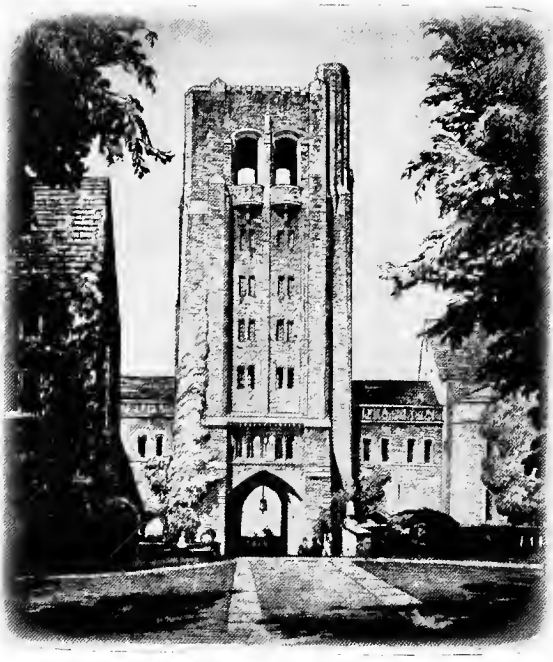

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PROBLEMS OF LAW

ITS PAST, PRESENT, AND FUTURE

THREE LECTURES

BY

JOHN HENRY WIGMORE

DEAN OF THE LAW SCHOOL OF NORTHWESTERN UNIVERSITY

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THE BARBOUR-PAGE LECTURE FOUNDATION

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PROBLEMS OF THE LAW'S EVOLUTION

PROBLEMS OF THE LAW'S EVOLUTION

In these lectures I shall attempt to describe some of the problems that abound in to-day's legal science. Solutions I shall not hesitate to offer, if I see any. But my principal object is to call attention to the presence of the problems, and to urge you to devote your energies to discover their right solutions.

In a trinity of lectures it is natural to select that triune division of any field—the Past, the Present, and the Future. In the first lecture will be sketched some of the problems of the Past—in particular of the Evolution of Law; in the second, some problems of the Present—in particular of Methods of Making Law; and in the third, some problems of the Future—in particular of America's

Share in World Legislation. The first kind of problems would be of prime interest to the Scholar; the second, to the Practitioner; and the third, to the Citizen and the Statesman.

But before any discussion of law must come its definition. What is law? The venerable Hooker, at one extreme of thought, assures us that "the seat of law is the bosom of God, her voice the harmony of the world. All things in heaven and earth do her homage, the very least as feeling her care, and the greatest are not exempted from her power; both angels and men and creatures of what condition soever, admiring her as the mother of their peace and joy." This nebulous idea of law is far above the level of my thought. At the other extreme is Farmer Corntossel's definition, who mused thus: "Law," he announced, "is like a colt; you can never tell what it's really worth until you've broken it!" Yet this mundane

pragmatism hardly suffices. Steering between these two, I shall proceed, with compass and microscope, to make a dry analysis of law as a scientist might see it.

The term "law" may be applied in geology, in philology, or in human conduct; the last is our field. In human conduct law is used either of behavior of a group of humans in general, or of behavior of a group living under a political power; the latter is our part of the field. Law here implies four separate elements: *A. Human conduct* is affected by it; *B.* The *mode* of its affection is (*a*) by a *uniform* or regular quality of behavior, as contrasted with a variable or arbitrary sequence of acts; (*b*) by a *compulsion,* objective or subjective or both, as contrasted with a purely voluntary behavior; (*c*) by a *State power* giving the force in this compulsion, as contrasted with unorganized social opinion supplying the compulsion. Let us look again a

moment at these last three elements so as to insure a common understanding about the problem: *B.* (*a*) The element of *uniformity* or *regularity* in any human situation, as where A kills B. A score or a hundred facts can always be found in each situation: *e. g.*, A may wear a white hat, B may be rich, A may be a farmer, and so on. Uniformity means that one or more of these facts are selected as the essence, so that whenever those selected facts exist a specific result follows: *e. g.*, in the Anglo-Saxon law of Ethelbert, whenever a man kills a thane of the third class the killer always pays forty shillings. This is contrasted with irregularity or arbitrariness, as in a modern jury's verdict, where the basis for each verdict varies arbitrarily and indefinitely, both as to the amount and the circumstances that lead to the fixing of that amount (being limited only by the statutory maximum of $5,000 or $10,000). Now, this contrast between

uniformity and non-uniformity is due, as above noted, to the selection of the same few facts as the essential ones, leaving the others ignored. This is, therefore, the perpetual and inherent contrast between law and justice—between the rigid uniformity of an American statute and the capricious orders of an Arabian Sheik. And, whether we are discussing the practical needs of to-day or the evolution of the past, this is always the contrast of forces that faces us —the contrast between law and justice.

B. (*b*) *The element of coercion or obstrictiveness.* The contrast here is between voluntary and obstricted (or coerced) conduct. The coercion need not be actual (objective), but may be merely potential (subjective) by fear of the possible force; as, when the faithful canine, Towser, susceptible to the sight of a feline enemy, is tempted to pursue, but upon his owner's stern voice and a shake of the stick, Towser turns humbly back

and crushes his impulse. But this contrast of voluntariness and coercion, how does it arise? It arises because in a multitude of persons the variety of individual temperaments, desires, and perceptions is great, particularly the variety of will-force; hence the uniformity of conduct, if not preserved by compulsion, would constantly be broken by individual strong wills. Whenever a common force, on behalf of uniformity of behavior, suppresses or is ready to suppress the individual force, we have the second element of law. For example, on the floor of the New York Stock Exchange, the daring wearer of a straw hat on a warm day after October first would find it dashed from his head by a physical force representing common opinion.

B. (*c*) The element of *State power, or politicality.* It does not here matter what kind of State it is, nor what kind of a ruler—king, chief, oligarchy, or ochlocracy. Nor does it matter what

kind of force or coercion (the second element) is used. A State may compel by boycott or other force of excommunication as well as by a red-axed executioner or a military firing-squad. The contrast is between the casual force of an unorganized community, and the systematic force of an organized community. For example, in a church on Sunday morning, the man does not exist (in our circles) who would, during the minister's prayer, call aloud cheerily to a neighbor in the congregation, "Neighbor Jones, did you lose that foursome on the links yesterday?" Here there is absolute subjective obstriction to uniform behavior by mere deference of the individual to communal opinion in the congregation. But among peoples where religious fervor and factionalism are often strong—as with the Scotch, the Poles, the Africans—the State police have sometimes been called in to suppress obstreperous individuals who are not susceptible to anything less.

And in mediæval times the Church, which was then really politically organized, used the force of excommunication (not a physical one) as an effective coercion.

We have now defined these three elements under *B*, the second head; this may be termed the *formal* element in law. The first head, *A*, may be termed the *substantial* element (using these terms in the old philosophical sense). Let us now return to the first head, to define it more carefully.

A. The *substantial* element, *i. e., human conduct-relations.*

Is it not enough to point out generally that these are infinite? Survey in the mind all possible occupations—all the daily life of every man, woman, and child in this country, and every other country, and in this day and week and month and season, and every preceding and following age—and we shall perceive the endless variety of this substance or

material to which law applies, *i. e.*, applies its uniform rules obstricted by State force.

Now, the obvious feature here is that this substance is something common to law and to social habits generally. That is, life in society supplies these materials independently of law; law merely applies its formal elements to some or all of them. People would go on digging, planting, harvesting, hunting, marrying, selling, and consuming, even if there were no law. Social opinion or convention would sanction and secure certain habits of conduct, even if no law did so. We can and must study the existence, for example, of marriage and inheritance and sale customs in many primitive communities where no law touches them; and even in modern communities the several social institutions exist more or less outside of and free from law.

In short, law does not create these varieties of conduct, and they are not

any part of the formal element of law. Law merely applies its formal element to them.

Law does indeed select certain factors in each conduct-relation, and give or refuse recognition to them; but it does not create them. For example, if a lecturer were to be moved to say falsely on this platform that the action of Governor Jones in calling out troops to quell a riot among miners in Illinois was a gross invasion of civic rights, the law might have declared this utterance to be a criminal or a civil libel, and in deference to that law the lecturer might refrain from the utterance; and to that extent law would have changed the actual course of conduct. Nevertheless, the riot, and the troops, and the Governor, and the lecturer's desire to make that utterance—these all exist by social forces independent of law; then (in theory at least) we contemplate the lecturer as actually uttering what he desires, and

then declare the law to forbid that act; so that *all* the materials of conduct to which law applies are given independently of formal element of law.

The lesson here to be drawn is that the study of the *substantial* element of law begins always with social facts and institutions. And the problem always is: To which factors in social relations does law choose to apply its rule and sanction? This is alike true whether we are studying Law in its past evolution or Law in its present legislative needs. Take for example the contract of marriage in the making. For the evolution of past law in a given country we must first observe the social facts of human mating, and the legal problem then is: When and in what form did law, as distinguished from mere custom, come to take the subject in hand, and how far did its rule coincide with or vary from any particular trend of custom? And for modern legislation a question is;

Observing the social facts of marriage between persons who go from a strict State to a loose State to mate with each other, how far ought and can law interfere by some State rule to control that social fact?

All this discrimination is necessary because unless we realize that law is, in its substance, not a separate thing from social life, and unless we concede this partial or complete overlapping of social habit-facts by the rules of law, we can never expect either to trace correctly the evolution of legal rules or to devise the proper dictates of legislation.

We are now, after these tedious definitions, in a position to analyze some of the

I. Problems of the Evolution of Law

1. A first thing to notice is once more this distinction between the *substantial* and the *formal* elements in law.

ELEMENTS OF THE IDEA OF LAW

A. *Substantial Element = Human Conduct-Relations.*

Family-Relations
- Parental
- Marital
- Etc.

Property-Relations
- Ownership
- Lease
- Etc.

Liability-Relations
- Torts
- Contracts
- Etc.

B. *Formal Element = Mode of Affecting Conduct.*

Includes
- (*a*) *Uniformity or Regularity* (as contrasted with Variable or Arbitrary Sequence)
- (*b*) *Coercion* (as contrasted with Voluntary Action)
- (*c*) *State Power* (as contrasted with Social Opinion)

In the *substantial* elements we are dealing primarily with the facts of social habit. Strictly speaking, there is here no evolution of law as such. There is evolution of social habits and institutions; and at some time or other Law may or may not have been applied to a given habit or institution. Take, for example, the use of the wedding-ring at the marriage ceremony. This usage takes us back to prehistoric or to mythologic times in many lands; as a fact of social custom, it is marked and inveterate, and yet law, so far as I am aware, has never had anything to say about it. Law has had something to say, in middle and later epochs, about various other factors in the marriage contract-making —age, place, status, consent, officials. So that the problem of Evolution of Law here is: When and how has Law selected certain factors, and imposed a rule for them? Now, to solve this problem, we must first collate and study the entire

data of social facts; and yet, in the course of doing this we are fairly certain to have collected the data for the subsidiary question how the *legal* rule developed. It is only in the more advanced stages of law that we can separate sharply the body of legal rules from the social habits, *e. g.*, in our own statute-book today; but even then we cannot hope to understand their evolution apart from the social facts. The lesson here, then, is that the evolution of the substantive part of Law is virtually inseparable from the evolution of social habits. And that is why any accurate knowledge of that part of legal evolution will be a long time in coming.

