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The New Feudal System

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A generation ago, in the reign of the historical legal science of the last century, an address before a bar association was likely to strike a note of praise. The path of the law was a progress from status to contract; the development of the law was a progressive unfolding of the idea of freedom. The footsteps of the common law were planted in this path of progress. American law had begun with the idea of freedom full blown. The legal institutions and legal doctrines of nineteenth-century America, the American developments and adaptations of the common law of England, were held up to our admiration as the last stage for the time being in this progress away from the status, the last step for the time being in this unfolding of the idea of freedom.

With the advent of the present century the era of progressivism gave to speakers before bar associations a new note. For a season an address was expected to be an attack upon something or an argument for some new solving measure of change. In the last decade the fashion for such discourses has changed again. To day one is not unlikely to be expected to sound a high and solemn note of warning.

I must disclaim any of these roles, and particularly the last. I am not here to praise anything, to attack anything, nor to warn against anything. The motive behind what I am to say to you is simply one of curiosity. Obviously things are happening in the economic and social order, and these happenings are reflecting in the legal order. Behind these happenings is some sort of change which may conceivably be far reaching. What it is to be I make no pretense of knowing. But philosophers may rush in where lawyers fear to tread. I do not fear the change, whatever it is to be. Yet I should like to make some guess at its course. I should like to guess at it, not in order to devise futile

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expedients for delaying it or warding it off, not in order to de- 
plore it, but merely as part of a taking stock of an important 
element in our legal materials. One whose interest lies in the 
science of law may well seek to discover the reason for the fail-
ure of that element to achieve the purposes of the law under the 
conditions of today. He may well seek to lay hold of some de-
cisive feature in those conditions around which to begin to draw 
another and more effective picture of an ideal social order. He 
may well seek a beginning for constructing ideals of the legal 
order more consonant with the society in which they are to 
 obtain.

We shall achieve nothing by an obstinate rear-guard action 
against the adapting of legal institutions and legal doctrines to 
the society they govern. In the end they will conform to the 
needs of the economic and social order, not the economic or 
social order to their logical or dogmatic demands. Yet all ex-
perience calls upon us to be very sure of ourselves when we have 
to do with things so far reaching in their social and economic 
consequences as the received ideals of the legal order. Specula-
tion on such a subject should be cautious, but may not be avoided 
if law is to be kept in touch with life.

In the classical law books of the eighteenth century and first 
part of the nineteenth century, there used to be long, philosophi-
cal discussions of the ideal basis of every department of the law, 
and often of each institution and doctrine and precept. The 
coming of historical jurisprudence early in the nineteenth cen-
tury made a change inevitable, and it came in the reign of 
analytical jurisprudence which was dominant in English-speak-
ing lands in the second half of that century. It became the ac-
cepted teaching that law was no more than an aggregate of laws.
All ideal element was rejected. Such is still, very likely, the 
accepted view in the English-speaking world. But jurists have 
been giving it over in the rest of the world and there are signs 
of defection in this country, if not yet in England. Everywhere 
the conviction is growing that our classical jurists were not 
wholly wrong; that to understand law, to administer justice ac-
cording to law, and to make law, we must admit some element 
beyond and behind the mass of authoritative legal precepts and 
the received technique of developing and applying them.
No doubt the eighteenth-century writers were mistaken in putting the ideal element of a body of law on a separate and higher footing. They did not put it as one element along with the mass of authoritative legal precepts and the received technique. They regarded it as the real law, of which precepts and technique were but imperfect reflections. As natural law, it was set off from positive law, which was but an aggregate of rules, authoritatively prescribed by the sovereign or received with his sanction, yet valid ultimately only because they reflected the principles of the ideal system. For in the eighteenth century natural law came to be, as it were, codified. It was taken to be a body of ideal precepts. Thus the real nature of the ideal element in law was obscured. When we gave over the theory of a distinct body of natural law, existing over and above the law of the land, it was easy to believe that the positive law, which was what remained, was but a body of precepts. The vice in the eighteenth-century theory was in setting off that part of the authoritative legal materials which were in the form of received ideals from the received traditions of development and, application and the received or prescribed precepts, as something outside of the positive law. It was no less a mistake to picture this body of received ideals as a body of rules instead of as an authoritative background for the making, interpreting, developing and applying of rules.

