THE THEORY OF JUDICIAL DECISION.[1]

I.

The Materials of Judicial Decision.

There are many signs that our law is on the eve of a period of creative activity analogous to the two classical creative eras in our legal history—the seventeenth century, which made the feudal land law of medieval England into a system which could go round the world in the nineteenth century, and the time just after the Revolution when English legal institutions and English legal doctrines were made over to conform to an ideal of American society by a criterion of applicability to American conditions. In each of these creative eras lawyers had a lively faith that they could do things by conscious effort intelligently directed. In each they were guided by a philosophical theory of natural law. In each they turned to comparative law to give concrete content to abstract ideas of natural law. In each they sought to bring the legal and the moral into accord, and thus brought into our legal materials much from outside of the law. One has but to read the proceedings of our Bar associations to perceive a revival of faith in the efficacy of effort which is in marked contrast with the juristic pessimism of a generation ago. Interest in philosophy of law, which was the foundation of legal studies when Marshall and Kent and Story were preparing for the Bar, is notably reviving in all English-speaking lands. Comparative law is taking on new life and the American Bar Association maintains a section devoted to that subject. In such a period of creative activity, what we do will be conditioned for the most part by the materials with which we must work and the juristic tools with which we work upon them. For except as an act of omnipotence, creation is not the making of something out of nothing. In legal history it is the reshaping of traditional legal materials, the bringing in of other materials from without and the adaptation of these materials as a whole to the securing of human claims and satisfaction of human wants under new conditions of life in civilized society. If we are to

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proceed wisely in this creative juristic activity in the complex social organization of to-day, we must study scientifically the legal materials that have come down to us from the last century. We must understand clearly what we have to do with them. We must consider critically the means of shaping, developing and applying them and of supplementing them by materials from without. We must learn them, not merely as they were and as they seem to be, but as they may be when we have discovered their possibilities in relation to what we seek to do by means of them.

History of a system of law is in large part a history of borrowings of legal materials from other legal systems and of assimilations of materials from outside of the law. In the history of Anglo-American law there are successive borrowings and adaptations from Roman law, *e.g.*, the rules as to title by occupation, from the canon law, *e.g.*, in our law and practice as to marriage and divorce, from the modern Roman law and Continental codes, *e.g.*, in our law of riparian rights, and from the commercial law of Continental Europe, as one may see in any of Story's books on commercial law or in the decisions of Mansfield and his brethren or of Kent when our commercial law was formative. Likewise there are successive assimilations and adaptations from outside of the law—from the Frankish administrative régime, as in the case of the jury; from the sixteenth and seventeenth-century Continental administrative régime, as in the common law of misdemeanors through the Star Chamber; from scholasticism in the fourteenth and fifteenth centuries, as in the Aristotelian theory of common-law maxims in Fortescue and Littleton; from sixteenth-century casuist literature in equity as shown in Doctor and Student; from the law-of-nature philosophy in the seventeenth century, as in the doctrine of reformation where there has been defective execution of an attempt to perform a moral duty; from the general usage of the mercantile world, as in the law merchant; and from current custom of the time and place, as in the British law as to the crossing of checks, or our American mining law. In all these cases it is the form and shape that has been made, not the content. The content was found, the form was given authoritatively. The creative process consisted in going outside of the legal materials of the time and place, or even outside of the law, and selecting something which was then combined with or added to the existing materials, or the existing methods of developing and applying those materials, and gradually given form as a legal precept or legal institution or legal doctrine. In Jhering's apt phrase the process is one of juristic chemistry. The chemist does not make the chemicals which go into his test tube.

He selects them and combines them for some purpose and his purpose thus gives form to the result.

Most of the discussion as to the nature of law which has been the staple of Anglo-American writing on jurisprudence has suffered from an initial false assumption that "law" is a single simple conception; that the one short word has one simple analytically-ascertainable meaning. As one reads the voluminous literature upon this subject he soon feels that the disputants are speaking of different things, although calling them by one name. Each jurist has assumed that there is one simple ultimate conception of law, that it may be identified by analysis of existing legal institutions or of legal institutions of developed political societies, or by generalizing from legal history, or by philosophy, and that those who reach results different from his have erred in their choice of method or in their choice of materials to which to apply their method. All take for granted that they are talking about the same thing; that there is a single definite something called "the law" to be reached and apprehended by some one absolute method.

