

## LAW IN EVOLUTION

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In the HARVARD LAW REVIEW for last November, Justice Holmes pays brief, genial, but illuminating respects to "Natural Law." He thinks that in all men there exists an ingenuous and naïve demand for a superlative—"so much so that the poor devil who has no other way of reaching it attains it by getting drunk." In this world of relativities the soul strains after finalities and absolutes. "It seems to me that this demand is at the bottom of the philosopher's effort to prove that truth is absolute and of the jurist's search for criteria of universal validity which he collects under the head of natural law." It is evident enough that the Justice takes but limited stock in natural law as represented by such "collections." The implication of his writings is that law is evolutionary. In any case, this utterance of his affords an occasion for asserting and maintaining that contention.

The most accessible point on which to join issue is the term "natural." This term is under suspicion, and deserves it. About it has collected a clutter of intellectual rubbish, heaped up by the winds of doctrine and rooted at, from time to time, by the vagrant dialectician. We men have stock ways of concealing ignorance and of dissimulating indolence and prepossession. We have elaborate and pretentious modes of saying: "I do not know," or even, "I do not care to know." "It is easy," writes Darwin,<sup>1</sup> "to hide our ignorance under such expressions as the 'plan of creation,' 'unity of design,' etc., and to think that we give an explanation when we only restate a fact." Camouflage is nothing new in the intellectual world, as is sufficiently indicated by the avidity with which the term has been seized upon as a metaphor. What is under the painted cheese-cloth this time?

In earlier and simpler ages men knew little and frankly referred the explanation of what they could not account for on the basis of concrete experience, to the world of spirits which, as they conceived of it, surrounded and permeated their existence. In so doing they regularly sought for an agent rather than a cause. The fellow-tribesman died of some disease; and the survivors asked forthwith, not *what* killed him, but *who* had done him to death—by witchcraft. How did the world and man come into being? Unkulunkulu made them. How did man acquire fire? Prometheus stole it from heaven. Where did the laws come from? Minos "gave" them.

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<sup>1</sup> *Origin of Species*, 497.

This tendency to seek a supernatural agency for all phenomena not explicable with the aid of present or accumulated experience, under the tests of reality current in ordinary life, is represented by copious survivals among more sophisticated peoples. Among these is the habit of personalizing abstractions. Says Darwin,<sup>2</sup> again: "It is difficult to avoid personifying the word Nature"; and he goes on to state that by nature he means "only the aggregate action and product of many natural laws, and by laws the sequence of events as ascertained by us." Manifestly this is not what Aquinas meant when he made proclamation that "by the law of Nature all things are common," thence deriving the sentiment that it was avarice which brought in the property-conception of mine and thine. What he had in mind was theological dogma, and his Nature was the Creator.

Scientifically speaking, the ascription of phenomena to the arbitrary action of a personal Power is only a grandiose way of saying: "I do not know." Sooner or later we men have to say that, as we face the encircling dark; but the only way we have got as far as we have is by resolutely refusing to say it till we have to—and then by saying it squarely and without self-deceiving circumlocution.

It is the tendency of ignorance and of intellectual torpidity to throw itself forthwith upon the "higher causes," or the absolute, or the universal, or revelation—why search painfully for the special key if you have the pass-key?—and thence secure a major premise, out of which, then, anything and everything can be readily deduced. "You can get out of a major premise," says Sumner, "everything you have put into it." This habitude, taken together with the personalization of the higher causes, or the absolute, has been the mode of primitive thought from the outset up to, and including, the present. It is easier. It is the line of least resistance. It is our human way to be engrossed in the definite and immediate things amidst which we live; "and then we think with less strain if we think in terms of persons. In fact, the race has always personalized the less tangible and more abstract things, for by such means it has been possible to tie up floating and evasive conceptions so that they can be found again and dealt with. The vast impersonalities that control our destiny—Nature, Chance, God—are rendered into terms that men are more used to handle. The de-personalization of what has been long personalized has demanded a tedious process of mental discipline and development."<sup>3</sup>

We have slowly and laboriously extended the range of the "lower causes" to explain what was formerly referred forthwith to Zeus, or Fortuna, or to some Law-Giver. We have progressively eliminated the explanatory subterfuge; we have discarded the easy excuse and

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<sup>2</sup> *Origin of Species*, 75.

