AXEL HÄGERSTRÖM

INQUIRIES INTO THE NATURE OF LAW AND MORALS

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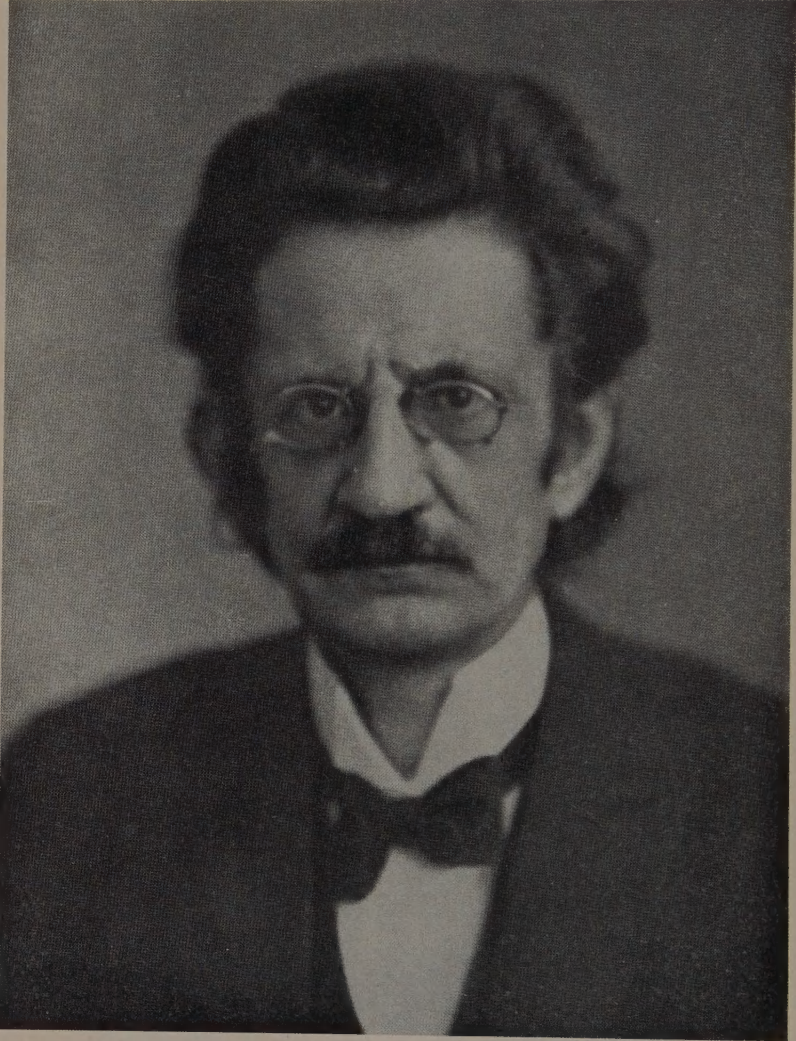

Axel Hägerström

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AXEL HÄGERSTRÖM

INQUIRIES INTO THE NATURE OF LAW AND MORALS

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I. Der römische Obligationsbegriff im Lichte der allgemeinen römischen Rechtsanschauung. I. Die Obligation als mystische Gebundenheit einer Person durch eine andere. 1927. Einleitung. (Pp. 1—18.)

II. Är gällande rätt uttryck av vilja? In Festskrift tillägnad Vitalis Norström. 1916. (Pp. 171—210.)

III. Till frågan om den gällande rättens begrepp. I. 1917.

IV. Hans Kelsen, Allgemeine Staatslehre. In the review Litteris, vol. V. 1928. (Pp. 20—40, 81—99.)

V. Begreppet viljeförklaring på privaträttens område. In the review Theoria, vol. I. 1935. (Pp. 32—57, 121—138.)

VI. En straffrättslig principundersökning. In the review Svensk Juristtidning, vol. 24. 1939. (Pp. 209—225.)

Translator's Preface

It was in the summer of 1947, during the second of my now annual long visits to Sweden, that Professor Olivecrona asked me whether I would care to try my hand at translating into English a selection, to be chosen by him, of Hägerström's writings on the philosophy of law. It appeared that Englishmen who know something of Swedish and something of philosophy are far from common, and that I, who happen to combine those two qualifications, could be of real help. I have received so much kindness and hospitality from my many friends in Sweden, and in particular from Professor Olivecrona and certain members of his family, that it would have been a pleasure to accede to this suggestion even if the writings to be translated had not greatly interested me. But from what I had read of Hägerström's work, and still more from what I had seen and heard of the influence which he exercised in Sweden, it was plain to me that he must have been a thinker of immense erudition and remarkable originality, whose writings most certainly ought to be made available to English and American scholars. I therefore gladly consented, subject to the condition, which was readily granted, that I might take my own time over the job.

I see in my diary that I began the translation on October 12th. 1947 and completed it on May 31st. 1950. The work was done mainly after dinner on winter evenings in Cambridge, with long interruptions during the summer months. When a piece was finished I would send two copies of it to Professor Olivecrona. He would compare the translation carefully with the original, mark any words or sentences which seemed to him questionable, and then return the marked copy to me for final discussion. When the whole work was in print I had an opportunity to go through the first proofs personally with Professor Olivecrona in Lund at the end of August

1951. His knowledge of law and of what Hägerström is likely to have had in mind in certain passages which were obscure to me, together with his remarkable mastery of English phraseology and idiom, should ensure that no serious mistakes now remain.

None of the essays by Hägerström which are here translated are easy reading in the original, and some of them are decidedly difficult. This depends partly, no doubt, upon the complexities of the subject and the novelty and subtlety of some of Hägerström's ideas. But it depends also to a large extent on the ponderous and involved sentences in which those ideas are expressed. This stylistic defect is not characteristic of the Swedish language, but it is highly characteristic of those German philosophers and jurists in whose writings Hägerström had steeped himself. Certain English philosophers of the late XIXth century, in particular Bernard Bosanquet, who were subjected to similar influences, wrote a kind of English which closely resembles Hägerström's Swedish at its worst. As I was at one time fairly familiar with this Hegelianised English, the peculiarities of Hägerström's literary style presented less difficulty than they might otherwise have done.

Nevertheless, it has sometimes been hard to understand Hägerström's meaning, and it has very often been difficult to express it in tolerable English without addition, omission, or modification. The main practical problem, which has recurred again and again, was to break up a single sentence, which would be intolerably long and complex in English, into a series of distinct sentences so interconnected as to exhibit the links which bound together the various clauses in the original sentence. I hope that I have attained at least accuracy and intelligibility; I know that I have not attained any high degree of elegance. I could have easily secured greater elegance in many passages by making minor omissions or modifications. But I did not feel justified in playing tricks with the text, and I have always sacrificed elegance to literalness where I did not see how to combine the two.

On the whole I have enjoyed wrestling with these difficulties, and I am sure that the work of translating has helped me to understand and appreciate the original. If the result should serve to make

Hägerström's ideas familiar and intelligible to scholars who would otherwise have remained in ignorance of them, I shall be well satisfied.

C. D. Broad

Trinity College, Cambridge
January 4th., 1952

Editor's Preface

With this volume some of Axel Hägerström's writings on the philosophy of law and of morals are for the first time presented to the English-reading public. Indirectly, his ideas have previously been made known through the works of others, chiefly those of Professor Vilhelm Lundstedt. Hitherto, however, nothing from the hand of Hägerström himself has been published in English, except an article on so-called spiritual religion, which appeared in the Swedish philosophical review *Theoria* 1948.

A translation of Hägerström's principal works in the field of law and of morals is long overdue. It met with exceptional difficulties, owing to the intricacies of Hägerström's reasoning as well as to the complexity of his style. Not only full mastery of English and Swedish but also thorough acquaintance with philosophical thought and language was required for the task. A unique opportunity presented itself when Professor Broad kindly offered to undertake the translation. With his deep philosophical insight and renowned lucidity of style he combines the necessary familiarity with the Swedish language. Nobody could indeed have been more qualified than he for this work. The result is a translation that actually reads more easily than the original text.

The writings included in this volume date from 1916 to 1939, the year of Hägerström's death. Born in 1868, Hägerström was assistant professor (docent) of philosophy in the university of Uppsala from 1893 and a full professor from 1911 to 1933, when he retired. His research ranged over a wide field, from epistemology to Roman law, from ancient Greek philosophy to Einstein's theory of relativity. From early youth to his last years his interest centered, however, on the problems of knowledge and the concept of reality. Starting from Kant, he discarded Kant's subjectivism and sought to establish an objective theory of knowledge. A summary of his views

in this regard was published in his article on his own philosophy in the German series *Philosophie der Gegenwart in Selbstdarstellungen* (vol. 7, 1929). His general tendency was pointedly expressed in the motto chosen for his "self-exposition": *Praeterea censeo metaphysicam esse delendam.*

From these brief indications it is evident that Hägerström must deny the existence of objective values. So-called value-judgments, according to Hägerström, are judgments only with regard to the verbal form. If we say, *e. g.*, that a certain action is desirable, the property of being desirable is ascribed to the action. But no such property can be discovered in the action as belonging to the context of reality; nor can the property in question be identified with the fact that the action is desired. The utterance springs from an association of a feeling of pleasure with the idea of the actuality of the action. No real judgment lies behind the sentence; nevertheless, the sentence takes the indicative form. This form of language is the ground for the objectification of values.

The objectification of duties is explained in a similar way. What lies behind the sentence: "this is my duty" is the association of the feeling of conative impulse with the idea of an action; but the verbal expression of this association is a sentence in the indicative form. In his inaugural lecture (1911) on the truth of moral ideas, Hägerström drew the conclusion that there can be no science of duties; only the actual *ideas* of duties can be the object of scientific investigation.

Hägerström's approach to the problems of *law* is conditioned by these basic views. Traditionally, the problems of legal philosophy have been those of the purposes of the law, of the grounds for its validity or binding force, and of the true principles of justice. From Hägerström's standpoint, these questions are illusory; since every statement of a purpose rests on valuation and the same is the case with the ideas of justice and of the binding force of the law, the questions can never be answered on a scientific basis. Briefly, no science of the Ought is possible. The subject matter of legal philosophy will be the analysis of legal concepts actually used, such as the con-

cepts of rights and duties, of the state, etc.; the investigation of ideas concerning justice and the purposes of the law; the study of the actual function of legal institutions such as, *e. g.*, punishment. Obviously, legal philosophy as a science will not be sharply differentiated from what is now generally called sociology of law. But while field investigations are the proper domain of sociology, legal philosophy is chiefly concerned with conceptual and psychological analysis.

Hägerström's writings on legal philosophy are almost entirely devoted to such analysis. His object was double: on the one hand to test the concepts and general theories of legal science, to detect contradictions and confusions, and to winnow out metaphysical elements; on the other hand to pave the way for a thoroughly realistic conception of the law.

Hägerström accorded great importance to the *historical background* of present-day conceptions and ideas. He believed that these could be properly understood only through a combination of analysis and historical research; they had to be traced back to remote origins in primitive society. Very conscientiously did he adhere to this view in his own work. He held a low opinion of philosophizing without a solid basis of facts. When he had been promoted in 1911 to the chair of practical philosophy in Uppsala, so he once told the present writer, he felt that he ought to acquire "some real knowledge" at least in some branch of the history of moral, religious, and legal ideas. Accordingly, he set himself to reading the whole Greek literature from its beginnings to about A. D. 300, excerpting everything of interest to him. These studies bore fruit in a major work on ancient Greek law, which was, however, never published. Instead of bringing it to completion, he turned his interest to Roman law. This was to absorb the greater part of his energy for many years. Rather unpractically, as he later said himself, he started by reading Justinian's *Institutions* and *Digesta* from beginning to end. After more than ten years' wrestling with the sources and the literature, he produced the first volume of his great work on the Roman concept of obligation[1]. This volume chiefly

[1] *Der römische Obligationsbegriff im Lichte der allgemeinen römischen Rechtsanschauung. I.* Uppsala 1927. Pp. 631 + IV.

dealt with possession, *dominium*, ancient procedure, and the original position of debtors. He contended that the Roman conception of an obligation as a *iuris vinculum* did not include the idea of duty in the sense of an unconditional ought. The obligation originally consisted in potential slavery entered into by formal contract or incurred through a delict. The slavery could be actualized by the creditor through a series of formal proceedings before the magistrate; but the debtor had the opportunity of freeing himself through payment of the debt. In the Roman view, therefore, the "sanction" was not conditioned by the infringement of a duty; the idea of an unconditional ought simply was not present in this connexion. The possibility of extricating oneself from slavery is not, of course, to be confounded with a duty.

The following volume, primarily devoted to verbal obligations but also treating many other subjects, among them the ancient law of succession, was completed just before Hägerström's death; its publication occurred posthumously in 1941.[1] A third volume, to be devoted to the subject of consensual obligations, was never finished; but a concentrate of Hägerström's theory regarding the Roman view on the ground of the binding force of consensual contracts was published in 1934 (in Swedish) as part of an essay on the 18th-century Swedish jurist Nehrman-Ehrenstråhle.[2]

Hägerström's inquiries into ancient Greek and Roman legal ideas led him to the realization of their close affinity with religious and magical beliefs. In fact, he found that the old Roman conceptions of *ius, dominium, possessio*, etc., *are* magical concepts. *Iustum, e. g.*, originally means pure in a religious sense, as in *iustum piumque bellum* = *purum piumque bellum, i. e.*, being free from elements apt to call forth the wrath of the gods. Hägerström interpreted the old legal acts, such as *mancipatio, stipulatio*, etc., as magical acts: their

[1] *Der römische Obligationsbegriff im Lichte der allgemeinen römischen Rechtsanschauung. II. Über die Verbalobligation.* Uppsala 1941. Pp. 190 + 504 + XI. (Edited by Karl Olivecrona.) Both volumes appeared in the same series as the present work (numbers 23 and 35).

[2] A German translation of this part of the essay was published in the *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, romanistische Abteilung*, Bd. 63 (1943) under the title *Über den Grund der bindenden Kraft des Konsensualkontraktes nach römischer Rechtsanschauung*, pp. 268—300.

sense, according to him, was the establishment, by formal acts and words, of powers for a person with regard to things or other persons. A power was called forth by being figuratively *represented* or by being proclaimed to exist. In such a way the fundamental conceptions of the *ius civile* were traced back to ancient beliefs in mysterious powers which could be brought into being and controlled by employing the proper words and gestures. As to the concepts of public law a parallel theory was set forth in a separate essay on the magisterial *ius*.[1]

The main thesis, expounded in the text, was supplemented by a great variety of discussions on special questions in the footnotes or in appendices. In both regards the argument was supported by an abundant wealth of material from juridical and other sources. Hägerström did not shrink from going into the minutest detail, though this was not really necessary for his purpose. The philosophical content of the work could have been put forward and adequately sustained in a volume of moderate size; in this manner the essential ideas would have come within easy reach of every jurist, philosopher, or historian. But Hägerström feared that such a way of exposition might have weakened the impression made on the specialists of Roman law. He therefore felt it necessary to supply the most complete documentation and discuss countless particular problems of history and interpretation; only by so doing, he believed, could the attention of the experts be secured.[2]

This was a regrettable miscalculation. The complicated exposition, which requires considerable familiarity with Roman law on the part of the reader, made the work very difficult of access to non-specialists; and the specialists passed it over. The first volume on the concept of obligation, as well as the essay on the magisterial

[1] *Das magistratische Ius in seinem Zusammenhang mit dem römischen Sakralrechte*. Uppsala 1929. In the *acta* of the University of Uppsala (Uppsala universitets årsskrift 1929). It should be noted that the essay is also of importance for private law. — The second volume of *Der römische Obligationsbegriff* contains indexes to both volumes and to *Das magistratische Ius*.

[2] How thoroughly Hägerström went to work may be gathered from some of his headings, *e.g.*, this one: "On the nature of the willing of a Roman god." The problem is discussed in 16 pages with a wealth of material.

ius, was unfavourably reviewed in the leading periodicals. The second volume seems not to have been reviewed at all, except by the editor himself, and has very seldom been mentioned in the richly flowing literature on Roman law; it sank like a big stone silently dropped into the sea. *Habent sua fata libelli.*

The negative attitude of the students of Roman law may partly be due to the difficulty of understanding Hägerström's language, especially in the first volume on the concept of obligation; partly it may be explained by Hägerström's extraordinary method of composition. In the first volume the footnotes occupy by far the greater part, and some of them are of quite exceptional length: Hägerström possibly holds the world's record with one running into 24 full pages. Reading the text, which is in itself no easy task, is rendered needlessly laborious by the necessity often to jump several pages ahead, in the middle of a sentence, in order to find its continuation; then read a few lines until there is a new jump, and so on. The footnotes in many cases extend into whole essays. It is, indeed, impossible to read the footnotes in conjunction with the text; text and footnotes have to be read separately. The absence of headings in the footnotes (even if this is partly remedied by an ingenious table of contents) makes it difficult to survey the material.

The linguistic and technical deficiencies cannot, however, alone account for the lack of interest in Hägerström's writings, particularly as they are not conspicuous in the second volume on the concept of obligation. Here the long footnotes have been replaced by appendices printed separately at the end of the text; the style flows more easily; the exposition is generally very lucid. But the volume appeared in the middle of the war: it escaped notice then; and during the fervent revival of interest in Roman law after the war it was almost completely forgotten.[1]

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[1] As an example of this it may be cited that Fritz Schulz in his *Classical Roman Law* (1951), which is well supplied with references to the more important literature, only lists the first volume of *Der römische Obligationsbegriff* (p. 464). No hint is given of the existence of the second volume; neither is *Das magistratische Ius* mentioned. Arangio-Ruiz, on the contrary, in his *Istituzioni di diritto romano* (10th ed., 1949, p. 283) refers to the second volume of *Der römische Obligationsbegriff* "per la potente analisi del formalismo romano".

It might be added that Hägerström perhaps to some degree impaired his goodwill among the scholars through a certain polemical acerbity which is sometimes apparent; this may have lessened the inclination to dedicate months, or years, to the study of his work, as is necessary if it is to be really penetrated and digested. But all the secondary features of Hägerström's writings cannot explain the general attitude towards them. Could it, then, be that the quality of the work appeared to be insufficient for making closer study worth while? This is inconceivable. Even a superficial glance will be enough to reveal that the scientific workmanship is first rate. Undoubtedly any scholar who takes the pain of penetrating Hägerström's massive volumes will readily agree that his exactitude in handling the material is irreproachable; that his learning is equalled by few; and that the acumen of his reasoning is unsurpassed.

The principal reason why Hägerström on the whole has hitherto failed to attract the attention of the experts on Roman law is that his main thesis seemed to be absurd. That the Roman *ius civile* should be an order for the distribution of magical powers appeared to be inconceivable; Roman law could not be explained in that way; and therefore the door was closed from the beginning.

The reaction was in great part due to the ideas usually attached to the word "magic". In many minds, this word seems to evoke a vision of witches gathering around a boiling cauldron in the middle of the night; and what has this to do with law? It might, indeed, be permissible to point out certain connections between magic and law in the most remote times. But to maintain that the well-known legal acts of ancient Rome, as the *mancipatio* and others, really were magic acts; that the *ius* of a Roman citizen was a mystical power of divine origin; that legal science was primarily a science about such powers; was this at all reasonable? It did not seem so to the scholars who wrote the reviews about 1930, and consequently the whole work was thrown on the scrap-heap.[1]

[1] Typical is the attitude of Beseler who expressly says that he does not want to enter into any discussion with "the mystic" (!) Hägerström (*Zeitschrift der Savigny-Stiftung, romanistische Abteilung*, 49, 1929, p. 404). Cf. *Der römische Obligationsbegriff* II p. 278.

I venture to suggest that the opinion formed in those days was premature; due consideration was, in fact, never given to Hägerström's thesis. The bewilderment caused by the word "magic" gave rise to wide-spread misconceptions as to his real intentions. To understand Hägerström properly it is necessary to make clear what he actually meant by the word.

Hägerström used to refer in his lectures to Sir James Frazer for the nature of magic. By magical beliefs he understood, as far as I know, every kind of belief in the possibility of producing desired effects by other means than those belonging to natural causality. A typical instance of magic is the production of an effect by representing it or proclaiming its occurrence in formal words. The effect may be a natural one, *e.g.*, the death of an enemy, the cessation of toothache, or the arousing of love in a beloved person. But the effect may also be of a supernatural kind, e. g., the investiture of a person with occult powers as priest or king, of making a thing dangerous of touch, or of consecrating a building to a divinity, thereby making it the property of the divinity itself. A usual feature of magical acts is the formality that attaches to them: the act has to be performed exactly in the right manner, if it is to produce the effect.

Take now the act of *mancipatio*, or buying, from which Hägerström starts. In the presence of five witnesses the buyer grips the slave and says, in throwing a piece of copper into a scale: *I proclaim that this man is mine according to the law of the Roman citizens and that he has been bought by me through this piece of copper and this copper scale.* The curious thing is that the buyer is not reckoned to be owner until the seller has appropriated the piece of copper. Consequently, the utterance of the buyer is false in the moment when it is pronounced. Now the Romans were extremely careful in phrasing their legal formulas; it is inconceivable that they should have put a false statement into the mouth of the buyer — if its veracity was relevant. The phrase has therefore long puzzled interpreters. Hägerström's solution is the following. The purpose of the pronouncement was to *establish*, in the person of the buyer, the *dominium ex iure Quiritium* over the slave. This dominium was a power with regard to the slave. But how could a power be established by

being *said* to be present? This depends on the nature of the power in question. True enough, the buyer would, in most cases, acquire an *actual* power. This power was, however, a consequence of the whole psychological situation in Roman society, including the general respect of the law, the importance attributed to such acts as the *mancipatio*, etc., briefly, by all the factors that caused surrounding people to regard the slave as belonging to the buyer and tended to reinforce the sense of power in himself. Every social power is a result of the interplay of such factors. Now, could the buyer proclaim the existence in himself of a power of this nature? Certainly not. This power was not even present when the words were spoken; moreover, it did not infallibly come into existence as the *dominium* was believed to do; finally, it was conditioned by the conviction that the buyer really had acquired *dominium*. The said power must have been of a supernatural kind. According to the Roman view, the formal words of the buyer in conjunction with the other elements of the ceremony had the effect of *producing* this power.

It is quite irrelevant whether one chooses to apply the word "magic" to such acts and to such powers. The use of the term seems, however, to be appropriate, since the act carries with it the essential features of what is usually called magic. In any case, the important point is not that word: it is the question whether the ideas of the Romans were of the kind briefly sketched or not. In order to support his theory, Hägerström has adduced superabundant material. His solution seems, indeed, to be so obvious that it is a wonder it has not been proposed long ago; in fact, both Ihering, in some pages of his *Geist des römischen Rechts*, and Sir Henry Maine came close to it, though they never took the full step. Certain deep-rooted ideas about the nature of the law, according to which the law is a supersensible reality, have stood in the way of realizing the magical nature of legal acts.

In the second volume of *Der römische Obligationsbegriff* Hägerström himself has defended his theory against the criticism levelled at the first volume and *Das magistratische Ius*. Some of his own words may be quoted:

It is of quite subordinate significance that I have characterized as mystical and magical the supersensible power with regard to things or persons that the Romans understood by *meum esse*, *ius agendi*, *obligatio*, or *ius magistratus;* or that I have characterized these ideas, as well as the belief in the gods being astringed by external ceremonies, as superstitious. I have called the power in question mystical because it is an ability to control things or persons — though this ability has no foundation in empirical reality. — — — I have called it magical, because in magic one handles such mysterious powers; and I have labelled the whole outlook superstitious because I hold that the belief in such powers — or in gods as being powers of such nature — can have no basis in reality. Nothing essential would, however, have been changed if I had assumed the Roman belief to be true and the powers to be real. The relevant question is not whether the Romans entertained a true belief when they meant, e.g., that the holder of the *imperium* (the *vis imperii*) acquired it through the ability to make auspices that was conferred upon him. If anybody who believes in a supersensible world will assume this, well, that is his opinion. Important is alone the question how the Romans looked at these things.

My whole exposition has been misunderstood because the readers have fastened upon such characterizing expressions as superstition, etc., and therefore taken for granted that my intention was to maintain a certain theory concerning the nature of law instead of simply exploring the history of ideas. I have certainly not taken my *basis* in any theory concerning the nature of the law. Therefore, I have neither held an ethical kernel in the law to be excluded, nor assumed such a kernel to be present (in the sense of basing myself on any theory in this regard). It is very dangerous, from a methodological point of view, to allow an investigation concerning the ideas of certain peoples during certain epochs to be in the least degree influenced by any theory concerning that which is called law.[1]

The quotation might be supplemented by another, taken from the end of *Das magistratische Ius:* it conveys Hägerström's principal views in a nutshell.

According to common opinion magic belongs to a *primitive, barbarian* way of thinking (Anschauung); in Rome, the magical element in the religion is said to be only a rudimentary survival from ancient, barbarian

[1] *Der römische Obligationsbegriff* II p. 399. Hägerström's rebuttals are found in the appendices, especially in numbers 21, 22, and 26. — The principal ideas of Hägerström set forth in the first volume of *Der römische Obligationsbegriff* are explained at length by Lundstedt in his review of the volume in the *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft*, vol. 59 (1930) pp. 74—116.

times. This opinion, as has now become apparent, is however mistaken. The strength of the Roman *ius privatum* as well as the Roman *ius publicum* — *divinum* and *humanum* — was grounded in the firm rules that were connected with magical ideas. The case was different with Greek law and religion. Because of its intimate connection with the moral consciousness, which is always somewhat vague, — — — Greek law could never attain the same degree of firmness. Therefore, it was not the Greek, but the Romans, who erected such an imposing system of law: a system which combines exemplary firmness with constant regard for the needs of social life and which throws its shadow even over modern legal science. What gave the system its firmness was precisely the *magical* rules. — — — According to that great expert on Roman ideology, Polybius, the strength of the Roman empire rested on Roman religiousness. The pontifical and augural "science" could decide, in every instance, what acts of state were suitable for making the gods propitious or for averting their wrath, and indicate whether a proposed act of state would be supported by the gods or not; what a source of power this must have been! Morality, it is true, was based neither on the law nor on the official religion; but this was no source of weakness for the state. Official morality had its immense importance through its connection with *fama* and *honor* on the one hand and with *infamia* on the other hand. Prevailing views on justice and expediency (the *aequum et bonum*) could influence the law in several ways: through free legislation by the people, through the authoritative interpretation of jurists and, in principle, through the *praetor* who had mastery over legal procedure.[1]

The two passages now cited may be sufficient to give some impression of Hägerström's real intentions. Nothing more is needed to make clear that his theories, based as they are on a vast material collected from all available sources, demand the closest attention by any serious scholar concerned with the history of Roman law or religion. Moreover, Hägerström's numerous elucidations of special questions retain their full significance independently of the opinion one may hold regarding his main thesis.[2] They are, of course, never

[1] *Das magistratische Ius* pp. 80 *et seq.*

[2] Among them may be mentioned the extensive discussions of the principal questions of the doctrine of possession; of the fundamental concepts of procedure; of the meaning of bonitarian property; of the history of debt-slavery; of the ideology of legislative acts; of the ancient law of succession; of the principles of interpretation of testaments and verbal contracts; of the origin of *stipulatio* and *promissio*, etc. As particularly beautiful examples of Hägerström's reasoning

grounded on the main thesis; on the contrary, the main thesis is based on conclusions drawn from the analysis of special phenomena, such as, *e. g.*, *mancipatio*. It would be easy to cite dozens of examples of authors who are apparently unaware of the fact that the very theme they are discussing has been treated at length by Hägerström. This ignorance should be dispelled; there is hardly any branch of Roman law concerning which the investigator will not find useful information and analysis in Hägerström's writings. Finally, Hägerström's main thesis can never be adequately discussed until his special inquiries have been duly appreciated; but this has not yet been done.

Hägerström's work is a challenge; the response has still to come. May it follow in a positive way, leading further to a deeper understanding of the ideology from which modern legal science has started and by which it has been so profoundly influenced.

Hägerström's writings on *legal philosophy* are strictly scientific. He does not discuss any problems of valuation; he is only concerned with questions of fact. It would therefore be vain to seek in this volume for any attempt to establish guiding principles of legislation, judicial practice, or social organization. In his more popular writings Hägerström sometimes gave expression to his own valuations; but such occasional utterances are, of course, to be distinguished from his scientific propositions.

His work on legal philosophy centred in the "fundamental question, what constitutes law" (Holmes); but he never published any fully elaborated answer to it; his views in this respect were only briefly sketched.[1] His work was mostly critical; but his criticism is much more than mere refutation of other theories: it contains a wealth of positive exposition, above all concerning the constitution of legal ideology.

Hägerström cannot be placed within any one of the well-known

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may be cited his reconstruction of tab. III 1—3 in the law of the XII Tables (*Der römische Obligationsbegriff* II pp. *379 et seq.*) and his explanation of the Caudinian pact (ibid. pp. 110 *et seq.*, *251 et seq.*).

[1] Below, pp. 37—40, 348 *et seq.*

categories into which legal philosophy and legal science are usually divided. His criticism is primarily directed against certain assumptions that are more or less common to legal theory in general. In fact, he drives his drill into the very foundations of traditional legal science as a whole.

Hägerström's criticism is aimed at legal positivism as well as against the doctrine of natural law; he contends that legal positivism is permeated with natural law concepts. His criticism may broadly be divided into two parts: (i) criticism of the fundamental legal concepts, and (ii) criticism of legal positivism.

(i) With regard to the concepts of right and duty, which form the basis of the whole system of legal concepts, Hägerström begins by asking, what is in our mind when we speak of rights and duties in the usual way. His analysis leads to the result that these concepts are metaphysical sham-concepts: it is impossible to identify that which we call a right or a duty with any fact; yet it is held to be an existent. The right is a power; but it is no actual power which could be fitted into the context of reality; it is conceived as a power raised above the natural order of things. A duty is a bond; but the bond is not factual; it is a purely ideal bond, the infringement of which is considered to be a condition for applying a sanction. Thus Hägerström's contention is that the fundamental legal notions are notions of unseizable, or "mystical", powers and bonds.[1]

If rights and duties in such a sense are assumed to be objectively existing, this necessarily leads to a metaphysical conception of law; for those powers and bonds can never be derived from actual facts. It is, *e. g.*, impossible to identify a right or a duty in the usual sense with the mere fact of a command being issued by a sovereign power. Unless this power is supposed to have a right to command, it is inconceivable that its commands could give rise to what is called rights and duties. The assumption of objectively existing rights and duties therefore entails the assumption of a metaphysical or natural law basis of the legal system.

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[1] This analysis is put forth in a condensed form in the introduction to *Der römische Obligationsbegriff*, Ch. I in this volume. Cf. also below pp. 315 *et seq.*

The notions of legal rights and duties are psychologically explained by Hägerström on the same line as the idea of a moral duty. He maintains that there is an emotional element behind the expressions which blends with presentations of actualities and thereby leads to metaphysical ideas of supra-natural powers and bonds. The historical background of these ideas Hägerström finds in ancient, deep-rooted magical beliefs.[1] He accorded very great importance to such beliefs for the forming of societies and the early development of law. In his lectures he used to say that man has risen above the level of animals not as *animal sapiens* but as *animal mysticum.* He also held the opinion that the usual distinction between the primitive and the modern mind is unwarranted, since the modern mind retains important elements of primitive thinking. His criticism of modern legal concepts should be compared with his analysis of the Roman concepts.[2]

Hägerström's contentions usually have a startling effect on jurists. He seems to say that legal rights and duties actually do not exist. But what is law without rights and duties? A legal system without rights and duties seems to be inconceivable. Legal science, as well as legal practice, appears to be unable to take a single step without using these notions. For such reasons, many jurists are inclined to disregard Hägerström's criticism and treat it as irrelevant to legal science, whatever its philosophical merits may be.

The criticism concerns, however, the ultimate assumptions of legal science. If it is fundamentally correct, it is bound profoundly to affect our view on law and society. It should therefore be most carefully discussed without any preconceptions. Here, as with regard to Roman law, what matters is not the characterizing words but the substance of Hägerström's contentions: the unfamiliarity of some of his expressions should not obstruct close study of his thought. The consequences of his results — if they contain an es-

[1] A synthesis of the historical and the psychological aspect is given by Hägerström in an essay on the idea of forces (*Vergleich zwischen den Kraftvorstellungen der primitiven und modernen Kulturvölker*, in *Festskrift för Grotenfelt*, 1933).

[2] In the essay on Nehrman-Ehrenstråle (above, p. XI footnote 2) he discusses the differences between Roman and modern legal concepts.

sential element of truth — are very far-reaching; they obviously cannot be adequately appreciated until the validity of his criticism has been thoroughly tested; and even then, the consequences will appear only gradually.

One question is naturally raised immediately: if there are no rights and duties, how can these "concepts" at all be used as tools in legislation and in legal practice? Hägerström's answer to this question is contained in an essay on the conception of a declaration of intention in the sphere of private law.[1] The notions cannot, in fact, be discarded en bloc. What can be done is to separate the metaphysical, or unreal, elements from the real ones.[2]

In the essay just mentioned Hägerström analyses the acts of promise and acceptance. The whole essay is typical of his method and outlook. It is an essential supplement to his criticism of the notions of legal rights and duties.

(ii) By far the largest part of Hägerström's writings on legal philosophy is devoted to criticism of the "will-theory", or what is usually called legal positivism, represented by Austin and his followers, by Ihering, Zitelmann, Bergbohm, Jellinek, Duguit, and others. According to theories belonging to the will-theory group, the law is an actual existent, consisting in the commands or declarations of a supreme power; law *is* the contents of the will of this power. A theory of this kind is generally held to be the alternative to the doctrine of natural law. Positivism, in one form or other, is widely regarded as *the* scientific theory of law.

Two essays from the year 1916 and 1917, which fill the greatest part of this volume, are dedicated to the criticism of the will-theory.[3] In the first one, Hägerström discusses the several theories

[1] Ch. V in this volume, especially pp. 315 *et seq.*

[2] This is precisely what Hägerström does in the pages mentioned in the preceding footnote.

