under the same heading as those where the nexus of logic is closer and more binding.[47] At bottom and in their underlying motives, they are phases of the same method. They are inspired by the same yearning for consistency, for certainty, for uniformity of plan and structure. They have their roots in the constant striving of the mind for a larger and more inclusive unity, in which differences will be reconciled, and abnormalities will vanish.

[47] Cf. Gény, *op. cit.*, vol. II, p. 121, sec. 165; also vol. I, p. 304, sec. 107.



# Lecture II. The Methods of History, Tradition and Sociology

THE method of philosophy comes in competition, however, with other tendencies which find their outlet in other methods. One of these is the historical method, or the method of evolution. The tendency of a principle to expand itself to the limit of its logic may be counteracted by the tendency to confine itself within the limits of its history. I do not mean that even then the two methods are always in opposition. A classification which treats them as distinct is, doubtless, subject to the reproach that it involves a certain overlapping of the lines and principles of division. Very often, the effect of history is to make the path of logic clear.[1] Growth may be logical whether it is shaped by the principle

[1] Cf. Holmes, "The Path of the Law," 10 Harvard L. R. 465.

of consistency with the past or by that of consistency with some pre-established norm, some general conception, some "indwelling, and creative principle."[2] The directive force of the precedent may be found either in the events that made it what it is, or in some principle which enables us to say of it that it is what it ought to be. Development may involve either an investigation of origins or an effort of pure reason. Both methods have their logic. For the moment, however, it will be convenient to identify the method of history with the one, and to confine the method of logic or philosophy to the other. Some conceptions of the law owe their existing form almost exclusively to history. They are not to be understood except as historical growths. In the development of such principles, history is likely to predominate over logic or pure reason. Other conceptions, though they have, of course, a history, have taken form and shape to a larger extent under the influence of reason or of com-

[2] Bryce, "Studies in History and Jurisprudence," vol. II, p. 609.





parative jurisprudence. They are part of the *jus gentium*. In the development of such principles logic is likely to predominate over history. An illustration is the conception of juristic or corporate personality with the long train of consequences which that conception has engendered. Sometimes the subject matter will lend itself as naturally to one method as to another. In such circumstances, considerations of custom or utility will often be present to regulate the choice. A residuum will be left where the personality of the judge, his taste, his training or his bent of mind, may prove the controlling factor. I do not mean that the directive force of history, even where its claims are most assertive, confines the law of the future to uninspired repetition of the law of the present and the past. I mean simply that history, in illuminating the past, illuminates the present, and in illuminating the present, illuminates the future. "If at one time it seemed likely," says Maitland,[3] "that the historical spirit (the spirit which strove to understand the classi-

[3] "Collected Papers," vol. III, p. 438.

cal jurisprudence of Rome and the Twelve Tables, and the Lex Salica, and law of all ages and climes) was fatalistic and inimical to reform, that time already lies in the past. . . . Nowadays we may see the office of historical research as that of explaining, and therefore lightening, the pressure that the past must exercise upon the present, and the present upon the future. Today we study the day before yesterday, in order that yesterday may not paralyze today, and today may not paralyze tomorrow."

Let me speak first of those fields where there can be no progress without history. I think the law of real property supplies the readiest example.[4] No lawgiver meditating a code of laws conceived the system of feudal tenures. History built up the system and the law that went with it. Never by a process of logical deduction from the idea of abstract ownership could we distinguish the incidents of an estate in fee simple from those of an estate for life, or those of an estate for life from those of an estate for years. Upon

[4] Techt v. Hughes, 229 N. Y. 222, 240.





these points, "a page of history is worth a volume of logic."[5] So it is wherever we turn in the forest of the law of land. Restraints upon alienation, the suspension of absolute ownership, contingent remainders, executory devises, private trusts and trusts for charities, all these heads of the law are intelligible only in the light of history, and get from history the impetus which must shape their subsequent development. I do not mean that even in this field the method of philosophy plays no part at all. Some of the conceptions of the land law, once fixed, are pushed to their logical conclusions with inexorable severity. The point is rather that the conceptions themselves have come to us from without and not from within, that they embody the thought, not so much of the present as of the past, that separated from the past their form and meaning are unintelligible and arbitrary, and hence that their development, in order to be truly logical, must be mindful of their origins. In a measure that is true of most of the

[5] Holmes, J., in N. Y. Trust Co. v. Eisner, 256 U. S. 345, 349.

conceptions of our law. Metaphysical principles have seldom been their life. If I emphasize the law of real estate, it is merely as a conspicuous example. Other illustrations, even though less conspicuous, abound. "The forms of action we have buried," says Maitland,[6] "but they still rule us from their graves." Holmes has the same thought:[7] "If we consider the law of contract," he says, "we find it full of history. The distinctions between debt, covenant and assumpsit are merely historical. The classification of certain obligations to pay money, imposed by the law irrespective of any bargain as quasi-contracts, is merely historical. The doctrine of consideration is merely historical. The effect given to a seal is to be explained by history alone." The powers and functions of an executor, the distinctions between larceny and embezzlement, the rules of venue and the jurisdiction over foreign trespass, these are a few haphazard illustrations of growths which history has fostered, and which history

