

1943

# An Outline of Taught Law Notes on American Legal Philosophy--The Beginnings to Holmes and Pound

Harold Gill Reuschlein

Follow this and additional works at: <https://scholarship.law.umn.edu/mlr>



Part of the [Law Commons](#)

---

## Recommended Citation

Reuschlein, Harold Gill, "An Outline of Taught Law Notes on American Legal Philosophy--The Beginnings to Holmes and Pound" (1943). *Minnesota Law Review*. 1423.  
<https://scholarship.law.umn.edu/mlr/1423>

# MINNESOTA LAW REVIEW

*Journal of the State Bar Association*

---

VOLUME 28

DECEMBER, 1943

No. 1

---

## AN OUTLINE OF TAUGHT LAW NOTES ON AMERICAN LEGAL PHILOSOPHY — THE BEGINNINGS TO HOLMES AND POUND

HAROLD GILL REUSCHLEIN\*

"Law Schools make tough law."—Maitland.

### I.

#### A BOOK

"the almost Scriptural authority of Blackstone in our early law."

—Charles Warren.

Among the early judges who were teachers as well as judges and who bespoke juristic philosophy from the bench, none were of greater importance than Wilson, Kent and Story. All three were teachers and writers upon the nature and purpose of law and it was chiefly through their work as teachers and writers that juristic creeds became articulate. It is to their work and to the more significant teachers who followed them that we turn in an effort to note how the fundamental problems of Jurisprudence have been formulated in this country.

But before speaking of these men, something must be said about the influence of a book. Certain it is that the influence of Blackstone's Commentaries gave great impetus to the reception

---

\*A.B., 1927, University of Iowa, LL.B., 1933, Yale University; J.S.D., 1934, Cornell University; Professor of Law, Georgetown University; Major, Judge Advocate General's Department; author of *Who Wrote the Mirror of Justices?* (1942) 58 *Law Quar. Rev.* 265, *Federalization—Design for Corporate Reform in a National Economy* (1942) 91 *U. of Pa. L. Rev.* 91, *Aluminum and Monopoly; A Phase of an Unsolved Problem* (1939) 87 *U. of Pa. L. Rev.* 509; *Municipal Debt Readjustment. Present Relief and Future Policy* (1938) 23 *Corn. L. Quar.* 365, *Provisional Arrest and Detention in International Extradition* (1934) 23 *Geo. L. J.* 37 and other articles in various legal periodicals.

of English law in the legal system of the colonies.<sup>1</sup> Indeed, it has been suggested that the common law as Blackstone expounded it became "the fundamental law of America."<sup>2</sup> Paradoxically enough, during the Revolutionary era the Commentaries were invoked to justify much that must indeed have shocked and grieved their Tory author, than whom none was more conservative and none more lavish in his praise of the English constitution.<sup>3</sup> What is more, the book grew in the influence which it exerted in the new nation which had just espoused and proclaimed principles in blazing contrast to those of the dominant party in England, of which Sir William Blackstone was an important member.<sup>4</sup> Seemingly the explanation must rest on the dire need felt by students and lawyers for a convenient, authoritative exposition, a need so great that it could overcome prejudices against it even among those who might be expected to comprehend its true political interpretation.<sup>5</sup>

In England the Commentaries met with violent attack from Jeremy Bentham, Joseph Priestley and "Junius"<sup>6</sup> for a variety of reasons.<sup>7</sup> In America, if Blackstone's influence was subjected to attack by a very few men, those attackers were, however, men of the greatest eminence. In the forefront was none other than Thomas Jefferson, who, apart from being in direct opposition to Black-

<sup>1</sup>"The fact that such a large mass of legal detail was made available in one work, in an interesting and easily mastered form, made Blackstone's work particularly useful in eighteenth century America. The Commentaries served as the principal means of the colonists' information as to the state of English law in general." Plucknett, *A Concise History of the Common Law* (2nd ed. 1936) 254. See also Hazeltine, *Blackstone 2 Encyc. of Soc. Sciences* (1931) 581, Hammond's *Blackstone* (1890) 108, Dillon, *Law and Jurisprudence of England and America* (1895) 298, Zane, *Story of the Law* (1927) 338-359; Reed, *Training for the Public Profession of the Law* (1921) 110-111, Jones' *Blackstone* (1915) XXIX, Odgers, *Blackstone* (1919) 28 *Yale L. J.* 542, 566, Oliphant, *The New Legal Education* (1930) 131 *Nation* 493, Thayer, *Teaching of English Law at Universities*, *Legal Essays* (1907) 367-368.

<sup>2</sup>Wickersham, *Presentation Address of Blackstone Memorial* (1924) 10 *A. B. A. J.* 576-578.

<sup>3</sup>4 *Blackstone Commentaries* (Jones ed. 1915) 443, Andrews, *Colonial Background of the American Revolution* (1924) 208-209.

<sup>4</sup>2 *Junius Letters* (Wade ed. 1894) 268.

<sup>5</sup>See Comment and reference, *supra* note 1.

<sup>6</sup>For Bentham's attacks see Bentham, *A Fragment of Government* (Annon. 1776), *A Comment on the Commentaries* (Everett ed. 1928); Ridell, *Bentham on Blackstone: A Review* (1929) 15 *A. B. A. J.* 676; Alexander, *Bentham* (1929) 6 *N. Y. U. L. Rev.* 141. For Priestley's attack see 4 *Blackstone, Commentaries* (Jones ed. 1915) 50, note 4. For Junius' attack (directed rather toward Blackstone's political acts) see 1 *Junius Letters* (Wade ed. 1894) 165.

<sup>7</sup>Bentham's attacks were prompted by his zeal as a law reformer, Priestley's largely by his very different views upon religious conformity and "Junius" by political difference with Blackstone in Parliament.

stone's political convictions, was, after his country settled down to peaceful ways, deeply interested in the beginning of legal education in Virginia.<sup>8</sup> In the first place, he thought ill of text book study as an adequate preparation for the legal profession, though admitting certain of the virtues which the book possessed. So he pronounced it to be superficial, to be read only after Coke and other digests.<sup>9</sup> Indeed, Jefferson added (and Langdell must have thrilled to this passage) that while the work was "lucid in its arrangement correct in its matter, classical in style" it was only an elementary book and "the great mass of law books from which it was extracted is still to be consulted on minute investigation."<sup>10</sup> But what seemed to Jefferson a far more serious criticism of the Commentaries was based upon his dread of its effect upon the political philosophy of youthful students.<sup>11</sup> This is readily understandable if one remembers that Jefferson was an agrarian democrat, the son of the Frontier,<sup>12</sup> and that his prime exaction of any government was that it be readily responsive to change.<sup>13</sup> Jefferson doubtless remembered Mansfield's attitude during the Revolution and with all that he disliked in Mansfield he associated Blackstone. His fears are thus vividly expressed.

"You will recollect that before the Revolution, Coke Littleton (sic) was the universal elementary book of law students, and a sounder whig never wrote. You remember also that our lawyers were then all whigs. But when his black-letter text and uncouth but cunning learning got out of fashion, and the homed Mansfieldism of Blackstone became the student's horn-book, from that moment, that profession (the nursery of our Congress) began

<sup>8</sup>For an account of Jefferson's attitude toward Blackstone see Waterman, *Thomas Jefferson and Blackstone's Commentaries* (1933) 27 Ill. Law Rev. 629.

<sup>9</sup>The law of England may be likened to a road divided into distinct stages, at each of which a review is taken of the road passed over so far. Among the reviews, Jefferson lists Bracton, Bacon, Coke, and Blackstone, 6 *Jefferson, Writings* (Washington ed.) 291.

<sup>10</sup>6 *Jefferson, Writings* (Washington ed.) 292, 315.

<sup>11</sup>Thus he writes, "I fear nothing for our liberty from the assaults of force; but I have seen and felt much, and fear more from English books, English prejudices, English manners, and apes, dupes and designs among our profession crafts." 6 *Jefferson, Writings* (Washington ed.) 335, and again "I ascribe much of this (adherence to England and monarchy in preference to their own country on the part of colonial lawyers) to the substitution of Blackstone for my Lord Coke, as an elementary work." 6 *Writings* (Washington ed.) 334.

<sup>12</sup>Parrington, *The Colonial Mind* (1927) 342-356.

<sup>13</sup>"And what country can preserve its liberties if their rulers are not worried from time to time that their people preserve the spirit of the resistance?" 5 *Jefferson, Works* (Ford ed.) 362; "Every constitution, then and every law, naturally expires at the end of 19 years" 5 *Jefferson, Works* (Ford ed.) 121.

to slide into toryism, and nearly all the young brood of lawyers now are of that hue."<sup>14</sup>

Some years before Jefferson expressed such views, James Wilson had criticized certain of the preachments of Blackstone. He took issue with Blackstone on the latter's view that English liberties were human in origin.<sup>15</sup> Wilson maintained that these liberties were natural rights and not subject to a supreme authority which Blackstone contended inhered in every government.<sup>16</sup> Though Wilson is known to have quoted Blackstone for the proposition that there is a fundamental law of nature which is superior to human law,<sup>17</sup> he did so merely to confound British statesmen with the learning of one of their own group. Wilson, like Jefferson, lamented that

"by the use of the Commentaries as the first book, the minds of students have been filled with ideas and principles not at all adapted to, and indeed in direct conflict with, the fundamental principles of American law, as there has been no corrective, these impressions cling to them after they have become lawyers."<sup>18</sup>

However, unlike Jefferson, he did not regard the Commentaries as superficial, but approved the book outside the field of public law. But the tide could not be stemmed and even at Virginia, Jefferson's own university, Blackstone came into its own as a text. It was, however, a remade Blackstone—the work of St. George Tucker. Now Tucker was a teacher and he shared Jefferson's view that law study must go behind Blackstone and like his patron believed that the supplanting of Coke upon Littleton by the Commentaries would flood the profession with "a great number, whose superficial knowledge of the law has been almost as soon forgotten as acquired."<sup>19</sup> Tucker, however, accorded a far greater degree of profundity to the book than did Jefferson.<sup>20</sup> In his edition of the Commentaries, he was unstinting in the praise which he gave to Jefferson's legislation in Virginia in the preface, lauding the lat-

<sup>14</sup>12 Jefferson, Works (Ford ed.) 456. Of interest is the correspondence between Jefferson and Madison on the choice of texts and a professor for the Univ. of Virginia, 9 Madison, Writings (1910) 218.

<sup>15</sup>Blackstone, Commentaries (Jones ed. 1915) 127

<sup>16</sup>2 Wilson, Works (Bird Wilson ed. 1804) 456-475. For further light on Wilson's attitude see 1 Hammond, Blackstone (1890) 111-117. (Editor's notes)

<sup>17</sup>3 Wilson, op. cit. 206.

<sup>18</sup>See Andrews; American Law (1900) viii.

<sup>19</sup>1 Tucker, Blackstone (1803) pt. 1, p. iv. Note Jefferson's characterization of "Blackstone lawyers" as "ephemeral insects of the law" 6 Jefferson, Writings (Washington ed.) 65-66.

<sup>20</sup>To Tucker, Blackstone was a kind of jurist, philosopher, historian, antiquarian and classicist all rolled into one. Tucker, op. cit. p. vi.

ter's efforts as a means of insuring the continuance of republican government. Moreover, he added bulky appendices republicanizing the treatise so as to more nearly accord with the views of American law students.<sup>21</sup>

Now those attacks upon Blackstone are of considerable significance because they indicate a good deal of thinking about the nature of law against a distinctly American background and about the kind of training desirable in equipping one for the profession. But the Blackstone tide rolled on until, as is commonly asserted, the Commentaries became the foundation upon which American law built.<sup>22</sup> What then were the cardinal tenets with which Blackstone so long bound American juristic thought? In the first place, Blackstone was not to be hobgoblined into consistency.<sup>23</sup> He was to furnish a well nigh verbatim text for John Austin when he defined law as a "rule of action dictated by some superior and which the inferior is bound to obey."<sup>24</sup> But along with that definition he propounds the most extreme doctrines of natural law.<sup>25</sup> Thus Blackstone stands as one aiding and abetting the makeshift union

<sup>21</sup>These appendices discussed, with a marked Jeffersonian bias, such questions as the sovereignty of the people, the introduction of the English common law, freedom of the press, the bill for public education in Virginia, the right of expatriation, the merits of the jury system and Jefferson's law of descents.

<sup>22</sup>"The effect (of the acceptance of Blackstone in America) was, that upon all questions, of private law at least, this work stood for the law itself throughout the country, and at least for a generation to come exercised an influence upon the jurisprudence of the New Nation, which no other work has enjoyed, and to which no other work can possibly now attain." 1 Hammond, *Blackstone* (1890) ix. For a like view see Dillon, *Laws and Jurisprudence of England and America* (1895) 298 also Zane, *Story of Law* (1927) 359-359.

<sup>23</sup>"Consistency is the hobgoblin of small minds."—Ralph Waldo Emerson.

<sup>24</sup>Austin defined a law as "a rule laid down for the guidance of an intelligent being by an intelligent being having power over him." *Jurisprudence* (3rd ed.) 88. For Austin, *Jurisprudence* seems to be nothing more than the plural of "a law" for he defines jurisprudence as having to do with rules set by men to men, provided they are established by determinate political superiors. *Ibid* 89. See Pound, "Theories of Law" (1912) 22 *Yale L. J.* 114, 140-142.

