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THE IDEAL AND THE ACTUAL IN THE LAW.

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THE IDEAL AND THE ACTUAL IN THE LAW.

Mr. President and Gentlemen of the American Bar Association:

In the endeavor to turn my thoughts upon some theme with which I might usefully engage your attention for an hour, the question not unnaturally presented itself, what is the purpose of these annual gatherings? Why do we lay aside our customary employments and recreations, and repair hither from long distances? We are not a convention of politicians assembled to make the arrangements for a political campaign; nor have we come together, as to an exchange, in order to procure employments, or to contrive plans by which our fees may be increased, or our profession be otherwise made more lucrative. Nor would the mere intellectual pleasure of listening to such addresses as we may hear be, of itself, a sufficient inducement. Still less would the sensual pleasures of the banquet, or the wit and eloquence with which we hope it may be enlivened, be enough to draw us here. Indeed, it is gratifying to feel that no selfish purpose finds a place among the motives, whatever they may be, which animate us.

If we examine ourselves closely, we shall find that, associated with much thankfulness, there is yet a feeling of discontent, a feeling that we are not individually, nor collectively as a profession, all that we ought to be, a consciousness of unsatisfied desires, a belief that there are benefits and blessings attainable, but not attained, a consciousness—a dream if you please—that there is for us as lawyers a higher condition and

a higher life which we nowhere see realized; in short, we find ourselves moved by the everlasting contrast, everywhere exhibited, between the ideal and the actual; and by that longing —the noblest which inhabits the human breast—of lifting up the actual to a nearer approach to the ideal. We come together under the influence of this aspiration; and it cannot, therefore, be inappropriate that I should offer to you some reflections upon the Ideal and the Actual in the Law.

That which most elevates man over the brute orders of creation is the capacity with which he is endowed to conceive of higher and better forms of life and action than the actual world exhibits, and the desire to make his conceptions real; and it is this capacity which distinguishes the highest and noblest individuals of the race from their fellows. Its sphere of activity is in the realm of thought, and it penetrates every quarter of that realm. Dissatisfied with each successive conception which it forms, ever reaching forward and beyond its present attainment, it aspires to grasp the infinite and the absolute. In philosophy it disdains apparent causes, and mounting up from one antecedent to another, essays to pass

"the flaming bounds of Place and Time,"

and find the one absolute cause. In poetry and the fine arts it is tantalized with the dream of a beauty which all nature suggests, but nowhere reveals. In morals it finds every form of excellence tainted with the presence of evil and wrong, and struggles against the everlasting barriers which oppose its progress toward the absolute good.

The extreme and exclusive cultivation of this tendency is the source of many fantastic and mischievous errors. The men who fall in love with their ideal conceptions and fail to correct them by a comparison with the actual and material conditions of life, descend through every grade of folly and absurdity, from the visionary to the crank. The religious devotee, longing for an impossible purity, disgusted with the sins of the world, flies from mankind and cherishes in solitude his vain contemplations

and his useless virtue. It was this spirit which peopled the deserts of Egypt, and built the monasteries of the middle ages. The pessimist is he who loses heart in the struggle of life and acknowledges defeat. He is an idealist with noble aims and purposes; but, finding that the coveted prize forever eludes his grasp, he comes to believe that it is an unreal lure which, "as he follows, flies"—the mere phantom of a diseased fancy. A great English poet, as full of misanthropy as ~~of imagination~~, has pictured in unequalled language this condition of despair.

"Of its own beauty is the mind diseased
And fevers into false creation;—where,
Where are the forms the sculptor's soul hath seized?
In him alone. Can nature show so fair?
Where are the charms and virtues which we dare
Conceive in boyhood and pursue as men,
The unreached Paradise of our despair,
Which o'er-informs the pencil and the pen,
And overpowers the page where it would bloom again?"

But, notwithstanding the extravagant manifestations of the ideal tendency, it is a highly useful attribute of our nature. It constitutes the true nobility of the individual man, and its activity marks a spiritual and progressive, as distinguished from a sensual and sliding, age. It is necessary indeed that it be stimulated, or restrained, according to the field of activity in which it operates, and the subject upon which it may be employed. The poet, the painter, the sculptor, the musical composer may give it a free rein, but the statesman, the moralist, the jurist, must check and moderate it, and blend it with an exercise of those other faculties which deal with the world of matter and life, rather than with the realm of ideas.

It may be at first thought that there could be little room in the dry domain of the law for the play of a faculty so lofty and spiritual; but a little reflection will show that even here there is opportunity for its useful exercise. Justice itself, the true foundation, the ultimate aim, of all law, is, in its essence, an ideal conception. It is the animating principle of every rule, observance

or statute. It is that which is unconsciously sought for in his tasks and studies by the humblest lawyer, and towards which the great jurist consciously aspires with a spirit enkindled by an almost poetic flame. The great lawgivers, the great statesmen of the world, and the great lawyers as well, have been idealists. All great reformers have been idealists. No man has ever yet removed an abuse, corrected a mischief, or lifted his fellow men up to a higher level of life except by virtue of his capacity to form a conception of a better world, and to make others comprehend and adopt it. Solon of Greece, uniting the fire and fancy of the poet with the practical instincts of the statesman and jurist—a marvellous, many-sided man—seized upon a period in Greek society when the antique feudalism was breaking up before an advancing industrial and commercial era, formed a conception of a state in which the old and the new should be reconciled and harmonized, reduced it to a system in his Laws, and created the Athenian commonwealth.

