II
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I have spoken of the rôle of religion in the reorganization of society in the later Middle Ages, when a stable legal order replaced the anarchy of the centuries following the downfall of the empire in the west. A new era of reorganization supervenes following the Reformation. It would be more true to call each an era of organization. No doubt in one aspect it is possible to think of the Reformation on a destructive side. But following the decay of the relationally organized society of the Middle Ages, society was gradually reorganized by organizing it on the basis of the free individual carving out his place in the world for himself, and exerting his will actively in all directions to acquire in competition with his fellows. In this era, too, religion shaped the ideal to which men adjusted relations and ordered conduct for at least three centuries to come.

Many causes were behind this social reorganization and the new legal order that grew out of it. On the economic side there was the discovery of the new world and the opportunities thus afforded men of finding new places for themselves and pursuing new activities, of exploiting natural resources in new domains, or of pursuing an expanding and constantly widening trade and commerce. On the cultural side there was the boundless faith in reason that came in with the Renaissance and led presently to a like boundless faith in individual reason. Out of this came the doctrine of individual free interpretation of authority, leading on the political side
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to the Whig dogma of the right of revolution, and on the religious side to non-conformity. The individual man as the moral unit became the unit for religious organization and thence the legal unit. An ideal of men in relation was replaced by an ideal of men freely asserting themselves in a society organized on the basis of independent individuals.

We are inquiring about a powerful element in the background of social control. In part, no doubt, this background is a matter of habits or tendencies formed or acquired in our formative years, and the systems which operate in this background—religion, home influence, ethical custom, the sentiment of our neighbors as to things which are done and things which are not done—have to do with giving direction to these tendencies. But beyond this a decisive factor in our efforts to maintain, further, and transmit civilization is to be found in ideals, both generally received ideals and individual ideals, of social life and social institutions and social activities as they should be. Let us use a more concrete word. In their origin “idea” and “ideal” mean “picture.” Let us say picture. Let us say that in what we do individually and collectively we are guided sometimes consciously and many times, or in large part, unconsciously by a mental picture, more or less definite, of things as it seems to us they ought to be. Take the example that used to be put by the old-time philosophers. The old-time smith has his tools and a piece of steel. Also he has in his mind the picture of a saw. He applies his tools to the steel and fashions it to the picture. Thus the picture is made real in the completed saw. It is true today we do not go to a blacksmith to have him make us a saw. We buy one at the hardware store. Yet the process is essentially the same; only a bit more complicated. Today the draftsman in the factory has a picture of the machinery which will make saws. He constructs blueprints
from his pictures of the machines and of the saw, and ma-
chines and saws are made to those pictures. The picture is
one degree further removed from the result. On every side
of human activity such pictures enter into everything that
we do.

What has just been said is especially true of the law. In
any complete view of the materials of decision one must not
fail to take account of the body of received ideals, quite as
authoritative as the precepts of the law themselves, which
determine the starting points of legal reasoning, the course of
that reasoning, and, indeed, often the whole process of what
we call interpretation and application. In English we have
the two words "right" and "law," where the languages of
Continental Europe have but one—droit, diritto, derecho.
Thus there is no conscious ethical element in the terminology
of English law and its derivatives. As Mr. Justice Holmes
put it, we have washed our terminology in cynical acid.
Nevertheless, the ethical element is there, not in the termi-
nology indeed, but in the body of authoritative materials of
determination, in the form of a definite body of received
ideals, as well established and quite as efficacious in the
results as the rules and principles we commonly think of as
making up the law. This body of ideals, handed down in the
law books, read by students, and taught consciously or un-
consciously by law teachers as part of the fundamenta of
legal thinking, is much more long-lived than particular rules
of law, and the ideals are much more far-reaching in their
results.

