The Genesis of Positive Law*)

BY IREDELL JENKINS, ALABAMA

I.

The subject to which this paper is addressed is that of the relationship - if any - between positive or civil law and other kinds or types of law. I state the question in this indeterminate form in order to acknowledge that it is still an open one, after all these centuries of debate. There are those who at least seem to claim that positive law is altogether *sui generis*, and so has no significant kinship with other apparently similar phenomena. Though I believe that this position is never consistently maintained, and probably is not seriously intended, being adopted only as a polemical device. And even those who agree that such a relationship does exist are often radically disagreed about both its precise nature and the other terms to which it runs.

I intend to argue the thesis that there is a real and intimate relation between positive law and other types of law. To this end, I shall isolate and identify what I regard as the basic modes of law; shall try to place positive law within this systematic context; and shall trace the connections that run between these modes of law. Finally, I shall draw the more important consequences, both theoretical and practical, that follow from all this regarding the nature and functions of positive law. In developing this thesis, I do not mean to be at all dogmatic. I merely wish to explore certain avenues of inquiry by carrying some very familiar ideas to what seem to me to be their logical conclusions. So my search is similar to what medical men call an exploratory operation, by which you hope only to determine whether other and more serious operations are feasible and desirable.

The thesis that I am espousing can be conveniently labeled that of the continuity of law. The precise content and bearing of this thesis - exactly what is asserts and what follows from this assertion - can only be made clear in the whole body of my discussion. But a rough and tentative idea of these can be given by saying that it obviously entails at least these basic

*) A somewhat shorter version of this paper was presented as a lecture before the Yale Law School in November 1961. The author gratefully acknowledges grants from the Rockefeller Foundation, the University of Chicago Law School, and the University of Alabama Research Committee which supported the work of which this paper is a part.

claims: First, that there is a common core of meaning that resides in all the senses and uses of the term 'law'. Second, that all laws have the same general and essential status in the universe, and reflect a single pervasive feature of reality. Third, that there is a real continuity of character and function among these diverse kinds of law. In a word, this principle asserts that all laws are coherent parts of one vast "rule and realm of law".

There is one further preliminary task: to confront this thesis with the array of fact that it encounters and must account for. This can be done most directly by listing some of the more familiar kinds of law to which we frequently refer. A merely casual and partial catalogue reveals such items as these: descriptive laws, normative laws, prescriptive laws, imperative laws, scientific laws, laws of nature, Natural Law, Divine Law, moral law, positive law, civil law, international law, primitive law, customary law, common law, laws of motion and of thought, laws of learning and of war, laws of heredity and of inheritance, laws of status and of contract, the law of the jungle and the law of the market-place. This is certainly a heterogenuous array of items, and to assert that there is real continuity among these various terms might well seem foolhardy.

Confronted with this challenge, it is a comfort and encouragement to realize that such a claim is by no means novel. For this notion of the continuity of law is one of the favorite themes of jurisprudence and philosophy, and has a long history. It was adumbrated by the earliest Greek philosophers. It was developed in various directions, though never systematically, by PLATO and ARISTOTLE. It became one of the central tenets of the Stoics, and from them passed to the Roman jurists, where it first served as a fruitful legal doctrine; here it found expression in the famous triad of *jus naturale, jus gentium,* and *jus civile.* The principle of the continuity of law received probably its most complete and refined statement in the thought of THOMAS AQUINAS, where it was systematically expounded in terms of the four types of eternal law, Natural Law, Divine Law, and human law. It played an influential part in the development of international law at the hands of GROTIUS and PUFENDORF. And it had a central place in the thought of JOHN LOCKE, both in its classical form and in the modern guise of Natural Rights. Through the American disciples of LOCKE, this principle was given a prominent role in our own legal thought and practice. Finally, this notion of the continuity of law can readily be seen to have a necessary

and important place in all of the varied doctrines of historical and sociological jurisprudence, with their emphasis on the derivation of positive law from some prior factors.

The wide occurence of this principle in legal thought can best be exhibited by quotations from a few jurists of varying persuasions; and this will at the same time display its essential content. AQUINAS spoke for centuries when he said that "Law is a measure and rule of acts".[1] And he elaborated in these terms, adopted from TULLY: "justice has its source in nature; thence certain things came into custom by reason of their utility; afterwards these things which emanated from nature, and were approved by custom, were sanctioned by fear and reverence for the law".[2] BLACKSTONE speaks in similarly broad terms: "Law, in its most general and comprehensive sense, signifies a rule of action; and is applied indiscriminately to all kinds of actions, whether animate or inanimate, rational or irrational. Thus, we say, the laws of motion, of gravitation, of optice, of mechanics, as well as the laws of nature and of nations".[3] MONTESQUIEU states the same idea with a somewhat different emphasis: "Laws, in the widest signification of the term, are the necessary relations that derive from the natures of things; and in this sense, all things have their laws".[4] HOOKER embodies this principle in a theological form when he says that "the being of God is a kind of law to His working";[5] and so he terms "any kind of rule or canon, whereby actions are framed, a law".[6] JOHN AUSTIN employs this same principle in his insistence that positive laws are related by resemblance to the laws of God and the rules of positive morality; and he devotes very much of his "Province of Jurisprudence Determined" to the elucidation of this theme. Finally, for contemporary echoes of this principle, I will cite two of our greatest jurists, Justices CARDOZA and HOLMES. CARDOZA is particularly explicit on this point for a modern, so I will quote him at some lenght: in *The Growth of the Law* he puts it thus: "When there is such a degree of probability as to lead to a reasonable assurance that a given conclusion ought to be and will be embodied in a judgment, we speak of the conclusion as law, though the judgment has

