Cornell Law Review

Volume 4
Issue 3 *June 1919 - NOTE: Issues 3 and 4 were combined publications.*

Article 6

Common Law

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The Common Law

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In the foreground and first to be answered is the question what is this law which we have followed from its origin, and what are the fundamental principles upon which it rests? We may recall the broad and limitless definition of the civilians: "The knowledge of things human and divine; the science of the just and the unjust." That is very nearly the stoic definition of philosophy, and sweeps into the law the contents of all possible knowledge. A much narrower conception was that of Xenophon who describes it as "whatsoever the ruling part of a state, after deliberating upon what ought to be done, shall enact;" and this was nearly followed by Hobbes who defined law as "the speech of him who by right commands something to be done or omitted." These definitions are limited to one sole characteristic of law which is its compelling authority and function, and exclude any necessary reference to morality, or custom, or divine wisdom, and were tersely paraphrased by Ihering who defined law as "the totality of the compulsory rules which prevail in a state."

Something more, but something very ambiguous and uncertain, was involved in Blackstone's definition: "a rule of civil conduct prescribed by the state commanding what is right and forbidding what is wrong." The latter phrase seems to have been borrowed from the limitation of Cicero: "*jubens honesta prohibens contraria.*" What Blackstone meant by it is inferable from his conception of a law of nature developed in his introduction. He says, "this law of nature being coeval with mankind and dictated by God Himself, is of course superior in obligation to any other. It is binding all over the globe, in all countries and at all times: no human laws are of any validity if contrary to this, and such of them as are valid derive all their force and all their authority mediately or immediately from their original."

We know, as a clear result of our study, that his doctrine is utterly unsound and without adequate foundation. It is the old confusion of religion and ethics with law. The author himself before he finished his work contradicted it continually. If by the law of nature he meant only that inborn instinct of self-preservation protecting itself by irresponsible force, extending itself to the extrinsic lives and things

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This was the last of a series of lectures delivered under the title "The History and Evolution of the Law." An earlier lecture of this series entitled "Seisin" was published in the April issue of this volume of the Quarterly.

brought within range of the personality, becoming a right by the recognition and assent of the society forming about, and so purely and intensely selfish as to need the restraint of extrinsic authority, he would have been within the truth of history. It is quite possible to call that a natural right, and to say that positive law should and does acknowledge and protect it, and is itself stronger and better because it does so: but what it ought to do is one thing: what by force of its inherent character it *may* do is quite another. The Roman and the Spartan, the Mosaic and the American law were still law though they disregarded and trampled on the original and natural right of the slave to his life and to his liberty. But in this doctrine of natural law lies the germ of the interesting debate which has come down to us, and which raises the question whether the law is simply the command of the state which the state enforces, or whether it has not a further necessary and essential element, derived from morality, and which, in a common though inaccurate way, we call justice and right reason. Some preference for the latter view seems to have been more or less involved in the definitions of the philosophical writers who have touched upon or busied themselves about the subject. Thus Kant describes law as "the sum total of the conditions under which the personal wishes of one man can be combined with the personal wishes of another in accordance with a general law of freedom." In this view law is the restraint of human selfishness in the interest of order and civilization. That is a truth but hardly a definition. Hegel's dogmatic description is "the abstract expression of the general will existing in and for itself." The meaning of that I excuse myself from any effort to ascertain, Krause terms it "the organic whole of the external conditions of life in conformity to reason." What is meant by "conformity to reason" involves over again the whole troublesome controversy. Savigny describes law as "the rule whereby the invisible borderline is fixed within which the being and the activity of each individual obtains a secure and free space." That again is a truth, and gives us the meaning of law from one point of view, but scarcely meets our demand for a practical definition.

From these philosophical abstractions we may turn to the analysis of Austin, which has served as the target for all modern criticism. We recall his definition that law is "the aggregate of rules set by men as politically superior or sovereign to men as politically subject." The steps which ended in this, the least rigid form of his definition, barred out morality and custom as in no respect inherent to essential elements of law, and drew the line sharply between law and ethics and law and custom.

Maine made an attack upon the soundness of this definition, resting

on the ground that it does not cover and cannot be made to cover the rules of the Indian village and of the Slavonic House-community existing under a non-lawmaking and merely tax-gathering empire. We may answer that these rules, and the similar sway of custom elsewhere observable and dominating the early social groups, constitute, not law, but, so to speak, the advance couriers of law, thin fringe of the coming array; that they take the place of and to some extent perform the office of the law that is to come, which is exactly Bracton's statement of the limit and work of custom; and so may be termed inchoate or customary law, but yet remain outside of the pale of that positive law which we seek to define. Professor Holland gives another answer. He refers to the fact that over these communities was a general sovereignty, even though tax-gathering, and which rather robs than legislates; that disobedience to the general custom was either forcibly repressed or feebly acquiesced in by the local authority; that in the former case it must, if only for the sake of peace, be supported by the sovereign, and in the latter case the rules cannot be called law at all. It is that resnlt which happens when there is no sanction beyond the general disapproval.

But passing by this form of criticism there are others more formidable. They rest on Austin's words of "command," of "sovereign," and of "rules set:" and insist that the large body of the law has no such origin, but depends for its vitality upon the common habit and custom and the general sense of justice. Among the advocates of that theory appeared Lord Chief Justice Russell in an address before the American Bar Association in 1890, whose conclusions have been strongly fortified by an argument of James C. Carter before the same Association. He insisted that the mass of the Common Law has been evolved by judicial decision,—which cannot be said to spring from the command of the state; that the soverign is under the law and cannot nationally be deemed to issue commands to himself; that any law which collides with the general habit and runs counter to the common opinion will fail to be enforced and become a mere nullity; and that the judge who decides does not make law but finds it crystallized in the general habit and custom, and simply recognizes what already exists.

To the first of these propositions we are not prepared to assent. It seems reasonable to say that the judges do represent the state: that they derive their office and so their authority from the governing power: and that the decisions which they make and the doctrines they define and declare may fairly be regarded as the commands of the state issued through their agency. But the remaining propositions of Carter's argument appear to be sound and true and to indicate a correct theory. That theory has great merit in several directions. It

shows us that where the sovereign is not under the law there is no law at all, but only the will of a tyrant resting on brute force, for that is not law which merely issues orders and formulates no general rules, and where the orders themselves operate only at the will of the autocrat. The theory too holds up to the light the hard and rigid outlines of Austin's "command" and "sovereign," and the very important truth that law is of little worth when against the general opinion.