[3] Ch. II and III in this volume. The two essays should be considered as one work, the latter being a direct continuation of the first one. In Ch. II the headings have been inserted in the English edition. The Swedish text has only the numbers 1—5 for paragraphs 1, 2, 3, 4—7, and 8, respectively. Longer footnotes have been printed here as part of the text, though with smaller type.

that have been put forward with the aim of showing the existence of the will in question. He contends that none of these theories is in accordance with social realities.[1] The criticism is followed up in the first part of the second essay with a series of examples drawn from history, which are intended to show that the will-theory is incompatible with historical facts.[2] In the next section, the author discusses the theory in its relation to the application of law through the judge in modern times. Again he purports to show that the will-theory is not consistent with empirical reality.[3] The part of the criticism now referred to is brought to a close by a discussion of the nature of willing. Hägerström here maintains that the will-theory must make certain suppositions concerning the law-giving will that cannot be reconciled with the actual nature of willing.[4]

At this point, the direct criticism of the will-theory is interrupted by a long investigation concerning the idea of duty. The criticism is thereafter resumed and continued from a new point of view. The question is now, whether the will-theory is consistently carried through by its adherents without admixture of foreign elements. The answer is in the negative. Hägerström maintains that within the framework of the will-theory there is a constant confusion between *IS* and *OUGHT* and an infiltration of ideas belonging to natural law. Imperatives are confounded with valid statements about duty; rights, in the traditional sense, are held to arise on the basis of legal commands though they cannot be reduced to the fact that certain commands have been issued, etc.[5] Hägerström even contends that the confusion is necessary from a practical point of view; jurisprudence, based on legal positivism, would cut off the connection with the common-sense notion of justice ("das Rechtsbewusstsein") unless it introduced the notions of rights and duties and what appertains to them.[6]

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[1] Below, pp. 17—55.
[2] Below, pp. 56—74.
[3] Below, pp. 74—105.
[4] Below, pp. 105—116.
[5] Below, pp. 201—244.
[6] Below, pp. 245—256.

In a separate essay Kelsen's theory of law and the state is discussed.[1] The introductory paragraphs to this essay might well be read as an introduction to Hägerström's whole criticism of positivism.

These outlines may suffice to indicate the scope of Hägerström's writings on legal philosophy. But the volume also includes the fundamentals of his *moral* philosophy, *viz.*, in the sections devoted to the idea of duty.[2] These pages are, perhaps, the most significant of all. The discussion of the concept of duty is preceded by an investigation into the state of mind of a recipient of a command. This state of mind is then compared with that of one having a sense of duty. Hägerström's power of penetrating and distinguishing are nowhere more apparent than in this analysis. Here, also, he gives grounds for his theory concerning the nature of value-judgments and for his denial of the existence of an objective ought.

Those who have known Hägerström, listened to his lectures, and taken part in his seminaries can only regret that his writings are so much more difficult of access than was his oral teaching. His lecture technique was peculiar. His head was deeply bent over the manuscript and he never cast a single glance at the audience; nevertheless, he captured the attention of the listeners by the intensity of his delivery; and he led them with convincing clarity through the most intricate of philosophical labyrinths. In his seminaries, however, he was perhaps at his best as a teacher. Usually a recent book was to be discussed (*e.g.* Pound's *Introduction to the Philosophy of Law* or Kelsen's *Allgemeine Staatslehre*). Hägerström would often pick up a thread somewhere at a point that might seem to be of secondary importance; he would put a question that seemed to be innocuous; but the answer occasioned a further question, and in a few steps he was at the core of the problem, having approached it from an unexpected angle. Still more, he acted as a teacher outside the class-room. He was an early riser; at 4 or

[1] Ch. IV in this volume.

[2] Below, pp. 116—201.

5 in the morning he started his 12 hour day; but in the evening, his door was open to visitors. Students and colleagues used to seek him for information and discussion. Sitting before the wood-fire in his old-fashioned home, puffing his long pipe and constantly re-lighting it, he generously put his immense knowledge and his treasure of ideas at the disposal of his interlocutor. A considerable part of his large influence in his native country stems from such talks.

The publication of this volume was made possible by the generous assistance of the State Foundation for the Promotion of the Humanities (Humanistiska Fonden). Thanks are also due to the Royal Society of Letters in Uppsala (Humanistiska Vetenskapssamfundet) for including the volume in their series. The debt of gratitude that is due to Professor Broad for his eminent work as a translator has already been indicated above.

The edition has been sponsored by the Hägerström Committee, in which my colleagues are Professor Lundstedt (chairman), Professor Björn Collinder, and Dr Martin Fries. I want to thank all of them for their loyal assistance. My wife has been of great help in comparing the proofs with the manuscript.

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University of Lund
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September lst., 1952

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I

General view

Introductory chapter to the work: *Der römische Obligationsbegriff im Lichte der allgemeinen römischen Rechtsanschauung.* I. 1927.

Suppose that one uses in Jurisprudence such notions as the right of property and the right to the services of another person, *e.g.*, the right to his labour on the ground of a contract of service or the right to be paid a certain sum of money on the ground of a payment made in advance. We seem to be dealing with something whose meaning is obvious. Every grown-up person at least seems to know what is meant. Nay, even children wrangling about their playthings are quite clear that this or that thing belongs to one or another of them. "This hobby-horse is mine and not yours." "Leave that alone, for I bought it with my own money." It should, therefore, it would seem, present no particular difficulty to explain what the rights in question really consist in. And yet to one's astonishment one finds a mighty juristic literature whose object it is to determine the meaning of these notions and which contains all kinds of different views about them. What is it that causes the difficulty?

It should be remarked at the outset that the problem is comparatively new. In the legal literature of Roman times we find only brief indications. It cannot be said that any real scientific controversy on the question existed. That more attention is given to the question nowadays depends on the circumstance that modern science in general, and therefore, modern jurisprudence, seeks to use only such notions as correspond to facts. But as soon as one tries to determine the facts which correspond to these ideas one lands in difficulties. Suppose I have the right of property to a certain house. The only actual fact seems to be that the state guarantees to me a certain protection in my possession, provided

that I or my predecessors have not taken certain actions by which I have lost that protection, *e g.*, if I have let the house and vacated it, or if I have mortgaged it and have failed to pay the debt for which it was pledged. But at this point difficulties at once arise. Does the fact just mentioned really correspond to what we understand by a right of property? We must notice that the state does not step in as protector unless I have actually lost possession of the thing, *i.e.*, unless it is in the possession of another person who cannot base his case on any relevant legal act. But the right of property would seem to be a right to the thing itself, *i.e.*, a right to retain possession valid against every other person. Can the state guarantee this? Of course not. All that it can do is to enable me to regain the house if it should already be in possession of another person. Moreover: Who would make the right of property dependent on the question of proving the title? Yet in a lawsuit I can obtain legal protection only if I can bring forward proof. It should be noted that the child who asserts a right of property in his plaything certainly is not thinking of protection by the state, and not necessarily of protection by his parents. It is plain that he often wishes merely to exercise a certain influence over his playmate and to give to himself a certain strength in his possession. We find the same situation in inter-state relations. Every state is in the main without external protection, yet in cases of conflict it asserts its rights in order to weaken the moral force of the other state and to strengthen its own. One fights the better when one is standing up for one's rights. The assertion that private property in the juristic sense has nothing to do with this natural notion of right cannot be maintained, for the historical connection is palpable.

So, in order to find the fact in question, one is forced to view the matter in another light. It is now said that a person's property means the fact that the state commands all others, who are not entitled to the possession of this thing through special legal acts, to respect this person's possession; and that, in the event of disobedience to this command, it threatens to take coercive measures for the benefit of this person if he should so desire. But consider

an ordinary dispute about property where both parties believe themselves to be in the right. No one here has been disobedient. For disobedience implies that one was aware of the command. But suppose I believe that I am in the right, and therefore that the state has not commanded me to give up the thing to my opponent. Then I am in no way disobedient. In this case I have never received a command addressed to me, and that is the same as if it had never been given to me. For an order which does not reach the person for whom it is intended is only an empty sound and not a real order. But although no disobedience to a command has occurred, and though none can even be alleged, yet the state-executive forces the party who has lost his case according to judicial decision to give up the thing if it is in his possession. And the ground which is given is that the *right* of the party who wins the suit was being infringed. So a person's right of property cannot consist in the fact that the state commands others to respect his possession, and threatens, in case of disobedience, to take coercive measures for the benefit of the proprietor, if he so desires.

It is plain that there are insuperable difficulties in determining the fact which corresponds to that which we call a right of property.

The difficulty is still more striking if we try to determine the fact which corresponds to what we call a personal right, *i.e.*, the right to a certain action on the part of a person who is regarded as under an obligation, *e.g.*, the performance of a piece of work or the payment of a debt within a definite time. Here it seems quite impossible to appeal to the question of protection by the state. For plainly in most cases the state can enforce nothing except the monetary equivalent of the omitted service. It can never guarantee that the person who is under the obligation shall actually perform that action to which the claimant is entitled. Again, the same thing holds here as in the case of rights of property. The possibility of proving the right is not a precondition of the existence of the right, but it is a precondition for obtaining the protection of the state.

So an attempt is made here too to show that the right consists

in a command by the state and coercion in case of disobedience to it. The state commands the party who is under an obligation, it is said, to perform the obligatory action; and it compels him to pay compensation in case of his failure, if the claimant desires it. This, it is alleged, is the content of a rightful claim. But the same difficulties confront us here as in the case of the right of property. In a lawsuit concerning a rightful claim the unsuccessful party is as a rule quite unconscious of any command by the authorities, and therefore there can be no question of disobedience on his part or even of his having received a genuine order. And yet he is compelled to pay compensation because the *right* of the successful litigant has already been infringed. Finally we must note the following objection to the command-theory, which applies equally to both cases. If it were a question of commands by the authorities, every infringement of a right would be an infringement, not of the right of the individual, but of the right of the state which issues the command. But we always assume that there is private right as distinct from public right. And in a conflict concerning private right the question turns exclusively on an infringement of the right of an individual, and not on an infringement of the right of the state.

The factual basis which we are seeking cannot be found, then, either in *protection guaranteed* or *commands issued* by an external authority. But, on the other hand, we cannot find any other fact of which it could be said that it corresponds to our idea of a right of property or a rightful claim. This insuperable difficulty in finding the facts which correspond to our ideas of such rights forces us to suppose that there are no such facts and that we are here concerned with ideas which have nothing to do with reality.

At this point it is tempting to connect these ideas with our moral intuitions of right and wrong. It might be said that the right of property means that the proprietor alone (apart from special agreements authorising other persons) is entitled to use the thing for his own purposes. But suppose we assign to the phrase 'is entitled' only the meaning that the proprietor and he alone does no wrong if he so uses the thing. Then the difficulty arises that

it is universally admitted that the right of property implies a right to protection by the state, at the very least a right in the proprietor himself to defend his possession of the thing. But it is impossible that such a right can follow merely from the fact that the rightful owner and he alone does no wrong if he uses the thing for his own purposes. From the fact that others are doing wrong if they appropriate my property it cannot follow that in that event they are liable to compulsion from me. To this must be added that, according to the common view, the right of the proprietor to do what he will with the thing is a mere consequence of the fact that it is his, that it belongs to him. But since the thing does not belong to his personality itself as a limb does, but is always something external to it, what is in question must always be a *power* over the thing, which nevertheless is not in itself a real power. To understand this right to protection as following from this power we must assume that it is quite independent of whether the proprietor has *actual* power.

Suppose that we assign to the phrase 'is entitled' only the meaning that the creditor does no wrong if he claims what is due to him, whilst the other party does wrong if he fails to honour the claim. Then it is even clearer that a rightful claim cannot be reduced to the mere fact of being entitled to demand a certain action from the other party. For the whole point here consists in the fact that the creditor *can* demand something. This presupposes a power over the other party; and that cannot be reduced to the fact that he does no wrong if he states his wish, whilst the other party does wrong if he pays no attention to it.

It seems, then, that we mean, both by rights of property and rightful claims, actual forces, which exist quite apart from our natural powers; forces which belong to another world than that of nature, and which legislation or other forms of law-giving merely liberate. The authority of the state merely lends its help to carry these forces, so far as may be, over into reality. But they exist before such help is given. So we can understand why one fights better if one believes that one has right on one's side. We feel that here there are mysterious forces in the background from

which we can derive support. Modern jurisprudence, under the sway of the universal demand which is now made upon science, seeks to discover facts corresponding to these supposed mysterious forces, and it lands in hopeless difficulties because there are no such facts. Traditional points of view overmaster us, which we try to fit into the framework of modern thinking, unsuccessfully because they are not adapted to it.

The notion of legal duty which is used in jurisprudence, a notion which is commonly conceived as corresponding to the notion of right within the sphere of personal rights, has a similar content. But attempts are made to reduce this notion also to a factual relationship, and to describe it as a certain volition which the legislative authority expresses. Here, as in the case of right, two alternative courses have been followed.

One is to assert that the duty is that action in regard to which the legislative authority declares that failure to perform it will bring about certain reactions which will fall upon the guilty party. But it is easy to see that this explanation does not coincide with the meaning of the notion in question. On this view all rules which determine the legal duties of private individuals would concern the legislative authority itself or its organs, and would thus be like the rules which regulate legal proceedings. But for thousands of years a distinction has been drawn between the rules of private law, which are valid for private persons in their mutual relations, and those of legal procedure, which hold for the legislative authority itself or its organs. The importance of this distinction appears clearly in the circumstance that for the Romans a duty of private law—*oportet*—can exist without its infringement involving the slightest disadvantage in an action-at-law. The praetor can refuse *actio* to the plaintiff, or he can grant to the accused the possibility of adducing a ground for immunity—*exceptio*. The latter alternative, though it does not in the least annul the *oportet* which holds as a duty of private law, will lead nevertheless to the dismissal of the case against the defendant, provided that the alleged fact is proved. And this can happen without the praetor thereby

breaking in any way the public obligation which he is under. Nay, it may, on the contrary, be his legally bounden duty to refuse *actio* or to grant an *exceptio*, although an *oportet* of private law is infringed. In modern jurisprudence the importance of the distinction between private rights and the rights involved in legal proceedings comes out clearly in the common view on the binding force of a judgment. Here one starts from the position that the substantive right, and therefore also the legal duty of the defendant, is unaffected by the result of the case. So the legal duty of the defendant can remain, even though the case against him be dismissed, though it loses every shred of practical importance. In this respect it has not even the same meaning as a *naturalis obligatio*.[1] The fact that legal duty is independent of the reactions of the legislative authority against breaches of it is seen particularly clearly in the region of legal punishment—to say nothing of the constitutional duties of the highest organs of the state. A crime may, *e.g.*, become statute-barred, and therefore not punishable. Yet no one would deny that the crime continues to have the character of a breach of legal duty in spite of its being legally unpunishable.[2]

The second kind of explanation of the notion of a legal duty, as it occurs in jurisprudence, is to reduce it to a command issued by the legislative authority. This, however, leads to the same difficulties as arise when one tries to explain right in terms of a command by the legislative authority to the opposing party. A legal duty, which has consequences for one who infringes it, can exist in certain cases without the latter being aware of any command by the legislative authority. Even in the realm of penal law, where an infringement of a legal duty requires a voluntary act in order to be a ground for punishment, no awareness of a state prohibition need exist. But, unless a person to whom a command is directed actually receives it and is aware of it, no com-

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[1] See in this connexion my essay '*Natural law in the theory of penal law*,' Svensk Juristtidning 1920 (In Swedish).

[2] Cf. below, p. 233.

mand directed to him really exists; any more than a piece of advice exists for a person, if it is sent to him but never reaches him.

From this point forward we are inevitably led to the view that the notion of legal duty cannot be defined by reference to any fact, but has a mystical basis, as is the case with right. Legal duty means, it would seem, an obligation in regard to a certain action which exists independently of any actual authority and which is crystallized out by legislation or other form of legal enactment. The interference of the legislative authority is a reaction which depends on one's neglecting to perform the action which is one's duty.

It is possible, however, to illuminate the psychological content of the notion by reference to the meaning of the concept of duty in the moral realm. Here too we have the idea of certain actions as of such a nature that a person is bound, independently of any authority constraining him, to do or to avoid them. 'I ought to act thus,' 'I ought not to act thus,' a man says to himself. Suppose that, in order to explain this ought, one tries to reduce it, either to the demands of public opinion (as has been so common with English writers since Locke), or to the approval or disapproval of one's own moral feelings. Then one commits the same mistake as the jurists do when they seek to reduce the mystical notion of legal duty to factual relationships. However much public opinion or the decision of one's own moral feelings may have to do with determining *what* we take to be right or wrong, the fact remains that we do not *mean* by right or wrong either the one or the other. We mean by them a certain peculiar characteristic of the action in relation to the person. Granted that public opinion exerts pressure on the individual's beliefs as to what is right or wrong for him; still, it is surely plain that public opinion itself, if its demands on the individual are to have any moral meaning, presupposes that he already *ought* or *ought not* to undertake such and such an action. Similarly, one's own moral feelings of approval or disapproval are directed to certain actions in so far as one believes them to be right or to be wrong, even though it be granted that it is the reaction of such feelings which gives

life to our ideas of right and wrong. Jurisprudence is guilty of a similar confusion when it confounds the content of legal duty as such with the fact that a certain higher authority, no matter what it may be held to be, is the factor which determines (at any rate so far as statute law is concerned) what we regard as legal duties and that it reacts against any breach of the legal duties which it lays down.

As an example of the prevailing lack of clarity on this point we may cite Clark's treatment of the matter in *History of Roman Private Law*, II, 1914. On the one hand it is said that 'right' in the moral sense belongs to a class of terms 'expressing the ideas of moral approval or disapproval' (p. 629). Cf. p. 632 where 'the particular right' in the moral sense is treated as 'arising from the common feeling of a society.' This seems to imply that the existence of this feeling is alleged to be identical with right or wrong. But, on the other hand, he treats this very same feeling as the sanction of 'moral rights and duties.' He says of them that they are 'protected and enforced' by 'the common conscience' in a human community (p. 630). Thus, *e.g.*, the fact that it is right to respect the life of another, and that failure to do so is therefore wrong, means that the community approves the one and disapproves the other. But this approval or disapproval on the part of the community derives its force and its effectiveness from—this approval or disapproval itself. Right becomes its own sanction, and so the notion of sanction loses all meaning. It is plain that the following two notions hover before Clark's mind. On the one hand, that the notions of right and wrong ('this ought to be done, and that ought not to be done') are established by 'the common conscience' through a process of suggestion, without on that account being concepts of that 'conscience.' On the other hand, that the individual is constrained by the 'common conscience' into conformity with what is right and into abstention from what is wrong.

There is no occasion here to go more deeply into the distinction between moral and legal duty. It will suffice to call attention to the following fact. We may exclude the duties involved in international law, since the distinction between them and moral duties is not so definite as that which holds for duties within a state. The distinction which strikes one at the first glance is this. A particular legal duty always belongs to a system of duties which, it is held, are valid only within a clearly delimited community. And such duties, so far at least as they concern the individual,

are always correlated with a right in other persons to exert an external constraint, with or without the assistance of the state, in the event of their being infringed. But we must add that the following notion is bound up with this idea of a system of duties with a sharply limited range of validity and a corresponding right of coercion. Certain individuals have the duty and the power, as judges, to lay down the duties which hold in any particular case, at any rate when contests arise between private individuals.

The following remark must, however, be made here. Let it be granted that the existence of judges is essential to drawing a clear distinction between legal and moral duties in the relations between individuals. Still, the existence of judicial authority presupposes the abstract notion of a distinction, quite independent of the judge, between two kinds of duties. The first kind concern the individual, and have their correlate in the right of other individuals to exert constraint in the event of their being infringed. The second kind concern individuals in their mutual relationships. Of course in primitive communities it often happens that it is the judge who determines what duties carry with them the right of coercion on the part of others. But the fact that a judge decides that so-and-so is a duty is never held to be what constitutes its specifically legal character—that it belongs to *jus*—as opposed to the moral *honestum*, *aequum*, *bonum*, *i.e.*, the kind of action which betokens a *bonus vir*. For the judge as such determines what is right only in so far as what he decides to be *jus* becomes so directly for that particular case, and indirectly, through the authority of his judgment, for other cases too. It is always assumed that there is for the judge a *jus* which is independent of him, even though he be regarded as peculiarly competent to determine what it is that this *jus* demands. It is a mistake to represent the formulation of law in a primitive community (as Clark does, *op. cit.*, II, p. 102 *et seq.*, and elsewhere) as if the judge were faced with the public popular morality as an undifferentiated whole, and as if his enunciation gave to particular elements in it the force of law. For, in so far as popular morality contains elements which relate to what befits a *bonus vir* without reference to the right of coercion, the judge must, if he enunciates the corresponding duties, state explicitly in his proclamation that they have no legal character. The judge as an authority can without such qualification incorporate in *jus* only those parts of the popular morality which in themselves involve the right of coercion, and which thus already count as *jus*. This does not rule out the possibility that the judge may, with or without the help of special persons who are qualified to 'declare the law,' proclaim as legal duties what before were only moral duties. He bases himself then on a

higher enlightenment than popular morality possesses. The consequence of Clark's position would be the following. The judge would function as a ruler in primitive conditions. He would attach sanctions to the breach of certain duties, which are recognized as duties in popular morality, but which do not in themselves imply the right of enforcement in case of their infringement. But it is contrary to fact that the judge, acting in that capacity, ever would function as a legislative ruler.

Finally, it must be noted that, when jurisprudence mistakenly tries to reduce its own mystical ideas of right and legal duty to the actual expressions of a powerful will, it merely seeks to explain ideas which have no basis in reality by something else which has as little real basis. For that there is a real will which expresses itself in law is not confirmed by the facts.

What would this will be? The *monarch* in a monarchical state? But he usually has no inkling of the majority of the legal enactments which hold within a community, even when he has formally authorized them. But, it may be asked, does he not in general will that the laws which have been promulgated shall be obeyed? If that is enough, then the content of the laws is certainly not a necessary expression of the will of the monarch. And besides, has the monarch always this abstract desire? May he not, *e.g.*, himself sympathize with a breach of, let us say, the marriage-laws or the laws of war, or even occasion one himself? And yet these remain valid, at any rate in a monarchy which is under the rule of law. But, it may be said, it is not a question here of concrete persons who are monarchs, but of the monarch in abstraction as an ideal person, who continually recurs in the person of the actual monarchs. This is a palpable fiction. It is not individual cats which catch mice, but the Idea of Cathood, present in all cats!

In a parliamentary state is it the *parliament* which wills the details of law, and thereby converts them into positive law? As if there were not many members of parliament who do not desire in the least that the existing laws should be upheld in all their details, but on the contrary wish with all their hearts that the law should be powerless in certain cases! Can members of parlia-

ment not themselves commit a breach of the law? But, it may be said, the decision of the majority is, from a legal point of view, that of the whole parliament. Therefore, from the legal point of view, all the members will that a law which has been passed shall have the force of law. The fiction here is palpable. The so-called decision of the majority—strictly speaking the way in which the members of the majority vote—is no guarantee even of the will of the majority that the proposed law shall be upheld in every point, still less of the will of the whole parliament to that effect. And this falsehood cannot be made true by the fact that the fiction is used in law!

What authority is it which wills the details of the law in a parliamentary state during the intervals between the sessions? The scattered members of parliament? But they have certainly no power whatever to determine anything with the force of law. Their wills must therefore be irrelevant as regards the validity of positive law. Is it the parliamentary king or president, as fully authorized representative of the parliament? But how can he be representative for a parliament which does not exist? Perhaps it is the king or the president, in so far as he automatically takes over authority and maintains the positive law because he wills it? But he has no power to make new laws or to abrogate those which are in force. How, then, can his will have any relevance for the validity of law in general?

Besides, what does it really mean to say that parliament is the sovereign authority in a parliamentary state? Does it amount in reality to anything more than that positive law is created by the results of the voting in an assembly which is brought into being by the 'choice of the people,' *i.e.*, by a certain regulated method of voting which determines the composition of the assembly? No doubt the rules of the constitution, which lead to this result through the power which they have over the minds of the multitude, assume in their formulation that parliament is a sovereign authority or the bearer of state-sovereignty. Its authority to pass laws, to make use of the executive, etc., is bound up with this. But, even if the theory of constitutional law conforms in its modes

of expression in this matter to the rules of the constitution, this does not prove that a parliament can exercise any sovereign power as if it had a unitary will. Nothing of the kind can be alleged on the ground of experience. From the power of the constitution in the minds of men nothing follows which can be tested by experience except that the result of the voting leads to a corresponding change in the law of the land. The truth here is quite independent of how one may formulate the idea of this sequence of events, of whether or not, *e.g.*, one chooses to connect it with the anthropomorphic conception of 'parliament' as a mighty will. For constitutional law has no authority when the question is what is true and what is false, and the science of constitutional law has just as little authority when it accepts the baseless fictions which constitutional law takes for granted.

But, it will be said, it is neither the will of this or that particular person, nor that of a collection of persons, but *the will of the state*, which expresses itself in law. But what is a 'state' except a community organized by *rules of law*? Suppose, *e.g.*, that there were no legal rules which determined the mutual relations of the citizens, and which were upheld by judges and executive authority. What would there be then except a mass of men? That being so, how can the law itself be an utterance of the state?

Huber (*Recht und Rechtverwirklichung*, 1920) speaks of a natural power of the community over its members, which the community converts into legal authority. 'The power in itself is something that exists physically, both in the strength of those who are united together, and in the fact of subjection, for which the collective consciousness in the minds of the subjects creates the capacity for obedience. This power is not created by law. But the community converts this *de facto* power into *de jure* authority' (pp. 224—225). In order to understand the fallacy in this account it is only necessary to read the following passage in Huber himself. 'A state of law (*sic*) is present through the mere fact of living together in a human society. For, in view of the conditions which must necessarily hold among those concerned if communal life is to be possible, it is inconceivable that a community, however primitive, should exist without some regulations for its communal life. The capacity for living in society creates a system of rules as a fact of nature, according to the powers and peculiarities of the persons who live together. Some of them

instinctively render obedience to others, with the no less instinctive consciousness that it is necessary.' (pp. 245—246). What is 'the power of the community,' in so far as it is exercised internally over its own members, except an expression of their subjection to the rules of order which hold for that community, and in particular the rules for the subordination of some under others? And how can the fact that these rules are not explicitly formulated in the primitive 'community' deprive them of the character of legal rules? In such conditions the power in question is undoubtedly based on the law which holds in the community. It is quite absurd to suppose that the 'power of the community' can convert itself into an authority *de jure*. No doubt a tyrannical power can create a system of law in which it is itself absorbed as an integrating factor. But it is a mistake to describe such a case by saying that the inherent power of the community gives to itself a legal character.

Moreover, if one sets aside mystical ideas of the state as person, what can the "will of the state" be except the will of its citizens in so far as they are united in a common purpose? But to say that the law of the land is an expression of the will of the state, in that sense of the phrase, is in glaring conflict with reality. One would have to leave out of account all those who willingly and wittingly infringe the rules of law, and also all those who dissent from the established order. These latter persons abstain from attempts at revolution, but they conform only because they realize their inability to undertake such attempts. It is nonsense to say that the will of such persons is expressed in the law of the land. They have not the least intention to uphold the law as a whole in the community, although they may find it prudent for their own part to conform to what the law ordains. We must take care not to confuse the tendency to maintain the law as a whole with the mere subordination of oneself to those parts of the law which directly concern one. Is it not the case that the majority of citizens in fact take up the position that they conform to the law in so far as it affects them (moved thereto by motives which we shall soon have to consider), but otherwise never reflect for a moment on the importance of maintaining the existing laws intact? Where, then, do we find this common direction of the will towards the system of law as a whole? Do we, in fact, find even

the will of the majority directed to that end? The so-called will of the state as bearer of the law is merely a spectre.

To this it is objected that the system of law as a whole is after all maintained. Does not this presuppose a general attitude in society towards the law? But one overlooks here the significance of the series of feelings, propagated by inheritance through thousands of years, which are attached to rules for the community that have come into being in certain ways, *e.g.*, through common use and wont, through decisions of the 'popular assembly' or the representative body 'chosen by the people,' or by the formal decision of the person who is recognized as monarch. This group of feelings is of two kinds. It consists partly of feelings of duty in regard to the restrictions which affect oneself, and partly of specially intense feelings of power in regard to the acquisition of advantages which the rules of law assign to oneself and which are regarded as rights. The former act inhibitively, the latter set free a special energy in striving for the advantages in question. To this must be added the following fact. The community is organized, on the basis of rules of law, into superiors and inferiors, and the former have the function of supervising the latter. It is therefore obvious that the former will react regularly against breaches of the law on the part of the latter, both from their feeling of duty, and from their intense feeling of power, which is connected with the idea of their own authority as being a right. To this must be added that an individual who infringes the right of another lays himself open to reactions from the latter which gain a special strength through feelings of power of a special kind, which are connected with the idea of rights. This brings in another psychological force, beside the group of feelings already mentioned, *viz.*, fear of reaction from one's neighbours. And so the whole legal machinery works, driven by a mighty complex of feelings, which function independently of the views on what laws ought to be established. If one conjures up from this force, peculiar to the system of laws, a communal will directed to the maintenance of law in general, one enters the realm of poetry and not that of reality.

It is said at this point that, even if law is not directly an expression of the will of the state, yet it is so indirectly by means of the organs of the state, which present (or, as some say, create) that will (*Jellinek*). But this really amounts to saying that the will of the state, regarded as the will which is the basis of law, is a mere fiction. The only real will, of which law is an expression, is the will of the so-called organ of the state. If the will of the state is merely 'presented' by this, that simply means that one has to represent this as the will of the state although it is not really so. If you say that the will of the organs 'creates' the will of the state, this leads in the end to just the same result. For then the will of the state does not exist as a separate will beside the will of those persons who are its organs. But we have already shown how mistaken it is to regard their will as the will which is the bearer of law.

We have now made plain what happens to jurisprudence if, pushed on by the demand which is made on modern science, it tries to exhibit the facts which correspond to its characteristic notions of rights and legal duties. On the one hand, it can discover nothing which corresponds to those notions as they are actually used; on the other hand, it has recourse to something which is only apparently an object of experience. Thus it is shown that the notions in question cannot be reduced to anything in reality. The reason is that, in point of fact, they have their roots in traditional ideas of mystical forces and bonds.

But, if that is so, it must be of the greatest interest to investigate the nature of these ideas in that system of law or that science of law which may be regarded as more fundamental than any other in the structure of modern jurisprudence, *viz.*, Roman law. There we may expect to find the ideas presenting themselves in a more naive form. But we may also expect to find them free from that confusion of thought which inevitably arises when, egged on by the general critical tendency of modern science, jurists attempt to reduce to actual facts the content of the mystical ideas which they employ.

II

Is Positive Law an Expression of Will? 1916

This investigation is concerned with the object of jurisprudence, in so far as the latter determines the content of 'positive law.' We shall confine ourselves, however, to the law which is current within a society. The expression 'law' is used in the sequel with that limitation.

Law is sometimes regarded as being essentially an object of theoretic cognition, *i.e.*, the kind of cognition which determines the nature of what actually exists. But it is also regarded as something which is in essence presented only to an evaluating consciousness, *i.e.*, an awareness of what ought to be regardless of the actual constitution of reality. In the first case it is assumed to be a certain actual existent, *e.g.*, a certain system of rules of conduct which are actually realized in practice, or as demands issuing from a certain will. In the second case it is regarded as being a certain system of valid principles which ought, either conditionally or unconditionally, to be obeyed. This is the case, *e.g.*, if the fundamental notions with which jurisprudence is concerned are held to be those of rights and corresponding duties, as those notions occur in the commonsense notion of justice.

Perhaps the most usual view in modern jurisprudence and philosophy of law is the following. Law is regarded as an actual existent, as being the content of a certain will, endowed with power and active in a society; that content being expressed in a certain way. Accordingly, the business of jurisprudence would be to determine the content of that will under the guidance of its pronouncements. Of course it is the positive character of law which this view wishes to emphasize as against the theory of natural rights. We read, *e.g.*, in Nagler's *Der heutige Stand der*

Lehre von der Rechtswidrigkeit, 1911, on p. 27 the following statement. "Modern Jurisprudence has finally got beyond the fiction that certain rights exist prior to the state (*i.e.*, exist before their embodiment in positive law) and that they survive in spite of the absence of any rule of law corresponding to them; and has passed to the order of the day. It sees in every subjective right the will of the law (*sic*!) standing behind the will of the possessor of the right, and it derives all his power from the domain of the former will."

The possibility of carrying through such a theory will be investigated here. In the meanwhile it should be remarked that it is obviously not a question of how law has *arisen* through human will. The question here is about positive law as such, no matter how it may have arisen. Is it, as it now exists and as jurisprudence analyses it, the content of a will in the sense suggested? To determine the conditions of its origin of course settles nothing about its essential nature. A machine comes into existence and is brought into action by a human will. But the investigation of the machine's structure and mode of operation is not, for that reason, an investigation of a certain human activity. It is concerned with a certain limited part of external nature, which works in a certain way in accordance with the laws of that nature.

1. The will determined by the law

In the first place, we can reject as circular the theory which regards the will, whose content expressed in a certain way is to constitute law, as *itself determined by the law*. As an example of this we may cite the view that law is the expressed content of the will of the state, regarded as a juridical person and therefore as the subject of rights and duties which are themselves determined by law. This way of treating law is particularly common, especially in modern German legal writings. It will suffice here to cite two typical expressions of this point of view. E. von Hartmann says that for the presence of law there is needed a "collective entity," "which is to be regarded as a juridical or moral per-

son, and as such has its own will and constitutional organs for establishing and uttering that will. In other words: The legal order presupposes the state in the widest sense of the word."[1] But, if the state is a juridical person, it of course presupposes law in its turn, and the analysis of the notion of law moves in a circle.