1) *Summa Theol.*, I, II, 90, 1.
2) *Ibid.* I, II, 91, 3.
3) 1 *Comm.* 38.
4) *L'Esprit des Lois*, 1.
5) *Ecclesiastical Polity*, I, ii, 2.
6) *Ibid.*, I, iii, 1.

not yet been rendered . . . I think it is interesting to reflect that such a use of the term law strengthens the analogy between the law which is the concern of jurisprudence, and those principles of order, the natural or moral laws, which are the concern of natural or moral science . . . If once I figured the two families as distant kinsmen, tracing their lines perhaps to a common ancestor, but so remotely and obscurely that the call of blood might be ignored, I have now arrived at the belief that they are cousins german, if not brothers . . . The study of law is thus seen to be the study of principles of order revealing themselves in uniformities of antecedents and consequences . . . As in the processes of nature, we give the name of law to uniformity of succession".[7] HOLMES puts the matter more succinctly and enigmatically, in the closing sentences of his famous essay, "The Path of the Law": "The remoter and more general aspects of the law are those which give it universal interest. It is through them that you not only become a great master in your calling, but connect your subject with the universe and catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law".[8]

I have not cited these voices of the past and present merely for their interest to the antiquarian. I have more than this in mind. For I would argue that roughly since the time of AQUINAS the principle of the continuity of law has been undergoing a steady attenuation, both intellectually and practically; and I hope that even these brief and scattered quotations will attest this decline. Once this principle was taken very seriously, was explored with care, and was employed as a guide in the development of legal doctrine. More recently, the service paid it comes not from the mind, but only from the heart and the lips. Or, what is worse, the principle is merely appealed to when convenient to buttress conclusion otherwise arrived at. And finally there arises a strong current of opinion to the effect that no significant continuity exists between positive or civil law and other kinds of law. This view is sharply developed in one of the most influential of modern texts - SALMOND's *Jurisprudence*, which went through ten editions between 1902 and 1947. SALMOND introduces his treatment of this question by distinguishing eight kinds of law: Imperative, Physical or Scientific, Natural or Moral, Conventional, Customary, Practical or Technical, International, and Civil (positive). He explicitly insists that this list is a "simple enumeration" of the kinds of

7) *Op. cit.*, at pp. 33-40.

8) 10 *Harvard L. R.* 457 (1897).

law, not a "logical scheme of division or classification"; and he strongly implies that to search for this latter is to tilt at windmills. SALMOND's general position is well summarized in his conclusion that "the relation between the physical laws of inanimate nature and the moral or civil laws by which men are ruled has been reduced . . . to one of remote analogy".[9]

Now, I frankly deplore this radical break with earlier modes of thought, and regard it as constituting a serious lacuna for legal thought. Simply as a matter of logic, I think it is a shirking of one's intellectual responsibility to proclaim that a principle is of central importance, and then to ignore it. Further, this view, if followed seriously, would isolate man and the legal order from the rest of nature. Finally, I think that it deprives the law of light and sustenance that it badly needs. It is for these reasons that I would try to return to the great tradition, and see if the principle of the continuity of law can be revived by having a more contemporary meaning poured into it.

II.

My thesis commits me to the view that the concept 'law' has a single general meaning that it always keeps, and that remains the same through all of the qualificatives that we attach to it. Or, to state the point more objectively, there is an essential characteristic and function that all laws share. This generic meaning can be briefly stated: *Law is a principle of order.* I have, in a recent article[10] explored this idea at length, seeking first to establish that it is indeed a postulate of jural thought, and then undertaking a careful analysis of the concept of 'order'. So I shall not labor these points, but shall refer to the numerous citations given in that article to establish the claim that the notion of law as a principle of order is pervasive in legal thought: several of the quotations given above contain this view, which is anyway already familiar (I suppose its most striking occurrence is in the virtual identity of meaning that we feel in the common phrase, "law and order"). Furthermore, I am on this occasion content to accept 'order' as a primitive term, which is the treatment usually accorded it: order is regarded as beyond definition, but as fortunately not needing this because its meaning is clear and familiar. So I

9) *Op. cit.*, pp. 20, 26.

10) IREDELL JENKINS: "The Matrix of Positive Law", *Natural Law Forum*, Vol. 6 (1961), pp. 1-50.

shall merely summarize the content that is commonly attached to the term.

Most elementally, the concept of order announces our discovery of pattern and regularity, of stability and continuity, in our surroundings. It refers to the web of relations that we find connecting discrete objects and occurrences. Order indicates similarities of nature among things and uniformities of sequence among events. To say that 'order holds' is to say that we are in the presence of a systematic structure, the parts of which follow established courses and hang together as a whole. Disorder conveys the opposite of all this: it means that the natures of things are variable, their behavior arbitrary, the course of events erratic, and the structure of the whole field amorphous and unstable. This is the general meaning we have in mind whenever we use the terms 'order' and 'disorder' whether we are referring to a person's private life, a marital relationship, a human community, the arrangement of furniture in a house, the movements of the planets, the conduct of government, or the schedule on which trains run.

