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NATURAL RIGHTS

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Ph.D. 1918.

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My dear Mrs. Dunham;

Of course much of that
is over my head; but the
theory of 'natural right' as
underlying the claim to property
by the church is interesting -
also the return of jurisprudence
to the philosophic stand point.

Sincerely yours

Wm. S. Hicks.

Sunday morning.

NATURAL RIGHTS

Let us begin not with definitions or explanations of the terms conjointly used, but first of all with the term 'right.' There are several definitions of this word, the most general being perhaps "that which conforms to moral law; that which accords with truth, propriety, justice, or moral ideals or the will of God."¹ "A right action, intention, motive, or attitude," may be defined as "one which fulfills or conforms to Duty."² Another and briefer definition is that "a 'right' is the correlate of a duty; e.g., it is the duty of a child to obey his parents, and his parents have a right to his obedience."³ So far the definitions have referred only to moral and 'natural' rights -- nothing has been said of legal rights. "The term is used in German to denote the general system of rights and obligations, especially as being capable of being enforced by law."⁴ Hegel calls this 'abstract right.'

Natural Rights, then, may be defined briefly as "the claims founded on the law of nature," and perhaps better understood in the light of the difference between a 'natural right,' and a 'legal right,' which is "a legal power of one person over another 'a capacity residing in one man of controlling, with the assent and assistance of the state, the actions of others.'"⁵ Another definition of legal rights is "The aggregate of the principles by which rights in the (last) above sense are determined, the science of rights."⁶ It is plain that a right, at least in the legal sense, cannot exist apart from the correlative

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1. Funk and Wagnall: New Standard Dictionary of the English Language.
 2. Baldwin: Dictionary of Philosophy and Psychology, Vol.II,p.134.
 3. Ibid.
 4. Ibid.
 5. Holland: Jurisprudence, Chap.VII,p.71.
 6. Smith: Right and Law, Sec.228,244.

duty thereby incurred in others. Right in the sense of morally good, as opposed to evil, a matter which is more personal than political, is not the primary theme under consideration, the onus of this thesis being centered more particularly on right in the sense of duty and justice to others rather than to self.

Many adjectives are prefixed to the term 'rights,' and it may be well to give a few instances here of rights in more or less specific senses. "'Relative rights' are those involving duties of particular persons. 'Absolute rights' are those involving duties on the part of all persons, as the right to life, liberty, and property. My right to my house in my possession is a 'real right:' it attaches ad rem against all the world. If I be wrongfully dispossessed, I have a 'personal right' to recover my possession from the wrongdoer in a real action. 'Vested rights' are those already existing in a certain person as owner, whether absolute or defeasible."¹. "'Right,' or abstract law in the views of the historical school of jurisprudence, as expounded by Savigny, 'is no absolute, universal and immutable rule, but one of the forces of society with which it changes, in accordance with fixed laws of development.'"².

The subject of Natural Rights is one which has concerned philosophers ever since the fifth century B.C., when the Sophists took up the problem of 'Nature' in law. It is quite impossible to understand the meaning of such terms as 'nature' or 'natural' except in the light of that to which they are set in opposition. In the age of the Sophists 'nature' was understood as the exact opposite of conventions and in-

1. Baldwin: Dictionary of Philosophy and Psychology, Vol.II,p.474.
2. Ibid.

stitutions. The Sophists were an ancient class of popular professional teachers, who arose in Greece to instruct the youth of Athens in such subjects as were commonly taught at that time - public speaking, music, art, and literature - and to awaken in them an interest in religion, laws, politics, and institutions, subjects such as were intended to aid man in acquiring knowledge about himself and his relations to nature and to the social world in which he lives. The Sophists themselves came from various parts of Greece, where they had been educated by the older philosophers who were concerned with the problems of nature, but who had not speculated about Ethics and Politics. These self-styled "wise men" taught their pupils mainly with a view to fitting them for public life; consequently Ethics and Politics were their chief concern. Up to this time men had been governed entirely by tradition and convention.

The Sophists aroused a speculative and critical attitude towards philosophy, religion, morals, and politics. By appealing to reason to guide men they incited what has been styled a 'rationalistic revolt against traditional beliefs,' thereby making the way clear for deep philosophical study of religion, morals, and politics. But by refusing thus to accept the firmest institutions of the time and assailing the oldest traditional beliefs, the Sophists inevitably incurred the contempt of the older philosophers, who represented the conservative tendencies to be governed by convention and tradition. Another feature of the Sophistic teaching, which greatly offended the older schools, was the fact that these teachers taught for money. This mercenary aspect was entirely lacking among the earlier masters, who gave of their learning gladly and unreservedly for love of it.

Aristotle's view of 'nature' is quite different from that of the

Sophists, as can plainly be seen in his famous statement "Man is by nature a political animal," by which he seems to mean not only that man is gregarious - for gregariousness is characteristic of many lower animals - but that man does not fully realize himself except as the member of a city-state, which Aristotle regards as the highest social organization, offering to man the opportunities of its active political life and intimate association. According to Aristotle, whatever is right, is right by nature and not opposed to political institutions, but in accord with the institutions of the ideal state. In his ethical and political writings Aristotle uses the term 'nature' in two clearly distinct ways: "(1) that in which he uses 'natural' for original," e.g., when he speaks of man's having certain natural (i.e., innate, inherited) impulses prior to training; and (2) that in which he uses 'nature' for the ideal. In the former sense he says that the family is 'by nature' prior to the state."¹ "Between husband and wife, friendship is thought to exist by nature; for man is by nature a being inclined to live in pairs rather than in societies, inasmuch as a family is prior in point of time and more necessary than a state, and procreation is more common to him, together with animals. To other animals, therefore, community proceeds thus far only; but human beings associate not only for the sake of procreation, but for the affairs of life; for the duties of husband and wife are distinct from the very first and different. They, therefore, assist one another, throwing into the common stock their private resources." (Eth. Nic. VIII, 12, Sec. 7.) In the latter sense (that of nature as the ideal) Aristotle holds that the state

1. Ritchie: Natural Rights, p. 28.

is 'by nature' prior to the family and to the individual. "In the order of nature, the state is prior to the family or the individual; for the whole must necessarily be prior to the parts."¹.

Aristotle's conception of the 'Law of Nature' suggests older theories at the same time that it resembles later ones. In his Ethics he speaks of 'natural justice' and in his Rhetoric of 'universal law.' "In discussing Justice, Aristotle has before him the Sophistic assertion that there is no natural justice, because the natural must be everywhere the same, whereas men's ideas about what is just and right vary in different places (Eth.Nic.V,7,Sec.1,2). Accepting the fact of the actual diversity of moral ideas, he still contends that there is an element of unity underlying all this diversity.....Natural justice is an ideal towards which human justice tends.....perfect justice is for man an ideal only."². Aristotle does not sanction the idea of a Law of Nature and he maintains that there is no absolute antithesis between nature and convention,³.....there being no necessary inconsistency between them. In fact, he holds that political justice (jus civile) is in part natural and in part conventional."⁴. While Aristotle in his Rhetoric refers to the universal law which he identifies with the law of nature, he makes no such reference in his Ethics or his Politics, where he stands firmly with the law of the land as being unimpassioned reason. To strengthen Aristotle's position we might refer to the definition "Law is the measure or image of natural rights....."⁵ which he disputes on the ground that "an image arises through imitation, and this is not the case with law."⁶.

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1. Aristotle: Politics and Economics, Chap.2, Sec.12, p.7.
 2. Ritchie: op.cit., p.29.
 3. Aristotle: Politics, Bk.I.
 4. Aristotle: Eth.V,7,Sec.1.
 5. Aristotle: Topics VI.2,140,a,6.
 6. Ibid.

While the Sophists revolted theoretically and dialectically against convention in their writings, they were scarcely bold enough really to practice their doctrines. But the Stoics, even more bitterly opposed to the laws of convention and tradition, revolted not only theoretically, but actually put into practice their convictions and regulated their conduct in accord with them. To live according to nature means, to the stoic, to act in conformity with reason; to live a good and virtuous life. To arrive at the highest self-realization is to serve universal purposes and ends with the greatest degree of virtue. Virtue is known through the universal reason or logos. Through virtue alone is the greatest happiness achieved. In order to live in such a way as to attain the greatest possible happiness, individuals, since they are rational beings, must be banded together and have the same rights. From the process of reasoning these individuals determine their duty, the strict performance of which gives them the greatest satisfaction and happiness. The great world soul is revealed in the lower instincts of man as well as in his reason. It is universal and directs his conduct and guides him. Man must subordinate himself to the universal reason, and obey its admonitions, which are the same for the whole world of individuals. As reason develops in man, he finds himself revering it as his true essence and the promotor of his purposes and the dictator of duty. To the stoic, reason and duty are paramount, virtue occupying the highest place for good, vice being the worst of all evils. Nothing is good or evil in and of itself, but the value of it depends upon how we use it and how it affects the character. Antisthenes, a pupil of the sophist Gorgias, was a stoic. He taught that the wise man is sufficient in himself. He lives according to the law of virtue and not in accordance

with established laws. Virtue is determined by deeds rather than by learning or argument, neither of which is necessary to it.

The Cynics, whose maxims preceded historically those of the Stoics, divested man of almost every artificiality which separates him from the beast, except the wearing of one garment. The food of the cynic consisted almost exclusively of herbs and cold water. The stoics, while they did not pamper themselves with superfluous possessions, nor encourage pleasure of the senses, did, nevertheless, aim at a kind of simple, modest, virtuous, and intelligent living far removed from that of the beasts of the field. Diogenes, the pupil of Antisthenes, was a representative cynic, going backward in the process of civilization rather forward, as his teacher had done. It is related of Diogenes that when he saw some little children drinking from their hands at a brook, he threw away his cup and declared the superiority of their simplicity in life over his own hampered artificiality.

This 'return to nature' of the Cynics, their extreme aversion for anything that savored of convention, is the historical beginning of what developed, by modifications, into Stoicism and later into Rousseauism. The stoics were great students of logic. Their criterion of right conduct is reason, with its arguments and discussions, not convention. The stoics were much more interested in the practical side of life than the theoretical. The stoics, like Aristotle, looked upon nature as reason objectively represented and of divine origin. Man's reason, too, they considered divine. Through his reason he is able to comprehend and realize the divine element in the nature of the Universe, and he can conduct his life in accordance with natural laws. Reason is therefore not a cause of antagonism between individuals, it is rather the link that

joins them and makes it possible for them to live in peaceful proximity, one with another. Institutions and laws, which they respect in common, are not therefore considered as mere conventions, but rather as methods by which men are able to exist to their common advantage.

Cynicism strongly opposed civilization. Stoicism, although apparently discouraging to social and political progress, nevertheless, to the students of the effects of its doctrines upon civilization, it is evident that it really contributed to social and political development, inasmuch as the burden of its practical ideal was not imposed upon the isolated human being, but upon him only in his union with nature and humanity.

Through the writings of Cicero, whose ideas show most affiliation with the stoics, stoic philosophy became incorporated in Roman Law. It is here that we find the earliest example of the idea of the law of nature distinctly formulated in the same way that it appears in modern times. "In every matter the consent of all peoples is considered the 'law of nature.'"¹ This furnishes the foundation for the 'jus gentium' - the common law of mankind.² Cicero holds that there is in all men a natural reason and discrimination between right and wrong. Such sense is innate, the gift of God, and from it springs natural law. Natural law is in turn the source of natural right. Notwithstanding the fact

1. Cicero: Tusculanae Disputationes, I, 13, Sec. 30.

2. By a mistranslation, 'jus gentium' was in the seventeenth century supposed to mean international law. This misinterpretation proved to be of excellent service and great advantage to the various civilized states, because it afforded the reason and the opportunity for incorporating in their political theories, the human ideas that had found their way into Roman Law, and these were thus embodied in the laws governing the relations of the different states to each other. Much of the well-known excellence of Roman Law grew out of this mistranslation of 'jus gentium', the influence of which is apparent in many subsequent legal conceptions of other nations.

that men are not all equal in ability nor in worldly possessions, they are nevertheless equal in respect to natural rights which have grown out of natural law. This idea of 'natural rights' which Cicero expounds constitutes the third law of the Declaration of Independence, the other two laws being (1) 'The conscious instituting of government by men' as known to Protagoras, the Sophists, and Epicureans, and (2) 'The equality of men,' advanced by the Stoics.

According to Ulpian, a renowned Roman jurist of the third century, the law of nature applies to the lower animals as well as to man. Including the lower animals is the feature of Ulpian's law of nature, which is peculiarly his own, but one that is perhaps not well founded. In the following quotation there is evident an interesting distinction between Ulpian's conception of 'jus naturale' and his conception of 'jus gentium:' "Slavery exists jure gentium, undoubtedly; i.e., all civilized people known to the Romans recognized this institution; ancient political society was based on it. 'But by the law of nature all men at first were born free.'"¹.