In H. Kelsen, *Hauptprobleme der Staatsrechtslehre*, 1911, the case stands as follows. On p. 40 we read: "A rule of law undoubtedly proceeds from a power which stands from the first outside the individual, and to which a man is subjected in virtue of the actual *de facto* dominion which it exercises over him without regard to his consent, to his will. This power is the state." On pp. 41 and 100 the state is described as a "normative authority," "the bearer of the law, the subject of legal order." This makes the difference between law and autonomous morality. "In the law,"—*law* here means rules of law—"and no-where else, the state wills, under certain circumstances, to punish and to exact payments, to support an army and to build streets . . ." (p. 176) According to p. 189 a rule of law presents itself as "an expression of the will of the state." From the passages quoted it seems to follow that a rule of law is to be regarded as an utterance of the will of the state. Again, according to p. 189, the leading idea of the book is "that all law is the will of the state." (Cf. p. 406.) But on p. 179 we learn that the will of the state exists only "in the ethical-juridical point of view"; and, according to p. 183, rules of law lie at the basis of that point of view. "When it is said that the law contains the will of the state, this merely means that the law determines the actual circumstances that are to be deemed the actions of the state, those which the state 'wills' . . ." Moreover, Kelsen is concerned to show that in jurisprudence the "will" of the state does not mean any kind of psychological fact or indeed anything that actually exists. (See, *e.g.*, chap. 6.) But in that case the position is that the notion of a rule of law is defined in terms of the will of the state, whilst the latter is itself a juridical

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[1] *Das sittliche Bewusstsein*, 2. Aufl., 1888, p. 401.

notion in the sense that it is essentially one that is applied in rules of law. It cannot therefore be defined without the notion of rule of law.

We might, however, regard such expressions as that the will of the state is the basis of law, and so on, as lapses, and confine ourselves to the definition on p. 413 of a rule of law as a true judgment about a conditioned volition of the state. In that case the notion of a rule of law obviously presupposes the reality of the state's volitions. But, on the other hand, the whole book is pervaded by the idea that the will of the state exists only in view of the rules of law. It therefore presupposes rules of law in its very notion.[1]

2. The idea of a "collective" or "general" will

In order to escape this circle in the definition of law it is usual to adopt the idea of a persistent actual "collective will' or "general will," over and above the legally constituted "organs of state," which expresses itself in a certain way in the law. This doctrine is derived partly from the doctrine of natural law and partly from the historical school and Hegel. It is often taken up without any further discussion of its implications.[2] We shall first consider it in its interpretation in terms of the doctrine of natural law, as the notion of a common will of all the active individuals belonging to the society in question. The notion is interpreted in this way, *e.g.*, by Hölder, *Über objektives und subjektives Recht*, 1893, pp. 12 *et seq.*; Hold von Ferneck, *Die Rechtswidrigkeit* I, 1903, pp. 80 and 275; and Bierling, *Jur. Prinzipienlehre* I, 1894, p. 149. In this connexion we will first consider the so-called normative theory (Bentham, Austin, Ihering, Windscheid, Thon, Bierling, Gareis, and others) in its application to the "general will" as the subject of law. Can law be regarded as a system of imperatives,

[1] In regard to the circle in this conception cf. Stjernberg, *On the question of the so-called purely economic categories*, 1902, pp. 89 *et seq.* (In Swedish). For further criticism of Kelsen's theory, see below, pp. 257 *seq.* (Ed.).

[2] Cf. *e.g.* Thon, *Rechtsnorm und subjektives Recht*, 1878.

expressed in a certain way and issuing from a "general will" which is conceived in the way suggested?

The absurdity of this notion is palpable, even if one ignores the special absurdity of supposing that an individual can give orders to himself, and confines the commands of the general will in connexion with law to the demand by each individual that all the others should follow certain rules of conduct.

(i) It is not at all certain that the individual would demand that all others should in all respects observe the rules of law. Do criminals as a rule feel such a burning desire that the judges shall apply the criminal law to them? (ii) The individual has no adequate knowledge of the rules of law which hold in his society, and therefore cannot demand that they shall be observed. It might no doubt be alleged that the general will does not demand in detail the observance of rules of law, and therefore that it does not need to have knowledge of them, but that it merely demands observance in the abstract of rules which have a certain formal character. Suppose, for the sake of argument, that we ignore the element of pure fiction in this whole supposition.[1] Still, no particular rule of law can *be* a demand of the general will, on this view, since its special content is not demanded by that will but is a matter of indifference to it.

One might, however, regard the claims which a possessor of a legal right makes on another person in order to substantiate his right as being actual law. But here the claimant, in his intention to make the other person act in a certain way by asserting his right, obviously assumes an already existing law to be in force.

But the law is not always conceived by the will-theory as a system of imperatives. It is also conceived as being partly or wholly a system of declarations on the part of a certain will concerning the content of its decisions.[2] But the attempt to conceive law as wholly or partly given in such declarations of a "general

[1] Cf. on this topic Zitelmann, *Gewohnheitsrecht und Irrthum*. (Archiv für die civilistische Praxis, Bd. 66, p. 373).

[2] Cf., *e.g.*, Holland and Kelsen, who hold a purely declaratory theory; and Binding and Sjögren, in reference to private law.

will," in the sense proposed, comes to grief for similar reasons to those which wrecked the normative theory. Neither you nor I, as private individuals, declare anything whatever which is significant for all the members of the community in connexion with a legal enactment. Furthermore, it is by no means the case that all active members of a community subject to law unanimously will the fulfilment of the law under all circumstances. The absence of such a volition shows itself most conspicuously in the case of illegality. Moreover, not all are acquainted with the law, and therefore not all can be regarded as declaring.

In reality all will-theories of law can be reduced to one or other of the two which we have mentioned, *viz.*, the normative theory or the declaratory theory, or to some combination of the two. Therefore all theories of the general will, in the sense under discussion, as the source of law, are liable to the criticisms which we have directed against those two theories as applied to the idea of the 'general will.' Suppose, *e.g.*, that one follows Dernburg in defining objective law as "that system of legal relationships which is maintained by the general will."[1] The general will must certainly be thought of as maintaining the system in question by means of certain special organs. But for that purpose it must reveal the system which it wishes to have maintained. This can certainly happen only through commands or mere declarations as to what it has decided. Stammler, for whom law is a certain unitary willing, takes the following view.[2] When legal questions arise, which cannot be answered by reference to any assignable part of the content of those volitions which have the force of law, ("formulated law"), recourse must be had to the idea of law ("the social ideal") as basis. Yet in so doing one does not go outside the positive law. For every legal volition aims, in so far as it is legal, at the actualizing of that idea. But it is surely obvious that, as soon as one passes in this way beyond those expressions of the will which are given by imperatives or declarations on the part of the willer, the complete arbitrariness in determining the con-

[1] *Lehrbuch des preussischen Privatrechts*, 1893—1896, § 19.

[2] *Theorie der Rechtswissenschaft*, 1911, pp. 646 *et seq.*

tent of the actual legal volitions is admitted. Apart from the question whether we could unhesitatingly ascribe consistency in carrying out its intentions to such a will, Stammler himself admits that a particular formulated law may, in spite of that intention, conflict with "the idea of law." And in point of fact by no means all legal enactments exhibit any very high degree of social idealism even in intention. How, then, can one know how far an actual legal volition exactly corresponds to "the idea of law" in a case where nothing is fixed by imperatives or by a declaration on the part of the legislator? Goos tries to maintain, by reference to the secret character of the *jus sacrum*, that a rule of law need not be promulgated in any way, although it may be a decision of the "organized authority of society."[1] But must not even *jus sacrum*, *if* it were such a decision, be promulgated at least to those particular persons who were concerned in applying the law? Surely the "organized authority of society" can never be so centralized that it is confined to a single person, who makes a decision about the external regulation of society and actualizes that decision without needing to inform any one else of it.

Sometimes, however, the description of law as a system maintained by the general will is used in a way which excludes the idea of either imperatives or declarations on the part of that will. But in that case it appears that the idea of a general will, whose aim is to unify the particular wills by maintaining a system of law and order, is excluded in all but name. H. A. Fischer uses this description in the sense that, in order for a system of law to exist, a majority of the members of the society must actually observe the rules in question and impose by external compulsion certain unpleasant consequences of disobedience on those who break them.[2] But a part of this majority obeys the rules "spontaneously"; and the rest reluctantly, but bowing to the objective power of the former part. It should be noted that at most the first part of the majority can be regarded as willing the system of law and order in its full extent. In the other reluctant part of the

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[1] *Lectures on Jurisprudence*, I, 1889, pp. 92 *et seq.* (In Danish).

[2] *Die Rechtswidrigkeit*, 1911, pp. 5 *et seq.*

majority each individual can be said to will the keeping of the rules only in so far as he personally has no sufficient motives for breaking them. But in no sense can he be said to will their universal maintenance. The so-called "will of the majority" is here therefore only a meaningless word. In reality the separate wills are not here thought of in the least as being unified through a common aim. Still less on such a theory is there any genuinely common will which is the force sustaining the law.

Hölder includes among legal norms, considered as utterances of the general will, not only imperatives which are the basis of an "ought," but also regulations of a "may," a "can" (power to establish legal relationships), and a "must."[1] But none of these additional regulations can be regarded as anything other than imperatives or declarations of intention or both. If the legal "may," considered as a mere permission, is referred to a regulation of the will, it merely means that a certain action is not forbidden by the legal will, or that that will does not attach to the action any reaction against the agent, or both of these.[2] If a regulation of the will is made the ground for a "may," considered as a person's subjective right, it can only mean one or other or both of the following two things. Either (i) it is an order to other persons to act in a certain way towards this person or to forbear from a certain action, and to certain state organs to uphold the force of this order if the person requests them to do so; or (ii) it is a declaration that the determinant will is prepared in certain circumstances to exercise compulsion on other persons for the benefit of the person who has the right, if he so demands.

On the same suppositions the legal "can" can have only the following meaning. The determinant will either commands certain persons to do or to forbear from doing certain actions in certain circumstances, or it declares its intention to act in a certain way in certain circumstances, or it both issues such commands and declares such intentions. To say that a certain person

[1] *Über objektives und subjektives Recht*, 1893, pp. 41 *et seq.*

[2] See, on this point, Hold v. Ferneck, *Rechtswidrigkeit*, I, 1903, pp. 281 *et seq.*

is "empowered" to do a certain action is only to say that his doing that action is a part of the circumstances contemplated by the determinant will in the command or the declaration referred to above.[1] The legal "must," on the same suppositions, can only mean an order to the state-organ to exert compulsion in a certain way, or a declaration that this will happen under certain circumstances, or both of these.

But often those who use the notion of the general will in defining law are thinking, in accordance with the historical school and Hegel, in terms of the notion of a super-individual will which has individuals as its organs. As super-individual it can be conceived in two ways. It can be thought of as the will of a psycho-physical organism analogous to the natural organism. There is a certain line of thought in sociology, according to which society is conceived as a psycho-physical organism, *e.g.*, in Bluntschli, Spencer, Schäffle and Fouillée. The individual or the family is the cell, telegraph wires are a kind of conducting nerves, fortresses a kind of skeleton, and so on. If the general will, as the subject of law, is conceived in that way, the organism in question carries out its decisions in law-making through individuals as its organs. But the motives of those decisions are feelings and presentations, often purely sensible perceptions. Suppose, *e.g.*, that the anger of the monarch or of the representative assembly at an anarchist outrage leads to actions which have legislative efficacy, *e.g.*, the passing of laws against anarchists. Then, on this view, it is anger felt by the organism in question (which is the real determining agent) which is the motive for the law. But, since anger is also present in the several individuals, it has a peculiar character. It is, in the case supposed, the anger of the collective organism itself; of that organism which in the last resort determines the law. So it does not merely presuppose the usual psycho-physical causes which produce such a feeling in an individual, *viz.*, certain presentations and other psycho-physical conditions in him. In the present case the collective organism's psycho-physical states are the determinants of the feeling in question. If one is angry as a

[1] Hold v. Ferneck, *loc. cit.*, p. 129.

private individual, without its having any legal consequences, the feeling can be explained in the ordinary way. But if this happens to the monarch or the representative assembly, and the latter has the power to translate its anger into decisions which have the force of law, we must have recourse to quite other grounds of explanation beside the natural ones. But it is hard to suppose that the anger itself would have a different character in the two cases. To take another example. The monarch reads a despatch about a mobilization in a neighbouring state. This reading calls forth a decision to mobilize in his own state, and thus an action having the force of law. So here there is a decision of the state-organism, motived *inter alia* by the reading of the despatch. Therefore the state-organism itself reads the despatch in the person of the monarch, it so to speak sees the despatch with the monarch's eyes. So this seeing cannot be explained in a wholly natural way. It is not merely the case that certain light-impulses strike the eye, are transmitted to the cerebral cortex, and there call forth the act of seeing in the individual with his psycho-physical constitution. Since an act of seeing is to be ascribed to a collective organism on its own account, it is necessary that the latter shall be a living being with a certain psycho-physical constitution in order for this to be possible. This act of seeing is conditioned by that constitution. Yet it seems to be of the same general nature, whether a private person or the monarch performs it. To such nonsense, however, are we led by the assumption of a special collective organism, analogous to a natural organism, and of its will as the bearer of law.

There is, however, another way of conceiving the general will, whose content, expressed in a certain way, is supposed to constitute law. It is also conceived as a purely spiritual reality, autonomous in relation to the psycho-physical context, which acts within individuals and determines them to perform certain actions. In that case it is the individuals who issue imperatives and declarations of intention, though they are determined in doing so by the superindividual will. As an example we may cite from recent juristic literature the theory that the state is a corporative

unity which governs through organs; a theory started by Gierke and developed especially by G. Jellinek and Hänel. When the unity of a society is itself conceived as a separate will what one has in mind is the following. One is thinking of the society as animated by an objective purpose, in accordance with which the organization of power within it is determined, and through which are given the principles by which the persons or associations of persons in authority make rules or declarations of intention. This purpose, in so far as it is active in the various individuals, becomes the will of the collective unity itself; and this will becomes the basis of the actual system of rules of law by means of the organs of state.[1] Now the difficulty here lies in the independence of the will of the collective unity in relation to the psycho-physical individuals. Unless it exists on its own account, as something purely internal which acts through the individuals, the "general will" reduces to the fact that the desires of the members of the society are jointly directed to a certain purpose. Suppose that the law is regarded as the content of this will expressed in a certain way. Then, on this interpretation, it merely means that the individuals, in consequence of the common direction of their desires to this end, also jointly accept the regulations and declarations of intention which issue from certain persons who have been authorised to exercise power by this fundamental community of purpose. That is to say, we have come back to the notion of the general will, in the sense of the doctrine of natural law, as the subject of law. But the alleged autonomy of the collective unity really involves a contradiction. Either it is absolute or relative. In the former case the unity has no connexion with the actual individuals. In the latter case there is something definite which is autonomous, but yet is determined by something external to itself. But this autonomous entity, which stands in relation to something external to itself, must as such be absolute (*ab omni alio solutum*) in order to be autonomous. But in that case it cannot stand in relations.

However, the theory in question is by no means unambiguously

[1] See further my work *State and Law*, pp. 221 *et seq.* (In Swedish).

stated even by its most distinguished systematic supporter, G. Jellinek. On the one hand, it is denied in the most definite way that the will of the corporative unity, regarded as autonomous in relation to the individuals, would be a mere fiction.[1] To regard the unity as a unit ("a subject, an individual") is in no way a fiction but a "necessity of thought."[2] It would also be unreasonable to define law by purely fictional notions. But, on the other hand, it is maintained that the real unity in a corporation is the product of a synthesis, which is no doubt necessary but none the less *subjective*; and that there stands over against it the *objective* multiplicity of inter-related wills, whose unity is created only formally by the identity of their purpose.[3] What really exists would thus be only the direction of the desires of a number of individuals to a common object, through which common direction certain persons' regulations or declarations of intention are accepted as authoritative. The definition of law, which occurs from time to time in Jellinek's writings, as consisting of norms which issue from an authority *recognized* by the members of a society, is an expression of this point of view.[4] In that case the general will, as bearer of law, is of course conceived in accordance with the notion of it in the doctrine of natural law.

3. The will defined as that of the *de facto* supreme personal authority

Another possibility of retaining without circularity the thought of a normative or self-declaratory will in the definition of law is to take as fundamental the *de facto supreme personal authority* in a society. Law can be defined without circularity as a system of imperatives or declarations of intention issuing from certain independently authoritative persons or complexes of persons in a

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[1] *E.g.*, *Allgemeine Staatslehre*, 3. Aufl., 1914, p. 150.

[2] Cf. *loc. cit.*, p. 143.

[3] Cf., *e.g.*, *loc. cit.*, pp. 150, 157, and 159.

[4] See, *e.g.*, *System der subjektiven öffentlichen Rechte*, 1892, p. 189, and *Allgemeine Staatslehre*, 3. Aufl., 1914, p. 303.

society, who are in a position to carry out the intentions thus expressed because the members of the society regularly obey them. Austin defines the sovereign, who, according to him, is the source of all law, in the following way. "If a determinate human superior, not in the habit of obedience to a like superior, receive habitual obedience from the bulk of a given society, that determinate superior is Sovereign in that society."[1] Cf. with this the statement of Holland, who is strongly influenced by Hobbes and Austin, in his *The Elements of Jurisprudence*[2], where a rule of law is defined as "a general rule of external human action, enforced by a sovereign political authority." Merkel must be understood in the same sense.[3] According to Berolzheimer it is "the assertion of domination," which, with or without recognition on the part of the governed, converts the purely factual state of affairs into a legal state of affairs.[4] That is to say, whenever there is an enduring "domination," in which case there also exists a state, the system of power becomes a system of law.[5] In Reuterskiöld we read: "The order of society becomes a *legal order* so soon as it is maintained by the will of the collective organ, as an external authority."[6] There is no circle in this explanation of law. For we are to understand by a society's organ of authority "those physical persons who, either severally or collectively, exercise *enduring actual power* in such a way that their will is recognized as the will of society if and in so far as it announces itself to be such."[7]

The consequence of such a view is this. The constitutional laws, which regulate the forms of activity of those in supreme power and determine the limits of their sphere of authority, must be regarded as rules or declarations of intention which express the united will of the authorities as the actual possessors of power.

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[1] Last lecture in *Lectures on Jurisprudence*.

[2] 9th edition, 1900, p. 40.

[3] *Juristische Encyklopädie*, 5. Aufl., 1913, § 43.

[4] *System der Rechts- und Wirtschaftsphilosophie*, III, 1903, p. 34.

[5] See, *e.g.*, p. 68, and compare pp. 117 and 119.

[6] *General Theory of Law and Society*, I, 1908, p. 61. (In Swedish.)

[7] *Loc. cit.*, p. 4.

So, if any of them is unwilling in one way or another to observe those laws, the latter cease to that extent to be valid. An unconstitutional action on the part of such a possessor of power is therefore impossible. The constitution, in so far as it regulates the activities of those in supreme power and delimits the sphere of their authority, is therefore devoid of all legal meaning. This does not mean merely that the constitution, like any other rule of law, ceases to be of legal importance when it is no longer applied. It implies that the constitution, *according to its own meaning*, cannot be applied to those in supreme authority. These may do whatever they please, they may arbitrarily infringe as much as they like the so-called fundamental laws; and yet they will not be breaking any rules which are contained in the constitution as part of its meaning. Yet the maintenance of the constitution consists to an essential degree in the very fact that certain rules, which concern the so-called supreme authorities, are actually applied.

The completely unreasonable features in G. Jellinek's and other writers' notion of a state-authority "binding itself" by its own will have so often been pointed out that it is needless for us to waste time over them. It is enough to refer the reader to the remarkable statement in H. Krabbe's *Die Lehre der Rechtssouveränität*.[1]

But the question can be raised: Is not the relation between the *de facto* power of the supreme authorities and the force of law altogether wrongly stated in the theories under discussion? Is it really the case that "the political authority," as Holland calls it, has *de facto* power independent of any law which is over and above it, and that the law has authority only through this power? Let us confine ourselves for the present to constitutionally governed states. Is it not true that, just as the private individual must appeal to the positive law when making claims on other individuals if he is to get his rights, so too must the political authority base himself on the existing constitution in making his regulations for social relationships if those regulations are to have the force of law? Note, *e.g.*, the difference between a monarch's

[1] 1906, pp. 6 *et seq.*

purely personal decisions and those which he makes in council, from the standpoint of their respective legal force. Must not constitutional law have first gained authority, no matter in what way this may have happened, in constitutionally governed states, in order that a certain person shall have any authority from the legal point of view? When, after a revolution, there is a question of establishing a constitutional authority in the state, whose decisions shall have actual application, the *first* thing to be done is to give force to certain constitutional rules. The same is true when it is a question of establishing a new constitutional state.

The personal owners of power, who in the first instance give to the constitution its authority, may be quite different from those who acquire powers through the constitution. They may lose all importance after its coming into force. Suppose, *e.g.*, that a constitution, proclaimed by one of the heads of a fortuitously collected armed force, obtains their immediate support. Then it gains stability by causes which operate universally; *e.g.*, its approximate agreement with the national ideas of justice, the people's need of peace, the lack of organization among those classes with a rebellious tendency, etc.

Salmond says that the logical presupposition of constitutional law is "constitutional practice" or "the *de facto* organization of the state." The constitutional law is only the actual constitution, as reflected by the courts.[1] This point of view, which is based on the dogma that the *power of the state* is prior to *law*, is certainly hardly correct. For what does it mean to say that a constitution actually exists except that certain *rules* for the governance of a certain group of men are in fact enforced? An essential part of this is of course that these rules are actually made the basis of legal theory, so that the judges in making their decisions actually base them on laws which are in force in accordance with constitutional rules. So what is primary is the actual maintenance of these rules, and not the *de facto* power of this or that organ of state. Salmond asks in various places on what *law* the American communities in rebellion against England based themselves when each

[1] *Jurisprudence* 4th, edn., 1913, p. 108.

and all of them founded a constitution for themselves "by way of popular consent, expressed directly or indirectly through representatives." The only existing law was the English. But this was infringed by those very proceedings. But in this context the question is wholly meaningless. It is certain that, when a constitution comes into being on the first formation of a state or through the transformation of the existing foundations of a state, no rules which are already in force need be applied in the process. But that is not the question here. What is at issue here undoubtedly is whether the constitution, which in a given case comes into force by one means or another, *is* anything but certain rules for determining the relationships of the group of men in question. Whether it is anything but rules which, by their own content, regulate the magistrates in the exercise of their office. Now it is indubitable that what became the basis of the newly founded state, through the people's "direct or indirect consent," at the foundation of the American constitution, was not the *de facto* power of such and such persons. It was certain rules for exercising power within the region concerned, rules which derived their importance from being norms for the judges in carrying out the duties of their office. But the example is an unfortunate one to choose, for even the wrongly posed question must in this case be answered in a way which conflicts with Salmond's intentions. Certainly English law had no longer force in this instance. Nor did the proceedings for founding the constitutions rest upon it. But there were other rules for the exercise of power which here governed men's minds and thereby had *de facto* effectiveness. It was considered that the English crown had lost its rights over the colonies in question through wronging them, and that power had been transferred to its natural basis, the people. There were rules, regarded as belonging to the law of nature, according to which the people itself had certain fundamental rights.[1] These rules had actual power in the realm of ideas, and it was only through the application of them in creating laws that the founda-

[1] See on this point Ritchie, *Natural Rights*, 2nd edn., 1903, and G. Jellinek, *Die Erklärung der Menschen- und Bürgerrechte*, 2. Aufl., 1904.

tion of the constitution could be carried through. Since they functioned in this way as the basis of the system of law, there is no reason why we should not regard them as positive rules of law which were logically prior to the particular constitutional enactments.

Salmond quotes as an example of a constitutional fact, in contradistinction to a constitutional law, the "custom of the constitution," which, he says, can come into conflict with constitutional law, as is shown in certain circumstances in England.[1] But, if a constitutional custom comes into being, that of course merely means that certain rules for the exercise of power have gradually come to be applied without being embodied in laws. In that way they have certainly become positive law. The law-creating power of the customs in question shows itself in the fact that regulations issued in accordance with them acquire actual application through the judges. If these rules conflict with the formal constitution, the latter has to that extent ceased to be in force, just as the old order ceases to be positive law in consequence of a revolution. If one appeals against actual constitutional custom to the ordinary constitution, which has not been repealed by legal enactment, one does not base one's case on positive law. Instead one tries in reality to give the force of law to rules which claim to be rules of law but which *are* not positive law. When Salmond here distinguishes between fact and law, on the ground that what is merely fact is not recognized in the judicial theory, and therefore is not law, there is an ambiguity in the notion of "judicial theory" in his argument. It may mean partly the theory of law which gains practical importance for the magistrate because it determines the norms for legal decisions; or partly theories of jurisprudence in general, regardless of whether they gain practical importance through being applied in the practice of law or not. Only judicial theory in the former and narrower sense is of importance according to Salmond's own definition of law as "rules recognized and acted on" (N. B.) "in courts of justice."[2]

[1] *Loc. cit.*, p. 109.

[2] *Loc. cit.*, p. 9.

Now if, in constitutional states, the supreme authority must base itself on the established constitution in all legislation, it follows that no constitutional rule as such can be described as a mere command or declaration of intention on the part of the possessors of power. At the very most a legal enactment as such may be a command or a declaration of intention on the part of those persons who derive from the constitution their significance for the relationships of the group of individuals in question. But it is also plain that, in such conditions, it is not necessary that a legal enactment, issuing from "the political authority," should in a constitutional state take the form of a command or a declaration of intention. If a law, promulgated in the proper constitutional form, contains nothing more than a simple statement about the delimitation of rights, it has nevertheless as such legal force. (We ignore here the power of the courts, recognized in some countries, to set laws aside as unconstitutional.)

Furthermore, if we consider the case of a law passed in a constitutional state by the monarch and the representative assembly acting in common, the idea of a command or a declaration of intention appears as a mere juridical fiction. That this or that resolution of a majority in the representative assembly should be regarded as an expression of its unitary will is nothing but a juridical fiction, as is pointed out by Sir Henry Maine.[1] Yet Maine does not draw the conclusion, which lies so near to hand, that the Austinian theory discussed in this connexion is a gross logical circle. Again, if the validity of a legal enactment rests upon the will of the "political authority," what happens to such legal enactments as issue from the representative assembly in its corporative capacity, at times when the latter is not in session and therefore does not exist as a will?

But we may set aside the special reference to constitutionally governed states, and raise the question: Is there any realm whatever (if one leaves out of account pure despotism and mob-rule), which can be called a "state," in which the actual possessors of power are not subject to rules, having an ideal force, on the basis

[1] *Lectures on the Early History of Institutions*, 7th edn., 1905, p. 352.

of whose authority or in accordance with which exercise of power alone can take place? Even in absolute monarchies the monarch appeals to a certain legal title, *e.g.*, inheritance, election by the people, etc., and thus bases himself on rules which are above him and determine the law. There is no ground for contending the legal character of such rules, if one admits the legal significance of the constitutional rules which determine in precisely the same way who are the rightful holders of power. They enter into the legal system as an essential part of it. Why should a rule of succession to the throne, which has been in force for generations, in an absolute monarchy, have any less legal significance, *e.g.*, than an electoral law which determines the way in which the highest authority in a parliamentary state is to be constituted? Moreover, we must notice the following fact. Even if the ruler in an absolute monarchy is not bound by any constitution, yet, if fairly lively economic intercourse exists, he is in fact bound by a system of private law, be it merely customary or settled by statute, even though in pure theory he may be entitled to interfere arbitrarily in such matters. The conviction that such a law holds and that it stands above the king's arbitrary will, which is commonly felt in such circumstances, endows it with an actual power against which the monarch is helpless. But, where pure despotism or mob-rule exists, one may question whether there really is any legal order. At any rate that is not the case if legal order includes security for established rights. Yet it is pure despotism which serves as a model for the theory under discussion. In particular it has been occasioned by the idea (which is not adequately supported by facts) of the Roman emperor as "*princeps legibus solutus*."[1] It has been assumed that all law must rest upon such a power not subject to any law.

4. The will defined in a purely formal way

Stammler seems to avoid the difficulty in determining the will which is to be the basis of positive law by giving a purely formal

[1] Cf. R. Loening, *Über Wurzel und Wesen des Rechts*, 1907, p. 15.

definition of the volition in question. According to him, it is to be a species of "combining" (organizing) volition, *i.e.*, of willing which proposes an end in which one man's willing is set up as a means to another man's realization of his ends, and conversely. This species is to be characterized by its being, according to its own intention, raised above all arbitrariness, "sovereign" or independently determining.[1] That a law is "in force" means simply that a certain volition of this kind, with its special content, has a possibility of being carried to completion.[2] But it is impossible to leave unsettled the question of what is the subject to whom the unitary willing, which is alleged to be present in positive law, belongs. A subject which wills must be found, for willing cannot exist without one. Now this subject cannot, without logical difficulties, be regarded as being itself determined by positive law. For, if it were, there would have to be, in accordance with Stammler's conception of law, another "sovereign" will which determines this one to make such a volition. But, if so, the subject of the ultimate determining "sovereign" volition cannot be regarded as being itself determined through the law. It would need to be defined merely by an investigation of the factual circumstances. Now for Stammler the *validity* of the law means its power of becoming actualized. So this power is an essential factor in positive law. But the only constituent element in positive law beside the "sovereign" will is this power. Therefore it is precisely in this power that the indispensable subject of legal willing must be sought. Occasionally we find a line of thought in Stammler which points in that direction. In Part I of his *Rechtswissenschaft*, p. 704, he speaks of "the Community," and on p. 729, of "the Will of the State," as the subject of legal willing. In this connexion it should be noticed that Stammler rejects the notion of a "collective will" as the subject of law, both in the sense of the combined will of

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[1] This point of view was first put forward in *Wirtschaft und Recht*, 1896, and further developed in *Theorie der Rechtswissenschaft*, 1911. See, *e.g.*, pp. 101 *et seq.* and 105 *et seq.* of the latter.

[2] See pp. 117 and 137.

all and in the sense in which the historical school interpret it.[1] So what he has in mind can scarcely be anything else than the *general power of the law to be actualized.*

5. The "will of the State" as an anthropomorphization of the various forces which maintain the legal system

Now it might be the case that the perpetual talk in modern jurisprudence and philosophy of law about the "will of the state" as the subject of law simply refers to the active power of the law within society to be enforced. It is certain that the original ruling power in a society, which is said to be what is characteristic of a society organized as a state, is nothing but this. A certain system of rules of conduct, which relates to a certain group of individuals, comes to be applied by certain specially appointed persons through forces operative within the group itself. In that way, and in that way only, the society "governs" itself. When one talks of the "sovereign organs" of a society which is a state, nothing else is meant than that certain rules for the exercise of supreme power come to be applied by persons or complexes composed of persons appointed for that end, in consequence of forces operative within the society. Exercise of power itself reduces to the following facts. In consequence of the force of already existing rules, declarations issued in a certain way by the "sovereign organ" themselves constitute rules. These latter rules, in preference to all other attempts to regulate relationships within the society, are put into operation by persons specially appointed for that purpose. What, *e.g.*, does that exercise of power consist in, which takes place when the "sovereign organ" enacts a law concerning private legal rights? Obviously, its actualization depends in the last resort on the fact that the judges apply it in cases of litigation. Unless this happens, the promulgation of the law means no more than that certain propositions have been published in a certain way as issuing from the so-called legislative authority for the consideration of the general public. No real exercise of power takes place.

[1] See, *e.g.*, *loc. cit.*, pp. 141, 146, and 388.

But suppose now that the judges actually apply the law and that an actual exercise of power does thus take place. What does this amount to except that the law, as a factor in the established legal system (which it becomes through being formally promulgated), acquires actual application in consequence of those same forces which maintain that system as a whole? When it is said that the *state* builds railways, runs the postal system, organizes an army, etc., the reality which lies behind the statement is merely the following. Certain persons or complexes composed of persons, empowered by the system of rules in force to exercise the supreme power of regulation within the group in question, *e.g.*, "sovereign organs," issue declarations, in accordance with certain formalities laid down by the rules, having a certain ideal content concerning the building of railways, etc. These declarations involve considered rules of action for certain determinate persons, "subordinate organs." The rules in question enter as items into the fundamental system of regulations in consequence of principles which themselves form part of the latter. They are actualized by being applied by the persons appointed for that end, in consequence of the forces which maintain the system of rules as a whole.

Is it possible to regard law as a system of imperatives and declarations of will issuing from the "will of the state," in the sense of the will of that power within a certain group of individuals which maintains a system of rules, of the kind described above, concerning the group? If we investigate more closely the nature of this power, it appears to be a singularly mystical will. All sorts of factors of various kinds enter as components into this force. We will take as an example the process which often takes place in the founding of a constitution. A "constituent" assembly proclaims a certain constitution. Is it the superiority of this assembly, in physical and psychical respects, which gives to the constitution thus proclaimed its force? Certainly not. It is impossible to understand the actual process, if one ignores such factors as the habit of the people to obey decrees which present themselves with claims to authority, and their opinions about the right of

the assembly to decide in the matter. Certainly it is of special importance in such cases that the chiefs of the army support the authority which issues the decree. But their importance depends in its turn on such forces as the strength of the military organization, and this again can be reduced to obedience which has passed into habit.

