Law’s Virtue and The Formal Structure of an Integrative Jurisprudence
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According to the legal historian Lawrence Friedman, life in modern America has become “a vast diffuse school of law.” While it is true that early Americans were voracious consumers of law books, prompting Edmund Burke to comment “in no country, perhaps in the world is the law so general a study,” modern Americans have got into the habit of taking almost any subject and reducing it to legal terms. More and more the law is seen as the problem solver of first resort. Little Johnny who is about to be punished for being naughty and threatens to call the police to have his parents arrested for child abuse is a kind of student of this modern legal education. American legalism has produced an eruption of law in the late twentieth century and Americans, though always litigious (Tocqueville diagnosed this propensity in the nineteenth Century), seem more litigious than ever—assisted by the largest cohort of lawyers to be found anywhere in the world.

Accompanying what seems to be a frenzy of legal activity in contemporary America is perhaps an orgy of legal theorizing in the academy. One is reminded of Socrates’s metaphor of democracy in Book VIII of Plato’s Republic as a general store in which one may shop around for lifestyles as for coats, only to go back the next day to exchange yesterday’s choice for today’s. The contemporary scene of the legal academy is like a vast flea market where one is invited to browse amidst a bewildering profusion of theories.

In large measure the convergence of intellectual talent on the subject of law has to do with the recognition that America is at a critical juncture in its history and the belief that the law will play a major role in shaping the future. For several decades we have been in the midst of a revolution in American life which is far from over. The stakes are high. The cultural wars have produced deep divisions in our society undermining its overall cohesiveness. The disintegration of families and communities is connected to the rise of the narcissistic person. Our public morality has come under relentless attack by various libertarian theories threatening the conditions necessary for the cultivation of civic virtue. These trends need to be reversed.

There are disturbing signs that the rule of law itself is at stake. Cynicism and outright contempt for law seem to be on the rise. We watch in dismay as juries put their own judgment above the law and acquit defendants in spite of the overwhelming evidence of wrongdoing. Legal theories may be connected
to these trends. Harold Berman has written that contempt for law and cynicism about law have been stimulated by the current academic revolt against legal formalism known as the critical legal studies movement. According to that movement, of which there are Marxist, feminist and other variations, law is no more than ideology under the guise of rules. Legal rules themselves play no decisive role in legal judgment - rather a subjective discretion prevails. What is called law is no more than the patchwork of conflicting prejudices, values, or ideological predilections of officials in power. This is antinomianism in law.

Narcissism in the culture has been stimulated by the emergence of various libertarian legal theories which have in common an emphasis on the rights of the individual and the insistence that the state be neutral with respect to values. Ronald Dworkin has asserted, for example, that the individual has a right to moral independence. In Planned Parenthood v. Casey, Justices Kennedy, O'Connor and Souter asserted that the Constitution secures individuals the right: “to define one’s own concept of the meaning of existence, of the universe, and of the mystery of human life” - an extraordinary epistemic license, to say the least.

There are libertarian theories that would ban religion from the public square, yet leave that square open to the pollution of pornography, preventing the law from engaging in any toxic clean-up operation. Proponents of these theories are on a search and destroy mission, their targets being the last vestiges of our public morality. There is also the economic analysis movement in law which would reduce law to the task of wealth maximization while distorting our understanding of the human person who seeks spiritual well-being. Theories of these kinds pull the law toward extremes and are vices of legal theory and practice. They mark a crisis of contemporary jurisprudence. That crisis is a justification for further theorizing.

The Chinese proverb recognizes in every crisis an opportunity and one cannot dismiss the impression that we live in a time that is a great watershed—an invitation to rebuild rather than to tear down. There are signs that this is happening in legal theory. The legal wars are not new. The traditional opposition in modern times has been between Natural Law and Legal Positivism. Yet, one hears today on either side that the controversies generated between the two have been sterile. Neil MacCormack, a prominent positivist has written recently: “I for one regard the issue of mutual opposition as now closed and unfruitful. There are elements from works in both schools which any sound theory of law must embrace...The tasks ahead are those of pressing forward with analysis and critique of legal ideas and institutions, and with studies of practical reason and practical discourse in legal, moral, and political spheres.”

The call to transcend the divisions of traditional jurisprudence is not new. Jerome Hall in the 40’s wrote of combining positivism and natural law theory with a sociological jurisprudence establishing what he called “integrative jurisprudence.” Bodenheimer in the 70’s and Harold Berman in the 1980s
repeated the call for integration. In an excellent 1988 *California Law Review* article entitled, "Toward an Integrative Jurisprudence," Professor Berman stated the thesis of this philosophy: "It is premised on the belief that each of these three competing schools [positivism, natural law, and historical jurisprudence which he substituted for Hall’s sociological school] has isolated a single important dimension of law, and that it is possible and important to bring the several dimensions together into a common focus." Professor Berman asserts that positivism has isolated law’s political dimension, natural law its moral dimension, and the historical school the dimension of law’s history. Any such theory, of course, has to deal with conflicts that arise among these dimensions and Professor Berman’s treatment of this issue is instructive. Rejecting the proposition that any one of them trumps any other he stated: "The issue is not the primacy of any one or another of these three aspects of the legal enterprise but rather their integration. In situations where they appear to conflict with one another, the right solution can only be reached by prudentially weighing the particular virtues of each."

I shall adopt the basic premise of integrative jurisprudence. While recognizing that law pertains to politics, morality, and history, I shall develop a three dimensional account of law that is phenomenological. One can draw from each of the three traditional schools that Professor Berman identified a distinctive emphasis which when integrated with the others yields a three dimensional law. While the description of law as the expression of the will of the sovereign had been a dominant theme of Austin’s positivism, both Austin’s and Hart’s work seem to circulate around a key term that provides a formal description of law. For Austin that word was “command” which for him was the key to the science of jurisprudence. Law takes the form of the general command. Hart made a significant advance over Austin in emphasizing that law takes the form of the rule—a term more formal analytically than Austin’s. Analytical positivism’s emphasis on the idea that law is laid down in the form of a rule, that law is identified as law by rules of validation rather than substantive morality (as in Hart’s rule of recognition) and juridical positivism’s tenet that judges have authority to apply the law on its terms rather than do discretionary justice, all point to a specifically formal dimension in law.

Natural lawyers have been concerned with the substantive morality of law. It is ordinarily understood that law is more than just a body of rules. These rules must command what is right and just. Law is a means for establishing order, settling disputes, protecting rights among people in a social context where policy and the ends of the general welfare compete with the claims of the individual to respect, to be left alone, and to be free. Law which flouted these ends and went unchallenged would hardly seem conceivable to us today. The Natural Law School has insisted that the law correspond to what justice demands, pointing to a distinctive teleology of law, a dimension of law’s ends.

Historical jurisprudence has emphasized the ongoing nature of law, that law as Harold Berman put it: “derives its meaning and authority from the past history of the people whose law it is, from their customs, from the genius of
their institutions, from their historic values, from precedents.”

It is “an outgrowth of custom, a product of the historically rooted values and norms of the community.”

According to Professor Berman, “It is never enough, in any western legal system, to attempt to interpret or explain a legal work (or concept or value or institution) solely by appeal to logic or policy or fairness, it must also be interpreted and explained in part by appeal to the circumstances that brought it into being and by the course of events that have influenced it over time.”

Law, over time, tells a story that is meaningful. It has a history. It establishes a tradition.

I shall assert that there are three dimensions of law: the formal, the teleological, and the historical. Rather than being distinct realms of law they are aspects of the same phenomenon: three different perspectives on the same subject. Looking at law from the perspective of its form reveals a distinctive side of law as does looking at it from the perspective of its ends and its history. Each alone is a partial view and each of the traditional schools of jurisprudence have tended to produce partial accounts. A comprehensive account of law requires that we shift perspective so that cumulatively law’s three dimensions come into view—doing what a jeweler does as he turns his stone around examining it from different angles, searching for both brilliance and flaws as he appraises its overall quality.

To know the virtue of each dimension requires that we know what is excellent in each and to integrate each requires that we know what is excellent in law as a whole. In pursuing this line of inquiry I shall personify law and adopt the vocabulary of the moral virtues in evaluating the normative force of each of law’s dimensions. There is precedent for personifying law: in Plato’s Crito the laws speak to Socrates and in reasoned argument persuade him to accept the authority of the Athenian verdict against him. The law as speech, reasoned argument, “logos,” moves him to a decision. Ronald Dworkin’s theory is a recent example of legal personification. His theory is full of character metaphor. He speaks of law as “integrity.” Law wields “empire.” We are law’s subjects, “liegemen to its methods and ideals.”