Such criticisms of Austin's definition have bred very much interesting discussion and led to repeated attempts at modification and improvement. Thus Professor Clark proposes to say, "The law of a state is the aggregate of rules administered, mediately or immediately, by the state's supreme authority, or regulating the constitution and functions of that supreme authority itself: the ultimate sanction being in both cases disapproval by the bulk of the members of that state." This definition seems excessive both in its length and in its breadth. It avoids one of the criticisms on Austin, but falls into a graver fault when it makes the sanction of the law reside merely in a popular disapproval. The debtor who refuses to pay will surely persist in his refusal if the only penalty is public displeaure. Indeed he will rarely incur that since what the definition describes as "the bulk" of the society will admire his shrewdness and envy his luck. Judge Markby gives us a better as well as a more compact definition: "the general body of rules which are addressed by the rulers of a political society to the members of that society, and which are generally obeyed." This is Austin over again with his grimness a little softened and subdued, but with a condition of general obedience added. We do not admire the addition. If one was arrested for profane swearing, made a misdemeanor by statute, wonld it be a good plea for the accused that the statute was generally disobeyed, and therefore there was no law, and so there should be judgment of acquittal?

What then *is* a correct definition? Probably one absolutely perfect is not attainable; but we may acknowledge a preference for that framed by Holland, if we are to leave out of it all reference to the vital elements of the law's origin and working material. It has been approved by Judge Dillon in his Yale Lectures and by Pollock in his essays on jurisprudence. It is this: "A general rule of human action, taking cognizance only of external acts, enforced by a determinate authority which authority is human, and among human authorities is that which is paramount in a political society." It describes law, first, as a general rule of human action; that is, as operating upon all alike, or at least all of a defined class, and so without respect to persons: second, confining its regulation wholly

to external acts, or busy rather with conduct than with character: third, enforced by a determinate authority, which shuts out the indeterminate sanction of a mere popular disapproval: fourth, which authority is human, thus excluding what is or is believed to be a divine command: fifth, and which is the paramount political authority, that is, the state.

But, excellent as this definition is and widely as it prevails, is it sufficient, does it satisfy the matured and intelligent thought? Has our patient study left us with no conception of law except that of a soverign standing over us with a whip in his hand? We think not. In following the trail of the law's progress we learn one thing, with a certainty which is complete and absolute: and that is that law is never mere product of sovereign and arbitrary will, but always a growth from the soil of social life; always a reflex of the external morality and habit of the time; always framed from and constituted by the dictates of that morality. The process went on slowly, gradually, with an almost imperceptible tread; but our investigation reveals to us two instances at least where that constructive process showed itself openly, and on a scale marvellous in its scope and in the courage which stood behind it. What did our old friend, the Roman praeter, do? He built up the whole mass of the "honorary law" out of the external morality and prevailing custom common to all known races, and never once concealing or denying the process. Again Coke, the crabbed and ugly, persistently robbed the dusty footed traders at the fairs of the whole mass of their customs and rules, and dumped the solid load of the Law Merchant into the Common Law. We should recognize the full meaning of such facts, and the obvious trend of our whole investigation, and heed the lesson which they teach. We may not trust ourselves into the awful company of sages and philosophers and jurists whose definitions have survived: but we may, at least, express for ourselves the thought that has grown out of our study and say:

Law is such of the rules of external morality and general custom prevailing in a social organism as the governing authority of that organism selects, defines and enforces.

That tentative definition will of course evoke criticism, and the criticism will be just and unanswerable unless careful heed be given to what we mean by the phrase "external morality," and to the effort we make to define it with some accuracy. The word, "morality," has drifted away from its primary meaning, and become the most ambiguous and treacherous work in human use. It meant originally manners, customs, usages of conduct, *mores*, but has had an ethical element thrust into it which has almost dislodged its primary mean-

ing and made it stand for what is good and just. To avoid the ambiguity we have used the phrase external morality, meaning by that to exclude any necessary or essential ethical quality, though not at all its incidental or modifying presence which in a given case, may or may not appear: and understanding by it the total of ways and manners and customs of a people which have grown up among them as product of their notion or belief of what is, on the whole, most useful for the general order, comfort, and prosperity. This definition covers and is intended to cover what tends to the political as well as social welfare of the people and includes what we call expediency or public policy—which is only one phase of the general morality. Thus defining external morality we undertake to argue, pressed by the force of our own investigation, that the Common Law is wholly constructed out of that external morality and framed of nothing else; and owes to that fact an authoritative force and power very much wider and greater than it derives from governmental sanction. The argument to the contrary can only become effective by demonstrating that there is some law which did *not* grow out of external morality and prevailing custom, and is not a doctrine or process chosen from them for definition and enforcement.

I know of no stronger effort to establish such a proposition than that contained in the very able introduction to Pollock and Maitland's History of English Law: and if I can possibly show that the instances there cited are not, in origin and effect, the product of something which is outside of external morality and prevailing custom, but are, on the contrary, derived from it and born of it, I shall have fairly met the difficulties suggested.

It is first said that there are laws which are colorless or neutral, and have no trace of morality about them; and the typical instance cited is that of the law of the road,—passing to the left in England and to the right in this country and on the continent. Of this example it is said that some rule is necessary but which,—to the right or the left,—is totally immaterial. When the necessity or even prudence of some rule for the travelers' meeting on the road is conceded an admission is involved that it is dictated by the external morality of the race, which aims by a uniform rule to prevent accidents and injuries on the highway. Morality, having demanded a uniform mode of passing as a measure of safety, the custom already existing as an outgrowth of that morality dictates which way—to the right or the left—the traveler must pass. The law of the road therefore is obviously the product of external morality and prevailing custom, and explains the different rules of different lands.

Again it is said that "cases occur where the legal rule does not pro-

fess to fulfil anything like perfect justice, but where certainty is of more importance than perfection, and an imperfect rule is therefore useful and acceptable." But if the rule is "useful" it is because the experience of the people has found it to be such, and if it is "acceptable" it is because it accords with the level of the external morality of the race. If it is "imperfect" it is only so because we measure it by a higher standard than that furnished by the morality prevalent at its creation and out of which it grew. No law ever has reached or ever will reach "perfect justice." That is an ideal standard, always above and beyond human morality; which changes with the years and the growth of intelligence, and always floats higher with an evasive lift the more we climb towards it. The law does the best that it can in the light of its time, and that best is measured by the morality from which it draws its material.

Next it is urged that "there are cases where the law for reasons of general policy not only makes persons chargeable without proof of moral blame but will not admit proof to the contrary." The trouble here lies again in the word "moral" as qualifying blame. It attaches to it an ethical element of goodness or innocent intent, and waves into it that internal morality which we describe figuratively as residing in the heart. The illustration given us shows this clearly. We are told that by the law of England "the possessor of a dangerous animal is liable for any mischief it may do, notwithstanding that he may have used the utmost caution for its safe keeping." But bringing the dangerous brute into the midst of the citizens is in and of itself a perilous risk, and has no utility sufficient to compensate for the possible harm. The keeper knows that in spite of his utmost care the brute may escape and do mischief, and the general morality of the people decides that he who ventures upon the known and inevitable risk shall take the risk, and be responsible for the consequence. His good intent, his extreme care is matter of no moment. The morality of the time, founded on experience holds that he has done a dangerous act in keeping the beast at all, and so is blameworthy and should be held responsible for results. Let him leave the brute to his native jungles or be absolutely responsible for his cage and chains. So the law adopts and enforces the decree of the general morality. Indeed, when the objectors admit that the rule of liability is founded on reasons of "general policy" they simply substitute the word "policy" for morality, meaning all the time one and the same thing.