Suppose we enquire as to the force which commonly keeps in existence an already existing law. The answer is a medley of all kinds of heterogeneous factors. They include popular feeling of justice, class-interests, the general inclination to adapt oneself to circumstances, fear of anarchy, lack of organization among the discontented part of the people, and by no means least the inherited custom of observing what is called the law of the land.[1] One cannot even say here that an actual will in the individual member of society to submit himself to the rules of law, determined by such factors, would have decisive importance. Such factors as custom and the feeling that it is natural to observe the existing legal rules have great influence; and they give rise to actions in the mass of the people, by which the law is maintained without any will intervening. But, even if one should admit that such a will among the masses is the essential factor, it is unreasonable to think that its unanimous direction towards the maintenance of law would be the determining force. If each person for his own part wishes to conform to the law, that by no means implies a unitary will in all these individuals with a common end as its unifying focus. It by no means follows that the separate wills are unanimously directed to the maintenance of the law in its entirety.[2] We may admit that in certain cases there really does exist a unanimous direction of wills to the maintenance of the foundations of the law of the land. In that case it is of course important as an actual law-maintaining force. But under modern conditions no such will normally exists. Whole strata of the population are desirous of a revolutionary alteration in the foundations of the law,

[1] Cf. Klein, *Die psychischen Quellen des Rechtsgehorsams und der Rechtsgeltung*, 1912, pp. 24 *et seq.*

[2] See above, pp. 20 *et seq.*

although this desire does not issue in action because of certain inhibiting factors. Other layers of the population are indifferent, or do not in general direct their attention to the question of the value of the continued existence of the law. But, in spite of this division, the legal order persists, without too great disturbances, in a given society, because of the co-operation between factors of the kind already mentioned. It should be noted besides that, even if a unanimous desire for the maintenance of a certain legal order is present in a society, still it could not be said that this direction of intention by itself would suffice to give stability to a system of law. If all such factors as inherited habit of observing the existing law, and all those that depend on traditional notions of the sanctity of law, were to disappear, it is quite certain that no resolution, however unanimous it might be, to maintain a certain legal order could be made effective. At any rate it is impossible to support with historical examples the contention that there might be such a unanimous law-maintaining force; for other factors, of the kinds just mentioned, have always played their part.

The arguments which we have presented should show how incredibly artificial is the account of the power of the state given by G. Jellinek and others, *viz.*, that the force which keeps the law in being is under *all* circumstances *essentially* rooted in the common direction of the wills of the members of a society towards a certain end. Eltzbacher treats a legal norm as "a norm which is based on the fact that men desire that a certain line of conduct should be universally followed within a group of men which includes themselves."[1] This definition is taken over by Salomon.[2] Here also law is defined by reference to the power which actualizes it. But that power has here been made into a unitary desire for a norm, present in the group in question. But the force of a legal norm never "depends" merely on the fact that a certain section of persons within the group desire that it shall be universally observed; it depends always on many other factors, such as habit, inertia, traditional modes of thought, and so on. Russian law

[1] *Über die Rechtsbegriffe*, 1900, pp. 27 *et seq.*

[2] *Das Problem der Rechtsbegriffe*, 1907, p. 45.

certainly does not depend *merely*, as Eltzbacher says on p. 29, on the fact that a certain section of Russians desire that what the Czar wills shall be carried into effect. It depends to a large extent also on such things as religious convictions about the person of the ruler, the indolence of the masses, army discipline, and so on.

The fact that one makes a unitary will out of the conglomerate of forces which we have indicated, and defines law by means of it, is an instance of that universal anthropomorphizing tendency which here, as so often, introduces fictitious notions into science. Yet there is a legitimate basis for this notion of the will of a "state" expressing itself in law. Law is, at any rate to a large extent, an expression of interests; and this is true both of its foundations and of secondary rules. Therefore the question of the intention and the significance of a law is a legitimate one. The mistake consists in the fact that one thinks, in this connexion, of a unitary will, which in the beginning adjusted its desires in accordance with a certain system of values, and thereafter acted in accordance with this system. The real state of affairs, on the contrary, is that, in the conflict of interests within a society, certain interests come to express themselves in the form of laws. The system of rules, which arises in this way, then becomes actualized because a whole mass of heterogeneous factors conspire to maintain it, without there needing to be in the group any unitary will to that end.

6. The will-theory as a basis for assessing the value of different sources of law

If the point of view in question merely sought to give a schematic expression for the conglomerate of forces which in fact cooperate in maintaining the system of law, it might be regarded as harmless and even justifiable, in spite of its unscientific character. Unquestionably this conglomerate of forces looks just as if a mighty will set up certain imperatives, or gave expression to its decisions, and so of its own power vindicated its position as ruler, or, breaking down all opposition, carried out what it had

once and for all declared to be its intention. That is certainly not what the supporters of this theory mean. Yet it would still be relatively harmless, if it were not made the basis for deriving ostensibly scientific propositions with juridical content. What happens is that the supposed will of the state is used as a measuring-rod for judging the claims of other original sources of law, *e.g.*, custom, the spirit of law, the nature of the situation, equity, etc., to validity, in addition to the law in the strict sense. It is often attempted to settle this question by seeking to determine the real will of the "state authority" in this respect. It is worth while to illustrate, by means of some examples from recent legal literature, the dangers of this mode of reasoning.

Goos argues as follows.[1] Two interconnected sources of law, *viz.*, the spirit of law and the nature of the situation, can be regarded as recognized by the "organized power of society" or "legislative power" only in so far as one or other of the following conditions is fulfilled. Either (i) when they are needed as auxiliaries in those cases where the law needs to be supplemented in order to be applied; or (ii) when it is plain from the law itself that a certain state of affairs is to be regarded as coming under legal rules, and yet this cannot be established by direct interpretation of the law. Legal custom, again, as a source of law in addition to the law itself, is to be regarded as recognized by that power in all cases where it is not expressly excluded. For codification of law is, historically speaking, secondary in relation to legal custom recognized from the beginning by the collective power.[2] So that power cannot be supposed to have revoked its original acceptance of legal custom except where this is evident from a special legal provision. In this way, it is claimed, the significance of the various sources of law in reference to the application of law is settled.

On this point the following remarks may be made. Suppose that a judge, in spite of everything, uses legal custom, the nature of the situation, and the spirit of law, *contra legem*. He may do

[1] *Lectures on General Jurisprudence*, I, pp. 115 *et seq.*, 119 *et seq.*, and 135. (In Danish.)

[2] *Loc. cit.*, p. 134.

this merely implicitly by putting a strained interpretation on the law, or openly in those cases where the application of the law would, because of special circumstances, lead to too great a shock to the sense of justice. This supposition is certainly not a merely theoretical possibility. Supporters of the so-called "free-legal" school in Germany have collected an overwhelming mass of material with reference to the procedure of German courts in this connexion. If now the judgment acquires the force of law, what is the real will of the "organized power of society" in this case? On the one hand this should be expressed in the law. But, on the other hand, it can just as well be regarded as expressed in a judgment that has gained the force of law, so far as concerns the special case in question. The latter is certainly the will that is actually realized. Suppose one says that the "organized power of society" disapproves of the judgment itself, but nevertheless supports judgments when once they are made. This line of argument is quite untenable. Disapproval cannot be alleged when the judge does not in any way become the object of censure on the part of the state authorities. The mere fact that the will of society, as expressed in the *law*, demands something different, in no way shows that there is disapproval. For it is impossible to prove that that will persists in its demand in respect of this particular case, for here its only utterance is in the judgment that was actually made. But it is equally impossible to prove that the will of society would now actually *desire* that such a judgment should be made, so long as the law in question remains in force. The reason why such arguments are untenable is simply that the supposed will of society does not exist, and therefore cannot be used as a measuring-rod for the validity of various sources of law.

Specially questionable is the view that law is the direct expression of the will of the *organized* power of society, and that other sources of law are sanctioned (within certain limits) by that will. For one can quite reasonably suspect a gross logical fallacy here. What does it mean to say that an *organized power of society* exists, except that a certain system of rules is applied within a certain group of individuals by certain persons specially appointed for

the purpose, who, in respect of this legally regulated activity, are the organs of the society? An actual *organization* can be said to exist only in so far as the various legally established activities have the negative property of not interfering with each other and the positive property of supporting and completing each other. This organization becomes a *power* in so far as the various organs actually can perform the regular activity which belongs to them, in face of any member whatever of the society. It is a power of *society* because its force is derived from factors which are active *within* the group itself. But what is this organized system of rules? In a modern society it is, in principle at least, just what is called statute-law. What is implied, *e.g.*, by the fact that there is a special organ for legislation in a society? It consists in the following two facts. (i) That constitutional law, as an ideal rule of action, assigns to certain persons or complexes of persons a certain activity in accordance with certain forms—"legislation"—and that this rule is now in fact put into operation. And (ii) that, through the above-mentioned activity, new rules ("laws") are promulgated, also on the basis of the content of the constitutional law, which themselves come into operation in virtue of that law. What is implied in the fact that there are special organs for making legal judgments? It consists simply in the following facts. (i) That certain persons, appointed for that purpose in virtue of the law, exercise a certain legally regulated activity, *viz.*, judging. And (ii) that a judicial decision acquires, in certain circumstances, in accordance with the law, legal force; *i.e.*, it issues in a concrete rule which is put into operation through the force of the law itself.[1] All organs of state must be defined in this way. But, if it is just statute-law which, through being in force, organizes society, how can it be an utterance of the will of an organized society? It is as if one should say that a man exists in virtue of his own voluntary decisions. It is also plain that, if in a modern society, with its predominant emphasis on statute-law, a judicial

[1] Cf., *e.g.*, the king's right in Swedish law to appoint "judges," and the legal rule, which is involved in it, concerning those who are to be regarded as "judges."

decision is also influenced by customary law, the spirit of the law, etc., supplementing or annulling the statute-law in a particular case, this means merely that the nature of the organization of a society is modified by other principles. The judicial decision, although it is not determined by the statute, becomes part of the system of rules current in the society, as a concrete ruling, in spite of the fact that this system is essentially statutory. To make the "will" of an organized society into a measuring-rod for estimating the validity of these other sources of law is therefore quite meaningless. The character of this organizing power itself is determined by the sort of rules which are operative.

Krückmann explains in a particularly interesting way how, even in a modern community organized on a statutory basis, it is by no means only statute-law which is put into force by the judges.[1] And this certainly does not depend on mistakes on the part of the judges concerning the positive law. Customary law, equity, the practice of the courts, etc., play a great part in addition to the statute-law, so that judgments are made quite consciously both *praeter* and *contra legem*. But, according to Krückmann, this cannot be justified juridically by any means. Through a decision, which is from the strictly legal point of view materially incorrect, the winning party does not acquire any real right which he does not possess in accordance with the law in question. He acquires only "possession of a right," *i.e.*, he is put in the same position as *if* he had an actual right in accordance with the statute.[2] The foundation for this argument consists in the fact that, according to Krückmann, law is only such determinations as issue from the "community-at-law."[3] The judge is "appointed" by the "organized community," and therefore cannot rightly judge in accordance with any other principles than those which are given by it, *i.e.*, only in accordance with the statute-law.[4] He can therefore by no means create any right outside the statute-law, even if he can put

[1] *Einführung in das Recht*, 1912, pp. 73 *et seq.*

[2] *Loc. cit.*, pp. 95 *et seq.*

[3] See, *e.g.*, *loc. cit.*, p. 1.

[4] See, *e.g.*, *loc. cit.*, p. 82.

a person in as fortunate a position as he would enjoy if he actually had a certain legal right. The same mistake recurs here as we noted above in Goos. Statute-law gets its privileged position as a source of law from the fact that it is held to be an expression of the will of an organized society; as if statute-law were not itself the constitutive element in the organization of society. In addition there is in Krückmann an, if possible, more palpable logical fallacy. He says that the judge is "*appointed*" by the organized community; as if there had ever been a state-organization which did not include judges as essential limbs in the organism. One might as well say that the human organism has a head or a heart as tools.

Neukamp makes a similar misuse of a fictitious "will of the community" in his book *Entwicklungsgeschichte des Rechts. Einleitung*.[1] There he asserts, on the one hand, that "a satisfactory account of the 'theory of the sources of law' " can be obtained only from "the prescripts of positive law"; and, on the other hand, that "positive law can make a perfectly free use of the 'sources of law' in developing its prescripts." By that means the special relationship between statute-law and customary law can be scientifically defined. For the "will of the community" can, just as well as the "individual will," determine beforehand the forms in which alone its "voluntary activities" shall count as "legally relevant," *i.e.*, as "legal products." Thus the Roman people in the time of the republic decided that only volitions expressed in certain forms (an official's rogation, etc.,) should have the character of law.[2] But suppose that a "communal will" determines, let us say by its legislative organs, that only a law which has come into being in accordance with constitutional forms shall be relevant in private law. And suppose that, nevertheless, a judge in applying the law supplements or even corrects the statute in a particular case by reference to customary law or equity. Then, if the decisions which he makes acquire the force of law, customary law or equity becomes legally relevant. Even

[1] 1875, p. 41.

[2] *Loc. cit.*, pp. 35 *et seq.*

in that case the "communal will," if this is assumed to be the supreme legal authority, creates real law by way of the judge. A decision which has acquired the force of law certainly cannot be regarded as legally null and void because the "communal will" has here departed from its own prescript. Suppose that Neukamp takes his example from Roman law to mean that the only legal rules which really counted were those which came into being through the "communal will" as expressed in certain forms. Then we have only to refer him to the so-called *responsa prudentium*, which seem to have been the actual content of the *proprium jus civile*.[1] It has often been shown that through these *responsa*, which acquired actual authority, the law underwent in its applications important changes in the direction of greater equity.[2] We need hardly develop further the fact that the analogy between "communal will" and "individual will," in respect of the power of the former to confine its production of laws for the future to certain forms, is false. The validity of an individual will's action in binding itself depends of course on the existence of a law to which it is subject.

A criterion for estimating the significance of various sources of law is here sought in the idea of the "will of the state" as determining itself by a certain utterance of its volitions. This utterance is to be regarded as genuinely binding, *i.e.*, as a reliable indication of what it really wills. But why should just *that* utterance, in and through which the significance of various other utterances is determined, be decisive, if other expressions of the same will occur beside it, in which the forms demanded by the first utterance are not observed? It is decided, *e.g.*, by legislation that statute-law shall never make way for customary law. Yet customary law has a derogatory effect on statute-law, if the "will of the state" (by which is understood the power which applies certain rules within a group of individuals) must nevertheless be regarded as having expressed itself also in customary law. Why should the decisions of statutory law concerning customary law

[1] Ehrlich, *Beiträge zur Theorie der Rechtsquellen*, I, 1902, pp. 1 *et seq.*

[2] See, *e.g.*, H. Maine, *Ancient Law*, new edn., 1908, pp. 30 *et seq.*

be regarded as the only valid expression of the will of the state? On the contrary, it seems as if the provisions of the statutory law had, in this case, no other significance except that they occur in print in the official collection of statutes. How can anything which is ineffectual be an expression of the *power* of the state? In fact one is driven here to suppose that the will of the state determines, prior to all its utterances, what utterances it will recognize as its own. This is in order to have a norm which stands above all actual utterances. W. Jellinek recognizes two rules of law, both issuing from the state.[1] One of them precedes all statute law, and determines the latter as being itself an expression of the will of the state. The other determines the application of customary law and "the nature of the case" under certain circumstances as the will of the state. So the will of the state can be recognized *before* it has expressed itself in any way. This eminent jurist gives us no indication of the source from which he has gained this knowledge of an unexpressed will of the state except a reference to G. Jellinek's theory of the state as the bearer of law.

7. The surreptitious introduction of ideas taken from natural law

We have now criticized the theory which attempts to find in the will of the state, taken as the will of the power which upholds law, the criterion by which the significance of the various primary sources of law is to be judged. We have criticized it on two grounds. (i) On general grounds, by showing the fictitious nature of the idea and the consequent futility of the reasoning. (ii) In particular, by showing the ὕστερον πρότερον which arises if one ascribes (as it is very natural to do) the will of the state to the state-organization itself, and if one draws the equally natural consequence that the will of the state becomes normative before it has expressed itself in any way. But our criticism would be incomplete if we did not bring forward yet another objection

[1] *Gesetz, Gesetzanwendung und Zweckmässigkeitserwägungen*, 1913, pp. 174 *et seq.*

to the application of the theory to the sources of law. This objection is concerned with the surreptitious introduction of ideas taken from natural law.

When a judge is engaged in deciding a legal case, and applies the statutes in force in accordance with the constitution, is there any rule of law according to which he decides that the statutes in force, and not some other rule, are to be the principles of his decision? What could this rule of law be, which would in effect determine the validity of the constitution itself? It obviously will not do here to refer to the instructions to the judges, since their legal validity itself depends on the constitution. Adickes asserts that there is such a rule of law; but he himself says that it is a rule of law which depends on "the nature of the case," *i.e.*, a rule of *natural*, not of positive, law.[1] According to W. Jellinek there is a supreme rule of law which gives to all legal systems their validity. "If there is in a human corporative entity a supreme holder of power, that which he ordains must be followed."[2] This proposition, which, according to Jellinek himself, is a "necessity of thought" and therefore not a prescript, obviously belongs to natural law; and it certainly cannot be said to be of much value. Lask says that the ought with which jurisprudence is concerned "has its formal ground in positive institution by the communal will," whilst the philosophical ought "is derived from an absolute standard of value."[3] There is a confusion in this. (i) According to Lask the kind of ought with which jurisprudence is concerned is an unconditional ought as regards that which is determined by the "communal will." Can such an ought be conceived without an absolute value? (ii) Can a "communal will" be the foundation of an unconditional ought, unless it is presupposed that its orders ought to be respected, *i.e.*, in some meaning of "ought" other than that each particular order should be obeyed because it issues from the competent authority?

[1] *Zur Lehre von den Rechtsquellen*, 1872, pp. 24 and 73.

[2] *Loc. cit.*, p. 27.

[3] *Rechtsphilosophie.* In *Festschrift für Kuno Fischer*, 2. Aufl., 1907, p. 304; with which cf. pp. 270 *et seq.*

In point of fact the judge's application of the positive law in accordance with the constitution depends on those forces which maintain the constitution and which first make "statutes" into genuine rules of law. In this case such factors as the following are active. The judge's feeling of justice; the oath which he takes as a judge; the conviction that statutes which are in force in accordance with the constitution supply the rules for exercising his official duties (just as a medical practitioner finds it natural to apply medical science in carrying out his professional duties); fear of punishment if he goes outside the law; and so on. He is certainly bound by such forces, so that his own wishes in regard to the rules which are to be applied count for nothing. But there is no juridical rule which predetermined the validity of the constitution itself. Again, what is the rule of law which authorizes the judge in a particular case to apply customary law, the spirit of the law, etc., *praeter* or *contra legem*? No such rule can be discovered. These applications take place in consequence of general extra-legal factors, such as feeling of justice or quite possibly a scientifically mistaken theory that the will of the state in this case demanded the use of such sources of law. In just the same way does the constitution derive its strength from such factors, and genuine rules of law arise. Every attempt to construct an ought for the judge in relation to this or that source of law is doomed to failure. The duty of judges as a class to judge in accordance with the law, says Radbruch "cannot be based by juridical theory upon the law; it must rather be based by ethics on the oath," by which the judge has bound himself.[1] We need not consider whether the latter constitutes a scientific foundation.

If, in spite of all this, it is thought possible to assess the validity of various primary sources of law in a positive juridical way by means of the theory of a state-will, this is connected with an obvious ambiguity in the notion of *positive* law which is used. On the one hand, the notion of a "state-will" is derived from the circumstance that a certain system of rules of conduct in a certain group of individuals is put into action through being applied by

[1] *Grundzüge der Rechtsphilosophie*, 1914, p. 182.

certain persons appointed for that purpose in accordance with rules, *e.g.*, judges. The utterances of this "state-will" are regarded as the *positive* law, with which jurisprudence is concerned. But, on this interpretation, it is of the essence of positive law that the rules are actually put into force by the authorities appointed by law for that purpose; and jurisprudence has merely to treat these *actually* applied rules from the point of view of their content, *i.e.*, as a guidance to the authorities, which, in consequence of the activity of certain forces, make them the basis of their actions. But now it happens that a certain system of rules is not completely applied in its unadulterated form. Additional rules of other kinds force themselves on the authorities charged with applying rules, whether as necessary supplements or as genuine modifications to the predominant system. Then arises the question: What rules *ought* to be applied in such cases? And now it is thought possible to settle the question by appealing to the "state-will," although *that*, as determining positive law, has a meaning only as an expression of the fact that a certain system of rules actually is enforced. That the will of the state wills this or that rule now means, not that the rule *actually is* enforced, but only that it *ought* to be enforced. At that stage the notion of *positive* law, in so far as it is bound up with the will of the state, has acquired the meaning that certain rules *ought* to be applied. But at that point an element of natural law has entered into "positive law" as the object of jurisprudence. This element, however, is disguised because it is thought that one is concerned only with what the will of the state actually wills; though really what is meant by the state's willing here is simply that certain rules ought to be followed.

H. Kelsen says that the "non-application by a judge of a rule of law which is formally in force is formally contrary to law," for a rule of law is in principle independent of whether it is applied or not.[1] It concerns the universe of ought, not of is. Yet he will not allow that this ought is of the kind contemplated by the theory of natural law, for it rests upon the will of the state expressed in the rule of law. Notwithstanding this, Kelsen asserts

[1] *Hauptprobleme der Staatsrechtslehre*, 1911, p. 333.

that, when a materially incorrect judgment acquires the force of law, one must assume from the juridical standpoint that the will of the state wills that there shall be an exception in this case to the rule which otherwise holds good.[1] If no legal action is taken against the judge who makes the judgment, the "volition" of the state to apply in this case the formally valid rule reduces to nothing. If we say that it ought nevertheless to be applied, as being formally still valid, this ought is plainly of the kind contemplated by the theory of natural law. To say that the will of the state wills that the rule shall be applied reduces to the statement that it ought to be applied. One hovers between holding that the state-will, which is postulated as the focus from which the actual application of rules proceeds, supplies the meaning of "ought," and holding that it derives its own meaning from "ought." When Kelsen[2] propounds the question: "What are the rules which ought to be applied by the organs of the state and observed by its subjects?" as *the* specifically juridical question, he describes as juridical what is specifically a question of natural law. But the magical formula of the will of the state serves Kelsen as a means by which to deprive the ought in question of its meaning in terms of natural law.

The result of this attempt of Kelsen's to deprive the ought in jurisprudence of its reference to natural law by referring it to the will of the state is, however, that both "state-will" and "ought" become empty words. "State-will" is not to denote any kind of actual will. Obviously, then, the whole notion is to be a juridical construction; but, according to Kelsen, jurisprudence is concerned with the world of ought and not with that of is. On the other hand, the ought resolves itself into the applicability to a concrete subject of the rule of law, of the judgment about the will of the state.[3] That is to say, the legal ought means merely that, if the will of the state in general wills to act in a certain way under certain circumstances, it wills also to act in accordance

[1] *Loc. cit.*, p. 247.

[2] *Loc. cit.*, p. 353.

[3] See the definition, *loc. cit.*, p. 348.

with the general rule in reference to a concrete case, if one should arise. For instance: — *Rule of Law*: The state wills to punish in a certain way if anyone should steal. *Legal Duty*: The state wills to punish in that way this person in so far as he has committed a theft. But what has this to do with "ought," in the ordinary sense of the word, any more than justice has to do with the constitution of a certain stone? Yet jurisprudence is to be a normative science along with ethics, and "ought" is to be used in its ordinary sense in spite of the author's definition. This is seen even in the long italicized definition of "ought."[1] It is said, almost in so many words, that a rule of penal law enunciates a duty to act in a way directly opposite to that which is described in the rule.[2] So we can say with some reason that, in the attempt to get rid of the reference of ought to the law of nature, both "state-will" and "ought" are used in such a way that all meaning has evaporated from those words.

If the theory of the sources of law is taken to be a theory about the rules which *ought* to be regarded as fundamental by the authorities who apply the rules, we approximate to Adickes' doctrine that the primary source of law is "subjective reason" or a personal conviction as to what is just.[3] It is difficult to imagine that anyone *ought* to act otherwise than in the way which he is convinced is right. In this connexion it is quite unintelligible that Adickes[4] can nevertheless hold that a judge acts unjustly if he sets aside the statute-law under any circumstances, and therefore even if his doing so is determined by his conviction that justice demands it. However that may be, this brings out clearly how little such an enquiry has to do with positive law.

The criticism which we have just made on the state-will theory, as applied to estimating the significance of the sources of law, resolves itself into this. Features from the theory of natural law

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[1] *Loc. cit.*

[2] See, *e.g.*, *loc. cit.*, p. 435.

[3] *Zur Lehre von den Rechtsquellen*, 1872, pp. 6 *et seq.* See also Schlossman, *Der Vertrag*, 1876, pp. 177 *et seq.*

[4] *Loc. cit.*, pp. 75 *et seq.*

are bound to intrude themselves into this theory, although the application of the notion of the will of the state as determining positive law was intended to remove the notion of natural law from jurisprudence. This criticism has nothing to do with the criticism of the state-will theory which the Dutch jurist H. Krabbe put forward in his interesting work *Die Lehre der Rechtssouveränität*.[1] He criticizes the theory because it leads to the consequence that the state cannot possibly be itself under an obligation to observe the existing law; whilst, according to Krabbe, it is under that obligation. This criticism is itself made from the standpoint of natural law. The whole positive account of "the sovereignty of law" in opposition to "state-sovereignty" is also in terms of natural law. On p. 95 it is said: "Law has validity like every other ethical norm. That is the theory of the sovereignty of law." Law is the only source of power, in the sense that it is "the only basis on which relationships of authority and obedience among men can be justified."[2] It is plain that the proposition that the positive law is as such obligatory is no less a part of the theory of natural law than the proposition that there are natural rights independent of positive law. One would certainly have to start from the principle that it belongs to the nature of society or of the individual to be under an obligation to obey positive law. So Krabbe's elevation of law above the state has nothing to do with the account which we have given of "the power of the state," which is as follows. The "power of the state" is merely the realization within a certain group of individuals of a certain system of rules through certain forces active within the group. Among these forces the most important is the application of these rules by certain persons appointed specially for that purpose. The power of the state is, in a word, a system of laws actually enforced. The "primacy" of law, in this sense, has nothing to do with natural law, for here the only question is to indicate what actually is present in what we call a state or positive law, as the case may be.

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[1] 1906, pp. 78 *et seq.*

[2] Cf. *loc. cit.*, p. 167.

On the other hand Stjernberg's criticism of the theory of the sources of law follows similar lines to ours, although the case is presented in quite a different way.[1]

8. Synopsis

If the will-theory concerning positive law regards the latter as a system of imperatives or declarations of intention on the part of the *legal* power, it is involved in a circle. If a "*general will*" is assumed, that will must be supposed to be either the will of all or a super-individual will. On the former alternative the theory comes into conflict with facts; on the latter it leads to absurdities. If the basis of the theory is alleged to be *the will of the holder or holders of de facto power* in a society, the difficulty arises that the law itself is the foundation and the limit of that *de facto* power. If, finally, the *power actually enforcing the law* (the "state-will") is taken as starting-point, we are faced with the impossibility of assigning this to an actual will. But this exhausts the possible forms of the theory.

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[1] *On the question of the so-called purely economic categories*, 1902. (In Swedish.)

III

On the Question of the Notion of Law

The Will-Theory. 1917*

1. Difficulties of the will-theory when applied to older legal systems. Examples

The will-theory seems to have a certain justification as applied to modern legal systems in civilized states, because 'statute-law' is there decidedly predominant. But the weaknesses of the theory come clearly into view when it is applied to older legal systems, in which statute-law in the modern sense is not predominant in the same way. We will here adduce just a few examples to illustrate the case.

(a) *On the meaning of fas in ancient Roman law.*

In the older Roman legal system there was no separation between *fas*, the divine law, and *ius*, the human. Nearly all legal

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* The preface to this work runs as follows:

The present work is directly connected with the introductory investigation of the will-theory as regards positive law which I presented in an essay in the *Festskrift för Vitalis Norström*, 1916, under the title *Is positive law an expression of Will?* (In Swedish.) This has also been separately issued, and it forms with the present work a single whole. But the question is here treated from quite a different point of view, and so this work can be read by itself.

Like the former essay, this book presents itself in the main as a criticism of what one might call the prevailing theory as to the nature of positive law. But my object is by no means only this. It is intended also to illuminate the psychological facts from which the presentation of the theory in the form which it generally takes becomes intelligible. My aim is also to throw light on the real nature of law by means of the critical investigation, and thus to lead up to an exposition of that conception of law which really covers the facts which legal theorists have in mind in their attempts at conceptual construction.

transactions seem to have taken a religious form. The administration of law was a religious concern. This explains why the priests had a dominant influence in it. They alone possessed knowledge of *fas*.[1] It also explains why the plebs attached so much weight, when the law of the twelve tables had been accepted, to the publication (by the so-called *ius civile Flavianum*) both of the calendar (which was so important for the administration of law) and of the no less important *formulas* for actions-at-law and for legal transactions, which before had been a priestly secret. The situation was not that the people could now decide for themselves without more ado what *formulas* were to be used. No, the law existed once and for all with divine authority in this respect, and was not to be changed. It was merely a question of knowing what the law was.

Here, then, there was a positive law which partly in the popular belief stood above every human power and partly also *was* really independent of the will of the 'state-authority.' When once the idea of a law preserved by the priests, which assigned to each his legal sphere, had entered into men's minds, the force of the idea acted as effectively as any external power could do. It immediately set up retaliatory actions against anyone who infringed the law, and thus the legal system was upheld. This reaction certainly did not depend on a previously agreed decision to uphold just this system, but proceeded directly from a conviction as to what is once and for all the law. To speak here of a popular acceptance, whether express or implicit, of *fas* or of the priests' politi-

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[1] Cf. Kuhlenbeck, *Die Entwicklungsgeschichte des römischen Rechts*, I, 1910, pp. 46 and 98 *et seq.*, De Coulanges, *La cité antique*, 21 éd., 1910, pp. 219 *et seq.* and Ihering, *Geist des römischen Rechts*, 4. Aufl., I, 1878, pp. 297 *et seq.* On priestly influence on the administration of law for similar reasons among the older Germanic peoples, see Grimm, *Deutsche Rechtsaltertümer*, 4. Ausg. II, 1899, p. 359 and Brunner, *Deutsche Rechtsgeschichte*, I, 1906, p. 172, and among primitive peoples in general, see Makarewicz, *Einführung in die Philosophie des Strafrechts*, 1906, pp. 172 *et seq.*, Wilutzky, *Vorgeschichte des Rechts*, III, 1903, p. 128, Cathrein, *Recht, Naturrecht, und positives Recht*, 1909, p. 256 *et seq.*, and Neukamp, *Entwicklungsgeschichte des Rechts. Einleitung*, 1895, p. 183.

cal power as the basis of the legal system, is to introduce without justification modern points-of-view.[1]

(b) *On the common law in England and ancient German judicial procedure.*

Again, we may mention the original position of the judge in relation to the common law in England. One started from the notion of an immemorial law which the judge merely applies in his decisions. Certainly every judgment that was pronounced became a legally important precedent for subsequent judgments, since common law was supposed to be authoritatively expressed in every judgment pronounced. But in principle it was held that there is a law '*in nubibus* or *in gremio magistratuum*' (Maine), which is to be applied directly in cases where no precedents exist to indicate how it should be interpreted.[2] The factual basis for the supposed unwritten law was old customs crystallized in legal decisions, together with ingredients from canon-law and Roman law.[3]

It is clear that the king was not regarded in judicial theory as the authoritative support of 'the law.' According to this theory the law existed as binding from time immemorial, exalted above the king's will. But, when this point-of-view had once entered into the popular consciousness, the king became thereby unfree in reality, when he assumed the judicial power. He was bound in two ways: —(i) By his own awareness of the current rules for the exercise of the judicial office, and (ii) by his subjects (and

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[1] Yet Goos thinks (*Lectures on the general theory of jurisprudence*, I, 1889, pp. 93 *et seq.* In Danish) that he can subsume this *ius sacrum* under his notion of law as 'the decision of an organized society as to the guiding principles which it will follow in legal administration.'

[2] In Hale's *History of the Common Law* of 1713, quoted by Salmond (*Jurisprudence*, 4th edn., 1913, § 55), this older point of view is expressed in the form that the tribunal is said to publish "what the law of the kingdom is." Cf.. Maine, *Ancient Law*, new edn., 1908, pp. 28 *et seq.* and Blackstone's *Commentaries*, pp. 68—71, quoted by Gray, *The Nature and Sources of the Law*, 1909, p. 207.

[3] Jenks, *A short History of English Law*, 1912, cap. 2.

especially the judges) holding him to be bound by the common law. This very idea of the king's lack of freedom was one of the ideal forces which controlled the legal side of actual life and was thus constitutive for positive law. In consequence of it the king was in fact unfree. Of course it was abstractly possible for the king to make revolutionary changes in the existing law, but only in the same way as it is abstractly possible for a constitutional monarch to make himself absolute. It may be that the recognition of 'the law of the land' by William the Conqueror was originally an act of political astuteness.[1] But (i) it was politically astute because he thereby attached himself to the popular belief in a law of the land exalted above the king's will. (ii) In proportion as this point of view was taken by the king's judges, they, and through them the kingly power, of course became bound by the idea in question.

In saying this we do not in the least deny that the kingly power exercized a most important influence on the development of English law by taking over the judicial function. It was through this that unity of law was first brought about, in so far as local laws were abolished and in so far as the judgment given in a certain case became a precedent for deciding other similar cases.[2] But here the question is simply whether the judicial power was limited by the idea of an already existing law or was free to define the law according to its own wishes. Even where the system of law *is* already developed by legislation, the judicial power exerts a very great influence on what is to be positive law for concrete situations in real life, by means of interpretation and the actual importance of precedents. (More on this point in the sequel.) But it is by no means correct to say for that reason that the judicial power itself on the whole determines the positive law in accordance with its own wishes. In normal cases the position of the English judge, who made a decision in accordance with the common law, was that he merely applied an existing positive law,

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[1] Jenks, *loc. cit.*, p. 17.

[2] Krabbe, *Die Lehre der Rechtssouveränität*, 1906, p. 63.

even if in his judgment he was merely giving utterance to his personal feelings of justice.

It is certainly true that royal instructions given to judges as the king's servants in practice exerted an influence even on substantive law. But in principle they concerned only procedural law.[1] It is therefore no argument against the view that the royal power was in principle bound by the idea of an already existing substantive law.

But it is equally incorrect to say that it was the people's will which gave to the whole system its power. For the people itself was governed by the idea in question. The whole notion of a popular resolve to maintain this idea is as absurd as to suppose that a prevalent moral climate of opinion depends on a popular resolve to maintain it.