<sup>25</sup>"This law of nature, being coeval with mankind, and dictated by God himself is of course superior in obligation to any other. It is binding all over the globe in all countries and at all times, no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force and all their authority, mediately or immediately from the original." 1 *Commentaries* (Cooley 3rd ed. 1884) 40. Again, Blackstone says "Upon these two foundations, the law of nature and the law of revelation depend all human laws; and that is to say, no human laws should be suffered to contradict these. And herein, it is that human laws have their greatest force and efficacy; for, with regard to such points as are not indifferent, human laws are only declaratory of, and act in subordination to the former." *Ibid.* 42.

between analytical and philosophical (natural-law) jurisprudence. By virtue of Blackstone's almost convincing inconsistency, he gave considerable aid to the grim business of forcing a natural rights philosophy to do service along with a rigid Austinian scheme.<sup>26</sup> By his exaltation of "the rule of action dictated by some superior" idea, Blackstone was able to "affirm that the power of Parliament is absolute and without control,"<sup>27</sup> and so to add to the stock of American political ideas the notion of legislative sovereignty—a notion which did not finally establish itself in our constitutional system. Of these two opposing ideas in Blackstone, our written Constitution took the higher law teachings and clothed them with the validity of a statute emanating from the sovereign people and then backed up those teachings with the doctrine of judicial review.<sup>28</sup>

The more important measure of the abiding influence of Blackstone is perhaps not to be derived from verbatim quotation of his words but from the afterglow<sup>29</sup> that trails the study of the book. The Commentaries are a tour through a legal paradise. What is good is good—in fact, it could not conceivably be better. The fact that such a philosophy was indoctrinated into every lawyer at so early a date in our history could not fail to make our lawyers receptive to the practical consequences, if not the systematic exposition, of John Austin's analytical jurisprudence which presupposed, if not a legal paradise, certainly a finished and fully developed legal system. This same Blackstonian philosophy fertilized American soil so that it effectively received the seed of the historical jurist. For the historical jurist, what had developed through custom was good, it was not to be arrested or disturbed.

<sup>26</sup>"Eloquent, suave, undismayed in the presence of the palpable contradictions in his (Blackstone's) pages, adept in insinuating new points of view without unnecessarily disturbing old ones, he is the very exemplar and model of legalistic and judicial obscurantism." Corwin, *The Higher Law Background of American Constitutional Law* (1929) 42 *Harv. L. Rev.* 365-405.

<sup>27</sup>"True it is, that what the Parliament doth no authority upon earth can undo." 1 *Commentaries* (Cooley 3rd ed. 1884) 161, cf. *De Lolme*: "Parliament can do anything except make a man a woman or a woman a man," quoted by Corwin, *op. cit.* 407.

<sup>28</sup>Professor Corwin avows that backing up "the higher law" by the doctrine of judicial review started "the higher law" upon the most fruitful period, juristically, since the days of Justinian. *op. cit.* 409.

<sup>29</sup>"Afterglow"—a term applied to the effect of a legal writing as a whole upon the reader by Karl N. Llewellyn. See his *Some Realism About Realism—Responding to Dean Pound* (1931) 44 *Harv. L. Rev.* 1222, 1229, note 22 (applied to Underhill Moore's *An Institutional Approach to the Laws of Commercial Banking* (1929) 38 *Yale L. J.* 703).

And in Anglo-American Jurisprudence it was Blackstone who told the historical jurist just what had developed through custom.

## II.

### THE EARLY TEACHERS—WYTHE TO COOLEY

In the United States, law first became an academic pursuit at the College of William and Mary. In 1779, George Wythe was named to a professorship "of law and police" at the instance of Jefferson who had studied law under him privately<sup>30</sup> We can but regret the loss of his manuscript lectures before such a time as they might have been printed.<sup>31</sup> There are indications that in his teaching he was no mere servile imitator of Blackstone<sup>32</sup> and that in losing his lectures we lost an important statement of legal philosophy dealing with the changes in American jurisprudence brought about by the new written constitutions, instruments which were wholly strange to Blackstone. As a judge he seems to have been the first to lay down the principle of the overruling power of the judiciary.

"Nay nor, if the whole legislature, an event to be deprecated, should attempt to overleap the bounds prescribed to them by the people, I, in administering the public justice of the country, will meet the united powers at my seat in this tribunal, and, pointing to the constitution, will say to them, 'here is the limit of your authority; and hither shall you go, but no further.'"<sup>33</sup>

Mention has been made of Tucker, Wythe's successor at William and Mary, and his first American edition of Blackstone. In the lengthy appendices Tucker supplied us with essays upon the relation of Blackstone's ideas to American political and legal institutions. In one of his appendices, he deals with the "indispensable necessary" natural equality of rights under our polity in the face of the patent fact of inequality. The explanation has now become a commonplace:

"By equality, in a democracy is to be understood, equality of civil rights, and not of condition. Equality of rights necessarily produces inequality of possessions."<sup>34</sup>

<sup>30</sup>Reed, *Training for the Public Profession of the Law* (1921) 116-117.

<sup>31</sup>Wythe's manuscript lectures were extant in 1810, being mentioned by John Tyler (Father of the President) in a letter to Jefferson who said of them: "They are highly worthy of publication, and it is a pity that they should be lost to society and such a monument to his memory be neglected."

1 *Letters and Times of the Tylers*, 249.

<sup>32</sup>Reed, *op. cit.* 116-117

<sup>33</sup>4 *Call. (Va.)* 5 (1813).

<sup>34</sup>1 *Tucker, Blackstone* (1903) Appendix, p. 28.



Among the absolute rights of every American, "the immediate gift of his Creator," we find the rights of personal opinion, conscience and religion, besides freedom of speech and press.<sup>35</sup>

Ten years after his first experiment, James Wilson, in the presence of the President and Mrs. Washington, began his weekly six o'clock non-vocational Blackstonian lectures at Dr. Franklin's College of Philadelphia.<sup>36</sup> These lectures have come down to us<sup>37</sup> and they supply us with the best statement we have of the considered legal theories of one of the founding fathers. One may see in his pamphlets how, during heated days of Revolution, Wilson had demonstrated a stout faith in the concept of natural law. Though the purpose of his law lectures was entirely different, they reveal that their author continued true to that faith.<sup>38</sup> The chief sources for his legal principles were precisely those from which he drew his political principles during the war—the civilians,<sup>39</sup> especially Dutch and French publicists.

Wilson's idea of the nature of law is set forth in his lecture "Of the General Principles of Law and Obligation." There he declares that law is a great universal. That idea he expresses in these words

"Order, proportion, and fitness pervade the universe. Around us, we see, within us, we feel, above us, we admire, a rule from which a deviation cannot, or should not, or will not be made."<sup>40</sup>

After exploring the many possible definitions of law, he espouses the classification of law into human and divine. There is something peculiarly Thomistic in his proposition that Natural law is one phase of the law of God and that in so far as it applies to man (as distinguished from irrational and inanimate parts of creation, to which it also applied) it is to be discovered by consultation of the Scriptures and the use of reason and the moral sense. In maintaining that human law (municipal and international) must own as its ultimate sanction the law of Nature he flatly denies Blackstone's pre-Austinian theory that human law of necessity involves a command by a superior to an inferior.<sup>41</sup> To

<sup>35</sup>2 Tucker, Blackstone Appendix, p. 3, 11ff.

<sup>36</sup>The College of Philadelphia later became the University of Pennsylvania, Reed, Training for the Public Profession of the Law (1921) 122.

<sup>37</sup>In two editions of Wilson's Works, that by his son Bird Wilson (1804) in three volumes and the edition by Andrews (1896) in two volumes.

<sup>38</sup>The fullest discussion of natural law is found in Chapter III of the Lectures. 1 Wilson, Works (Andrews' ed. 1896) 95-127.

<sup>39</sup>For an enumeration of the number of citations to Dutch and French publicists, see Pound, Theories of Law (1912) 22 Yale L. J. 114, 127, note 50.

<sup>40</sup>1 Works (Andrews' ed. 1896) 49.

<sup>41</sup>Ibid.

Wilson, human laws are not commands of any sort; rather they are the applications of principles of law to particular situations (rules?)<sup>42</sup> To Wilson, the sine qua non of law is not authority, but reason. Of course, there were weighty political reasons for Wilson's denial of the Blackstonian theory of sanctions, he saw in that theory a threat to republicanism. This is observed in his statement that Blackstone

"has defined municipal laws, as applied to the law of England, upon principles to which I must assign the epithets dangerous and unsound. It is of high import to the liberties of the United States that the seeds of despotism be not permitted to lurk at the roots of our municipal law."<sup>43</sup>

Nor could Wilson for a moment admit the human origin of English liberties for these too were deemed natural rights not subject to a supreme power supposed to inhere in every government.<sup>44</sup> Now any natural law scheme must be as much, if not more, a moral scheme as a legal scheme, and that calls up the ever troublesome duty of determining right and wrong. How shall such a determination be made? Wilson proposed that the determination be made by the people's power of moral perception (conscience) and by the use of reason which serves "to ascertain the exactness, and to discover and correct the mistakes, of the moral sense." These human powers are to be aided by divine revelation. By diligent application of these three tools the universal law of nature is found.<sup>45</sup>

That talismanic idea of the seventeenth and eighteenth century, a state of nature, is found in Wilson. But he was not one to subscribe to what the idealistic Rousseau had to say about a state of nature. It seems to have been a characteristic of Mr. Justice Wilson to attempt to trace a fundamental principle to the place of its first statement.<sup>46</sup> When he looked upon a state of nature, it was through the eyes of Aristotle rather than through the eyes of Rousseau, he

<sup>42</sup>Have we not, in essence the idea of an hierarchy of precepts wherein "principles" dominate "rules" (in the narrower sense)? See for the full development of this idea of a hierarchy of legal precepts as 1. Rules (in the narrower sense), 2. Principles, 3. Concepts, 4. Doctrines and 5. Standards, Pound, *Hierarchy of Sources and Forms in Different Systems of Law* (1933) 7 *Tulane L. Rev.* 475, 482-486. In his *Introduction to the Philosophy of Law* (1920) Pound had offered but four stages in the hierarchy. "1. Rules, 2. Principles, 3. Concepts, and 4. Standards" pp. 115-120.

<sup>43</sup>1 *Wilson Works* (Andrews' ed. 1896) 159-160.

<sup>44</sup>2 *Works* (Bird Wilson ed. 1804) 456-475. Blackstone's inconsistencies are attacked in I Hammond, *Blackstone* (1890) 111-117 (Editor's notes) and Andrews, *American Law* (1900) 46, note 1.

<sup>45</sup>1 *Works* (Andrews' ed. 1896) 125.

<sup>46</sup>*Ibid.* xi (Editor's preface).

would have us learn the law of Nature from man in his most perfect, not in his savage state. In many respects Wilson's thought was far in advance of any of his contemporaries and his view that society is natural and that there existed no state of nature which antedated society is illustrative of that fact.

Since Stammler and Saleilles we have heard much about natural law with a changing content.<sup>47</sup> Wilson seems to have been grasping at some such idea when he pointed out that though the laws of nature are immutable, that need not mean that man's interpretation of them must remain ever fixed. Indeed, man's interpretation will change with the progress of his knowledge.

"It is the glorious destiny of many to be progressive. . . . Our progress in virtue should certainly bear a just proportion to our progress in knowledge. Morals are undoubtedly capable of being carried to a much higher degree of excellence than the sciences, excellent as they are. Hence, we may infer, that the law of nature, though immutable in its principles, will be progressive in its operations and effects. Indeed, the same immutable principles will direct this progression. In every period of its existence, the law, which the divine wisdom has approved for man, will not only be fitted to the contemporary degree but will be calculated to produce, in future, a still higher degree of perfection."<sup>48</sup>

He seems to have realized that in the direction of natural law with a changing content lay the great contribution of natural law to the future for he concludes with a statement containing a hope

"From what has been said concerning it, (the law of nature), the most finished performance executed by human hands cannot be perfect. But most of them have been rude and imperfect to a very unnecessary, some, to a shameful degree.

"A more perfect work than has yet appeared upon this great subject, would be a most valuable present to mankind. Even the most general outlines of it cannot, at least in these lectures, be expected from me."<sup>49</sup>

To all who know the story of the American Revolution, it is a commonplace to assert that natural law-rights political theory was

<sup>47</sup>Stammler, *Wirtschaft und Recht nach der Materialistischen Geschichtsauffassung* (ed. 1896) Sec. 23. Title: Ein Naturrecht mit einem wechselnden Inhalte (Changed in edition of 1906 to *Die Möglichkeit eines objektiven richtigen Rechtsinhaltes*, Stammler, *Die Lehre von dem Richtigen Rechte* (Transl. Husik as *The Theory of Justice*), Chapter III, Saleilles, *Ecole Historique et Droit Naturel* (1902) 1 *Revue Trimestrielle du Droit Civil* 96ff. See also Sabine, *Rudolf Stammler's Critical Philosophy of Law* (1933) 18 *Cornell L. Quar.* 311-330. Drake, *Juristic Idealism and Legal Practice* (1927) 25 *Mich. L. Rev.* 571-572, Pound, *Scope and Purpose of Sociological Jurisprudence* (1911) 25 *Harv. L. Rev.* 154-159, 160. A brief statement concerning Stammler's place in the history of juristic thought by G. H. Robinson prefaces Sabine's paper (1933) 18 *Cornell L. Quar.* 321.