[6] "Equity and Forms of Action," p. 296.
[7] "The Path of the Law," 10 Harvard L. R. 472.





must tend to shape. There are times when the subject matter lends itself almost indifferently to the application of one method or another, and the predilection or training of the judge determines the choice of paths. The subject has been penetratingly discussed by Pound.[8] I borrow one of his illustrations. Is a gift of movables *inter vivos* effective without delivery? The controversy raged for many years before it was set at rest. Some judges relied on the analogy of the Roman Law. Others upon the history of forms of conveyance in our law. With some, it was the analysis of fundamental conceptions, followed by the extension of the results of analysis to logical conclusions. The declared will to give and to accept was to have that effect and no more which was consistent with some pre-established definition of a legal transaction, an act in the law. With others, the central thought was not consistency with a conception, the consideration of what logically ought to be done, but rather consistency

[8] "Juristic Science and the Law," 31 Harvard L. R. 1047.

with history, the consideration of what had been done. I think the opinions in Lumley v. Gye, 2 El. & Bl. 216, which established a right of action against A. for malicious interference with a contract between B. and C., exhibit the same divergent strains, the same variance in emphasis. Often, the two methods supplement each other. Which method will predominate in any case may depend at times upon intuitions of convenience or fitness too subtle to be formulated, too imponderable to be valued, too volatile to be localized or even fully apprehended. Sometimes the prevailing tendencies exhibited in the current writings of philosophical jurists may sway the balance. There are vogues and fashions in jurisprudence as in literature and art and dress. But of this there will be more to say when we deal with the forces that work subconsciously in the shaping of the law.

If history and philosophy do not serve to fix the direction of a principle, custom may step in. When we speak of custom, we may mean more things than one. "Consuetudo," says Coke, "is





one of the maine triangles of the lawes of England; these lawes being divided into common law, statute law and customs."[9] Here common law and custom are thought of as distinct. Not so, however, Blackstone: "This unwritten or Common Law is properly distinguishable into three kinds: (1) General customs, which are the universal rule of the whole Kingdom, and form the Common Law, in its stricter and more usual signification. (2) Particular customs, which for the most part affect only the inhabitants of particular districts. (3) Certain particular laws, which by custom are adopted and used by some particular courts of pretty general and extensive jurisdiction."[10]

Undoubtedly the creative energy of custom in the development of common law is less today than it was in bygone times.[11] Even in bygone

[9] Coke on Littleton, 62a; Post v. Pearsall, 22 Wend. 440.

[10] Blackstone, Comm., pp. 67, 68; Gray, "Nature and Sources of the Law," p. 266, sec. 598; Sadler, "The Relation of Custom to Law," p. 59.

[11] Cf. Gray, *supra*, sec. 634; Salmond, "Jurisprudence," p. 143; Gény, *op. cit.*, vol. I, p. 324, sec. 111.

times, its energy was very likely exaggerated by Blackstone and his followers. "Today we recog-
[illegible]," in the words of Pound,[12] "that the custom
[illegible] a custom of judicial decision, not of popular
action." It is "doubtful," says Gray,[13] "whether at all stages of legal history, rules laid down by judges have not generated custom, rather than custom generated the rules." In these days, at all events, we look to custom, not so much for the creation of new rules, but for the tests and standards that are to determine how established rules shall be applied. When custom seeks to do more than this, there is a growing tendency in the law to leave development to legislation. Judges do not feel the same need of putting the *imprimatur* of law upon customs of recent growth, knocking for entrance into the legal system, and viewed askance because of some novel aspect of form or feature, as they would if legislatures were not in frequent session, capable of establishing a title that will be unimpeached and unimpeach-

[12] "Common Law and Legislation," 21 Harvard L. R. 383, 406.

[13] *Supra*, sec. 634.





able. But the power is not lost because it is exercised with caution. "The law merchant," says an English judge, "is not fixed and stereotyped, it has not yet been arrested in its growth by being moulded into a code; it is, to use the words of Lord Chief Justice Cockburn in Goodwin v. Roberts, L. R. 10 Exch. 346, capable of being expanded and enlarged to meet the wants of trade."[14] In the absence of inconsistent statute, new classes of negotiable instruments may be created by mercantile practice.[15] The obligations of public and private corporations may retain the quality of negotiability, despite the presence of a seal, which at common law would destroy it. "There is nothing immoral or contrary to good policy in making them negotiable if the necessities of commerce require that they should be so. A mere technical dogma of the courts or the common law cannot prohibit the commercial world from inventing or issuing any species of

[14] Edelstein v. Schuler, 1902, 2 K. B. 144, 154; cf. Bechuanaland Exploration Co. v. London Trading Bank, 1898, 2 Q. B. 658.

[15] Cases, *supra*.

security not known in the last century."[16] So, in the memory of men yet living, the great inventions that embodied the power of steam and electricity, the railroad and the steamship, the telegraph and the telephone, have built up new customs and new law. Already there is a body of legal literature that deals with the legal problems of the air.

It is, however, not so much in the making of new rules as in the application of old ones that the creative energy of custom most often manifests itself today. General standards of right and duty are established. Custom must determine whether there has been adherence or departure. My partner has the powers that are usual in the trade. They may be so well known that the courts will notice them judicially. Such for illustration is the power of a member of a trading firm to make or indorse negotiable paper in the course of the firm's business.[17] They may be

[16] Mercer County v. Hacket, 1 Wall. 83; cf. Chase Nat. Bank v. Faurot, 149 N. Y. 532.