In this connexion we may refer to the character of the older German legal conditions. The commune itself judged originally with the help of special "finders-out of the law," Rachinburgii, Scabini, etc. Their business was to "show forth the law, *legem dicere, veritatem dicere*" according to what they *ex relatu suorum progenitorum, seniorum et antecessorum semper audiverunt.*[2]

It is a perversely modernized interpretation of the facts to say that the state gives binding force by an 'express or tacit law' to 'ancient customs.'[3] Neither the facts themselves nor the notions

[1] Jenks, *loc. cit.*, p. 23.

[2] Grimm, *loc. cit.* II, pp. 388 *et seq.*, Brunner, *loc. cit.* pp. 152 and 203 *et seq.*, Brie, *Die Lehre vom Gewohnheitsrecht* I, 1899, pp. 203 *et seq.* and 225 *et seq.*, and Gierke, *Deutsches Privatrecht* I, 1895, pp. 159 *et seq.* Cf., as regards the lawman's '*lagsaga*' in the older Swedish conception of law, Westman, *History of the sources of Swedish law*, 1912, pp. 4 *et seq.* (In Swedish), and, as regards primitive enunciation of law in general, considered as putting into words a universal law-conviction in relation to particular cases, see Schmölder, *Die Billigkeit als Grundlage des bürgerlichen Rechts*, 1907, p. 45.

[3] Holland, *The Elements of Jurisprudence*, 9th edn., 1900, p. 59 in agreement with Austin, *Lectures on Jurisprudence*, 5th edn., p. 538. Similar forms of expression in Gareis, Enzyklopädie und Methodologie der Rechtswissenschaft, 4. Aufl., 1913, pp. 40 and 48 and *Vom Begriff Gerechtigkeit*, 1907, p. 30, Salmond, *loc. cit.*, p. 155, and Binding, *Handbuch des Strafrechts*, I, 1885, p. 212. See also the literature quoted by Windscheid (*Lehrbuch des Pandektenrechts*, I, 7. Aufl., 1891, p. 39, note 1).

of law which prevailed at the time correspond to anything of the kind. The reality, which underlies the assumption of a 'tacit law,' a '*Gestattung*,' on the part of the state, is *simply* the fact that the rules in question are effective in actual life, whether the supreme organ of the state wishes it or not.[1] It is also a mistake to drag in the thought of the state's recognition of customary law by way of the judicial power. Grabowsky says: "But it is only when the state really gives its sanction to it (*i.e.*, customary law), that it becomes law in the real sense. Customary law first acquires real legal validity through judicial dicta which have regard to it."[2] It is quite fair to say that statutory law first becomes positive law in so far as a judicial dictum takes account of it, if the criterion for a law becoming 'positive' is that the rules are actually applied in the relationships of real life. But it does not in the least follow that the state, in the person of the judge, gives its sanction anew to the application of a given law through the judge's taking account of it. For the judge is not free in this matter. On account of the force of the constitution and of his oath as judge he is obliged to regard the law as his guide in performing his office. But the same holds *mutatis mutandis* for the judge's position in regard to customary law in primitive conditions. The conviction, which is part of the law, that he is obliged to make the customary rules his basis for determining rights and duties, is unconditionally operative in his performance of his office. So the judge is just as little free in relation to customary law as in relation to statute-law. In each case he has the same fictitious freedom which a skilled physician has to disregard his technical knowledge in carrying out his duties. Therefore in neither case

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[1] Cf. Stahl, *Die Philosophie des Rechts*, 3. Aufl., II, 1, 1854, p. 237, Windscheid, *loc. cit.* p. 39, note 3, Zitelmann, *Gewohnheitsrecht und Irrthum*, *Archiv f. civil. Praxis*, Bd. 66, pp. 363—364, Bekker, *Grundbegriffe des Rechts und Missgriffe der Gesetzgebung*, 1910, p. 53, Jung, *Das Problem des natürlichen Rechts*, 1912, p. 105, Regelsberger, *Pandekten* I, 1893, p. 86, and Hagerup, *Encyclopaedia of Law*, 1906, p. 18. (In Danish.)

[2] *Recht und Staat*, 1908, p. 42. Cf. Bruno Schmidt, *Das Gewohnheitsrecht als Form des Gemeinwillens*, 1899, p. 39 *et seq.*

can there be any question of the state recognizing certain rules through the judge.

Here of course we do not intend to treat the question of the binding force of customary law under modern conditions where *legislation* is the predominant factor. Still less are we concerned with the question how far, or under what conditions, a judge ought to regard a custom as giving rise to law without reference to positive regulation as to the binding force of custom. The only question at issue here is whether under primitive conditions customary law exists because of the state's recognition, whether through legislation or in judicial functions. To that question we must give a negative answer.

But the historical school's application of the notion of a people's 'communal will' as the determining factor in customary law is equally unsound in regard to primitive conditions. According to them, custom itself is an expression of this will, as the law is an expression of the will of the legislative authority. This view goes back to the Roman jurists' conception of customary law as a '*tacitus consensus populi*.'[1] This has survived into modern times.[2] The conception rests upon the assumption of a non-existent power in the people to determine the law by their resolutions. It is in the nature of custom that it arises from the conditions of

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[1] Savigny, *Das System des heutigen römischen Rechts*, I, 1840, pp. 35 and 168 *et seq.* (Cf. p. 24), Puchta, *Gewohnheitsrecht* I, 1828, pp. 144 and 165. (Cf. p. 141.) See also the places quoted by Zitelmann (*Archiv f. civil. Prax.* Bd. 66, p. 389, note 109).

[2] We may quote as examples Ahrens, *Naturrecht*, 6. Aufl., I, 1870, p. 325, von Kirchmann, *Die Grundbegriffe des Rechts und der Moral*, 2. Aufl. 1873, pp. 124 and 125, who even regards present-day morality among civilized peoples as resting on the popular will; Makarewicz, *loc. cit.*, p. 68; Bekker, *loc. cit.*, p. 79, who refers customary law to a 'state-will of the people' which expresses itself directly in such law without organs; and Krückmann (*Einführung in das Recht*, 1912, p. 79), who holds that customary law is binding on the magistrate through the commands of the individuals which establish the custom. Brunner, in his German history of law, opposes "the people's peace" to "the king's peace." The former is one with the spontaneously growing popular legal system in primitive conditions, and depends on the *popular will*. The latter depends on the *king's orders*, *loc. cit.*, p. 169.

human social life through the direct influence which the modes of behaviour of others have on the individual, together with the mechanization of actions which are often performed. It maintains itself partly through the same forces which gave rise to it, and partly through the inconveniences which an individual incurs when he breaks it, although it is not usually possible to indicate any general desire that just this or that custom should be maintained. Under certain circumstances, however, custom is bound up with a more or less effective *opinio necessitatis*, in the sense of a notion that it is *right* to exercize *direct external* coercion in case of a breach of it.[1] This is bound up with the notion of *obligations* which, if they should be neglected or broken, must be made good, so far as concerns their external aspect, by the exaction of an equivalent recompense to the *possessor of a right*. This carries with it the notion of an objective rule concerning rights and duties, a rule which the judge must apply if he is to make genuine legal decisions and not merely to exercise tyrannical force. The rule is that an equivalent recompense is to be exacted when a right is infringed, if the injured party so demands. This rule is now regarded as having its objective existence in the order established by custom.[2] The people, including the judges, is bound by its own ideas on this matter, and 'customary law' functions in legal judgments and in the executive action which enforces them.

Brie (*loc. cit.*, pp. 246 *et seq.*) holds that the popular German view of law regarded the difference between mere custom and customary law as consisting in the fact that in the latter case there is a conviction in the mind of the person who follows the custom that it has legal validity. On this view such persons would therefore have been regarded as having the power to change mere custom into a law objectively valid for them merely through their own subjective conviction. The reason adduced in sup-

[1] Cf. Arnold, *Kultur und Rechtsleben*, 1865, pp. 363 *et seq.*

[2] Stahl's representation of the nature of substantive law as being the moral idea incorporated in an objective system which acts with natural necessity (*loc. cit.*, pp. 197 and 235) is really a reproduction of one side of the conviction of law ("Rechtsüberzeugung") which is prevalent in primitive customary law.

port of this, *viz.*, that only *just* or *good* custom was regarded as customary *law*, in no way proves the proposition asserted. All that can be inferred is that, if a person considering whether a custom was legally valid were to come to a positive conclusion, that custom must appear as just and good, quite independently of the opinion which those who followed the custom might hold on the question. The sources adduced by Brie (notes 9 to 31 on Sect. 30) point without exception in this direction. The utmost that can be said, as regards the significance of the conviction of law on the part of those who followed the custom, is this. For *them* its character as a positive law was determined by its justice or goodness, so that their conviction on this point was decisive for their belief that the custom contained objectively valid rules for rights and duties to be maintained by coercion. It is plain that, since judges or 'finders-out of the law' came in general from circles of persons who themselves followed the custom, the law came in every case to be determined by the conviction among these persons of the justice or goodness of a custom. But that in no way implies that the *de facto* existence of this conviction was regarded as the basis of the legal character of the custom.

Moreover, the proposition that the justice or goodness of a custom was regarded as determining its juridical validity cannot be asserted with any claim to complete generality. Sometimes a custom appeared as legally valid in spite of the fact that it was seen to be unjust, and its abolition by legislative means was demanded. (See Brie, *loc. cit.*, notes 32 and 33, Section 30). In such cases it was obviously the fact that the custom had actually the force of law which produced the idea that it was a valid rule for rights and duties to be maintained by coercion, and the unfavourable reaction of the sense of justice was thrust aside. In a similar way the mere fact that a law exists, as a rule which is maintained by the 'state-authority,' leads to the view that the actual rights and duties are defined in it regardless of what the sense of justice might indicate. (Cf. Jellinek, *Allg. Staatslehre*, 3. Aufl., 1914, pp. 337 *et seq.*)

As regards the founders of the historical school, it should be noted that their theory, in contrast to the cruder form which it takes among their modern followers, hovers between the will-theory and the theory of a general conviction of law as the determining force in customary law. It is characterized even by an aloofness from the pure will-theory of the doctrine of natural law as regards positive law. As will be seen from the passages quoted, they use alternatively the expressions 'will of the people' and conviction of law. Zitelmann (*Archiv. für civ. Prax.*, Bd. 66, p. 389) can therefore justly accuse them of inconsistency in this matter. Schuppe (*Das Gewohnheitsrecht*, 1890, p. 18) certainly maintains that no inconsistency is present, but does so on inadequate grounds. The conviction of law, of which the historical school talks, "obviously consists,"

he says, "of the idea of an action and the feeling of its value. That the will to act in this way proceeds from this, is self-evident. In the concrete case it forms a single whole with it . . ." Though Puchta declares himself against the will-theory, he means only to contest the view that there is a 'deliberate resolution,' a conscious volition resting on 'a reflexion as to what should be the law in the present case.' He does not deny that will, in the sense stated, is involved in customary law. As against Schuppe it is to be insisted that the essential question is this: Are the expressions 'will of the people' and 'communal will' employed to mean an intention, which is unitary either as being common to all or as belonging to a transcendental 'spirit of the people,' to make certain rules of action operative in individuals and in legal judgments and in the enforcement of such judgments? (As regards the obscurity in the notion of 'spirit of the people' among writers of the historical school, see Brie, *Der Volksgeist bei Hegel und der hist. Rechtsschule, Archiv für Rechts- und Wirtschaftsphil.* II, 2, pp. 199 *et seq.*) If it is only a question of the force which a general law conviction as such exercises in this respect, an intention of the kind suggested has nothing to do with the case. Suppose we take the phrase 'general law conviction in a society' to mean a conviction that so-and-so is a law which is binding on the society as a whole. And suppose we take this latter expression to mean that it is a rule which lays down rights and duties and also the way in which they are to be enforced if they should be infringed. Then the 'general conviction of law in a society' makes such a rule into a positive law, in the sense of a rule which is actually applied—in the last resort through coercion on the part of the legal organs. But it certainly does this without any kind of common decision to maintain this rule. The conviction of law acts almost directly as a tendency to a certain action. But this tendency is not itself a resolve to maintain the rules in question, either as demands (norms) or as *de facto* rules which are followed in action. The universality of the conviction of law acts morover as a pressure both on the individual and the legal organ, so that on the whole it leads to its own fulfilment. When a person's own interests are not involved the conviction of law brings about directly a reaction against the infringer. This reaction itself rests, not upon a common intention to maintain the rules *in general*, but at the utmost on a common intention to maintain them against this particular violator of them. The phrase: *coactus tamen voluit* can then be applied to a certain extent to the pressure which fear of this reaction exerts on the individual and the legal organ. But only *to a certain extent*. For this pressure, together with one's own conviction of law, also has the effect that within certain limits the thought of the possibility of acting against what one takes to be the positive law simply does not arise. In such cases there is not an intention to act in accordance with one's conviction. A prisoner,

who has no thought of the possibility of breaking out, does not resolve to abstain from flight. But in so far as an intention, brought into being by psychological pressure, is of importance, it is not in the least a question of willing in conjunction with others to maintain the relevant rules in general. For in each individual the fear of a sanction merely brings it about that he personally will not expose himself to it; and that is quite another thing.[1] But, in spite of the obscurity in their expressions, it is probable that Savigny and Puchta, when speaking of the will of the people as the ground of customary law, had in mind a unitary, though unreflective, intention to make certain rules operative in the way described. For one thing, the expression 'collective will,' which is used here, is of course borrowed from the doctrine of natural law; for another thing, it would otherwise be a meaningless assumption that this 'collective will' creates customary law by *expressing* itself in custom. But, that being so, the contradiction which is alleged is already present.

A similar obscurity is present in Tönnies, *Gemeinschaft und Gesellschaft*, 1887, p. 254. On the one hand, customary law, as being natural law, is the 'community' itself, which presents itself as an 'institution of natural law.' In other words it is itself the constitutive form of a society, through which the latter exists as a unity. (Cf. p. 225.) On the other hand, for that very reason customary law is *positive* law, *i.e.*, an ordinance issuing from society and binding upon individuals. Here the common conviction of the binding force of a custom—a conviction which is held to constitute the unity of a society itself—has been converted into an intention in that same unified society to maintain the system which manifests itself in the custom.

Goos (*loc. cit.*, I, p. 125) tries in the following way to prove the existence of a common legislative will in customary law. Each person follows certain rules of action because he thinks that this is the common will of all the others:—*opinio obligationis*. This imitation on the part of each individual implies, however, the presence of a collective will having the rules as its content, though this will may be unorganized. In this way the above-mentioned *opinio* is justified. "The general subjection *ex opinione obligationis* is therefore more than a sum of obedient wills. It is also the establishment of legal norms by the community or the communal power." How can the will of *the whole* establish norms when each individual is governed only by a norm which he considers to be already established? How can one will that so-and-so shall *become* law, when one is already convinced that it *is* law? (Cf. Zitelmann, *Archiv. für civ. Praxis*, Bd. 66, p. 370). Besides, the *opinio obligationis* here mentioned is quite wrongly described. As appears clearly from the posi-

[1] Cf. above, pp. 23 *et seq.*

tion of the judge in ancient German law, the question was never in the least: 'What do other members of society wish to be positive law?,' but only: 'What is the traditional law?'

A decided rejection of all attempts to refer customary law to a certain will is to be found in Loening, *Über Wurzel und Wesen des Rechts*, 1907, p. 19, though no adequate ground is given for it.

(c) *On the meaning of responsa prudentium in the time of the Roman republic.*

Next we may call to mind the importance which the *responsa prudentium* acquired in Rome in republican times.[1] Here there was an influence on the legal system on the part of private individuals 'learned in the law,' which is plainly comparable with the power of legislation.[2] What gave the 'men learned in the law' this authority? Every explanation is defective except that which refers to the need of an interpretation of the law of the twelve tables, in accordance with the demands of actual life, and to the reputation of the persons in question. The circumstances here were such that the whole thing took place in consequence of their own force, whether in concurrence with or in opposition to the will of the popular assembly or of the people.

(d) *The Roman ius gentium.*

The Roman *ius gentium* may also be mentioned. In the opinion of the Roman jurists this was a law common to the various peoples, and it was not definitely distinguished from *ius naturae*, the law founded on *naturalis ratio*.[3] It was nothing but a system of legal principles which arose naturally from the more lively trade-relations between and with foreigners within the Roman empire. These principles were used primarily (by the *praetor peregrinus*) merely to settle the legal relationships of foreigners to each other and of Romans to foreigners, but they gradually superseded the

[1] Cf. the importance of the Brehons for the development of old Irish law. Maine, *Lectures on the early History of Institutions*, 7th. edn., 1905, Lect. II.

[2] Maine, *Ancient Law*, p. 30 and Kuhlenbeck, *loc. cit.*, I, pp. 200 *et seq.*

[3] Gaius, Inst. I, 2, 1. Cf. Bruns-Lenel, *Gesch. und Quellen des römischen Rechts* in Holtzendorff-Kohler's *Encykl. der Rechtsw.* I, 1904, p. 103.

ius civile as the law which held for Roman citizens. The assertion of Bergbohm and of other positivistic jurists, that the Roman jurists never regarded *ius gentium* as in itself binding, is refuted, as Cathrein[1] has shown, by definite statements on their part. The parallel between *ius gentium* and *ius civile* comes out strongly in the theory that rights could be acquired either *iure gentium or iure civili.*[2] It is also extremely unlikely that the praetorian edict, in so far as it contained elements from *ius gentium*, would have been regarded either by the praetor himself or by the people as the declared will of the state or anything of that kind. Did the people, then, leave it to an official to introduce at his own pleasure legal principles and thus to determine the foundations of social life? No, according to the received view the praetor could not create any law.[3] The only natural way to regard the matter is this. The praetor, with the support of distinguished jurists, came by force of circumstances to construct a *ius gentium* as an enduring obligatory norm for legal relationships under certain circumstances. And in the praetorial edict he announced that he would regard this construction of his as positive law.[4] The material out of which the construction was made seems to have been certain well-known legal customs among different peoples. From this were extracted common elements, whose application as independent rules of law met the needs of the situation. (An example is the use of *traditio* for the transference of property.) It was considered that such elements constituted the essence of the legal customs; other elements were accidental and could be shed.[5] The people revered the praetorian construction of law because it was performed by the official whose duty it was to deal with the application of positive law.

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[1] *Recht, Naturrecht und positives Recht*, 2. Aufl., 1909, pp. 195 *et seq.*

[2] See the passages quoted by Ehrlich, *Beiträge zur Theorie der Rechtsquellen*, I, 1902, 94.

[3] See Binder, *Rechtsnorm und Rechtspflicht*, 1912, p. 31.

[4] Cf. Savigny, *loc. cit.*, I, p. 117: "The praetor, on the other hand, did not announce in his edict what the law henceforth would be, but what he would regard as the law and would apply." Cf. also Puchta, *loc. cit.*, I, p. 40 *et seq.*

[5] See Maine, *Ancient Law*, p. 44 and Tönnies, *loc. cit.*, p. 238.

If what we have adduced is correct, it is idle to talk in this case of a will, whether of the state or of the people, which determines law. The decisive factor was the conviction, common to the legal organs and the people, concerning positive law, in the sense of standing rules about rights and duties and about the authoritative statement of such rules. This conviction made those rules into positive law in the sense of rules actually followed in practice without any intermediary resolve to maintain them either on the part of an abstract state-power or of the people.

There is only one reasonable ground for denying that *ius gentium* in Roman law is a law which holds directly and without any mediating state-will in a certain region in the sense that it consists of rules of action which are in fact followed. This is the fact that the legal principles with which we are here concerned, *viz.*, those which were demanded by increasing intercourse among peoples, first became binding in concrete situations through praetorial interpretation (if we neglect cases of legislation); and that this interpretation was inevitably arbitrary because of the vagueness of the principles in question. This makes it appear that the interpreting authority is the real legislator.[1] But it should be noted that even law (in the modern sense) becomes actually binding in concrete situations only through the interpretation which gets itself accepted. *Only* this interpretation is irresistibly in force. But it cannot for that reason be denied that the law itself, in its abstract character, is also positive law, provided that it actually binds the authorities who are empowered to apply it to particular cases by means of interpretation. Thus it constitutes the basis for regulating concrete situations in actual life. In Rome too, in the same way, the principles referred to were the basis for regulating concrete situations, in so far as they were actually binding on the legal organs.[2] That they were intrinsically vague may well be true. But (i) it should be noted that even statute-law, in spite of its technically developed form, cannot generally be applied without

[1] Thus Mommsen, *Römisches Staatsrecht*, III, 1887, p. 604, note 2.

[2] Cf. Hildenbrand, *Geschichte und System der Rechts- und Staatsphilosophie*, I, 1860, pp. 608 *et seq.*

passing beyond its verbal content by using certain principles of interpretation; and that therefore it is not a sufficiently definite basis for the regulation of concrete situations. (ii) One must not exaggerate the vagueness in the principles in question. It certainly cannot be denied that there really are certain legal principles which must be applied if any active economic intercourse is to be possible, in so far as it rests on the basis of free private economic activity. That the Roman law could work for centuries as a *scripta ratio* for different peoples bears witness to this fact.[1]

(e) *The position of the law in relation to the "sovereign" people in the Athenian democracy.*

In this connexion it should also be mentioned that even in the palmy days of the Athenian democracy the law was regarded as standing above the sovereign people itself, in the sense that they were by no means unconditionally free to alter existing laws, even if they observed proper legal forms in doing so. This is plain from the fact that, if a citizen brought an accusation on oath against the proposer of a newly accepted law, the law could not come into force until the popular court had given a judgment of *acquittal.* The accusation might be concerned either with the illegality of the proposal (γραφὴ παρανόμων) or with the disutility of the law (γραφὴ εἴ τις μὴ ἐπιτήδειον νόμον γράφειε).[2] Nay, even if the proposer's responsibility had lapsed through efflux of time, the law could still be subjected to legal trial, and its coming into force would depend on a judgment of acquittal by the popular court. In that case the law itself is the accused party. In Demosthenes' speech against Leptines, the latter is represented as speaking "for the law," although he himself was free from responsibility. The prosecutor is represented as pleading the case against the law.[3] A judgment is given about the law itself, as to whether

[1] Cf. Schmölder, *loc. cit.*, pp. 34 *et seq.* and 92.

[2] Demosthenes, *Or.* 24, especially 710, 33, Pollux, *Onom.* H, 88, Schoemann-Lipsius, *Griechische Alterthümer*, I, 1897, pp. 411 and 416, Busolt, *Die griechischen Staats- und Rechtsalterthümer*, 1892, p. 263.

[3] Demosthenes, *Or.* 20, 477, 67.

it is "expedient or not."[1] If an already accepted law was made the object of subsequent legal investigation, special spokesmen for the law had always to be chosen.[2] It is also of interest to notice that, during a certain period (beginning at least from the end of the fifth century), changes in the law did *not* take place by means of the *ecclesia* (apart from legal investigation by the courts, which was always a possibility). They were made in the last resort by a legal commission (*nomothetes*) chosen from the circle of the sworn judges. (It is possible that the council also belonged to it.)[3] That it really was of special importance that sworn judges acted as *nomothetes* is plain from the fact that the proceedings took the form of a legal action between the old law, which was to be repealed, and the new law, which was to be substituted. The *ecclesia* had to choose five defenders of the old law against the proposed new law.[4] The decision of the *nomothetes* had also, in Demosthenes' view, the nature of a "dokimasi" of the new law. That is to say, the new law was subjected to an investigation comparable to the testing of the legal competence of officials chosen by lot. That changes in the law thus acquired the character of legal judgments implies that the law had to be altered in accordance with its own spirit, *i.e.*, on principles of equity and public utility. Note that the judges were directed by their oath to judge according to their own law convictions where the law itself did not decide. According to Demosthenes this was especially so when a proposed law was on trial.[5] Suppose now that one takes into account the further fact that the new law could always be subjected to investigation by a formal court, even if it had been accepted by the *nomothetes*. It then becomes evident that a change in the law was not in the nature of a resolve on the part of the

[1] *Loc. cit.*, 482, 83.

[2] Demosthenes, *Or.* 20, 501, 146 and 503, 152.

[3] See, *e.g.*, Hermann, *Ueber Gesetz und gesetzgebende Gewalt im griechischen Alterthume*, 1849, p. 65, Schoemann-Lipsius, *loc. cit.*, I, p. 415, Busolt, *loc. cit.*, p. 265, and Lipsius, *Das Attische Recht*, II, 1908, p. 385.

[4] Demosthenes, *Or.* 24, 707, 23 and 20, 484, 89. Note that the proposer was the plaintiff against the old law (γράφεσθαι).

[5] *Or.* 20, 492, 18.

supreme power, but was a declaration from the authorities charged with such questions that the new law had a *right* to come into force as against the old one. It may also be said that it had the character of a constitutive judgment, where the successful party first acquires his right through the pronouncement of the court. But this pronouncement must be in accordance with the law.

There is thus an obvious analogy between the powers of the authority which had the final say in alterations of the law and the powers of the praetor in Rome in regard to *ius gentium*. The latter could, by an authoritative interpretation of *ius gentium*, give legal force to those principles which were necessary for mutual intercourse. But, in so doing, he merely gave expression to his own law convictions; he declared merely that this, in his opinion, which was authoritative, *was* positive law. In the same way the actions of the law-changing authority in Athens were valid only as an authoritative declaration that a proposed law had the right to come into force in consequence of the highest legal principles, *viz.*, equity and public utility.[1]

(f) *Attempts to defend the will-theory even in respect of the above situations.*

Salmond[2] thinks he can defend the application of the will-theory even to such more primitive conditions by alleging that the *formal* source of law, that which gives the form of law (which here means positive law), is always "the power and will of the state" or "the organized commonwealth." This holds true, he says, no matter what the *material* sources of law may be. His meaning is that the *putting into force* of a certain law, which is essential to its formal character as positive law, always depends on the will of the state, whatever may be the reasons why just *this* is put into force.[3] But what does "the power of the state" mean here? Suppose that it means the supreme personal power in the

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[1] In addition we may compare with the praetor's legal position the original functions of the Frankish royal court of justice and of the English chancellor.

[2] *Jurisprudence*, p. 50 *et seq.*

[3] So too Lasson, *System der Rechtsphilosophie*, 1882, p. 413.

state. Salmond himself asserts[1] that it is by no means "within the powers and functions of political rulers to change and subvert the laws at their own good pleasure" according to primitive ways of looking at such matters. If such views are prevalent, the holder of political power will certainly find that it is not within the bounds of possibility to neglect to do what is expected of him as regards carrying out the laws, if he would retain his own legal position. But, in so far as his power depends on his legal position, which it certainly does in stable conditions of society, he simply *cannot* act as a political ruler without taking account of laws which stand above him. Under such conditions what meaning can be attached to the ruler's will to uphold or not to uphold the laws? If it is this will which here gives legal force to the laws, then it is also the will of the subordinate authorities to obey the commands of their superior which gives legal force to the latter. But, as is well known, the subordinate authority is unfree in this respect because of the coercive power of the superior. But suppose that the "power of the state" means the organized power of the people. We have already shown (see above, pp. 64 *et seq.*) that, where there is a general conviction of a law standing above the whole community, this conviction puts itself into effect without any intermediate collective intention to uphold the rules which are regarded as positive law. Thus, whichever of these two interpretations one takes, it is not the will of the state-power which is the ground for putting the law in force, *i.e.*, the ground of its binding force under given conditions. Either the state-power is in a position to exercise its power only on the condition that there is a will to carry out certain rules of conduct. In that case there is no power, prior to this volition, which could make a decision in one direction or another. Or else the supposed will is a mere chimaera.

Maine's attitude to the present question is peculiar. He says (*Early Instit.*, p. 364), in regard to the possibility of applying the Austinian theory of will-power to certain primitive legal conditions: "The theory is perfectly defensible as a theory, but its practical value and the degree

[1] *Loc. cit.*, p. 132.

in which it approximates to the truth differ greatly in different ages and countries." This is indeed a rather peculiar view of what is required if a theory is to be "completely defensible." But note further the objections which are brought against its truth. "There have been independent political communities, and indeed there would still prove to be some of them if the world were thoroughly searched, in which the Sovereign, though possessed of irresistible power, never dreams of innovation" (*i.e.*, in regard to the rules of law). *This* is certainly not an argument against the truth of the theory. Everything still seems to depend on the sovereign's will. But why not put the question as follows? "Are there not historical cases where the sovereign is, in consequence of the climate of ideas, utterly powerless in face of existing rules, and where therefore his "will" is without importance in respect to these?" If this question must be answered in the affirmative—and no one has shown this more conclusively than the distinguished author of *Ancient Law* and *Early Institutions*—then the theory, which claims to be quite general, is actually false and thus in no way "perfectly defensible."

2. Difficulties of the will-theory in regard to the application of the law by the judge in modern times

But we can in fact extend the argument, which has been applied above to primitive legal conditions, to cover modern ones too, although in the latter case neither religious law nor customary law nor natural law nor such an institution as *responsa prudentium* plays a corresponding part. What concerns us here is the *significance of statute-law for the judge.*

(a) *Can the judgment be regarded as including the utterance of the legislator's will?*

Is the law, which the judge takes account of, identical with the content of the legislator's will? Bergbohm asserts that the law is for the judge "always at the moment when he makes his decision completely predetermined, completely flawless and self-consistent, no matter how hard he had to struggle beforehand with the indefiniteness, the inadequacy, and the disharmony of the *indicia* of the law in order to bring to light the latent rules of

law."[1] So the "*indicia* of the law" ("Rechtszeugnisse") can be disharmonious, indefinite, and full of flaws; but the law which is present to the judge at the moment of decision is ideal. But the "*indicia* of the law" are after all the only authoritative expression of the legislator's will. We must therefore conclude that the law which holds for the judge cannot be identical, as Bergbohm himself thinks, with the content of the legislator's will.[2]

If the judge really had to puzzle out the legislator's actual meanning as conveyed in the relevant expressions of it, one is afraid that he would be confronted with a Sisyphus' task. This is particularly obvious when the legislator is a corporation. There is no reason why the decisive majority in the corporation should not contain members who have altogether different objects in view in voting for a law. Nay, is it altogether incredible that some of them had no opinion whatever about the implications of the law in certain points?[3] Of course it is always possible to a certain ex-

[1] *Jurisprudenz und Rechtsphilosophie*, 1892, p. 384 note. Cf. pp. 375 and 391. Cf. Schlossmann, *Der Vertrag*, 1876, p. 172, Salomon, *Das Problem der Rechtsbegriffe*, 1907, p. 65, Kaufmann, *Das Wesen des Völkerrechts und die Clausula rebus sic stantibus*, 1911, pp. 48 *et seq.*, Bruns-Eck-Mitteis, *Das Pandektenrecht* in Holtzendorff-Kohler's *Encykl. der Rechtsw.* I, 1904, p. 304, Nagler, *Der heutige Stand der Lehre von der Rechtswidrigkeit*, 1911, pp. 89—90, and the excellent exposition in Radbruch, *Grundzüge der Rechtsphilosophie*, 1914, pp. 187 *et seq.*

[2] Wurzel (*Das juristische Denken*, 1904, p. 26) accentuates the usual contradiction in the positivist view on the above question in such a way that there are said to be flaws in the positive law but these are to be patched with positive law.

[3] Cf. Hagströmer, *Swedish penal Law*, I, 1905, p. 45. (In Swedish), Bülow, *Gesetz und Richteramt*, 1885, p. 35, and Schmitt, *Gesetz und Urteil*, 1912, pp. 22 *et seq.* The circumstances mentioned above are altogether ignored, *e.g.*, by Windscheid, *Pandekt.*, I, 7. Aufl., pp. 51 *et seq.*, Bierling, *Jur. Prinzipienlehre*, IV, 1911, pp. 197 *et seq.*, W. Jellinek, *Gesetz, Gesetzesanwendung, und Zweckmässigkeitserwägung*, 1913, p. 139 *et seq.*, and Herrfahrdt, *Lücken im Recht*, 1915, pp. 46 *et seq.* All these regard the "legislator" as a single historical person, whose inmost thoughts are to be deciphered by the historical method when the law is to be applied. Heck (*Gesetzesauslegung und Interessenjurisprudenz*, 1914, pp. 13 *et seq.*, 59 *et seq.*, and 64 *et seq.*) thinks he can overcome the difficulty by referring to the "legal community" as the legislator, as if its interests determined every law.

tent to discover, by means of historical investigations (including pure textual research), the opinions about the law which were held by the originator or originators of the proposal or by a preparatory committee or by certain influential members of the legislative corporation. But even this is possible only in a certain measure. It must always be borne in mind that legislation often has its basis in the ideas of justice current in particular social classes, which express their interests. These ideas, which influence those taking part in the work of legislation, have not always the clarity which might be desired, since they are of instinctive origin. To this should be added that legislation under modern conditions is often the expression of a compromise between opposed ideas of justice, and therefore lacks any single line of thought.[1] Moreover, the results which could be reached by the means described above are by no means satisfactory for determining the real intention of the corporative legislator. That intention need by no means be identical with the point of view either of the law-commissions, of the committee, or of individual members. It is therefore incorrect to describe a method of interpretation which is historical, in the sense explained, as involving a way of discovering the legislator's will. But similar difficulties also appear when the legislator is the monarch alone, at any rate in the case of modern complicated legislation. How is it possible, *e.g.*, that the Russian czar should have a clear idea of the implications in every detail of the legal proposals which he makes into positive laws? Here too research into the motives of law-commissions, etc., in proposing a law does not supply real knowledge of the legislator's will.[2]

But, quite apart from this, such a method of interpretation is inadequate as a means of finding the key to the proper applica-

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[1] See Rumpf, *Gesetz und Richter*, 1906, p. 108 and Merkel, *Juristische Enzyklopädie*, 5. Aufl., 1913, p. 55.