Anew it is urged that "a master has to answer for the acts and defaults of a servant occupied about his business, however careful he may have been in choosing and instructing the servant," and however free from personal fault. That rule has evoked many theories of

origin and justification. It is easy to see how in the primitive days the father was identified with the children and their act was regarded as his, since they were under his absolute control and utterly destitute of means with which to answer damages. It is equally easy to see how that identification should continue in the case of a slave; but not so easy, though possible, for the thought to extend itself over the servant, become free and at liberty to serve or not. We can see how the notion failed in the region of crime and penalty, and even in trespass in Anglo-Saxon times, and the test of command or consent by the master was put in the vacant place. But experience taught that the substituted test worked badly; that it practically freed the master and left only a remedy against the irresponsible servant; and then appeared the theory of an implied command derived from the fact that the servant did the wrong while engaged in the master's business. But all along the line two things were obviously operating upon and influencing the moral thought of the times: one, pity for the person injured and a conviction that he should somehow have redress; the other, that the normal condition of the servant could not furnish such redress, while that of the master could. Who would sue the master to-day if the servant was fully able to answer for all the damages is a significant question which Maitland puts. And one might add this further inquiry,—how careless would the master be if he was never responsible for the act or neglect of the servant? Obviously, the history of the rule is that of a struggle of the external morality of the ages with the problem of a recognized evil. The pendulum has swung sometimes to the severe, sometimes to the lenient curve of the arc, but no theory has ever yet derived the rule from the unsupported and arbitrary dictation of the state.

Finally it is asserted that there are cases in which there is no room for moral considerations to operate, and the illustration given is where a purchaser buys stolen securities, capable of passing from hand to hand, from one who has stolen them, but has made the purchase in good faith and without fault or negligence, and one of the two—owner or buyer—must bear the loss though neither is blamable. The law is certainly puzzled over such cases, but that is because the moral thought from which it springs is equally puzzled by the situation. In such a case the judicial mind studies the facts closely in search of some moral ground like negligence on which to base a preference for one party over the other. If it finds none it either decides that the misfortune must rest where it came,—"the tree must lie where it falls,"—or more commonly studies to determine which location of the loss as between the two men equally innocent will be best for the general interests and convenience of the people. It observes that if it is gold

coin or bank bills that are stolen it would be intolerable to allow the owner to pursue them in innocent hands. It then observes that promissory notes payable to bearer and passing by mere delivery are in the same category and logically applies the rule to them, and then to coupon bonds possession of which constitutes title. It sees how business and commerce would be hindered and endangered if no purchaser was safe against an unknown theft somewhere along the line of transfer, and so solves the problem by leaving the man who suffers the original misfortune to bear the misfortune. If in some jurisdictions a different result was reached and the loss thrown on the innocent purchaser it only shows how debatable the moral question is. In those courts the obvious rule that a man could transfer only such title as he had and that a thief has no title to transfer, and so the owner remained owner, outweighed all other considerations. The very disagreement shows how close the moral question is and how easily the thought of different communities, and so their law, might vary. Who ever says that the solution either way does not stand on moral grounds injects into the word "moral" an element which we have steadily disclaimed. And that ambiguity discloses itself when the objector adds "there must be *some* law for such cases, and yet no law can be made which will not seem *unjust* to the loser." We may doubt whether any law *seems* just to the man who suffers its penalty. The proper test is not the individual feeling of the loser but the general moral thought of the community which takes into view all the elements and surroundings of the difficult problem. The solution either way stands wholly on moral grounds. And so I hope that I have fairly met the objections formulated by an authority which I profoundly respect, and that I may have helped somewhat to clear the subject of the doubts which have surrounded it.

Up to this point the definition has been confined to the Common Law; but I believe it to be equally applicable to procedure and legislation, although on the surface and to an unreflecting view they may seem to be, more or less, products of the arbitrary will of the state.

Procedure is not doctrine although it often holds doctrine entangled in its meshes, and more or less reflects that doctrine in its operation. It is, therefore, very properly called adjective law because its main office is to aid and assist in turning doctrine into concrete application and activity. That it is never the product of some sovereign's arbitrary will; that it was never manufactured but always grew; that so it harmonized with the average morality of the time, betrayed all its faults and developed all its virtues; are lessons which our historic studies have invariably taught us. The two dominant elements of procedure are, first, some method of ascertaining the facts on which

judgment may rest and, second, a method of enforcing the judgment when once rendered. In primitive days, as we have already seen, the only fact was a killing or stealing, in general sufficiently obvious, or at least chargeable upon some neighbor tribe, and the judgment was revenge or retaliation. The process was moral measured by the existing standard of morality which identified revenge and justice, and held courage to be the principal virtue; for war was the normal condition of the tribes. Ere long it ceased to be so and peace became a common desire and the general rule, leaving war an exception; too common perhaps but still an exception. Composition becomes the rule, at first voluntary, at last imperative. And here the process of self-help begins to disappear and the intervention of the state becomes necessary. The blood-price must be fixed. The sovereign authority fixed it not at all arbitrarily but according to the valuation of the general opinion. That opinion does not regard all lives as of equal value. That of the king or count or chief is valued more highly than that of the thane and his life as more valuable than that of the simple tribesman and so the blood-price is graded accordingly. But the ruling authority neither made the grades nor created the values. It found them already existent and simply recognized what existed. In other words the ruling authority steps in to enforce the prevailing morality of the time, but in a manner dictated and governed by the needs and the decrees of that morality. But all along the way there has been trouble about the facts. Suit and compurgatory oaths were rough and coarse methods, and these sometimes balanced each other, and left the truth in doubt. Then the procedure became an appeal to the Deity, and the hand was thrust into the scalding water, and the hot iron grasped, or the champions pounded with their clubs. Immoral? Not for them. Believing that the divine wisdom would make manifest the truth, it was not immoral to adopt a procedure which would reach that result. But again morality outgrew the rude methods. When the belief in the divine intervention vanished some other mode of ascertaining the truth had to be planned; and here the morality of different races reached different conclusions. At Rome the question of fact was first left to a *judex* or referee, and then under the empire to the magistrate; a method which yet prevails on the continent where the Civil Law predominates. But in England by slow stages it was left to the jurors, hearing the witnesses and sworn to decide the truth. This method was complicated by a vast system of writs, and as a consequence by various forms of action. But these writs were never the arbitrary construction of the sovereign power, but dictated by successive and often new groupings of actionable facts which the writs were made to fit. Later this complicated procedure began to lag