<sup>3</sup> Keller, *Through War to Peace*, 2.

have girded ourselves to the arduous performance. But there are many modern men who yet resist the process; it is of such that Darwin<sup>4</sup> speaks when he refers to "one whose disposition leads him to attach more weight to unexplained difficulties than to the explanation of a certain number of facts"—that is, one who, in the face of difficulties, races incontinently back to the refuge of his chosen universal. Such an one refuses to remove an issue from the domain of Natural law into that of natural law.

An attenuated and a paler survival of this same attitude is to be found in the rooted persuasion that, even among the "lower causes," there is some absolute or universal to be detected. Many a man who rejects "Natural" in the sense of supernatural, yet readily uses "natural" to cover the unknown. Why is the right arm generally stronger than the left? It is "naturally" so. But that is no answer. It is an evasion; it is no more than equivalent to the childish retort: "Because it is." And then, when "natural"—or "instinctive" (another bit of cheese-cloth)—is felt to be insufficiently protective, there will be a little hedging and a reference to "second nature." It is a sop, automatically and unconsciously thrown to vanity, to employ an expression that sounds as if it meant and explained something, and that darkly suggests vistas of profound reflection, rather than to admit ignorance baldly and without adornment.

Push the man who says that it is natural to be right-handed, and very likely he will abandon his subterfuge and be candid about his ignorance; or he will rake about in his mental outfit and try to construct some rudimentary theory. Either alternative is hopeful: the one ethically, the other scientifically. Theories can be corrected. This is the way we have got our science: we have corrected astrology into astronomy, alchemy into chemistry, magic into medicine. Push the man who talks about natural law, and he will either admit his ignorance, fly to the "Natural" of which his "natural" is but a thin and bloodless survival, or set to work to dig out some real evidence. As temperament and previous experience determine, he will show a blockhead's indifference, the antique recourse to unverified authority, or the modern procedure of the positivist. If he adopts the last course, he is on the way to the truth of the matter, for he will shortly find that "natural law" exists about as little as "natural rights," or any other of those philosophical figments that have not been checked up with realities. He will soon come to see that law, like all other living things, is evolutionary, persisting only as it secures adjustment to a changing environment. Then he will change his tune about absolutes, finalities, and universals.

The origin of species was by creation, or it was by evolution.

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<sup>4</sup>*Origin of Species*, 497.

Species are either permanent and invariable, or they are not. Nobody who is informed has any doubt any longer on this issue. Codes of law are either a created, permanent, and invariable product; or they are evolutionary, relative, changing, and adaptive. There is no third possibility. If law is evolutionary, then its course will show, as that of organic nature shows, a series of forms developing out of forms, in a connected series, with survival of the fitter, in adjustment to environment. Evolution is a law of all life, social as well as organic.

No man can execute a *tour de force*, like that of Darwin, and confine resultant intellectual clarification, even if he wills, within the range of phenomena immediately under observation while the theory was being constructed. Ranges of knowledge are sufficiently akin to be subject to ready mutual infection. In the middle of the last century evolution was in the air, and Spencer was discovering it in the social—or, as he called it, the superorganic—realm while Darwin and Huxley were demonstrating its presence in the organic. No man who has seriously followed Spencer's sociological writings, however much he may dissent from Spencer's specific contentions, has any excuse for not knowing that law, along with all other social forms and institutions, is a matter of growth from unpromising beginnings, through illimitable time—time that stretches not only from the present back to the beginnings, but also from the present forward to the last days of the last human society that shall inhabit this planet.

One may accept this general contention on general principles, however, and still feel that it does not get him anywhere. Or he may be disposed to reject the contention in default of evidence of a concrete nature. All homage to either objector: to the first, who insists that any acceptable theory about law, or any other institution of society, shall work out into something tangible and actual—shall be another tool in his kit; and to the second, who refuses to accept what looks like a plausible philosophical conclusion, arrived at by general reasoning, supported by analogy, but not established by specific cases. Both styles of objection are valid against much of Spencer's work, which was so largely philosophical and speculative as to have incurred the distrust of his scientific contemporaries, notably Darwin and Huxley. Spencer was so plausible that Darwin used to be impatient with himself because he could not consent to conclusions so smoothly arrived at; while the quicker and wittier Huxley used to plague the solemn philosopher over his "diabolical dialectics."