This much being accepted, a further question arises. What is meant by saying that law *is a principle of* order? What is the relation of "law" to "order"? How are "laws" connected with the "orders" of which they are principles? This question goes to the heart of my inquiry; and unfortunately it permits of no simple answer, but requires a complex one. There clearly are different kinds of law, as witness the list given earlier. Just as clearly, we do not think of all these laws as standing on the same footing, either in themselves or in relationship to the orders to which they refer. We recognize laws of personal health and public sanitation, of moral responsibility and contractual obligation, of learning and school attendance, of genetic heredity and legal inheritance, of pre-natal development and post-natal duties. But we certainly feel that these laws are differently related to their phenomenal fields: that they have different statuses, serve different functions, operate in different ways, and are differently compelling. As my main thesis indicates, I think that we exaggerate these distinctions, and make them too sharp. But this point must wait. For differences of some sort are present here, and these must be clarified separately before we can trace the continuity between them.

This task can be broached most simply through a classification of laws. I would argue that there are three fundamental modes of law: Expository, Prescriptive, and Normative. These categories embrace all laws whatsoever. The descriptions now to be given of these modes of law, and the distinctions to be drawn between them, are too rigid to be faithful to the

facts: they are tainted with the artificial. This is a temporary sacrifice to clarity, and will shortly be repaired with the qualifications that truth in its turn requires. For the moment, I am describing abstract types of law rather than actually operative laws.

Expository laws describe an *actual* order of things and events. We think of them as reflecting a state-of-affairs that is established and self-sustaining. The characteristics of objects and the course of happenings that they report appear to be imvariant and pre-determined. Typical cases of laws of this mode are what we call scientific laws or laws of nature: for example, the laws of gravitation and acceleration, of molecular structure, of genetic and chromosal recombination, of good and bad money, of instinct and learning. We usually regard such laws as expounding an order that is prior to and independent of the laws themselves: they embody and depict what is, but they do not determine or create or maintain this. Expository laws describe how things are ordered; they consecrate what we accept as fact.

Normative laws describe an *ideal* order of things and events. We think of them as defining a state-of-affairs that should be but is not yet, and that commands our efforts in its behalf. Such laws depict standards to which the characteristics and conduct of things ought to conform. Typical cases of this mode are what we call the Moral Law, Divine Law, and Natural Law. More specific examples are the laws of proportion, of harmony, of legal and business ethics. The stereotypes, ambitions, and heroes that we hold before the young are covert normative laws: they are implicit descriptions of happiness, virtue, blessedness, or success. Political declarations and constitutions have much this same character. Such laws expound an order that represents the perfect completion and realization of tendencies which, if left to themselves in this world, often go astray or meet frustration. Normative laws describe how things should be ordered; they consecrate what we accept as value.

Prescriptive laws describe the *passage* from the actual to the ideal order. We think of them as expounding the most effective methods for transforming *what is* into *what ought to be.* They trace the courses that we should follow if we are to attain our goals. Obvious examples of this kind are the laws of eugenics, of bodily and mental health, of plant propagation and cultivation, of musical and dramatic composition, of industrial organization, of financial investment, of animal breeding, of traffic control. Prescriptive laws occur in two sub-types: advisory and imperative. The former assume that those to whom they are addressed have

certain goals, and they recommend ways to achieve these: their sanction is merely the succuss or failure that will follow upon their acceptance or rejection. Prescriptive-imperative laws command some patterns of conduct, and prohibit others, on the ground that these observances are necessary to some valuable goal, but are apt to be challenged by individuals, either because they reject the goal in question or resent the efforts and restrictions it demands. These sub-types are not sharply separate: they merge into one another, and the form of a law often changes - in either direction - while its content remains constant. Prescriptive laws describe how things can be ordered as they should be: they consecrate what we accept as the prudential.

I must now introduce the qualifications that this analysis requires. These are simple but sweeping:

1. There are no such things as Expository, Normative, and Prescriptive laws.
2. Rather, every law is a synthesis of these abstract types, and partakes of the characteristics of each of them.

The context to which I am anxious to apply this doctrine is that of man - of human nature and society. And the kind of law with which I am chiefly concerned is positive or civil. But if these matters are to be dealt with adequately, there must first be a reference to broader areas and more basic issues. For the continuity of law presupposes the continuity of nature or reality - that is, of the various orders of which laws are principles. I shall treat these essential but extraneous matters as briefly as possible: indeed, the ground here is so uncertain that I shall almost hope to be enigmatic.

We can begin with the proposition that every law is at once Expository, Normative, and Prescriptive. When we take this notion seriously, it means that every law refers to an order - a state of affairs and a pattern of events - that is at once actual, ideal, and in transition between these two. That is, every law reflects the ways in which things are presently behaving, the ends to which these things are tending, and the steps they are taking to effect this passage. Given our common understanding of many of the contexts of reality, and of the laws appropriate to them, these entailments must appear ridiculous. What causes much of the trouble here is our habit of thinking the world in a quaint mixture of mechanistic and theological terms. We regard physical reality as quite passive and inert, with no inherent capacities or inclinations of its own, and as acting in accord with laws that are somehow imposed on it from

without: wether by God, nature, necessity, or our own thought. On these terms, to ascribe Normative and Prescriptive elements to most laws is absurd.

