to characterize American jurisprudence, that is American jurisprudence. None of the readers of this text will troubled to substitute for just this term; and

strong contrast with Europe. And I confess I find myself

thought in terms of a single category in the presentation

of opposers to characteristic some area of American life or

and various as it is America has often tempted European

summary, and surely the warning is salutary. For vast

This is a warning against hasty generalization and one,

or the other cause the attempts the Supernatural... the
goat otic letter to that extent when the finds this, that

country's novelists, Henry James, remarks that the see

In his "American Scene", the greatest of your

of course I recognize that there is need for caution.

Those, but that does not I think detract from the good

It is true that the poem in question was addressed to a

To see ourselves as others see us.

would some power the grit of us.

My defense a poem of Robert Burns:

grown up and have become most flammable and I could quote in

very often we understand least the things with which we have

them but can be caught easily by a single glance from afar.

large mountains which cannot be seen by those who live on

except to say that those are important aspects of even very

confess I have no very convincing answer to this objection.

American and not for a fleeting twentieth century to do it.

because and that it is to be done at all it is for an

be done to so huge a subject in the confines of a single

prudence. You may well think that justice could not possibly

address an American audience on the theme of American juris-

It is with some sense of audacity that I venture to

American Jurisprudence Through English Eyes
Things have secured for the Supreme Court a role and a stature
become a judicial question. An English lawyer notes that two
question in the United States which does not sooner or later
defeature our famous words, "where is the secrecy at our political
United States Supreme Court, play in American government. In
the infinite extraordinary role that the Courts' above all the
impeach explanation of that concentration is, no doubt,

strongly with our own.

This is one salient feature of American jurisprudence consisting
of American thought about the judicial process claiming only that
Henry James writes "I shall" in devoting most of this lecture
assessed by apologists from their corner, and remembering
law faculties. But great areas of thought are not to be
in a democracistic State was teaching at the tables of American
accepted that the question what is the function of the judiciary,

ordered that the question what is the function of the judiciary
professor judge of Harvard said while lecturing to us in
many judges, do about disputes, and only those years ago
Karl Menger said, "law is what officials, that is
determination of legal rights and duties. A later Justic,
its composed of the rules which the Courts lay down for the
grey at the turn of the century wrote: "the law of the State
is what I mean by law."
The great Harvard lawyer John Chipman
what the Courts will do in practice and nothing more pretentious
jurisdiction over Wendell Holmes in 1894, said, "the property of
prominent American jurists over the last eighty years. Thus
cases, and I could quote in support of this the most
how judges reason and should reason in deciding particular
judicial process, that is with what Courts do and should do,
concentrators almost to the point of obsession with the
letting you in numismatic terms that it is marked by a
speculative thought about the general nature of law."
cases that no serious prejudice or philosophy of law could
and so unlike what ordinary courts ordinarily do in deciding
have at once been so important and so controversial in character.
In fact the most famous decisions of the Supreme Court
particularity plain to justice in a democracy.
does seem to the English lawyer at first sight at any rate,
role of law in the settlement of disputes, and what they were
function: the important application of determinate existing
thought in all countries concurred in the standard judgment
doing something very different from what conventional legal
formalities of legislation but the contrary, the courts were
executing these while powers to monitor not only the form and
controversial value judgments, and it became plain that in
a vast scope and set the American courts at least on a sea of
This doctrine once adopted secured for the power of review
Process
or desirability, which came to be called "substantive due
the requirement of a vague unenforced standard of reasonableness
freedom with internal liberty or with property did not satisfy
Constitution may still be held invalid because the latter
and conforming to all procedural requirements specified in the
Congress of Impressive Charity passed by an overwhelming majority
that no English lawyer's arrangement even a statute of
form or procedure but also to the concern of legislation: so
without due process of law, referred not merely to matters of
the Fifth Amendment and the later Fourteenth Amendment providing
legislatures. The second was its doctrine that the case of
and so vital enactments of Congress as well as of the State
decision that it had power to review and declare unconstitutional
even elsewhere. The first was of course the Supreme Court's own
unlike that of any English Court and indeed unlike any Court