Here, in the past, has been the vital point of contact be-
tween law and religion. If the immediate ideals, the ideals
of this or that institution or of this or that particular phase
of social control are often no more than idealizings of fea-
tures of the actual legal system in which the particular jurist
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was trained and with which he is familiar, the ultimate ideal which gives shape to these, which governs in interpretation, in choice of analogies and starting points, and determines the application of standards, is or at least has been in the past fashioned to the religious ideas of the time and place. Very likely the realist thinker of today will seek to give us an economic interpretation of religion in this connection. Very likely, for example, he will tell us that it was the economic environment of the American pioneer in our formative era that made him a Puritan. But those who settled the new world were Puritans before they were pioneers.

It is important to notice four points of contact between law and morals, that is, four points at which the ideal element is controlling. The first of these is judicial finding of law, the supplying of rules for new cases or new phases of old cases, by the technique of development of rules out of the authoritative legal materials. This involves a choice of starting points for legal reasoning. It often involves a choice between competing analogies of equal authority with no authoritative precept to dictate the choice. The analogy which will yield a result in accord with the received ideals of the legal system is sure to be chosen. Again, there is a point of contact in interpretation, in ascertaining the meaning to be given to a particular legal precept. In a general way of putting it, the doctrine is that if the literal wording of a precept and the context do not yield a clear and satisfactory meaning, resort is to be had to the intrinsic merit of the several possible interpretations. But there is no rule telling when an interpretation is to be held satisfactory and no hard and fast measure of intrinsic merit of interpretations to be applied like a rule of law. Satisfactory means satisfactory to the sense of justice, ethically satisfactory. Intrinsic merit means intrinsic ethical merit. But these questions are not
for that reason wholly at large. The sense of justice, the feeling as to ethical merit are referred to the received, authoritative ideal of the legal and social order. Third, there is a point of contact in the application of standards, that is, of authoritative definings of limits of conduct within which one who is carrying on some course of conduct must confine himself or to which he must conform on peril of liability if he neglects or fails. There is a moral element in these standards, e.g., in such standards as due care in what one is doing so as not to cast an unreasonable risk of injury on others, or of fair conduct on the part of a fiduciary, or of fair competition in business. These standards are applied according to the circumstances of particular cases exactly as in case of a moral precept. Fourth, there is discretion. That is, some matters are expressly committed by the law to the personal opinion of the judge in the individual case. In cases left to his judicial discretion, he must be guided by principles in his exercise of the discretion. In cases left to his personal discretion, however, he is free to follow the dictates of his own conscience and judgment. Here, again, the only check upon his exercise of the power conferred on him is moral. In each of these four points of contact between law and morals the decisive factor in judicial determination is the ideal element in law. The background of judicial action is the received picture of an ideal social order. If it is to some extent an ideal picture of the existing social order, it is one which in the past was largely drawn by religion. The ideal element in a legal system requires a critique, requires defining and systematizing no less than the precept element. It is by furnishing this critique and providing a criterion of definition and system that religion has been a directing force in periods of transition from one social order to another in legal history.

Greek philosophers thought that the end of social control
was harmonious maintaining of the social *status quo*. They might first idealize the *status quo*. But given the ideal Greek city-state, the task of social control was to keep things as they were. Every man was to be assigned to the place in the social order for which he was best fitted and was to be held there. He was to be kept in his appointed groove so as to avoid friction with his fellows. Thus a perfect harmony and unity would characterize both the state and every one in it. This way of thinking grew out of the political conditions in the Greek city, the perennial contests between the oligarchies and the demos, and the chronic difficulties with ambitious men seeking to set up extra-legal dictatorships. The Roman jurists made this ideal of social control into an ideal of the legal order. There was a regime of adjusting relations and ordering conduct set up in order to assure a harmonious maintaining of the social *status quo*. Men were to be constrained to live honorably, not to injure others and to give to every one his due. For a time the Germanic peoples who invaded the empire brought back the primitive conception of merely keeping the peace, but the later Middle Ages accepted what was found in the Roman books, as something given by authority. To Thomas Aquinas, as to Cicero, to the classical Roman jurists, and to Justinian, the principle of justice is to give to every one his own as the social organization has determined it. This ideal was accepted as prescribed by authority. But it was eminently suited to a relationally organized society. The idea of securing to every one a maximum of free individual self-assertion, which came later, was not adapted to the Middle Ages.