[17] Lewy v. Johnson, 2 Pet. 186.





such that the court will require evidence of their existence.[18] The master in the discharge of his duty to protect the servant against harm must exercise the degree of care that is commonly exercised in like circumstance by men of ordinary prudence. The triers of the facts in determining whether that standard has been attained must consult the habits of life, the everyday beliefs and practices, of the men and women about them. Innumerable, also, are the cases where the course of dealing to be followed is defined by the customs, or, more properly speaking, the usages, of a particular trade or market or profession.[19] The constant assumption runs throughout the law that the natural and spontaneous evolutions of habit fix the limits of right and wrong. A slight extension of custom identifies it with customary morality, the prevailing standard of right conduct, the *mores* of the time.[20] This is the point

[18] First Nat. Bank v. Farson, 226 N. Y. 218.

[19] Irwin v. Williar, 110 U. S. 499, 513; Walls v. Bailey, 49 N. Y. 464; 2 Williston on Contracts, sec. 649.

[20] Cf. Gény, *op. cit.*, vol. I, p. 319, sec. 110.

of contact between the method of tradition and the method of sociology. They have their roots in the same soil. Each method maintains the interaction between conduct and order, between life and law. Life casts the moulds of conduct, which will some day become fixed as law. Law preserves the moulds, which have taken form and shape from life.

Three of the directive forces of our law, philosophy, history and custom, have now been seen at work. We have gone far enough to appreciate the complexity of the problem. We see that to determine to be loyal to precedents and to the principles back of precedents does not carry us far upon the road. Principles are complex bundles. It is well enough to say that we shall be consistent, but consistent with what? Shall it be consistency with the origins of the rule, the course and tendency of development? Shall it be consistency with logic or philosophy or the fundamental conceptions of jurisprudence as disclosed by analysis of our own and foreign systems? All these loyalties are possible. All have





sometimes prevailed. How are we to choose between them? Putting that question aside, how do we choose between them? Some concepts of the law have been in a peculiar sense historical growths. In such departments, history will tend to give direction to development. In other departments, certain large and fundamental concepts, which comparative jurisprudence shows to be common to other highly developed systems, loom up above all others. In these we shall give a larger scope to logic and symmetry. A broad field there also is in which rules may, with approximately the same convenience, be settled one way or the other. Here custom tends to assert itself as the controlling force in guiding the choice of paths. Finally, when the social needs demand one settlement rather than another, there are times when we must bend symmetry, ignore history and sacrifice custom in the pursuit of other and larger ends.

From history and philosophy and custom, we pass, therefore, to the force which in our day and generation is becoming the greatest of them

all, the power of social justice which finds its outlet and expression in the method of sociology.

The final cause of law is the welfare of society. The rule that misses its aim cannot permanently justify its existence. "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."[21] Logic and history and custom have their place. We will shape the law to conform to them when we may; but only within bounds. The end which the law serves will dominate them all. There is an old legend that on one occasion God prayed, and his prayer was "Be it my will that my justice be ruled by my mercy." That is a prayer which we all need to utter at times when the demon of formalism tempts the intellect with the lure of scientific order. I do not mean, of course, that judges are commissioned to set aside existing rules at pleasure in favor of any other

[21] Dillon, "Laws and Jurisprudence of England and America," p. 18, quoted by Pound, 27 Harvard L. R. 731, 733.





set of rules which they may hold to be expedient or wise. I mean that when they are called upon to say how far existing rules are to be extended or restricted, they must let the welfare of society fix the path, its direction and its distance. We are not to forget, said Sir George Jessel, in an often quoted judgment, that there is this paramount public policy, that we are not lightly to interfere with freedom of contract.[22] So in this field, there may be a paramount public policy, one that will prevail over temporary inconvenience or occasional hardship, not lightly to sacrifice certainty and uniformity and order and coherence. All these elements must be considered. They are to be given such weight as sound judgment dictates. They are constituents of that social welfare which it is our business to discover.[23] In a given instance we may find that they are constituents of preponderating value. In others, we may find that their value is subordinate. We must appraise them as best we can.

[22] Printing etc. Registering Co. v. Sampson, L. R. 19 Eq. 462, 465.

[23] Cf. Brütt, *supra*, pp. 161, 163.

I have said that judges are not commissioned to make and unmake rules at pleasure in accordance with changing views of expediency or wisdom. Our judges cannot say with Hobbes: "Princes succeed one another, and one judge passeth, another cometh; nay heaven and earth shall pass, but not one tittle of the law of nature shall pass, for it is the eternal law of God. Therefore, all the sentences of precedent judges that have ever been cannot altogether make a law contrary to natural equity, nor any examples of former judges can warrant an unreasonable sentence or discharge the present judge of the trouble of studying what is equity in the case he is to judge from the principles of his own natural reason."[24] Nearer to the truth for us are the words of an English judge: "Our common law system consists in applying to new combinations of circumstances those rules of law which we derive from legal principles and judicial precedents, and for the sake of attaining uniformity, con-

