstrated, as in his “The Jurist’s Art”³⁵ — have made the Supreme Court stand out as a living instrument of government. Never has the prestige of that Court been higher. No one is worrying about restating constitutional law so that it will be simpler and easier for that Court to apply it. These formulae seemed to have slipped into their proper place, as necessary tools with which the Court must work, which limit its activities, and aid in the expression of the attitude and ideals which it brings to the solution of governmental problems. And the confusion incident to a written expression of these doctrines in too many cases is prevented by a discretionary appeal.

That the bundles of concepts and logical systems found in such fields as contracts or torts, are not different, except in the area of their application, from the formulae of constitutional law, does not seem to be so clearly recognized.³⁶ The constant attempt is to use

³² As in FRANKFURTER AND GREENE, *THE LABOR INJUNCTION* (1930).

³³ Frankfurter and Landis (1927). See also Frankfurter and Landis, *The Business of the Supreme Court at October Term, 1928* (1929) 43 HARV. L. REV. 33, *The Business of the Supreme Court at October Term, 1929* (1930) 44 *id.* 1, *The Business of the Supreme Court at October Term, 1930* (1931) 45 *id.* 271.

³⁴ (1931) 44 HARV. L. REV. 889.

³⁵ (1931) 31 COL. L. REV. 1073.

³⁶ This is becoming less true every year. Dean Pound in *The Call for a Realistic Jurisprudence* set out the need for a discussion of the utility of doctrine in the judicial process and also the relevancy of a study of the psychological factors involved. (1931) 44 HARV. L. REV. 697. Leon Green, in *JUDGE AND JURY* (1930), emphasizes the function of legal doctrine in the delimitation of functions of trial and appellate courts and juries. Two recent articles in the *Yale Law Journal* indicate by their titles that the function of legal concepts instead of their logical analysis is the center of interest. Cormack, *Legal Concepts in Cases of Eminent Domain* (1931) 41 YALE L. J. 221, and McCormick, *The Parol Evidence Rule as a Procedural Device for Control of the Jury* (1932) 41 YALE L. J. 365. Nevertheless the statement still represents a widely prevalent attitude.

them so that they will control, not the processes of the court, but society in general. They are being continually rephrased in various ways, so that their fundamental elements can become more and more detailed and certain. The English trick of isolating them from the general run of litigation so that the effect of the attitude which they induce and the general directions which they furnish will not be lost, is not realized. An illustration may be useful here. If *A* tells *B* to report an accident, giving only the facts and omitting so far as possible his conclusions, this general direction will unquestionably affect the type of report. But if *A* and *B* insist on writing books about the differences between facts and conclusions examining in detail all the reports which have been handed in for the past ten years, the direction will become unintelligible. The rule will fail to function if it is analyzed in every case. It will also fail to function if everything which has been said about the difference between facts and conclusions, and not expressly repudiated since the time of Lord Coke, must be preserved and made relevant in the discussion of the report which *B* makes.³⁷

PROCEDURE AS AN ESCAPE FROM SUBSTANTIVE LAW

Our judicial system, objectively examined, seems to be founded on so many imponderable psychological factors that it can never be molded by a direct attack upon its ideals without impairing its prestige. On the other hand, its logical machinery is so elastic that it is capable of tremendous changes if we understand the function which that logical machinery performs. And because of the

³⁷ This is illustrated by an interesting controversy over the nature of the code "Cause of Action." Dean Clark proposed a test which left the determination of the extent of the cause to the discretion of the court, having in mind the facts of the particular case. CLARK, *CODE PLEADING* (1928) 83. This was attacked on the ground of (1) lack of certainty and (2) lack of symmetry by three able scholars all of whom sought to define the fundamental elements of the term in the various dissimilar situations in which it was used. McCaskill, *Actions and Causes of Actions* (1925) 34 *YALE L. J.* 614; Harris, *What is a Cause of Action* (1928) 16 *CALIF. L. REV.* 459; Gavit, *The Code Cause of Action: Joinder and Counterclaims* (1930) 30 *COL. L. REV.* 802. The significance of the controversy lies in the fact that in spite of the dialectic ability of the three last named authors seeking the fundamental elements of the "cause of action" they not only disagree with each other, but also with the earlier definitions of the term.

efforts of such men as Clark, Pound, and Sunderland to make procedure a practical thing, followed by the missionary propaganda found in such a periodical as the *Journal of the American Judicature Society*, we find that today, by calling a body of doctrine procedure, we can take an entirely different attitude toward it from that which we take where we call it substantive law. Anyone can say that procedure is not fundamental, that it has only to do with the legal process, that it does not govern the outside world, that it always needs reform, and finally that the reform may be accomplished by a consideration of the problem involved, not by analyzing the fundamental principles involved in doctrine.

