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LAW IN BOOKS AND LAW IN ACTION.

When Tom Sawyer and Huck Finn had determined to rescue Jim by digging under the cabin where he was confined, it seemed to the uninformed lay mind of Huck Finn that some old picks the boys had found were the proper implements to use. But Tom knew better. From reading he knew what was the right course in such cases, and he called for case-knives. "It don't make no difference," said Tom, "how foolish it is, it's the *right way*—and it's the regular way. And there ain't no other way that ever I heard of, and I've read all the books that gives any information about these things. They always dig out with a case-knife." So, in deference to the books and the proprieties, the boys set to work with case-knives. But after they had dug till nearly midnight and they were tired and their hands were blistered, and they had made little progress, a light came to Tom's legal mind. He dropped his knife and, turning to Huck, said firmly, "Gimme a case-knife." Let Huck tell the rest:

"He had his own by him, but I handed him mine. He flung it down and says, 'Gimme a *case-knife.*'

"I didn't know just what to do—but then I thought. I scratched around amongst the old tools and got a pickaxe and give it to him, and he took it and went to work and never said a word.

"He was always just that particular. *Full of principle.*"

Tom had made over again one of the earliest discoveries of the law. When tradition prescribed case-knives for tasks for which pickaxes were better adapted, it seemed better to our forefathers, after a little vain struggle with case-knives, to adhere to principle—but use the pickaxe. They granted that law ought not to change. Changes in law were full of danger. But, on the other hand, it was highly inconvenient to use case-knives. And so the law has always managed to get a pickaxe in its hands, though it stead-

fastly demanded a case-knife, and to wield it in the virtuous belief that it was using the approved instrument.

It is worth while to recall some of the commonplaces of legal history by way of illustration. One of the first difficulties encountered by archaic legal systems founded upon the family and postulating for every sort of legal, social and religious institution, the continuity of the household, was the failure of issue, the want of the son to perpetuate the household worship whom religious and legal dogmas required. No one thought of superseding these dogmas, but their manifest inconvenience and injustice were avoided by the device of adoption. Presently a better way of disposing of property after death, without infringing upon ancient doctrines, occurred to some Roman. Why not sell his whole household and estate to the person upon whom he desired it to devolve? But if he so sold it, and the purchaser was an honorable man, the latter would carry out oral instructions at the time of the transfer as to the purpose for which it was made and the disposition to be made of the property. After this had gone on till every one had begun to employ the proceeding, a law of the Twelve Tables gave legal efficacy to the oral instructions, when the form of sale was had, and wills had come into being. A better example is to be seen in the Roman law of marriage. The religious marriage, which was the only one recognized by religion and hence by law, was not open to the plebeian. In consequence he did not have his wife in *manus* or his children in *potestas,* and his household had no standing before the law. The law was not altered. It was not enacted that there might be marriage without a wife in *manus* and a family without children in *potestas,* but purchase or adverse possession and the statute of limitations were resorted to in order to bring the plebeian's wife into *manus* in another way. Our own law furnishes many such instances. When the Anglo-Saxon king desired to extend the protection of his peace to some one, he took him by the hand publicly and made of him, for legal purposes, a minister or

servant entitled to the king's peace which attached to members of his household. When wager of law had made the action of debt a worthless remedy upon simple contracts, wager of law was not abolished, but the courts found a trespass and a breach of the king's peace in failure to perform a promise, if only something had been given presently in exchange for it, and thus imposed upon our law of contracts the formality of a consideration. When the delay and formalism of real actions and the incident of trial by battle made them inadequate remedies, a fictitious lease and fictitious ejectment were resorted to in order to make another remedy meet the situation. When the hard and fast form of writ and declaration failed to provide for new cases of conversion of a plaintiff's property, the form was not altered, but the loss and finding were assumed from the conversion; so that we are able to read in an American report of the nineteenth century that the plaintiff casually lost one hundred freight cars and the defendant casually found them and converted them to its own use, as if it were a watch or a pocket book that had been lost.

We are by no means so much wiser than our fathers as we sometimes assume. While we have few of the old fictions of procedure left, we can make new ones of our own upon occasion in the like spirit. The mode of reading bills to some of our state legislatures pursuant to constitutional requirements is in every way worthy to go down in history with *ac etiam* and *quo minus*. The doctrine of the presumed citizenship of stockholders of corporations, and hence of the corporations, for purposes of suit in the Federal courts, is worthy of the courts that found a breach of the king's peace in fraud and deceit. But it is not of fictions of themselves that I would speak. They soon get into the books and become part of the law as it is written. They mark where there was once a distinction between law in the books and law in action, and show one way in which the two have been brought into accord. They show where and how legal theory has yielded to the pressure of lay ideas

and lay conduct. The current divergencies are not yet so marked. They escape notice. The fictions that are to mark them for future generations of jurists are in the making. But if we look closely, distinctions between law in the books and law in action, between the rules that purport to govern the relations of man and man and those that in fact govern them, will appear, and it will be found that today also the distinction between legal theory and judicial administration is often a very real and a very deep one.