One element in the law, then, as I shall assume, is a body of received ideals of the social order and so of the legal order; a body of received ideals of what law is and what it is for, and so of what legal precepts and legal principles ought to be and how they ought to be applied in the light thereof. These received ideals are something more than subjective ideals of particular law makers or particular judges or particular writers. Undoubtedly the received ideals, which are part of the law, are affected by the personal ideals of strong law makers, strong judges, masterful jurists. So it is with received doctrines which are none the less part of the law of the land. To be part of the law, ideals must have been received by the courts and the lawyers as such, exactly as in the case of received doctrines, received conceptions, received technique.

These received ideals are the background of all judicial
action, whether in finding law, in interpreting it, or in applying it. They give content and form to legal precepts and dictate their application. This is the element we have in mind when we speak of law as universal and rooted in the eternal verities. It is this element which the philosophical jurist has in mind when he tells us that law cannot be made, it can only be found. With his eye on this element only, he thinks of legislation and adjudication not as creative but as mere formulating processes. As he sees it, the reality of law is in this ideal element. Legislator and judge do no more than give definite formulation to details drawn from this ideal picture of the whole. We may admit that this view of the philosophical jurist is overdrawn and yet insist on the paramount importance of the ideal element in determining the actual course of justice. In law, as in everything else, by and large men do what they seek to do, what they believe they are doing. If they seek to do justice, if they believe they are doing justice, and they have in their minds a received and definite picture of what constitutes justice, of what they are seeking to do and why, the details of what they do are certain to be shaped by that picture. Indeed the controlling part which received ideals play in judicial decision is shown whenever these ideals are changing and the line between them and the personal ideals of judges is obscured.

This has been manifest recently where courts have been called upon to apply to social legislation the constitutional guarantee of due process of law. There are no texts defining what is reasonable and what arbitrary and unreasonable. There are no fixed starting points in established legal principles from which to deduce mechanically and infallibly that this is reasonable and that is not. The question must be projected on a background of received ideals, received pictures of American society. In effect it is projected upon a background of the common law ideal as adapted to the new world in our formative era. What fits into, what accords with that picture is held reasonable. What does not is held arbitrary and unreasonable. In a time of transition, the details of such pictures are not always clear. It is significant that dissents and five-to-four decisions are rare in cases involving the law of property or the law of commercial transactions, but are not uncommon where conduct is involved.
or where the question is one of reasonableness. In the latter cases new situations, with respect to which the old pictures are not clear, call for retouching or redrawing. The decisive ideal element lacks definiteness and disagreement results.

It need not be said that these pictures of an ideal social order, which come to enter into the law as part of the authoritative materials of judicial decision are not photographs or even idealized photographs of the social order of the time and place. There are rather idealized pictures of the social order of the past undergoing a gradual process of retouching with reference to details of the social order of the present. Thus the received ideals of American law, as they took shape in our classical era in the first part of the nineteenth century, are much closer to the dead and gone pioneer society of our past than to the typically urban industrial society of twentieth-century America. In general men have always sought to explain the institutions of the present in terms of a picture of the social order of the past.

For example, Plato’s Republic is a picture of an ideal Greek city-state. Aristotle’s Politics is a treatise on government in terms of the Greek city as an independent economically and politically self-sufficient unit. Each had Sparta in mind when the Spartan type of state was passing forever from the stage. Each had in mind the Greek city-state when the days of such states were over. Again, the Medieval jurists had before their minds the academic conception of “the empire”—the conception of an empire embracing all Christendom and continuous with that of Augustus and Constantine and Justinian. This idea of a universal empire with a universal law, gave rise to an ideal which has been received in the law of half the modern world and is still of cardinal significance in legal thinking everywhere. Yet it arose and was given shape and content at a time when the Roman Empire, of which it was an idealization, was utterly in the past; when the world was on the eve of the nationalism which followed the Reformation.