Hence, the title of his principal treatise on law, Law’s Empire. While ideas of loyal subjects, “liegemen,” conjure up images of chivalrous knights and arouse passions of fulfilling duties and acting honorably, emotions which are very important to law and its animation (and a metaphorical vocabulary for law must draw on these emotions) the word “empire” or “imperial” suggests overreaching and even arrogance—a failure to respect limits. Daniel Bell grasped the predicament of our times when he wrote that we are “groping for a new vocabulary whose keyword seems to be limits.”

For law we may recover an older vocabulary, that of virtue, which Aristotle in De Caelo defined as “the limit of power.”

Law is a kind of power. Austin, the originator of the command theory of law, ironically enough obscured the nature of this power in his haste to discredit natural law theory. For Austin law essentially is a communication in the form of a general command laid down by one intelligent being to another intelligent
being. Physical nature does not speak and lacks intelligence (or more precisely reason to conceive the purpose of law and will on which law works). According to Austin, therefore, it is incorrect to speak of laws of nature. Yet, the positive law of which Austin wrote shares a fundamental property with what he felt were improperly called laws of physical nature. Both kinds of law refer to forces sufficient to bring order from chaos, whether that be the ordering of particles in a gravitational field or the ordering of pedestrian traffic by a crossing guard or the internal law of the person who behaves himself without the need of police. As with any power one may speak of an excess or a deficiency and in Aristotelian ethics the term virtue conveys the right amount of power given that power's proper function. "In all characteristics... there is some target on which a rational man keeps his eye as he bends and relaxes his efforts to attain it. There is also a standard that determines the several means which, as we claim, lie between excess and deficiency, and which are fixed by right reason."

I propose to isolate within each of law's three dimensions an axial principle which involves the balancing of opposite forces within the dimension. The virtue of law is to be found in striking the mean, in Aristotle's sense, between excess and deficiency in this principle. Each dimension, therefore, has a corresponding virtue. I shall argue that the virtue of law's form is "integrity," the virtue of law's historicity is "prescriptiveness" drawing from Burke's concept of prescription, and the virtue of law's ends is "justice." Judgements necessary to arriving at the mean in each dimension, as well as judgments necessary to resolving conflicts between and among the dimensions, require an additional virtue. The special and general virtue necessary to harmonize the three dimensions into a unified whole is prudence, in Aquinas's sense of practical wisdom. The theory "Law's Virtue" looks to restore prudence in its classical sense to jurisprudence in order to produce an integrative jurisprudence and to show the practical limits of theory in judgments about law.

Areté, the ancient Greek word for virtue, means the particular excellence appropriate to the subject under study. One cannot know the excellence of something without understanding its nature and if we are to understand law in particular we must ask what is its purpose. An interesting passage from Swift's Gulliver's Travels helps illustrate why Austin's positivism which attempted to understand law "scientifically" from the perspective of the external observer failed to adequately account for law. Gulliver had been washed ashore on Lilliput and the Lilliputian magistrates Clefren and Marsi Frelock were ordered to conduct a search of Gulliver's person and effects and report to the emperor. Part of their inventory included an object described in painstaking detail:

Out of the right Fob hung a great Silver Chain with a kind of engine at the Bottom. We directed him to draw out whatever was at the end of the chain; which appeared to be a Globe, half Silver and half of some transparent
Metal; for on the transparent side we saw certain strange figures drawn and thought we could touch them, until we found our fingers stopped with that lucid Substance. He put this engine to our ears which made an incessant noise like that of a water mill. And we conjecture that it is either some unknown animal, or the God that he worships; but we are more inclined to the latter opinion, because he assured us (if we understood him right, for he expressed himself very imperfectly) that he seldom did anything without consulting it. He called it his Oracle, and said it pointed out the time for every action of his life. 

The two commissioners give an accurate external description of the engine that is sufficient so that we know what it is, without themselves knowing what it is and without conveying knowledge to the emperor. The befuddled ruler turns to his experts who can only speculate about it. Neil MacCormack used this passage to explain how Hart’s adoption of the internal point of view (looking at law from the perspective of someone who lived under legal rules and accepted them) was another advance over Austinian positivism. Yet, I think that Hart’s insistence on separating law from morality, separating the inquiry of what is law from what ought to be law in the best sense ultimately prevented him from fully capitalizing on this advance. (Interestingly, in the story the Frelocks had asked Gulliver about the watch, but reported that he communicated unclearly. The Lilliputians continued to have difficulty communicating precisely with Gulliver—a reminder perhaps about the limits of language to bridge vast cultural gaps and the dependence of linguistic meaning on context and custom, a point we shall address later in examining the historicity of the law.)

Like a watch, law (in a sense a machine) is known by considering its function.

II

Take but degree away, untune that string,
And, hark what discord follows! each thing meets
In mere oppugnancy: the bounded waters
Should lift their bosoms higher than the shores
and make a sop of all this solid globe:
Strength should be lord of imbecility,
And the rude son should strike his father dead:
Force should be right; or rather right and wrong,
Between whose endless jar justice resides,
Should lose their names, and so should justice too.
Then everything includes itself in power,
Power into will, will into appetite;
And appetite, an universal wolf,
So doubly seconded with will and power,
Must perforce an universal prey,
And last eat up himself. Great Agamemnon
This chaos, when degree is suffocate,
Follows the choking.
Shakespeare, *Troilus and Cressida* (I, iii)

Why have law? One answer seems obvious. We are vulnerable and need police, prosecutors and judges to protect our persons and property from harm by others. In the absence of lawful government our rights are insecure and we have little hope of seeing that justice will be done. Life without law, we may suppose, would be “nasty, brutish and short” to use Hobbes’s phrase or the horrible condition of the world without “degree” imagined by Shakespeare’s Ulysses in the epigraph above. (That law is essentially a matter of degree is a central tenet of “Law’s Virtue”.) We only tell half the story, however, when we characterize law as the protection of officials. Thomas Aquinas in the *Summa Theologica* shrewdly perceived another rationale for law in his response to the objector who asked: why not have judges rather than law as animators of justice, judges dispensing simple justice in the cases that came before them. We would have good reason to be distrustful of a system that granted to officials such a broad discretion. Aquinas’ reply is enlightening:

As the Philosopher [Aristotle, Rhet. I:] says, “it is better that all things be regulated by law, than left to be decided by judges”: And this for three reasons: First, because it is easier to find a few wise men competent to frame right laws, than to find many who would be necessary to judge aright of each individual case. Secondly, because those who make laws consider long beforehand what laws to make; whereas judgment on each single case has to be pronounced as soon as it arises: and it is easier for man to see what is right, by taking many instances into consideration, than by considering one solitary fact. Thirdly, because lawgivers judge universally and of future events; whereas those who sit in judgment judge of things present, towards which they are affected by love, hatred, or some kind of cupidty; wherefore their judgement is perverted.

Since then the animated justice of the judge is not found in every man, and since it can be deflected, therefore it was necessary, whenever possible, for the law to determine how to judge, and for very few matters to be left to the decision of men.18

Law is an abstraction which is both prospective and universal. It binds officials whose “discretionary justice” is subject to perversion by human passion. In his *Nicomachean Ethics* Aristotle put the rule of law over the rule of man: “For the just exists only among men whose mutual relationship is regulated by law... legal judgment decides and distinguishes what is just and what is unjust... we do not allow the rule of man but of reason.”19 Law protects us from officials, as well as other persons.
"That to live by one man’s will became the cause of all man’s misery"
Hooker - *Laws of Ecclesiastical Polity* (1594)

“You must not allow conscience to prevent your doing law.”
Maitland

I once spoke with a lawyer educated in Europe, who, when referring to his formal study of law, said that he “read law.” We commonly think of law as something written down and law or “lex” is derived from “legere,” to read. Legal formalists have focused on the idea that law is in the books. For Langdell the laboratory of the legal scientist was the law library. Legal positivists have emphasized that the law is laid down, but, they are not alone in this. For Aquinas promulgation was essential to law and he wrote that the natural law was “imprinted” on us. That the law be known in some way, that it be promulgated, is essential if it is to be a fair and effective means of ordering human affairs.