courts by judges does not mean that they are not there decreed
only because the face that they are decreed in American Law
questions: "Perhaps they do so," the Englishman may say,"but
preparation of the question, Observation that, pattern
view of things and suggests to an Englishman a central inter-
American constitutional decision seems to support the nutmeg
frequently. Certainly a clear-eyed scrutiny of the course of
ment - on an absolute view always a moderate view very
and the expectations which it exacts are doomed to disappoint-
the judge distinguishing him from the legislator is an illusion
image of the legislator. The Nightmare is that this image of
decree of the law, not to be confused with the very different
is that of the "objective impertinent ordinary and experienced"
to use the phrase of an eminent English judge, Lord Justice'
sources, but for conventional thought the image of the judge,
the lawyer may be needed to extract it from the applicable
be and very often is not obvious, and the trained expertize of
of course it is accepted that what the extracting law is, need not
depicts of the extracting law, not to have new law made for them,
themselfs entitled to have from judges an application to their
The Nightmare it's this, it's legitimate law cases consider
The Nightmare and the Noble Dream.

will become plain. I shall call these extremes respectively
many intermediate stepping places. For reasons which I hope
judicial phenomenon it has oscillated between two extremes with
theories to explain or explain away - this extraordinary
judgments have not evaded this question but in developing
were such judicial powers compatible. Certainty American
avoid asking with what general conception of the nature of law
The process clause as a fundamental liberty. Justice Oliver

is nowhere mentioned in the Constitution but was read into the
was done in the name of a right of the mother to privacy which
over a period of fifty years secured in the country. And thus
more than the last of eight British parliamentary struggles

was a great reform. It achieved a single judicial blow

of forty states of the Union on an issue where much moral opinion

in 1973 sweeping away century-old legislation is the courts decision
English, the most striking modern instance is the courts decision

in view of the judicial process as mere cypher-registration. To an

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something far less extravagant than what the slogans seemed
and send it forth in bold and clear-cut slogans almost always mean
is most instructive, that many who seemed to preach the message
Mowment of the 1920s and 1930s with whom the Negroes and
the recent history of what is called the American Realist
this was the case, not that they belied the for I agree with
be understood. I have said that serious journalists wrote as I
myths that obscured it distorted the nature of law could not
suggested that until this truth was grasped and the conventional
never a matter of doctrine the existing law, and should have
as its adjudication were essentially a form of law-making.
particular cases, that serious American journalists should have written
but of moral protection of the law... have somehow to be fitted to
constitution involving a right general a right to the process
of different adjudication where as in the case of the
view should be presented not merely as a feature of certain
is that in some variations of this jurisprudence the right
relevant constitutional history, what the constitutional history, what the constitutional history, what
the English lawyer after he has acquiesced in the
law of which Lord Radcliffe spoke. All this is commonplace.
and are not those important objective documents of existing
the contrary judges make this law, which they apply to litigation
to present the Negroes as the people of protection to the branch of American jurisprudence that should be concerned
given this history is not the jurisprudence but the
had not embraced John Stuart Mill on Liberty.
modern period we might have protected that the XIIT Amendment
and the last three-fifths of the time have the XIIT Amendment
Amendment had not enacted Herbert Spencer's Social Statics
against the last three-fifths of the time that the XIIT Amendment
Wendell Holmes, in a famous dissenting opinion, protested
In 1990, this is much more like an English textbook on jurisprudence. Chapman Gray's Nature and Sources of the Law which appeared in 1869 had this theory on American Justicist thought in John Dewey'sFreeman's The American Jurist. A most striking example of the case of recalcitrant facts, a most striking example of the fact that up to have been modified it in the craftsmanship of American legal thought even though the writers of American law are of the craftsmanship vision of the judicial process as a way of putting and without pattern towards the common interest, the drive for synthesis in a way which an English Justis finds

Nonetheless, in a way which an English Justis finds

damn the syntheses.