Look at the picture behind our classical seventeenth-century law books, the received ideals of the social and legal order as they appear in Coke on Littleton and Coke’s Second Institute. In our formative period, these books were oracles in the new world for our private law and public law respectively. Cer-
tainly there was behind them no picture of Colonial-American Society. Nor were they even written on a background of Elizabethan society. The system described in Littleton’s Tenures was moribund when the book was written. It is no more in the spirit of the England of Shakespeare than the pedantic formal logic of Coke on Littleton is anything but an anachronism in the days of Bacon. Yet this spirit of medieval England, this idealized picture of relationally organized pre-Reformation England, was an enduring element in the body of legal materials which came to govern English speaking people everywhere.

It is not so easy to speak with assurance of the received ideals of our twentieth-century law. Yet I venture to think that while the psychologist of today feels about the fundamental conception of the classical economics—about the economic man following the path shown him by enlightened self-interest—as Bacon did about the scholastic method and Aristotelian logic of Coke on Littleton, yet that picture of the economic man is as real and persistent part of our law as Coke’s method and logic were a real and persistent part of the law of Bacon’s time. Even more, our American politico-legal ideal of a pioneer, rural, agricultural community cannot but irritate the social scientist of the twentieth century. Yet it is in the background of everyday decision and is perhaps more decisive for the administration of justice here and now than in the heyday of the society it pictures. Where, today, are the economically self-sufficient households and neighborhoods, where is the economically self-sufficient, versatile, restless, self-reliant man, freely making a place for himself by free self-assertion, which that ideal assumes and portrays? Where, indeed, but in our legal thinking in which it is so decisive an element?

Let us look back on the picture of the social order which has been standard for jurists since the seventeenth century. It is a picture of a world of free competition among individually self-sufficing human economic units, with the fullest measure of free, individual self-assertion put as the highest good. I suppose one runs some risk in querying whether this is at all a picture of the actual world in which we live. Controversies attaching to it when it did represent an actual world have come down to us with it and make hard the path of the objective observer.
But from the days of the Greek philosopher, professors have been privileged to be heretics. I venture to suspect that our orthodox jurist's picture of an ideal American social order is as out of line with realities as was the picture of an idealized Greek city-state on the threshold of the Hellenistic world, or of Christendom as a universal Roman empire on the threshold of nationalism—while the nations of modern Europe were growing strong and self-conscious and independent. Indeed international law furnishes an excellent, because non-controversial, example. Since the seventeenth century international law has had for its background a picture of the political world as it was when Grotius wrote. The seventeenth and eighteenth centuries were an era of absolute governments. Personal sovereigns, of the type of the king under the ancient regime of France, ruled in the significant countries of Western Europe. The problem of international law was one of adjusting the relations and guiding the international conduct of these personal sovereigns. They made war with highly trained regular armies. They represented their several countries so completely that for practical purposes international relations could be treated as relations between sovereigns and the rules of war as limitations on the belligerent conduct of sovereigns. International law grew up to this picture and we still speak and think to its outlines. Yet it long ago ceased to portray reality. Such phenomena as the British empire, the rise of democratic government, the conduct of war by peoples by every agency they may command, rather than by personal rulers through standing regular armies—these phenomena defy intelligent treatment on the lines of the classical picture.

Perhaps the most significant evidence of what has happened to our orthodox individualism is furnished by a recent pronouncement of Henry Ford. I would not disparage his powers of observation. When he said that history was "bunk," he put epigrammatically what the philosophers of history and historians of history-writing are taking volumes to tell us. No doubt when he reproached American farmers for not being individualists he had his eye on a profound divergence between the farmer and the rest of us. Certainly the farmer in his thought, his method, his want of organization in an organized age, is much nearer to the American of our formative era than those of us who are in
step in the regimented life of today. Why then should the farmers, the old guard of American individualism, struggling valiantly for the old economic order in a new economic world, be reproached for want of individualism? I suppose the chain of reasoning goes like this: Individualism is good, so what is good is individualism. Methods that can amass a billion dollars are good, therefore they are individualist. The methods of the American farmer, as applied in the world of today will never amass any considerable sums of money. Hence they are bad. Hence they are not individualist. Q. E. D. Could anything show better how far we are forgetting what the individualism of the last century really meant? Could anything show more clearly that we are but throwing about a word that has become empty in the economic life of our time?

