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Joseph Henry Beale's Lectures on Jurisprudence, 1909

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JOSEPH HENRY BEALE'S LECTURES ON JURISPRUDENCE, 1909

WARREN J. SAMUELS*

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I. INTRODUCTION

The lecture notes which follow accord insight into one of the major jurisprudential controversies of the early part of this century, that between analytic jurisprudence (or legal fundamentalism or legal absolutism as called by its critics) and legal realism. Indeed, the deliverer of the lectures, Joseph Henry Beale, albeit a relatively passive participant in the controversy, was of such stature that Jerome Frank, a leader of the legal realists, referred to the attitude of legal fundamentalism as "Bealism."¹ The lecture notes are a brilliant exposition of the analytic point of view (or at least its American version, as Beale was quite critical of the Bentham-Austin English tradition). More important, they accord insight into the nature of the basic issues involved in the controversy.

Joseph Henry Beale (1861-1943)² was one of the leading figures in the Harvard Law School and in American legal education in the early decades of this century. A prolific writer and master lecturer who "took all law for his province,"³ Beale was a founder and trustee of the *Harvard Law Review* and also helped organize the University of Chicago Law School in 1902-1903, the American Law Institute in 1922 (for whom he became reporter for conflict of laws), and the American Legal History Society in 1933. Although his primary accomplishments were in conflicts, he was also a major figure in public utilities, municipal corporations, criminal law, damages and liability. He taught at one time or another almost every course in the curriculum; and accordingly published in almost every field. As already indicated, Beale

* Professor of Economics, Michigan State University. Grateful appreciation is acknowledged to Mrs. Robert Lee Hale and Mr. Robert Lee Hale, Jr., for making available most liberally the private papers of the late Robert Lee Hale. The lecture notes are in the possession of Mrs. Hale (Folder 54) and are eventually to be deposited in the Law Library of Columbia University. A copy of the notes is in my possession. I am also indebted to Edith G. Henderson of the Harvard Law School Library; to various personnel of the law libraries of the State of Michigan and the University of Michigan; and to my research assistant, Mr. Jan Palmer.

1. J. FRANK, *LAW AND THE MODERN MIND* 60 (1930) [hereinafter cited as FRANK].

2. Biographical information is based upon the essays by Williston, Griswold, Pound, Chafee, and Justice Frankfurter in the Beale dedication issue, 56 *HARV. L. REV.* 685-703 (1943); the dedicatory essay (unsigned, but written by Dean Pound) in *HARVARD LEGAL ESSAYS* xi-xiv (1934); and the obituary note by R.H. Smith in 29 *A.B.A.J.* 147 (1943).

3. Frankfurter, *Joseph Henry Beale*, 56 *HARV. L. REV.* 701 (1943) [hereinafter cited as Frankfurter].

became widely known as the leading exponent of C. C. Langdell's school of American analytical jurisprudence.⁴ Beale retired in 1938, having taught at Harvard Law School for 47 years.

The lecture notes were taken by a student, Robert Lee Hale, in the course in jurisprudence given by Beale in the Harvard Law School in the spring term, 1909. The course was for third year students and met two hours a week. Irregularly given (it had not been given the year before), it earlier had been taught by John Chipman Gray and was soon to be taught by Roscoe Pound. In 1909 there were six students in the course.⁵

Robert Lee Hale (1884-1969),⁶ one of the students, was a long-time specialist in public utilities and legal economics at the Law School of Columbia University. Like Beale, a member of a distinguished American (and English) family, Hale received the B.A. (1906), A.M. (1907) and LL.B. (1909) from Harvard and the Ph.D. (1918) from Columbia. His non-law degrees were all in economics. He produced a stream of important articles in public utility law which had manifest eventual impact on the courts, in part through his friendship with Justices Stone, Brandeis, Cardozo, Frankfurter, Hand, and Frank, among others. He taught a unique course, Legal Factors in Economic Society, and in this course, as well as in extensive writings, he articulated a theory of the economy as a system of mutual coercion based upon relative power and on the legal bases thereof.⁷ The lecture notes were discovered by the present author during an examination of Hale's private papers, in the course of researching Hale's theory of the economy as a system of power and its legal bases.⁸

In this Introduction to the edited lecture notes, I shall first briefly describe the course and its coverage; then review the insight which the notes provide for understanding Beale and the conflict between the schools of American analytic jurisprudence and legal realism.

The lecture notes run 146 pages. They are in longhand, well-preserved, and legible. Taken primarily by Hale, a few day's notes were copied from another student. The 26 lectures are each designated by the date and day of the week (omitted below, Wednesdays and Thursdays).

Apparently no textbook was assigned in the course and a bibliography given the first days seems to have substituted for a formal

4. Cohen, *A Critical Sketch of Legal Philosophy in America*, in 2 *LAW: A CENTURY OF PROGRESS, 1835-1935*, at 290 (1937); also in M. COHEN, *AMERICAN THOUGHT* 154 (1954).

5. Course information from letter from E.G. Henderson to W.J. Samuels, April 1, 1970.

6. Biographical information is based upon 4 J. DORFMAN, *THE ECONOMIC MIND IN AMERICAN CIVILIZATION* 160-63 (1959); and 5 J. DORFMAN, *THE ECONOMIC MIND IN AMERICAN CIVILIZATION* 588 (1959), *A HISTORY OF THE LAW SCHOOL* 324-25, 361 (J. GOEBEL, JR. ed. 1955); 11 *LAW ALUMNI BULL.* 39 (Winter 1969); E. BROWN, *LAWYERS, LAW SCHOOLS AND THE PUBLIC SERVICE* 142 (1948); and Hale Papers.

7. See, e.g., Hale, *Coercion and Distribution in a Supposedly Noncoercive State*, 38 *POL. SCI. Q.* 470 (1923); HALE, *FREEDOM THROUGH LAW* (1952).

8. Samuels, *The Economy as a System of Power and Its Legal Bases: The Legal Economics of Robert Lee Hale*, 27 *U. MIAMI L. REV.* 261 (1973).

reading list.⁹ The bibliography covered the major writers and texts referred to and used by Beale during his lectures, though not all the initial references were recorded by Hale as being later cited by Beale and not all the later recorded citations were represented in the initial bibliography. The initial bibliography, together with Beale's comments taken down by Hale, is given in the note.¹⁰ The figures whose ideas were principally developed or referred to in the lectures were Holland, Gray, Austin, Pollock, Carter, Langdell and Salmond. The organization of the course was evidently much influenced by Carter's pamphlets, especially "The Provinces of the Written and Unwritten Law," the language of which Beale adopted to entitle the first half of his course.

Beale's general philosophy of law and jurisprudence is articulated in the first half of the course in which he literally surveys the provinces of the written and the unwritten law. Beale begins by providing an overview and critique of the alternative approaches to jurisprudence and law. He then analyzes the nature and the sources of common law, emphasizing the main themes of American analytic jurisprudence, and defending the common law against the claims of both legislation (statute law) and codification.

In the second half of the course, "Jurisprudence Proper," Beale presents a brilliant and penetrating classification of types of rights, a classification which echoes in his later tripartite division of rights into primary, secondary and remedial rights.¹¹ In the lectures he first discusses rights and obligations in general. He then proceeds to divide his subject matter into rights in possession and rights in action. While maintaining this basic distinction between types of rights, he further divides the course into the nature and elements of wrongs, and remedies. Included in rights in possession are status, personal rights, and

9. Letter from E.G. Henderson to W.J. Samuels, April 1, 1970.

10. The pamphlets and treatises given by Beale include: J. CARTER, A PROPOSED CODIFICATION OF THE COMMON LAW (1884), THE PROVINCES OF THE WRITTEN AND UNWRITTEN LAW (1889), and THE IDEAL AND THE ACTUAL IN THE LAW (1890); F. VON SAVIGNY, HISTORY OF ROMAN LAW (transl. 1829) and SYSTEM DES HEUTIGEN ROMISCHEN RECHTS (8 vols. 1840-1849); R. VON JHERING, GEIST DES ROMISCHEN RECHTS (2d ed. 1866); J. AUSTIN, JURISPRUDENCE (3d ed. 1869); W. MARKBY, ELEMENTS OF THE LAW (6th ed. 1905); T. HOLLAND, ELEMENTS OF JURISPRUDENCE (10th ed. 1906); F. POLLOCK, A FIRST BOOK OF JURISPRUDENCE (2d ed. 1904); and J. SALMOND, JURISPRUDENCE (2d ed. 1907).

According to the notes, Beale said that "European books are not of much assistance, for they are content with the philosophizing of Roman law writers, and their books have been devoted mainly to elucidating Roman law. But in doing this there *are* great writers." He called Savigny and Jhering the "ablest exponents of the German school." No reference is given for Bentham; but on the line immediately preceding Austin, is the terse statement: "Bentham—Beale dislikes." Of Markby's book, Beale said, "not pretentious but thoughtful," of Holland's, "the *standard* book in the English language;" and of Pollock's, "a more acute book."

The bibliography and comments are found on the first page and one-half of the notes and are omitted from the edition of the notes given below. Also some editions and dates have been supplied (giving the then most recent edition) and some others corrected.

11. J. BEALE, 1 A TREATISE ON THE CONFLICT OF LAWS 67-86 (1935) [hereinafter cited as TREATISE].

property rights. Rights in action are classified as either absolute or relative. There can also be the transformation of rights in action into rights in possession. What distinguishes Beale's analysis is not his classification, but rather the brilliance with which he digs out and articulates the play of principles, which is the main concern of his approach to jurisprudence. He is especially adept in the areas of status, the elements of injury (and here most especially the problem of causation), responsibility, and the theory of compensation. Heavy reliance is placed by Beale upon the concept of *seisin* in developing both property rights and rights in possession in general. Although the concept is largely metaphysical, Beale's use of it is so convincing that it appears to be more operational than it really is; he makes of it a brilliant, if question-begging, principle of the common law.

II. THE INTERMINGLING OF BEALE'S ANALYTICAL JURISPRUDENCE WITH LEGAL REALISM

Jurisprudence is an intellectual inquiry concerning law, and common law is a system both of social control and social change: It channels the structuring of power and of change, insofar as these are a function of legal rights and actions. As such, common law is inevitably and ubiquitously concerned with reconciling the dualisms of freedom and control, and continuity and change. But these dualisms apply to the operation of the common law itself, and jurisprudence necessarily must deal with them in some manner. The problem is complicated, as we shall see below, by the need to legitimize the status quo system and the rights incident thereunder. If the common law operates as social control of power, it is also an instrument of power and of power play, and thus, it is available for use of power players. In the view of the followers of C. C. Langdell, and the American analytic school generally, the common law was contemplated as something transcending all this, a body of ideal principles for all practical purposes existing independent of man and of human policy. In Beale's view, law is not formally the generalizing of principles which serve to explain *ex post* the operation of the law but rather the transcendent principles upon which the actual or positive law is based and from which the actual or positive law is derived: "By the Common Law, we mean an ideal, not an actual, system of law, which is the basis of the law of any common law country."¹² It is, he told his class, "an ideal system, the fountainhead from which the law of each common law country is derived."¹³

12. J. Beale, Lecture Notes on Jurisprudence, paragraph 45 (1909). All subsequent paragraph references not otherwise identified are to the lecture notes, which follow this Introduction. Hereinafter, paragraphs of the lecture notes will be cited as "para. . ."

13. Para. 45. *See also* paras. 49, 50, 52, 55, 58, 116. In his treatise on Conflicts Beale wrote of "that quality of the law which is absolutely characteristic: that it tends to form a single homogeneous philosophical system." TREATISE, *supra* note 11, at 23. He also insisted that "the general system exists apart from positive law . . ." *Id.* at 35. He also argues that "[i]t must be

Following Pollock, he insists that "a rule is enforced by a court because it is law; it is not law because it is enforced by the court."¹⁴ Particular decisions are "evidences of the existence of a principle,"¹⁵ but the law transcends the decisions.¹⁶ Whereas modern jurisprudentialists, under the influence of sociological jurisprudence as well as legal realism, tend to concentrate on the operation of the *legal process* and its generation of authoritative decisions and rules (in interaction with other social subsystems), to Beale the emphasis was upon law, a law discerned and discovered but not made by judges.¹⁷ As Justice Frankfurter observed of him, for Beale "teaching law was an attempt to bring rational order out of the welter of cases."¹⁸ Beale's rational system of law was idealized as if it were self-contained, with its own internal structure, classification and laws of development and application, in other words, as if it were a closed system of legal reasoning, as if general principles did decide concrete cases. It was precisely this point of view which Holmes had in mind when he made his famous critical statement.¹⁹

To Beale, then, the ideal common law—the common law in its ideal existence—was "a body of principles for determining such obligations and rights as are recognized by the State."²⁰ Jurisprudence, accordingly, was concerned with studying "the conceptions back of laws,"²¹ and is of the nature of a science.²² Rights in general, moreover, appear independent of human determination and policy.²³ Beale's fundamentalism appears most clearly, as Frank pointed out,²⁴ in his holding that, assuming law "to be a body of principles; . . . the nature of those principles . . . must be" general, universal, predictable, and continuable.²⁵ These are necessary qualities of law in its ideal form; not mere desirable qualities or evaluative criteria. Jurisprudence to Beale was an inquiry into the necessary logical structure and classification and essential character of the components of law (rights, wrongs, etc.).

obvious that neither by legislation nor by judicial legislation can the basic system of law be changed." *Id.*

14. Para. 38. See also TREATISE, *supra* note 11, at 24, where the same point is made. In both the TREATISE, at 38, and in the lectures, at para. 143, Beale defended against the argument that judicial law is *ex post facto* law.

15. Para. 86.

16. See paras. 54ff., 99.

17. See paras. 60, 61, 93, 117.

18. Frankfurter, *supra* note 3, at 702.

19. For Frank's discussion of Holmes, see FRANK, *supra* note 1, at 270-77.

20. Para. 42. See also TREATISE, *supra* note 11, at 25.

21. Para. 171. A few years earlier Beale had written that, "[b]y jurisprudence . . . I understand to be meant the whole body of law of the European and American nations, regarded as a philosophical system or systems; in short, the science of justice, as practised in civilized nations." Beale, *The Development of Jurisprudence During the Past Century*, 18 HARV. L. REV. 271 (1905) [hereinafter cited as Beale].

22. See paras. 10, 81, 90, *passim*.

23. See paras. 172, 180ff, 213, 309.

24. FRANK, *supra* note 1, at 53, *passim*.

25. Para. 51. This discussion is echoed in the TREATISE, *supra* note 11, at 45ff.

Beale's so-called legal absolutism is primarily manifest, so far as practical matters are concerned, in his defense of the common law against the pretensions of statute law and codification.²⁶ Law to Beale is common law;²⁷ legislation, and legislation through codes, is something else, part of government to be sure, but not law. The common law is seen by Beale as a system of government, indeed, as the primary system of government to which all other governmental forms and forces must adjust.²⁸ Beale felt deeply that:

The force of the common law is greater than merely to persist where not expressly changed by statute. The force of the common law attacks the statute and modifies it.²⁹

To be a really successful statute, it must be capable of having its corners rubbed off, and of being assimilated by common law. The test of an absolutely successful statute is such complete assimilation with the common law that the ordinary person will not distinguish it from the common law

³⁰

Indeed, "Common law cannot be effectively changed by legislation, unless the change is in the line of the common law."³¹ It is thus not impossible for legislation to have successful effect, but the odds are against it:

If your legislation is framed by competent persons and you can be sure that it will not be tinkered with by incompetents later, then it is better than change in common law opinions. But if done by haphazard legislation by a legislature chosen not primarily for wisdom, then legislation is bad, for example, Granger legislation, and present anti-railroad legislation.³²

His general view is that "the rules of courts are formed by men who have devoted their whole lives to just this kind of thing, they have the experience of the whole of English law for 1800 years."³³ That is a handicap which legislation has got to meet."³⁴ As a consequence the room for statute law in the governmental scheme of things is narrow indeed.³⁵

26. The lectures follow the argument presented earlier, in Beale, *supra* note 21, at 276-79; the discussion of the same point in the TREATISE is considerably softened (possibly as a result of his American Law Institute experience). TREATISE, *supra* note 11, at 42.

27. See paras. 134, *passim*, 260.

28. See paras. 91, *passim*, 119.

29. Para. 119.

30. Para. 122.

31. Para. 146.

32. Para. 138. See also TREATISE, *supra* note 11, at 49: "Well-considered legislation is a prompter improver of the law than the slower operation of legal opinion; and when it is based, as that is, on knowledge and experience it is the most powerful means of legal improvement."

33. Para. 141.

34. Para. 142.

35. See paras. 125ff, 133, 136. Notwithstanding the statement quoted in note 32 *supra*, Beale in 1935 wrote: "The application of general principles may be inhibited by legislation: but

Moreover, the common law involves, according to Beale, a system of governance through a legal caste, a caste of those who have acquired the scientific knowledge of the mystery that is the common law: "Law is a 'mystery' in the proper sense, that it is in the peculiar knowledge of those specially versed in it."³⁶

All this notwithstanding, Beale's approach to jurisprudence was not a pure or idealized analytical approach. While he was a clear, or at least an official, Platonist, the elements of so-called legal absolutism co-existed with a number of themes more usually and prominently associated with legal realism. As Frank pointed out, "Beale, it is fair to say, is not a consistent Bealist."³⁷ This is certainly evident in his lectures, if the notes are accurate (and there is no reason to doubt them).

One of the principal themes of legal realism concerns the myth of legal certainty attributed to legal absolutists by the legal realists, in part a fundamental skepticism concerning the precision with which legal rules can be stated and the conclusiveness with which they can be applied. Beale's lectures are replete with this theme. He refused, for example, to give a definition of law. Hale's notes state that: "Beale does not believe in making a definition of law; you cannot make a definition that will cover it."³⁸ Even more fundamental for our purpose is his argument with respect to legal principles: "When principles are reduced to a formula, the formula is sure not to represent accurately the idea."³⁹ And again:

You cannot adequately express even the simplest ideas in language, much less complex ideas like law. If we are trying merely to approximate truth, that is ok. But if we try to define the truth in language, either we will change the truth; or we will get people quarreling on what the language means. If we try to express in language a formula for people to act on, we get people to quarreling.⁴⁰

The critical notion of legal certainty is thus tellingly compromised.⁴¹

A second matter in which Beale qualifies certainty is also one in which he approaches the study of the legal system or process instead of simply postulating some ideal law. According to Hale's notes, speaking of the nature of law judicially administered, Beale maintained that "[t]he nature of this law is that it is a method of thought rather than a body of fixed rules."⁴² According to this view, the common law is not

the amount of legislation which affects ordinary private law is relatively small, and doctrine is not greatly changed by statute." TREATISE, *supra* note 11, at 25.

36. Para. 91. See also paras. 76, 81, 92, 100-111, 138, 141.

37. FRANK, *supra* note 1, at 60 n.3.

38. Para. 40. See also paras. 46, 153ff, 160, 163.

39. Para. 159.

40. Para. 162.

41. The lecture notes are echoed in the TREATISE, *supra* note 11, at 29, 30, 43.

42. Para. 90. See also para. 91. Beale's realism in considering law as "a method of thought rather than a body of fixed rules," is strikingly similar to the statement of John Maynard Keynes in economics:

something pre-existent and pre-eminent to man but rather a paradigm and a process worked out by man within which legal questions are handled and resolved, a very human process of conflict resolution.

Supportive of this position and of the other realist elements in Beale's jurisprudence is his evolutionary point of view. Although the evolutionary stance is directly developed by Beale as a basis of criticizing statutory and codified law, it pervades his lectures. More important perhaps is his cognate discussion of a broad range of sources of law.⁴³ In part, the same Beale who criticizes codification as static and hardening⁴⁴ also consistently envisions common law evolution in response to changing economic conditions.⁴⁵

A further realist element in Beale's jurisprudence, one which is of particular interest coming from an analytic jurisprudentialist, is his frequent reference to, or acknowledgement of, the conflict character of the origin and development of common law. Perhaps this is only logically inherent in his acknowledgement of a broad range of sources of common law, but the conflict element is identified and somewhat stressed. Thus he generally sees the development of the common law as part of the general conflict between competing customs or values,⁴⁶ and he specifically sees the common law as "something which restrains custom, not justifies it."⁴⁷ He rejects the more bland (and commonly accepted) view of common law vis-à-vis custom: "It is often said that the common law had its origin in the customary law. This is untrue; it conflicted with and finally overcame and superseded the customary folk law."⁴⁸ To the same effect he points out that common law was long tied to the rise of the monarch, that it was unifying and simplifying primarily as a by-product of the centralization of power in the King, the older customary law and the law of the manorial courts being overcome in the process.⁴⁹ And, of course, he acknowledges the long conflict between common law and equity.⁵⁰

But the truly critical element of Beale's realism, one quite surprising coming from an analytical jurisprudentialist, is his frequent and explicit recognition of judicial choice. On one hand, Beale, as fundamentalist, wrote:

Why not believe judges when they say (as they always

The Theory of Economics does not furnish a body of settled conclusions immediately applicable to policy. It is a method rather than a doctrine, an apparatus of the mind, a technique of thinking, which helps its possessor to draw correct conclusions. It is not difficult in the sense in which mathematical and scientific techniques are difficult; but the fact that its modes of expression are much less precise than these, renders decidedly difficult the task of conveying it correctly to the minds of learners.