But we now know that this view of even physical reality is inadequate. All things are ingredient with energy, they act out of the needs and resources of their own natures, and they have careers through which they exert and express themselves. All things - from atoms to men - fall under certain necessities: they are bound by their own limitations and by the pressures of other things.But all things also face certain possibilities: the world offers them alternatives which their initiative seizes, so that variation and origination are continual in nature. Finally, all things exploit these possibilities in a manner that is consonant with their inherent orientation and appropriate to their fuller development, or realization. These conclusions are logically inescapable, in the light of modern knowledge. Genetic mutations and quantum phenomena are but spectacular manifestations of what is everywhere the case: that things are as much their histories as their natures, their existences as their essences.

This recognition entails a corresponding change in our view of scientific laws or laws of nature - the prime examples of what I have called Expository laws. These laws must now be interpreted as reflections of the ways in which things express themselves, pursue their careers, and realize their potentialities. Here two points must be emphasized. First, things do not follow invariant and predetermined courses that are imposed on them by some extraneous power: they fashion their own courses, though of course not autonomously or in isolation. Second, the existences - the total behavior - of things have real meaning, in this sense that through their existences things become what they were not. At their beginnings, things are more potentially than they yet are actually; and their natures dispose them to the actions that will realize this potentiality.

If we bear these points in mind, then it is apparent that every Expository law has its Normative and Prescriptive elements. Scientific laws - the laws of mechanics, of gases, of quanta, of genetics, of plant physiology, of animal behavior, of psychological conditioning, of social movement - are certainly and even predominantly Expository, in that they describe an actual order that is well-established and self-pertetuating. Such laws refer to states-of-affairs and courses of events that are highly uniform, regular, and repetitive, with only minor variations and deviations. But these laws also have a Normative aspect: they describe an ideal order that expresses the potentialities of things and depicts their appropriate

realizations. That is, these laws embody the outcomes that things seek and the states to which they tend. Finally, such laws have a Prescriptive character in that they describe the courses of becoming through which things develop and realize their potentials; that is, they depict the passage through time by which things at once exhaust and complete themselves. If we remember that things are not subject to fate, but work out their own destinies, then we can recognize that these laws represent the paths that things explore, the spontaneous adventures they undertake, as they live out their existences. It is virtually impossible to frame zoological and biological laws without reference to these Normative and Prescriptive factors of outcome and tendency; if I understand the matter rightly, it is now becoming difficult to do so for chemical and physical laws. We are being forced to recognize that throughout nature things vary from the normal and originate the novel: initiative, change, and uncertainty are everywhere present. The order that holds throughout nature is at once settled, dynamic, and directed.

There is one further aspect of this matter that must be discussed briefly, for otherwise it might stand as a puzzle and impediment to understanding. We clearly think of Prescriptive laws, on the model of positive laws, as being proclaimed and sanctioned; and it appears impossible that anything like this could occur at all widely in nature. But when we treat these characteristics as essential to positive law, we are being led astray by the sophisticated notion that these laws are primarily enactments or decisions or commands that have been issued and inscribed: that is, we are falling into what is commonly called the vice of conceptualism. The prescriptive character of positive law resides eventually in the effects it produces: in the influence it exerts and the change it accomplishes in our behavior. The realists should surely have taught us that laws as legislative enactments or court orders are merely marks on paper. What counts is what people do under the stimulus of these marks. It is this doing - these modes of conduct - that constitute the prescriptive character of positive law. And there are all sorts of ways of stimulating things to act other than by marks on paper. Even the simplest things exercise this power by their effects upon their surroundings and their impingement on other things. I think the more fruitful analogy here is with the officer who comes upon a traffic jam, cuts off the signals, stations himself in the center of the inter-section, and with his whistle and his arms directs the movements of vehicles. All things behave similarly whenever they appear upon the scene, exerting an

influence beyond themselves. That is, things announce and enforce prescriptive laws - they serve as their own sheriff and bailiff - merely by their presence.

This metaphysical excursus has been at once too long an interruption and too fragmentary an account. Let me at least draw its lessons explicitly. I am anxious to give persuasive power to the principle of the continuity of law: to lend an air of sweet reasonableness to the claim that all laws are at once Expository, Normative, and Prescriptive. I am especially anxious to establish these truths as applicable to positive law. But the validity of these propositions in that limited domain must remain tenuous unless it can be shown that they are deeply rooted in the structure of reality. That explains the preceding effort. The outcome it is intended to reach can be briefly stated. Every law reflects an order that is already established, an order that is being sought, and an orderly passage beween these. Every law consecrates an actual achievement, an ideal quest, and a persistent effort. Every law embodies a perpetuation of the past, an anticipation of the future, and an exploration of the present[11].

III.