Let us take a few examples. It is a settled dogma of the books that all doubts are to be resolved in favor of the constitutionality of a statute—that the courts will not declare it in conflict with the constitution unless clearly and indubitably driven to that conclusion. But it can not be maintained that such is the actual practice, especially with respect to social legislation claimed to be in conflict with constitutional guaranties of liberty and property. The mere fact that the Court of Appeals of New York and the Supreme Court of the United States differed on such questions as the power to regulate hours of labor on municipal and public contracts, and the power to regulate the hours of labor of bakers, the former holding adversely to the one[1] and upholding the other,[2] while the latter court had already ruled the opposite on the first question[3] and then reversed the ruling of the New York court on the second,[4] speaks for itself. Many more instances might be noted. But it is enough to say that any one who studies critically the course of decision upon constitutional questions in a majority of our state courts in recent years must agree with Professor Freund that the courts in practice tend to overturn all legislation which they deem unwise,[5] and must admit the truth of Professor Dodd's statement:

"The courts have now definitely invaded the field of public policy and are quick to declare unconstitutional almost any laws of which they disapprove, particularly in the fields of social and industrial legislation.

[1] People v. Coler, 116 N. Y. 1.
[2] People v. Lochner, 177 N. Y. 145.
[3] U. S. v. Martin, 94 U. S. 400.
[4] Lochner v. N. Y., 198 U. S. 45.
[5] Green Bag. XVII, 416.

The statement still repeated by the courts that laws will not be declared unconstitutional unless their repugnance to the constitution is clear beyond a reasonable doubt, seems now to have become 'a mere courteous and smoothly transmitted platitude.' "[6]

Departure from the legal theory at this point is leading to another change. The doctrine of the books is that an unconstitutional statute is simply a nullity. There never was such a statute. No legal effect whatever has been produced. But when in five years the courts of this country hold three hundred and seventy-seven statutes, or an average of over seventy-one a year, unconstitutional, it is obvious that such a theory becomes highly inconvenient. It is a natural consequence that a practice of recognizing what might be called "*de facto* statutes" is beginning to appear in one guise or another.[7]

Another example is to be found in those jurisdictions where the common-law doctrines as to employer's liability still obtain and in those corners of employer's liability in other jurisdictions where recent legislation has left the common law in force. It is notorious that a feeling that employers and great industrial enterprises should bear the cost of the human wear and tear incident to their operations dictates more verdicts in cases of employer's liability than the rules of law laid down in the charges of the courts. Most of the new trials directed by our highest courts of review because the verdicts returned are not sustained by the evidence are in cases of this sort. Here the law in the books is settled and defined. The law administered is very different, and only the charge of the court, rigidly examined on appeal, serves to preserve an appearance of life in the legal theory.

More striking still is the divergence between legal theory and current practice in the handling of persons suspected of crime. The "third degree" has become an every day feature of police investigation of crime. What is our law

[6] The Growth of Judicial Power, Pol. Sci. Quarterly, XXIV, 193, 194.
[7] Ibid. 199.

according to the books? "The prisoner," says Sir James Stephen, "is absolutely protected against all judicial questioning before or at the trial." "This," he adds, "contributes greatly to the dignity and apparent humanity of a criminal trial. It effectually avoids the appearance of harshness, not to say cruelty, which often shocks an English spectator in a French court of justice."[8] Such is the legal rule. But prosecuting attorneys and police officers and police detectives do not hesitate to conduct the most searching, rigid and often brutal examinations of accused or suspected persons, with all the appearance of legality and of having the power of the state behind them. It is true, no rich man is ever subjected to this process to obtain proof of violation of anti-trust or rebate legislation and no powerful politician is thus dealt with in order to obtain proof of bribery and graft. The malefactor of means, the rogue who has an organization of rogues behind him to provide a lawyer and a writ of *habeas corpus* has the benefit of the law in the books. But the ordinary malefactor is bullied and even sometimes starved and tortured into confession by officers of the law. It is no doubt a sound instinct that makes us hesitate to give any such examinations the sanction of legality. We may agree with Sir James Stephen's informant that there is a deal of laziness behind it, that, to use his words, "it is far pleasanter to sit comfortably in the shade rubbing red pepper into a poor devil's eyes than to go about in the sun hunting up evidence."[9] The fact remains, however, that the attempt of the books to compel prosecutors to use only a case-knife is failing. They will use the pick-axe in practice, and until the law has evolved some device by which they may use it in all cases the weak and friendless and lowly will be at a practical disadvantage, despite the legal theory.