So deeply did Spencer impress his stamp upon the social thought of his age that to most students of social phenomena evolution means Spencerian evolution. It is something of a novelty to discard his formulas and to seek the sturdier supports afforded by Darwin and the Darwinians. But let us set aside those all-inclusive, and therefore tenuous and unscientific propositions that Spencer revels in—about the

passage of matter "from an indefinite, incoherent homogeneity to a definite, coherent heterogeneity"<sup>5</sup>—and inquire, more prosaically, whether human institutions, and, among them, law, show adjustment to life-conditions by way of the stock Darwinian factors of variation, selection, and transmission. For the upshot of evolution, in the Darwinian sense, is adaptation to environment.

Judge Gager, in a forceful and penetrating review of one number of the "Evolution of Law Series,"<sup>6</sup> wonders "whether the use of the term 'evolution' as applied to the history and transformation of law is not vague and merely metaphorical or actually misleading." He thinks it probable "that law as law has no 'tendency' whatever, any more than a quantity of bricks has a tendency to become a house. Strictly it never changes, but it is changed from without; it does not develop, but it is developed." And he writes, later on: "The world would place upon its loftiest pinnacle of fame that person who, to-day, with the help of principles derived from the so-called evolution of law, would be able to forecast the events in the field of law within the next few years."

Taking these objections in reverse order—it is doubtless true that the test of a scientific discipline is prediction, and that accurate forecasting has been attained where the nature of the scientific material, say, in chemistry, has allowed of it. But the pinnacle of which Judge Gager speaks is likely to remain unoccupied for some time yet. Such accuracy in prediction has never been possible in the social sciences, and very likely never will be. There are too many variables to take into the equation. The best that can be hoped for, at least for the present, is a high degree of probability. That the evolutionist in the social field cannot forecast events accurately, in the legal range or elsewhere, is nothing against him whereby he should not be accorded a right to existence. If he can show an orderly development in the past and present, he has done all he professes to do; and he has accomplished something that has waited ages for its realization.

As for law showing no "tendency," that also is true. But neither does the horse's hoof or the camel's foot show a tendency. Each exhibits an adjustment or adaptation to life-conditions; and that is precisely what any legal enactment shows, or it becomes dead-letter and nil. Each of these things is a *product* of the evolutionary process; it has nothing to do with the process itself. Such a product is also the pile of bricks. The place to look for a revelation of the tendency

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<sup>5</sup> Spencer's formula of evolution (*First Principles*, sec. 145) states: "Evolution is an integration of matter and concomitant dissipation of motion; during which the matter passes from an indefinite, incoherent homogeneity to a definite, coherent heterogeneity; and during which the retained motion undergoes a parallel transformation."

<sup>6</sup> (1919) 28 YALE LAW JOURNAL 617, ff.

or trend of evolution is in a long series of successive adjustments; no single case, or stratum of cases, can show it. The process is too slow, massive, and cosmic to be observed under limitation of observation in space or time. Each of us stands upon a geographical great circle, but we cannot, from local observation, plot its trend.

It is much to be feared that those who seek a trend or tendency in evolution are, perhaps unwittingly, looking for something that they can call progress or betterment. But such terms are out of place in pure science. They imply a selected view-point. Is the horse's hoof an improvement upon the camel's foot? It all depends upon the nature of the environment. Each is an adequate adjustment to the conditions encountered, and there is no more to be said. Which is better, frontier-justice or the sort we ourselves are used to? Let the inquirer read Wister's *Virginian* over again, and note the maladjustment of the standards of Bennington, Vermont, to the conditions of the West.

The first of Judge Gager's exceptions can be met only by a more extended demonstration, in the course of which, even if the suspicion of vagueness, etc., may not be dispelled, it is hoped that further light will be shed upon his other thoroughly reasonable and apt criticisms.