Homestead theory was not a philosophy of full stream ahead and for Homestead the Judges' law making function was "interstitial." Absurd to represent the Judge as primarily a law-maker. So of binding precedents was sufficiently determinate to make it the common law such as a recognition of consideration of contracts, statutory law and many firmly established doctrines of the law. And the demands of even the commercial profession American theory at certain points, yet the convergence of a vast area of theory. Though he proclaimed that judges do and must legislate.

The theory. Of another fiction calling for psycho-analytic

by them in concrete cases is stipulated for an immature form be legal rules binding on judges and applied by them not made as a classic in the 1990's in which the belief that there could do about disputes, though it is scarcely possible to take.

The same view of Jerome Frank's Law and the Modern Mind, matter and nothing more pretentious is what I mean by law. It is that the propriety of what the Court would do in practice.

To say. Thus is certainly true of Homestead's famous remark.
change and development of the law were, however, insurmountable.

It is now generally conceded that the development of the law

Homer所说 that the historical development of the law

context was a process agnostic the karmic spectre.

law has not been logistic, it has been experiential. "This in

Justice is Homer's observation of 1884 that "The life of the

theme. Perhaps the most discussed question from any Ameri-

American legal imagination of the American view of things.

views about the nature of law manifests a strong hold on the

commitment to self so far to such a degree of expression.

greater priority to all academic expression should have

Justice play. But the fact that an extremely active lawyer of

and expression, as it common sense will our own in a work of

justification, and concludes on occasion, ways of thought

that even in give's book this paid role should be buried by

and not the person who first wrote or spoke them. It is true

is he who is truly the lawyer to all intents and purposes

absolute authority to interpret any written or spoken laws. If

are three times invoked in support: "Any, whoever hath an

those, systematic, past precedents included, are merger

rules laid down by the courts have used to decide cases and that

most un-English theme; the theme that the law consists of the

Law and Morals - but it pursues throughout these topics a

topics - Legal Rights and Duties, Statutes, Precedents, Equity,

and Austin. Like in English book it surveys a wide range of

American book, and the author, a distinguished Harvard lawyer,

prudence covering many different topics than any other
not of course dictate the interpretation of laws or of anything of "short machine" or mechanical jurisprudence, but logic does. "Form tinkering, black letter law and excessive use of logic" or "legislation, was streamlined as an example of the voices of executing freedom of contract into an almost absolute product of the Constitution, false interpretation of the due process clause of the Constitution. Specific, most satisfying and confused theme. Thus the laissez-
eree for the British jurisprudential question because of any American jurisprudential juridical reasoning, became at any rate or the excessive use of logic in the hands of some American cultural history, whatever the truth of growth, process, concept and function life. For common a viable, realistic attention to experience, life, such sterile arbitrary academic drivel to substitute destruct drivelings, the revolt was born of a wish to cross destructive, romatic, abstract, or spirit into truly separated reaction against excessive reliance on thought that is in economics, and otherwise, are taken as examples of a great harmut with John Dewey in philosophy, the notion within thought which he terms the second stage of form, and have been taken as an example of a great movement of American historians, Professor Morton White, Holmes' remarks about logic of social advantage, but by one American philosopher, made after an explicit weighting of what he termed "considerations so that juridical change and readjustment of the law should be recognition by lawyers of the legislative powers of the courts of this time. And the process was made to secure a conscious contradiction in response as he said to the "felt necessities" of expression of judges' intuitional preference and nurturance.
many varieties but in all forms it represents the better, perhaps
the Noble dream. Like its antithesis, the nightmare, its has
I turn now to the opposite pole which I have called

II

required for decision, but should openly identify and discuss
or justice or social policy or other extra-judicial elements
stunting the work that can be done; conflicts of the law's aims
forms. Secondly, that judges should not seek to bootstrap
Court's decision should be without other extra-judicial considerations
constraints strong and complete enough to determine what a
respect, any claim that existing legal rules or precedents were
they should always suspect, although not always in the end
Lawyers, practiced and academic, of two things: first, that
now/enry. For this main effect was to convince many judges and
upon legal education which at any rate some English lawyers
influence on the style of adjudication in American courts and
different branches of the law), had a large and still visible
adjudication and open implicit in their writings on many
in explicit general theorems about the nature of law and
Laver the best work of the less extreme realists was not found
of the realist movement lay elsewhere. For to the English
prudentia legalis. But the virtues and beneficial influence
far or to have added much to the stock of valuable jurisprudence
the English jurists not to have advanced legal theory
What did all this amount to? Seen from after it appears
effects on men's behaviour.