[24] Hobbes, vol. II, p. 264; quoted by W. G. Miller, "The Data of Jurisprudence," p. 399.





sistency and certainty, we must apply those rules when they are not plainly unreasonable and inconvenient to all cases which arise; and we are not at liberty to reject them and to abandon all analogy to them in those in which they have not yet been judicially applied, because we think that the rules are not as convenient and reasonable as we ourselves could have devised."[25] This does not mean that there are not gaps, yet unfilled, within which judgment moves untrammeled. Mr. Justice Holmes has summed it up in one of his flashing epigrams: "I recognize without hesitation that judges must and do legislate, but they do so only interstitially; they are confined from molar to molecular motions. A common-law judge could not say, I think the doctrine of consideration a bit of historical nonsense and shall not enforce it in my court."[26] This conception of the legislative power of a judge as operating between spaces is akin to the theory of "gaps in the law" familiar

[25] Sir James Parke, afterward Lord Wensleydale, in Mirehouse v. Russell, 1 Cl. & F. 527, 546, quoted by Ehrlich, "Grundlegung der Soziologie des Rechts" [1913], p. 234; cf. Pollock, "Jurisprudence," p. 323.

[26] Southern Pacific Co. v. Jensen, 244 U. S. 205, 221.

to foreign jurists.[27] "The general framework furnished by the statute is to be filled in for each case by means of interpretation, that is, by following out the principles of the statute. In every case, without exception, it is the business of the court to supply what the statute omits, but always by means of an interpretative function."[28] If the statute is interpreted by the method of "free decision," the process differs in degree rather than in kind from the process followed by the judges of England and America in the development of the common law. Indeed, Ehrlich in a recent book[29] quotes approvingly an English writer, who says[30] that "a code would not, except in a few cases, in which the law at present is obscure, limit any discretion now pos-

[27] 9 Modern Legal Philosophy Series, pp. 159–163, 172–175; cf. Ehrlich, "Die juristische Logik," pp. 215, 216; Zitelmann, "Lücken im Recht," p. 23; Brütt, "Die Kunst der Rechtsanwendung," p. 75; Stammler, "Die Lehre von dem richtigen Rechte," p. 271.

[28] Kiss, "Equity and Law," 9 Modern Legal Philosophy Series, p. 161.

[29] "Grundlegung der Soziologie des Rechts" [1913], p. 234.

[30] 19 L. Q. R. 15.





sessed by the judges. It would simply change the form of the rules by which they are bound." I think that statement overshoots the mark. The fissures in the common law are wider than the fissures in a statute, at least in the form of statute common in England and the United States. In countries where statutes are oftener confined to the announcement of general principles, and there is no attempt to deal with details or particulars, legislation has less tendency to limit the freedom of the judge. That is why in our own law there is often greater freedom of choice in the construction of constitutions than in that of ordinary statutes. Constitutions are more likely to enunciate general principles, which must be worked out and applied thereafter to particular conditions. What concerns us now, however, is not the size of the gaps. It is rather the principle that shall determine how they are to be filled, whether their size be great or small. The method of sociology in filling the gaps puts its emphasis on the social welfare.

Social welfare is a broad term. I use it to

cover many concepts more or less allied. It may mean what is commonly spoken of as public policy, the good of the collective body. In such cases, its demands are often those of mere expediency or prudence. It may mean on the other hand the social gain that is wrought by adherence to the standards of right conduct, which find expression in the *mores* of the community. In such cases, its demands are those of religion or of ethics or of the social sense of justice, whether formulated in creed or system, or immanent in the common mind. One does not readily find a single term to cover these and kindred aims which shade off into one another by imperceptible gradations. Perhaps we might fall back with Kohler[31] and Brütt[32] and Berolzheimer[33] on the indefinable, but comprehensive something known as Kultur, if recent history had not discredited it and threatened odium for

[31] Enzyklopadie, Bd. 1, D. 10; Philosophy of Law, 12 Modern Legal Philosophy Series, p. 58.

[32] *Supra*, p. 133, *et seq.*

[33] "System des Rechts und Wirthschaftsphilosophie," Bd. 3, s. 28.





those that use it. I have chosen in its stead a term which, if not precise enough for the philosopher, will at least be found sufficiently definite and inclusive to suit the purposes of the judge.

It is true, I think, today in every department of the law that the social value of a rule has become a test of growing power and importance. This truth is powerfully driven home to the lawyers of this country in the writings of Dean Pound. "Perhaps the most significant advance in the modern science of law is the change from the analytical to the functional attitude."[34] "The emphasis has changed from the content of the precept and the existence of the remedy to the effect of the precept in action and the availability and efficiency of the remedy to attain the ends for which the precept was devised."[35] Foreign jurists have the same thought: "The whole of the judicial function," says Gmelin,[36]

[34] Pound, "Administrative Application of Legal Standards," Proceedings American Bar Association, 1919, pp. 441, 449.

[35] *Ibid.*, p. 451; cf. Pound, "Mechanical Jurisprudence," 8 Columbia L. R. 603.

[36] "Sociological Method," transl., 9 Modern Legal Philosophy Series, p. 131.