At the Reformation, the main purpose of the Protestant jurist-theologians was to throw over the authority of the church and set up the authority of the state. Hence they insisted on a national instead of a universal law and on
replacing the universal empire of the Roman law and the
canon law by the civil law of each state. The legal system
was to rest on the authority of a divinely ordained state, not
on an authoritative universal law. This followed from the
break with authority which substituted private interpreta-
tion, each individual Christian for himself, for authoritative
universal interpretation by the church. The logical exi-
gencies of this demand for private interpretation led to a
claim of independence in politics no less than in creed and
led inevitably to the opposition of the abstract man to
society which reached its full development in juristic thought
in the eighteenth century.

Immediately it led to a transition from natural law, ideal
legal precepts discovered and demonstrated by reason, to
natural rights, ideal qualities of the ideal man, whereby he
ought to have certain things and be able freely to do certain
things, which the ideal system of precepts fully secured and
the positive law of each state must declare and maintain.
These natural rights were put by the Englishman and by the
English colonists in America as liberties. They steadfastly
claimed and declared liberties. Their first statute books were
called books of laws and liberties, and their bills of rights
were bills of liberties. Indeed, right and liberty seemed to
them inseparable. In each case we were thinking of the free-
willing man and his freedom to do what his conscience and
the word of God, as his reason interpreted it, told him it was
right that he should do. Natural rights are not popular
today. It has been said that the natural rights of man have
shown that they could be as tyrannous as the divine right of
kings. As they lost their ideal quality and came to be
thought of as authoritatively ascertained and delimited by
legal precepts and became a sort of positive natural rights in
the last century, they became too rigid and absolute to
maintain themselves. But it is worth while to ask ourselves what we have taken on in their place. Natural rights were the rights of all men guaranteed to all men. Instead we now have, in the most persistently urged theory of the moment, the self-interest of a class asserted and to be asserted as such and valid to the extent that it can force itself upon others through the power of politically organized society. The one is an ethical theory, holding that what ought to be should be set up as what is. The other is a materialist economic theory, disclaiming all questions of ought to be, and asserting that law is whatever is done officially and that a class which can control the force of politically organized society, using that force to its own ends, formulates those ends in what it calls rights and that is all there is to it.

It ought not to be necessary to go to such an extreme by way of reaction from the extreme abstract individualism of the nineteenth-century development of natural rights. The best thought of today is able to take account of opposing ideas, recognize the validity of each, and find a means of admitting each and effecting some reasonable compromise instead of assuming that only one can possibly be admitted, that one must be absolutely true and hence the other absolutely false. The best thinkers have ceased to assume that opposing ideas necessarily destroy each other, if each is recognized, or to insist upon complete receiving of the one and rejecting of the other. Hence we are not bound to renounce our legal and political legacy from the Reformation and the Puritan revolution because competing ideas have come into currency, the validity of which we cannot wholly deny. Some of the neo-idealists in legal and political philosophy have seen this in recent years with respect to the nineteenth-century opposition of individualism and collectivism, of a maximum of free individual self-assertion as the highest
legal and political good, on the one hand, or a maximum of power, efficiency and control in the politically organized society as the highest legal and political good, on the other hand. They have seen that it is not necessary to make an out and out choice once for all between nineteenth-century abstract individualism and nineteenth-century orthodox socialism as inevitable alternatives. They have perceived that it is quite as possible to recognize both individual personality values and community values by reckoning both in terms of civilization values. Lawyers have learned this by experience a long time ago as they were confronted with the practical necessity of reconciling the general security and the individual life. Responsibility for culpable conduct only and responsibility without fault in order to maintain the general security are logically incompatible. Nevertheless, the law has been able to give effect to each without impairing too much of the other. Free spontaneous individual initiative and ordered cooperation are both agencies of civilization and looked at in terms of civilization one does not negate the other. Hence one is not fighting a hopeless rearguard action or bewailing a lost cause when he ventures to appreciate the contribution of the Puritan to the law and politics of the last century. Looked at under the aspect of eternity it needs no defense.