Keynes, *Introduction* to D. ROBERTSON, *MONEY* at v (1922).

43. Paras. 63ff, 99ff.

44. Paras. 165ff.

45. Paras. 71, 105, 148.

46. See paras. 78-80.

47. Para. 75.

48. Para. 79.

49. See paras. 83, 84, 152.

50. See paras. 111 *passim*. See also Beale, *supra* note 21, at 275.

have) that they were merely deciding what the law was as it already existed?⁵¹

When a judge decides one way rather than another, it is because there is something already existing which constrains him so to decide. A judge always is constrained—he is not free to make any rule he sees fit; therefore he does not make the law, but only interprets it as it exists.⁵²

The sovereign legislating is not controlled by pre-existing principles, while the judge is merely deciding in accordance with legal principles.⁵³

While, on the other hand, Beale held:

Probably one of the most important [sources of law] is the current idea of right—the moral conception of lawyers. . . . The judge is constrained primarily by his idea of justice or right.⁵⁴

He reinforced this point by reference to Gray, that “even modern law is largely as it is on account of judges’ ideas of ethics.”⁵⁵ The major premises of the analytic syllogism do not come from the self-contained law. The law changes through judicial decision; it is a human artifact; the law is a human instrument. In an interesting discussion Beale called attention to the conflict between precedent and principle and the general weakening of precedent. He thought *stare decisis* “has been weakening in the last one hundred years” in the United States.⁵⁶ There is much realist insight, too, in the following revealing statement:

A greater factor than judicial decision, Beale thinks, is the current ethical thought of the time. It is much easier to go counter to a previous decision of the court, than to go counter to what the whole mass of the people think right. The court would probably not overrule expressly the former decision, but restate it in such a way as to get away from it.⁵⁷

And this was followed a few moments later by a discussion of “a conscious desire for reform,” in which Beale suggested that “[t]his conscious feeling of the bar that law ought to be something different, runs into a feeling that the law is that different thing.”⁵⁸ This is surely critical when it is seen that Beale maintained that

[i]t is the opinion of those expert in that method of thought,

51. Para. 60.

52. Para. 61.

53. Para. 117.

54. Para. 64.

55. Para. 68. Beale went on to say that, “*Now judges’ own ideas of ethics and economics have more relative importance.*” Para. 71. *See also* paras. 85, 88, 91. It is interesting to speculate what Beale might have had to say on Holmes’ dictum concerning Herbert Spencer and the fourteenth amendment.

56. Para. 98.

57. Para. 103.

58. Para. 106.

which is the law. . . . The law of Massachusetts is what the body of the Massachusetts bar thinks it is. It changes when the opinion of the bar changes.⁵⁹

But the most instructive evidence of Beale's thought along realist lines concerns his repeated assertion of an arbitrary or pure choice element necessarily inherent in law and the legal process. The best statement of this is found in Beale's discussion of the nature of wrongs. Discussing the view "that wrongs do not cover the whole field of harms, but that the law can arbitrarily select certain wrongs," Beale locates the exercise of choice at another point but fully accepts and elaborates the existential arbitrary character of legal rules and rights:

Beale thinks that the arbitrariness is in selecting what are rights, not in selecting wrongs. Our law or any other law may out of all possible rights select certain rights arbitrarily which shall be given by law. The field of rights in any particular law does not necessarily cover all conceivable rights. What things are rights must be determined more or less by arbitrary rules.⁶⁰

A similar point is made in connection with proximate causation: "Where the line is to be drawn [between remote and proximate causes] is to be determined by the particular law-giver."⁶¹ Similarly the relation between law and equity involves the exercise of legal choice.

[I]t is a universal tendency of the human mind for principles to be formulated in fixed rules; but it is also a tendency to want to make exceptions to these fixed rules, in cases where the principles would work hardship. And if we regard equity as the formulation of the exceptions to the fixed principles, then it is true that the distinction between equity and law in the human mind is innate in any system of law. And, Beale thinks, equity is a generalization of exceptions and an engrafting of the principles of the exceptions on the body of the common law.⁶²

And again, even more tellingly: "Equity is the system of doctrine which deals with the exception; and it is an essential of civilized law that we should provide not only general rules, but special rules for special cases."⁶³ Beale does not elaborate upon the calculus whereby exceptions are made, that is to say, whereby special rules are interposed against general rules, but he is here clearly in the tradition of Holmes et al. Indeed, acknowledgement of the exercise of legal choice pervades the lecture notes.⁶⁴ Judicial choice is constrained by principle and by the opinion of the bar as well as by concepts or precepts of

59. Para. 91.

60. Para. 257.

61. Para. 278.

62. Para. 108.

63. Para. 300.

64. See, e.g., paras. 193, 201, 202, 214, 260, 290-92.

morality, justice and ethics; but choice remains. The seemingly closed system of legal reasoning has dissolved; uncertainty exists and for deeper reasons than simply "defects in reasoning power."⁶⁵

III. LEGITIMATION OF THE COMMON LAW

How are we to explain or reconcile these disparate elements in Beale's thought? What are we to make of this apparent dualism, at least this juxtaposition of Beale the fundamentalist and Beale the realist?

The answer, to begin, seems in part to be that Beale was both a metaphysician and a positivist at the same time, as most of us are most of the time. His mind operated on an abstract, Platonic level on which existed an idealized (and even hypostatized) body of general principles and categories of an absolute and ultimate character; while at the same time it operated on an empirical, practical, real-world level on which particular rights and liabilities were wrought out of the matrix of legal principles and precedents by (an often unconscious but nevertheless real) judicial selection in a world of often violently conflicting interests, enhancing certain rights (and the interests and values which they represent) and weakening others. The idealized paradigm of the common law that is part of the intellectual equipment—and, more fundamentally, being—of every common law lawyer co-existed with the down-to-earth realism of the practical legal mind. If anything, the former was only more explicit and thereby more prominent in Beale's writings and lectures than in those of many other writers.

It is possible to argue that Beale only obscures the legal choices made in an ostensibly determinate system. It is also possible to maintain that there can be a transcendental body of law, which jurisprudence ought to study, and that jurisprudence should also study the real world of judicial law-making as the legal caste attempts to approximate if not reach the ideal. What is certainly the case is that Beale did think on both levels; that in his course in jurisprudence he gave instruction⁶⁶ to his students on both the common law as an ideal system and the common law as it is actually found. It was, in Carter's words, a course in "the ideal and the actual in the law."⁶⁷

But what, then, accounts for the difference between Beale the legal fundamentalist and the legal realists who were so critical of him? Was "Bealism" a jurisprudential fiction, coined and used by Frank for argumentative purposes? Was there no "conventional wisdom" which Beale represented in the legal profession and which Frank was chal-

65. Para. 160.

66. I use the term advisedly: Dean Griswold wrote of Beale "as the rediscoverer, systematizer, and evangelist of the Conflict of Laws." Griswold, *Mr. Beale and the Conflict of Laws*, 56 HARV. L. REV. 690, 693 (1943). Justice Frankfurter mentioned that it was "once remarked that Professor Beale was the theologian of the law . . ." Frankfurter, *supra* note 3, at 702.

67. See note 10, *supra*.

lenging? What distinguishes Beale's jurisprudence? This is not the place for a comprehensive analysis of orthodoxy and heterodoxy in legal thought during the early decades of this century, but perhaps we can place Beale's position in these lecture notes in some perspective.

What distinguishes Beale's jurisprudence lies, I suspect, in Beale's reverential regard for the common law as the status quo legal system, and in two major notions corollary thereto: First, the role of the common law as a pre-eminent system of government, and second, the necessity of legitimation to make the common law authoritative, with its accompanying functional pretenses of finality and certainty. Moreover, Beale's reverential regard extends to the larger status quo of which the common law was but one interdependent facet, namely, his economic conservatism and his aristocratic posture in the struggle to democratize both the economy and the polity. Finally we must return to his general absolutist position coupled with strong and profound elements of realism, the true Bealist solution being the resolution of the problem of continuity and change through and within the common law as a system of government, with the pretense (largely if not completely taken for granted by Beale) of finality through absolutist, or idealist, formulation. Given this general summary, let us examine the constituent details.

What strikes the reader of Beale's lectures on jurisprudence is the combination of a descriptive or positive with an evaluative or normative jurisprudence. There are, in the notes which follow, magnificent analytical descriptions of the principles of the common law. There are also both explicit and implicit castings of luster on the common law. When one comes right down to it, the heart of Beale's instruction in the law was, as Daniel J. Boorstin has written of Blackstone, the making "of the law at once a conservative and a mysterious science."⁶⁸ As with Blackstone (so Bentham claimed), there is a confusion of positive and normative jurisprudence, an admixture of what Bentham called "expositorial" and "censorial" jurisprudence.⁶⁹ And the distinctive quality of the finished product is its calm exhortation of the virtue and magnificence of the common law and the larger status quo represented by it. As in the case of Blackstone, "the Science of Law would surely have to be an admiring science."⁷⁰ It is not surprising, then, that just as Blackstone had his critique given by Bentham, Beale had his rendered by Frank and on essentially similar grounds. Herein lies the deeper meaning of Hale's note: "Bentham—Beale dislikes." The reverential posture of a normative jurisprudentialist which Beale shared with Blackstone had as its logical counterpoint a distaste for

68. D. BOORSTIN, *THE MYSTERIOUS SCIENCE OF THE LAW* i (1941) [hereinafter cited as BOORSTIN].

69. J. BENTHAM, *A FRAGMENT ON GOVERNMENT AND AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* xxviii, 7ff (W. Harrison ed. 1948).

70. BOORSTIN, *supra* note 68, at 19.

anyone who, like Bentham, so unabashedly subjected society—and, above all, the common law—to critical inquiry and, indeed, criticism and even sarcasm. While Beale must have been uncomfortable with Pound's statement that the ideal common law was but "an idealized version of the positive law of the time and place," as was natural law, he still must have accepted the statement that "in practice the law was made to provide the critique of itself,"⁷¹ for the casting of luster on the system of the common law meant that it could be criticized only on its own terms, that it would provide its own "starting points for reasoning, of interpretation, and of applying standards."⁷² The social or political significance of postulating the common law as an ideal system is to render it above criticism and to render safe the social system of which it is a fundamental part.

The real object of Beale's calm exhortation, like that of Blackstone, was to promote the continuity of the common law as the predominant and pre-eminent system of government. For Beale, it was the essence of civic virtue and wisdom that decisions governing the exercise of social control and social change, decisions governing the structure of rights and liabilities, should emanate from the legal caste.⁷³ Beale's jurisprudence, for all its description and internal critique, is a defense, like Blackstone's *Commentaries*, of the common law as the best possible system of government given man as he is.

But Beale goes further than revering the common law as a system of government. The lecture notes reveal Beale to have been concerned with a profound and perplexing social problem: The need to legitimize both the system of the common law and the decisions of common law courts as authoritative. One of the leitmotifs of the lectures is a concern for the conditions of political obligation and obedience, for the maintenance of justice, which was, as Beale saw it, "the custom of regarding things as just."⁷⁴ Beale did not have to read Max Weber to sense that the strength of the common law as an institution resided in its legitimacy, in the sense of charisma attached to the members of the legal caste and, by extension, in the sense of propriety and security attached to the system of the common law. Indeed, whatever the metaphysical grounds for the tone of finality and certainty often given by Beale, the social significance of such pretense (as described, for example, by Levi)⁷⁵ is precisely the underpinning of legitimacy provided by the sense of security accorded by belief in finality and certainty. The casting of luster on the common law was to promote the fact and legitimacy of its authoritative status, to enable it to continue its own *èlan*, and to provide for its defense against rival governmental systems such as statute law and codification. The candor with which

71. R. POUND, *SOCIAL CONTROL THROUGH LAW* 4 (1942) [hereinafter cited as POUND].

72. *Id.* at 6.

73. See paras. 64, 71, 78-81, 91, 94, 111, 117, 122, 137.

74. Para. 75. See also paras. 65-67, 71, 73, 75-76, 144, 151; TREATISE, *supra* note 11, at 47.

75. E. LEVI, *AN INTRODUCTION TO LEGAL REASONING* 1 (1948).

Beale spoke of the mystery of the common law was in the nature of instruction for his students as initiates, as apprentices to the law,⁷⁶ it was not for public discussion, else the veil would be pierced.⁷⁷

Two economists, both leading theoreticians of the role and significance of existential uncertainty in economic affairs, have argued that theory—and here we may speak of jurisprudence as legal theory—as with religion, serves deep needs of the human spirit, to put minds at rest.⁷⁸ As Knight has put it, “[c]ivilization cannot exist without believing something”⁷⁹ And Beale shares Knight’s fear of nihilism: The universality which Beale finds in the common law—“everything which happens must happen under law”⁸⁰—is security against the contingency that, as Pound put it, “[t]he force of politically organized society” will be “left to itself,” and against the possibility that there will be “no authoritative ideal to guide” that force, so that it will not become “a matter of individual wish and prejudice and predisposition—the very things law seeks to repress.”⁸¹ “If we cannot establish a demonstrated universal legal measure of values which everyone will agree to,” and Beale may not have agreed with Pound’s premise, though certainly with his conclusion,

it does not follow that we must give up and turn society over to unchecked force. There have been centuries of experience of adjusting relations and ordering conduct by law, and we have learned to develop that experience and make use of it in weighing and valuing interests.⁸²

The roles of the ideal in law, however changing its substance has been,⁸³ are multiple. The ideal provides the basis for legal determinations of rights and wrongs, it provides the basis for the legitimacy—the

76. Para. 92.

77. See Frank’s discussion of Demogue and Wurzel on the value of lay ignorance. FRANK, *supra* note 1, at 238-47. For the classic review of the social function of ignorance, see Schneider, *The Role of the Category of Ignorance in Sociological Theory: An Exploratory Statement*, 27 AM. SOC. REV. 492-508 (1962).

78. All we can seek is consistency, coherence, order. The question for the scientist is what thought-scheme will best provide him with a sense of that order and coherence, a sense of some permanence, repetitiveness and universality in the structure or texture of the scheme of things, a sense even of that one-ness and simplicity which, if he can assure himself of its presence, will carry consistency and order to their highest expression. Religion, science and art have all of them this aim in common. The difference between them lies in the different emphases in their modes of search. . . . The chief service rendered by a theory is the setting of minds at rest. . . . Theory serves deep needs of the human spirit: it subordinates nature to man, imposes a beautiful simplicity on the unbearable multiplicity of fact, gives comfort in face of the unknown and unexperienced, stops the teasing of mystery and doubt which, though salutary and life-preserving, is uncomfortable, so that we seek by theory to sort out the justified from the unjustified fear. Theories by their nature and purpose, their role of administering to a “good state of mind,” are things to be held and cherished. Theories are altered or discarded only when they fail us.

G. SHACKLE, *THE YEARS OF HIGH THEORY* 286, 288-89 (1967).

79. Knight, *The Arbitrary as Basis for Rational Morality: Discussion*, 43 ETHICS 149 (1933).

80. Para. 80.

81. POUND, *supra* note 71, at 15.

82. *Id.* at 108-09.

83. *See id.* at 13.

sense of justice, to Beale—which sanctions the system and its decisions, and it provides the basis of psychic identity and thereby security, as individuals internalize the norms of the status quo legal system. The pretense of certainty caters to the legitimacy of the common law which in turn caters to the needs of order. There is much wisdom in received institutions,⁸⁴ and to discuss the substance of legitimation is to many true believers to open it to question and thence to doubt, which is to render it, like other matters, no longer sanctified and thus open to change. Yet in a pluralistic society, legitimacy—and the absolutes serving that function—is hard to come by. For example, the absolutist formulations legitimizing Supreme Court power conflict with the absolutist formulations legitimizing other founts of authority.⁸⁵ What differentiated Beale from Frank, and what differentiated Blackstone from Bentham, was the sense of importance attributed to the needs of legitimacy. In this, Beale was taking a position on a fundamental human and social problem. Indeed, the question of how much public discussion and awareness of the slim foundations of public order is possible, even as a basis for change, if order is to continue, is still unsettled. Frank praised Holmes as the completely adult jurist;⁸⁶ but it is still the case that “the drive and search for equilibrium is our human, superhuman task in law, as it is in esthetics, in economics—and, indeed, in all endeavors at all times.”⁸⁷ The questions of legitimacy and lay ignorance are truly important and intractable questions, in both law and economics; part of Beale’s genius and his position in jurisprudence rest upon the positions he took in these matters.

Beale’s reverence toward the common law, so instrumental in legitimizing it as a system of government, also extended to the defense of the status quo economic system and its distribution of power and rewards. While Beale was not very explicit on this, there is not much doubt that he was in the tradition of Story and Choate, for whom the common law was a bastion against extreme democracy, a protector of the sacred rights of property against the intrusion of statutory law dictated by temporary legislative majorities, and given to “the terrible task of curbing the democratic anarchy by the majestic power of the law.”⁸⁸ Beale’s regard for the common law was part of the aristocratic defense against the democratic struggle to pluralize both the economy

84. The classic statement is F.A. HAYEK, *The Use of Knowledge in Society*, in *INDIVIDUALISM AND ECONOMIC ORDER* 77-91 (1948).

85. The preceding lines are adapted from SAMUELS, *THE CLASSICAL THEORY OF ECONOMIC POLICY*, 279 (1966) [hereinafter cited as SAMUELS].

86. FRANK, *supra* note 1, at 270-77.

87. Ehrenzweig, *Psychoanalytical Jurisprudence: A Common Language for Babylon*, 65 *COLUM. L. REV.* 1331, 1359 (1965).

88. *THE LEGAL MIND IN AMERICA* 258-59 (P. Miller ed. 1962); the quote is from Rufus Choate’s address before the Harvard Law School, July 3, 1845. The text summarizes discussions on 177, 180, 261, 270.

and the polity, in which struggle the idealization of both law and the common law as a system of government (often obscured through the advocacy of a transcendental, ideal corpus of law) served as a counterweight to the popular sovereignty tendencies of legislative activism. (Beale's continual reference to the "sovereign," partly a matter of then established legal usage, was also partly a function of his having idealized the democratic system along aristocratic lines.) The development of the common law and the judiciary in the United States in the nineteenth century was very much tied up with the problem of hierarchy versus equality, and the apostles of the common law were typically very much on the side of established power, ergo, the business community's view of private property, free contract, and laissez faire, especially during the late nineteenth century when Beale matured both intellectually and professionally. One wonders what Beale's reaction would have been to reading that "the basic character of the law school . . . is at present dominated by a curriculum and ethos of advocacy for wealthy interests," and that "[t]he law school has always been closely aligned with established economic interests and has thus taught and promoted an ideology compatible with those interests."⁸⁹ He very well might have initially dismissed those claims as nonsense; but upon reflection he probably would have simply maintained the inevitability, necessity and generally constructive role of dominant interests in society.

Something of this is revealed through examination of Beale's conservatism in matters of economic policy which, while only one facet of his general conservative position, is occasionally manifested in the lecture notes. We have already seen that Granger and anti-railroad legislation were considered unwise.⁹⁰ He also felt that interference with property rights resulting from labor disputes⁹¹ constituted malicious torts. This theory would have provided an almost impregnable legal defense of property and business against unions. Extremely revealing are his related discussions bringing out the greater legal security to be had by relying upon property right protection (right in possession) than upon contract right protection (right in action)⁹²—the route which judicial conservatism went in the early decades of this century, along with substantive due process of law (among other common law and constitutional doctrines), to protect established economic interests from state and federal regulatory statutes. There is also his hypostatization of particular rights in the concept of seisin.