Not only does the law in the books seek to surround accused persons with safeguards which the practical exi-

[8] History of the Criminal Law, I, 441. [9] Ibid.

gencies of prosecution will not put up with, but at other times it demands conviction of persons whom local or even general opinion does not desire to punish. Jury lawlessness is the great corrective of law in its actual administration. The will of the state at large imposed on a reluctant community, the will of a majority imposed on a vigorous and determined minority, find the same obstacle in the local jury that formerly confronted kings and ministers. More than this, where in a particular cause there are peculiar considerations of mitigation or circumstances requiring exercise of a dispensing power, the power of juries to render general verdicts needs only a little help from alienist theories of insanity to enable a verdict to be rendered which will accord with the moral sense of the community. Here again, as in the case of the "third degree," the law is often too mechanical at a point requiring great nicety of adjustment. And the tendency to extend the scope of jury lawlessness, manifest in almost all jurisdictions, indicates that there are many points where a readjustment or a better adjustment must be had. For instance, legislation making questions of negligence in all cases matters wholly for the jury is becoming common. Many states make juries judges of the law in criminal cases, and a larger number commit to juries the power of sentencing in many classes of prosecutions, or even in all cases. Persistent attempts are making to leave all cases of contempt to juries. More than all these, legislation against comment upon the facts in the charge of the Court, requiring a written charge, or in some states limiting the Court to granting or refusing written instructions tendered by counsel, has reduced the charge of the Court to an imposing, but ineffective, ritual and turned the actual decision of causes over to a jury unfettered by rules of law.

What is the purpose and what the occasion of the extensions of the powers of juries to which I have referred? Practically the purpose is, in largest part, to keep the letter of the law the same in the books, while allowing the jury

free rein to apply different rules or extra-legal considerations in the actual decision of causes—to create new breaches and widen existing breaches between law in the books and law in action. The occasion is that popular thought and popular action are at variance with many of the doctrines and rules in the books, and that the law is trying to save the latter and accommodate itself to the former by the good old device of calling a pickaxe a case-knife. If the ritual of charging the jury on the law with academic exactness is preserved, the record will show that the case was decided according to law, and the fact that the jury dealt with it according to extra-legal notions of conformity to the views of the community for the time being is covered up. It is worthy of consideration whether the exaggerated tendency of American procedure in the past fifty years to try the record rather than the cause is not in part a result of extravagant powers of juries. To adjust the rules of law to the exigencies of action, we have set up a wide dispensing power in juries. To preserve the appearance of legality and rule and system, we have developed a complicated machinery of procedure and have refined and re-refined its smallest details. In England, where an unfettered Parliament makes the written law sensitive to public opinion, there is very little jury lawlessness. The judges charge effectively on the law and vigorously on the facts. They hold the jury to the law. It is not entirely a coincidence that English courts waste but little time on procedure.

Another attempt at adjusting the letter of the law to the demands of administration in concrete cases, while apparently preserving the law unaltered, is to be seen in our American ritual, for in many jurisdictions it is little else, of written opinions, discussing and deducing from the precedents with great elaboration. As one reads the reports critically the conclusion is forced upon him that this ritual covers a deal of personal government by judges, a deal of "raw equity," or, as the Germans call it, of equitable application of law, and leaves many a soft spot in what is superficially a hard and fast rule, by means of which concrete

causes are decided in practice as the good sense or feelings of fair play of the tribunal may dictate. One instance of this, in constitutional law, has been spoken of. Many others might be adduced from almost any department of private law. Let one suffice. In the law as to easements it is laid down that a right may be acquired by adverse user, although the known use was not objected to, if it was in fact, adverse. But the same courts say properly that a permissive user will give no right. When, however, one turns to the cases themselves and endeavors to fit each case in the scheme, not according to what the court said was the rule, but according to the facts of that case, he soon finds that the apparent rules to a great extent are no rules, and that where to allow the right would work a hardship the courts have discussed the decisions as to permissive user, and where, in the concrete cause, it seemed fair to grant the right they have insisted on the adverse character of the claimant's conduct. And the reason is not far to seek. We have developed so minute a jurisprudence of rules, we have interposed such a cloud of minute deductions between principles and concrete cases, that our case-law has become ultra-mechanical, and is no longer an effective instrument of justice if applied with technical accuracy. In theory our judges are tied down rigidly by hard and fast rules. Discretion is reduced to a strictly defined and narrowly limited minimum. Judicial law-making has produced a wealth of rules that has exhausted the field formerly afforded for the personal sense of justice of the tribunal. Legally, the judge's heart and conscience are eliminated. He is expected to force the case into the four corners of the pigeon-hole the books have provided. In practice, flesh and blood will not bow to such a theory. The face of the law may be saved by an elaborate ritual, but men, and not rules, will administer justice.