In the maturity of our law in the nineteenth century the watchwords are equality and security. Equality is thought of in two aspects: equality of operation of legal precepts and of application of the force of politically organized society and equality of opportunity. Security, likewise, has two aspects. It includes an idea that every one is to be secured in his interests against aggression by others, and an idea that others are to be permitted to acquire from him or to exact from him only through his will that they do so or through
his breach of rules devised to secure others in like interests. The Puritan believed in equality and security maintained by law as enjoined by the reason of the divine wisdom governing the universe. Hence his ideal of the judicial process was a regime of objective decision by applying an authoritative technique to authoritative precepts promulgated in advance of controversy. As it was put in the Massachusetts bill of rights: “Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty, and property according to standing laws.”

It was chiefly on this ground that the Puritans and Non-Conformists objected strenuously to English equity. In the administration of equity the Chancellor employed a large measure of discretion. It was not until the crystallization of equity in the nineteenth century that a Chancellor could say that the doctrines of his court “ought to be as well settled and made as uniform almost as those of the common law, laying down fixed principles, but taking care that they are to be applied according to the circumstances of each case.” In the Long Parliament the Commons voted to abolish the Court of Chancery, and colonial Massachusetts and colonial Pennsylvania steadfastly rejected equity. Indeed, Pennsylvania did not give her courts equity jurisdiction as such until the fourth decade of the last century, nor did Massachusetts complete her grudging doling out of equity jurisdiction to her courts until the last quarter of that century. If it is said that this is not the whole story, that opposition to equity was something more than theoretical, I grant that there was an administrative element in the beginnings of the Court of Chancery which was likely to be obnoxious to Englishmen of any creed as it was manifest down to the middle of the eighteenth century. In one of the tracts of the period of the Commonwealth it is said that the strict law, even if defective
“yet had some certainty,” whereas Chancery sought, “under a pretense of conscience, to devolve all causes on mere will.” No less than Chancery, all the administrative tribunals which multiplied in Tudor and Stuart England were inclined to act more or less arbitrarily. Certainly equity was for a long time extravagant in an officious kindness in making peoples’ bargains over for them and resettling their trusts for them. No doubt the American colonies opposed equity in part at least because of extravagant exercise of equity powers by royal governors as Chancellors. But it should be noted that it was the Puritan Revolution which curbed the arbitrary action of seventeenth-century administrative tribunals and did away with those of most significance. Also it was in the New England colonies and Pennsylvania that attempts from England to set up courts of equity in the new world were successfully resisted. Puritan and Non-Conformist took their religious views very seriously. They carried them into their political views, and theories of government and of the exercise of the powers of politically organized society were much more to them than mere theories. When they stood out against arbitrary administration of governmental power they felt that they were asserting eternal verities and striving in the cause of reason and the will of God.

Lord Acton tells us that “the rise of those whom we call Congregationalists when we think of them as a church and Independents when we mean a party,” was not merely an event in the history of religion. It was, he says, “a political event . . . which profoundly influenced the modern world.” Hence, he goes on, “this epoch is more fitly called the Puritan Reformation than the Puritan Revolution.” For the significant achievements of these sects were in church government rather than in theology. They did not admit the finality of doctrinal formulas, but awaited the development
of truths to come. But what made them a power for a new era in politics and in law was their church polity. Each congregation, united by "a willing covenant of conscious faith," governed itself independently, and every member of the church participated in its administration. The church was not to be governed by the state nor by bishops, but by the people of whom it was composed. As Lord Acton says of it, it was "the ideal of local self-government and of democracy." We can understand how those bred in such a polity in what they took to be the most serious organization in which men could engage, were zealous upholders of trial by jury, were unwilling to have verdicts of juries reviewed by judges, and conceived of an appeal from the judgment of a court as best disposed of by trial to another jury in the higher court. The chief exponent of the doctrine that juries in criminal cases are judges of the law as well as of the facts was a Chief Justice of Massachusetts.