2. A second truth to be kept in mind is that evolution in Law, as in other cosmic facts, is always the result of a *conflict of forces*. The situation is very much like that of two men pushing face to face on the pavement, each seeking to pass, or wrestling in a final grip on the

mat; in the wrestling-match, finally a slight balance of force prevails, and the one man falls on his back, with the other over him as the winner. Then there is equilibrium for a while, but only until the next bout begins. Law is usually a series of wrestling-bouts; the prize to the final winner signifies the enactment of the winning force as a rule of law. Complete rest may or may not ensue. But the victory does not signify the annihilation of the losing force; it signifies only a slight overbalance in the winning force, followed by a more or less permanent rest, according to the conventions of the game. For example, the recent victory in this State, under the leadership of a distinguished Virginia gentleman whom I am proud to claim as a friend and colleague, of the system of registration of land titles over the old system of recorded deeds, signified a long wrestle between the forces of general business convenience of landowners against the forces

of mere inertia of habit and of positive self-interest of the private title-insurance companies.

The importance of this truth is that, to solve the problem of evolution of a legal rule, we must first analyze fully the respective social forces which were struggling underneath the surface before the rule of law came into being; for the decision or enactment of a rule of law meant simply the overbalance of some forces against other forces.

In physics Sir Isaac Newton's third law of motion was this: "To every force there always exists a corresponding force which is equal and oppositely directed." When the forces which aid any uniform motion are added to those which oppose the motion, the sum is always zero. And even when motion is not uniform, and acceleration exists, there a force of reaction will be found; for Newton's Law proclaims that action is always equal and opposite to reaction. The same

truth obtains in the mental and social world.

3. A third postulate to keep in mind is that evolution is something less than mere history, and something *more than an abstract formula.*

What is meant by the evolution of law? Does it mean necessarily progress? Or may it mean mere change? And if so, change of what? Can we conceive of a going backward, in evolution—or of the death of an institution? May there be a degeneracy now and then, in evolution?

The usual discussions of legal evolution seem here to commit certain fallacies. For example, in Sir Henry Maine's masterpiece, *Ancient Law*, perennial in its freshness and stimulus, the learned author, in describing the development of contract, sums up the change as a change from general concepts to special ones. Again, in the same field, he declares that the contract began with ignoring the

moral idea of keeping faith, but looked solely at some outward ceremony, and ended by minimizing the outward form and protecting the mere mental and moral promise, the actual will of the parties; in short, the movement is from outward physical form to inward moral essence, or, as he puts it, "from a gross to a refined conception." Again, in another famous generalization, he offers the thesis that the movement of human relations in general is "from Status to Contract." So, too, De la Grasserie has discovered, he thinks, some twenty-eight general trends in the evolution of law, enumerated as follows:

DE LA GRASSERIE'S TWENTY-EIGHT DISTINCT EVOLUTIONARY MOVEMENTS OF LAW

1. From Custom to Ordained Law and to Judge-Declared Law;
2. From Oral to Written and to Codified Law;

3. From a Law of Nature to a Positive Law and a Law of Equity;
4. From Local to General Law;
5. From Simple to Complex Law;
6. From Material to Immaterial Law;
7. From Formal to Formless Law;
8. From Theocratic to Secular Law;
9. From Criminal to Civil Law;
10. From Civil to Commercial and Industrial Law;
11. From Political to Private Law;
12. From Collective to Individualistic Law;
13. From Esoteric to Popularized Law;
14. From the Outward Act to the Mental Act as Creative of a Right;
15. From Rights "*in rem*," or Real Rights, to Rights "*in personam*," or Obligatory Rights;
16. From a Law of Nominate Relations to a Law of Innominate Relations;
17. From Concrete to Abstract Rights;
18. From Immediate to Deferred Rights;
19. From Gratuitous to Commutative and Aleatory Transactions;

20. From Legal Regulation to Liberty of Contract;
21. From Unilateral to Bilateral Agreements;
22. From Family to Individual Rights;
23. From Ethnic to Territorial Law;
24. From Exclusion to Admission of Foreigners;
25. From a Law of Violent Methods to a Law of Peaceful Methods and of Equitable Aims;
26. From Oral to Written Form and the Return to Oral Form;
27. From Immovable to Movable Property;
28. From Reality to Fiction.

Now, these and other generalizations naturally suggest two or three critical questions, before we can accept them as solutions *pro tanto* of the problems:

(*a*) What *definiteness* of *meaning* do these scholars give to the evolution of a legal idea? Let us answer this by saying that it means something less concrete

than history and something more lifelike than a mathematical formula. For example, the *history* of human marriage would fill several volumes; but its *evolution* is something that could be summed up (one would suppose) in a page or two. On the other hand, to say (for example) that the evolution of marriage, in respect to the number of persons that mate, passes from promiscuity through polygamy to monogamy (assuming that this were true) is too abstract, in that it ignores the contrary local variations and does not explain them, and therefore fails to represent the whole truth. The reason is that it fails to state anything about the outside factors which cause the movement; for example, local poverty of economic resources may make polygamy impossible, or local moral precepts may make monogamy impossible; and thus the abstract formula becomes fallacious.

We may, therefore, simply to have a

common understanding of terms, take the following definition:

The evolution of law, which we seek to discover, does not imply progress, either morally or otherwise, but merely movement; it does imply movement in the *abstract elements* of the conduct shown in history, seeking always to proceed to the more and more abstract; but always including *the cause with the effect.* In other words, we seek to trace the movement of the more abstract elements in the history of each type of legal conduct, so far as the sequence of cause and effect can be discovered.

(*b*) The second critical question is: Do these scholars assume *constancy* in the evolution of a specific legal institution, in all epochs and all communities? They do often seem to assume this. They assume it very much as all of us (including scientists) assume constancy in the nature of the fundamental chemical elements, such as sodium, magnesium, or

nitrogen; that is, wherever an atom of nitrogen exists in the cosmos, it is always the same in its nature, and will always work in a certain way. Many years ago I published an essay on the development of the mortgage or pledge idea, in all available systems of law—Germanic, Greek, Jewish, Babylonian, Egyptian, Japanese, Slavic, and Roman; and I formed the impression in my own mind (though I publicly disclaimed insisting upon it) that the pledge idea had somewhere an inherent sameness or constancy, which would therefore develop alike, in general features, in all communities and in all epochs. And we find it often assumed by scholars that in the world of legal ideas there are certain atomic elements (so to speak) which, if they develop at all, will develop spontaneously in a necessary or constant way, no matter what may be the combinations with others—for instance, the movement from judge-made law to legislative statute,

from formal procedure to informal procedure, from unwritten law to written law, from paternal family power to individual independence.

Now, it is of course obvious, upon reflection, that no such inherent fixed tendencies in legal ideas have been proved to exist. Probably no scholar to-day would deliberately affirm it except a few of the idealists. But we need to avoid the danger of its assumption in tracing the positive evolution of law. What really takes place, in evolution, is a change of effect whenever there is a change of cause; and these causes come chiefly from outside the law itself. For example, until the invention of writing, legal customs could not be written down on stone or parchment; the Scandinavian law-men, for instance, committed the customs to memory and chanted them, up to about 900 A. D. All the development of legislation and justice that ensued from such epoch-making incidents

as the inscription of the Twelve Tables at Rome, or the compilation of the Germanic Codes in the fifth and sixth centuries A. D., became possible only by the use of writing. If writing had not come into use, we cannot say just what would have been the course of development. In modern African tribes, for instance, justice is still done without written law; and an important cause of its difference from European law must be the lack of writing, and not necessarily some inherent nature of legal ideas. Had there been some intrinsic nature, it would have developed irrespective of writing.

Another circumstance that must make us sceptical as to any inherent constancy of evolution for legal ideas is the extraordinary *differences of speed* of evolution of humanity in different epochs. Apparently, the speed has increased enormously with the lapse of time. The paleontologists tell us, for example, that during the Third Interglacial Period of the world

and the Fourth Glacial Period (the Lower Paleolithic), represented by the Piltdown and the Neanderthal races, the time that elapsed was 125,000 years; yet the entire human progress in arts of life made in that inconceivably long period is represented only by improved methods of chipping the surface of flints for the making of tools.* In short, the evolutionary changes in family and property institutions during the last 3,000 years have been vastly more numerous and rapid than in the whole preceding 400,000 or 500,000 years of the life of the human race. This being so, there is little room for assuming any inherent constancy in the operation of a particular legal idea.

In short, the only constancy, if any is discovered, in evolution of law, is constancy of cause and effect, not of inherent nature of a legal idea.

(*c*) The third critical question is this: Do these scholars assume *universality* of

* H. F. Osborne, *Men of the Old Stone Age* (1916), pp. 15–23.

a formula of evolution throughout all legal *ideas?*

Let us roughly enumerate the entire mass of principal legal ideas: Personal relations, including family and clan, marriage, parentage, adoption, emancipation, expulsion, etc.; Property, including ownership, lease, mortgage, succession, community, sale, etc.; Liability, including tort, crime, contract, agency, suretyship, etc.; Procedure, including judge, summons, arrest, pleading, evidence, judgment, etc. Now let us take some of De la Grasserie's twenty-eight generalizations as to the movement of legal evolution. These generalizations represent, as it were, identical threads of evolution on which *all* legal institutions are strung. But does this learned investigator mean that these threads are the same and equally true, not only in the main-trunk ideas of the law, such as family and property, but also in each branch idea, such as marriage, adoption, succession, part-

nership, etc.? For example, the assertion that evolution proceeds from the simple to the complex. Is this alike true for family and clan law as a whole, and for every detailed idea of it, such as relationship, marriage, divorce, and adoption? It is certainly not true for relationships, nor for marriage, nor for adoption; it may be true for divorce. Is it alike true not only for liability as a whole, but also for the specific forms of liability such as suretyship, money debt, tort, warranty of property, etc.? If it is true for liability in general, it is hardly true for money debt, for warranty, or for suretyship. And if it is not thus universally true, *where and why does it cease to be true?* And if it ceases to be true in any species of any genus of legal idea, what becomes of its validity as a general or abstract truth? Moreover, since these general truths obviously differ, in that some purport to apply in the whole field and some in part only (such as property),

why are some of them universal and some only partial?

I do not offer any solution here. And I realize that perhaps one or several of these abstract truths can be demonstrated empirically or by observation to be universally true. But I merely raise the warning that we cannot assume beforehand that such universality of truth exists and will be discovered in the evolution of legal ideas. All we can assume is the unversality of identical effects from identical causes.

We are now in a position, with these criticisms in mind, to consider two interesting problems of legal evolution:

I. What are possibly the most general formulas of evolution?

II. What is the necessary method of study to be used in tracing evolution?

1. *What are possibly the most general formulas of evolution?*

This inquiry has fascinated the philosophers for centuries. I confess to a

scepticism of their hypotheses. I will try to demonstrate their unsoundness, and the greater probability of a rival hypothesis.

We must, of course, assist our minds by analogies in the material world. The philosophers have resorted to the analogies of physics and physical forces. Some philosophers, for example, have imagined the path of progress to be in a simple, undulating line; others figure it as a single line with angular regressions. Vico conceived it as a simple circle returning upon itself. The popular notion is that of an ascending straight line. De Greef supposes a helix, or circular spiral, constantly ascending, but returning over itself identically; De la Grasserie accepts this figure. Goethe pictured a helix, or circular spiral, constantly ascending but enlarging itself. Goethe's symbol, says Picard, a recent writer, in his chapter on evolution of law, "seems, better than any other, to take account of

the immense variation of facts, especially in the law, while marking the destined tendencies."

But, to me, that is precisely what it seems *not* to account for, viz., the immense variety and variation of forces. For, as already pointed out, the evolution of legal ideas is affected by a large number of forces, great and small, acting oppositely or in harmony, some here and some there, in the different parts of law, in different countries, and at different times. Hence, it is simply impossible to assume that the total path of evolution is so simple as even Goethe's spiral. Take, for example, the types of human mating—promiscuity, polygamy (in its two forms of polyandry and polygyny), and monogamy. Now, the movements to be represented in our symbol must include *all* communities in *all* epochs of time, and must represent all of these three forms. According to Goethe's spiral, the movement could only be from

one of these forms through another into the third, either once in all time or else over again at each coil of the spiral; and it must be the same movement in all communities—past, present, or future. And yet we know that a few communities have been arrested in their growth and still practise polygamy; and we have no proof that no community has circled through all three and started again on promiscuity; moreover, we do not positively know that some communities did not begin with monogamy. And in other parts of law the simplicity of Goethe's spiral is even more incongruous with observed facts.