The imagination of the ancients always ascribed an ideal and divine origin to laws. The bold Hebrew legend makes them proceed immediately from God himself to Moses upon Mount Sinai. The same source is imputed to the *lex sacra* of ancient Rome; but the actual communication had a more tender character, and is enshrined in the passionate myth which has given its name to the fountain of Egeria. The framers of our national constitution were idealists. No men of the mere matter of fact type could have formed the conception of dividing sovereignty into parts, and awarding some to many distinct governments, and others to one all-embracing common government. Mansfield was an idealist when, in Somerset's case, grasping the clear conception of human liberty, observing the steady tendency of the English race towards it, how link by link it had shaken off the chains of servitude, until the idea had taken root in the law as well as in the popular heart, he resolved that the hour was ripe for the utterance, and made the memorable declaration that slaves could not breathe in England. Marshall was an idealist when, setting out in his thought the idea of American

nationality, more clearly than the framers of the constitution had done, he saw that their work was threatened with defeat, and supplemented it with the judicial declaration that the constitution and all laws passed in pursuance thereof were, in fact as well as in name, the supreme law of the land.

There is then a field for idealism in the domain of the law, and I apprehend that in setting the proper limits to the play of this tendency in that domain, and ascertaining the precautionary safeguards which should always accompany its action, we may reach some just conclusions upon the interesting and important subject of Reform in the Law.

Whenever we become impressed with the necessity of a reform in any part of the law, we are naturally inclined to make direct efforts to accomplish the object, and *legislation* seems to be the only method by which such efforts can be made. This instrumentality is, therefore, freely employed; but, somehow, in most cases, the expectation is disappointed. The statute sometimes stands unnoticed, is sometimes evaded, sometimes nullified by construction. The old evil continues to manifest itself in the same or in other shapes, and the baffled and despairing reformer relapses into indolence; and, by and by, some new adventurers, animated by like hopes, repeat similar experiments and meet with similar results.

This is not so in other fields of human effort. The builder of the ocean steamship, finding that his expectations of speed and economy have been disappointed, makes a profound and patient study of the operation and laws of forces and resistances. He discovers his errors; re-adapts his ship and its engines to the conditions which he is compelled to encounter, and his well-directed effort is rewarded in his new creation, which is hailed as the pride of the seas.

In the field of legal reform no similar study seems to be made. We use the instrumentality of legislation apparently with no suspicion that we do not fully understand the nature of that agency; and we deal with the unwritten law as if it were something of the same nature which we are capable of shaping and

moulding at our will. It seems not to occur to most of those who attempt legal reforms, that it would be well to inquire a little more closely into the real nature of the thing which we call the *law*, the sources from which it proceeds, and the real elements which impart to it its power and efficacy. Here is a field of research much neglected even by professed legal students, and which has not been explored by the right methods, even by those who have given to it the most attention.

If we should ask the body of lawyers the question what law really was, the majority would probably give us with assured confidence the definition of Blackstone, that it was a rule prescribed by the supreme power in a state commanding what is right and prohibiting what is wrong. And Austin, the most celebrated of modern English writers upon the science of Jurisprudence, the one who is commonly credited with the largest measure of profundity and precision, adopts the main element of this definition by asserting that law is a command proceeding from a superior to an inferior, and enforced by a sanction.

I cannot help thinking that this is a fundamental error, and one tending to greatly mislead us, in our efforts both to administer and to reform the law. There would be some support for this definition if, by law, only statutory law were intended, although even here I should not think it free from just criticism; but these eminent authorities do not so limit it. They intend it as a definition of all law, unwritten as well as written. But how do they make it apply to that vast body of our law—nine-tenths, we might safely say, of the whole—of which we know nothing except as it is declared by judicial tribunals? They do it by saying, in substance, that the sovereign adopts as law that which is declared by the judges, and commands it to be obeyed. But where is the evidence of this adoption and command? If the fact actually exists, it must be susceptible of proof. But no statute can be pointed out which proves it, nor can any other form of adoption or command be shown. It is quite manifest that this alleged adoption and

command is mere hypothesis, and philosophical reasoning forbids the employment of that expedient, unless it be necessary in order to explain phenomena otherwise inexplicable.

And how can this definition be reconciled with the fact that the sovereign is subject to the law? If law be a command addressed from a sovereign to a subject, and has force because it is a command, it must proceed from the free will and power of the sovereign, who has the right to make it, or refrain from making it, and to make it, if he chooses, to be different from what it is. He would be necessarily superior to his own creation, and it would not be binding upon himself; but where can we find among civilized nations a sovereign so absolute as not to be bound by the laws?

It seems to me that this attempted explanation of the genesis of law by the hypothesis of a command is wholly illegitimate. There is no occasion for any hypothesis. The whole process is open to observation as matter of fact, and the solution of the question lies, like that of any similar problem, in a scrutiny of the actual facts. We know that we have judges, and that all we know of the law comes from their declarations. The statute book, indeed, is open to us; but we do not know the meaning of this, in any controverted case, except from the declaration of the judges. All the knowledge, therefore, which we really have of the law comes from the judge. But how does he get at the law? Does he *make* it? If he did, it would be *his* command, and he would be the sovereign, which would be, itself, fatal to the theory. Any such imputation of sovereignty to the judge would be contrary to the observed and manifest fact. No such function was ever yet assumed by a judge, either openly or tacitly. The exercise of any such power would be ground for his impeachment. We all know the method by which he ascertains the law. There is no secret about it, and no occasion for resorting to hypothesis. It is in operation every day before our eyes. We have only to take note of it. Let us examine the process.