<sup>48</sup>1 Wilson, *Works* (Andrews' ed. 1896) 127

<sup>49</sup>*Ibid.*

translated into the most effective kind of political action. When, however, one turns to the more strictly legal writing one is likely to find the lawyer employing the philosophical natural law terminology out of mere polite deference to the current political and legal theory. Thus it may be truly said of Blackstone that he talks the language of natural law (though not with thoroughgoing consistency) but when he grapples with a legal problem his technique is now that of the analytical jurist, now that of the historical jurist. Not so with Wilson, however. For him natural law was a theory to be actively employed in solving problems, it had utility—exactly the virtue modern day proponents of natural law with a changing content claim for it. He flatly disagrees with the theory that man surrenders in trust all his natural rights upon coming into civil society so that thereby he may obtain the blessings of civil liberty. Wilson maintains that when man comes into a politically organized society, his rights are increased and made more secure. So looking successively at various fields of law such as those regulating property, character, liberty and security, he finds one pivotal problem, the application of principles of natural law to specific questions of human relationships and behavior.<sup>50</sup> In the field of criminal law this leads Wilson to discuss possibilities of individualization of punishment far in advance of his day. He is much interested in the work of Beccaria, in no uncertain terms he announces that the criminal law in England stands greatly in need of reformation.<sup>51</sup> We have often spoken of the early American period as the day of the natural law jurist—it was such without a doubt, but it was anything but the exclusive day of the natural law jurist.

If James Wilson was a natural law jurist, he was an historical jurist as well. The essence of the historical dogma is that law is popular custom. That theory is found fully stated in Wilson's writing. It found hearty acceptance, apparently, because Wilson presented it in such a manner as to ground law in the most direct manner upon popular consent.<sup>52</sup> Sovereignty Wilson still looks upon as the attribute of a personal monarch, but of custom, we find this

“Of all yet suggested, the mode for the promulgation of human law by custom seems the most effectual. It involves in it internal evidence, of the strongest kind, that the law has been introduced by

---

<sup>50</sup>2 Wilson, Works (Bird Wilson ed. 1804) 466.

<sup>51</sup>2 Works (Andrews' ed. 1896) Pt. 3, Ch. 1., esp. 346-347

<sup>52</sup>For the Roman origins of the theory that law is custom see Dickinson, *The Law Behind Law* (1929) 29 Col. L. Rev. 113-127

common consent, and that this consent rests upon the most solid basis of experience as well as opinions."<sup>53</sup>

and this

"In the introduction, in the extension, in the continuance of customary law, we find the operations of consent universally predominant."<sup>54</sup>

It has been suggested that while the customary theory of law paid tribute to the prevalent doctrine of "popular sovereignty" it did so in a way which was acceptable to lawyers who feared the possible excesses of democratic legislatures.<sup>55</sup> This had the effect of minimizing the conscious volitional element in law, it paved the way for hostility to conscious law-making through an appeal from the temporary legislative will of the people to their fundamental will as embodied in traditional institutions. By this unique transformation as found in Wilson, America was given what Dean Pound has referred to as "natural law upon historical premises."<sup>56</sup>

To Wilson, custom is not merely the raw material out of which legal rules are made, but rather, custom is regarded as fully formulated law ready for application as a rule of decision before it ever comes into the hands of a court. It is quite as specific as any rule which a court might itself lay down. To put it otherwise, Wilson's argument is that judges do not make law, they merely find it.<sup>57</sup>

Four years after Wilson's debut in Philadelphia (1794) a young Federalist politician, James Kent, began his lectures at Columbia. In 1798, his work as a teacher was interrupted by his career on the bench, in 1824, he resumed his teaching, which continued until he tired of his labors and devoted himself to his famous Commentaries.<sup>58</sup> Kent's Commentaries constituted the first systematic treatise upon American law. The work stands as an independent composition, though conceived in the spirit of Blackstone, in con-

<sup>53</sup> Works (Andrews' ed. 1896) 57

<sup>54</sup> *Ibid.* 89.

<sup>55</sup> Dickinson, *The Law Behind Law* (1929) 29 Col. L. Rev. 113, 127

<sup>56</sup> *The Scope and Purpose of Sociological Jurisprudence* (1911) 24 Harv. L. Rev. 591, 60ff, *Common Law and Legislation* (1908) 21 *Idem.* 383, 402.

<sup>57</sup> Works (Andrews' ed. 1896) With this compare *The Ideal and the Actual Law* (1890) 24 Am. L. Rev. 752, 760. On the views of Carter see Pound, *The Ideal and Actual in Law and Forty Years After* (1933) 1 *Geo. Washington L. Rev.* 431.

<sup>58</sup> The first edition of Kent's Commentaries appeared in four successive volumes between 1826 and 1830. Wm. Kent, *Memoirs and Letters of James Kent* (1898) 193-5, *History of Columbia University 1754-1904*, 64, 78, 91, 92, 335ff.

trast to the mere adaption of Blackstone's Commentaries which St. George Tucker gave us.<sup>59</sup>

Chancellor Kent began his "Commentaries" with a comprehensive survey of the Law of Nations which he correctly considers as a part of the Common Law,<sup>60</sup> and therefore a part of our law. Regarding "the faithful observance" of the Law of Nations as "essential to national character, and to the happiness of mankind," he prefaced his work by a careful outline of International Law.<sup>61</sup> This compact treatise constitutes the first scientific treatment of the subject in the English language.

Kent, like his fellow jurist, was a staunch devotee of the concept of natural law. Public law, particularly international law, is inextricably bound up with ethics.<sup>62</sup> He gloried in the opinion of Lord Coke in *Dr Bonham's Case* in declaring that acts of Parliament contrary to reason and equity are void though at the same time admitting that Blackstone's remark concerning the omnipotence of Parliament was sound legal doctrine in England.<sup>63</sup> In the United States all legislation at variance with the true intent of our constitutional system is void. However, Kent's is a particularly individualistic interpretation of the theory of natural rights. This is, perhaps, nowhere better evidenced than in his discussion of the rights of persons. These rights he holds to be

"Either absolute, being such as belong to individuals in a single, unconnected state, or relative, being those which arise from the civil and domestic relations."<sup>64</sup>

Now these rights which he denominates "absolute" he classifies into

"the right of personal security, the right of personal liberty, and the right to acquire and enjoy property. These rights have been justly considered, and frequently declared, by the people of this country, to be Natural, inherent, and inalienable."

The bill of rights is hailed by Kent as the "muniments of Freemen" and as the best testimonial "of the deep and universal sense of the

<sup>59</sup>That is, Kent was the first to cover so great a field. A similar work confined to the law of a single state had been written by Zephaniah Swift, *The System of the Laws of the State of Connecticut*. (1795).

<sup>60</sup>*Triquet v. Bath*, 3 Burrow's Repts. 1478 (1764) *Heathfield v. Chilton*, 4 Burrow's Repts. 2115 (1767).

<sup>61</sup>It is worthy of note that with the years Kent's appreciation of the importance of the Law of Nations grew upon him. Thus in his *Dissertation* (1795) he closed the work with a sketch of International Law while the *Commentaries* (1826) are begun with a prominent treatment of the subject. James Brown Scott, *James Kent in 2 Lewis, Great American Lawyers* (1907) 491, 524.

<sup>62</sup>Kent, *Commentaries* (Holmes' 12th ed. 1873) 11ff.

<sup>63</sup>*Ibid.* 449.

<sup>64</sup>2 Kent, *Commentaries* (Holmes' ed. 1873).

value of our Natural rights."<sup>66</sup> His handling of natural rights concepts is best illustrated by his treatment of specific rights. In dealing with the right of self-defense he tells us that there are certain cases in which this right may be justly invoked and in such instances the law of nature is not to be superseded by the law of society.<sup>66</sup> He views most of the rights of individuals in their domestic relations as having their origin in the law of nature.<sup>67</sup> The right of revolution is stated to be a natural right "founded on the law of nature and the reason of mankind, and supported by the soundest authority, and by some very illustrious precedents."<sup>68</sup> Now the significant idea in that statement is that sound authorities and illustrious precedents are not the source of the right, they do but confirm it—it is the difference between the philosophical jurist and the historical jurist.

It has been suggested that our Constitution was designed primarily for the protection of vested rights in property.<sup>69</sup> In something of that spirit, we find the Commentaries stating that the laws of nature extend their protection to the property of individuals. A law attempting to divest title to property lawfully procured is void unless attended by the securities prescribed by the principles of natural equity—and so the law and procedure of our concept of eminent domain is identified as an "acknowledged principle of universal law."<sup>70</sup>

It was Story who most effectively pointed out the great distinguishing contributions of Chancellor Kent in these words.

"equity was scarcely felt in the general administration of justice, until about the period of the Reports of Caines and of Johnson. And, perhaps, it is not too much to say, that it did not attain its full maturity and masculine vigor, until Mr. Chancellor Kent, brought to it the fulness of his own extraordinary learning, unconquerable diligence, and brilliant talents."<sup>71</sup>

Now the significant quality of Kent's equity is that it was not merely the equity of a disciplined and well-stocked mind whose mainspring was a love of abstract justice applied to the concrete case, but rather it was the equity of English Chancery adapted to the needs of Kent's own time and place.<sup>72</sup> Upon ascending the

<sup>66</sup>2 Kent, Commentaries (Holmes' ed. 1873) 4, 8.

<sup>66</sup>Ibid. 15.

<sup>67</sup>Ibid. 39.

<sup>68</sup>2 Kent Commentaries (Holmes' ed. 1873) 209.

<sup>69</sup>Argument of Mr. Choate in *Pollock v. Farmer's Loan and Trust Co.* (Income Tax cases) 157 U. S. 429, 534, 15 S. Ct. 912, 39 L. Ed. 759 (1894).

<sup>70</sup>2 Kent, Commentaries (Holmes' ed. 1873) 339.

<sup>71</sup>Story, *Equity Jurisprudence* (13th ed. 1887) sec. 56, p. 53.

<sup>72</sup>Kent's opinions in equity are to be found in the seven volumes of Johnson's Chancery Reports.

Chancery bench, the new Chancellor found the ancient tenor of the common law greatly modified by statutes of the New York legislature and the new Constitution. This being true, it was Kent's particular province to apply the principles of equity to these changes and of necessity his opinions were somewhat detailed and written rather in the style of the commentator than in that of the judge. As a judicial craftsman he seemed bent upon placing the first series of American Equity Reports on foundations deeply and strongly laid. Though admitting the binding character of precedents in English Chancery,<sup>73</sup> he had a characteristic historical-mindedness<sup>74</sup> which drove him to verify the original sources from which Lord Somers or Lord Hardwicke had drawn. He was not one to attribute to Somers that which was due to Ulpian or Paulus.<sup>75</sup>

It seems in point here to note that Chancellor Kent had something to say about the nature of the judicial process in so far as his own technique was concerned. Writing to Thomas Washington in 1828, he said.

"My practice was, first, to make myself perfectly and accurately (mathematically accurately) master of the facts. It was done by abridging the bill, and then the answers, and then the depositions, and, by the time I had done this slow and tedious process, I was master of the cause and ready to decide it. I saw where justice lay, and the moral sense decided the court half the time; and then I sat down to search the authorities until I had examined my books. I might once in a while be embarrassed by a technical rule, but I most always found principles suited to my views of the case. my object was to discuss a point so as never to be teased with it again, and to anticipate an angry and vexatious appeal to a popular tribunal by disappointed counsel."<sup>76</sup>

Now when Kent referred to himself as an examiner of books, he meant not only the books of English authority, but the books of the Dutch, French, Swiss and German publicists as well. We have noted that in the field of political theory American thinkers had abundant precedents for employing the comparative method.

<sup>73</sup>Manning v. Manning's Exrs. 1 Johnson's Chanc. (N. Y.) 527

<sup>74</sup>"Historical-mindedness is so much a preconception of modern thought that we can identify a particular thing only by pointing to the various things it successively was before it became that particular thing which it will presently cease to be." Carl Becker, *The Heavenly City of the Eighteenth Century Philosophers* (1932) 19.

<sup>75</sup>Fowler, *Observations on the Particular Jurisprudence of New York* (1881) 25 Alb. L. J. 285, 288.

<sup>76</sup>Wm. Kent, *Memoirs and Letters of James Kent* 158-159. See *Memoirs*, 118, where Kent explains the need of his writing labored opinions in order to beat down opposition, "or shame it by exhaustive research and overwhelming authority."