Such twisting of the watchwords and solving phrases of the past to meanings satisfying to the wants of today are among the staple modes of growth in law. Behind them are changes in the ideals of the social order responding slowly to changes in the actual social order. Conflict of the received ideals with newer ones, idealizing conditions which are coming to be and competition of the resulting pictures with those which idealize conditions as they are ceasing or have ceased to be, are fruitful causes of uncertainty in law and in the application of law in any period of growth.

At the time of colonization the English common law was made up almost wholly of land law and procedure. Moreover these two subjects were those chiefly called for in a pioneer American community. Land titles were the most important subject of litigation and for the rest it was enough to provide for bringing controversies before the courts and disposing of them there. Land law, therefore, was long the dominant branch of the substantive law. The spirit of the land law was largely the spirit of the common law. The leading analytical jurists were real-property lawyers. Thus the science of law, for England and America, came to look at law from the standpoint of rules of property. Also our theory of application of law was made for rules of property, so that when, in the present century, we had to turn more and more to administration, for a time it was far from easy to adjust our legal ideas to the de-
mands of a new type of tribunal. In large part the received
ideals of our law come from the feudal land law which took form
in the Middle Ages. Partly they come from the contests between
courts and Crown in seventeenth-century England. Partly, too,
they come from the conditions of pioneer communities in the
period after the Revolution. It is to the oldest of these elements
in our body of ideals that I would direct your attention.

Until the end of the last century, the details of what was at
least taken to be the feudal organization of society were part of
the education of every lawyer. Today the first-year law student
is impatient of even the minimum which he must acquire in
order to understand even the terminology of our law of real
property. But forty years ago, when I was a law student, we
still took the feudal element in our law seriously and the student
set himself to learn these details patiently on the assurance of
his teachers that they were an indispensable preliminary to our
understanding of the Anglo American legal system. These de-
tails, as we learned them from Coke on Littleton and Black-
stone's Commentaries, had for the most part been made obsolete
if not earlier, at least by the Statute of Charles II abolishing
tenures. Yet down to the present generation the lawyer was
expected to learn, as preliminary to the common-law estates and
the acquisition, creation and conveyance of them, the theory of
feudal organization, the old tenures, the incidents of tenure, the
effect of a conveyance before and after _Quia Emptores_, the sub-
infedations, and much else that no amount of zeal on the part
of the teacher can make interesting to the student of today.
Nor was this without reason. The forms of conveyance then in
use retained the _habendum et tenendum clause_ which _Quia
Emptores_ had deprived of meaning in the thirteenth century,
and much which had lost meaning through the legislation of the
seventeenth century. At least this instruction in the legal
theory and legal structure of feudal society, this familiarity with
fines and reliefs and wardships and the like, taught us what was
vital and what empty verbiage in the old forms of conveyance
and so, perhaps, led us with assurance to the simpler forms of
today. When Coke dared to write of ownership in fee simple
and to think of the tenant in fee simple as the absolute owner of
the land in which he held an estate, the substance of tenure was
gone, although whether tenure existed in one of our great states could be the subject of acrimonious discussion in the second decade of the present century and could be debated in the Association of American Law Schools in the third decade.

Certainly it has seemed that the feudal learning, which was once so great a part of the educational equipment of the American lawyer, had ceased to have value. It seemed clearly time to cast off what had become the merest historical rudiment. Indeed an American law school has gone further recently and has announced that Coke and Blackstone are to be put on the shelf. No doubt Coke on Littleton is meant, for Coke’s Second Institute is still a useful introduction to our constitutional law. But it is curious that we should be putting the authoritative repositories of the feudal land law on the shelf just at the time when the kind of relational society which they picture has revived; just at the time when the ideas of relation to property and relation of man to man which they set forth may once more be useful for legal thinking. For centuries we studied Coke on Littleton after its spirit and ideas had ceased to be active forces in the law. Now we are to give up this oracle of our land law at the very time when it may be useful to us.

What is our orthodox picture of the society which is ordered by law, to which, therefore, the details of the administration of justice are to conform? It is one which has governed from the seventeenth to the nineteenth century, getting what is likely to prove its final form in the latter. It is a picture in which relation is ignored and each man is made to stand out by himself as an economically, politically, morally and hence legally self sufficient unit. He is to find his place by free competition. The highest good is the maximum of free self assertion on the part of these units. The significant feature of these units is their natural rights, that is qualities by virtue of which they ought to have certain things or be free to do certain things. The end of law is to secure these natural rights, to give the fullest and freest rein to the competitive acquisitory activities of these units, to order the competition with a minimum of interference. Even now one must outwardly do lip service to this picture on pain of being branded a “socialist.” But both this orthodox individualism of the nineteenth century and the orthodox socialism
which was its contemporary are dead as significant ways of thinking.