He made the statement that, "[t]he basis of the King's peace is the maintaining of the status quo."⁹³ Yet there is the only partially con-

89. Wizner & Resnick, Book Review, 70 COLUM. L. REV. 1305, 1308-09 (1970).

90. Para. 138.

91. Para. 257.

92. Paras. 183-85, 227, 317; cf. paras. 248, 251-52.

93. Para. 315.

trary statement that, "[i]f the characteristic of law is to change rights, then everything which happens must happen under law, and either change or not change rights."⁹⁴ Law is not just the conservator of continuity, it is also the selector and promulgator of change, and it is social control as well. Beale was not completely laissez faire on the practical (and theoretical) level:

The principle of freedom of action, the courts in all questions now agree, rests upon the doctrine that the interests of the public are best subserved thereby, and applies only so far as that is true. When freedom of action is injurious to the public it not only may be, but it must be, restrained in the public interest.⁹⁵

As Cardozo was to argue so often, jurisprudence, law, and the legal process all require principles for the reconciliation of continuity and change, of freedom and control, as well as of hierarchy and equality (or of aristocracy and democracy).⁹⁶

This brings us to the heart of the matter, namely, Beale's position on the problem of reconciling a transcendental, absolute ideal law with an actual positive law whose content is changing. Resolution of this problem involves the questions of who decides the changes and who decides when new law is consonant with the ideal law. Beale rejects codification, in part because codes are static,⁹⁷ whereas the common law is dynamic with built-in principles or mechanisms of change.⁹⁸ While the genesis and development of common law is incremental and largely nondeliberative,⁹⁹ there is also room for changes of a larger order of magnitude that are conscious and deliberative, as by legislation. Several years before he gave the lectures in review here, Beale wrote:

The spirit of the time molds and shapes its law, as it molds and shapes its manner of thought and the whole current of its life. For law is the effort of a people to express its idea of right; and while right itself cannot change, man's conception of right changes from age to age, as his knowledge grows. The spirit of the age, therefore, affecting as it must man's conception of right, affects the growth both of the common and of the statute law. But the progress toward ideal right is not along a straight line. The storms of ignorance and

94. Para. 51.

95. Beale, *supra* note 21 at 282. In the TREATISE, Beale wrote that, "[t]he function of law is a social one: to make it possible for society to exist by setting bounds to the complete imposition of his will by each member of society upon other members." TREATISE, *supra* note 11, at 44.

96. See Spengler, *The Problem of Order in Economic Affairs*, 15 SO. ECON. J. 1-29 (1948); *Hierarchy vs. Equality: Persisting Conflict*, 21 KYKLOS 217-36 (1968). See also B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1922), *THE GROWTH OF THE LAW* (1924), *THE PARADOXES OF LEGAL SCIENCE* (1928).

97. Paras. 87, 165ff.

98. Paras. 64ff, 87-88, 98, 100ff, 137, 148, 169.

99. Para. 75.

passion blow strong, and the ship of progress must beat against the wind. Each successive tack brings us nearer the ideal, yet each seems a more or less abrupt departure from the preceding course. The radicals of one period become the conservatives of the next, and are sure that the change is a retrogression; but the experience of the past assures us that it is progress.¹⁰⁰

This statement is a brilliant knitting together of the idealist and realist position. Beale's solution is to adopt an absolutist posture, as much or more out of belief than out of a sense of utility, as much if not more because it was part of his intellectual and psychic identity than because it contributed to legitimacy; and to couple with it realist elements; or, as has been said of many others, to combine a belief in absolute forms or general principles—of that right which "itself cannot change"—with a recognition of changing particular content.¹⁰¹

What Beale did not provide was a calculus with which to solve the problem of differentiating between those changes in actual law which were consonant with ideal law and those changes which were not consonant with ideal law.¹⁰² But while he did not provide a calculus (neither did Bentham),¹⁰³ he did provide an answer—a procedural answer: The common law as a system of government was to be the mechanism of resolution. When the heart of the matter is broached, Beale would leave it where it had to be, in the work of those involved with the construction of the law. Thus, in his *Treatise on the Conflict of Laws*, Beale wrote:

The law of a given time must be taken to be the body of principles which is accepted by the legal profession, whatever that profession may be; and it will be agreed that the judges have a preponderating share in fixing the opinion of the profession.¹⁰⁴

The common law itself is too flexible and too subject to change with the changing necessities of the people to be comfortably confined in dogmatic form.¹⁰⁵

100. Beale, *supra* note 21, at 272-73.

101. *See, e.g.*, paras. 249, 292, 300.

102. *See, e.g.*, paras. 90-106. The distinction between changes which are consonant and changes which are not consonant with ideal law is analogous to the distinction between government activity which is framework-filling and that which is merely intervention, the analogy being in regard to the role the two distinctions play in policy analysis, namely, to enable differentiation between acceptable and unacceptable legal changes. For a critique of the framework-nonframework distinction, see SAMUELS, *supra* note 85, at 127ff.

103. Writing of Bentham's formula of "the greatest happiness of the greatest number," O. H. Taylor has written, "[t]here is not only the obvious ambiguity of that carelessly worded phrase or formula with its two superlative terms, leaving unanswered the question *which* is really to be maximized, the number or percentage of (more or less) happy people, or the intensity of the happiness of those most largely benefited." TAYLOR, *A HISTORY OF ECONOMIC THOUGHT* 134 (1960).

104. *TREATISE*, *supra* note 11, at 40.

105. *Id.* at 43.

The whole history, then, of law is the history of alternate efforts to render the law more certain and to render it more flexible.¹⁰⁶

This is a restatement of thoughts from Beale's lectures: The law that counts is the law in the mind of the bar, and "[i]t changes when the opinion of the bar changes."¹⁰⁷

Thus Beale was quite modern, and consistent with leading doctrines of welfare economics, when he wrote, in 1936, of social justice and business costs in the light of certain cases:

These cases, it is submitted, mark the emergence of a distinctly sociological jurisprudence in the decisions of the Supreme Court. It has come to be recognized that society requires the final distribution of all costs, including those of accidents, so that they will come into the cost of production or of use and be shared among the ultimate consumers.¹⁰⁸

Yet this is just one application of Beale's reaction to the controversy joined by Frank:

Two opposed views as to the nature of law are dividing juristic thinking in America and on the Continent of Europe. One of these, vigorously discussed in Mr. Frank's book . . . looks on law as the decision of a court on given facts: "the law of the case," non-existent until the courts speaks. The older view is that law exists as a social governmental agency, constantly changing and progressing, to be sure, but capable of fulfilling its social end apart from the action of any particular court. Since life constantly changes, law, which has a function connected with life, must change with it. That lawyer is a good, a sound lawyer, who, trained to judge the relation between life and law, can most correctly sense the existing condition of the law.

The task of the next generation of lawyers will be to absorb into the legal order what is sound and right in the behaviorist theory, freed from its extravagancies and its crudities.¹⁰⁹

Continuity and change were to be reconciled within the system of the common law operating as a system of government, sanctioned by the sense of justice and authoritativeness issuing from its legitimacy.

106. *Id.* at 50.

107. Para. 91.

108. Beale, *Social Justice and Business Costs—A Study in the Legal History of Today*, 49 HARV. L. REV. 593, 608 (1936). The article is particularly noteworthy because Beale therein is basically arguing that the allocation of resources is a function of relative prices which in turn is a function of relative costs and, moreover, that relative costs in the market are partially a function of the state of the law (in other words, that resource allocation in the market is not a closed or self-contained system, and that, by inference, economic analysis can include the role of legal rules, and of alternative legal arrangements, in the allocation of resources.) Beale also calls attention to the macroeconomic impact of the foregoing. See *id.* at 608-09.

109. Beale, Book Review, 31 COLUM. L. REV. 516, 517 (1931).

Beale's own version of sociological jurisprudence was conciliatory toward Frank's legal realism, in search of jurisprudential order in the same way that he saw the common law producing social order. The ideal law becomes essentially a basis for critique (as well as of legitimation) of extant law and legal system.

IV. RELATED THOUGHTS OF BEALE

As might be expected there are innumerable points or discussions of interest in the lecture notes. Brief reference may be made to several particularly interesting or timely ones. First, there is a brief but pregnant reference to the effective publication of personal credit or financial information. This is another example in the notes of how alternative legal rules or arrangements affect resource allocation and income distribution, here through consumer (and business) credit. This is timely in respect to the current controversy over invasion of privacy issuing from the development of data banks and credit dossiers.¹¹⁰

Second, there is a discussion touching not only upon the social-psychological sources of vigilante justice but also upon the complex social factors governing the decision to prosecute (as well as the discretion of police to file charges).¹¹¹ Third, Beale's discussion of tangible and intangible property in relation to wealth is of particular interest to an economist. For example, economists generally tend to consider goodwill as the capitalization of a monopoly (or imperfectly competitive) return, and not a property which does not subtract from anyone else's wealth.¹¹²

Fourth, included in rights in action by Beale, as one class of relative rights, are legally enforceable rights arising from mutual consent through contract.¹¹³ Although normally not seen as such by most people, Robert Lee Hale, the taker of the notes, interpreted the right of private contract with legal enforcement of contract terms as a delegation of governmental power to private individuals and as the basic form of "private government," a concept of which Hale was a major developer. In his *Freedom Through Law*, Hale quoted from a 1910 article (which Beale possibly was working on during the time of his course in jurisprudence), to the effect that when the law allows the parties to a contract to determine its provisions, and thereby the respective rights and duties of the parties, including the choice of which law will govern its validity as a contract,

it involves permission to the parties to do a legislative act. It practically makes a legislative body of any two persons who choose to get together and contract. The adoption of a rule to

110. Para. 290.

111. Paras. 336-37. See Cole, *The Decision to Prosecute*, 4 LAW & SOC'Y REV. 331-44 (1970) and references given therein.

112. Paras. 225-26.

113. Para. 253.

determine which of several systems of law shall govern a given transaction is in itself an act of the law.¹¹⁴

Fifth, there are several interesting passages concerning the relevance of war for jurisprudential interpretation.¹¹⁵ There is a passage in Beale's 1905 article on jurisprudence that is beautiful but, unfortunately, premature: "While all independent states are still free, they are not now regarded as free to become a nuisance to the world."¹¹⁶ There is still no effective "international tribunal with an international army,"¹¹⁷ and we are more immediately concerned with "How Wars End"¹¹⁸ than with an end to war.

Finally, it has already been seen that the legitimation of judicial decision was of continued interest to Beale. The subject remains viable, especially in an age of social discontent. Moreover, the related subject of legal justification has been receiving renewed attention.¹¹⁹ As Hale expressed it, "justice—the custom of regarding things as just" is "based on morality And this, thinks Beale, is the fundamental of law."¹²⁰

V. CONCLUSION

We will conclude with a few words about the editing of Hale's lecture notes. The editing has consisted primarily of completing abbreviated words; separating conjoined words; inserting verbs and pronouns where omitted; and making a few miscellaneous corrections. I have deleted the underlining from the original. Relatively heavy in volume, the underlining was apparently done by Hale at the time he took the notes in class. I also have completed and adjusted the headings of subsections. Some of the organization of subheadings is obviously arbitrary; for example, sections B and C of Part II could easily be rendered as subsection (1) and (2) of A. Finally, it should be remembered that these notes are neither Beale's lectures nor text but rather Hale's notes, as taken by him from Beale's lectures, and transcribed and edited by the editor.

114. HALE, FREEDOM THROUGH LAW 366 (1952), quoting Beale, *What Law Governs the Validity of a Contract*—III, 23 HARV. L. REV. 260 (1910).

115. Paras. 47, 313.

116. Beale, *supra* note 21, at 275.

117. Para. 313.

118. *How Wars End*, 392 ANNALS (November 1970).

119. See, e.g., R. WASSERSTROM, *THE JUDICIAL DECISION: TOWARD A THEORY OF LEGAL JUSTIFICATION* (1961).

120. Para. 75.

Notes by Robert Lee Hale from Jurisprudence Lectures given by
Joseph Henry Beale, Harvard Law School, 1909

I. PROVINCE OF THE WRITTEN AND UNWRITTEN LAW

A. *Jurisprudence*

Feb. 10, 1909

1. What is meant by "Jurisprudence?" There have been many meanings.
2. The word was first used by Cicero and later writers to mean a person well versed in law, acquainted in a scientific way. It was pursued as a branch of learning by the Romans at the time of Cicero and later.
3. It came to have a more definite meaning later, namely, those singularly skilled in the philosophy of things, rather than the particular rules. "Jurisprudence is the knowledge of things, human and divine; of things just and unjust." This is Ulpian's definition in the beginning of Justinian's Institutes.¹ It is the philosophy of the just and the unjust.
4. This has always been one use of the term, but there are many others. One peculiar use in French law and others borrowing French use is the body of decisions of the courts. It is confined to knowledge of the ways courts have decided cases. They have a term "constant jurisprudence," that is, a body of decisions all one way, which they regard as a persuasive authority, though any one decision they do not regard as authoritative. But if a thing is of "constant jurisprudence," then it is regarded as the basis of law.
5. As used often now, however, "jurisprudence" is merely a big, mouthfilling word for "law" [margin notation: "Medical Jurisprudence"]; and when only law is meant, the word is useless.
6. Jurisprudence does mean more than law, but just what more?
7. Jurisprudence according to Holland has to do with the political relationships of men for which rules have to be framed. But Beale thinks that his book does not bear out his definition, he actually does study the actual legal rules; and whenever Parliament passes a new statute, he gets out a new edition. When Holland gets through his definitions, his book is a study of what English law is, dressed in terms of Roman law, so as to seem to be transcending English law.
8. In sharp contrast with this idea of Jurisprudence as the study of actual existing rules of positive law, see Gray's definition in an article in 6 Harvard Law Review: "Jurisprudence is the science which deals with the principles on which courts ought to decide questions."² Gray

1. JUSTINIAN, INSTITUTES I.I.1. "Justice is the set and constant purpose which gives to every man his due. Jurisprudence is the knowledge of things divine and human, the science of the just and the unjust."

2. Gray, *Some Definitions and Questions in Jurisprudence*, 6 HARV. L. REV. 21, 23, 27 (1892) [hereinafter cited as Gray].

goes on to say that we can progress in changing the principles on which they do decide.

9. Holland's working definition is derived from Austin, who defines thus: "Jurisprudence is concerned with positive laws . . . considered without regard to their goodness or badness."³

10. Gray is right, for "science" is a study of truth already existing, not of something we create.

11. Beale's definition [margin notation: 18 Harvard Law Review 271] is that it has to do with existing systems of law, not merely what law ought to be; but it regards those systems not as mere bundles of rules, but as studying their causes etc. "The science of justice as practiced in civilized nations."⁴

12. Holland objects to general jurisprudence—or any other jurisprudence with an adjective. Gray likes "comparative jurisprudence," but says that you cannot have a general jurisprudence, which Beale says is very likely true, but not consistent with Gray's definition.

13. But "general jurisprudence" is often used, and probably means a deduction from all systems of law of the general principles of the science of justice, that is, any system of law is merely evidence of the workings of the human mind in general whenever the needs of justice are presented to it. This is probably what Gray means by comparative jurisprudence; and Beale thinks "general jurisprudence" is as good a name—anyway it is the one in Carter's will.⁵

14. Holland (p. 10)⁶ considers many other definitions of jurisprudence.

15. Two distinct schools of Jurisprudence are the historical and the philosophical. This really means only different methods for investigating the science.

16. In England there is the so-called "analytical school," going back to Hobbes, then taken by Bentham and Austin, and taken by Holland, Austin the exponent of it. The peculiarity which it has is that you will find in Austin nothing about the science of the law but long and laborious definitions heatedly defended. Austin's definition of a term almost always is different from the definition ordinarily accepted. His book is most remarkable, for he is about the only philosopher who sticks to his definition; he is logically consistent, and follows his absurd definitions to their absurd results with logical accuracy. But Beale thinks it is wholly fruitless to form a priori definitions and follow them out without getting them from observation of facts.⁷

[Notes from L. W. Clark, Jr.]

3. J. AUSTIN, LECTURES ON JURISPRUDENCE 176-77 (3d ed. R. Campbell 1869). See T. HOLLAND, THE ELEMENTS OF JURISPRUDENCE ch. 1 (10th ed. 1906) [hereinafter cited as HOLLAND].

4. Beale, *The Development of Jurisprudence During the Past Century*, 18 HARV. L. REV. 271 (1905).

5. The reference is unclear.

6. HOLLAND, *supra* note 3, at 10.

7. On the impossibility of accurate legal definitions, see paragraphs 40, 46, 153ff, 162, 163 *infra*.

B. *Law*

Feb. 11, 1909

17. What is Law?

18. Bentham says that it is the sum total of individual laws taken together. This means that there are certain disconnected rules and that law is the collection of these individual rules. His corollary is that it is perfectly easy to get back of law by collecting the rules. He says, codify. This is a crude notion; Beale says that whatever law may be, it is not a collection of rules.

19. For Austin, a law is a rule laid down for the guidance of an intelligent being by an intelligent being having power over him. (He means a general rule for the guidance of the conduct of a human being.) If an English King wrote a philosophical treatise, it would not be law because it is not a rule of conduct.

20. The rule must be a command and disobedience punished. Obedience is forced by "sanction."

21. There is (1) a command (2) from the sovereign to the subject (3) which is sanctioned (the means of compelling obedience by the threat of harm). Austin would say that if a robber takes one's purse, it is not law because it is a specific and not a general command. If a robber baron takes regular tribute, Austin would say that it is law.

22. Austin says that command and duty are correlative words. Duty is when an intelligent being is commanded where an intelligent commander has sanction. Austin would say that I have the duty to hand over my purse to the robber. This is a queer use of duty.

23. We must differentiate between positive and other law. Positive law is sanctioned by the sovereign. Law set by the parent over the child is a positive law, because it is sanctioned by the sovereign. You have to have a sovereign before you can have positive law. Austin says a judicial command is not law because it is a specific command. This is sound, says Beale; a general command, says Austin, is addressed to practically all people for all time.

24. Austin's definition has been swallowed whole by English writers.

25. But where Austin's definition requires command, sovereignty and sanction, Pollock, an exception, says to limit law to commands, which is the definition of a layman. Salmond also dissents from Austin's definition.

26. Austin says that Law is a Command. Just what does this mean? Suppose that a statute says that anyone who occupies 160 acres in a certain place shall get title. Austin would say that it is a contingent command that if a person does certain things then other people shall not molest him. Law as a command is most applicable to criminal law. Austin has to say that the gist of the law is the sanction. So for contract, according to Austin, the law is not that consideration makes a contract; but that if thus and so is done, one party must pay damages. You have to twist things to make Austin's definition fit. But perhaps his definition can be best supported by the fact that he considers sanction the main cheese.

27. What is the objection to this point of view? What is the fundamental difference between law and precepts of fashion? Is it sanction against violation of rights, or is it creation of the rights?
28. Can we have law where there is no sanction? Austin would say no. Most writers make enforcement of legal rights a necessity in order to have law.
29. Suppose there is a mixed body of immigrants in a new territory. Is there an existence of law in the territory before courts are set up?
30. Suppose all emigrants from a single state go to a desert island and settle. A month later they establish courts. Before the courts, two make cross-promises. Is there law governing this?
31. Suppose a sovereign borrows on his private account \$1000. No action takes place. He is afterwards deposed. Can he be sued? It has been held, yes. If the sanction of the courts is necessary to make law, then there was no law binding the sovereign.
32. Now as to the "sovereign" element. Austin says that the sovereign is a person who does not habitually obey any human superior. Is law derived from a person who obeys no human superior? How about a State of the United States? and the Island of Jersey?
33. Austin would have to say that morality may precede but law must follow organization of the political sovereign.
34. Any definition of sovereignty which loses sight of law is wrong. The sovereign is made such by law.
35. The existence of law is necessarily contemporaneous with political society. The very moment you have a political society, you have a law.

[Notes from L. W. Clark, Jr.]

Feb. 17, 1909

36. Austin's idea of law was not based on any observed phenomena at all; that was not his way. It struck him as an inspiration, or as the result of hard thought, that law meant a command by the sovereign. This is not what law means—unless Austin has his own definition of command.
37. Maine and Pollock also point out that historically most laws have not been commands. The stock example of Maine is the folk law of village tribes of India, of which the sovereign knows nothing—and therefore his command must be a fiction. Pollock cites also with more force the laws of Scandinavian and Germanic tribes. Why take for the basis of a definition of law what must often be a fiction—viz., command of a sovereign.
38. For Thayer, "Law is a rule or standard which it is the duty of a judicial tribunal to apply and enforce." (Preliminary Treatise on Evidence)⁸ Salmond and Gray also adopt, practically, a rule of con-

8. J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 192 (1898).

duct prescribed by the courts. (6 Harvard Law Review etc.)⁹ Pollock's criticism of this is that a rule is enforced by a court because it is law; it is not law because it is enforced by the court. (Pollock's Jurisprudence, 26)¹⁰ Pollock gives as proof of this, historically, the Scandinavian laws, which were laws, though there were no courts at all to enforce them. Vinogradoff has pointed out how states existed long before there was any judicial power; which first came into existence by will of the parties. And Beale thinks you cannot have an established political society without law. In Homeric times, there was law, but no courts—though if they chose they could take disputes to the King. It is not far out of the way to say that today law is the body of rules enforced by courts, or that it is the command of the sovereign if you put a different meaning on command. But it is contrary to all history to say that either of these things are characteristic of law as such.