behind and far behind the growing business morality of the race. The popular thought assailed its vexatious forms and rules, and more and more began to demand a simplified and less awkward procedure, and a court of equity less like a sponge of fortunes and graveyard of estates: and in obdience to that demand the system was swept away and the present simpler and wiser practice substituted. The interesting process began with us in our state of New York. It was not at all in its origin an arbitrary edict of the ruling power. It was born of the resentment of the people protesting against intolerable delays,—the snares of a technical and complicated practice, in which truth was strangled rather than evolved or saved. The system was framed largely by one scholarly and learned lawyer, who, like Tribonian at Rome, comprehended the needs and the demands of the intelligent morality of the day: and revised by others with a view to constructing a simpler procedure, and one better suited to the needs and convenience of the citizen. The demands of business and social morality presided over the new code, and shaped and moulded it: and the state had nothing to do with it except to attach the formal seal of authority and make imperative the decree of the general morality. State after state watched the working of the new system, studied the results which followed that working, and, out of the experience thus attained, followed the example. If in some of our jurisdictions that did not occur, if one state clung to the Civil Law and others to the old English procedure it was because long habit and venerated custom were strong enough to resist the change. Then England ventured upon the experiment, with modifications due to her own peculiar needs, and taking the new system from the hands of chosen citizens, fitted for the task, and whose sole guide was a clear conception of what suited the needs of the race. It seems impossible to resist the conviction that procedure, like substantive law, grew from the needs and the general morality of the nations; reflected those needs and that morality which were transplanted into the law to furnish its working methods, and after having been carefully selected out were first strictly defined and then made imperative.

Something similar seems to be true of legislation. To a casual glance it appears to be the product of an arbitrary machine which grinds like the "mills of the Gods." That impression, tested by the results of history, is seen to be an obvious error and one of large proportions. In our day the written law is always made either by an autocrat, or by representatives of the people. In the latter case we know that the legislation evolved reflects always the popular judgment, and stands at the level of the general morality. The legislative body comes from

the people, is more or less a sample of the mass, and has in its veins the blood of their virtues and their faults. It is full of the general morality of the state or the race and has no other atmosphere in which to breathe. When any new enactment is proposed its authors understand that it must bear the scrutiny of debate, be measured and tested by the popular habits and needs, and cannot live for an instant without some real or supposed necessity or justification behind it. Its consideration involves an inquiry into its probable effect upon the economic and social life of the citizens, into the fairness and justice of its expected operation, into the reality and the scope of the need to be supplied or the remedy to be furnished. The whole discussion about it rests upon grounds of general morality and without some basis derived from that source the measure would not have the remotest chance of life. The entire debate about it has a moral foundation and all the arguments come from the armory of the prevailing morality and custom. Beyond that there is restraint and direction from above. Over the legislature usually presides that group of moral axioms born of the popular experience, and which we call a constitution. If not written as with us it is in the air as in England. It crowds all legislation into the domain of conceded morality, and builds barriers against possible violations of fundamental rights belonging to the citizen. And so if anything is founded upon the external morality of a race it is surely the legislation thus framed by its chosen representatives.

It is true that the legislature is sometimes deceived, may on occasions mistake the moral quality of the law proposed; or that lurking in a measure apparently prudent and wise there may be found a word or a phrase skilfully chosen and deftly concealed in a tangle of sentences which serves an individual or corporate purpose purely selfish and plainly unjust. But the very fact of the concealment and the ingenuity of the mask betrays a consciousness that legislation rests on an external morality which the artifice violates, and so a fraud is resorted to whose purpose would utterly fail if seen or known. When the truth is finally disclosed repeal or amendment swiftly follows, and meantime the noxious feature of the law is eliminated by judicial construction, or annulled as unconstitutional, or resisted and overwhelmed by the concentrated force of public opinion. It is a fraud masquerading as a law. If it be said that nevertheless until repeal or annulment it remains a law during the interval, and so we have an instance of a veritable and enforceable law which is such though at odds with the general morality the criticism may be parried with two suggestions. The enactment was supposed to be in accord with the public welfare and owed its existence to that supposition. When the mistake was discovered another doctrine of the general morality came

into play: that no law however bad should be at the mercy of the individual but should be respected until annulled by the authority of all. The illustration only shows that the morality of a people, reflected in their laws grows by experience and learns by its mistakes.

Again we are told that a law often emanates from the legislative body, which is recognized and obeyed as such, but which plainly violates the rules of morality and even shocks the popular sense of justice: and a common illustration is the law which once compelled the free states to deliver up a fugitive slave. But the morality underlying the law was that of the slave states. In them the slave was property, and the law was built not only on long habit but on a conviction that the bondage was best for the slave himself. In those communities ministers of the gospel did not hesitate to justify the morality of the institution. The free states for a long time accepted the law in deference to the Southern standard of morality, and as a necessary concession to secure that close and effective union upon which the safety and prosperity of the nation depended. It is always a mistake to measure the morality of a law by some later standard of a more advanced civilization.

But all law is not made by representatives of the people. Sometimes it springs from the will of an autocrat, and the question may fairly be asked—what have we to say to that? The answer involves several considerations. The arbitrary ruler, whoever he may be, cares little or nothing for his people except in two respects. The safety of his throne requires him to preserve order, and the support of his royalty compels the imposition of taxes. As a general rule, he makes no law outside of or beyond those two necessities of his reign. Hence, it is that when we examine the dooms of the English kings we find alone a legislation against murder and theft and assault, the three crimes which most imperilled the order of the realm. They were forbidden as violations of that order, the preservation of which was, if not the sole, at least the predominant morality of the time. If the autocrat went further, if he sought to regulate the relations of men with each other as it respected their property rights he came at once into the domain of morality to find the material for his work. If he sought to violate the manners and customs of the people within the range of their normal activities he met at once reistance and rebellion. John tried it and had to yield to his armed barons: James tried it and was met with the prohibitions of his own judges. The history of the past reveals that the autocrat has no liking for the field of private law, or if he enters it comes under the influence and domination of the ideas and habits of his people. And so he is either a tyrant ruling his subjects as slaves with no law beyond his own shifting will, or if he

makes any, recognizes and utilizes in his rules the thought and custom of his people.