Relativity has done a great service in setting us free from the dilemma in which we had put ourselves quite unnecessarily in the sociological and political and legal thinking of the past. We had assumed that in every connection in which we were confronted by what seemed a choice, we must inevitably and inexorably choose one to the exclusion of the other. We could only look at things from one standpoint. We could only and must needs emphasize some one feature, which alone had real significance. At any point of divergence we must irrevocably follow out one path to the logical bitter end. Hence as between the free individual and an ordered society, as between a regime of full and free competition and one of cooperation, as between natural rights and the general security, there was of necessity one exclusive choice. We must range ourselves with the one series or with the other. We must put the whole stress on the one or on the other. We must let everything be fought out in an ordered struggle or else commit everything to an omnicompetent state. A superlative valuing of individual personality or a superlative valuing of organized society were necessary and all excluding alternatives.

This narrow mode of thought long stood in the way of an effective philosophy of law. Now that it is dissipated, now that we know that the universe can be both finite and without bounds, now that we realize that we are not held eternally to a rigid choice of an absolute personalism or absolute transpersonalism, it is possible to look on competition and cooperation as sides or phases of something which transcends both. We are not held to stress individual free self-assertion at the expense of all other aspects of human life. We are not bound to lay the whole stress upon the unique side of the individual man at the expense of control over internal nature which makes it possible for man to inherit the earth and to maintain and increase that inheritance. In civilization, in the raising of human powers to their highest possible unfolding, in the maximum of control over nature, both external and internal for human purposes, we have an idea which transcends both the individualism and the social-
ism of the last century. As exaggerated versions of equally valid sides of civilized life, there is both truth and untruth in each.

Let us, then, give over the conventional nineteenth century labels and seek to look at the phenomena of the economic order without reference to them.

We understand new things by comparing them with old things with which we have become familiar. To the lawyer, trained in the old books of our Anglo-American law, it would not be hard to paint a picture of the economic order of the present, as it is and as it is becoming, in terms of those classical books.

Recall the broad lines of the social organization in which our law had its rise. Society was organized about relations. It rested on relations and duties, not on isolated individuals and rights. Everyone, no matter how great or how small was in a relation to some one else—a relation involving reciprocal duties of service and of protection. The original fundamental idea was cooperation in defense. The single individual had not proved equal to defending himself. Hence he was not thought of as self-sufficient. In the beginning he commended himself to some lord, that is, he surrendered his land to some lord who then owed him protection and to whom he owed service. If a lord acquired a new domain, he gave interests or estates in it to his retainers, and was bound to protect them therein while they were bound to do the services and perform the incidents attached to their estates. In England, all land came to be held. On the Continent there was still land held in full ownership by owners of the old type. But there also the general course came to be that one held of some lord. The typical man did not compete. He had his place in a cooperative organization. The several economic activities, in such division of labor as obtained in a medieval community, were conceived as services. Thus the services due the lord from the holder of an estate might be services to the feudal community in which he had his estate. He was held in his place by duty of service instead of by pressure of competition. He found his individual greatness in the greatness of his lord, not in competitive achievement. He did not own land. He had an interest in it; he owned an estate in it. Hence whoever owned anything for that very reason stood in a relation. Estate
and relation, relation and reciprocal duties were inseparable. When these estates were conveyed, an elaborate series of rights and duties resulted. Before the statute of *Quia Emptores* there might be a long chain of holdings, one of another, with services due all along the line. *Quia Emptores* simplified this. But it remained that men owned not the land but an interest in it, that the emphasis was on duties not on rights, that the duties of protection and of service were reciprocal, that the watchword was cooperation, that the significant thing was relation, with duties of doing the several things which the community required resting on those who had interests to which those duties were attached. It was not what men undertook from self interest or caprice. They were held to what their position in the relationally organized society made it their duty to do.