39. If, however, there may be law without being enforced (enforcement being only a consequence and not a cause of it being law), then how can we distinguish law from morals? The distinction is in the consequences of the given rule: if the consequence affects the obligations between parties in the broadest sense, then the rule is one of law not of morals. (There may be rights which cannot be enforced under existing machinery; and as soon as the machinery comes into existence, rights already created, though hitherto unenforceable, will be enforced. Cf. the deposed king case, *ante*; also promises made before establishment of courts.) Obligation to someone else is what constitutes law. As soon as it came to be a rule that a certain event would give a certain person a certain right against a certain other person, then you get law. Of course, you have got to get some form of political society to get this result; but no enforcement, unless you consider general recognition of a definite rule as enforcement.

40. This is merely a test to distinguish law from morality, not a definition. Beale does not believe in making a definition of law; you cannot make a definition that will cover it.

41. Beale admits that in most societies there is a sense of fairness which makes them recognize the rights, though he thinks this follows the law. But this sense is very different from "sanction" or enforcement.

42. What seems to Beale a statement of law from this point of view, is a body of principles for determining such obligations and rights as are recognized by the State.

Feb. 18, 1909

43. Whatever view we take, the body of rules in force in a given

9. Gray, *supra* note 2; J. SALMOND, JURISPRUDENCE ch. 1 (2d ed. 1907) [hereinafter cited as SALMOND].

10. F. POLLOCK, A FIRST BOOK OF JURISPRUDENCE 26-27 (2d ed. 1904) [hereinafter cited as POLLOCK].

place adopted or commanded by a sovereign is the only kind of law recognized by the writers.

44. Is there any other kind of law? The law taught in Law School is not the law of England or of Massachusetts or of any one place. Austin would certainly not call what we are taught, law.

45. But is it proper to speak of international law, or the law merchant, etc? How about the common law? We study here the common law, that is, a body of principles which are the ideal principles supposed to be accepted by a number of countries but not by any means identical in any two countries. By the Common Law, we mean an ideal, not an actual, system of law, which is the basis of the law of any common law country. The same is true with Civil Law. Austin etc. say that it is improper to speak of international law. But it is an ideal system, part of which is adopted by the sovereign of any given State as part of its common law. If one sovereign in adopting it errs in its understanding of some rule of international or of common law, to that extent its law differs from the ideal principles of international or of common law. And we learn more by studying the ideal system of common law than by studying the law of any one State; for we study the fountainhead from which the law of each common law country is derived. The "common law" as we use it has never been the "positive" law of any country. And it is foolish for Austin to say that this use of "law" is wrong, when it is the most frequent meaning men have when they speak of "the law."

46. "Law" is an ambiguous term. There is not much practical difference between the ideal common law and the common law of a given common law State—and that is why we do not note the ambiguity easily.

47. To illustrate this:

What is the legal nature of war? There is a system of the Law of Nations. When a State decides to be civilized, it accepts this ideal system as part of its law (so far as it is not mistaken as to the principles). When one State makes war on another, it merely says, that as to that State it withdraws from acceptance of principles of the Law of Nations—it will act towards that State as if it were not bound by the Law of Nations. What does the State reject?—its understanding of the ideal principles of the Law of Nations, not of the law of any one country.

So, when a State decides to accept the Law Merchant it accepts as part of its law the principles worked out by merchants, which may not be the law of any country.

48. So we cannot properly keep out of sight that meaning of "law" which is not the law of any country, for example, law merchant, or law of nations. Common law is the same, though it happens to have had a definite time and place of origin.

49. In saying that this meaning of the common law is an ideal law, we do not mean to exclude from its principles certain technical requirements which all common law lawyers would say were settled though anomalous. We mean merely the common law of an ideal State (not the actual territorial law anywhere).

50. The two meanings are so nearly identical in practice that we generally do not recognize the difference, because each common law State has adopted the ideal law so far as it knows; and the constant tendency of American decisions is towards uniformity; that is, conformity to a type; what type?—the type of common law in the ideal sense.

51. Essential Characteristics of Law. Assume it to be a body of principles; what must be the nature of those principles? The must be:

1. General, not particular.

A special divorce is not law. Adoption of the Hilary Rules by a court is law. A judgment is not law; it is personal. When the Chief Executive, by authority, makes a public proclamation, it is law; it is not law, but an order, if he opens a public forest.

2. Universal.

Every act must be covered by the law. If the characteristic of law is to change rights, then everything which happens must happen under law, and either change or not change rights.

3. Predictable.

It must be possible, before an event happens, to know what the law is as to that event; it must exist at the time the act is done and since that is so, and since it must be general, it must be possible for lawyers to know. It must be an application of general principles previously existing.

Feb. 24, 1909

4. Continuable.

Law which once comes into operation must continue until changed. There cannot be any law which bobs up every few days and then disappears. So either the original law, or something which has taken its place, must always be in existence.

52. The reason for these four requirements: what is the good of law? It exists not simply to enable judges to decide cases. For one case brought to trial there are millions of things (with or without consulting lawyers) in which we follow the law. Every time we turn to the right when driving, or buy goods etc., we are acting on an existing law. If there were not any law giving us legal title to a thing we buy, we would not buy it. When we go further in some complicated business transaction, we go to a lawyer to find out what is going to be the legal effect of that transaction. This is one thousand times more important a part of a lawyer's work than arguing before courts. Businessmen know

themselves some of the settled principles, for example, that a contract requires consideration. It is only the novel and complicated questions on which a lawyer is consulted; and then he is consulted as to what the law is; therefore we need predictability and continuity. He is asked advice on the legal result of future actions. If there was not any law on novel things until the Supreme Court decided, then he would not be consulted. When he argues in a brief, he is arguing what the law is.

C. *Nature of the Common Law*

53. What is the existing content of the common law?

54. (We can tell more or less what the statute law is.) What is the common law? Is it a collection of court decisions? We have a large number of "common law jurisdictions." In general, their common law is supposed to be in agreement, though they conflict in different particulars.

55. Suppose an Oklahoma court has never yet decided that a contract requires consideration. Is it required by Oklahoma law (before it is decided by an Oklahoma court)? May we assume that the court of the particular jurisdiction need not have decided on the particular question in order to make it law? Yes, it would be agreed that we do not have to have a decision in the particular State to have law. When it is decided, the decision as such is not law, but the reason for the decision. Besides, it is not the reason given in the decision which is the law (it may be obiter, or wrong).

56. Is it the body of common law decisions generally (the "constant law") which constitutes law? To test this, take the territory in the State of Georgia. If in the same town, two men each hits one other man over the head, of course (other circumstances being alike) we would agree that both must be torts, or neither, torts. We cannot conceive the same thing by the same law to be both a tort and not a tort.

57. Now for some time after Georgia became an independent State, there were two supreme courts, each having jurisdiction over one-half of the State, and no appeal from one to the other, or to any other court—no common superior. So there was nothing to prevent one of these courts deciding one way and the other another. Suppose the question of one of these blows came up in one supreme court, the other in the other (merely because the persons lived in different parts of Georgia); and one court holds the blow tortious, the other not tortious. What is the law on it? If one of those decisions created the law, the other did not. Yet one court has as much weight as the other, and there is no superior to choose between the two. (The courts were sitting for different parts of Georgia, but not for acts done in different parts; each decides as to the law of Georgia, not the law of one-half of Georgia.) This shows the difficulty of saying that the decisions of courts make the law.

58. Suppose a tenant for life without impeachment of waste cuts down an ornamental tree. Either it must be permitted or forbidden by

law. A court of law would say that this was not wrong; a court of equity would say it was a wrong. The settled doctrine of both is as above. Each court has as good a right to decide as the other. If the decision is law, then we have got mutually destructive decisions. Langdell's Brief Summary of Equity Jurisdiction, 251, puts this well. "Either court may be wrong, and one of them must be."¹¹ When a court of equity and a court of law differ in their definition of a legal right, then if we say that the decision of a court makes the law, we have got an unaccountable state of affairs. The decisions per se cannot be law.

59. Prior to the Judiciary Act of 1873 in England, there were three coordinate courts (King's Bench, Common Pleas and Exchequer), from which appeals were very seldom taken to Lords. The three gave conflicting opinions. Were these conflicting laws? Of course not; therefore the decisions were not the law.

60. Why not believe judges when they say (as they always have) that they were merely deciding what the law was as it already existed?

Feb. 25, 1909

61. When a judge decides one way rather than another, it is because there is something already existing which constrains him so to decide. A judge always is constrained—he is not free to make any rule he sees fit; therefore he does not make the law, but only interprets it as it exists. The Legislature does make law: it has the option to make or not to make a certain proposed thing law.

62. So much as to what is not law. Now as to what is the law. What is the source of the law? We consider first, what various writers have said; Beale's own statement coming later.

63. There is not any one source of law.

64. Probably one of the most important, is the current idea of right—the moral conception of lawyers. This view of source goes back very far. Ulpian, in Justinian, talks of it; and there is no question that the greater part of Roman law was derived primarily from the notions of justice prevailing, not from any formal enactments; that is, in determining what the law is on any particular point, there being no other guide such as statute or opinion, the judge is constrained primarily by his idea of justice or right.

65. Carter thinks that there is a conception of justice; it is connected with custom, meaning the custom of thinking what things are just.

66. Austin, on the other hand, says "just" means merely "in accordance with law." If this were so, we could not speak of an unjust law. If he is right, of course, justice cannot be a source of law.

67. Pollock speaks of conflict between "legal" and "moral justice" and says that not only is moral justice an important source of the law,

11. C. LANGDELL, A BRIEF SURVEY OF EQUITY JURISDICTION 251 (1905) [hereinafter cited as LANGDELL]. "Either court *may* be wrong, and one of them *must* be; for the question depends entirely upon the legal effect to be given to the words, 'without impeachment of waste,' and that cannot depend upon the kind of court in which the question happens to arise."

but if this were not so as a whole, that would be the end of obedience to the law. He says "morality and law cannot move at exactly the same rate."¹² By "morality" here he means our ideas of morality; and that as men's ideas of morality progress, the law also progresses, only not so rapidly. So a change of law to bring it more in accordance with morality is slower than change in the ideas of morality, but it follows it.

68. Gray (6 *Harvard Law Review* 33)¹³ says even modern law is largely as it is on account of judges' ideas of ethics. He thinks also (p. 30)¹⁴ that in the absence of decisions and statutes, a decision on any act is a decision as to the morality of that act.

69. Another source of law which is urged is custom. How far is custom as distinguished from morality a source of law? Custom alone is no source whatever. The custom of stealing in Blackheath did not make stealing there lawful.

70. But custom might mean, the custom of the courts to decide one way—which is merely precedent. This is what we mean by the custom of Englishery; or the custom of England as to carriers.

71. But we do not usually mean this sense in talking of custom as a source of law, but the custom of the people as to thinking what is right. This is somewhat different from the feeling of the judge as to what is right, and it ought to influence the judge to some extent, and five hundred years ago it was a very important source. Now judges' own ideas of ethics and economics have more relative importance.

72. How about the custom of turning to the right in the United States and to the left in England? That means that it is better ethics to make that custom law, and in that way, it is all right.

March 3, 1909

73. Law is coeval with organized political society. You cannot have one without the other. It takes law to have an organized political society; and on the other hand you cannot have law without organization; without a political tie there can be no legal tie between people. Law, as distinguished from morality, is political in its nature.

74. It is conceivable that the earliest political society existed without judicial or legislative functions. The earliest society in Iceland (as shown by sagas) certainly was without judicial function; the injured person took the remedy in his own hands. There was some sort of legislature and executive.

75. Also, it is possible to have no legislative function. But in all earliest societies there is a law. We cannot say that it had any origin, any more than we can say there is an origin in human thought. There was a time when there was no law, but the origin of it must have been insensible; it did not come into being by some act or event. Beale

12. POLLOCK, *supra* note 10, at 33.

13. Gray, *supra* note 2, at 23, 33.

14. *Id.* at 30.

thinks public opinion was the first creator of law, if you can speak of the creator of a thing without an origin. This is what is meant by the origin of law being custom, custom never having an origin either. What custom is meant as the first law? There was custom before organized society. It was custom for man to kill and eat his neighbor. But this was not law. Law is something which restrains custom, not justifies it. Most writers do not keep this distinction in mind; even Carter does not make it clear, though Beale thinks that is what he has in mind when he says that custom makes the law. What kind of custom, then, makes law? The custom of regarding a limit on conduct as right; law is something which prevents people from doing as they please. The real basis of Carter's proposition is this: that to make law really law, you have got to have behind it justice—the custom of regarding things as just—and this custom he says is based on morality, only not the speculative morality of those of the highest moral sense but the customary morality of the body of the people. And this, thinks Beale, is the fundamental of law.

76. This brings us close to the idea that the origin of law and the origin of religion are pretty close. And it is true in most peoples that the first people to act as judges were the priests; they have a knowledge of the law. The primitive conception of law, then, was not the custom of the whole people, but of the priestly caste. That caste tells what is the proper thing to do. There was not necessarily an ethical element at first in either law or religion; but before law got out of the hands of the priests, Beale thinks the ethical element did come into both law and religion. It is pretty significant that in most languages there are two distinct root words applied to law: "just" (in accordance with law), and "right" (in accordance with ethics).

77. Certainly law in as primitive times as we know anything about, had an ethical element.

78. The next stage is where law comes to be administered not by the priestly caste but by the popular court, and then the customary element becomes plainer, it became customary through and through. But the custom got to be the custom of the court. To use later language, if a man could bring his case in one of the customary writs he could have his action; and if the defendant could set up his defense in one of the customary writs, he could set it up, otherwise not. The customs all had to do with remedies. This was the law of Greece in historical times and of England in historical times. This is the way law was administered in the folk courts. There were no lawyers and no judges (in the modern sense). The members of the court were no more judges than they were jurors. As members of the court they have grown up with the knowledge of what that court does, and vote in accordance with the custom of that court. But the members were the whole people, not a class of lawyers.

79. It is often said that the common law had its origin in the custom-

ary law. This is untrue; it conflicted with and finally overcame and superseded the customary folk law.

80. Customary law is not the habits of the people; but the habits of the court. This customary law answered in primitive times, but not far into modern times, though the popular courts lasted in Greece well into historical times, and into the 16th century in Germany. Technically they lasted in Rome through the Republic, but were practically obsolete in consular times. Technically it lasted in England (at least as to trial by battle) until 1818, but practically it had long been obsolete.

81. This customary law is to be very sharply distinguished from the common law of England, which is judicial in character. Its principle characteristic is that it requires a scientific knowledge on the part of a legal caste, thus coming back to a characteristic of the most ancient times, where it was in the knowledge of a priestly caste.

82. Before Henry II, the King was only one of the feudal landlords, and had no courts of his own, except the ones where the lands holding immediately under him—his own manorial courts. Henry II during the reign of Stephen had been Chief Justician in the King's manorial courts, and had travelled all over England to these courts. Therefore he was a trained lawyer, as much as anyone in those times, familiar with the customs of many manors. He also had the Plantagenet centralizing mind. His two motives were centralizing power in the King, and simplifying the law in all the manors. He therefore created judges whose duty it was to travel through England administering justice. These judges were nothing like those who hitherto had been presidents of the King's courts. But these judges were to administer justice to all applying. They (1) created a "King's Peace," and brought into court all violators of it; and (2) they let anyone with a dispute over land bring a King's writ and have it settled in the King's courts by the assize.

83. [deleted]

84. Both of these were *extra* the old law; crimes were before only a matter of popular courts and disputes over land were to be settled in manorial courts.

85. When these judges were created, how were they to determine what the law was? Glanville gives this account: the judges were ordered to decide in accordance with the customs of the manorial courts tempered by "equity," that is, the ethical element in the law. (Found in Introduction to Glanville's Treatise.)¹⁵

March 4, 1909

86. The first effect of putting law into the hands of judges is that the test of law is reason. In folk law, law is determined by recollection alone. In the second place, with professional judges, it is determined more or less by precedents, which are regarded not as evidences of custom, but as evidences of the existence of a principle.

15. Beale wrote the Introduction to A TRANSLATION OF GLANVILLE (H. Beames transl. 1900).

87. The customary law seems to have been built on the law of the priests; but as soon as it became customary law, it ceased to have any elements of growth; and whether or not the priests had reason in making their law, the customary law is professedly based only on recollection. In theory, there is no possibility of growth in it; but in practice, it does grow due to erroneous recollection.

88. But judicial law does have a principle of growth in it, because it is based on reason.

89. Nature of Law Judicially Administered. Beale will speak chiefly in reference to English common law; but what is true in that case is true also of all other judicial systems.

90. The nature of this law is that it is a method of thought rather than a body of fixed rules. In the earliest period of it, it cannot be dignified with the name of a science; but it is a body of doctrine; the judges consider themselves bound by law, and as determining a question in the only way in which it can be determined. Of course they may be mistaken in their decision, but they purport to decide in the only right way. The judge may be wrong in his assumption that he has reached the right way; but he is right in assuming there is a right way.

91. How is the right way to be determined? Law is a "mystery" in the proper sense, that it is in the peculiar knowledge of those specially versed in it. This is necessarily so in all law administered by the judges; there must be a body of men specially versed in it. When you say law is a method of thought as to what is right, you say it must be established by thinking about it; and, as many cannot think about it, those who do are a class having it in their peculiar knowledge. It is the opinion of those expert in that method of thought, which is the law. How do you tell what is the law of Massachusetts today? You can of course ask the judges, as special experts; but they will not say unless a case is brought before them. The law of Massachusetts is what the body of the Massachusetts bar thinks it is. It changes when the opinion of the bar changes. And it is changing all the time.

92. How does one become an expert in the "mystery?" By acquiring from those already expert such knowledge as they can give. In the middle ages, persons were apprenticed to the law just as any other "mystery." The lawyer who was not a "serjeant" (journeyman) was an "apprentice." After seven years' apprenticeship, he took the degree of serjeant-at-law, which meant he had learned the mystery, and was admitted to practice at the Common Bench.

93. He learned by listening in the court; he argued most cases; he listened to lectures from the bench to the serjeants; and in some cases could argue, but not take a fee. He thereby became familiar with the method of thought of the court, and by so doing for seven years was competent to be a part of the body making the law. Serjeants just as much as judges (so far as office went), knew the law. The judge's position was only different in that he officially stated in actual cases what the law is.

94. The bar is the body whose opinion of the law is the law for the time being. The law is not merely the opinion of the judges, though the best evidence of it is the expression of opinion by the judges—that is what they are there for.

95. The above gives the origin of the law so far as it is based merely on reason. But there is always this factor involved: one of the most fundamental principles of justice is that all persons should be treated alike. So what has been done once by the court ought to be done a second time in the same kind of case between other parties, unless there is some very good reason for changing. Any body of men dealing with others, and anxious to do justice, will act on precedent, because to violate precedents is to treat one man differently from the way another has been treated; and that is something wrong.

96. The extent to which precedent will be followed differs in different countries. In England, it is followed more than here, which is natural, for we have more Supreme Courts. In Germany and France it is less binding than with us; in Spain, absolutely binding.

97. These differences merely indicate differences in the prevailing opinion of the bars of the different countries as to how far the doctrine of stare decisis should be carried.

98. In the United States, the principle has been weakening in the last one hundred years. In England, too, the force of "precedent" as opposed to "principle" has weakened; thus *Quinn v. Leatham*¹⁶ practically overruled *Allen v. Flood*,¹⁷ which could not have been done sixty years ago.

99. How does law change? A decision per se does not change it. We have an erroneous decision; the Supreme Court reversed itself within a month on the income tax; there wasn't any change in the law caused by the first decision.

100. The change coming in judicial law, is a change in the opinion of the bar. A decision of a court probably has most effect on changing the opinion of the bar; but it is not the only thing.