The lawyer commonly flatters himself that the vagaries of legislators are responsible for most of the divergence between law in the books and law in action; that statutes

impossible of enforcement, enacted off-hand without knowledge of the situation to be dealt with, are chiefly to be blamed. No doubt crude legislation has been a factor of no mean importance. Legislation imposing a heavier punishment upon one who gives an adult a cigarette than upon blackmail, or upon many forms of graft most detrimental to the proper conduct of public business, does not impress jurors or prosecutors, or even judges, with a sense of duty of upholding the written law. No doubt, too, we have had laws made merely to please particular constituents and not intended to be enforced. But to my mind these are the least of the matter; for our revered common law, our judge-made traditions, our settled habits of legal thought often fare little better in action. I have already spoken of our common law of master and servant. Our ultra-individualist doctrines of contributory negligence fare no better at the hands of juries, and legislation is either modifying them or leaving the whole question to juries in an increasing number of states. Again, it is a settled judicial doctrine that opposes collusive divorce. Yet every morning paper bears witness how little force it has in practice. What would the average community do to a supposed gentleman convicted judicially of extreme cruelty to a lady? Yet there are coming to be respected persons of high standing in all communities against whom there are such records. We know that in many parts of the country, at least, extreme cruelty has become a convenient fiction to cover up that incompatibility of temper that may not unreasonably exist between a lady and a gentleman. The legal theory, the judicial decisions defining cruelty, the judge-made rule against collusion remain in the books. But husband and wife agree upon a settlement of property out of court, they agree that she shall aver and prove cruelty unopposed, the newspapers publish the fact, the ritual is gone through with and a decree is entered. In other words, public thought and feeling have changed, and, whatever the law in the books, the law in action has changed with them.

Some of the causes of divergence between the law in the books and the law in action have been suggested already. In the first place, it is nothing new. Law has always been and no doubt will always continue to be, "in a process of becoming." It must be "as variable as man himself."[10] "Social life," says Wundt, "like all life, is change and development. Law would be neglecting one of its most important functions if it ceased to meet the demands of this ceaseless evolution."[11] However much the lawyer, enamored of his ideal of an absolute certainty in legal rules, may seek to evade these demands, the people will not permit it. Men will do what they are bent on doing, laws and traditions to the contrary notwithstanding. The forms may be kept, but the substance will find some fiction or some interpretation, or some court of equity or some practice of equitable application, to sanction change. Nevertheless, the divergence between law in books and law in action is more acute in some periods of legal history than in others. In all legal systems, periods of growth, periods in which the law is developing through juristic activity, alternate with periods of stability, periods in which the results of the juristic activity of the past are summed up or worked out in detail or merely corrected here and there by legislation. Our common law in America has passed through its period of growth. In some parts of the country this period ended about the time of the Civil War. Elsewhere it lingered for some time, but in general it may be said to have come to an end about 1875. Today we are manifestly in a period of stability. Our case law is incapable of solving new problems or of meeting new situations of vital importance to present-day life. Judicial decision has failed conspicuously to provide a sound doctrine as to employer's liability. With the theory of "general jurisprudence" of the Supreme Court of the United States at hand to build on, it has failed to meet the general demand for uniform commercial law. With centuries of discussion before them, our courts have

[10] Wundt, Ethik, 2 ed. 556. [11] Ibid. 581.

failed to work out a reasonable or certain law of future interests in land. The common law has broken down wholly in the attempt to prevent discrimination by public service companies, because of inability to make procedure enforce its doctrine and rules. In our western states, where there was abundant opportunity for free judicial development, judicial law-making proved inadequate to adjust water rights. Case law has been found unable to hold promoters to their duty and to protect those who invest in corporate enterprises against mismanagement and breach of trust. It has failed to work out a scheme of responsibility that will hold legal entities, or those who hide behind the skirts of such entities, to their duty to the public. Finally judicial decision is doing little or nothing for improvement of procedure in the face of insistent popular demand. On all these points we have had to turn to legislation. Juristically, then, we are in a period of stability and the growing point of law is in legislation. But legislation has always brought with it an imperative theory of law, a theory that law was the command of the sovereign and a resulting tendency to overlook the necessity of squaring the rules upon the statute book with the demands of human reason and the exigencies of human conduct. More than this, in periods of stability the desire for formal perfection seizes upon jurists. Justice in concrete causes ceases to be their aim. Instead they aim at thorough development of the logical content of established principles through rigid deduction and at a certainty which shall wholly eliminate the personal equation in the administration of justice and permit judicial decision to be predicted with absolute assurance. Such periods have produced in the past spurious interpretation and courts of equity. In the present such a period is giving rise to a practice of equitable application as a means of asserting the element of discretion, of reason, of equity in its wider sense, inherent in all law. The controversy between the analytical and historical schools on the one hand and the equitable school on the other over the application of the new code in

modern Germany is an instance of the same thing; for in such periods of juristic stability popular thought and popular practice may be anything but stable, and in consequence may diverge widely from the doctrines and rules to be found in the lawyer's books. This is a general reason, applicable to all cases of divergence between the nominal and the actual law in periods of legal maturity.