A much more plausible hypothesis, to my mind, is the analogy of the planetary system, with its numerous local interdependent motions. To apprehend its application to the movements of legal forces, let us call to mind the principles of physics, as illustrated in the ordinary gyroscope.

As you know, a rigid body in space of three dimensions has three degrees of independence of motion; that is, three axes on which its rotation will have no component of motion about either of the other axes. Thus, the gyrostat has three possible directions of rotation about either axis *O A* or axis *O B* or axis *O C*, each at right angles to the other two. Every such rotation will be due to some external force, and each such external force will somehow affect the resultant motion dependently upon the other forces. For example, by the pull of gravity the body may be forced to rotate about axis *O A*. Or by a separate push or torque it may be made to rotate around the axis *O B*. Or still a different force might give a third motion or precession about the axis *O C*. Now, the speed and fluctuations of this new motion will depend on the relative measure of the three or more forces. These forces, being external and independent, may vary infinitely from

time to time; but the result of their operation in each instance will proceed according to certain discovered formulas.

To illustrate concretely, I hold here, in my left hand, a bicycle wheel, free to rotate on its axle. Let the axis of my right arm, when stretched out to my right, be axis *O A*; let the axis of my left arm, stretched out directly in front of me, and holding the axle of the wheel prolonging my left arm, be axis *O B*; and let my body, upright from the floor, be axis *O C*. Now, (1) with the wheel thus extended, the force of gravity is pulling it downward, with a rotation around axis *O A*; call this force *X*; but the pull of my left hand counteracts the force momentarily and holds it up; call this *X'*; if the pull or lift of the left hand, *X'*, is removed, the wheel falls by gravity, *X*, *i. e.*, rotates around axis *O A*. (2) Again, another external force applied to the wheel at the rim will produce rotation left-right around the left

arm, axis $O\,B$; call this force Y; and an opposite force would cause its rotation right-left around the same axis, clock-wise to the spectator; call this Y'. (3) Again, a third force, applied to the wheel, would cause its rotation east-west around the upright axis of the holder's body, $O\,C$; while an opposite force would cause a corresponding rotation west-east around the same axis; call these Z and Z'. And the simultaneous application of either of these latter two opposite forces, Y and Y', or Z and Z', would leave the wheel stationary, as in the case of X and X'. Now, one of the discovered laws of such forces is this: if, while gravity alone, the force X, is operating on the wheel (thus held out on the left arm) to rotate it downward around axis $O\,A$, another force, Y, is applied to rotate it left-right (against the clock) around the left-arm axis $O\,B$, the entire wheel takes on also a rotation east-west around the upright axis $O\,C$

(the body of the holder). And the more rapid the rotation around *O B*, the slower the rotation around *O C*. And if the point of support be shifted, by transferring the hand from one side to the other of the wheel, so that the direction of the *O A* rotation (due to the pull of gravity, force *X*) is reversed, then also the direction of the rotation around axis *O C* is reversed from east-west to west-east; and yet the *rotation of the wheel around O B continues exactly as before.*

If, then, we ask, What is the path of motion of a given particle of matter, *M*, in the wheel, when acted upon by force *Y*? that path superficially *seems* to be always a simple circle, going around axis *O B* as a centre. But if we add thereto the facts that force *X*, or gravity, is acting to pull the particle around axis *O A*, and that no force *X'*, or uplift, is counteracting gravity, and that no force of friction or other obstacle is preventing motion around axis *O C*, we find that in

fact the true path of the given particle, *M*, is not that simple circle, but is a complex curve, determinable by a mathematical formula which takes into account all the above forces and their quantities. And if we add to our reckoning the periodical shifting of the centre of gravity, from one side of the wheel to the other (due to shifting the location of the hand) we find that the path of the particle *M* becomes still more complex, while remaining symmetrical and regular, so long as none of the forces are altered.

What, then, is the lesson of this analogy for legal evolution? If a spoke of this wheel represents an institution (let us say descent of property after death to lineals instead of to collateral relatives), our superficial observation, finding it in its first position, is that the institution is stationary; and, further, that when a force *Y* (let us say migration of races), is applied, its motion becomes circular, against the clock, around *O B*.

But we must notice further that in both cases we have omitted to reckon that gravity (let us say religion in this case), force X, is operating to pull the institution around $O A$, but is counteracted by the upward lift of the hand, force X' (let us say the political power of kings); and that as soon as force X' is removed, the motion of the spoke is now in reality a complex one, due to recession east-west around axis $O C$; and that the further change of the centre of gravity (let us say the economic change from a tropical country to an arid or cold country) produces another change of motion in the institution. Now, these several forces are all external to the institution itself; and they may themselves all be subject to regular and periodic operation and not to arbitrary or whimsical happening, such as is due the momentary choice of the lecturer. Moreover, these forces vary widely in different times and places.

So that, if we ask again, What is the evolution of a given legal institution? we now perceive that, even with these simple elements exemplified in a wheel held by the lecturer, the path can never be a simple circle, or any elementary curve, but must be at least a complex of many curves, original and different for each institution.

Moreover, while all this is going on, with only these few elements assumed as representing the whole, there is besides a larger body, to which the first and smaller one is affixed (like the building in which the lecturer is), and the larger body may also be moving independently, and moving in any one of the three primary directions, and subject to still other forces. And, furthermore, this larger body may itself again be part of a still larger system, one of several bodies, and the larger system will have its own motions under its own forces. In the total cosmos of bodies, the motions of the

smaller bodies will be affected by the motions of each of the larger systems, though the larger ones may not be appreciably affected by the smaller ones. And the motions of one or more of the smaller bodies may reverse or cease while all others continue. In short, we shall have a planetary system, full of endless possibilities.

The analogy of this planetary system to the law will not be necessarily identical; no physical analogy would be. But at least it shows how such complexities are consistent with regular evolution, *i. e.*, with constancy of change and relation of forces by cause and effect, in a set of legal ideas forming part of a whole system. And the complexities of interrelated legal movements are certainly no less than those of the planetary system, but presumably vastly greater; for human life is but a part of the terrestrial mass, and law is but part of human life, and the details of their forces and

phenomena are obviously more numerous than the grand forces of the total mass.

Take, for an example, the evolution of the last will or testament. Sir Henry Maine and others have attempted to disentangle the various elements of its growth in the law of Rome, Greece, Germania, and India. What is certain is that in a primitive stage there is no will, and that at a later stage the will is recognized. But, on analyzing this net line of motion, so to speak, we find that it is the direct resultant of at least several forces; and that all of these are affected by still other forces proceeding from still larger independent legal institutions. In the first place, the force tending to validate the paternal last will is directly modified by several minor forces: there are the claims of the blood relatives, of the wife, and of children; and, furthermore, the distinction between agnate (male line) and cognate relatives, and between male and female descendants, between

polygamy and monogamy, will here produce minor variations according to time and place. Then, outside these, are the larger forces represented by the system of religion, of economics, and of property. Religion requires that the family worship, the ancestral rites, shall be continued. "Religion prescribes," said Cicero, "that the property and the worship of a family shall be inseparable." "He who inherits," said the Hindu Laws of Manu, "is bound to make offerings upon the tomb." And so the Hindu's only expedient, and a common one in all peoples, for transmitting the estate where no blood-child existed, was the expedient of artificial adoption; thus the limitations of the principle of adoption affected the paths of evolution of the testament. This principle of adoption is itself part of another sphere of forces involving artificial relationship, of which the variety known as blood fraternity has now died out. But, furthermore, the economic

system sometimes distinguished between land or house and the few primitive movables; for example, in some of our own surviving American Indian tribes, a man's movable property is all that he owns personally and it is destroyed at his death; it cannot be inherited and therefore it cannot be willed; moreover, the communal property, or land, continues, just as before, to be owned by the community; the individual has nothing to will. And so we find a subordinate eddy in the limitations upon testament, viz., that certain properties cannot be included; then, at a later stage, they may be included by consent of relatives; and finally without such consent. Still further, the mode of transfer of property affected the movement of the evolution of the will; for in Rome the patrician will, recorded before the Comitia Curiata, was a variety of adoption but disappeared gradually, while the plebeian will, which proved the permanent form, was made

by a formal sale, or *mancipatio*. And finally, in Germanic law, both continental and English, the whole movement of testamentary evolution receives new turns by the local ideas of transfer, including the *salman*, the feoffee to uses, and the executor; while the Roman example, arriving in different countries of Western Europe during different centuries, introduced a new force, that of imitation, which added still other variations. This imitation of the Roman law, in European history since 600 A. D., is like the addition of the magnetism or gravitation of a great central sun, added outside the system, which exerts a modifying force on every legal institution native to each of the smaller spheres.

My summary is, then, that no simple spiral will serve as an analogy; that no less complex an analogy than the planetary system will serve; that this analogy is a useful guide in our studies, because the gyroscopic interaction of plan-

etary forces reveals to us the inevitableness of similar interactions in the forces affecting laws; and that therefore we cannot expect to trace the evolution of a single legal institution without conceiving of it as a body in a motion produced by a force, this motion modified by other immediate forces, and this body and its motions being one part only of a larger body, which is itself in one or more motions produced by other forces, and modifying the first motions; and this system as one part only of a larger system of forces and motions; and so on indefinitely.

II. Another interesting problem is: *What is the necessary method to be used in tracing the evolution of a legal idea?* Hitherto little, if any, of the results achieved in the evolution of law have been reached by a rigidly scientific method. The reasons that extenuate and account for this are numerous.*

*The general objective of a science of universal legal history has indeed been perceived to require something more

The usual method and necessary effort has been to collect the materials for different countries and periods; for the tracing of the history in each country must come first. This has been possible hitherto for only a few systems of law in their entirety; the European systems since the Christian era have been subjected to complex forces of imitation from each other, so that a pure system for any long period is rare. But the idea of

than the collection and collation of data of numerous peoples; notably this has been insisted on by Post, in his *Ethnologische Jurisprudenz* and other works, and by Del Vecchio in his *Scienza del Diritto Universale Comparato* (both translated, in part, in Kocourek and Wigmore's *Primitive and Ancient Legal Institutions*, 1915, "Evolution of Law Series," vol. II). But no application seems to have been made of this by a rigid method of inductive demonstration in tracing the evolution of a specific idea or institution.

In the recent work of Pinélès, a Polish scholar and lecturer at Vienna, *Questions de Droit Romain ; Etudiées d'après la Nouvelle Méthode Historique du Droit Comparé* (translated by Herzen, Paris, 1911), some parade is made in the preface of the author's *New Method*, which shall remedy the "defects" of the prior methods of that science; but the examples given as the professed demonstration of the new methods are lacking in any advance over the method of such eminent laborers as Maine and Post.

In Cogliolo's *Saggi Sopra l'Evoluzione del Diritto Privato* (Turin, 1885) this distinguished Romanist defines legal evo-

evolution, as distinguished from history, has been seldom the objective of search. The method has been merely to search for common features in different legal systems, and, after selecting here and there from the entire mass these common features, to point out the reappearance of common institutions, or, in Del Vecchio's words, "that certain ideas have been the common heritage of all humanity in all epochs." But this method proves only

lution in a well-balanced and truly scientific treatment, but then proceeds to his specific instances of the process of evolution with this singular postulate, fatal, of course, to the attainment of any results having great value. "Since it is not necessary to study all the plants of a certain species for purposes of botanical science, so it is not necessary for legal evolution to examine the laws of all peoples; to pile up facts and to repeat the accounts of others is not to discover principles; they may be discovered by the study of a single system of law, provided it is like the Roman, not merely fragmentary and imperfect one, but brilliant in the completeness of its development"; and therefore he proceeds to demonstrate the existence of a number of supposed principles of evolution by Roman examples alone.