When wars took place and captives were made slaves, natural law was violated because according to natural law all men are born free and with equal natural rights; it was therefore not designed that one should be the slave of another. No civil institutions can, according to natural law, disregard natural rights.

Cicero and Plato had held that man is by nature social, wherefore he organizes societies. St. Augustine adds to this the idea that man is peaceful, and that "there is a general pact to obey kings.....Government is to render service to those who are governed - an idea that the government rests on the consent of the governed.... In the natural order of

1. Ritchie: op.cit., p.38.

the world, God arranged for man to rule only animals. One man was not to be ruled over by another.....Slavery is a temporary institution of this world existing on account of man's sin. By natural and divine law it is unjust, but by human law it is not so.....It is not always had not to obey a law, for when a ruler makes one which is contrary to God, hence to divine and natural law, then it is not to be obeyed. In this doctrine of St. Augustine we see the beginning of the theory of active resistance or revolution."¹ These two doctrines of St. Augustine, that the power of kings rests on the consent of the governed, and that laws, which are contrary to God and nature, need not be obeyed, are of immense importance. These two laws added to Cicero's three, constitute the five laws of the Declaration of Independence of the time of St. Augustine.

The church strongly encouraged revolution against unjust laws, not wishing too much power to vest in the state. The laws of God and nature were represented by the pope, while the king or state represented the laws of man. Pope Gregory VII said, "Kingship does not exist by nature or by merit.....The power which a king has was given to him by the people.....If he falls into tyranny, the people are freed from subjection to him. As you would dismiss a swineherd for not taking care of his herd, so must you with better and more reason remove a king."² John of Salisbury recommended the killing of kings if necessary for the welfare of the people. Gratian says: "Divine laws exist by nature, human law by custom, which varies with different people. Divine law is identical with natural law. 'Jus naturale'

1. Sullivan: Antecedents of the Declaration of Independence.

2. op.cit.

is common to all nations and precedes all law in time and dignity. It includes such topics as the union of man and woman, the rearing of children, community of goods, one liberty for all, the acquisition of those things which are to be taken in the air, on the earth or in the sea, the repulse of violence with force"¹. The five laws of the Declaration of Independence were originally philosophical, but they gradually became political and have continued to serve as such through the centuries.

In the twelfth century we have the beginning of a revival of learning, in which the study of Roman Law was vigorously pursued along with the doctrines of Aristotle. Thomas Aquinas combines the doctrines of Aristotle and Cicero in his conception of Nature, emphasizing the idea of the natural law as a system of regulations arrived at through reason. He makes three divisions in the precepts of the law of nature as follows: First, man has, by nature, along with all other creatures, an inclination to self-preservation and the taking of those measures which are conducive thereto, according to his nature. Secondly, man has an inclination to perpetuate the race. This he has also in common with all other creatures. Thirdly, man has a rational nature which disposes him to revere God, to live in communities, and to seek to acquire knowledge. Like the stoics, Aquinas held that natural law is to the mind of a human being only a participation in the eternal law (Aquinas *Ethicus*, 1a 2ae, qu. 91, art. 2); that man can conceive by reflection something of the eternal law, which is known in toto only to God and to those who see God (Aquinas *Ethicus*, 1a 2ae, qu. 93, art. 2); that

1. Ibid.

human law which governs states has its source in natural law, and is valid only when not in conflict or at variance with it. A final distinction is given to Roman Law by Justinian, who shows the law of nature to be separated from and more perfect than any human laws. The respect for natural law was much enhanced by Justinian's treatment of it. His interpretation greatly assisted the French in disentangling their own confusion of laws in critical times. Nature appears now for the first time in the role of a court of appeal in the period of scholasticism.

The cynics and stoics had been advocates of the greatest simplicity in life and had practiced their convictions as far as possible, so this matter of the law of nature as supreme was not new at this time, but only revived. Francisco Suarez in 'De Legibus' says of an unjust law, that it is no law at all. But this idea is not incorporated in Scholastic Ethics. It is thought, moreover, to be in direct defiance of the Church, the authority of which is guarded with reverential vigilance and nothing is countenanced which would be likely in any way to interfere with its absolute domination.

Machiavelli, the famous Italian political philosopher, was greatly opposed to the authority of Church over State. The political corruption of his day caused him to devote much time and thought to the laws of nature and rights of individuals and to the inauguration of such theories as he hoped might aid in correcting existing evils. That church and theology rightly supercede in authority state and politics was the prevailing verdict of his time, which he heartily rejected. His writings gave great impetus to men who followed him; they exerted a marked influence particularly on Grotius and Hobbes in the next century, whose views, however, are at variance with each other.

Grotius had advanced the theory that in the law of nature are contained all the specifications and definitions of the right and obligations of individuals; this Hobbes denied, and argues that the state wholly determines these matters. If all human civilization had been denied men, they would, according to Hobbes, be in a state of war, each against all, with self-preservation as the foremost instinct and a natural right. Uninfluenced by the ties of family and society, man would exercise his native pugnacity towards everything that interfered with his liberty to follow his inclinations unhampered; that, without institutions, ^{by} these can be no ties. But we know that there are ties without institutions or regulations of any sort - natural instinctive ties which exist and have their effect upon life regardless of the want of institutions - we see this in the kingdom of birds and among various other animals as well as in the life of man. Hobbes argues that, although man's natural inclinations, unguided by laws or institutions of any kind, lead him to protect himself from personal harm by any available means of self-preservation within his power; that "the Right of Nature is the Liberty of each man has to use his own power for the preservation of his own Nature, (i.e., of his own life) by the aptest means which he conceives,"¹ it is, nevertheless, profitable to him to seek and maintain peace, which Hobbes considers the fundamental law of nature and the real means of self-preservation. From this fundamental law he derives what we understand as the Golden Rule: "Quod tibi fieri non vis, alteri ne feceris," "that a man be willing to lay down this right to all things and be contented with as much liberty against other men as he would allow other men against himself."² Renouncing a right is distinguished, by Hobbes, from transferring a right, in that in the for-

1. Hobbes: Leviathan, part I, chap. 16, p. 96.

2. Ibid.

mer case, the beneficiary may be any one at all, while in the latter he is some one in particular. When a man renounces or transfers a right, he does so with a view to benefitting himself, since every voluntary act is selfish. Does a man who subjects himself to the danger of losing his life by drowning in order possibly to preserve the life of another, do so to benefit himself or to aid the other at his own risk? Hobbes' position in this matter would certainly not harmonize with the present-day idea of ethics.

Hobbes defines contract as the mutual transferring of right. The transference may be contemporary in the case of two contracting individuals, or one may realize his benefit later than the other. A covenant between individuals may be void on any provocation, if made without institutions, which is a condition of war of each against all, therefore the necessity of some law sufficient to enforce the covenant is evident, and there is such provision in every civilized state. A man may refrain from breaking his covenant for two reasons within himself, fear and pride - fear of God and pride in his own honor. The custom of taking oath over a legal document has been considered, for many centuries, a means of invoking God's imprecation upon non-fulfillment of contract, and a strengthening support to one's honor.

Hobbes' first law of nature, as has been noted, is to seek and maintain peace; his second is to live up to the gospel in respect to the Golden Rule; the third, which is now to be considered, is Justice. Where there has been no covenant, no injustice can exist. "Injustice is the not Performance of Covenant. And whatever is not unjust is just..... There must be some coercive Power, to compel men equally to the performance of their Covenants, and to make good that Propriety, which by mutual Contract men acquire in recompense of the universal-Right they

abandon: and such power there is none until the erection of a Commonwealth. The nature of Justice consists in keeping of valid Covenants."¹.

Rights must sometimes be transferred in order that the peace of individuals may be promoted and maintained, and there must be some undisputed authority to compel individuals to keep their agreements which must be made in good faith. From this absolute necessity of a recognized head for the maintenance of peace, there came into being the idea of systematized regulations with all degrees and varieties of ideas in the determination of ever-varying codes. The realization of this exigency in the experience of living, brought about the advent, upon life's stage, of government or the construction of the commonwealth, which has for its primary consideration, the enforcement of justice.

The determination of what we understand as justice is the source of endless difficulty to civilized man. It is the thing about which individuals cannot agree; it is that which causes endless strife and hatred and disastrous wars. In the determination of justice it is impossible for individuals to eliminate themselves and their own interests, even to the extent of one half, allowing, in compliance with the golden rule, an equal consideration for others. If it were otherwise, the millenium would be reached, for this is the one point about which the difficulties of the world revolve and multiply themselves. The mind of the little child, in the earliest years of mental activity, resents what to it may still be nameless, but what we recognize as injustice. Parents are prone to fail to appreciate a child's mental reservations in this matter or to realize what damage - even permanent damage - is inflicted upon the child's gradually developing character. To be unjust to a child, from

1. op.cit., p.106.

his own standpoint, detracts from his buoyancy immediately. This is detrimental to him physically and mentally; besides this, it may sow the seed of willful misrepresentation (through the instinct of self-preservation), and it may inculcate in the child a spirit of malevolence, which under benign influences might never take root.

The sense of injustice in human beings is one of those never-failing characteristics which predominate as long as sanity remains. It is one of the very first features of self to appear in earliest life and it can be relied upon to be in evidence until mental dissolution. What, therefore, can be more worthy of investigation and constant consideration? Justice to all individuals at all times would actually result in that Utopia the like of which could never be found in any other way. With absolute justice there would be no need for laws, but, aside from the fact that justice is a relative principle, absolute justice is wholly inconsistent with the nature of man, and governments with definite constitutions are necessary for the preservation and development of humanity. With the establishing of governments, definite ownership begins, and it becomes possible for individuals to work to some purpose. An incentive arises and man feels a pride in what he accomplishes, which stands apart and may be compared with the work of his neighbor. This gives him some sort of measure of value, which he owes to the protection which justice affords him. "Justice," says Hobbes, "the keeping of a Covenant, is a Rule of Reason by which we are forbidden to do anything destructive of our life, and consequently a Law of Nature."¹

The fourth law is gratitude. Hobbes continues to enumerate laws of nature up to nineteen in the following succession: 'Complaisance,' "that every man strive to accommodate himself to the rest" like stones brought together in the building of an edifice; 'Facility to Pardon,'
^{1.} op.cit.

"that upon caution of the Future time, a man ought to pardon the offenses past of them that repenting desire it. For Pardon is nothing but granting of Peace." The seventh law is "that in Revenges, men respect the future good;" the eighth, against Contumely, "that no man, by deed, word, countenance or gesture declare Hatred or Contempt of another; the ninth, against Pride, "that every man acknowledge other for his equal by Nature;" the tenth, against Arrogance, "that at the entrance into conditions of Peace, no man require to reserve to himself any Right which he is not content should be reserved to every one of the rest; the eleventh, Equity or Distributive Justice "that if a man be trusted to judge between man and man, it is a precept of the Law of Nature that he deal Equally between them;" the twelfth, Equal use of things Common, "that such things as can not be divided, be enjoyed in Common, if can be; and if the quantity of the thing permit, without Stint; otherwise Proportionally to the number of them that have Right;" the thirteenth, that "if a thing can not be divided nor enjoyed in common, "the Entire Right or the First Possession be determined by Arbitrary Lot, which is agreed on by the Competitors; the fourteenth, by Natural Lot, which is either Primogeniture or First Seisure, therefore by the thirteenth and fourteenth Law of Nature "such things as can not be enjoyed in common nor divided ought to be adjudged to the First Possessor and in some cases to the First-born, as acquired by Lot." The next Law of Nature is that of Mediators, who shall have safe conduct; then comes Submission to Arbitrament, then the Law that "No man is his own Judge;" and that No man shall be Judge "that have in him a natural cause of Partiality;" the nineteenth and last is that of Witnesses, that "in a controversy of Fact the Judge must give equal credit to all, - else the question is undecided and left to force, contrary to the Law of Nature."

Since such a list of laws of conduct for the preservation of life and best interests of mankind would be onerous for individuals to bear constantly in mind, Hobbes suggests that a thorough understanding and practice of the second Law, that which we understand as the Golden Rule, comprises them all sufficiently for the maintenance of the welfare of humanity. "The Laws of Nature oblige in Conscience always, but in Effect then only when there is Security.....they are Immutable and Eternal; for Injustice, Ingratitude, Arrogance, Pride, Iniquity, Acception of Persons (violation of Distributive Justice or Equity), and the rest can never be made lawful..... The same Laws, because they oblige only to a desire, and endeavor.....are easy to be observed.....he that endeavors their performance, fulfills them; and he that fulfills the Law, is Just."¹.