But to Kent and Story must go the distinction of first using comparative law as a tool for the decision of cases.<sup>77</sup> An examination of Chancellor Kent's opinions must reveal their author deriving inspiration from the juridical writers of Europe during all ages. There one finds citation to the classical writers upon the Roman law; to the Dutch publicists, Grotius, Vinnius, Voet and Bynkershoek; the German jurists, Puffendorf, Heineccius and Strykuis, the French juridical writers, Domat, D'Aguesseau, Fournel, Emerigon, Pothier and Valin and to the Swiss, Burlamaqui and Vattel. And this was no mere idle display of erudition on Kent's part. He found a practical utility in the civil law during the time he was shaping our equity. Again, in a letter to Thomas Washington, he confesses

"I could generally put my brethren to rout and carry my point by my mysterious wand of French and Civil law. The judges were Republicans and very kindly disposed to everything that was French, and this enabled me, without exciting any alarm or jealousy, to make free use of such authorities and thereby enrich our commercial law."<sup>78</sup>

Story, like Kent, was a comparative law jurist and a learned civilian.<sup>79</sup> When, however, one looks for the effects of this comparative method introduced into American juristic science by Story and Kent, one finds few permanent results.<sup>80</sup> Now while the citation of civilian jurists abounds in the output of both men, what seems more to the point is the fact that, when the ideas of either of them differ from those of the civilians on issues newly presented, both judges invariably inject their own idea into our law in spite of the civilians. One must conclude that Kent and Story were employing the comparative method only to build up the common law and not as a wedge to pry open the door so that another system might ease its way in. Both men seem to have realized that the examination of old problems and the discussion

<sup>77</sup>To the effect that the comparative method must necessarily enter into the science of jurisprudence whether that science be analytical, historical or philosophical, see Pound, *Outline of Lectures on Jurisprudence* (4th ed. 1928) On Comparative-Apologetic Schools see Isaac, *The Schools of Jurisprudence* (1918) 31 *Harv. L. Rev.* 373, 400.

<sup>78</sup>Wm. Kent, *Memoirs and Letters of James Kent* (1898) 117. In another place Kent says "We had but few American precedents. English authority did not stand very high in those feverish times." *Ibid.* 118. See Pound, *The Influence of French Law in America* (1909) 3 *Ill. L. Rev.* 354.

<sup>79</sup>See *Bright v. Boyd* (1841) 1 *Story's Repts.* 478, *Fed. Cas. No.* 1875, wherein nearly two-thirds of the authorities cited are civilians.

<sup>80</sup>A few of the instances in which civil law rules have displaced the common law rule are cited by Dean Pound, *The Influence of French Law in America* (1909) 3 *Ill. L. Rev.* 354-361.

of new ones by a comparison of common-law and civil-law authority must needs make for progress in our law.

Like Kent, Story affected the development of our law in three ways, as judge, as writer and as teacher. But Story's service upon the bench and his career as a teacher were more extended than Kent's and, as a writer, the former was far more prolific. Kent, as a pioneer, confined himself to an institutional book while Story was to contribute model treatises (in some instances the first in their field) upon Conflict of Laws, Constitutional Law, Equity, and Commercial Law. It has been suggested that when Justice Story took his seat upon the bench in the second decade of the nineteenth<sup>81</sup> century the work of receiving and adapting the common law and of developing from it a system of American law remained yet to be done and that the beginning of any real progress in this work dated from the judicial appointments of Marshall and Kent.<sup>82</sup>

It is an obvious truth that the case-law of Justice Story constitutes a record of achievement on the bench and yet it seems not too ungracious to assert that the qualities of mind in which Story excelled and which he most delighted to employ were those of the teacher and the jurist and not those of the judge. To a mind such as Story's, eager to traverse the entire field of the law, the confines of the judicial office, with its supposed limitation to proved fact and established law, might well prove irksome. Such limitation does not exist to the same degree in the career of the teacher and the jurist. Coming to the bench in the formative period of our law's development, Story shared with Kent the task of shaping equity to an American environment. In Admiralty and Prize his opportunities were not unlike those of Lord Stowell and his contribution in commercial law may be likened to that of Lord Mansfield.

To the student of the judicial process, Story too is an interesting study. He was quite idealistic and this tendency to idealize, and at times to reform, undermined his practical soundness as a judge. For instance, he suggested that a court of equity might quite properly decree specific performance of all bona fide con-

<sup>81</sup>Story was appointed to the Supreme Court of the United States by President Madison in 1811.

<sup>82</sup>Pound, *The Place of Judge Story in the Making of American Law* (1914) 48 Am. L. Rev. 676, 682-3, (1916) 1 Mass. L. Q. 121. John Marshall was appointed Chief Justice of the Supreme Court of the United States by President Jefferson in 1801, while James Kent was made Chancellor in New York in 1814.

tracts.<sup>83</sup> Again, in his judicial opinions, one may discern the same mental tendency. In *Martin v. Hunter's Lessee*<sup>84</sup> the doctrine that the whole of the Federal judicial power should be at all times vested in courts created under Federal authority is advanced. Closely allied to his tendency to idealize is his adherence to the concept of natural law. Acting under its influence in *La Jeune Eugenie*,<sup>85</sup> he held that the slave trade was contrary to natural justice and moral duty and so violative of the law of nations. Since both Kent and Story were crusaders for a broad equity, a description of the latter's method of deciding cases by one who knew him well should be contrasted to Chancellor Kent's description of his own judicial behavior quoted above. Of Story, his colleague at Harvard, Simon Greenleaf, said

"It was his habit, after hearing an argument, in cases of importance to defer the investigation of the matter until his mind had cooled after the excitement of the hearing, and freed itself of all bias produced by the high colorings of the eloquence of his appeals, leaving in their memory only the impressions made by the principal facts and the legal reasonings, of which he also took full notes. After this, he carefully examined all the cases cited and others bearing on the subject, reviewing and fixing firmly in his mind all the principles of law which might govern the case. By the aid of these principles he proceeded to examine the question upon its merits, and to decide accordingly, always first establishing the law in his mind, lest the hardship of the case should lead him to an illegal conclusion."<sup>86</sup>

In 1829 Nathan Dane of Dane's Abridgment fame founded a professorship of law at Harvard for Joseph Story and in the foundation provided that the holder of the professorship should not only lecture, but should also "revise for publication." How well Story carried out the mandate of the Dane Foundation needs no arguing. The body of legal writing coming from Story's pen has been likened in its importance to that of Coke.<sup>87</sup> True it is that

<sup>83</sup>Story, *Equity Jurisprudence* (4th ed. 1846) par. 717a.

<sup>84</sup>1 Wheat. 304, 4 L. Ed. 97 (1816).

<sup>85</sup>2 Mason's Repts. 409, Fed. Cas. 15551 (1822). In *The Antelope*, 10 Wheat. 66, 6 L. Ed. 268 (1825) Marshall in considering the question followed Lord Stowell in *The Lewis*, 2 Dodson's Repts. 210 (1817) saying, "this court must not yield to feelings which might seduce it from the path of duty, and must obey the mandate of the law."

<sup>86</sup>Greenleaf, *Discourse Commemorative of the Life and Character of Hon. Joseph Story, LL.D.* (1845) 44.

<sup>87</sup>"As Coke summed up the development prior to his time and thus furnished the basis for a juristic new star, so these text writers (referring mainly to Story) summed up English case law of the seventeenth century and eighteenth century and made it available as the basis of a new start in America," Pound, *The Place of Judge Story in the Making of American Law* (1914) 48 *Am. L. Rev.* 675, 692 (1916) 1 *Mass. L. Quar.* 121.

Marshall in large part made our public law, but Story became its great expounder to the bench and bar. One may trace the influence of his Commentaries on the Constitution<sup>88</sup> through Cooley into nearly all the texts of the last part of the nineteenth century. It may be doubted whether any treatise of more importance than Story's Conflict of Law has ever emanated from American legal scholarship. Dicey maintains that it "forthwith systematized, one might say, created a whole branch of the law of England."<sup>89</sup> But from the standpoint of the upbuilding of our system of law, the treatise upon Equity stands as Story's most significant contribution. In view of the traditional Puritan hostility to equity,<sup>90</sup> it was of supreme importance that equity be expounded to American readers by a friendly commentator. Story did this in an extremely readable fashion presenting English Equity as essentially Roman law and a body of universal principles of justice. While Kent was achieving equity upon the bench, Story, perceiving the importance of equity in our system, contributed a book destined to beat into submission the forces actively hostile to the extension of equity.

Though perhaps better known to political scientists and students of international law than to lawyers, Francis Lieber published a book of peculiar significance to the student of jurisprudence. This was his Legal and Political Heremeneutics or Principles of Interpretation and Construction in Law and Politics with Remarks on Precedents and Authorities, the first edition of which appeared in 1839<sup>91</sup> It seems to have been the first attempt to put the science of heremeneutics into operation in the field of Jurisprudence. Heretofore it had been confined to the province of theology in England and America, as the theory upon which the practice of exegesis proceeded. In his discussion of the problems inherent in the process of legal interpretation and construction, Lieber shows genuine awareness of the weakness of rigid codification.<sup>92</sup>

Among our juristic thinkers are illustrious men who have proposed to save the law from its vagaries by word cures—devices

<sup>88</sup>The first edition of the Commentaries appeared in 1833.

<sup>89</sup>Dicey, Conflict of Laws (5th ed. 1932) 931. The first edition of Story's Conflict of Laws appeared in 1834.

<sup>90</sup>Pound, The Spirit of the Common Law (1921) 53-54.

<sup>91</sup>This work was an expansion of two articles, On Political Heremeneutics, or on Political Interpretation and Construction, and also on Precedents (1837-1838) 18 Amer. Jurist and Law Mag. 37, 381. The volume is dedicated to James Kent. For a biographical sketch of Lieber see Nys, Francis Lieber—His Life and His Work (1911) 5 A. J. I. L. 84, 355.

<sup>92</sup>Legal and Political Hermeneutics (Hammond's 3rd ed. 1880) 155.

either in the nature of fool-proof schemes of legal analysis, heremeneutics, or a science of "nomo-thetics."<sup>93</sup>

When first examining Lieber's Heremeneutics one is tempted to mark the author as a mere logomach, his theory of interpretation seems to consist in nothing more than the examination of the meanings of words by the dictionary process. His principles governing interpretation and construction, however, are valuable even today as a guide to ordered thinking on the part of those who have to do with legislation, whether as legislator or judge. Implicit in Lieber's theory is the ideal often proposed by Dean Pound for the effective Code,<sup>94</sup> as contrasted to the doctrine of utter futility in codification so often voiced by Carter. Says Lieber

"It has been shown that it is impossible to word laws in such a manner as to absolutely exclude all doubt, or to allow us to dispense with construction, even if they be worded for the time for which they were made with absolute (mathematical) distinctness; because things and relations change, and because interests conflict differently with each other at different times. The very object of general laws is to establish general rules beforehand, for if we would attempt to settle each case according to the views which, with the momentary interest, it might itself suggest, we should establish at once the most insufferable tyranny or anarchy. By this inherent generality, however, there is a constant reason for requiring construction in the application of laws, since most cases occurring are of a complex character. It is in vain, therefore, to believe in the possibility of forming a code of laws absolutely distinct, like mathematical theories."<sup>95</sup>

In Lieber's writing is also a redefinition of sovereignty which seems clearly a prophecy of the approaching ascendance of the historical school in American juristic thought, sounding, as it does in the Nationalist-Geist philosophy of the Germans.<sup>96</sup> According to Lieber, sovereignty is the vital principle of the state, resting upon a contract entered into by the people but springing from the

<sup>93</sup>For examples of rigid analysis and logomachian jurists (who seem to derive their inspiration from the ancient glossators) see Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1923) 23, 65 reprinted from (1933) 23 *Yale L. J.* 16 and (1917) 26 *Yale L. J.* 710; Kocourek (1928) *Jural Relations* Kocourek (1930) *An Introduction to the Science of Law*, especially Chap. IV, Wigmore, *Introduction to Kocourek's Jural Relations* (1928) and Wigmore, *The Terminology of Legal Science (with a Plea for the Science of Nomo-Thetics)* (1914) 28 *Harv. L. Rev.* 1.

<sup>94</sup>Writing of a model practice act, Pound says that it "should deal with the general lines to be followed, leaving details to be fixed by rules of court, which the courts may change from time to time as actual experience of the application and operation dictates." *Some Principles of Procedural Reform* (1910) 4 *Ill. L. Rev.* 388, 403.

<sup>95</sup>*Legal and Political Heremeneutics* (Hammond's ed. 1880) 154-155.

<sup>96</sup>See Thilly, *History of Philosophy* (1914) 475 (On Hegel)

organic unity of a homogeneous population united by a common tradition and inhabiting a common territory. The manifestation of sovereignty is to be found in public opinion which itself is "the continued sovereign action of society." In more familiar terms this is only a somewhat labored statement of the principles of majority rule as reflected in the constitutional arguments of Daniel Webster.<sup>97</sup>

Though an exponent of natural law, Lieber saw certain shortcomings in the blind acceptance of such theories in the light of the historical attitude toward which he seems to be inclining. To him natural law was a body of principles from which to begin to build a science of law and politics. Natural law principles were to serve as guides, not dogmas—they had a flexibility which yielded to certain conditioning factors which historical jurists were beginning to insist upon.

"On the one hand, men have seen that, without establishing firm and absolute principles, all would be confusion and insecurity. On the other hand, they have been so far misled by principles drawn from natural law, as to judge every political question by theory alone, disavowing experience, expedience, and a due regard to the elements which were given wherewith to work."<sup>98</sup>

In his later writings, Lieber drops the concept of natural or primordial rights altogether. Though he does not expressly repudiate the concept of natural law, he flatly ignores it and in its stead we find "Anglican liberties," used to designate those rights secured by the common law, statute and constitution.<sup>99</sup>

Perhaps no book exercised a greater influence upon the development of American Constitutional law after the Civil War than Thomas McIntyre Cooley's *Constitutional Limitations* (1868). In this work as well as in his edition of Blackstone, the influence of the theory of natural rights is everywhere apparent. In dealing with the bills of rights he says:

"we must not commit the mistake of supposing that, because individual rights are guarded and protected by them they must also be considered as owing their origin to them. These instruments measure the rights of the rulers, but do not measure the rights of the governed."<sup>100</sup>

In his edition of Blackstone he interprets the American bill of rights on the basis of Blackstone's theory of the absolute rights of

<sup>97</sup> Webster, Works 320-341.