In Mazzarella's *Les Types Sociaux et le Droit* (Paris, 1908—a compendium of his views scattered through various works) is found the only rigidly scientific system hitherto published. Its presentation is marred by certain favorite doctrines of his; but it is the one attempt at a genuinely complete method of generalization.

that similar forms have *existed* at different times and places. It does not *prove* that these forms have had any inherent or necessary *development* as ideas common to all, or that there is a necessary evolution for any particular idea in all times and communities.

Any rigidly scientific results must be based on at least the following elements: Taking a single idea or institution, its forms must be traced (1) in two or more successive epochs for the same communities; (2) then in two or more communities in successive epochs; (3) then the other legal institutions in the same communities and epochs must be mapped out, so that the connection if any may be disclosed; (4) then the main social forces in the same communities and epochs must also be mapped out, so as further to detect the possible causes of difference; (5) the whole must be conceived of as a simultaneous movement of forces. Perhaps such a rigid method is as yet impracticable, for lack of adequate

data, but at least it is an ideal to be looked forward to.

Let us take an example* of its possi-

*ILLUSTRATION OF THE METHOD OF STUDYING DATA OF LEGAL EVOLUTION

People Studied	Epoch.	*A.* Form of Law: *a.* case judgments *b.* customs (b^1) oral (b^2) written *c.* legislation	*B.* Organ of Law: *a.* King *b.* aristocracy or oligarchy (b^1) ecclesiastic (b^2) political *c* democracy (c^1) lawyer class (c^2) general assembly
Hebrews	B. C. 1200	*a.* case judgments	c^1. lawyer class
	B. C. 900 B. C. 700	b^1. oral customs b^2. written customs	b^2. political oligarchy b^1. ecclesiastical oligarchy
	B. C. 400	*c.* legislation	b^1. ecclesiastical oligarchy
	A. D. 300	*a.* case judgments	c^1. lawyer class
	A. D. 500	*a.* case judgments	c^1. lawyer class
Romans	B. C. 700	*a.* case judgments	*a.* Kings
	B. C. 500 B. C. 400	b^1. oral customs b^2. written customs	b^1. ecclesiastical oligarchy b^2. political oligarchy
	B. C. 200	*a.* case judgments	c^1. lawyer class
	A. D. 200–600	*c.* legislation	*a.* Kings
Scandinavians	A. D. 500	*a.* case judgments	c^1 lawyer class
	A. D. 1100	b^1. oral customs b^2. written customs	c^1. lawyer class c^2. general assembly
	A. D. 1200	*c.* legislation	b^2. political oligarchy *a.* Kings
Anglo-Normans	A. D. 1100	*a.* case judgments	*a.* Kings
	A. D. 1500	*a.* case judgments	b^2. aristocratic lawyer class
	A. D. 1800	*c.* legislation	c^2. democratic general assembly

Note: The data for Hebrew law are based on Messrs. Kent and Sanders's chapters on "The Growth of Israelitish Law"

bilities. Take two legal ideas: first, that of the *form* of expression of law; secondly, that of the *organ* for declaring law. (*A*) The three chief *forms* of the expression of law are (*a*) statute or legislation, (*b*) custom, (*c*) judgments. Sir Henry Maine advanced the plausible assertion that the historical sequence is always the reverse of the above, *i. e.*, is this: judgments, customs (first oral, then written), legislation. (*B*) The three main *organs* for declaring the law have been: (*a*) Kings or chieftains, (*b*) Aristocracies, either ecclesiastical or political or military, (*c*) Democracies, either by an expert body of lawmen or lawyers, or by a popular assembly, representative or otherwise. Sir Henry Maine advances the conclusion that in the Indo-European

in *Yale University Biblical and Semitic Studies* (1901). Those for Scandinavian law are based on Mr. Ebbe Hertzberg's chapter on Scandinavian sources in vol. I (*General Survey*) of the "Continental Legal History Series" (1913). The data for Roman law are based on the manuals of Muirhead and others.

communities the order of development was as above: Kings, aristocracies, democracies—the Orient, in the second stage (aristocracy), developing by an ecclesiastical oligarchy and the Occident by a military or political one.

(*A*) Let us now test these generalizations by tracing these institutions in three or four types of peoples in successive epochs: In tracing the first institution, the *form* of expression of law, we find that Sir Henry Maine's sequence does indeed appear in Roman development, though the sequence is broken between (*b*) and (*c*) by a marked reversion to (*a*), or case judgments, during the late republic and early empire. (Of course, it must be understood that in tracing the sequence of these elements we emphasize only the *dominant* element; two or more elements may exist at the same time, especially case judgments and legislation; but one or the other is so dominant as to give the real character

of the epoch; just as a river has many side eddies, though the main current is plain.) Among the Hebrews, however, a reversal of Sir Henry Maine's sequence is found; for the flowering time of Hebrew law is found in the records of the Ghemara, the case law or casuistry of the rabbis in the fourth to sixth centuries A. D.; the rabbis were virtually a lawyer class voicing popular civic law. In the Scandinavian communities (ignoring local variances between the three main regions) we find probably the purest record of independent development in any recorded people; and here the sequence of Sir Henry Maine is found in its exactness; the peculiarity is that the second and third stages are so sharply compressed into a short period, whereas elsewhere the second period tended to be prolonged. But in the Anglo-Norman history, which is the most mixed of all in its influences, the second stage—customs oral and written—is virtually omit-

ted (unless we distort the period of written and printed case-law since A. D. 1400 by calling it customary law); and in the 1800's the method of legislation suddenly dominates the entire mass; perhaps the Cromwellian revolution, had it succeeded in its abortive legal changes, would have marked the destined time for a stage of codified custom; but at any rate it did not in fact.

And it is to be noted that Sir Henry Maine's generalizations might be interpreted as meant to explain the *whole* course of a people's legal development, from beginning to end. Yet the above illustrations represent only segments from a continuous legal life of at least two of the peoples; only the Romans and the Hebrews have ended their legal career. Hence, the complete legal life, if traced, might show even further variations from Sir Henry Maine's sequence.

(*B*) Taking next the second legal idea, viz., the *organ* for expression of law, we

find that Rome does indeed exhibit Sir Henry Maine's sequence, viz., Kings, oligarchies (ecclesiastical and political), democracies (lawyer class and general assembly); and Sir Henry Maine's sequence was based partly on Rome as a type. But even here we find, before the end of Roman organized life, a marked reversion once more to the first stage, viz., imperial law; and this would signify either that Sir Henry Maine's typical sequence is imperfect, or else that the triple sequence is invariably followed by a renewed cycle of the same sequence; and yet in either case it is fallacious. Moreover, in Scandinavia we find history emphatically exhibiting the exact reversal of Sir Henry Maine's sequence, viz., (*c*), (*b*), (*a*); while among the Hebrews his first stage, viz., (*a*) Kings as judges, is not found at all. In the Anglo-Normans, his three stages are found in his exact sequence; and yet here the influences were the most mixed, and therefore

the coincidence would seem to be less reliable as revealing an inherent type of development.

In short, a rigid inductive method leaves little degree of certainty to his generalized hypothesis.

Next, however, comes the necessary complement in this method, viz., the mapping out of the related legal institutions and of the social forces; so that the clews to the variations in the selected institutions may be discovered. Space does not suffice to expound the application of this part of the method.* It must suffice here to note that, taking these

* So far as ascertainable, only two authors have hitherto attempted any schematic tables of data mapped out on this line.

Mazzarella's tables (*Les Types Sociaux et le Droit*) are virtually useless because based on his fundamental postulate of the distinction between feudal and "gentilician" societies as the controlling one; but his method is undoubtedly sound and deserves the universal attention of scholars.

H. A. Junod's *Life of a South African Tribe* (1912, 2 vols.) has, in the appendix, a schematic table representing the successive stages in social and economic conditions for a certain African tribe. So far as it goes, this is precisely the method to be used; but his data are too largely hypothetical.

outlines, our task would be to prolong the chart, for each people and each epoch, by filling in the several facts (so far as ascertainable), and then to study to detect the possible connection between some of these facts and the variations in the selected institution. For example, both the Scandinavians and the Hebrews, at the period of our earliest knowledge, lack the element of kingly justice. With what feature of their social life is this lack connected? It could hardly be connected with the facts of clan and tribal organization; for both Scandinavians and Hebrews had this at that period; moreover, the Anglo-Normans lacked it entirely, though they had a king as organ of justice. Was it connected with the conquistadorial relation of Romans and Anglo-Normans to a subject people largely outnumbering the conquering immigrants? This feature existed for both early Romans and early Anglo-Normans; but it was lacking in Scandinavia. And

yet must we not say that it was found among the Hebrews after the exodus? And so, just as we approach some plausible explanatory factor, we find ourselves again baffled and doubtful.

Take again the principal legal institutions—patriarchal power, blood-feud, adoption, serfdom, commercial exchange, and so on; do we find that any of these, or any combination of them, signifying some definite stage of legal development in themselves, are associated with some particular feature of the form of expression of law, *e. g.*, case judgments? If in two or more communities we could discover such a connection, we might be entitled (hypothetically) to attribute that feature to a particular stage of legal development in general; and this hypothesis could then be tested for other communities, and their variations be explained by local factors.

For these problems I do not pretend

to offer any solutions.* I point out merely, in conclusion, that the solutions will be reached only by the adoption of a rigidly scientific analysis of the data, and that any general truths hitherto discovered must be regarded merely as guiding hypotheses. And, above all, I suggest that an evolution of law cannot be thought of except as a movement of cause and effect, *i. e.*, successive forms taken by hypothetically constant elements in each legal idea in time and place, under all the forces of its environment.

* I am inclined to think that the Italians will supply the scholar who will first offer acceptable solutions. There is scarcely one of their younger legal scientists who does not have something to say upon the evolution of law; and more thought is devoted to the subject in Italy than in all other countries put together.

Among some of the more recent chapters the following may be noted:

Arturo Monasterio, *L'Elemento Morale nelle Norme Giuridiche Considerato nell' Evoluzione Storica*, pt. II, chap. VI (Perugia, 1913).

Silorio Perozzi, *Precetti e Concetti nell' Evoluzione Giuridica* (Rome, 1912).

PROBLEMS OF THE LAW'S MECHANISM IN AMERICA

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Methods of Making Law

We come now to problems of the present in legal science. Let us select that one which is the most prominent, the most important, and the most deeply rooted in legal science, viz., the problem of Legal Method. Let us plunge directly into it, by asking these questions: *Why* is a judge? *Why* is a legislator? Why do we go to the legislator for one mode of legal activity and to the judge for another? Why do we go to the legislator to ask for an abstract declaration of a desired rule of law, but to the judge for a concrete application of some existing rule to a dispute between specific persons? Why do we not, for example, go to the judge for the former and to the legislator for the latter?

Is it because they are elected by different political *powers?* No; because in most states they are alike elected by popular vote.

Is it because they have essentially different *qualifications?* No; because the judges are invariably selected from the body of practitioners of law and the judiciary committees of the legislatures (which make most of the laws) are also composed of lawyers.