The statute book is first examined, and if that speaks to the

point and clearly, all doubt vanishes. But in the great majority of cases, the statute book is silent, and what is the next resort? Inquiry is made by the judge concerning what his predecessors have done, and if he finds that a similar state of facts has been considered by them and the law pronounced in reference to it, he declares the same rule. But in many, indeed most, of the controversies brought before him, no record is found of a precisely similar case, and the law is to be declared for the first time. Here is the interesting and crucial test of the question how the law springs into existence. That the judge can not *make* the law is accepted from the start. That there is already existing a rule by which the case must be determined is not doubted. Unquestionably the functions of making and declaring the law are here brought into close proximity; but, nevertheless, the distinction is not for a moment lost sight of. It is agreed that the true rule must be somehow *found*. Judge and advocates—all together—engage in the *search*. Cases more or less nearly approaching the one in controversy are adduced. Analogies are referred to. The customs and habits of men are appealed to. Principles already settled as fundamental are invoked and run out to their consequences; and finally a rule is deduced which is declared to be the one which the existing law requires to be applied to the case. In all this the things which are plain and palpable are, (1) that the whole process consists in a *search* to find a rule; (2) that the rule thus sought for is the *just* rule—that is to say, the rule most in accordance with the *sense of justice* of those engaged in the search; (3) that it is tacitly assumed that the sense of justice is the *same* in all those who are thus engaged—that is to say, that they have a *common standard of justice* from which they can argue with, and endeavor to persuade, each other; (4) that the field of search is the habits, customs, business and manners of the people, and those previously declared rules which have sprung out of previous similar inquiries into habits, customs, business and manners. The conclusion is already suggested that our unwritten law—

which is the main body of our law—is not a command, or a body of commands, but consists of rules springing from the social standard of justice, or from the habits and customs from which that standard has itself been derived.

I have been dealing with the process of making, or finding, the law as it is actually going on day by day in an old and civilized society; but the truth I am seeking to establish is perhaps better illustrated by a resort to the instances of early communities in which society is just beginning to develop itself, and where the same process is exhibited in a simple form. In early Rome, and in every other instance of which we have authentic information, we find that the first step in the administration of justice has been to elect a judge. The creation of judges everywhere antedates the existence of formal law. But 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 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 simple affairs of such a period is the selection of a person for a judge who best comprehends those habits, customs and thoughts.

I shall not degrade the subject if I call up a meaner illustration. In all athletic games, baseball, cricket, or prize fighting, a referee is appointed to see fair play. There are no commands preceeding from a sovereign, or superiors, to subjects, or inferiors; but there is a standard of justice founded upon the habits and usages of the game, and there is consequently a law which it is the function of the referee to declare. We have here in miniature the whole scheme of human justice.

In the early stages of society to which I have alluded, the judge is not selected from a special class, for there is no special class; but he is, nevertheless, the man supposed to be most familiar with the habits and usages which he is called upon to declare, and whose integrity in truly declaring them is most relied upon. As society advances, and wealth and population increase, the transactions of men become more and more numerous

and complex, and the rules which are from time to time declared become infinite in number and variety. A need arises of a special class of men whose sole function is to apply the social standard of justice and to qualify themselves for the office by a study of these rules, and hence the origin of the judicial establishment, and of our profession as an incident. Society is organized power; and it is organized justice as well; and justice is fully organized when the office of the judge is created whose function it is not to make, but to find, and affix his official mark upon the rule which is in accord with the habits, usages and thoughts of the people. Care must be taken not to associate the notion of Law too nearly with that of Power. Justice is an oracle, and not a force. We sometimes speak, indeed, of the *sword* of justice; but this sword is not her own. It is borrowed from the arsenal of power. The sheriff is not a judicial, but an executive, officer. Hamilton in one of his best papers has truly said:—

"The judiciary has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither *force* nor *will*, but merely judgment; and must ultimately depend upon the aid of the executive arm for the efficacious exercise even of this faculty."*

But how could a great philosophical jurist, like Austin, have attempted to found his entire system upon the postulate that law is a *command* in the face of the universal and necessary maxim that every one is presumed to know the law? That this is a necessary maxim must at once be acknowledged. If men could plead ignorance as an excuse for legal wrong, the administration of justice would be impossible. Is this imputation of knowledge a false assumption? It certainly is if law be necessarily a command; for a command, if realities and not fictions are intended, is a matter of fact, the existence of which is susceptible of proof. But, except in the case of statute law, there is no producible

* Federalist, No. 78.

evidence that commands have ever been given, and even in the case of written law the majority of the people are ignorant of the statute. Moreover, the only means open to us of certainly knowing the law, namely, a resort to the judge, is available only in the case of an alleged violation; and what sort of a *command* is that which must be violated, or alleged to have been violated, before it can be known? But, if law be not a command, but the mere jural form of the habits, usages and thoughts of a people, the maxim that all are presumed to know it does not express a false assumption, but a manifest truth. In the great game of society, as in the little one of ball, all the players are justly presumed to be familiar with the *usages*, that is, with the rules. The same knowledge and the same ignorance are found in sovereign and subject. For the great mass of the occurrences of life, neither requires any aid. The exceptional cases alone in which transactions assume forms somewhat different from the customary ones are the only occasions for doubt and uncertainty, and here sovereign and subject alike must resort to the referee—the judge—the expert—for his better decision.

Statute law may be thought to constitute an exception; but the difference, as I shall presently a little more fully show, is more apparent than real. Statute law itself, when dealing with the jural relations of men, if confined to its just province, merely puts those relations, as they already exist in popular custom and thought, in a clearer and more definite form.