Locke, in explaining the origin of political authority, adopts the same individualistic point of view that Hobbes has taken, and starts with a conception of the state of nature; but it is not the original Hobbesian doctrine so much as Pufendorf's modification of it that is presented by the Whig philosopher. The state of nature as conceived by Locke is a pre-political rather than a pre-social condition. It is not a state in which men live in brutish reciprocal hostility, but

1. Hobbes: Leviathan, Chap. XV, pp. 119-120.

one in which peace and reason prevail. It is not a lawless state. Rejecting the incisive distinction made by Hobbes between the law of nature and real law, Locke follows the Grotian doctrine and declares the law of nature to be a determining body of rules for the conduct of men in their natural condition. Under this law of which reason is the interpreter, equality is the fundamental fact in men's relations to one another. On this foundation Locke constructs his doctrine as to the natural rights which belong to every man in the pre-political state.¹ Locke agrees with Hobbes in the matter of self-preservation as being the first motive, right, and privilege of every human being, but he differs from Hobbes in determining what the liberty of individuals is. Locke binds man to no restraint except that exercised by the law of nature. As to property in the nature state every man owns everything. Locke's doctrine of individual sole ownership is, in effect, "that property redounds to the individual who, by right of his having expended his time and labor on the process of converting it into a productive or profitable condition, becomes the rightful owner of the fruits of his own labor. Such encouragement our own government now gives to ambitious and industrious claim-holders in the United States.

Locke's state of nature is not, like Hobbes', the state

1. Dunning: State of Nature and Natural Rights.

of war of each against all, but a condition in which each regards with respect the fundamental natural laws which concern all. Nevertheless, Locke finally admits that owing to man's natural propensity to pugnacity and selfishness, the natural state is neither feasible nor possible to the well-being nor happiness of man nor to his peaceful pursuits. When a man relinquishes his right to execute the law of nature for offenses against himself, which he does, by social contract, when he becomes a member of a social community, he does not give up all his rights, as Hobbes holds, but only one right. He does not transfer this to any individual, but he gives it up to the civil state to which he is bound. A man gives his consent to membership in a community either by expression or by silently remaining personally located there or by owning some of the property of said community. If his obligation has been incurred even by word of mouth, it continues as long as the stability of the government endures. Unlike Hobbes', Locke's idea of sovereignty does not include the divine right of Kings. Neither absolute nor arbitrary power "without settled standing laws, can.....consist with the ends of society and government, which men would not quit the freedom of the state of nature for, and tie themselves up under, were it not to preserve their lives, liberties, fortunes and by stated rules of right and property to secure their peace and quiet."¹.

1. Locke: Treatises of Government, II, Sec. 137.

Locke advocates absolute separation of Church and State and defines a church as being "a voluntary society of men joining themselves together of their own accord, in order to the public worshiping of God in such a manner as they judge acceptable to him and effectual to the salvation of their souls."

Rousseau, who was largely responsible for making the theory of Natural Rights popular, studied Locke's theories and incorporated them into his own ideas, losing, however, to a large extent, their logical aspects and making additions of all sorts of inconsistencies. He nevertheless developed farther what he received from England, and his influence has, during the last two centuries, permeated the various parts of the civilized world. Russia has just recently shown its effects in the writings of Tolstoi.

Rousseau's attitude towards civilization is well expressed in the following quotation: "Men are equal by nature; society through its institution of property has made them unequal, so that we now have masters and slaves, cultured and uncultured, rich and poor. Civilization, with its culture and inequalities resulting therefrom, has corrupted our natural inclinations, producing the slavish and the lordly vices, servility, envy, hatred, on the one hand, contempt, arrogance and cruelty on the other, and has made life artificial and mechanical."³ Rousseau, in his own life, held himself bound by no conventions nor institutions of any sort, not even the institution of marriage. In this respect his influence was malevolent in the extreme. He was, however, a man of remarkable genius, which spent it-

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1. Locke: First Letter Concerning Toleration, p.13.
 2. But that Tolstoi was directly influenced in his theories by Rousseau is disputed in the American Review of Reviews, October, 1913, by the Russian, Professor Kovalessky, who holds that with respect to the similarity of the theories of Tolstoi to those of Rousseau, there is simply accidental concurrence of views on certain questions, particularly those in education realms.
 3. Thilly: History of Philosophy.

self without guidance or conscience. He is considered "one of the best instances in support of the theory that genius is allied to insanity. He was full of new and original ideas that found room to germinate uncontrolled and unchecked by any considerations of mutual compatibility and truth. Friend and foe find in these characteristics the basis of adoration and criticism. In the riot of opinion each reader can find what appeals to him."¹.

Rousseau held "that the right ordering of human life demands simplicity in our normal wants and surroundings, and that in particular, the laboring people are, through the greater naturalness of their lives, more accessible than any other classes to moral appeal, and richer in moral insight and virtue."². We admit that "It is generally recognized by thoughtful people that luxury and dominion, the consciousness of being able to claim the services of others for every irksome business, are very powerful adversaries of moral sensibility and effective good will.....Again the inherent social perversity of living wholly on the labor of others is being recognized no less eagerly than its economic and social mischievousness."³.

Rousseau's doctrine of natural rights manifested itself in collectivistic individualism as well as in the individualistic phase known as anarchism. His theories set the world

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1. Pillsbury: Rousseau's Contributions to Psychology, Philosophy, and Education.
 2. Roberts: International Journal of Ethics 20, 1909-10.
 3. Ibid.

to thinking, and put in motion the wheels of revolution, causing thoughts valuable for the making of better constitutions of government to be evolved. For this, his work, from a utilitarian standpoint is worthy of the highest commendation. It has proved as vital and epoch-making as the doctrines of St. Augustine, and although it can never, by any means, be accepted in its entirety, it is nevertheless replete with suggestions and laudable principles.

Kant, in his Practical Philosophy, shows the influence of Rousseau with respect to government. From both the ethical and legal standpoints, however, he is opposed to hedonism. Kant includes in his idea of morals the concept of law.¹ In his philosophy of law, the idea of duty or the sense of obligation is paramount in determining morality. He regards the following of personal inclination as opposed to moral conduct. The tendency toward good is determined by law, which is comprehended through reason, and is therefore conceivable only to "rational beings," who are, through their rational wills, free. Kant emphasizes especially the importance of loyalty to law, as evidenced in his categorical imperative "Act according to a principle which may also serve as a general law."² Kant's idea of the State is that it is "an association of men under a system of laws."³ Man's freedom is not impaired but is rather secured by the constitution of the state. In Kant we find modern legal philosophy, taking the place of 'natural law' in which the state was established by human will with little regard for reason. He looks upon the state as bound by reason, but he holds nevertheless that there are no natural rights outside of positive law. The particular in which Kant differs from former philosophers, some of whom also regard the state as bound by reason, is in his interpretation of reason. He uses the term 'reason' to signify a formal principle, not a material principle. Kant's conception of natural rights, therefore, differs

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1. Kant: *Grundlegung zur Metaphysik der Sitten*, Vol.4, p.8.
 2. Kant: *Collected Works*, 5, p.25; *Grundlegung*, p.43.
 3. Kant: *Metaphysik*, p.145.

from that of former philosophers in that he emphasizes the formal rather than the material content of reason. Kant believed "in the State as the guardian of freedom, and the law as the expression of freedom. He believed in a new form of ideal positive law."¹ "The free man is not the empirical man separated from the social, but it is the rational man who asserts himself by a constant struggle with the empirical man."² "Rationalism confuses the limit of right with the principle of right and therein lies its error."³ "Every action is just following the principle by which the liberty of each can subsist with the liberty of all, according to a general law."⁴

According to Kant's conception, reason and ideal justice determine the philosophy of law. His 'legal justice' formulates "the notion of an equal chance to all exactly as they are, with no artificial or extrinsic handicaps."⁵ Kant regards restraint as a means and freedom as an end, advocating complete freedom on the part of man except where restraint is necessary to bring about "harmonious coexistence of the individual with his fellows according to a universal rule."⁶ With Kant, then, the individual will is the central point. Society is made up of free-willing men whose individual wills should not be arbitrarily disregarded.

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1. Erhardt: *La Crise Actuelle de la Philosophie du Droit*, p.29.
 2. *op.cit.*, p.26.
 3. *op.cit.*, p.42.
 4. Kant: *Rechtslehre*, p.33.
 5. Pound: *Scope and Purpose of Sociological Jurisprudence*, p.152.
 6. Kant: *Metaphysische Anfangsgründe der Rechtslehre*, p.27.

Fichte holds that there is no law prior to nor beyond the State, and that the assumption of 'natural law' is a fiction. "There are no primitive or inalienable human rights. Man acquires rights only as a member of a community. Primitive right, is thus a mere fiction required by science."¹. Since there is no law beyond the State, there is likewise no citizenship beyond it.

The state must offer absolute guarantee that none of its citizens will suffer injustice. In order to secure the carrying out of such a guarantee the law must of itself, as some supreme will, make the community as a whole suffer for any injustice to an individual. In order to accomplish this a civil contract must be accompanied by the right of nullification.

"Fichte distinguishes between what is legal and what is moral. The requirements of the law are limited to what is legal; the mechanism of the law, through the right of nullification in the civil contract, makes it incumbent upon the will to desire only what is loyal to the principle of law and thus automatically supplies the place of a well-disposed will."². Ideally, this conception of the law is very interesting; practically, it is entirely without value.

Fichte shows the influence of Rousseau in emphasizing

1. "Collected Works," III, p.112.

2. Berolzheimer: World Legal Philosophers, p.198.

the freedom of the human being. "Every man is by nature free, and no one but he himself has the right to impose law upon him."¹ "Every man again becomes free as soon as he so desires, and has the right to withdraw from obligations which he has imposed upon himself."² "To be able to think freely is the distinctive difference between the human and the animal mind."³ Society is based upon this fact. "Civil legislation becomes valid for the individual only in so far as he freely accepts it.....and thus freely imposes the law upon himself."⁴

Law exists that individuals may live in societies, each one sacrificing a certain amount of his own individual freedom that the freedom of the other members of the society may remain unimpaired. "The deduced relation between rational beings through which each limits his freedom by the consideration of making possible the freedom of others, provided that others likewise will restrict their freedom, may be called the legal relation; and the formula thus enunciated is the principle of law."⁵ Fichte resembles Kant in maintaining that law and therefore the State are direct products of reason. According to Fichte, law is not an end in itself, but a means toward man's moral education.

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1. Fichte: Collected Works, VI, p.262.
 2. op.cit., p.263.
 3. Fichte: Collected Works, VI, pp.11-13.
 4. Ibid.
 5. Fichte: Collected Works, III, p.52.

It is for the advantage of the individual that the state exists. While the state as a legal institution is necessary, nevertheless in order that the moral status of man may be improved, the state must become an institution governed by reason, and not by mere law. From the point of view of economics, the fundamental principle of the state is that everyone be guaranteed the privilege of existence. "The purpose of human activity is to enable one to live; and all who have been granted life by nature have the same claim to this privilege. The division of rights must thus first be so arranged that all may be able to exist."¹.

Fichte established no school of philosophy, but he nevertheless exerted great influence upon his contemporaries and successors, conspicuous among whom was Hegel. The most notable exponent of Fichte's doctrines in America is Münsterberg.

1. Fichte: Collected Works, III, p.402.

II. The history of the conception of natural rights in the nineteenth century is largely a working out of the ancient and mediaeval Roman view and the modern Anglo-French view that found expression in Rousseau. Our Declaration of Independence, the English Bill of Rights in 1689, the French Declaration of the Rights of Man, and all Bills of Rights that furnish preambles for constitutions in the United States are little more than variations of the Anglo-French conceptions of natural rights.

The French Revolution was based on the theory of Natural Rights - the theory of Old Natural Rights - represented by Rousseau, Kant, and Fichte. It was due to the French Revolution that an intellectual reaction against Natural Rights occurred. This reaction against Natural Rights and the subsequent development of positivism is reflected throughout the history of the nineteenth century. It began in England with Burke and Bentham and was later taken up in Germany by Schelling, Hegel, and Savigny.

Although Burke and Bentham are both antagonistic to the theory of Natural Rights, their points of view are very different. Burke attacks Natural Rights on historical grounds; Bentham attacks it on logical grounds, on utilitarian or positivistic grounds. Burke did not create a school, he was not popular in any sense. The reaction, therefore, was taken up by Maine.

