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## German Legal Philosophy

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# MICHIGAN LAW REVIEW

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## GERMAN LEGAL PHILOSOPHY.

*"We shall not light up our temple from that unhallowed fire. It will be illuminated with other lights. It will be perfumed with other incense than the infectious stuff which is imported by the smugglers of adulterated metaphysics."*—Burke.

**A**NNEXED as an appendix to the translation of Kohler's Philosophy of Law is an appreciation of the work by Adolf Lasson,<sup>1</sup> who complains that he himself once wrote a philosophy of law which has sunk into oblivion, probably for the reason, as he modestly suggests, that he knew so much of systematic philosophy that he had no time to acquire any "special scientific learning either

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<sup>1</sup>A professor at the University of Berlin, who published in 1882 a "System der Rechtsphilosophie" which is the work to which he refers as characterized by little knowledge of law. His ideas are a strange farrago of contradications. The law, he says, is an ordering to govern men's conduct toward other men and its form, more or less accidental, has been given it by history. Here he follows Savigny. He next announces that all law is positive law, supposing thereby that he throws aside natural law. Law can exist only as the product of the authority of the state. Here he follows Austin and Hobbes. Justice is an absolute principle which has its source in equality. Here he follows both Kant and Hegel who borrowed from Rousseau. Justice, however, is an ideal which the law ought to follow but which it can never realize. Here he is on the ground of natural law, but his assumption that justice is any more definite than law is wholly gratuitous and commonplace. Law next becomes a portion of ethics, which, of course, it is not. He maintains that the problem of philosophy of law is to interpret existing law as an expression of reason. Law lives and finds its source in human consciousness. The principles of law are justice and liberty and it is an harmonious expression of the relation between the inner life and needs of the community and the outer forms of the regulation of that life. The rule in Shelley's Case touches the inner life very closely. He defines the state as a human association, which it no doubt is, but suddenly he finds that to this artificial human association "belong the people, the land, the sovereignty". The human creation, therefore, is higher than its creator, and he says that the origin of the state is remote from the people's will. Here he is thinking of the divine right of the worthy Hohenzollern Burgrave of Nuremberg, who bought the old Mark of Brandenburg from the Emperor and thus made "the sovereignty of the people a meaningless term". At last like all the rest he reaches Prussian absolutism. This nonsensical compound is to Professor Kocourek an important systematic contribution to legal philosophy. Lasson, of course, is at one with the eminent jurist, von Tirpitz, in denying that international law has any legal status, i. e., Prussian recognition.

in the law or any other special department of knowledge."<sup>2</sup> This complaint is a confession, child-like and amusing in its vanity, which could be dismissed without comment, were it not something that is wholly German, very German of very German, I hope I may say without irreverence; for German legal philosophers are plainly separable into two classes, the very large class to which Lasson admits that he belongs, who know nothing of law, and the very small class, who know something of law but are not philosophers. It is not an accident that these wise men who "profess" law as their special province call themselves mainly either Neo-Hegelians or Neo-Kantians. Neither Kant nor Hegel was a faint skiagraph of a jurist, yet both essayed a philosophy of law,<sup>3</sup> based upon a much wider system of metaphysics. And it is generally true that the German philosophy of law is a mere side issue of a pretentious transcendental theory of the Prussian state.

In an earlier work<sup>4</sup> Herr Professor Lasson with true Teutonic truculent arrogance avows that teaching as to the meaning and purpose of the state which is a household word in Germany: "The national state, representing the highest expression of the culture of its race can come into being only by means of the destruction of other states and this destruction can be effected only by violence." This is the orthodox *Kultur* creed of greed and aggression which has brought on the great war. There will never be wanting in Germany philosophers to give a governmental dogma an apparently philosophic expression and this particular dogma is the crown of their legal philosophy. One looks at Lasson's atrocious statement—atrocious for this age—and is wholly unable to realize the morally filthy soul that is capable of prattling in the next breath of right and morality,

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<sup>2</sup> Appendix II, Kohler's *Philosophy of Law*, translated by Albrecht, p. 331. In the introduction to this work are some observations by Professor Kocourek, which are referred to in the preceding note.

<sup>3</sup> Hegel and Kant each thought that right was the fundamental idea and hence their philosophy of law is really a philosophy of right, which is a very different thing from a philosophy of law and is a task which may be attempted by a metaphysician with impunity. It has been said that *Recht* here ought to be translated law (see Kocourek's note 1, Gareis, *Science of Law*, p. 1), but this is a total error. When these writers mean law, they use the word *Rechts*. The use of *Recht* for law belongs to a much later time. A mere cursory reading of Puchta or Kant or Hegel will show the utter confusion that would result. Right is to them the reality, law is a mere development of right, so far as it can be called law. The transcendental state theory is caused by their attempt to make the actual government the highest expression of right.

<sup>4</sup> *Das Kulturideal und der Krieg*, p. 66. Treitschke in his *Politics* i, 65, 66, sets forth the same creed with even more rawness. Treitschke, by the way, thinks President Jackson was "the conqueror of Texas" and asserts that "the reverence of the masses for President Lincoln rose to such a pitch that he could perfectly well have attained to kingly power among them had he so willed it" (*Politics* ii, 285). Compared with him the muddle-headed von Holst is a master of history.

liberty and equality. It comes as a sort of shock to find that this same Lasson, echoing both Kant and Hegel, pretends to believe the function of government to be "the development of law toward justice, which offers the ideals of freedom and equality as the goal of such development".<sup>5</sup> This freedom and equality is best realized according to German philosophers under the autocratic military Prussian state and they seem to believe that they prove that the citizen enjoys freedom and equality by being denied both and that the state realizes justice by enslaving and destroying its weaker neighbors.<sup>6</sup> We naturally inquire of these worthy idealists how they are able to differentiate such a state in spirit and design from Morgan's band of pirates. They as a social organization under an autocratic ruler, who made women "walk the plank", realized freedom and equality in the same way with a military organization and they had a form of *Kultur* which could achieve itself only by force and violence and yet a world of unthinking realists rejoiced when they were all killed or hanged. Is it not for much the same reason that the whole civilized world receives as tidings of joy the reports of great German losses in dead and wounded, tempered with regret that the wounded were merely wounded?

The Herr Professor Doctor Lasson reminds us of Frederick the Great's cynical avowal that he committed his lawless acts of aggression first and then set some professor to work to justify them. It may well be asked what is the advantage of examining such a philosophy of law if its outcome is a palpably indefensible result. The most important reason is that upon a proper philosophy of law resulting in a proper theory of the state depends the question whether there is or can be an international law, the most important legal question for our day and the future. Another reason is that in these last years we have been hearing much of the surpassing importance of German legal philosophy. Lately a number of trans-

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<sup>5</sup> Berolzheimer in his *Legal Philosophies*, translated by Mrs. Jastrow, p. 285, suppresses all reference to the earlier book of Lasson. He shows a similar reticence as to Nietzsche and Treitschke. This is only another instance of the hypocritical attempts at deception so prominent a feature of Münsterberg. The latter never had the hardihood in this country to admit the Prussian theory of the state, but he was trying to lead up to it, as will later be shown.

<sup>6</sup> By a curious inversion of language, this lawless, swash-buckling, buccaneering state is in their absurd language an *Intelligenzstaat*, a *Kulturstaat*. But this state is on no higher moral plane than when Caesar noted (*De Bello Galico*, vi, 23) that the Germans of one tribe thought stealing from another tribe highly meritorious rather than blameworthy. Velleius Paterculus (ii, 19) notes them as *natumque mendacio genus*, "a race born for lying". "The monsters that barbarous Germany breeds" (*Germania quos horrida parturit fetus*, Horace, *Odes* iv, 5, 26) have not changed in moral attributes in two thousand years.

lations of German legal works has been put forth by the associated law schools. In reading some pro-German introductions and prefaces to these books we are made to feel that we have been losing "the precious life blood of master spirits". The hierophants of this propaganda have been attempting to commit the law schools of our country to a serious and exhaustive study of these works to the exclusion of more useful things. The rub-a-dub of this phase of the pro-German propaganda is but a part of the general pro-German drum beating that has found places for such persons as Münsterberg, Francke and Dernburg.<sup>7</sup> It will not do for us to act as the indignant householder who, when he had thoroughly digested the German sacking of Belgium and northern France, went to his china closet and meticulously smashed all his Dresden and Meissen. Even though most of it be hideous, it is worth while to look into this enormous output of the professorial Pandours<sup>8</sup> and see whether this "country of damned professors", as Lord Palmerston called it,<sup>9</sup> has achieved anything of note in its attempt to construct a philosophy of the science of law, which is easily the most uncertain of all the sciences connected with that most uncertain of all things, human nature expressing itself in social existence.

These Germans for a century have been abusing each other, wrangling through innumerable Enzyklopädien, Grundlinien, Grundbegriffe, Grundrisse, Grundlagen, Grundzüge, Grundlegungen, Grundlehren, and other profundities of that sort and through periodicals and articles in various kinds of Zeitschriften about what law is and the true philosophy thereof and the place of law in the Teutonic universe. As a matter of fact the quarrel is over mere words, theories and definitions, but not over actualities. To understand their various schools and conclusions we must survey those

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<sup>7</sup> I suppose we may acquit the persons, who have been misled, of any consciousness that they were being used as tools of the propaganda, but I hardly know what to say of Dean Hall of the Law School of the University of Chicago, who was not ashamed to enter on a warm defence of German submarine methods against merchant vessels. He doubtless has now seen the error of his ways.

<sup>8</sup> I hope no one will understand that for the greater number of professors in this country I have any feeling, but one of warm admiration. Many of them have given themselves wholly *pro patria*. Their course is an honor to humanity. The great majority of professors of law in this country have no use for the German legal philosophy.

<sup>9</sup> We now reflect that Lord Palmerston was the only English statesman of the long reign of Victoria who understood the Prussian aims. He desired to fight in 1864 for Denmark and the Duchies, but he was overruled by the Queen. Until the letters of Lord Clarendon, Lord Granville and, best of all, Sir Robert Morier were published, it was not known how often the Queen mounted what Lord Granville called "her German high horse" to England's detriment. The lowest period of England's foreign policy was when Gortchakoff said to the English ambassador: "I understand, then, that England will not go to war on a point of honor."

general considerations which enter into legal philosophy in order to estimate the German treatment of the material and to comprehend their riotous discussion. That any branch of knowledge should have a philosophy, it must first become a science. Science is based upon matters of fact. What law is must first be settled as a matter of fact. From matters of fact a theory or philosophy generalizing the facts of the science may possibly be constructed if they can be ascertained with completeness after a survey from different points of view. To this end, law first may be examined from the standpoint of the larger facts that condition, limit and restrict it. Second, it may be investigated in regard to its place and sphere among the other sciences concerned with human conduct. Third, it may be considered from the standpoint of the portion of human conduct to which it is confined. Fourth, it may be surveyed in its growth as shown in history and by comparative jurisprudence. Lastly, its rules must be analyzed from the standpoint of what they actually are, what the philosophers in their metaphorical jargon call its "content". Then a glance at the so-called schools gives some further light upon the subject. The common method of approaching the subject is by a ponderous notebook apparatus quoting voluminously from various authors and creating a hodge-podge of illy digested matter in the German way. If one attempts to say anything upon this subject he ought to have in mind Seneca's advice, "It is disgraceful for a mature man or one approaching maturity to get his wisdom out of his notebook. 'Zeno said this': 'Yes, but what do you say?' 'Cleanthes said this', 'But what have you to say?' How long are you going to march under another's banner? Put out something of your own. I have a very poor opinion of those who are never trying to create, but always to interpret, always lurking in the shadow of some one else".<sup>10</sup> Besides, one who has spent all his days in busy practice could not follow the common-place book geniuses even if he had the time to copy bulky extracts.

## I.

### FUNDAMENTAL FACTS.

The fundamental fact disputed by no one is that law is concerned with human conduct. The obvious limitation upon human acts instinctively recognized by all human beings, whatever their grade of intelligence, is that the lives of themselves and their offspring must be preserved. As in the case of all animals, the preservation of the

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<sup>10</sup> Seneca, *Moral Epistles*: 33, 7.

species is bound up with the preservation of individuals. Since human offspring require years of nurture to become viable, the preservation of the species presupposes the extended support and bringing up of the young. This ultimate fact was recognized by the great Roman jurist Ulpian in his famous passage (so much misunderstood) as to a natural law which we enjoy in common with other animals. He speaks in this connection "of the union of male and female, procreation of children and bringing up of the young".<sup>11</sup> This statement has been denounced by Austin in his raw, Jacobinical, Benthamic way<sup>12</sup> as "a foolish conceit" and "an inept speculation", but Austin simply does not understand. Ulpian means that the most fundamental natural fact<sup>13</sup> about the subject-matter of law, as regulating human actions, is to recognize that human beings are animals, that the elemental facts which govern and preserve animal life must govern them; that the race must be preserved in the same general way that every animal species is preserved and that the preservation of the race presupposes unions of men and women, and the begetting and the rearing of children. It is not likely that any race, however low, ever consciously violated this absolute requirement. We know, as a matter of reason, what is the fact, that the most fundamental part of law will be concerned with the family, marriage, the domestic relations including parent and child, as well as with the protection of human life and human security and the assuring to the family what happens to be necessary as property, with suitable provisions to secure the family property to the succession of the children. Whatever may be the variations among different peoples, this is found to be a part of every system and it may be called natural law.

The second fundamental fact is that it is impossible to consider human beings except in association with other human beings. I do not mean the family group alone, which is predicated upon an unalterable fact of nature, but it is impossible to consider law as applicable to even a single family group at any stage of human history. None of the legal theories which build upon the family as the original unit is verifiable. Human beings even in the lowest phase of savagery lived and always have continued to live in some sort of social aggregate larger than the family. This is a settled fact in biological and anthropological science; "man can live only in society

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<sup>11</sup> *Maris atque feminae conjunctio, liberorum procreatio, educatio.*

<sup>12</sup> Austin Jurisp. (5th Ed.), 209, 210, 552.

<sup>13</sup> The natural law (*jus naturale*) of Gaius's Institutes is a different thing from what is meant by Ulpian in the passage above. In other places Ulpian himself uses natural law in the ordinary sense of Roman jurisprudence, which is the product of reason.

and has never lived except in society."<sup>14</sup> There is nothing new in this conception. Aristotle's fundamental fact for his science of social man called his Politics is that man is a "political animal" by which he means first of all an animal compelled to live in a social state with other like animals. Every society as a part of law demanded by nature must have a certain kind of law looking to the preservation of society.

The above are the general physical facts of biology and anthropology to which law must be adapted and accommodated. The next fact is that human beings are rational animals, and they have behind them a process of development by which the human mind became rational. In the progress of human beings through a time "*unendlich lang*", they became capable of reflecting upon their sensations and of rationalizing them and of attaining self-consciousness, by which is meant that a human being at some point after birth is capable of making his own mind and the minds of other human beings the subject of his investigation, observation and thought. Just as the human embryo reproduces the physical development of the race, so the human mind in the individual from its capacity in the child to receive sensations without more, up to the stage of adult self-consciousness and rationality, reproduces the mental history of the race. Since the human mind has never existed except in the social state, the mind of man is a social mind trained only to life in a social state and no other condition. This social mind will govern man's life and institutions, and since law is the product of the social mind of human beings in a social state, the basic facts of psychology, the science of the social mind, as well as of sociology, the science of the social state, are bound to form and condition all human conceptions of law. This is no less true of the derivative social sciences, ethics, economics and politics. No man has ever been so deluded as to deny this self-evident fact. There is nothing new in this express recognition of the interdependence of law and the other social sciences, for Cicero has happily said in the opening of his legal argument for the poet Archias, which we construed when we were stumbling our beginners' way in Latin, that "all the sciences which concern human conduct have a kind of common bond and are related by a sort of blood kinship to one another".<sup>15</sup>

<sup>14</sup> Duguit, *The Law and the State*, Harvard Law Rev., xxxi, 23. The most primitive types today and the human race as far back as it has been traced to the earliest types, Chellean, Mousterian, Aurignacian, Magdalenian, Cromagnon, Azilian and Solutréan are all social types. No fact is better settled in anthropology.

<sup>15</sup> Cicero pro Arch. i. *Etenim omnes artes quae ad humanitatem pertinent habent quoddam commune vinculum et quasi cognatione quoddam inter se continentur.*



## II.

## FACTS OF THE SOCIAL SCIENCES.

Since the social sciences are the result of the social human mind psychology comes first, but it happens that psychology and sociology are necessarily indissolubly bound together. It is necessary to go no further into psychology than to say that the mind as a product of an evolutionary process can not be divided into separate social and non-social faculties. In late years it has been demonstrated that no part of the rational power of the mind could have been developed if there had not been constant association and intercourse among men. But almost all the legal theorists lose sight of this fact. They assume that there is some contrariety between the individual mind and society, and hence the collectivists talk of the collective mind and its will, while the individualists talk of individualism. But both talk of the non-existent. The conception of a collective mind is a metaphysical abstraction pronounced palpably false by psychology, which knows only individual minds, but individual minds developed by, trained in, adapted to, and impossible without, the social state.

This individual social mind is the result of certain large factors, nowhere disputed, which result from the associated state. Especially is to be noted the influence of language, first spoken and later spoken and written, but men reached comparatively high stages of civilization before written language appeared.<sup>18</sup> Without language men would be to each other what the other animals are to man. By means of language men share the minds of others. Without language, the realization of personality is a psychological impossibility. The reasoning power which results from self-consciousness can arise only among men using languages and language belongs to the associated state. This long process of development brought men to the point where the mind was capable of benefiting by its own and by others' experiences. The mere dependence on external things ceased. The products in the mind of the senses ceased to be in any way of controlling importance. Ideas and trains of ideas shut out the things of mere sense. Man separated his inner self of thought from his self as a mere animal, obedient to the senses. But this whole development is, of course, the interaction of individual minds. The expansion of faculties came from knowledge gained of man's social self through language. The individual mind was en-

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<sup>18</sup> It is perhaps unnecessary to point out that the world's greatest epic took form among men who had no written language.

abled to work back on itself and it was impossible for it to act and it was incapable of judging of acts solely with reference to the single self. No normal human being has ever had a mind that would enable him to avoid the judgment of his fellow men or to avoid action for his fellow men. Collective action for common ends is of the essence of society and man as a member of his social group, the tribe, later the collection of tribes, and the nation, taking thought for the common good, learned to take counsel with himself for his own good as bound up with the good of others. He gained the distinct adaptability to willingness to work for the common good and this willingness is a permanent feature of his mind which he cannot lose. At last he became the so-called man of good will free and able voluntarily to choose the good for himself and for others. This he came to recognize as his true self, something better than his selfish self, and as his ideal answering to Browning's phrase that it is not what man does, but what man would do that exalts him.

It may seem that we are far afield, but we are not, for half of legal philosophizing consists of a denial of the fundamental truths of evolutionary psychology. Psychology teaches that pleasure and pain are not mere conditions of simple sensation, but complex conceptions of the mind, while the state called happiness is not determined by pleasure or pain, but is the individual's realization of his own adaptation to his most complete functioning as a member of society. Thus long before we ever reach law we get rid once for all of the Benthamic theory of balancing pleasure and pain to find utility, for the proposition is psychologically impossible. Happiness is the most intricately involved conception of the human mind and it gives the answer to the end of society as the utmost adaptation of man in his development to his realization of his most perfect functioning as one of the social aggregate.<sup>17</sup> This is the true social welfare, not because it is the greatest good of the greatest number, but because it results from a process of development that binds humanity, and because the human mind is so constituted that it can in the long run seek no other end. To this we may properly apply the much abused word efficiency and say that law is necessarily

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<sup>17</sup> If the great mass of lawyers had been trained in what may be called the new psychology, and had not always had in mind the old psychology which kept the field long after evolution ought to have overthrown it, we should have heard less of the ego and far more of the true constitution of man's mind. Bentham's balancing to find utility of a man's pleasure in killing another against the pain caused by the act is a low, disgusting performance, eminently worthy of Bentham, but to a man capable of introspection unthinkable. His elaborate expositions in his *Principles of Morals and Legislation* in Chapter four, "Value of a Lot of Pleasure or Pain", chapter five, "Pleasures and Pains, Their Kinds", and Chapter six, "Circumstances Influencing Sensibility" are for psychology the greatest nonsense ever penned.

limited by the necessary constitution of the human mind, to the tendency in all men to seek the most complete development in efficiency of individuals in the social state. But since man can say,

"Mine is the world of thought, the world of dream,  
Mine all the past and all the future mine,"

this efficiency is never alone a mere physical adaptation or productiveness, but is a tendency to realize the most perfect adaptation of mind, and body reacting upon mind, to the highest development of each individual in the social state which is consistent with the same development of every other individual. It is Matthew Arnold's idea of a culture that is self-realized, not the German mechanical *Kultur* which eliminates the individual's self-realization. Thus after all, the end of society is the improvement of the individual, but as a part of society. As individuals gain in moral stature, society progresses, as individuals decay, society decays. A legal theory of individualism which sacrifices society is as impossible in the long run from a psychological standpoint as a collectivism which interferes with the highest and best development of the individual. This truth rids us of any collectivism which blunts or paralyzes men's moral conception. This at once disposes of the German theory that the state has no morality and can be amenable to no rules, that the state can be immoral, thieving, rapacious and murderous without affecting the individual citizen. We get rid, too, of all socialistic theories which sacrifice society and individuals to a particular class. They are doomed from birth because they deny the essential mental nature of man.

But the actual fact that man never was and with his mind can never have been a solitary being, disposes once for all of the theory that society resulted from an agreement among individuals, the social contract or social compact theory, stated by Hobbes, followed by Locke, called by Rousseau the *Contrat Social*, stolen by Kant and Hegel for base uses, accepted by Austin, practically adopted by Spencer, made the basis of the Rights of Man doctrine that individuals agreeing to enter society retained all natural rights not necessary to preserve society, and asserted in our Declaration of Independence in its opening statement of certain "inalienable rights". It is useless to examine a theory that is opposed to actual fact and is as completely disproven as the flatness of the earth's surface. The answer is that it never really happened, and if it be assumed as a fiction, it is harmful, because it gives an impossible basis for the social aggregate. Yet while this is true, it is no less true that the

actual form of government, what Germans generally call the state, for which they predicate a transcendental basis, is a matter of agreement or convention, because in many cases the actual time and place of the agreement can be proven as completely as the date of a contract. But this shows the difference between the social organization or the state, i. e., the society for which the government exists, and the actual form of governmental machinery. This distinction obviously proven by history and proven by the forming of the German Empire itself by a written agreement, is an absolute refutation of the German theory of the state. They confuse the matter, and often deceive themselves, by using the word nation or state, now for society and now for the government as if the two were identical and the terms interchangeable, a result to which they are prone, on account of the vagueness and lack of precision in the German language. It is immensely to the credit of English or French or Italian that the verbal tumultuosities of Hegel or Kant could not have been written in those languages.

Turning now to the other part of the psychological conception of the social mind, we come to the science of sociology. The term sociology is a hybrid made up of a Latin and a Greek word and until late years the science was as hybrid as the mule "without pride of ancestry or hope of posterity".<sup>18</sup> One of its baldest impositions was the attempt to show that society was an organism in the sense that a living animal is an organism. No one ever disputed that society was an organization of human beings, but there is nothing more crass than Herbert Spencer's<sup>19</sup> attempt to show from a biological standpoint society as a single living organism by means of a long, involved, fallacious parallel between the growth, maturity and decay of a living organism and what he called the social organism. And when at last it appeared that his organic theory was irreconcilably opposed to his extreme individualistic state theory, his retraction was nothing short of pitiful in the man and the manner of it was mentally dishonest in the philosopher. But gradually sociology has worked itself away from impossible theories and the biological basis of the German state theory is gone. It is now based on nothing more substantial than metaphysics. Fact tells us that no two or more minds can function as one, any more than two or

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<sup>18</sup> It will not be denied at this day that Comte sterilized sociology by his neglect of law and government. By his exclusion of these things from scientific treatment, he rendered a true sociology on his lines an impossibility. His science is called above a hybrid, but it produced certain results just as the "hinny", which is a cross between a stallion and a jennet, is sometimes fertile. The mule is always infertile.