Recent legal theory has focused on the judicial interpretation of law in hard cases, with debate centering on the degree to which judicial judgment in such cases involves discretion. A hard case is seen as one where the available legal rules for some reason (whether inapplicable, ambiguous, or conflicting) do not dictate a decision. Hart believes that judges in these cases apply extra-legal standards to reach decisions thereby making law. Dworkin contends that judges are in these cases already bound by preexisting legal norms, principles or policies, which elude positivistic analysis because they are not identifiable by any test of validity like Hart’s Rule of Recognition. Instead their sense of appropriateness (their authoritativeness if you will) is developed within the legal profession over time.

Ronald Dworkin refined his theory of judicial review in hard cases with Law’s Empire. According to Dworkin judges are subject to two sorts of legal constraints in these cases, corresponding to two dimensions of law. Legal judgement must: (1) fit the legal past (the constraint of legal history) and (2) read that past in a way that makes it the best it can be from the standpoint of a political morality that can be said to be presupposed by the law taken as a whole (the constraint of justice). Judicial judgment in hard cases reads a dimension of law’s fit and a dimension of law’s justification. This two-dimensional analysis, however, seems to presuppose a third dimension which it does not identify. Imagine that Dworkin’s Hercules (his hypothetical judge) discovers that the brute facts of his “legal” history do not contain anything like a doctrine of *stare decisis*. Past decisions were highly pragmatic and inventive, and so tied to their particular facts, so *sui generis*, as not to have general application. In such circumstances Hercules’ judgment would not be bound by fit (by history) and would be one dimensional. But Hercules would no longer seem to be interpreting law. He would be engaged in discretionary justice. Hercules is only constrained by a legal past where that past satisfies the
requirements of formality necessary if we are to have law at all. We have a
dimension of law’s history and law’s ends, when we have conditions necessary
for law as a formality—law as a form constraining officials to do justice in
accordance with law. While history provides its own set of constraints (as
memory and experience of regime, constitution, and custom, set prudential lim-
its on the proper means of accomplishing justice through law) and as law’s nat-
ural ends set limits on the uses to which law may be put, law’s form constrains
official judgment.

If we are to have the rule of law and rule by law, law must be conceived and
administered in such a way as to constitute formality, a barrier to the pure exer-
cise of will. Harvey Mansfield, Jr. described the formality of an action as:
“what can be separated from its end, and this separation is possible because the
end can be achieved in more than one way. When one means is absolutely nec-
essary to attain the end, no formality exists; but when a choice of means is
required, the one chosen... as ‘correct’ is the formality.” Any legal society
commits itself, within the realm appropriate to its laws, to the achievement of
justice by way of law and it is therefore committed to a certain form. We asso-
ciate the formality of law’s action with legal procedures—the ceremonies of the
trial being the central case. But, procedural formality is only one aspect of
law’s form. There is formality in the very concept of law as a rule. Rules are
abstractions that specify general features applying to a class of cases, so that
once a specific case falls within the class and therefore under the rule, the case
is to be decided in accordance with the rule’s dictates rather than the judge’s
preferences. Law should have this property of rules, what Weber called “formal
rationality,” and other properties necessary to readily identify cases as falling
under it, if law is to constrain officials’ discretion.

One may distinguish various categories of these constraints. Positive law is a
communication and as such it must be clear and intelligible. We may isolate
linguistic criteria of law’s formality and evaluate legal practice in light of these
desiderata. As a case in point, we may examine the application of the “void for
vagueness” doctrine in American constitutional law. There are also logical cri-
teria: constraints of non-contradiction, consistency, and coherence that must be
respected. Like cases should be treated alike; here law’s formality shares with
morality the principle of formal justice. There are rational criteria that we
associate with the principle of universalization. Law applies universally to the
general classes it specifies. And there are formal criteria having to do with the
allocation of legal competence among different types of officials—police, pros-
ecutors, legislators, and judges—resulting in a system of checks and balances
that serve to limit abuses of discretion. This formality, for example, we associ-
ate with the idea of jurisdiction as it limits the power of courts. In mature legal
systems (rather than immature common law systems) judges may be allocated
principally interpretive rather than lawmaking authority which is left to legisla-
tures. This allocation of competence between judge and legislator has the effect,
as Herbert Packer has argued, of limiting the discretion exercised not only by
judges but by police and prosecutors as well. The principle of legality and the
prohibition against *ex post facto* criminal laws in American jurisprudence bind judges to permit criminal convictions only in cases where the crime has been defined beforehand. Police and prosecutors may not apprehend merely on grounds that “wrongdoing” has occurred and look to convince courts after the fact that law has been violated.

The linguistic, logical, rational, procedural, and “jurisdictional” norms that we associate with law’s formal dimension may be considered subsumable under the more general norm of efficiency - where law is seen as a technical activity, as an instrument to achieve the ends of the lawgiver. Laws that met these criteria would be more effective than laws which did not. But I do not think that criteria such as these are purely technical. They share ground with formal criteria that we associate with the concept of right. (See John Rawls *Theory of Justice*, “The Formal Constraints of the Concept of Right” and his discussion that principles of Justice must be general in form, universal in application and public.) For Lon Fuller criteria like these form an “inner morality of law.” Fuller’s claim has been criticized: in *Ethics and the Rule of Law* (pp. 74-78) David Lyons argued that Fuller’s criteria, that the law be in the form of general rules that are intelligible, followable, stable, interpreted as reasonably understood by people and prospective, do not amount to a morality. Taking what I understand to be a perspective on law that sees it in solely formal terms, Lyons concluded that the law as such is morally neutral. Moral neutrality seems to me too strong a claim even when focusing on law as a form. The formal criteria outlined above constitute necessary conditions for good, as Lyons himself admits. They rule out self-contradictory law, secret law, they limit arbitrariness in law and the requirement of generality rules out a certain egoism in law; what Rawls called “first person dictatorship.” (For example, the command “everyone except me is to be bound by this rule” cannot be a law because it is not general in form.) Moreover, the order that these formalities establish and the discipline they impose have to my mind the effect of drawing law toward the good. Socrates in *The Republic* saw justice as the principle of the well-ordered soul, and injustice a disorder of the soul. Good has a certain affinity to order, as Fuller believed, evil an affinity to disorder. Much of what we consider good is connected to order, even liberty itself is dependent on more fundamental orders (one of which is law). Yet, I think it would have to be admitted that the formal criteria of law are not sufficient to produce the good, as not all order is good - we must look for moral criteria in the other dimensions of law. (A purely analytical jurisprudence, then, which focuses solely on law as a form is not sufficient for the purposes of determining law’s virtue.)

H.L.A. Hart sees law as a body of rules. Ronald Dworkin disputes this view of law and used the case of *Riggs v. Palmer* to illustrate that law contains principles as well as rules. In *Riggs*, a grandson had murdered his grandfather and still insisted to the probate court that he had the right under his grandfather’s will to inherit his estate. The New York Court of Appeals was split three to two. The dissenting judges held that under the rules of wills in the State the unrevoked will was valid, even though conscience would dictate that the grand-
son did not deserve the estate. The majority held the will invalid citing the principle that “no one should profit from his own wrongdoing.” The Court may be seen as split between positivism in the dissent and natural law in the majority.30

Law does partake of both rules and principles. These two standards, however, may be indistinguishable in terms of their articulation. “That no man may profit from his own wrongdoing”—the majority’s principle in Riggs—may be a rule, if it is applied and controls decisions involving all cases that fall under its classification (though specified exceptions may be established over time.) But if in its application judges have discretion to balance this proscription against other norms, then the standard is a principle. The difference between the rule and the principle has to do with the degree of formality present in either, and this manifests itself in the application of the standard in reaching some legal judgment. Principles, when in a form that is more abstract and/or ambiguous, invite discretion. Rules usually more concrete and/or specific in form disinvite discretion. Rules we might say lack the degree of informality in principles, while principles lack the degree of formality in rules.

Rules and principles are an opposite pair of norms along a fundamental axis of law’s formal structure, an axis along which we may trace the degree to which legal norms possess formality. They represent the paradigmatic case of tension within the dimension. Legal norms must strike balances along this continuum. Legal judgment must find the proper degree (neither an excess nor a deficiency) of formality in law, hit the mean in light of the law’s proper function and given the particular circumstance of the case.