Maine, who holds to the validity of positive law, advances the theory that the to him fallacious natural law doctrine of modern times drew strength and authority from the confusion of interpretation of "Jus Gentium" or Law common to all Nations, and international law. The classical expression for international law is Jus Feciale or the law of negotiation and diplomacy. It is, however, unquestionable that indistinct impressions as to the meaning of Jus Gentium had considerable share in producing the modern theory that the relations of independent states are governed by the Law of Nature.....After Nature had become a household word in the mouths of the Romans, the belief gradually prevailed among the Roman lawyers that the old Jus Gentium was in fact the lost code of Nature, and that the Praetor in framing Edictal jurisprudence on the principles of the Jus Gentium was gradually restoring a type from which law had only departed to deteriorate. The inference from this belief was immediate, that it was the Praetor's duty to supercede the Civil Law as much as possible by the Edict, to revive as far as might be the institutions by which Nature had governed man in the primitive state."^{1.}

Maine was succeeded in the school against Natural Rights by Pollock, who began as a follower of Maine, who

1. Maine: Ancient Law, pp. 43, 46-47.

always scoffed at natural rights. Pollock, instead of attributing his antagonism for natural rights to Maine, where it rightfully belongs, puts the onus on Bentham, whom he dislikes. Pollock during the course of his investigations changes his point of view and becomes an adherent to the theory of natural rights. He is prominent as the leading intellectual representative of English Law at the present time.

Bentham, who attacked the natural rights theory on positivistic and utilitarian grounds, was succeeded by Austin, whose reaction against natural rights was distinctly positivistic, retreating from the utilitarian. Austin was the founder of the analytical school in England. He is the author of 'Jurisprudence,' a complex and ponderous work, expounding and espousing the cause of positive law, and known also as the 'Philosophy of Positive Law. Austin is responsible for his position of antagonism against natural law to Bentham, who first suggested to Austin his attack on the natural law doctrine, giving to Austin the view which he embraces. Burke and Bentham together with Austin represent the English attack upon the French doctrine that man has natural rights.

Austin's successors of today are Brown, Holland, and Bryce, English representatives of positivism. Their posi-

tion of antagonism to natural rights, however, is less violent in England than in Germany, gradually becoming of an almost indifferent nature. Indeed, Brown and Holland substantially abandon the whole issue.

In Germany the course was very different. We have the reaction taken up by Schelling, Hegel, and Savigny. Schelling, was the patron of Hegel, opposed 'natural law,' exerting a decided influence on the philosophy of law, and laying the foundation of the Historical School of Law. According to Schelling every man should so conduct himself that through his action no rational being should be "made a mere object, but always a co-operate subject.....Ethics and law coincide in their highest stages.....Ethics solves the problem of the absolute will in that it makes the individual will identical with the general will; the science of law solves the problem in that it makes the general will identical with the individual will."¹. The general will is for Schelling the absolute will. The determining factor of the will in the philosophy of law is its form in contrast with its content. Legal science derives its importance from the fact that it allows of historic as well as pragmatic investigation, namely, that it is an element of the absolute, a manifestation of it. "Whenever the particular and the general form an absolute unity, whenever all that

1. Berolzheimer: World Legal Philosophies, p.205.

is necessarily free and all that freely occurs also necessarily occurs,"¹ then will the ideal State be realized.

Hegel and Savigny differed in that Hegel represents the philosophical reaction, whereas Savigny represents the historical reaction. Hegel's view is metaphysical, while Savigny is positivistic and historical. Both are antagonistic to the doctrine of natural rights.

Hegel, in his Philosophy of Right, expounds his theory of the state. He tries to formulate the intellectual steps through which 'the idea of the state' must pass in order to exist, and he begins with the will. It is evident this is a logical beginning, because, without the will to choose or the power to do a voluntary act, every act would be a necessary one, the world of ideas would be useless, and right and wrong, as they are generally understood, would be unthinkable conceptions. Right is the will to choose the good, according to our best judgment, whatever that may be. But the will of Hegel is not that of the individual, it is 'one aspect of pure abstract intelligence,' 'Geist.' Will in this sense is 'eternal, universal, self-conscious and self-determining.' The essence of the will thus conceived is freedom. The processes through which the absolute free will must go to become realized finally, produce the idea of the state. The postulates most emphasized are 'What is rational is real; what is real is rational.' The free will is a product of right reasoning, logical thinking, rationality. It is a problem or result of formal logic. By conceiving the will as active Hegel formulated certain concepts which approximate perfect freedom. These form the headings of his philosophy of right.

1. Schelling: System des Transz. Idealismus, pp.411,422.

The first of these is law, in which he shows that 'personality, property and contract' are all expressions of the free will. "A living creature is a person only so far as it freely wills to be so. An object is property because it is determined by the free will of a person.....A human being or people is property (slave) only because of the lack of the free will to be free." But Hegel judges law and rights, not by a static criterion, but by the state of civilization, culture, and self-consciousness which the times represent.

The second consideration of Hegel's philosophy of right is 'subjective morality.' In this phase the individual determines himself with the consciousness and realization of the existence of other individuals like himself. 'The conceptions of purpose, responsibility, motive and conscience take form;' but the full relation of the individual to the universal will is not yet displayed here. The fact that man is a creature of habit reveals some 'universal cause.' And yet, each individual expresses a choice, and a degree of uniqueness in all his acts. Hegel says, 'What law and abstract morality are not, custom is, namely spirit-Geist; and spirit is unity of the individual and the universal.'

The final development of the subjective morality is the socially ethical. This stage in the development of

Hegel's philosophy of right is manifested in the 'family, civil society and the state.' His idea of the family is no different from the conventional one of the times, but his doctrine of civil society is new. Corporations, police systems, economic needs, and property protection are taken care of under civil society. Symmetry seems to be a great factor in molding his system. The ultimate is however, the state. In the state the 'social-ethical idea' becomes realized, which is the will fulfilling itself as far as it knows itself. The state becomes the 'eternal and necessary essence of spirit.' Thus formulated, the state is not a historical fact, but a mere 'intellectual concept.'

The idea of the state has three important aspects: 'the internal public law, the external public law and world history,' each manifesting freedom and the unity of individuality and universality of will. Hegel says further that every state has an underlying political self-consciousness which predetermines the constitution and code. The constitution is not a thing apart from the people or state, but a necessary revelation of this inherent underlying political consciousness. Herein lies one great difference between a crowd and a state. A crowd lacks universality, and, in consequence, organization. It represents particularity alone. A state, on the other hand, shows the synthesis of particularity and universality, due to this common fundamental political consciousness which

realizes itself in organization and constitution. No one person does or can make a constitution. It is the result of many in agreement, and it is not made, but simply revealed, being given objective form to its already universal subjective existence. Thus a people expresses itself through its constitution, and a constitution reveals the spirit and stage of civilization of its people. No other constitution could be better or even possible for that people at that time. Thus we see the necessity and absolute character of legislation and constitutions. As a people evolve, the constitution will evolve in harmony with its source. The more freedom the constitution shows, the higher is the culture of those who live by it.

The external side of public law is the form in which the internal and necessary law becomes manifest. Hegel says that the state is an 'organism' which functions through 'distinct powers so correlated as to sustain and strengthen the unity of the whole.' These powers are three, the number in harmony with his entire dialectical system. They are the "legislative, administrative and monarchic." To the monarchic he gives the greatest emphasis, because it is the synthesis of the dialectic, "the unifying force through which the other two powers are restrained from disrupting the State." The legislative and executive are thesis and antithesis; they stand in opposition and contradiction to one another, thus producing the action and struggle so vital to the life of legis-

lation. But, although this disagreement is inherent and is the cause of change and progress, still the two find harmony and become synthesized in a monarchic aspect, which capacity for harmony is equally necessary to the existence of thesis and antithesis. (Otherwise each would destroy and cancel the other.) For instance, a state of perfect opposition, where one says 'yes' and the other 'no,' or one 'plus' and the other 'minus,' would be as static as perfect harmony in which the two would so agree as to remain in apathy. It is therefore evident that we must have agreement in disagreement and disagreement in agreement, in order to have existence of any kind whatsoever. This is one of the greatest truths to be culled from Hegel's impossible dialectical system.

Constitutional Monarchy, thus conceived, fulfills for Hegel all the conditions of perfect rationality. Herein monarchy, aristocracy, and democracy become synthesized or combined into one. 'The prince represents the one, the administration, the few, and the legislature, the many.' It is the joint cooperation of the prince and the administration that accomplishes 'the unity of the state and its will.' Thus a people becomes an organism and the particularity of each individual finds its universality with the whole.

In external public law the state becomes divided into factions, thus giving rise to international relations. International law is a code which must recognize the individuality of each separate faction, and yet draw all the factions into

harmonious interaction, interrelation, and adjustment. It discovers a common working basis for 'the wills of the particular states.' Hegel claims that 'war.....must remain.....an inevitable and not wholly maleficent incident.....in the preservation of national individuality.' The ultimate aspect of the state is world history. To him the process of events is an unfolding of universal spirit. "The culture of every people... expresses a particular stage in the activity and revelation of the absolute idea.....This is a fourfold process..... The four systems are the Oriental, Greek, Roman, and German... The Orient knew and to the present day only knows that One (i.e., the despot) is free; the Greek and Roman, that some are free; the German, that All are free."¹

Hegel insisted that the truths of right are not to be sought in morality and natural rights, but in Sittlichkeit. Hegel's philosophy of law is clearly exemplified in the triad of Law, Morality, and Sittlichkeit. Law, the thesis of the triad, is for Hegel not the field of general rights, but of legal institutions. Morality, the antithesis of the triad, is described as the dictates of conscience. Sittlichkeit, the synthesis of the triad, is the embodiment of the actual state. Thus the actual state becomes superior to the individual, and the effect of the laws must supercede the individual conscience. Moralität is subordinated to Sittlichkeit. It is only when law finds in itself morality, indeed,

1. Pol. Sci. Quarterly 28: p.492.

finds itself to be morality, and morality recognizes itself as law, that Sittlichkeit, the synthesis of the two, is achieved. Hegel is a metaphysician, and, although his social philosophy is in effect positivistic, his method of arriving at it is metaphysical.

Savigny was a great student of positive law. He argues that, even in the primitive life of a people, civil rights are as necessary as language, developing and evolving with it, and binding together the people. "Law grows as the people grow, develops with the people, and declines when the people lose individuality."¹ Savigny sets forth the doctrine that positive laws results from the needs, customs and convictions of the people. It is "the living conception of legal institutions in their organic connection."² He advances a valuable theory in particular in connection with permissive forms of law. He points out the fact that they are imperative in significance, when they have a correlative duty; that they are negative principles involving limitation or negation, when the element of command or prohibition is not present in them. "The 'permittere' gains its importance only from its relation to a precedent prohibition, which is either abrogated by the permission or limited by an exception."³

1. Savigny: Vom Beruf unsrer Zeit, p.11.

2. Puchta: Kursus der Institutionem, p.35.

3. Savigny: System, sec.16.

Hegel and his followers, as, for instance, Dr. Bosanquet, dedicate their influence to socialism inasmuch as they favor the modern tendency to accomplish an effect as much as possible by means of the direct action of the state. The other school of thought, the individualistic, of which Mill and Spencer are typical representatives, advocates the widest possible scope for individual endeavor. The latter regards the state and its activities as necessary evils, while the followers of Hegel try to extend state activities and state control as far as can be done even by force, when necessary. The Hegelians agree that the true ideal of political theory lies in thus maximizing the control of the state. Bosanquet, who is also a metaphysicist and a dialectician, defends Hegel in his view of the state as the objectification of freedom. He defines the 'general will' as the rational will, even though the people are unaware of it. This, too, is indefinite. He says that the 'general will' is best typified for us by the army, but this is not a true type, for the will of the army is but the sum of particular wills. That the particular wills shall become a unit is the essential requisite for efficient organization. This is the ideal, but the very nature of the will is egoistic and self-sufficient and difficult to adjust to other wills, and therein lies the source of failure to organization. There is some approach to Stammler in Bosanquet's position!

Hegel's metaphysical view, which was actually positivistic, glorifying the state and what is rather than what ought to be, was taken over by the Neo-Hegelians in England, among whom Green, Caird, and Ritchie are prominent. Green, following Hegel,

1. Cf p. 56 f.

regards the obligation of the individual towards the state as absolute in so far as the state expresses 'general will,' which, for the stability of the state, must carry with it the actual or tacit assent of the mass of the people governed. In this sense government must rest on general will. But 'general will,' in this sense, means merely that no considerable section of the people is in active agreement (a naïve revelation of the individuality of nature). Green, by 'general will' does not, by any means, mean what Rousseau does by 'unanimous will,' - for in 'unanimous will' conflict is impossible, while in 'general will' there may be decided conflict and complexity of opinion, out of which the one opinion, to which the greatest number consent, is chosen to apply to all concerned. Those then of different opinions are accorded no consideration. The nearest practical approach to Rousseau's ideal of a 'unanimous will' is a convention where votes are taken before citizens have time to discuss issues and form factions, and in which the votes just naturally and individually agree. Green's meaning of 'general will' is not clear and definite. It is neither the will of the sovereign nor that of the bare majority.