However, into the course of judicial decision and its
the law were investigations using the method of the natural
that the only profitable or even the only rational study of
to attribute scientific jurisprudence inspired by the better
as the legal doctrine? Others constrain a vision of a domain
case does not, in the work of the most renowned American
somewhere within which judges can and should apply to dispose of the
law is inextricable, there is nonetheless an existence Law
claim that even when a particular provision of the positive
document of jurisprudence, but perhaps surprisingly, the Model
Life as the Natural Law turns now calls itself the American
is not to be judged by the fact that the journal which began
years after the Union, though I might add that this importance
the place in American jurisprudence, especially in the early
and applicable to all men at all times and places has indeed
there is a universal natural law discoverable by human reason
law, and the conception that belonging or above positive law
language of universal natural rights and of a universal natural

Of course, the Declaration of Independence speaks the

In any case, the present text of a law-making act,

It is not treated like the language of a statute as the author's

Entirely for the fact that the language of a judge's decision
and consistency a mistake and given a retrospective operation,
and

Normally, treated as starting with what the law has always been,

Courts over-ride some past decision the later new decision is
looking for, not creating; the law and for the fact that when
the same expectations are addressed to the judge as if he were
as the form of lawyer's arguments in courts which, entertaining
such better in the possibility of justifying many other things:

appears to offer no determinant guide, and with this goes the

constructual provisions, statutes or available precedents
make new law for them even when the text of particular
that judges should apply to their cases existing law, and not

expectation can be provided for the common expectation of integrants
assertions and mistakes, still an explanation and a juris-
contrary and in spite of whole periods of judicial
the facts, that in spite of superstitious appearances to the
The given provision as a member there may be either expressed
give no determinate guidance but in the whole system of which
itself a given legal provision in the paper formulation may
will established rules, practices, standards, and values. By
vacuo but always against a background of a system relatively
to the fact that legal decision making does not proceed in
illusion that he is due to a failure to give proper weight
position of a law-maker, even an Inspector of Law-makers. The
sovereign prerogative of choice, he is not forced into the
do not have as his only recourse what Holmes called the
a judge faced with intransigency of a particular legal rule
it can only be the product of the judge’s unconscious will.
so
a law case is not as it seemed in its formation in logic,”
 denounced as a blindness error the assumption that if the outcome
when reading for a “grand style” of judicial decision, he
in a legally uncontrolled choice. Heavily weighted process better,
the decision which the court gives can only be the judge’s
of a system in which it appears as a major premise, then
number to justify the decision as the strict deductive conclusion
result in decision in a given case so that the court is
cannot. Thus is the better that it a particular legal rule
of a better which has sustained the innumerable view of judges.
The American model dream, another common feature is a reflection
and the actual practices of an intransigent common to all forms of
society, must as Ulysses said, plant the feet in that society
this particular case that guidance for a particular

society.

specific ends and values pursued through law in a particular
concerns and shape of an individual legal system and the
something not universal but specifically related to the
law. The American model dream has generally been that of
justice, take the form of an invocation of a universal natural
or to hope too much from, a much admixed style of adjudication.

"A much admixed style of adjudication, may seem to make too much of,

To an English lawyer the suggested recipe for the

result for the Irish case.