[2] See Wurzel, *loc. cit.*, pp. 48 *et seq.*, where the controversy in juristic literature on the meaning of "the legislator's will" is discussed; Bülow, *loc. cit.*, pp. 48 *et seq.* and Wüstendörfer, *Zur Hermeneutik der soziologischen Rechtsfindungstheorie*, *Archiv für Rechts- und Wirtschaftsphilosophie*, IX, 3, pp. 307 *et seq.*

tion of the law to all cases that occur,—cases whose very possibility could not have been foreseen when the law was passed, but which must yet be decided in accordance with the law. To this must be added that in interpreting a law attention must always be paid to the legal system as a whole. It is by no means the case that a self-consistent whole always arises when various ordinances are combined and account is taken of the so-called motives behind the law. On this ground alone it is always necessary both to limit and to supplement the method of interpretation in question by another which is more objective. One seeks for the so-called 'reasonable meaning'[1] of the special ordinances, *i.e.*, really the meaning which they would have on the assumption of a *contemporary* legislator, who was reasonable (in the opinion of the interpreter), and who had a clear comprehensive view of the various typical possibilities of application.[2] It is obvious that all kinds of moral, economic, and social-political judgments of value must enter here.[3] Nevertheless, the desire to secure certainty in the law produces an effort towards consistency in the interpretations of the courts.[4] In this way the subjective tendencies to valuation on the part of the interpreter are checked, and a *certain* mode of valuation becomes prevalent and stands out as the correct one. It is plain that the standard of values of the socially predominant class must have great importance in this.[5] Furthermore,

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[1] A characteristic expression of this is the so-called objective theory of interpretation, represented by such writers as Kohler, Binding, and Wach. Laws are to be interpreted "according to what is reasonable in the case." "The historical interpretation is wholly worthless" (Kohler). Cf. Radbruch, *loc. cit.*, p. 190 and Reichel, *Gesetz und Richterspruch*, 1915, p. 71. According to Rumpf (*loc. cit.*, p. 120) the objective theory of interpretation is the one which is predominant in the literature.

[2] For the presumption of reasonableness in modern jurisprudence see Sternberg, *Einführung in die Rechtswissenschaft*, 2. Aufl., 1912, p. 134. Cf. Stammler, *Theorie der Rechtswissenschaft*, 1911, p. 609, Kaufmann, *loc. cit.*, p. 86, Binding, *Handbuch des Strafrechts*, I, p. 455 *et seq.*, and Reichel, *loc. cit.*, p. 76.

[3] Clear expositions of this will be found in G. Rümelin, *Werturteile und Willensentscheidungen*, 1891, Wurzel, *loc. cit.*, and Rumpf, *loc. cit.*

[4] See Schmitt, *loc. cit.*, pp. 71 *et seq.*

[5] Cf. Spiegel, *Gesetz und Recht*, 1913, p. 61.

one ordinance must be co-ordinated with another, and this without regard to the identity of the legislator or to consistency between the operative motives behind the law in each case.[1] In this way there is constructed, on the basis of abstractly possible interpretations of the several ordinances consistent with their verbal form (eked out where possible with the method of interpretation which is regarded as historical) a legal system which the judges take as the foundation of their decisions.[2]

Where this system, even when eked out with customary law, proves inadequate for the application of a law, recourse is had to analogy of law (which is always determined by teleological considerations) to "the spirit of the law," to "the nature of the case," to justice and equity, as special sources of law. Here it is still more

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[1] Wurzel says (*loc. cit.*, p. 54): "No jurist hesitates to explain and to put a construction upon a law by reference to any other law, even though the latter originates from different persons and from a different period, *without demanding a shred of evidence that the legislator* who passed the law which is to be explained had the other law in mind at the time." See Heck, *loc. cit.*, p. 179, for an account of how conflicts between laws are solved by "development of the law" on the part of the judge.

[2] According to Saleilles the art of interpretation may be defined as "a theory of the application of law which keeps itself in harmony with the *purpose which gave rise to the law*, with its *adaption* to the needs of the present, and with a general attitude towards the conditions of life in the future". The quotation is from Jung, *Das Problem des natürlichen Rechts*, 1912, p. 6. Taking account of social needs in interpreting laws is often maintained to be the correct method by modern jurists. See, *e.g.*, Heck (*loc. cit.*, pp. 278 *et seq.*), who cites Kohler's and Wüstendörfer's sociological theories; Sternberg, *loc. cit.*, p. 124; Krückmann, *Einführung in das Recht*, p. 149; and the quotations given by Reichel, *loc. cit.*, p. 78.

Of the three mutually complementary methods of interpreting laws which are employed in modern jurisprudence, *viz.*, the grammatical, the "logical", and the historical (which refers to the development of a legal institution), only the first can be regarded as closely connected with discovering the legislator's real will. (See, *e.g.*, Makarewicz, *Einführung in die Philosophie des Strafrechts*, p. 21). Schlossmann, in his essay *Der Irrtum* in O. Fischer's *Abhandlungen zum Privatrecht und Zivilprozess*, Vol. 9, 1903, strongly emphasizes that the "logical" interpretation, in particular, which has always been common and which Rumpf (*loc. cit.*, p. 138) identifies with interpretation "on internal evidence", in no way refers to the will of the legislator.

obvious that considerations which are independent of the legislator's will, in so far as that is objectively ascertainable, come into play.

A person who uses analogy in applying a law may take himself to be acquainted with the purposes of the legislative will. On that supposition he may think that he knows that the legislator, if he had had the present case before him, would have treated it legally in the same way as certain other cases. But this has not in fact happened. Actually there was no legislative will which acted by giving a command or declaring an intention. When, notwithstanding this, analogy is used in applying the law, one takes as one's ground, not the particular order which the legislator *actually intended* to establish, but the *purposes* which lay behind his intention. So one goes outside the concrete intention which the legislator had in making his decision. Moreover, if the legislator himself was unaware of any gap in the law, one goes, not merely outside his concrete intention, but against it. For the legislator, who had never thought of the present case, was determined by the idea that the establishment of the ordinance in question would lead to the result which he desired, *viz.*, the realization of a certain legal policy. This idea, as determinative of his decision, is the concrete intention. Now, in order to be in agreement with the legislator's will, the judge himself would have to be determined by the same idea in his action. But, in so far as he judges by means of analogy in such a case, his action depends on *departing from* the idea which was the concrete intention of the legislator. *E.g.*, the old German commercial law ruled that an offer made to a person who was present at the time should be reckoned as declined unless it were immediately accepted, whilst an offer to a person at a distance should remain open for a certain period. Then offers by telephone, a case which the law could not have foreseen, came to be treated as if the recipient of the offer were present, by an analogous application of the rules which already held for such cases. (See Zitelmann, *Lücken im Recht*, 1903, pp. 10—11.) The legislator's concrete intention, which determined his enactment, must be supposed to have been based on the thought that the rule given would secure, let us say, a reasonable concern for the interests of both parties in regard to the time for which an offer should remain valid. But, in consequence of the occurrence of a kind of case which was in principle unknown to the legislator, precisely this thought is deemed by the judge to be mistaken. The judge, in making use of analogy, has thus rejected the legislator's *concrete intention*, but has instead been determined by his *purpose*. If, on the other hand, the judge were to omit to apply analogy in such cases, after he had seen the mistake in the legislator's motives, he would by no means be in agreement with the

concrete intention of the legislator in his decision. For he would then be keeping to the restricted interpretation in full knowledge that this leads in the opposite direction to the goal which the legislator had set up.

Bierling says (*Juristische Prinzipienlehre*, IV, p. 383) of gaps in the law that they can be held to exist only when the existing norms "do not completely suffice for the intention of the law directed to the regulation of certain legal relationships or groups of such." Since analogy as such is a means of filling gaps in the law, it aims at improving the fulfilment of "the law's intentions" in certain regulations.

As regards modern views of analogy see further Rumpf, *loc. cit.*, p. 147, Oertman, *Gesetzeszwang und Richterfreiheit*, 1909, p. 27, and Herrfahrdt, *loc. cit.*, p. 44. Oertman talks, in this connexion, of the legislator's "judgments of value" as "objectively valid rules of law" (p. 28). The same line of thought occurs in Heck's already mentioned work *Gesetzesauslegung und Interessenjurisprudenz* and also in Müller-Erzbach, *Gefühl oder Vernunft als Rechtsquelle*, 1913, pp. 12 *et seq.* On this view the will-theory, according to which only the legislator's concrete intention at the time when he makes his decision has legal force, is set aside. This is realized by Herrfahrdt, *loc. cit.*, pp. 38 *et seq.* Falk's attempt (*Die Analogie im Recht*, 1906, pp. 52 *et seq.*) to retain the will-theory in connexion with the legal force of analogy, by referring to a "will of the legal community" which lies behind the state-will, rests on a mystification.

Savigny (*System des heutigen römischen Rechts*, I, p. 292) makes the following assertion: "Every use of analogy rests on the assumption of the internal consistency of the law; only this is not always a merely logical consistency like the pure relation between ground and consequent, but, on the contrary, an organic conclusion which proceeds from a synoptic view of the practical nature of legal relationships and their original forms." If one takes account of the fact that the organic character of law, according to Savigny, is determined by the spirit of the people, which gives a teleological unity to it, the consequence follows that analogy in jurisprudence involves the application of teleological points of view. Wüstendörfer (*Archiv für Rechts- und Wirtschaftsphilosophie*, IX, 2, p. 179) complains of the obscurity in Savigny in regard to the difference between the logical and the teleological points-of-view in the application of analogy.

Really juridical analogy, on the basis of the will-theory, is never a purely logical argument. The legislative concept, which is derived from one or more special legal rules as their ground, has no wider sphere of application than the basis from which it is derived. For it is neither a rule of law itself, nor a cause from which rules of law necessarily proceed, but is merely a basis of decision for men in creating rules of law.

Therefore, from the standpoint of the will-theory, all derivation of new rules of law from it is absurd. This is overlooked by those who regard analogy in the application of law as a cogent deduction. See, *e.g.*, Binding, *loc. cit.*, pp. 214 *et seq.* and Kierulff, *Die Theorie des gemeinen Civilrechts*, 1839, pp. 25 *et seq.* Cf. Falk, *loc. cit.*, pp. 48 *et seq.* and Wüstendörfer, *Archiv für Rechts- und Wirtschaftsphilosophie*, IX, 3, p. 291.

In reality, however, it often happens that it is hardly possible to say what were the aims of those who drafted a law. Still less can the intentions of the *real* legislator be ascertained and least of all those of the extremely confused 'spirit of the people.' So the use of analogy is often determined by the judge's own valuations, or by his own purposes. He assumes that such valuations constitute the legal basis (*ratio*) of the rules which are actually given in the law for certain cases; viewed in this light, the rules become applicable to other cases too. Through the valuations the judge gets a norm by which he can decide that the similarities between different state of affairs (*Tatbestände*) are legally essential and that the dissimilarities are inessential. This is also strongly asserted by the so-called 'free-legal' school. See, *e.g.*, Rumpf, *loc. cit.*, p. 147, Schmitt, *loc. cit.*, p. 12, and Wüstendörfer, *Archiv für Rechts- und Wirtschaftsphilosophie*, IX, 2, p. 179. Cf. Stark, *Die Analyse des Rechts*, 1916, p. 122.

But even when the system which is obtained by historical and objective interpretation of the particular legal ordinances really does provide a norm for applying the law, *i.e.*, a major premiss under which a legal case can be subsumed, it may happen that one uses the sources of law which we have just been mentioning. This happens if subsumption under the rule would lead to results which conflict too violently with certain moral, economic, or general social values, or with the demands of justice or of equity. Here the principle is very important that the ground for treating a certain case in a certain way, which is obvious from the standpoint of the legislator or merely of the interpreter of the law, ought to hold for any other case where it is equally applicable.[1] There then occur what Zitelmann has called "spurious gaps" in the law, *i.e.*, one uses sources of law, which are valid in

[1] See Zitelmann, *loc. cit.*, pp. 10 *et seq.* and legal cases cited by Rumpf, *loc. cit.*, p. 71 IIIa and pp. 75 *et seq.*, IVa and IVb, Heck, *loc. cit.*, pp. 173 *et seq.*, and Reichel, *loc. cit.*, pp. 113 *et seq.*

principle only for filling in genuine gaps in the law, even where strict adhesion to the principles of regular legal interpretation would allow of only one procedure.

On this point see Zitelmann, *loc. cit.*, Herrfahrdt, *loc. cit.*, and Wüstendörfer, *Archiv für Rechts- und Wirtschaftsphilosophie*, IX, 3, p. 301.

Two cases are possible with such gaps. *Either* there is in fact no ruling relevant to the case, and yet a decision *can* be made within the framework of the given rules by declaring that the facts in question have no legal consequences. But such a decision is found to conflict with the legislator's intentions. *Or* there is formally a relevant ruling, but one believes oneself to know that the legislator would have made an exception if he had thought of the case. See examples in Zitelmann, *loc. cit.*, p. 10, in Reichel, *loc. cit.*, pp. 115 h and 121 a, and the declarations of principle of the German *Reichsgericht* in Falk, *loc. cit.*, p. 8. In the latter case one speaks of a "restrictive interpretation." This is quite incorrect if "interpretation" is taken to mean determining the legislator's real meaning in making the regulation, *i.e.*, the thought behind the words. Since he *has not* provided for any exception here, even though it be because he overlooked the case in question, he must have intended that the rule should hold without exception. "Restrictive," like "extensive," interpretation is in place only if an incorrect form of expression has been used, which therefore does not coincide with the real meaning. But the assertion of an actual mistake, in this case the assumption that the alleged legal intention will be fulfilled in this way, is not concerned with the question what the legislator meant by his words.[1]

Moreover, it should be noted that, although the decision can be made in such cases within the framework of the given rules and therefore it can be said that only spurious gaps in the law exist, yet from another point of view the gaps can be regarded as genuine. It is always assumed here that the "legislator," by which one really means the originators of the draft of the law, did not think of the case in question when he made his rule. Therefore it is always uncertain that one is really in agreement with the legislator's actual intention if one decides the case by applying the existing rules. This is specially true if, under the existing rules, the given facts have no legal consequences whatever. We cannot conclude from the failure of the rules to provide for the case that, if it be decided in this way, the "legislator's" intentions will not be frustrated. It is clear, however, that in this way the possible extent of the gaps would be unlimited. For any particular legal case always has certain peculiarities, of which the "legislator" cannot have thought; and so any decision upon

[1] Cf. below, pp. 306 *seq.* (Ed.).

it within the framework of the given system of rules may lead to a result which would conflict with his intentions. (Cf. Stark, *loc. cit.*, p. 402.) So the limits to the extent of the gaps have to be arbitrarily fixed. A real gap is held to be present only when a decision within the framework of the given system of rules would involve too glaring a departure from the legislator's intention. In view of the difficulty of knowing the legislator's intention this means in reality that the degree to which the interpreter's feelings of value are shocked is the decisive factor. Accordingly Bierling (*loc. cit.*, pp. 384 *et seq.*) is in principle right when he criticizes Zitelmann's way of characterizing the facts on the lines which we have indicated. Cf. Reuterskiöld, *Fundamental Features of the General Theory of Law and of Society*, 1908, p. 92. (In Swedish). But Bierling overlooks the fact that to describe the gaps as "spurious" may be correct from a *certain* standpoint.

As regards the first case, *viz.*, that no legal consequence whatever is associated in the given system of rules with certain facts although such a consequence ought to be associated with it according to the legislator's intentions, the judge may consider that he has no authority to attach a legal consequence to it himself through his decision. As regards the second case, *viz.*, where the direct application of a given rule to a particular case would conflict with the "legislator's" intentions, it can always be maintained that the legislator did not make any exception for the case in question, even though this may have been through inadvertence, but meant that the rule should hold universally. If so, there is no gap for the judge to fill in any such case.

Herrfahrdt (*loc. cit.*, pp. 20 *et seq.*), in order to avoid the above-mentioned lack of limits in the extent of the gaps, which would certainly involve very great dangers to legal security, makes the following assertion. He argues that the criterion for a "spurious" gap is not that the legislator would have given a satisfactory ruling if he had known of the case, but that the legislator would have favoured a certain decision upon the case under the existing unsatisfactory rule. Since the legislator is not supposed hypothetically here to supplement the law, this can only be understood to mean that the special treatment of the case would—*rebus sic stantibus*—be in accordance with his wishes if he were aware of it. It is inconceivable that he, as legislator, would issue a command or a declaration of will, with the case before his mind, except as a law for every similar case. Thus the departure from the will-theory becomes still more obvious. On this view the measure of the extent of a gap is not even a hypothetical will, but only a hypothetical wish.

Under such conditions it is natural that legal theory acquires a peculiar influence upon the application of law. It leads the way,

not *only* in the sense that it gives the most authentic account of the content of the "legislator's will." If judgments of value become necessary in systematizing the law and in filling in "genuine" and "spurious" gaps, legal theory cannot get on without them. It is intelligible that prevalent lines of thought on these matters in legal theory must play an important part, since it offers a fundamental systematization and a filling of gaps in accordance with general principles, which the judges always need in order to apply the law consistently.[1] To this is joined the importance which precedents naturally have (to the great advantage of legal security), particularly where "the content of the grounds of decision are of less importance than having a decision of some kind or other."[2] How strong this influence can be, even when there is a palpable conflict with the "legislator's will," is perhaps best indicated in the following remark of Krückmann's[3], which many jurists would certainly wish to subscribe to: . . . "it is a great nuisance after many decades to discover in some records which one has hit upon by chance that an established interpretation of a certain rule of law is incorrect, and that on the contrary the rule had originally a different meaning and must now be interpreted otherwise than has been accepted for decades past." (On this point further remarks will be made immediately in another context.)[4]

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[1] Cf. Regelsberger, *Pand.* I, p. 87.

[2] Schmitt, *loc. cit.*, p. 107.

[3] *Loc. cit.*, p. 150. And cf. Dernburg, *Pandekten*, 3. Aufl., I, 1894, p. 65 and Regelsberger, *loc. cit.*, pp. 108 *et seq.*

[4] Bernhöft (*Das bürgerliche Recht* in v. Birkmeyer's *Enzyklopädie der Rechtswissenschaft*, 1904, p. 370) maintains that, even in modern conditions, customary law plays a by no means unimportant part as a primary source of law. One is liable to forget, he says, "that to every law, as soon as it begins to be applied in practice, there accrues a superstructure of customary law which is of far-reaching importance". As in Rome "so too to-day every law is explained, supplemented, and modified through being worked over in jurisprudence and in legal practice, and through the opinions and usages of the people". "Every law is a centre for an indefinite number of accretions of customary law, and it is only thus that it is adapted, as it must be, to present and future needs." To this we need only add that the notion of "customary law" is here taken far too

It is therefore not surprising, when account is taken of the complex network of factors which operate in the application of law, in which the ascertainment of the legislator's actual will really plays a subordinate part, that the process has been described as "not a science but an art."[1]

(b) *Can the judge's will be said to complete the law?*

However, the judge's position in carrying out his duties might be so conceived that his will, as an original or a delegated legal power, is independently determinative within the framework of the letter of the law. On that view he would, in exercizing his judicial functions, possess a power which is different from that of the legislator only in the fact that it would be a power to determine positive law merely for a particular actual case. The real legislator would have laid down in his legal enactments the general basis for the judge's legislation. But on that basis the judge would move freely, interpreting and supplementing in accordance with principles which he himself defined.[2] In that case the question of a possible lack of identity between the legislator's will and the law which is valid for the judge becomes irrelevant in investigating the tenability of the will-theory. For the judge's will would then take the place of the legislator's. Certainly the judge would have over him a positive law, in so far as the letter of the law would constitute the framework for his activities. But that law could then be regarded as merely the legislator's will that the judge should confine himself within the letter of the law, and apart from this there would be no law valid for him in his

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widely, since it is made to cover all law which arises through an extra-legal factor. By no means all such law needs to rest on custom.

Spiegel (*loc. cit.*, pp. 18 and 30—31. Cf. also pp. 57 *et seq.* and the examples cited there) more correctly opposes "non-statutory law" to "statutory law," as exercising an influence on the interpretation of the latter.

[1] *E.g.*, Pfaff-Hoffman, quoted by Wurzel, *loc. cit.*, p. 28 and Bekker, *Grundbegriffe des Rechts*, etc., p. 194.

[2] Thus Bülow, *loc. cit.*, pp. 40—41 and Kiss, *Billigkeit und Recht, Archiv für Rechts- und Wirtschaftsphilosophie*, III, 4, p. 547. (The latter does not express himself quite clearly.)

judicial function. His own will would determine the law which is to be valid for the case. From this point of view there would be nothing to prevent law from being regarded as the content of a will expressed in a certain way.

The first point to be settled in this matter is the attitude which ordinary legal opinion takes to the question. It is certainly plain that, according to positive law, a decision which has the force of *res iudicata*, whether it be correct or not, does actually determine the law which shall hold for the case. Moreover, it is by no means excluded that precedents have *legal* importance for subsequent cases. That is undoubtedly true in certain respects in England. But that is not the question here. On the contrary, the question is whether general legal opinion holds that the judge, in presence of a legal case, is authorized to settle for himself, by free interpretation and by filling in genuine or spurious gaps, provided he keeps within the letter of the law, how the case shall be decided. He may lack that authority, and nevertheless it may be that a decision which has the force of law acquires legal validity both for this case and for similar cases in future, without regard to whether the judge in this respect overstepped the bounds of his authority. If the question be put in this way, there can hardly be more than one answer to it. Jung points out that, if a judge lays upon one of the parties to a dispute the obligation to perform a certain action or to forego a certain advantage, this presupposes that the obligation objectively arises from the given circumstances.[1] Otherwise the unsuccessful party would feel that he had simply been robbed of something for the benefit of his opponent. The legislator *regulates* future conditions of life, the judge decides upon past ones. Note here the principle: *Res iudicata pro veritate accipitur. Veritas* here concerns not only legal facts but also the right application of the law.[2] Although the praetor in Rome was actually legislative, both in regard to *ius gentium* and to *ae-*

[1] *Probl. des natürlichen Rechts*, pp. 44—45.

[2] Cf. Kleinfeller, *Gesetzgebung und Rechtssprechung* (*Archiv für Rechts- und Wirtschaftsphilosophie*, I, 2, p. 204), Krückmann, *loc. cit.*, p. 95, and Reichel, *loc. cit.*, p. 109.

quitas, yet he was regarded by others and regarded himself as merely authorized to declare what *is* the positive law.[1] Not even the 'free legal school,' which demands greater freedom for the judge to take account of the requirements of equity even when they conflict with law, asserts that the judge ought in any way to decide the case before him in accordance with his own wishes. The judgment is to be such that it expresses a demand of equity which is obvious for everyone with adequate legal training and knowledge of the case; that is to say, equity, which is to be binding upon the judge, must be supposed to be capable of being objectively ascertained. And it should be quite unquestionable that a judge regards himself as proceeding in accordance with objectively valid norms, not only when in a given case he interprets the law according to his judgments of value, but also when he supplements it or even decides *contra legem*.[2]

There is a strong emotional demand that the judgment shall be just, *i.e.*, that it shall be a declaration of objectively existent rights and duties; and this demand has its roots deep in the past history of civilization. To all appearance the judge had among the Greeks, Romans, and Germans originally the character of an arbitrator to whom the parties voluntarily submitted themselves.[3] He had to exercize the functions of a pacificator by ideal means before the state had developed into a firm power upholding peace by external means. The most ancient Greek legislators were such arbitrators, bringing about peace between warring classes in the main by ideal means, and they were therefore described as '*aisymnets*' (in Homer this means "arbiters").[4] According to Hesiod, the king who is honoured by the muses is distinguished, not by

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[1] See above, pp. 67 *et seq.*

[2] According to Schmölder (*Die Billigkeit als Grundlage des bürgerlichen Rechts*, p. 32), who contends for a freer application of the law, equity itself is a part of law. For, "if it did not pertain to the law, it would be proper to refuse to it any influence upon judicial judgments. For a judicial judgment ought to reproduce the law and nothing besides". Cf. p. 45.

[3] See Wilutzky, *Vorgeschichte des Rechts*, pp. 126 *et seq.* and Ihering, *Geist des römischen Rechts*, I, p. 167.

[4] Shoemann-Lipsius, *Griechische Alterthümer*, I, p. 162.

his might, but by his capacity to bring "even a great strife" to an end by "ably administering justice," appealing to the opponents by "soft words" (μαλακοῖσι ἐπέεσσιν) and awaking in them loving reverence.[1]

The procedure in *legis actio sacramenti* in Rome seems to be a dramatic representation of primitive pacification by a "*vir pietate gravis*," who appears as an arbitrator while a fight is in progress.[2] *Litis contestatio*, *i.e.*, the opening of a legal process, was certainly also originally a mutual acceptance of the judge chosen in presence of the praetor; the judge was therefore primarily an arbitrator.[3] In so far as the process was concerned with infringements of right which it was possible to conciliate, it was intended among the Germans to lead to a conciliatory agreement in place of strife.[4] How could this pacificatory process be exercized by ideal means unless the judge presented himself as having expert knowledge of an *objective* norm for rights and duties which stood above both parties, and as willing to apply it without fear or favour to the case before him? Only confidence in the judge's knowledge[5] in this respect, and in his will to speak the truth and nothing but the truth, could give to him the ideal power needed for pacification. With the need of social peace there was thus inseparably bound up from the beginning the demand that he who takes upon himself the office of judge must put himself, as it were, between the two contending parties. He must not one-sidedly support either[6], but must speak the objective truth as to how the strife is to be brought to an end without either party being deprived of what is rightly his. This demand gave rise to the ἰδεῖα

[1] Theogoni, v. 81 *et seq.*

[2] See Maine, *Early history of institutions*, p. 253.

[3] Dernburg, *loc. cit.*, p. 186, Neuner, *Wesen und Arten der Privatrechtsverhältnisse*, 1866, p. 27, and Kierulf, *loc. cit.*, p. 43, 1.

[4] Brunner, *Deutsche Rechtsgeschichte*, I, p. 253.

[5] Note that in Homer the arbitrator is called ἴστωρ, *i.e.*, the man with expert knowledge. See, *e.g.*, *Il.* 18, v. 501 and 23, v. 486.

[6] ἐζ, μέσον ἀμφοτέροισι δικάσσατε, μηδ' ἐπ ἀρωγῇ (*Il.* 23, v. 574).

δίκη, so highly prized by Homer and Hesiod, *i.e.*, the straight judgment which is one with the truth concerning the case.[1]

But the judge has the same pacificatory function nowadays by ideal methods, although the carrying out of his decision is now guaranteed by external means through the organs of the state. As Merkel says, he is *not merely* an organ of the law as power but also of the law as the doctrine of rights and duties. Confidence that the judge in legal controversies does really and truly express the objective norm for rights and duties, which stands above the litigants, in its application to the case before him, is still one of the corner-stones of social peace. The strength of the demand for this depends to a large extent on this fact; though of course, when the judge represents an irresistible external power, there is in addition a reaction of the feeling of justice against anything which appears as mere violence.

This view of the judge's functions is especially emphasized in the position of the judge in England in respect of the law. Undoubtedly the judge is bound by statutes, by precedents, and by customary law. But he does not feel himself to be merely one who applies abstract rules of law. He regards his function as essentially that of determining the *real* legal relations which arise out of the nature of the particular case before him. He therefore makes his decision much more freely than would be possible on the Continent. See Mendelsohn Bartholdy, *Das Imperium des Richters*, 1908, p. 150 *et seq.* The underlying idea here is that *real* justice is reached, not by the mere application of abstract rules, but by taking account of all the circumstances which are important in order that the real norm for rights and duties shall be applied. It is this freedom of the English judge in relation to abstract rules which has led to the definition of law, which sometimes occurs among English and American jurists, as "rules recognized and acted upon in courts of justice" (Salmond, *Jurisprudence*, p. 9) or "the rules which the courts . . . lay down for the determination of legal rights and duties" (Gray, *The Law and the nature of the Law*, p. 82). Yet the denial of a law binding on the judge himself *in his own consciousness* is fundamentally incorrect. Apart from statutes, precedents, and customary law, which are binding on an English judge, he is always under an obligation to declare the legal

[1] Hirzel, *Themis, Dike und Verwandtes*, 1907, pp. 95 *et seq.* and 108 *et seq.* For the "finder-out of the law" among the ancient Germans as having the duty to "utter the truth," see above, p. 60.

position which, in his opinion, is *objectively* present in the mutual relationship of the parties. Bülow (*Das Geständnisrecht*, 1890, p. 90) asserts strongly that a legal decision in its essence is merely a doing of "justice," *i.e.*, the authoritative establishment of the legal relationships which exist between the parties independently of the decision.

But, if the judge, according to current legal opinion, is under an obligation to express in his decision the objective law itself as it applies to the case before him, he is also bound in actual fact both by his own and the public's view of the law. It is therefore incorrect to say that he himself determines, even within the framework of the letter of the law, the way in which the case shall be decided. It is incorrect to say that the law which holds for the case, as specifically determined in and through his decision, is identical with the content of the *judge's* will. Normally the judge wishes to make a declaration, in pronouncing judgment, of the purport of the objective law as applied to the case before him, *i.e.*, to pronounce a materially correct judgment. This wish may arise from a sense of duty or from fear of sanctions or from both. But in general he does not desire to pronounce a certain judgment simply in order to satisfy his wish that just that pronouncement shall acquire, whether hypothetically or categorically, the force of law. Certainly the judge *knows* that *in fact* his decision will have that effect. But that is not the same as to say that he wishes it. It may be indifferent or even repulsive to him, although for the reasons given he feels bound to decide the case in a certain way. And, even if he does wish it, that is not the motive for his action. It might happen that wishes concerning the law were determining factors in his conviction as to what the objective law involves in the case in hand. But these wishes, which exist in the background, do not usually constitute the motive for making the decision. Once the conviction has arisen, feeling of duty or fear of sanctions or both are the decisive factor.

So the judge is bound in such a way that in normal cases the force of circumstances prevents him from being determined by his wishes about the positive law. The legislator, on the other hand, is determined under modern conditions in issuing legal

declarations, at any rate to a certain extent, by his desire that so-and-so shall become positive law. He is therefore to that extent free in his decisions as to the meaning of legal enactments. (Yet, even in modern conditions, the position of the legislator compared with that of the judge is not wholly clear. Apart from the rules governing his formal sphere of authority, the legislator feels himself bound by an objective norm for rights and duties, which stands above him. He feels obliged to give positive legal force to this, without regard to his social wishes as to what shall become positive law. To investigate this further would, however, fall outside the limits of the present question.) It is true that neither the legislator's nor the judge's intention to bring about certain legal consequences gives the force of law, through their personal power, to the pronouncements which they make. It is a higher legal power which is here decisive.[1] Such an intention really presupposes knowledge that declarations made in a certain way acquire the force of law through a factor independent of them, *viz.*, a legal system which stands above them. But there is this difference. The declarations which acquire legal validity in consequence of the legal system are in the one case determined (within certain limits) by desires as to what shall be law, and in the other case are not. If, then, the legislator's will can be regarded as positive law for the judge, still the overstepping of this will, which undoubtedly occurs on the part of the judge when he interprets and supplements the statute-law, cannot be regarded as acquiring its legal validity for the case in hand through the will of the judge. It is certainly true that the judge often becomes genuinely legislative in so far as his interpretation acquires the force of law. He is not a mere calculating-machine. His subjective convictions as to objective law, which act as an intermediary, may be tinged with all kinds of contingent factors. But one must not conclude from this that the content of the law which is determined by the rulings of the judge is to be regarded as the content of the judge's will expressed in a certain way.[2]

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[1] See above, pp. 28 *et seq.*

[2] Bülow's account in his little book *Gesetz und Richteramt* is misleading in so far as he confuses, or at any rate does not clearly enough distinguish, the judge's

But the subjectivity in the judge's convictions may easily be exaggerated. There are of course objective factors, at any rate where statute-law predominates, which introduce regularity into the judge's performance of his functions and make it objectively capable of being counted upon, to the great advantage of legal security. The ideal rules of conduct supplied by these objective factors, which find their application in the judge's professional activities, together constitute the law which is valid for him. The factors in question are, beside the letter of the law, general rules of interpretation and supplementation together with prevalent lines of thought in jurisprudence and legal practice.

(c) *Can the judge be regarded as authorized to use current rules of interpretation and supplementation?*

It would seem therefore that we can abide by the result reached above, *viz.*, that there is a positive law binding on the judge; and yet that this is not identical with the legislator's will, because the latter's intention in promulgating the law is not the only determinant, on account of outside factors. Still one might, in order to defend the identity in question, put the case as follows. It might be said that it is the legislator's will that the judge shall interpret and supplement the letter of the law by taking account of just those factors. It might be said that the legislator expresses this volition and makes it effective by issuing a general authority to

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undoubted historically established power to make law, on the one hand, and a power of initiating law analogous to legislation, on the other. Cf. pp. 16 *et seq.* with pp. 40—41. A judge's subjective conviction that so-and-so is the positive law, in the sense of a norm for rights and duties either in general or in certain particular cases, certainly can give rise to new rules of law, in the sense of rules of conduct which are applied in practice. (Cf. the reception of Roman law in Germany.) This happens because a legal decision has the force of law for the case in hand, and becomes decisive for subsequent cases as a precedent. But such making of law is distinguished from legislation by the fact that the judge, in making his subjective convictions effective through his decision, is *not* determined, like the legislator, by the wish that so-and-so shall become positive law. There is a similar confusion in Heck, *loc. cit.*, pp. 248 *et seq.*, Adickes, *Stellung und Thätigkeit des Richters*, 1906, p. 13, Gray, *loc. cit.*, pp. 164 and 209 *et seq.*, and Stark, *loc. cit.*, p. 101.

the judge.[1] Naturally the weaknesses of the will-theory reappear here when the question arises of how that authorization is to be interpreted.[2] But we can leave that aside here.

