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VICARIOUS EXPERIENCE: IS THE LEGAL ORDER
THE GUARDIAN OF TRUTH ?

THERE is no such thing as vicarious experience. The expert alone is not the revealer of truth. The judge alone is not the guardian of truth. Neither expert nor judge can be offered as the remedy for “the failure of democracy.”

I spoke above of the present-day seeking for reality in facts, in the “objective situation,” as only half our quest. We have, however, one great current of intelligence which is consciously striving to weld together into a reciprocally enriching unity principles and the objective situation. The legal order today is telling us that precedents are to be interpreted in the light of events always in flux. The philosophy of law today, in the hands of such men as Dean Pound, is contributing not only to jurisprudence but to the study of every aspect of human relations.

The founder of the modern theory of jurisprudence, Jhering, insisted that law is not a system of abstract principles, but rests on the objective purpose to be served. The acceptance of this view marked an important step in juristical thinking. Another step is now being taken, for that “objective purpose” is understood today as a purpose which is never static but

which changes as rapidly as life changes. One activity sets in motion many others; in the interweaving of these lies at any one moment the sought-for purpose. Innumerable examples spring to mind of the way in which purpose develops. Take the aims of English labor a few years ago: the eight-hour day, union recognition, safety devices for machinery, general health regulations, and the nationalization of mines and railroads. These were the interests labor wished secured. But now the eight-hour is changing to a six-hour demand, the demand for union recognition is changing to the demand for union control, health regulations are being brought about indirectly through insurance laws, and the wish for the nationalization of mines and railroads is giving way to the wish for guild control. Wherever one turns one sees examples of the evolving purpose. Credit Unions, begun in protest to bankers' contracts, became the sources for cooperative enterprise. Lockouts, begun as a weapon against strikes, became a way of breaking the union. Farmers cooperated to raise prices and then began to work for better schools. A capital illustration is the way shop-committees often develop. I asked the head of a big electrical plant where I went to learn something of its shop-committees what his purpose had been in starting them. He replied instantly: "To get the managerial policy across." But as I looked further into these committees, I found that the purposes they were serving—the purposes disclosed by their activities—were quite different from the one given me. This evolving purpose, rather than a preconceived purpose, is what the legal order has always to take into account, for while you are "securing" ends, life goes on to

make ends of its own very different perhaps from the original ones.

A teleological psychology sees an anticipatory purpose—the individual does so and so because it anticipates certain results; a teleological sociology is founded on anticipatory purposes; a teleological jurisprudence conceives the function of law as comparison of present activity with a preconceived purpose. But what the legal order has to do is not to hug its blueprints, but to recognize the purpose which the activity discloses. Yet while the judge can have no charted purpose, no architect's plan, by which to construct his decisions, still we must remember in considering what the evolving situation means for jurisprudence, that the decisions of the judge do far more than take note of its developing character—they contribute towards it. While the power of the legal order as something outside the social process imposing patterns upon it has been greatly exaggerated, its place within that process has often been underestimated. This will be referred to again in a later chapter.

But if one accepts the notion of an evolving purpose, the next question is one of valuation: who is to decide between the values of various purposes? I think here the function of the legal order is not always conceived with entire accuracy. One writer tells us that the validity of law "is determined by the end which the law seeks to realize." But who is to judge the validity of ends? We do not "decide" on ends, a word which occurs in much juristical writing today; ends appear from out our concrete activities. Again we hear that law is to meet real needs; many writers use this expression. But who knows what "real" needs

are? Still another jurist tells us that the question always to be asked in law is “Does it serve a *useful* purpose?” Who is to have the decision as to what is useful? Is not that just where our difficulty, our perfectly genuine puzzlement, usually lies? And when we hear that there is now to be a conscious attempt to make law conform to ideals, we are still left inquiring, Whose ideals? It is said: “The State secures those interests which it thinks most worth while to protect.” How does it know which are most worth while? Cardozo, thinking that “the interest that is better founded in reason and more worthy of protection should be helped to achieve victory,” asks specifically, “How is the judge to know when one interest outweighs another?” And we are told that he must learn it from the practice of his art, “from tradition, other judges, the collective judgment of the profession, the pervading spirit of the law.”¹ But the judge cannot learn how to weigh interests from legal tradition, legal reason, legal activity alone—as of course Cardozo knew.