To the Puritan, then, as each man was an equal unit before God, so he should be before the state and the law. As John Robinson, the great preacher of the Pilgrims, put it, we are with one another, not over one another. There is to be consociation, not subordination, an equal is to apply objectively the predetermined precept to an equal; not a superior to apply his will to the conduct of an inferior. Subjection of the will of one to the arbitrary will of another was abhorrent to the Puritan. He waged a constant and consistent warfare upon institutions which seemed to him to involve any such subjection. The exposition of the common-law rights of Englishmen in Lord Coke's commentary on Magna Carta appealed to him as the sort of system of predetermined precepts, limiting the power of the magistrate to defined situations, treated by a defined technique, by which alone one free and equal human being could be trusted or allowed
to judge another. The fundamental thing was to declare men's liberties, not to define social ends and set up administrative tribunals to give effect to those ends in the most efficient way.

In passing it should be noted that Kant, who formulated the nineteenth-century theory of justice in what is probably its final form, was brought up in a Pietist household. The Pietists, like the Puritans, believed in a congregational church government, and this belief had the same effect, apparently, of emphasizing individual personality values in the one case as in the other. At any rate, the personalism, as it is now called, which reckoned both community and civilization values in terms of personality values and took free individual self-assertion to be the highest political and legal good, was put by Kant in a formula upon which metaphysical jurists and positivists rang changes in the last century without any substantial improvement or modification. According to Kant we have in right and law "the sum of the circumstances according to which the will of one may be reconciled with the will of another according to a common rule of freedom." Can we doubt that John Robinson would have nodded at this and added a hearty "amen?" This exaltation of individual personality values, along with making of the moral unit, the individual free man, the political and legal unit, entered into our American law in the formative era as an essential element in the received ideal. "The theory of our governments, state and national," said Mr. Justice Miller in 1875, "is opposed to the deposit of unlimited power anywhere. . . . There are limitations on such power which grow out of the essential nature of all free governments."

This rooted objection to anything that looked in any way like caprice or individual will in the legal adjustment of
relations and ordering of conduct was reinforced by the Puritan’s habitual reading of the Old Testament in which ordinances and laws and a certain objective administration of justice were regularly praised and the certain and just judgments of the Lord were held up as a model and contrasted with capricious and unjust judgments of the ungodly. The Psalmist saw the regularity and predictability of the operations of nature, the orderly succession of day and night, the coming round of the seasons, the phases of the moon, and saw in these and in the regularity and predictability and adherence to principle in the conduct of the upright man and in the constancy in all relations which characterizes the conduct of the righteous, a divine ordering of things which fortified his faith. It showed principles and rules behind things, laid down before and not deduced afterward, and led him to testify that he abided the Lord not because of His power and control of force but because of His law.

Here we see also the root of the extreme insistence upon judicial rather than administrative determination which is characteristic of the formative era of American law. If it be said that the lawyers derived from Coke’s Second Institute an ideal of judicial correction of all errors judicial and extra-judicial “so that no wrong or injury, either public or private can be done but that this shall be reformed or punished in one court or other by due course of law,” one must answer that the Second Institute was published by order of the Long Parliament and that it was little less than a Bible to the founders of our legal polity because it embodied ideas which fitted exactly into their conception of a legal order on the model of church organization. The individual human being was to stand before politically organized society as he stood before God in the church as a responsible, free, equal unit. As such he was to be judged by standing laws by tribunals
administering laws objectively, as he might be judged in a church meeting, not by an ecclesiastical superior, but by the appointed elders trying him by the word of God. Characteristically our nineteenth-century common law had faith in laws and in judges. It is suggestive that the first colonies to set up tribunals composed exclusively of judges as their highest courts of review were Massachusetts, Pennsylvania, and Rhode Island.

Turning to the substantive law, a conspicuous consequence of applying the conception of a congregational church polity as giving an ideal of all political and legal relations may be seen in constant and consistent attempts to apply the idea of covenant or compact on every side. Reasoning from the precedent of the covenant which made Abraham and the children of Israel the people of God, applied to all civil as well as church organization, did not stop there. It made for an individualist conception that all legal consequences depend upon some exertion of the will, as against the feudal conception of referring them to some relation. As late as 1853 a Professor in the Harvard Law School, of old New England stock, writing a law book which had great authority for more than a generation, could tell us that contract was the foundation of substantially all the law that governed the everyday relations of life. Contract and voluntary culpable conduct were taken to be the solving ideas for all legal problems. When later the exigencies of lawmaking for an urban industrial society called for what we commonly speak of as social legislation, for a time that new type of legislation fared hard when it came in conflict with this ideal.