It is clear enough that, to get any results at all respecting evolution, there is need of a long perspective. It is also evident that distance and detachment, so necessary to the dispassionate study of any aspects of human society, can be most securely attained by fixing attention upon the members of the evolutionary series that are remoter from us, and from our interests and biases. Presumably it is agreed by any who have given scientific attention to the matter that laws come out of precedents, and that precedents are simply a selection from custom. If it is not so agreed at the outset, perhaps it will be when we have looked into the case further. Anyhow I want to begin with custom. Anyone who sees that all human institutions whatsoever have risen out of custom will observe that we are thus dealing with the remoter members of a series certain of whose later phases are now called law; and those who are not ready to subscribe to this contention may, perhaps, allow me to begin, to them arbitrarily or inconsequently, where I do.

"Custom" is a floating and vague conception, difficult to handle with certitude, prone to assume protean form and evade the hand. It takes mental grasp to reduce such a conception to usable form. This was, some of us think, the supreme service of Professor Sumner to the social sciences; for he analyzed the elusive thing and developed a terminology that fixed it within a framework, so to speak, so that it could be found, handled, laid aside, and returned to with security. Custom, in its most unformed phase, he called *folkways*. Folkways that had been generally approved as conducive to welfare he denominated *mores*. But, since the most salient of the folkways are always conceived as making for the welfare of those who practice them, *mores*

has become the more current and inclusive term. The mores, as Sumner defined them,<sup>7</sup> are "the popular usages and traditions, when they include a judgment that they are conducive to societal welfare, and when they exert a coercion on the individual to conform to them, although they are not coördinated by any authority." I shall not attempt to reproduce here, or even to digest, the mass of data and suggestive comment given by Sumner in the course of his analysis of the mores. I wish now to show reason for regarding the mores as an evolutionary product—a position that Sumner did not take.

Plants and animals are adapted to environment through structural modification. They thus show a diversity of characteristics on which naturalists classify them into species, genera, and wider categories. To a limited extent, man is similarly classifiable; but, although he is the most widespread of organic beings, over all types of earthly environment, the physical differences which he exhibits in adjustment to these differing sets of life-conditions are relatively trifling. Classification of *homo* into different species is the most that can be hoped for; there are no differences great enough to be generic, and the several races are most commonly regarded as mere varieties, so nearly alike are they. Man's diversities of structural modification are by no means sufficient to secure his adjustment to the extremes of environment in which he lives.

His typical mode of adjustment is mental. But this mode is not measurable, or even observable, except through its products. These products run all the way from the stone ax to the trip-hammer, including all material civilization, even to a pile of bricks. They also include modes of action that represent efficiency in coping with the conditions of life. They cover systems and economies and organizations that develop in the struggle for existence and the competition with fellow-creatures. They therefore embrace, in short, all the folkways and mores, and whatever develops out of these in the way of more definite and settled social forms. Then the mores are as much evolutionary products as are the horse's hoof and the camel's foot aforementioned. They are equally adjustments to life-conditions, possessing survival-value and thus characteristic of the fitter societies. It is by adjustments in its mores that a human group adapts itself to environment; the slower method by way of structural change is superseded by the swifter action of a specialized organ of adjustment, the mind.

Adjustment may be mental without being deliberate, purposeful, rational, or even conscious. Folkways are empirical, not planful. Those who practice them can seldom give rational excuse for so doing. It is as if the society at large developed them. "It seems as if the

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<sup>7</sup> *Folkways, a Study of the Sociological Importance of Usages, Manners, Customs, Mores and Morals*, iii. Sumner's conception is summarized to some extent in Keller, *Societal Evolution*, ch. I, and, more popularly, in *Through War to Peace*, ch. V.

crowd had a mystic power in it greater than the sum of the powers of its members. It is sufficient, however, to explain this, to notice that there is a coöperation and constant suggestion which is highly productive when it operates in a crowd, because it draws out latent power, concentrates what would otherwise be scattered, verifies and corrects what has been taken up, eliminates error, and constructs by combination." All this is a highly unconscious and unplanned procedure, not alone among primitives, but among us all. "Thinking and understanding are too hard work. If any one wants to blame the masses let him turn to his own case. He will find that he thinks about and understands only his own intellectual pursuit. He could not give the effort to every other department of knowledge. In other matters he is one of the masses and does as they do. He uses routine, set formulae, current phrases, caught up from magazines and newspapers of the better class."<sup>8</sup> Most of mankind has always lived almost wholly in the mores, and the most emancipated and sophisticated have lived in them most of their time.