In short, when we are now told that the problem has become one of valuing—of finding criteria of the relative value of interests—our first thought is: How is this valuing to be done, who is to do it? Mr. Justice Holmes brings in the word social. He speaks of establishing the postulates of law on “accurately measured social desires.” He tells us that it is because of the estimated relative worth of our different social ends that we extend the sphere of one principle and allow another gradually to dwindle into atrophy. Here again the question we naturally ask is, Who is to “accurately measure”? Who is to “estimate relative worth”? But

1 Benjamin N. Cardozo, *The Nature of the Judicial Process*.

Mr. Holmes gives us some hint of a process by which, in his opinion, these desires receive measurement when he says that the justification of a law must be found in some help which it “brings towards reaching a social end which the governing power of the community has made up its mind that it wants.”² But law is far more than either the weapon of the strong or the protector of the weak, as no one has better shown us than Mr. Holmes. Social interests are not exclusively the interests of the governing power, nor can they be declared by the legal order alone. The evaluation of interests involves the psychological development of an interacting people; it depends not on “the wisdom of the judge” except as he is part of that development.

Moreover, the distinction between individual and social interests needs careful analysis. The phrase social interest is, to be sure, now defined with precision by modern jurisprudence, but the legal meaning has not yet found its way into general usage, hence arises some confusion of thought. Moreover, while the word interest is today employed by jurists in its psychological sense, until recently that word has been used by the legal order as well as by economists not in its psychological meaning, but as connoting economic advantage. Many jurists have thought, as Pound has pointed out, that they could dispense with the most pressing human claims by demonstrating that no economic advantage was involved in them. The interest involved was what that particular jurist thought the people concerned ought to need, what they ought to want, what ought to be their economic advantage considering them in the abstract. Today however, the

2 *Law in Science—Science in Law in Collected Legal Papers.*

“interests” of the legal order are merely the de facto claims and desires of concrete individuals; “social interests” are such claims generalized. Yet even if interest is no longer employed by jurists in the sense of economic advantage, even if one of the contributions of contemporary jurisprudence to all the social sciences is the getting away from the “individual in vacuo” (as from those absolute rights which can never conflict), still I think that because the word social is used so loosely in general speech and writing, it would be well if either it could be avoided in legal literature, when possible, or else the sense in which it is employed more fully explained. In general literature the word social is often used as a pure abstraction; or it is used to express a personal estimate—what a man himself thinks the best way of acting he dignifies by calling it the social way; it is used as a blanket expression by all of us when we feel too lazy to think out what we really mean; it is used emotionally times without number. Therefore, while the jurists of today are not using the word social either sentimentally or subjectively, are not using it either as an abstraction or a rationalization, but merely, as I said above, in the sense of a concrete claim or desire generalized, still it seems to me that a distinction which is thought of by many people so vaguely and inaccurately as the distinction between individual and social interest might well be replaced by something else, as perhaps by the difference involved in the long and the short view.

One point I think is very necessary to note in this discussion, and that is that we sometimes go astray in our use of the word social because different uses of that word merge so imperceptibly one into the other; they

merge so imperceptibly that two sets of people dealing with the same situation may employ this word in different ways without its being noticed. It is often used as a “rationalization” when all the time there *is* a genuine social interest if it be employed in another sense. For instance, we are told that the organization of winter sports is a social interest because winter sports are good for the health, yet we all know that they are being encouraged in New England towns because they bring trade to the local stores and hotels. But this also is a “social interest” without any rationalization at all, for it is a concrete claim generalized. Again, when town planning is presented to the general public, it is presented as an æsthetic policy with an appeal to local pride based on a comparison with what other towns are doing. Yet the boards of trade in our small cities, most of the members of which are interested in local real estate development, accept town-planning after they have been convinced that it pays. After that we have town-planning bills in the legislature. When two of our state courts declared that such legislation should stand, had they recognized “social” or individual values? Social values, to be sure, in the sense in which jurists use that term—individual values generalized—but not in the sense in which that term was used when the social reformers or the architects or the legislators supporting the measure addressed the voters. These speakers used it with its emotional appeal, with its moralistic appeal of “sacrificing” your individual interests to the “general good.” I think, therefore, a term unfortunate which has this objection of double usage; it seems to me that often it would be well to substitute for individual and social interests, the

idea of the short and the long view. Whenever we are informed, as we often are in juristical writing, that the court has made a particular decision not in the individual interest of plaintiff or defendant, but in the social interest of the security of acquisitions and security of transactions, we recognize that that is an accurate statement, and yet the layman who has suffered much and long from the crowd orators' use of the phrase, from promoters of all kinds, might prefer the notion of an *individual* interest in the security of acquisitions and security of transactions divided into the short and the long view. When we are told by jurists that the Germanic peace which played so large a part in building common law—the peace, the peace of highways, the peace of festivals, the peace of markets—was a securing of social interests against individual self-assertion, it seems to me that here too we might prefer to make the distinction between what is to the interest of individuals for the moment, and in “the long run.” When it was found difficult to enforce the Rivers' Pollution Act in some towns in England, the mill-owners, who were the chief offenders, were finally won over not by urging them to sacrifice their individual for the social interest, but by showing them that their interest in the long run was unpolluted rivers.