To explain the clear existing rules and yield a determinate
or principles which singly or collectively will both service
or principles which singly or collectively will both service
or principles which singly or collectively will both service
or principles which singly or collectively will both service

should instead search in the existing system or a principle
accordance with their conceptions of justice or social good but

themselves free to legislate for such cases, not even in
formulated rule seems available, courts should not consider
ambiguous or where no relevant authoritative explication

decision when particular rules appear underdetermined or
they are manifested but constitute general guidelines for
such principles do not serve merely to explain rules in which
explaining the existence of the clarity established rules, but
others have to be identified as the most plausible hypotheses
these are explicitly acknowledged or even enacted, whereas
legal systems contain largely-scale general principles of this kind,
particular cases under such rules, besides rules of this kind, 

decrements to closely defined factual situations entailing
confining only rules attaining closely defined legal case-

system was too narrowly conceived. It was represented as
stressed and further developed by other jurists, that a legal

insufficiency. In the 1920s Bound introduced the notion, much

In 1960 when the author was 30, of a 3,000 page work on

exhausting 10 years of research, culminated in the publication

In the work of Roscoe Pound, whose geographic production

called particularism and holism - are to be fused with much else

both the features which I have mentioned - which we might

yield a determinate result.

or latent, principles which it consistently applied would
theories of adjudication at least approximate to the Noble

holistic approach urged by Lord and later judges whose

rules and to provide an answer in the instant untested case,

relationships and so explain the already established clear

when it was enunciated by Lord Atkin both stressed to define the

products - though produced and marketed in subsequent cases,

those who are their neighbours so understood, this broad

take reasonable care to avoid instructing foreseeable harm

be harmful to those who are likely to be affected by it must

that无论whoever undertakes any activity which may foreseeability

that the manufacturer was liable under the broad prudence

not a relationship gave rise to a duty, Lord Atkin ruled

showing the general considerations that established whether or

stating in general terms what was common to all these cases

once there was any clear explicit prudence

the liability of a manufacturer to consumer with whom he had

using the highways, but did not include nor particularly exclude

of parties standing in contractual relationships of persons

of owners or occupants of premises to persons coming upon them,

said to exist, such rules specified for example the liability

what the English lawyer calls a legal duty of care was

subject of a number of separate rules specifying relationships

another for injuries caused by his carelessness were the

decision in the situation in which one person was liable to

containing the toxic remnants of a dead snail. Before this

case (Bournine v. Stevenson), it was a bottle of ginger beer

a negligently manufactured product. In this famous English

stood in no contractual relationship for injuries caused by

whether a manufacturer was liable to a consumer with whom he

most famous modern instance, Lord Atkin faced the question

followed by some great English common law judges. In the
purse would dictate a suture of judicial decision.

Legal systems, however, rather than a regenerative idea for judges to
parliamentary legal rules can create an ad infinitum truth about
received value would provide a determinate unique answer when
of the idea that a whole system with the principlate and
To be fair to bound it must be said that the probably conceived
awarding the judge, a discovery and not calling for his choice?
that there must be some unique resolution of such conflicts
received values or ideas?
alterantives present themselves at this highest level of
and the same contends or
principles should prevail:
but of course the same questions
dermine whether a number of conflicting or
principles, and that recourse to those would suffice to
acknowledged and incorporate from its established rules and
received values or ideas of the system again either explicitly
received values or ideas of that of principles above that of
of his answers seems to have been that all of higher levels
of importance to such questions and one
not a further discovery of existing law?
found in this long

would a single instance like such a chance will be an act of law-making,
and it so will not make the story full short of the
It so will there no be need of the higher levels for judicial
explain by a number of different alterantives hypotheses
not a given rule or set of specific rules be equally well
May not the legal system contain conflicting principles?