101. If a court, which has the confidence of the bar, makes a decision which surprises the whole bar, the bar will, 999 times out of 1000, accept the decision: 1) because they think the court will again decide the same thing; 2) because they respect the learning etc. of the court. Then the effect of that decision is very soon going to change the law, practically from the moment of decision.

102. But in cases like *Haddock v. Haddock*,¹⁸ we have a decision accepted by all as erroneous, and Beale thinks that it will not and has not changed the law.

103. A greater factor than judicial decision, Beale thinks, is the

16. [1901] A.C. 495.

17. [1898] A.C. 1.

18. 201 U.S. 562 (1906). Beale discussed the case in *Constitutional Protection of Decrees for Divorce*, 19 HARV. L. REV. 586 (1906); *Haddock Revisited*, 39 HARV. L. REV. 417 (1926); and 1 A TREATISE ON THE CONFLICT OF LAWS 497-500 (1935).

current ethical thought of the time. It is much easier to go counter to a previous decision of the court, than to go counter to what the whole mass of the people think right. The court would probably not overrule expressly the former decision, but restate it in such a way as to get away from it.

104. (These factors only come into play to change the law.)

105. A third factor, is change in economic and social conditions. This does not mean the whole law will be changed, but only in those rare cases where the old law is counter to the new conditions.

106. A fourth factor is a conscious desire for reform which occasionally leads to a change in the law. (The other changes in opinion, of the bar, being unconscious.) This conscious feeling of the bar that law ought to be something different, runs into a feeling that the law is that different thing.

107. A fifth factor is change by equity.

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108. All the above four factors changing the common law are factors operating in the law itself, that is, operating on the opinions of the bar. There is an outside influence working on and changing the law in spite of the opinions of the bar, that is, what Roman and English law call equity. Ames says that the distinction between equity and law is ingrained in any system of law. In one sense, it is clumsy and surprising that we find it in two great systems. But in another sense, Ames' statement is true. Law is thought of often as a system of rules (though Beale does not think that is what law is), even apart from the archaic "customary law." Anyway, it is a universal tendency of the human mind for principles to be formulated in fixed rules; but it is also a tendency to want to make exceptions to these fixed rules, in cases where the principles would work hardship. And if we regard equity as the formulation of the exceptions to the fixed principles, then it is true that the distinction between equity and law in the human mind is innate in any system of law. And, Beale thinks, equity is a generalization of exceptions and an engrafting of the principles of the exceptions on the body of the common law.

109. (It is also true that there is a tendency to a fusion of equity and law, for example, justification for crimes, equitable defenses to contracts, etc.)

110. Of course, English equity is more than the generalization of exceptions; but so far as it is more, it is certainly not innate. Thus, there is the distinction between legal and equitable interests in property, though there is an innate distinction between a principle and its exceptions. The nature of equity, when separate, is to modify rules of law. When the obligation or right is once created, there is no distinction between the case when it is created by law, and when it is created by equity,—as Beale has said in *Conflicts*.

111. By this way of changing law by outside pressure, there are two

bars, legal and equitable; and this way of changing is as common as by changes in the opinion of the legal bar itself. Of course before the merger of law and equity, the two bars had practically reached agreement as to both principles being part of the general body of the law of the land.

D. *Legislation*

112. We will consider later what legislation can properly affect. But now, its nature and growth of the legal power of legislation will be considered.

113. Legislation may be defined as "the legally expressed will of the sovereign," as distinguished from the legal opinions of the bar. In its origin, it is indistinguishable from judicial law, we do not know whether the first orders of the King were expressed judicially or legislatively. The King's expressions of opinion of law were probably the origin of both judicial law and statutes, that is, he expressed opinion of law both in particular cases litigated before him, and in general without a case litigated (though it was usually made to fit some case). From that, the step was easy to a general statement by the King of what he wishes. An example is the Praetor's Edict in Rome: the Praetor at the beginning of the term gave an edict stating what principles would govern him as a judge. This differs almost not at all from the early legislation by the Kings. Earlier statutes are simply edicts of the King which are statements of his personal will. Beale is not an historical authority on statutes and can find no one who has worked out the history of statutes as distinguished from other law. So what he gives is based on superficial facts. In Beale's opinion, however, the first statute properly was simply a personal statement of that King's will, ceasing at his death. This is indicated by the fact that the early statutes are described as the laws of such and such a King. When the Normans conquered England, the demand was not for the re-establishment of Saxon laws, but of the laws of Edward the Confessor. Magna Carta was re-issued by Henry III, and again by Edward I. As long as the King was thought the source of statutes, it was apparently thought necessary for new Kings to reissue statutes.

114. This Beale thinks continued until it got to be an accepted doctrine of constitutional law in England (this all applies to England) that the function of legislation came to be localized in a local body the King in Parliament. (It had probably always taken place in the court of the King.)

115. When Parliament came in, we get the conception of a Peerage and of a Commons which never end, and thus two of the three parties legislating did not end. Certainly after 1295, we had no more necessity of re-enactment.

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116. It is often asserted that the power to legislate is controlled by law, just as the courts are controlled. Is this true? In one sense, not at

all. In making a statute part of the law, the legislative power is uncontrolled. Of course every expression of sovereign will, even in statutory form, is not law. If Parliament passes a statute to the effect that hereafter the sun shall rise in the west and set in the east, it is not law (though some dispute this). The field of law is the field of human action within the control of the sovereign. Thus it is not law if (1) the sovereign expresses a will as to something other than human action; or if (2) he expresses a will as to acts outside his power. Thus if the English Parliament says whoever in New York slanders the King of England shall be guilty of a crime, it is not law. If it said whoever slanders the King in New York shall be punished when he comes to England, this would be law, and the crime would be committed when the man came to England. If the former one by its terms applied only to Englishmen, then Beale thinks that it is not law, but an executive command to the certain class named, a command on their allegiance as British subjects.

117. But this is not the limitation meant when it is said that it is impossible to make any law by statute which is not in accordance with the "general genius of the people," or with "the common honesty," etc. Such assertion is not true. The sovereign legislature may make a statute which is contrary to ethics, contrary to the genius of the people, and unenforceable. Yet it would be law. The sovereign legislating is not controlled by preexisting principles, while the judge is merely deciding in accordance with legal principles.

118. But though the sovereign is not controlled in legislating, nevertheless, to be really successful, legislation must have certain characteristics, which we will take up later. But now we consider what is the nature of a successful statute. The result of a statute is an effort at the re-adjustment of the previously existing law in conformity with the statute, that is, the living body (the common law) must conform itself to the thing stuck into it (the statute), or the statute is unsuccessful. How is the living body going to conform itself? First, we have the principle that the common law principles persist in spite of the statute, except so far as the express provisions of the statute interfere. As a corollary, it is impossible to step from a common law basis to a statutory basis.

119. The force of the common law is greater than merely to persist where not expressly changed by statute. The force of the common law attacks the statute and modifies it. This would be absurd on Austin's theory of law being a command of the sovereign, for if this were so, the courts would tumble over themselves to give effect to the sovereign's will. But the fact is that the courts always round off the edges of the statute, that is, they apply common law principles to modify, not the language, but the application of the statute; they do this in some justifiable and some unjustifiable ways.

120. The crudest way they do this, and one wholly unjustifiable, is to follow the "spirit" or the "equity" of the statute, disregarding its

words. This is done, and is really the commonest way by which the common law assimilates the statute.

121. Another way less unjustifiable, is what was done with the Statute of Frauds: the court says, "yes, this statute is a principle of law; but there is another common law principle also applying to the case, and we will get the resultant of the two principles." Thus, a man makes a contract of service void under the Statute of Frauds, and does the work. By the Statute, the contract is void; but there is another principle (of equity) that when a man has worked for another, he may get reward. So the court says that the contract is void by the statute; but we can let him recover without the contract. This process is not really a modification of the statute, as the first process was. The modification under the second process is an insensible one, taking effect by modifying the interpretation of the statute. Thus, a statute says that anyone killing another with malice aforethought shall be hanged. A sheriff acting under a warrant hangs a man. He has killed a man with malice aforethought, and is within literal terms of the statute. What the court does is not to act on the spirit of the act; but to interpret the statute (by a rather strained interpretation) by saying the words of the statute mean (being interpreted by common law) that a man under the description shall be hanged if the common law elements of a crime fit; the courts say that is what the words mean, not that the sovereign said one thing and meant another.

122. To be a really successful statute, it must be capable of having its corners rubbed off, and of being assimilated by common law. The test of an absolutely successful statute is such complete assimilation with the common law that the ordinary person will not distinguish it from the common law, like the Statute of Frauds, Statute De Donis,¹⁹ etc. A statute which does not become consistent with the common law will either be repealed or forgotten, like the Connecticut blue laws, but it is law just the same. A statute which does not get along with the principles of common law is law, but not good workable law.

123. What is the province of statutes, of the written law? We do not mean in discussing this, what is the field in which the sovereign has the power to pass statutes, but what is the field that needs statutes, and on this question much light is thrown by showing that a statute to be successful must be assimilable. It is only where assimilable that the sovereign should, wisely, act. And here, too, we can discuss better by looking at facts than a priori reasoning.

124. Holland makes a fundamental division of law into public and private law, and defines the former as all law to which the State is a party, the principle division being the criminal law. Beale thinks that Holland is totally wrong in making this a fundamental distinction. If it were, crimes, government bonds and torts on government property

19. 13 Edw. I, c. 1 (1285).

would form one grand division of the law. Beale thinks that it is a purely accidental circumstance that the State is a party.

125. Beale by public law means all constitutional law in the broadest sense. This is the proper field for legislation. He means by it all law having to do with election of public officers, revenue laws, etc. Beale would also include in the proper subjects of legislation, criminal law to this extent, law enumerating crimes. These subjects form, Beale thinks, most of the annual laws passed in the United States.

126. If you add to these what Beale thinks are not true laws but executive acts of legislatures, such as the creation of corporations and appropriations, then you get 99% of what has in fact proved the proper subject of legislation.

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127. Our legislation is of three kinds: Federal, State and city by-laws. But Federal legislation is practically all that can be grouped under public law.

128. As for state legislation, the Massachusetts legislature is the busiest, partly because anyone asking for anything gets a hearing. Massachusetts Revised Laws is a good illustration of what legislation is actually passed in the States. Analysis: (1) it has been called "Public Law" by the revisers, but it really contains a good deal of what we would call private. But the first part of it is public: judicial, charitable, revenue forming, corporations, servers, etc. All this is not law at all in our sense (merely orders), or else it is law affecting the forms of government. Then there is also the body of laws as to licenses, police laws, fish and game, labor laws, etc.—these have to do in part with the administration of government, and in part with matters which might more properly come under the criminal law. The Statute of Frauds is also put here, and that is almost purely private. It is put here because it is headed "an act to prevent frauds and perjuries," but it is not a prevention by penal treatment, but a change of the common law—the only one so far making change in common law.

129. (2) Purely private law: (a) conveyances, etc., and descent of real property (common law being considerably changed here); (b) also a division for settlement of estates—this is all either a statement of common law principles, or change in them and adoption; (c) the third part is marriage and divorce—also having to do with common law.

130. (3) It deals with courts and their procedures. (4) Crimes and punishments—this does not mean that it affects common law as to crimes, but jurisdiction, etc.

131. The second subdivision of the Statute of Frauds is the only part of the above having to do with common law.

132. This amounts to regulations as to certain forms of doing business (conveyances etc.), rules as to inheritances, which were statutory from the start (based on English statutes) and the regulation of family

ties (originally regulated not by the King's law, but by the Church, and on the breaking down of the civil power of the Church had to pass to common law by statute).

133. So we have a very narrow range of successful statutes. Those actually touching common law could be put in two or three pages of print, that is, the kind of law with which lawyers have to do has practically no statutes at all other than those to do with forms of doing business and procedure, and such things as marriage and divorce.

134. As to the third class of statutes—city ordinances etc.—President Eliot has said that none of this is legislation affecting law. This is a natural mistake, because the ordinances are grouped under heads of departments. In Cambridge, they have been separated out, and it has been found that about half have to do with the organizing of departments, the other half affecting individuals. But about half of this last half have to do with buildings; others are regulation of trade; also regulation of the use of public highways and public places, and also regulation of police. This shows that most actual legislation does not affect the bulk of the law.

135. The same would be found in foreign countries except that they have usually codified the private law.

136. Why is legislation in fact limited in this way? What is the effective field of legislation? Of course, in the first place, all the constitutional law in the broad sense (organization of government etc.) is necessarily statutory. The creation of crimes is also recognized as well within the sphere of legislation, and the whole subject of penology. But this is all the public law, affecting the State. What part, then, has legislation as to private law?

1. Correcting errors—mistaken doctrines which are found not to work well. Such legislation is efficient.
2. Often efficient to meet changed conditions. Success depends on the rapidity of common law to change to meet changed conditions.

137. Dicey's "Law and Opinion of the 19th Century"²⁰ shows change in England has been almost wholly statutory. Beale, in an address before the New Hampshire Bar Association, showed, as to public service law, that changes in the United States had been brought about by changes in common law, that is, in opinions of the bar.

138. There are certain advantages and disadvantages about both kinds of changes. If your legislation is framed by competent persons and you can be sure that it will not be tinkered with by incompetents later, then it is better than change in common opinions. But if done by haphazard legislation by a legislature chosen not primarily for wisdom,

20. A. DICEY, *THE RELATION BETWEEN LAW AND PUBLIC OPINION IN ENGLAND IN THE NINETEENTH CENTURY* (1905).

then legislation is bad, for example, Granger legislation, and present anti-railroad legislation.

139. As a matter of fact, legislative changes in private law are brought about nine out of ten times thus: a lawyer loses a case, sees an injustice, forms a statute to obviate that injustice, and takes it to the legislature. Usually he is not wise enough to foresee its effects other than the particular injustice in mind. Whether it is passed or not depends on other things usually than its intrinsic merits. In some States, Governors have the practice of getting expert advice on such statutes.

140. In England; all legislation is framed first by legislative experts as to their form, but not on substance.

141. On the other hand, the rules of courts are formed by men who have devoted their whole lives to just this kind of thing, they have the experience of the whole of English law for 1800 years.

142. That is a handicap which legislation has got to meet.

143. Can we find any characteristics to which successful legislation must conform? The best thing on this is Carter's book. His argument is on pp. 224 and following.²¹ He first takes up Bentham's argument that all we have to do is to find human needs, and then everyone can read the law you pass by legislation and see what the law is. Bentham says that common law is like a man training his dog by punishing him for transgressing rules he has not been taught. But Carter points out that that is the way men naturally learn all laws including natural laws. Bentham would have children taught the laws by heart.

144. Just how can you make law more effective in human life? Carter's answer is: law and habit interact, the custom of thinking about right affects the law, and the habit of centuries of the law affects the habits of the people. English people must act in accordance with the English law. The experiment of trying to live under a different law has been tried several times by English people. The law of Moses was adopted as an ordinance by the Massachusetts Bay Colony, and it was an absolute dead letter, because English people were not adapted to live by such laws, except as to things properly within the field of legislation, the creation of certain crimes.

145. When Louisiana became a State, a careful Code was framed in accordance with old French law by Livingston, one of the ablest lawyers ever living. But the State was filled up by Americans, and today, with one or two peculiarities, the law of Louisiana is as much the common law as any other State, because the bulk of the inhabitants are accustomed to live by common law, and cannot be made to live any other way.

146. Common law cannot be effectively changed by legislation, unless the change is in the line of the common law.

21. J. CARTER, *LAW: ITS ORIGIN, GROWTH AND FUNCTION* 224ff (1907).

147. You cannot make a successful prohibition law where there are many Germans, because they are not accustomed to that kind of law, and cannot change in one generation. But such laws are effective in communities where there has been a permanent change in the habits of thinking as to liquors.

148. The province of legislation is to follow custom, not to lead it; or if to lead it, to lead it by a very short lead. If a statute is way ahead of current opinion, it will either be disregarded or repealed. You can, probably, though, have a statute up to the leading current thought. So the two fundamentals of statutes affecting private law are: (1) correcting errors (that is, where common law is not in accordance with current opinion) and (2) keeping up to current economic opinion.

E. Codification

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149. We mean by it strictly, as used by Bentham and the French codifiers, and in the recent heated discussions, the reduction to statutes of all the principles of law (not things like the Massachusetts Revised Statutes, which simply reduce the statutes). Codification, as defined above, had the movement for it started by Bentham on grounds we saw yesterday; and was followed by Austin, the Mills and other English utilitarian writers. At the same time Codes were adopted in Prussia and France; and the Field Code rejected in New York but adopted in California. Also partial Codes have been adopted, as in the case of the Code of Civil Procedure and Penal Code in New York. Complete Codes have also been adopted in most of the other countries of Europe. So we cannot say that it is impossible to frame and pass what is called a full code.

150. There are two types: 1) the Napoleonic and German Codes, framed by a commission after much discussion, submitted and criticised and criticisms adopted by the commission after much deliberation, and finally promulgated; and 2) the California and Louisiana (Livingston) Codes, which were drawn up by one man each, and adopted by legislatures which had no idea what they were passing.

151. Carter, p. 258,²² points out that when Mill etc. wrote, evolution and science had not been worked out, and these people had not worked out principles of causation in psychology etc. They did not see that you could not make a man think right by pointing out to him the right way of thinking a priori.

152. Bentham's reason for codification—making the law known and certain—was not the only reason for codification. Where it has had any success, it has been in unifying the different laws of the country. The Napoleonic Code did this, and also the Prussian Code, which was

22. *Id.* at 258.

for the purpose of making the same law for all Prussia. The same is true with the recent German and Italian Codes, the laws of different states could be unified only by legislation. So there has always been the second object of codification for the reform and uniformity of the separate laws. The same thing was also done without codification by the common law adopted by Henry II, but that probably could not be done now.

153. A third objective urged for codification is given by modern Benthamites [margin notation: Holland] who have generally abandoned Bentham's argument, namely, that by codification we can state existing principles of law in a more scientific form than they are stated in cases, and thus enable not the populace but the lawyers to get a clearer idea of the law. This supposes that the code will be the most scientific statement, but this does not depend on its being a code, but on the amount of science used in making one; and this would be just as useful if it is scientific if not a code.

154. Now let us examine the allegation that a code can be adopted which will accomplish some one of these purposes. We will take up the last first, whether the code can be adopted which will clarify the law.

155. No code has been framed as yet for which any of the theoretical codifiers except the framer of that code has a good word to say. You cannot please any condifier with any code but his own, with the possible exception of the present German Code which is the best ever formed, and conforms more to Holland's idea than any other framed.

156. As to Bentham's argument, it is quite clear that no Code has succeeded in making every man his own lawyer. Nobody now has any idea that Codes have the slightest effect on lessening the needs for lawyers.

157. Does a Code make law more certain? Carter, p. 275,²³ says that when new cases arise different from any yet decided, codification cannot clear up where it is to be classified. The difficulty in applying law to facts does not arise from cases already decided, those can be known by hindsight; but what you consult a lawyer for is foresight, and the codifier cannot have more foresight. The lawyer only has foresight enough to apply the law to the given facts he has before him, but not to foresee states of facts.

158. If it is a simple case which a merchant could find out the law about from a Code, he can now from a text-book. He only goes to lawyers because the law given in either the Code or the text-book does not fit his case. Now he does not consult a lawyer because he doesn't trust Parsons on Business Law,²⁴ just as much as he would a Code, but because he cannot tell how the laws as given in Parsons will affect his state of facts.

23. *Id.* at 275.

24. T. PARSONS, THE LAWS OF BUSINESS FOR ALL THE STATES OF THE UNION (new rev. ed. 1901).

159. Also, whenever a principle is reduced to statute, there is much less uncertainty as to how lawyers will deal with a certain philosophical principle than there is as to how they will interpret the language of a statute. When principles are reduced to a formula, the formula is sure not to represent accurately the idea. Without a Code, when there are two rival principles, lawyers know pretty well how much one principle will act as an exception to the other. But it is much more uncertain how they will deal with conflicting statutory provisions.

160. Uncertainties in common law are due to defects in reasoning power, which we cannot avoid. The Code has all the danger of this defective reasoning, and also the danger of mistakes in framing the code, in making exceptions to certain provisions and also in uncertainty in reducing the great body of ideas to words. Beale (contrary to Bentham) thinks that it is impossible to express ideas accurately in words; and law is largely ideas.

161. Bentham etc. have all based their argument largely on the successful codification of Roman Law by Justinian. But what Justinian did was three things: 1) Treatise; 2) Digest of case law; and 3) Revision of existing statutes. Justinian never made a code in the sense of what Bentham wants. The important part of Justinian's work was the Digest of the case system. The only approach to a statute is, that if the opinions of lawyers in the Digest differed, certain rules should apply to determine which prevail.