It is true many have seen that the word "law" has different meanings in general usage from the more precisely limited sense with which alone we are concerned in jurisprudence. In the Platonic Minos, the companion to whom Socrates addresses his question, "What is law?" counters at once with "What sort of law is it about which you ask?" But Socrates overwhelms him by asking whether law differs from law in the very respect of being law, as if gold should differ from gold in being gold. In the Middle Ages a distinction between rules of law and customs is presented constantly. But as lawyers come to be governed by the ideas, or at least the language of the Roman texts, the two seem to be embraced in the one idea of "law." Ideas of natural law confirm this mode of thought, which comes from the identification of law and morals in the natural law of the Roman jurists and goes back to ambiguities in Greek philosophical thinking, at a time when law was not in the hands of professional lawyers and legal precepts had not been differentiated clearly from traditional religious customs, settled social habits, and general philosophical ideas of the just. To Suarez, in the beginning of the seventeenth century, the actual legal precepts that obtained in contemporary Spain, the precepts of Roman law not in force in Spain which it seemed to him ought to obtain, practical morality, and the dictates of reason and conscience were all parts of a universal system of law. The critical analysis of nineteenth-century jurists gradually dispelled this way of thinking. Austin distinguishes laws properly so-

called from laws improperly so-called, for example by metaphor or analogy. Holland distinguishes law as a rule of conduct from law as the order of the universe. And although historical jurists are wont to include all social control in their conception of law, the tendency of recent thinking has been to confine the term to that part of social control which is achieved through the agency of politically organized society.

Even so limited, however, law is by no means so simple a conception as has been assumed. Bentham says that "law" is a collective term which can mean no more nor less than "the sum total of a number of individual laws taken together," and that "a law" is a command or the revocation of a command. But this is too simple for the actual phenomena for which we must frame our theory. In truth no fewer than three quite distinct things are included in the idea of law, even limited as the analytical jurists have limited it, namely to the apparatus by which tribunals actually decide controversies in modern societies. Sometimes the jurist has one of these before his mind, sometimes some two of them, sometimes all three. Much of the controversy as to the nature of law turns on which one of these is to be taken as the type and as standing for the whole. These three elements that make up the whole of what we call law are: (1) a number of legal precepts more or less defined, the element to which Bentham referred when he said that law was an aggregate of laws; (2) a body of traditional ideas as to how legal precepts should be interpreted and applied and causes decided, and a traditional technique of developing and applying legal precepts whereby these precepts are eked out, extended, restricted, and adapted to the exigencies of administration of justice; (3) a body of philosophical, political, and ethical ideas as to the end of law, and as to what legal precepts should be in view thereof, held consciously or subconsciously, with reference to which legal precepts and the traditional ideas of application and decision and the traditional technique are continually reshaped and given new content or new application.

It will be worth while to give some examples of each element.

Legal precepts are the type of which we think first. But legal precepts are not all of one kind. For example: In our law a promise made by one person to another is not enforceable unless put in the prescribed form of a sealed instrument or made in exchange for some promise or other act which the law pronounces "consideration." That is, the law attaches definite legal consequences to the definite detailed facts of promise in a writing sealed, signed, and delivered, or of a promise in exchange for a promise or other act to which the promisor therein was not theretofore bound. This type of legal precept may

be called a rule or a rule of law. Again, as a general proposition in modern law, there is no legal liability to repair a loss suffered by another unless the person held liable has been at fault. Here no definite detailed legal result is attached to a definite detailed state of facts. Instead the legal system lays down a sweeping generalization as an authoritative premise for judicial and juristic reasoning where rules of law are wanting or inapplicable or inconvenient. This type of legal precept may be called a principle. Again, at common law a bailment is a delivery of a chattel to some person for some special purpose which defines the duties of the parties with respect thereto. Here there is much more than a single definite legal result or a set of definite results attaching to a narrowly defined set of facts. A generalized type of situation of fact is defined and established. Particular states of fact are to be referred to this type. If they come within the defined limits, a series of rules or even of standards become applicable. If the facts of a given controversy do not come wholly within the limits of the established type, a basis is afforded for deducing a rule from its logical presuppositions. In such cases the legal precept is dependent upon a legal conception. Again, one who is engaged in a course of conduct is bound to act with due care under the circumstances of his acting, and must make reparation for any damage that results from his failure to adhere to that standard. But no definite, detailed set of facts will inevitably entail such liability. Within certain limits the trier of fact must determine with reference to the circumstances surrounding each action whether that particular bit of action was carried on with "due care." And he is to do so not from any legal knowledge, but from his sense of what is fair and reasonable, derived from his experience of the conduct and the opinions of ordinary prudent men in the community. In such cases the legal precept in its application is dependent upon a legal standard. Thus it will be seen that the legal precept itself is not a simple institution.