We have thus passed in review the objections most commonly raised to the theory of law involved in the definition which we have ventured to formulate. I hope those objections have been fairly met, but at all events the study of them has served to confirm convictions which have steadily been gaining strength. One other thought will further support those convictions. One may notice in a study of judicial action how constant are the appeals of the courts to the average conduct of men and to the moral ideas prevailing among them. In bailment the degrees of care required are measured by the average conduct of the prudent man; negligence is asserted when that conduct is departed from; fraud is ascertained by its variance from the assumed action of honest men; a felonious intent is deduced from outward circumstances; the customs of merchants have been transformed into imperative rules of law; in brief, in every direction the judicial habit is solving its problems by an appeal to the ways and action and thought of the typical man of the race. This persistent appeal to rules of general morality, to the human experience unfolding about us can hardly be justified unless we deem the judges authorized by the very nature of their office to apply to the problems of litigation the solutions which the general morality of the people furnishes for choice and use. They cannot enact statutes; they have never been formally authorized to make law; and I see no way to justify the decisions of the courts, as they have come down to us, and are being daily dispensed, except to hold that it is the inherent nature of the judicial office to select out, define and enforce such rules of the general morality as are effective for the solution of the questions submitted for decision. We avoid all difficulty when we adopt the terse expression of Carter: "The judges do not *make* law; they *find* it;" and that other vital phrase of Holmes: "The law is founded not on logic but on *experience*." The argument may be closed with the enactment of the German Civil Code of 1896 which declares that "a juridical act against good morals is null."

A further result of our inquiry into the evolution of the law should be a clearer and easier understanding of the abstractions which envelop and yet express its fundamental principles. The one word which includes them all in its almost unlimited generalization is the word "right." With its correlative "duty" which is always implied, it pervades and dominates the whole area of ethics, the entire thought of religion, as well as the substantive doctrines of the law. In the latter aspect only it comes within the scope of our study, and we are to ascertain how much and what help the historical method furnishes

to our understanding of that word. If our theory of the law is a correct one it becomes apparent that the legal right is so much of the moral right pervading the social organism as the governing authority deems essential to the safety and prosperity of the organism and which it therefore selects out, carefully defines, and then enforces by a sanction much beyond mere public disapprobation. The moral rights thus chosen are quite too numerous for mention, but are almost, if not quite all, derivatives from those primitive and natural rights of life and liberty which it is claimed are inherent in the man's personality. That personality gradually extends over property, movable and immovable, carrying its rights with it, and to wife, children and slaves whose obedience is rendered or compelled. These natural rights at first come into the man's consciousness only when invaded or assailed. It is the sense of a wrong done which gives birth to his conception of a right violated, and he resents the wrong and faces it with revenge. Soon the society about him adopts and justifies the retaliation, and so recognizes the right, the invasion of which led to the violent remedy. When that recognition becomes general and pervades the whole social structure the natural rights defended and maintained become moral rights having the sanction of the general approval so that thereafter violation inevitably awakes the popular disapproval. From these moral rights thus formed and inwoven in the habit of the races, the law selects out what it most needs for purposes of order and safety and common prosperity and transforms the moral rights so chosen into legal rights by making them imperative and fitting them with an effective sanction.

But a right in one man implies a duty in others. Each must respect the right of each. That is essential to the very existence of the moral right. On occasion that duty is not performed. The right is wilfully invaded and the invasion becomes a delict or tort which the law must of necessity punish or redress. But it adds one limitation to its punitive action. The tort must not only violate a legal right but must cause some tangible harm and is then called an injury. That is the law's word though in common speech we give it a much wider application. The legal doctrine is crystallized in the phrase "*damnum absque injuria.*" Obviously the law is here selecting out from morality a special class of immoral acts for its prohibitions, and refusing to take all. The wrongs which occur as violations of duty are of two sorts; those of commission and those of omission. In either case the vicious act may be intentional or without evil purpose. Both alike the early law regarded as a trespass. The wide scope of that word is evidenced by the range of the action founded upon it, which when broadened so as to cover the facts of every wrong, as in the action on the case,

included almost all forms of tort whether of commission or of omission. For there were many of the latter. The duty of one man, born of the right of another was often not performed at all, or in such careless and imperfect fashion that injury resulted. That is negligence; another of the law's words, holding in its grasp a multitudinous variety of actionable facts, and breeding a class of lawyers of whom we are not extremely proud. And it extended, as we have heretofore seen, not merely to the personal acts of the party himself but to those of children, slaves, and of servants engaged in his business. This negligence may be either active or passive. One may do as he should not, or not do as he should. In either case his negligence is not, in and of itself, a ground of action, but rather a characteristic of the act or omission and which attaches liability where without it none would exist. The standard by which it is measured is the assumed conduct of the average prudent man, placed in the same situation and amid the same surrounding circumstances; and the approach to or failure to reach that standard is usually left to what we call the common sense of a jury representing the average level of the morality of the time. But the judges learn continually from the verdicts of their juries. When, as to certain occurring acts or omissions, they almost invariably attach the characteristic of negligence, and the judges concur, such acts or omissions grow to be regarded as negligent *per se;* and so appears negligence as matter of law, leaving no question about it for a jury to consider. While much of good has grown from these legal doctrines much of evil has also developed not from the doctrines themselves, but mainly from that unwise legislation which allows the lawyer to share in the proceeds of the litigation, and tempts him often by devious ways to turn accident into negligence. The general morality begins to appreciate the evil, and we may hope will take away the temptation to speculate upon the poverty of the client and the sympathies of a jury.

But wrongs took on a new phase. Not only were there legal collisions between private individuals quarreling over trespass, and in which such parties were the sole litigants, but there were cases in which the state was involved as a party, and its safety and rights imperilled. In the plebeian nest on the Aventine there were nightly meetings in which conspiracy was hatched, and which meant not merely plunder or murder, but treason against the state, and in repressing which by process of law the state became necessarily a party prosecuting. And so the civilians drew the lines between the *jus publicum* and the *jus privatum*, and we have the distinction between public law and private law. That, however, was not the only result. The notion of a wrong against the state, once realized, inevitably

spread. It was easy to regard murder and arson and burglary as offenses against the order and safety of the aggregate community beyond their character as wrongs against individuals. And so the generalization of crime appeared in the nomenclature of the law and as time went on began to cover a wider range of cases.

All these torts or wrongs, in the view of the early races, were such entirely irrespective of the presence or absence of a vicious intent. The wrongful act, the visible and tangible fact alone was regarded. Every man acted at his peril and was responsible even for the remote consequences of his acts. Maitland describes the situation thus, as the resultant effect of the Leges Henrici: "You take me to see a wild beast show or that interesting specimen a madman; beast or madman kills me; you must pay. You hang up your sword; some one else knocks it down so that it cuts me; you must pay." Of course with advancing civilization morality began to protest, and eventually worked two changes: one that the graver crimes should exhibit the element of a felonious intent, while its presence in trespass should be unessential except as on occasion it might serve to enhance damages; the other that the tortfeasor should only be liable where his act or neglect was the proximate cause of the injury done. But morality has been asked and so the law has been asked—why punish an act or neglect admittedly free from any evil intent and therefore innocently done? No better answer can be given than that furnished by Judge Holmes, which is, in substance, that the basis of blame in the wrongdoers is the knowledge possessed by him or imputed to him, that certain acts or defaults tend naturally to work harm to persons or property. If he does such act or makes such default in the face of such knowledge he is blamable and a tortfeasor. Whether he intended the result or not is immaterial.