We can now apply this doctrine to the specific field of positive law. At the threshold of this effort we come upon two massive facts: Positive law is both a *human* and an *historical* phenomenon. It does not occur beyond the human context. Order certainly prevails in these other regions of nature: within the spheres of what we call the inorganic, the organic, the vital, and even the psychic but sub-human. But just as certainly this order is established and maintained by other factors than positive law. Furthermore, positive law - at least in an institutional sense - is a relatively late occurrence even within the human context. It arises and develops in time. We have clear evidence of human groups in which such law is present in only a rudimentary form; and we have good reason to believe that there have been groups in which there existed nothing even vaguely its equivalent.

All of this suggests that positive law is a supplemental principle of order that arises in the human context when other forces and agencies -

11) I have discussed in detail, in an earlier paper, this problem of the different types of order that hold in various regions of nature and the different types of laws that one consequently finds. Cf. IREDELL JENKINS, "The Modes of Law", in *Experience, Existence, and The Good*, edited by IRWIN C. LIEB: Southern Illinois University Press, 1961; pp. 192-212.

operating through other modes of law - prove inadequate to the conditions and the challenge that man faces. Positive law is an instrument that man devices, forging it out of cruder material, and then employs to achieve a kind and degree of order that would otherwise escape him. I have elsewhere developed this thesis in detail, and I will now make only a brief appeal to history to lend it substance[12]). Here we are on familiar ground. For there is wide agreement, at least in general terms, regarding the course of change that elicits positive law: this resides in the transition from primitivism to civilization. These conditions cannot be sharply defined or distinguished, for this transformation is gradual: but they can be satisfactorily, if roughly, identified.

Under primitivism the human group is tightly knit, unilaterally organized, and cohesive. Individual differences of status, function, training, opportunity, and achievement are relatively slight. The margin of safety with respect to the environment - the human control of the physical surround - is small, so that the way of life is largely dictated by the pressure of external circumstances. Conformity and cocperation are required for survival. Under these conditions, *what actually is* tends to become identified with both *what must be* and *what ought to be*. Order is maintained within the group by a complex of forces and agencies: instinct, habit, custom, training, imitation, tradition, the feeling of reciprocity, natural necessity, emotional ties, the sense of personal obligation, moral sentiments, the urge for acceptance and respect, religious influences, and others. These have been variously interpreted and emphasized by different investigators. But all agree that primitive groups tend to be homogenuous, to be dominated by personal relationship, and to be characterized by a strong felt solidarity.

The disruption of primitive conditions, and the trend toward civilization, is a complex and gradual process, involving changes on three levels. Physically, groups grow in size, they advance technologically, they attain a larger control of the enviroment and a greater measure of safety, they come into contact with other groups. Socially, group structure becomes complex, sub-groups arise, functional specialization and differences of status become greater, competition for material goods increases, heterogeneity spreads, special interests arise and conflict. Psychologically, self-consciousness and self-assertiveness increase, men envisage their private interests as distinct from those of the group, they form associations.

12) Cf. the articles cited supra notes 10 and 11.

These changes take place gradually, concurrently, reciprocally, and cumulatively. Just where within this process positive law emerges can be determined only in the loosest way, and then largely by arbitrary definition. But it seems clear that the process that we later recognize as leading to law exhibits from its inception two tendencies: there are definite arrangements for the use of the organized force of the group; and there are explicit rules as to when this force is to be invoked and how it is to be employed.

When we first discern the germ that is to grow into positive law, this seems to consist primarily in a technique for effecting a reconciliation between men who have been estranged by some act or occurrence. The rules that define who and what is "right" or "wrong", as well as the agents of decision and enforcement, hover very much in the background. In this sense, the first recognizable legal figure is not the legislator, not the executive or Sovereign, and not even the judge, but rather the lawyer. He appears in the guise of the mediator and negociator: he is the "runner" or "go-between" of the California tribes, the Ifugao in the Phillipines, the Ashanti on the Gold Coast. Both the function and the power of this figure are largely persuasive. He lacks organized force, and there is no code to which he can appeal: behind him there stand only the tacit support of the group and established usage.

When positive law in an institutional sense emerges, with its twin facets of force and form, it largely inherits the status and character of the go-between. As the transition from primitivism to civilization proceeds, there is an increase both in disagreements among individuals and in defiance of group decisions and interests by individuals. That is, disorder in this double sense threatens. In its first appearance, the function of positive law is to prevent or restrain this disorder: it seeks to repair and maintain the fabric of group life. It does this chiefly by reiterating and preserving the order that has been. The content of such law comes from established ways and usage: it asserts itself as merely an additional agent - or sanction - by which these are to be kept effective. In law at this stage, what predominates is its Expository character, with its Normative and Prescriptive elements altogether in the background, though already certainly present: its ambition is to reflect and maintain an actual order. There is little thought of either an end-in-view or a process of transformation to be guided by prudence. Such law is retrospective rather than prospective. Its norms, such as they are, are the normal. And

what it prescribes is merely the maitainance of the *status quo*. This is law in its conservative function, seeking to perpetuate what the past has achieved.