Is it because they *do* different things with the law, the one "making" it (as we say) and the other merely applying a law already made? Not essentially; because there are numerous orthodox instances in history of the judge making a legal principle; for the bulk of the common law was "made" by them, and the fellow-servant rule in employer's liability is a typical modern instance. And because the legislator, conversely, may decide particular controversies; witness the common-law rule that divorces were

grantable only by Parliament and the numerous so-called "private acts" still common in modern times; witness the Federal Court of Claims, whose work was formerly done by Congress and the early colonial legislatures.*

This distinction between judge and legislator is apparently not essential; it is merely dominant and customary. And if it is not essential why need it be preserved? Why might not the judge legislate more than he does? Why may he not unmake as well as make law, if need be? Why does the law-declaration of a legislator, *i. e.*, a statute, have to be obeyed, unbroken, by the judge, though the legislator is free to unmake and change the law-declaration of the judge? Why not reverse this and allow the judge to modify the legislative statute in his discretion, while forbidding the legislator

* *E. g.*, in Rhode Island, "originally the General Assembly seems to have considered itself a court as well as a legislature." Chief Justice Durfee, quoted in Justice Stiness's essay on Samuel Ames, 5 Lewis, *Great American Lawyers*, 301.

to override the decisions of the judge? Why, indeed, must there be *two* separate functions? Why not merge them in a single officer or body of officers?

These questions, radical though they seem, are soon to become questions of the day. We have reached a point in American law and justice where intelligent progress is impossible until we have answered them to satisfy ourselves. Nor are they *our* questions only; they represent the great current theme of discussion among Continental jurists in all countries for the last twenty years. It is a remarkable coincidence in the evolution of law that Europe and America, differing so in their past legal careers, should now have come to a stage where the same general issue is presenting itself at the same epoch of time. *

Not that the problem is quite the

* The Continental discussions are fully set forth in a volume just from the press, *The Science of Legal Method*, by various authors ("Modern Legal Philosophy Series," vol. IX, 1917).

same, of course, on the Continent. There the background of it is represented by the dominance of comprehensive codified law, and the struggle is to give judicial discretion a modifying power, in order to avoid the huge task of a complete legislative reconstruction. Here, on the other hand, the codes do not so broadly dominate the law, and the struggle is rather to free the judges from the incubus of their own mass of precedents, without resorting for that purpose to an incompetent legislature. But it is probably impossible to put ourselves fully into the undercurrents of the Continental movement of thought. We can only note that the resultant issues of theory are much the same; and we may now proceed to look more closely into the nature of our own problem.

Taking just a glance at history, it reveals that the separation of function between judge and legislator has not always prevailed. In several peoples the early

kingly power was both judicial and legislative; in England, for example, both the House of Lords and the High Court of Justice are modern offshoots of the early King's Council, in which he enacted laws and dispensed justice alternately, by the same kingly power. So too in France, where the Parliament retained until the revolution both legislative and judicial powers. The same person, however, may conceivably be performing two separate functions. And we may now ask whether in the nature of law there *are* two separate functions.

As we saw in the first Lecture, one of the formal elements of law is *uniformity*, *generality*, a rule more or less abstract. And this uniformity consists in selecting one or more circumstances common to numerous situations involving human conduct, and declaring that these few circumstances shall produce a certain result, whatever the other variety of circumstances may be. But the rule thus

formed is an *abstraction*. And it will never be of any practical consequence so long as it remains an abstraction. In other words, a rule of law is always conceived as being applied sooner or later, *i. e.*, *enforced;* for the enforcement of it represents the second inherent formal element of law. And it cannot be enforced except upon concrete human beings. And the moment it is applied to concrete persons each person presents once more the infinite variety of personal circumstances. And some of these circumstances, for this or that person, will thereupon be urged as making the abstraction inequitable for that person and his case.

In short, law is obtained by abstraction of a few circumstances out of the varied circumstances of reality; but in applying it we are once more plunged into reality and its variety. This application of it is what we mean by *justice*. Hence, the inherent contrast between law

—the abstract—and justice—the concrete—a contrast inherent and forever inescapable. The great problem is how to preserve both. Experience has taught us that masses of men *must* be ruled by general principles; but it has also taught us that these generalities are merely abstractions and ignore concrete realities, and therefore will sometimes lead to results undesirable because inconsistent with the merits of the individual case when surveyed in all its circumstances. Hence, the problem is to combine rigidity with flexibility—law with justice.

Let us take an example not clouded with legal traditions: a theatre-manager makes an absolute rule that every person applying for entrance to the play shall present a ticket. Suppose that out of one thousand persons applying for entrance twenty bring no tickets. The gatekeeper questions each of these twenty; fifteen urge that they desire the

pleasure of seeing the play but have no money; this excuse he easily holds to be a vain one. (Is it? Why should not the poor have the pleasure of the drama, in a municipal theatre, for example? However, our economic views find no injustice in denying this.) The sixteenth applicant urges that he desires to see the play because his sister is leading lady; the gatekeeper holds this to be no excuse. The seventeenth declares that he is a dramatic critic; the eighteenth is a cousin of the gatekeeper himself; the nineteenth professes to have lost a ticket which he had once bought; these facts also the gatekeeper decides to be no reasons for exemption. The twentieth is a father seeking his little girl, who has been taken into the play by a companion, contrary to the family's wishes, and the father desires merely to enter and find the little girl and take her home. This too is plain violation of the rule; but the justice of his claim (let us assume)

is equally plain. Here the gatekeeper ought certainly to admit. And yet the rule would be broken thereby.

Here, then, are the elements of our problem. The rule about tickets is a mere abstraction until the applicants begin to come; but each applicant brings a great bundle of personal circumstances; and the application of the rule as a rule must ignore all these circumstances. Yet in twenty or more out of every thousand cases the rigid enforcement of the rule is incongruous with the just demands of some of those other circumstances. How shall we meet this dilemma?

Take first the judicial aspect of the problem. Shall the gatekeeper be given discretion to exempt from the rule whenever he pleases? If so, would not the exemptions often undermine the rule and cut off the profits of it? And would not the gatekeeper be inconsistent with his own decisions on different days, and the several gatekeepers be inconsistent with

each other? And where can we expect to obtain gatekeepers wise enough to make just exemptions? And will the justice of the gatekeeper correspond with the sense of justice of the managers?

Take next the legislative problem. Can the manager obviate the need for the gatekeepers' discretion by specifying certain general exceptions when he makes the rule? Is the manager capable of foreseeing all the cases that might thus call for a decision? And as conditions change, will these exceptions be futile, because no longer needed or demanded? And, as the manager has other primary duties, can we assume that he will always be expert enough to understand what justice requires or what the directors' sense of justice would expect? Can the manager's legislation be prompt enough to modify the rule as new situations arise —if, for example, an insane man in the audience becomes violent and his guardian is sent for to take charge of him?

This example may serve to set before us, freed from the confusing associations of legal tradition, some main aspects of the present-day problems of law and justice—the mode of making and using law by legislator and judge. The problems are inherent and permanent. They are inseparable in every system of law and justice, past, present, or future. What is their specially *present* aspect?

Their present aspect is this: hitherto, in our system, a certain line of adjustment between law and justice has been reached and settled; but this line is now questioned; it is argued that the times demand a readjustment. There were several possible ways of answering the questions above put and of alotting the respective tasks of judge and legislator; the answer that has hitherto served is no longer satisfactory; shall we now take a different answer and reconstruct our system upon it, until, in some later century, that also becomes unsatisfactory?

For we must concede that no one way of solving the problem is inherently required. It is simply a question whether the way hitherto chosen is working well, and, if not, whether another way will certainly work better, for us at least.

Let us attempt to analyze the possibilities:

I. The Judicial Problem

1. *Is it necessary that the judge should be the intellectual slave*—(*a*) of the legislators? (*b*) of the judge's own precedent?

(*a*) *Is the judge to be absolutely under the statute?* This is perhaps the hardest question of all. It is the one that most troubles the Continental thinkers. With us the supremacy of the statute has been unquestioningly assumed. Perhaps there are ways of improving the mode of making statutes; we shall consider that in a moment. But, assuming the statute to be perfected, must it still bind the judge? May we not, instead, consider

the judge as entitled always to make exceptions to the statute where justice demands?

In answering this let us not deceive ourselves by any sanctimonious fictions about the "will of the people" as embodied in the statute. The people of this State do not write the words of the statute; a few men in a committee of the Legislature write it; and these few men may have bribed or bullied or wheedled a minority of the voters (the majority seldom vote) of small districts into electing them and, in any event, they may lack wisdom. Hence, while the statute is law, it is not necessarily wisdom. Moreover, it is an abstraction; and the lawmakers could not possibly foresee, nor mention if they did foresee, the special concrete case which the judge sees before him.

Why, therefore, may not the judge be given a general power to flex the statute? We have scores of instances of such a

method. Our family government is built that way. Many parts of our administrative law are so built. Our foreign relations are thus managed by the President. Ways could be devised for checking unwise discretion, by requiring a report monthly or annually. The harm, if any, would hardly extend beyond the individual case. The statute would remain in force, and in most cases would be rigidly enforced. Theoretically, there is no objection to recognizing this power in the judge. Two practical objections I will notice later.

(*b*) *Is the judge to be bound by his precedent?* This part of the question ought not to trouble us overmuch. *Stare decisis*, as an absolute dogma, has seemed to me an unreal fetich. The French Civil Code expressly repudiates it; and, though French and other Continental judges do follow precedents to some extent, they do so presumably only to the extent that justice requires it for safety's sake. *Stare*

decisis is said to be indispensable for securing certainty in the application of the law. But the sufficient answer is that it *has* not in fact secured it. Our judicial law is as uncertain as any law could well be. We possess all the detriment of uncertainty, which *stare decisis* was supposed to avoid, and also all the detriment of ancient law-lumber, which *stare decisis* concededly involves,—the government of the living by the dead, as Herbert Spencer has called it.*

Of course, there are rules of property and contract which require stability, and *stare decisis* is a sound principle to

* The great Jefferson was perhaps the first thinker to use this thought. 3 Randall, *Life of Thomas Jefferson*, 588, Letter to Madison, Paris, September 6, 1789: "The question, whether one generation of men has a right to bind another, seems never to have been started, either on this or our side of the water. . . . I set out on this ground, which I suppose to be self-evident, that the *earth belongs in usufruct to the living;* that the dead have neither rights nor power over it. . . . No society can make a perpetual constitution, or even a perpetual law." *Ibid.*, p. 651, Letter to Kercheval, Monticello, July 12, 1816: "The dead have no rights. . . . The present inhabitants alone have a right to direct what is the concern of themselves alone, and to declare the law of that direction,"

employ for them. But just as the principles of non-retroactivity of laws and of non-impairment of obligations are flexibly applied, where needed, by the judges, so also *stare decisis* has only a limited merit. It is the absolute and universal rigidity of the principle that is unsound. And our judicial history shows that such rigidity is needless. "We do not sit here," said Lord Mansfield, "to take our rules of law from Keble or Siderfin," meaning the decisions of one hundred and fifty years before his day. And in Oklahoma Chief Justice Furman has shown, in the last ten years, that a civilized community can dispense with intellectual slavery to *stare decisis*. (I pause to offer tribute to the memory of this courageous judge, recently departed.) The Supreme Court of Kansas also deserves honor for having cast off its rigid fetters.

We can afford to ask: Is it necessary for the supreme judge to feel *chained* by

any line of precedents? May he not repudiate the chain, and hold himself free to follow precedent only when required thereto because the faith of contracts and the toil of property has been rested on them? *

But we now meet a practical objection:

2. *Can we trust the judge to have wisdom in using his discretion to exempt from statutes and to ignore precedents?* Most people will promptly answer in the negative. Their reasons, if asked, are reducible to two: (*a*) History exhibits the growth of abuse of such power; (*b*) our own judiciary exhibits no capacity for it.

(*a*) The argument from history is probably fallacious. Take the extreme instances of the English judges under Charles II and James II, and the French criminal judges under Louis XIV and

* "The Process of Judicial Legislation," by Prof. M. R. Cohen, of the College of the City of New York, 48 *Am. Law Rev.*, 161, is an enlightened discussion of the whole subject.

earlier. These instances come from a period when judges were but political branches of royalty. The position of a judge was never before so independent in theory as it is to-day in England and America. We have no reason to assume that inherently history must repeat itself. And remedies and checks exist to-day which were unknown in former times.