Law overall must strike the mean between extremes of mechanical jurisprudence and legal pragmatism. In the particular we must look to the subject matter the law regulates. In the criminal law where sanctions put liberty and even life at stake and where the moral precepts the law is protecting are of fundamental importance, the mean is struck at a high level of formality as can be seen in such doctrines as: the prohibition on ex post facto criminal laws and the “void for vagueness” doctrine. Such doctrines check official discretion and guard against abuses of power. In the civil law of torts when values such as human life are not at stake and when the remedies do not involve the deprivation of liberty but the award of compensatory damages, the mean is struck closer to the end of principle or policy, as is evident in the elastic concept of legal duty in tort which Prosser characterized in this way: “[In tort] Duty is not sacrosanct in itself, but only on expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection....No better general statement can be made, than that the courts will find a duty where, in general, reasonable men would recognize it and say it exists.”31 In the law of wills, given the absence of the deceased, formality is far stricter than in tort—wills will be held invalid if rules (such as having the appropriate number of witness signatures) are not followed to the letter. Yet, in a case such as Riggs v. Palmer, where the wrong committed is the murder of the testator by the legatee, discretionary authority to apply principle justifiably
overrides the norm of non-discretionary application of rules.

We may call the virtue of law’s formal dimension which strikes the mean between excess and deficiency in the formality of law, “integrity” (using the term in the sense meant by the engineer who speaks of the “structural integrity” of a bridge.) The word integrity conveys a solidity appropriate to legal standards that in some cases needs to be inflexible and yet in others elastic, standards that seek to regulate human conduct in various spheres, all with a view to achieving justice. The right application is accomplished by a prudential balance of the rule of law and the broad principle of equity, a balance between the law’s letter and its spirit. Book 5, chapter 10, of Aristotle’s *Nicomachean Ethics* contains the classical discussion of this issue. When legislators draft rules it is difficult for them to foresee all cases that may arise and so Aristotle allows that equity step in, in the irregular case where law because of its universality would produce an injustice. The law is made adjustable like the Lesbian leaden rule. The judge is not free to do as he pleases however, but is to do what the legislator would have done had he known of the case.

Having said that integrity in law’s formal dimension strikes the mean between excess and deficiency in the formality of law, we may suggest vices of this dimension. If one defines law exclusively as rule, hyper-extending its formality, the by-product is a version of what has been condemned as mechanical jurisprudence, a formalism that reduces judicial judgment to a ministerial act. The spirit of the law comes to be lost in the excessive pursuit of its letter. The distrust of official discretion would produce the administration of justice by automaton—the relentless, unbending, unyielding Javert of Hugo’s *Les Miserables*. While too much formality leads to mechanical jurisprudence, a deficiency of formality leads to legal pragmatism, unraveling the law and submerging it in politics: an antinomianism in law results, the condition of law described by the Critical Legal Studies Movement, where law over time is a contradictory patchwork of the ideological preferences of people in power, with result-oriented judges disguising their agendas in legalese.

Tocqueville thought that democracies are naturally inclined to be hostile to formality:

> Men living in democratic centuries do not readily understand the utility of forms; they feel an instinctive contempt for them....Forms arouse their disdain and often their hatred. As they usually aspire to none but facile and immediate enjoyments, they rush impetuously toward the object of their desires, and the least delays exasperate them. This temperament, which they transport into political life, disposes them against the forms which daily hold them up or prevent them in one or another of their designs. Yet it is this inconvenience, which men of democracies find in forms, that makes them so useful to liberty, their principal merit being to serve as a barrier between the strong and the weak, the government and the governed. Thus democratic peoples naturally have more need of forms than other peoples, and naturally respect them less.
If Tocqueville is right, our democratic regime naturally inclines toward the vice of pragmatism in law rather than formalism. (Robert Summers and Patrick Atiyah have argued that American law is, compared to English law, pragmatic). The antinomianism of the 1960s, and the experiences of the last three decades lend credence to this claim. In striking the mean, in achieving integrity in law, we must be sensitive to this bias. Aristotle put the problem this way in the *Nicomachean Ethics*: “We must watch the errors which have the greatest attraction for us personally. For the natural inclination of one man differs from that of another....We must then draw ourselves away in the opposite direction, for by pulling away from error we shall reach the middle, as men do when they straighten warped timber....This much at any rate is clear: that the median characteristic is in all fields the one that deserves praise, and that it is sometimes necessary to incline toward the excess and sometimes toward the deficiency. For it is in this way that we will most readily hit upon the median, which is the point of excellence.”

IV

“Upon this point a page of history is worth a volume of logic.”


“The life of the law has not been logic; it has been experience.”

Holmes, *The Common Law*

Edmund Burke derided modern legislators who came to law “with no better apparatus than the metaphysics of an undergraduate.” These Legislators were equipped with only a handbook of abstract universal human rights which they sought to impose on their societies. Burke instead admired the lawgivers of the ancient republics who in their laws took stock of the general facts of human nature and the particular modifications of these facts in the form of habits produced by the circumstances of civil life, which constituted a “second nature.” From the combination of the two “arose many diversities amongst men” which law ignores to its peril.

Dworkin imagined Hercules’s task in the hard case to be like a chain novelist who must contribute the best chapter he can fashion given what has already been written. As judge, Hercules looks to find in the legal past a political morality, a theory about the rights and duties of citizens which can be said to be presupposed by the law, taking the law (the constitution, statutes, judicial decisions) as a given. That theory, about what is best in the law, forms the basis for his judicial decision. Assuming the legal past is good enough, this theory posits a political morality that justifies the law, a metaphysics of law if you will.

Dworkin’s chain novel metaphor suggests law’s historicity - that law is to be taken as telling, over time, a meaningful story. But the metaphor of the novel can be misleading as law is more than text, more than form. Hercules cannot simply engraft on law a surprise innovation which on his formal theory consti-
tutes a brilliant reinterpretation of law—albeit one which on formal criteria may be said to fit the past texts of the law. This would be to supplant practice with theory, laying form over facts. It is a kind of abstract metaphysics that imprudently ignores practical realities. Hercules must consider how in fact the law is lived if his decision is to be well grounded. (We should be legitimately concerned about the degree of discretion Dworkin has Hercules exercising in a jurisdiction where the written constitution is, as Dworkin recently characterized the American Constitution, “breathtakingly abstract.”) Law in the books is inanimate. Law as a force ordering human affairs is animate and legal theory must attend to the conditions necessary for law’s animation (and this involves recognition of the principle that, at least in part, law develops from the ground up). We may distinguish criteria of law’s formal efficacy, discussed in the previous section, from criteria of law’s material efficacy, part of which may be found in history.

Law bespeaks power, but the coercive power of law very much depends on people by and large cooperating with it. Law’s norms must draw from custom, convention, and be in keeping with the habits of the people whose law it is, as these things go a long way to producing the impression that the law is right and establishing the practice of abiding by law. When law is dissociated from custom and convention, it comes to be isolated and exposed. Absent a pervasive sense of its rightness and absent habits of law abidingness, law ultimately depends for its efficacy on its ability to force compliance. This disturbingly requires magnifying the police power, putting civil liberties in jeopardy. Only some urgent supervening good could justify taking such risks with the law.

Aquinas in his treatise on law recognized that law’s capacity to bind (law as derived from “legare”) depended upon law’s being a measure of human acts homogenous with what it measured: “As is stated in [Aristotle’s] Metaphysics, different things are measured by different measures. Therefore laws imposed on men should also be in keeping with their condition, for, as Isidore says, law should be possible both according to nature, and according to the customs of the country.” Where law would attempt to impose ideals out of proportion to the actual conditions of men “the precepts are despised, and those men, from contempt, break out into evils worse still.” Aquinas advised: “The purpose of human law is to lead men to virtue, not suddenly, but gradually. Therefore it does not lay upon the multitude of imperfect men the burdens of those who are already virtuous, to wit, that they should abstain from all evil.”