Mores fall into categories as they surround the nucleus of a major social interest; and out of these categories, when they have shaken down into more or less typical form, come the institutions. One of the cardinal facts of human life is sex. It is an inevitable condition of the life of *homo* that the fact of bisexuality must be encountered. The sexes show basic and inalterable physical and mental differences, which are reflected in sex codes of mores. But now the sexes must live in some sort of association. Here is a need requiring many personal and social adjustments, which has been met by all thinkable expedients. The question of how mating men and women shall live together is one that touches not only the personal interests of the protagonists, but also those of many other persons, including the parents of both, their children, and the society at large. Titles to property must be defined and secured, for otherwise there would be confusion and disorder; legitimacy must be defined. The mores settle all this, so that it is never a matter of dispute, but young men and women grow up into an unconsciously developed system of conduct as respects sex-conditions, than which they know no other. This accretion of mores about this nucleus receives a name and designation; we call it matrimony, and we do not hesitate to term it an institution. And presently we have also the family-institution. The whole exhibit is only a group of mores, a ganglion of custom, labelled for identification, and then sub-labelled, according to its various emphases, as polyandry, polygyny, monogamy, patriarchate.

Another major interest is the environment of ghosts and spirits. It is as actual to primitive people as any other form of life-condition.

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<sup>8</sup> Sumner, *Folkways*, secs. 23, 54.



The mores developed in response are sacrifice, prayer, magic, etc., which are labelled "religion"; and religion is an institution. The interest of men is enlisted, once more, in the question of the relation of a thing to a person, so that it belongs to him; and mores develop that we label "property." The taboo is the institution-builder; it chisels away at the raw block of custom, gradually shaping a figure which at length seems to have had an origin in "nature."

All these accretions of practices and precedents tend to become traditional, almost invariable, universal in a group, and highly imperative. It is hard to fight against priority and prescription. Let now the sanction of religion enforce precedent—and you always have the authority of the dead behind the major exhibitions of the mores, among simpler peoples—and you have ecclesiastical laws and canons. Let the power of the State—itsself a growth of mores engendered in response to the vital social necessity of obedience, discipline, and order—let this power back up the mores, and you have secular law. Law is a sort of crystallization of the mores; it is a selection from precedents of behavior.

But I am falling into evolutionary terminology, which needs justification unless its use is to be conceived of as "vague and merely metaphorical or actually misleading." It is freely admitted that its employment has generally been open to all these charges. The "biologic analogy" of Spencer has had argumentative weight ascribed to it by his less judicious successors; and all the contemporary jabber about "social heredity" and other terms borrowed from biology and evolution and applied incontinently and without discrimination to social phenomena, has inspired every cautious thinker with a suspicion that does him credit. Nasmyth<sup>9</sup> has even rushed to the succor of the gentle-hearted Darwin and tried to clear him of the charge of being the *fons et origo* of recent Teutonic savagery. For the German pedants, with their typical heavy crudity, had laid hold of the analogy between a society and an organism, and were working it out, with the implied or alleged authority of Darwin, to lend theoretic support to their predatory tribal mores. The unfit must get out of the way of the fit or take the consequences; and the Germans were the fit by their own admission and demonstration. No account was taken of the fact that fitness is not the same thing in social as in organic life; or in the twentieth century as in the first. The readiness with which German scientists abandoned their scientific method and candor in the face of material opportunity confirms the distrust that some of us, in the social sciences, at least, have long harbored as to the genuineness of their devotion to truth, or even of their perception of it. It looks as if they too really believed at bottom in the revelation to a

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<sup>9</sup> *Social Progress and the Darwinian Theory.*

chosen people by a tribal *Gott*, through his earthly, or unearthly, representatives, of a "natural law" exalted high above mere mortal examination or criticism.