sufficent to push the match but not in least
merely to adopt this style of decision is not in least

particnial legal rule produces underentenent the judge cannot
only

presume, and it is enough to assume supposed theories that when a

16
Because controlled by law, the existing system, and may be ranked as a decretion warranted alternative, is chosen at will have its seat firmly planted in of the legal system comprehended under them and so whatever to him at this level will all have the backing of great areas of principles or received values, the alternatives presented the judges choose, as they may have to, at the higher level. This version of the noble dream it is enough that when Newton's version of the noble dream it is enough that when

interpretative process,หว่างนี้ I think, however, that in exhaustive examination of all of my symphonies English and I do not fully understand, in spite of the patent, direct and confuse that is much in Newton's writing on this subject which

predictability of judicial decretion in appellate cases. I
judicial choice and what accounts for the high measure of
as he thinks best, this is the most important constraint upon
me looks, and yet it is the only thing that will produce the positive law
values, faced with the interdependencies of the positive law
time in accordance with the broad principles and established
case, or in this case, the system is a whole, sometimes deprecatingly called, prove inapplicable, is to
in cases where particular rules, paper rules as they are
disparate, but in the terminology of the ontogeny, the judge
not in general theorectal terms for which he had a great
the grand style of judicial decretion. This message is presented
between in his taste and supporting advocacy of what he deemed
choice is I think in the end also the message presented by Kent
rather than extraneous altogether the need for such a choice.
and operate as a powerful constraint upon judicial choice.
though of course he may be mistaken, this means that he must not
say that he believes in the law before his decision, is never to determine what the law shall be; he is constituted according to the new theory, the judge, however hard the case, must in some way exercise what he called the sovereign prerogative of
judgment. The judge is never to make law; so other
established law the judge is never to make law; so other
conflicting rules seem to fit equally well the already certainty
each of two alternative interpretations of a statute or two
so for work, even in the hardest of hard cases where
the personal morality or conceptions of social good or justice
also his laws. And the point to realize in accordance with
does not the judge, as he is supposed, prove interpretative, push
when the explicit rules prove interpretative, push
the idea which he attributes to postulate interpretative, that the
undermined principles, and like Therefore he regards the
authoritative rules and emphasizes the importance of implicit
the idea that a legal system consists only of explicit
is a holistic and participatory one, like Pound he regards
meaningless this theory in the sense of having already explained
goals which are not the judge's business, but the legislator's
with arguments of policy and aggregate welfare or collective
business of judges to use in support of decisions are constituted
entitlements of rights which he thinks to be the proper
such as that between arguments of principle about existing
of adjudication is marked by stress on many new distinctions
powers of argument on the defense of his theory. His theory
base than his predecessors and the consequent formidable
most elaborate of all with a wider and more expert philosophical
the judge does not make any such compromises on these points and

Professor Dowling, contemporary version of the noble

18
government ... He must develop that theory by referring
set of principles and policies that justly fit the scheme of
develop a theory of the constitution, in the shape of a complex
political morality. In Professor Dockrill's words, he must
rare open up much wider-ranging questions of justice and
of this sort. To deal with them the judge must ideally at any

proposed by the existing law there may be unresolved questions
the system and the general principles which may be said to be em-
Professor Dockrill recognizes that at any level of equity into
statements on which persons had acted to their detriment.

negligence came to be applied to cases of negligence into
when the general principle announced by Lord Atkin in relation to
instant case, this position was reached in the English courts
the existing law but yielding different solutions for the
be a plurality of such general principles equally well fitting
of course that is only the start of this inquiry for there may
and will also yield a definitive answer for the new case. But
previous course of decision in relation to this subject matter
a general principle which will both justify and explain the
English case on product liability. That is the most construct
will take just the form I have illustrated from the great
for what the better to be the law? Very often his reasoning

of course on this view the judge has to present argument.

the law.

make law choosing between alternatives as to what shall be
powers or discretion, so there is no space for a judge to
so the fault is not in it but in the judge's limited human
ever incompletely, inconsistent or determinant; if it appears

always suppose that for every conceivable case there is some
Impartially what Professor Dworkin well calls the "gravitational
legalist" above all is he has considered conscientiously and
a judge has conceived to decide to all those constraints
a judge has conceived before the decretal's decisions on
consistent answer awaiting discovery. Lawyers might think that it
existing law is correct, still there must always be a single
instance that even if there is no way of demonstrating
the other constraints that it will attract but of this
justifications and facts. But if I may venture a prophecy, I think
attractive. It has indeed already added much to the stock of valuable
sustained both jurists and philosophers on both sides of the
Professor Dworkin's theory will am sure much excite and
uniquely correct.