"has . . . been shifted. The will of the State, expressed in decision and judgment is to bring about a just determination by means of the subjective sense of justice inherent in the judge, guided by an effective weighing of the interests of the parties in the light of the opinions generally prevailing among the community regarding transactions like those in question. The determination should under all circumstances be in harmony with the requirements of good faith in business intercourse and the needs of practical life, unless a positive statute prevents it; and in weighing conflicting interests, the interest that is better founded in reason and more worthy of protection should be helped to achieve victory."[37] "On the one hand," says Gény,[38] "we are to interrogate reason and conscience, to discover in our inmost nature, the very basis of justice; on the other, we are to address ourselves to social

[37] Gmelin, *supra;* cf. Ehrlich, "Die juristische Logik," p. 187; Duguit, "Les Transformations du droit depuis le Code Napoléon," transl., Continental Legal Hist. Series, vol. XI, pp. 72, 79.

[38] *Op. cit.,* vol. II, p. 92, sec. 159.





phenomena, to ascertain the laws of their harmony and the principles of order which they exact." And again:[39] "Justice and general utility, such will be the two objectives that will direct our course."

All departments of the law have been touched and elevated by this spirit. In some, however, the method of sociology works in harmony with the method of philosophy or of evolution or of tradition. Those, therefore, are the fields where logic and coherence and consistency must still be sought as ends. In others, it seems to displace the methods that compete with it. Those are the fields where the virtues of consistency must yield within those interstitial limits where judicial power moves. In a sense it is true that we are applying the method of sociology when we pursue logic and coherence and consistency as the greater social values. I am concerned for the moment with the fields in which the method is in antagonism to others rather than with those in which their action is in unison. Accurate divi-

[39] Vol. II, p. 91.

sion is, of course, impossible. A few broad areas may, however, be roughly marked as those in which the method of sociology has fruitful application. Let me seek some illustrations of its workings. I will look for them first of all in the field of constitutional law, where the primacy of this method is, I think, undoubted, then in certain branches of private law where public policy, having created rules, must have like capacity to alter them, and finally in other fields where the method, though less insistent and pervasive, stands ever in the background, and emerges to the front when technicality or logic or tradition may seem to press their claims unduly.

I speak first of the constitution, and in particular of the great immunities with which it surrounds the individual. No one shall be deprived of liberty without due process of law. Here is a concept of the greatest generality. Yet it is put before the courts *en bloc*. Liberty is not defined. Its limits are not mapped and charted. How shall they be known? Does liberty mean the





same thing for successive generations? May restraints that were arbitrary yesterday be useful and rational and therefore lawful today? May restraints that are arbitrary today become useful and rational and therefore lawful tomorrow? I have no doubt that the answer to these questions must be yes. There were times in our judicial history when the answer might have been no. Liberty was conceived of at first as something static and absolute. The Declaration of Independence had enshrined it. The blood of Revolution had sanctified it. The political philosophy of Rousseau and of Locke and later of Herbert Spencer and of the Manchester school of economists had dignified and rationalized it. *Laissez faire* was not only a counsel of caution which statesmen would do well to heed. It was a categorical imperative which statesmen, as well as judges, must obey. The "nineteenth century theory" was "one of eternal legal conceptions involved in the very idea of justice and containing potentially an exact rule for every case to be reached by an absolute process of logical deduc-

tion."[40] The century had not closed, however, before a new political philosophy became reflected in the work of statesmen and ultimately in the decrees of courts. The transition is interestingly described by Dicey in his "Law and Opinion in England."[41] "The movement from individualistic liberalism to unsystematic collectivism" had brought changes in the social order which carried with them the need of a new formulation of fundamental rights and duties. In our country, the need did not assert itself so soon. Courts still spoke in the phrases of a philosophy that had served its day.[42] Gradually, however, though not without frequent protest and intermittent movements backward, a new conception of the significance of constitutional limitations in the domain of individual liberty, emerged to recognition and to dominance. Judge Hough, in an interesting address, finds the dawn

[40] Pound, "Juristic Science and the Law," 31 Harvard L. R. 1047, 1048.

[41] Cf. Duguit, *supra*.

[42] Haines, "The Law of Nature in Federal Decisions," 25 Yale L. J. 617.





of the new epoch in 1883, when Hurtado v. California, 110 U. S. 516, was argued.[43] If the new epoch had then dawned, it was still obscured by fog and cloud. Scattered rays of light may have heralded the coming day. They were not enough to blaze the path. Even as late as 1905, the decision in Lochner v. N. Y., 198 U. S. 45, still spoke in terms untouched by the light of the new spirit. It is the dissenting opinion of Justice Holmes, which men will turn to in the future as the beginning of an era.[44] In the instance, it was the voice of a minority. In principle, it has become the voice of a new dispensation, which has written itself into law. "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics."[45] "A constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state, or of *laissez*

[43] Hough, "Due Process of Law Today," 32 Harvard L. R. 218, 227.

[44] Cf. Hough, p. 232; also Frankfurter, "Const. Opinions of Holmes, J.," 29 Harvard L. R. 683, 687; Ehrlich, "Die juristische Logik," pp. 237, 239.

[45] 198 U. S. 75.