The conclusion that law is custom and opinion, rather than a command, may be strongly reinforced by other facts of common observation. And let me borrow my first illustration from statute law, and at the same time show that this differs slightly, and in degree only, from the unwritten law. We all know that when a statute is passed which conflicts with the opinions, customs and habits of a large part, although it may be a minority, of the community, it is difficult, and often wholly impossible, to enforce it. In many instances such enactments are absolutely futile. They have the form of absolute commands, proceeding from the sovereign power; but can that be, in any just sense,

law which stands as a dead letter upon the statute book? Is it not rather a nullity? It may be said that a law does not lose its character as such because men choose to violate it; but does it not lose that character when it is at all times and everywhere violated, and nowhere, or in rare and exceptional instances only, enforced? The fact must be admitted that such commands are enforceable only when they are in accord with the opinions of an overwhelming majority; that is to say, when they are in accord with the habits, customs and thoughts of the people; and if this be true, it must be in consequence of that accord. The thing therefore which gives them life and efficacy—that which makes them laws—is not the fact that they are commands, but that they are expressions of existing habit and opinion; and if it be habit, custom and opinion alone which give to commands the force of law, it follows that the real substance of the law is not the command, but the habit, custom and opinion which it embodies.

Another illustration: William of Normandy decreed the establishment in England of the feudal system and law. Did this immediately thereupon become the law of England? Far from it; and yet he and his successors did really make it the law of England; but it was only by persistently enforcing their power through the period of a century, until they had effected a complete conquest of that realm, extinguished its ancient land laws and usages, and created, as it were, a new and different civilization. It was then that the feudal system really came to represent and express the customs and habits of the people, and then for the first time it acquired the true character of law.

It is sometimes said that laws do not execute themselves. This apothegm well enough expresses the thought intended by it, namely, that the work of vindicating the law in the instances in which it is violated necessarily requires voluntary effort. But it is a half truth only. Indeed, it would be more correct to say that all real laws do execute themselves, and that it is such only as thus execute themselves which are, in a just and

philosophical sense, laws. Law being the mere expression of the universal habits and customs of the people in their jural relations, it necessarily follows that it is for the most part silently obeyed. And the observed fact is completely in accordance with the inference. Property is sometimes stolen or misappropriated; but the instances are as nothing in comparison with the universal respect in which its rights are held. Contracts are sometimes broken; but for every one violated ten thousand are kept.

I have referred to the phenomena which early societies exhibit in order that the identity of law with custom might be more clearly brought into view, but if my assertion of this identity is well founded, it ought also to appear in the highest forms of social development. And such will be found to be the case. The complexity of civilization renders it less apparent, but the task of exposing it is not difficult, and upon the fundamental and vital question of what the sources of law are, and what its real nature is, you will not expect me to apologize for detaining your attention.

Let me employ here, as I have endeavored to do throughout, the true method of scientific investigation, and again scrutinize the actual process of judicial inquiry as it takes place from day to day. I may take the homely instance of a milkman suing for milk which he has furnished. The defendant pleads and proves, as a complete, or, at least, a partial defense, that the milk was watered, and the plaintiff seeks to avoid the effect of the evidence by proving that milkmen generally thus adulterate their milk. This is the nature of the transaction, and the parties, or their counsel, enter upon the argument before the judge. They talk of principles and rules. But these are nothing but customs. The plaintiff tacitly relies upon the rule or principle that purchasers must pay for the goods they buy. Without this he would have no *prima facie* case even. But why is this a principle? Plainly, for no other reason than that it is the universal custom. If such were not the custom, there would be no such principle. But

the defendant insists that the adulteration of the milk is not a custom, and it is upon this that the real contest turns. The plaintiff points to his proof that milkmen generally are given to this practice. The defendant criticises this evidence. He points out that it does not appear that *every* milkman waters his milk, and so that the custom is not universal, even among milkmen. He shows that those who do it, do it in secret, and so the custom is not *known*. He argues that the selling of milk is but an instance of the larger custom of selling goods generally, and that the sellers of goods generally do not adulterate their wares; and finally, he shows that the adulteration of milk, so far as it is a custom at all, is the custom of those who are denominated in society as rogues, whose practices are wholly exceptional, and that the real custom of society is to condemn it.

We thus perceive that the whole argument of the parties, although they are constantly speaking of rules and principles, really turns upon what the customs are, and that rules and principles are only other names for custom. The judge accepts the argument of the defendant, and his decision consists simply in affirming that the transaction, instead of coming under a custom which society approves, falls under one which it condemns; in other words, that it is contrary to the general practice of men.

If we take the instance of a novel transaction we shall find that the process is precisely similar. For example, when the first action was brought against a telegraph company to recover damages sustained by an error in sending a dispatch, the real dispute turned instantly upon the question whether there was a custom to pay such losses. The defendant asserted there was none, and could be none, for the reason that the case was the first instance of such a claim. The plaintiff asserted that there was a custom where one party undertook to perform a service for another for a reward, and performed it negligently and imperfectly, to pay the loss, and that the example in controversy was an instance of that custom.

And here the law reveals itself in its true character as an Inductive Science engaged in the observation and classification of facts. The naturalist observes the plants and animals of the globe, and arranges them in classes according to some common features which they exhibit, the higher and more general including the lower and narrower; and when a new specimen is found, the only questions which science asks in relation to it is in what order, family, genus and species it belongs, or whether it is a wholly new discovery for which a new species must be framed; and these questions are answered by observing the features which the specimen exhibits and comparing them with those found in others which have been before examined and classified. When this task is accomplished the immediate office of science is fully performed. The judge and the jurist perform a precisely similar work in the domain of the law. They observe the transactions of men and arrange them in orders, families, genera and species according to their proper description from a jural point of view; that is, according to the particular customs the features of which they exhibit; and when a novel transaction makes its appearance, the function of the judge is to closely scrutinize its features and determine to what class, that is to say, what custom, it should properly be assigned.