Ritchie, who was also a follower of Hegel, held tenaciously to the idea that questions of politics and ethics must be regarded from a metaphysical point of view. For him

the foundation of ethics necessarily rests on the ideal end of well-being, and, keeping this ideal end in view, he proceeded to trace its history at different times, also the manner in which it shapes itself in the mind of each individual, and the way in which it can be developed and realized. Ritchie is an advanced thinker of the liberal type, with some socialistic tendencies. "In his best known and most pretentious work, 'Natural Rights,' he has given us what is perhaps the best criticism that we have in English upon the doctrine that there are in political and social ethics specific rules of conduct which admit of definite statement and which are universally valid. But in doing this he has not given us what we fain would have, a systematic exposition of his own political philosophy."¹

Ritchie in his volume on 'Natural Rights' treats the subject rather sympathetically. One writer has said of him that his volume "contains the materials of a perfect defense of the doctrine which it was written to confute."² Ritchie distinguishes between natural rights and moral rights on the ground that in many cases people have claimed that they have a moral right to do things that were not recognized "either by the law of the land or by prevalent public opinion or by the conscience of the average individual."³ He further says that if it could be determined what rights all societies should guarantee the individuals comprising them, that those

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1. Willoughby: Studies in Political and Social Ethics by Ritchie. Political Science Quarterly, 17, 1902.
 2. Clark: Natural Rights, pp.45-50.
 3. Ritchie: Natural Rights, p.80.

rights could properly be designated as our 'natural rights.'

Moral rights are to be determined through social utility revealed by past experience. He says that "Nature made man an animal; society has made him a rational animal - a thinking, intelligent being capable of moral action."¹

It is society, then, that makes the individual. According to Ritchie "the person with rights and duties is the product of society, and the rights of the individual must, therefore, be judged from the point of view of society as a whole and not the society from the point of view of the individual."²

Government is an institution for common advantage, and its existence is justified only on the ground of its maintaining conditions advantageous to the common good. "If there are certain mutual claims which cannot be ignored without detriment to the well being and, in the last analysis, to the very being of a community, these claims may in an intelligible sense be called fundamental or natural rights. They represent the minimum of security and advantage which a community must guarantee to its members at the risk of going to pieces if it does not with some degree of efficiency maintain them."³ Natural rights, then, may be considered as those which are essential to the progress and efficiency of society.

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1. Ritchie: Natural Rights.
 2. op. cit.
 3. Ritchie: Natural Rights, p.87.

The difficulty of finding and maintaining the 'general will' and making it one with the state is what causes socialism to clash with individualism. Mill says, "The state is only justified in interfering with the individual, when individuals interfere with the interests of one another, or (with) certain interests which ought to be considered as rights."¹. Spencer says, "Every man is free to do that which he wills, provided he infringes not the equal freedom of every other man."². The assertion of the principle of individual liberty and of the limits of the authority of the state over the individual is said to be self-contradictory. Bosanquet's criticism is founded mainly on the assertion that every action of every man affects to some degree the interests of others and therefore Mill's principle justifies both administrative nihilism and administrative absolutism.....Bosanquet asserts that the distinction between self-regarding and other-regarding actions cannot hold good. His criterion is 'what the coercive authority is and is not able to do towards the promotion of the good life.'³. The danger of his criterion is that it is easy to infer from it an almost 'unlimited extension of state activity.'

Man in his social relations offers an extremely complicated problem, one, in fact, with no beginning and with but little, if any, possibility of completion. The ideal sought cannot be found in relegating the individual to insignificance nor

1. Int. J. Eth.: The Hegelian Concept of the State and Modern Individualism.

2. op. cit.

3. op. cit.

in limiting too much the power of the state. Spencer's ideal of freedom arises in banishing the 'general will.' A powerful, controlling paternal state may be defended as a product of evolution, an adaptation to environment, or a practical necessity in the present state of affairs. But there is no ideal behind it. The individualist therefore is entitled to treat the state and all forms of control of human beings by each other, as a necessary evil and to regard as the great problem of statecraft how to reduce that evil to the minimum.

Neo-Hegelianism has been revived in Germany in the last fifteen years by Kohler and Berolzheimer. These men emphasized the historical aspect, the evolutionary aspect of Hegel's metaphysic; whereas the English school, Green and Ritchie, emphasize the metaphysical aspect. Kohler and Berolzheimer oppose natural rights and are metaphysical in their adherence to Hegel - but, in respect to their theory of the content of law, they are positivists.

Josef Kohler, the leader of this school, ranks first among living jurists. He is an authority on comparative legal history. "The three important points in Kohler's doctrine are: first, his theory of law as a product of the culture of a people; second, his theory of the relation of comparative legal history and the philosophy of law; third, his method of interpretation and application of legal rules."¹

Kohler declares that Stammler's Neo-Kantian legal philo-

1. Pound: Scope and Purpose of Soc. Jurispru., p.156.

sophy is unhistorical. He agrees with Hegel in regarding law as a "phenomenon of culture." Kohler opposes Savigny's idea, however, that law is the result of the genius of a people rather than its will, attributing it largely to the will and effort of a people in harmonizing the culture of the past with the culture of the present. Law changes because one of the factors in this harmonization, i/e., present culture, is ever changing. Therefore, "law cannot remain the same. It must accommodate itself to the progressing culture of the time and must be so fashioned as to express the growing demands of culture."¹ Kohler defines culture as "the development of the powers residing in man to a form expressing the destiny of man."² Kohler, however, is most significant for his "theory of sociological interpretation and application of law."³ He emphasizes the sociological significance of law-making. "Rules of law are not to be interpreted according to the thought and will of the law-maker, but they are to be interpreted sociologically, they are to be interpreted as products of the whole people, whose organ, the law-maker has become."⁴

Recently there grew up in Germany another school of jurisprudence which was also positivistic with a strongly utilitarian tendency. Their general point of view was very similar

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1. Kohler: Lehrbuch der Rechtsphilosophie, p.2.
 2. Kohler: Moderne Rechtsprobleme, sec. 1.
 3. Pound: op. cit., p.158,
 4. Kohler: Lehrbuch des Bürgerlichen Rechts, I, sec.38.

to that of Austin. The followers of this school oppose the theory of natural rights vehemently. Jhering and Jung represent this position.

The first and greatest representative of this group is Rudolf Jhering (1818-1892), whose point of view is teleological. He maintains that life is governed by purpose, and on that account the only satisfactory method of studying society is the teleological one. Laws, he holds, are made to serve purposes and the important thing for the jurist to know is what end a law has been created to subserve. "The sense of right has not produced law, but law the sense of right. Law knows but one source - the practical one of purpose."¹ Jhering emphasizes the inherent sense of rights and justice, that is in people.

Jhering declared that the value of laws could be determined only by their results, by their practical application, and that they could not be worked out by deduction from older historical laws. His is a "jurisprudence of realities." Sternberg says of him, that "he placed jurisprudence upon the basis of a sound realism of which every separate science, and especially every practical science, has need. The science of law must never lose contact with the present. Its problem is to discover what justice and right require now.....If the scheme of legal conceptions does not express what the consciousness of right brings to the surface in practice, then

1. Jhering: *Der Zweck in Recht*, 4 ed. I, 3-25.

the scheme of legal conception must be altered, for it is false or out of date."¹.

The conception of law as a securing of interests or a protecting of relations has all but universally superseded the individualist theory. The conception of law as a means towards social ends, and the doctrine that it exists to secure interests, social, public, and private, requires the jurist to keep in touch with life. Wholly abstract considerations are not sufficient to justify legal rules. Jhering theory of law is socialistic. He tries to refute, for instance, the idea, which resides in American Bills of Rights, that the individual appeals to law as a protection against society. He holds that society creates the law by which the interests of the individual are secured in accordance with society's recognition of the rights and interests with which the individual is vested.

With respect to punishment of criminals, Jhering agrees with Saleilles that "punishment must be governed by its social end and must be fixed with reference to the future rather than to the past."². By this he means that punishment should be determined wholly with a view to the general welfare, and in no way involve the idea of retribution. Legislative Reform is usually connected with positive law as exemplified in the theories of Jhering, who finds the hope of remedy in the authority of law.

1. Sternberg: *Allgemeine Rechtslehre*, I, 190-91.

2. Saleilles, *L'Individualism de la peine*, 2 ed., sec. 3.

Jhering's postulate of purpose as "the creator of the entire law"¹ is much criticized. It is a theory of "law-making rather than of law.....If all law has in view the welfare of society, then law abdicates in favor of administration; the idea of political expedience displaces the idea of right. Under the domination of the theory of purpose we have indeed rules of law (Gesetze) but no law."² We understand by purpose something opposed to content, something higher and above the institution, which is but a means for its attainment."³ It is fallacious to attempt to "fix the universal object of law, unless one means by this phrase merely the ideal which law should aim to attain according to a particular conception."⁴

Jhering's ideas as presented in his contributions are of much greater value to sociological jurisprudence than they are to philosophical jurisprudence.

Jung tried to establish a theory on a purely positivistic basis. The necessity of his position is seen in the fact that law is not a closed system and needs supplementing all the time. Jung tries to give an evolutionary basis. The weakness of his position of positivism lies in the fact that he attempts to solve his problem by recourse to ethics. His positive theory is like that of Bentham holding that the greatest happiness of the greatest number can be achieved through positive law.

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1. Jhering: *Der Zweck in Recht*, I Bd., 1877, p.442.
 2. Berolzheimer: *Rechtsphilosophische Studien*, p.143.
 3. Jhering
 4. Bierling: *Berolzheimer*, p.212.

Of all the positivists, Treitschke is the most extreme. He holds to his position tenaciously. He is ^{rather} known/for the errors of thought in his writings than for their truths. His errors have made the doctrines of Germany as a nation famous, in so far as they are absolutely at variance with all other civilized nations. His 'Politik' is held responsible in a great measure for many evils even in Germany, where his philosophy is accepted. The state is the highest possible conception, by which society is created, and for which it exists. This doctrine distinguishes Treitschke from most other modern philosophers, even German philosophers who, before the Franco-Prussian War, held that the state is created by and exists for society. In his youth, Treitschke was deeply impressed by the fact that petty quarrels were continually arising among the states of Germany. This he attributed to the diminutive size of the states and to the fact that they were not united. He became more and more convinced of the cause of the afore-said quarrels as he studied other great world civilizations in connection with his own. He felt that something was lacking in almost every case to make a perfect state. Every true state, he insists, must necessarily have two characteristics. The first of these is unity, whereby the state is given certain definite limits; the second is citizens who are essential to the very idea of state. Since a state cannot exist without citizens, the state must become so much a part of them and their interests that they will support it

individually and unitedly.

The Roman Empire, so often cited as an example of the perfect state, is found lamentably lacking by Treitschke, who claims that self-realization cannot be achieved by a state except through intercourse with other states, friendly or hostile. Nor is a true state one in which this intercourse is carried on, but where unity is derived only from the fact of its having one ruler, as was the case among European kingdoms after the fall of the Roman Empire. He distinguishes the true state from a mere society. In ancient Greece alone in the time of Aristotle, Treitschke finds the true state - the one in which both essentials are found and which constitute a state true for all time.

Treitschke was a follower of Aristotle and held, like him, that man, as an individual, has, latent within him, certain characteristics which distinguish him from other animals. These are 'affection, rectitude, knowledge, philosophy, and Art.' These are developed only as men live in societies, which they can do only by observing certain rules. To insure this observance some authority is necessary, and this authority is the state. The state is not a natural evolution, even though it does arise from a natural necessity. It is rather a conscious and artificial product made by the people whom it protects.

While unity and citizens are the two essential charac-

teristics of the state, its true essence is Power. This idea finds its echo in Machiavelli, who feels that power alone can make a unit of the states of Italy. By power, Treitschke means simply 'the brute force of arms.' From this he reduces Aristotle's definition of the State as 'a plurality of families, permanently living together and legally united' to 'the State is a Society united for offensive or defensive war.'

He holds, moreover, that the moral law which should be applied to states is fundamentally different from that which is suitable for individuals of the state, the latter being founded on the principles of Christianity, love, and self-sacrifice, the former on the reverse of these principles. Hatred, then, for other states is more the principle on which the life of the state is based, and Treitschke holds 'that for one State to regard another with even an appreciable amity is a sin; whilst for one State to sacrifice any one of its own interests to another State would be the sin for which there is no forgiveness - the sin against the Holy Ghost.' Thus everything which any State may do, or demand of its citizens individually, is moral if it does or demands the thing for the sake of its own aggrandizement; and, when the moral conduct of one State conflicts with that of another, the only way of deciding which is right or wrong is to see by experiment which of them can kill or mutilate the largest number of men, women, and children

of the other State.'