But such a general authorization cannot usually be shown to exist.[3] It is a mere fiction motived by desire to defend the will-theory, and it may be compared with similarly motived fictions concerning customary law as the general will.[3]

It is said, *e.g.*, as regards analogy, that, if it is forbidden for special reasons in a particular field of law, *e.g.*, with regard to threats of punishment, the legislator's "silence" elsewhere shows that he *allows* it in general. (Herrfahrdt, *Lücken im Recht*, p. 20.) This way of arguing is, however, arbitrary. It might well be the case that the legislator thinks it impossible to regulate the use of analogy in such a way that his regulation would be actually followed or would be sufficiently precise. It is quite certainly impossible to talk of a legislator's *permission* when it is a question of the law by which the judge feels himself bound, so that he finds himself obliged to pronounce merely what it determines as regards the case. If this is identical with the legislator's will, it can be a question only of command or prohibition and never of mere permission. No doubt it may be said that this will leaves the judge free, *within certain fixed limits*, to settle the case on his own authority in accordance with certain principles to which the legislative will merely refers, *e.g.*, trade-customs, equity, the purposes of punishment which figure prominently in the penal law, etc. But here the judge certainly does not receive a mere permission. It is, no doubt, *thinkable* that the legislator's will in a similar way tacitly directs the judge to make use of analogy as he may think fit. But, in view of the "spurious" gaps which can be held to be present in every case which the legislator could not have foreseen, is there a single case in which appeal could not be made to the analogous application of legal norms or to the "spirit of the law"? Since it cannot be intended

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[1] This is expressly stated by Kaufmann, *loc. cit.*, p. 96, note 1. It seems to hover before the mind of Stammler, *Theorie der Rechtswissenschaft*, p. 617. Ambiguous expressions will be found in Bernhöft, *loc. cit.*, p. 379. So too in Zitelmann, *loc.cit.*, p. 26 in reference to analogy. On the rules of interpretation as legal prescripts see further W. Jellinek, *loc. cit.*, p. 158 and Bierling, *Juristische Prinzipienlehre* IV, pp. 226 and 264.

[2] See Hölder, *Theorie der Willenserklärungen*, 1906, p. 28. Just imagine a regulation which commands the use of analogy in the application of law!

[3] Art. 1 of the Swiss civil code and its predecessors constitute a merely apparent exception. For the meaning of this see immediately below.

that analogy shall be used without limit, such a general regulation would leave the judge without any directions for deciding *when* the principle is to be applied. To allege that the legislator gives actual directions for the use of analogy is *contrary* to fact. If he can be regarded as favouring the practice through his silence, that has not the least legal significance from the standpoint of the will-theory.

Besides it would hold good in general that, if the legislator should issue an order or a declaration of will in which the current rules of interpretation and supplementation are vindicated, this would amount to ruling that the legislator's actual concrete intention in his particular orders or declarations of will is not to be absolutely determinative. In that case these would be intended only hypothetically. But a genuine order or declaration of will can never be meant hypothetically. So, even if the action contemplated is referred to a certain situation as the condition for its taking place, the "Thou shalt!" of the order or the "I will" of the declaration is categorical. Just such and such an action in such and such a situation "shall" be performed, as a rule for practical conduct. (More of this in another connexion.) But under such conditions the general command or declaration of will concerning the interpretation or supplementation of particular declarations would be the only command or declaration of will which concerns the judge. It is of course understood here that the judge's procedure is to be determined by the result of his interpretation or supplementation. In order that this should be observed and put into practice it would of course be necessary that no ambiguity whatever should exist on just this point, so that the right procedure could be decided upon without question. For this purpose there would be needed detailed legislation about interpretation and supplementation, *e.g.*, about the limits to the use of analogy, about the significance of current practice, etc. But where is anything of the kind to be found?

Article 1 in the Swiss civil code is a mere parody on real command or declaration of will, if indeed anything of the kind is intended. Without issuing any directive to the judge in filling gaps in the law, it refers him to the rule "which he would set up if he were legislator." This means "what he holds to be right when viewed in relation to the legal system as a whole." It refers him *also* to "established doctrine and tradition." [This applies also to interpretation.] It does not answer the question: When is a gap present in the law? See Reichel, *loc. cit.*, p. 50, Herrfahrdt, *loc. cit.*, p. 44, and Rumpf, *loc. cit.*, p. 19.

When Heck argues (*loc. cit.*, pp. 49 *et seq.* and 170 *et seq.*) that in interpreting commands one does not consider merely the intentions of the authority in issuing his several orders, but takes account of these only as a means to investigating what his actual interests were, he alto-

gether overlooks the characteristic peculiarities of a command. When he asserts that such a "deeper interpretation" (p. 51) of the ruler's commands in daily life is the duty of a servant who can think for himself, this may well be correct in so far as it may be the servant's duty, out of regard to his master's *true* interests, to set aside his commands. But this can never constitute *obedience*, unless the *only* command which the master issues is to serve his interests. In that case the latter are to be discovered, not by interpreting actual commands, but by taking account of the wishes which he has declared on various occasions. But it may be questioned whether such a general command is really psychologically possible, in view of the freedom to make subjective estimates of the interest-situation which it would leave to the recipient of the order. In order that a command shall act *as such*, he who receives it must feel himself to be under the influence of a constraint issuing from the person who commands.

But, even if such an authorization existed, it would be meaningless in reference to the application of law. The fact is that, however faithful to the law the judge may be, he *must* treat the letter of the law on principles which arise from the medium in which he works. It is *on the whole* a matter of indifference whether the legislator should authorize or forbid him to take account of the principles for interpreting and supplementing the letter of the law which have once come to be accepted in legal theory and legal practice.[1] A legal regulation which, *e.g.*, forbade the use of anal-

[1] Wurzel (*loc. cit.*, pp. 13 *et seq.*) comes out strongly against the view that rules of interpretation are legal prescripts. According to him, they are "natural regularities." Oertmann (*Rechtsordnung und Verkehrssitte*, 1914, p. 370) speaks of "universal principles of interpretation which are above the state" as operating "with the necessity of natural law."

If Article 1 in the Swiss civil code (cited above, p. 94) were to be generally introduced, probably the only effect on the whole would be as follows. The *formulations of legal decisions* would possibly be modified, and in some places (*e.g.*, in Germany) the freedom of the judge in regard to the "letter of the law", which already exists in legal *practice*, would be extended as stated in this article. In principle it exists everywhere independent of any authorization. That German judges too "have always claimed for themselves" the principle of filling gaps laid down in this article, is emphasized by Reichel, *loc. cit.*, p. 107. It is typical in this connexion that, according to the information given by Falk, *loc. cit.*, p. 5, the use of analogy permitted by Sect. 49 of the Introduc-

ogy in all circumstances, would certainly be impotent in every case where a decision must be made but neither the statute-law nor customary law provide a norm for it.[1] Nay, the same would be true also in those cases where subsumption according to the rules would be too shocking to the sense of justice or where its universal application would be destructive of the more important interests of society.[2] In the actual dependence of the application of law upon judicial precedents, notwithstanding the frequent absence of any legal authorization thereof, we can see clearly how certain sources of law, which cannot be reduced to the will of the legislator, are operative in the application of law. In saying this we do not, of course, deny that the legislator can exert an influence on the application of law through promulgating special rules of interpretation, *e.g.*, legal definitions.

The rule in the Prussian General Landsrecht, Sect. 6: "In future decisions no account is to be taken of the opinions of jurists or former *dicta* of judges" seems undoubtedly to have remained a mere pious aspiration, if one leaves out of account official formulations of legal decisions. (On this point see Schmölder, *loc. cit.*, p. 170.)

Since Bülow's work *Gesetz und Richteramt* appeared (1885) the opinion has been common among German jurists that judicial practice really is legislative without either express or tacit assent on the part of the legislator. (See Oertmann, *loc. cit.*, p. 19.) W. Jellinek (*loc. cit.*, p. 26) speaks in this connexion, in a somewhat peculiar terminology, of a "creation of law through reality" in contrast to "creation of law through freedom" (by the legislator). As regards the actual significance of precedent Spiegel says (*loc. cit.*, p. 42): "If judicial practice agrees with the law, the judge

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tion to the Prussian General Landsrecht is seldom appealed to in decisions which relate to it, and that in *no* case is the decision founded upon the words of the Section.

[1] See Binder, *Rechtsbegriff und Rechtsidee*, 1915, p. 253.

[2] Spiegel (*loc. cit.*, pp. 128 *et seq.*) shows that the prohibition of the use of analogy (in Austrian law) in connexion with threats of punishment, although analogy is certainly not needed for filling real gaps, is nevertheless not consistently maintained. *E.g.*, intentional damage to the state-telephones is treated as if it were a question of the state-telegraphs. The telephone is just declared to be a kind of telegraph! So analogy "enters unnoticed into interpretation". (p. 130). It should be noted, however, that the prohibition has good grounds as a protection of the freedom of the citizen. See Zitelmann, *loc. cit.*, p. 17.

who follows the law can dispense with knowledge of it. If it conflicts with the law, it is not prescriptive for him. Nevertheless, practice, which keeps itself free from doctrinaire reflexions, shows an obvious tendency to *influence* the judge in his interpretation of the laws by holding up the precedents before his eyes. When the law permits of more than one interpretation the judge should, if possible, decide as previous judges have decided."

Nordling (*Swedish civil law*, general part, 1891. In Swedish) takes a somewhat confused position in this question. On p. 34 legislation is put on a level with the practice of the courts and legal doctrine as sources of law. Of the practice of the courts in particular it is said: "These (*i.e.*, the legislator's) prescripts must undergo greater or smaller modifications when applied to particular cases. In the process of applying the law these modifications are connected with the commands of the legislator as legal norms (*N.B.*) defined through legal practice or the practice of the courts." But on p. 36 the question is raised: "To what extent, according to our law (*N.B.*), are precedents to be counted as rules for administering the law?" This question is here answered decidedly in the negative on the basis of statute law, just as if "our law" were determined *merely* by statute law, which was nevertheless contested in earlier passages.

Only in *one* case would it be conceivable that the judge could be forbidden with real legal force to make any use of the usual methods of interpretation and supplementation. This would be if the legislator himself were ready, in every case where any doubt about the meaning of the law was possible, to give an authentic interpretation. But, apart from the difficulty that such an interpretation may itself necessitate further interpretations without end, such a method is alien to modern cultural conditions both for practical reasons and because of the demand made by the general sense of justice that the judge shall be independent of the legislature. It belongs decidedly to the principles of absolutism, according to which the arbitrary will of the ruler in theory determines the "law" in every case.

For Justinian's regulation on this point see Savigny, *System des heutigen römischen Rechts*, Bd. 1, pp. 304 *et seq.* For the corresponding "référé législatif" in later absolutistic systems see Spiegel, *loc. cit.* pp. 100 *et seq.*

(d) *Can the legislator's intention to make the letter of the law the basis of its application be regarded as determinative for the judge?*

However, in order to defend the will-theory at least relatively, we might view the matter as follows. Let it be granted that neither

the legislator's concrete intentions in his various regulations, nor an abstract intention as regards the methods of interpretation and supplementation, is the determining factor in the application of law. Still, it might be said that the *text* of a statute which is to be applied as law must always be intended by the legislator. This is shown, it might be argued, in the case of mistakes in drafting a statute, since what can be proved to be the intended expression is determining the application. Now the actual state of affairs is undoubtedly the following. The legislator starts with the accepted juristic technique as a factor which is independent of him, and regards himself as determining the law which is put into force *in concreto* only through the words in which it is formulated. He does not regard himself as determining it also by his concrete intentions in regard to it or by general regulations for interpretation and supplementation. He formulates it therefore in view of the accepted juristic technique, regarded as a force which operates in a certain way independently of himself.[1] If the legislator is a corporate body, it is also true that the only intention which can be shown to be common to the participants is to give authority to a certain legal form of words.[2] And, if the legislator is a single individual, it is often true that the only clear and indubitable intention is just the legal form of words. So, as regards both the legislator's own point of view and the possibility of establishing what was his intention, we are forced to the conclusion that the only volitional factor in the legislator which can on the whole be considered as positive law is simply the intention to use certain expressions.

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[1] Cf. Kohler, *Ueber Interpretation von Gesetzen* in Grünhut's *Zeitschrift*, Bd. 13, pp. 3, 20 *et seq.*, and 30.

[2] Cf. Bernhöft, *loc. cit.*, p. 370. Salomon (*Das Problem der Rechtsbegriffe*, 1907, p. 74) defines the will which lays down the norms for interpretation as "the totality of law-making factors which are unified in the common end, in so far as they are thus unified". Since only the verbal formulation of the law can with certainty be determined as a "common end," the will which supplies the norms for the interpretation of the letter of the law reduces to the joint pursuit of that end. This of course provides no norm for interpreting the letter of the law.

It must be noted, however, that the legislator's intention to utter a certain legal form of words can never be taken by itself in isolation from the other intentions. If he really intends that just this and nothing else shall be the letter of the law, and does not merely sanction a legal draft without regard to the form of words in which it is expressed, he must have in mind certain legal consequences of the regulation in view of the normal judicial technique. It is only his intention that these consequences shall follow which can determine him to choose just that verbal formulation. Nay, an intention to use a certain mode of expression is possible only as an intention to use it as a means of establishing certain legal consequences. In reality the subordinate intention always contains that which is superordinate to it, although the converse does not necessarily hold. I may in the abstract have the intention to make money. But I cannot, for that reason, intend to start a commercial undertaking except in so far as I regard it as leading to money-making. I intend it, not absolutely, but only as a link in a causal chain. That is to say, the subordinate proximate intention always refers to its object as a term in a series whose end-term is the realization of the object of the superordinate intention. Therefore, if in applying the law the legislator's intention to use just this form of words is to be positive law for the judge, then this will necessarily include the legislator's choice of just this form of words as leading to such and such legal consequences. For there is no other intention but this. If, in cases of mistakes in drafting a statute, the expression actually intended is made the basis for applying the law, the determining factor is merely an objective rule for applying the law; the rule being that a certain factor in the legislator's actual intention is made the basis. Since that factor occurs, only as an item in a context, whilst it is here made into a basis in isolation from that context, the actual intention itself is by no means the determining factor.

We must not let ourselves be led astray here by the circumstance that the legislator, knowing that the letter of the law may carry with it unintended legal consequences, can really be said

to intend to expose himself to this risk and therefore to intend that the expression shall have unconditional legal force. For he intends this unconditional legal force only as a necessary condition for the legal consequences which he desires. There is no other way to reach his end except by exposing himself to the risk that something which he did not intend may result. The intention to express oneself in a certain way, taken in abstraction, therefore simply does not exist. If one goes out sailing in a storm, one intentionally exposes oneself to certain dangers, but merely because that is a condition of obtaining the pleasure or the profit of sailing. Risking one's life cannot be regarded as the content of an isolated intention, as if one would equally well fulfil one's intention if one should founder.

To regard the legislator's intention to express himself in a certain way, taken in abstraction, as the determining factor in applying the law, is to commit the same mistake as is often made in defending the will-theory in reference to private "declarations of volition." The usual irrelevancy of *error in motivis* is combined with the will-theory in such a way that only the actual intention as to *legal consequences* is binding and not the *motives* for intending just those legal consequences. (It is assumed that the correctness of the incorrect belief which is involved in the motive is not regarded as being in any way a condition of the validity of the declaration.) See, *e.g.*, Zitelmann's standard work on will-theory, *Irrthum und Rechtsgeschäft*, 1879. But if, in making a declaration of volition, one intends the unconditional occurrence of the legal consequences one intends that result merely as a necessary condition for the realization of something else. If I buy a horse for riding, on the assumption that I can learn to ride, I certainly buy it without making the correctness of that assumption a condition of the purchase. But I will the unconditional purchase only as a condition of riding. There is no abstract intention of the legal consequences which could bind one to the declaration of volition, which one has made. If the intention of the legal consequences really were what is binding, one would be bound only in so far as the legal consequences really led to the realization of the ultimate end. Absence of *error in motivis*, therefore, must always be presupposed if the declaration is to give rise to a right. (More will be said on this point in another connexion.) In the same way, if what is binding on the judge is the legislator's actual intention to express just so-and-so by legislative enactment, any *error in motivis* on the legislator's part must nullify the force of the law.

The legislator's intention to express himself in a certain way can be regarded as constituting positive law only on condition that the concrete intention in his ordinances is made the basis for applying the law. It follows that the difficulties, already discussed, concerning the identity of the legislator's will and the law which is binding on the judge, have reappeared. The will-theory is thus driven out of its last line of defence as regards the significance of the legislator's will for the application of law.

(e) *Can the will of the "legal order" itself be regarded as determinative?*

In order to avoid the difficulties in identifying the legislator's will with the law which is binding on the judge, and nevertheless to maintain the will-theory, recourse is often had to the notion of a will of the "legal order" itself. This is alleged to be the positive law, independent of the will of this or that legislator, which is binding on the judges.[1] This assumption is quite obviously a council of desperation. It is never explained what a will of the legal order could mean in abstraction from the will of legislative individuals.[2] The objective legal system, which is here assumed

[1] The chief representatives of this view are Binding, Kohler, and Wach. See Reuterskiöld, *Ueber Rechtsauslegung*, 1899, pp. 22 *et seq.* In Swedish doctrine it occurs in Hagströmer, *Swedish Penal Law* (In Swedish), *e.g.*, pp. 45 and 50. He talks promiscuously of "the meaning of the law" and "the will of the law." Spiegel (*loc. cit.*, pp. 17 *et seq.*) connects the theory in question with the transition from monarchic absolutism to constitutionalism, as does Reichel (*loc. cit.*, p. 10). The latter regards the theory as a useful fiction, but this is to abandon the will-theory.

[2] Schmitt (*loc. cit.*, p. 27) asserts that the phraseology in question is modelled upon the idea of the legislator's will and "apart from it is both formally and materially unthinkable".

Seligmann (*Beiträge zur Lehre vom Staatsgesetz und Staatsvertrag*, 1886, p. 138) recognizes that sanction is often given to a law "thoughtlessly" and without its being possible to survey its full bearings. He says therefore: "Is it then illogical to regard the person who has given the force of law to a legal proposition by means of a legal fiction as willing it? How much less logical it is to feign a *will without a willer*, as Binding, Wach, and others do." (Which of these points of view is more logical or illogical is a matter of taste. But neither

to exist with a will of its own, is really only a product of juristic interpretation and supplementation of legislative expressions on principles which become operative by the force of circumstances. That the judge is bound by the letter of the law is one factor in the power of the constitution itself. His being bound to use certain ways of interpreting and supplementing is a consequence of extra-legal factors which act with a certain uniformity on the judges in the exercise of their office. There is no single all-embracing will here; though that does not exclude the fact that all kinds of interests are at work both in the formation of legislative expressions and in the interpretation and supplementation of them.

When Windscheid (*Pandekten* I, 7th ed., p. 58) asserts that the business of interpretation in dealing with gaps in the law is "to recognize the real thought of the legal system," he takes up the same untenable point of view as the dogmatic literalist who assumes that a single coherent thought is to be found in the conglomerate of writings in the bible, dating from various times and written by authors with widely different aims. Undoubtedly the single thought which he believes himself to find is his own and not the bible's. Reichel (*loc. cit.*, p. 10) says, in regard to the time of legal absolutism which was bound up with constitutionalism, that the judge saw in the law a "revelation." "He regarded the law with that unshakable orthodoxy which the older Lutheranism displayed towards holy scripture."

Binding says (*loc. cit.*, p. 456): "So instead of the will of the law-giver it is better to designate the will of the law, which has expressed itself in a legal norm as one item in a single system of law, as that whose content, authority, and intentional effects are the object of the interpretation of this legal norm." And later on: "The law thinks and wills what the reasonably interpreting spirit of the people makes out of it." Cf. the remark of Merkel, quoted by Reuterskiöld, *loc. cit.*, p. 21. Sub-

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of them has scientific validity.) That these authors really smuggle in an individual legislator's will in order to give a meaning to their "will of the law" is shown by the same writer (p. 139—140).

Bernhöft says (*loc. cit.*, p. 379): "The law is a volitional content independent of a person. It continues to be valid for a while even after the death of the bearer of the legislative power, nay even after a violent revolution in the constitution." Cf. quotation from Wach in Heck, *loc. cit.*, p. 74. But he omits to explain how a volitional content can exist without a will whose content it is.

stitute here for the mystical "reasonably interpreting spirit of the people" the prevalent way of interpreting and supplementing, and the reality which is described as the law's own thought and will would be correctly presented.

The same remarks apply to Reuterskiöld's identification of "the spirit of the laws and of justice" with "that which is willed by society" or "the actual collective will" (*loc. cit.*, pp. 62 *et seq.*), which is said to be determined by the universal consciousness of law ("allgemeines Rechtsbewusstsein," p. 65). The reality which corresponds to "the spirit of the laws," etc., is in fact the system of legal rules which is the result of following the prevalent rules for interpretation and supplementation in regard to actual law. It is certain that these rules include regard to social needs and the "universal consciousness of law." But it does not follow from this that there exists a social communal will, with the "universal consciousness of law" as its determining basis as the *principle* for interpreting and supplementing actual law.

Bülow (*Das Geständnissrecht*, pp. 243 *et seq.*, 257, and 271) believes himself to have discovered the true relevancy of admission of facts in civil procedure. This is to be made the basis of the judgment without investigation, not because the conceding party had the intention to surrender his right to contest the admitted facts or to accept them as true, but because the object of the civil process is to bring about peace, and this would be disturbed if the tribunal set about investigating that on which both parties are agreed. *Quieta non movere!* The basis is therefore not a matter of private, but of public, law. From this the conclusion is drawn that Sect. 288 of the German C.-P.-O., which is concerned with admission of *facts*, is to be applied by analogy to the admission of *legal relationships* which are important for the settlement of the disputed legal case. For, it is said (pp. 273 *et seq.*), granted that the authors of the code of civil procedure had no clear view of the principle in question or its consequences, still it contains a "binding legally valid command" which, because of its consequences, is to be applied beyond the limits of Sect. 288. For the law is not a mass of regulations, but "a unitary force governing our communal life, a spiritual whole, whose complete content and deepest meaning" the legislators "could not adequately enunciate." It is the high calling of the judicial office, and of jurisprudence which is the soul thereof, to penetrate more deeply into this than the legislators have done.

On this point the following comment will suffice. Does this unitary force, which the law itself is said to be, really exist independently of the statute which "enunciates" it? Does not the supposed legal principle concerning the object of the civil process derive its force in the first place from the fact that the legislator establishes the process in accordance

with it? Conversely, would not the legislator undermine the principle if he did not consistently observe it in shaping the law of procedure? Note that the extension of Sect. 288 by analogy, which Bülow recommends, was by no means universally admitted as justified in legal practice at the time when he wrote his book. Moreover, is the "unitary force" in question really an independent object of knowledge for the judge and for jurisprudence? Might not the general acceptance of Bülow's principle in judicial practice be a prerequisite of its becoming a factor in the "unitary force" which is said to be the law itself? In a word, is not the supposed force, which is alleged to lie behind the particular commands of the law, and which is said to be the law itself, in its turn a creation of law, of judicial practice, and of legal doctrine in conjunction? And is not therefore the appeal to its commands as an already existing positive law for the legislator, the judge, and jurisprudence, a ὕστερον πρότερον?

This assumption of a will located in the law itself is harmless enough, in spite of its scientific untenability, if the will in question is merely an anthropomorphic ellipsis for the prevalent methods of supplementation and interpretation as applied to statute law. Nay, it is possible that this fiction has arisen from a social need; since the judge, in order not to appear as judging according to his own private inclinations, which would offend the feeling of justice, must have recourse to an authority standing above him. If the legislator himself cannot play this part, the "law" as such is made into the authority required.[1] But it is open to objection in two respects:

(i) It easily leads to the view that the prevalent principles for applying the law are not primary sources of law but are authorized by the "will of the law," which is the supreme source of law. It is therefore thought that they can be subjected to juridical criticism in respect to their validity, as is the case with secondary sources of law, and not merely to criticism *de lege ferenda*.[2]

[1] On this see Wurzel, *loc. cit.*, pp. 94—95.

[2] See above, pp. 41 *et seq.*

In point of fact the ordinary expositions of the *correct* principle for interpreting and supplementing legal enactments are by no means juridical in the proper sense of the word. They belong to practical philosophy or sociology. If, *e.g.*, an author recommends the historically philological method, he maintains at the same time that the legislator's real intentions *ought* to be made the

(ii) It easily leads to a tendency to regard the supposed will as necessarily directed to that which the interpreter takes to be the supreme end of the law, and from this to draw conclusions about *positive* law. Such tendencies are specially prominent in Stammler and his adherents.[1]

3. Difficulties of the will-theory in regard to the nature of willing

We pass now to a fundamental enquiry concerning the *possibility of applying law* in so far as law is reduced to a commanding or a self-declaring will. In order that this may be possible in such a case it must be assumed that one can infer from given legal material, taken as given content of a certain will, to this or that as also part of the content of that same will. Suppose that the legal will has commanded or declared, as part of its content, that so-and-so shall in general happen, *e.g.*, that a certain kind of crime shall be punished in such and such a way. Then it must

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basis for regulating social relationships. The same is true, *mutatis mutandis*, if he supports a sociological method, if he takes the consciousness of justice to be normative, or if he takes as fundamental the investigation of the interests of society on the basis of the legislator's intentions. The belief that one is engaged in jurisprudence in the ordinary sense in such cases can arise only from the fact that one starts from the notion of the law itself or the legal system as a will existing somewhere *in nubibus*, whose content one believes oneself to know. Only an investigation of the content of the rules which are *actually* applied in legal practice is genuine jurisprudence as distinct from practical philosophy or sociology.

[1] For Stammler's arbitrary introduction of "the idea of justice" as a positive legal norm where technically formulated law is lacking, see above, p. 22.

In one of Stammler's followers, Graf zu Dohna, *Die Rechtswidrigkeit*, 1905, p. 50, we read: "We know now that, when the legal order itself characterizes a course of action as illegal, this can never be one which, as regards the final goal of the social community, is a right means to a right end. For the legal order, which desires to lead the citizens to actions of just this kind, would contradict itself if it were to forbid them in particular circumstances." In this way, under the pretext of a scientific justification, the judge is given *carte blanche*; and, in view of the very various views which different classes entertain as to the "final goal" of society, the consequences of this can scarcely be foreseen.

be assumed to belong to the content of the same will that this particular crime, which falls under that species of crime, shall be punished in accordance with the general rule. Suppose, again, that in such and such special cases so-and-so is stipulated, and that by analysis certain general purposes can be formulated as the motives of the will in this matter. Then, in view of the assumed consistency of that will in its conations, these motives must be applied to interpret other particular regulations, or in those special cases where no direct application of existing legal ordinances is possible but where a decision must be made. Otherwise, of course, application of the law on the basis of the will-theory would be impossible.

(a) *Necessity for the will-theory to assume, in order that application of the law may be formally possible as logical subsumption, that the resolve of the legislative authority is absolutely fixed during the period for which the law is in force.*

This presupposes that, given that the will has resolved to act in general in a certain way, it also makes such decisions in each particular case as are required in order to carry out the mode of action contemplated in the original resolution. The point can also be put in the following way. In every resolution there is involved a conative experience of a peculiar kind which one expresses to oneself in the phrase: "I will undertake so-and-so." In order that application of the law may be possible it is necessary that the conative consciousness which is involved in any resolution of the legal will appertaining to objective law, shall be regarded as manifesting itself in each particular case in accordance with the conditions for carrying out the mode of action contemplated in the original resolution. It must be possible to assume in the particular case a conative experience which can be expressed as follows:—"This particular thing shall happen, because it is a carrying-out of that general mode of action, *viz.*, that which was resolved upon in the primary resolution." *E.g.*, this criminal shall be punished in such and such a way, because the penal law (*i.e.*,

the content of the legal will in its original decision about punishment) determines such a punishment in cases like this.

This might be assumed if it can be assumed that the subject of the conative experience, whose content is the fundamental objective law, always draws the correct practical conclusions in the situation with which it is faced, *i.e.*, if it draws those practical conclusions which really do follow from the given premisses. Now it is, of course, by no means always true that one actually draws the conclusions which in fact follow from given premisses, even if the latter are all present in *a single* consciousness. Suppose I know that the shortest distance between two points is the straight line joining them. And suppose I also know that this is a triangle, and that I apprehend both these facts in a single act of consciousness. It is by no means certain that I shall draw the conclusion that two sides of the traingle are together greater than the third. The relation of magnitude between the sides is not necessarily apprehended in and through such an act of consciousness. Still, it can be determined in the said way on the basis of the content of this unitary consciousness. Whether it happens or not depends on particular psychological or psycho-physical conditions, *e.g.*, scientific interest. So, in order that the subject of the legal will may be thought to draw the practically correct consequences in every case, certain psychological or psycho-physical conditions are required. These could be reduced to what is called in ordinary language "fixity of resolution."[1] Now we are concerned here only with the constitution which a certain legal *will* must have in order that it may be possible, on the basis of the will-theory, to apply the law. It is therefore a question only of the conditions for drawing correct *practical* conclusions when special cases have already been theoretically subsumed under the contemplated rule of action. So we can here leave out of account the conditions for drawing correct theoretical conclusions from the rule of action and

[1] Stammler (*Theorie der Rechtswissenschaft*, 1911, p. 105) describes legal willing as in its essence "irrefragable" in the sense of "something enduring for ever and fixed". *That* of course does not exclude changes in law made in accordance with forms laid down by the law itself.

the special cases which present themselves. The latter concerns the authorities who apply the law. But, on the basis of the will-theory, they can successfully defend the legality of the procedure which is appropriate to the particular case in accordance with the legal rule of action, only if it can be assumed that the legal will itself actually draws the correct conclusions whenever it is fully aware of the situation. So that which the will-theory must assume, if application of the law is to be possible in the present context, is simply the fixity of the resolution. But a merely relative fixity is not enough here. If that were all, it would be uncertain in a particular case whether the general rule is really to be used, and application of the law would come to a standstill. The resolution must in fact be assumed to be absolutely inflexible.

To state the matter fully, then, we must presuppose, in order that application of the law may be possible on the basis of the will-theory, a legal will having the following characteristics. It must have an absolutely inflexible resolve that a certain system of ways of acting shall be put into practice; and, determined by that resolution in every case which enters into its conative consciousness, it must judge in accordance with its insight into how the contemplated system of action is to be applied to that case. Such a will, however, is veritably something *ab omni alio solutum*. It must be thought of as free from the influence of all those complicating factors which act on any will that belongs to the order of nature and modify its resolutions. It is no wonder that, in order to explain law on the basis of will, it has been found necessary to postulate a supersensible will.[1] Yet it is impossible to carry through this thought of something autonomous in relation to the order of nature whenever the question arises of finding a connecting link between this autonomous entity and anything that belongs to the natural order.[2]

[1] According to Lasson (*System der Rechtsphilosophie*, 1882, p. 289) the state, which on his view is the one primary source of law, has a universally valid, reasonable, and self-consistent conative content. In accordance with this it is for him "a mirror of the reason of the universe" and has "something divine and holy in it". (P. 293.)

[2] See above, pp. 26 *et seq.*

(b) *Psychological investigation of intention and of the conditions for its fixity.*

Yet it might seem as if it would be possible to conceive the given will as a relatively self-contained unity. In so far as it has a resolution as its principle, and in so far as the conative consciousness involved in the resolution proceeds with relative logical consistency in applying this principle, it would seem to be a relatively self-contained unity. It seems to have its unity through its principle, and to be self-contained through its logical procedure. For in such a process there seems to be what we are wont to call an autonomous activity of thinking. And certainly it seems that self-contained unity is the very thing that is essential to a will as such, and that relativity merely indicates a limitation in the given will's character of will. So, if one ignores the general difficulty inherent in the notion of something absolute, it might seem not unreasonable to think of a will as absolute. One would do this by ignoring the limitation on its self-containedness which characterizes the given will, and by concentrating upon the autonomy which is of the essence of it as will.

It will be convenient to investigate more closely the nature of intention in general, and in particular what is to be understood by fixity of intention and the possibility of a *logical progress* within the conative consciousness which is bound up with intention. But we shall here carry the investigation only so far as it is of importance for resolving the question at issue.

An intention contains a peculiar kind of consciousness which may express itself, at the moment when the decision is made, in the words: "I will do so-and-so." Conversely, this kind of consciousness is impossible unless an intention is present. It is easy to see that it is not of the nature of a judgment in which something is characterized as being such-and-such. If it were, it could be expressed in the form: "I am in fact going to do so-and-so" or "It is in fact the case that the action will take place." But it is immediately evident that such a mode of expression is not adequate in relation to the state of mind in question. It may be that a belief that the action will in fact happen is part of the con-

sciousness of intention.[1] But this "I will do so-and-so," considered as expressing that kind of consciousness, does not itself describe a future state of affairs, even if there is bound up with it a thought of something which is going to happen. Obviously I can, on purely theoretical grounds (through knowledge of my actual character) make a prediction about my future action without this knowledge about it in the least involving an intention. But the consciousness with which we are here concerned involves intention. Similarly I can, on the basis of introspection, make the judgment: "I am now deciding to do this or that." But such a judgment is not a factor in the formation of the intention itself.

So the question is: *What* do I express with the words "I will do so-and-so" when I form an intention? If the consciousness in question includes the intention itself, so that the latter is necessarily present if the former occurs, it is probable that it is the conative element in the intention, which is apprehended along with the action to which the willing refers. We might describe this conative element as the conative impulse. That which is apprehended cannot indeed be described without circularity as being that consciousness which belongs to intention. But that it must be something involved in the intention follows from the necessary connexion of that consciousness with it. On the other hand, the consciousness in question seems only to need to become distinct in order to acquire the character of a judgment that the conative impulse is actually present. But this is not the case.

A similar curious situation presents itself if, *e.g.*, we consider a feeling of pleasure or unpleasure. Plainly one experiences something in the feeling, and therefore a state of consciousness is occurring. Yet awareness of the presence of the feeling is on a quite different plane, and it in no way implies a higher degree of clearness in relation to that 'experience' which is the feeling itself. It cannot be said that the same content which is presented in the feeling is more clearly apprehended in the awareness of the feeling. The feeling-content itself is not as such present in the awareness of the feeling. That content cannot in general be inserted into a wider

[1] See v. Ehrenfels, *System der Werttheorie* I, 1897, p. 243.

whole, and therefore it also cannot be elucidated or defined as a factor in an existent complex without being introjected into the ego. It is always an I which has pleasure or unpleasure. Thus a feeling-content is real for us only as an experience in an ego. The I, which must of course be distinguished from the psycho-physical organism, has its peculiar significance for us in the fact that it is immediately given or accessible to itself. That which we apprehend as immanent in the ego therefore exists *for* the latter or is in a certain way experienced *by* the latter. That the ego has pleasure, unpleasure, etc., thus implies that it feels or experiences something of the kind. The assertion of the reality of a feeling-content is thus always the assertion of the reality of a feeling-experience.