I venture to think that the true genesis and nature of the law which is administered—of the actual law as distinguished from ideal, or hypothetical conceptions of it—have now been pointed out. We find it to spring from and rest upon the habits, customs and thoughts of a people, and that from these a standard of justice is derived by which doubtful cases are determined. The office of the judge is not to make it, but to find it, and, when it is found, to affix to it his official mark by which it becomes more certainly known and authenticated. The office of the legislator—speaking, as I have throughout, only in relation to that law by which the private transactions of men in their jural relations are governed, and not of that law which relates to the formal organization and mechanism of government—is somewhat, but not fundamentally, different. In the order of social development it

comes in *after* the institution of judicial tribunals and is properly supplemental to their work. As society advances and becomes complex, the judges, who are the experts to find and declare the law, sometimes differ in opinion, and the law becomes uncertain; and besides, society in its progress and development outgrows its old usages and essays to form new ones. The uniformity and persistency at which the judicial office always aims, become a barrier to this development; and the need is felt of an agency less fettered by precedent and clothed with a power somewhat resembling the creative function. It is the office of legislation to supply this need. It may declare, unembarrassed by former precedent, what the law is; but, as we have seen, the successful performance of the task depends upon the skill and certainty with which it interprets and applies the already existing customs, habits and thoughts of the people. It acts in every instance at the peril that its work will be empty and ineffectual unless it accords with that public opinion of which it is its function to be the exponent.

It is not worth while to dispute the correctness of the common phraseology which ascribes to the legislature the office of *making* law. Its liberty of action so far exceeds that of the judicial tribunals as to justify, for ordinary purposes, such a designation of its functions; but the deeper and more philosophical view would assimilate its office more nearly to that performed by the judicial tribunals, namely, of affixing the public mark and authentication upon the customs and rules already existing, or struggling into existence, in the habits of the people. If by the making of law we mean the framing of rules at pleasure, there has never yet existed a sovereign whose power was so absolute as to embrace such a privilege. The avowed maxim of Roman imperialism was indeed "*quod principi placuit legis habet vigorem*," but the actual practice of that conquering nation was widely different. What enabled it to incorporate and consolidate within its own realm its prodigious conquests was its profoundly wise policy of recognizing and adopting the laws and usages of the nations it

had subjugated, instead of attempting to impose its own laws upon them.

Wise legislation seeks to accomplish in relation to each human interest only what it seeks in the domain of business and finance. A hundred vain efforts have almost taught ignorant minds that governments can not by legislation make that to be money which would not otherwise be such; but it can and should affix its mark and authentication upon the metals which society has by usage adopted as money, and certify the quantity which each coin contains. In other affairs as well as in economy, the mark will be respected if it is affixed to the genuine product of public habit and custom, but will be rejected with the like contempt in either case, if placed upon some spurious creation.

These observations upon the true nature and function of legislation will be found well confirmed by an appeal to the great historic statutes of English law. That law in its early stages denied to the owners of lands the power to dispose of them by will; but the growing needs of an advancing society demanded this privilege. It came to be customarily asserted and allowed through the intervention of uses and otherwise, until finally the legislature recognized and authenticated the practice by the passage of the Statute of Wills. Nature and sense taught men that the best method of guarding against frauds and perjuries in relation to matters of contract was by reducing agreements to writing. No statute was necessary to give them this information; and the practice of written contracts was fully in use long before the Statute of Frauds. The legislature correctly apprehending the tendency of business, and wisely stepping in to supplement and aid it, required certain classes of contracts to be reduced to writing, and its action was at once, and has ever since been, accepted as a just performance of its function. On the other hand, the multiplied forms of abuse growing out of the practice of making conveyances to uses led the legislature to believe that it would be wise to cut up such conveyances to the root; but in this it misapprehended the customs and

needs of society, which demanded this form of transfer for the purpose of making provision for families and other just objects, and persisted in employing it, and the judiciary, better apprehending social wants, reduced the Statute of Uses, by a bold interpretation, almost to a nullity.

It may be objected that in thus imputing, as I do, the origin and genesis of law to custom and habit, a difficulty is encountered in this, that there are many bad customs, and that if custom really makes the law, it would, to the extent that the customs are bad, make bad law, which the tribunals would nevertheless be bound to recognize and enforce; whereas the fact is that the courts recognize bad customs only to condemn them. This criticism would be founded upon a very superficial view. We do indeed hear from judges and lawyers of bad customs; but, if such are scrutinized, we shall find that the term is not employed with precision. The trouble with these so-called customs—that which constitutes their badness—really is that they are not customs, but violations of custom. Milkmen may be shown to have put water in their milk, and the practice be proved to be so common among them that it might, without a great deviation from propriety, be called, in common speech, a custom. But this is a secret act designed to deceive those who deal with them. This surely, even were it a custom of milkmen generally—and I impute to that class no such dishonesty—is not the custom of men in general. It is not the general custom in society to practice this deceit; but quite the contrary. It is in violation of the general custom and would, for that reason, be stigmatized as wrong. There is no doubt of the existence of bad practices in society, no doubt that the instances in which men act contrary to custom are very numerous. It is the very purpose of the whole machinery of the law to repress such practices and compel compliance with the general custom. In the case, however, of a custom admitted to be universal in any human society, no doubt could be started concerning its legality in the courts, nor concerning its propriety in the forum of morals. Neither law nor practical

morality can ever transcend a universal custom. Polygamy may be wrong in New York, but is is right among the Turks. And in this we find further corroboration of the main proposition which makes custom the origin of law. The fountain cannot rise higher than its source.