The essence of evolution is adjustment to life-conditions. But adjustment to changing conditions implies change. Change is secured, in the organic range, by the element of variation. It is immaterial to the process whether or not the variation is pronounced enough to be called a mutation. The presence of variation in the mores, over space and through time, is a matter of observation. Variation in the less vital of the folkways, as for example, fashion, can be viewed from day to day. The race is unreflectingly aware of the action of this factor, as is shown by those repositories of folk-wisdom, proverbs. "Other times, other manners." *Tempora mutantur, et nos mutamur in illis*. "When in Rome, do as the Romans do." Laudations *temporis acti* or projected reforms witness to an acceptance of the possibility of change in human codes of conduct. To cite evidence of such variation looks like elaboration of the obvious; but candor obliges one to admit that the obvious is oftener left out of account than the recondite.

We have, however, the fact of variation in custom. There is no analogy here; the phenomenon is present in the social realm entirely independently of its presence elsewhere. And is it necessary to be specific in the matter of law? "No," answers the objector, "we know that the details of legal codes have changed; but there is an element of permanency, too. How do you account for that?" We do account for that also, and presently; but we accept for the moment the admission of change. In any case, then, not all law is "natural" or revealed; Lycurgus did not provide for limited liability nor Solon for the regulation of wireless. Something is gained by an admission even so trifling.

Not all variations of law persist, even nowadays. For instance, regulations about sterilization of hopeless idiots and criminals have not amounted to much, and seem nearly if not quite dead-letter. It is plain that all the laws about slaves saw their passing when there were no more slaves; or, to widen again into the broader field of custom, that mores about slaves and their rights and duties passed away with the change of human status. The mores of chivalry exist only in histories and in travesties such as Don Quixote. The elaborate dueling-code is all but extinct. If, then, some mores and codes have been discarded, there has been a selection. Much of this selection (the term is used in the evolutionary negative sense) has been automatic and unconscious, not rational or planned. Often it has been an unforeseen consequence of action initiated in a quite different range of operation. Slavery never prospered, though it was tried, in New England; but those who gave it up there did not hate the system or morally reprobate it. It simply did not pay where there was an adequate supply of acclimatized free labor. Variation provides for unconscious

experimentation; certain variations are not apt to the situation and are selected away as practically inexpedient.

But variation is in all directions, constituting, in earlier epochs, a sort of undirected and empirical groping about for satisfaction or surcease in the face of a compelling need. And when the inexpedient has been discarded, the less inexpedient, or the fitter and more expedient, is left to hold the field. There is a survival of the fitter form in the social range as there is such survival in the organic. There is no vagueness of analogy here; it is an identity—the same process of elimination manifested in another and characteristic realm of phenomena. The only dispute that seems reasonable here is as to how far the process of selection is rational and planful, and how far automatic and unconscious. I believe it to be typically the latter;<sup>10</sup> but the point does not need to be pressed in the present connection. The issue here is simply as to the presence and activity of the factor of selection.

The constant variation of the mores renders them of unequal survival-value. But to test this matter there must be a conflict or competition between them, as put into practice. No theorizing or prophecy will settle this question; for even the best-planned measures, not to mention those that are automatically hit upon, or those that make the strongest emotional appeal, even to the highminded, often fail in actuality where they show nothing but promise prior to their application. The test comes in the result of collision between the exponents of rival codes of behavior. This is most readily seen in war, but appears also in the case of various peaceful industrial and other social competitions. For example, the late War was, at last analysis, the confrontation of the exponents of two irreconcilable codes of national conduct; and the result has been, we hope, a selection out of existence of the challenging code. The Civil War eliminated slavery; and from the French and American Revolutions we date an era of new mores, political and social. Peaceful collisions of the adherents of diverse policies occur at most elections. Diverse interpretations of law, evoked by needs of adjustment to changed life-conditions, come to discrimination before every court; and not infrequently the accepted interpretation does away in actuality with the original intention of the law, thus amounting to a selection on the criterion of applicability to altered conditions.