The distinction between procedure and substantive law is one of the most interesting consequences of our attitude toward an independent judiciary. Substantive law is sacred and fundamental. It represents the experience of the ages. On it is based the freedom of the individual. It never needs reform because its fundamental verities can always be discovered by logical analysis. Procedure, on the other hand, is entirely practical. It always needs, not logic, but change in the light of practical details. It is based on the experience of the ages also, but age with it is senility, not wisdom. Yet, in spite of these fundamental differences, no one has ever been able to formulate any test which will distinguish between procedure and substantive law in any particular case. Substantive law remains the "law" which we enforce, procedure the practical rules by which we enforce it. We therefore always "restate" substantive law in the light of its principles, and "reform" procedure in the light of its practical problems.

The distinction is most useful in the judicial system, once we realize that the difference is only in attitude, that any doctrine may be treated as procedure and the problem discussed, or as substantive law and the principle stated. The difference between procedure and substantive law is a movable dividing line which may be placed wherever an objective examination of our judicial institutions indicates is necessary. Illustrations of this may be multiplied indefinitely. We will confine ourselves to two. The problem of the distribution of legal business between states may be considered from the substantive-law angle under the topics of conflicts of laws, collateral attack, process, presumptions

in favor of a court of general jurisdiction, the distinction between lack of jurisdiction and error in exercising it, the distinction between domicil and mere residence, the concept of doing business, express and implied consent to be sued, conceptions of local and transitory actions, and so on indefinitely. Or it may be considered from the procedural angle as a practical problem of determining the place of trial in civil actions, as Mr. Roger Foster does in two illuminating articles.³⁸ From such a point of view the concepts and theories disappear as irrelevant, without even doing violence to the rule of *stare decisis*. It becomes apparent that if the court will only talk about the problem it can easily escape the consequences of a philosophy which is quite unfitted for its solution. Or if it can not, in any given instance, we will at least know how to draft an act which will treat the problem procedurally. Another example is found in the method by which the law of sales determines where the loss of goods destroyed by fire should fall as between buyer and seller. Obviously what the doctrine is doing is determining in what cases the determination of liability shall be left to a jury. Treated substantively we find that it depends on whether "title" passed, which in turn depends on the "intent" of the parties, which in turn may depend on certain presumptions, from which the jury must find intent. The jury is never permitted to find the real fact — that the parties had no actual intent at the time because they were thinking neither of "title" nor of loss by fire. Treated procedurally we would talk not of intent but of the distribution of power between the court and jury. Probably the sales question is better solved by the apparent uniformity of the doctrine where no better practical solution is offered,³⁹ and probably the place of trial can be better solved by a procedural treatment because the doctrine includes so many dissimilar things.⁴⁰ We use the illustrations merely to

³⁸ Foster, *Place of Trial in Civil Actions* (1930) 43 HARV. L. REV. 1217, *Place of Trial—Interstate Application of Intrastate Methods of Adjustment* (1930) 44 *id.* 41.

³⁹ The uniform sales act in its generalizations as to when title passes, offers a simple set of principles which are not descriptive of the numberless situations where they are employed, but which serve as a classification of these cases at least as good as any which the writer has seen suggested.

⁴⁰ To the writer's mind Mr. Foster establishes this conclusively in his articles. See note 38, *supra*.

show that there is no doctrine of *stare decisis*, as opposed to *stare dictum*, which prevents us from considering the practical utility of treating any problem from a procedural point of view. Substantive law is canonized procedure. Procedure is unfrocked substantive law.

In view of these existing legal attitudes, emphasis on the procedural aspects, rather than on the underlying principles of any legal doctrine can afford an effective method for immediately relieving courts and attorneys of much of the burden arising from the myriad precedents in this country. The law of negligence, for example, deals for the most part with (1) the distribution of power between trial courts and juries and (2) the ritual by which the jury is put in the proper frame of mind to determine liability. The substantive-law solution is in part a textbook, written through the medium of instructions, against a background of conflicting results which certainly are not determined by those instructions. Our formulae concerning non-prejudicial error, and the jury's power over questions of "fact" are sufficiently loose that we may, if we wish, consider instructions in the light of their purpose,⁴¹ and remove the cases which deal with them from cases dealing with the question whether the jury is to be permitted to pass on the question at all. Thus we may treat any part of our substantive law from a procedural point of view. The selection need not be based on history but on objective utility.