If the foregoing views are well founded, I am now justified in stating the conclusions to which they lead. These are that law is not a body of commands imposed upon society from without, either by an individual sovereign or superior, or by a sovereign body constituted by representatives of society itself. It exists at all times as one of the elements of society springing directly from habit and custom. It is therefore the unconscious creation of society, or in other words, a growth. For the most part it needs no interpreter or vindicator. The members of society are familiar with its customs and follow them; and in following custom they follow the law. It is only for the exceptional instances that judicial tribunals or legislative enactments are needed. In those cases where the customs are doubtful, or conflicting, the expert is needed to ascertain or reconcile them, and hence the origin of the judicial establishment. But as the judge is bound down strictly to the declaration of what actually is, and must preserve a consistency in his declarations, occasions arise in which his functions are not adequate to social needs. In the advance of the arts of life new fields of action are constantly opening, and new instrumentalities are required; and on the other hand, in other directions, decay and retrogression set in. New customs, new modes of dealing, must be contrived to meet the new exigencies, and society by the unconscious exertion of its ordinary forces proceeds to furnish itself with them. But this is a gradual and slow process, attended with difficulty and loss. Another agency is needed to supplement and assist the work of society, and legislation springs into existence to supply the want. Legislation is the product of an advanced civilization. Society by a concerted and voluntary effort, but not seeking to revolutionize the past, or to make wholly new creations, gives shape and direction to the new customs

struggling into existence, and accomplishes at one stroke what would otherwise cost the toil of years. The statute law is the fruit of the conscious exercise of the power of society, while the unwritten and customary law is the product of its unconscious effort. The former is indeed to a certain extent a creative work; but, as we have already seen, the condition of its efficacy is that it must limit itself to the office of aiding and supplementing the unconscious development of unwritten law.

I have now, so far as my humble ability permits, indicated the origin and nature of the law which is actually administered. We find that instead of being a body of commands imposed upon society from without, it is one of the great facts of society itself. The law is a department of sociology. It is the unconscious resolve of society that all its members shall act as the great majority act. I cannot stay to discuss the philosophical question whether the conceptions of *ought* and *must* in the breast of the individual—in other words, the sense of obligation—are anything more than the product of that habitual observance of custom which society compels. I prefer to believe, and do believe, that they proceed from a higher source, that there is for man a destiny higher and nobler than the world has reached towards which his tendencies impel him, and which his faculties fit him to attain. Otherwise neither the conception of a higher condition, nor the aspiration to reach it would be explicable.

Upon these views there should be no wonder that the actual condition of the law is such as we find it. For the most part it could not be otherwise. Being one of the phenomena of society, it must exhibit all the characteristics of the latter, its virtues and its vices as well. We conceive of justice as a pure, disinterested, almost heavenly rule; but what is it often as it comes from the lips of ignorance, weakness, subserviency, self-interest and prejudice. One of the offices of the law is to ascertain the truth in matters of fact; but how often are its efforts wholly successful? The historian Hallam ascribes the long continuance in England of wager of battel to "the systematic perjury of witnesses, and the want of legal discrimination

in judges." What wonder that men should turn away in disgust from the shocking spectacle of falsehood and ignorance assuming the sacred name of right, and prefer to believe that the God of Justice would listen to a direct appeal. Let us not smile at the credulity of an age which could sanction such a device for the discovery of truth and the punishment of wrong. Our own boasted trial by jury, which affirms that all grades of capacity above drivelling idiocy are alike fitted for the exalted office of sifting truth from error, may excite the derision of future times.* Centuries ago our ancestors recorded with every form of solemnity their resolve that justice should be neither denied, delayed, or sold. Their ideal even then was high and pure; but how far removed we still are from its realization! Justice is now, in multitudes of instances, so long postponed that the delay amounts almost to denial, and there have not been wanting mortifying examples in which it has been believed to have been sold.

The true picture of the law as it is, must, alas, be shaded with many gloomy tints. But if this is the Actual, what is the Ideal? I shall not attempt to draw the counterpart. An ideal law could be exhibited only by setting before you an ideal world; and that picture has once been painted in colors which my dull pencil could not hope to rival, by the brilliant fancy and enlightened genius of Sir Thomas More. One Utopia will suffice until society shall realise its best aspirations and reduce that imaginary province into actual possession.

And let me not be thought inclined to disparage the ideal as unreal and unattainable. It has an existence as truly as the actual. There is a world of thought as well as a world of action; and as every thing which we do is prompted and shaped by previous thought, our actions are determined by our

* Some of my hearers thought this indicative of an opinion unfavorable to the system of jury trial. I did not so intend it. I am a thorough believer in the present expediency of that system, but I am not insensible of its defects, and do not suppose it will last forever.

thoughts, and the ideal is thus the predecessor and the parent of the actual world. Every step which has ever been made in human progress by conscious effort must have had its origin in some previous idea, and the problem of reform in the law, as in everything else, is to form just ideas and contrive the methods by which they may be realized.

The one idea which the lawyer must ever cherish and strive to hold clearly and firmly in his conceptions, is that of justice. To say precisely what this is seems to transcend the power of human analysis. We attempt to describe it at one time and another by calling it what is right, or good, or fit or convenient; but it is neither of these things alone; perhaps because it is all of them together. It is the subtle essence which animates every rule deserving the name of law, but which we can not separate from the actions in which it dwells.