In time politically organized society had put down private war. The duty of protection owed by the lord ceased to be of consequence. Defence was no longer a prime consideration. Economic activity took the first place which had been held by military activity.

When each household was economically independent, when each neighborhood performed within itself the main functions called for by such division of labor as a rural agricultural society demanded, a relationally organized society was wholly out of line with the economic order. But the days when the local miller ground the flour for the local community from the grain grown by the local farmer, and this flour was baked by the local baker and the local housewives, are hardly even remembered in our great urban communities and are passing in their last rural strongholds. The days when the local butcher provided the local meat from animals sold him by the local farmers, and the hides were tanned by the local tanner and made into shoes for his local customers by the local cobbler are utterly gone. Gone, too, are the days when the local founder provided materials for the local blacksmith and the local carriage maker made the local vehicles. These days of local economic self-sufficiency are wholly in the past. Hence the individual can no longer do single-handed the aggregate of things demanded by the minute division of labor in a complex economic organization. The situation created by the economic order is analogous to that presented by
the social order when the individual landowner, unequal to protecting himself, entered into a relation of service and protection with a lord. For the days when the individual business man was self-sufficient are also in the past. More and more he has proved insufficient for any but the smallest businesses. He has had to commend himself by transferring his business to a corporation and taking shares in its stead.

In our economic order business and industry are the significant activities. They stand toward the social order of today where land-holding stood toward the social order of the Middle Ages. Every one in business, great or small, is in a shareholder relation in which things are due him as shareholder, not because of any special undertaking. He is not freely competing. The great bulk of the urban community are upon salaries and owe service to corporations which of late have sometimes shown consciousness of owing a reciprocal protection. The individual businesses are more and more giving up and going into corporate form. The corporations are more and more merging. Chain stores are bringing about a feudal organization of businesses which until now had been able to exist on the older basis. If a new domain of business or industry is opened, those who have conquered it distribute stock as a great feudal lord distributed estates. It is coming to be the general course that men do not own businesses or enterprizes or industries. They hold shares in them. Moreover, as one who held several tracts of land might owe services to more than one lord, so one who holds investments may be a shareholder, with the reciprocal duties that relation implies, in more than one corporation.

Today the typical man (for the city dweller, not the farmer is the type for this time) finds his greatness not in himself and in what he does but in the corporation he serves. If he is great, he is published to the world not as having done this or that, but as director in this company and that. If he is small, yet he shines in the reflected glory of the corporation from which he draws a salary. Moreover the chain of subinfeudations, of subsidiary companies, and affiliated companies, and holding companies has come to be as intricate as that of mesne tenancies before Quia Emptores. It may yet call for some analogous statute to
put intelligible simplicity into the tenure by which our businesses and industries are held.

But the significant point is to contrast the feudal self-sufficient community with the individualist self-sufficient man, and then contrast the latter, as he had a real existence in the pioneer, rural, agricultural society of the past, with the employee, shareholder, investor of today, held at least in one and often in many relations, with shares or interests rather than ownership in the things which count; cooperating rather than competing; finding his satisfactions in the achievements toward which he contributes rather than in what he achieves of himself.

As I have put these contrasts, they suggest something of a return to ideas of the Middle Ages. But that is not what I have in mind. History does not repeat itself in any such sense. Things in time are unique. No one could pretend that we shall ever return exactly to a feudal organization of society. Yet we do seem to be developing a relationally organized society. Our picture can no longer be one of free competitive activity of economically self-sufficing units. It must be redrawn as one of adjusted relations of economically interdependent units. The orthodox picture is too much out of line with the actual economic and social situation to serve us longer. This does not mean that we must give up everything which has been gained for spontaneous, free, individual initiative by the Reformation, the Puritan Revolution, the contests of courts with crown, and the democratic movement of the last century. But it does mean that the orthodox picture includes far too little; that it excludes much which we can not overlook. It has become a cause of uncertainty in law and in its administration. It has become a cause of dissatisfaction on the part of the business world with a state of things in which no one can speak with assurance as to what is the law at a time when the law is actually or potentially regulating everything. In drawing a new picture, we need something to guide us to seizing the significant features. We may yet have to apply Coke's admonition: "Observe, reader, your old books."

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