In determining the utility of doctrine it is important to recognize that the function of the legal scholar as critic or reformer is different from that of the judge writing an opinion. The former may state his position from the point of view of an objective examination of the court as an institution. The latter must deal with doctrines as realities. The penalty of uncompromising realism on the part of the judge is the disappearance

⁴¹ It is assumed here that if the sole purpose of instructions in negligence cases were to put the jury, unfamiliar with legal concepts, in the proper frame of mind to determine liability, and such instructions were not considered as accurate expressions of the "law of negligence" many of our elaborate definitions of negligence, and its qualifying doctrines, would disappear. The two questions, when will a court permit a jury to pass on a case, and how will the court talk to the jury, could be sharply distinguished in any formulation of negligence law which treated the question as one of distribution of power. See GREEN, JUDGE AND JURY (1930) 153 *et seq.*

of courts as we now know them. The penalty of the belief that the legal scholar need only state fundamental principles in a judicial way is that uncompromising realists will flourish. The imponderable psychological factors involved in the necessity that critics and judges adopt different standards of values in their respective rôles may be expressed in an analogy.

The operation of our judicial institutions may be likened to the presentation of a play. The judges are the actors on the stage moving the audience with great lines, impressively delivered. To some in the audience the lines carry moral lessons, inspirational ideals, and definite directions as to how they should act in situations similar to the one presented. To others the lines have the moving effect of great art. Every audience will contain both types, and every person in the audience will swing backward and forward between these two points of view. The litigant who has sponsored the performance has been ushered out because he was disturbing the audience (just as the formulation of the principles of substantive law is constantly aimed at getting rid of the litigant by making the law so certain that litigation will be unnecessary, or telling him to resort to arbitration, or the action of a commission). Unquestionably the play is exercising a stabilizing influence on the manners and customs of the community.

Suppose into this very satisfactory situation we introduce a realist who insists on interrupting the actors in their most impressive speeches by telling the audience that it is only a theatrical performance. Or suppose that one of the actors bends over the footlights in an aside to explain that he is only an actor in a play. Obviously the effect of the play is destroyed.

Suppose, on the other hand, that the directors of the play are composed of fundamentalists who are firmly convinced of the truth and objective importance of the great lines of all the plays in the past. Because of that belief they insist that the principle actor repeat Hamlet's soliloquy in "Desire Under the Elms." Such a restatement would destroy the play as effectively as the interruptions of the realists, and might even make the play so dull that the audience would prefer to listen to the realist rather than the actors. The only worthwhile critic or director would be the one who considered the utility of any line to produce the effect at which he consciously aimed within the limits of the setting in which it was to be delivered.

Such a figure of speech is significant, not in depicting absolute truth but in picturing what the writer considers to be a useful attitude in America today. The details of legal philosophy are not so significant as the general attitudes or approaches to problems which they induce. There is no absolutely true approach because "in the house of jurisprudence there are many mansions."⁴² The happy phrase "relativist-realist jurisprudence"⁴³ recently coined by Dean Pound is a short way of saying that an objective examination of courts may not be so necessary in England where appellate courts confine their observations to a few hundred volumes as it is in America when we seek to prevent the confusion of a yearly output of twenty-five thousand printed opinions. We have a very practical problem before us, to make our way of judicial expression more intelligible, and our judicial principles and ideals more effective. The writer thinks that it can only be solved by determining what problems may be removed from the rigid impersonal atmosphere of substantive law and brought down into the practical atmosphere of procedure. This is not a denial of the necessity of a rigid philosophy of substantive law in our judicial system. It is simply an attempt to point out that the legal scholar or critic, by centering his attention on the judicial institution in connection with the problems with which it is confronted, can determine which of these problems should be treated with the attitude of substantive law, and which with the attitude of "procedure."⁴⁴ In that way rather than in the assumption that historical categories can only be changed by legislatures, which do not and can not understand them, lies the way to the clarification of our judicial expression. Without an objective examination of the judicial institution itself, we are likely to be trapped by our old phrases, and to feel that we must continue to use them long after this utility has disappeared.

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⁴² Pound, *supra* note 19, at 711.

⁴³ *Id.* at 710.

⁴⁴ It must be apparent that the writer has used the terms "substantive law" and "procedure" to describe different attitudes, rather than the classification found in the law school curriculum. Many of the concepts which are ordinarily denominated "procedural" have been treated with the attitude of "substantive law" though this is becoming less frequent. See McCaskill; Harris; and Gavit, all *supra* note 37.