> "Guest of million painted forms
> Which, in turn, its glory warms,"

we find the chase after it to be endless, and guess that it is a divinity. But we do know that all reform and progress in the law consist in lifting up the actual system which we administer into a more perfect harmony with the ideal conception.

The motive, the inspiration, and the matter for the improvement of the law come from the realm of the ideal. The problem of how the work is to be accomplished must be solved by ascertaining the true method of applying the possible benefit to the actual law, and its solution is indicated by the conclusions I have endeavored to establish in relation to the sources of law and the ways in which it is actually formed. It must be very plain that there can be no way of reforming and improving law except to reshape it, or add to it, and this can be done only by action in one or the other of those methods by which law is produced. I have shown that there are three agencies concerned in producing it in the form in which it actually appears. (1) The great and principal source,

namely, the customs and habits of society. (2) The decisions of the judicial tribunals pronounced in doubtful and exceptional cases. (3) Legislation, which is properly suppletory to the judicial tribunals. There are thus indicated three directions along which all reformatory effort should proceed.

First. Habits and customs. It must be manifest that so far as law proceeds from habits and customs, being merely the jural form in which they are exhibited, it cannot be improved except by improvements in habits and customs. This means that, to this extent, law can be advanced only by a general onward movement in society. Neither the lawyer nor the judge has any part in this work except as a member of the community in common with his fellow-citizens. Neither the judicial tribunals nor the legislature can properly attempt this task, for neither can create habits or customs. But this reform is in every progressive society constantly going on. Every advance in the arts of life, every development in education, every elevation of the standard of morality, every amelioration in physical condition is at once reflected in the domain of the law, and the improvement here brought about reacts with the same beneficial tendency upon the other interests of society. This is the great field of legal, as of every other reform, in which all are co-laborers. The work progresses slowly, unaided, for the most part, by conscious effort. And yet society has a wonderfully effective way of getting rid of the abuses and obstacles which stand in its path. The burdens which they bring are pushed from one member to another until in the general turmoil and strife they are finally done away with. We must have patience here,

> "Till jarring interests of themselves create
> The according music of a well mix'd state."

Second. The next field of reform is that in which our profession is the especial agency, that of judicial inquiry and decision. It might be thought that, inasmuch as it is the sole office of the judicial tribunals to *find* existing customs and not to make any, they could not effect improvements, which is a

creative function; but, as I have heretofore pointed out, they are chiefly employed in the consideration of doubtful cases, in determining under what custom a particular transaction should be brought, and this enables them to prefer good customs to bad ones, to adopt what is fit, convenient and useful, and reject what is unfit and hurtful. They can thus sanction and encourage what is just and condemn what is unjust. This is the genuine process of improvement, and the work approaches, although it does not fully assume, a creative character. The judge, the lawyer, the jurist of whatever name, continually occupied in the work of examining transactions and determining the customs to which they belong, and whether to those which society cherishes and favors, or to those which it condemns, is constantly employed in the contemplation of what is fit, useful, convenient, right—or, to use the true word, *just*. He reaches a nearer and clearer conception of the subtle element which that word denotes. It permeates the intellectual atmosphere he breathes, and governs his thoughts as if by instinct. It inflames his ideas and incites him to never ceasing endeavor to lift up the actual standard of justice which he applies to human affairs into a nearer conformity to his ideal conceptions. Sympathizing with every advance made by society, catching the spirit which animates the movement, it is his aim to keep jurisprudence abreast with other social tendencies. In this way there is a gradual, insensible and unconscious progress in the law. We do not perceive the movement, but it becomes apparent by comparing its condition at different and widely separated periods of time. It is thus that the Common Law starting from rude beginnings has expanded itself into the vast and consistent scheme which affords a safe bulwark for all the great classes of rights. It is thus that Equity taking note of every detail in the complex relations of life, responding to every added refinement in morality, has grown into the majestic system which guards the relations of confidence and trust, frowns upon every appearance of fraud, and furnishes a remedy for every exceptional form in which injustice and wrong are exhibited.

Third. The last of the methods I have mentioned in which law is shaped or produced, and consequently the remaining direction in which efforts for its improvement may be exerted, is legislation. This is a conscious, direct and voluntary agency. It is here that society exercises a creative function; but its action is not wholly creative. It is such, indeed, in form, but in substance, as has already been shown, it is largely limited to the declaration of what already exists. The essential nature of creative action is that it is voluntary and arbitrary, and can do what it will; but no legislature can make what laws it will; that is, such laws as will be obeyed, and no others are properly laws. The substance of them must be already found in the customs and habits of the people. Here is the principal field of direct and voluntary reform. It is here that society can consciously note its defects and shortcomings and resolve upon change and improvement. And it is here that the imperfection of the instrumentality involves the greatest liability to errors. Surely there is no employment which demands a larger measure of wisdom than that of surveying the field of human activities, observing the tendencies to evil, discerning the unconscious efforts of society to counteract them, divining the common thought which is animating the general mind and contriving plans which will be accepted as satisfactory expressions of that thought.

When we compare these large requirements with the actual elements which compose our legislative bodies, the prospect for well directed reform seems almost hopeless. But we should not so regard it. Except upon points which involve partisan or personal interests, our legislatures are always ready to receive the suggestions and consider the proposals of public-spirited citizens; indeed they are often too ready to adopt them without sufficient consideration, and another want becomes manifest, namely, that of an adequate comprehension among the leading minds in society of the true function of legislation, and of a sufficient public spirit to exercise a proper watchfulness over legislative action.