<sup>98</sup> Lieber, *Manual of Political Ethics* (Woolsey's 2nd ed. 1875) 71.

<sup>99</sup> Lieber, *Civil Liberty and Self-Government* (1853).

<sup>100</sup> Cooley, *Constitutional Limitations* (2nd ed. 1871) 36.

individuals.<sup>101</sup> Of greatest importance, perhaps, is his argument that certain rights, particularly rights of property, are so essential that they should receive the protection of the courts though they find no specific provision in bills of rights.<sup>102</sup> Cooley knew enough history<sup>103</sup> to have little if any regard for rights said to belong to one in a state of nature and apart from society. The supposition of any such state he held to be "useless even as a matter of theory"<sup>104</sup>

Cooley preached with much eloquence certain constitutional and juristic dogmas, which have since become storm centers in American juristic thought. In the first place, he was a most determined champion of the doctrine of the separation of powers in all its pristine purity. To him a constitution was simply a limitation on the power of the legislature and he was loath to admit any implied limitations.<sup>105</sup> He also had some very positive opinions as to the degree of certainty or uncertainty to be found in the law. In the light of recent pronouncements upon the question, some indicating a "here-the-law-is-certain, here-it-isn't" attitude<sup>106</sup> and some indicating an "it's-all-uncertain" attitude,<sup>107</sup> this confident statement by Cooley is of interest.

"It is not true in any sense that the law is uncertain, it is in fact so far from being true that, on the contrary, the law will be found on investigation to have more of the elements of certainty about it, and to be more worthy of trust than anything else, even in

<sup>101</sup>Cooley observes that "absolute rights" or "natural rights" are few and simple while "relative rights" are far more numerous and complicated and that these "relative rights" are constantly on the increase. 1 Cooley, Blackstone (1884) 124, note 4.

<sup>102</sup>Constitutional Limitations (8th ed. 1927) 356.

<sup>103</sup>Cooley could lay claim to being something of an historian. In 1885 he published his *History of Michigan* as one of the then popular American Commonwealth Series.

<sup>104</sup>*People v. Salem*, 20 Mich. 322, 4 Am. Repts. 400 (1870).

<sup>105</sup>Constitutional Limitations (1st ed. 1868) 88. See also Knowlton, Thomas McIntyre Cooley (1907) 5 Mich. L. Rev. 309, 317.

<sup>106</sup>Pound, *An Introduction to the Philosophy of Law* (1925) 139-143. *The Theory of Judicial Decision* (1923) 36 Harv. L. Rev. 802-825, *Law and Morals* (2nd ed. 1926) 58, 72, *The Call for a Realist Jurisprudence* (1931) 44 Harv. L. Rev. 697, 707-7-8, Dickinson, *Legal Rules and Their Function in the Process of Decision* 79 Univ. Pa. L. Rev. 833, 835ff.

<sup>107</sup>Frank, *Law and the Modern Mind* (1930). The whole book proceeds upon the theme that the attainment of certainty in the law is "the basic legal myth," but see especially Chaps. I, IV, Part One and Chap. I, Part II, also Appendix iv Notes on Pound's Views 289-295, Llewellyn, *A Realistic Jurisprudence—The Next Step* (1930) 30 Col. L. Rev. 431; *Some Realism About Realism* (1931) 44 Harv. L. Rev. 1222, 1236. See also Green, *Are There Dependable Rules of Causation?* (1929) 77 Univ. Pa. L. Rev. 601, 628.

physical nature, or in the realm of mind or of morals, that concerns to the same extent the every-day life of mankind."<sup>108</sup> To Cooley it was conceivable that law which was uncertain might in a degree be better than no law but he held that it could not possibly foster a condition of confident security and peace. Cooley's arguments tending to exalt certainty as the great distinguishing characteristic of our laws were chiefly drawn from Federal constitutional law. This fact itself would seem to weaken his argument, in that it excluded the peculiarly grave American problems of diversity bred of a large number of separate and distinct states. To Cooley the uncertain does not mean simply the not clearly predictable, to him "uncertain" means "difficult to understand" and "untrustworthy."<sup>109</sup> He argues eloquently for the need of certainty in the law governing commercial transactions and he tells us that there is a legal rule for every case, and that though the rules may seem technical, exact compliance is requisite and that "the perils of non-compliance are often very great."<sup>110</sup> In the law of real property he saw an equal need for certainty, nor had he any doubt of the fixed character of the law of family relations, nor of the desirability of that fixity.<sup>111</sup> Strange it is for us to accost the observation that "the uncertainty of the law is most apparent when the estates of deceased persons come to be judicially settled up."<sup>112</sup>

The law which Judge Cooley found so pleasingly certain is the law of a purist—something beautiful in the clarity of its delineation

<sup>108</sup>Cooley, *The Uncertainty of the Law* (1887) 4 Repts. Ga. Bar Assn. 109-110.

<sup>109</sup>"difficult to understand. But if we were to begin our observations with preconceived notions that the law governing banking operations was difficult to understand and uncertain, we should probably be astonished by the clock-like regularity of all transactions, and by the evident rarity of occasions when the cashier or other officers would deem it necessary to delay to take counsel." *The Uncertainty of the Law* (1887) 4 Repts. Ga. Bar Assn. 109, 117 "Untrustworthy. How thoughtless, and how baseless and unwarranted are all statements, utterances or insinuations, from whatever source coming or in whatever form, which imply that the law, spoken of collectively, is uncertain or untrustworthy." *Ibid.* 121.

<sup>110</sup>*The Uncertainty of the Law* (1887) 4 Repts. Ga. Bar Assn. 109, 117

<sup>111</sup>*The Uncertainty of the Law* (1887) 4 Repts. Ga. Bar Assn. 109, 116. Here then seem to be the three conceptions of certainty zones in the law. (1) Cooley: The entire area of the substantive law is certain (2) Pound: Certainty is desirable in the fields of property and commercial law while discretion is desirable in the field of personal relations (3) Frank: Llewellyn: The quest for the certainty in the law is the quest of an illusion whether that quest be pursued in the fields of property, commercial law or personal relations.

<sup>112</sup>This unsatisfactory degree of uncertainty in testamentary law Cooley explains in part by the temptation of the parties "to engage in litigation on a mere chance that in some way not clearly perceived they may succeed in what they desire." *The Uncertainty of the Law* (1887) 4 Repts. Ga. Bar Assn. 109, 120.



but sometimes decidedly unreal. His law had no factual content other than the fact of the rule itself. Fact and law were things distinct and the former was no part of the latter. If law seems uncertain it is only because of uncertainty as to the view that will be taken of the facts—that kind of uncertainty can never be cured by perfecting the law for it inheres in the finite character of human understanding. Since Cooley's law is pure law, we find him arguing that law and the administration of law are two different things and one is not to be blamed for the sins of the other.

“Having said this much concerning law in the abstract, and concerning its silent and unobtrusive benefactions, we shall not shrink from a consideration of the law as it manifests itself in its administration. Here we shall admit, as indeed we have done already, that doubts, difficulties and uncertainties come in, and that sometimes the instrumentalities of the law become the subject of just reproach. It does not follow, however that the law itself is subject to reproach.”<sup>113</sup>

But if Cooley talks the language of natural rights, he talks the custom-worship of the historical jurist with equally great conviction. With whole-hearted approval, he quotes the proverb. “With customs we do well, but statutes may undo us” and adds that our laws are still for the most part customary and are likely to continue so. There is a Savignian *Geist* in Cooley's conception of the nature of law. “Law,” he avows, “is something more than a collection of rules.” By “more than,” however, Cooley does not mean to include anything non-legally factual, whether these be economic facts or the facts of law administration. The “more than” of his concept of law is indefinable spirit with the suggestion of Nationalism which custom invariably dictates

“Law is something more than a collection of rules. Those who expect to find somewhere all the law in black and white, fail to grasp its divine significance. Tongue has never formulated it completely, pen has never fully written it down. Law is expressed in statutes and in decisions, but as the anatomy is not all of the man, so these are not all the law, there is a vital force which is more than words, and which, if the words were all blotted out, would still hold the units of society together and in order, while the words were being reproduced.”<sup>114</sup>

With the development of civilization, we are told, customary laws and the laws of nature tend to approximate each other as legal rules. Though many of them may have been conventional in origin, when long observed they create a reason for themselves and

<sup>113</sup>The Uncertainty of the Law (1887) 4 Repts. Ga. Bar Assn. 109, 122.

<sup>114</sup>The Uncertainty of the Law (1887) 4 Repts. Ga. Bar Assn. 109, 126.

the citizen conforms to them without question as he does to the laws of nature whose operation he perceives about him.

No one could demonstrate better than Cooley the inseparability of the several Schools of Jurisprudence, one from the other.

### III.

#### COOLEY TO OUR CONTEMPORARIES

At the very heart of contemporary writing in the field of Jurisprudence is the problem of law reform. It seems always to have been so. Few indeed could or would approach the severely pure anatomical Jurisprudence of John Austin. We have seen that philosophy (natural law) tempered the views of so many whom we have chosen to label analytical or historical jurists.

No more significant warfare has ever been waged in the history of American juristic thought than the bitter warfare between codification and custom which ranged over the second half of the nineteenth century. The codificationists took their commands from David Dudley Field who found the beginnings of the common law in the code of Alfred.<sup>115</sup> Of course Field defines law as a command and he insists upon a distinction between law and jurisprudence.

"Though law and jurisprudence are not convertible terms, they are often used in the same sense. The latter is the science, which treats of the law and explains it, the former is the formulated precept."<sup>116</sup>

The practical utility of the study of Jurisprudence, according to Field, was that study might guide the sorely needed efforts to reform the law. In his zeal for reform, Field has long been likened to Bentham. Field clearly recognized the difficulty in arousing the members of the legal profession to the needs of reform, but he insisted that a lawyer has more than a duty to advise his clients aright and to deal with the courts. When the lawyer finds laws imperfect or unjust, he, as the one who best knows the laws and knows best how to improve them, ought to make his knowledge available for the public good. In short, the lawyer he conceived to be a man with a mission and that mission was law reform. In pointing the direction which reform should take, he thought nothing quite so valuable as the example of others and so he placed a de-

<sup>115</sup>Field, Address at the Dalhousie University Convocation, April 29, 1885, 19 Am. L. Rev. 616, 617

<sup>116</sup>Dalhousie Convocation Address (1885) 19 Am. L. Rev. 616, 617

cided emphasis upon the comparative method which he dignified by the term "comparative jurisprudence."

As the ideals to be sought after in the reform of Anglo-American law, Field set up three—condensation, simplicity and uniformity. He stoutly maintained that condensation would be attained only through codification. He did not see that rigid codes would never prevent the "multiplication of details" against which he arrayed himself. The first step in the problem of simplification he thought involved a realistic break with historical differences, distinctions and technicalities when present conditions no longer warranted obeisance to these ghosts of the past.<sup>117</sup> As to uniformity, he found it to be the crying need of a world no longer constituted of so many isolated communities, of a world committed to the policy of intercourse rather than to the policy of isolation. Condensation, simplicity, uniformity—these were the ideals to be sought after in a legal system and the means for attaining any and all of them was codification. Though Field did not include the attainment of certainty in his statement of the aims of his reform program—the attainment of certainty in the law and in its administration is clearly implicit in all of his labors.

That he translated his statement of aims and ideals into stern practice is, of course, a matter of common knowledge. He was himself the great maker of codes, the manufacturer of certainty. Thus he codified not only the law and practice of American states, but he bent his efforts to the formulation of an International Code<sup>118</sup> and insisted upon arbitration as the method of procedure for enforcement before resort should be had to arms. He would today, perhaps, find himself holding much in common with the idealistic School of International Law.

"In some happier age, under some more benignant star, there will yet, we would fain believe, be established among men a great Amphictyonic council of the nations with a wider sway than the Council of Greece, to which the nations will submit, as individuals now submit, with unflinching deference, to a court of honor."<sup>119</sup>

More familiar than his effort in behalf of an International Code is the imposing array of Codes covering the substance and

<sup>117</sup>Field singled out, as particularly unnecessary variations and distinctions, the law with respect to the effect given to sealed instruments and the law treating of the difference between real and personal property in respect of its devolution upon the owner's death. Dalhousie Convocation Address (1885) 19 Am. L. Rev. 616.

<sup>118</sup>Field, *Outline of an International Code* (1872) (2nd ed. 1876).

<sup>119</sup>Quoted by S. Netton Fiero, *David Dudley Field and His Work* (1895) 18 Rept. N. Y. St. Bar Assn. 177, 181. See also 1 *Field's Speeches, Arguments, Miscellaneous Papers* (Ed. Sprague 1884-90) 426, 481.

procedure of the law of New York, including a Penal Code, a Code of Criminal Procedure, a Civil Code, a Political Code, a Code of Evidence and a Code of Civil Procedure. None but the most faithful believer in a command theory of law could ever have spent a life in an effort of that kind.