Let us put some examples of the second element that goes to make up the law. In our legal system we have a good example in the doctrine as to the force of judicial decisions as affecting judicial decision of subsequent cases. It is almost impossible for the common-law lawyer and the civilian to understand each other in this connection. In fact our practice and the practice of the Roman-law world are not so far apart as legal theory makes them seem to be. We by no means attach as much force to a single decision as we purport to do in theory. Even the House of Lords, which purports never to overrule its decisions, on occasion deals with them so astutely as to

deprive them of practical efficacy as a form of law. On the other hand, in Continental Europe a judicial decision tends to become the starting point of a settled course of decision, which in some countries is recognized as customary law having the force of a form of law, and in other countries is acquiring that effect in practice. But if the results are coming in their broader features to be much alike, the modes of thought are wholly unlike, and these modes of thought have decisive effect upon the administration of justice.

Another example may be seen in the attitude of legal systems toward specific and substituted redress. With us, substituted redress is the normal type; specific redress is exceptional and reserved for cases for which the former is not adequate. To the civilian, specific redress is the normal type; substituted redress is to be used only in cases in which specific redress is not practicable or would operate inequitably. Again, to us these two types of remedy are so distinct that we think of them commonly as calling for distinct types of proceeding. But the civilian conceives of the proceeding in terms of the right asserted, not of the remedy sought, and so thinks only of what is the practical means of giving effect to that right. In other words, we think procedurally in terms of the remedy; the civilian thinks in terms of the asserted right.

A third example may be seen in the difference between civil-law and common-law thinking as to statutes. According to the orthodox view of our law a statute is something exceptional, something introduced into the general body of the common law without any necessary or systematic relation thereto, in order to meet some special situation, and hence governing that situation only. With us a statute, unless declaratory of the common law, gives only a rule. Hence statutes in derogation of the common law are to be construed strictly. Hence Lord Campbell's Act is applied as if it were something anomalous and exceptional, although it is as universal in common-law jurisdictions as any legal institution can be. With the civilians, on the other hand, a statute is regarded as an expression of a principle, to go into the body of the law along with other legal precepts which also express principles. Hence the civilian reasons by analogy from a statutory provision the same as from any other legal rule. Thus it is as easy for him to administer justice by a code as it is difficult—I had almost said impossible—for us. To him a series of code sections involves the same problems that a series of decisions involves for us. He fails to understand how we can treat the latter as giving a series of legal rules. We fail to see how he can administer justice by means of the former in the multitude of cases that do not come within the four corners of the text.

Upon review of the three examples of the second element in the law, it will be seen that the characteristic feature in each is that they are not legal precepts; they are modes of looking at and handling and shaping legal precepts. They are mental habits governing judicial and juristic craftsmanship. It is true, one who sought to reduce the whole content of law to rules might say it is a rule of law that courts shall follow their past decisions and the analogy of their past decisions or of the past decisions of other common-law jurisdictions where their own are lacking. But such a rule is not a rule in the same sense as the rule that a will must have a certain number of witnesses, or that a promissory note must have words of negotiability in order to be negotiable, or that a malicious prosecution in order to be actionable must have been without probable cause. Nor is it a principle in the same sense as the principle of tort liability as a corollary of fault, or the principle that no one is to be enriched unjustly at another's expense. The latter are authoritative premises for judicial reasoning. We use them as the civilian uses a text of a code or a text of the Digest. The accident that the common law of Continental Europe is in form legislation of an Emperor, while our common law is in form a body of reported decisions, obscures the identity of our analogical reasoning from common-law principles with the civilian's interpretation of the Roman-law texts or of the provisions of a century-old code. The doctrine of precedents, on the other hand, is not something to be developed by analogy. It is not an authoritative premise from which to deduce grounds of decision. It is by no means anything so simple as a rule or a principle. It is not a legal precept at all. It is a traditional art of judicial decision; a traditional technique of deciding with reference to judicial decision in the past; a traditional technique of developing the grounds of decision of particular cases on the basis of reported judicial experience, just as the civilian has a traditional art of construing legal texts and a traditional technique of developing the grounds of judicial decision therefrom.

How much our doctrine of precedents differs from a mere rule to follow an established course of decision on a given point of law may be seen by comparing our mode of applying precedents with the French *jurisprudence fixée*. With us a precedent will govern a case "on all fours." But it may do much more. We distinguish it and limit it, or we extend its application and develop its principle. The French, on the other hand, think only of a definite proposition as established by a settled course of judicial decision. Neither a decision nor a course of decision can lay down a general rule. The

principles to be developed are found elsewhere. In other words, the art of working with the materials of the legal system is no less different than the content of the materials themselves.