What I am objecting to chiefly is the self-deception which the notion of “social interest” allows or even encourages. I saw it stated in a description of the cooperative movement among the fruit growers of California, that California had bankers and merchants so socially minded, so public, spirited, that they supported the cooperative movement because they saw that, however it might affect banker or merchant, it was better

for the community as a whole, they saw that they had an “opportunity to render a great public service.” But this was not the reason for their participation in the cooperative movement. It is obvious, and those merchants and bankers who went into the cooperative movement saw it, that the merchants will not do much business unless the growers are prosperous and have money to spend. It is equally true that the bankers’ prosperity is in the long run bound up with the prosperity of the farmer: whatever increases bank deposits, develops the farming industry and stabilizes real values, helps the banker; orderly marketing means orderly financing and avoids peaks and dips in the credit situation.

The difference here is clearly between a short and a long view. It is true that the old “time-merchants” who charged exorbitant prices to cover bad debts and long accounts, being able to do so because they had the farmers in their power, made something out of the farmers’ extremity, but in the long run it is obvious they stand to gain by the farmers’ prosperity. The same is true of the bankers: temporary high rates of interest are not to the bankers’ advantage in the long run because the conditions on which they are founded are to the advantage of no one in the community.

Examples could be multiplied indefinitely. Any plan made to initiate or stimulate joint effort in small towns is usually presented to the townspeople as an appeal to their sense of “social” values as against individual values, which they are told they must “sacrifice.” How often we hear that *cliché*! But the difference between competition and joint effort is a difference between a short and a long view. When

we become enlightened enough to realize that we individually get more out of joining with people than by competing with them, we do it. For instance, formerly the local stores in a small town competed sharply with one another. Now, in some places they are beginning to join in an effort to secure the trade of the outlying farming districts and of the summer residents who tend to buy from the city by mail order. They do this by saving capital through common store-houses, through dividing specialties and thus increasing stock without increasing expenditure, by improving local service through cooperative deliveries, etc.

I should like to say, too, in support of the suggestion that the short and the long interest is perhaps a conception fraught with less possibility of self-deception than that of individual and social interests, that I do not find the distinction between individual and social made anywhere in actual life. I telephoned to my bank this morning and asked what my balance was. They replied that they could not tell me unless there was someone there who could recognize my voice, and added, "This is to protect you." If I ask them in a shop to give me some article although I have not my charge coin with me, and they refuse, they always say, "We have this rule in order to protect you." In neither case do I hear anything of the social interest. In both cases, however, they show me that my immediate is against my long-run interest. Nowhere in actual practice do I find the categories of individual and social interest.

Another difficulty in the Distinction between individual and social interest is that even after you have decided on the validity of social interests, it is not al-

ways possible to tell what the social interest is. For instance, is our law in regard to illegitimate children an illustration of the sacrificing of individual interests for the social interest in the security of domestic institutions? There are people who think the social interest better secured by laws which legitimize the children of the unmarried mother. I am giving no consideration to this question; I mention it merely to point out that there would be a difference of opinion here in regard to the social interest. Agreements on such points will come not through accepting the wisdom of one man, the judge, or of the legal order, but through the interweaving of many desires and attitudes, emotions and, ideas, through much trial and error.

There is one consideration alone which should show the undesirableness of the separation of social and individual. When society is given an interest, this tends with some writers to make an entity of the "social soul," the "group mind." "Social interests," "general security," "public safety," is it possible for these to be other than individual interests, individual security, individual safety? If we are looking to the future, social interest may be merely a synonym for the unborn—individuals. One of the ways in which Kohler allowed his conception of Hegel to influence him unduly was when he conceived the development of society as separate from the development of individuals "each trying to perfect itself." This very markedly influences his philosophy of law, but there should be no separation between development of individual and development of society.