(*b*) The argument from present conditions is of course self-stultifying. We have, and shall have, as good judges as we deserve. We can have competent judges any time when two things exist: first, when citizens use their best common sense in electing them, not their blind partisan prejudice; and secondly, when the best lawyers must accept the honor of the post, and not seek merely money by preferring lucrative practice to judicial positions. Whether we do have to-day judges competent to use greater power is immaterial. The point is that

we *can* have them whenever we, lawyers and citizens, become sensible and unselfish enough to want them.

3. But another practical doubt remains, if we grant to the judge a freedom from resort to precedents: *What materials of reasoning shall he use in substitution for precedents?* That is, in applying abstract law to do concrete justice, there must be some standard of guidance for the judge. We do not want the meaningless justice of the traditional Arabian sheik—the justice of individual whim and momentary notion. If, then, he is not to be mechanically controlled by statute and by precedent, what shall be the substitute?

The change in scope of reasoning would not necessarily be as cataclysmal as it might seem. There will always be a controlling intellectual influence by the settled law, wherever a professional class fills the bench. This has been so from the time of the priest-judges of primitive

times until to-day. Moreover, there is a large material furnished by common sense (common and undisputed, that is) and by common policies. Beyond this lies a field of questionable scope. And no doubt there is room for speculation as to the use of this field by the judges. Can they safely be turned loose into it? This is the problem of a "*freie Rechtsfindung*" and "*libre recherche*"—the needs and dangers of which are discussed in current Continental literature by the trenchant pens of Gény, Ehrlich, and other jurists.

Let us not minimize these dangers of uncertainty; let us merely not exaggerate them. And, for consolation in the prospect of them, let us recall at least two relevant circumstances:

(*a*) In the first place, our own Supreme Courts have long been drawing copiously and consciously from this unbounded field of public policy. The opinions are full of such discussions. Some of the

greatest questions of the day have been settled with no more definite guidance and control. Examples taken at random are: the decisions settling the law of illness caused without impact (nervous shock, "railway spine," etc.), where the known conditions of modern personal-injury litigation have furnished the main grounds of judgment; the law of releases signed by patients in a hospital, where the apparently fixed principles of documentary execution have been subordinated to the policy applicable to such a situation; the law of privilege for torts in general, where modern conditions have at many points required sole reliance upon neither precedent nor statute. And this list might be indefinitely enlarged. An extension of this field of "*libre recherche*" would be no novelty in method.

(*b*) In the second place, the judge's liberty could in any event not exceed that of the legislators, whose liberty (and license) of reasoning we have long viewed

(and suffered) with equanimity. Reflecting on the debate that occurs in a judiciary committee of the legislature, when an ordinary measure of private law is presented, what is the range of reasoning? What of the personal oddities, the maddening irrelevancies, the ignorant assumptions, the crude philosophies, the fragmentary conceptions, the narrow outlook, the obstinate bias, the stolid indifference to facts and needs? These legislators, in their motives and reasonings for a declaration of law, have a "*libre recherche*" indeed. But we have accepted it as a matter of course. Why not accept it for the judges also?

II. The Legislative Problem

Let us assume that the judicial problem has been solved. And now remains the legislative problem. But first must be faced the preliminary inquiry: Why have a separate legislator? If, as we have seen, the two functions of law and

justice are inherently distinct, is this a reason why the functionaries should be distinct? * Theoretically, no. Their merger is conceivable. Examples can be seen in our universities, where the same faculty both enacts the rules of government for the students and also applies the rules to specific cases. So, too, the house committees of clubs, and the directors of boards of trade and stock exchanges, both enact the rules and apply them. But these cases concern small communities only, and the bulk of their affairs is relatively small and simple. In a large State the functions of legislation and of justice each require an expert body devoted solely to their tasks. And the spirit of each task is so different—one that of generalization, the other that of concrete application—that the same per-

* Randall, *Life of Thomas Jefferson*, 211, Letter of June 20, 1807: "The leading principle of our Constitution is the independence of the legislature, executive, and judiciary." Compare Professor Cohen's essay, cited above, for a discussion of the principle.

son cannot best be concerned with both as a life-work. The mental attitude best for the one conflicts with the mental attitude best for the other. Practically, then, we may conclude that the two functions should be separately vested.

We come, then, to the main questions of method. And the problem is this, law being abstract, but justice being concrete, and law therefore needing some flexibility, how can legislation be so conducted as to provide the necessary flexibility and no more? We may here assume that the judge has been given some power of using law flexibly; but naturally our result will depend somewhat on this assumption. The three parts of the problem are these: 1. How far should legislation go into details? 2. How far should legislation provide for future change of general conditions? 3. How far should the legislator be an expert?

1. *How far should legislation go into details?* These detailed circumstances

are what make up the individual case. Justice deals always with the individual case. The abstraction of the law needs flexibility. Shall the legislator attempt to provide for this by express exceptions or provisos? Of course he does so to some extent habitually. And yet, with what futility! As one example out of thousands, take the statutes on death by wrongful act. One type of statute, which expressly provided for the death of the injured party, forgot to say anything about the claim for the injury received during lifetime. Another type of statute made just the contrary omission. Seventy years of interpretation have not served to clarify the legal situation completely. And as late as 1908 the Federal Employers' Liability Act was framed with so little imagination that within a few years important amendments were needed. And the reason is that the actual legislator, at the best, is a human being of limited imagination, and he can-

not imagine all or most of the cases in which his abstract rule might need modification. However many provisos he makes, the unimagined possibilities seem as numerous as ever. Is it not a hopeless attempt?

On the other hand, abstract rules are always too large. No legislator wishes to enforce a purely abstract rule; he knows that there must be some exceptions. Moreover, some of the most simple abstractions have been notoriously inadequate, regarded as legislation, because the abstraction has used terms so broad as to leave the whole subject open to the judges. "Thou shalt not steal" seems simple enough; and yet it was so interpreted by the judges that embezzlement and the confidence game, two of the most common wrongs of modern times, were not construed by the judges to fall within its prohibition. The Statute of Frauds, two and a half centuries ago, used two sentences to enact that cer-

tain transactions of contract and of sale should be made in writing; and yet whole volumes have been written, both in Anglo-American and in Continental law, to expound the judicial cases decided under that statute; each word of the statute (it has been said) has cost a fortune in litigation to interpret it.

It would seem that inherently there is no canon for determining how far legislation should go into details. There are dangers and advantages in either extreme. This seems to show, then, all the more clearly that legislation, or abstract law-making, is intrinsically incapable of finding a just means. In other words, for the needed flexibility we must always expect to fall back upon the judicial power. This conclusion emphasizes the need, already seen, of conceding that large judicial power.

2. *How far should legislation provide for future change of conditions?* If the legislator has not adequate imagination

for details of present cases, much less has he adequate imagination for future changes in general conditions. No one has. Legislation must, however, provide for them somehow. Curiously enough, this truth is seldom or never realized by the legislator. Neither he nor any of us is apt to remember that life is constantly moving like a slow river. Hence law is changing, like the dissolving views of a cinematograph. Conditions are sure to change; other factors will become more important; and therefore the factors selected by the law to define its rule will become incongruous with the new conditions. How shall this be provided for?

A simple way, of course, is merely to give liberty to ask for new legislation when new conditions arise. This is our own traditional way, and it seems natural enough. But it often involves great waste and injustice.

(1) In the first place, since law is the result (as already seen) of a conflict of

interest, in which one interest is finally given the upper hand over others, the request for new legislation often becomes the signal for another great struggle of the once defeated interest; and then, even if no prolonged deadlock takes place (as it sometimes does), the new adjustment of law often loses something valuable and right that had been once gained; and, in fear of this, it has often seemed best to endure the present ill-fitting law. Here are two examples, out of hundreds. The federal copyright statute was interpreted by the Supreme Court, fifteen years ago, not to protect the musical disk-records.* Common sense of justice revolted at this, and Congress was asked to amend the statute. Immediately the pirates who profited by this interpretation of the existing law made strenuous opposition; the publishers and other interests joined in the struggle, and the final result was in part a compromise.

* White-Smith Music Co. *v.* Apollo Co., 209 U. S. 1.

Again, the Constitution of Illinois adopted in 1870 (almost the oldest in the Union except the federal one) is, in many respects, far behind the needs of the time. For ten years or more the best opinion has believed that a revision is needed. But if a constitutional convention is held, all sorts of legitimate interests may be attacked, and the new constitution may injure them. Hence a reluctance to embark wholesale into this new legislation, and hence a perpetuation of the ill-fitting features of the present law for at least several years more.

(2) A second shortcoming of the present traditional method—that we must ask the Legislature for new statutes whenever new needs arise—is that in the countless smaller matters it is impossible to get the attention of the Legislature, or even to find any one who will try to get their attention. Where no great popular or class interest, or strong

self-interest is involved, the injustice remains unattended to. For example, grand larceny is a penitentiary offense, but petit larceny is not; now, in Illinois the distinction between the two is fixed at the sum of fifteen dollars—an ancient statute, enacted when money value was different. One who steals fifteen dollars must now go to the penitentiary, regardless of the circumstances that mitigate and call for special treatment. The judges have frequently reported that this law is cruel and harmful, but the Legislature has never yet been induced to heed the situation, though no opposition would be found. Thus, though each Legislature annually passes a hundred petty amending acts, it leaves a thousand petty measures unnoticed.

Can legislation in itself provide against such shortcomings? Probably not, without a change to be referred to under my third and last head. Two other methods have indeed been tried. (1) One method

is to require the judges to report, annually or oftener, on the defects of the laws. This requirement exists in Illinois and elsewhere. Experience shows it to be a failure in America; for either the judges do not report (their whole mental attitude being traditionally uncongenial to the legislative point of view), or their report, if made, is not heeded by the Legislature. (2) A second method is to provide a special permanent commission whose duty it is to report periodically on defects in the law. This method is employed in Prussia and in Spain. These methods are described by Alvarez and Lambert in their chapters in the volume entitled *Science of Legal Method*, above cited. In Prussia it is habitually used; whether to best results, I am not informed. In Spain, I have no information as to its use. But neither method seems capable of success in this country, except as an adjunct to a radical political measure, to which I now come.

3. *How far should the legislator be an expert?* We have seen that the process of legislation has inherent and insuperable difficulties, both as to provision of details and as to foresight of the future. And these special difficulties are added to the general one of adjusting the abstract rule of law so as to reconcile conflicting interests and interpret the best public opinion. It is needless to insist, therefore, that the legislators should be highly competent in experience for their task. Are they? Far from it. However high their character, the experience of the majority of members is slender and negligible in quality. They lack not only experience in legislative method but experience in the subjects of legislation. A few veterans in each legislature really make the laws; but even these are experienced in method only, and seldom in the varied subjects of legislation, nor do they use adequate means to inform themselves. I do not know anything about

legislatures of other countries, and I make no comparisons. But judging only by standards of efficiency which I see exemplified around me in other fields, and which indicate the heights of American capacity—I mean in the universities, in industry, in art, in commerce—I venture to say, after considerable observation, that the most incompetent bodies of men in the United States, relatively, are the legislatures of the several States and Congress. The standard of American achievement is disgraced by their methods and by their product.

This, then, is the problem—how to constitute our legislatures competently, while retaining the principle of representative government. I see no permanent solution for this problem, other than that proposed in Kansas:* Make experts of

* Bulletin No. 1, Legislative Reference Department, Kansas State Library (1914), *Legislative Systems;* Chester L. Jones, *Improvement of Legislative Methods and Procedure*, 8 *Am. Pol. Sc. Rev.*, 1 (1914); Paul S. Reinsch, *American Legislatures and Legislative Methods*, 2 ed. (1914).

the legislators (1) by reducing their numbers, (2) by giving them longer terms, (3) by paying them enough to justify it as a career for men of talent, (4) by making their sessions continuous.