Nor is there merely a legal precept that the remedy must be by action at law, and hence the relief must take the form of substituted redress wherever that remedy willfully secures the interest legally recognized and delimited. A traditional art of remedial justice and a traditional technique of applying it, with a consequent judicial and professional attitude toward remedies, are the significant phenomena. This attitude determines our whole mode of approach to every new situation, and determines our application of legal rules, our development of legal principles, and our deductions from legal conceptions, quite as much as the content of the precepts for the time being. If one doubt this, let him note the attitude of our more conservative courts toward the declaratory judgment, which they feel somehow to be out of line with common-law ideas and so not due process of law. Let him note the halting development of preventive relief in case of injuries to personality, and the tendency of courts to say there is an adequate remedy at law in such cases, in spite of the manifest impossibility of valuing feelings in money or restoring peace of mind by buying it on the market with damages. Let him note the almost pedantic squeamishness of courts about absolute certainty in all details as a requisite of specific enforcement of a contract. Let him note the *ex post facto* attempts to put reason behind a historical prejudice in case of specific enforcement of contracts for construction or for continuous performance. The point in each case is that we have developed an art of justice through money damages. We have a traditional technique of redressing injuries in this way. We hesitate to employ restitution or coercion of specific action or prevention until we are convinced that our common-law remedial technique will not suffice. Even in England, where jurisdictional and procedural lines between law and equity have been gone for half a century, the courts as late as 1922 were hesitating about using injunctions in any way out of the usual course of practice. This attitude colours our whole administration of justice, and makes it possible for Lord Coke and Mr. Justice Holmes and the Supreme Court of New Hampshire to tell us that the promissee in a contract has no legal claim to performance but only to damages for non-performance. The civilian, trained to a wholly different technique of an action for fulfilment of the engagement and execution *in natura*, conceives of the obligation in a wholly different way.

How thoroughly such things determine the effective content and

application of legal precepts may be seen in American judicial handling of Lord Campbell's Act. Look, for example, at the cases which deny to a non-resident defendant a right under the statute. The courts which so hold admit that the statute gives the action "in broad and comprehensive terms." They admit that the language would include even alien non-resident widows, children, and parents. But, they say, in order for the statute to have such an operation the statute must be express. They say that to permit non-residents to claim advantage of the act would be to give it extraterritorial effect. It would allow the statute of one State to create a right in a person in another State. No one would think of saying that the Sales Act, or the Negotiable Instruments Law, which we feel in their main lines are declaratory of the common law, are given extraterritorial effect when non-residents or aliens are allowed to assert rights under their provisions. But Lord Campbell's Act gives a right that did not exist at common law, and hence must be treated as something anomalous and exceptional. If one assaults another and merely injures him, the assailant must justify or repair the injury. If, however, he succeeds in killing his victim and the latter's dependents sue under the statute, it is not to be assumed that the aggression was what it appeared to be. The assailant need not justify; the dependents of the assailed must prove that it was wrongful. Such things flow so naturally from our traditional habits of thought that they do not appeal to the lawyer as anomalous. But let him try to convince students that they are reasonable and part of an enlightened system of administering justice, and he will perceive how truly Coke could speak of the "artificial reason and judgment of the law" as contrasted with "every man's natural reason," and how decisively that "artificial reason and judgment" is a part of the law itself. "To know rules of law," says the Digest, "is not merely to understand the words, but as well their force and operation." This force and operation are determined largely by the traditional technique of decision and traditional rules of art that determine how legal materials shall be looked at and how they shall be developed and applied. An account of law that overlooks this element, by confounding it with the aggregate of received legal precepts for the time being, gives an untrue picture of the actual phenomena.

Turning now to the third element that goes to make up what we call "the law," we may find an example in the criterion of applicability to American political and social conditions by which our courts judged English legal rules and institutions and doctrines in the formative period of American law, in order to determine

whether they were received as common law in the new world, and, in case they were not "applicable" and were not received, to determine what should obtain in their place. Other examples may be seen in the conception of conformity to "the nature of free government" or to "the nature of American institutions," by which courts tried novel legislation and new means of securing newly pressing interests in the nineteenth century, and in the idea of liberty as a maximum of abstract individual free self-assertion by which decisions as to due process of law have been governed within a decade. How was the applicability of English legal precepts to American conditions to be determined, There were no rules defining it. That English legal precepts were in force with us so far as they were applicable, and only so far as applicable, was not a principle with any such historically-given definiteness of content as the principle that harm intentionally caused is actionable unless justified, through which courts and jurists have been writing a new chapter in our law of torts in the last generation. Nor was there any traditional technique of receiving the law of one country as the law of another which the courts could lay hold of and utilize in the making of American law. In fact they determined what was applicable and what was not applicable to America by reference to an idealized picture of pioneer, rural, agricultural America of the fore part of the nineteenth century, and this picture became part of the law.