<sup>19</sup> See Spencer's *Sociology* i, part 2, for the discussion. A host of imitators followed him. The most prominent is Schäffle in his *Bau und Leben des Socialen Koerpers*.

more animals can function as one.<sup>20</sup> Metaphorically the state has been called a partnership, which is a better analogy, but best of all is Burke's superb phrase that any particular human society "is placed in a just correspondence and symmetry with the order of the world, and with the mode of existence decreed to a permanent body composed of transitory parts, wherein, by the disposition of a stupendous wisdom the whole, at one time, is never old or middle-aged or young, but in a condition of unchangeable constancy, moves on through the varied tenor of perpetual decay, fall, renovation and progression."<sup>21</sup> Governments may rise and fall, empires may flourish and decay and the social aggregate itself may remain. The usual term applied to the social aggregate considered as the state not as the government, is a moral person. This means that it is to be considered as a unity both in dealing with its own members and with other social aggregates and is thus bound by and amenable to the rules of morality as well as to the rules of international law founded on justice and morality.

But while society cannot be conceived as a single thinking person except by a metaphysical fiction, modern sociology has demonstrated that society is evolving in the individual not the qualities, in Spencer's narrow conception, which contribute alone to his own efficiency in the struggle for existence with his fellow men. We have advanced beyond the sabre-toothed tiger. Man has been developing by his social mind, rather the qualities which contribute to his own efficiency in making himself more capable as one of a social aggregate which is thereby rendered more capable, more articulate, more humane and more just.<sup>22</sup> This discovery now universally accepted demonstrates that there can be no enduring kind of law which is based on the theory that man is solely an egoistic, self-seeking individual and not a social individual, or that he is on the other hand to be disregarded for the social organization. But owing to the fact that most men see only one thing at a time, there are bound to be conflicting ideas of the function of law as governing men's conduct toward other men. The ideal is the adjustment of the individual to society and the social mind in its gradual improvement is constantly striving therefor, and law in the end is bound to seem to conform to "a double standard", but it is after all the single standard of the social mind. It is in the necessity for conforming to the

<sup>20</sup> No one denies, of course, that the social aggregate is something more than a mere civil corporation.

<sup>21</sup> Burke's Works (8th ed.) iii, 275.

<sup>22</sup> See Kidd's *Individualism and After*, *Social Evolution and Two Principal Laws of Sociology*, which are remarkable works. They belong to a world other than the ideas of Comte.

standard of the social mind that is written the certain destruction of the German state theory that might is right. In the ancient world the failure of society and the individual was complete. Every civilization perished, because there was no realization that the interests of all human societies are necessarily the same. The destruction of states by one another, the sacrifice of the growth of wealth and commerce to racial hostility or greed, was the failure to realize the interests of general human society. It is more than an accident that the *pax Romana* had its advent with the dissemination of the Christian belief in the oneness of humanity's interests. In this view Christianity is a part of the great social evolution and undoubtedly the greatest single factor. There never can be another Rome, since that stage of social evolution has long been passed. Just as in earlier society nothing was safe in the face of one strong marauder and his confederates, until the force of the whole society suppressed him by law, so in the society of nations the one strong marauder is bound to be suppressed by the realization of solidarity among civilized nations and by international law. The historical development makes it plain, therefore, that the ultimate basis of law in a single society is the basis of international law among many nations.

This general form of sociological development must be given a more particular application to law. The efficiency of separate individuals in the social aggregate when added together must make up the efficiency of society.<sup>23</sup> Now the individual efficiency always has been and always will be measured, roughly speaking, by his contribution to the means of living, considering life both a physical and a mental state. This is a necessary postulate of the social mind and of the law of social development. The savage's efficiency is measured by the game he makes his own, by the goodness of his weapons and by the skillful use he makes of them. In all civilized life the same necessity for the accumulation of property follows man. In highly civilized societies the works of the intellect are under the same general rule. That there may be a contribution to the general stock of physical well being and mentality, requires the incentive of social estimation resulting from the individual's stock. This is the reason why as man has progressed more and more of different things have become the subject of property,<sup>24</sup> even to the products of the mind in patents for processes, in copyrights and trade designa-

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<sup>23</sup> The proposition that the whole is greater than its parts cannot be true if the individual's efficiency comprises all his powers as one in society, although it is doubtless true that the efficiency of society is greater than that of the individuals considered as separate non-social units, which was the idea of Aristotle in his famous phrase.

<sup>24</sup> The tendency of savages to thievery is due partly to the fact that they steal things which are unknown among them and hence not the subject of property.

tions. Hence property as a sociological fact begins with man; there never was a time when private property was unknown. By the laws of man's development we know that communistic systems are doomed. That stage once passed can never be regained except by recurring to a lower stage of life which requires a psychological alteration in men, for no law can be possible that is opposed to the fundamental constitution of the average human mind.

The sociological law stated in another way is that the ideal of social evolution is the perfect division of labor, physical and mental, considering as labor every possible human activity that contributes to efficiency. The materials of sociology are matters of fact, necessarily of historical fact. Beginning with the savage, history shows that society's expansion has been a widening of the number of those to whom social duties are owed. This is a necessary result of increasing division of labor, and we find the fundamental conception of economics agrees, as it must, with the deeper fundamental conception of sociology. In all ancient civilizations human institutions rested solely on force, outlanders were natural enemies,<sup>25</sup> conquered enemies became slaves. The state as the government was absolute against the individual and had "neither moral nor legal limits to its power", and thus the government was absolutely identified with the society over which it ruled.<sup>26</sup> Slavery was necessarily its economical basis, and even philosophers like Aristotle thought it natural. It was natural only because of man's inadequacy to social conditions. In such a society there could be no proper division of labor, but it realized its efficiency in a conquering war-like organization which supplied the best army and the most servile labor. Everywhere that men developed the works of peace, wealth and commerce, came the conquering power of some mighty military organization. Readily recur to mind the Egyptian war-chariots, the Assyrian bowmen, the Persian cavalry, the Macedonian phalanx and the Roman legion. The policy of the ancient state with its dominant ideas was bound to result in one universal dominion, which alone would survive and

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<sup>25</sup> Among savages the tendency to steal from outsiders is marked. The German state theory is an attempt to project this state of mind among civilized nations.

<sup>26</sup> This it will appear is the theory of Kant and Hegel and Germans have never gotten beyond the standpoint of the ancient world. In all that tiresome work, Hegel's *Philosophy of History*, he shows no inkling of understanding that the world even in his day had passed beyond that point. It has been said with good reason that the Prussian, at least, has never become a part of modern civilization. Goethe believed he never could become so. Plato's Republic with his ruling class, warrior class, and his third class to labor in the arts and handicrafts, in the fields and in commerce, is not different from a society where all human industry is only of importance as it props the military power. To quote Lasson's *Kulturideal* again: "*The cannon is the most important part of the weaving loom.*"

which represented the acme of then unrestrained national competition. But the Empire brought peace and with it the spread of Christianity and its conception of a social force transcending a group of tribes, a people, a race, a nation. In peace division of labor substituted an industrial organization throughout the Empire. This organization yielded for a time to barbarian inroads, but the gradual social expansion disintegrated the feudal military society resting on slavery and undermined the power of the barbarian ruling class. The result was a constantly increasing division of labor which promoted toleration against bigotry, and brought about the same increase in the efficiency of the individual and society, the growth again of wealth and commerce. Had it not been for the German conception of the state, its *wille zur macht*, the social expansion long ago would have realized an international law accepted by all societies, and the Federation of the World would have been realized. But the menace of a great military system required the arming of neighboring states for self-defense. Only corrupt or imbecile Russian doctrinaires could expect a durable state of security before the menace was destroyed. We in America never noticed it in our colonial existence far from the main current of the world's affairs. And just as a national law is demanded in a particular society, so an international law is demanded among all societies. It remains to be seen, and the issue is not doubtful, whether the power of industrial society will overcome the organization of a military society. The tendency to wide conquest of civilized states can no longer be characteristic of the highest social organization. It is now a moral outrage and a social anachronism. The public opinion of the world is too powerful. Marxian socialism, the attempt of a class to rule in a particular society, is just as surely gone as its counterpart among nations. But the essence of the situation is that at last nations have developed the necessary social force behind international law that was required in each particular society to form a base for its national law.

But this general view of economics needs to be supplemented by more particular statements. Concerted collective action for social improvement is a necessary concept of the human mind. Law is bound to serve in the effort to increase individual social efficiency, and the division of labor. A discerning man can see that the whole of the law of contract as developed both in the civil and the common law is far more significant than Sir Henry Maine's generalization that it is a passage of society away from a condition of status. It is a necessity resulting from an increasing division of labor impossible without contract. Let any man who thinks that courts



make law ponder this to find what actually makes law—the power of social development in whose grasp courts and men stand as helpless and chidden as the Greeks felt that the gods stood before the eyes of Fate.<sup>27</sup> Obviously the mass of labor legislation is due to the same cause. Many errors in legislation are bound to be made in the attempt to assist the natural growth. Dominant popular ideas on economics are generally stupid, and this is the real difficulty with popular legislation. Our long career of wild-cat banking, our absurd independent treasury, our rank greenback phase, our deluded silver obsession, our present system of gross inflation under the Federal Reserve Law<sup>28</sup> all show these mistaken efforts.

The legislation forced by popular economics in the way of appropriating one man's earnings to another man must always stop at the point of a great impairment of individual efficiency measured by producing power expressed in terms of property. As soon as the insistence upon the supposed social welfare proceeds beyond that point, private property, inheritance, wills and succession will be imperiled and by the law of social development resulting from the basic constitution of the human mind, the deeper tendency of society to preserve itself will overcome the menace or society will disintegrate. If society has reached the stage of a nation, the national

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<sup>27</sup> This thought is from Swinburne, I believe, but I have not attempted to verify the quotation. The idea is that the Greeks believed that men stood chidden before the eyes of the gods as they before the eyes of Fate.

<sup>28</sup> The government printing presses and the serried ranks of the finance professors have been continuously sounding the praises of the Federal Reserve Law. It was the work of impractical professorial theorists while the legal draughtsman was below contempt. A few men skilled in finance pointed out its dangers. The inflation and the continuous disuse of gold have done much for high prices, which are elevated by the decreasing purchasing power of gold. It is so easy to delude the public by blaming something else that it is useless to point out the errors on which the Reserve Law is based, and its increasing injustice toward all classes of people. If the country had done what it ought, (1) abolished national bank notes and had the government bear the greater part of the loss on the bonds, (2) abolished the greenbacks by retiring them, (3) retired the silver notes, the most notorious swindle in the world, (4) legalized the issuance of notes under the clearing houses guarding the issues so as to force retirement, (5) prohibited all paper money under ten dollars, (6) abolished the independent treasury, we should have seen a different situation. The pretence that the Federal Reserve Banks are of any benefit is constantly asserted by sciolists, but their functions could better have been performed by the allied clearing houses, a natural, not a forced growth. Had the six things above been done, the increase in prices, if any, would have been only the result of the war, and due in no part to inflation by disusing gold. As it is, every man's producing power has been continuously marked down because measured by a medium that has been continuously decreasing in purchasing power, assisted by a wholly unnecessary inflation, but it is of no use to say this, because Ephraim was no more joined to his idols than our people to paper money. Now we hear of a great United States Bank, the objections to which were the only excuse for the Federal Reserve System. But this new proposal seems to be for a promoters' bank.

life will overcome the obstacles.<sup>29</sup> If that spirit is not sufficiently developed, the nation and the society it represents will pass away, as did the worthless government of Poland. Social development in some other form will incorporate such a disintegrated society. To prevent misconception it is here to be said that in war the effort being by the social aggregate to preserve itself, the appropriation of private property may go to any extent, provided the business organization is kept functioning. Destroy that and chaos will result. In Germany today the business organization is no more. All property existing and becoming is pooled. The form of business activity is kept up by an endless chain of credit coming back to paper money and bonds. Every one is fed from the government pool, and the business organization is not functioning at all. Far beyond the losses of war will be the result and Germany's actual difficulties will only begin when peace requires the dissolution of the militaristic pool. Even the Prussian cannot be converted into a complete "slave of the lamp". This is the sole question in Russia. Has it sufficient national feeling resulting in social coherence to overcome the gyrations of law attempting the destruction of individual efficiency? The incapacity of the Slav for self-government, his credulous imbecility, no less apparent in the Russian than in the Prussian masses<sup>30</sup> presages the worst. But the law in our country has survived numberless Bolsheviki. The Adamson law passed by Congress at the command of the Bolshevik dictators sitting in the galleries disgusted the country beyond expression. Now and then a typical specimen of Bolsheviki attains high judicial position, but under our system he is like a rogue elephant surrounded by tame ones and cannot do much harm. We have survived, so why may they not ride out the storm in Russia?

Happily it is only after man has reached a comparatively high stage of civilization that society consciously attempts economic legislation. Prior to that time all such law is the slow and gradual

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<sup>29</sup> A case in point is the railroads. Legislation assaulted them. The Interstate Commerce Commission carried out the work of destruction by pandering to popular feeling. The railroads were rendered helpless, for proper protection in the courts was denied them in the woefully wrong cases which held the Sherman law applicable to railroads. Now the government seizes the roads to prevent a calamity, and it will raise the rates, and pool the roads. All this roundabout folly was caused by an initial error rendering necessary other and greater errors. Thus fate laughs at the courts and legislation.

<sup>30</sup> The great racial basis of the Prussians is Slavic. When Quatrefages, the great anthropologist, was brought to Berlin to ascertain the racial descent of the Prussians, he demonstrated that in the mass they were Slavs with an admixture of Tartar repulsiveness, and with no infusion of Germans except in the ruling class. Thereupon the Prussian zeal over *die Herbrunft* suffered a perceptible diminution. Bluntschli in his *Theory of the State* (English Translation), p. 11, speaks of the Prussians as having "the pliancy and submissiveness of the Slav."

growth of massed individual experiences hardening into imperious customs, under many of which as positive law we live today. This is why the economic legislation of custom never goes backward, while conscious economic legislation is generally erroneous.

The derivative social science of economics has been noted. The derivative sciences of morality and law are the product mainly of the moral ideas of right and justice. It is useless to speculate on the aeons required to develop the general concepts which we call the moral ideas. They were an infinitely slow and gradual growth. Men came instinctively to think and act in a certain way. The moral ideas represented numberless individual inductions of the social mind slowly developing. These inductions were individual judgments upon numberless concrete states of fact and at length a rule of conduct instinctively felt to be just was gradually evolved. The mental processes by which this moral idea has been arrived at were forgotten and became the "broken potsherds of the past".<sup>31</sup> In the same way the allied instinctive conception of right was later evolved and those ideas of justice and right became moral ideas with which every normal social mind was furnished. The idea of the rightful is no longer furnished by a process of reasoning any more than is the idea of justice, as the Socratic dialogues show. Yet these instinctive ideas became in the mind the directing factors of deliberate reasoning for making moral judgments. These moral ideas are, however complex, not simple notions. They may be analyzed and all are now fairly agreed that the fundamental notion at the basis of justice results as a necessity of men living in a social state, and that is that all men in the most homogeneous state of society are entitled to the same recognition, that is to an equal right to an equal recognition. All the philosophers consider justice as having, therefore, two categorical imperatives, freedom and equality. Equality requires equal action upon different men, which must be arrived at by general rules. The idea of justice instinctively asserts in this reaching after equality that when a man has done something to another which reduces that other below the level of equal recognition, the one so acting must submit to the other's getting back to the same level with the aggressor. This is the normal human feeling whether we call it the *lex talionis* or compensation in damages or punishment proportioned to the offence. Thus we arrive at the fundamental notion of justice which is equality before the

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<sup>31</sup> It is nothing less than genius that enabled Pascal to venture the generalization, most extraordinary for his time: "*Qu'est-ce-que la nature? peutetre une premiere coutume, comme la coutume est une seconde nature.*" He was probably anticipated by Montaigne in his essay on Custom.

developed social custom. Roughly the notion is that what a man has caused another to suffer, he should suffer himself. Thus in the code of Khammurabi, which dates probably from 2200 B. C.,<sup>32</sup> when Babylonia was at a high stage of civilization under a written code, which survived the Persian, Greek and Parthian conquests and still in part exists as law, we read that if a builder build a house so that it fall and kill the owner, let the builder be put to death, but if it kill the son of the owner, let the builder's son be put to death. It required ages to disentangle the son by reasons based on better conceptions of justice. The sentiment of equality in recompense was called in religion expiation, in morals it was retribution, in law it was punishment or reparation. This general notion is as strong today as it ever was, for it is a formative concept of the social mind. When a mob goes forth to lynch a malefactor it is acting in obedience to this primal sense of justice. Legal philosophers, however, rarely recognize this part of human nature. They conceive that men are all docile pupils to be harangued, admonished or rebuked as in the class-room, and the Germans are the sort of docile people who endure such treatment. The criminologists are always forgetting that they must leave room for the human feeling that in an atrocious or peculiarly unjust case men instinctively desire to see one who has hurt another, himself hurt to approximately the same degree.

The other phase of the sense of justice is that men to be equally treated must be treated with impartiality. This requires as a basic concept of justice general rules applied to all self-regarding men imbued with the social idea. We say that if a court is biased or prejudiced it is unjust; we mean that it is not impartial. If a court is venal, or corrupt, or swayed by motives no less corrupt so well known among us through the judge who wears some powerful politician's collar of SS, or the judge who seeks to meet the wishes of the appointing power or the judicial creature who seeks to please the populace, the sense of equal treatment, of impartiality, of equality before the law is violated. The cynic might say that things being what they are among us, there is not much chance for a correct administration of the law. We all have suffered from "the backstairs" to judicial chambers and few lawyers have not had juries offered for a price, but courts in their individual in-

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<sup>32</sup> There is a book well worth reading, although the first few chapters are sufficient. It is called *The Origin and Development of the Moral Emotions* by Westermarck, an Anglicized Dane, who like most sociologists would find himself in congenial company among the Bolsheviki, but there is a great mass of material in two large volumes. All the German material has been sifted. The German writer to be consulted is Wundt.

justices deal merely in individual judgments. Courts must all pretend to general and impartial rules and even if they serve the devil must to the general eye wear the spotless ermine of an impartial tribunal.

The dominant notion is that every one can justly ask from another what the other can justly ask from him.<sup>33</sup> The snuffy old Kant at Königsberg announced with a great flourish upon his metaphysical contra-bombardon, the largest of the brass wind-instruments, that he had discovered the basic principle of all law which was so to act that your rule of action could become a general law. The lawyers turned from him in disgust for he pretended to have newly discovered the golden rule and was merely editing the Sermon on the Mount and the tenth commandment. As a matter of fact he was announcing what the lawyers had laid down for almost two thousand years as the fundamental notion for the idea of justice.<sup>34</sup> It reminds us of the famous witticism of Speaker Reed who said that he could never forget the inspiring spectacle of a certain politician's pride and joy at discovering the ten commandments. While all men who are rational are ready to acknowledge that justice requires for law general rules applicable to all alike, the legal difficulty has just been reached. This general rule must be applied to single cases of concrete fact. But of necessity every human act that has moral significance produces a moral judgment. This moral judgment may be applied inwardly to an act contemplated.<sup>35</sup> It is to this sphere that many German philosophers attempt to confine morality. But a contemplated act when done may turn out not as contemplated and the whole moral judgment goes astray. This is of little importance to the law since it regards only human acts actually done which affect other persons. Such acts, if

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<sup>33</sup> It may be needless to point out that the tenth commandment: "Thou shalt not covet" is the widest application of this rule. Precisely the same is Menander's fragment: "Choose equality and eschew covetousness". Menander never heard of the Jewish law, but a quotation from him, "Evil communications corrupt good manners," came through St. Paul into our burial service.

<sup>34</sup> The Institutes I, 1, 1 borrowing from Cicero through the jurisconsults, define justice: *Justitia est constans et perpetua voluntas jus suum cuique tribuere*, usually translated "justice is the constant and perpetual willingness to render to each one his due". It means, however, "to render to each one his right". At the basis of the idea of justice lies the conception that what is due to each man all men have the right to claim.

<sup>35</sup> It ought to go without saying that justice which concerns alone conduct toward other men developed long before any introspective ideas of one's own conduct. Looking outwards precedes looking inwards as a psychological necessity. Right became a much wider generalized thought than justice. It contained not only all the conceptions of justice, but it carried all the notions involved in correct conduct where justice was not concerned. Hence it is that men's moral ideas of right and justice do not agree, but right as the more vivid concept prevails.

they have moral significance, at once become the subject of a moral judgment, but if they are of legal significance, they give rise also to a legal judgment. The moral judgment is governed by the instinctive moral ideas, while the legal judgment, as we shall see, is merely a deduction by a process of reasoning applying the general rule of law to the concrete case. The moral judgment may or may not correspond with the rule of law applicable by reasoning. But since the human mind is a unity the intensity of the moral judgment and the intensity of the legal judgment as to any act may vary greatly. The more intense the moral judgment, the more certain the legal judgment is to yield in the case of an ordinary individual. Perhaps he may not know the legal rule applicable. Perhaps he may know it beforehand. At any rate the ordinary individual follows his moral judgment and pronounces the differing legal rule very unjust. If men were so constituted that they could work one faculty at a time, we should not find this difficulty, but the human mind is a unity and works all together. *This defect of the human mind is not noticeable as long as law is automatically working custom, but as soon as law becomes rational, the defect is apparent. Hence the necessity for specially trained minds whose legal knowledge and power of legal judgment are so developed that they are able to disregard conflicting moral judgments.* Hence it is that after law has passed the stage where it is generally known to the great mass of the community as rigid custom, it is necessary to have a specially trained body of men called lawyers, who alone are capable of legal judgments, generally speaking. The idiots who ask that every man be his own lawyer and that the courts be filled with men who, in their phrase, know "less law and more justice" are simply quarreling with the constitution of the human mind and asking to have civilization set back three thousand years.