Every other expert function or occupation requires continuousness. The lawyer's career requires continuousness; why not the legislator's? When once we concede that legislation requires expertness, the conclusion follows inevitably. The Italian cities of the Middle Ages, the most prosperous and brilliant in the world's history, called in professional mayors (or *podesta*) to govern their cities. The American movement for professional "city managers" is another sign of the times in the same direction. Let us have professional legislators.

I am not afraid lest the will of the people will not prevail. In the first place, every American is sensitive to public opinion, and an elected legislator will never fail to defer to any great popular

demand. In the next place, the "will of the people" has no place in the details of technical legislation. I say that it has no business to meddle, nor to be considered in framing technical details. The "will of the people" does not know how the professor of chemistry should teach chemistry, nor how the bridge engineer should build his bridge. The mass of the people—you and I included—are ignorant in these matters, and we should be content to have the technic of legislation unimpressed by our personal will.

I believe in democracy. And I would rather emigrate or die than see the American people Prussianized. But I do not believe that democracy has to be synonymous with incompetency.

PROBLEMS OF WORLD-LEGISLATION AND AMERICA'S SHARE THEREIN

PROBLEMS OF WORLD-LEGISLATION AND AMERICA'S SHARE THEREIN

This is, in my opinion, the greatest problem of the future for our law. I invite attention to my general theme by making two assertions: *first*, a most important process of the next twenty-five years in the world's affairs will be a vast activity in world-legislation; *secondly*, into this activity the United States of America will enter as a self-inflicted cripple, unless certain positive measures are first taken to remove this disability. I speak of an actual situation—actual both in its facts and in its law. I do not merely warn of a possible danger and advise a possible remedy; but I speak of indisputable realities and of an indispensable remedy.

Introductory

Let us first notice the international situation in a preliminary survey before examining the necessary remedy and the extent to which that remedy is now being canvassed. Let us ask: 1. What is meant by this "world-legislation"? 2. Is world-legislation—that is, legislation for the uniformity or identity or assimilation of the several national laws—is it desirable—desirable for anybody, and desirable for us? 3. How far has such world-legislation actually proceeded at the present date? 4. What are the various methods by which world-legislation has hitherto been effected? And this will bring us to the main inquiry, viz., By what methods can the United States take part in world-legislation?

1. *What is meant by "world-legislation?"* I do not refer to the field of public international law, *i. e.*, the legal

relations of states with each other, whether in war or in peace. Public international law, of course, is due to receive some sort of more rigid sanction in the future by a world-parliament, or league. But that is rather world-politics than world-law in the strict sense. Such a league would be concerned only with the rights of one *state* or government against another. What I propose to discuss is the international aspect of the substantive national law affecting the relations between *individuals* of different states—the law of contracts, property, and commerce generally—private law, so-called—in short, law of the kind that the practising lawyer ordinarily uses in the affairs of clients, the kind that constitutes 99 per cent of the law of daily life for all of us. That body of law, as we see it, now consists of the law made by Illinois or by Virginia for its own inhabitants, *i. e.*, the law of the several American States, and the federal law

for interstate and national causes. To this corresponds the national and local law of England, of France, of Germany, of Latin America, and of the other countries.

Now, the citizens of these various countries have always had interstate transactions with each other. But in the last generation or two, with the enormous expansion of rapid communication by steam and electricity, by mail, cable, and wireless, international intercourse has increased by leaps and bounds. The diversity of national laws has thus become more obvious and more inconvenient. Every shipment of wheat outside of the boundaries of this country raises questions of the law of two or more countries. Every American corporation starting trade in Latin America finds that two or more diverse systems of law affect its business. The diversity of laws is a daily world-phenomenon, sensed in almost every large counting-house in every

country. The question of removing that diversity of law and of effecting uniformity or assimilation of law has thus arisen. In recent years it has come to the front in all circles of the commercial world, the diplomatic world, and the judicial world. The question, then, is presented: Shall we endeavor to make uniform the laws of the several countries by assimilating them to one another?

2. *Is uniformity or assimilation of the several national laws of the world desirable?* In all that has been said and done on this subject during three generations past, two different attitudes may be perceived, the ideal and the practical.

The movement started with idealists. Back in the days of the first world-expositions, in the 1850's, at London and at Paris, many great leaders in law, politics, and commerce proposed uniformity of law as an end in itself, as an ideal worth reaching for its own sake. The friend-

ship of nations, the unity of action and progress, was the inspiring theme. But this point of view has been long abandoned by all but a few.*

The attitude now perceivable, and the only practical one, is that uniformity is desirable so far as it serves a practical need and no further. And this is the sound view. Uniformity, as an end in itself, is *not* desirable. Variety is desirable, because variety means individuality, and individual life is the only endurable life—the only life of liberty. We are at present witnessing the direful results of an ideal of compulsory uniformity—the ideal of the Prussian State, which in-

* Some account of these earlier ideals may be found in Professor Cohn's chapter on "The History of the Uniformity of Commercial Law," in *Progress of Continental Law in the Nineteenth Century* (Boston, 1917), "Continental Legal History Series," vol. XI. At the present day the only advocate of uniformity for its own sake appears to be Professor Ivan Perich, of Belgrade, in his address delivered at the First Congress of the European Federation, at Rome, in 1909 (Roma, Forzani), which is entitled, "Influence de l'Unité de la Législation Civile sur le Développement de la Solidarité parmi les Nations."

sists that all individuals shall surrender their liberty of habits to the uniform dictation of the state. The world at large could never endure such uniformity. We do not want to Prussianize the world, whether with French or German or Anglo-American or any other law. The richness and fulness of life, in national habits as in personal habits, will be annihilated if individuality is suppressed. Live and let live, is here the only truth. Uniformity of law, then, as an end in itself, is not only an impossible dream—it would be a nightmare.

But, on the other hand, from the practical point of view, uniformity *is* desirable in so far as it serves to remove some evil or some inconvenience, actually experienced, which arises from the diversity of laws. If that is the basis of the demand for uniformity, by all means let us strive for it. For then it is not only desirable, it is necessary. And such is to-day the spirit in which uniformity is

being sought. All the publicists and jurists to-day agree in this attitude. *

There have been and are numerous ways in which world intercourse has been seriously obstructed by diversity of laws, and in many parts of law uniformity has already become a natural and successful means of removing these obstructions. Let us now briefly review some of the achievements. This represents the third stage of my preliminary explanation.

3. *How far has world-legislation actually progressed?* † (1) The laws of railway freight traffic have been made uniform for Europe by an organization perfected in 1893. All the matters of law that would be covered by a bill of lading are governed by this union, which has its

* Some of the important utterances on this subject, by Nippold (of Switzerland), Ripert (of France), Picard (of Belgium), Baldwin (of Connecticut), and others will be found collected in Part III of *Progress of Continental Law in the Nineteenth Century* (Boston, 1917), "Continental Legal History Series," vol. XI.

† The history here summarized is given in full detail by Reinsch, Cohn, and others in the volume above cited.

headquarters in Switzerland. (2) The maritime law of general average—*i. e.*, the shares of contribution payable by shipper and ship-owner and insurers for sea losses incurred—has been made uniform by a voluntary but universal contract system. (3) The maritime law of collisions has been made uniform, in large part, by the Rules of Navigation at Sea, now enforced by uniform national legislation in more than thirty countries. (4) The commercial law of bills of exchange has been brought into tentative uniformity for the European Continent, by conferences beginning some forty years ago; the draft adopted by the last one in 1912 has now become law in most European countries, in China and Japan, and in some Latin-American countries. (5) The administrative law of communications by mail, by wire telegraph, by marine cable, and by wireless telegraphy has been made uniform; the central bureau of each union is in Switzerland;

the wireless union is not yet perfected. (6) The administrative law of automobile traffic has been made uniform, by an official conference, on the European Continent. (7) The law of intellectual and industrial property—patents, trademarks, and copyrights—has been made uniform, in its international administrative features, by a union having headquarters in Switzerland. (8) The law of industrial protection for laborers by measures of safety to health and life is in course of slowly being made uniform, through conventions; thus far, the prohibition of white phosphorus is the principal measure agreed on; another proposed field is industrial insurance. (9) The administrative law of agriculture, in respect to local favors or restrictions and exchange of privileges, is in the process of slow assimilation; the headquarters of the Institute is in Italy, but David Lubin, an American, founded it. (10) The administrative law of sanitation is

being harmonized by successive conferences and unions—affecting contagious diseases, deleterious imports such as opium, and the like. (11) Criminal police measures have been in a few subjects made uniform—the protection of fisheries and of submarine cables, the suppression of the negro slave trade, of the liquor traffic, and of the prostitute trade, and the adoption of criminal identification systems. (12) The law of personal status by marriage and divorce has been in part made uniform on the Continent and in Latin America, by conventions providing rules to solve conflicts of law. (13) The law of execution of judgments has similarly been made uniform on the Continent and in Latin America by conventions for solving conflicts of law in the rules of bankruptcy and of execution of judgments.

These are the principal fields in which complete or partial results have already been achieved. I now proceed to the

fourth and last preliminary point of explanation, viz.:

4. *By what methods has this uniformity of law been attained?* Four methods in all are available and have been used: (*a*) Uniform usage of parties or groups, by voluntary agreement; (*b*) uniform national law, by voluntary national legislation; (*c*) uniform international administration, by executive order; (*d*) uniform rules for deciding conflicts of law.

(*a*) *Uniform usage.* The most notable example of this first form is given by the Rules for Maritime General Average—known as the York-Antwerp Rules, because adopted at a conference at York and modified by a later conference at Antwerp. The wonderful feature of these rules, which now govern the commerce of the world, is that they came into effect by voluntary agreement between underwriters, shippers, and ship-owners, to make all their contracts subject to these

rules.* It took twenty-five years of effort to reach this agreement, but it is now as solid as any law can be.

(*b*) *Uniform national legislation.* The second method, though hitherto successful in our interstate law, has had less rapid progress internationally. One principal reason is that the drafting bodies at the international conferences have been different persons from the national legislatures; and the national legislatures when offered the draft for ratification are slow to see the necessity for making the compromises which are inevitable in such matters, although the experts at their international conferences can see the necessity plainly enough. Nevertheless, this is the only method that can ultimately take care of the bulk of the commercial substantive law that may have to become uniform.

* "Individual effort has done more to spread the vogue of these rules than all the reports of official commissions to their various governments." Bousquet, *Commentaire Pratique des Règles d'York et d'Anvers* (1916), p. 25.

(*c*) *Uniform administrative rules.* This method has been very successful in certain fields, but its scope is inevitably limited.* The Postal Union is the best example. The executive departments of the several states send delegates to a conference, and then severally adopt the rules agreed upon internationally. The great feature of this method is that here the international legislators are experts in their field. International legislation by diplomats only is bound to be a failure. The general training of the diplomat does not fit him to understand the technical interests involved. The moral is that the international legislators of the future must be professional experts in the specific subject. That is, we need never expect, outside of the purely political field of public international law, and

* Besides the monograph of Ambassador Reinsch, *Public International Unions* (1910), the following works describe some of these unions: Combes de Lestrade, *La Vie Internationale* (Paris, 1911); Raymond L. Bridgman, *First Book of World Law* (Boston, 1911).

inside the numerous fields of private law, that a single general international legislature will be of any efficiency. There must be successive special legislatures, created *ad hoc* for each special subject.

(*d*) *Uniform rules for conflict of laws.* This method suffices very well for a few subjects, such as marriage, divorce, and succession. But for commercial law it is not adequate. A main reason is that it maintains in every country two rules of law, the local and the international, and in commerce this is a detriment.