Few doctrines in our law of torts or private wrongs were more irritating, when applied under conditions of employment in large industrial plants or by great public utility companies, than those of assumption of risk and contributory
negligence where employees were injured in the course of the employment. But these doctrines got their hold in America from their conformity to the Puritan social idea when our law was formative. The employee was a free man, to be guided by his own conscience and his own interpretation of Scripture. He chose for himself. So choosing he determined to work in a dangerous employment in which he ran a risk of being injured. He knew that others were to be employed with him, that they might be negligent, and that if they were he might be injured. The employer had done no wrong. It followed that the employee must stand or fall by the consequences of his own conduct. The classical exposition of this doctrine was written by a great judge in Massachusetts, the son of a Puritan minister.

A striking example of the influence of the Puritan ideal upon everyday rules of law as they have developed in America may be seen in cases where something is forbidden by a municipal ordinance having the force of law and some one violates the ordinance, without being otherwise culpable, and another is injured. For example, in a case in the horse and buggy days a city ordinance forbade leaving horse-drawn vehicles untied and unattended in the streets. The driver of an ice wagon left the wagon untied and unattended in the street, and, while he was delivering ice, a child playing in the street pushed a toy wagon so that accidentally it ran between the horses and the wagon so that the horses started up and the child was injured. In such cases many courts hold that breach of the ordinance is only evidence from which a jury may on weighing all the circumstances find there was negligence, but that the breach does not of itself establish fault. Under all the circumstances the driver was entitled to use his best judgment whether to tie the horses as the ordinance required. He could be prosecuted and subjected to a
penalty for breaking the ordinance. But in order to hold him for damages culpable conduct must be established and as to the ordinance, he was, so far as civil liability was concerned, entitled, so to speak, to private interpretation.

Dunning reminds us that in America the Puritan had his own way, at least down to the time of the Civil War, and consequently was able to carry into effect what in England could only be abstract opinions. In consequence, he was able to tie down the courts by procedural requirements limiting judicial discretion, to restrict the discretion of courts of equity, and to hold back the individualization of penal treatment much beyond what was done in these directions elsewhere in the world. To look at but one of these examples, the Puritan’s objection to individualization in punitive justice was instinctive and deep-seated. It is said that he saw in the Star Chamber the fundamental theory involved in the penitential system of the Roman church—"subjective individualization under the cover of a wholly objective legal sentence." Such a point of view was wholly repugnant to the Puritan. An offender was not to be judged by the discretion of men but by the inflexible rule of the strict law.

In what we call private law, that part of the law which governs adjustment of the relations of man and man, as we received the common law of England as the rule of decision in our courts either by provisions of colonial charters or by legislation, the Puritan ideal did not have full scope for operation. But our public law has been largely homemade and so has been made largely to the Puritan pattern. As has been said, the Puritan idea of the frame of government for a politically organized society was drawn to the model of his church organization. The one no less than the other must rest on a "willing covenant of conscious faith." Moreover, the Bills of Rights were nothing less than the covenants
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of a people not to do certain things and not to do certain other things except in a certain way. Today writers on politics reject such an idea, asserting that it involves a contradiction in terms. To the Puritan, however, who remembered the covenants in the Old Testament, the idea of the binding force of the covenant was perfectly clear. It was not primarily a political doctrine. It was religious. But he believed in law as well as in the keeping of covenants. Hence constitutions under his influence were more than frames of government, they were, within their jurisdictional limits the supreme law of the land. Constitutions were legal no less than political documents, for politically organized society, like the medieval King, was to rule under God and the law.