Among the torts which both the law and morality condemn none have wider prevalence or assume a greater variety of forms than those which are the product of fraud, or deceit. The law abhors it, persistently and resentfully tracks it through all its concealments and artifices and resolutely annuls its work. It seeks to punish it both directly and indirectly: directly when it can award damages: indirectly where it can deny to the liar the profit of his falsehood. It was recognized as *dolus* in the Roman law, and we may recall that *exceptio doli* of the praetorian procedure which let in to the defense everything tending to show that in justice and good conscience the complainant ought not to succeed. But here again, as in so many instances already noted, we observe that the law does not take over the moral rule entirely and completely. Morality hates a liar, and so the law does not love him, but it leaves him undisturbed when the lie touches only

immaterial matter, and nobody in good faith relying upon it has suffered harm in person or property. But when that does occur the law sometimes confronts the deceit with the doctrine of *estoppel*,—a doctrine which it frames and enforces in a way to make one tingle with pleasure at the method. It ties the liar to his lie; it refuses to let him prove the truth when the truth would free him from liability or give him success. He has made his bed: let him sleep on the straw. The cases of fraud and deceit are innumerable but may be passed by to take note of the manner in which the general law of torts applied itself to the land and invoked the enormous spread of the doctine of disseisin.

Disseisin:—that was another famous word but founded on a fact and an idea lying beneath; at first clinging closely to the land but in the end floating over the real and the concrete with the lift and sweep of an abstraction. That idea was the doctrine of possession.

Possession may be traced from mere manual detention in the case of movables, and communal occupation in the case of lands, to a control over and mastery of the one when out of hand or even in the temporary care or use of bailees, and a similar control over the other exercised by the individual when away from the land and when that was in the permitted occupation of another. In both cases the tangible and real detention or occupation became represented and dominated by an intangible and abstract right, taking the place and serving the purpose of the actual and visible fact. But two such conceptions, that of possession in the abstract and actual possession in the concrete, could not long co-exist without jar, and naturally enough the latter gained the advantage at the outset and proved the stronger. As it respects movables, one may be surprised to see the possession of the trespasser or the thief prevailing over the right of the owner to possess, and in case of land, to find the disseisor able to hold his possession, however vicious, against every assault until the person disseised asserts his right or the true owner comes by the tedious route of the writ of right. We account for it in a loose and general way by supposing that the archaic intelligence found it very difficult to master and handle abstract ideas in the face of a contradicting reality, but something more than that seems necessary to account for the strong and persistent protection which the Common Law gave even to the violent disseisor. We read of four explanations, among which our historic travels lead us to prefer that which regards possession as an outwork or defensive protection of property in its character of the abstract right of ownership. For possession was almost the equivalent of property. The possessor was regarded as the owner, and protected as such, until the true owner appeared with his title and demonstrated his right. But as time went on and intelligence grew the abstract right of owner-

ship gained upon the concrete possession and the right to maintain it, until at last the law became able to see property in one man while there was possession in another. Still, even to the end the two were not easily distinguished, and the fact makes very acceptable the analysis of Holmes, who declares as its result, that the owner holds with an intent to exclude all others: the possessor all but one. The abstract thought of a right of possession yields only to the higher right of ownership. The latter is defined by the new German Code thus: "The owner of a thing can, so far as the law and the rights of third persons do not prevent, dispose of the thing at will and exclude all action which others may wish to exercise over it." Pollock gives us this more compact definition, viz., "the entirety of the powers of use and disposition allowed by law."

An historical analysis teaches us however a thing concerning ownership, recognized in Austin's analysis, though not involved in his definition, but quite fairly admitted in the German Code; and that is, contrary to our usual impression, the merely relative character of ownership and the constant and narrowing limitations which restrict it. We seem to learn the lesson that there is no such thing known to the law as absolute ownership, and that, when we postulate that, we are simply idealizing and imagining a thing which does not exist. The study of ancient law led Pollock and Maitland to that conclusion, and we are not surprised that it did. The medieval land-law is full of what is called the relativity of rights; that, is they are good relatively to those which confront them, and are simply the best rights that appear. Always, even in the writ of right, which was regarded as a proprietary action, the successful title was derived from some priority of seisin, and is substantially so derived to this day; and that prior seisin may or may not have been the vestment of a full ownership. It is presumed to be such until some better right is produced, but a better one is by no means impossible. As to movables, we can hardly raise a right to the level of absolute ownership which right permits that an owner may be compelled to sell against his will. A wrong-doer takes my goods under a false claim of right. My remedy is trespass or replevin. In the first case I recover only damages; in the second the defendant has an option when defeated to keep the goods and pay their value. I lose my goods but get that value. I have been forced into an involuntary sale. This comes from what is deemed the pecuniary character of movables. The law assumes that their money value will generally replace them. But beyond these limitations the most complete ownership known to the law is restricted and qualified by the operation upon it of the rights of the public and of third persons. It yields to the seizure of eminent domain; it submits to the shadow and

the rush of an elevated road; it is hurt by a change of grade; it cannot be used for purposes which make it a nuisance to the neighbors; one may not build of wood against the fire laws; the board of health will dictate your pipes and drains, and bar you from the flow of your own well; and so the German Code did well to limit ownership by its exceptions. It is true that in some of these cases compensation is provided, but we are forced to yield as owners and be content with money. That ownership is hardly absolute where the free use is restricted and the possession may be violated against our will. It is facts like these which led Austin to refuse to define property, and to say that its definition involved the whole body of the law.

As we look back over the long catalogue of torts and the remedies provided for their redress we are not surprised to observe that in the earlier days every remedy known to the law was an action of tort. There was no other. But out of one of them,—the action for deceit, —we have been taught that assumpsit appeared and with it contract, and the new action founded wholly upon a promise. The duty underlying it, the breach of which constituted a wrong, gave place to the contract itself as the one and sole ground of actionable redress. Very rapidly contract took the foremost place in the remedial action of the law and swiftly assumed the leadership. It rested wholly upon the promises of the parties. Those promises made needless any inquiry into the underlying relations of the contractors out of which the promises grew, for these registered and established the duties born of those relations, and conclusively so with the two exceptions that there must be a sufficient consideration and fredom from duress or fraud. These exceptions opened almost if not quite the only doors to an investigation of the underlying relations in which the promises were rooted. In thus requiring a consideration the law as usual took from morality only a part of its doctrine. The latter requires that every promise should be fulfilled,—the bare word should be inviolate,—but the law chose only to enforce those founded upon sufficient consideration. The purely gratuitous promise with some rare exceptions in foreign jurisdictions was left within the domain of morality. Of course these relations framed by the assent of the parties and which we call contractual covered an enormously wide area and could not be fenced in or limited. But the law early began to gather them into groups and to give the groups names by which they might be known and recognized. I believe that these groups grew in a sequence as natural and orderly as that which characterized the legal abstractions which we have been studying. Until a better one can be found I suggest what seems to me the probable line of evolution as it respects mainly rights of property. The primitive man in his relation to things had first a