If the fact of variation in the mores be granted, whereby some of them enjoy, under selection, a survival-value over others, leading to their persistence, then the mores thus approved under test as superior in fitness become subject to the action of tradition. This is the factor in the social field that corresponds to heredity in the organic. It exhibits, not through analogy but in its actual essence, the same typical

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<sup>10</sup> See Keller, *Societal Evolution*, chs. IV, V; *Through War to Peace*, chs. I-IV.

quality of conservatism. Where variation engenders the new, it preserves the old; and the same eternal oscillation under the forces of change and those of stabilization takes place in the one range as in the other. But tradition possesses, as it were, a certain supporting handicap of inertia. In general, the burden of proof falls upon the innovation. To any evolutionist it is well that this is so, for the very fact that that inertia exists shows that it has had its utility in the course of things. Most innovations break against its solid and stolid bulk; and if one makes a breach it must have had its qualities in order to do so. It is possible to be too stable, but the dangers of stability are perhaps to be preferred to those of mutability. Crystallization versus chaos: the choice of extremes is the typical human choice of ills, but very likely the *via media* is not always along the mathematical mean.

The only characteristics that tradition can carry forward are those which have, at some time, survived the conflict by their superior fitness to environment at that time. For the mores, the environment has been the sum of life-conditions at the time. If one society of human beings got on better than others, and increased in numbers and power, because its code of behavior was better suited to life-conditions—by reason of a superiority in industrial coöperation, or in its marital arrangements, or in its regulative system, or in its religion—its code succeeded with it and gained extension and intensity. The tradition of success laid hold of it and endowed it with the authority of the illustrious dead who had sponsored it. It became fixed and immutable, to the eyes of those who received it. If life-conditions had not been subject to change thereafter, this would have been well; and we should doubtless all be practicing the successful code ever since. But in view of the perennial change in life-conditions, all we can be sure of about tradition is that what it transmits to us must have been an adequate adjustment at one time and under its conditions. The only way in which a traditional social order can be accepted as infallible, and applied to much later conditions, is by subjecting it to such interpretation as to deceive ourselves as to its real nature and meaning. Such interpretation is necessary in order, for example, to fit the prescriptions connected with the mores of the ancient Hebrews to the life of contemporary America.

By the action of variation, selection, and tradition, then, the mores, which are the external projection of mental action on life-conditions, show adaptation to those life-conditions, and are evolutionary. For the essence of evolution is such adaptation. Cases of adjustment of codes to types of physical environment abound throughout ethnography and are particularly marked in the life of frontier-societies, where the code of the settlers almost unconsciously comes to approach, in many respects, that of the natives. But even the modern great city has a code of its own, new to the world, which it is developing all the time as material life-conditions become more complex; and which is currently

enough set in contrast with the rural code. But the life-conditions of a society are by no means all of a physical or material quality; they include neighboring societies, and, as distance has been annihilated by progress in the arts, almost all human societies have become neighbors to one another. Thus the adjustments in the mores must needs become ever more delicate and subtle, with ever increasing prospects of maladjustment, consequent pain and discomfort, selection, and readjustment. The fact that the modern case is so complex forms a reason why it is better to come at the whole matter from a study of the simpler and more primitive forms.

What is said of the mores in general applies *a fortiori* to law. Mores are the society's traditional ways of acting in the presence of interest. But now one of the major interests of any society is that there shall be cohesion, order, discipline, and coöperation within. Otherwise it is subject to aggression from without. The extreme case is that of war, when internal regulation reaches its acme of extension and severity. What is a crime in war-times is perhaps not even a misdemeanor in peace. In that sense, war represents a reversion to the crudities of the primal regulative system, with its frequent death-penalties for what are to us trivial offenses, its undeveloped apparatus of courts, advocates, etc. Here, in any case, is shown an insistence, under special stress, upon the regulative system that governs conduct in the interest of society's self-preservation.

Excluding war from the general case, it is clear that any society at any time must show discipline and order in the conduct of its members, if it is to persist under an unintermittent competition. For these qualities have survival-value in them. Only under the protection of extreme isolation, which minimizes the competition, may the socially or the organically obsolete last on. The mores take care of the more scattered and intimate questions of conduct. There is an extensive field where law does not enter at all, as, for instance, that of the domestic arcana. The essence of marriage is the personal, not the legal, relation. Man and wife have to live together in adjustments, involving good-breeding, self-sacrifice, etc., which the law cannot touch. All such intimate relationships are matters of the mores. But certain more external cases, and classes of cases, enter more visibly and tangibly into the arena of public accessibility and regulation; and these become public precedents.