Moreover, it seems to me that in some of the writ-

ing of today which tells us of “social ends,” we are bound to a certain extent by deterministic assumptions. Do we see, as we should, that social ends are not preexisting things but eventual things, to use an illuminating expression of Dr. Kallen’s? Do we not run the risk of making the *same* error which Graham Wallas tends a little to make in *The Social Heritage*, where he sometimes seems to invoke the “Good Life” as an abstraction? The arbitrary determination of interests may lead us into as many errors as the doctrine of “rights.” To declare that certain interests, aims, are “social,” and therefore valid, and that some are not, is exactly as arbitrary as when any jurist of the past chose certain principles and declared them “right.” The arbitrary choice of interests is no more legitimate than the arbitrary assumption of rights.

But if the expression social interest has seemed somewhat unsatisfactory of late, and if the distinction between the short and the long view given above is not adequate to cover all cases, or cannot be invoked when we are dealing with a sharply drawn conflict the immediate issues of which for the persons involved overshadow all other considerations, there seems to be some reason in the development of recent thinking for substituting the term integrating interests—the integrating of individual interests—for that of social interests, or to give the latter term this more concrete meaning. With English, American and German psychologists, physiologists, and physicists too, now employing the term integration, it may certainly be considered in good use, and the students of the social sciences may well ask if it is not exactly the word they need to describe what their own observations note. And as for

some years now jurisprudence has seemed in advance of the other social sciences, so here too we find it in the forefront of thinking. We see a theory of law now emerging which goes as far beyond social interest in the looser usage of that phrase, as that conception was an advance on individual interests in the sense of private or personal interests. We see signs of this newer theory in our courts, in legislation, in juristic writing. This theory rests on a recognition of the fact that opposed interests are not necessarily incompatible interests.

In Massachusetts the judges of our Small Claims Court have the opportunity to show us law as not inevitably a struggle resulting in victory for one side and defeat for the other, but as a struggle which may show the way by which each side can attain its desire. The following shows the point. Smith brought suit against Panotti, a small fruit-dealer, for a debt of forty dollars and attached his business for that amount. Panotti claimed that the payment of that sum would ruin his business. The judge ruled (he could not have done it before the law which went into effect January, 1921) that the amount be paid in installments out of the defendant's earnings. What is the result? Smith gets his money; Panotti's business is not injured. Both are satisfied. I believe that in every conflict—between persons or nations, classes or races—this method should be tried. We cannot always reach such happy conclusions as in the case of Smith vs. Panotti, but I think we should succeed much more often than we now think possible; at any rate it seems as if the method were worth a trial. I wish someone would make a study of recent decisions of the bench to see what evidence could

be found of the recognition of the fact that cases brought to court, while showing apparently clashing desires, may at the same time reveal to a perceptive judge the way by which the desires on both sides can be fulfilled. Dicey says that the history of law has been the history of "rough compromises" between "conflicting rights." It does not seem now as if that need always be true. The illustration I have given was not a compromise; it would have been if Smith had had to be satisfied with twenty-five dollars. I believe that the legal order is now beginning to see that there may often be found by acute, fair-minded, and inventive judges ways of settling disputes which give to both sides what they really want. The increasing powers given to the judges in the municipal courts may give the opportunity for this.

There have been of recent years many integrations made by legislation; there seems happily to be a growing tendency in that direction. Take the Workmen's Compensation Act; the active cooperation between employers and workmen to carry out this law shows its value to both. The employer has the following advantages: he had formerly to pay much more when the employee's lawyer succeeded in winning the case than he pays now; and there was an uncertainty hanging over a business that might be wiped out if a serious accident occurred. On the other hand, the employees under the old system either did not get anything if the other side won, or even if they themselves won, they had to wait a long time for the award and payment, when it was at the moment of the injury or illness that they needed the money. Since the negligence of fellow-workmen has been included, the employee has been

fully protected. This is a good example of the integrating of individual interests.

Moreover, the doctrine of integrating interests does away with that of the balance of interests which has so many advocates. And this modifies Adams' theory of law as the resultant of the struggle for power. When Adams points out that contradictory precedents register the points of dominant power he says, "You will find that the law is regularly wrenched, more or less violently, from its logical path, to facilitate the rise of each new species of the competitive man, and that it is again dislocated to accelerate that species' fall." And since lawyers "may be assured that that party will prevail before courts of justice whose cause embodies power rather than logic," his advice to them is "to measure intelligently the relative energy of the forces locked in the controversies" in which they may participate.³ While I am sure that there is much truth in this, I do not think it is wholly true. In fact, observation of industrial controversy for the last ten years leads me to think that those disputes which are "settled" merely by the balance of power are not really settled at all. The slightest shift of power brings the matter up again with accumulated rancor and hard feeling. The balance theory gets us nowhere in law or politics or international relations.