manual detention; then a crude possession founded on control of things, within his power though out of his personal grasp; but that possession he sometimes transferred to another by a deposit or lending or hiring, and this class of transfers, probably the oldest of all, grew into bailment, the essence of which lay in the duty to return. Then came transfers in which there was to be no return, but each was to keep and hold the thing transferred, and that was exchange or barter. Next with the appearance of an admitted representative of value followed sale; at first a fact executed, complete; but very soon involving on one side, instead of immediate payment, a promise to pay in the future. Hence debt and the beginnings of contract. With the spread of that the personal activity of the seller proved insufficent, and he had to have servants who broadened into bailiffs and factors and the relation was described by the name of agency. Since transfers began to rest more and more on promises, security for performance or safety of title was demanded, and there came guaranty and warranty. The range of transfers expanded, too much for the strength and capital of one man, and he joined himself with others, and partnership made its appearance, and that, proving not strong enough for the work required of it, there arose incorporation, an artificial ownership vesting in one control the interest and capital of many. Amid the endless relations thus engendered were devloped some, not covered by either tort or contract, but because of a supposed likeness to the latter were grouped as quasi-contracts. These were not contracts at all and did not disclose the elements of tort. They were obligations imposed upon a party by the law, not only without his assent but in face of his positive dissent, because as in the case of money paid by mistake, he had received what in equity and good conscience he ought not to retain. His liability rested wholly on morality; it had no other orgin or measure; and presented a case where without concealment or disguise the law drew from morality the whole of its doctrine. Finally death entered the scene of the rights and duties to be regulated, and there resulted succession and inheritance. If some one can trace this line of evolution with a keener eye for the trail and the blazes on the trees I shall not be surprised or sorry but glad.

We have just referred to succession. That is another of the law's words involving a great wealth of doctrine and opening a wide area of controversy. It is a very curious and interesting word and involves a problem not easy of solution. We know that in our day the executor of a deceased testator may sue to recover debts due to the decedent, and may be sued on the latter's liabilities although such executor has no connection with the claims which he pursues, and never incurred the liabilities with which he is charged. As an individual he is a total

stranger to both credits and debts. The answer always made to the problem is that he represents the deceased, but that is only stating the problem in another form, and leaving us still to inquire what that "representation" really means and how it acquired some of its most remarkable qualities. It is absolutely impossible to explain the seeming anomaly except by recurring to the doctrines of the Roman Law. We must solve the problem historically or not at all, for no theory of agency will reach the case since the dead man can have no agent, and if he could it would not remove the difficulty. In all my study I have found no better explanation than that made by Judge Holmes in his very interesting chapter on succession. I shall accept his guidance up to a certain point, and to him must be awarded the credit of the explanation. It takes us back to the time when the family was the unit of organization, and the father was its manager or head, owning and controlling all its property and yet admitting a certain degree of interest in it belonging to his children. When he died a new head of the family was appointed who became the "universal successor" and for all purposes of the family was by a convenient and very natural fiction identified with the deceased. The aggregate of his rights and duties while alive was grouped into the *familia* and the *persona* of the decedent passed as a whole and unbroken to the successor. By force of that identification he took upon himself not only all the rights but also all the duties of the deceased, the whole aggregate of the dead man's rights and liabilities, and the *heres* became in the eye of the law the dead man himself. The fiction solved the problem. That this was so is apparent from the fact that the heir as successor was personally liable for all the debts of the deceased, and bound to pay them out of his own property where no sufficient assets descended. The fiction of identity flowing down the years accounts for that puzzling rule in the English law by which the administrator took a share of the assets. Blackstone tells us that, by the custom of London which the statute preserved, where a decedent leaves a widow and children his "substance" is divided into three parts one of which belongs to the widow, another to the children and a third to the administrator. This last was called "the dead man's part" and the commentator adds that "the administrator was wont to apply it to his own use." Of course. He was the dead man and not being otherwise disposed of it belonged to him. The same thing was true of an executor who took a residue undisposed of by the will. We can easily understand that when we recall the fiction of identity. The executor filled the place of the Roman heir, was identified with deceased, and what the latter had not given away of necessity belonged to the executor in his character of dead man surviving. The fiction also accounts for that joinder of

rights not easy of explanation, and which we are apt to regard as the product of an arbitrary decree. Thus, if A holding a hyde of land has used a way over the land of B for fifteen years and then dies and the land descends from A to C who is his heir and the latter uses the way without disturbance for five years more than C acquires the right of way by prescription, since he can add to his five years his ancestor's fifteen and so make up the adverse twenty which ripen a trespass into a right. He has obtained what the Roman law called a servitude but the English law an easement. Why he should have that right is explainable on the old Roman theory that the heir is a continuation of the ancestor and C is A for all legal purposes of the estate; so that instead of two separate possessions and each a trespass there is one continuous user creating a right. One should not regard the notion of the dead man's survival in his *familia* and the theoretical identification with him of his universal successor as extravagant for the fiction pervaded many areas of English law and its possibility is seen even among the living. It became quite common to assert a fictitious identity of husband and wife and so to merge her existence in his with all the inevitable consequences of the merger. It enabled the children of a dead man who would have been heir if he had lived to stand in his place and be heir for the purposes of the descent of the land. They were said to take by representation. That was a new word substituted for the old identification. With the splitting up of the *heres* into executor, administrator, heir, devisee, legatee and distributee the fiction of identification became very much maimed and disabled and faded into the more plausible form of representation. For much of the old identity was shattered, and Justinian gave it a heavy blow when he decreed that the successor should not be liable for the debts of the deceased beyond what the assets would pay. And so there was representation instead of identification but the main characteristics of the old thought still inhered in the new one. Description of the thought was changed but the elements of the thought remained. If I have pushed the conclusions of Holmes in some directions beyond his boundaries he has pushed them beyond mine for he carries them into transfers *inter vivos*. He may be right about it. There seems to be in those transfers a trace of the old thought. We detect its shadowy presence in the familiar doctrine that "the assignee stands in the shoes of his assignor;" and again in some cases of negligence where the default comes from a servant who is described as the *alter ego* of the master. But I do not pursue that further line of investigation since my own thought about it is not sufficiently clear and confident to justify an expression.