Closer analysis will reveal three special causes behind the conditions in American law to which I have called attention —namely, (1) that our settled habits of juristic thought are to no small extent out of accord with current social, economic and philosophical thinking, (2) the backwardness of the art of legislation, particularly in that our legislative law-making, like our judicial law-making, is too rigid, attempts too much detail and fails to leave enough margin for judicial action in individual cases, and (3) the defects of our administrative machinery.

To the ancient, law was sacred. It was not made by man, and could not be changed by man. Man simply discovered it. Any attempt to alter it was of necessity futile. We are told that when contact with the Romans taught Teutonic peoples that through the written page they could make and alter the law as well as record it, a great ferment resulted. In somewhat the same way, when lawyers find they can deduce law from settled premises and the people find they can enact it without premises, a ferment ensues. When legislation is merely a record of law, when juristic speculation is merely a discovery of the dictates of reason, the resulting rules and doctrines in the books can not be far removed from current popular thought and popular practice. But once admit an imperative theory, and let the rule be *quod principi placuit legis habet vigorem,* and it makes little difference whether the *princeps* is a Roman emperor, represented by jurisconsults who legislate in his name, or the people of an American commonwealth speaking through the judiciary committees of its Legislature. In either case it will be found that a mass of detail will in practice lack the

force of law. But it is equally true that if we admit the doctrines of the historical jurist and take the juristic principles of the Roman law or of Anglo-American common law as the bases from which to make logical deductions, the law in the books will more and more become an impossible attempt to govern the living by the dead.

Settled habits of juristic thought are characteristic of American legal science. Our legal scholarship is historical and analytical. In either event it begins and ends substantially in Anglo-American case law. But the fundamental conceptions of that case law are by no means those of popular thought today. Nor is this condition in any wise unique. "All sciences," wrote Ulrich Zäsius in 1520, "have put off their dirty clothes, only jurisprudence remains in her rags."[12] When Zäsius wrote this, every other department of learning was revivifying under the influence of renewed study of the classical texts by the humanists. Jurisprudence was conspicuous in its isolated existence to the new light. Greek learning made itself felt in Roman letters and Roman thought in the first century B. C.; in Roman legal science in the second and third centuries A. D. Philosophy had been delivered from Aristotle and theology from the fathers of the church for over a century before law was set free from Justinian and jurisprudence was divorced from the older theology. Today, while all other sciences, in the wake of the natural sciences, have abandoned deduction from predetermined conceptions, such is still the accepted method of jurisprudence. After philosophical, political, economic and sociological thought have given up the eighteenth-century law of nature, it is still the premise of the American lawyer. In other words, law has always been dominated by ideas of the past long after they have ceased to be vital in other departments of learning. This is an inherent difficulty in legal science, and it is closely connected with an inherent difficulty in the administration of justice according to law—

[12] Stintzing, Ulrich Zäsius, 107.

namely, the inevitable difference in rate of progress between law and public opinion.

Of the defects in our American administration of justice with which fault is found today, the more serious are reducible ultimately to two general propositions: (1) over-individualism in our doctrines and rules, an over-individualist conception of justice, and (2) over-reliance upon the machinery of justice and too much of the mechanical in the administration and application of rules and doctrines. At first sight the coexistence of over-individualism in the rules of law and in the doctrines from which they proceed, with lack of individualization or too little adjustment to individual cases in the application of the rules and doctrines, is a paradox. But in truth the latter is due to exactly the same causes, and is a result of the same attitude toward law and government and of the same frame of mind as the former. The former is an assertion of the individual against his fellows individually. The latter is an assertion of the individual against his fellows collectively. The former expresses the feeling of the self-reliant man that, as a free moral agent, he is to make his own bargains and determine upon his own acts and control his own property, accepting the responsibility that goes with such power, subjecting himself to liability for the consequences of his free choice, but exempt from interference in making his choice. The latter expresses the feeling of the same self-reliant man that neither the state, nor its representative, the magistrate, is competent to judge him better than his own conscience; that he is not to be judged by the discretion of men, but by the inflexible rule of the law. Each proceeds from jealousy of oppression of the individual. The former is due to fear he may be oppressed in the interest or for the protection of others; the latter is due to fear that a magistrate, who has power to adjust rules to concrete cases and discretion in the application of legal doctrines, may misuse that power and abuse that discretion to the injury of some individual. It assumes that oppression by mechanical laws,

mechanically executed, is preferable to government by other men exercising their own will and judgment, and that elimination of every personal element and procedure according to hard and fast rules necessarily constitutes justice. Each is a phase, therefore, of the extreme individualism which is one of the chief characteristics of the common law. Indeed, Berolzheimer asserts that the one distinguishing mark of common-law juristic thought is this "unlimited valuation of individual liberty and respect for individual property."[13]