Granting the power of the State, the next thing to consider is its purpose. The State should provide its citizens with conditions conducive to their development, that they may improve their civilization to the utmost, through some form of culture. This is moral progress. Treitschke holds that "The State is a moral community called to positive labors for the improvement of the human race, and its ultimate aim is to build up real national character through and within itself, for this is the highest moral duty of nations as well as of individuals."¹.

The two parts of his doctrine - the State as Power, and the State as a 'moral community,' are totally incompatible. It is the latter part which cannot stand in Treitschke, for above all the State is Power, but no allowance is made for the struggles and yearnings of humanity to personally perfect themselves as individuals. "Treitschke's development, excepting in one respect, is an image in miniature of the development of the thought of Germany. One of his earliest observations with regard to German unity was, as we have seen, that it must first be an accomplished fact, and that the ideas by which the fact is to be justified must follow afterwards. The prophecy which these words suggest, a unified Germany, has been fulfilled. Having achieved unity through Power, it sought to sanctify Power by erecting

1. Treitschke: Politics, I, p.74.

it into a general principle, which was not merely an induction from the process of particular acts, but was also a moral premise possessing universal validity, from which the ideal justice of particular acts might be deduced."¹.

Treitschke determined early in his youth that Germany's weakness lay in being divided into separate and independent States. If Germany is to become a strong nation she must first of all become united, which unity can be achieved alone through Power (brute force). Prussia, being the only State possessing such Power, must be the recognized head of Germany. This part of Treitschke's doctrine Germany has accepted, but the part concerning the value which States derive from the culture of moral promotion it rejects or at least ignores.

The Germans still regard the Power of the State as supreme above all else, and they justify in their political laws (which have developed out of Treitschke's doctrine) all possible atrocities which in any way make for national power.

"In the case of Treitschke personally, the philosophy of Power, which generally increased in ferocity as he matured it, was an expression of the concurrent development of German Power as a fact; and that the same thing holds good of the German people in adopting it. German militarism is not the result of this philosophy, but the philosophy is the expression of the accomplished fact of militarism, and of the inordinate ambitions which a consciousness of mere military power

1. Quarterly Review, 226, p.189.

(without a consciousness of its limitations) has engendered."¹.

"According to Treitschke's doctrine the State is PowerWar is an end for its own sake; and everything else is subsidiary to it.....valour is only valuable in so far as it leads to war."². Treitschke's definition of a State as something which cannot exist except in co-existence with other States distinct from it, entirely excludes the possibility of the existence of a 'World State' as a State.

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1. Quarterly Review 226, p.195.
 2. Quarterly Review 222, p.191.

Influenced by a kind of revival of philosophical jurisprudence at the end of the nineteenth century, Rudolf Stammler attempts to discover a method not of determining the impossible, that is, "the absolutely and eternally just, but the just relatively and for the time being; he sought to give us a 'natural law' with growing content,' and thus to make available for a new period of growth an idea which had been perennially fruitful in legal history."¹ He denies that law is the fundamental principle of legal philosophy, emphasizing the social life(not the economic) as the foundation. Law, though a factor in social life, is not the determining factor, but rather the social relation. Stammler describes social life as "a living together of men regulated by externally uniting norms."² He uses the word 'social' in two senses, distinguishing between its relation to law, and its relation to convention; the former use takes cognizance of the outward restrictions imposed upon society, the latter, although also determined from without, is in agreement with the natural tendencies of society, as, for instance, with custom. Both of these interpretations - enactments of law and conformity to custom - are essential factors in social life. Old Natural Law had its error in assuming a positive content, while Stammler as the advocate of New Natural Law postulates "a variable content."³ "All schemes of natural law have undertaken, each

1. Pound: Scope and Purpose of Sociological Jurisprudence, p.150.

2. Stammler: Wirthschaft und Recht, p.257.

3. op. cit., p.685.

in its own way, to furnish a project of an ideal code with an unchangeable, unconditionally valid, legal content. Instead, it is my purpose to discover a formal method of general validity by which one may treat the material afforded by principles of law, which must necessarily grow and are conditioned empirically and may criticize and determine the material so that it shall have the character of being objectively just."¹.

Stammler recognizes two methods of regarding a legal rule - as an end, and as a means of arriving at an end. The means is evaluated according to its efficiency in determining an end. With these two methods in view, Stammler attempts to arrive at justice through morals or natural law. Formerly law determined what morals and ethics should be, now morals and ethics determine what law shall be.

Stammler's philosophy is significant in emphasizing the social ideal as the measure of justice instead of the individualistic ideal which held individual welfare as paramount. With Stammler, as with the utilitarians, justice is found in the social welfare, which determines individual conduct. In Kant's conception, reason and ideal justice determine the philosophy of law. Stammler, in contrast to this, recognizes that external constraint and coercion are necessary to legislation in this democratic age when 'the individual demands the widest possible freedom of action.' He distinguishes between "legal measures of force," which are justifiable and "arbitrary measures" which are not, the former being inviolable and applicable to all individuals, including those who propose them.

1. Stammler: *Lehre von dem richtigen Rechte*, p.116.

"Arbitrary measures" are such as do not apply alike to those enforcing them. Justifiable law is "in spirit, the inviolable coercive regulating of the communal life."¹ What is the justification of legal coercion in the realm of social regulation? Stammler discusses the claims of causal and teleological necessity for such coercion - that it is indispensable to the accomplishment of a purpose, and that, in the light of its teleological necessity, life and morality are vitally involved in its realization. He justifies it on the ground of its being "a necessary means to the establishment of the principle of order in the social life of man,"² which it regulates in all its phases.

The question of content of coercive law is a vital consideration. Such content must be absolute and universally valid; its fundamental basis is 'good will' and its regulative principles are 'justice and morality.' This constitutes a social ideal which can never be absolutely realized, it can only be approximated.

For Kant's individual will, Stammler substitutes "a social theory of justice in which individual ends are to be regarded, rather than individual wills except as assertion of the individual will is an individual end."³

Like Kant, Stammler held that society is made^{up} of free-willing men whose individual wills should not be arbitrarily

1. Stammler: *Wirtschaft und Recht*, p.264.

2. *op. cit.*, p.553.

3. Pound: *op. cit.*, p.152.

disregarded. Hence he holds to the following four principles of administering justice through law:

"One will must not be subject to the arbitrary will of another;

"Every legal demand can exist only in the sense that the person obliged can also exist as a fellow creature;

"No one is to be excluded from the common interest arbitrarily;

"Every power of control conferred by law can be justified only in the sense that the individual subject thereto can yet exist as a fellow creature."¹.

These principles differ fundamentally from rules of natural law, in that from them cannot be deduced a whole code. They are fundamentally useful in applying legal rules, but are not themselves actual rules.

Stammler's position is a frank revival of natural law on the basis of a return to Kant.² Stammler differs from the Catholics in holding that the laws can be changed whereas they claim that certain laws, such as rules of property, are a priori. Stammler, however, maintains that natural rights applies not to the specific rules, but to the methods.

1. Ibid.

2. The Catholic Church has never given up the natural law philosophy since the time of Thomas Aquinas, and it still teaches that doctrine. Cathrein's *Morale Philosophie* gives the point of view of Thomas Aquinas brought down to date.

Stammler's legal theory is a theory of social justice. His theory of jurisprudence is invaluable, his idea of justice through law stands preëminent, and the older individualistic theories are abandoned. Stammler identifies law with the idea of right - not individual right, but the right of society as a whole. His work is important to sociological jurisprudence in that it points out the coöperation between the science of law and the science of legislation in the promotion of social welfare and justice - this coöperation being brought about through individual effort, individual effort being the central point. Stammler substitutes social philosophy of law for the individualistic philosophy, formulating a theory of social justice.

He adds a 'theory of just decision of causes to the theory of making just rules,' himself questioning the application of legal rules.

Stammler's aim in behalf of Natural Law is to establish the New Natural Law, 'the law par excellence,' which is, as nearly as possible, an 'absolute, just, model law.' Justness is that quality of a law "which in a particular relation accords with the fundamental idea of law in general..... what may be established is not natural law, but only principles involved in the nature of law."¹ To search for and formulate a general system whereby law may be scrutinized

1. Stammler: *Wirtschaft und Recht*, p. 97 seq.

and shown to be valid in the interest of justice, is the task confronting present-day philosophy.

In France, Italy, and Spain the situation is even simpler. There are some Hegelians, however, but their influence is slight. There are also some Neo-Kantians. Among these are Saleilles, who adopts in part Stammler's point of view and Del Vecchio, who comes out clearly for natural rights on the basis of Kantian philosophy. Charmont is a disciple and follower of Saleilles. Charmont's idea of natural law is "reconciled with the idea of evolution and with the idea of utility. It loses its absolute and immovable character. It has only a variable content. It takes account of the interdependence of the individual and of the whole. It tends also to reconcile the individual conscience and the law instead of putting them in opposition."¹.

Among the other French writers are Tanon, Picard, and Duguit. These men are for the most part positivists, or at least claim to be. However, they show a tendency towards the theory of natural rights. Tanon holds that ethics must be taken into any doctrine of natural rights - which is, in fact, the position of natural rightists. Picard and Hennebic hold to a similar view. Duguit, who is an important French philosopher, claims to be an ultra-positivist, but he does not meet squarely the issue of the gaps in the law. He meets it, however, indirectly, holding that law makes legis-

1. Charmont: *La renaissance du droit naturel*, p.217-18.

lation, and not legislation laws. His is really a theory of natural rights in positive terms. Thus he denies the whole positivistic theory by claiming that law is due to the ways in which social life becomes possible. Duguit, the greatest French writer on the subject today, is the author of "Les transformations du droit publique," in which he shows that he is in favor of natural rights in that he holds public officials responsible as agents of the law. In this respect his point of view is American rather than German.

Among the Italians we had Del Vecchio and Ardigò and Levy, a pupil of Ardigò. These men profess to be positivists, but they meet the difficulty of lacunae or gaps in the law by filling them with the what-ought-to-be, namely, laws based on general sentiment. Thus they are positivists of the eclectic school, starting out with a positivist basis, but weakening their position by adopting certain of the natural rights tenets.

Among the American writers on the theory of natural rights we have Brooks Adams, Fite, Pound, and Cohen. Brooks Adams is a positivist of the most emphatic type. He gives his position in the following quotation: "Law is the resultant of the conflict of forces which arises from the struggle for existence among men. Ultimately these forces become fused under the necessity of obtaining expression through a single mouthpiece, and that fusion, effected under this pressure, we call the will of the sovereign. It

is, however, the will of a sovereign precisely in the sense that the earth's orbit, which is the resultant of the conflict between centrifugal and centripetal force, is the will of a sovereign. Both the law and the orbit are necessities, and the one and the other have a like relation to an abstract idea of right and justice."¹.

Fite, who is the author of a volume entitled "Individualism," confuses Individualism with Natural Rights. His "only basis for natural rights is that a man is a conscious agent. In his treatment of consciousness as a matter of degree and therefore of individual right as also of degree, he rests the assertion of individual rights not on social approval, but on inner consistency."². The individual acts according to his understanding and his aims, all values having their source in his consciousness of external relations. He is not isolated and mechanical, but is self-adjustable. His activity is the outcome of selection and force, and he is not the product of society, but society is the result of his conscious aims. Fite seeks to refute the doctrine that 'individual rights are conferred by the state and individual duty demands self-sacrifice for the common good.' He also seeks to 're-establish the ethical doctrine of rational egoism and the political doctrine of natural rights with a new basis and meaning.' As a champion of individualism, the author does not derive in-

1. Brooks Adams: Centralization and Law (1906) p.23.

2. J. Pol. Econ. 19:356, Ap.'11.

dividual rights from the recognition or support of society but from a man's own nature.....He insists that the better social order is not to be achieved merely by denouncing or denying or blunting individual self-assertion in the name of a transcendent social interest, but by an intelligent analysis of individual interests and a scientific discovery and invention of methods of co-ordination.^{1.} The road to social progress and welfare is, therefore, adjustability, and not renunciation by individuals of their purposes and interests. The basis of moral acts is intelligence, which, in its various degrees, constitutes the difference between a criminal and a good man, both of whom are individualistic to the same degree. An individual has rights only in proportion to his intelligence, wherefore it follows that a person totally devoid of intelligence has no rights at all. Intelligence is also the basis of unselfishness or lack of it. "A truly wise and moral man will in every action take his fellow's case fully and fairly into consideration. He will not waive his own end, but he will contrive to attain it with regard for the other man's end. In other words, where there is mutual understanding of a situation in its entire import, a mutually agreeable and profitable adjustment is always possible.....Altruism affords no real adjustment and breeds

1. E.A.Ross: Ann. Am. Acad. 38:658.S.'11.

self-deception. We must transcend these impulses and sentimentalities and learn to know ourselves in others."¹ If altruism has virtue, it is only because the world has not yet outgrown the use for it, but, in the realization of an improved state, there will be no place nor excuse for altruism.