The illustration just given of the Workmen's Compensation Act shows the important thing about integration. The moment you try to integrate loss, you reduce loss; as when you try to integrate gain, you increase gain. This is the whole claim of integration over either domination or compromise, the three ways of dealing

3 Brooks Adams, 19 *Green Bag*, 32-33.

with conflict. In either of the latter you rearrange existing material, you make quantitative not qualitative adjustments, you adjust but do not create. In the case of the Workmen's Compensation Act, you have done more than distribute loss, you have prevented loss. This is creating. You have not balanced or weighed interests, those of industry, workers and community. By integrating these interests you get the increment of the unifying.⁴

A further aspect of such legislation is of great significance in showing one of the essential functions of legislation to be adjusting conflicts in advance of the conflicts by providing the means of integrating before the conflict has taken place. It would take another book to unfold the implications of this thought. We are now given a conception of politics which can so vitalize our political life that it, may yet emerge from the slough of greed and strife in which it is so largely immersed at present.

We have been considering legislation which tries to integrate interests instead of choosing between them. From this point of view do we want "labor legislation"? It is at any rate an unfortunate term. Labor legislation is called social legislation. It cannot be both. If it were truly labor legislation it would be class legislation, and class legislation does not become social by legislature or court so declaring it. Of course the interdependence of society is recognized in most labor legislation; it is not therefore labor but social legislation. This is however a good illustration of one of the dangers of this word; it shows the temptation to call what we think good "social." "Social behavior" usu-

4 This is taken up at length in Chaps. III and IX.

ally means the behavior of which the person using the expression approves.

I have said that we now see the theory of integrating interests emerging in legal writing as well as in legislation and legal decision. I refer chiefly to what Pound has written of relation. All that he says of relation implies that we must seek and bring into use those modes of association which will reveal joint interests those between employer and employee, landlord and tenant, master and servant. Law, he tells us, must find the essential nature of the relation; this seems to me a more profound truth than some of the vaguer theories of social interests. Moreover, Pound defines social interests as “the claims or demands involved in the existence of society,” and here we have nothing vague or abstract. “The social interest in the individual,” “the individual interest in the social,” must become coordinate expressions. Thus does the individual preserve his integrity through all our “social” theories. Thus also we do not discard the abstract man of the nineteenth century only to put in his place an abstract society; social interests are the interests of men in their multitudinous and ever-varying *relations*.

Pound tells us also that relation is taking the place of contract in modern law, that the duties of public service corporations are not contractual, flowing from agreement, but quasi-contractual, flowing from the calling in which the public servant is engaged. Social in its doubly concrete significance—in the sense of interdependence, and as the authority derived from the activity involved—is happily a conception which is gaining ground. Much remedial legislation rests on the growing realization of the interdependence of commu-

nity life. When certain bankers and welfare agencies in Massachusetts decided a few years ago that the loan shark was a social evil which ought to be curbed, and banded together to secure the passage of the Small Loan Act, it resulted not in benefit to themselves directly but to the group of workingmen who were the borrowers. Yet it was felt that the community life as a whole was more sound. Pound gives a number of examples of the recognition of community of interests, such as the limitations on building laws, limitations on the part of creditors to exact satisfaction, limitation on water rights, etc.⁵ A community of interests understood as a unifying of interests benefiting and developing individuals, benefiting and developing society, is the true social interest. In this sense the conceptions of the social function of property, the social functions of industry, have been very valuable ones in the progress of the last twenty years because they acted against "special" and "private" interests.

Perhaps, indeed, the prejudice against individual interests has come from the fact that they are often associated with the bad meaning we give to "special" interests, but this is unfortunate. If some years ago we began to use social as a blanket word which meant anything that was not "private" or "personal" or "special," if then and therefore it came unhappily to be considered the opposite of individual also, surely the time has come now for a closer analysis, and for us to realize that the opposite of all particularity may yet keep its oneness with everything individual, that in fact its authority is derived from nothing else but interweaving *individual* activity.

5 Harv. Law Rev., 28, 195-234.

The greatest objection perhaps to the word social has not yet been touched on. We live today in a power-society; therefore social interest by its very wording *might* mean the interest of the most powerful class or individuals. What we sometimes hear called “the social recognition of an individual interest” may be merely the legalizing of a particularly private interest. When we abandon our power-society, we can perhaps use the expression social interest without ambiguity; it can then mean the interest involved in, evolved by, relation.