This view of the matter is not exhausted without noticing the further fact that there are certain general rules in regard to right and justice that all rational men at a given stage in a particular society will agree upon as just and right. Those general rules as to matters of importance in the conduct of men toward each other will generally be embodied in the law. But every general rule made from the moral standpoint is likely to be swept away as soon as a concrete case is presented involving some particular circumstance appealing to the moral ideas. This can best be illustrated by a case put by a Grecian sage over twenty-four hundred years ago and stated, I think, in Plutarch's *Morals*. An importer of grain on the Island of Rhodes had in the harbor a vessel of grain just arrived from Egypt. Owing to a scarcity of grain on the island, the

price had risen beyond all measure and the grain merchant can ask what he pleases. But he knows what no one else knows that a half dozen ships will arrive in a day or two and then the supply will exceed the demand and the price will fall to normal or below. 1. the importer bound to disclose his knowledge to purchasers? One school of Grecian philosophers and Cicero, the greatest of Roman lawyers—greatest because he is so much more than a lawyer that he is one of the five first class men of letters the world has produced—answered the question “yes”, but the Stoics answered “no, the importer was under no obligation to disclose”. The Roman law followed Cicero and imposed the duty of disclosure on both vendor and purchaser, hence in our law the assured applying for marine insurance is bound to disclose the facts relevant to the risk, because our insurance law comes from the civil law, and as applied to insurance of vessels, the rule of law seems reasonable. But in the meantime, the common law had answered the question in another way. The vendor is bound only by express or implied warranty, the common law with its well known practical sense assumed that the purchaser can call for no disclosure except in a relation of confidence. The vendor does enough if he tells the truth as to matters material if inquired of. Now this is a general proposition of law which has, when no concrete instance is involved, a variable moral aspect. But suppose the bargainer for grain be a poor widow whose necessities compel her to sacrifice her all for grain for herself and children. At once we are on different ground. The ordinary man is revolted and he says that the rich importer who grinds the faces of the poor is a rascal who should be compelled to disgorge. The abstract rule means nothing to him in the face of what seems a gross breach of right. The law becomes a travesty on justice and in the confused idea of the Apostle, the law has been unlawfully used, and if the law is, as Cicero says in his eleventh Philippic, a just sanction from on high *jubens honesta et prohibens contraria*, a phrase repeated by Justinian's compilers and by our revered Blackstone, a definition which is every day being used by courts in the rural districts, the law is not what it is claimed to be.

It is plain that in some cases the application of a general rule, and the rule must be general resulting from an imperative command of the general notion of justice, will violate the popular sense of justice or right applied to a concrete case. Law, except as custom among poorly developed peoples, can not stand the strain. Hence will arise the problem of how in particular cases to get rid of the general rule while drawing a veil of decency over the process Aristotle met the problem by saying that *epieikeia* or reasonable-

ness should vary the rule. But this leaves no rule at all. The Roman *aequitas* mitigated the rule of law just as the English equity did, but by an inevitable process equity develops its general rules. To some extent the sense of a particular equity gives an opportunity to apply the moral judgment to a particular case. As long as the rules of law are custom this process answers to a limited extent. But as soon as we have legislation the hard and fast general rule is in a statute which provides for no exceptions, but forbids them. The great discussion going on as to free judicial decision in the interpretation of statutes is a present professorial agitation which would leave nothing of the general effect of a statute but all to the judgment of the judge. But this is useless, the legislature would soon put the courts trying free judicial decision beyond all possibility of interference.<sup>36</sup> What the professors coolly propose to the judges is the commission of impeachable offences.

A system of law which in its administration does not provide for varying the general rule to suit specific cases having a moral aspect will not endure in a civilized community. Popular courts like the Athenian dicasts or the Roman centumviral courts or the Anglo-Saxon county courts attained the result because the violation of the rule was veiled in a judgment of many people. In English law the original assize, then the jury, reached the same result. First, the jury of twelve as sole witnesses to the fact and then the jury with their verdict binding as the fact upon the court relieved the court of the odium of opposing popular judgment and enabled the popular ideas to set aside in the particular case the general rule, by the simple device of a general verdict which blended the rule of law and the facts in a general finding for one party or the other. In criminal cases this is buttressed by the further rule that the verdict of acquittal of the jury cannot be set aside for any error however great. In cases of a judgment wrong to the moral sense of many people, the jury bears the odium of an unjust verdict. This device reaches free judicial decision whenever a statute comes in question, but this sort of setting aside of the general rule is just what is not desired by the professors, who advocate free judicial decision.<sup>37</sup> Plainly if the moral judgments of men were to govern

<sup>36</sup> See the Science of Legal Method, Select Essays; the paper by Geza Kiss (Take heed, ye tuneless Nine) is a Hunnish view. The most absurd of it all is a paper by Wurzel who, according to Professor Kocourek, gives us to be "born anew into a realm of clear thinking and perpetual disillusionment". The trouble with the professors is that they wish to abolish human nature. Since the days of Plowden this question of free judicial decision in the interpretation of statutes has been worn threadbare.

<sup>37</sup> In the United States and England no legislative power would listen to judges varying statutes to suit special cases. Where there is a Reichstag or a Reichsrath and a



there would be no general rule of law in any case presenting a strong ethical aspect contrary to the rule. All men are entitled to equal justice under general rules except those who in the opinion of many people are not entitled to it. The result is bound to be compromise, but surely it is best arrived at by smothering under a thick fog of administration the refusal to accord the citizen the benefit of the general rule of law. It is certainly better than to ask a judge to violate his oath of office or to bring the courts into popular disrepute. After all the vast mass of cases are the very doubtful. The whole subject is relative. The general considerations of justice, the needs for human security, the general public welfare, the need of honesty, good faith and fair dealing, the general recognition of the rights of property, of the necessity for keeping contracts, the injunction to refrain from injuring others, will in the end give substantially sound results as applied to the great mass of human conduct legally affecting others.

The influence of psychology, sociology and the social mind has been surveyed. The science of economics was found to be bound up with sociology. The sciences of law and morality were found to be closely connected. The science of politics comes next. In this sphere racial characteristics and historical development will dictate the great mass of what is called public law. The form of government, the relations of citizens to the government are purely matters of conventional law modified by historical circumstances. Up to a certain point the sentiment of justice as civilization develops will tend more and more to the abolition of caste and of class distinctions and the sentiment of equality which is but a phase of justice, will more and more assume a strong moral aspect. Female suffrage is now as much a moral question as slavery formerly was. The case of *Minor v. Happersett*,<sup>38</sup> a much respected deliverance of our revered Supreme Court, which held that female suffrage presented no moral aspect, now sounds like a doleful noise from the Dark Ages. Generally speaking the more democratic governments show the higher civilizations since they require a higher degree of the social sense and of self-control in the citizens and realize more thoroughly the sentiment of equality. Social distinctions in the realm of the conventions, of manners and non-legal rules of behavior will not be affected by law, but legal distinctions resulting from discriminations by law will more and more tend to realize the ideal of

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judiciary trained to respond to any governmental suggestion, the discussion may have some relevancy. Here it is simply nonsense.

<sup>38</sup> 21 Wall. 162. But under *Davis v. Beason*, 133 U. S. 333, we may still disfranchise Germans when they become polygamists and emigrate to this country.

equality. Perhaps in this realm the claim for social justice, so-called, should be placed, but that is more properly a phase of economics and the demand of a class. Its essential effort, to try to render inferiority or mediocrity equal to capacity and ability, can never be approximated until mental capacity in the mass of men reaches a greater uniformity. Law has rendered physical differences among men of little account, but mental differences it cannot reach. In the meantime, outside the realm of law, the labor organizations will insist on the leveling process, but their work is necessarily confined to their own guilds, and is of no more importance than the work of the mediaeval guilds. Leveling in a class will never achieve any result, except to furnish places of command and large emoluments to needy leaders. The law will be used, however, to appropriate as much as possible of the results of the efficiency of capacity to the reparation of the lack of results of the inefficiency of inferiority. That pleasant process will stop when the efficiency of the individual is too far confiscated or threatened. But judging by the past, the mental powers of capacity will enable it to keep well ahead of the law's effort to appropriate its earnings by the most magnificent philanthropy that the world has ever seen.

Thus far we are able to say as the result of the social sciences that law must consist of general rules, that the machinery of administration of the law must provide some method of decently veiling violations of the general rule in particular cases which will necessarily come when law passes the stage of rigid customs. But as a necessary part of the moral idea of justice and as a psychological necessity of the human mind the general rule of law to be applied to a particular case must be conceived as existing before the particular concrete case to which it is to be applied occurred. This is a matter of mental science, and is not a matter of law. It is a question that must be settled before law is considered as a product of the human mind.

Since the sense of justice is an original moral idea closely connected with the sense of right, it is certain that the rules of law which have any moral significance must conform to the moral ideas. Therefore it is plain that the great part of law which is dictated by moral ideas may properly be called natural law. As a part of natural law must come as a necessary result of a developing sense of social solidarity an international law regulating the relations of nations to each other. This law is bound to conceive each nation as a social aggregate acting through its government, where the different social aggregates are bound by the rules of natural law based upon the sense of justice, of equality and of rendering to each na-

tion its right as an equal with all other nations. Hence, international law has been rightly conceived by Grotius and his school as natural law developed by human reason. The accident that there exists no common tribunal to enforce it has no bearing upon its claim to be called actual positive law.

### III.

#### SPHERES OF HUMAN CONDUCT.

We come now to the field of legal judgments upon human conduct and the sphere of conduct that is subject to legal judgments. We know that the largest part of human life never touches law in any manner. The great mass of men never have a lawsuit. Compared to the totality of human life, the sphere of law is a very small part of it. The spheres of life governed by rule may be called the sphere of the conventional and the proper, the sphere of the moral, and the sphere of the legal. A large part of the conduct of human beings is dictated by received ideas of the customary, fitting and proper. This is by far the larger part of human life. The rules of law rarely, if ever, touch this sphere, unless such instances as indecent exposure or public drunkenness or blasphemous conduct forbidden by law and such like things may be considered as rules of the becoming enforced by law. But no civilized man ever avoided indecent exposure because he feared the law, nor would such a law be necessary except as to certain degraded foreigners of the lowest condition. The drunkard is not affected by penalties against drunkenness any more than the religious crank refrains from public expression on account of a penalty. Human beings have standards of conduct and follow them as implicitly and perhaps with more instinctive readiness than they would follow rules whose infraction brings punishment. These standards vary with the various walks of life and are enforced merely by public opinion. Such things have no more moral significance than one's clothes. Once, however, the law as custom ventured into this field, and still among less civilized peoples governs matters of caste. In our own country, where the standards of civilization are lower, caste shown by color is a matter of legal importance. But among highly civilized men the law has nothing to do with this field. In some frontier communities such a breach of good manners as the refusal to drink with another may lead to bloodshed, but it is a mistake to call such people civilized, though curiously enough, at the last general election they appeared as strong pacifists. Juries in those benighted

regions have condoned murders in deference to a crude public opinion.

It would be a mistake, however, to suppose that these rules do not affect law. These ideas of the suitable, the proper and the conventional differ with different classes. The man who robustly feeds himself with a knife and is contemptuous toward the use of napery feels a natural disgust at the conduct of other social orders. Jealousies felt by one class toward another in the realm of legislation have a potent effect. Many a legislator votes for a foolish bill because it will please some class of people. In the administration of the law matters of class have often a great effect upon juries and even upon judges who may happen to have in some things liberality of thought and broadness of vision. Witnesses who testify may have their credibility entirely ruined by appearing to have violated these rules, so that they indirectly have often a strong influence in the ascertainment of the facts to which the law is to be applied. A litigant finds himself *persona non grata* to a jury or a judge on account of some defect in manners or mode of thought which has nothing to do with the merits of his case. All men sooner or later find that they must conform to ordinary public feeling on matters not defined by or made the subject of law. These rules are of very great effect upon racial enmities. One nation classes another according to its manners. We all remember the noble and high-born Baron von und zu Krautschloppen, how disgusting were his table-manners, how raucous his methods of food absorption. Such a man creates a great prejudice against his country wherever he goes.

The next field of human conduct is that great mass of human acts which are the subject of the individual's ideas of right or wrong, but which are not the subject of legal rules. Here we reach the domain of morality (already discussed) not a little complicated by religious beliefs. The science of morals, so-called, will never be an exact science because it concerns the instinctive judgments of the moral consciousness. What some men think right others think wrong, yet in the rough most men at any given time in a particular society think the same things to be right or wrong. There are certain fundamental simple virtues, such as goodness of heart, generosity, cheerfulness, mercy, compassion, kindness, charity, self-restraint and self-control, which most men instinctively admire. These virtues have a moral aspect. They render life and human intercourse kindly and genial, they give a man standing and reputation among his fellows. Their greatest effect is upon the individual who by such qualities is so highly civilized that he finds

obedience to law not only a pleasure, but a matter of necessary conduct. But none of these matters ordinarily is enforced by rules of law though in the administration of the law a witness or a litigant whose conduct shows some particular circumstance of underhandedness, cupidity, avarice, disregard of others, lack of kindly feeling, brutality, or any of the thousand and one things which lawyers look for on the opposite side, or fear and avoid on their own, which too have no relevancy to the facts or the law, may absolutely determine a case whether before jury or judge.<sup>39</sup>

But the orbits of law and morality cross each other. The difficulty is not avoided by saying that every violation of law is immoral. Of course, it is not true, for all the law of procedure has no moral significance except in its equality, and a man who commits contempt of court has committed no moral offence, very often his act is exceedingly moral and courageous before a drunken judge. Even a mass of criminal law defines no immoral acts. On the other hand, many immoral acts are not illegal. Just how wrong certain conduct must be to be forbidden by law is problematical. The great mass of right conduct is not defined by law. It is just at this point that we return *à nos moutons Allemands*. Here the German legal philosophers have attempted a veiled but systematic assault upon the science of law by the dogma, wholly metaphysical, that morality concerns merely a man's inward state of mind while law governs his external conduct toward others. To this view morality never touches legality, and therefore the state even if subject to legal rules, whatever it may do, can never touch the sphere of morality.

One of the most dangerous, because one of the most artful of the "smugglers" of adulterated German metaphysics, either self-designated or detailed by authority, was Hugo Münsterberg for whose activities Harvard in a burst of unusually dense colonialism had given a place. He has been the *Janus bifrons* of this German propaganda. He began by giving us the rechauffé fragments of his former writings in German not too strong for American daily food. But at last he came forward with his "The Eternal Values" which is a German mystification of the eternal verities. No doubt,

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<sup>39</sup> Lord Haldane, whose mind had become confused by much German, in his address before the American Bar Association, in 1913, at Montreal, (Rep. Am. Bar Assn. xxxviii, 393) called that part of daily conduct which was not dictated by law, that part which was dictated by the rules of the fitting and proper, by the German word *Sittlichkeit*, but all through his address he mingled the ideas of the decorous with the ideas of morality. There is no such use in German of *Sittlichkeit* that is established. It is the ordinary word for morality. Fichte used the word to denote conduct which is not based on morality or law. He said moral conduct rests upon choice. This is a true German distinction, namely, none at all, for moral judgments are just as much instinctive as judgments of the fitting, proper or decorous.

he thought the time, 1909, was propitious. The war was coming, as the Germans alone knew, and we were to follow the German triumphal car in the harness of the German-American Alliance. He announced, of course, as many men do and some of them succeed with it for a time, that he had something freshly minted from the great treasury of his mind,<sup>40</sup> the "new idealism". It is the old metaphysical trash that began with *Geist* and ends with *Kultur*. Like most Germans he is sadly confused as to morality in other ways,<sup>41</sup> but his main offence is his theory of the relation between law and morality. He gradually works up to a division of human life into that of the outer world or industry, that of the fellow world or law, and that of the inner world or morality. This looks innocent enough though of course it is nonsense since his parts are not mutually exclusive. The outer world includes the fellow world and industry is concerned with law on the side of economics at least, and industry is one of the main concerns of the fellow world through division of labor. But the real vice of his division is the assertion that morality concerns solely the inner world. Since, as we have shown, moral judgments are the basis of much law, his assumption is contrary to fact. Having laid out this carefully camouflaged trench, he borrows the conception that "law is for us the order by which the realization of the common will in the mutual treatment of the members of the community is intentionally secured and guaranteed by coercive measures". Passing by this old Rousseau common will, erected by Hegel into a dogma asserting the one living organism of the state, here reasserted by Münsterberg, it is plain that his definition wipes out international law. Next he pronounces the theory that law has nothing to do with morality, for morality concerns the inner self while law concerns the fellow self. The reason that a German makes this assertion is his desire to feed the German theory of the state, that the government is not bound by the dictates of morality and hence owes no responsibility for wanton onslaughts and brutal tyrannies. Volumes have been written in Germany to show whether the government can be limited by

<sup>40</sup> Perhaps some may think that Münsterberg ought to have the benefit of the *de mortuis* rule. I cannot think so. I prefer to say with Senator Hoar, when he was asked about Wendell Phillips' funeral: "I was not present but I approved of it."

<sup>41</sup> See the *Eternal Values*, pp. 63, 337, 338. In morality the Germans remind us of the old epigram translated in Hamilton's *Logic*, or was it his *Metaphysics*?

"The Germans in Greek  
Are sadly to seek,  
Not five in five score,  
But ninety-five more;  
All save only Herman  
And Herman's a German."

its own laws, and the result has been that if it can be so limited, it is a case of self-limitation to remain only during its own pleasure. This theory, without openly avowing it, was what Münsterberg had in mind to put forth, and his work shows him to be no better than Dernburg whose career is so well known, as a smuggler of "infectious stuff".

This German theory is all verbal fencing.<sup>42</sup> The question is as to an act. No one but a German "inebriated with the exuberance of his own verbosity" could deny that human acts have a moral significance and are the subject of moral judgments. The question is why some acts which men recognize as wrong and immoral are not forbidden by law, while other acts are so forbidden on the ground that they are wrong and immoral. The answer is that the distinction is dictated by the public convenience and the amount of interference with the public welfare.

But on the other hand, law while going part of the way with morality deserts it altogether for other spheres. The rule that a deed to a man and his heirs gave a fee simple, while one to the man alone gave a life estate, the fee tail created by De Donis, the conditional fee before De Donis, never had any meaning for morality. The rule that a simple contract without consideration is void, that an executory gift is not enforceable, that an instrument under seal imports a consideration, that a common recovery with a double voucher suffered by the tenant in tail bars not only the fee tail, but some other innocent person's remainder in fee or the reversion in fee, that a fine by the heir in tail bars the estate tail, but not the remainder in fee and creates a base fee which endures as long as there is issue of the heir in tail, are all matters outside morality. Numberless rules of law can be cited that have no more to do with morality than have the matters in the Federal Judicial Code. The conclusion is plain. Much law is dictated by the fact that as to certain matters there must be some rule, but what rule may be adopted is wholly a matter of historical accident. On the other hand, when an act immoral in its nature becomes of sufficient importance to the public or to other men as to have the attention of public opinion or of the legislative power, it is almost certain to be prohibited by law and in just the same way certain acts regarded as morally right will be enforced by law, but a man who can say that the human

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<sup>42</sup> Bentham who can always be relied upon for something untenable has a distinction as to justice. Interior justice he says is the conformity of our will to justice, exterior justice is the conformity of our action to justice. He believed that the judges made law and hence he could have said law may be divided into interior and exterior law. Interior law exists while the judge is thinking about it, exterior law is what he announces as his decision.

mind when considering the evil consequences of a contemplated act is thinking of morality and when thinking of the evil consequences toward others of an act actually done is thinking of law, has achieved a metaphysical feat that is a psychological impossibility. What he has done is to attempt an untenable definition of the moral ideas not reconcilable with fact. He asserts that the moral ideas of a certain point become legal ideas and are no longer moral.

In another field we know that the conduct of men is defined by law which has its source in prevalent ideas upon economics which seem to have a moral aspect. The record of the courts on certain matters is a painful subject. For a few years prior to the Jacksonian assault on the Second Bank of the United States, we had a currency that could fairly pretend to decency.<sup>43</sup> The bank prevented great issues of worthless paper from western banks by presenting the paper for payment. At once arose the howl of "oppression by the money power", the favorite cheap political device of worthless demagogues preying on popular ignorance. The western states had begun their orgy of great paper banks. The Supreme Court of the United States, eminently sane under the leadership of Marshall, in *Craig v. Missouri*<sup>44</sup> held the state paper illegal and void, but by a close decision of four judges to three dissenting political judges. Then came on the case of *Briscoe v. Bank*, which was the same point in effect, but the court was lacking two judges and divided three to two, Marshall and Story and Baldwin holding the bank's notes illegal, but no opinion was announced since four judges were not concurring.<sup>45</sup> The case was continued over two terms.<sup>46</sup> Then Marshall and another judge passed away and Jackson packed the court with his wretched partisans.<sup>47</sup> The court now steadily deteriorated into stump speech decisions until it went to pieces over the Dred Scott case. The mistaken decision legalized "wild-cat" banking. The government could put no money in the state banks for it was all stolen owing to the fact that politicians would not patronize solvent eastern banks. This brought on the curse of Van Buren's scheme of an independent treasury carried through under the pitiful Tyler. At last came on the civil war. The government needed money and the solvent northern bankers, like the patriots they

<sup>43</sup> See *The Second Bank of the United States* by Catteral, a valuable book never discovered by such writers as Conant.

<sup>44</sup> 4 Pet. 410. Read in the original report the superlatively absurd argument of Thomas H. Benton, our old *demos-krateo* friend.

<sup>45</sup> See dissenting opinion of Judge Story, 11 Pet. 328.

<sup>46</sup> *Briscoe v. Bank*, 8 Pet. 118; same case 9 Pet. 85; same case 11 Pet. 257.

<sup>47</sup> See Sumner's *Life of Jackson*, p. 360. Of the seven Jackson had now appointed, five, Taney, C. J., and McLean, Baldwin, Wayne and Barbour. One good judge, Baldwin, out of five was a high average for Jackson.



were,<sup>48</sup> agreed to loan the government one hundred and fifty millions. Chase, Secretary of the Treasury, with ineffable stupidity insisted on the money being paid in specie into the independent treasury. There it was locked up in spite of the representations of the bankers that such conduct would take away the metallic basis for the circulation and cause every solvent bank to suspend specie payments.<sup>49</sup> Chase persisted and by his financial crassness broke every bank in the United States. Then he invented his criminal greenbacks, and in violation of all sound finance made them a legal tender. They started on the downward grade while Chase kept printing more currency to accelerate the process. Then he became Chief Justice and, still hoping to be President, held his legal tenders unconstitutional.<sup>50</sup> The court reinforced overruled the decision,<sup>51</sup> Chase and the Democratic hard-shells wailing in dissent, and thus we had the double curse of greenbacks and independent treasury. All these varied evils which cost the people of the United States untold wealth and our currency evils to the present day would never have happened except for the "hayseed" finance in one absurd opinion. It is needless to say anything about the Sherman law since it appears to be repealed by "unanimous consent", after running the usual course of ponderous and irreconcilable error; or rather, it has been found to be the ill-conditioned dog which sinks his teeth into the calf of the best friend of the family.

But happily for the law the difficult questions for law in economics do not appeal to the moral instincts. They are more or less conflicts between classes and there are so many classes that no particular class, except in moments of extreme governmental supineness or cowardice, will have very much of its own way. The political appeal to one particular class stirs resentment among other classes. As we proceed through other fields of law we find that while almost all the law of torts and practically all the penal law has a moral sanction; when the field of public law and the influence of the science of government is reached, we are no longer dealing with morality,<sup>52</sup> except when equality presents that aspect. When we pass to the

<sup>48</sup> Nothing in our political history is more disgusting than the usual abuse of bankers, yet when the country is in difficulties they always respond as they are now responding. They are the one class who can claim "hands that never failed their country".

<sup>49</sup> See McCall, *Life of Stevens*, pp. 154-157. It is rather a pity that Samuel W. McCall has been lost to Congress.

<sup>50</sup> See *Hepburn v. Griswold*, 8 Wall. 603.

<sup>51</sup> See *Legal Tender Cases*, 12 Wall. 457.

<sup>52</sup> The whole remedial part of the law is properly a part of the public law. Even Baron Parke, old Surrebutter himself, could not get up any moral enthusiasm over the science of special pleading or that tort feason of wide machinations, the casual ejector.

sphere of international law we are again in the field of rules, many of which depend solely on the abstract idea of justice. Among civilized men whose moral instincts have not been blunted by the training of perverts, public international opinion is much the same as the public opinion of a particular state. Considering the Russian as denied as to the great mass of his population a place among civilized peoples, or at any rate any but a low place, the Swedes are the only civilized race which seems impervious to international moral ideas. What Professor Kohler called "the great Islamic culture" does not, of-course, belong among civilized nations.