But the movement toward civilization cannot be contained. Differentiation and variation proceed; initiative intensifies; social life becomes more open and fluid, both in fact and in man's desire. The disruption of the established order is now seen not as a threat and a calamity, but as an opportunity and a challenge. Under these circumstances, the function of positive law is to prevent the old order from stifling and frustrating the new forces that are moving toward a different future: it seeks to encourage change and protect enterprise. Law now becomes predominantly Prescriptive, with its Expository and Normative features kept at the periphery of its activity. If this seems a strange characterization of Prescriptive law, that is because we tend to identify the prescriptive with the imperative. But as I have argued earlier - and etymology bears me out - a prescription is fundamentally a laying out of a course of action designed to procure certain results. And in saying that positive law at this stage is primarily prescreptive, I mean that it prescribes - it announces rules and patterns of behavior - with relatively slight attention to either the actual order that surrounds it or the ideal order that this seeks. Of course this neglect is not absolute: it would be absurd or even impossible to prescribe courses of action without some regard for both existent circumstances and ends-in-view. But this regard from positive law can and sometimes does become systematically uncritical and casual. Its norms then are merely such amorphous futurities as Progress, Liberty, Enterprise, Expansion, the General Welfare and Individual. Well-being. And it is content to preserve a pattern of order that is minimal, general, and vague; it leaves the details of individual and social life largely indeterminate and at the disposal of other forces. Equally of course, such law has an imperative element: in bestowing rights it imposes duties and sanctions. But these are incidental. What positive law seeks when it is dominantly prescriptive is to define a framework within which human nature and conduct can be unmolested. One might put this by saying that law becomes primarily procedural, leaving it to other forces to supply substantive Expository and Normative content. Or one might better say that what such law prescribes is quite simply the form of freedom. This is law in its liberalizing function, seeking to explore and exploit the present.

Positive law becomes fully mature when it consciously assumes the Normative task. Where the rule of law becomes too exclusively prescriptive - in the sense just defined - tension, inefficiency, and injustice come to mar the human scene. If energies are left undirected, and goals are ill-defined, then men's efforts are dispersed and erratic. Under these conditions, man calls upon positive law to intervene purposively and systematically in the course of events. The major function of law now becomes that of defining and executing policy: its task is to give form, content, and direction to society. If law does not actually propose and fashion the ideal ends it is to serve - and it is usually most reluctant to admit that it does - at least it decides among those submitted to it. And the difference is not great. In the light of these norms, law then devises means to transform the actual order. This is positive law in its constructive function, seeking to anticipate and prepare the future. Positive law here undertakes to compose and create - to expound and prescribe - an ideal order.

The preceding account is probably closer to an abstract schema than to actual history. But I think it is generally faithful to the course of legal development, and that within this we can discern a persistent movement toward a double culmination. First, law becomes a more powerful and pervasive human force. Second, law becomes a more consciously and purposefully directive agent.

Positive law is certainly not, even now, the only "principle of order" that operates in society. It shares this role with a horde of other natural forces and human institutions: instinct, habit, custom, tradition, morality, religion, education, technology, science, art, economic and industrial organizations, and others. That is, law is a part of culture. But it is a commonplace that law has steadily extended its reach, until now it is probably the dominant principle of social order. Other institutions have been losing influence: this is clearly true of religion, tradition, the family, the community, and even, I think, education, which seems to be so prominent. For education, I should say, is going through a phase in which it conceives its role in primarily prescriptive terms: it is reluctant to either inculcate a way of life or define a set of values, and self-consciously confines itself to equipping men with skills and trainings that it leaves to them to use as they see fit. As these forces have declined, law has largely filled the place they leave vacant.

In closing this phase of the discussion, it must be emphasized that as positive law grows and assumes new functions, it still retains its old ones. In becoming constructive, law does not escape the responsibilities of its earlier conservative and liberalizing stages. If we speak of legal activity rather than of law, this point can perhaps be made more realistically. Legal activity is always exerted upon an actual order, directed toward an ideal order, and effected through orderly processes. So such activity must be sensitive alike to ends, to means, and to actualities.

IV.

There is one final topic that requires a word, partly for its own sake and partly for the light it can shed on what has gone before. It is abundantly evident that what I have been expounding is a variety of Natural Law doctrine. At least in this minimal sense that positive law, which is essentially prescriptive, inevitably contains within itself normative and expository elements which inform its prescriptions and keep them appropriate to ends and actualities. I take it that every one who works with the law - except maybe HOLMES's famous bad man - is interested not only in what his chosen instrument (or profession) actually does, but also in what it should do and in how it can do this more effectively. Indeed these three interests are so closely merged that what probably shocks lawyers and jurists is the sheer artificiality of an analysis that separates them and treats them as different "modes" of law. But such an analysis is necessary, for otherwise there is danger that the prescriptions of law will be issued without a proper regard for the actualities law serves or the values it seek.

Now, it is a familiar fact that the phrase "Natural Law" is repugnant to many in the legal profession. This fact has always puzzled me, for it seems to me that the claims I have just made express the essence of Natural Law, and that these claims are self-evidently true. After much thought upon this matter, I now think that I can disentangle its etiology and can see why lawyers have this reaction.

I would suggest that there are two prevalent notions regarding Natural Law doctrine that are responsible for its rejection.

First, the idea that Natural Law constitutes a set of principles and directives that are categorical, absolute, unalterable, complete, and certain.

Second, the idea that Natural Law is a body of doctrine that exists altogether prior to and independent of positive law, upon which latter it imposes itself as an alien and superior authority.