One finds the most complete development of the theory of law as custom in the writings of James Coolidge Carter. In the midst of his busy life at the bar, Carter found time to assume the supreme command of the forces which defeated the adoption of the Field Civil Code in New York. This long struggle equipped him admirably for juristic controversy. To Carter the one striking characteristic of the development of private law was the very small influence of legislation.<sup>120</sup> That evidence led him to assert that law is found and not made. The judicial process he characterized as a search, in which both judge and advocates join, to discover the applicable rule of law.<sup>121</sup> The unwritten law is not regarded as a command but rather as a rule springing from the social standard of justice, or from customs and habits from which that standard has in turn been derived.<sup>122</sup>

The *sine qua non* of formal law is a judiciary and so the first step in the transformation of custom into formal law is the creation of judges. Now Carter believed that, though formal law does not at first exist, the law itself exists or there would be no occasion to appoint a judge to administer it. The explanation was all quite simple to Carter—he found one constant factor, human nature, and while that factor continued constant, law must always remain custom. He put it thus

“The social standard of justice exists in the habits, customs and thoughts of the people, and all that is needed in order to apply it to the simpler affairs of such a period is the selection of a person for a judge who best comprehends those habits, customs and thoughts.”<sup>123</sup>

Carter could hardly fail to be impressed by the unanimity with which early American jurists rejected the theory that law is necessarily the command of a superior and thus seems equally true of his contemporary, William G. Hammond. Hammond avowed “that

<sup>120</sup>Carter, *Law - Its Origin, Growth and Function* (1907) 118.

<sup>121</sup>Carter, *The Ideal and the Actual in the Law* (1890) 24 *Am. L. Rev.* 552ff. Cf. Pound, *The Ideal and the Actual in Law—Forty Years After*. (1930) 1 *Geo. Washington L. Rev.* 431.

<sup>122</sup>Carter, *The Ideal and the Actual in the Law* (1890) 24 *Am. L. Rev.* 752, 759.

<sup>123</sup>*The Ideal and the Actual in the Law* (1890) 24 *Am. L. Rev.* 752, 759. See also Carter, *Law - Origin, Growth and Function* (1907) 120.

we have no sovereign in the juristic or in the political sense."<sup>124</sup> But for all his disclaimer of the existence of a sovereign, it were error to think that Hammond regarded the origin of law in custom. Quite the opposite, "we find that the first trace of any recognition of order and law in the world appears in the form of some God or superior being."<sup>125</sup> Throughout his writing Hammond is conscious of a higher law than that framed by men. How far from Carter Hammond really is may be judged from this account of customary law in primitive society

"The resemblance between customary jural law and the law of nature or physical law is complete. Both are systems independent of human will to be observed and followed if one would prosper. One must plow and sow in a certain method if one would reap a satisfactory harvest, one must govern his actions by that customary law if he would not bring pestilence or disaster upon his family or his tribe."<sup>126</sup>

The differentiation between physical and jural law Hammond regarded as a later development which attained completeness only with the rise of legislation.

Legal rules were deemed to have a natural existence comparable to that of the principles of physical science.<sup>127</sup> The judge is also a finder of law, rather than a maker thereof, his function being to record his observations of the principles of penal law which are pre-existent in the natural order. The belief that principles upon which cases of first impression have been decided are the creation of judges is utterly unthinkable since it involved a denial of a divine order in the moral constitution of this world. If English and American judges are themselves the authors of the law which they expounded, we are forced to the admission that the whole course of their jurisprudence has been an unjust government of litigants under rules that did not exist when they entered into the transaction before the tribunal.

"The new view, that they (the judges) were really making law while they professed only to expound it, seems to me to rest entirely upon the assumption that all law must necessarily be legislation—a rule or rules promulgated beforehand in writing, by some earthly sovereign whom the people are bound to obey. The old

<sup>124</sup>Hammond's Blackstone (1890) (Editor's notes) There will be found extensive quotations from the early American jurists.

<sup>125</sup>1 Hammond's Blackstone (1890) 96.

<sup>126</sup>1 Hammond's Blackstone (1890) 103.

<sup>127</sup>For a contemporary effort to establish a kind of kinship between the methodology of legal sciences and the physical sciences, see W. W. Cook, *Modern Movements in Legal Education* (1920) 6 *Am. L. Rev.* 409; *Scientific Method and the Law* (1927) 13 *A. B. A. J.* 303, 15 *Johns Hopkins Alumni Mag.* No. 3.

doctrine rested on the assumption that there were fixed principles of jural as well as moral rights, which every man was bound to obey, and which every magistrate was bound to recognize and enforce to the best of his knowledge and ability."<sup>128</sup>

So it is that the higher law, to which the rules laid down by the judges must conform, comprises those immutable principles which control the universe. These include the eternal dictates of natural justice, reason, or equity, which are operative in guiding human conduct.

In 1894 appeared the lectures of John F Dillon under the forbidding title *The Laws and Jurisprudence of England and America*. These lectures reveal Dillon to be an analytical jurist but certainly not of the same severe stripe as was Field. In discussing the nature of law, true to the analytical pattern, he points out that law and morality are quite distinct spheres and he did not fall into the error of dismissing the question with that proposition as so many analytical jurists had done, thereby leaving their readers to draw the sad conclusion that our law has been built in disregard of the principles of morality. Rather, he leans to a Thomistic view of the relationship between law and morals:

"Theoretically, and for many purposes practically, lawyers must discriminate law from morality, and define and keep separate and distinct their respective provinces. But these provinces always adjoin each other and ethical considerations can no more be excluded from the administration of justice, which is the end and purpose of all civil laws, than one can exclude the vital air from his room and live."<sup>129</sup>

And this close interrelation Judge Dillon found to be a matter of considerable practicable importance in discussing the nature of the judicial process. Dillon's description of his own judicial behavior is singularly reminiscent of a like pronouncement by Kent.<sup>130</sup>

"If unblamed I may advert to my own experience, I always felt, in the exercise of the judicial office, irresistibly drawn to the intrinsic justice of the case, with the inclination, and if possible the determination to rest the judgment upon the very right of the matter. In the practice of this profession I always feel an abiding confidence that if my case is morally right and just it will succeed, whatever technical difficulties may appear to stand in the way; and the result usually justifies the confidence."<sup>131</sup>

<sup>128</sup>Hammond, Notes to his edition of Lieber's Legal and Political Hermeneutics (1880) 328.

<sup>129</sup>Dillon, *Laws and Jurisprudence of England and America* (1894) 17.

<sup>130</sup>Wm. Kent, *Memoirs and Letters of James Kent* (1898) 158-159.

<sup>131</sup>*Laws and Jurisprudence of England and America* (1894) 17-18.

Despite all this, however, he avows that the very essence of law is its sanction, i.e. the coercion of the State.<sup>132</sup>

To the problem of law reform, Dillon also gave considerable thought. He viewed with alarm both the bulk of our law (particularly case law) and its uncertainty. In trying to suggest the direction which reform must take he prophesied the expansion of legislative action. This he viewed as rather desirable since he believed the cause of certainty in the law would be promoted. On the question of codification and its desirability, Dillon's thinking seems to have been somewhat confused. He repudiated the Benthamite idea of a code whereby all the minutiae of legal rules might be embodied in a code to the end that the welter of reported case law might be superseded, but he championed the same rule of construction of a code which was followed by so many men upon the bench during his day, a notion which so thoroughly emasculated the codes of procedure once they succeeded of enactment—this was the rule that the code should be construed as an attempt to embody the common law. The same motive has prompted construing statutes strictly when in derogation of the common law.<sup>133</sup> Under such a rule of construction, substantially all that the legislature does is speedily undone in the courts.

Dillon would admonish each and every judge that his task is not to merely search the books and worship precedent but that, first and foremost, he must hand down a just decision. All who sit upon the bench he would charge with Dr. Johnson's observation—"no precedents can justify absurdity"<sup>134</sup> Of the American writers on Jurisprudence, it was probably Dillon who first gave us an epigrammatic picture of law as an abiding paradox in that it must be fixed and yet must progress.<sup>135</sup> In the confident affirmation that all law, whatever its form, "must be in its nature mutable and

<sup>132</sup>Cf. Holland. "The original, and still the popular conception of a 'law' is a command, disobedience to which will be punished, prescribing a cause of action." *Jurisprudence* (13th ed. 1924) 16.

<sup>133</sup>Dillon, *Laws and Jurisprudence of England and America* (1894) 183. Cf. Pound "The original New York Code of Civil Procedure failed of effect in many important particulars with respect to which its provisions were well calculated to achieve the ends sought because so many of the judges who were first called upon to administer it were determined to limit its operations and preserve the principles and the dogmas of the older procedure wherever possible." (citing Cases) *Some Principles of Procedural Reform* (1910) 4 *Ill. L. Rev.* 388, 390.

<sup>134</sup>Samuel Johnson, *Life of Milton*.

<sup>135</sup>The idea has been often stated, e.g. MacIntosh "The science of law is continually struggling to combine inflexible rules with transactions and relations perpetually varying," and Coleridge said. "The two antagonistic powers or opposite powers of the state under which all other state interests are comprised are those of permanence and progression." Both quoted by

temporary," one at first glance beholds something startling—but all that natural law ever stood for is still implicit in the qualification, which follows—"except those principles of justice and right that are rooted in the moral convictions of enlightened men."<sup>136</sup>

In the Harvard Law School were three men who contributed generously to the development of American juristic thought in the fruitful period between Story and Pound. They were Langdell, Ames and Gray

Without a scientific method there can be no science. If the law is to be regarded as a science, albeit a social science—legal method must necessarily be scientific method. It was Christopher Columbus Langdell who, by his system of case study, introduced the characteristic method of scientific investigation into the study of law. His experiment seems to be an extremely early attempt to apply the inductive method of the laboratory to matters foreign to the natural or physical sciences.<sup>137</sup> In these few words the story of his contribution to the science of law by way of giving to it a scientific method is told. The effect of his contribution has been revolutionary—its effects are indeed immeasurable. Langdell was one of those men whose published works, though extremely valuable, give no adequate idea of his labors, nor of the extent to which he has, through his students, influenced legal thought.<sup>138</sup> Perhaps Langdell's jurisprudential technique is best illustrated in

---

Jerome Frank, *Law and the Modern Mind* (1930) 289, note; Sir Henry Maine: "With these (progressive races of men) social necessities and social opinions are always more or less in advance of law. Law is stable; society is progressive. How shall this gulf be narrowed which has a perpetual tendency to reopen?" *Ancient Law* (Third American, Fifth London ed. 1888) XVI, Pound. "Law must be stable and yet it cannot stand still. Hence all thinking about law has struggled to reconcile the conflicting demands of the need of stability and of the need of change." *Interpretations of Legal History*. (1923).

<sup>136</sup>Dillon, *Laws and Jurisprudence of England and America* (1894) 297

<sup>137</sup>Langdell, *A Selection of Cases on the Law of Contracts* (1871) Preface; Langdell, *Teaching Law as a Science* (1887) 21 *Am. L. Rev.* 123; Pollock, *The Late Professor Langdell* (1906) 22 *Law Quar. Rev.* 353, Wambaugh, *Professor Langdell—A View of His Career* (1906) 20 *Harv. L. Rev.* 1, *The Nation* of July 12, 1906, Fox, *Professor Langdell—His Personal Influence* (1906) 20 *Harv. L. Rev.* 7, Beale, *Professor Langdell—His Later Teaching Days* *Ibid.* 9; Jeremiah Smith, *Professor Christopher C. Langdell* (1906) 2 *Proced. Bar Assoc., State of N. H.* 342. For a quite different estimate of Langdell, characterizing him as a "bookish man" responsible for the divorce of legal education from the realities of legal practice see Jerome Frank, *Why Not a Clinical Lawyer-School?* (1933) 81 *Univ. of Pa. L. Rev.* 907, Frank, *What Constitutes a Good Legal Education* (1933) 19 *A. B. A. J.* 723, 7 *Am. L. School Rev.* 894.

<sup>138</sup>Jeremiah Smith, *Professor Christopher C. Langdell* (1906) 2 *Proced. Bar Assoc., State of N. H.* 342.



his article "Classification of Rights and Wrongs"<sup>139</sup> which reveals that when he essayed a problem in general jurisprudence he did so according to the most careful methods of the best exemplars of the analytical school. It is analysis and classification—but it is not mechanical analysis and classification, rather re-analysis and re-classification, in answer to a changing law conditioned by the time and place in which it must operate.

If only for the reason that James Barr Ames was the most promising of "Langdell's Freshmen" and that he did more than any single, individual to establish the Langdell method of instruction as the standard of virtually all the better law schools, he would merit a prominent place in the story of American juristic development. But great as such an achievement was, Ames did infinitely more. A science of Jurisprudence unless it be grounded upon a sound and thoroughgoing legal history is not worthy of the name. Now it was Ames who supplied much of the historical learning upon which Jurisprudence has since builded. He was America's first significant legal historian and he probably still stands as our first legal historian today. Though he wrote no comparable institutional treatise, his services to legal history have frequently been compared to those of Maitland, whose contemporary he was.<sup>140</sup> Both were passionately and narrowly devoted to the Common Law system to the exclusion of much help that a moderate use of the comparative method might have afforded and both were possessed by the sense of the supreme importance of a knowledge of the sources of legal doctrine. The very efforts which insured the rapid success of a scientific method in law teaching, i.e., the preparation of many case books, prevented Dean Ames from giving to the world any more than a fragment of the result of his labors in this field. It is to be regretted that now when the movement for a scientific legal history seems to be gaining considerable momentum,<sup>141</sup> there is apparently no Ames among us.