To conclude this view of the part of human conduct dominated by law, we are able to say generally that the idea of justice dominates the greater part of the law, or at least the idea of what was once supposed to be justice, and hence law is in this sense natural. But the enthusiastic description of Cicero, that "law is the distinction between things just and unjust, a distinction that has its source in that eldest and first nature of all things to which the laws of men are all directed, which represses evil men by penalties and defends and protects the good", is as to existing law but the mystical expression of "the soul of the wide world dreaming on things to come". Law we must all sadly acknowledge is full of "defects, redundancies and errors", but those things come mainly from the fact that law must be a system administered by the weak and infirm minds of human beings, and almost all its defects arise from a praiseworthy attempt to make it "fool-proof" against judges. On the one hand is the individual's forgetting that justice demands as the rule of equality a general rule applicable to all, and on the other hand, the lawyers and the best judges perfectly persuaded that unless general rules are preserved there is no law. Above it all is the basic notion of justice demanding general rules.

There is no criterion by which the domain of human acts governed by law can be separated from other human conduct. Morality is no criterion, justice is no sufficient guide, hurtfulness of the act to society and to others is too indefinite for use, the tendency to promote the public welfare is simply a rule of public policy which is as changeable as the chameleon. All these matters have an influence, but they do not define the limits of law. Can we even say that law is concerned solely with human conduct toward other human beings? The laws against cruelty to animals, the law by which a trust for animals may be enforced, the cases of theft where no one's property rights can be ascertained to be affected, the laws against attempts at suicide, are only seeming exceptions. We may say that law is a collection of rules which govern men in their rela-

tions with other men, that an illegal act must be one which concerns more persons than the doer of the act, or, to use the phrase of Münsterberg which is very happy when applied Teutonically, "the fellow world". The farthest, however, we can go is to say that the largest part of human conduct toward other men is not the subject of law, that not all of right or wrong, just or unjust conduct toward others, is the subject of law, that of the part of human conduct which is enjoined by law some of it has a moral significance, some an economical significance and some a purely governmental significance, but all of law, even its omissions, has in some view of it a supposed benefit or advantage to the social welfare and hence a sociological significance.

#### IV.

##### THE LAW HISTORICALLY CONSIDERED.

The general facts of legal development are an essential part of civilization. The progress from the miserable cowering savage through his invention of the bow and arrow, assuring him food; through the finding of fire, stolen the Greeks said from Heaven; through some sort of pottery, assuring the means of cooking food; through the domestication of animals, assuring flocks and herds, to the nomad state, while the objects of property kept widening as men had use for different kinds of property, gave man a certainty of means of regular living. Next he found that he could cultivate plants and thus come together with his "fellow world" in larger communities. Houses and lands now became property, and barter grew as an incipient division of labor. The working of the metals and improving weapons made men prepared to enslave their fellow men by war. The tribe kept widening and chiefs and sub-chiefs gaining in power. At last the discovery of the precious metals gave scope for a widening commerce and a larger division of labor.<sup>53</sup>

Generalizations upon the form of developing social organization have been attempted. It is said that the order is a progression from the tribe founded on marriage and blood relationship to the terri-

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<sup>53</sup> There has been a great struggle over whether law as the product of man's will can be considered a cause, or whether the mechanical theorists are correct in denying causal significance to all human acts. Jhering's *Purpose in Law* conceives law as conscious purpose, therefore as a means by which men consciously strive for ends. The thought is a mere commonplace. The ordinary belief of men has been so, and history while it shows men in the grasp of destiny, yet tends to show that with advancing civilization men gain greater power over nature. But men gain at the same time greater social adjustment.

torial organization founded on occupation of the land, to the seigniorial organization founded upon the relation between lord and dependents, to the social organization based on intercourse and contractual relations between individuals. Similarly the family organization is said to have progressed from the matriarchy, or relationship through the mother alone, through patriarchy as in the Roman *patria potestas*, to the modern bilateral family. But in this field almost any assertion may be supported by some sort of gauzy proof and the matter is all speculative.

But the fixed fact is that out of the barbarous stage men emerged with a mass of customs, far more binding and inexorable than our laws, but certainly deserving the name of law because they were rules of human conduct governing men in their relations with their fellow men and universally observed. This body of customs was homogenous in the sense that religious, tribal, trading, pastoral and legal customs were all binding alike. Gradually as combinations of villages and cities and tribes gained a social feeling, states developed. Along the Nile, eternally enriched and fertilized, a district developed a powerful government. In the rich lands on the Euphrates and the Tigris grew another social aggregate, or rather two, that were to contest the world with the Egyptian. On the eastern shore of the Mediterranean and on the islands grew a great commerce and the accumulated wealth of Tyre, and Sidon and Crete. The Grecian hive swarmed to the mainland of Asia. Those great traders filled the harbors of the Mediterranean and the Black Seas. In the meantime a sturdy collection of villages was beginning its career on the banks of the Tiber.

In the world today we can find every stage of this growth. The Australian still uses a club for his favorite weapon. The Indian until lately used the spear and bow and arrow. The nomads still roam in the uplands of Asia. The village community with its common lands is found all over the world. The single tribe without a chief is not unknown. The powerful collection of tribes has been studied as it exists in Africa and as it existed in North America. From the Andaman Islander who catches fish with his hands to our high civilization, the phenomena are basically the same. The method of increasing social aggregates is also the same. Through it all men are governed by customarily accepted rules which are laws for human conduct. The system of law is none the less law among those who have no judicial tribunals than among those who have our elaborate forms for litigation. Law, the fact, the thing itself, is wholly independent of any judicial tribunal, and if we make a definition of law we must regard the judicial tribunal as a mere ac-

cident. But what is the common feature of all these various systems? Is it not that the body of customary conduct was accepted by individuals and that men found that the social well being could prevail only if the rule for all men was enforced by public opinion? Livy, speaking of the earliest days of Rome, has a remarkable statement: "The laws are a deaf and inexorable thing, safer and better for the weak, than for the powerful; they have no relaxation nor indulgence, if their bounds are exceeded; for it would be a perilous thing in the midst of so many human errors to try to live by innocence alone".<sup>54</sup> This statement when analyzed gives the same reason for law that the sciences give; it is the zeal for equality, the desire to make all things equal and the rules of conduct equally binding. Even a German may be quoted for this. Schiller says:

The law is the friend of the weak.  
It strives to make all equal.<sup>55</sup>

But comparative law gives us further light. We go back to the stage of no judicial tribunals and the sanction of law is self-help. The sufferer himself exacted the penalty for a breach of his customary right. When this condition existed, the law itself measured the reparation for an injury upon the principle of equality, and the only measure it could give to self-help was an exact equivalent, an eye for an eye, a tooth for a tooth, ox for ox, sheep for sheep. This is the rule of equality and a very reasonable rule for the condition. Compensatory damages, reparation of the loss is still our guiding principle. In the primitive days, the custom gave the judgment, the injured individual carried his own warrant or execution, but like the sheriff today, he took the chance of finding no one at home, or of no property to take. But public opinion was the only *posse comitatus*.

Society found, however, this process of self-help, and consequent fighting and private war, too costly. Men were ready to pay for their mistakes and the more peacefully inclined were ready to take the recompense. Now by the same slow agency of custom grew up the customary tariff. So much was due for a hand, so much for an arm, so much for a life, so much for a daughter's chastity, so much for a wife's unfaithfulness. But how can any man say that this is not law, just as much as our law laid down by judicial tribunals. In fact, we can prove it law today. If under

<sup>54</sup> Livy ii, 3.

<sup>55</sup> "Das Gesetz ist der Freund der Schwachen  
Es will alle nur eben machen."

our law the husband find the adulterer defiling his wife, he may kill him. This is the pure law of self-help. The householder may kill the burglar, the cowboy may kill the "rustler" who is making off with the cattle. In a hundred different ways we apply the law of self-help and we do it without the aid of any judicial tribunal, simply by the power of customary public opinion called law. We too have our tariff for a foot, a leg, an arm, an eye or a life. What is our law as to personal injuries in dangerous or hazardous occupations? It is merely an accident that it is a statute. Public opinion made the law, perhaps very unwisely, for it is a recurrence to a barbarous stage, and such atavism is always unsafe. And what is the reason for the law? The same old reason of law striving to make all things equal. What now becomes of the theory of law that it contains the element of a coercion by the public authority? What becomes of the theory of law that it is made by a judicial tribunal? Here is law that carries no public coercion, law that never heard of a judicial tribunal. The corner's verdict, the *ignoramus* of a grand jury, the discharge of a magistrate, the settlement of the damages, are all the mere accidental trimmings of a higher civilization. We can emphatically say then that public coercion and a judicial tribunal are not historically a part of the notion of law.

In course of time certain acts become public offences and these were at first the more dangerous crimes. A judicial tribunal of some sort was rendered necessary. In some tribes it was probably the whole body of the tribe. As the chief gained in power, such matters were offences against him as the public authority. As society grew in complexity, the laws and customs grew and were reiterated by individual cases. The elder men or the priests, as among the Celts, passed on the questions and awarded the compensation or penalty. But in many cases proof was needed. The oath was a defence and then the oath with oath helpers. Other methods of proof, such as the ordeal of battle, were developed. Perhaps it is safer to call the trial by battle a regulated private war. But it was all customary and rigid and formal. Perhaps the next stage was that laws and customs were written down or engraved on stone. Just as Justinian's compilers headed by Tribonian went through the legal writings and made up the Digest, so Khammurabi, ages before, wrote down the customs and the tariffs, and they were found in great part when the great library was unearthed,<sup>55a</sup> along with multitudes of court decisions. The same thing is true of the Lex Salica, or the Breviary of Alaric or the first Visigothic code,

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<sup>55a</sup> The diorite stone belongs to a much later time.

or the laws of the Anglo-Saxon kings. But man is an imitative animal. He hears of other and better laws. He calls upon Solon or Lycurgus to improve his customs, or Rome sends her decemvirs to consult the Greeks, and much of the result is incorporated in the Twelve Tables. But the Greeks made a lamentable failure, for they never developed a competent tribunal.

Two races in this long history showed a great genius for law, the Roman and the Norman, but the Roman long preceded the Norman, and in many ways helped to make the Norman law in England. Their legal history presents a curious parallel and no less interesting divergencies. At Rome a body of customs grew up among a certain aggregation of village communities. They developed the private ownership of land and personal property. But the situation was complicated by the presence of two classes, the original Romans called patricians and the descendants of the subjugated, or plebeians. Gradually a law of contract was developed, first religiously enforced as a matter of good faith.<sup>1</sup> The right to seize the person of the debtor and enslave him was recognized. Private vengeance for a death was exacted, and theft and robbery were originally private wrongs often compounded for money, but there was a gradually developing distinction between crime and private wrong. Gradually, too, the mass of the people gained a part in the government, and in the making of laws. They had a palladium of liberty (*unicum praesidium libertatis*) which was that no Roman citizen should be deprived of life, liberty or citizenship without an appeal to the popular assembly (*comitia centuriata* not *concilium plebis*). At last a commission was sent to Athens to study the laws of Solon and a code of part of the law was made in the form of the Twelve Tables. Now the law was ready to develop a legal profession. As soon as law reaches the stage where it cannot be generally known, a legal profession is a necessity. The practice was first in the hands of the priests, then in those of the laity. A stereotyped procedure and then the *legis actiones* no less formal governed the substantive law.

The body of law that grew up called the *jus civile*, was the particular law for the full Roman citizens, but all sorts and conditions of men crowded to Rome. They were not entitled to the *jus civile* but they had their own controversies either among themselves or with Romans, which must be governed by some law. They were of different races, and what more appropriate than to apply to them the principles of law accepted everywhere and considered to be proper because conformable to natural justice. This *jus naturale* or *jus gentium* was potentially applicable among all people at all

times and corresponded with innate conceptions of right and justice. It was in fact a rationalizing process applied to the law and showed the growing power of substance over form. Another term for it was the *jus honorarium* or the officials' law, and it became highly developed by the responses of the jurisconsults to particular cases. It gradually overcame and substituted itself for the *jus civile*. From this source was made up the final collection of Justinian.

If this commonly received account of the Roman law is true, and in its main outline it cannot be denied, it would follow that the Roman *jus gentium* or natural law was a system of positive law, and that the legislation of the praetors embodied in the Perpetual Edict, improved upon by the jurisconsults, is the greatest standing argument for the advocates of the natural law school.

The growth of English law began with a ruling class of Normans who governed a much larger class of Anglo-Saxons and perhaps older races of servile condition.<sup>56</sup> The Normans found among the English a crude system of composition for injury and crime and a set of popular tribunals. At first there was a sort of personal law for Normans and another for Saxons, but this did not long survive. If we could know with preciseness the situation in the hundred years from 1066 to 1166, the crucial period, much doubt would be removed.<sup>57</sup>

The law at first was one of forms and writs. The writs were developed on Roman models by the clerics among the Normans. We know the law just as it is developing a learned profession. Sitting in the courts were generally priests as judges, and all they knew was the highly Romanized canon law. The king's judges presided over the county courts when they went to take the assizes. They were compelled to apply a vast mass of customary law, but they soon wiped out in their tribunals the old composition system of the Anglo-Saxons and practically all of the Anglo-Saxon law.<sup>58</sup> At first all wrongs and crimes were private injuries, and the one who sought justice brought an appeal where either wager of battle or

<sup>56</sup> For the continuance of Roman Law see *Roman Law in the Modern World*, a most interesting and valuable book. It is by Charles Sherman and published by the Boston Book Co.

<sup>57</sup> I have never doubted that the basis of the English population was Briton and not Anglo-Saxon. The persistence of the Anglo-Saxon myth is to me inexplicable.

<sup>58</sup> It cannot be too strongly insisted that English law is Norman and not Anglo-Saxon. I remember that Dean Pound somewhere quoting from Freeman, the English historian, the most noted of the Anglo-Saxon myth-makers, cites the examiner in law who insisted that William the Conqueror introduced the feudal system at the gemote at Salisbury in 1086, and strongly insinuates that it was an ass speaking. He should have recalled the historic instance of the ass that spake, and this is the only one on record; and when Balaam belabored him, it turned out that the ass was right and Balaam the wise man was wrong.



wager of law by oath and oath helpers was used. The Norman, however, soon developed a better style of tribunal, and got rid of the hap-hazard popular tribunals of the Anglo-Saxons. He had the genius to keep the popular element, but under control. Twelve men were sworn to inform the court upon oath as to the fact. These sworn witnesses soon usurped all other forms of trial through the judicial device of turning the assize into a jury. This is the unique development of the English law which had its errors as well as its benefits. But gradually the form of trial by jury witnesses reduced the tribunals to certain civil remedies, either the giving of a money judgment for damages for breach of a written contract or for a wrong to person or property, or an adjudication of the ownership or possession of real or personal property. This left a large gap of jurisdiction which the clerical chancellors under the rules of equity absorbed. Developing commerce brought the simple contract more and more into use. The common law courts could not enforce such a contract because they saw that a private contract could not be witnessed to by the sworn twelve who could swear only as to matters of public knowledge. Hence those courts were compelled in the case of unwritten contracts to retain the old wager of law whereby any debtor with six rascals could swear an honest man out of his goods, as Lord Chief Justice BEREFOED tells us in the Year Book. The Chancellors quickly took jurisdiction over these matters of simple contract and enforced them until the common law courts restored their jurisdiction by the growing practice of the jury hearing the evidence of witnesses and by the invention of the action of assumpsit to which wager of law was not pleadable.

The chancery system of equity and the system of common law, after violent quarrels, settled down to a situation of peace; and equity in its turn hardened into a body of well defined rules and a strict division was maintained until in the progress of time the two systems became amalgamated except as to the jury trial, which compels the distinction to remain.

It appears that in many ways the developments of Roman and of English law were analogous. Both started with customs and built upon them. Both had a system of rigid formulary law which gradually yielded to the rationalizing process. As the *jus civile* yielded to the *jus gentium* so the common law gradually yielded to the system of equity. The process in either case lasted over four hundred years. Both systems at the stage where rationalizing began developed a powerful legal profession. The English process was the work of trained lawyers just as the Roman process was the work of jurisconsults. But Rome with her great legal and political capacity

developed merely a powerful form of administration while England and her lawyers developed political liberty.

Other nations have not been so fortunate. France was ruled for centuries by a system of personal law where the members of each race had their particular kind of law. This gradually yielded to a system of local customs over which the Roman law presided as the custom of the written law or common law. Out of this mass of laws through a powerful legal profession France developed by a succession of codes culminating in the Code Napoleon, a general national law, which merely established for the whole country one set of theretofore prevailing customs.

Germany on the other hand never had a powerful legal profession, and there was no class to relegate to a proper field the professors. There the lawyer was always held in contempt. The different districts lived first under personal law then under local customs until at last came the reception of the Roman law which was called the common law. It attempted with varying success to supplant the various local customs until at last the law, after various partial attempts, was codified in the Civil Code which is mainly Roman Law and the work of law professors, not practical men. It has been extravagantly praised but is already showing the usual defects of every code.

Generally speaking, therefore, two races developed enduring systems of law by their own exertions. In other countries the final law was more or less the result of imitation; in either case the law as it took enduring shape was the work of lawyers working either on the basis of custom or on the Roman law. The net result viewed from a historical standpoint is that the law as developed among civilized nations is very little of it the work of legislation.

The poets have attempted to tell us of this history. Lowell's lines are precisely true of the law:

"On the rock primeval hidden in the past its bases be

Block by block the endeavoring ages built it up to what we see."

A remarkable instance of legal development under custom has taken place in the memory of men now living. After the placers, the products of erosion, had been worked in our California mining country, gold and silver and other metals were found in the Sierras existing in veins called lodes. There was no law to govern the miners in regard to lodes which were deposits of ore in place, not in *lustritus*, unless they made one themselves. The rule was established after an old English mining custom, by which the miner never going beyond his length of vein could follow the vein anywhere on its descent. This seemed to the miners eminently just and ap-

plicable to any sort of veins. At last this custom in 1866 was attempted to be put into a few sections of a statute. But although it was well known then that there were many kinds of ore deposits that were not regular, the presiding Rhadamanthus, a strange old Santa Claus named Stewart, could think only of regular narrow fissure veins. The law would have been excellent had not nature proved so erratic.

Then came a development of the mining law which has been claimed to be peculiarly an instance of courts making law, but the facts are otherwise. The custom was not as narrow as the statute. The custom was independent of the form of veins; it said that the discoverer took the length of vein he marked off on the surface with convenient surface ground also marked off, and that everything in the ground belonged to the owner except a vein that had an apex or outcrop in some other person's ground. Veins were now discovered which were not fissures but contacts of different formations. One side of the contact was often soft rock and large ore bodies had made off into the soft rock. Stewart's law was wholly astray but the courts followed the custom refraining from making any law of their own. Soon it turned out that some veins were in fact zones of impregnation with bunches or bodies of ore anywhere in the zone. The courts followed the custom and gave to the miner the zone as a vein between the end lines. This actually governed the case where the miner not knowing how wide the vein was had placed his side line cutting the vein lengthwise, leaving part of the outcrop on its strike outside the claim. The whole vein for the length located went to the discoverer under the custom. In the meantime it was found that the discoverer not knowing how the vein ran placed his claim across the vein. Still following the custom the courts gave the length of the vein covered and side lines became end lines. Again the outcrop crossed an end line and a side line, still the custom as to length of vein was followed. But now came the cases where great bodies of ore lay in the ground without any outcrop. Here the other part of the custom was followed and the ore went to the owner of the surface unless some one else could prove the apex. In some cases hundreds of thousands of dollars were spent in cutting down or up through solid country rock, working out immense chambers, as if full of ore, with a full connecting line of raises and winzes and levels, and in supplementing this dishonest work by colossal perjury to show an apex. One shudders to think how the facts were settled in important mining cases. I know of a case where the Supreme Court could not see that it was lending its authority to a holding that the descent of a vein into the earth

was its length along a level run lengthwise in the vein. But out of it all emerged the triumphant custom that the discoverer obtained his length of vein and everything under his surface ground not shown to apex in some other miner's claim. At length came the case of two parallel veins of which different lengths were covered by the claim. Here the court like the chameleon "attempting to make good" on a Scotch plaid, went to pieces. No one in the court seemed to understand the case and the court asserted that it had decided the exact opposite of that which it did decide. The court left us as the heirs of an insoluble mystery,<sup>59</sup> but no one could claim that the court made any rule of law. The law of water appropriation and irrigation in the arid part of our country is an even better instance of custom.

Historically, therefore, law is custom, and rigid and unvarying custom applying without exception a general rule. The idea that in oriental justice the will of the judge takes the place of law by rule, or that law has progressed from uncertainty to certainty is a total error. The law progresses by a rationalizing process which substitutes a lesser certainty for a greater. No less erroneous is the idea that a rule of law is not logically essential to the administration of justice.<sup>60</sup> It has been shown above that by the constitution of the human mind a general rule is essential to the concept of justice. When a legislative power is developed it by statute imposes certain rules of law. The ancient division of *lex scripta* and *lex non scripta* holds good. There is no other source of law and Bracton was strictly correct when he called his treatise on law *De Legibus et Consuetudinibus Angliae*. There is another professorial and pedantic use of the word sources meaning the places where is sought information as to what the law is or was. In this sense constitutions, statutes, treaties, judicial decisions, legal writings may all be used to ascertain the fact, but the proper use of the word source is in a causal sense, what causes the law to exist, and to this question there can be but one answer, custom shown by general consent and legislation. These are the proximate causes and they are both one, for no statute is a statute unless obeyed generally as a statute. If remote causes are sought and *in jure proxima sed non remota causa spectatur*, the answer must be the general sense of justice and general notions of public convenience or welfare. For international law the same statements hold good, except that there is no

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<sup>59</sup> Walrath v. Champion Mining Company, 171 U. S. 293.

<sup>60</sup> See 13 Columbia Law Rev. 696. For the most preposterous statement in this article as to the law, a story by Kipling is cited.

legislation and in some cases custom and the rules resulting from general justice become embodied in agreements between nations.

In this description of legal development most thinking men will miss any reference to the influence of religion upon legal conceptions. It is no doubt true that religion with its great emotional appeal has done probably more than all other influences to mould the human race to the reign of law. It is with good reason that the priest and the clergyman are said to be in alliance with the lawyer. From the priest the lawyer both in Rome and England and in other systems received the torch of legal enlightenment, and when the torch was handed to the lawyer the priest still kept the sacred fire burning on his altar. The moral law embodied in the ten commandments has done more for the law of humanity in Christian lands than all the statutes.<sup>61</sup> The ordinary man long after he has ceased to feel an active interest in religion and is a *parcus deorum cultor et infrequens* unconsciously acts from his long inherited training in the commandments. For millions those solemn words still fall upon the ear as the Divine law. The lovely ideal of faith, joy, hope, goodness, charity, mildness and self-control of the Savior's life upon earth is yet the most powerful emotion to lead men to the virtues that make the gracious, kindly and law abiding soul. Neither atheist nor socialist can ever still "the Voice that breathed o'er Eden the primal marriage blessing". Millions of men are gladly offering their lives for Christ's ideal of the oneness of suffering humanity and in obedience to the moral law. Nowhere has the essential alliance of law and religion been better expressed than in the words of Bracton, himself a priest and our first great legal author: *Ius dicitur ars boni et aequi cuius merito quis nos sacerdotes appellat; justitiam namque colimus et sacra jura ministramus*. "Law is called the science of the right and just whose priests some one has said we are; for justice is our religion and we minister its holy rites."