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162. You cannot adequately express even the simplest ideas in language, much less complex ideas like law. If we are trying merely to approximate truth, that is ok. But if we try to define the truth in language, either we will change the truth; or we will get people quarreling on what the language means. If we try to express in language a formula for people to act on, we get people to quarreling. The result of codification has been greatly to increase litigation. Taking the body of litigation in England and France, there is a vastly greater body of reported litigation in France than in England, and France and England are pretty similar. Take the common law and code States in the United States, the body of litigation in Massachusetts is exceedingly small compared to code States. There is much less litigation on questions of law in Massachusetts than in California, which has much less commercial etc. interests which you would think would be likely to lead to litigation. Massachusetts is the only State of anywhere near its size which gets along with only one court deciding questions of law.

163. As soon as you formulate a principle, then the formula takes the place of the principle, and there is infinitely more dispute over the meaning of the formula. In France a vast body of judge-made law has been growing up.

164. (Beale does not believe in a Code but does not object to statutes as such.)

165. The chief argument against a Code is not these negative arguments that the code will not accomplish what is claimed for it, but an affirmative argument: if the law has got to grow with the needs of the people, codifying it hardens its shell and it cannot grow. Holland etc. criticize this argument, saying that it is based on a confusion of two things, the condition of things in some countries where law is still growing, and conditions where they have got to the bottom of the law; and Holland etc. say that the last type of situation can be codified. They admit that a growing topic cannot be codified, but a settled one can (such as bills and notes); also that in countries where the law is growing, it cannot be codified, but where it is grown, it can. They weaken their case by citing as an example the Roman Law, saying that it could not be codified in the Republic, when it was still plastic; but that it was in the Empire. We have seen, however, that Roman Law was not codified.

166. One answer to Holland's argument is that if the law could get into a condition where it would be definitely settled, it would be useless, for it would not be adaptable to the changing needs of the people.

167. The second answer is that the law never can get into that condition. One hundred years ago lawyers complained of the law growing so fast that they could not keep up, and there were probably five books of decisions published a year. Now there are one thousand.

168. To say that the law of bills and notes is in such a final shape that it can be codified, is merely to say that business development today has turned away from having to do with bills and notes to having to do with railroads etc. But we do not know whether transactions in bills and notes won't develop.

169. As Carter said, the movement for codification was based on a system of thought which antedated the discoveries in science of the past century, which may be summed up as evolutionary thought. The law must grow, and you cannot tie it up permanently. So a Code cannot be effective except as a lot of statutes. If we call a lot of statutes on a subject a Code, that may be all right; for example, a "code" in this sense on the law of bills of lading might well be made. Codification as a complete movement is bound to fail; but "codification" which means only the passing of a good many statutes may be successful or not according as it falls in the proper scope of legislation (which we have already discussed). Thus Beale thinks that it would not be useful to "codify" the law of sales; but it would be to "codify" the law of warehouse receipts or bills of lading or bills and notes or the criminal law. Penal Codes have been quite successful except when the Code contained the abolition of common law crimes.

170. This completes the subject of the Province of the Written and Unwritten Law.

II. JURISPRUDENCE PROPER

A. *Rights in General*

171. Beale agrees that what Holland says (but not does) is desirable, analyzing not particular laws, but the conceptions back of laws. In working it out, Holland does not do this, but gets out a new edition whenever there is a new English decision or statute. So Beale does not intend to take up a considerable portion of what Holland and other have laid considerable stress on.

172. The subject of law in general is the knowledge of rights. Holland would say that this is only one part of the law, private law; and that public law is not concerned with rights. Nevertheless, Beale thinks all law is concerned with rights. The whole purpose of the law having to do with the organization of departments of government has to do with the enforcing of rights. Criminal law is simply a branch either of the creation or redress of rights to which one party is the corporation we may call the State or the Sovereign. The law of nations is a branch, speaking broadly, of the law of corporations.

173. The three parts of this field of law are:

1. creation and nature of rights
2. violation of rights (wrongs)
3. adjective law—the law of enforcement of rights or remedy for wrongs.

174. In the last analysis Beale thinks a right is a compelled relation between parties; this of course is a definition of a legal right as distinguished from a non-legal right.

175. Holland, following Austin, has analyzed rights thus: for a "right" there must be two parties and a relation between them: the person who owes the right, the thing as to which he is compelled, and the nature of the compulsion—the terms of the right. This is a fair analysis of rights, bearing in mind, however, that the right may have only one definite party to it, that is, where the other party is indefinite. I owe a duty to refrain from committing a tort. I am the party of incidence; all the world would be harmed by my breach of it. On the other hand, I own land; all the world owes me a duty to keep off. So one party only may be fixed; the other being indefinite.

176. But for a study of the nature of rights we have got to study rights themselves (the subject-matter of them) and also the persons who are the obligors and obligees.

177. Nature of Obligations. (This was the basis of the principal division of the law of rights in the Institutes of Justinian.²⁵ The division is one of convenience rather than of nature.)

178. In our law there is a division which Beale thinks is the most

25. JUSTINIAN, INSTITUTES III, IV.

fundamental division, between rights in possession and rights in action. Certain rights are fixed, in their nature somewhat permanent, as distinguished from the accidental nature of rights created merely for the time being between persons. The distinction sometimes is expressed as between the rights of property and obligations. This is ok if we regard rights of property in the right way. A right of property is simply one class of rights in possession, but a property right is a typical right in possession. A person's obligation is a typical right in action.

179. Thus a right from domicile is a right of some permanence; residence which is not domicile is a mere temporary accident.

180. So, custody is mere accidental relation to a thing not involving any permanent attitude towards it, possession being the permanent thing.

181. The same distinction applies between license and lease. If I license a man to come on my land he has no real relation to the land, just a temporary relation between him and me. If I give him a lease, he has a permanent fixed relation to the land as long as the lease lasts (by permanent we mean only remaining for an appreciable period).

182. As a corollary of distinguishing, consider the attitude of third persons. If I have a right in possession, it is a right of which others must take notice; if a mere right of action, it is nobody's business but the obligee's and obligor's. The minute you establish the obligation of a third party to pay attention to the contract, it has ceased to be a mere right of action.

183. Both rights tend to pass into the other. This is seen in the case of service, the tendency for rights in possession of slaves to pass into rights in action. Then comes another tendency for the service to pass again into a right in possession; for example, a baseball contract in the National League, where the services of players are owned by one club and sold to others.

184. The same tendency is shown in contracts generally, to hold third persons who interfere with performance of a contract. To say that they must regard it is to say that it is a right in possession, a property right. Also, the tendency nowadays is to explain the Dartmouth College case by saying that interfering with a charter is the taking of a property right, rather than an impairment of a contract.

185. We go so far now as to say that the party himself can interfere with it as property, that is, that he does wrong if he interferes with a contract in some other way than by actual breach—the doctrine of anticipation of breach. Anticipating breach interferes with the contract as property, while it does not cease to be a chose in action; that is, in addition to being a chose in action, it becomes also a chose in possession.

186. There are earlier examples of changing. It is believed that the entire law of tenure of land simply supersedes what was merely a right of action—tenants holding by contract merely.

187. *Lumley v. Gye*²⁶ does the same sort of thing for a parol contract that the custom of merchants had done for promissory notes.

B. *Rights in Possession*

188. The distinguishing features are: 1) a certain fixed quality; and 2) the world must take notice of them.

189. The first class of rights of possession which we take up is status.

190. 1. Status. A permanent, personal relation is what is meant by status. There is a tendency to treat it as a branch of the law of persons. Now, the rights arising from status have to do with the law of persons. But the nature and creation of status has rather to do with the nature of rights.

191. The difference between a person with a certain status, and a person not capable of doing certain acts because he is not the right person, is the difference between a fixed relation and a temporary one.

192. So status is a right in possession; it has also the other characteristic of rights in possession, namely, it concerns all the world.

193. The first class of rights of status is status of personal existence. (We can generally divide status into natural and artificial status.) The law might conceive of existence itself as a status, but our law does not, though the Civil Law generally does. As a right (by Civil Law) it is of course a right in possession. So on the Continent a man must be endowed with Civil Status before having "Civil Rights." If he is not registered when born, he must get on the registry later in order to get Civil Rights. A foreigner can get on. If he does not, he can get into commercial courts, but not civil courts. To have the rights of a person having a legal existence, he must be on the registry. His mere living in fact if not on the registry does not differ from a living being not human.

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194. The second class of rights of status is status of incorporation. Incorporation is not necessarily based on any life, still less on human life. In India, it is very common to incorporate an idol, which receives gifts. In Roman Law, the *fiscus* (State Treasury) and the *hereditas* (the not yet administered estate of a deceased person) were similarly treated.

195. In the Middle Ages, there were many proceedings against animals—punishment etc.—, a species of incorporation. When there was a plague of rats, they would be warned not to come back; and if they did, it was legal to kill them.

196. It is generally assumed in our law that a corporation consists of persons. At the same time we have traces of what Beale thinks we must accept as incorporation of things. In what Langdell called "real obligations," we have things under obligations, for example, covenants

26. (1853) 2 E. and B. 216.

running with the land etc. Langdell called these cases where things were obliged, but if we say things we must recognize it as impersonation, and that means that the thing is given a fictitious personality; and that is incorporation. If we do not say this, we must say that there is an obligation with only one party to it, and that is unknown to our law. Beale thinks the land or the ship (in admiralty) is incorporated.

197. What is the nature of this artificial status of incorporation?

198. Many legal thinkers say that there is no difference essentially between a partnership and a corporation; and that to say a corporation is a fiction is itself a fiction.

199. Now it is true that there may be aggregations of persons acting as a unit—the family, and partnership etc. A corporation is also such an aggregation, and often the purpose is not to change the essential character of the aggregation, but to escape certain liabilities.

200. But there is a fundamental difference between a partnership and a corporation, as fundamental as the difference between rights in action and rights in possession. If there were such a relation as a man and a woman living together as long as and no longer than they want, that relation would have the same relation to our marriage as partnership has to corporation. A corporation is a permanent relationship created and controlled by the State; a partnership is one terminated at will by the parties, and controlled solely by them. A corporation is an aggregation “in possession;” a partnership one “in action.” In every law that has reached any development there has been this distinction between corporation and partnership. The only thing throwing doubt on this is the existence of the modern French *Societee* and the German *Gesellschaft*. These merge from the partnership to the corporation, and the requisite of the State taking part in their formation applies to all. That is, every association, whether it is what we would call a partnership, or what we would call a corporation, must be registered. Besides all of these there is a separate law of corporations. The *Societees* vary from plain partnerships, through joint stock companies, nearly up to real corporations. These, in other words, are intermediate things having some but not all the characteristics of personality.

201. The third class of rights of status is status based on qualities. Those based on natural qualities have to do with age, race, sex, or mental qualities etc. In English law these things are not any of them bases of status at common law. Under statutes in most States, we do have the possibility of creating status of persons legally declared incapable of managing their property.

202. In most European countries all the above things except sex are bases of status. The status, though based on the condition, is permanent when once created until the law puts an end to it. A man once declared insane in France remains in that status after his recovery until he is removed from that status. The status of minority puts an end to itself on reaching age.

203. Artificial status is based on some non-natural fact. Some examples are: nationality, honor and rank, and slavery. Nationality is based on the accident of allegiance, rather than the natural fact of race. Rank is hardly a status in England, though it has important social and political effects there. In the German states, rank is the basis of status—the high nobility has a law of its own.

204. With respect to status based on personal relations, examples of natural status are marriage and descent. They are based on things existing in fact, and they have important legal effects; and are permanent, they cannot be terminated at will.

205. Examples of non-natural status are guardian and ward, and adoption.

206. Status of Public Office and Public Occupation. There is another class of legal conditions best treated if recognized as a species of status; but which are not usually so recognized. These are the holding of a public office, and entering on a public occupation, like a common carrier etc. Beale thinks that we will explain the characteristics of law of these if we recognize that those things constitute status. In the case of public occupation we are shading off pretty fast into rights of action, and that is the nearest status to the point where the person in it may put an end to his status by his mere will. But he cannot except as the law lets him, and it does not if his stopping will be detrimental to the public. And he cannot get out of public office unless his resignation is accepted. In both cases, the status has relations to outside parties who must take notice of it.

207. Holland on Status. In English universities the study of jurisprudence is really a study of English law; and Holland gives just what they want for an outline of English law.

208. In speaking of artificial persons, he goes into details of English law which are accidental, and not essential elements of jurisprudence, for example, the number of persons in trading corporations.

209. Holland has no chapter on status; he has one on abnormal personalities, and in his headings under it, in some he discusses status, in others only personal rights etc. Beale wants to distinguish sharply between status, which is a right in possession; and the law of persons, which has to do with the creation of other rights, but is not in itself a right. (We will take it up after finishing the law of things.)

210. The next class of rights in possession (after status) is personal rights.

211. 2. Personal Rights. (a). Personal rights of a physical nature include among the possible rights, the right of security, of freedom from adverse touch, of freedom from wounding and mutilation. These rights are not unlimited at all.

212. The right to bodily freedom to act as one pleases, to be free from vexation in certain ways (for example, violated by malicious prosecution), the right of bodily health, are all included.

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213. (b). Personal rights of a mental sort are requisite to security of mind (freedom from fright or feelings of danger, from mental shock etc.) It makes no difference whether such a right does exist in any particular law or not, it is the kind that might exist. The legislature would not change the science of jurisprudence either by providing that disturbance of such a right should be or should not be a tort.

214. In this class belongs the right to freedom from disagreeable ideas. Our law does not give the legal right to object to merely disagreeable ideas as such; thus our mind is protected from the intrusion of certain disagreeable ideas (for example, a house of ill-fame in residential districts, or a stud farm in public sight—aside from the question of injury to property). Such a right is the right of privacy if it exists in any law; violation of such right has a mental effect only (for example, publication of one's photograph without consent). Such also is wrongful dealing with a corpse; here the only injury is mental, not a right of property (in our law).

215. (c). Personal right of reputation is also not a right of property. Here it is damage to the reputation of the owner of the right in the mind of other people.

216. Holland enumerates a number of other things as personal rights, such as the marital right of husband; but this is really a right arising from status. Holland puts it here because he does not deal with status. The same is the case with parental rights etc. The three kinds of rights in possession, thinks Beale, are rights of status, personal rights, and rights in property.

217. 3. The Third Class of Rights in Possession: Property Rights. This is the class we are likely to think of as constituting rights of possession. What is property, as distinguished from what is not property? A man has a stream of water passing through his land. Has he property in the water? If he pumps it into a tank, has he property?

218. If air passes over his land, has he property in it? If he extracts helium from the air, has he property?

219. He has property in the water in the tank, and in the helium; but not in the running water or the air. The test is whether he has seisin. He has possession of the tank-water and helium. Thus, the law does not recognize a dog as property, for it recognizes no important legal consequences of possession. Contrariwise with a cow.

220. The Indians, when America was discovered, had no property in land; they had only a temporary relation to it.

221. We have got to have a conception of a reduction of a thing to possession before we can get a conception of property. (We use property here as the subject owned, not ownership in the thing—we speak of the thing here, not the rights in the thing—to bring "property" as we use it here on a level with status.)

222. What things are subject to ownership?

223. (a). The tangible, material thing: land, products of land, domesticated animals, chattels, etc. Anything which exists physically may be property. To be such it must be reducible and regarded as reduced to possession. Movables and immovables may be distinguished. English law does not make the distinction; the distinction between real and personal property is not exactly the same.

224. Property may be treated as particular property or as universal property, like the estate. The estate of a deceased person is said by the Roman lawyers and by Holland to be not a tangible but an intangible thing. Beale cannot agree, though any law may treat an estate as intangible (as Roman law did, making it a corporation). We can deal with it as a universal thing without making it intangible, that is, we can deal with an estate as a bulk without making it different from its component parts.

225. (b). But we can have property in intangible things. Tangible things constitute the total wealth of the community, and you cannot increase this total wealth by creating intangible property. Intangible property is a division of rights between persons. There is one class of intangible property which does increase the owner's wealth: patent rights, and good-will. Good-will is a real thing which is property to the owner, without subtracting from anyone else's. But after all, this increase in good things for the world is really only an increase in the world's capacity to enjoy the good things it already has (and may probably in the future result in increasing the tangible wealth). Other intangible property, which involves an obligation as well as a right, does not in any sense increase its wealth.

226. That is to say, there are three classes of property: 1) Tangible; 2) Intangible which adds to enjoyment, to value, but not to tangible wealth; and 3) Intangible property which subtracts from another [the obligation] as much as it adds to the owner's wealth. So far as Beale knows, these three classes exhaust all property, though not all of these are property in any particular system of law.

227. The obligation is not property, but a right in action purely. But it is perfectly possible for the law to say that when there is a right of action created, that right of action is a right in possession of the obligee. Our law has now (within the past fifty years) gone the whole length. On no other doctrine can you explain the doctrine of anticipatory breach. One who commits it destroys the obligation, from the outside, not by not performing it. He commits a tort—he injures a property right.

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228. What do we mean by ownership, or general ownership?

229. Markby, beginning section 307,²⁷ says that "ownership is to be

27. W. MARKBY, *ELEMENTS OF LAW* § 314 (6th ed. 1905). "Ownership . . . is conceived as a single right, and not as an aggregate of rights."

conceived of as a single right, and not an aggregation of rights;" just as we speak of a bucketful of water as a single thing. It is possible, he says, to think of ownership as a separate thing from the particular rights constituting ownership. That is, it is possible to conceive of ownership divested of all the rights that flow from it, as the status of slavery is recognized in a country where no incidents of slavery attach. The incidents are a result of and not a cause of the ownership. The same is true of all rights in possession.

230. Suppose we start with a piece of land. It is brought into possession, therefore a right in possession (ownership) attaches to it. We then grant away to 10,000 persons 10,000 different rights, and we find that that includes every right incident to ownership. No one of those rights is ownership; and either the original ownership continues to exist, or it does not. If it does not, the incidents cannot continue to exist, for they are derivative from the ownership. Therefore, the ownership must continue, or all the incidents would fail.

231. We have examples of rights in possession without incidents existing in cases (in Conflicts) where slavery exists in England though without incidents. (Question: is the right deprived of all incidents, or only of incidents of control in England; do not incidents of control in Virginia continue?) [Margin notation: R.L.H.] At 3 *Harvard Law Review* 314,²⁸ Ames says that ownership is possession coupled with an unlimited right to possession. Holland, in Chapter XI,²⁹ takes a similar view.

232. They are using "ownership" in a different sense from Beale. Ames uses it as ownership with incidents. Holland uses it as ownership until parted with.

233. But are not these all degrees of ownership?

234. There are many incidents of ownership—possession, right to possession (Ames), right to use (beneficial owner), right to alienate. One with any of these rights is the owner of the particular right. The thief owns an interest in the property, viz., possession. In early law, possession had the only right. There is also the man with the right to get it from the possessor. This man is conceived of as an owner of an interest as soon as he is conceived as having more than a relative right (right of action). The bailor etc. had at first only a right of action.

235. Ames, in a series of articles on "Disseisin of Chattels" in 3 *Harvard Law Review*,³⁰ goes into the early law. And rights other than the possessor's in early law were only rights in action. The disseisee could not sell his right, for that was maintenance, like selling any right of action.

236. There are also joint interests in present possession (*cestui que*

28. Ames, *Disseisin of Chattels*, 3 *HARV. L. REV.* 23, 313, 337, at 314 (1889-1890) [hereinafter cited as Ames].

29. HOLLAND, *supra* note 3, ch. XI. The lecture notes erroneously refer to chapter VII.

30. Ames, *supra* note 28.

trust, tenants in common, etc.). There are rights of immediate reversion (bailor and bailee, etc.). In all these cases, the history is invariably that at the start one is regarded as having the right of possession, the other as having the right of action. Thus the joint owners are regarded as having a single right in possession, on the theory that there could be only one right of possession. In both bailor-bailee and cestui que trustee cases, there is no doubt that the bailor and the cestui started as having merely a right of action. There is also no doubt that now everywhere the bailor has a right in possession. As to trusts, the whole law of trusts is based on the conception that the cestui has only the right of action. But when we come not to look from the point of view of any particular court, but from the point of view of general law as to whether the cestui has a right in the land, we have seen that he has. Similarly on contracts to convey land, the grantee is now regarded as having an interest in the land. All these people now do own an interest in the chattel or the land. (Though when Williams wrote fifty years ago, he spoke of the reversioner as having only an incorporeal right in the land.)