I turn rather to one final word everywhere dominant in the working

of the law and yet in its constant use painfully ambiguous. That word is justice. A similar ambiguity hung about the *jus* of the Roman law, and he was a very good civilian who always used the words *jus* and *lex* without confusing them. What we are to regard as justice necessarily depends upon the standard which we apply. If we measure it by ethics then it is action in accord with the conscience or what we describe as good morals; but if we measure it by law then it is action in accord with legal rules, and accounts for the bold phrase of Hobbes that a law is never unjust for it is always in accord with itself. In the first sense it is possible for us to say, as we sometime do, of a legal decision,—that may be law but is not justice. Whenever we say that we inject into it an ethical element of an altruistic character which does not belong to it in the region of law and is our own conception of what is good as distinguished from what is useful; or more often we view the facts out of which the decision grew and to which it was applied from a prejudiced or interested standpoint of our own with results very divergent from the construction arrived at by the judicial arbiter. Legal justice can never operate except upon some matter of facts. It must ascertain them first, and often does so with difficulty, sometimes perhaps mistakenly, and there can be no criticism of its conclusions apart from the group of facts which challenge its judgment. Those facts are evolved from the evidence furnished, and that evidence is in general contradictory, occasionally false, and likely to be disorderly and confused. In every litigation, almost if not quite without exception, there are *some* rights on each side but which have come into collision. Out of a profusion of examples we may content ourselves with one. An adjoining owner builds by the side of my residence an iron-works. The clang and vibration of his machinery ruins my home by making life in it intolerable. Clouds of smoke and soot pour from the stacks and darken and foul the air I breathe. But my neighbor owns the land on which he has built. He had a right to build and pursue an industry not only profitable to him but useful to the community at large. But I have a right to the normal and usual quiet of my home, to the natural purity of the air, to sleep at night reasonably undisturbed. What has happened is that two rights have come into collision and out of the impact has come what the law describes by the word nuisance, which may either be of a public or private character. If the colliding rights cannot coexist, legal justice must determine which shall prevail. Every litigation thus is more or less a collision of rights or of what are supposed or asserted to be such, and justice is the adjustment of that collision. In making such adjustment the court, which is the instrument or agency provided, hears both sides, weighs in its balance the conflicting

rights, and tests them by the accepted rules of external morality. It first applies to the problem the settled rules of law. These as we have seen, were moral rules transplanted into the field of legal action. If these do not suffice an appeal is made to the outlying morality, so that the justice supplied is at least the best that can be had. Sir Frederick Pollock ascribes to it the three characteristics of generality, equality, and certainty:—that is it is no respecter of person but deals with all or all of the same class on the same level of duty: it upholds equality, granting no favors, exacting equal responsibility and obedience: and it is certain; that is, it follows fixed and settled rules and not the vibrant and varying notions of the person who happens to be judge. This last element is very often disputed. We hear much about what is described as the "uncertainty of the law," when in truth that uncertainty lies not in the law but in the facts and the inferences to be drawn from them. Anyone who has had a judicial experience can hardly fail to have observed that where there was some disagreement among the members of a court about the abstract legal rule, study and reflection almost always ended in a concurrence: but that where there was final dissent it grew from an inability to see the facts alike or the inferences to be drawn from them. And when we recall that the facts are usually left to the common sense of a jury there need be no surprise that the justice ultimately evolved is sometimes open to criticism. Perfect justice we cannot reach. The justice which the law develops is the best which a fallible humanity has been able to attain.

I have reviewed these general principles not only for the purpose of presenting them with the light of history upon them rather than by way of the usual analysis, but also to put them as far as possible in the order of their growth and to indicate their line of evolution. Their obvious connection with each other and natural and orderly sequence lead one to suspect that there may be found some one characteristic which may include them all and be true to their historic development. Holmes finds that in the idea of revenge: his theory being that what at first the man did for himself with blood and blows and a raid upon flocks and herds the law now does for him in a peaceful and orderly way. He is not without authority behind him. M. Thevenin, translating the German of Sohm tells us that revenge is in effect the true manifestation of individual activity. But that was true only of the primitive society. The law as we see it is not revengeful and actuated by no such sinister motive. It punishes but not in hatred or anger. It takes a man's goods or lands but only for restitution or to do justice. Indeed its obvious effort has been to put a stop to revenge by ending all self-help except where imperatively needed for self defense.

As morality began to regard revenge as an evil and a danger to the social order so the law rose to the new moral level. The courts steadfastly deny any such motive for their action. In our day they uniformly resent the imputation. It is not difficult to understand how in dealing with crime the element of revenge has been eliminated. That element inhered in self-help, and in the personality of the individual prosecutor. Because of that the law set him aside and put in his place the abstract and passionless state. In civil actions the same thing is clear down to a certain point where doubt begins. The general measure of damages is compensation and that only: but then come cases where exemplary or punitive damages are allowed and which go to the individual prosecuting and seem to feed his revenge. Even there it has been possible to say that the excess of damage is given as compensation for insult suffered or injured feelings. We may doubt whether that is more than a method of wrapping a rough fact in smooth words. And yet it will hardly be safe to take as a basic and prevailing element one which the courts themselves resent and repudiate, and which has been more and more disappearing, especially when we are conscious of the conviction that it ought to disappear utterly. Probably therefore we must look elsewhere for some characteristic broad enough to hold the entire law in its grasp. It may not be possible to name one safely but I eannot resist the temptation of a suggestion for that purpose. If our theory of the law is sound it is obvious that law differs from morality mainly in one respect, and that is in its sanction, in its capacity to enforce obedience, in its compulsory power, in its wielding of physical force in the room of merely moral force. That characteristic had its history. It was in the primitive days that "blind brute beast of force" which the only real laureate crowned by official England told us of; that mingled power of muscle and of brain which was the substance and the being of the natural man, which he was sure to exercise somehow, which from him has passed to the aggregate of men; modified, mollified, dignified, by having revenge thrust out of it; changing that revenge into redress, and brute force into regulated and restrained power, but still a plain derivative from its crude original. The thought is not new and there is in it no element of surprise. More than thirty years ago it was voiced by Professor Condemit of Leyden whose work on the Roman Law discloses a marvellous range of investigation and a reasoning of equally remarkable clearness and ability. He said: "A right in its subjective sense is a power given by right in the objective sense to the will of a person relatively to a certain object." And again, "From the fact that a right is a power it follows that no conception of it can be formed except as attached to a person." And once more; "We

exercise a right when we actually and consciously make use of our power in relation to some specific object." And so we may say for ourselves that it would not be surprising to see that power divide itself into power over persons and over things and frame a procedure for the convenient exercise of that power. We should have the power of the husband over the wife, of the father over the child, of the master over the slave, of the guardian over the ward, of the employer over the servant, of the principal over the agent, of the man wronged over the wrongdoer, of society over the criminal, of promissors over each other created by their own voluntary act, and running through all the varieties of contract, of the governor over the governed, of the state over the citizen. We should see the power of possessor and owner over land and what belongs to it, over goods and chattels and animals tamed or captured, over the thing bailed or loaned or sold or exchanged or transferred by will or descent when death demands a new control. We should see a procedure taking numerous forms, differing with time or race, but always and everywhere a method and means for the exercise of that power. It would not surprise us if some one in the end should say of the law we have studied that its last analysis, its bottom thought, its master word is power. In that view we may be able to say that law is morality imperative and armed.