The relations of law and custom are complex. Aquinas wrote: “the ability or facility of action is due to an interior habit or disposition...” The expressions “customary usage” and “customary practice” suggest interior and exterior habits, habits of intellect and heart and habits of action, which have the effect of ordering our will and our affairs producing a certain constancy. Law that is in the books seeks to acquire the material conditions of a custom if it is to be a force (like a habit) sufficient to order human affairs. Custom can establish law, as in “customary law” that is grounded in long established and constant practice. Other kinds of law may be practicable or impracticable depending on
whether they correspond with custom. When statutory law is consistent with customary practice it has the force of habit behind it. The custom helps animate the law and preserve it. When, however, law contravenes custom, the force of habit works against the law, making it difficult to enforce. If strong enough, the custom may, as Aquinas put it “abolish law.” (Consider the American experience with Prohibition, for example.) Furthermore, custom itself becomes involved in the very interpretation of law as the language of statutes derives meaning from linguistic conventions (customary usage) and the habits of action to which they refer (the context of customary practice.) Anthony D’Amato has, for example, pointed out that a “STOP” sign communicates the message: vehicles are to stop and [when safe] go, without the extra verbiage in light of the established customs of the road. Aquinas himself wrote of custom as the “interpreter of law” as “something can be established which obtains force of law, in so far as by repeated external actions, the inward movement of the will, and concepts of reason are most effectively declared; for when a thing is done again and again it seems to proceed from a deliberate judgment of reason.” Custom fills the printed letter of law with content and along with an appreciation of the purposes of the law (its ends) gives determinate meaning to law.

In the Middle Ages custom played the part of “law’s interpreter” merging natural law and positive law. During that period, according to Lloyd Weinreb: “A difference between the Natural Law and actual law in effect seemed less stark, because the latter was supposed to have emerged from a society’s distant past rather than being entirely dependent on positive enactment... the force of custom provided a bridge. Natural law seemed more accessible to reason because law itself seemed less the product of deliberate legislative decision. The conception of law as something independent of and pre-existing particular circumstances fostered the view that the actual law contrary to the natural law did not contradict the reality of the latter.” Antiquity lent to positive law the odor of sanctity. Jurists in the 12th Century, for example, looked to the Code of Justinian as a kind of ideal law. The fact of its antiquity gave it an authoritative-ness that put it beyond the fray of politics, so that it could be appealed to as a way of resolving disputes among King, Lord, Vassal, and Merchant. Faith in the Code’s perfection, its sacredness, inspired jurists to commit themselves to the arduous work of resolving its apparent contradictions and producing from the Code’s fragments an integrated corpus juris, laying the groundwork for the formation of the Western legal tradition. Absent an abiding faith in the Code jurists might simply have abandoned it in favor of some project of their own making or positing. The positive law they would have produced, however, would hardly have had the authority of law rooted in the ancient Code of Justinian and may well not have been sufficiently strong to overcome the divisions in their societies nor strong enough to establish the Rule of Law.

The historicity of law has as its ground that fundamental experience of order conveyed by the ancient Greek word politiea. Translated as “regime,” the politiea comprises the customary institutions and actual practices characterizing a
political order. A kind of unwritten constitution, it is in substantial part the existential source of a written constitution’s authority. In Book 10 Chapter 9, of the Nicomachean Ethics Aristotle criticized sophists who believed that to legislate was simply to collect highly regarded laws. The mistake lay in abstracting law from the context of the politiea. Legislation, Aristotle observed, requires judgment as to “what enactments are good and which are not, and what measures are appropriate to what circumstances.” In The Politics, he said laws “should be enacted with a view to the regime.”

Burke conveyed the historicity of this fundamental order in his characterization of the English nation: “... [a] nation is not an idea only of local extent and individual momentary aggregation, but it is an idea of continuity which extends in time as well as in numbers and space. And this is a choice not of one day or one set of people, not a tumultuary and giddy choice; it is a deliberate election of ages and of generations; it is a constitution made by the peculiar circumstances, occasions, tempers, dispositions, and moral, civil, and social habits of the people, which disclose themselves only in a long space of time.”

Law draws from and develops a tradition as law is passed from generation to generation. It is supposed to endure. The U.S. Constitution, for example, looks to secure the blessings of liberty not merely for the framer’s contemporaries but for “posterity.” Legal officials are stewards of a tradition which attempts to locate the ideal not merely in the formal texts of the law but in the actual experience of law in the lives of the people whose law it is.

History broadly defined is the attempt to find meaning in the experience of the past. It is an attempt to trace on the plane of recorded time highs and lows that diverge from a baseline. History is the plane on which the universal meets the particular, setting off thunderstorms. In the Jewish and Christian traditions history originates with God intervening in time giving to human events a transcendent meaning. It is the divine light piercing the veil on Mount Sinai delivering the law to Moses. In a very real sense Nietzsche’s declaration that “God is dead” sounds the death of history and marks the advent of historicism—the collapse of the universal into the black hole of the particular. In secular Western legal traditions one might say that history is the attempt to find in law a correspondence to the natural rights and duties of mankind, a civil religion transcending merely positive law. The end of secular history may be found in the death of political philosophy, the project to determine the naturally best or most just regime, and in the rejection of transcultural, transnational, universal moral truth.

We may see in law’s historical dimension a fundamental axial structure with universal norms and particular norms constituting opposite pairs. Law must strike the proper balances among these opposites as it attempts to locate the ideal in the actual, as it attempts to integrate natural law with positive law, producing a tradition that tells a meaningful story, rather than a mere record of the past that makes no sense. Law may suffer from an excess of the universal - as in that constitution of revolutionaries that would impose democratic ideals in a country with no tradition of democracy. And law may suffer from a deficiency
of the universal - as in that society where the legal right is nothing other than
the abominable practices of ancestors. Likewise we may speak of an excess
and deficiency of the particular in law. The virtue of law’s historicity strikes
the mean between the universal and the particular, a mean relative to the cir-
cumstances of the people whose law it is. That mean, and therefore the virtue
of law’s historical dimension, I shall call “prescriptiveness.” The word has sev­
eral meanings. What is prescriptive tells us what we should do, as contrasted
with what is descriptive, which tells us what we in fact do. Prescriptions are
commonly thought of as what doctors provide to cure some malady. Law is
prescriptive both in the sense that it is an imperative and in that its effect, when
well framed, is to benefit. Edmund Burke, however, identified a third meaning
of prescription in the English law of property where it meant ancient and
unquestioned possession conveying legal right. The right existed “beyond the
memory of man.” Burke in a speech to the House of Commons in 1782 said of
the English unwritten constitution: “Our constitution is a prescriptive constitu­
tion, it is a constitution whose sole authority is that it has existed time out of
mind.” 44 In a letter to Mr. William Smith, Burke wrote that to have law as a
habit and upon authority rather than disputation “requires that law stand long
enough (or endure long enough) to make prescription its mainstay.” 45 The
sense that something is right in social affairs depends a great deal on the habit
of thinking that it is right and on corresponding habitual practice. We may say
that the force of law, its material efficacy, is a function of its prescription.
Burke himself admitted, however, that the antiquity of a custom did not estab­
lish its rightness. Prescription for Burke also carried the sense that the opera­
tion of this venerable practice was beneficent. People had in fact flourished
under it. The history of law carries normative force when it is prescriptive in
this double sense, that it is enduring and beneficent. Prescriptiveness in law
bespeaks the prudential application of the universal to the requirements of
action in particular, concrete circumstances. We may suppose, without elabo­
rating on the point, that the degree of prescriptiveness necessary in law varies
with the type of law and the subject matter of the law. It presumptively should
be greatest in the area of constitutional law and especially in the matter of
rights implicit in the Constitution.

In identifying prescriptiveness as a virtue of law I have departed from my
practice of personifying law by drawing from the traditional vocabulary of the
moral virtues. As far as I know the tradition does not identify prescription as
a virtue of the person and yet, do we not desire to both endure and to con­
tribute some lasting good? (Some write books for this reason). We honor
heroes and martyrs, build monuments and statues to them, which in physical
form mark that they have achieved a measure of immortality in the world.
Surely, the enduring and beneficent presence of such people constitutes a
form of human excellence.