There is, at first, no distinction between the personal and the public (if these two classes of cases may be roughly so termed) or between mores and law. It is *themis* in Homer for a child to kiss his father; but yet the king is charged with upholding the *themistes*, and does it as an executive officer. Naturally, though, he does not enforce caresses between parent and child. That the law is at first mere precedent is strikingly illustrated in the judgment-scene wrought on the

shield of Achilles: there are a number of elders there; they all hear the case and each then speaks the precedent as he sees it. That is, he applies the current code whose tradition he, as an elder, is supposed to know best, to the specific circumstance. The audience applauds or not; and in the midst lie two pieces of gold, to be given to the judge who speaks the precedent straightest.<sup>11</sup>

Precedents touching salient lines of conduct are presently codified in some fashion: in formulas, or verses, or, at length, on "tablets." This was long ago; but the very first codifications must have been preceded by an unreckonable period of test in usage. No one knows or can know their origins, except as he can infer it from what we can know of their subsequent course. Because they are so old they look to be inevitable and "natural." And so they are currently referred to some mythical, supernatural source—they were "given" on Tables amidst terrific exhibitions of supernatural potency. Further, if we examine such codifications, we find them pretty much alike; and that strengthens the impression that they are somehow inevitable, and therefore "natural." But human societies are nearly enough alike to be obliged, as a condition of self-preservation, to taboo practices that might be termed anti-social. Such taboos might be thought to be the result of acculturation (contagion, borrowing) if any possible agency of communication could be discovered or even imagined between remote parts of the earth in primitive ages. The better explanation of concurrences is that they are parallelisms—taboos that have sprung up under similar conditions as the only adequate response to them.

The taboo: Thou shalt not kill (thy fellow-tribesman) represents the very essence of social necessity, if internal cohesion and order are to be maintained; and Thou shalt not steal (from a tribal brother) establishes the right to property, thus excluding aggressions, reprisals, and consequent chaos and disorganization. No society can long persist in the competition without such inhibitions. Here are laws, then, which have an eternal survival-value in them, so far as we can predict in the light of the past, over space and through time; they are as good in a modern society, as a *conditio sine qua non*, as they have been in the most rudimentary group. It will be noted that they contemplate merely the fellow-tribesmen—the members of the so-called "we-group," or "in-group"—for it is proper and praiseworthy to kill the alien, to rob him, and to do to him all the other things which the code forbids within the group. There is here no outcome of a yearning altruism; the code is as un-moral from that point of view as are any of its analogues in nature—the lion's claw, the viper's tooth, the law of the pack.

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<sup>11</sup> *Iliad*, XVIII, 497 ff.

If we confine our attention to the elements common to all codes of laws, over all earthly space and through such a vista of time as we can span by recourse to our records, ethnographic and historic, and if we are naïve, we may readily conclude that this presence of similar or even identical provisions in them supports the assumption that they were put there by some Power. That is the way similarities in organic nature used to be explained; it was "unity of design" that accounted for all that—a pseudo-explanation restating the question. Or we may say that part of law is "given," as species were given; and admit that the rest was made by man, or, at least, not by "Nature," as formerly it was admitted that varieties of animals and plants could be produced under the operation of natural or "lower" agencies. Or we may dodge the whole explanation by drawing a blank check on "natural law."

From the evolutionary standpoint, these similarities and identities are simply variations that have persisted in the conflict because endowed with lasting survival-value under any life-conditions of society yet known to us. Tradition has passed them down unimpaired, because they respond to a perennial necessity for the very self-preservation of society. In that sense, they are natural and not Natural law; but now we know what the "natural" means. We are on the familiar scientific ground so strongly fortified by Lyell and others, who championed the competency of forces which we see daily in operation about us to produce any and all results that come before our eyes. In that position inheres intellectual liberation; and it is not recorded that the possession of a long and orderly perspective has ever constituted a handicap when science has come to practical application.