*faire.*"[46] "The word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law."[47] That is the conception of liberty which is dominant today.[48] It has its critics even yet,[49] but its dominance is, I think, assured. No doubt, there will at times be difference of opinion when a conception so delicate is applied to varying conditions.[50] At times, indeed, the conditions themselves are imperfectly disclosed and inadequately known. Many and insidious are the agencies by which opinion is poisoned at its sources. Courts have often been

[46] P. 75.

[47] P. 76.

[48] Noble v. State Bank, 219 U. S. 104; Tanner v. Little, 240 U. S. 369; Hall v. Geiger Jones Co., 242 U. S. 539; Green v. Frazier, 253 U. S. 233; Frankfurter, *supra.*

[49] Burgess, "Reconciliation of Government and Liberty."

[50] Adams v. Tanner, 244 U. S. 590.





led into error in passing upon the validity of a statute, not from misunderstanding of the law, but from misunderstanding of the facts. This happened in New York. A statute forbidding night work for women was declared arbitrary and void in 1907.[51] In 1915, with fuller knowledge of the investigations of social workers, a like statute was held to be reasonable and valid.[52] Courts know today that statutes are to be viewed, not in isolation or *in vacuo,* as pronouncements of abstract principles for the guidance of an ideal community, but in the setting and the framework of present-day conditions, as revealed by the labors of economists and students of the social sciences in our own country and abroad.[53] The same fluid and dynamic conception which underlies the modern notion of liberty, as secured to the individual by the constitutional immunity,

[51] People v. Williams, 189 N. Y. 131.

[52] People v. Schweinler Press, 214 N. Y. 395.

[53] Muller v. Oregon, 208 U. S. 412; Pound, "Courts and Legislation," 9 Modern Legal Philosophy Series, p. 225; Pound, "Scope and Progress of Sociological Jurisprudence," 25 Harvard L. R. 513; cf. Brandeis, J., in Adams v. Tanner, 244 U. S. 590, 600.

must also underlie the cognate notion of equality. No state shall deny to any person within its jurisdiction "the equal protection of the laws."[54] Restrictions, viewed narrowly, may seem to foster inequality. The same restrictions, when viewed broadly, may be seen "to be necessary in the long run in order to establish the equality of position between the parties in which liberty of contract begins."[55] Charmont in "La Renaissance du droit naturel,"[56] gives neat expression to the same thought: "On tend à considerer qu'il n'y a pas de contrat respectable si les parties n'ont pas été placées dans les conditions non seulement de liberté, mais d'égalité. Si l'un des contractants est sans abri, sans ressources, condamné à subir les exigences de l'autre, la liberté de fait est supprimée."[57]

From all this, it results that the content of

[54] U. S. Const., 14th Amendment.

[55] Holmes, J., dissenting in Coppage v. Kansas, 236 U. S. 1, 27.

[56] Montpellier, Coulet et fils, éditeurs, 1910.

[57] "There is now a tendency to consider no contract worthy of respect unless the parties to it are in relations, not only of liberty, but of equality. If one of the





constitutional immunities is not constant, but varies from age to age. "The needs of successive generations may make restrictions imperative today, which were vain and capricious to the vision of times past."[58] "We must never forget," in Marshall's mighty phrase, "that it is a *constitution* we are expounding."[59] Statutes are designed to meet the fugitive exigencies of the hour. Amendment is easy as the exigencies change. In such cases, the meaning, once construed, tends legitimately to stereotype itself in the form first cast. A *constitution* states or ought to state not rules for the passing hour, but principles for an expanding future. In so far as it deviates from that standard, and descends into details and particulars, it loses its flexibility, the scope of interpretation contracts, the meaning

parties be without defense or resources, compelled to comply with the demands of the other, the result is a suppression of true freedom."—Charmont, *supra*, p. 172; transl. in 7 Modern Legal Philosophy Series, p. 110. sec. 83.

[58] Klein v. Maravelas, 219 N. Y. 383, 386.

[59] Cf. Frankfurter, *supra;* McCulloch v. Maryland, 4 Wheat. 407.

hardens. While it is true to its function, it maintains its power of adaptation, its suppleness, its play. I think it is interesting to note that even in the interpretation of ordinary statutes, there are jurists, at any rate abroad, who maintain that the meaning of today is not always the meaning of tomorrow. "The President of the highest French Court, M. Ballot-Beaupré, explained, a few years ago, that the provisions of the Napoleonic legislation had been adapted to modern conditions by a judicial interpretation in *'le sens évolutif.'* 'We do not inquire,' he said, 'what the legislator willed a century ago, but what he would have willed if he had known what our present conditions would be.' "[60] So Kohler: "It follows from all this that the interpretation of a statute must by no means of necessity remain the same forever. To speak of an exclusively correct interpretation, one which would be the true meaning of the statute from the begin-

[60] Munroe Smith, "Jurisprudence," pp. 29, 30; cf. Vander Eycken, *supra*, pp. 383, 384; also Brütt, *supra*, p. 62.





ning to the end of its days, is altogether erroneous."[61] I think the instances must be rare, if any can be found at all, in which this method of interpretation has been applied in English or American law to ordinary legislation. I have no doubt that it has been applied in the past and with increasing frequency will be applied in the future, to fix the scope and meaning of the broad precepts and immunities in state and national constitutions. I see no reason why it may not be applied to statutes framed upon lines similarly general, if any such there are. We are to read them, whether the result be contraction or expansion, in *"le sens évolutif."*[62]

Apposite illustrations may be found in recent statutes and decisions. It was long ago held by the Supreme Court that the legislature had the power to control and regulate a business affected

[61] Kohler, "Interpretation of Law," transl. in 9 Modern Legal Philosophy Series, 192; cf. the Report of Prof. Huber on the German Code, quoted by Gény, "Technic of Codes," 9 Modern Legal Philosophy Series, p. 548; also Gény, "Méthode et Sources en droit privé positif," vol. I, p. 273.