The tendency in America is to drive the law toward an ahistoricism. A ten­
dency perhaps as instinctive to democracy, where the desire for immediate
gratification is powerful, as the tendency towards anti-formalism which
Tocqueville diagnosed. In America today we see a gross neglect of history in our schools and in the bench and bar. Again, this is not very new. Daniel Boorstin in a 1940’s essay entitled, “The Humane Study of Law,” criticized law schools for their failure to integrate history into law school curricula, but the deficit of history seems to have grown in recent years producing today a great chasm separating the present from the past. Lawyers have little knowledge of legal history and law school case books devote less and less space to the historical development of the body of law under study. Lawyers are ill-equipped to ascertain historical limits in law. We live in an iconoclastic age obsessed with the now, preoccupied with selfish pursuits, producing debt that mortgages our children’s futures, showing little care about the past or the future. It is difficult to see how a society may produce a prescriptive law without a reverence for legal tradition. We live in an increasingly profane legal culture that is connected to the wider culture’s hostility to traditional religion, a culture hostile to the idea of the sacred, as well as to the practice of sacrifice. Even the United States Constitution, the closest thing to a sacred text in American law, is showing signs of fatigue given the intense political pressures applied to it as a result of an ahistorical constitutionalism based on rights of individual self-determination and privacy.

The loss of history is a deeply disturbing trend. Orwell observed that he who determines the memory of the past determines our future. Without knowledge of the past we are easy prey to instrumentalist pseudo-histories that reinvent the past in order to realize some future agenda. Arthur Schlesinger, Jr., in the book *The Disuniting of America* warned us to beware of the subordination of objective history to group politics and of the use of history as weapon. American law should be examined for evidence of ahistoricism, historicism, and for models of historical jurisprudence. Potter Stewart’s opinion in *Gregg v. Georgia*, an Eight Amendment death penalty case, in an interesting way integrated an interpretation of law’s history into an analysis of law’s form and law’s ends as it determined the meaning of the phrase “cruel and unusual.” Stewart construed that phrase against a background (formal) theory of constitutional boundaries between legislature and court that defined the role of the court and limited its power. He read the clause by way of a history that took into account not only the framers’ intent but also evolving standards of decency. He then looked to reconcile that history with theories that offered justifications for the death penalty (although only retributivist and utilitarian theories were addressed) in order that the clause be read in such a way that accorded with “the dignity of man.” Each layer of Stewart’s argument bears inspection to determine whether all the appropriate empirical and prudential judgments were made as it proceeded to the overall conclusion.

We should also examine the Supreme Court’s 14th Amendment substantive due process jurisprudence, whereby the Court finds implicit rights in the Constitution. In *Bowers v. Hardwick*, Justice White, writing for the majority, required that any implicit right be deeply rooted in the Nation’s history and tradition. He also identified a second test, which he did not satisfactorily describe...
or separately apply, which was that the right be "implicit in the concept of ordered liberty" so that "neither liberty nor justice would exist if the claimed right were sacrificed" (citing Powell in Moore v. East Cleveland.). I discovered from a computer survey of some 65 Supreme Court cases in which the phrase "implicit in the concept of ordered liberty" was used that the Court has not explained what it means by that language. (The concept of ordered liberty needs to be elaborated as an integrative concept, along lines I will suggest in the next section.) A jurisprudence which combined both these tests with a third that applied the normative criteria that we have identified with law's formal dimension would count as an interesting application of integrative jurisprudence to be evaluated in terms of whether it produced a prudential balancing within and of law's three dimensions.

Law's historicity suggests that even the meaning of the Constitution may be said to evolve rather than, as strict originalism requires, be frozen at the time of ratification. That evolution, however, in the highest text of the law must be reconciled to the requirements of formality in law and be tied to deeper fundamental changes in the politiea which on the theory of law's ends can be demonstrated to be beneficent. The Court may not adopt an easier theory of an evolving Constitution which has the effect of enshrining in the highest law of the land the ephemeral political fashions of the day, if the Constitution is to retain its prescriptiveness.

V

The just in political matters is
found among men who share a common
life in order that their association
bring them self-sufficiency, and who
are free and equal, either proportionately
or arithmetically.

Aristotle, Nicomachean Ethics
Book V, ch 6.

According to Aristotle, all human action seeks some good and the final most complete good sought is happiness, a state of self-sufficiency and human flourishing. Jefferson in the Declaration of Independence identified "the pursuit of happiness" as one of the inalienable rights of man, not to be denied by government. Political philosophers debate whether happiness is the pursuit of private interests safeguarded by negative rights against the state or the full participation in civic life of the citizen bound by duties to the community: liberal individualism versus civic republicanism or some form of communitarianism.

Justice Brandeis in his famous dissent in the Olmstead case suggested the former view when he claimed that "the right most cherished by civilized man is the right to be left alone." But the condition of civilized man is not isolation. Civilization is a word deriving from the Latin civilis, meaning civic, which in
turn was based on the Greek word *politikos*, meaning political. The highest form of life is social, and great depictions of civilized man, such as Montegna's paintings of the Court of Urbino, show him immersed in social life. He is a natural part of a wider whole. Individually, man is not self-sufficient. He enters the city, as Socrates taught, because he needs much. And the full development of his faculties, the moral and the intellectual, require not merely a certain order and stability to his life, but also intercourse with others. He cannot simply insist on doing as he pleases, on living according to unrestrained appetite, because he must get along with others, and he does not desire to merely get along, but to live well and fare well.

A recent Gallup Poll of eighteen nations discovered that Icelanders (82% of whom are satisfied with their personal lives) are “the happiest people alive.” While Americans are better off materially we seem less happy. Richard C. Morais, writing in *Forbes*, offered a rationale: “Like Icelanders, Americans are individualists. Where we seem to differ is in our sense of community. Iceland, known as the land of ‘fire and ice,’ is about living with opposing forces. It is one of the most active volcanic countries on earth, but has 4536 square miles of glacier—heat and cold co-existing....No surprise then that its society can reconcile another set of opposing forces: individualism and the needs of the community. [In Iceland] individualism exists with a sense of community. For years I have known an Icelandic family that embraces a family drunk and illegitimate child. This family never let them drift like human flotsam, to be beached in some government institution.” Morais believes that the extra margin of happiness enjoyed by Icelanders has to do with a better balance between the individual and the communal and that Americans have become too individualistic.

Interestingly, American multiculturalism and historical revisionism reflect another imbalance putatively avoided by the Icelanders. Morais observed: “Most Icelanders travel out into the world as adults. They learn that theirs is not the only way of doing things. Yet their new perspective doesn’t translate into contempt for their own land and its history. The 12th Century Icelandic Sagas, studied at universities the world over, are revered at home. Turn on the radio and at the top of the charts is Babbi Morthens, a troubadour....I wish American multiculturalists and historical revisionists would grasp what Icelanders understand: trashing your nation's myths is the wrong way to create a better society. ‘A nation has to be tolerant of newcomers,’ says psychiatrist Neil Micklum. ‘But if it loses its myths, it loses its center.’” Morais suspects: “this loss of ‘center’ is what makes Westerners unhappy amid their affluence.” I wonder whether the centeredness which Morais finds among the Icelanders and is a source of their “happiness” is reflected in Icelandic law. In its historical and teleological dimensions does Icelandic law strike a mean between ethnicity and multiculturalism, and a mean between the individual and the community?

Thomas Aquinas in his *Treatise on Law* found human happiness to lie not in the individual life, but in the life enjoyed by members of a perfectly just community. Law he thought must concern itself with producing this kind of
order and so should not be “ordained” to the private good, but to the common good. While the United States Constitution does not expressly guarantee Jefferson’s right to the pursuit of happiness, the ends stated in the Preamble—to promote “a more perfect Union,” “establish Justice,” “insure domestic Tranquility,” “provide for the common defense,” “promote the general Welfare,” and “secure the Blessings of Liberty to ourselves and our Posterity”—presuppose commitment to social life and a scheme of ordered liberty conducive to the pursuit of happiness.

It is widely proclaimed that law’s aim is, in the words of the U.S. Constitution, “to establish justice.” In America today we tend to conceive of justice not as a virtue of the person (one of the cardinal virtues of the tradition and the social virtue par excellence), but as that state of affairs securing the rights of the individual, the most important taken to be liberty and equality. Current debate often founders, however, when these ambiguous rights require definition (as in cases when they collide.) How does one define liberty and equality and reconcile them in the conflict between artist and feminist: the artist claiming freedom of expression, the feminist that pornography violates a woman’s right to be treated with equal respect? Rights conflicts are intensified in America today because of the tendency to see rights as absolutes, as independent variables. When we forget that rights to liberty and equality are rights to degrees of liberty and equality, the two rights drive in opposite directions producing tensions between them that give to justice the appearance of inherent contradiction or antinomy. Eventually, the fabric of our legal and moral life is torn apart by irreconcilable libertarian and communitarian forces.