## V.

### ANALYSIS OF THE EXISTING LAW.

It is not necessary here to enter upon the controversy of a proper classification of the law. The subject has its difficulties but they are mainly difficulties of convenience of treatment. The point for our present purpose is to state the comparative rules of law as they exist among civilized peoples. If law is in general among all

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<sup>61</sup> It is peculiarly appropriate that Nietzsche in his *Also sprach Zarathustra* should say to the Germans: "Thou shalt not kill, thou shalt not steal." These words were once called holy; before them men bared the head and bent the knee. \* \* \* Oh, my brothers I beseech you to break the old tables." Kohler is a profound admirer of Nietzsche.

civilized nations controlled by the same physical facts, the same facts of mental constitution, the same general conceptions of justice and morality, we may expect to find a general correspondence in the rules of law and the various subjects to which it is applied, varied by influences of race and comparative advancement. The differences in details are not of importance for our present purpose.

The necessary division of the science of existing law would seem to be into that part of law which governs the relations of citizens among themselves and that part which governs the relation of citizens to their government; the one part called private law, the other called public law. The division called public international law has a separate place. That there is such a law as the latter as a fact is proven by its use and application in the courts. Private international law belongs under the head of private law.

The law that involves the person and the duties which each person may claim as owed to him or her as a member of the social organization, resulting as such law must result from fixed physical and social facts will be found to be practically the same in every civilized society. Personal security will be everywhere protected, but in certain countries arrests and improper imprisonments are considered as not being private wrongs. The general disabilities due to infancy, coverture, lack of mental ability, are in general effect the same. Even personal privacy and the duty to respect it will be recognized except where the curiosity of the prying vulgar or the low level of the newspaper will introduce variations. Reputation and social acceptability and occupational, professional or business standing will be protected from unjust attack. The variations among different countries are of little importance and often wholly accidental due to particular conditions. The method of forming artificial persons and their powers and duties, and the relations of the artificial persons to their constituent members and the members' relations to each other, partly belong to the law of personality and partly to the law of obligations, but they have in all countries a complete general identity.

The regulation of family relations, marriage and its incidents, the duration of the marriage and the property relations of the spouses, the dissolution of the marriage and the results of dissolution, the laws regulating the relations of parent and child, and the artificial substituted relations, like guardian and ward, the succession to the family property in cases of intestacy, the devolution of property by will, are all a part of every system of civilized law. The local variations are due either to current religious conceptions or to social development.

The laws as to the possession and ownership of property, its acquisition and transfer for both real and personal property, are practically the same in general features. Even such property as patents, trade marks, trade names, shows a development very much the same. In English law the differences between real and personal property, the peculiar law of estates in real property is but a local variation due to certain facts of historical development. Equitable ownership shows some peculiarities in different countries owing to the same reason. The law of obligations varies somewhat with the effectiveness of division of labor.

Private international law which is ordinarily called the conflict of laws presents an insoluble problem to those who think that law is made by judicial decision. The substantially similar results reached by courts in different countries are an encouraging phenomenon for those who look for an ever growing and ever more universally respected international law. Practically the whole field of private international law is the development of purely rational principles proceeding from the dominant sense of justice among civilized men in the Roman law co-ordinated with the thought that each nation should be at liberty to form its own law within its own dominions. The part of criminal law that belongs to private international law causes a formal difficulty, but more formal than real, in the classification of criminal law as a part of the public law.

Penal law concerns that part of jurisprudence which defines criminal offences. Criminal offences are considered as breaches of the public order, and therefore they define relations between the government and its citizens. But however penal law is placed in a legal classification, it is apparent that in most civilized countries crimes are substantially the same. The great number of crimes existed long before legislation. The ordinary penal code is merely a transcript of the customary list and definitions of public offences. Legislation has added some crimes and abolished others, but the decisive and controlling features remain the same in different countries. In point of punishment for crimes the general sense of civilized communities shows a prevailing uniformity. Volumes, however, have been written to justify the imposition of punishment. It has been said that it is due to a feeling of revenge, but as has been shown above, it is really due to the sense of justice, to the basic idea of equality. The conception that punishment is due to revenge has done much to obscure the true end of penal law. The theories are that the punishment is imposed for revenge, and therefore it is improper, that it is imposed for public example and therefore where no public example is to be served, no punishment

should be imposed, and that it is imposed for the reformation of the criminal, and hence in the case of an incorrigible, he either ought not to be punished at all or should be perpetually imprisoned or put to death. All these theories have no basis in either psychology or sociology. Criminals are punished for public offences because it is for the good of society that their punishment should not be left to individuals as formerly it was. Offences against the whole society, such as treason, are necessarily punished by the state. The reason why men should be punished for crime is because the normal human social mind is not like a maudlin penologist's or a nerveless theorist's. The individual has the sense of equality and to him it is plain that every offence of one man against another lowers that other and the balance can be restored only by a punishment proportioned to the offence. But as men have rationalized the law they have found that the same offence greatly varies in moral guilt. When depraved wretches steal a little child and hold it for ransom and kill it to avoid detection or because the ransom is not paid, every normal human being wishes them hanged. On the other hand when a man under strong provocation kills another, there is a different suggestion. The law attempts to rectify these matters by means of degrees of crime and latitude in punishment. Sometimes, as in the case of the woman who killed her husband for grounds the law could not accept as sufficient justification under a general rule, she was not thought at all culpable, and her acquittal of any crime is smothered under the verdict of a jury. But the criminologists deny moral responsibility for crime. They generally accept the mechanical theory that human purpose, motive and intention, cannot be the cause of anything since they are caused by invariable factors, for which the man himself is not responsible. This is the old dispute as to free will now given a mechanical instead of a theological aspect. The answer to it is that every human being feels that he can choose his course and act upon his choice, and the feeling of remorse proves this consciousness. It seems useless to speculate upon a mere theory which all normal human minds reject, unless they happen to be criminal. But it is also true that the free will of the best mind would be one that would instinctively choose the good instead of an evil course. But for the purposes of punishment and of society, all people must be assumed to be responsible for their conduct, unless under disability of some kind. Punishment becomes then a purely relative thing. But there is more nonsense talked about reforming criminals than about any other subject in the law. Probably the effect of punishment for public example is grossly exaggerated, and if it is of any importance



then the death penalty for most important offences is the proper solution. But the point here is that crime and punishment have little to do with any part of the law except the basic notion of justice.

When we turn to other fields of public law we find a greater diversity. Every civilized government has assumed the double duty of doing justice between its citizens and between itself and its citizens. For this purpose there has been established an elaborate system of courts and of remedies for the exercise of what is called the judicial power. As between citizens it is recognized everywhere that the judicial power must be absolutely independent of control or there can be no general rule applied or impartiality maintained, which are both necessary to justice. These remedial forms are of a general similarity. A notice to the opposite party of a claim made against him, an opportunity to be heard, proceedings in his presence or in the presence of his counsel and an impartial judgment are deemed necessary. The greatest diversity exists as to the method of ascertaining contested facts, and it is in regard to these matters that the imperfect human element is most in evidence. Next comes the ascertainment of the rule of law applicable, which may be a rule of law of the particular country or sometimes that of some other country. Here the imperfect human element is just as much in evidence. The judgment and its execution are analogous under most systems. The peculiar English and Anglo-American institution of the jury adopted in many countries and the rules of evidence nowhere adopted need not detain us.

For correcting errors of courts appellate courts exist, but in Germany their function is merely ornamental since the lower court is not bound by the decisions of the appellate court.

But in deciding controversies between the state and its citizens the question is at once raised whether the state is bound by its own laws.<sup>62</sup> Under the German conception where the government

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<sup>62</sup> There is a growing jurisdiction in England which may well be copied among us which shows the binding force of law. It would be a simian act more intelligent than some of our efforts. M. Tarde would say that practically all general improvement in law comes from imitation. The jurisdiction and procedure to be copied is that of declaratory judgments where men can go to court and find before the difficulty happens what their rights are. This shows that courts cannot and do not make law, for the assumption is that a rule of law exists which will apply to the controversy when it arises. And this obviates a great difficulty in the law. Law does not prevent anything except in the rare cases where preventive action can be obtained. It leaves men free to violate the law simply telling them they must either make restitution or in certain cases that they will be punished. Generally speaking any one can violate the law, if he is willing to pay for it. Even if he is enjoined before hand by the law, he can still violate it if he is willing to pay the penalty. This no doubt comes in part from the idea that a

is identified with the social aggregate, the state is bound only as long as it is willing to remain bound. Theoretically this is true in England with its doctrine of parliamentary omnipotence, although Coke denied it. It is not true in the United States where the discrimination between the social aggregate and the government is recognized.

The case involving the Adamson law<sup>63</sup> illustrates such a situation. It was the law passed by Congress at the terrified request of the President. The law was upheld by a bare majority of the court. The reasoning in the opinion, if such mental processes can fairly be called reasoning, was to this effect. Congress has no constitutional power to fix the wages to be paid by interstate railroads to employees. This Adamson law fixes such wages; it is therefore *prima facie* unconstitutional. But Congress constitutionally could fix such wages temporarily provided it was necessary to obtain the parties an opportunity to come to an agreement on wages, and to keep the railroads operating in the meantime. Congress at the time the law was being passed could have passed a law giving the parties an opportunity to agree, by forbidding the strike and compelling a compulsory arbitration. This means that Congress had power to make arbitration compulsory. Hence the part of the proposition above which speaks of opportunity to agree is wholly irrelevant. Therefore the Adamson law was not necessary either to allow the parties to agree or to prevent a strike, and no occasion was presented for passing this law. The moment the Chief Justice conceded that Congress had the clear power to forbid the strike and enforce a compulsory agreement, the case was no longer arguable. The assertion of a crisis, or public sacrifice by a strike was entirely baseless. The only crisis was that Congress was at the moment given a choice to pass a constitutional law or to pass one that was unconstitutional. Even the decision of the court annulling the law could occasion no crisis, for Congress could forbid a strike and enforce an arbitration. This was the only point. It was not noticed in either opinion nor was it argued by counsel. The majority opinion refutes itself. If the opinion correctly states a rule of law the rule is that Congress can create a crisis justifying an unconstitutional law by refusing to pass a constitutional one. Such a situation is no sort of *vis major* and the opinion is even worse than that of the German prize court in the Appam case holding at the direction of

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man could either submit his case to a court or submit to outlawry. A developing social sense is slowly supplanting this idea of option, with the conception that it is wrong to violate the law to the injury of another.

<sup>63</sup> Wilson v. New, 243 U. S. 332.

the government against all international law that it had jurisdiction of an alleged prize lying in an American harbor, because, forsooth, the Appam could not be brought within the jurisdiction of the court.

But such constitutional chickens generally come home to roost. Congress should then and there have been forced to do what the court stated was within its constitutional power and, therefore, was its duty. If it had been forced we would not now be threatened with the renewed danger of a strike in the midst of war but would be meeting a demand for another arbitration. The court simply created an endless chain of crises by paltering. The consequences were deplorable. The railroads were by this mandate brought much nearer practical bankruptcy, their revenues confiscated without their being heard as to the justice of the edict, and at last the railroads, kicked from pillar to post between the Inter-State Commerce Commission and the courts, had to be taken possession of by the government to prevent their universal collapse. If Congress had the manhood even now to prohibit strikes on the great public highways and to enforce compulsory arbitration and the Lilliputians on the Commerce board should gain a modicum of practical sense, this great Gulliver of a country would cease to be a subject of laughter in its helplessness. But Puck's remark still holds good, and we are diverted by an investigation into the conduct of a *leguleius* out of his depth. What was needed to meet the Adamson law and what is always needed in democracies is the courage of the Great Chief Justice when he frowned down the wretched crew of Jefferson and his partisans. He was pre-eminently a man who knew and knowing dared to maintain the meaning of the lines as true today as two thousand years ago:

*"Justum et tenacem propositi virum  
Non civium ardor prava jubentium  
Mente quatit solida."*

The "*civium ardor prava jubentium*" was that of a class claiming to override the law. Nothing in the history of the court is more inspiring than the famous opinion of Stanley Matthews, now frittered away, when in the face of a clamoring mob he held for the court that even helpless and friendless Chinese laundrymen were protected by the law of the land. Probably the high water mark of all judicial action was that of the English court in the presence of war holding the orders in council to be contrary to international law. Justice hath her victories even in an age of "sophisters and calculators", but we ought to be grateful that any court survived Taney and Chase.

The so-called sovereignty of a government is divisible into its legislative, its executive or administering, and its judicial power. These powers are fixed by our constitutions as separate and independent and independently to be exercised. Theoretically they are separate in every government. They are not parts of the same power as sometimes asserted, for they have absolutely nothing in common. In late times in this country we have been imitating the German police state and creating a fourth kind of anomalous and bastard power called administrative.<sup>64</sup> We have judicial power administered by administrative boards and legislative power wielded by such boards. This development has introduced a great deal of confusion, and gradually the bureaucracy is entrenching itself permanently. This remark, it may seem superfluous to say, does not apply to the activities of the country in war and to the numerous boards rendered necessary as purely administrative assistants.

One of the favorite subjects of professorial assault is the judicial power in this country of deciding which of two conflicting laws is supreme. The courts do not in fact decide the point since the supreme law declares itself to be supreme. The sole function of the court is to ascertain the merely formal matter whether two laws are in conflict. The objection to holding statutes unconstitutional is incomprehensible to men with legal minds, for to deny it is to deny that men are entitled to equality before the law, the basic notion of justice. The simple question is whether the government is bound by the law.

There are the judgments rendered by courts and the judgments rendered by administrative bodies. This development has introduced confusion in regard to the well known division in the law. In the ancient world thought had not analyzed the different functions of government. Their rulers took the customary law and sometimes enacted it or let it alone, as did Sir Henry Maine's Runjeet Singh, I think it was, in the Punjab. The courts and the assemblies among the Greeks both legislated and adjudged very often in regard to the same matter, and Aristotle showed this to be a great error. In Rome the praetors legislated and then applied the rules they had formulated, but regular legislative bodies were also judicial bodies, like the senate or the comitia. In European countries there has never been any controlling division. Montesquieu pointed out with clearness the executive, the legislative and the judicial functions of government. Legislation establishes rules for the future. An *ex*

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<sup>64</sup> Many pages of pro-German stuff in our legal magazines have been written on this theory which has cursed us with a lot of boards which use the government printing office to puff themselves.

*post facto* or retroactive law or a legislative judgment such as a bill of attainder or a decree of divorce, is not legislation whatever else it may be. The executive power cannot legislate nor can it adjudicate. The judicial power can only adjudicate. It can render a judgment upon a particular concrete state of facts. Every judicial act resulting in a judgment consists of a pure deduction. The figure of its reasoning is the stating of a rule applicable to certain facts, a finding that the facts of the particular case are those certain facts and the application of the rule is a logical necessity. The old syllogism, "All men are mortal, Socrates is a man, therefore he is mortal", states the exact form of a judicial judgment. The existing rule of law is: Every man who with malice aforethought kills another in the peace of the people is guilty of murder. The defendant with malice aforethought killed A.B. in the peace of the people, therefore the defendant is guilty of murder.

The rule of law and its application may be reached in a thousand different ways, but a judgment of a court is always this pure deduction. Now it must be perfectly apparent to any one who is willing to admit the rules governing rational mental action that unless the rule of the major premise exists as antecedent to the ascertainment of the fact or facts put into the minor premise, there is no judicial act in stating the judgment. The man who claims that under our system the courts make law is asserting that the courts habitually act unconstitutionally. In other countries the question of division of power is not important for in England parliament is omnipotent, in France the division is not imperative, in Germany the government is omnipotent.

In the philosophy of the law another question has arisen which presents no difficulty whatever, if the distinction between national society, the state or the nation and the government erected by law is kept in mind. From our earliest history we have been accustomed to the fact that the Federal government was the creation of an agreement made at a definite time and place while it was no less apparent that the national society was something very different, indissoluble in its character and the result of a natural growth. But in countries like Germany where society and the state is identical with the government, a real difficulty is presented. Until 1870 the Prussian theory of the absolute identity of the social organism and the government as metaphysically outlined by Hegel, was complete. But when the German Empire was formed a federated government appeared. There was no question regarding the unity of Germany's social organization. There was no question of the fact that the unity of the German social aggregate was a natural growth while

the German Empire as a ruling government was the creation of an agreement which had been made at a definite time and place. The German legal philosophers were at sea. As has been pointed out by M. Duguit, Gerber denies unlimited power to the government, he differentiates between the government and the social aggregate and even to the social aggregate he denies unlimited power, thus agreeing with an enunciation of our Supreme Court in *Loan Association v. Topeka*. Jellinek, while he differentiated society and the state by which he means the government, and afterwards says the separation is possible only as an abstract conception, still clung to the Prussian state theory, and he held that the government was bound by the laws only because it was self limited.<sup>65</sup> In this Jellinek was merely following Jhering who reached the same result by a sort of transcendental reasoning.<sup>66</sup> The Bavarian Seydel went to the other extreme, and in order to prove Bavaria a sovereignty denied sovereignty to the empire or that it was even a state. Then he reasserted in the most violent form the Prussian theory of the state and applied it to insignificant Bavaria, which was exactly like the wretched State of South Carolina insisting that it was sovereign and the nation its creature. But M. Duguit does not note that Preuss<sup>67</sup> completely undermined the whole Hegelian theory by revising the notion of sovereignty. Singularly enough in this country where the distinction between the social aggregate, the nation and the government artificially constituted has always been recognized, this deceptive theory of sovereignty has always been clung to. Preuss rejects the notion of absolute sovereignty and shows that "there is in reality no sovereign state, exercising an absolute and unlimited authority. The authority of each state is in fact limited, and depends externally upon international relations and internally upon the organization of the different groupings which compose it. It is impossible to confute the arguments which Preuss brings forward".<sup>68</sup> Kohler takes refuge in vague generalities<sup>69</sup> but in effect agrees with Preuss. It is worthy of note that Fritz Berolzheimer in his *World's Legal Philosophies* is so imbued with the Prussian professorial mental hypocrisy, which consists in ignoring what does not suit its purpose, that he declines to notice in his much touted exhaustive work either Gerber, Seydel or Preuss although he gives much space to the self limitation theory of the state as bound by law.

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<sup>65</sup> See Duguit, *The Law and the State*, Har. Law Rev. 119, 123.

<sup>66</sup> See Duguit *op. cit.* 126, 148.

<sup>67</sup> *Gemeinde, Staat, Reich*.

<sup>68</sup> Korkunov, *Theory of Law* (Hastings' Translation), 340.

<sup>69</sup> Kohler, *Philosophy of Law*, 297.

We come finally to international law. Private international law will always be applied and enforced by the tribunals of a particular state and we are not further concerned with it here. Public international law governs the external relations of states between themselves. If coercive power or a judicial tribunal or tribunals coextensive with the law are necessary to the conception of law then there is no international law. But international law is not a theory, it is a fact. It is recognized the world over and treated as existing law by the courts of every civilized country. No theory can repeal the fact. Even Jellinek admits that there is an international law, that coercion and tribunals are not necessary to the conception of law but he takes the secession ground that whenever international law comes in conflict with the supposed interests of a particular state it must yield to that state. But this theory leaves no international law. On the other hand we have our Supreme Court asserting in the strongest possible way that no one nation can vary a rule of international law.<sup>70</sup> Gareis recognizes its existence<sup>71</sup> and Kohler asserts with positiveness that there is a supernational law of much the same character as the law of federated states.<sup>72</sup>

We have now surveyed the field of existing law and found that the sources, at least, of all private and public law, are custom and legislation, and of public international law are custom, treaties and conventions. The addition of treaties and conventions between nations is rendered necessary by the fact that in the field of international law these elements are often equivalent to legislation.

## VI.

### SCHOOLS OF LEGAL PHILOSOPHY.

The school which is the oldest is in fact the only school of legal philosophy that has ever accomplished results. Men who talk about the so-called school of natural law rarely betray any knowledge of what the term means. It advocates the application of rationalized justice to the rules of positive law. As we have seen, the social human mind as a necessity of its development looks through the hum-drum, every day life of man and his imperfect functioning as a social being to an ideal world where justice alone shall reign. The ancients who saw life more clearly in certain ways than we

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<sup>70</sup> *The Nereide*, 9 Cranch 388; *The Scotia*, 14 Wall. 170; and *Miller v. Ship Resolution*, 2 Dall. 1, under Confederation.

<sup>71</sup> Gareis, *Science of Law*, 75, 289.

<sup>72</sup> Kohler, *Philosophy of Law*, 296, 300.

see it, because they saw it divested of the vast mass of the machinery of life which confuses our thoughts and blurs our vision, dreamed of an age when Astraea would return to earth and all law would become so perfect that all men would instinctively obey it. The ideal was correct and is still the controlling ideal. Some of the noblest expressions in literature show this craving of humanity. The great dramatist,

"whose even-balanced soul  
From first youth tested up to extreme old age  
Business could not make dull or passion wild;  
Who saw life steadily and saw it whole;"

has told us of "the laws that in the highest heaven had their birth, neither did the race of mortal men beget them nor shall oblivion ever put them to sleep, for the power of God is mighty in them and groweth not old".<sup>74</sup> This eternal craving is that to which Cicero appealed as "the law which was never written and which we were never taught, which we never learned by reading, but which was drawn from nature herself, in which we have never been instructed but for which we were made, which was never created by man's institutions, but with which we are all imbued".<sup>75</sup> This was the future universal world law of Cicero quoted by Judge STORY in *Swift v. Tyson*,<sup>76</sup> when laying down a rule of general law: "There will not be one law at Rome, another at Athens, one today and another tomorrow, but everywhere and among all races and at all times, one and the same law shall obtain."<sup>77</sup> This law dictated by the highest reason of man the Romans called natural law, the law of nations, and nobly the Roman jurists labored on the superb edifice which is still being repaired and adorned. These ideas converted the raw *jus civile* into a *jus naturale*, discovered by a just consideration of the agreement or disagreement of human actions with the social mind of man, the product of the greatest body of lawyers this world has ever seen, not excepting the English and the French. It is an attempt to accommodate law to ideal justice.

Our greatest publicist speaks with the amplitude and spirit of Cicero:

"Justice is the greatest interest of man on earth. It is the ligament which holds civilized nations together. Wherever her temple stands, and as long as it is duly honored, there is a foundation for social

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<sup>74</sup> Sophocles, *Oedipus Rex*, 863.

<sup>75</sup> Cicero pro Milone, 10.

<sup>76</sup> 16 Pet. 1, 19, quoted from Lord Mansfield in *Luke v. Lyde*, 2 Burr. 883, 887.

<sup>77</sup> Cicero, *De Rep.* III, 22.



security, general happiness, and the improvement and progress of our race. And whoever labors on this edifice with usefulness and distinction, whoever clears its foundations, strengthens its pillars, adorns its entablatures or contributes to raise its august dome still higher in the skies, connects himself in name, and fame, and character, with that which is and must be as durable as the frame of human society."