I now come, after these explanations, to a brief account of my main theme:

By What Methods Can the United States Take Effective Part in World-Legislation?

Let me remind you that there are only these four methods. One of them calls for voluntary change of usage by parties interested, as in the York-Antwerp Rules for General Average. Another comes to

pass by regulations adopted by an executive department—as in the Postal Regulations. Both of these are, therefore, very limited in possibilities for us. The remaining two methods both require legislation, *i. e.*, either national legislation adopting a single rule for solving conflicts of law, or national legislation assimilating the several national bodies of substantive law so that no conflicts of law can arise.

Assuming, therefore, for practical purposes, that legislative action by America is necessary, whenever international uniformity becomes desirable for us, we ask: *What is our legal capacity as a nation to enact such legislation, and thus to perform and to obtain our share?* In offering an answer to this question, I invite your consideration to the following three assertions:

I. *The Federal Legislature of the United States has no power to adopt a uniform international rule which shall be actually*

effective throughout the country; it has only two very limited powers, each of which will still leave at least two distinct rules of law in operation within each State: (*a*) The first is its power over interstate and foreign commerce; (*b*) the second is its power to make treaties for solving conflicts of law.

II. *The several State legislatures have all the remaining power to adopt a uniform international rule; but they never have exercised and never will unitedly exercise this power by adopting some uniform international rule; and therefore the prospect of any share for us in world-legislation is hopeless by this method.*

III. *The several State legislatures do have the power to share individually in world-legislation, by availing themselves of the constitutional liberty under Article I, Section* 10, *to make agreements or compacts with a foreign power, with the consent of Congress; and it is therefore absolutely necessary for the future international self-*

respect of this country that this power should be promptly exercised by the leading commercial States of the United States.

I now proceed briefly to explain the basis for these three assertions:

I

I. The first assertion needs but little comment. *The Federal Legislature has no power to adopt an international rule, uniformly adopted elsewhere, which shall be actually effective throughout this country,* for its powers are expressly limited.

(*a*) The first one that might help us is the power to legislate for *interstate and foreign commerce.* But plainly this is inadequate. (1) For one thing, its subject is narrow. It does not include the vital subjects of criminal police, property, family law, corporations, insurance, commercial contracts, and others. Even commercial paper is without its scope; and at the 1912 Hague Conference on that subject the American delegate was obliged

to refrain from voting, with the humiliating confession that the "Federal Government has no authority to legislate regarding bills of exchange." * (2) Secondly, a federal interstate-foreign-commerce rule leaves the local State rule still in force. There will always be two rules, and therefore diversity of law. For example, the thousands of bills and checks daily exchanged at our Chicago banks are now subject to a Uniform Negotiable Instrument Law for American transactions; but, even if the Federal Congress had the power to adopt an international rule, there would still be a separate and

* Mr. Conant, in Report of the Delegate, July 21, p. 118. And at the Second Convention of the International High Commission to Latin America, Mr. Untermyer, a United States delegate, in a memorandum submitted (p. 15, Committee Reports, etc., of National High Commission, Washington, 1916), used these significant words: "As a result of the well-recognized [constitutional] restrictions and limitations under which our delegates labor in dealing with this subject, we are naturally most reluctant to advance suggestions of any character. . . . Our reluctance is due to the fact that we are unfortunately unable to contribute in full measure to our share of the compromises that are inevitably involved in reaching a complete agreement on so complicated a question."

often different law for the instruments representing local transactions. Thus, the federal commerce power is grossly inadequate to give us a share in uniform world-legislation.

(*b*) The other federal power is the *treaty power*, applied to solve conflicts of law. This power has never been exercised for that purpose. We have refrained from signing the Hague Rules of 1904 for private international law (so-called). The Federal Government hesitates to exercise this untried power. We should unquestionably try to exercise it, and thus test its existence. But whether we have it at all is doubtful. And even if we have it, no real uniformity is secured by it, but merely a uniform rule for solving conflicts of diverse law.

These two federal powers, then, are so limited that they send us crippled into an international legislative conference. They can never serve adequately for that purpose.

II

II. The second assertion proves itself. *The several State legislatures have all the remaining power to make uniform our law when desired; but they have never exercised that power co-operatively for an international rule, and they never will.* This prophecy may seem extremely positive. But it will be remembered that all such international uniform rules would have to come to our several States as rules already adopted abroad, and transmitted diplomatically to and through our Federal State Department. Now, the Federal State Department has never even communicated any of them to the States; notable examples are the Hague Conference Rules of 1904 for marriage, divorce, and judicial executions. And, even if the Federal Government should communicate any of them, we may well believe that the State legislatures, in any appreciable number, will never pay effec-

tive attention, amidst the local pressure of bills, to the federal communication of foreign proposals. And, most important of all, a body of rules adopted by European nations, founded in part on the Roman civil system, differing at vital points from ours, and offered in gross, would never be adopted by an American State legislature.

Hence the assertion that, for international purposes, this mode of securing American uniformity is practically out of the question. And even were it feasible it is humiliating, for it would consist in abandoning our own law and adopting a foreign law. There would be no possibility of that fair compromise and mutual sacrifice and gain which is the only true basis for uniformity.

III

III. I come therefore to the third and final assertion, the one in which I hope

to enlist your active interest—the method by which alone America can have any substantial prospect of obtaining its due share in the shaping of world-legislation. That assertion is: *The several State legislatures do have the power to share, by individual action, in world-legislation, if they avail themselves of the Constitutional liberty under Art. I, Sec.* 10, *to make agreements or compacts with one or more foreign powers, with the consent of Congress.*

I shall not delay you by attempting to speculate upon the possible judicial interpretation of the scope of that clause of the Constitution. Enough to say that it has been used by the several States in a dozen or so of instances; that it has been interpreted in only half a dozen decisions of the Federal Supreme Court; and that there is nothing thus far in those decisions to prevent the ample use of the power for the purpose with which I am now concerned. I desire rather to ask your attention to the feasible method

of procedure, and to its obvious utility in giving America a due share in necessary world-legislation.

(1) *Procedure.* First of all, Congress would by general law give its consent in advance that a State may make a compact with one or more foreign powers upon a specified subject of law—let us say, for example, the law of warehouse receipts. Next, when an international conference is called on the law of that subject, one or two important commercial States, like Virginia or Illinois or New York, will, by its legislature, authorize delegates to be sent to that conference to sign a convention. The delegates will include a senator, a representative, and two or three eminent professional experts in the legal and commercial fields involved. These delegates will have voting powers in the conference; hence their arguments and votes will avail to secure some compromise in favor of important American ideas. Finally, the draft adopted by the

conference will be brought back directly to the Virginia or Illinois or New York Legislature for ratification. And the personal interest of the delegation, the influence of the legislative members in the delegation, and the State pride in having shared in a world-conference, will present some strong prospect of securing adoption. Thus, the international rule will become the rule for that State. Thereafter, its acceptance by one or more powerful American States for that class of commercial transactions will induce, and in some cases will compel, other States to follow the example. And thus the uniformity will gradually be attained. Such will be the procedure.

(2) Now let us take a glance at the great advantages of that method, as contrasted with the inadequacy of any other method.

(*a*) *Promptness.* Both the Federal Congress and the Federal State Department are extremely slow to take up such

matters. The State Department is especially slow. It is already overwhelmed with international political business. Even in time of peace the spirit of its personnel is to despatch first those affairs on which there is the most pressure to act; and in the field of private law it cannot be relied upon to initiate anything. For example, not the slightest steps have ever been taken to secure either Congressional or State action on the subjects of the Hague Conference of 1904 on conflict of laws, nor of the Hague Conferences of 1910 and 1912 on bills-of-exchange law. Those protocols are simply buried in the State Department. On the other hand, a State delegation coming back from an international conference is certain to apply immediately to its State legislature and to press for action. As a probable instrument of promptness, therefore, the State-compact method is decidedly superior.

(*b*) *Freedom of Action for the Progres-*

sive States. By the method of State compacts the progressive commercial States, like New York, Virginia, Massachusetts, Pennsylvania, and Illinois will have it in their own power to go onward independently, without waiting for the co-operation of other slow and tardy States, or of States having no such important interests in jeopardy.

(*c*) *Stability*. Furthermore, the State-compact method is the only one which will give stability to international relations. The other method, *i. e.*, the mere voluntary adoption by one or more States of some uniform law, gives no certainty that it will not be changed in a year or two. But the parties to an international conference need to know that the law as agreed on will remain unchanged for a specified period at least; and by the State-compact method the treaty can so provide, if desired.

(*d*) *Dominance of American Ideas*. Fourthly, and most important of all,

this is the only method (outside of the limited federal field of interstate and foreign commerce) by which America can hope to obtain any fair share for the influence of American ideas in world-legislation. If powerful American States can enter the international conference with a body of plenipotentiary delegates, having voting powers, they can bargain and can thus obtain the recognition of some of their own rules as a part of the bargain. There is a lamentable contrast visible between the powers of the American delegates in the Hague Conferences on international arbitration and war law, and their powers in the Hague Conferences on bills of exchange. In the former they were able to prevail on some vital points; in the latter they were unable to vote or to bargain, and in fact the Conference resulted in the triumph of purely Continental ideas at many or most of the vital points of diversity. And if a world-conference has adopted a uniform code,

with American ideas left out, the legislatures of America will be obliged either to adopt it in its foreign shape, moulded by the bargains of foreign powers among themselves, or to reject it and thus to remain behind on the highroad of international unity, suffering all the disadvantages of diversity and conflicts of law. They will in either case have lost the chance of impressing upon international legislation something of American features.

What Is Being Done

And now a final word to mention what is being done at this moment to forward this idea of using the State compact as a means to redeem our share in world-legislation. Two things are being done.

(1) The International High Commission, formed in 1916, to organize close relations with Latin America, appointed in that year a Committee on Uniform Legislation. The chairman is John Bas-

sett Moore, and among the members are Samuel Untermyer of New York and Leo Rowe of Philadelphia. The Committee has found itself seriously obstructed by this impotence of federal legislation.* Mr. McGuire, its assistant secretary, was sent by the Commission to Chicago to attend the 1916 meeting of the American Bar Association and of the National Conference on Uniform State Laws; and through him the Commission will now take up the possibilities of using this method in their efforts for uniformity with Latin America.

(2) The other quarter in which something is being done is the National Conference of Commissioners on Uniform State Laws. At its recent meeting in Chicago, in August, 1916, a brief on the legal possibilities of Art. I, Sec. 10 of the

* See the memorandum of Mr. Untermyer, already cited; also the *Reports* of Mr. P. J. Eder and Mr. C. S. Haight, on bills-of-exchange law and bills-of-lading law respectively, made to Secretary McAdoo, for the International High Commission (Washington, 1916).

Constitution, was presented by George D. Ayres, commissioner from Idaho. Mr. Ayres is primarily interested in the availability of this clause to assist uniformity of law between our own States. Meanwhile, the international aspect of it had been noted by myself in a paper presented to the Second Pan-American Scientific Congress, held in Washington last January. At the Chicago meeting, therefore, on motion of Mr. Ayres, seconded by myself, the National Conference of Commissioners has now appointed a committee, of which Mr. Ayres is chairman, to report at the next Annual Conference, on the legal and political possibilities of the State-compact method for advancing the cause of uniformity, both national and international.

Conclusion

In conclusion, then, I repeat the assertion that the State-compact method is the only method which offers any sub-

stantial prospect to the United States of America for maintaining their self-respect and influence in the field of international private law during the next generation, which will be a generation of world-legislation. And I bespeak the interest of the enlightened public and the legal profession in this endeavor to solve the greatest legal problem of the future that affects the world-welfare of our beloved country.