Moreover, if we should substitute the conception of integrating individual interests for that of social interests, I think we should avoid the fallacy involved in the idea of “as many interests as possible to be secured.” For here we come dangerously near involving ourselves in regard to social and individual interests in Rousseau’s distinction, between the general will and the will of all. Society flourishes through the satisfaction of individual human desire, yet not through as many as possible, but through interweaving human desires.

To sum up this section. The chief objections to the term social interests are: with too zealous advocates it may mean the abandonment of the individual; with some it opens too easily the gates of the ever-ready stream of sentimentality in us all—it has been vitiated or at any rate weakened by platform and propagandist use; and especially, it is very difficult not to connect the social interest with the interest of the governing class. It seems to me that the phrase integrating individual interests, as referring both to the possible outcome of conflict and the anticipation of conflict, both

to the measure of value and the developing of value, is a more fruitful and more legitimate expression than that of social interests, and one supported by both recent legal and psychological thinking as well as by our most profound philosophy. The gravest danger in the word social is that society tends too readily with all of us to become an abstraction. Social interests are often either an abstraction or a “rationalization”; integrating interests are both concrete and genuine.

Yet I realize that both philosophically and practically there may be advantages in the word social: philosophically because we need a word to indicate that integration is not mere coordination, practically because it is sometimes better to re-define an old term than to invent a new one. What we must be careful about, if we do use it, is that we do define it carefully. Perhaps we shall be rid of some of the objections I have noted to the term social when there has been time for those two doctrines of contemporary psychology—the *Gestalt* theory and what I have called the theory of circular behavior—to penetrate our thinking in the social sciences. For the implications of these doctrines confirm our philosophical thinking, our empirical observations in the social field, in regard to the unity of individual and society. Many people who embrace the doctrine of social interests advocate the “sacrificing” of the individual to the social, but these can never be sufficiently opposed for one to be “sacrificed” to the other, since the social interest is not merely an interweaving of individual interests, it is an interweaving *with* the parts as well as an interweaving *of* the parts. This makes it impossible to pit individual and society against each other. This at the same time saves us

from the suggestion of atomism in the word individual and from the suggestion of abstraction in the word social.

We can now answer the questions asked at the beginning of this chapter. We see now at the same time the function of the legal order and in what way that function is limited. Social interests, as now defined, emerge *as* social interests through a certain process; the inestimable service of the judges is to open the way for and to promote this process. They can never take a step beyond; they can never substitute themselves for the process. The judge must understand the life of his day, but he can live life for no one. Not in the wisdom of the judge nor the facts of the expert nor the “will of the people,” but in life itself do we put our trust. A more penetrating analysis of the interactivities of men in their daily lives is what is needed today.

To be sure the judge must know and consider all three essentials: (1) the principles, (2) the precedents, which include both the application of principle and the emergence of principle—it is important to notice this double aspect of precedent—and (3) the particular case in hand. The interpretation of the Anti-Trust Act is an example of the emergence of principle from legal enactment. In applying the statute, the first cases appeared to prevent certain useful forms of combination. The court therefore resorted to what has been termed the rule of reason, and decided in particular cases that the monopoly was beneficial and should be allowed to continue. The wiser the judge the more ability he shows in uniting principle, precedent and case in hand. Any reading of legal history shows us

that when the legal order is not able to do this, the principle tends to become choked by the precedents. Thus our view of the origin of law does not reduce the obligation of judges to be very closely in touch with the social facts of their day—on the contrary it increases many times that obligation—but we must also remember, what is often forgotten, that the integrating of principles and facts has taken place to some extent before the matter comes to court. Law has its origin in the concrete daily activities of us all.

We need not commit ourselves to *laissez-faire* doctrine, nor, on the other hand, entrust to the legal order a too exclusive guardianship of our “rights” or interests. Another doctrine is emerging. The social agency of the law is not something *outside* the democratic process, an apparatus of safeguards provided as a check upon misdirections of “will.” Still less can we think that there are patterns of what is socially valid which can be invoked from time to time to be superimposed upon the changing order in order to correct its aberrations. Law must be integral with the social order.

And yet this does not take away from the function of the legal profession, but rather adds to it. The legal order by helping to integrate purposes is helping to produce larger purposes. The judicial decision must anticipate this process, it must meet the larger purpose even although the larger purpose does not exist until the contribution of that very decision has been made. Thus the difference between declared and *de facto* purpose is more subtle than is always seen: the judge is working for an end which does not exist as an end, wholly, until he begins working for it.