The individualism of our common law is something of far more than academic interest. So far as American legal scholars trouble themselves with juristic theory at all, their point of view is usually historical. English juristic thought is chiefly analytical. The English hold to the imperative theory because it expresses the actual situation in the English polity. What Parliament commands is enforced in the courts, and hence visibly and obviously law is the command of King, Lords and Commons. But in the United States Austin's critics have been read much more than Austin himself. Although our writers upon politics adopt the imperative theory,[14] the American doctrine of judicial power with respect to legislation makes against adherence to the imperative theory by lawyers. It is not what the Legislature desires, but what the courts regard as juridically permissible that in the end becomes law. Statutes give way before the settled habits of legal thinking which we call the common law. Judges and jurists do not hesitate to assert that there are extra-constitutional limits to legislative power which put fundamental common-law dogmas beyond the reach of statutes. Under such circumstances an imperative theory is too much at variance with the actual situation to find acceptance. This manifest inapplicability of the chief tenet of the analytical jurists, together with the commanding position of Harvard Law School in American legal education,

[13] System der Rechts und Wirthschaftsphilosophie, II, 160.

[14] Willoughby, The Nature of the State, Chaps. 7, 8.

has led to an almost uncontested supremacy of the historical school. But when we look closely into the method of the historical school we find it in practice strangely like that of the eighteenth century law-of-nature school against which it arose to protest.

Eighteenth century jurists conceived that certain principles were inherent in nature, were necessary results of human nature, and that these principles were discoverable *a priori.* They held that it was the business of the jurist to discover these principles, and, when discovered, to deduce a system therefrom and test all actual rules thereby. Such is even now the orthodox method in our constitutional law. Our bills of rights are regarded as merely declaratory of fundamental natural rights. Eminent judges assert that legislation is to be judged by those rights and not by the constitutional texts in which they are declared. And the greatest American lawyer of recent times, in the true method of the eighteenth century, lays down a criterion of law and legislation *a priori,* deduces from it an absolute test of right and wrong and proceeds to define the limits of legislative law-making accordingly. A portion of the eloquent passage from Mr. Carter's posthumous work to which I refer is worth quoting. He says:

"There is a guide which, when kept clearly and constantly in view, sufficiently informs us what we should aim to do by legislation and what should be left to other agencies. This is what I have so often insisted upon as the sole function both of law and legislation—namely, to secure to each individual the utmost liberty which he can enjoy consistently with the preservation of the like liberty to all others. Liberty, the first of blessings, the aspiration of every human soul, is the supreme object. Every abridgment of it demands an excuse and the only good excuse is the necessity of preserving it. Whatever tends to preserve this is right. All else is wrong. To leave each man to work out in freedom his own happiness or misery, to stand or fall by the consequences of his own conduct, is the true method of human discipline."[15]

My excuse for this long quotation is that it is an authoritative exposition of current juristic thought in America. To

[15] Carter: Law, Its Origin, Growth and Function, 337.

lawyers all that I have said may seem to go without saying, but to economists, to sociologists, to students of comparative legislation, of politics, or of the juristic thought of the rest of the world, the eighteenth century interpretation of law as existing solely to secure liberty, the acceptance of Herbert Spencer's Kantian formula of justice, the theory that government is to be held down to the inevitable minimum and the uncompromising insistence that men should be required to act unaided by legal restraints in their own interest and made to stand or fall by the consequences of their choice, belie the twentieth century date upon the title page. Yet the author believed that he wrote from the historical standpoint, and he represents undoubtedly the views of the historical school in America. For the historical school too works *a priori*. It has deduced from and tested existing doctrines by a fixed, arbitrary, external standard. Having no philosophical method of their own, as Berolzheimer has pointed out, when the German historical jurists overthrow the premises of the eighteenth century law-of-nature school, they preserved the method of their predecessors, merely substituting new premises. They had, he says, neither the capacity nor the desire to put a new philosophy of law in the place of the buried law of nature. They sought the nature of right and of law in historical deduction from the Roman sources, from Germanic legal institutions, and from the juristic development based thereon.[16] In the United States this natural law upon historical premises has gone even further. With us the basis of all deductions is the classical common law—the English decisions and authorities of the seventeenth, eighteenth and first half of the nineteenth centuries. We make of this a very *Naturrecht*. We test all new situations and new doctrines by it. We construe statutes by it, and Mr. Carter tells us that it is a wise doctrine to presume that legislatures intend no innovations upon this common law, and to

[16] System der Rechts und Wirth schaftsphilosophie, II, 4.

assume, so far as possible, that statutes were meant to declare and reassert its principles.[17] More than this, through the power of courts over unconstitutional legislation and the doctrine that our bills of rights are declaratory, we force it upon modern social legislation. Hence the character, the attitude—if I may fall back upon a German word, the *Weltanschauung*—of this body of doctrine becomes of the utmost practical importance. Not merely the jurist, but the legislator, the sociologist, the criminologist, the labor leader, and even, as in the case of our corporation law, the business man, must reckon with it. For the fundamental conceptions of our traditional case law have come to be regarded as fundamental conceptions of legal science. When in a period of collectivist thinking and social legislation courts and lawyers assume that the only permissible way of thinking or of law-making is limited and defined by individualism of the old type, when, while men are seeking to promote the ends of society through social control, jurists lay it down that the only method of human discipline is "to leave each man to work out in freedom his own happiness or misery," conflict is inevitable. With jurisprudence once more in the rags of a past century, while kindred sciences have been reclothed, we may be sure that law in the books will often tend to be very different from the law in action.