He, too, was a disciple of the school of natural law. This ideal for which the great and good of this earth have striven is the teaching of the school of natural law, and in spite of the deadly legal Philistine it is still the ideal toward which the great and the good are striving. Its system of jurisprudence came to be regarded as a universal law of all mankind, common to all European nations, because resting on the nature of things and the general sense of equity obtaining among all men, a sort of natural law exacting recognition everywhere by its inherent reasonableness. The theory of this school was that an ideal system of law could be constructed by means of reason working with the sense of justice and right, to which all rules of positive law should be made to accord, and they, so far as they did not accord with it, were unsound and indefensible. In modern times Grotius and his followers upon this basis founded a theory and practice of international law, and it is plain that international law can find no other basis. The horrors of the Thirty Years War, perpetrated fortunately by Germans upon other Germans, led to the development of that international law recognized by all civilized nations until the Kaiser arrogantly announced: "There is no longer an international law". And we may hope that these new German horrors will mark another great advance in international law by enforcing again on the broken savages the rule of international justice. All the really great names in the philosophy of law were natural law advocates. Rousseau, and the Encyclopedists, Kant, Fichte and Hegel were disciples of this school. All the noted international jurists are its devoted adherents. Schopenhauer, the one clear thinker among the German metaphysicians, asserted a pure ethical law which created a science of law independent of all statutes. The school is just as powerful today; whenever a legal philosopher appeals to the ideal of justice, whosoever admits that that ideal is what the law must strive for, whoever believes that the law should be consciously fashioned in aid of justice among men, which is merely the expression of the social mind devoted to its social ideal of freedom and equality, is burning incense before the shrines of this school. All the men who denounce the school of natural law recognize its efficacy. Savigny and Puchta are just as surely bound

to it as Kohler or Stammler. Volumes have been written by men to denounce it, and yet in the midst of their denunciations they were appealing to its ideals. It will always survive, for it is based upon an unalterable fact, a constant aspiration of the normal human social mind. The men who think it dead are only deluding themselves, and when they appeal to reason and justice, they assume its livery.

But this school of law was too narrow. Men do not live by ideals alone. Its ideal was sound enough for a part of law, but it ignored certain facts in human society. A natural law unchangeable, eternal and universal, resulting necessarily from man's nature, is impossible for the whole of law. It does not take into consideration the changing life and improving nature of man, nor that the social mind of man is constantly adapting itself in a greater degree to the social life of man. Certain fundamental parts of law and the matters that condition all legal rules with their infinite variety are in fact unchangeable. The main features of the family law, of succession, of the laws protecting human life, of the general rules as to obligations and as to property will be just as sound when Macauley's New Zealander shall be sitting on a broken arch of London Bridge; but a great part of the law is relative and the result of race and time. Many of its rules are variable. There is a great mass of law that as we have seen is not connected with morality. It might just as well be otherwise. It exists because it is necessary to have some rule. This part of law was seen very clearly to be a development of the national life. It has nothing to do with the school of natural law or its tenets. Another school, therefore, arose which laid its whole emphasis upon the historical development of the law as it progressed in orderly succession from one rule to another. Hugo and Savigny were its founders, but they had found nothing new. They believed that by showing that the law had developed naturally and regularly, there was no necessity for assuming that there was any system of natural law. The reasons for the law need not be looked for in reason; there was no longer any danger in denying natural law, for it was not admitted by the denial that all law was purely arbitrary and therefore indefensible. Law was shown to be historically a necessity, and a sure development of human history not created by arbitrary human will, but by the steady social development of a nation. This school even went further and said that the germ of every nation's law was in the race and all the development of the law was the growth and development of the germ. This is the organic theory attempted to be proven biologically by Spencer and his imitators. This school

was bound to fall for the reason that all law becomes a purely animistic development; whatever is, is right, because it could not be otherwise. Positive or existing law becomes not only the only law, but the only possible law. Human will and purpose, the conscious effort on man's part to improve society becomes a myth as baseless as the labors of Hercules. Men instinctively felt and knew that they were not helpless, that there was an ideal toward which they could strive. Then came the school of Stahl and Lasson who maintained the proposition of the ideal system of natural law existing along with the positive law. But here again they grasped but a part of the truth since their ideal system was non-existent, a mere set of legal ideals, and must be necessarily a growing and improving system because it was the product of growing and improving human minds. The folly of comparing an ideal as one existing system with another system existing as a fact, the impossibility of putting conceptions so different in their natures upon any common basis offered no difficulty to men who could identify the thinking subject with the thought-of object. At last Stammler tried to reconcile the historical and the natural law schools by his theory of "a natural law with a variable content", an improving and growing sense of justice. This would be well enough if there were not many things in the law which are unchangeable and eternal. But the existence of international law is easily reconcilable with the tenets of the historical school, and it is a necessity to the school of natural law.

Savigny being of French descent had the courage of his convictions and boldly asserted the folly of legislation and the impossibility of men changing the law by their conscious purpose. The dogmas of the historical school ceased to reign as a new school had seized the thought that only positive law does or can exist and on that basis had founded the so-called analytical school whose great names are Austin and, with faltering and reluctant steps, Sir Henry Maine. They were really a combination of Hobbes and Bentham. That was law which was law in a particular country at a particular time, and that alone. This is true, but it is nothing to the purpose. This school first appropriated the absolutist theory of Hobbes that law was rules imposed by the ruler upon the subject, and they insisted upon legislation to change the law. Austin defined law as the set of rules set by men as politically superior to other men as politically subject. These men politically superior are the government whether it be Kaiser, the Council of Ten, a ruling oligarchy, a representative parliament, a congress, or a popular meeting. It included everything from Khammurabi to a meeting of the miners of a min-

ing district in early California. This school deified legislation and accepted Bentham's crude theories of legislation. A German named Jhering took the thought, called it Purpose in Law, and boldly claimed to be its inventor.

This theory was compelled to account for the fact that law was mainly a natural growth out of previous conditions. Legislation, conscious purpose, touched it very lightly. The historical school had deprecated legislation, had insisted that religious beliefs and customs had made the greater part of law when re-enforced by the reasonings of jurisprudence. The law was the work of silently working forces not the will of a law giver, and the greater part of the rules enforced as law in any court were not imposed by any superior. This objection was met by the proposition that the rules of law enforced by courts were permitted by the superior, and therefore imposed by it. At once the theory was in the hornet's nest that the law permits nothing, it commands or forbids. If all that is permitted is law, then all human conduct is regulated by the command of the superior, a *reductio ad absurdum*. But there was a preliminary difficulty to be met even before the one just indicated. Half the statute book was like our Sherman law repealed by unanimous consent and not enforced in any way. It was found that the consent of the governed was in the end necessary to complete legislation. So Markby adds to Austin's definition the qualification that the rules of law must be generally obeyed. It seemed, then, that the sovereign command did not make law at all, but the general consent of the obeying subjects made it, which fact destroyed Austin's definition and the law was defined as by the historical school. Holland deserted the question of the causation of law and said that law is a system of rules governing men's external acts enforced by a sovereign political authority, and since law is enforced by judicial tribunals, it seemed to follow that the enforcement by a judicial tribunal was the test of law, and hence the step was easy to the thought that courts made law. This was followed without conscious assent by our Supreme Court in an opinion by Justice HOLMES who worked off with no little cynical, though, no doubt, concealed, amusement on his innocent brethren (who had never troubled themselves about a philosophy of law) the definition of law that the court was every day denying and against which a hundred of its decisions could be quoted, that "law is a statement of the circumstances in which the public force will be brought to bear through the courts".<sup>78</sup> This seemed to the court the perfectly innocent statement that if a

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<sup>78</sup> *American Banana Co. v. United Fruit Co.*, 213 U. S. 356.

rule is law the courts will enforce it. Courts are the only people who do not know what a violent presumption this is. They seem imbued with the idea that they follow the law. The most that can be allowed them is that generally they try to do so. But the sense in which the court took Justice HOLMES' proposition is not what he meant. The sentence means the exact opposite. It means that a rule is law because the courts enforce it, and for no other reason, and that a rule does not exist until particular circumstances are before a court; and, therefore, it is the court that makes the law, a proposition once again urged by Justice HOLMES in another case in a dissenting opinion, where he showed what he really meant and the majority of the court overruled him.<sup>79</sup>

The theory that courts make law is the thesis maintained in Gray's *Nature and Sources of Law*, but the very instances he cites prove that courts do not make law, for the simple reason that the cases he cites are all based on pre-existing rules.<sup>80</sup> Any opinion can be read and the decision will be seen to be a deduction from a more general rule. An application of a rule to a new case does not make a new rule. Mr. Gray puts the case of "what was the law in the time of Richard Coeur de Lion on the liability of a telegraph company to the persons to whom a message was sent." This illustrates that he is not thinking about law at all, but about the rules of thinking. He states a concrete case of fact and asks what general rule of law would apply in the time of the Lion Hearted. The answer is plain. His concrete case was then non-existent, and it is mentally impossible to conceive of a rule of law governing non-existent human conduct. Professor Gray has simply perpetrated a psychological absurdity. He also does not see the difference between a rule of law and a judgment on a concrete state of facts. He might as well ask for the law among the Wanyamwezi as to fellow servants. The difference is a matter of the rules of thinking which must be settled before you attempt to apply them.

It happens that we as well as all civilized countries have judicial tribunals. These judicial tribunals ascertain as best they can what

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<sup>79</sup> *Kuhn v. Fairmount Coal Co.*, 215 U. S. 349. If a man desires to see where the idea that courts make law lands a rational mind, let him analyze the dissenting opinion. If he thinks it sound, he may be absolutely certain that he does not know what law is.

<sup>80</sup> See his whole chapter iv. The opposite view in the book of a very great lawyer, James C. Carter, *Law, Its Origin, Growth and Function*, is not put very convincingly, because he is trying to deny that legislation makes law, a palpable error of fact. In 17 *Col. Law Rev.* is a paper which contains more error than can anywhere be found in the same space. In the *Bering Sea Arbitration*, Mr. Carter in order to support the absurd position of our country threw overboard his beliefs, and maintained a philosophy of right theory of international law. He was, of course, utterly demolished by Sir Charles Russell.

are the general rules of law. They do not consciously invent rules for they all recognize that any judgment which they give is founded upon a major premise which must be an existing rule of law. If they do not do this, they are not performing a judicial act. Suppose a court should avow that out of its own head it made a rule, would it legislate? The answer is no, because the application which they make of the rule is to a past state of facts. Therefore when a man talks of a court making law, he must be referred to treatises on psychology and logic. The fact that courts announce rules of law is a mere accident. Suppose that they followed the rule of merely announcing their judgments without giving reasons. For nine courts out of ten this would be an excellent rule. Years ago a judge of the Territorial Federal Court in Wyoming told me that he had become so disgusted with stupid reversals that at one term when he had twelve chancery cases, he took the six cases where the complainants' names came earlier in the alphabet and decided those for the complainants, the remaining six he decided for the defendants. He gave no reasons. They were all appealed, and those were the only cases at any term which were all affirmed. If this story is *non vero*, it is certainly *ben trovato*.

No one not blinded by our system would ever suppose that courts make law. It has never occurred to a European lawyer to make such a supposition, because they have not our system of precedents. This idea of law is our peculiarly provincial contribution. There are literally hundreds of legal systems in full working order on this earth today, whose rules are absolutely binding and observed, which are neither laid down by a superior power nor announced nor enforced by courts. The mere accident of machinery has been mistaken for the characteristic of the abstract idea. Law is a concept, a generalized abstraction attained by mental processes. Generalized concepts such as horse are type ideas which result from observation, but a generalized concept like law is itself a higher abstraction from other abstract notions, which exist only in the mind. The various rules of law are themselves abstract generalizations. The attempt to define law is simply the attempt to find what the various abstract rules have in common. It is not coercion by state power because that element is no part of the abstract rules. It is not the fact that it is laid down by a superior power because the rules have not that element in common. It is not the fact that the rules are stated by courts, for that fact is not a common element. Nor do any of these facts enter into the abstraction. The mere abstraction would not be important if the definitions above did not exclude public international law. It is among the disciples

of the analytical school that international law is being beset in the house of its friends, of those who ought to be its defenders (in courts which have gone so far as to say that the rules of public international law are a part of the municipal law), who are "reiterating stab on stab". Certainly we cannot give up public international law for a Philistine idea of the Saurian Cretaceous period in law, which is refuted by the laws of thinking, by the truths of history and by the demands of justice, which all require a rule of law antecedent to a judicial decision.

There is a book by Joseph H. Beale of Harvard,<sup>81</sup> a part of which has appeared, which is to become the definitive treatise on private international law or as he very properly prefers to call it, the conflict of laws. It gives the strongest promise of being the best legal work done in this generation. It unites industry and erudition to keenly discriminating thought and in it the author has exhausted the abstract concept of law. His studies were in a department where he was required to free himself from the usual erroneous limitations. He saw a whole system of law that was practically virgin ground to the law giver. It bore the marks of the labors of many centuries of the natural law thinkers. It gave all the proofs of its noble historical origin, and its orderly development. It has been illustrated by the labors of jurists. Mr. Beale himself had written a book upon the great mediaeval authority Bartolus,<sup>82</sup> which every lawyer who is better than a "*leguleius, cautus atque acutus*", ought to read with delight. It was positive law, daily applied by the courts in many different lands, and yet no tribunal existed whose jurisdiction enabled it to lay down the law for all its different spheres of operation. Here was a body of law that no one could deny and yet it rested on nothing else than the age old sanction of law, its general acceptance. He saw, none more clearly, that this body of law like all other law, had a set of general principles which gave it standing as science, but which blossomed into many particular rules. He defines law as "the body of general principles and of particular rules in accordance with which civil rights are created and regulated and wrongs prevented and redressed". He uses civil rights as a term of widest import, and he points out that the characteristic of law as a living system, is the fact of its acceptance. This definition of law is reconcilable with all its attributes.

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<sup>81</sup> Beale, *The Conflict of Laws*, p. 132. In Korkunov, *Theory of Law*, there is an attempt to define law as a limiting of the sphere of rights, which does not meet the difficulties.

<sup>82</sup> The book on Bartolus may be read with the life, much more sketchy, in *Great Continental Jurists*.

It leaves scope and play for the gross errors of courts.<sup>83</sup> It gives room for public international law in the fact of acceptance by all civilized nations, and in the fact that rights are created by it and wrongs redressed according to its rules. When Germany attempts to repudiate this law, she is refuted by her own jurists. Practically all writers agree that the effect of law is to delimit rights in one person with corresponding duties in others to respect those rights. This situation creates legal relations. So far all are agreed as to the situation between citizens. But all agree that the citizen stands in legal relations with his government. If this be so, the citizen must have rights complemented by duties on the part of the government. In our country these rights and duties are defined by the organic law. But all agree that governments bear legal relations toward one another, and those relations are and must be defined by law, which is international law, as the Germans admit. One of them, Kohler, as we shall see, trying to account for his statements as to the existence and binding force upon nations of international law, emits the ludicrous Teutonic roar that his "honest German nature" had been

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<sup>83</sup> It is painful to have to record another of Justice Holmes' careless and debonaire utterances. In *Kawananokoa v. Polyblank*, 205 U. S. 349, he must have completely misled his associates into concurring in a statement of the law that is not only not correct, but actively vicious. He says: "Some doubts have been expressed as to the source of the immunity of a sovereign power from suit without its own permission, but the answer has been public property since before the days of Hobbes. Leviathan Chap. 26, 2. A sovereign is exempt from suit not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends. '*Car on peut bien recevoir loy d'autrui, mais il est impossible par nature de se donner loy*', Bodin *Republique* i, chap. 8 (Ed. 1629), p. 132". The French sentence means, "For one can very well receive law from another, but it is naturally impossible to give law to oneself". Here we have the German theory that the government cannot be bound by law put forward in its rawest form. The authorities quoted are the Philosopher of Malmesbury, the advocate of royal absolutism, and a Frenchman who believed in *quidquid principi placuit habet legis vigorem*. Justice Holmes never meant to assert such a thing. His associates never would have concurred in such doctrine. It was contrary to a hundred decisions of the court to the effect that the government could bind itself by laws, and the courts had always enforced them. The doctrine stated was not the ground of the rule. That doctrine was obsolete theory except in Germany. If the statement is true, the government cannot be bound by the law. The statement is astonishing and to all Americans who understand it, intensely humiliating. The point decided, however, was correctly decided. The reason for the rule is public convenience, for all sorts of actions would be brought against the government if the rule did not exist. But if opinions make law, it is law today in this benighted country that the government cannot bind itself by the laws it promulgates. There is no logical basis for such a rule and can be none, and one naturally inquires of our Supreme Court, *que le diable faites-vous dans cette galere*. But this is the trouble when a judge announces law on his own researches. Bracton, Fortescue and Coke denied his proposition. It was never true in Imperial Rome nor in France. See *Le Maxime*, *Principes Legibus Solutus Est* by Esmein, *Essays in Legal History*, 1913, Vinogradoff. I can only quote Coke's words in Calvin's case, I think, that Justice Holmes has given "a damnable and damned opinion".



deceived into telling the truth. But the fact that private international law exists is proof positive that a public *jus gentium* exists.

As we have seen, there is a certain stage in the development of law where a legal profession necessarily comes into existence. This legal profession after its advent will determine the acceptance of law and its meaning. Just as in mediaeval Year Books, no writ would stand against the opinion of the sergeants, so no principle of law will stand today against the opinion of the profession. One of the practical objections to the judicial-decision analytical school is that there is unloaded on the science of jurisprudence all the manifold mistakes of courts. There is no certainty that a decision has stated a rule until the statement has stood the test of time and acceptance. It is not necessary to refer to cases where the courts have made mistakes by first enunciating one rule and later finding they were wrong. We may take a case where a court has had two identical cases before it and *mirabile dictu* has decided them in the same way, applying a principle or a rule. One case is appealed and reversed. The other is not appealed, and the judgment stands. The first rule of justice which is impartiality, has been violated by an accident. Shuffling out of this difficulty, they say that law is made by courts of last resort. If so, whether there be law in a court decision, depends upon the accident of appeal, a wholly nonsensical conclusion. Again a decision is made and an appeal taken. In the meantime another case between the parties involving the same point comes on for trial. By the doctrine of *res judicata* the first decision decides the second case. It also is appealed. On the same day in the same court, the two cases are decided. The first case is reversed, the second is affirmed, rightly because the effect of the first judgment was not suspended by appeal. This very case has happened. So far as the ultimate rights of the parties are concerned, two exactly contrary decisions have been made by the same court at the same time on the same subject-matter. This is the law of our Supreme Court of the United States, yet no one would contend that the accidents of litigation made two diverse rules of law. It is merely certain that a great injustice was done by a clumsy procedure. Now shall lawyers admit that all the errors and mistakes of fallible men in the courts shall be unloaded on jurisprudence which is the noblest product of the human intellect? It is against these puny mistaken men that this great science has been waging her war for aeons and will continue to wage it long after we are gone.

There has lately been proposed another school of legal philosophy called Sociological Jurisprudence which is said to have given up

the search for what law is and has concentrated its efforts presumably on what it ought to be. Since there never was any jurisprudence that was not sociological, this school must profess "jurisprudence as is jurisprudence". It is claimed, however, in all apparent seriousness that this is a new school. It is said to be seeking for the ideal and enduring side of positive law, but this is merely the natural-law school given a new name, and curiously enough this hypothetical school is said to blame the natural law school for doing just what it proposes to attempt. Then it is said that this school seeks to define the legal order<sup>84</sup> rather than to reach a definition of law. But this is the analytical school over again and Kohler repudiates his disciple, even as Bentham repudiated Dumont, and asserts that philosophy of law is the philosophic study of evolutionary processes by which law is formed, which is the historical school over again with certain *Kultur* "*Persicos apparatus*". In this school we are shocked to find classed together Comte, Spencer, Ward, Jhering, Duguit, Sternberg, Berolzheimer, Merkel, Gumpłowicz, Demogue, Kohler, Post and Dahn. M. Duguit between Jhering and Sternberg must feel (I say it in all reverence) as if he were being crucified between two thieves.<sup>85</sup> This new school seems to be a hasty and unjustifiable generalization from Fritz Berolzheimer's book. Fritz is a perfect Fritz of Fritzes for he does not always tell the whole truth, but he never supposed, I venture to say, that the Neo-Kantians would be classed with the Neo-Hegelians and the Utilitarians. These people have literally nothing in common. They abuse each other like pirates. Kohler says Jhering has "a wholly unphilosophical head". Jhering trounces almost everybody. Spencer has nothing in common with these high prerogative divine-right-of-the-Kaiser Germans, nor with the Utilitarians. The school includes biologists, utilitarians and transcendentalists. It is much as if some new Cuvier should arise and announce in tones of thunder that he had discovered a new species of animals which all had this fact in common, that they ate food, and that the species comprised the elephant, the rhinoceros, the tiger, the eagle, the zebra, the jackal, the lion, the baboon and the vulture. But where in this list are Binding and Bierling with their "norms" which look like a new species of legal "worms"; they are analytical jurists; and where are Seydel, Preuss,

<sup>84</sup> The "legal order" is one of those convenient vague German phrases with "a variable content" that mean nothing. Only one who has followed the German "subjective" and "objective" through almost a hundred different senses, most of them contradictory, can form any adequate notion of this vagueness and looseness of thought.

<sup>85</sup> See the articles in 24 and 25 Har. Law Rev. on Sociological Jurisprudence and 15 Col. Law Rev. I have not verified the number of the last volume for one reading was quite enough.

and Gerber? Berolzheimer left those out of his book, so the projector did not have them to classify. The inventor himself is the American protagonist of this school, but now comes Professor Kocourek and says that the inventor does not belong here, and *horresco referens*, is in "a hostile camp of legal philosophy". This is very mystifying, especially as Professor Kocourek after his attempt to comprehend this exhaustive work of Fritz ventures on certain schools himself. Those schools are the Positivist, the Neo-Kantians and Neo-Hegelians, and he evidently classes the inventor, "one of our greatest juridical scholars", along with Comte as a Positivist<sup>86</sup> while he rejects the Natural-Law, the Analytical and the Historical schools altogether, although if he could have foreseen what the inventor was going to do in his elaborate disquisition on the Natural-Law, Analytical and Historical schools, while classing all of Professor Kocourek's three schools together as one school, he would not have been, we may hope, so temerarious. As it is, his classification has been treated by Dean Pound after Count von Luxburg's recipe of "*spurlos versenkt*". Both professors agree, however, in saying that Kohler, who is the elephant of sociology's new school, is "the first of living jurists".

We dismiss the Sociological School of jurists as too involved "for human nature's daily food".<sup>87</sup> If we attempt to generalize from the lucubrations of the schools, we see no reason to change Professor Beale's definition of law. It stands as an accurate description of the abstract conception of law. But the astonishing thing is that any one should have treated any of these schools seriously. They practically agree on the facts. They differ on the theories. Each one seizes a part of the truth and proceeds to exploit his parcel as if it were the whole estate, and thereby commits waste on the inheritance which all life tenants must avoid.

## VII.

### GERMAN LEGAL PHILOSOPHERS.

No one is infallible, not even the Pope. In 1868, John Hay, then an attaché at Madrid, where he had written his lovely book "Castilian Days", came through Paris and told with great joy a story that was current in Madrid of that "amiable old pessimist", Pius IX. The Ecumenical Council of the Church under direct in-

<sup>86</sup> See Kocourek's *Introd. Kohler's Philosophy of Law*, p. xv.