We may look at liberty and equality as opposite pairs of norms. Equality is fundamentally identity as in the equation: two equals two. One person is said to be equal to another in that in some respect the two are the same. An egalitarian society treats its citizens as if they were the same in all relevant respects and so establishes rights to the same things in the same amounts: equal incomes, equal taxes, equal estates and so on. Equality is the condition of our sameness. Liberty on the other hand can be seen as the condition of our differences. We assert it as a right in circumstances where we want to express or develop what makes us unique. Its by-product is inequality. The nightwatchman state treats its members as individually self-determining establishing a right to liberty that minimizes the degree to which individual differences may be limited. We may claim a right to equality, however, where the condition of our sameness can be considered good and a right to liberty where the condition of our differences can be considered good.

Not all differences are good. They can divide us, pull us apart, cause wars. In some respects we need to be the same: having common values, common rules, and a store of common experiences. But too much of the same is repulsive to us (and in-breeding is dangerous). We are drawn to people who have talents and qualities that complement rather than duplicate our own. Opposites attract and make good matches. Men and women form a union because of what makes them different, their inequality if you will. Yet, a marriage in
which nothing is common is doomed. Social solidarity depends on the quality of our sameness and the quality of our differences. The sociologist Emile Durkheim believed that the cohesion of a society took two forms: an organic solidarity (produced by complementary differences) and mechanical solidarity (produced by resemblances that tied people together—including common beliefs and common standards of behavior).\(^{59}\)

The problem of difference and sameness is a fundamental theme underlying classic political philosophy’s attempt to discover the best or most just regime. Socrates in Plato’s *Republic* explained the genesis of cities to Adiemantas and Glaucon this way. As individual man is naturally deficient (not self-sufficient), he enters the city where others, because they are different, are able to supply him with what he needs. In return he offers his own unique talents. Justice is a principle which harmonizes the differences into a unified whole requiring each individual to perform that special function for which he is best fitted by nature. The thrust of Aristotle’s critique of the Republic is that by imposing a communism of families and property, Socrates failed to sufficiently acknowledge that “Plurality is the very nature of the state.” Having families and property private better conduces to harmony in the city and the more careful stewardship of offspring and property. (Consider how a vacation cabin jointly owned by friends may lead to fights between them and less careful maintenance of the property.) Aristotle’s analysis is an early version of the American motto: *E pluribus unum.* Unity is achieved through a certain plurality—a plurality, however, of the right kind and of the right degree. Sameness/difference remains a theme that underlies modern discourse about justice. For John Rawls, principles of justice “single out which similarities and differences among persons are relevant in determining rights and duties.”\(^{56}\)

The fundamental structure of law’s ends is an axis along which we may trace excesses or deficiencies of sameness or difference. As “the act of justice is to do what is right”\(^{61}\) justice which is the mean of the dimension, its virtue, strikes the right balances between extremes, reconciling a series of opposite pairs of terms that in different ways express this fundamental dialectic. Law must balance the rights of the individual with duties to the community, balance the private and the public, liberty and equality, diversity and uniformity, the norms of liberal individualism and the norms of communitarianism. Neither side of the opposition can be said to be more fundamental. Equality is not more fundamental than liberty; liberty is not more fundamental than equality. The person as “self-determining” individual is not more fundamental than the person as citizen, as liberal individualism holds, nor is the citizen of the state more fundamental than the individual, as political communism seems to hold. They lay claim to different sites along a continuum on which we must find the right balance of difference and sameness.

The normative concepts of law’s ends must integrate these opposite terms if law is to be centered on its axis. To some extent our legal language reflects a synthesis of these elements. We do not accept a right to complete equality but a right to equality of opportunity—a fair and equal playing field upon which
to work our differences producing inequality. We do not accept absolute freedom but endorse ordered liberty, freedom subject to a background order, law, a system of equal restraints. Yet Americans today are unclear about what constitutes a fair playing field and a fair system of restraints. Increasingly, as in the areas of gender and race, they are suspicious of inequality of results and impose quotas. With respect to liberty, their young seem to demand the freedom to be and to do whatever they please and in areas such as sexuality, an anarchy seems to prevail.

Burke saw the rights of men “as in a sort of middle,” “often in balances between differences of good” and his conception of a right to liberty is an integration of freedom, justice, and equality. Liberty, Burke said: “is not solitary, unconnected, individual, selfish liberty, as if every man were to regulate the whole of his conduct by his own will. The liberty I mean is social freedom. It is that state of things in which liberty is secured by the equality of restraint.... This kind of liberty is, indeed, but another name for justice; ascertained by wise law and secured by well constructed institutions....But whenever a separation is made between liberty and justice, neither is in my opinion safe.” Liberty is forfeited under the anarchic conditions of human debasement which Burke described as “the abuse, or oblivion, of our rational faculties...” Burke thought “...a ferocious imbecility which makes us prompt to wrong and violence, destroys our social nature, and transforms us into something little better than the description of wild beasts. To men so degraded, a state of strong constraint is a sort of necessary substitute for freedom; since bad as it is, it may deliver them in some measure from the worst of all slavery—that is, the despotism of their own blind and brutal passions.” Positing a right to liberty in the books, is imprudent where the existential conditions necessary for ordered liberty do not exist. Burke had grave misgivings about the new right to liberty claimed by the French Revolutionaries: “I should...suspend my congratulations on the new liberty of France until I was informed how it had been combined with government, with public force, with the discipline and obedience of armies, with the collection of an effective and well-distributed revenue, with morality and religion, with solidity and property, with peace and order, with civility and social manners. All these (in their way) are good things, too; and without them liberty is not a benefit whilst it lasts, and it is not likely to continue long. The effect of liberty to individuals is that they may do as they please... we ought to see what it will please them to do.”

What about an implicit right to privacy in the American Constitution? If we were to recognize such a right, as Justice Douglas did in *Griswold v Connecticut*, a right to keep government out of the “sacred precincts of the marital bedroom” (although the Court’s “jurisprudence” in this area has shown that the right developed had little to do with marriage or even bedrooms or with any prescriptive right “older than the Bill of Rights—older than our political parties, older than our school system,” such language it turns out was merely rhetorical) integrated into that right must be a corresponding duty on the part of the individual (here the opposite norm of the polarity) to keep those
intimate associations that normally take place in the marital bedroom private. Public indecency even on the movie screen could be challenged as a violation of a duty of privacy, and the community could perhaps charge pornographer and exhibitionist and even voyeur with a conspiracy to violate privacy. (The fair wages of recognizing an implicit right to privacy in the Constitution.) The legitimation of an implicit right to privacy, however, depends not only upon it's meeting the test of an integrative concept of ordered liberty, but also on its meeting criteria associated with the formalities of Constitutional law and formal interpretation of the Constitutional text and good faith argument, not mere rhetoric, that establishes (The jurisprudence that emerged in Eisenstadt v. Baird, Roe v. Wade, and their progeny, fails on these criteria to legitimate the Fourteenth Amendment liberty interests upheld in those cases.)

It is interesting and perhaps lamentable that the text of the Constitution does not have some statement about duties - even a Bill of Duties. The presence of a Bill of Rights only, lends to interpretation (given the cultural dominance of individualism) that skews the Constitutional text toward an individualistically oriented account of rights. And once a right has been identified as fundamental (such as the liberty interest under the 14th Amendment) attempts to find the mean in the right are frustrated by the requirement that the government prove a compelling state interest is directly implicated before regulation is permitted. Constitutional analysis must mandate that in the articulation of implicit rights under the Constitution judges find the mean of the right in law's form, history, and ends. Some language such as the Universal Declaration of Human Rights article 29, or perhaps even a Bill of Duties might have proved helpful as language judges could have used in developing legal doctrines to counter individualistically oriented rights arguments, allowing for a more balanced jurisprudence of Constitutional rights.