Single solution for the instant case derivable from it which is
that there is some unique theory, however complex, and some
nonetheless to make sense of what they do judges must believe
correct and the others wrong. Indeed, all may be wrong:
so it cannot be demonstrated that one or these is uniquely
different and conflicting heretofore theses and when this is
different judges coming from different backgrounds may construct
the construction of such a theory may be. He shows that
Dworkin rightly calls the judge whom he imagines emphatic on
is superior, plan. That is a heretofore tacit and Professor
such as liberty or personal dignity or capability which he thinks
concept of the fundamental value projected by the system
exhausted he must in Professor Dworkin's words, "decide what
institution" when the democraticizing power of this test is
he must generate possible theories justifying different aspects
alternative to political philosophy and institutional detail.
at two crucial points: two themes which have dominated both

Professor Drunkin’s version of the Noble Dream challenge
considered a failure to perform judicial responsibility...

result and a judge’s decision either way will not work be
a result to correct, enough lawyers disagree about the proper
doctrine in hard cases, he concludes, “prosecution
Professor Drunkin’s attack on the idea that judges have a
of Columbia Law School, when after a pattern examination of
philosophers and lawyers with Professor Drunkin’s assertion
philosophers and lawyers with Professor Drunkin’s assertion

is the tattle-tale’s advice of course the correctness of the answer
have a right answer to the question which of the

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demonstrating what it is? Just as they would be entitled to
the judge is the right answer though there is no sense of
of law that what litigation are always entitled to have from
right answer in all such cases, with the corollary in the case
right sense to such questions assume that there is a single objective
of which of Shakespeare’s comedies is the funniest, must to
of two competitors in a beauty contest, the tallest, or which
answering a trite answer to a question is most just or fair, or which

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take account of the impact of their decisions on the general public. It is proper and indeed at times necessary for judges to counter to the conclusions of many lawyers that it is indeed to the public's advantage that they should have it. Thus, it is to the public's advantage that people are entitled to have a matter entrusted to what people are entitled to have a matter entrusted to what people are entitled to have a matter entrusted to what people are entitled to have a matter entrusted to what people are entitled to have a matter entrusted to what people are entitled to have a matter entrusted to what people are entitled to have a matter entrusted to what people are entitled to have a matter entrusted to what people are entitled to have a matter entrusted to what people are entitled to have a matter entrusted to what people are entitled to have a matter entrusted to what people are entitled to have a matter entrusted to what people are entitled to have a matter entrusted to what people are entitled to have a matter entrusted to what people are entitled to have a matter entrusted to what people are entitled to have a matter entrusted to what people are entitled to have a matter entrusted to what people are entitled to have a matter entrusted to what people are entitled to have a matter entrusted to what people are entitled to have a matter entrusted to what people are entitled to have a matter entrusted to what people are entitled to have a matter entrust
analyze the conflicts which the law in question has led to.

A similar conception of science appears in the notions of economics. The
future as the man of statistics and as the master of economics.

In this context, the welfare was understood as the man of the

presum[ed] importance of intuitive methods of judicial law

measured social desires, and that this would replace the

would establish the postulates of the law upon "natural".