[62] Munroe Smith, *supra*.

with "a public use."[63] It is held by the Supreme Court today that there is a like power where the business is affected with "a public interest."[64] The business of fire insurance has been brought within that category.[65] A recent decision of an inferior court has put within the same category the business of the sale of coal where the emergency of war or of the dislocation that results from war brings hardship and oppression in the train of unfettered competition.[66] The advocates of the recent housing statutes in New York[67] profess to find in like principles the justification for new restraints upon ancient rights of property. I do not suggest any opinion upon the question whether those acts in any of their aspects may be held to go too far. I do no more than indicate the nature of the problem, and the method and spirit of approach.[68]

[63] Munn v. Illinois, 94 U. S. 113.

[64] German Alliance Ins. Co. v. Kansas, 233 U. S. 389.

[65] German Alliance Ins. Co. v. Kansas, *supra*.

[66] American Coal Mining Co. v. Coal & Food Commission, U. S. District Court, Indiana, Sept. 6, 1920.

[67] L. 1920, chaps. 942 to 953.

[68] Since these lectures were written, the statutes have been sustained: People *ex rel.* Durham Realty Co. v.





Property, like liberty, though immune under the Constitution from destruction, is not immune from regulation essential for the common good. What that regulation shall be, every generation must work out for itself.[69] The generation which gave us Munn v. Illinois, 94 U. S. 113 (1876), and like cases, asserted the right of regulation whenever business was "affected with a public use." The phrase in its application meant little more than if it said whenever the social need shall be imminent and pressing. Such a formulation of the principle may have been adequate for the exigencies of the time. Today there is a growing tendency in political and juristic thought to probe the principle more deeply and formulate it more broadly. Men are saying today that property, like every other social institution, has a social function to fulfill. Legislation which destroys the institution is one thing. Legislation which holds it true to its function is quite another. That is the dominant theme of a new and

La Fetra, 230 N. Y. 429; Marcus Brown Holding Co. v. Feldman, 256 U. S. 170.

[69] Green v. Frazier, 253 U. S. 233.

forceful school of publicists and jurists on the continent of Europe, in England, and even here. Among the French, one may find the thought developed with great power and suggestiveness by Duguit in his "Transformations générales du droit privé depuis le Code Napoléon."[70] It is yet too early to say how far this new conception of function and its obligations will gain a lodgment in our law. Perhaps we shall find in the end that it is little more than Munn v. Illinois in the garb of a new philosophy. I do not attempt to predict the extent to which we shall adopt it, or even to assert that we shall adopt it at all. Enough for my purpose at present that new times and new manners may call for new standards and new rules.

The courts, then, are free in marking the limits of the individual's immunities to shape their judgments in accordance with reason and justice. That does not mean that in judging the validity of statutes they are free to substitute

[70] Transl., Continental Legal Hist. Series, vol. XI, p. 74, sec. 6, *et seq.;* for a more extreme view, see R. H. Tawney, "The Acquisitive Society."





their own ideas of reason and justice for those of the men and women whom they serve. Their standard must be an objective one. In such matters, the thing that counts is not what I believe to be right. It is what I may reasonably believe that some other man of normal intellect and conscience might reasonably look upon as right. "While the courts must exercise a judgment of their own, it by no means is true that every law is void which may seem to the judges who pass upon it excessive, unsuited to its ostensible end, or based upon conceptions of morality with which they disagree. Considerable latitude must be allowed for difference of view as well as for possible peculiar conditions which this court can know but imperfectly, if at all. Otherwise a constitution, instead of embodying only relatively fundamental rules of right, as generally understood by all English-speaking communities, would become the partisan of a particular set of ethical or economical opinions, which by no means are held *semper ubique et ab omnibus*."[71]

[71] Otis v. Parker, 187 U. S. 608.

Here as so often in the law, "the standard of conduct is external, and takes no account of the personal equation of the man concerned."[72] "The interpreter," says Brütt,[73] "must above all things put aside his estimate of political and legislative values, and must endeavor to ascertain in a purely objective spirit what ordering of the social life of the community comports best with the aim of the law in question in the circumstances before him." Some fields of the law there are, indeed, where there is freer scope for subjective vision. Of these we shall say more hereafter. The personal element, whatever its scope in other spheres, should have little, if any, sway in determining the limits of legislative power. One department of the government may not force upon another its own standards of propriety. "It must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as courts."[74]

[72] The Germanic, 196 U. S. 589, 596.

[73] "Die Kunst der Rechtsanwendung," p. 57.

[74] Missouri, K. & T. Co. v. May, 194 U. S. 267, 270; People v. Crane, 214 N. Y. 154, 173.