<sup>87</sup> In *Har. Law Rev.* xxxi, 373, Nathan Isaacs of the Cincinnati Law School has ventured on further schools.

spiration from on high had pronounced the dogma of Pius' infallibility. But he had his doubts and to test his infallibility he had been trying his new powers on the weather and on lottery tickets with disastrous results to the dogma.<sup>88</sup> It is rather a pity that certain professors of law have not some such method of ascertaining their own fallibility. But here let me say that the larger class of the law professors assume that they are to teach law and have no roving commission to assault all its rules and to abuse the legal profession. They know how difficult a matter it is to be a worthy member of such a profession. No one should attempt to apologize for all lawyers. In this country, the profession is burdened with many, perhaps a great majority, who have never been illuminated by "the gladsome light of jurisprudence". Many of them are mere "hacks" not even persons of good education, but no one can deny that in the history of this country lawyers have given a good account of themselves. There exists too often, a sort of hostility between the practical, practicing lawyer and those theoretical professorial colleagues, who think that they have become the depositaries of ultimate truth. It is mainly due to the fact that the theorist shows so little actual knowledge of jurisprudence as a practical art. Lawyers are constantly seeing deliverances of the theorists that would not stand a day's practical test. The theorists are constantly carping at the profession for its imperviousness to ideas and its sordidness. The lawyers reply with truth that the professors have no conception of how carefully, minutely and thoroughly, with what liberality of thought, an important case is prepared for trial, with what great research and attention to detail. If a question of statutory construction is involved, all the considerations which the theorists think themselves to have discovered, but which in fact have been the common basis of argument for many years, are carefully weighed, all the material that the Historical or the Natural-Law or the Analytical schools can furnish is searched and pondered; all the light possible from former analogous statutes is obtained, the situation the statute was designed to meet, the social reasons demanding it, the reasons in existing law for its enactment, the general public policy involved, the demands of abstract justice and right, the interference, if any, with general rules—all is placed before the court; very often it is the useless task of *margaritas ante porcos*. All the reasons for a liberal or strict construction, the appeal to the general spirit of the enactment, all the different rules

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<sup>88</sup> This tale is in John Bigelow's *Retrospect*, I think in volume four. But any one who is desirous of verifying the story may consult the index. He will find diverting and some valuable material.

for interpretation are urged and debated, weighed and tested. The lawyers say that when one of them arises in court all his fallacies, shortcomings, lack of information and immaturity of reflection are exposed, while the professorial theorist never receives a criticism or reply, and thinks that because he can escape a lot of illy informed students without correction, he would pass muster everywhere. Even the judge upon the bench must submit, very often with ill grace, to an exhaustive examination of his opinion and exposure of any inadequacy in his reasoning. It is true that he can act like the professor and resent criticism. Very often he does so, but the fact is not altered. The lawyers know how great and difficult a matter is the law, how much insight is required, how a perfect system on paper would be a monstrosity in actual use, how the law is always loaded with human imperfections, lack of ability, incapacity to discriminate, personal prejudices or ridiculous hobbies, how the judicial head seems often to be constructed of non-conducting material; and the lawyers claim that if the theorists were put into court, made to prepare and argue great questions, they would find that their new discoveries were as old as the hills and they would discover that their cackling over new discoveries had not even the hen's excuse of the production of one actual egg. The theorists accuse the lawyers of narrowness and intense conservatism and charge that they have no confidence in legislation. The lawyer replies that owing to the numberless mistakes which he sees, the silly and stupid statutes without number, he would be a criminal, if he were not a conservative; that the theorists with their Jacobinical offerings, abuse of law, decrying of the methods for the administration of justice and their attempts to unload their crude designs on a jurisprudence tested by the years are irritating and dangerous. They point to the law, to what it has done for civilization, and say that it suffers enough from human imperfections, that the theorists are wrong in trying to hack our aged mother to pieces. They point to the vast complexity of human affairs, to the immense burdens the law is called upon to bear and answer:

“Yes, we arraign her, but she  
The weary Titan with deaf  
Ears and labor dimmed eyes,  
Regarding neither to right  
Nor left, goes passively by,  
Bearing on shoulders immense,  
Atlantean, the load  
Well nigh not to be borne  
Of the too vast orb of her fate.”

It may be admitted that the practical lawyer does not exhibit a very receptive attitude toward legal philosophy. He can see nothing very valuable in English legal philosophy so far as it goes. Salmond or Miller or Amos or Austin or Lorimer are not of any value to him. Sir Henry Maine's books are interesting and suggestive. The Common Law of Holmes was exceedingly good if it had been true, but it had at any rate the rarest and best of all things, charm and inspiration and faultless diction.

But the lawyer is told that Germany is the home of legal philosophy. Now when we are told of this great philosophical literature, we are skeptical, but we naturally recur to the books that are open to all. There are Kant's, Hegel's, Puchta's, Jhering's and Kohler's Philosophies of Law, beside numerous other works. One opens Hegel's Philosophy of Law and one's mind goes back over the *fugaces annos* to the days when he was an undergraduate. The Universities were then filled with those who had gone to Germany to draw inspiration from the bubbling fountains of philosophical verbosity. The Germans had done great things in the world, the new German Empire was stupendous and nothing succeeds like success. The great apparent good of Bismarck filled the world, the evil that was to live and fester and breed after him, was not yet known. The Universities were full of seminar courses and every one was talking German methods. It fell to my lot to sit under the ministrations of one of the great and early exponents of German philosophy, George S. Morris, whose death was so untimely. We threw ourselves with youthful enthusiasm upon Kant, Fichte, Schelling and Hegel. Especially the German theory of the state was in the air. Our lecturers on political economy were talking the Jacobinical stuff made popular by the German professorial "socialists of the chair". The watchword then was *Geist*, intelligence applied to state affairs and in training the population, resulting in an *Intelligenzstaat*. Matthew Arnold's Culture and Anarchy and Friendship's Garland had preached the healing power of *Geist* in lovely and moving tones. We panted for enlightenment as the heart panteth for the water-brooks. We pored over the Pure Reason and the Phenomenology of Spirit, but we found nothing to quench our thirst. Imagine our horror and dismay to find that Kant, the starting point of German philosophy, had nothing new; it was the old agnosticism dressed up in many words. He was a Scotchman and had borrowed his ideas from Hume. He had once shown signs of trying to talk of free institutions, and had been promptly suspended and taught a bitter lesson, so that he never ventured into that field again, but had signed a full recantation to the effect that the sov-

oreign power in the state was the existing government and that its law was holy; "A law which is so holy and inviolable that it is practically a crime even to cast doubt upon it, or to suspend its operation even for a moment, is represented of itself as necessarily derived from some Supreme, unblameable law-giver. And this is the meaning of the maxim, 'All authority is from God', which proposition does not express the historical foundation of the civil constitution, but an ideal principle of the practical reason. [We noted that this was not imputed to the pure reason (*die reine Vernunft*), which was concerned with truth, but to that practical reason (*die praktische Vernunft*), which was involved in his salary.] Hence it follows that the supreme power in the state has only rights and no (compulsory) duties toward the subject." This was the old divine right of kings, or of government, which Kant had made a tenet of the practical reason and to stop it, the English a hundred years before had cut off one king's head and chased another from the realm.

So we turned to Hegel and found that he strummed the same tune. He was opposed to all free government and representative institutions. In international law he preached the doctrine that nothing was binding on a state, that states were in Hobbes' condition of "the war of all against all". He, too, held the doctrine of sovereignty vested in the monarch, who was a person and therefore made the state a personality. The power of the monarch was not derivative, but his right was a becoming unto itself, which in Hegel's language means absolute reality. "Accordingly, the conception which represents the right of the monarch to be founded upon divine authority is wholly exact, because in such notion is contained the unconditioned part of the monarch's right". Here we found again the Germans feeding on the dry husks of divine right which had been burned in 1688 in England and in France in 1789.

Fries, a German publicist of the time when they still dared to think, said that Hegel's theory of the state had grown "not in the garden of science, but on the dunghill of servility". This is an accurate description, and our philosophy of law is expected to roost upon that dunghill. Although Hegel conceals his views on jurisprudence, we can discard his trinitarian system of thesis antithesis and synthesis and approximate his conceptions. Law he conceives as the antithesis of customary morality and their synthesis is true morality. The individual and the group are opposed but they are united in the family. The family and the civil society are opposed and they unite in the state. At bottom his idea, if he had one, is an attempt to reconcile individualism as opposed to society.

Efforts had been made to apply this German philosophy of law to our political institutions. At that time in the consulship of Arthur, the effort had been made by Mulford's "The Nation", a work long forgotten, I suppose. He propounded the following propositions in an attempt to apply the Hegelian theory to a state without a monarch; that the nation is founded in the nature of man and is a natural growth and relationship, is continuous and is an organism, a conscious organism, a moral organism and a moral personality. He stopped short of the Hegelian identification of the existing government with divine right. The interesting point in his book is the discrimination which he made between the nation as the social aggregate, the people, and the government, called the commonwealth. It was apparent to him that the people of the United States, the social aggregate, must be considered as formed and existing prior to our adoption of a constitution, otherwise the conception of Calhoun that the nation was a mere compact between states and therefore an artificial, not a natural and necessary growth and development, indivisible and eternal, could be fairly maintained. But the theory of Mulford had been already stated by Webster with precision in his speech, *The Constitution not a Compact*.<sup>89</sup> "The Union is the association of the people, under a constitution or government, uniting their power, joining together their highest interests, cementing their present enjoyments, and blending, in one indivisible mass, all their hopes for the future". This is the theory, the existence of a nation, a social aggregate, anterior to the constitution, which is the doctrine of our Supreme Court. In *Chisholm v. Georgia*<sup>90</sup> the distinction between the government and the state, as the social organization, is noted in the phrase that the government has often claimed precedence over the state, which is the artificial person, the complete body of free persons united together for their common benefit, to enjoy peaceably what is their own and to do justice to others. And Chief Justice JAY said: "The Revolution, or rather the Declaration of Independence, found the people already united for general purposes and at the same time providing for their more domestic concerns by state governments and other temporary arrangements". In *Pennhallow v. Doane*,<sup>91</sup> the same assertion was made of the existence before the constitution of the one political body, which raised armies, conducted military operations, issued bills of credit, received and sent ambassadors and made treaties. In

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<sup>89</sup> Webster, Works vi, 211.

<sup>90</sup> 2 Dall. 455.

<sup>91</sup> 3 Dall. 54.



*Texas v. White*,<sup>92</sup> the court noted that the word 'state' is used first for the political community, second for the territory of the community and third for the government thereof. But the society constitutes the state, and the united society is one state and one country. "The Union never was a purely artificial and arbitrary relation. It grew out of common origin, mutual sympathies, similar interests and geographical relations. It was confirmed and strengthened by war and received definite form in the Articles of Confederation". In *Lane v. Oregon*,<sup>93</sup> it was asserted that the United States existed before the constitution. In *Loan Association v. Topeka*,<sup>94</sup> Judge MILLER asserted that outside of the constitutional limitations on the government were limitations arising from the nature of free government and beyond the control of even the state, the political aggregate. But Mulford did not see that his theory refuted Hegel's identification of the state, the nation, the social aggregate, with the particular form of government. Later, in England, attempts were made to furbish up the theory in a new form in Green's Principles of Obligation and Bosanquet's Philosophical Theory of the State. Germany had grown into one political community. Events had disposed of Hegel's theory, yet the Germans have never admitted it. It having become united, the rulers of the different states, the various kings, grand dukes and dukes (there was no nonsense about the people) by their agreement had constituted a government for the already existing German Empire. This ended the Hegelian theory and now Bavarian legal philosophers are claiming that the Empire is merely a league, that the God-given states are still the different social aggregates. They have adopted the Calhoun theory and applied it to the German Empire. But at the present time one who would deny the social unity of Germany must surely be daft.

But we ought not to part from Hegel without a specimen of his line of thought. In his *Phänomenologie des Geistes* I take a sentence at random from his great chapter: "When reason observes, this pure unity of ego and existence, the unity of subjectivity and objectivity, of for-itself-ness and in-itself-ness, this unity is immanent, has the character of implicitness or of being; and consciousness of reason finds itself".<sup>95</sup> This union of the thinking mind, the subject, and the thought of object is perfectly apparent to Hegel.

<sup>92</sup> 7 Wall. 700. Here Chase stumbled on a thought, but like the politician he was, he proceeded to dilute it in the next sentences.

<sup>93</sup> 7 Wall. 71.

<sup>94</sup> 20 Wall. 655. This is a good specimen of Miller's rugged writing. He was a strong legal personality. If he had been educated and had had the balance that comes from wide reading in the law, there would have been none greater.

<sup>95</sup> Hegel, *Phenomenology of Mind* (translation Baillie), p. 430.

He assumes it. I see my hat, that objective thing, the hat, creates an impression on my mind. That impression is a part of my mind. The mind was for itself. The hat was in itself. The two things unite in the hat impression and not until then am I conscious of reason, but because I am so conscious the thinking mind has become one with the objective thing. What could be plainer? A man's mind finds itself in the in-itself-ness of his hat, while his pure ego "talks through its hat". Schopenhauer in his Essay on Style says of this sort of work: "The mask of unintelligibility holds out the longest; this is only in Germany, however, where it was introduced by Fichte, perfected by Schelling and attained its highest climax finally in Hegel, always with the happiest results. And yet nothing is easier than to write so that no one can understand. \* \* \* The Germans from force of habit read page after page of all kinds of such verbiage without getting any definite idea of what the author really means. \* \* \* Obscurity and vagueness of expression are at all times and everywhere a very bad sign. \* \* \* Those writers who construct difficult, obscure, involved and ambiguous phrases most certainly do not rightly know what it is they wish to say:—*they have only a dull consciousness of it which is still struggling to put itself into thought*; they also often wish to conceal that in reality they have nothing to say. Like Fichte, Schelling and Hegel, they wish to appear to know what they do not know, to think what they do not think, and to say what they do not say."

Kohler is constantly imputing to Hegel the application of the idea of evolution to history as if he were the inventor of it. This is a part of the general German theory of claiming everything, and is characteristic of their mental dishonesty. As a matter of fact, the whole idea of evolution is absent from Hegel's system. He could not have had it because to the idea of man's evolution his presence on this earth for at the lowest 250,000 years is necessary, and Hegel believed in Archbishop Usher's chronology, by which man came on earth 4004 B. C. with the same mind that he has today. In Hegel's Philosophy of History he does not conceive of one form of civilization passing into something higher, but he takes certain races as typical of certain manifestations of reason in humanity. This is entirely foreign to what they call *Entwicklungsgeschichte*. This uncouth word, meaning historical evolution, did not exist for Hegel. Hegel conceives of right as a development of reasoning, not as a product of the evolution of the mind.

And this takes us on to Puchta who denies Hegel's whole assumption that Reason produces the notion of right. Puchta says that freedom is the foundation of right, which is the essential prin-

ciple of all law. Hence, says Puchta, it follows that it is not from the notion of Reason that we get to Right, as the principle of law.<sup>98</sup> This illustrates the superficial character of the German philosophy of law. It is all bare assertion. Freedom, that is to say, freedom from the aggression of others, is the foundation of law, because it is one of the basic notions of justice, not freedom from all restraint, but the social freedom which is that which is compatible with equal freedom in others. This is jural freedom postulating equality and general rules of law applicable to all alike. But in order to develop this complex concept of justice as an original moral idea, some power of reasoning in men was necessary. Then he proceeds: "At first, at his creation, man was put into this free central sphere. Only when he had fallen from it, did necessity as such appear, and only then did the exercise of Reason begin,—a high gift certainly and indispensable to the fallen nature". This sort of stuff is what Puchta places as an introduction to his great treatise on Roman law, and he proceeds in this mediaeval style to develop a conflict between the principle of Right and that of Morality! This is a favorite thesis of the German school, and they try to put it into practice. He has no understanding of the subject at all, but in regard to Roman law he states that it developed equality before the law, but not freedom. Here is the usual German confusion. He is using freedom in two senses without knowing it. Jural freedom is one thing; that freedom the Romans had because they had an almost perfect system of private law. Political freedom in the sense of taking an equal part with others in matters of government, they did not have, but political freedom in that sense had nothing to do with the basic idea of justice or law until the idea of equality became highly developed as a political tenet. Anyone is at liberty to read this worn-out literature, but it has been cast behind by the knowledge of this age.

We may take now two books of Jhering. One is *The Struggle for Law*, the other, *Purpose in Law*. The sole idea in *The Struggle for Law* is that law results from every man contending for his rights, that it is this constant clash between human beings that develops law, and if men do not insist upon their rights, no law will be developed. The necessary result of this would be that if men did not violate other men's rights and everybody was law-abiding, the law would be destroyed. Jhering was not a philosopher. In this country his style would have fitted excellently a professional

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<sup>98</sup> Puchta, *Outlines* (Hastie's Trans), p. 5, 6. Mr. Hastie's introduction leads one to think that he must be actually descended from that Judge Staunton, whom the irreverent Year Book reporters called Harvie le Hastie.

exhorter. A practical lawyer rejects his creeds as nonsense. "Blessed are the peacemakers" will do more good than a hundred such treatises. When to go to law is a most difficult problem, unless you are a fomenter of petty village litigation, or paid by some governmental power an unearned salary to stir up litigation.

His book, *The Spirit of Roman Law*, outside its erudition, which is possible to any one who can write in a note book, has a great reputation on account of a number of original views. One of his most unpardonable performances was to slander the memory of the great Roman lawyer Gaius. No one knows who Gaius was or where he lived, so that as to him the Germans are particularly strong, especially Mommsen. Jhering pondering a problem of Roman law, proceeded, he tells us,<sup>97</sup> to summon the spirit of Gaius for cross-examination through the clouds of cigar smoke, and most villainous smoke it was, according to my experience, if the cigar was "made in Germany". Gaius appeared and Jhering describes him as "a strange figure of a man, tall, shrivelled, slightly bow-legged, with freckled brow and the general air of a schoolmaster". In fact he was a typical German underfed pedagogue. Let us hope that even the fat ones now look thin and shrivelled. But what an atrocious slander! Gaius was a fine, upstanding Roman, with eagle-face and clear-cut features, a high official of the great emperors, Hadrian and the Antonines, and for the German savages who were then carrying on barbarous forays on the confines of the Empire, he had a limitless horror and contempt.

As to Jhering's *Zweck im Recht* (Purpose in Law), Kohler, the behemoth of German legal philosophy, tells us that it is full of "amateurish platitudes". The whole idea of it was borrowed from the English Utilitarians whose theories Jhering gave a German dressing and perpetrated as original matter. The first volume is translated and published by the associated law schools. He did one good act, he thoroughly punished the aforesaid Puchta in the gentle German way that uses a buldgeon, but never a rapier. What Jhering professes to have discovered is that the law exists not for single men, but for social ends (and a precious discovery it is, but over two thousand years too late), and can be consciously formed by legislation toward that end, as Bentham contended in his *Principles of Morals and Legislation*. Since the English Parliament from 1275, the beginning of Edward I's great reforming statutes, had filled many volumes with acts of legislation all openly for the purpose of social ends, Jhering's great discovery seems to lack patent-

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<sup>97</sup> This tale may be found in the life of Gaius in Continental Jurists.

able novelty, even if Plato, Aristotle and Cicero had not anticipated him by prior use. But he begins with the usual metaphysical apparatus, in which he evolves a psychology of the lower animals, followed by a psychology of purpose in man, which bears not the faintest relation to actual fact. He passes through egoism and altruism, to the rewards of society, and the coercion of law. In the course of his work, he descends to simple German prattle;<sup>98</sup> he shows that the military class in Germany perpetuates itself by the factors, first, of the government furnishing free public institutions for instruction "as well as facility for study by means of stipends, free board, etc. The second factor is the rich wife. She constitutes an important factor in the present system of the government service, a scarcely less important requirement than the passing of the examinations. Care is taken that the procuring of it shall not be too difficult. The daughter of the rich manufacturer or merchant becomes the wife of the military officer or state official; she brings him the money, he brings her social position, both are benefited". This is what is called the application of *Geist* to the *Intelligenzstaat*, and to a grave professor at Göttingen it is philosophy of law. Somewhere Heine says that the three great enemies of Napoleon were Louis XVIII, Lord Castlereagh and Professor Saalfeld of the University of Göttingen. They all suffered a horrible fate. Louis XVIII rotted upon his throne, Castlereagh cut his own throat and Professor Saalfeld is still a professor at the University of Göttingen. In 1848 the liberal minded professors were all driven from Göttingen, hence Jhering. It is a pleasure to leave this vulgar old man who deserved to die a professor at Göttingen.

We have often referred to Berolzheimer's Legal Philosophies. In the fields of ancient law the Germans are particularly strong. Any sort of particular assertion almost can be made and no one can contradict it, although the general facts are plain. Berolzheimer follows in his early pages the work of Leist, who without the least difficulty constructs a Primitive Aryan *Jus Civile* and a Primitive Aryan *Jus Gentium*. It seems hardly necessary to point out that the *jus civile* and *jus gentium* were peculiar products of a special social situation at Rome, that nothing of the kind could have existed among the primitive Aryans, that an equitable system of law by the side of a rigid formulary system is peculiarly the work of a legal profession. Such difficulties are nothing to Leist; he evolves

<sup>98</sup> Law As A Means To An End, p. 151 (a poor title for the translation of *Der Zweck im Recht*).

for the primitive Aryans a *jus civile* and a *jus gentium*, and thereby sheds the light of German moonshine over Berolzheimer's pages.

In speaking of Roman law, Berolzheimer following Leist in his *Graeco-italische Rechtsgeschichte* says that the *jus gentium*, which caused the renaissance of Roman law, was accomplished through the philosophical principle of "Ratio (reason). It meant what the Egyptians figured as 'Ra', natural energy deified, or the ancient Aryans as 'Rita' the regulative principle of the world and nature".<sup>99</sup> On the strength of this problematical common root this whole theory is founded, a purely German process without any validity. By this method of reasoning it is possible absolutely to prove that that wholly unoffending person, Mr. Felix Frankfurter, is the lineal descendant of a happy (*felix*) sausage. But Berolzheimer goes further;<sup>100</sup> he says that the Greek *sophrosune* comprised "all the virtues, moderation in all things—the *aequa mens* of Horace, including, as the prime virtue, justice." This is where the German shows his cloven hoof. He assumes that any sort of statement will pass.

Horace's *aequa mens* occurs in the passage:

Aequam memento rebus in arduis  
Servare mentem, non secus in bonis  
Ab insolenti temperatam  
Laetitia, moriture Delli.<sup>101</sup>

It means in Knapdale's translation,<sup>102</sup> which I give for its neatness and which has none of Horace's *curiosa felicitas*:

"Keep a stout heart when times are bad, my boy,  
And don't forget, when things are looking better,  
To guard against extravagance in joy,  
For death *will* come—a foe no man can fetter."

It is the old Epicurean thought and has no more to do with the Platonic *sophrosune* than with German *Kultur*. Why Fritz should assert this to an unsuspecting world passeth all human comprehension.<sup>103</sup>

<sup>99</sup> Berolzheimer, p. 83.

<sup>100</sup> Legal Philosophies, p. 61.

<sup>101</sup> Horace Odes ii, 3, 1.

<sup>102</sup> Blackwood's Mag. cxv, 300.

<sup>103</sup> It was reserved for Bluntschli (Theory of the State, 15-23), to insult the whole feminist movement. He asserts in all soberness that the state is *philosophically and historically* a number of men with a fixed territory, it has unity, an organic nature *with spirit and body*, with various members, it develops and grows but not naturally; it has a moral and spiritual organism and is a *personality of the masculine gender!* Shade of Susan B. Anthony, arise and lead us!

Give us an hour of Carrie Catt,

One lift of Anna's lance,

to convince this Teuto-Switzer that the state is not a male person.

We come now to the leviathan Kohler and his *Lehrbuch der Rechtsphilosophie*. I have already quoted the paeans of the duumvirate of our legal philosophy, and we are prepared for a work of transcendent merit.<sup>104</sup> But first let me state with considerable awe that Professor Kocourek in his introduction to the translation asserts that Kohler, this professor of law, "has all the versatility and inspiration of Goethe, without any of his frailties". These be mighty and Tamberlanian words, my Masters, and it behooves us to ponder them deeply. Goethe is, indeed, one of the great lights of the world. If we look over the history of the race we cannot find to rank with him as men of letters more than Plato, Cicero, Voltaire and Shakespeare.

"When Goethe's death was told, we said,  
Sunk, then, is Europe's sagest head.  
He took the suffering human race,  
He read each wound, each weakness clear;  
And struck his finger on the place,  
And said, 'Thou ailest here and here.'"