Again, when our courts were called upon to perform the novel task of interpreting written constitutions and judging of legislative acts with reference to constitutional texts—something which they could not but feel was distinct in kind from the interpretation of statutes—they had no traditional technique at hand. The earlier cases in which judicial power over unconstitutional legislation was established were cases of attempted exercise of legislative power in contravention of express precepts. But presently the "spirit" of constitutional texts or the "spirit" of constitutions began to be invoked, and it became necessary to give a content to abstract constitutional formulas exactly as the civilian has had to give a content for modern purposes to abstract oracular texts of the Roman books. Our traditional art of deciding had not been devised for such problems. Except for Coke's exposition of Magna Carta and of the legislation of Edward I., there had been little to do in the way of building a system of legal precepts upon a foundation of authoritative texts. Moreover Coke's Second Institute was in great part a political tract in the contest of the common-law lawyers with the Stuarts. The influence of Coke's exposition of Magna Carta upon judicial application

of our bills of rights is obvious. The most significant legal provisions of the bills of rights were taken from the Second Institute and represent an attempt to give to the natural rights of men a concrete content of the immemorial common-law rights of Englishmen, as set forth by Coke and Blackstone. Yet this historico-philosophical content, derived from seventeenth-century England and eighteenth-century France, could not be used, as it came to us, for a measure of American legislative power. Hence the courts fell back upon an idea of "the nature of free government" or the "nature of American government" or the "nature of American institutions"—an idealized picture of the legal and political institutions of pioneer America.

Sometimes a caricature will bring out significant features more truly than a photograph. In 1863 the Supreme Court of Georgia had before it a case involving the constitutionality of a Confederate conscription statute with reference to the Confederate constitution. In deciding this question the court assumed the political doctrine of States' Rights as something fundamental, to which all legislation must needs conform, irrespective of constitutional texts. It was something running back of all texts which texts at most could but recognize and declare. A picture of the polity for which Southern statesmen had been contending in the bitter sectional political contests of the immediate past, put in terms of conformity to the nature of free government, was the basis of the court's reasoning, and it was assumed that this picture stood for the spirit of the constitution, and obviated all need of searching for any special text.[2] Compare with this the reasoning of the judges of the Court of Appeals in *People* v. *Coler*.[3] In that case the judicial discussion on a question of due process of law, as applicable to social legislation for twentieth-century metropolitan New York, begins with the proposition that the State governs best that governs least. A picture of a pioneer, rural, agricultural society, needing little social control and nothing of what we have come to call social legislation, was a controlling factor in the result.

Again, when in the last quarter of the nineteenth century our courts were called upon with increasing frequency to pass on the validity of social legislation, in the transition from pioneer, rural, agricultural America to the urban, industrial America of to-day, they turned to an idealized picture of the economic order with which they were familiar, the principles of which had been set forth by the

[2] *Jeffers* v. *Fair*, 33 Ga. 347, 365-366 (1862).
[3] 166 N. Y. 1, 59 N. E. 716 (1901). See O'Brien, J., pp. 16-18, Landon, J., pp. 23-25. Se also *Ives* v. *South Buffalo R. Co.*, 201 N. Y. 271, 285-287, 293-295, 94 N. E. 431 (1911).

classical political economists. They pictured an ideal society in which there was a maximum of abstract individual self-assertion. This was "liberty" as secured in the Fourteenth Amendment. Hence all limitation upon abstract, free self-assertion, all derogation from a maximum of free self-assertion, was presumably arbitrary. Such legislation sought vainly to turn back the current of legal progress in its steady flow from status to contract, and hence was not due process of law. With such a picture of the social order and the end of law before it as the basis of its conclusion, more than one court declaimed against legislation forbidding the payment of wages in orders on a company store as subversive of the abstract liberty of the workman, reducing him to the position of the infant, the lunatic, and the felon, and arbitrarily setting up a status of laborer in a world which had moved to a régime of contract.