Probably one may summarize this first point by saying that a gulf has grown up between social justice, which is the end men are seeking today, and legal justice; that the movement away from the Puritan standpoint in our social and economic and political thought has not been followed by legal thought, and that we still adhere to the idealistic, or at least to the political interpretation of, legal science, although in kindred branches of learning the economic and social interpretation is now more and more accepted.

That the legal idea of justice is not the idea entertained in the related sciences is becoming a commonplace of the sociologists. They do not hesitate to contrast social justice

[17] Law, Its Origin, Growth and Function, 308, 309.

and legal justice.[18] As Professor Commons put it recently, "Justice is not merely fair play between individuals, as our legal philosophy would have it—it is fair play between social classes."[19] And one has only to read the judicial decisions upon liberty of contract to see that his conception of legal justice is that entertained by the courts. As Judge Baldwin has well put it, "The circle of individual rights narrows."[20] But courts and lawyers seem to conceive it their duty to oppose and resist this narrowing at every point.

Sometime in the future when a philosophical jurist writes upon the spirit of the common law, we may have a worthy account of the relation between Puritan theology and the common law. Such an account will be as much a part of the philosophical history of our system as the relation of Stoic philosophy to Roman law is a part of the history of that system, and hence an important consideration in legal science. I have ventured some discussion of this on another occasion. Here I need only say that it is not an accident that the great periods of common law history, the periods of growth, the periods when doctrines were worked out and took shape, were periods in which religious thought was a prime form of mental activity and were periods in which the Puritan was a potent force in religious thought. The work of the English courts prior to Coke was summed up for us and handed down to us by that indefatigable scholar in what we have chosen to consider an authoritative form, and we have looked at it through his spectacles ever since. Hence we may neglect the periods of growth prior to the age of Elizabeth and James I., since their results in our law today depend upon the way in which they appealed to the end of the sixteenth and beginning of the seventeenth centuries. Again we may pass over the constructive work of the eighteenth century, for that was done in equity and the law merchant. Neither of these strictly is part of the

[18] Ward, Applied Sociology, 22-24; Willoughby, Social Justice, 20-25.

[19] 13 Am. Journ. Sociol. 764.

[20] The Narrowing Circle of Individual Rights (Reprint from Proc. Va. Bar Assn. 1908), 4.

common law, and, so far from their affecting the spirit of the common law, the spirit of the common law has affected them powerfully. But there are two great growing periods of our common law system; two periods in which principles and doctrines were formative, in which our authorities have summed up the past for us and have given us principles for the future. These periods are: (1) the classical common-law period, the end of the sixteenth and beginning of the seventeenth century, and (2) the period that some day may be held no less classical than the first—the period of legal development in America that came to an end with the Civil War. In the one the task was to go over the decisions and legislation of the past and make a system for the future. In the other the task was to examine the whole body of English case law with reference to what was applicable to the facts of life in America and what was not. Obviously the spirit of these times and of the men of these times, whose juristic labors gave us what we call our common law, could not fail to give color to the whole system. But the age of Coke was the age of the Puritans in England and the period that ends with our Civil War was the age of the Puritans in America. We must not forget that the Puritan had his own way in America, that he was in the majority, had no powerful establishment to contend with, and made institutions to his own liking. For again it is not an accident that common-law principles have attained their highest and most complete logical development in America, and that we are and long have been more thoroughly a common-law country than England herself. It is significant that the classical expositions of characteristic common-law views upon employer's liability, for example, upon rights of adjoining owners with respect to surface water, and upon abusive exercise of rights have come from New England.