One of the saddest moral debacles in history is shown by the fact that at any time within the last thirty years his voice must have been silent in Germany. He was a true cosmopolite, who would have valued at their actual worth Germany's designs to conquer the world, her greed toward her neighbors. He would have rebuked the feverish activities by which she sought and in many ways succeeded in extending her commerce by methods as ruthless as those she has exhibited in this, on Germany's part, the most brutal war in history. Goethe could not have foreborne his Olympian reproof to the rapine, cruelties and frightful barbarities toward non-combatants, men, women and children, the indiscriminate stealing of private and public property, the indescribable savageries toward prisoners, the warfare of poisonous gases and of poisoning wells, and the dissemination of poison cultures to supplement the no less poisonous *Kultur*. To Goethe with his wide outlook how dishonoring would have seemed the repulsiveness of the Germany of today and its cult of covetousness, its succession of generations trained to forget Goethe's, "Thou shalt go without, go without; this is the eternal song that every hour hoarsely sings to us our whole life

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<sup>104</sup> In the two volumes of material on comparative law published by the Associated Law Schools, compiled by Dean Wigmore and Professor Kocourek, will be found the portions of the book that touch comparative law. This collection is quite interesting, but many of the conclusions are not proven or capable of proof as our knowledge now stands.

long".<sup>105</sup> After her prolonged debauch of *Prussianismus* Germany will be compelled to return to the wisdom of Goethe, but that time seems so far away that Professor Kocourek will have ample opportunity to learn that one line of Goethe is worth a Congressional Library of Kohler.

Kohler has written a book of patent law that has been translated and is highly spoken of, as are also his writings on the German Civil Code, but the only book by him that is of importance for us is his *Philosophy of Law*. Its favorite word is the constantly recurring "culture", used with many diverse meanings. When applied to Germany it is merely our old conceited friend "Geist" draped in a supposedly Hegelian toga. Applied to other countries it connotes some particular kind of civilization that the country has produced. But in his book Kohler nowhere defines the term for the obvious reason that in the German way, for purposes of vagueness and to cover looseness of thinking, he desires to vary the meaning without warning. Simple and credulous persons are likely to be deceived. Professor Kocourek quoting from Kohler thinks that Kohler's only definition of *Kultur* "in the sense of philosophy of law is the greatest possible development of human knowledge and of human control over nature".<sup>106</sup> This is merely another word for civilization and surely there is nothing more trite than that history shows a developing civilization. But the element in culture of human knowledge includes the other element of control over nature, unless Kohler means to say that actual culture which is an individual mental condition is on no higher plane than the mere machinery of life. The real difficulty, however, is to decide whether culture is an individual self realization of one's highest attributes, or a mere governmental training of the population. In some places Kohler seems to use the word in the sense which he copied from Matthew Arnold's *Culture and Anarchy* as the greatest individual perfection of man. In other places, he uses it merely as synonymous with evolution. He says elsewhere that every culture has at a particular period its postulates of law, and he is using the word to denote merely a stage of development with its appropriate laws. In another connection he speaks of the demands of culture upon law as the required adaptation of law to social conditions. This hopeless mixture is essentially Teutonic. It is due to the fact that every

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<sup>105</sup> *Entbehren sollst du! sollst entbehren!*  
*Das ist der ewige Gesang,*  
*Den unser ganzen Leben lang*  
*Uns heiser jede Stunde singt.*

<sup>106</sup> Kohler, *Phil. of Law*, 329, note 4.



German professor makes his reputation by emitting some new theory. Having enunciated a theory they invent facts or bend and twist them to suit the theory without any apparent consciousness of mental dishonesty.

German lawyers have not our training in the rules of evidence nor our respect for facts. Their law professors are shut up by themselves, cut off from contact with practical life and affairs and seem to lose all balance of judgment. Here is Kohler, who in his first pages enters upon a savage attack upon natural law, found soon assailing Jhering because the latter in his *Purpose in Law* hoped to assist social conditions by legislation, which is just what Kohler had been asserting as the demand of culture. In the next breath he is abusing Windscheid because the latter rejected natural law and asserted that the sense of justice is not a source of law, whereas Kohler had been practically asserting the same thing. This is a peculiarity of German professorial life. The savage attacks upon each other can be found nowhere else in Europe, since Milton had his famous controversy with Salmasius. In Biblical criticism they are just as savage. "Hear Dr. Volkmar on Tischendorf: 'of every sovereign in the world he has begged decorations; in vain; people would not treat him seriously. Renan in his life of Jesus never once names the Messiah Tischendorf'. Hear Tischendorf on Dr. Volkmar: 'The liedom which tramples under foot Church and science indifferently! stuck full of lying and cheating'. Professor Steinthal says of a rival: "That horrible humbug, that scolding flirt, that tricky attorney! whenever I read him, hollow vanity yawns in my face, arrogant vanity yawns at me'."

So it is in the philosophy of the law. Professor Beinkopf<sup>107</sup> finds something that strikes him as an idea in English or French or Italian writing. He at once invents a new theory, sounds a new watchword and savagely criticizes his rivals as without discernment. Thereupon Doctor Schlechtbier retorts with a rolling thunder of German amenities pronouncing Beinkopf a hollow sham. This rouses Professor Raucher who writes a grund-something-or-other to prove to a demonstration that both Beinkopf and Schlechtbier are mere dabblers in science, arrogant peacocks, and a disgrace to a learned country. The noise of conflict arouses the Geheimrat Rauhbart, and by a mere multiplying of language, beginning with the heavy patter of metaphysics degenerating into a slow, steady, endless drizzle of words, he drowns the others and demonstrates that

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<sup>107</sup> I am not sure that I have the name correctly, but it means just what he writes, whatever it may be.

Beinkopf, Schechtbier and Raucher are all of them totally wrong. But after the storm has passed it is found that they were all asserting the same thoughts in different words, and the only residual matter is their denunciations of one another. Professor Kocourek apologizes for this "elemental savagery" of German "criticism" by the fact that "the German language is blunt and plain".<sup>108</sup> It seems to be an extraordinary sort of language in which a man cannot express himself without being a blackguard. As a matter of fact the German language is like their critical thought and writing. What is needed is justness of perception in dealing with involved facts. But in this sort of perception the German mind, as a great critic has remarked, is naturally wanting. Their mind is like their language, not clear but vague and *gauche*; it has in it "something splay and something blunt-edged, unhandy, infelicitous—some positive want of straightforward, sure perception". The language permits and encourages the invention of awkward, vague compounds, with no restraint upon their ugliness. This gives their language to ordinary eyes its tremendously learned appearance. The average man is bound to assume when he sees such agglutinative monstrosities as *Militärstrafgerichtsverfahren*, *Gerichtsverfassungsgesetz*, *Poliszusammengehörigkeit*, *Geschlechtsgenossenschaft*, *Büffelshalsbuckelsfettigkeit*,<sup>109</sup> *Entwicklungsgeschichte*, or *Völkerrechtswissenschaftslehre* sprawling their uncouth lengths of tremendous consonantal thickets across the page, that the language is learned and the thought profound. But this is all illusion. Aristophanes or Plautus did this kind of thing for fun, but the Germans are in deadly, sober earnest.

Kohler as a preliminary matter lays down the metaphysical basis or lack of basis of his legal philosophy, and at once we find ourselves in the Dismal Swamp of "reality", "ego", "non-ego", "duality" and "identity". He rejects Kant's dualism and Kant's demonstration after Hume that thinking subject, mind, cannot be identified with the object thought of. This to Kohler is a great error but if it had ever happened to Kohler to be hit in the head by a brick he would find some difficulty in identifying the brick with his own sensations. Nay, rather, Kohler says with owl-like gravity, "we must assert that ego and non-ego belong to one great world whole". Certainly we must, and it never occurred to Kant to claim that the

<sup>108</sup> Kohler, *Phil. of Law*, p. xxi.

<sup>109</sup> This word is the title of an obscure treatise on the fatty hump that some of the gentler sex develop between the shoulders at the base of the neck as the years pass. This German has invented in his gallant German way a word which translated means Buffalo-neck-hump-fattishness and written a treatise on it.

external world was out of the world. Kohler next enunciates his refutation of Kant's dualism: "If the ego apprehends the non-ego, that is the external world about it, as an object, then the external world becomes unified by perception with our own ego and thereby forms an entity independent but homogeneous to our own ego". But Kohler simply thinks that he is thinking. To unite two things so that they form independent entities is not identity but it is dualism and the infinite vagueness of his word "homogeneous" is apparent. The external world was a separate entity before it was unified just as afterward. Kohler has now gotten out of his depth, so he begins to quote Hegel: "I distinguish myself from myself and therein I am immediately aware that this factor distinguished from me is not distinguished". By this he means: I can observe the operations of my own mind, therefore I know that I am myself. But this is the old Cartesian: "I think, therefore I exist", (*je pense donc je suis*). Then follows this gem: "I, the self same being, thrust myself away from myself, but this which is distinguished, which is set up as unlike me, is immediately upon its being distinguished no distinction for me." But what an absurdity it is. Because I can observe my own mind, or to put it as we usually do, because I am self-conscious, I know that what I am knowing is my own mind, myself, and because I can observe my mind, it is a part of the external world, but I identify my observed mind with itself doing the observing, wherefore the external world is identified with my own mind and is my mind.<sup>110</sup> Kohler then on this basis invents the most absurd of all the theories, a theory which shows that he does not understand Hegel and is more dualistic even than Kant. He says we have two minds, the mind that observes itself and the other mind that is observed, a real ego and a phenomenon ego. And now a man who is no metaphysician at all knows that Kohler has talked himself into a German mess. But we must leave Kohler in this Slough of metaphysical Despond.<sup>111</sup> We merely remark that he does not connect his metaphysics with his philosophy of law.

He now proceeds to reprimand Ahrens, Krause and Röder "for their utter banality and poverty of ideas", and Merkel who "caused the decay of juristic thought" and Jhering who "with superficial

<sup>110</sup> Leibnitz's apothegm is: "*Nihil in intellectu nisi intellectus ipse.*"

<sup>111</sup> There is a book, "Immanuel Kant," in two large windy volumes, by that pitiable renegade Houston Stewart Chamberlain. I cannot advise any one who values his time to read it, but in it the renegade has shown the Germans that in fuliginous vagueness he has surpassed them all. In a sane moment he describes the Hegelian identity of subject and object as the "primeval Aryan Myth of all the Myths". See vol. i, 318, 319.

brilliancy" made "a few stammering remarks", which is too delightful applied to a man who had all the volubility of a corn sheller. He next denounces Stammmler for saying that "at no stage of human culture has slavery been just", which certainly is true. Even Cicero asserted it, and Seneca made a homily upon it, that ought to convince even Kohler. Lastly Kohler mentions his colleague Lasson in a handsome way, and Lasson replies with a laudatory review at which the amiable Professor Kocourek is so astonished that he prints it as Appendix II to the book before another review by a highly mystified Italian.

We need not delay over Kohler's commonplace views on causation and psychic life, by which he means mental factors of race and individual psychology, or his excursion into collectivity and individualization without betraying any knowledge of evolutionary psychology, or his remarks on the culture of wealth, where he makes the total error of saying that the desire to accumulate property is not innate, or his wholly inadequate explanation of possession or his "technic of the law" which requires objects of right, by which he means rights in material and immaterial things and rights in one's own personality and in others' persons (the right in another does not extend to destroying that other's personality) which rights are either general or limited. Here he makes a classification that is rendered possible only by the confusion in German legal conceptions. The counterpart of a right is a claim to call upon another to perform some act. But he does not seem to know the difficulty involved here, and his statement is so confused that it is apparent that he has taken refuge in Hegelianism. He denies with heat *that individuals have any claim upon the state for justice* or that he is "an exponent of the absolute State".

The whole subject of existing law he divides into the law of individual persons, the law of the body politic and the law of human society. The law of individual persons is divided into the subdivisions of persons and of property. It is needless to say that there is nothing new in his classification and the difficulties of the classification are enormous. But it is all a mere sketchy outline with some comparative law material that is not proven to say the least of it. He enters upon a warm defence of the cultural value of slavery, without betraying the slightest knowledge that slavery is caused by an inadequate division of labor and is in that respect a real obstacle to progress, while it feeds the cruel instincts of cruel men. Yet in the next breath he avers that the substitution of a peasant class and an artisan class ennobled work. What he does not see is that the theory of the ancient world was the production

of a very highly developed but small class resting upon a very large but degraded class, and that this conception violates the fundamental notion of justice and therefore of law which he says must be founded on justice. Kohler has never discovered what are the moral emotions and their concepts and how they developed, and in this regard he is like most German legal philosophers.

We need not delay upon his law of property and obligations. It is all obvious enough but better stated by any of the English analytical jurists, and much more clearly even by Gareis.<sup>112</sup> His division of public law begins with the statement that the State is a community organized into a personality, which, by virtue of its own law, takes upon itself the task of promoting culture and opposing non-culture; and "it aims at performing this task not only in certain respects, but in all the directions of human endeavor and development." If this is so it must administer justice to its citizens and to others against its citizens and between itself and individuals, but this now conceded fact he had just before denied and had strenuously argued that it was neither proper nor necessary. He seems to deny here the Prussian theory of the state and he does not meet the question as to what is the state, whether the government or the social aggregate, and he does not attempt to solve whether the state is bound by its own laws. In his comparative law regarding the evolution of the State he enters upon a warm eulogy of the Kingship and thoroughly endorses the necessity for the division of power into legislative, executive and judicial. Kohler shows that he has read much English history and literature, and therefore he is a warm exponent of representative government. I pass over his pages on the law of procedure merely remarking that the practical difficulties do not seem to have occurred to him. He repudiates the criminologists in the strongest and most cutting terms, and offers some remarks of his own upon punishment which contain nothing that is valuable or new.

We now reach the crucial point with Kohler, his law of humanity. This term has a strange sound coming from a German, but before the war Kohler was the German exponent of public international law. He insists that in the ancient world public international law was known and stood above the nations.<sup>113</sup> The one universal Empire destroyed the necessity for such law, but when the imperial

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<sup>112</sup> Gareis, *Science of Law* (translated by Kocourek).

<sup>113</sup> Philipson's *International Law among the Greeks and Romans* is an excellent work. Kohler no doubt had read it, but like most Germans he is chary of giving foreign credit. They rely upon foreign writings for the views which they announce as new to the befuddled Germans.

sway was ended international law had to begin anew. "Hence the idea was bound to arise that \* \* \* a *super-national* law ruled, that regulated the relations of the nations to one another; they, neither (*sic*) could live in anarchy but (*sic*) must conduct themselves towards one another according to *definite legal principles*." Here he admits the basis of and the necessity for, and the existence of international, or as he calls it, *super-national* law. He illustrates the point by the law of federated states and he asserts that the two are strictly analogous. "After the separation of states, international law, as the super-national standard, necessarily combined the nations and *created legal relations among them*." "When once the idea has arisen in this way that there is some law above the State, a so-called super-national law, we have gained a new plane of culture". He advocates the proposition that super-national law grants rights to individuals which are independent of the legislation of individual states. He then formulates certain rules of war, that war is subject to international law, that war must be humane, that only those sufferings may be inflicted which serve its purposes, that there must be no war against the population, but only against the State and its combatants. Only such war is legal, he asserts, and outside of this range, combatants inflicting wrong are not protected by the fact of war. Prisoners of war may not be harmed, inhabitants may not be enslaved or robbed and plundered.

This is the result of Kohler's book. His principles pronounce the submarine warfare on merchant vessels, the pillaging of Belgium, northern France and Serbia, the robbery and plundering of the inhabitants, the cruelties toward the prisoners in German hands, to be absolutely unlawful, and the men who have ordered it are, according to him, personally responsible under international law. He condemns, also, the poison gases used by the Germans, the bombarding of unprotected and unfortified cities with or without notice. The shelling of merchant vessels with or without warning, the dastardly acts by which boats putting off are shelled and sunk, are acts of piracy according to Kohler. If what he wrote before the war is true, the Kaiser and his general and naval staff, and most of his commanders in the field, may be punished as criminals under the rules of international law since they have departed from the laws of war and cannot plead its protection. According to Kohler's ideas international law justifies the hanging of the Kaiser when he is apprehended. It is proven by this book written before the war by the highest authority in Germany that the contentions of the Allies are strictly true.

Now I have to record the strangest Teutonic phenomenon in the philosophy of law. Here was a man committed to the rules of international law and to their binding effect. He had been braying about culture for many years. He had edited the *Zeitschrift für Völkerrecht* (Journal of International Law). He had asserted by anticipation that the whole method of German warfare was illegal and barbarous. But when the war had started he showed his own lack of mental honesty in an article in his Journal which is a genuine curiosity.<sup>114</sup> He there first speaks of the efforts of The Hague Peace Conferences and says that those dreams have burst like bubbles. He means that the Germans having solemnly engaged to observe the rules, treated them like bubbles even unto bursting.

"We also were enthralled by these illusions and we are frank enough to confess, if we are rebuked for being impractical and shortsighted for doing so, that it was our *honorable German nature* which permitted us to overlook cunning and wickedness; it was our belief in mankind which led us and the thought that at least a spark of our German idealism was to be found among other peoples". One would imagine that he means to say that his "honorable" German nature was deceived by the Kaiser, but no, we find that this greatest living jurist is not an actual man, merely a thing painted to look like a man. He deliberately says that what he means is that he did not know what the German general staff was going to do, and hence he was grossly deceived in the honesty of the Allies, because they objected and left him bound by the rules that he had been asserting as rules of international law. By his method of reasoning Belgium was guilty of a gross breach of faith to him personally when it objected to being pillaged.

But Kohler goes on with an elaborately tiresome figure from the Wagnerian music of the speech of the birds in the forest, and here he makes a grotesque error in metaphor. The speech of the birds that Siegfried heard was the speech of innocent, well meaning birds, yet Kohler has his hulking Siegfried hearing in the speech of the innocent birds lies and slander, and suddenly in this mixed metaphor the birds have become a dragon of cunning, lies and slander which is "stretched beneath our victorious sword". Now comes the German blackguardism so prominent a characteristic of their legal philosophers. He seems to think that the Allies had no right to insist on the treaties because they are "liars and falsifiers"; the French are "a nation of bragging tricksters", the English

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<sup>114</sup> See the article in Michigan Law Rev. xv, 634, translated by Professor Reeves, now of the Flying Corps.

are "a race of sneaking bandits" who resorted to bribery to apprehend that patriot Roger Casement, the Russians are "a nation of barbarians" (perhaps now he would find good in Lenin and his tribe), the Italians are "an immature and half educated proletariat", the United States is "ruled by the Morgan-Vanderbilt" millions, and all are cast into outer darkness. Could anything be more utterly fantastic, and is not Kohler a pronouncedly stuffed prophet?

But he goes on to console himself with the thought that in the future Germany will have no international law with any nations except those within "our circle of culture", Austria, "the highly gifted Hungarians" and "an important group of Slavs", "in alliance with Turkey as a powerful fortress of Islamic culture". Fortunately we have some very apposite remarks on Turkey as the depositary of culture by Germany's most popular historian. Treitschke says of Turkey: "It is to be hoped that the future will wipe out the scandal of having such a government on European soil. \* \* \* The Turks have never developed at all, and in virtue of their lazy-mindedness have always remained a nation of soldiers. \* \* \* A state capable of such proceedings will never change, but since some of the old martial spirit survives \* \* \* Turkey will in all probability remain in Europe until driven out by force. \* \* \* The famous dogs of Constantinople are the best simile that can be found of a people mentally inert. \* \* \* It was therefore quite reasonable and logical to exclude the Porte, for many hundreds of years, from the scope of European international law. The government of the Sultan had no claim to a full share in its benefits so long as the Porte was dominated by a Mohammedan civilization".<sup>115</sup> Treitschke little supposed that the day would come when Germany would stand before the world as a criminal condemned to be excluded from the equality of international law until she had rid herself of a government of freebooters worse than the Sultan. Kohler concludes his article: "Naturally International Law needs its sanction just as every branch of law does, but we shall, as I hope, be so vastly fortified by our victorious war that we can undertake the protection of International Law". But he has already said that international law is to be confined to Germany and her subject nations, Austria, Hungary, Bulgaria and Turkey.

Thus we see that for Germany international law means the kind of law that enables Germany to do what she pleases, to violate treaties, to perpetrate all manner of barbarities, and this international law she is prepared to protect. It is the solid, *aes triplex* plate of

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<sup>115</sup> See Treitschke's *Politics*, vol. ii, *passim*.



conceit and arrogance that prevents these Germans from appraising themselves correctly. For many years it has been so beaten into them that they are the greatest race, entitled by divine right to rule the world, that they think they are acting too modestly if they are not continually insisting upon it. The greatest critic of life that England has yet produced has said in his inimitable way: "Dr. Mommsen, when he became Rector of the University of Berlin, with a charming crudity, gravely congratulated his countrymen on not being modest, and adjured them never to fall into that sad fault. These are the intemperances and extravagances which men versed in practical life feel to be absurd. One is not disposed to form great expectations of the balance of judgment in those who commit them". In matters requiring as much tact in weighing facts and judgment in sifting theories as is required in the philosophy of law, we may be sure that the Germans are conspicuously wanting, and therefore of no use to us. We have seen that Kohler in his book is wanting in judgment and coherence, and in his conduct has displayed a childishness that is hopeless. All we can say of a man who thinks him the greatest jurist in the world is,

*Boetium in crasso jurares aere natum.*

But here let me record that there is in Germany a basis to build upon anew. Dr. Wehberg, of Düsseldorf, took issue with Kohler, sharply reproved him and discontinued his association with the *Zeitschrift*. But among the great mass of them Kohler will remain a prophet and a great jurist even as he is to Dean Pound and Professor Kocourek. But it needs only a critical examination to show that the abnormal self-conceit, the lack of humor of self-conceit, the blindness and incapacity for self-examination that come from self-conceit, make German philosophy of law utterly worthless. The late Dean Ames of the Harvard Law School, a finished scholar who worked with distinction on the lines that offer so much to the legal scholar, a man whose death was an irreparable loss, told a student of his who was departing for Germany to avoid their philosophy of law. He had found it to be mere pedantry and chaff-cutting. The situation is really worse. The difference between a civilized man and a barbarian or savage is that the latter cannot appreciate another's point of view. In this respect the German is a barbarian, for he will not even examine another's point of view, hence his greed for what he calls "his place in the sun", which means the taking of another's place.

The very history of our race and the necessities of social existence teach us that among nations the same justice shall apply as

among individuals. The primary notions of freedom and equality are precisely as binding. All must be equal before that International Law which is the ligament of justice that holds the nations together. The humble state has a claim on international law as great and as sacred as that of any other state. In one view its rights are even greater, for it is base and unmanly to trample on the weak. The invasion of a strong country may require courage, but to tread upon the weak adds contemptible and cowardly meanness to a cruel wrong. The world cannot admit the pretension of a lot of criminals under international law to repeal the law of justice and equality that is made for all nations. The civilized world has been taken at a disadvantage by the strong marauder who had prepared his forces, but the *posse nationum* has been organized, is being constantly augmented.

If the safety of a single state from robbery and oppression is worth fighting for, how much more vital is it to preserve the moral government of all civilized society. To this end the criminals must be apprehended that the law may be restored for the law-abiding.

“They pour their youth and treasure  
For the fullness of the measure  
Of the light that shall endure, of the law that shall be sure,  
Of the equity of freedom—that all nations may possess”.<sup>116</sup>

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<sup>116</sup> Lines from “America to England, 1917,” by Charles Mills Gayley.