To take an example that is no longer controversial, note how such pictures of the social and political order and reference of legal questions thereto, dictated the divergent conclusions of the judges in the Dred Scott case. For we deceive ourselves grossly when we devise theories of law or theories of judicial decision that exclude such things from "the law." When such ideal pictures have acquired a certain fixity in the judicial and professional tradition they are part of "the law" quite as much as legal precepts. Indeed, they give the latter their living content and in all difficult cases are the ultimate basis of choosing, shaping, and applying legal materials in the decision of controversies. When we seek to exclude them from our formal conception of law we not only attempt to exclude phenomena of the highest significance for the understanding of the actual functioning of judicial justice, but, as things are, we do the courts much wrong by laying them open to the charge of deciding lawlessly when they do what they must do, and what courts have always been compelled to do, in administering justice according to law.

To recognize that the traditional technique of deciding cases and the traditional or reasonably fixed professional pictures for the time being of the legal and social order and of the end of law are part of the law, need not impair the certainty and predicability which are demanded for the general security. Rightly used, the recognition of these elements makes for a real, as distinguished from an illusory, certainty. It is futile to try to conceal the vital rôle of these elements in the actual work of the tribunals. To insist upon a theory which ignores them as the explanation of a process in which they visibly control invites ignorant attacks upon the courts and must in the end impair lay confidence in our judicial institutions

much more than frank recognition of the facts and endeavor to give a scientific account of them. For courts and jurists have always proceeded on the basis of something more than the formal body of legal precepts for the time being. Even the analytical jurist, whose boast is that he goes wholly and exclusively upon the actual rules that in fact obtain in the courts in modern states, in practice imports into his science an ideal pattern of what those rules should be which determines all his results. The "law-that-is" in the sense of the analytical jurist is an illusion. Representing to himself the whole body of legal precepts, as made at one stroke on a logical plan to which it conforms in every detail, he sets out to discover this plan by analysis. What he does is to set up a plan which will explain as much as possible of the actual phenomena of the administration of justice, and to criticize the unexplained remainder for logical inconsistency therewith.

Such books as Gray on Restraints on the Alienation of Property, or Gray on the Rule Against Perpetuities, do not state the legal precepts that actually obtain just as they actually obtain in any one jurisdiction at any one exact time. They set forth the author's conception of what legal precepts ought to obtain in an ideal common-law jurisdiction, in which there was an ideal, logically-interdependent body of legal precepts upon these subjects, logically deducible from the classical common-law authorities. No such system exists anywhere, nor did it ever exist. Yet the picture is of the highest utility for the administration of justice according to law, and should any court decide a particular cause in a way that is out of harmony with this picture we are likely to feel and say that the decision "is not law," although we recognize that it will almost certainly be followed by the court which rendered it. Nor are analytical patterns, such as the nineteenth-century judges usually had before them in deciding upon matters of commercial law and of the law of property, the only ideal pictures which have done good service. A historical picture of an idea of right or an idea of liberty progressively unfolding or realizing itself in human experience in civilized society and taking form in the legal precepts of the time, which are the culmination of historical development—so that the idea which is found by putting the classical common-law doctrine in an ideal form points out the line of legal development and gives us limits from which the law cannot depart—largely superseded the analytical picture in the last third of the nineteenth century and was often combined with it. In the formative period of our law a philosophical picture of an ideal body of rational principles, valid in all times in all places among all

men, and expressing the qualities of man as a rational creature in a state of perfection, filled with a content of the actual legal precepts of the common law put in an ideal rational form, was a chief factor in giving direction to American legal development. At the end of the last century a wholly different philosophical picture of an ideal system of deductions from a fundamental, metaphysically-demonstrable *datum* of the conscious free-willing individual, had come to play no mean rôle in our doctrines as to legal liability.

A striking example of an idealized political picture of the existing social order made the basis of judicial action may be seen in the medieval English decisions, which assume as a matter of course and beyond controversy the absolute separation of temporal and spiritual power, and hence hold that acts of Parliament attempting to deal with subjects which in the then understanding of men came within the purview of the spiritual power were "impertinent to be observed."

Baron Parke gave us a classical statement of the analytical picture in *Mirehouse* v. *Rennell*,[4] and his insistence that results called for by analytical legal reasoning from the analogy of existing rules were not to be rejected because they seemed less convenient and reasonable than other results otherwise obtainable, was no doubt due to reaction from the picture of a wholly rational system of ideal rules, to which actual legal precepts must be made to conform, which had obtained a generation before. Lord Justice Fry shows us the historical picture in action in *Cochrane* v. *Moore*.[5] We may see the eighteenth-century philosophical picture used as the basis of judicial reasoning in the opinion of Chief Justice Marshall in *Ogden* v. *Saunders*.[6] The metaphysical picture is behind the dogma of no liability without undertaking or fault—*i.e.*, except as a result of exercise of the free will—which has been the basis of judicial objection to workmen's compensation laws. To a certain extent these pictures overlap or have common elements. In truth they are but details of broader idealized pictures of the social order and of the end of law, the main lines of which, in any given time and place, are as well fixed as those of the body of legal precepts and of the traditional rules of art and technique of decision.