The fundamental proposition from which the Puritan proceeded was the doctrine that man was a free moral agent, with power to choose what he would do and a responsibility

coincident with that power. He put individual conscience and individual judgment in the first place. No authority must be permitted to coerce them, but every one must assume and abide the consequences of the choice he was free to make. In its application this led to a regime of "consociation, but not subordination."[21] "We are not over one another," said Robinson, "but with one another."[22] Hence law was a device to secure liberty, its only justification was that it preserved individual liberty, and its sole basis was the free agreement of the individual to be bound by it. The early history of New England abounds in examples of attempts to make this a practical political doctrine.[23] The good side of all this we know well. On the side of politics, the conception of the people—not as a mass, but as an aggregate of individuals—the precise ascription of rights to each of these individuals, the evolution of the legal rights of Englishmen into the natural rights of man, have their immediate origin in the religious phase of the Puritan revolution.[24] But on the side of law it has given us the conception of liberty of contract, which is the bane of all labor legislation, the rooted objection to all power of application of rules to individual cases which has produced a decadence of equity in so many of our state courts, the insistence upon and faith in the mere machinery of justice which makes American legal procedure almost impossible of toleration in the business world of today, the notion of punishing the vicious will and of the necessary connection between wrongdoing and retribution which make it so difficult for our criminal law to deal with anti-social actions and to adjust itself in its application to the exigencies of concrete criminality.

Finally, our interpretation of jurisprudence and of legal history is either idealistic or political. Brooks Adams is

[21] Lord Acton, Lectures on Modern History, 200.

[22] Ibid.

[23] Merriam, Am. Political Theories, 19.

[24] Dunning, Political Theories, from Luther to Montesquieu, 220, 221.

the only American writer to insist upon the economic and social interpretation. But until we come to look at our legal history in this way, history on which our jurists rely chiefly is not unlikely to prove a blind guide. The history of juristic thought tells us nothing unless we know the social forces that lay behind it.

I have discussed at length the effect of stability of juristic thought and the nature of American juristic thought because those are the subjects which the lawyer must ponder. It is there that the divergence between law in books and law in action has a lesson for him. The other two causes may be looked at only in the briefest way.

Rigidity of legislation is best illustrated in the codes of procedure and practice acts, so common in the United States, which in large measure have defeated their own ends by going too much into detail. Legislation must learn the same lesson as case law. It must deal chiefly with principles; it must not be over-ambitious to lay down universal rules. We need for a season to have principles from which to deduce, not rules, but decisions. Legislation which attempts to require cases to be fitted to rules instead of rules to cases will fare no better than judicial decisions which attempt the same feat. So long as an imperative theory leads the law-maker to think that he has only to put his views of all the details of legal and judicial administration into sections and chapters, and, as the will of the sovereign, they will become effective law, the law upon the statute books will be far from representing what takes place actually in the courts.

The third cause mentioned, defective administration, perhaps more than any other cause, is immediately responsible for making law in action different from law in the books. If any legislation has an active public interest behind it, and is sought to be enforced by zealous partisans whose wishes command the attention of executive officers, it is labor legislation. But the proceedings of the American Association for Labor Legislation bear abundant and eloquent

testimony that our copious labor legislation for the most part fails of effect because of defective administration.[25] Both judicial and executive administration are at fault. A great deal of the law in the books is not enforced in practice because our machinery of justice is too slow, too cumbersome and too expensive to make it effective. One need only instance petty cases, triable by justices of the peace, appealable for a complete new trial to superior courts of record and then reviewable by supreme courts or courts of appeals. It is not to be expected that such a machinery of justice will afford any real check upon extortion by public service companies. But, beyond this, we have preserved an etiquette of justice, devised in large part in a past age of formal over-refinement, no small part of which is as out of place in a twentieth century American court of justice as gold lace and red coats upon a modern skirmish line. It is chiefly, however, in executive administration that laws fail of effect. The clash of departments or even of officials, so characteristic of our polity, the extreme decentralization that allows a local jury or even a local prosecutor to hold up instead of uphold the law of the state, the elaborate machinery of check, balance and subdivision which the Puritan jealousy of the magistrate has fixed in our institutions, too often result in a legal paralysis of legal administration. Effective administration is perhaps the great problem of the future. But that is a problem chiefly for the statesman and the student of politics.

For the lawyer, the moral of the difference between law in books and law in action is not to be obsessed with the notion that the common law is the beginning of wisdom and the eternal jural order. Let us not be afraid of legislation ,and let us welcome new principles, introduced by legislation, which express the spirit of the time. Let us look the facts of human conduct in the face. Let us look to economics and sociology and philosophy, and cease to

[25] Proc. Second Annual Meeting of Am. Assn. for Labor Legislation, pp. 9, 32, 92.

assume that jurisprudence is self-sufficient. It is the work of lawyers to make the law in action conform to the law in the books, not by futile thunderings against popular lawlessness, nor eloquent exhortations to obedience of the written law, but by making the law in the books such that the law in action can conform to it, and providing a speedy, cheap and efficient legal mode of applying it. On no other terms can the two be reconciled. In a conflict between the law in books and the national will there can be but one result. Let us not become legal monks. Let us not allow our legal texts to acquire sanctity and go the way of all sacred writings. For the written word remains, but man changes. Whether laws of Manu or Zarathustra or Moses, or the fourteenth amendment, or the doctrine of the Dartmouth College Case, or Munn v. Illinois, or the latest legislative discovery in Oklahoma, all laws tell us the same tale.

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