Fite postulates two aspects of the individual as the source of individualism and socialism. These two aspects, the external and internal, are respectively mechanical and social, the former being anti-social forces excluding mutualization, the latter being primarily inclusive of mutual interests and relations. "The very knowledge which shows the individual himself, shows him also that he is living in a world with other persons and other things, whose mode of behavior and whose interests determine for him the conditions through which social relation is to be adjusted by just those methods of practical intelligence and ingenuity which we use when we combine various ends in the construction of a house or machine - that is to say, by the method of technical adjustment."² "Dr. Fite develops his argument with the greatest lucidity and has the knack of setting forth his ideas interestingly as well as forcibly."³ But he attributes to consciousness "an absoluteness and invariability which is unknown either to the experimental psychologist or to the pragmatist philosopher.....in this way he offends by way of omission of all consideration of the environmental factors."⁴

1. Nation: 92:400, Apr. 20, '11.

2. Parris (Marion): Am. Econ. R. I: 312, Je. '11.

3. N.Y. Times, 16: 313, My. 21, '11.

4. L.L. Bernard: Am. J. Soc. 17: 120, Jl. '11.

Pound, Dean of the Harvard Law School, and Cohen, Professor of Philosophy in the College of the City of New York, are the two most prominent writers on the theory of natural rights in America today. They hold similar views inasmuch as they both favor the theory of natural rights. Cohen defends the doctrine of natural rights. In an article entitled "Jus Naturale Redivivum," he states the usual arguments, namely, the historical, psychological, legal, and metaphysical, against natural rights, and then tries to refute these arguments.

The historical argument asserts that natural law began in a state of nature prior to organized society, but this state of nature having no ground or proof, the argument crumbles and falls to pieces. But those who uphold the doctrine say then that it does not necessarily rest upon the actuality of such a state of nature, but merely upon the logical hypothesis of such a state. It is a supposition resting upon a state of nature logically prior to the 'civil state.' The essence of the old natural law lay not so much in an existing actuality, as in an ideal of what ought to be, and therefore the historical point of view cannot sufficiently establish its validity or value, but has been one force among many others which have made a contribution in that direction. The greatest argument against this point of view is not so much rationalism as idealization.

The psychological argument assumes that all theories of natural law must be intellectualistic or individualistic. The eighteenth century was inclined to lay too much stress upon "conscious experience, deliberate invention, or consensual contract, and too little to slow unconscious growth.....

But while the shallow mechanical intellectualism did color all the speculation of the Enlightenment, there is no necessary connection between it and the theories of natural¹. government; and laws are not things drafted upon society or culled out of it, but they are necessary and inherent in it, therefore natural law in its essence is a thing apart from logical formulations. There is no industry, institution or family life without inherent natural industrial institutional or family law adequately revealed, actualized and enforced. The effectiveness of all man-made laws or legal rights depends upon the recognition of these previously existing and inherent natural rights.

The fundamental psychic or social interests of a community are the forces existing prior to stimulating the demand for and causing the formulation of specific laws to protect and foster them. They are the real material and "natural law behind the legal code. "There is no property in ideas or published works before the existence of patent and copyright laws; but interests and claims do exist prior to and not as creatures of these laws which they call into being. The latter must justify themselves by the services they render to these and other interests."².

The legal argument assumes positive form in Bergbohm's

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1. Cohen: Jus Naturale Redivivum, Phil. Review, Nov., 1916, p. 764.
 2. Cohen: op. cit., p. 765.

Jurisprudenz und Rechtsphilosophie, which argues that natural law either repeats the rules of positive law, and is futile, or it contradicts them and is illegal and not law at all."¹ This regards "positive law as a closed legal system to regulate all possible cases."² But "if positive law means law actually enacted by some human agency devoid of supernatural omniscience, it is clear that it cannot foresee and regulate all possible contingencies." The rest of life not regulated by positive law, is guided by "the customary rules of what people think fair," and they "constitute a natural or non-positive law." Such rules often become so habitual and well-established that judges use them for precedents. Thus ethical views and the common standards of justice and the opinions of the fair-minded public as well as that of judges and jurists keep molding and changing and increasing the positive law. The body of the law could not more remain static than the life it aims to regulate, and so it changes and grows hand in hand with the prevailing ideas and sense of justice of humanity. The courts must dignify the legal code in order for it to maintain itself, but it is constantly modified by the ever-changing popular opinions of justice and right, and is in fact just the natural laws. This moral justice is the natural law, and the code is the

1. Cohen: op. cit., p.766.

2. Cohen: ibid. ...
to recognize this conflict.

man-made law formulated to cope with it. It is this sense of justice which is the greatest motive force in any evolving and satisfactory set of laws. It is the modern recognition of this natural foundation of the law that allows for its growth and progress. These natural principles of justice must be worked into the law in order to produce a working code. They are "the life of the law."

"The essence of all doctrines of natural law is the appeal from positive laws to justice, from the law that is to the law that ought to be." The issue arises from the clash between what is and what ought to be, and leads to the unsolvable philosophical dualism. "The boldest attempt in history to do away with the antithesis of what is and what ought to be is the Hegelian philosophy with its violent assertion of the complete identity of the real and the rational"....."To the conservative right this meant the deification of the actual Prussian state. To the revolutionary left, it meant the denial of the right of existence to the irrational actual state.....By its own dialectic it sets up its own opposite, so that its assertion of the identity of the real and the rational gives way to the insight that, in the necessary opposition between these two we have the clue to the process or life of civilization." Hence the conflicting idea that "the law is the will of the people," and also "the expression of immutable justice," and the refusal of people in general to recognize this conflict.

The fourth or metaphysical objection says: "Questions of justice are relative to time, place and changing conditions of life. Hence there cannot be such a thing as a definite science of these matters.....The objection ignores the difference between a substantive code and a science of principles.....The temperature or the time of sunrise of different places undoubtedly varies, yet that does not prove the absence of a rule or formula for computing it.....The variability of social judgments has been greatly exaggerated... The fundamental resemblances of all human races and modes of life must be seen not to have lost significance." The fundamental unity is quite as important as the fundamental differences. The differences in moral opinions are due to the differences in social conditions. In ordinary life we all agree largely in our ideas of justice. A critical science takes its origin in this agreement.

Opposed to this view are the objections (1) "that questions of justice are all matters of opinion; (2) "that all things are in a flux, but that there is no formula to determine the fact that things are changing, and no definite measure according to which they do so." Against the first position, we must remember that change and constancy are strictly co-relative terms. From experience we realize the constant on account of the changing, and vice versa. One gets its meaning in virtue of the other, and no matter how

we may universalize either, we can only understand it in opposition to the other.

In seeking the character of the principles of legal justice or natural laws, and their establishment, the Stoics say that "they are axioms whose self-evidence is revealed to us by the light of natural reason." But the self-evident character of axioms in mathematics and the mechanical sciences has lost its weight. Axioms have been found to be simply definitions, hypotheses or rules of procedure, whose contraries may not only be just as conceivable, but even preferable in certain systems of mechanics." Such criticism applied to the axioms of natural laws, such as "All men are equal before the law,"¹ or "All men have the right to life," "to the product of their labor," etc., show the unreliability of their apparent self-evidence. From the analogy of scientific theories, we learn to take these precautions. (1) Our principles must be clear, (2) consistent with each other, and (3) sufficient to yield a coherent system. First, for instance, what does equality mean? Shall we ignore the physical, mental, and social inequalities of men and treat them as if they were equal, or recognize these inequalities and hold back the stronger and aid the weaker? In either case new objections arise. The idea of justice as an equalizer leads to serious difficulties.

1. Cohen: *Jus naturale redivizum*, p. 774.

Secondly, what is consistent? For instance, the right to life and the right to what one produces may be, in the case of the invalid or feeble-minded, inconsistent and contradictory. In this case each rule must be qualified and adjusted to its opposite so as to avoid the clash. Thirdly, what is sufficiency or completeness? Is a set of rules in a system sufficient to solve all problems that may come under it? It is plainly evident that this cannot be decided except by a long usage of the rules in a great variety of cases. These considerations are merely a warning against the acceptance of principles as self-evident - a habit which we easily fall into on account of our tendency to generalize, simplify, and accept things as true and final without analyzing them.

Cohen holds that "The essence of all doctrines of natural law is the appeal from positive law to justice, from the law that is, to the law which ought to be," wherefore he rejects Fite's "attempt in his Individualism, to reduce natural rights to a question of intellect-power, or intelligent self-assertion." "It seems to me," writes Cohen, "a subtle way of reducing questions of right to a species of might. Basing his theory on an analysis of consciousness, Professor Fite consistently arrives at the position that the unintelligent have no rights. If this were so, we would have to say that infants, before the age of self-consciousness, and the senile

or demented have no rights whatsoever, and anyone who takes advantage of his superior intelligence in dealing with them is exercising his rights. In one case, at least, Professor Fite does not hesitate to follow his theory to such a conclusion. A nation, he tells us, which allows valuable public lands to pass into private hands through lack of interest and intelligence should not complain of being robbed. If Professor Fite were consistent, he would have to say, not only that the public has no right to complain of being robbed because of its ignorance, but that the robber is perfectly justified, so long as the public does not know a way of recovering it. This, indeed, would be reducing questions of right to questions of might, but it would really make the predicate right devoid of all meaning."¹ Cohen has analyzed these arguments to show that the supposed refutation of the theory of natural rights is no refutation at all.

1. Cohen: *Jus Naturale Redivivum*, *Phil. Review*, Nov., 1916, p.769.

III In the development of jurisprudence there have been various schools of jurists and methods of jurisprudence. Jurists were formerly divided, according to their view of the nature of law, into the following three Schools, the Philosophical, Historical, and Analytical. The philosophical has three divisions: the Law-of-Nature School, which belongs most particularly to the eighteenth century, but is still represented by a Rousseau School in France and has present-day followers in America; the Metaphysical School, which belongs to the first half of the nineteenth century; and the Social-Philosophical School, best represented by the Neo-Hegelians.

There are two schools of historical jurists - the German Historical School which approaches the study of law from the standpoint of philosophy and history, and is philosophic in its methods because of the tremendous influence of philosophy during its incipency; and the English Historical School, the standpoint of which is comparative and historical-comparative, because it arose as a revolt against the existing analytical school, and, in its revolt, adopted comparative methods. The tendency in jurisprudence is to merge the various methods, and to become more sociological in its development.

It has been empirically demonstrated that reason must measure relations and contingencies as they arise in matters of controversy, in order to arrive at any degree of

justice in administrative bodies. There is no way that the will of society respecting the relations of individuals can be justly determined in advance in the multitude and variety of constantly-changing situations which confront mankind. Decisions of cases can only approximate justice even when the administrative body is the possessor of reason which has been schooled and disciplined by a large and varied experience, and is actuated by the highest possible desire to be just. Laws are made to further the ends of society and not as arbitrary interferences to progress.

The Analytical School is characterized by taking into account only developed systems, by considering law as made consciously by legislators or judiciaries, and by holding that a law can be such only as it is enforced. The philosophical tendencies of the Analytical School are utilitarian.

The historical jurist and philosophical jurist hold that law is found - this type of law is custom - the analytical jurist claims that law is made. Historical and analytical methods both work a priori, which is an objectionable characteristic. The same objection is found in American Law, the basis of deduction of which is the classical common law of the seventeenth, eighteenth, and nineteenth centuries, being English decisions and authorities. To advocate departure from existing rules (sustained by the weight

of judicial authority) is criticized even if done in accordance with our ideals and tendencies. The historical method, which was begun by Savigny (1779-1861) in the early part of the nineteenth century, fails because of not sufficiently taking into account the future; being, in fact, strictly empirical.

The characteristics of the Historical School may be contrasted with those of the Analytical School in that they take into account the past rather than the present of law, that they look upon law not as consciously made, but as found in the form of custom. The philosophical tendencies of the historical school are Hegelian.

Philosophical jurisprudence began in the seventeenth century and gained in strength throughout the eighteenth century. In the nineteenth it suffered a relapse, as did all philosophical tendencies. In Germany, however, a reaction has occurred whereby the philosophical method of jurisprudence is again coming into prominence.