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237. Conception of Possession (of Seisin). There is a notion that it is the seisin of a right that makes it effective. Now, who is seised of status? The conception of seisin was not unfamiliar to the technical lawyers of olden times. In the Year Books there was a case where two men claimed to be the husband of the same woman. Finally one was sued for interference with the other's marital rights. The defense set up was that he was her husband. The court held that he could not claim such right, since the other was seised of the marriage. This is really an accurate legal conception. If one is seised as a slave, his claim is not that he is free (as long as his master is seised of him), but that he ought to be free.

238. So these things do lie in seisin just as much as property does. The same is the case with personal rights—a man is seised of them; if they are outlawed, he ceases to be seised of them.

239. A body of men may be seised of the corporate status, and we do not look into the question of how they became seised. So we do have a de facto corporation, which is seised of the status, but improperly—the sovereign being disseised.

240. So a conception of seisin is necessary of all these rights of possession. If we cannot predicate a seisin on any of these rights, it follows that it is only a right of action.

241. With respect to the effect of seisin, until there is a disseisin, the person seised is entitled to the right. This is not archaic, but, Beale thinks, essential to any system of law. If we are to get the rights of the owner after having been disseised, we have got to be resealed. We can

complain of the act of disseisin, but we cannot claim the incidents of seisin. If I can get back the thing by legal process, then I can get damages for the loss of use of the chattel. So it was in the two-husbands case: he could not complain of the loss of marital rights without getting back his marriage.

242. What is seisin? It is the holding of the thing claiming the right.

243. It is this conception of seisin of rights that is at the basis of the doctrine of title by prescription. If a man enters into the seisin of a right, claiming the right, he has that right except so far as he may be disturbed by someone else. If there is no one else who may disturb him in the enjoyment of that right, then he has the right; he has it by seisin, the title dating from the moment of seisin. Whether it is a good legal title or not, no one can dispute it as long as he is seised. If someone has paramount title, he cannot assert it without ejecting the disseisor who has the title by seisin; and when the disseisee by statute can no longer eject him it is a good title. This was clearer when livery of seisin was necessary to pass title to land, but it is still true.

244. Now if a man goes into possession of land without claiming title, he cannot acquire it by prescription, for he has no seisin, not making any claim.

245. If he goes in under a deed purporting to give him an estate for life and stays twenty years, he gets by prescription a life estate; that is what he is seised of, that being what he claimed. If he claimed for himself for life and the remainder in fee to X, X would be seised of the fee, too.

246. Under English law, if one claimed for years without claiming for another after the term, it would not be seisin on account of the English notion that the tenant for years is not seised.

247. There is a curious application in *Persons*. A sheriff cannot exercise his function outside the State of his appointment. If a sheriff takes a prisoner from one part of his State to another, passing through another state, in the foreign state he is seised of the prisoner, and habeas corpus will not lie—though not exercising a sheriff's authority in the foreign claim. This was so held in England when the sheriff was passing with his prisoner from Canada to Australia. England recognized his established status, and gave the incidents to status of the prisoner. The sheriff could probably retake him by force if he escaped in England.³¹ This is shown in bail cases: the bailor can retake the prisoner by force in any State into which he may go, though he is not recognized as bailor in the other States. The bailor has to rely on the relationship, or status, of which he is seised—not on the authority of his home State, for that State cannot give authority to do acts outside its jurisdiction.

31. *Watson's Case*, 9 A. & E. 731 (1839). The case is discussed in BEALE, 2 A TREATISE ON THE CONFLICT OF LAWS 663 (1935).

C. *Rights in Action*

248. A characteristic of a right in action is that it exists simply between individuals, and is merely a relationship of right and duty between corresponding persons. It is a fleeting thing, for it can be put an end to by the two parties, and does not concern third parties.

249. Fundamentally, there are two classes of rights in action. Austin calls them rights in rem and rights in personam. Langdell much more accurately calls them absolute rights and relative rights. Absolute rights in action are rights to which all the world is subject; relative rights are rights to which some particular person is subject, on account of something he has done. Langdell has suggested that in relative rights we speak of "obligations;" while in absolute ones we speak of "duties"—each corresponding to their respective rights.

250. The fundamental distinction is between obligations to which a person has bound himself, and duties to which all the world are subject.

251. Absolute rights. "Duties" (in the restricted sense) grow out of rights of possession, rights to have the possession respected. It is usually a negative duty, to refrain from a tort to another's rights in possession (whether intentionally or negligently). There is the absolute right independent of the right in possession, namely, the right to have the right in possession free from interference. Breach or tort gives rise to a right ex delicto. Then there are absolute rights where the duty is affirmative, for example, the duty (to all the world) to exercise a public office, or the exercise the duties of a public service calling. The breach gives rise to a right quasi ex delicto.

252. The first kind of absolute right is a duty owed by everybody, to everybody, it is true, but specifically it is to the owner of the particular right in possession. The second class is a right owed by the particular officer or public service company to all the world.

253. Relative rights. These are rights to which are annexed the "obligations." There are two classes of these rights: 1) rights arising by consent, consensual rights; a) arising from contract, b) arising from a more general undertaking—examples: performance of a bailment, etc; and 2) quasi-contractual obligations, obligations to return for an enrichment etc., duties not lying in consent, but in some obligation created by the parties regardless of consent.

April 14, 1909

D. *Wrongs*

254. Holland begins his discussion by saying that they are classified by five different methods at least. This classification has a practical bearing:

1. according to the state of the will of the wrongdoer—whether negligence, intention, malice, etc. (Books on Negligence)

2. according to the state of the will of the injured party—consent, non-consent, or consent induced by deceit (Books on Fraud)
3. according to the means whereby the wrong is effected—physical violence, words spoken, or breach of contract
4. according as the actual loss to the injured party following the act of the wrongdoer is or is not essential to the action. This is minor—the line between trespass and trespass on the case.
5. according to the nature of the right invaded, for example, of a corporation etc.³²

255. The trouble with taking Holland's classification is that it is merely a repetition from another point of view of the discussion of rights. It is true that a wrong should be looked on scientifically as a violation of a right, but nothing is gained by this repetition. This illustrates Holland's whole tendency to classify rather than to analyze. Thus he divides all contracts into obligations to do or to give. These are simple enumerations, useful, if you are writing a treatise, as a convenient method of dividing up the material. (This is one of the great merits of Wigmore's Evidence.) Holland's book has been well criticized as laying the subject out as it would be layed out by the writer of a treatise, and not giving the reader the fundamental philosophical ideas underlying the subject. Beale thinks Holland's book is the best there is, however.

256. Starting with an understanding of wrongs as violations of rights, what is the real nature of wrongs? Every wrong involves a harm—injuria—an event which harms a man in one of his rights. The harm alone (damnum) is not enough to constitute a wrong in the legal sense. You have got to have the legal responsibility (culpa). He must have suffered a damnum which interferes with his legal rights. But this is not enough. If a man's horse is struck and killed by lightning, he has suffered, in a sense, an injuria—his legal right in possession has been interfered with; but there is no culpa. *Injuria sine damno*³³ has no real legal meaning; it means only that the damnum is not appreciable—like walking across my land. But there is harm done in invading a legal right. Beale means by harm an event which violates a legal right.

257. It is often said (for example, Salmond, p. 180)³⁴ that wrongs do not cover the whole field of harms, but that the law can arbitrarily select certain wrongs. Beale thinks that the arbitrariness is in selecting what are rights, not in selecting wrongs. Our law or any other law may out of all possible rights select certain rights arbitrarily which shall be given by law. The field of rights in any particular law does not necessarily cover all conceivable rights. What things are rights must be determined more or less by arbitrary rules. But there has been a

32. HOLLAND, *supra* note 3, at 320-22. The lecture notes follow Holland's language closely.

33. *Injuria absque damno*.

34. SALMOND, *supra* note 9, at 180. The lecture notes erroneously refer to page 160.

tendency to get away from arbitrary, particular rights to the general. The generalization that all rights in possession are protected could not have been made fifty years ago, the generalization that any injury to a man's right in possession (as generally put, to his property) is a tort. That generalization is now the fundamental question underlying rights in labor disputes. If we say that every man has an absolute right that his rights in possession shall not be interfered with, then we get the so-called "malicious torts" on a sound basis—the malice is not what makes the tort, but which bars justification.

258. There is the same tendency to generalization in the law of crimes: rights of the public have gone more and more on a general basis. In the old treatises on the pleas of the Crown there was simply enumeration of the rights of the public, with no apparent connection between them. Now it is generalized that any interference with the rights of the public is a crime.

259. The first element of a wrong is the harm. This does not include the whole notion of the *injuria*, for *injuria* means more than the *damnum*.

260. There are two kinds of harm; to the enjoyment, and to the possession. Acts of harm are: 1) acts of disseisin, and 2) acts of "tort" (the latter meaning interference with enjoyment, not possession). Beale thinks that this division is fundamental. We have seen the effect of possession, which confers all the rights of enjoyment so long as the man remains in possession. So if a man disseises me, he deprives me not only of the right itself, but of all the fruits of possession. Of course, this disseisin may be of any of the rights in possession. It can hardly be predicated, so far as Beale can see, of a chose in action. But human ingenuity will probably find a way of disseising the obligation of contractual rights. If someone dispossesses me of my cow, which then has a calf, I have no right to the calf, until I get the cow back. If someone disseises me of my land, and then it is taken by eminent domain, Beale does not know just how I would get the proceeds—the only way would be, he thinks, to hold the disseisor as a constructive trustee. This, of course, is just a peculiarity of English procedure. But not having the land, I have no right against the sovereign for the value of it, not having had the land. This is ingrained in the nature of the law, that I have to first get back seisin before getting the fruits. Of course, legislation might take a short cut. When Beale says that these conceptions are essential to law as law, he means to law where it has grown up naturally.

261. With respect to the second kind of harm, namely, acts of "tort" (Beale cannot think of a better word), the wrong by disseisin can be done only to rights in possession. But such rights can be injured also by simple wrongs. Wrong by tort may be done either to rights in possession or to rights in action. It may be done either to a relative right or to an absolute right. For example, a wrong to the relative right

of contract, consisting in a partial or complete non-performance, or in interference with performance. The latter is really a wrong to a contract regarded as a right in possession, but it is still a "tortious" wrong. So, a wrong may be committed to the relative right *quasi ex contractu*. Strictly speaking, the quasi-contract is the obligation to return the enrichment; the wrong is the non-return.

262. We may also have a "tortious" wrong to an absolute right (the only wrongs ordinarily called torts); and the wrong is of the same sort as to relative rights, though the latter may be a negative wrong (failure to perform a contract). One kind of a tort to an absolute right is by injuring rights in possession; another by failure to perform a duty, usually spoken of as a *quasi-delict*. The distinction between violation of absolute rights and violation of relative rights is not a distinction between violation of affirmative and of negative rights. A relative right may be a right to have a man do or to have him refrain. In absolute rights, the ordinary tort is almost always an affirmative act (except the failure to build a fence) but the *quasi-delicts* are failures to do affirmative acts. The distinction between affirmative and negative, Beale thinks is not essential.

April 15, 1909

263. The second element of wrong is *Culpa*. This is the subjective element—how far am I the wrongdoer, responsible for that harmful event.

264. The responsibility of an individual depends on three elements: 1) an action by the individual; 2) causation of the harm by the individual; and 3) blameworthiness of him. Until these three elements concur there can be no responsibility fixed for a harm done.

265. (1) As to the action of the wrongdoer, does "action" mean a positive deed? Practically all writers, when speaking of wrong, say that it requires some physical, affirmative action, for example, Holland and Salmond. But this entirely overlooks the "negative action." Refraining from doing something may furnish this element as well as an actual doing, yet refraining is not physical, but mental merely. One large division of rights and wrongs presents this question. To have responsibility for a breach of contract, in 99 times out of 100 we have to show not a doing of something but a refraining from doing it.

266. When is it that a mental act of refraining can be fixed on him when it causes a harm and he is to blame for it, and make him responsible for the harm? Whenever there is a duty on him to do a thing and he does not do it, that is an act on his part just as much as if he is under a duty not to do it and yet does it.

267. Why is it that such refraining is an act when there is a duty, and not otherwise? Because when there is a duty I am thinking of it, as far as we can see from the outer manifestation of my mind. When there is a duty, the elements of fact when there is a refraining indicate a

mental act—just as when a man says “yes,” that is consent regardless of what is in his mind. This dealing with the mind as it is connected with its legal manifestations is pretty well grounded in the law.

268. We could get out of the “fiction” by saying that what is required for the first element in responsibility is not action but either action or failure to perform a duty (and in contracts, to say that what we want is not assent, but outward manifestations of assent).

269. We mean by “action,” then, this double thing, either doing a thing or neglecting to do a duty. What are the qualities of this “action?”

270. It involves more than mere physical motion, there must be willing. A motion made while asleep is not an “act.”

271. Suppose a woman takes a baby to bed with her and during the night while asleep she turns over onto the baby and smothers it; and suppose that it is a careless thing to do. She would be liable. That is no exception to the above statement: the act is not the rolling over but the taking of the child to bed with her, from which results the harm as she should have foreseen.

272. (If a man has taken on himself a contract to perform an act, and does not, the mere fact that he did not will not to perform it won't save him, for he did will the act of entering the contract. [Margin notation: But that is only willing to create the right, not willing to refrain from the duty thereby violating the right—R.L.H.] But if the sovereign orders a man to do something, it is a wrong (if the other two elements are present) if he wilfully disobeys; but not if he nonwilfully disobeys. So the willing is a necessary element of either the act or the refraining from duty.

273. Now unconscious motions are not in themselves acts; nor are motions made by outside constraint—someone taking my hand and hitting someone with it.

274. But the willing need not be intelligently willed.

275. If I am induced by fraud to do an act; or if by the threat of violence to a member of my family, I will that act. If I yield to threat of violence to myself tomorrow, it is my act. If one holds a pistol to my head and makes me sign a paper, there is a difference of opinion. Common law considers that it is not my act—it distinguishes between immediate constraint by threat of immediate personal violence dangerous to life and limb, and more remote constraint. Logically, of course, there is no distinction, and it is my act. But common law is well settled that it is not—*non est factum* can be pleaded. This form of the statement of the law is not accurate; it is more accurate to say that it is my act for which I am not responsible. Speaking as common-law lawyers, we have to say that it is not my act; speaking as jurists, we say that it is.

276. A person of diseased mind may nevertheless have a will. The act of an insane or drunken man is nevertheless an act, unless the

lunatic or drunk is such that he no longer has a will, and does not know what he is doing.

277. (2) As to causation, having fixed an act on the person, then you have got to show the connection between the act and the harm for which you are seeking redress.

278. What is involved in causation? Is it more than consequential sequence? We have the general statement that one is not responsible for remote consequences. Why? It is perfectly clear logically that a man's parents are the cause of all his actions, but not responsible causes because they are too remote. What is this element of remoteness? It is that the law is necessarily limited within human activities; therefore entirely aside from the defendant's interests, but for the public reasons, we have got to stop looking for causes when we get a certain number of steps away from the consequences. When a particular cause has got so mingled with other causes as resultants, that we can say as a practical matter that it is no longer an operating cause, then we dismiss it. We deal only with the proximate causes. Where the line is to be drawn is to be determined by the particular law-giver. Here we are interested merely in the fact that law must limit responsibility to proximate causes of the harm done.

April 28, 1909

279. In speaking of action, Beale is starting from the subjective end, working from the act to the harm; though usually in practice we start at the harm and go back asking if the harm is the act of the defendant. This is the language Beale uses in Criminal Law, but it is not quite accurate. When a man is shot, the act is the crooking of the finger of the defendant. We know the defendant let something go out of his hand; also that an event happened of harm to the plaintiff. To connect the act and the event we have got to have a relation of cause and effect. What do we mean by this? There are two meanings: 1) happening after the "cause;" and 2) happening as a consequence of the "cause." But this leads us very far. Everything has a cause, and in the course of infinite time these causes have so interacted that we may well postulate that there was an original cause as a consequence of which everything else has happened. That is, Beale puts no limit at all to the tracing of causation. It is perfectly true that the voyage of Columbus was the cause of everything happening in this continent.

280. We cannot fail to apply the word "cause" to the very remotest kind of cause; so we have found causation if we have found the very remotest causal connection between the act of the defendant and the harm to the plaintiff. But we have got to find more than mere causation, on account of human limitations. We have not time to investigate causation to its remotest limit; also, the more remotely we investigate, the more chance there is for error. For both reasons, any civilized law

must stop short of the most remote causation; though where we will stop is a question of each law to settle for itself.

281. What is the natural place to stop in investigating causes? Every consequence follows from at least two causes; this is just as true logically as physically. So whenever you get a new effect, it means that a new cause has come in and united with the cause you are investigating. In getting the next effect, there are four causes, and so on in geometrical progression. Now where is the line where a cause becomes too remote? This is like asking where the line between day and night comes. It cannot be definitely located, but the fact is true that at one time there are so many rays of light that we call it day, at another so few we call it night. And in causes, there is one place where the number of contributing causes is so small we can say the cause in question plays a considerable part in the result; and another, where the cause in question plays so slight a part in comparison to other causes that that part is negligible. It is not true, as frequently said, that the chain of causation has been broken; it is merely so attenuated as compared with other causes as to be negligible.

282. We must rule out, then, remote causes.

283. There remain the proximate consequence of the causes to be considered.

284. One consequence is direct, caused by the combination of the cause with one other cause. There is no real difference between direct effect and proximate effect, but the distinction is important when we come to the question of blame.

285. In dealing with responsibility, we are not seeking for the sole cause. There never is a sole cause (though there may be a sole human cause). So responsibility never depends on the defendant's act being the sole cause of the result. Yet one of the commonest errors in the study of law is to say that since A is responsible for this, B is not; whereas in fact if both are causes, both are responsible (if other elements of responsibility are present), and the law so holds.

286. That is, where you have concurrent causes, if other elements are there, each cause is responsible. And it makes no difference (granting blame in both) that one cause was direct, the other proximate. This explains the case where A gives a wound from which the victim would bleed to death and then B comes and gives another wound from which he would bleed to death, and both are responsible, providing one act has not become remote.

287. (3) Blame is necessary to fix liability for any wrong, whether it is a breach or a crime.

288. The clearest kind of blame is evil intention; one who causes a wrong and intends to, is, of course, responsible. Also, if he causes one wrong, intending to do another. A second kind of blame is negligence: to blame for neglecting to take precautions which one ought to have taken against the consequences. In what cases should he take such

precautions? In cases where as a reasonable man he foresaw or should have foreseen the consequences, then he must take reasonable precautions. It is sometimes said that he must take precautions against the "natural" consequences of his act. What we mean thereby is foreseeable. But even if not foreseeable, he is responsible even then if intended. For responsibility, we want, first, proximate consequences, and second, either intentions or foreseeableness, or some other ground of blame. That is, proximate and foreseeable are not on the same plane. The statement that one is responsible only for proximate or natural (foreseeable) consequences of his act, is not true.

289. A third kind of blame is responsibility which accrues because a man has assumed a risk. Certain acts are forbidden a man by the law except at his peril. In such cases he is responsible for the consequences even if they are neither intended nor foreseeable. If I assume by contract to do an act, I am absolutely liable for breach of the contract whether I intended to break it or not.

290. Giving information may or may not make for responsibility for the consequences. A commercial agency giving information of a person's financial standing takes the risk by English law, but not by American law.

291. In our law there is a whole class of arbitrary acts of this sort: trespasses *vi et armis*. If I walk across land *vi et armis*, I am liable for damages for trespass even if I thought it was my land, and if I used all care.

292. I may assume a risk for the consequences either of an act or of an omission. I assume a risk when I collect water artificially in States where *Fletcher v. Rylands*³⁵ is the law. Just what acts do constitute an assuming of risk vary with different laws, but in general the taking of a risk is one method of attaching blame.

293. In summary, a man is responsible for a harm done if (1) he has done an act personally or refrained from one which it was his duty to perform; and if (2) there is a relation of cause and effect (not too remote) between his act and the harm done; and if (3) there is the element of blame.