I do not think that these two tenets have been held by any of the outstanding adherents of Natural Law, from ARISTOTLE, through the Stoics, CICERO and the Roman jurist, AQUINAS, to such contemporary figures as KOHLER, STAMMLER, DEL VECCHIO, GENY, CHARMONT, ROMMEN, D'ENTREVES, or FULLER and NORTHROP. Though it must certainly be acknowledged that a doctrine of this kind has often been appealed to be both rulers and judges in order to support edicts or decisions for which they could find no ground in custom, law, or common justice.At all events, I would hope that the rejection of these tenets is implicit in the ideas I have proposed. But I would like to be quite explicit on the point, especially as these doubts raise issues that are central to my thesis of the continuity of law.

First, the notion that Natural Law impinges upon positive law as a doctrine that is already complete and categorical, so that it determines before the event what the proper course of action is: what the legislator, the judge, or the executive should do. The repudiation of this should be clear from the earlier account of the Prescriptive element of law, which is always present, and usually dominant, in positive law. I have argued that it is of the essence of Prescriptive laws, in whatever guise they occur and whatever context they operate, that they reflect the forward thrust of becoming. These laws embody the self-transforming power of reality: the adventures in which things engage and the explorations they undertake. In the human context, it is through prescriptive laws, of every sort and in all of the domains of liefe, that man creates his future. So the courses of action that positive law recommends and imposes always represent a quest and an experiment: they constitute a process of finding one's way. Certainly these courses of action are rooted in known actualities; and certainly they are directed toward pre-conceived goals. But just as certainly these actualities are elastic and these goals are tentative. Of course, we often forget these truths: which heightens the importance of positive law, and also its burden. Both Expository and Normative laws tend to assume the guise of permanence: the "is" of fact and the "ought to be" of value are equally peremptory and final. Only Prescriptive laws are always hypothetical - even when cast in the imperative mood - reflecting a condition that is free of the past, fluid in the present, and provisional as to the future. So positive law must be continually charting its course anew, as it learns more of its present surroundings, its future ends, and its own effectiveness. For there are no absolutes and no

certainties, either Expository or Normative, either factual or ideal, upon which positive law can rely.

This discussion leads directly to the second notion mentioned above: that Natural Law is a separate and independent body of sources and principles, which positive law has to acknowledge and implement. The insistence that positive law is at once Expository, Normative, and Prescriptive contains my repudiation of this error - and, I would hope to be able to say, its refutation. Positive law is not an inert set of rules by which other and more dynamic forces are regulated; it is not a series of directives marking a path has been already cut and smoothed by other agencies. These are important but nonetheless incidental features of law: devices through which it asserts itself. More basically and really than this, positive law is a force and a process: an institutionalized way of applying pressure in order to get things done. As such, positive law - more accurately, legal activity - has to impinge directly upon all three of the regions with which it is concerned. It has to make its own estimate of the actual - of the human and social milieu - and of the possibilities, limitations, and tendencies that it presents. It has to form its own interpretation of the ideal - of the values it is to further. And it has to develop and apply its own techniques for effecting the transformation of the actual toward the ideal.

It is evident that in the performance of these tasks positive law seeks all the advice and assinstance it can get from other sources: from religion, philosophy, morality, history, sociology, psychology, economics, and any other disciplines that can promise it help. But this advice can only serve as a basis from which positive law is to form its own conclusions and come to its own decisions.

I would even be inclined to think that in this matter positive law is the victim of a Freudian slip: it protests so vehemently against being relegated to a subservient and derivative role just because in fact it so often adopts the parts of its own accord. That is, positive law has often been far too casual and uncritical in its acceptance of extraneous authority: it has relied upon estimates of the actual and evaluations of the ideal without submitting them to the scrutiny they require. The sources to which law has abdicated its functions have varied with time and fashion: the revealed truths of religion; the elf-evident truths of reason; the empirically established truths of the social sciences; the compelling truths of political and economic power; the simple truths of common-sense; the unchallengeable truths of history and the challenging truths of the future.

I do not mean to impugn these truths or their sources. Each has its sphere and its significance, and each makes its contribution. So positive law should acknowledge and use them; but it should not submit to them passively. As law achieves a higher place in the respect of men, and a larger role in fashioning their lives, it must accept commensurate responsibilities. It cannot evade these by alternately pleading its incompetence and asserting its power, as suits its fancy. It has become a dominant directive force, so it must explicitly assume the Expository and Normative functions, as well as the more accustomed Prescriptive role. That is, it must make its own estimate of the actualities it confronts and the values it accepts. It is only in this way that the content of its prescriptions - what we call its imperatives - can be made appropriate to man's final good and effective in man's present behavior. Legal activity is now probably the most forceful agency in mediating the actual and the ideal: the responsibility for the human career, as it moves between these, lies more and more largely in its hands. So it must generate institutions and processes that can guarantee the continuity of law that is required for the continuity of life.

IREDELL JENKINS

La genèse du droit positif

Résumé

Ici il est question des rapports entre le droit positif ou la loi civile *(positive or civil law)* et d'autres lois. Le mot «loi» a bien des sens: on parle de la loi naturelle et des lois de la nature, la loi divine, la loi morale, la loi civile, les lois de pesanteur, de guerre, de jeu. Cet article préconise alors *la continuité de la loi.* Je maintiens qu'il y a un sens commun dans tous les emplois du terme «loi», qu'il existe parmi toutes les lois une continuité de caractère et de fonction. La plupart des théoriciens classiques ont soutenu cette thèse, aujourd'hui reniée ou négligée par la pensée juridique contemporaine. Cet article plaide pour un retour à cette grande tradition et pour un revivrement de ce principe.