Ideal pictures of the social order and of the end of law are means of directing and organizing the growth of law so as to maintain the general security. Courts and lawyers may not ignore the demand for stability even in periods of the most rapid growth. Equally, even in periods of exceptional legal stability, legal precepts gradually

[4] 1 Cl. & Fin. 527 (1833).
[5] 25 Q. B. D. 57 (1890). [6] 12 Wheat. (U. S.) 213 (1827).

change their content if not their form, and are made to fit the changes that constantly go on in the social life that is to be governed by them. These changes take place by unconscious reshapings of legal precepts, or by conscious or unconscious borrowings or adaptings of materials from other systems of law or from without the law. When such borrowings or adaptings are going on upon a large scale, or having gone on for a time the borrowed materials are to be, as it were, assimilated and incorporated into the general body of the law by a systematizing juristic science, ideal pictures of the social order are guides to lead growth into definite channels and insure a reasonable continuity and permanence in the development of rules and doctrines, or plans whereby to fix the starting points of systematic analyses and give a living content to what otherwise would be but abstract schematism.

Why, then, have we sought so persistently to exclude such generally received or traditionally established ideal pictures of the social order, and consequent ideal patterns of the legal order, from our theory of law? In truth we have not always done so. Early in the last century Chief Justice Marshall reminded us that the founders of our legal polity "were intimately acquainted with the writings of those wise and learned men whose treatises on the law of nature and nations have guided public opinion in the subjects of obligation and of contracts."[7] and argued that the idea of natural law and hence of the legally binding force of the moral obligation of contract, maintained in these treatises, must be the basis of applying the contract clause in the federal constitution. Indeed, until well into the nineteenth century the law-of-nature theory prevailed universally among lawyers, and the law in the sense of the analytical jurist was taken to be but an imperfect reflection of an ultimate and universal natural law—that is, of an ideal of what law should be founded on rational consideration of human nature and a resulting picture of an ideal human society. One of the chief characteristics of the natural-law jurisprudence is its identification of law and morals; of what ought to be law, as the particular jurist sees it, with what is. This mode of thought was of the highest service in legal history, both in the classical era of Roman law and in seventeenth and eighteenth-century law in western Europe. It led to an examination of the whole body of legal precepts with respect to its accord with reason and its relation to the end of law as conceived for an ideal human society, and to rejection of archaisms, reshaping of over-rigid rules, and development of broad principles to meet the requirements of the modern

[7] *Ogden* v. *Saunders*, 12 Wheat. (U. S.) 213, 353-354 (1827).

world. The strict law of the Middle Ages had ignored the moral aspect of conduct, asking only if the prescribed legal forms which called for the prescribed legal results had been duly followed. Hence in the seventeenth and eighteenth centuries there was a large infusion into the law of moral ideas from without. But in time this process had gone as far as was compatible with the general security. In the maturity of law a reaction set in. For a time the energies of jurists were directed toward systematizing and ordering and reducing to internal logical consistency the mass of assimilated materials.

Reaction from the seventeenth and eighteenth-century identification of law and morals is a marked feature of every type of nineteenth-century juristic thought. The metaphysical jurists contrasted them. The historical jurists conceived that morals were potential law, but that law was not to be made consciously and deliberately upon an ideal moral pattern, nor was the moral to be authoritatively translated into law. The idea of right would realize itself in experience of conduct and experience of decision, and judges and jurists would formulate that experience in legal precepts as part of a spontaneous process of development. The analytical jurists whose influence has been chiefly in England and America insisted rigidly on keeping law and morals apart. Only the legal precepts which had actually received the stamp of the State's authority and were enforced in tribunals were law. Everything else was matter for a separate science of legislation, or for ethics. They were zealous to show that one might have a legal right that was morally wrong. They were never weary of refuting the proposition that a legal right is not a right if it is not right. This mode of thinking bore fruit in the mechanical jurisprudence of conceptions which was at its height in this country about 1875. All this made in its day for sound thinking, and was a needed corrective of the loose notions as to the basis of legal obligation in the inherent moral force of the abstractly just precept, the individual conscience as the measure of all moral and hence of all legal obligation, and the possibility of devising a perfect code by reasoning from purely moral premises quite independent of historical legal materials and as if there had been no legal past, with which the eighteenth-century treatises are filled. But after the manner of reactions it went much too far. In the words of Judge Dillon, "Ethical considerations can no more be excluded from the administration of justice than one can exclude the vital air from his room and live." Even Austin's analytical conception of legal duty is not a conception found in the law by analysis. It is a conception taken over into the law from ethics and but partially legalized. Historically