294. We will postpone discussion of what amount of blame is required for crimes, torts, etc., until after remedies.

April, 29, 1909

295. Responsibility for a wrong does not necessarily mean that some bad result will follow; it means that the man responsible must give an answer for what he has done. If we had the Roman procedure, this would be clear. The plaintiff would come to court and establish the fact that he had been harmed (his cow dropped dead); then would take steps to make the defendant responsible—say the defendant pointed a gun, and pulled the trigger, and the bullet went into the cow. (He

35. *Rylands v. Fletcher*, [1868] L.R. 3 H.L. 330.

would be helped as to blame by the presumption that the defendant had *mens rea* if he did point the gun.) At this point the defendant has the opportunity to disprove any of the facts. But suppose these facts have been established; that does not end the case, it fixes responsibility, and it is now for the first time the defendant's case to take up, and answer for what he is responsible. He may fail to answer; then his wrong is established and his responsibility, and he has no defense. But he may respond and in one of two ways: 1) justify (in the broadest sense); or 2) discharge himself.

296. Defense by way of discharge, may be something that wipes out the stigma, or may show that the wrong had been satisfied by some form of procedure; or show that he has been pardoned, or released.

297. As to justification, what is its real nature? What is it that we justify? It is not the harm; that is unlawful, and cannot be wiped out except by a change of law. The justification must affect some element of responsibility. Which element: action, causation, or blame? It really has nothing to do with the blameworthiness of the defendant. The law, in justifying a man, does not look on his individual desert, though it does look to it in imposing responsibility.

298. Nor does justification apply to the causation, but to the action of the defendant. He is justified because the State gave him permission to do the act. If the State justifies him for the killing, the justification is not for the result, but for the act of shooting. Suppose, in excusable self-defense, the man pulls the trigger; the shot does not hit the attacker, but an innocent bystander. The justification applies just the same: the State does not permit the result of the shot fired into the bystander, nor does it permit the killing, but it does permit him under the circumstances to pull the trigger, carefully. (If he has not used care, it would not be justified.) The justification does not prevent him being blameworthy (in the sense of fixing him with responsibility).

299. It follows that if any act (the shooting) is justified, it is impossible to hold him for any of the consequences of the act. It was neglect of this idea which led the court into a wrong decision in *Regina v. Lesley*³⁶ (where the defendant took the Chilean exile on board ship in Chile by order of the government and took him onto the high seas). If the defendant is responsible for the imprisonment on the high seas, it was due to some act of the defendant; the only act was putting the vessel so far out on the seas that the prisoner could not swim ashore. That was not the direct act of the defendant; the direct act was setting sail with the intention of keeping water around the boat. If that act was justified, no consequence of that act could make him liable. His leaving shore made him responsible for the imprisonment, but that act was justified, so the consequences should not have made him liable.

36. *Regina v. Lesley*, Bell C. C. 220 (1860). Beale discussed the case in *Justification for Injury*, 41 HARV. L. REV. 553, 554-55 (1928).

300. What is the nature of this justification? It is a counter-demand by the defendant. The defendant says that he, as well as the plaintiff, has a case, and that the defendant's case will wipe out the plaintiff's. The defendant's case is that the State has given him a license to act, and under this he can sue the plaintiff to restrain him from prosecuting his claim. The counterclaim is an equitable right: the distinction between the ordinary rule and the power of the State to intervene to permit or to do an extraordinary act. This is the fundamental distinction between law and equity in any system of law. Equity is the system of doctrine which deals with the exception; and it is an essential of civilized law that we should provide not only general rules, but special rules for special cases. It is not necessary that they be administered by different courts, however. The nature of this equitable defense of the defendant is, in the last analysis, "The sovereign, when he made his law, told me not to do this; but when he saw how it would work here, he told me to go ahead and do it." Of course, usually he has not done it by the direct command of the sovereign. When one acts as a public officer he is doing this, even when a private individual makes a justifiable arrest for a felony. But this is not the only kind of justification; there are always other effectual answers besides the exercise of public powers. It is a tendency of justification to extend; for example, self-defense was not a justification in our law until about 1600. It is a tendency of equitable doctrine to grow. So we get a man justified for what on the whole is regarded as for the good of the State to have him do it. But always it is the State extending the privilege (for example, of shooting in self-defense to the person attacked). Limitations of any sort may be put by the sovereign on the privilege he gives to the subject of self-defense. The existence of justification must be looked at from the point of view of the sovereign, not of the actor. Thus, the sovereign says that whoever is in reasonable danger of life from attack may shoot. The sovereign wants reasonable action; and if a man unreasonably but bona fide shoots, though he is no more to blame than one who reasonably does it, he is not justified: his act is not permitted to him by the sovereign. The justification must be defended on the premise of the sovereign, that is, on grounds of public policy, not of the individual's own blameworthiness.

May 5, 1909

E. Remedies for Wrongs

301. There is the maxim, "no wrong without its remedy," and from this it has been said that if there is not a remedy there is no wrong. But this is not so. It is not essential that there should be a remedy, or that there should be a court, in order that there should be law.

302. Yet one great purpose of law is to afford some remedy for wrong.

303. Something like remedy and part of adjective law, and which cannot be spoken of as accurately as remedy, is the steps for prevention of a wrong. Thus an injunction to prevent a threatened wrong is not really a remedy, yet it is part of the adjective law (dealing with enforcing rights) rather than of substantive law (dealing with creating rights). Yet this preventive right may be very important and we will take up preventive things first before the more strictly remedial.

304. Preventive measures must be based on force, either on actual constraint or on threatened force. Actual constraint to prevent a wrong is not common now, though we have certain examples, for example, deportation of alien paupers, restraint of insane persons, etc. But these are rather governmental than strictly judicial matters. The more common judicial form of prevention is by judicially threatening force to prevent the commission of a wrong. The principle ways are by decrees or orders of courts forbidding specific wrongs. In our law, two classes exist: orders against commission of crimes, and orders against commission of torts. The former are called "binding over to keep the peace," a process attempting to prevent a future breach of the peace by this person. An order against a threatened tort, or against any threatened affirmative wrongful act, is an injunction; it is accomplished by us by a decree of a court of equity. In countries without equity courts, the same thing is done. The plaintiff's statement in such process is not that he has suffered legal injury, but that he fears he may suffer it. This kind of process is exceptional in the sense of being less common; but logically there is nothing exceptional about preventing as well as remedying wrongs.

305. Remedies Proper. What does the law undertake to do when it provides remedies?

306. Probably the first answer you would make is, that the object is prevention of wrong; not of that particular wrong committed, but prevention of future similar occurrences by punishment of this one.

307. Some says that since pecuniary damages do not prevent the commission of wrongs, let us make it a crime. More advanced thinkers say that the object even more than prevention is reform of this wrongdoer, and that legislation should be framed with this end in view.

308. How far is it the object of law to prevent commission of wrongs, or to reform wrongdoers? Beale thinks not at all; though he believes in both these objectives, he thinks it is the task of people with other functions, not the task of the law. The objects of the law are to deal with rights, not with morals. Beale thinks there is a moral element in the growth of law, and that it is affected by moral ideas; but that is not saying that objects of law are objects of morality, but that doctrines of law should not run counter to doctrines of morality.

309. The object of law is merely that men may obtain their rights, whether it makes men better or worse in doing so. A man who is always looking out to get his rights is not ipso facto a moral man or a

desirable character. Beale believes that the tendency of law is to have legal rights right in the moral sense. But as law is now, we have got to secure those legal rights as they are. The objective of giving remedy is to heal the sore caused by the wrong. The wrong may result in one or the other kind of harm, to rights in possession or in action, according as the wrong is one of disseisin or of destruction. In disseisin, the form of remedy is getting back the possession. In destruction, we get the other form of remedy.

310. The act of remedy is always simply the carrying out of a right, in Beale's opinion. It never has reference to a wrong but to a right; it is the satisfaction of a right. Whenever a legal wrong happens, there is concurrently with the happening of a wrong the creation of a right. When a man takes my horse, I no longer have a possessor's right; I have got a new right, the right to re-possession. The act of disseisin creates the right of re-seisin. And any remedy for disseisin is really a putting of me into possession of the fruits of my right of re-seisin. It may be a right in me to go and take that horse myself, or to have the court help me get it. When we have the disturbance of a right in action—somebody hits me on the head—I cannot go into court on the wrong; my right not to be hit has gone for I am hit; but I go into court on a new right which arose at the moment of destruction of my right not to be hit, viz., a right to redress.

311. When a man commits a crime, the State's right not to be harmed by the crime is gone; courts deal with the right which came into being as the result of the commission of the wrong: the right of the State to have redress.

312. The whole law of remedy is based on the creation by the act of wrong of a new right.

May 6, 1909

313. What is the bearing of the nature of remedies on what is often called "the adjective law of nations"? There is a school of lawyers who accept the common doctrine that since a sovereign has no superior and cannot be constrained there would be no international law except for the existence of war as a remedy. War cannot be a remedy for a wrong, on Beale's theory. A remedy is merely a carrying out of a right. Operation of war can never be the enforcing of a prior existing right. It is the strong arm, but not the arm of a sheriff executing the order of a court. There is all the difference between war, and the state of affairs if we had an international tribunal with an international army. In such case, international law would create the right which the international army would enforce.

314. Now we will take up the two classes of remedies: the "possessory remedy" (giving the thing of which he is deprived); and the "compensatory remedy" (redress of his loss).

315. "Possessory remedy" is applicable only to rights in possession.

The first remedy of this sort does not involve an action of the court; it is the right of recaption: the right to the dispossessed person to follow the property and get it back personally, a more or less archaic form of remedy. We still have the right of immediate recaption of a chattel provided that too much force is not needed. This is a very narrow and strictly limited remedy today. In more archaic law it is perhaps the typical remedy; but even then it was confined to some sort of immediate recaption. You could get the goods from the thief in early English law if you could get him while raising a hue and cry, otherwise not. The basis of the King's Peace is the maintaining of the status quo.

316. The second possessory remedy is that of following and demanding property taken from me, if I cannot properly retake it. If the taker refuses, he is doing me a wrong. This would not follow if this right were not a special remedy created (without bringing a real action). By this doctrine of following I can often establish a constructive trust, thereby getting the fruits of the property; without the right of following, I could not, for he has the right of possession and of the fruits of possession. It is by this doctrine that if a man steals my cow, and it has a calf, I cannot hold him at law, but I can affix a constructive trust for myself on him.

317. Judicial possessory remedies include:

1. Reseisin: the thing is actually taken away from the disseisor and given to the disseisee, the remedy afforded by a real action.

2. I cannot get the thing which I am entitled to, but the law gives me some actual thing in place of it. So if my chattel is taken and changed into something better I can get that thing. The typical instance is the ancient writ of warranty. If the lord gave his man in fee ten acres of plowland, and that was taken away by a paramount owner, the lord would have to give the man another ten acres of plowland. Another example is when my property is taken and changed into something else, I can get that other thing by constructive trust.

3. There is a remedy of a type of specific performance of a contract. I am entitled under contract to get conveyance of land on January 1. The owner refuses to convey them. February 1 I file my bill for specific performance. What is the nature of the remedy given me? Beale thinks that the real idea at the basis of specific performance is this: a contract to which I am entitled has been kept away from me, and the court of equity is restoring to me my contractual right. Langdell criticized the term specific performance: he said that a decree on February 1 cannot be specific performance. Beale thinks that the above contract was to do two things: 1) to convey, and 2) to convey on January 1. When not conveyed on January 1, the second part of the con-

tract was destroyed, but the first part remains. Beale thinks what we do by specific performance is to conceive of a partion of the contract as still alive and calling for performance. The obligation to convey January 1 is incapable of being performed; but the first part is still performable. The action at law conceives of the whole contract as being broken, and I get damages for the whole. But in equity that part which can be conceived of as still capable of performance is still alive, and equity will help me out. What does this help mean? On January 1, the defendant took the contract out of my possession,—what he did was dispossession, not breach—except of that January 1 part. It is only because I can conceive of part of the contract as still existing that I can get specific performance; if there is not still left a contractual obligation of which I may become repossessed, I cannot get anything but damages. If a horse is taken from me, I must while it is still left bring a possessory action, not get damages, if I still claim title, for there is no loss if I can re-take the horse. When a wrong has been done to my right, if I rely on a remedy by way of redress, I have got to assume the destruction of my right; if I want to get benefit from the right still being alive, I must bring a possessory remedy; and the remedy of specific performance is based on the continued existence of the contract, that is, it must be based on the assumption of a continued right of property in the contract. The whole doctrine of specific performance assumes that there is a property right in a contract; specific performance is a process by which the plaintiff gets reseeded of his property in the contract. The obligation is the expressed willingness to do something; the wrong is the refusal to do it—though it may still be done—a disseisin of the willingness to perform.

May 12, 1909

318. It does not matter much whether we take Beale's view in specific performance that the plaintiff is getting the very thing he has lost, or Langdell's, that it is a remedy in exchange for what the plaintiff lost. The important thing is that the plaintiff has a right to this thing, whether created by breach or by the contract. One reason for preferring Beale's to Langdell's view is that breach is not necessary for specific performance. If the remedy is giving a new thing, the right to that new thing must have risen some time, and there must be a breach. There is the case where land is to be conveyed on payment on January 1, plaintiff did not tender, hence there has been no breach, yet the plaintiff may get specific performance on February 1—and in that case there has been no event creating a new right (no breach). Therefore, what you are getting must be the thing you were originally entitled to.

319. In the extraordinary writs at law—mandamus, quo warranto, prohibition, etc.—these are also to restore rights in possession, not to give compensation for wrongs.

320. That is, all these are real actions just as much as replevin, etc.

321. With respect to the second general class of remedies, remedies by way of redress, there are two classes of such remedies: 1) compensatory and 2) punitive.

322. Compensatory remedies are of the type of an action for damages. What is the theory of this? The legal theory on which compensation is given is clearly not Markby's prevention of wrongdoing by the scaring of wrongdoers. The court in giving a judgment for damages must be proceeding on a right in the plaintiff. What is the right? If the plaintiff were suing to get back what belongs to him, the right would be a right of property in the chose of which he has been dispossessed. But in an action for damages that is not the right asked; the plaintiff does not ask to get back his unbroken contract or his unwounded body, etc. He does set up his pre-existing right which he claims has been violated—he sets it up by way of inducement, then sets up the breach of it, and it is the breach which is ordinarily called the cause of action. If the tort is for assault and battery, he does not have to set up by way of inducement the preexisting right; the right to security he had by the law. If it is a breach of contract, he does set up the pre-existing right of contract. He sets up anyway the breach, and the injury done by it. But it is not the injury on which the court proceeds; it proceeds to enforce his rights. The right on which the court proceeds is a "right in action;" a right to damages which springs up at the time of the wrongdoing.

323. A proceeds against B for assault and battery. He says that he had a right to personal security, an absolute right at a certain time not to have his body hit; at that time the defendant hit his body; the right at that moment not to have his body interfered with was destroyed by the defendant. The right at a given moment not to be interfered with comes to an end either by fulfillment or by destruction. If fulfilled, that is an end of it. If destroyed, it gives rise to a new right. Why? Because, if my right was destroyed and nothing took its place, I should be out so much. Therefore the law give me compensation. The object of law is to prevent loss to me from the destruction of my right, not to punish the wrongdoer. The law does not undertake to prevent the right being destroyed (except in injunctions, etc.) but to prevent loss to the injured party; and looking to the value of the right I have lost, the law gives me a new right against the wrongdoer which in justice should equal the wrong done me.

324. The right not to have my land trespassed on at a given time, or the right (by contract) to have X give me a horse at a certain time, similarly, will either be fulfilled or destroyed—and an action in damages will be my new right by way of compensation.

325. In the case of any right which lies in possession, there is the possibility of either form of remedy.

326. Suppose I have a horse and someone takes it from me. I have the possibility of two remedies: 1) reparation: by granting me repossession, or recaption; or 2) right of damages. A system of law will frequently offer both, but the wronged party cannot get both in one case, because they are mutually exclusive. If I claim repossession, I am necessarily insisting that my right exists, and therefore I have no right arising from a breach of it. But I can have possessory action to get back the horse and also damages for the loss of the use; but loss of use was not a breach of a right in possession—my right to use tomorrow springs from my right in possession; and damages for loss of use are inconsistent with being deprived of the title to it. So my alternative is either to claim damages for the entire value of the horse, or to claim repossession plus damages for the loss of use of money. In the first alternative I have lost the right from the time of breach, but I am insisting that my right to the horse was destroyed when taken; so I have a right to extra damages for the loss of use of money from that time. That is, if I choose to ask for damages for the entire loss of the horse, I am also entitled to interest.

327. The above is what is possible in law. In our law in many instances the law does not offer the right of reparation, but only the right to damages.

328. Sometimes a man destroys my possessory right without taking it to himself, and then I cannot get a remedy by reparation, for there is nothing I can be resealed of (as when a man walks across my land).

329. The right to reparation and the right to damages are exclusive, for if the original right still exists, there can be no right to damages for its destruction.

330. If a man borrows my horse to drive to A, and instead drives to B, it is settled by our law that that is a conversion (though Beale thinks that it is bad law). It follows from the law that as I have the right to elect whether to treat it as a disseisin or destruction of my right—so the convertor cannot make me take it back by tendering it unharmed; I can refuse to take it back, and have a right of action equal to the value of the horse.

331. That is, no one can oust me of my election when I have one, between the right of action for damages and the right of possession.

332. If I have a biting dog, and there is a statute making dogs property; and someone whistles to the dog, gets him a little way and kicks him back; and then the dog bites a stranger, who sues me: I am at my liberty to say that I choose to treat my right as one of action, and claim I have no right of property in the dog—it belongs to the man who kicked him. Or I could exercise my right of property, and demand the dog. If I do, I am liable for the bite in the interim, though if my demand is refused I have a right of damages from that moment.

333. So the right to damages is for the purpose of filling up a hole caused by the destruction of the right. The right to whom? It is immaterial. The plaintiff may recover as the representative of the man

whose right was interfered with, and who gets the benefit of the right to damages. If I make a contract for the benefit of X, and it is broken, I may recover for the value of the right destroyed, though I am not allowed to keep such damages from X.

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334. On page 239 of Langdell's *Equity Jurisdiction*,³⁷ Beale's idea of the nature and purpose of compensation is better put than anywhere else.

335. As to redress by punishment, here Langdell thought that the State was dealing with a wrong, not fulfilling a right. But Beale thinks that even here, the action of the court is to effectuate rights. What is the right? It is of the same nature as when the court gives compensation for a tort. The sovereign has an absolute right not to be injured by a crime; also the relative right not to have the allegiance to him violated by his subject. When this right of the sovereign is violated, as in tort or breach of contract, a right takes the place of the destroyed right, equal to it. Are we to conceive of the right as destroyed, or can the sovereign keep it alive and get repossession? He cannot, just as in a violation of a private right of security. Beale cannot think of the sovereign having a real right to repossession of his right, for the sovereign cannot be conceived of as being dispossessed of a right. The right can only be destroyed. They can be dispossessed only by entirely destroying the sovereign, as by Revolution. So as a practical matter all we have in the breach of a right of a sovereign is an action of redress. Redress of what? Not damages, for the wrong is not pecuniary, like the commonest wrongs to an individual. In the case of the sovereign, we get a remedy which is measured by the desire of the sovereign for vengeance, for punishment. The size of the claim for redress is based directly on the desire of the sovereign to exact suffering in return for the suffering, and to go a step further, it is based on the desert of the criminal; and he may suffer in his pocket-book or in his person. We are satisfying the sovereign's desire to make him suffer for what he has done, and it is a real requirement of what common law understands as justice to make the criminal expiate his crime by suffering.

336. Let us see the basis of this. What would the effect be of not demanding expiation? In the first place, an unsatisfied desire for justice on the part of the people, and a tendency to make him suffer by mob violence. This means that you are failing to satisfy one of the moving passions of the human mind, with the result of mob violence. If you abolished punishment by law, it would be like law abolishing marriage; you would get illegal punishment as you would illegal intercourse. In other words, there is a real existing desire to make a wrongdoer suffer which must be satisfied either by the law, or outside the law.

37. LANGDELL, *supra* note 11, at 239.

337. The desire for private vengeance as a matter of honor can be controlled, because only one person is interested; but the desire for public vengeance cannot be controlled, for it affects the whole community, and if law does not require expiation, the mob will.

338. As to the nature of carrying out punishment, though prescribed by the legislature, etc., that is a question of executive action—and is outside the realm of jurisprudence, just like rules for the collecting of taxes. The sovereign's right is satisfied by the sentence; how the sentence is carried out is an executive manner.

339. In "penal actions" and "exemplary damages," the law gives redress not merely to satisfy the right of getting back the value of the right, but to satisfy the individual's desire for vengeance. The principle is the same as in criminal law: that the defendant deserves the expiation.

340. The criminal law is not due to the public feeling, but Beale has brought up the public feeling merely to show that it is a just law.