Je propose, pour postulat de base, que toutes les lois sont des *principes de l'ordre.* L' idée générale de l'ordre même conçoit une similarité dans la nature des choses aussi bien qu'une uniformité dans la suite d'événements; «l'ordre» indique l'existence de dessein; de regularité, de solidarité et de cohérence dans notre milieu. Toutes les lois se rapportent à l'ordre, mais

non pas de la même façon. Dans leurs domaines aperceptibles les lois, soit de responsabilité morale et d'obligation contractuelle, soit d'hérédité génétique et juridique, s'occupent évidemment des conditions et des fonctions bien différentes.

Pour éclaircir ces différences; il faut diviser ces lois en trois groupes ou modes fondamentaux: *les lois expositives,* qui décrivent l'ordre véritable (matériel) des choses et des événements; *les lois normatives,* qui décrivent l' ordre idéal des choses et des événements; et *les lois prescriptibles* qui décrivent la manière de mieux effectuer le passage entre le vrai (le matériel) et l'idéal.

On dit ensuite que ces modes ne sont que des abstractions: toute loi matérielle est une synthèse de ces types ou genres mentionnés ci-dessus; toute loi partage les caractères de chaque genre. La loi positive doit donc se montrer utile à ces trois fonctions: l'Expositif, le Normatif, le Prescriptible. Pour bien soutenir cet argument on fait appel à l'origine historique et au développement du droit positif. Finalement, on utilise cette analyse pour définir systématiquement les desseins qui doivent servir tout droit civil.

IREDELL JENKINS

Die Genesis des Positiven Rechts

Zusammenfassung

Es wird hier die Frage nach den Beziehungen zwischen dem *positiven Gesetz (oder civil law)* und den anderen Gesetzen erörtert. Das Wort „Gesetz" hat mehrfachen Sinn: Man spricht von dem natürlichen Gesetz und Gesetzen der Natur, dem göttlichen Gesetz, dem moralischen Gesetz, dem Zivilgesetz, den Gesetzen der Schwere, des Krieges und des Spiels. Dieser Artikel behauptet nun den inneren Zusammenhang dieser Begriffe, d. h., *die Kontinuität des Gesetzes.* Der Verfasser ist also der Ansicht, daß es einen gemeinsamen Sinn in allen Verwendungen des Ausdruckes „Gesetz" gibt, oder daß zwischen allen Gesetzen eine Kontinuität des Charakters und der Funktion besteht. Die Mehrheit der klassischen Theoretiker haben diese These vertreten, die heute vom gegenwärtigen juridischen Denken geleugnet oder vernachlässigt wird. Der vorliegende Artikel plädiert für eine Rückkehr zu dieser großen Tradition und für eine Wiederbelebung des genannten Grundsatzes.

Der Verfasser setzt als Grundpostulat voraus, daß alle Gesetze *Prinzipien der Ordnung* sind. Die allgemeine Idee der Ordnung selbst begreift eine Ähnlichkeit in der Natur der Sachen ebenso wie eine Gleichförmigkeit in der Folge der Ereignisse; „die Ordnung" zeigt das Vorhandensein des Zweckes, der Regelmäßigkeit, der Gemeinsamkeit, des Zusammenhanges in unserem Milieu. Alle Gesetze beziehen sich auf die Ordnung, aber nicht in derselben Weise. Auf ihren Anwendungsgebieten befassen sie sich vielmehr, sei es als Gesetze der moralischen Verantwortlichkeit und der vertraglichen Verpflichtung, sei es als Gesetze der genetischen und juridischen Erblichkeit, offensichtlich mit sehr verschiedenen Bedingungen und Funktionen.

Um diese Verschiedenheiten abzuklären, wird es nötig sein, diese Gesetze in drei Gruppen oder Grundarten einzuteilen: *die expositiven Gesetze,* welche die wirkliche (materiell vorhandene) Ordnung der Dinge und Ereignisse beschreiben; *die normativen Gesetze,* welche die ideale Ordnung der Dinge und der Ereignisse beschreiben; und *die präskriptiblen Gesetze,* die die Art beschreiben, zwischen Wirklichkeit und Ideal den besten Weg zu finden.

Es wird alsdann ausgeführt, daß die gezeigten Gesetzesarten nur Abstraktionen sind: jedes materielle Gesetz ist eine Synthese von den oben erwähnten Typen; jedes Gesetz nimmt Anteil am Charakter eines jeden Typs. Infolgedessen muß das positive Gesetz sich diesen drei Funktionen nützlich erweisen: also der expositiven, der normativen und der präskriptiblen Funktion. Um hierfür den Beweis zu liefern, wird auf den geschichtlichen Ursprung und auf die Entwicklung des positiven Rechts Bezug genommen. Schließlich wird die angestellte Analyse dazu benutzt, um systematisch die Zwecke zu bestimmen, die jedem Zivilrecht dienen müssen.