The characteristics of the philosophical jurists are the following: They consider the ideal future of law rather than its past or present; they look upon law as found and not made; but they emphasize the importance of stating the law, when found, in definite terms; the moral bases of law are more important for them than the enforcement of the law; their philosophical tendencies are varied, comprising a number of schools. The rationalizing tendency of this move-

ment has been significant and valuable, even though carried too far.

The philosophical jurist appeals to reason and to man's sense of justice and right. He also "insists upon what ought to be law as being binding law because of its intrinsic reasonableness."¹ The tendency of philosophical jurisprudence is to become over-abstract, and barren of significance, leaving legal doctrines without a foundation.

The rise of the Sociological or the Social-Philosophical School occurred in the following manner. As has been shown, a philosophical tendency followed the comparative tendency. Law came to be looked upon as reason. Against this philosophical tendency there arose as a reaction an analytical tendency. Reasons were scrutinized and found to be inadequate and even historically unsound.

Besides this analytical tendency we find, existing at the same time, a historical tendency, also reactionary in its character to the philosophical tendency. In Germany the historical tendency arose before the analytical, in France and England it succeeded it. In all three cases, however, it did much to destroy 'pseudo philosophy' and to make room for a "true philosophical jurisprudence" which was needed to tear down or at least modify the arbitrary

1. Pound: Scope and Purpose of Sociological Jurisprudence, p.608.

and external standards which were the result of the analytical and historical methods.

"On the whole, we may say that analytical jurisprudence is attaining the best results in the present, that historical jurisprudence has accomplished most in the immediate past, and that philosophical jurisprudence, which had been most fruitful from the Reformation till the nineteenth century, but was sterile during that century, shows signs of regaining its usefulness and reacquiring its former importance in the immediate future."^{1.} But the new sociological tendency, which is already well established on the Continent, is due in large part to the importance of political and social as well as economic science in our day.

This new movement arose out of the historical school in Germany. Much the same cycle occurred as has been above described. The historical tendency was followed by a comparative tendency, which in its turn was succeeded by a philosophical tendency, in which various legal institutions were scrutinized and an effort made at establishing a legal jurisprudence in which were the bases of modern law. While this movement was taking place, the investigations assumed larger proportions, and historical jurisprudence began to take the form of 'universal legal history,' in the words of Kohler. This soon came to be recognized as something more than a comparative jurisprudence, as rather a sociological jurisprudence.

Along with the tendency to consider jurisprudence comparatively and historically, there was the tendency to regard it

1. op. cit., p. 613-14.

from the philosophical and analytical standpoint. Kohler describes what took place by saying that historical and philosophical jurisprudence lose their distinction as separate schools and become unified in a social philosophical jurisprudence. This really amounts to regarding the historical and philosophical methods from the comparative point of view. It is little more than considering old methods in a new way.

The philosophical school was divided into three groups, as indicated before. The first of these represents the philosophy of law of the eighteenth century with which we associate the Rousseauists in France and America; the representatives of the second group, the metaphysicists of the nineteenth century, were, among others, Herkless in Scotland, Del Vecchio in Italy, and Boistel in France. The third division of the philosophical school, consisting of those who concern themselves with the philosophy of law of the twentieth century, is called the Social-Philosophical School. Its representatives are of three types, namely, the Neo-Kantians, whose tendency is mainly philosophical and sociological; the Social utilitarians or teleologists, who are analytical and sociological in their tendency; and the Neo-Hegelians, whose tendency is historical and sociological.^{1.}

Just as the historical school has come to have a branch which is sociological, so also the philosophical schools has developed such a branch, and the two sociological branches thus developed are almost indistinguishable.

1. op. cit., p.618.

With the social utilitarians we observe a marked change in the way of regarding law and a subsequent change in jurisprudence itself. The social utilitarians emphasized the purpose of law rather than its nature.

The Neo-Kantians represent a return to the philosophical method, and their position is a reaction from the historical school to the philosophical school. Up to this time Savigny's doctrines were accepted, causing a tradition confining jurists to the "classical common law" to come about. Through the influence of the analytical and historical methods, the ideas of rationalism and justice were lost. It was the Neo-Kantians who restored them by reviving philosophical jurisprudence.

The Neo-Hegelians emphasized the importance of the historical method, which is essential to modern jurisprudence. Especially is the comparative-historical indispensable to any profound critique of philosophical, not, however, metaphysical, theories. This accounts for the importance of the Neo-Hegelians in preserving and developing the historical method.

Savigny's influence established in France also the historical school; the philosophical method becoming less significant for a time. In 1900, with the appearance of the new German code, there occurred in France a reaction from the positivists' view, as well as from the historical school, to the sociological school through the prominence of the social sciences in France, and the greater leniency

in the application of rules of legislation.

According to Charmont, the beginning of this movement dates back to Beudant's 'Droit individuel et l'état,' which appeared in 1881. This claim, however, is questionable, for Beudant was an individualist. The factors in the revival of natural law in France were: "The influence of Stammler's doctrine; the survival of philosophical jurisprudence, both of the eighteenth century and of the metaphysical type; and, not least, the verification of the idealistic interpretation by comparative law."¹ Saleilles says that questions of social justice and social order "depend upon certain social facts with which ^{the} law comes in contact. These facts change, evolve, and are transformed."²

Demogue says of the new juridical idealism that it is striving towards "the ideal of an epoch," rather than an absolute ideal.³

In France the historical and philosophical schools have merged as the historical and analytical schools did in England. The harmony of the new school was secured through concessions on the part of both the philosophical and historical methods, each serving the purposes to which it is adapted. "In spite of the historical school, in spite of the importance of the sociological school, which in its turn believed it could limit everything to the study of the laws of evolution, we believe

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1. Pound: Scope and Purpose of Sociological Jurisprudence, P.160.
 2. Saleilles: "L'école historique et droit naturel, Revue Trimestrielle de droit civil I, pp. 80, 98.
 3. Demogue: Les notions fondamentales du droit privé, p.22.

in the necessity of an ideal; for there is in human activity a certain element of the conscious, of the willed, which must be directed. To deny this is to put the laws of the physical world in the same rank with the principles of human action and to reduce the law to a descriptive study. It is also to refuse to guide the law-maker."¹.

Sociological jurisprudence has its origin in positivist philosophers in the sense that each subject has a continuous development from the positivist philosophy of Comte, who was the founder of the positivist school, but both have long progressed beyond this and are now wholly independent of it. Charmont and Berolzheimer, however, insist that sociological jurisprudence must be identified with a philosophical jurisprudence of the positivist type.

According to Pound,² sociological jurisprudence has already appeared in three stages and is beginning to assume a fourth. He calls these stages the mechanical stage (positivists), the biological stage, the psychological stage, and the stage of unification.

The positivists, those representing the mechanical stage of sociological jurisprudence, owe their tendency largely to the general point of view of the time, which was mainly mechanical or mathematical. In the early part of the nineteenth century men attributed the existence and the development of all things to certain mechanical laws. We recognize the tendency in the mechanical stage of sociological jurisprudence to be the same as that in the first positive philosophies of

1. Ibid.

2. Pound: op. cit., p.491.

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law. An analogy may be drawn between the representatives of the mechanical period of sociology and those of the historical school in so far as both regard law as a development emphasizing its changes and attempting to relate them to the changes occurring in society.¹ In America this doctrine has assumed its most emphatic form in Brooks Adams.

The position of the mechanical stage of sociological jurisprudence, of which August Comte was also a representative, is well expressed in the following quotation, "The sovereign being only a vent or mouthpiece, the form the mouthpiece takes, or the name given it is immaterial. The dominant class, whether it be priests or userers or soldiers or bankers, will shape the law to favor themselves, and that code will most nearly approach the ideal of justice of each particular age which favors most perfectly the dominant class."²

The weaknesses of this theory are due to the fact that it leaves out of account the quest of jurists and judges for an ideal of absolute, eternal justice, well or ill conceived, to which they make the rules enforced in tribunals approximate so far as possible, as well as "juristic tradition, that is traditional principles and traditional modes of reasoning therefrom."³ These are the things which influence and in-

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1. CHarmont: *La renaissance du droit naturel*, p.117 et seq.
 2. Brooks Adams: *Centralization and Law*, (1906), p. 63-64.
 3. Pound: *op. cit.*, p.494-95.

deed determine existing laws. Like the historical school, therefore, it holds that human effort is futile.

The advantages to be derived from this theory are first of all that it emphasizes the importance of society as a whole, doing away with the individualist basis, and secondly that it shows the necessity of the relation between law and other social phenomena. In this way the positivists suggested broader bases for the other schools and did much to bring about the social-philosophical school.¹ This was no doubt largely due to the significant work of Darwin, whose theory of evolution was becoming wide-spread, and invaded the field of jurisprudence as well as that of other sciences. This idea of evolution had a broadening effect upon the science of jurisprudence. The fallacy of this theory with regard to jurisprudence lay in the fact that it emphasized too much the force of evolution as a primary cause of law, whereas, it is at best only a secondary factor in the determining of law.

Sociological jurisprudence came to have a psychological tendency. This was due to the fact that the study of collective personality came to absorb the interests of certain writers, especially Gierke, and to the fact also that it was maintained that "psychic forces are as real and natural as physical forces.....and that they are the true causes of all social phenomena."² Gierke, in contrast with the histori-

1. Pound: *op. cit.*, p.495.

2. Ward: *Dynamic Sociology*, I, 457 et seq.

cal school of his time emphasized the social will rather than the individual will as the basis of law. "What man is he owes to the union of man with man. The possibility of creating association³ which not only enhance the power of those who live contemporaneously but above all, through their permanence, surviving the personality of the individual, bind the past of the race to those to come, gives us the possibility of the development of history."¹ With Gierke the group-will and the group-motive came to be emphasized rather than the individual will and the individual motive. The idea of the state came to be regarded as less important than the idea of society, and it was even said that "the state is not so necessary to law as association or society which has the power of expressing a collective will on account of common ideas and motives."² Through this group idea the principle of relativity is brought out. We have the development of law described as "a process of psychology of peoples."³ Law, therefore, can never be an absolute creation, but must be ever changing and developing. "Thus we see that law is as variable as man himself; and the attempt to include it in an abstract and absolutely valid system has about as much chance of success as the attempt to introduce a universal language."⁴ Society has been defined as the "aggregate of the psychological relations between men which

1. GIERKE: Das deutsche Genossenschaftsrecht, I, p.1.

2. Wundt: Logik, II, 2 ed., 543 (1895).

3. op. cit., p.533.

4. Wundt: Ethics (trans. by Titchener et al.) III, p.161 (1892).

are manifest in the external world."¹.

Ward did much to cause the biological position to be abandoned in favor of the psychological.² This gave a place to the idea of effort. At the end of the nineteenth century and the beginning of the twentieth, sociologists began to realize that none of the methods previously adhered to were adequate and yet that all were essential. A stage of unification has resulted, or, rather, is resulting. Not only must the various methods of considering sociological jurisprudence be unified, but jurisprudence itself must be regarded in its connection with the other social sciences. All the social sciences must become unified.³.

With this fact in view - that jurisprudence and politics in coöperation is the significant method insuring progress, the sociological school endeavors by every available means to strengthen this coöperation. Its tendency is to emphasize the possibilities of effort in the making and enforcing of laws. In this respect it differs from the earlier schools which did not take this into account. Another distinguishing feature of this type of jurisprudence is the stress it lays upon the other social sciences as influencing and even largely determining legal principles. In studying for the purpose of making or of enforcing laws, the followers of this school direct their attention rather to ^{other} sociological

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1. Jellinek: Allgemeine Staatslehre, 2 ed. p.89(1905); also in 1 ed. (1900).
 2. See Ward: Dynamic Sociology (1883); The Psychic Factors of Civilization (1901).
 3. Bosanquet: Philosophical Theory of the State, p.36 (1889).

factors, to other conditions generally, than to the study of other legal systems, as was the method of the historical and other schools of jurisprudence. The sociological school, in studying other legal systems, emphasizes the effects of those systems, rather than the systems themselves, in determining their value. Laws are made and enforced with regard to their effect upon society rather than to their actual content. There is also a tendency in law to place some stress upon individual cases and to allow for some flexibility of the law where justice, determined in part by attendant conditions, demands such flexibility. New Natural Rights influence the formulating of workable laws which are evaluated according to their social effect rather than their precedential authority. After the laws are thus formulated it becomes a matter of constant care to discover how said laws can be made most effective, using continuous effort to meet the ever-changing conditions with new and improved methods, finally reaching, in many cases, the desirability of revision of law, as the necessity of the same becomes apparent.

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