---

<sup>139</sup>Langdell, *A Brief Survey of Equity Jurisdiction* (2nd ed. 1908) 1-40, 219-260 (1900) 13 *Harv. L. Rev.* 37, 659.

<sup>140</sup>Wigmore, *James Barr Ames* (1910) 4 *Ill. L. Rev.* 509, 510; *James Barr Ames* (1910) 58 *Univ. Pa. L. Rev.* 289, 291. Mack, *James Barr Ames—His Personal Influence* (1910) 23 *Harv. L. Rev.* 336.

<sup>141</sup>Happily attention is now being focused upon the need for the collection and preservation of the materials from which the history of American law must eventually be written. See Joseph H. Beale, *The Study of American Legal History* (1933) 39 *West Va. Quar.* 95, and Carl Wheaton, *A Movement to Stimulate the Writers and Study the Legal History of the United States* (1933) 19 *A. B. A. J.* 209. Recently The American Legal History Society has been organized for the purpose of advancing the knowledge of the history of American law by making available and promoting the preservation of legal studies and the publication of selected

Viewing Ames' legal doctrine as a whole, one must conclude that he was not a law reformer, if by law reform is meant a pronounced departure from the course traced by previous legal development. Being one of the finest exemplars of the historical school, he preferred to stand *super antiquas vias*, and where he advocated a doctrine at variance with prevailing judicial opinion, invariably it was because he believed that opinion to represent a departure from an earlier and better standard. This does not imply that he was a worshipper of precedents as such, on the contrary, he was a bold critic. But, as distinguished from an individual precedent, a doctrine established by a long course of judicial decision was quite different matter. True to the philosophy of the historical school, long established doctrine, "hallowed by prescription," had acquired an almost sacred character for Ames and departure from it was heresy. Of course the social reformer, impatient of the slow process of legal evolution, will criticize such an attitude of mind, but it is not at all inconsistent with the possession of a keen sense of justice and with the frequent characterization of him as one who taught law "as it ought to be."<sup>142</sup> To put it another way, Ames' means of escape from worship of precedent which shocked so many others, was his belief that it was the function of the law teacher to weld a body of mutually consistent and coherent principles from the decisions. To his mind there was but one right principle upon a given point, and if the decisions failed to recognize it, so much the worse for the decisions. He would not permit his reverence for the doctrine born of the cases to blind him to the nature of the moral principle that lay behind that doctrine.<sup>143</sup>

The same period that saw Langdell and Ames at Harvard saw the production of America's finest book on analytical jurisprudence in John Chipman Gray's "Nature and Sources of the Law."<sup>144</sup> In the midst of Gray's scholarly writing in the field of Real Property, there appeared in 1892 the prolegomena to the later lectures—his essay, "Some Definitions and Questions in Jurisprudence."<sup>145</sup> The essay seems to justify the conclusion that for the analytical jurist

---

source materials and monographic studies. See Harris, Association of American Law Schools Holds Annual Meeting (1934) 20 A. B. A. J. 119-120. The American Historical Association has a cooperating Committee on Legal History.

<sup>142</sup>Williston, James Barr Ames—His Services to Legal Education (1910) 23 Harv. L. Rev. 330-332.

<sup>143</sup>Such a philosophy is implicit in his Law and Morals (1908) 22 Harv. L. Rev. 97

<sup>144</sup>The first edition appeared in 1909. The second edition by Professor Gray's son, Roland Gray, appeared in 1921.

<sup>145</sup>(1892) 6 Harv. L. Rev. 21.

an abiding struggle for precise definition is the *sine qua non*—yet, Gray seems to have wisely avoided the temptation of any such thing as Dean Wigmore styles “a science of nomothetics,” that seducer of so many American analytical jurists. Now the cause of analytical jurisprudence could not possibly have been entrusted to a better advocate than Gray. For Gray recognized the valuable contribution which analytical jurisprudence could make, at the same time recognizing its shortcomings. He was surprisingly tolerant—though he chose the analytical method as his own vehicle, he ungrudgingly acknowledged all of the value which the historical and the comparative method could teach him, unlike so many analytical jurists, who by the magic of nomenclature and tight classification devise messianic legal schemes to save us from all further doubt and worry. Gray may be said to have somewhat doubted the value of analytical jurisprudence on the purely constructive side to him it was rather a very effective and a very necessary equipment of the sincere critic. He puts it thus:

“Especially valuable is the negative side of analytic study. On the constructive side it may be narrow and unfruitful, but there is no better means for the puncture of wind-bags.”<sup>146</sup>

Gray wrote at a time when the historical school, at least in this country, was still possessed of its full vigor,<sup>147</sup> and yet he succeeded in restoring no little portion of its faded glory to analytical jurisprudence. A partial explanation of this feat lies in what has been said, a further explanation is to be found in the fact that, though appreciative of the contribution which the historical school had made, he saw certain shortcomings in the historical method which its own enthusiastic advocates did not themselves see. He saw that if you talked of evolution and flux you did not do practical things. Gray appears to have had an insight into a juristic problem which since the rise of Sociological Jurisprudence and Realism has become the storm center of jurisprudential discussion. The necessity of catching hold of something and holding it in stability for a moment while you do something useful with it seems implicit in this observation:

“I by no means regret this [the emphasis of the historical

<sup>146</sup>Gray, *Some Definitions and Questions in Jurisprudence* (1892) 6 Harv. L. Rev. 21, 23.

<sup>147</sup>At the time Gray's *Nature and Sources of the Law* made its appearance in 1909, Pound's call for a sociological jurisprudence in America had already gone forth but it is not likely that it had by that time made any considerable number of converts. See Pound, *A New School of Jurists* (1903) 4 Univ. of Neb. Studies No. 3, *Do We Need a Philosophy of Law?* (1905) 5 Col. Rev. 339; *The Need of a Sociological Jurisprudence* (1907) 19 Green Bag 607 31 Repts. Am. Bar Assn. 911.

school upon legal evolution], and I fully recognize the fact that legal conceptions are constantly changing; yet, to borrow a figure from the shop, it seems well at times to take account of stock, and to consider where legal studies and investigations have in fact brought us, although we believe it is neither possible nor desirable to prevent their carrying us further."<sup>148</sup>

In this too-little-read prolegomena Gray defined Jurisprudence as "the science which deals with the principles on which courts ought to decide cases."<sup>149</sup> That is the definition of an analytical jurist, but it is also the definition of a philosopher; it is certainly not Austinian. The preliminaries set forth in this essay of 1892 were fully developed in the lectures at Columbia which finally assumed the form of the "Nature and Sources." The book treats first of the nature of law, including legal rights and duties, legal persons, the state, the law of courts, the law of nations, jurisprudence, and secondly, of the sources of law including statutes, judicial precedents, opinions of experts, custom, morality, and equity.

Gray enumerates the usual three possible approaches to juristic study of the pre-sociological period—the historical, the systematic or analytic, and the deontological or ethical. True to the time-honored formula for a book that will merit the imprimatur of the analytical school, Gray treats upon legal rights and duties.<sup>150</sup> Few of such analytical treatments have much abiding value as generalizations, though they may be of untold merit in the analysis of concrete situations. It is therefore possible to criticize Gray's treatment of legal rights and duties only by comparison with the handling of similar materials by such analysts as Salmond,<sup>151</sup> Hohfeld,<sup>152</sup> and Kocourek.<sup>153</sup> Of these it may be said that each system is capable of being the best devised—provided that all lawyerkind agreed to believe that any one of them is that best. Gray's treatment has much to commend it for it claims far less in

<sup>148</sup>Gray, *Some Definitions and Questions in Jurisprudence* (1892) 6 Harv. L. Rev. 21, 22.

<sup>149</sup>*Some Definitions and Questions in Jurisprudence* (1892) 6 Harv. L. Rev. 21, 27. Compare the definitions of "Jurisprudence" as found in Austin and Holland and there observe the complete exclusion of the deontological element.

<sup>150</sup>Gray, *Nature and Sources of the Law* (2nd ed. 1921) Ch. 1, pp. 7-26.

<sup>151</sup>Salmond, *Jurisprudence* (8th ed. 1930) Chs. XII and XIII, pp. 273, 276.

<sup>152</sup>Hohfeld, *Some Fundamental Legal Conceptions As Applied in Judicial Reasoning*. (1923) 22-193. (1913) 23 Yale L. J. 16; (1917) 26 Yale L. J. 710. See especially the Jural Opposites and Jural Correlatives set out in *Fundamental Legal Conceptions* 65 (1917) 26 Yale L. J. 710.

<sup>153</sup>Kocourek, *Jural Relations* (2nd ed. 1926), especially the Tables set out at pp. 21, 27 and 28.

the way of finality than do the more pretentious analyses of Hohfeld and Kocourek.<sup>154</sup>

It is difficult to say just what the concept of the state and sovereignty within the state mean to Gray. At one time he seems to look upon the state as the whole body of the nation in the guise of a personified unit greatly desirous that each member should wash himself each day, but regretfully refraining from such a command because it would be somewhat inconvenient to compel such ablutions.<sup>155</sup> Elsewhere he intimates that the State may be a figment of the imagination for which patriots may find it sweet to die,<sup>156</sup> or a mask behind which the "real rulers" of society may take refuge while subjecting the unknown citizens to their will.<sup>157</sup> The test seems to indicate that these "real rulers" are neither kings nor presidents, but they are political bosses. And so far as sovereignty is identified it appears to reside in these same "real rulers" who create not only the state, but create and control the courts as well.<sup>158</sup>

Perhaps the portion of Gray's book of most permanent value is his analysis of the Law of a state which he defines as "the rule which the courts, that is, the judicial organs of that body lay down for the determination of legal rights and duties."<sup>159</sup> We are told that law is not a command of a sovereign, as Austin would have us believe, nor is the foundation of the law to be found in the common consciousness of the people, where Savigny found it. Further, it is inaccurate to state that judges discover the Law as a scientist might discover laws of Nature, for a judge cannot make a mistake in the same way that Newton could inasmuch as the "difference between the Judges and Sir Isaac is that a mistake by Sir Isaac in calculating the orbit of the earth would not send it spinning round the sun with an increased velocity, his answer to the problem would be simply wrong; while if the Judges, in investigating the reasons on which the Law should be based come to a wrong result, and give forth a rule which is discordant with the eternal verities, it is none the less Law."<sup>160</sup>

<sup>154</sup>For a contrary view attributing Gray's less neat system to a lack of perception of his problem, see Vance, *Review of Gray's Nature and Sources of the Law* (2nd ed. 1922) 32 *Yale L. J.* 210, 211. Professor Vance kept the Hohfeldian faith to the last. See his *Handbook of the Law of Insurance* (2nd ed. 1930) Preface to the 2nd ed. V.

<sup>155</sup>Gray, *Nature and Sources of the Law* (2nd ed. 1921) 82.

<sup>156</sup>*Nature and Sources of the Law* (2nd ed. 1921) 67, 70.

<sup>157</sup>*Nature and Sources of the Law* (2nd ed. 1921) 69.

<sup>158</sup>*Nature and Sources* (2nd ed. 1921) 70, 122, 123.

<sup>159</sup>*Nature and Sources* (2nd ed. 1921) 84.

<sup>160</sup>*Nature and Sources* (2nd ed. 1921) 101.

It was just about the time Professor Gray expressed these views that James Coolidge Carter's *Law, Its Origin, Growth and Function* appeared, proclaiming that the judges were the discoverers and not the makers of the law.<sup>161</sup> A like view had been stoutly argued by Professor William G. Hammond.<sup>162</sup> In refuting this proposition, Gray may be charged with flying to the other extreme. He took the position that even statutes duly passed by the legislature are not law, but merely "sources of law" upon which the judges draw in exercising their lawmaking function.<sup>163</sup> Most of us today would agree with Mr. Justice Cardozo, that the truth is midway between the extremes represented by Carter and Gray.<sup>164</sup>

Of course, if one accepts Gray's definition of law as the rules applied by the judges of any sovereign state the conclusion that international law is not law in the proper sense is inevitable. Only rules applied by a court established by the nations would be Law in the proper sense.<sup>165</sup>

To Gray, Jurisprudence means "the statement and systematic arrangement of the rules followed by the courts and of the principles involved in those rules."<sup>166</sup> Within his analytical school there are three kinds of jurisprudence, particular jurisprudence, comparative jurisprudence, and general jurisprudence. Particular jurisprudence considers the law of a particular people. Comparative jurisprudence is the comparison of the laws of two or more peoples, and general jurisprudence is the comparison of all the legal systems of the world. As there are many legal systems which are practically unknown to us, general jurisprudence as a science based on observation does not yet exist.<sup>167</sup>

As an analytical jurist, one might suppose that Gray would deny that the deontological element enters into the science of jurisprudence. On the contrary, he tells us that particular jurisprudence is not limited in its subject matter to the rules which have been actually applied by the courts, but it considers also what the rule

<sup>161</sup>For discussion of Carter's views see supra p. 27.

<sup>162</sup>In his edition of Blackstone's Commentaries (1890) for discussion of Professor Hammond's views see supra p. 27.

<sup>163</sup>Gray, *Nature and Sources of the Law* (2nd ed. 1921) 125, 170.

<sup>164</sup>Cardozo, *The Nature of the Judicial Process* (1921) 124-135. See also pp. 104-110.