Some critics of our public law insist that the power of the courts to fix the limits of permissible encroachment by statute upon the liberty of the individual is one that ought to be withdrawn.[75] It means, they say, either too much or too little. If it is freely exercised, if it is made an excuse for imposing the individual beliefs and philosophies of the judges upon other branches of the government, if it stereotypes legislation within the forms and limits that were expedient in the nineteenth or perhaps the eighteenth century, it shackles progress, and breeds distrust and suspicion of the courts. If, on the other hand, it is interpreted in the broad and variable sense which I believe to be the true one, if statutes are to be sustained unless they are so plainly arbitrary and oppressive that right-minded men and women could not reasonably regard them otherwise, the right of supervision, it is said, is not worth the danger of abuse. "There no doubt comes a time when a statute is so obviously oppressive and ab-

[75] Cf. Collins, "The 14th Amendment and the States," pp. 158, 166.

surd that it can have no justification in any sane polity."[76] Such times may indeed come, yet only seldom. The occasions must be few when legislatures will enact a statute that will merit condemnation upon the application of a test so liberal; and if carelessness or haste or momentary passion may at rare intervals bring such statutes into being with hardship to individuals or classes, we may trust to succeeding legislatures for the undoing of the wrong. That is the argument of the critics of the existing system. My own belief is that it lays too little stress on the value of the "imponderables." The utility of an external power restraining the legislative judgment is not to be measured by counting the occasions of its exercise. The great ideals of liberty and equality are preserved against the assaults of opportunism, the expediency of the passing hour, the erosion of small encroachments, the scorn and derision of those who have no patience with general principles, by enshrining them in constitutions, and

[76] Learned Hand, "Due Process of Law and the Eight Hour Day," 21 Harvard L. R. 495, 508.





consecrating to the task of their protection a body of defenders. By conscious or subconscious influence, the presence of this restraining power, aloof in the background, but none the less always in reserve, tends to stabilize and rationalize the legislative judgment, to infuse it with the glow of principle, to hold the standard aloft and visible for those who must run the race and keep the faith.[77] I do not mean to deny that there have been times when the possibility of judicial review has worked the other way. Legislatures have sometimes disregarded their own responsibility, and passed it on to the courts. Such dangers must be balanced against those of independence from all restraint, independence on the part of public officers elected for brief terms, without the guiding force of a continuous tradition. On the whole, I believe the latter dangers to be the more formidable of the two. Great maxims, if they may be violated with impunity, are honored often with lip-service, which passes

[77] Cf. Laski, "Authority in the Modern State," pp. 62, 63.

easily into irreverence. The restraining power of the judiciary does not manifest its chief worth in the few cases in which the legislature has gone beyond the lines that mark the limits of discretion. Rather shall we find its chief worth in making vocal and audible the ideals that might otherwise be silenced, in giving them continuity of life and of expression, in guiding and directing choice within the limits where choice ranges. This function should preserve to the courts the power that now belongs to them, if only the power is exercised with insight into social values, and with suppleness of adaptation to changing social needs.

I pass to another field where the dominance of the method of sociology may be reckoned as assured. There are some rules of private law which have been shaped in their creation by public policy, and this, not merely silently or in conjunction with other forces, but avowedly, and almost, if not quite, exclusively. These, public policy, as determined by new conditions, is competent to change. I take as an illustration modern decisions





which have liberalized the common law rule condemning contracts in restraint of trade. The courts have here allowed themselves a freedom of action which in many branches of the law they might be reluctant to avow. Lord Watson put the matter bluntly in Nordenfeldt v. Maxim, Nordenfeldt Guns & Ammunition Co. L. R. 1894 App. Cas. 535, 553: "A series of decisions based upon grounds of public policy, however eminent the judges by whom they were delivered, cannot possess the same binding authority as decisions which deal with and formulate principles which are purely legal. The course of policy pursued by any country in relation to, and for promoting the interests of, its commerce must, as time advances and as its commerce thrives, undergo change and development from various causes which are altogether independent of the action of its courts. In England, at least, it is beyond the jurisdiction of her tribunals to mould and stereotype national policy. Their function, when a case like the present is brought before them, is, in my opinion, not necessarily to ac-

cept what was held to have been the rule of policy a hundred or a hundred and fifty years ago, but to ascertain, with as near an approach to accuracy as circumstances permit, what is the rule of policy for the then present time. When that rule has been ascertained, it becomes their duty to refuse to give effect to a private contract which violates the rule, and would, if judicially enforced, prove injurious to the community." A like thought finds expression in the opinions of our own courts. "Arbitrary rules which were originally well founded have thus been made to yield to changed conditions, and underlying principles are applied to existing methods of doing business. The tendencies in most of the American courts are in the same direction."[78] I think we may trace a like development in the attitude of the courts toward the activities of labor unions. The suspicion and even hostility of an earlier generation found reflection in judicial decisions which a changing conception of social values

[78] Knowlton, J., in Anchor Electric Co. v. Hawkes, 171 Mass. 101, 104.





has made it necessary to recast.[79] Some remnants of the older point of view survive, but they are remnants only. The field is one where the law is yet in the making or better perhaps in the remaking. We cannot doubt that its new form will bear an impress of social needs and values which are emerging even now to recognition and to power.

[79] Cf. Laski, "Authority in the Modern State," p. 39.