it goes back to the Stoic conception of the course of conduct which accords with nature—that is, with ideal perfection—the conduct of a perfect man because he is perfect. Roman lawyers made this a legal conception in effect, but they never discuss it as such. In form it remains a purely moral conception throughout Roman legal literature. Thinking of it as a moral conception, Roman lawyers gave it a legal content. This bit of history is repeated in English law, as one may see readily in the old cases in English equity and in the pages of Doctor and Student. We must recognize to-day that Austin's rigid setting off of what he called law from the ideal of law, has proved a disservice to jurisprudence in blinding us for half a century to factors of the first moment in the actual working of the legal order. It has led to a merely superficial certainty; to a belief in a mechanical, logical application of fixed legal precepts in the teeth of the facts. It has led to-day to a condition of groping for method where, if we had recognized what we were doing, we might have utilized the experience of our classical period, the period before the Civil War, and might by this time have been acting much more intelligently.

Law, then, is not the simple thing that we sought to make it in our legal theory in the last century. It is not something established definitely and absolutely by the will of the sovereign. It is not something given absolutely by logic on a basis of authority, nor revealed absolutely and definitely by history, nor deducible infallibly from an absolute, fundamental metaphysically-given *datum*. It is a highly complex aggregate, arising socially from the attempt of men in politically organized society to satisfy the claims involved in civilized social life so far as they may be satisfied by a systematic ordering of conduct and adjustment of relations. Looking at law in this way we perceive at once how change takes place continually without our being aware of it. "No," says Mr. Dooley, speaking of the decadence of Greece, "on account iv th' fluctuations in rint an' throuble with th' landlord it isn't safe to presoom that th' same fam'ly always lives in th' wan house." Because names and forms remain the same it does not follow that the content of the law is constant. Modification of the current ideal picture of the social order by which judges are governed in choosing analogies, in developing principles, and in applying rules, may change the law in action profoundly within a generation while the outward forms remain the same.

Nor is this all. New forms of legal precepts arise gradually and unnoticed below the surface, and before legal theory is aware of it become established in all but legal theory, and in time compel legal theory itself to recognize them. In this process, too, a political ideal

picture of the social order penetrating the law from without, and little by little replacing, or at least retouching, the lawyer's traditional picture of the end of law, is a large factor. To take an example from legal history which cannot be controversial, witness the way in which the administrative power of the Roman Senate to issue directions to magistrates became a legislative power, so that *senatusconsulta* could be enumerated as forms of law along with *leges;* witness the way in which the Emperor's speech to the Senate proposing a *senatusconsultum* came to be thought of as the law and spoken of as the law even by lawyers, as if we should think of the President's message proposing legislation as the law rather than the formal act of Congress; witness the way in which the Emperor's executive directions to administrative officials came to be a form of law (*mandata*). Presently lawyers generalized this into a legal principle that the will of the Emperor had the force of law, and found a legal basis for it in the *lex regia,* which originally had quite a different scope, and did not serve as a legal foundation for imperial law-making till it had come to be an empty form. Compare with these the continually increasing importance of administrative rules in contemporary America, the growing volume of so-called statutory rules and orders in England, the tendency of legislation to enact a mere skeleton, leaving the details actually governing the conduct of enterprises to be fixed by administrative regulation, and the tendency of common speech to speak of administrative interpretations as law. Popular speech is sometimes much nearer to reality than legal theory. It is quite possible that new forms of law may be growing up under our eyes of which our science of law is blindly ignorant.

But be this as it may, the element of most enduring effect in legal development is professional and judicial ideals of the social and legal order. In the transition to a new stage of growth the key to our problem is here. We need to study these ideals scientifically instead of ignoring them. We need to learn whence they are derived, how they take form, and how they are used. If we would avoid the temporary return to Oriental justice which has been so marked a feature of periods of legal growth in the past, and is suggested to-day by the continual development of administrative jurisdiction in the United States and in England, we must learn how to supply substantially the same ideal picture of the social order to all our judicial magistrates, and to make it the best, the most critical, and the most complete that is compatible with social progress. We must learn where such pictures are to be resorted to and where not, and how to use them with intelligence and assurance.

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