<sup>165</sup>Gray, *Nature and Sources of the Law* (2nd ed. 1921) 130-132.

<sup>166</sup>*Nature and Sources of the Law* (2nd ed. 1921) 133.

<sup>167</sup>*Nature and Sources* (2nd ed. 1921) 135-136. The field over which Gray would have his "general jurisprudence" range to the point of including "the law of many of the nations and tribes" (primitive law) would seem to carry with it by necessary implication an admission that popular custom is at least in some instances law.

should be in cases where no rules exist. As soon as a rule is declared on a given point, the question of what the law on that subject should be ceases to be a subject of jurisprudence and becomes a question for the science of legislation. The same principle he would carry over into comparative jurisprudence. If we are comparing two legal systems, the question of what the law ought to be on any given point is proper unless the matter is definitely settled in both jurisdictions, then the question of what the law ought to be is no longer appropriate.

With Holland's definition of Jurisprudence as a formal analytical science,<sup>168</sup> Gray cannot agree, it would exclude too much. Nor can he agree with Lightwood that a science of Jurisprudence should deal only with the law that is demonstrated to "have real basis in the wants of the people;"<sup>169</sup> that more nearly approximates a definition for the Science of Legislation. The history of institutions is admitted to be a valuable aid to the understanding of their nature, but Gray cannot subscribe to the tenets of the historical school since they beget literary rather than practical study and hinder the grasping of the law of the present time as a whole.

To the late Professor Munroe Smith of Georgetown and Columbia must go the credit for at least two achievements of importance. He contributed the standard American treatment of European legal systems.<sup>170</sup> To Smith also must go no small share of the credit for introducing Jhering to and interpreting him for American readers.<sup>171</sup>

For a few brief years, the views of Wesley Newcomb Hohfeld excited the interest of these who concerned themselves with the development of American Jurisprudence. Hohfeld is dead and perhaps no more convincing evidence of the death of that particular variant of analytical jurisprudence which he so painstakingly expounded could be found than the all but complete abandon-

---

<sup>168</sup>"Jurisprudence is therefore not the material science of those portions of the law which various nations have in common, but the formal science of these relations of mankind which are generally recognized as having legal consequences." Holland, *Jurisprudence* (3rd ed. 1886) 8.

<sup>169</sup>Lightwood, *The Nature and Positive Law* (1883) 10.

<sup>170</sup>Munroe Smith, *The Development of European Law* (1928) Of importance also is his lecture, *Jurisprudence* (1908)

<sup>171</sup>Munroe Smith, *Four German Jurists*, Bruns, Windscheid, Jhering, Greist (1895) 10 *Pol. Sci. Q.* 664, (1896) 11 *Ibid.* 278, (1897) 12 *Ibid.* 21. In these articles, Jhering is treated at length, Bruns, Windscheid and Greist are treated but briefly.

ment of Hohfeldianism by the School whose faculty he last graced.<sup>172</sup>

Hohfeld was a severe thinker, for he was, in essence, the most certain of certainty lawyers. Because so much of juristic thought following the Hohfeld pattern coming down to us at a comparatively recent date<sup>173</sup> has been so disappointing in point of appeal to any great number of persons, it may be doubted whether the legal analysis which Professor Hohfeld offered would have enjoyed any wide acceptance had he lived to further advocate it. Yet it may be that we have been at times a bit unfair in appraising the man and his work. We ought not to speak with too great finality about the potentialities of unfinished business that can never be finished for want of the craftsman. What Hohfeld attempted in his *Fundamental Legal Conceptions* was<sup>174</sup> in reality mere prolegomena—what was to follow might have proved extremely profitable. Professor Hohfeld began to build an analytical jurisprudence in part at least for the same reason that Gray had, simply because he believed there was no more sharply pointed instrument for the puncture of windbags.<sup>175</sup> But behind, over and beyond this initial structure of analytical jurisprudence

<sup>172</sup>It would seem that since Professor Vance has passed on, the last of the Hohfeldians is Yale's Professor Corbin. See Corbin, *Cases on the Law of Contracts* (1933) X, Corbin's *Anson on Contracts* (Am. Ed. 1930) "Preface to the Third American Edition" VI, *Rights and Duties* (1924) 33 Yale L. J. 501, *What Is a Legal Relation?* (1922) 5 Ill. L. Q. 50; *Jural Relations and Their Classification* (1920) 30 Yale L. J. 226; *Legal Analysis and Terminology* (1919) 29 Yale L. J. 163, *Offer and Acceptance, and Some of the Resulting Legal Relations* (1917) 26 Yale L. J. 169; *Terminology and Classification in Fundamental Jural Relations* (1921) 4 Am. L. School Rev. 607 Vance, *A Handbook of the Law of Insurance* (2nd ed. 1930). Preface to the 2nd ed. V

It is submitted that any scheme of rigid classification of legal relations, if followed through consistently, will make for a system of legal interpretation in which certainty is a most prominent characteristic. This is fervently denied by Professor Walter Wheeler Cook. See Cook, *Hohfeld's Contributions to the Scheme of Law* (1919) 28 Yale L. J. 721-2. In the light of the fluid kind of law advocated in some of Llewellyn's writings, such as *A Realistic Jurisprudence—the Next Step* (1930) 30 Col. L. Rev. 431 and *Some Realism About Realism—Responding to Dean Pound* (1931) 44 Harv. L. Rev. 1222, it is of interest to read his editorial, as a student at Yale, upon the death of Professor Hohfeld (1919) 28 Yale L. J. 795, 4 Am. L. S. Rev. 409.

<sup>173</sup>Kocourek, *Jural Relations* (1928). Of particular interest is the introduction by Wigmore; Kocourek, *An Introduction to the Science of Law* (1930) especially Ch. IV

<sup>174</sup>Two articles, the first appearing in (1913) 23 Yale L. J. 16 and the second appearing in (1917) 26 Yale L. J. 710; both reprinted in *Fundamental Legal Conceptions* (Hohfeld's miscellaneous legal essays edited with an appreciation of the author's work by W W Cook, 1923) 23, 65.

<sup>175</sup>Gray, *Nature and Sources of the Law* (2nd ed. 1921), *Some Definitions and Questions in Jurisprudence* (1892) 6 Harv. L. Rev. 21, 23.



lay a program which if it failed to meet all the demands of the rising Sociological School was, nevertheless, a program in many ways admirable, broadly conceived and constructive in purpose.<sup>176</sup> In his program, Hohfeld postulated six "departments of general jurisprudence" wherein intensive and extensive study and research should be fostered. These departments included

1. Historical, or genetic, jurisprudence.
2. Comparative, or eclectic, jurisprudence.
3. Formal, or analytical, jurisprudence.
4. Critical, or teleological, jurisprudence.
5. Legislative, or constructive, jurisprudence.
6. Dynamic, or functional, jurisprudence.

The answer to this elaborate plea for a multi-compartmental jurisprudence is, perhaps, that Sociological jurisprudence comprises all these varied techniques and methods in an effective single instrument. But the fact stands that in plan and ambition, Hohfeld was far more than an analytical jurist pure and simple. Analytical jurisprudence was simply the one department of six wherein his short life permitted him to work.

In his analytical work, Hohfeld argued that what law needed was uniformity of method. In the perfection of an agreement upon the ideal method lay the only possible answer to the quest for certainty. Through faith in method, he was able to arrive at fundamental concepts<sup>177</sup> and these legal concepts were deemed applicable to what seemed to be the most divergent and dissimilar branches of the law. Let Hohfeld tell you how it worked

"By such a process it becomes possible not only to discover essential similarities and illuminating analogies in the midst of what appears superficially to be infinite and hopeless variety, but also to discern common principles of justice and policy underlying the various jural problems involved. An indirect but very practical, consequence is that it frequently becomes feasible by virtue of such

<sup>176</sup>Hohfeld, *A Vital School of Jurisprudence and Law; Have American Universities Awakened to the Enlarged Opportunities and Responsibilities of the Present Day?* Fundamental Legal Conceptions (1923) Essay VIII, 332-384.

<sup>177</sup>These constituted the "fundamental legal conceptions" according to Hohfeld.

Jural Opposites	}	right	privilege	power	immunity
		no-right	duty	disability	liability
Jural Correlatives	}	right	privilege	power	immunity
		duty	no-right	liability	disability

See *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, Fundamental Legal Conceptions (1923) Essay I, pp. 23, 36 (1913) 23 Yale L. J. 16, 29. Cf. Kocourek, *Jural Relations* (1928) Ch. IV, Wigmore, *Introduction to Kocourek's Jural Relations* (1928), Wigmore, *Nomothetics* (1914) 28 Harv. L. Rev. 1.

analysis, to use as persuasive authorities judicial precedents that might otherwise seem altogether irrelevant. In short, the deeper the analysis, the greater becomes one's perception of fundamental unity and harmony in the law."<sup>178</sup>

Now there is much value in Hohfeldianism—there can be no doubt that it will make for clear thinking upon many a sadly muddled problem.<sup>179</sup> But as a means of juristic salvation it has a fatal defect; it is the same defect which proves fatal to Kocourekism and to Wigmorean nomothetics. You cannot make men throw away age-old words and age-old ways of thought, albeit they be loose words and slovenly ways. In the gospel of nomothetics, whoever its preacher, the lawyer has had little faith.

Today a great deal is heard about the interrelations between law and economics. Indeed, it would seem that all of Juristic Realism which does not answer to the description of Psychological Realism may be labeled Economic Realism. Long before the rise of militant realism—economic or otherwise—economic materials were introduced into jurisprudence as a factor conditioning the development of law by exponents of the economic interpretation of legal history. In America a positivist economic interpretation was grafted upon the orthodox English analytical jurisprudence,<sup>180</sup> which simply meant that, law being regarded as the command of the sovereign, the sovereign was conceived to be a mere mouth-piece through which economic forces speak. The foremost exponent of this creed in America was Brooks Adams who tells us that "law is a resultant of forces which arise from the struggle for existence among men," and that Law "is the will of a sovereign precisely in the same way that earth's orbit, which is a resultant of a conflict between centrifugal and centripetal force, is the will of a sovereign. Both the law and the orbit are necessities."<sup>181</sup> In another place he tells us that, inasmuch as the law is the resultant of forces in conflict, it "must ultimately be deflected in the direction of the stronger and be used to crown the victor."<sup>182</sup> In other words nothing had power or strength to withstand the march of the economic law—and economic determinism

<sup>178</sup>Fundamental Legal Conceptions as Applied in Judicial Reasoning, *Fundamental Legal Conceptions* (1923) Essay I. pp. 23, 64, (1916) 23 *Yale L. J.* 16, 57

<sup>179</sup>The several law review articles by Professor Corbin dealing with numerous knotty problems in the law of Contracts bear ample witness to the effectiveness of clear-thinking analysis along Hohfeldian lines.

<sup>180</sup>Pound, *Interpretations of Legal History* (1923) 94.

<sup>181</sup>Brooks Adams, *Centralization and the Law* (1906) 23.

<sup>182</sup>*Centralization and the Law* (1906) 133.

has been read into English analytical jurisprudence.<sup>183</sup> Brooks Adams found confirmation of his views in the doctrinal and institutional history of the common law,<sup>184</sup> while another stock argument for the economic interpretation was derived from the rules of the common law dealing with injuries through the fault of a fellow servant and the doctrine of assumption of risk. This latter argument received a conclusive answer in a critical examination of the cases upon which Brooks Adams relied and of some others upon which he did not rely, by the late Francis Marion Burdick in his memorable article "Is the Law an Expression of Class Selfishness?"<sup>185</sup> On the basis of the evidence, Professor Burdick rejected the notion that law is nothing more than the resultant of the clashing of greed-sodden classes or the product of blind economic forces untempered by moral and social forces, as untenable. His statement has an abiding value, it ought to be read by that group, so vociferous today, who would explain all legal phenomena solely on economic grounds.

Such in the main were the rather scattered efforts of American scholarship in the field of Jurisprudence before the advent of Roscoe Pound.

The work of Oliver Wendell Holmes chronologically belongs to the period of which I have written but in point of content it has kinship with—indeed it fathered—the thought of Pound, Frank, Llewellyn, Rodell and scores of other realists and iconoclasts.<sup>186</sup> Their work is another story that must wait upon a later telling.

---

<sup>183</sup>Pound has pointed out that the evidence adduced by the adherents of the economic interpretation was derived from legislation. Thus the dogma of the analytical school which made law the command of a sovereign (body of rules enforced by the sovereign's judicial organs) *Interpretations of Legal History* (1923) 96-97. The command theory fairly shouts in this statement from Adams "The dominant class, whether it be the priests or usurers or soldiers or bankers, will shape the law to favor themselves, and that code will most nearly approach the ideal of justice of each particular age which favors most perfectly the dominant class." Adams, *Centralization and the Law* (1906) 63-64.

<sup>184</sup>The arguments from history which Adams made are effectively answered by Pound, *Interpretations of Legal History* (1923) 101ff.

<sup>185</sup>(1912) 25 *Harv. L. Rev.* 349. The article stands, together with Pound's pages (96-101) in his *Interpretations of Legal History* (1923), as the classic answer to the arguments which Brooks Adams advanced.

<sup>186</sup>For an explanation of Holmes' fatherhood see Lucey, *Natural Law and American Legal Realism, their Respective Contributions to a Theory of Law in a Democratic Society* (1942) 30 *Geo. L. J.* 493.