Probably no one had more influence than Mr. Justice Field in impressing upon judicial application of the constitutional standard of reasonableness the Puritan conception of consociation. As he saw it, the politically organized whole must justify all control over the individual beyond the minimum necessary to keep the peace. Everything beyond that was to be left to the free contract of a free man or to liability for culpable conduct in the free exercise of his powers. Reasonableness consisted in safeguarding a maximum of abstract individual self-assertion, exempt from social control. Need one say that to thorough study of the books in which the ideals of the Puritan Revolution were handed down Mr. Justice Field added a Puritan ancestry and a Puritan bringing-up.

Today it is trite that the Puritan ideal, as applied in twentieth-century America, postulates a society of economically self-sufficient individuals, such as existed in the era of colonization and the era of settlement and development of new areas which followed. It is equally trite that we no longer live in such a society. But it does not follow that our
whole public law as it developed in the last three centuries is to be scrapped and that we are to turn back to the absolute political doctrines and institutions against which the Puritan revolted.

If our constitutional legal ideas are those of the Puritan Revolution, yet they were developed by lawyers on the basis of limitations on the crown in Magna Carta, going back to medieval ideas of limitations on all authority. They were developed by lawyers in the struggles with the Stuart Kings in the seventeenth century, were found by colonial lawyers in Coke’s Commentary on Magna Carta and in Blackstone, were developed in struggles with the British government before the American Revolution, and finally were formulated in Bills of Rights, lest the government we were setting up in the new world should do the things that drove the colonists to leave the old world and settle in the wilderness. The founders of our polity remembered how the Privy Council had kept Pennsylvania without courts for twenty-one years at the beginning of the eighteenth century. They remembered how judgments of colonial courts had been reversed on the basis of letters from defeated litigants. They understood the practical need of constitutional guarantees and separation of powers from actual experience. They were not, as it is fashionable to say today, seeking to hold down one class in the interest of another. Holding all men equal, they sought to hold down official will to power in the interest of all men.

Separation of powers as the doctrine is declared in American constitutions is not merely a philosophical idea of Aristotle's fastened upon political thinking by the unchallenged authority of the great philosopher in the formative period of modern political theory. It is not a mere misinterpretation by Montesquieu of the British constitution of his
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It is an idea of declaring inherent limitations on authority of those who wield the power and control the force of politically organized society, derived from the medieval idea of a King ruling under God and the law, given new meaning by the Puritan ideal of government and law, and given force and point by experience of the administrative agencies of the Tudors and Stuarts in which all the powers of government were habitually concentrated. It is an idea developed from their English law books and from the political writings of the Puritan Revolution by Americans who in the colonial period had had abundant experience of governors and councils and boards with uncontrolled power. When the colonies began to set up governments of their own, on the morrow of the Declaration of Independence, they held Bills of Rights more important than detailed formulations of the plan of each agency of political organization and thought of the separation of powers as one of the chief items, if not the most important item, in those declarations. When later the states joined in forming a higher, central political organization, they feared it would do the sort of things which in their experience had been done by the central government at Westminster before the Revolution. Hence they consented to set up a government over themselves only if it could be held down by a Bill of Rights, a constitution enforced as the supreme law of the land, and a separation of powers such as to make the Bill of Rights effective in practice. There was more than mere fashionable theory behind their insistence that no one of the departments of government should be competent to act except in its constitutionally allotted sphere and that even there it should be restrained from acting arbitrarily and unreasonably.

Belief that we have here an ideal which will endure as a permanent contribution to politics and law is perfectly com-
compatible with recognition that the nineteenth century ideal of the social order and resulting ideal of the reasonable needs redrawning to become an authoritative picture of the society in which justice is to be administered tomorrow. But there need be no more place for absolutism in the new picture than in the old. What is called for is not rejection of the leading ideas of our nineteenth-century law, but a putting them in balance with ideas which along with them make for civilization. Free individual self-assertion and ordered cooperation are to be brought into harmony.

As the leading ideas of the religiously conceived law of the Middle Ages have retained their vitality, so we may be confident that those of the nineteenth century, also conceived originally and developed in terms of religion, will endure, shaped it may be to a society organized more on a cooperative basis, but still even then a society of free men freely cooperating to maintain, further, and transmit civilization.