If the views I have advocated concerning the origin and nature of law are well founded, the rules which should guide legislative action are simple and plain. In the first place, legislation should never attempt to do for society that which society can do, and is constantly doing, for itself. As custom is the true origin of law, the legislature cannot, *ex vi termini*, absolutely create it. This is the unconscious work of society. But the passage of a law commanding things which have no foundation in existing custom would be only an endeavor to create custom, and would necessarily be futile. In the next place, the legislature should never attempt to perform the function of the judge, that of simply ascertaining and declaring existing customs. This is the work of experts who can qualify themselves only by the devotion of their lives. The legislator came, in the order of social development, *after* the judge, not to displace him, but to perform an office for which he was incompetent. The function of the legislator is suppletory to that of the judge. It is to catch the new and growing, but imperfect, customs which society is forming in its unconscious effort to repress evils and improve its condition—customs of the existence of which the judges are uncertain and at variance, or which are so different from former precedent that they cannot declare them without inconsistency—and to give to these formal shape and ratification.

I may refer to some instances which excellently illustrate the office of legislation. In the early period of English law it was a firm maxim that the legal existence of the wife was merged in that of the husband. This was but the expression of the universal custom by which a man assumed the ownership or enjoyment of all his wife's property. By degrees, the rigor of this practice relented, and in many forms, rights in property began to be conceded to married women. The judge could not change the solemn declaration so often made, but, through the instrumentality of what he called equity, he began to recognize this growing custom by declaring that *trusts* for the benefit of married women could be made which would be binding

in conscience, though not at law, and which the judges who ruled through the instrumentality of conscience would enforce. This was doing all the judge could do. It was taking note of, and authenticating, to a limited extent, new and growing customs. But in later times the custom of treating married women as entitled to their own property had become well-nigh universal. The judge could not repeal his declared maxim and rule, but the legislature interposed to supply the want, and by positive law fully recognized and adopted the approved custom. Again; our law originally accorded no right of property in the products of the mind; but in the advance of civilization the custom of paying authors for the fruit of their labors grew up. It could not be declared by the judge until it was recognized and adopted by the legislature, and that adoption, when brought about, extended only so far as the custom upon which it was founded, that is, to native authors. In recent times society, in its developing morality, begins to see that justice requires that the like benefit should be extended to foreign authors. A custom begins to grow, and becomes more and more general, to make to them some remuneration. It is not universal. The judge cannot, consistently with his prior declarations, recognize it; but the unconscious forces of society are struggling for it, and the final legislative sanction is impatiently awaited.

In legislation, therefore, the rule should be never to act unless there is an end to be gained for which legislative action alone is competent; and when such action is initiated, it should seek to recognize and express the customs which society is aiming to make uniform. When Solon was asked why he did not give the Athenians better laws, that wisest of men answered, "I gave them the only laws they were fitted to receive." Bentham was the opposite of Solon. He was an idealist, enraptured with his conception that the principle of utility was the universal solvent which would change everything into good. But he wholly failed to perceive that law could proceed only from custom. He believed that commands were law, and that he could

reform the world by legislation. He gravely proposed to the Emperor of Russia to frame a code for the government of that monarch's vast territory, and could hardly understand why his offer should be rejected. He was, indeed, one who may be accurately described by the vulgar designation of *crank*—a man who cherishes his pet theories in the solitude of his own contemplations, and disdains both the observation of the present and the study of the past. We need look no further for the reason why his schemes have never recommended themselves to wise and practical legislators.

Such then are the methods and the conditions for the prosecution of the work of Reform in the Law—for elevating its actual state towards our ideal conceptions. For such a work a combination of qualities is requisite which is rarely found in one individual. There is room and demand for the united labor of all. There is room for the idealist; for from the lofty heights to which aspiration soars, visions may be drawn for the inspiration of practical effort. There is room for the man of sober observation, and for the ingenuity which is fertile in devices. But above all, there is room, and an imperious demand, for that knowledge of the true nature of the problem by which alone endeavors may be guided. This aid can be furnished only by the educated jurist. How can we expect beneficent legislation in the absence of knowledge of its true relation to law, its possibilities and its limitations?

I cannot help thinking that right here our profession fails to discharge its full duty to society. We do not shed upon this part of the social problem that light which can come from no other quarter. We neglect the study of the science of jurisprudence. We make little provision for it in our schools, and abandon it in our private studies. The absence of it cramps and belittles the work of our text writers. The multitude of lawyers in our legislative bodies are as unfamiliar with it as the laymen. It seems to be regarded as a study which may engage and amuse the leisure of the curious student, but which has little in it to reward the devotion of practical men.

Gentlemen, upon occasions like the present, which seem appropriate for the purpose of taking note of the things which concern the dignity and honor of our profession, the place it should hold and the offices it should discharge in society, let us ask ourselves whether in the particulars I have thus indicated, we are not justly chargeable with neglect, and resolve to do something to repair it. Let us not boast that our profession deals with the highest of sciences, and yet remain unable to explain of what that science consists. Let us not make claim to be masters of the law while we are ignorant of the sources from which it proceeds, and the real methods by which it is brought into life and action. Let us do something through our influence in the seats of legal education to establish there, for the first stage in professional training, better provision for the study of the science of jurisprudence. Let us make this science the subject of our private studies. By such efforts, and by such only, can we rise above the mere vocation of aiding our clients by advice in the chamber, or action in the forum, and qualify ourselves for that other and larger office of leading and guiding society in its endeavors for the Reform of the Law.