VI

Conflicts among the dimensions of law do occur. Legal scholars have been preoccupied with the theoretical problem presented by the unjust law. Legal positivists treat the problem of law's moral deficiency as outside law; moral evaluation is extra-legal evaluation. Natural lawyers judge the quality of law in terms of its rightness, so that an amoral enactment seems devoid of the quality of law. Aquinas in the Treatise on Law quoted Augustine to the effect that an unjust law "seems to be no law at all." Is the unjust law, law, on the positivist's account or not law, as suggested by the Natural Law tradition? In a way both answers seem correct. From the perspective that focuses on law's formal dimension, the unjust law has the appearance of law. From that perspective which focuses on law's ends, the unjust law does not appear to be law. (The danger of legal positivism is that it produces a jurisprudence that overlooks the moral deficiency of law; the danger of natural law is that it tends to overlook the formal and material conditions necessary for law.) When both perspectives are integrated, injustice in law becomes the classic case of conflict internal to law, a conflict between the values we associate with law's form and the values
we associate with law's ends that must be resolved by reconciling the require-
ments of the Rule of Law with that of legal justice. Prudence requires that in
searching for a solution to the practical problem of the unjust law, judgment be
sensitive to the pull of both values in law.

Literature in the area of civil disobedience attempts to deal in various ways
with conflicting values. How do we preserve the rule of law and yet effective-
ly demonstrate against the injustice of a particular law? Martin Luther King,
Jr. in his "Letter from Birmingham Jail" found in conscientious civil disobedi-
ence of law an expression of the highest respect for law: "In no sense do I
advocate evading or defying the law....That would lead to anarchy. One who
breaks the law must do so openly, lovingly, and with a willingness to accept
the penalty. I submit that an individual who breaks a law that conscience tells
him is unjust, and who willingly accepts the penalty of imprisonment in order
to arouse the conscience of the community over its injustice, is in reality
expressing the highest respect for law."\textsuperscript{69} One may say that it is the respect of
the law-loving who seek in disobeying an unjust law to repair a conflict within
law, to mend a fabric torn between ends and form and make law whole. Civil,
conscientious, non-violent, public disobedience (as a last resort where legal
means have proved unavailing or may be reasonably judged futile) can be an
effective means of accomplishing this. Yet, as Aquinas indicated the disobedi-
ent must prudently judge whether the consequences of disobedience in the
particular case will not give rise to more grievous injury, in effect judge with
sensitivity to historical circumstance and to requirements of law's historicity.

Prudence is required not only in cases of civil disobedience or in other cases
of discord among law's three dimensions but in reaching legal judgments that
promote prescriptiveness, integrity, and justice in law—judgments that find
within each dimension the mean between excess and deficiency. One can have
too much of the rule in law, a vice associated with versions of legal formalism,
and too little of the rule, as in extremes of legal pragmatism; too much of his-
tory, as in an historicist originalism that freezes the doctrinal content of law to
the time of ratification and leaves no room for reasoned judgment, or too little
history, as in metaphysical universalist natural rights theories that displace his-
tory with abstract judgment. One may have too much of the individual self in
law, as in libertarian rights-based theories that undermine conditions necessary
for civic virtue, or too little of the individual, as in socialist theories that bury
the individual for the "good of the cause." Finding the means of these polari-
ties is not like finding some middle point along a line, equidistant from oppo-
site ends, but as Aristotle conceived of the mean of moral virtue, striking a
proper balance. Prudence, practical wisdom, rather than a mathematical calcu-
lation is required. Law is, as Aquinas referred to it in the \textit{Treatise on Justice} a
"rule of prudence."\textsuperscript{70} The prudence required of law is prudence in the classical
rather than the modern sense, which conveys too much the utilitarian calcula-
tion of interest. Prudence as practical wisdom applied to human action is
based on astute evaluation of experience, keen insight of present reality, and
clear foresight of the consequences of actions, so as to inform a reasoned judg-
ment about what action to take. According to Aquinas prudence “applies universal principles to particular conclusions of practical matters....It belongs to prudence to decide in what manner and by what means man shall obtain the mean of reason in his deeds.” Prudence is necessary because “the means to the end in human concerns, far from being fixed, are of manifold variety according to the variety of persons and affairs.”

Sound legal judgment requires prudence when it comes to law, a means of ordering human affairs. Hence the term jurisprudence for the science of law. Prudence dictates the manner and means by which justice may be achieved through law. Prudence requires not only reason but experience, memory, imagination, and moral character. Uncontrolled passion interferes with good judgment. As Aristotle put it in the Nicomachean Ethics “pleasure and sorrow pervert the estimate of justice.”

To come to the best estimate of what law’s excellence is requires not the perspective of the “bad man” (who for Holmes saw law most clearly) but the perspective of the prudent man, who is good and wise in matters of action. Law’s virtue in all its dimensions requires the forward looking prudence of the legislator, the backward looking prudence of the judge and the rule-based prudence of the lawyer - all combined into a single jurisprudential point of view. As the jeweler eyes his stone by turning it, examining it from all angles and in this way appreciates both its brilliance and its flaws, jurisprudence’s eye examines law’s different dimensions looking for balance and for excess and deficiency in the overall appraisal of its excellence.

In this paper I have attempted to describe the formal structure of an integrative jurisprudence. The theory which I call, “Law’s Virtue,” attempts to explain law’s deep structure from the standpoint of three dimensions each of which contains a fundamental axial principle. Excellence in law locates the mean in each dimension and harmonizes the three into a coherent whole. Each principle generates a tension produced by opposite pairs of norms: tensions between rule of law and broad principle of equity, between the particular and the universal, and between difference and sameness. Law which strikes a balance among these forces prevents them from pulling apart. It establishes a kind of centripetal order without which chaos would come. Law establishes the conditions necessary for the pursuit of the human good, without which anarchy would prevail and in its wake all manner of human destruction. Law is, when excellent, as Cicero defined it, “the essence and energy of justice.” But to be that, law must possess the qualities of integrity, prescriptiveness and prudence, in addition to justice.

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**Notes**


8. Ibid., 801.


10. Ibid., 556.

11. Ibid., 16.


20. Ronald M. Dworkin, “The Model of Rules,” in *Philosophy of Law*, Joel Feinberg and Hyman Gross, eds., 148. The legal realists made much of the so-called absence of law in hard cases. They transformed the hard case into the central case of law and defined law as nothing more than what a court will say. Two points in response to legal realism: (1) it is a bad definition which makes the more atypical case of a phenomenon its central case - the bulk of the law we know does not fall into the category of the hard case and in the hard case we may say the law is least like itself, as something which is inchoate is least like a force regulating human conduct in a determinate way and (2) it is perilous to law that the public be convinced that the law is merely the invention of judges. In some sense the law must be an objective discoverable fact, if laws rather than judges are to be animators of justice.


23. For the claim that the law is a universal see: Aristotle, *Nicomachean Ethics*, p. 141: “all law is universal”; Kant, *Fundamental Principles of the Metaphysic of Morals*, trans. J.K. Abbott (Buffalo, N.Y.: Prometheus Books, 1987), 60 where Kant writes: “In fact the objective principle of all practical legislation lies (according to the first principle) in the rule and its form of universality which makes it capable of being a law,” and Aquinas in the text herein: “Lawgivers judge universally.”


38. Ibid., 23.

39. Ibid., 23.

40. Ibid., 23.


45. See generally Harold Berman’s discussion of the important role played by the Code of Justinian in the formation of the Western Legal Tradition in *Law and Revolution*.


49. Ibid., 227.

50. Ibid., 225.


56. Ibid., 165.

57. Ibid., 165.


59. See Emile Durkheim, *The Division of Labor in Society*, trans. George Simpson, (Glencoe, Ill., Free Press, 1947). A key to the development of a substantive theory of law is the elaboration of a theory of the good which provides the bases upon which to find the necessary limits, *inter alia*, of equality and liberty. The work of John Finnis in particular merits study here. Such a theory would then, I believe, have to be linked to the formal theory I am sketching in this paper to complete the account of a general theory of law. Special theories could then be developed for specific legal systems.


62. *Burke’s Politics*, 305.

63. Ibid., 279.

64. Ibid., 279.

65. Ibid., 285.


67. (1) Everyone has duties to the community in which alone the free and full development of his personality is possible. (2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.


71. Ibid., 1387.

72. Ibid., 1392.

73. This is Aquinas’ rendering of Aristotle in *Summa Theologica*; Ibid., 1393.