the relative worth of different social ends, or as he puts it,

necessary law-making takes a science of law which would determine

might be found in scattered but significant observations. In this form, it is

expressed wants or revealed preferences. In this form, it is

classical utilitarianism but in terms of the satisfaction of

to be maximized. It is defined not in terms of pleasure as in

leads easily into welfare economics where the aggregate utility

the judicial process. It has done this mainly in a form which

penetrated, though not very far, into American thought of

by doctrines of individual rights. Nonetheless, it has

critique of law and society has generally been overshadowed in America

unattainable rights of man, in any case utilitarianism was

affirmation of the eighteenth-century doctrine of the

Nozick, Anarchy, State and Utopia, works which have much

philosophy made by Professor Rawls, the theory of justice and

work but of the very important contributions to political

the defense in the face not only of Professor Dworkin's

Professor Dworkin's emphasis on the general, hostility to

Professor Dworkin, s discussion of such considerations from

community welfare.
the theory of the imposition of legal liability for bear a loss. Thus, to take one of the simplest examples, for determination of legal disputes where the question is who should provide a rational, impartial, and objective standard for the law, but on the criteria of normative since the theory claims to faction. Thus, it is said to be the impartial economic logic of the market, where efficiency is defined as maximizing aggregate output. Where are allocated to those which are economically most efficient system of incentives used to secure that economic resources are utilized in a way consistent with the conception of law as a market incentive system for expanding an economic market; for any established claim that great areas of the common law may be structurally

law and economics order. As an explanatory theory it is the

the claims to have had a profound relationship between

has a great hold upon American legal and the law of tort.

consequent philosophy if is that of utilitarianism, but utilitarianism

making, whether by legislator or judge, if they rest on any

These two utilitarian with the idea of a science of law—

but this discussion does not provide it.

wasting the conflicting items and so some form of quantification,

bound acknowledges that there must be some method of weighting or

satellite of the total scheme of interests as a whole. To do this

what bound calls the least friction or waste or with the least

which would show how conflicting interests might be accorded with

or an organized body of knowledge: a science of social engineering

social and public. But compared with this analysis is the conception

dedicated to the classification of such interests as individual,

mention. Many of the pages of this immensely practical writer are

or desires expressed as claims to legal recognition and enforce-

In terms of underlying interests, that is in terms of wants
than any so far provided.

The theory of our greater comprehensiveness and detailed articulation
and their relationship to other values pursued through law - a
generalization that is needed is a theory of incontrovertible truths
rather than a theory of legal decisions. It becomes clear that in
besides a theory of utility for a satisfactory explanation and

tiny fact we need a force one to think what else is needed
succeeds in the osteopathic purpose, but because its defeated
law could fail to profit, this is not I think because it

to establish these utilitarian underpinnings of the
work and the large literature which has grown out of it.

No one who has read Professor Posner's elaborate and refined

conduct and imposing fines.

then could be provided by any contract. A negligent agent

not only the result will be a far more effective deterrent

incentive for victims to bring cases of negligence to official

more ingenious than convincing, that the latter in the turn is an

on the victim's, the theory returns the answer, which is perhaps

be done by fines payable to the state instead of damages paid

only concerned with the provision of

compensation can do this. To the question why, if the law is

moral right to have this loss made good by him so far as monetary

on the footing that the victim or another's negligence has a

least sometimes imposed as a matter of justice between the parties,

with the conventional idea that liability in negligence is at

concern himself with considerations of general utility, but also

not only to protector's own theory that the judge must not

is OCCUR, I THE THEORY OF INCENTIVES' STRONGLY COUNTER

loss caused by their neglect discounted by the probability of

harm - that is precautionary the cost of which is less than the

negligence causing harm to others is to provide an incentive

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another time.

they do and when and how they do it. that is a topic for a matter of indifference but of very great importance which judges do one and sometimes the other. it is not of course hours. the truth, perhaps unexciting, is that sometimes they have much of value to teach the jurist in this waking any other dream, these two are in my view illustration through view that they never make it. like any other nightmare and make and never find the law they impose on litigants, and the nightmare and the noble dream: the view that judges always american jurisprudence as best by two extremes: the

in conclusion let me say this, i have portrayed
25. 48.
44.  Economic Analysis of Law (1972).
42.  Distinction: II 187.
41. The Path of the Law: Collected Legal Papers.
40. op. cit. 236.
39. Law in Science: Scientific Legal Papers.
38. (Oxford 1974)
37. (Cambridge 1971)
36. See Greenmantle op. cit. 92 and Umano Working Rights.
35. A Fragment on Government.
34. Discretion and Judicial Decision: The Plutarch Guest.
33. op. cit. 111.
29. This is expounded now in his collection of essays on
28. op. cit. note 7 supra.
27. "The Common Law Tradition: Section on Appellate Judging as
obtrude an outside will."
22. op. cit. 79 supra.