The same point can, moreover, be established directly without reference to introjection in the ego as the medium for asserting the reality of the feeling-content. We can, of course, without any difficulty think of colour, extension, etc., as themselves something real with a certain character. In that case we are in no way concerned with our presentations of them, as if it were they that we are characterizing. But any attempt to characterize joy, *e.g.*, without reference to the *feeling* of joy, the *experience* of joy, as something real with a certain nature of its own, fails hopelessly. What would a joy be which was not experienced by anyone? In fact we always mean something subjective by the word. It denotes for us only a certain experience.

If what has been argued is correct, the consciousness involved in a feeling can never take the form of a judgment in which the same content which is experienced in the feeling-consciousness is characterized more determinately as a factor in the system of reality. Awareness of the presence of joy in myself is in no way awareness of that which I experience in the feeling of joy.

Now it is clear that consciousness of intention, if it is to involve the intention itself, must involve a direct experience of the conative impulse, and not merely consciousness that one is experiencing it. But the conative impulse which is experienced cannot be inserted into a larger whole and made into the object of a judgment which characterizes it as a factor in the system of reality,

unless it be introjected into the ego. In thinking of a real act of willing it is always an I which wills. But, when this introjection takes place, the impulse as such is not apprehended but only the experiencing of the impulse. Thus direct awareness of the conative impulse has the peculiarity which we have just pointed out in feeling. (Since this characteristic, which becomes apparent when we consider what the word "feeling" denotes, is what distinguishes feeling from other forms of consciousness, we can apply this description to the consciousness of intention as a direct experience of the conative impulse.) This explains how it can be consistently maintained (i) that consciousness of intention is an experience of a conative impulse, and yet (ii) that by being made clear and distinct it does not acquire the character of a judgment about the presence of that impulse.

But, even though a judgment cannot be contained in the consciousness of intention expressed by the sentence "I will do so-and-so," still the *expression* of the feeling of conative impulse—the word "will"—is referred to the word "I" as grammatical subject. Now suppose that what lay behind this mode of expression were that, in a single act of consciousness, I apprehend myself as "intending" to act in a certain way. In that case the introjection of the conative impulse into the ego would actually have taken place. The fully clear consciousness of intention would then have the nature of a judgment in which "I" am characterized as a factor in a system of reality. The conative impulse would not then be given in a feeling whose content cannot as such be referred to a larger whole. This being so, there is only one psychological category under which we can bring the state of consciousness which underlies the expression. That category is association, and more particularly simultaneous association. There are different simultaneous states of consciousness in the same subject. They are combined with each other in a peculiar way, and are therefore both expressed together in a single sentence. The two associated states of consciousness would then be the feeling of the conative impulse and the idea of myself as acting

in a certain way. The expression "I will do so-and-so," used when the intention is formed, would refer to this association.

An analogous simultaneous association between a feeling and the idea of a certain event must be supposed to lie at the basis of the optative sentence "would that so-and-so would happen!" Every attempt to transform such a sentence to the form of a genuine judgment, *e.g.*, "This event is such that it would be desirable that it should happen" is a failure. The reason is that "would that" is a direct expression for a feeling of pleasure, and not at all for consciousness of the presence of pleasure. But a feeling-content as such can never be a factor in a judgment. Yet the expression takes the form of an indicative sentence, in which the expression of the feeling is the predicate to the expression of the idea of the event. This makes plain the necessity of regarding the state of consciousness which lies at the back of this as a simultaneous association between the feeling and the idea of the event.

But it would seem that an essential part of the intention is, not only the consciousness of intention, but also the actual conative impulse itself which is experienced. But, if the foregoing explanation is correct, the conative impulse itself can be characterized as a factor in a system of reality only by being introjected into the ego, and therefore only as content in an experience of the ego. But this means in effect that it cannot in principle be characterized as something real. For one cannot regard the conative impulse as something which exists and which has the property of being experienced as a predicate. For to be apprehended cannot be a predicate in an object, which that object would acquire in and through being apprehended. Either this predicate would be presented in the apprehension of the object; or else the object has 'being-apprehended' as a predicate through being apprehended, without this predicate being itself presented in this apprehension. In the former case the apprehension would be an apprehension of itself, which is absurd. In the latter case there would be an infinite regress. For the object which has 'being-apprehended' as a predicate is the content of an apprehension in respect of just this property; and therefore, according to the initial assumption,

it again acquires 'being-apprehended' as a property through this apprehension, and so on to infinity. Or, to put it in a nutshell, the fact that a thing is apprehended means merely that there occurs an apprehension of it. If it exists only as apprehended, this must imply that only an apprehension of it exists, and not the thing itself.[1] It is therefore wrong to say that an intention involves *both* consciousness of intention and a real act of willing. Intention *is* the state of consciousness here described, or rather the association of states of consciousness.

To the above should be added that the feeling of conative impulse, which is a constituent in intention, must be akin to the feeling of a tendency to act or of conative tendency which often occurs in connexion with the idea of a certain action without any intention being formed of acting in that way. What distinguishes the two is probably only a special feeling of energy which occurs in the case of intention. This feeling of energy is obviously connected with the conviction that the action will take place, which is characteristic of intention. It is needless to investigate this matter further here.

But this makes it clear that intention by no means indicates the presence of a unity in willing. One could indeed suppose a unity of will underlying the association in which intention consists. But this unity of will must be thought of either as constituting the basis of intention through activity of willing, *i.e.*, through decision or intention; or as a *qualitas occulta*, about whose mode of action nothing can be said. In the former case the explanation is clearly circular. In the latter it explains nothing and has nothing to do with willing as a psychological phenomenon, which just is intention and incipient intention (conative tendency).

It is thus clear that all talk of a possible logical process in willing by practical syllogisms is idle, since such a process presupposes judgments. What may make it plausible is this. The association between a feeling of conative impulse and the idea of a certain action, which is the essence of an intention, may be followed

[1] A clear account of this is to be found in Phalén, *Zur Bestimmung des Begriffs des Psychischen*, 1914.

by another such association. This may connect a feeling of the same kind with the special kind of action which, in view of the circumstances, is logically bound up with the action foreshadowed in the original intention. But such a sequence of associations does not of course imply a process of inference. The latter always presupposes judgments as premisses, and, in drawing the conclusion, an apprehension of the contents of those judgments in a single consciousness.

As regards "firmness of intention," as a condition for the sequence of associations just mentioned, we must first note that this cannot be regarded as a property of the original intention itself. For the question whether an intention is firm or wavering cannot be settled by introspection directed upon it. As Kant rightly says, it is only the outcome which decides how far one can talk of a firm or a weak intention. But "firmness" equally cannot belong to the "will" as basis of the intention. According to what we have already said on this point, it would then be a property either of the intention itself or of a *qualitas occulta* which cannot be used as a basis of explanation. All that remains, then, is that "firmness," as a condition for the consistent carrying through of the originally intended course of action by new intentions, is a certain property of the physiological correlate of the intention in the psycho-physical individual. The progress from one intention to another consistently with the originally conceived action is therefore not even an instance of a psychological connexion. This conclusion gains importance through the fact that the regular progress in a course of action, which is ascribed to what is called the firmness of the intention, need by no means occur through forming new intentions in the special circumstances which arise. If I have decided to follow a certain road, which is known to me only in its general direction, I do not need to form a special resolution to continue following it at every hitherto unknown bend in it. Indeed, as is well known, I do not even need to have the original intention before my mind while carrying it out. In such a case the physiological condition, which is the 'fixity of the intention,' acts without any psychological intermediaries.

This should suffice to make clear that willing as experienced cannot be regarded as even a relatively self-contained unity which might serve as a basis for forming the notion of an absolute will. It shows itself, on closer investigation, to be in its very structure a factor in the system of nature. Every thought of an absolutely fixed will, which as such would be exalted above all influence from without, is thus seen to be a contradiction in terms. But, *if* law is really the content of a will, something of the kind must be assumed in order that the logical application of law may be possible.[1]

4. As a basis for the subsequent investigation of the absorption of foreign elements by the will-theory, e.g., the notion of a legal norm as determining rights and duties in the sense in which these are understood in the commonsense notion of justice, the psychological content of *command* is investigated, in order that it may be compared later with the meaning of the idea of *duty*.

The representatives of the theories which are here discussed say that they maintain the view that positive law is merely a system of commands or declarations of a certain will. Law would therefore have to be regarded as an actual reality existing for a purely theoretical consciousness which merely recognizes it. We shall now examine more closely *whether they really keep to this and do not introduce something else into law in the course of presen-*

[1] Radbruch (*Der Handlungsbegriff in seiner Bedeutung für das Strafrechtssystem*, 1904, p. 14) maintains that consequences can be drawn only from judgments, not from imperatives. Therefore, even from the point of view of the imperative-theory, a rule of law must be regarded, not as an imperative, but as a judgment in which the legislator's ruling is described as actually existing. But Radbruch here overlooks the circumstance that, from the fact that a legislator has willed something in general, no conclusion can be drawn about what he wills in a particular case, and therefore that the difficulty remains the same as if a rule of law were an imperative and not a judgment that an imperative exists.

ting their theories. But for this purpose it is necessary first to investigate more closely the psychological implications of a *command*, with particular reference to its relation to the notion of *duty*. In so doing we prepare ourselves for the transition to the main theory concerning law, which regards the latter as expressions, issuing with authority, of ideas about rights and obligations.

In a command the person who issues it seeks by certain signs, especially by a certain utterance, to cause the person commanded to act in a certain positive or negative way. Let us confine our attention to an utterance, as being the commonest method of command. An utterance which has the property of being a command has a peculiar form: "Thou shalt do so-and-so!" or "Do so-and-so!" What kind of idea or what state of consciousness in general does the issuer of the command intend to call forth in the receiver of it?

In the first place we must insist on the difference between the content of this expression and the content of a threat, which is sometimes adjoined to a command. By using a threat one seeks merely, in order to induce a person to act in a certain positive or negative way, to arouse in him the idea that certain unfortunate consequences will ensue to him from the utterer of the threat unless he acts in such and such a way. A threat may possibly be combined with a warning. The essential point about a warning is this. He who issues it puts himself in imagination into the other man's scheme of values, and, by reference to what is counted as a disvalue in that scheme, strives to persuade him of the wisdom of avoiding a certain action. But the peculiar implication of "thou shalt" in a command does not emerge in either a threat or a warning. As is well known, it can be uttered without any threat or warning being either openly or secretly combined with it. In that case we have a pure command. In general it is clear that the "thou shalt" in every command is meant *categorically*. It is not intended to arouse the idea of the action as something which ought to happen merely in respect to the realization of a positive value or the avoidance of a negative value on the part of *the person commanded*. So a threat or a warning can only be an

appendix to this "thou shalt," used in order to induce the person addressed to act in a certain way by means of additional motives.[1]

But, if there is no reference in the "thou shalt" of a command to any value for the recipient, it may be asked how the issuer of the command can influence the receiver of it by his mere utterance. (1) The explanation cannot lie in the utterance being intended to arouse in the recipient the idea that a certain wish or volition exists in the person who issues the command.[2] It may be that the recipient can conclude from the fact that the command is given that something of the kind exists. But that is not the same as to say that the meaning which the utterance has for one who realizes that its purpose is to convey a command consists in the arousing of such an idea in his mind. It is plain that such knowledge cannot have the least practical influence on the recipient unless he also knows that action contrary to the wish

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[1] Hold v. Ferneck (*Die Rechtswidrigkeit*, I, 1903, pp. 75 *et seq.*) assumes that a command is meaningless without a sanction. So too Seligmann, *Beiträge zur Lehre vom Staatsgesetz und Staatsvertrag*, p. 46. Cf. Gray (*The Nature and Sources of the Law*, 1909, p. 25), who follows Austin. This leads to the consequence that the only thing which is significant in a command is the assertion that the omission of a certain action will lead to certain unfortunate consequences for the recipient of it. On that view it is a question either of a purely theoretical utterance, intended however to induce to a certain action, or in addition an advice to the recipient of the command to beware. This is also noted by Binding, *Die Normen und ihre Uebertretung*, 2. Aufl. I, 1890, p. 39. Hold v. Ferneck insists, however, (*loc. cit.*, p. 183) that a command differs from such an utterance in the fact that it includes also an announcement of the will of the person who issues the command. (So too in the definition of a norm, p. 79.) But such an announcement of volition serves no purpose if the only significant thing is a sanction. But, if the announcement of volition played no part in the intention of the command, it would not in general occur. Now it should be noted that, if it occurs, it does so precisely through the "thou shalt" which is specific for a command as distinct from a threat or a warning. In assuming a special announcement of volition as an essential factor in a command one is therefore assuming that the expression of a command itself has a peculiar meaning which must be distinguished from that of a sanction. The latter thus merely adds to the force which the mere expression of a command possesses.

[2] So Hold v. Ferneck, *loc. cit.* So too Schuppe, *Grundzüge der Ethik und Rechtsphilosophie*, 1881, p. 46.

or volition of the person who issues the command will lead to unfortunate consequences for him, or on the other hand that action in accordance therewith will bring about the realization of certain positive values for him. But, if the only intention of the person issuing the command were to operate in that way, he would need only to threaten or to issue a warning against a certain kind of action, or to promise something as a consequence of the kind of action that he wishes, or to advise in favour of it. That is to say, the "thou shalt" in uttering a command would, on this view of its content, be quite meaningless for the purpose of the command. It should be specially noted that, if this "thou shalt" is identical with "I want you to" and not merely "I wish that you would," the complete expression must be: "I will by a certain process make you act in a certain way." But, if the process here thought of is just that of commanding, it cannot be the same as giving utterance to such a volition. Otherwise one would be forced to the consequence that the person who issues a command expresses his volition to express a volition to express a volition . . . and so on *ad infinitum.* To this must be added that an imperative, in spite of its propositional form, cannot possibly express a judgment that something is in fact such-and-such. This is as impossible as that the "I will" in an intention should do so. Every attempt to transform the "thou shalt" of an imperative into something like: "It is in fact the case that you will act in such-and-such a way" is seen at once to be a failure.[1]

(2) It cannot be the case that the "thou shalt" in a command is a direct expression of a personal wish or volition of the person who issues the command.[2] This too, for the reasons already given, would be meaningless for the purpose of the command. Besides, in that case the expression of the command would be either

[1] That an imperative does not express a judgment is asserted by Sigwart, *Logik*, 4. Aufl., I, 1911, p. 18, note, Bierling, *Juristische Prinzipienlehre* I, 1894, p. 29, and Maier, *Psychologie des emotionalen Denkens*, 1908, pp. 679 *et seq.* Hold v. Ferneck's elaborate analysis of the command (pp. 75 *et seq.*) is spoiled by his completely overlooking this.

[2] In the same sense Kelsen, *Hauptprobleme der Staatsrechtslehre*, 1911, p. 202 and Stark, *Die Analyse des Rechts*, p. 36, cfd. with p. 91.

"Would that you would act thus" (in so far as it was the expression of a wish) or: "I shall make you act in a certain way" (in so far as it is the expression of a volition). It should further be noted that it is by no means necessary that there should be in the person who issues the command an actual volition as to his own action, in the psychological sense, which always includes a special intention. We often "act" without any special intention (See above p. 115). That in such cases we talk of "acting" and also of "volition," "purpose," etc., depends on the fact that the activity goes on in the same purposive way as if a special intention were present.

(3) It cannot be a question of arousing in the recipient of the command by means of the utterance a wish to act in a certain way. Such a wish, which must always refer to some value which is to be realized by the person through the action, can be aroused indirectly through threats or promises attached to certain ways of acting. It can be aroused directly through advice in favour of a certain action, combined with promises or threats. A piece of advice is just a pointing-out the desirability, from the point of view of the person addressed, of a certain action. It therefore presupposes putting oneself in imagination into his scheme of values. It thus gives expression to a wish, based upon his system of values; a wish which it is sought to awaken in him directly through giving the advice. That there can be no question here of this follows immediately from the fact that a command as such does not refer to the recipient's scheme of values.

This being so, there remains only one way of interpreting the meaning of an expression in the imperative. It can aim only at creating *directly* in the recipient of the command an intention to act in a certain way. According to the analysis of the notion of intention given in (3), this amounts to saying that, without arousing wishes as motives, it effects an association between a feeling of conative impulse and the idea of a certain action. Through the absence of motives in the person influenced, this mode of influence acquires the character of a practical suggestion. As a condition for this there must be of course special relations between

the active and the passive party, *e.g.*, a superiority in power on the part of the former which makes the latter susceptible to his influence. Often, however, the person who issues a command wishes merely by the use of 'Thou shalt' to arouse in the other party the idea of a certain action, but to do this in such a way that the idea maintains itself and represses all conflicting ideas of action and thus passes over directly into realization. In such cases the relation between the active and the passive party is such that the latter's will, in the correct sense of the word, may be paralyzed. Indeed, where the order works mechanically, as when it refers to familiar military movements in accordance with fixed words of command, an idea of the action need be present only in the mind of the giver of the order. For those who receive the order the mere auditory perception of the word of command, *e.g.* 'Quick march!,' acts without any intermediary idea of the action, and thus the reaction-time is reduced. In the latter case it is, however, natural that one seeks at the beginning of the drill to impress practically on the men the meaning of the words of command in terms of action. But the real meaning of the imperative form does not emerge even if we leave out of account the use of a mechanically operative power of command and confine ourselves to commands in which the idea of an action is effectively impressed. When no alternative is envisaged the imperative form serves merely to strengthen the suggestive force of the indication of the action and thus to repress the ideas of other possible actions. But it may happen that, although the relation between the giver and the receiver of an order is indeed such that the order might be effective, yet, in consequence of conflicting impulses which arise in the meanwhile in the mind of the recipient, the thought of other kinds of action cannot be altogether suppressed. In *that* case it is necessary to evoke a special intention in him to perform the commanded action, if the order is to be effective. It is here, where the whole process cannot take place in a purely ideo-motor way, that the imperative form acquires its peculiar meaning. When the idea of the action which the order arouses is prevented from predominating, because it meets with opposition in the re-

cipient's own will, it becomes necessary to act directly upon the latter. And this takes place through emphasizing the imperative form as such, which will break down the opposition of the will. In consequence of ideas of other modes of action, which are maintained by opposing impulses, it is not enough here merely to inculcate the idea of the action commanded. In order to make that idea pass into action, it is necessary to suppress the tendency of these impulses to materialize in actual intentions, by producing through the imperative form an intention to carry out the action commanded.

We can now understand how the imperative form can function as a mere auxiliary to the power which the mention of an action has of making the idea of that action predominant. When the imperative form functions in its own characteristic way its use is to break down the resistance due to opposing impulses by arousing a direct intention to act in the way commanded. But, when nothing of this kind is needed, all that remains of the conative significance of the imperative form is the negative function of checking possible opposing conative impulses. This happens, in such cases, by paralyzing all genuine willing. When this has been accomplished the field is left open for suggestion through indicating the action. The imperative form then acts in the same direction as when it exerts its characteristic function, although the latter retires into the background. In the same way the military command 'Attention!' is effective in certain circumstances, without arousing any idea of an action in those who hear it, in exactly the same way as when its meaning in terms of action is operative.

In so far as the imperative form has a characteristic meaning of its own, the following point must be emphasized about it. It is concerned with that state of consciousness (or, more correctly, that association of states of consciousness) which, according to the analysis in (3) above, *is* an intention. It is not concerned with the idea of an intention. If an intention *is* itself a state of consciousness, it would obviously be an unnecessary detour to try to impress the idea of an intention in order by that means to arouse the intention itself. Besides, it follows at once, from the

fact that the imperative form baffles every attempt to reduce it to the form of a judgment that there can be no question here of evoking an idea which, if it were made clear, might become a judgment, *viz.*, a judgment to the effect that a certain intention is really present. But, of the two factors in consciousness of intention, *viz.*, a feeling of conative impulse and the idea of a certain action, the imperative form as such represents by its 'Thou shalt' the former. The 'I will' of an intention represents just the conative factor in it. Thus the 'Thou shalt' of an imperative and the 'I will' of an intention are concerned with the same factor in an intention. But they are concerned with it in different ways. 'Thou shalt' in the imperative aims at directly calling forth that factor. 'I will' in the intention is an expression of that factor as already existing.

But this way of distinguishing the two needs one qualification. It is doubtless true that the 'Thou shalt' in an imperative does not express an already existing feeling of conative impulse in the giver of the command, which would be a factor in what we call an intention. It aims indeed only at arousing such a feeling in the recipient of the order. But, if the imperative form is to be really effective in arousing a consciousness of intention in the recipient of the order, it must bear the mark of being a real expression of intention. But, unless there already were in the giver of the command just that consciousness of intention which he seeks to arouse, the imperative form would not adequately express it. For this purpose what is needed is not the mere utterance of the words but in addition that they should be uttered in the way which is characteristic of the expression of an already existing volition. That very state of feeling which accompanies an actual intention colours the expression of it in a characteristic way. It is characterized especially by the feeling of energy which marks an intention. In order that this peculiar characteristic may manifest itself it is therefore necessary that the consciousness of the intention in question shall actually be present in the giver of the order. But how can a person have a consciousness of intention which refers to *another's* action and not his own? Note that it is not a question

here of the intention to *make* the recipient of the order act in a certain way, though this may happen to be present in the giver of the order. *That* intention is expressed in a quite different way. However, the explanation given in (3) of consciousness of intention enables us to understand the possibility of its referring to *another* person's action. Suppose that the consciousness of what we call intention is *merely* an association of a feeling of conative impulse with the idea of a certain action of one's own. Then there is no reason why another person should not have a corresponding consciousness of intention, though of course in him the idea associated with the feeling of conative impulse would be, not an idea of 'my' action, but an idea of the other person's — of 'thy' action. The action thought of is of course exactly the same for the person who has the intention and for the one who has the consciousness of intention corresponding thereto. The feeling of conative impulse, too, which would be associated with the idea of the other man's action, may be completely analogous to the corresponding feeling in the other self. Nothing stands in the way of such a process of analogy except the assumption that a feeling of conative impulse must of its very nature be a feeling of myself as willing. But, it is impossible that a feeling of conative impulse as such should involve a consciousness of the self. For when willing is introjected into the ego the result is that an experience of willing becomes an object of perception. But a *perception* of an experience of willing cannot be the same as an experience of willing itself; the former clearly presupposes, and is distinct from the latter.

A's consciousness of intention in reference to an action of B's can be conceived as involving an idea in A of a certain intention in B. This idea can be thought to carry with it the presented conative feeling itself in association with the idea of the other person's action.

In short, we must assume that in an imperative the giver of the order has a feeling of conative impulse associated with the idea of a certain action on the part of the recipient of the order. The imperative form, just in so far as it is a reflexive expression

for this association, is effective in producing in the recipient of the order a corresponding state of consciousness. So the imperative does not merely aim at producing in the recipient of the order a consciousness of intention. The state of consciousness which it aims at producing exists also in the giver of the order, though in him it does not represent a consciousness of intention in the ordinary sense of the word because it does not refer to his own action. Still it is analogous to this. Conversely, we can also say that the characteristic expression of a consciousness of intention, 'I will undertake this!,' is often not merely an expression of the presence of that state of consciousness. It also often means that one wishes to strengthen the already existing association in oneself by auto-suggestion. So not only can an imperative be regarded as analogous to an expression of intention, but the latter can also be regarded as analogous to the former. In the first person plural of the imperative: 'Let us!' we have an unquestionable connexion between an expression of intention and an imperative.

As we have said, the suggestion in a command does not appeal to the recipient's system of values. It follows that the consciousness of intention, which it aims at producing, also does not contain any valuations along with the feeling of conative impulse. So, if the command is to be effective without the help of other means, such as threats or warnings, there must occur in the recipient an intention which is devoid of valuation. It may, however, sometimes happen that an order fulfils its purpose only to the extent of evoking a mere feeling of impulse associated with a certain action, but fails to arouse the feeling of energy which is needed for an intention. In that case a full-blown intention does not arise. It is clear that in both cases a person in whom the command has been wholly or partly effective would feel himself to be unfree in willing. For his impulse is determined, not by values which are significant for himself, but by the imperative form of the expression. So a feeling of inward constraint naturally accompanies the process of being influenced by a command.

Finally, it should be remarked that prohibition, with its 'Thou shalt not!', is most easily conceived as a command to avoid a cer-

tain action, *i.e.*, to repress all conative impulses towards a certain action. Thus, according to what has gone before, this 'Thou shalt not!' expresses a feeling of conative impulse associated simultaneously with the idea of repressing in the recipient of the prohibition the impulses to a certain action. The practical 'No!' expresses either a repression, already taking place, of conative impulses to a certain action; or the idea of such a repression. The latter is just what corresponds to 'Thou shalt *not*!'. In a similar way the theoretical 'No!' expresses either a rejection, already taking place, of a certain suggestion ('*No*! That is *not* so!'); or the idea of such a rejection ('That is not admissible!')

It may be mentioned here incidentally that the corresponding expressions for advising and admonishing are related to the 'Thou shalt!' of commanding. In advising it is sought to arouse a consciousness of intention by 'Thou shalt!'. But here it is not a question of arousing it directly in the person advised. In giving advice the counsellor seeks, by the use of the reasoned 'Thou shalt!', to strengthen the consciousness of a certain intention by referring to certain values which are already significant for the person whom he is advising. From the standpoint of these values he presents this action as being the best possible among the alternatives. Here, however, the 'Thou shalt!', with its peculiar appeal to volition, is on the verge of insignificance, because the essential thing here is the application of already accepted valuations. In admonishing there certainly is involved a process of arousing a consciousness of intention by suggestion, and for that reason special relations to the person admonished are necessary here too. But here, in contrast with the case of a command, one seeks, in conjunction with the special suggestion to the will, to inculcate also certain valuations from which the appropriateness of the action would follow. One can admonish a person to take account in his actions of his life as a whole rather than of the values of the moment. One can admonish a person to do his duty. But one does not command such things.

5. On the idea of duty

(a) *On the relationship of the idea of duty to the state of consciousness of the recipient of a command, through the nature of the fundamental feeling of obligation as a feeling of conative impulse divorced from valuation.*

We pass now to the consideration of the content of the idea of duty. Its kinship with the state of consciousness which exists in a person who receives a command is already obvious from the fact that it is a prevalent opinion in the history of ethics that duty is connected with an imperative. Such a common assumption must certainly be founded in some way upon observed psychological facts. The two states of consciousness seem also to be related in so far as a person who experiences a feeling of duty feels himself driven to a certain course of action. Thus, according to the explanation given above, a feeling of compulsion occurs in immediate association with the idea of a certain action. The way in which one expresses that feeling in negating a certain action—"I must not do that"—bears witness to this. Even if "must not" does not here express a completed intention to reject, it must at any rate be regarded as expressing a rejective impulse of the will. The expressions "obliged to", "bound to", which indeed indicate that we are here concerned with an unconditional impulse to a certain action, not one determined by the subject's judgments of value, point in the same direction. But the feeling of duty expresses itself also in a simple "I *ought* to do this". Now the ought is sometimes indubitably an expression for a mere valuation attached to a certain action. *E.g.*, I "ought" to go this way, as being the shortest one to the desired end. It is therefore necessary to enquire whether the feeling of duty is of the same nature as the feelings which lie at the basis of our valuations or whether it belongs to our conative feelings.

A feeling of inner compulsion towards a certain action is inseparably bound up with or inherent in the feeling of duty. To speak in Kantian terms, a feeling of necessitation. We experience a feeling of inner compulsion when, *e.g.*, an action, which itself

involves unpleasantness or at any rate does not involve pleasure, presents itself as one which ought to be done simply and solely in order to avoid a certain unpleasantness. The criminal law exerts an inner compulsion on a man who wants to steal for one reason or another, in so far as he feels that he ought to repress this inclination in order to avoid the consequences attached to theft. In so far as mere unpleasantness, or rather the thought of avoiding unpleasantness, is what determines our decision as to what action we ought to undertake, we seem to ourselves to be dependent on something external to us. Pleasure alone, as the Cyrenaics and the Epicureans say, seems to us to be an οἰκεῖον, something that belongs to us. But in such a case the compelling ought clearly indicates that the action in question is the only right one of all the possible alternatives, under the actual circumstances, from the standpoint of value. It is approved, all the others are rejected. Does, then, the inner compulsion which is experienced in the feeling of duty also refer to a selective valuation of a certain action merely with a view to avoiding unpleasantness? Various facts argue against this.

1. The unpleasantness which, on this view, it would be sought to avoid by acting in accord with duty could only be the pangs of guilty conscience. Now it should be noted that what goes by this name is often a very complex network of feelings. It may include such things as fear of public opinion, of external reactions on the part of society, and of religious punishment. But, in so far as the avoidance of such consequences of my action is *clearly* present to my consciousness as the reason why I ought to act in this way, the action demanded of me ceases to be a duty and becomes a measure of prudence, and the unpleasantness which is feared is no longer the pangs of conscience. If I should regard such factors as reacting unjustly, the very action by which I expose myself to the unpleasantness in question may present itself as my duty, and compliance may appear as merely a cowardly measure of prudence. Consider, in this connexion, the state of mind of an idealistic anarchist or a morally revolutionary innovator. These feelings are genuine factors in the pangs of conscience

only in so far as they are associated with, and not definitely distinguished from, a feeling of unpleasantness of a peculiar kind. What is characteristic for this is that it is bound up with the idea of an action which is *in conflict with one's duty*. It is because I did not act as it was my duty to act that I feel pain. Therefore I cannot think of the pangs of conscience as a threatening consequence of a certain action unless I already have the feeling of duty in regard to the opposite course of action.[1] It is therefore impossible that this feeling, and the feeling of inner compulsion which is attached to it, should consist in approval of a certain action as necessary for avoiding unpleasantness (*viz.*, pangs of conscience).

2. Suppose that a hunted murderer, in order to avoid capital punishment, is forced to submit himself to the greatest privations, to wander about in the woods without food, to hide himself from the sight of men, etc. Then he is certainly subject to the greatest possible mental compulsion. Yet the ought which concerns him here has nothing to do with duty. On the contrary, his feeling of duty may act in quite the opposite direction. And the curious thing is that, if the thought of obligation really arises in such cases, where it is a question of the right course of action in order to avoid unpleasantness, the ego, in relation to which the obligation holds, objectifies itself in a peculiar way. I, the agent, have obligations towards myself, as a person who has rights against the self which now feels itself to be under an obligation. That is to say, I feel that I ought to act in such and such a way, not from the standpoint of my own values, but with reference to a person who stands over against me and puts forward his rightful claims. This brings us to the question of the state of consciousness which exists when a person feels himself under an obligation to act in a certain way in respect of the rights of another person. Here the latter person and *his* values seem to be the only relevant factor. The value of the action for the person who is under an obligation is utterly irrelevant. For a man who feels himself under an obligation in

[1] Kant, *Kritik der praktischen Vernunft* . . . Hrsg. von K. Kehrbach, [1877], p. 47.

respect of another man's right the avoidance of unpleasantness for himself is in no way the reason why he ought to act in a certain way. In so far as he regards the other man as possessed of a right, the latter stands decisively in the foreground as the person in relation to whom the duty to act in such and such a way holds. It is an essential feature in this point of view that the interests of the person who is under an obligation must here be set aside.

It should be noted here that the ascription of an inner value to a person who fulfils his duties, *i.e.*, respect for him, is something secondary in relation to the feeling of duty itself. Action in accordance with duty seems to us *as such* to possess an inner worth. Thus the alleged *objective* value of the action is not what determines the ought of duty. From the alleged objective nature of the value of the action we cannot, therefore, derive any explanation of the feeling of compulsion which is an essential part of the feeling of duty.

If, then, the feeling of compulsion, which we experience as a factor in the feeling of duty, is not determined either (a) by any valuation of the action from the point of view of its being necessary in order to avoid unpleasantness, or (b) by reference to objective values which stand over and above the individual, it must be explained in some other way. It would seem that there remains only one possible form of explanation, *viz.*, that we are here concerned with an impulse towards a certain action, which is felt as compulsive just because what is here determinative is not the subject's free valuation, but something which is, in that respect, external to him. The impulse imposes itself on us, no matter what evaluatory attitude we may take towards the action. That is to say, the feeling of duty is a conative feeling, and, to put it more definitely, a feeling of being driven to act in a certain way. Undoubtedly a free valuation of the action is not the determining factor in this feeling.

The kinship with the state of consciousness of a person who receives a command is thus evident, not merely in so far as both cases are concerned with a conative feeling, but also in that both

involve a conative feeling which presents itself as independent of the subject's own valuations.

Since Adam Smith's time the attempt has often been made to explain the feeling of duty as a social revengeful feeling directed against anti-social behaviour. But this retaliatory feeling does not arise only in the other members of a society against an individual in so far as he has tendencies to anti-social behaviour. When he himself takes part in social intercourse, and thus becomes himself inspired with the same feeling, it works *in* him to repress such tendencies. This inner reaction against anti-social behaviour is alleged to be conscience. It should be noted here, however, that it is necessary to distinguish sharply between the subject as reacting and as reacted upon. The feeling which the subject has as reacting cannot possibly be the feeling of duty. For a feeling of obligation is in no way a part of the social retaliatory feeling. Such a feeling can arise in an individual only in so far as he is the *object*, and not in so far as he is the *subject*, of a reaction. Therefore, in order to explain the feeling of duty, we must refer to the feelings which arise in the individual when he experiences the reaction of his social ego, *i.e.*, of "conscience." If, now, that state of feeling is so defined that he rejects anti-social behaviour because it exposes him to suffering through the reaction of his social ego against such conduct, it fails to explain the feeling of duty. For the feeling of duty is already presupposed in order for it to be possible to fear the unpleasantness attached to breach of duty, *viz.*, "the pangs of conscience," as we have just pointed out. A possible explanation of the feeling of duty (having regard to what has now been shown as to its nature) would be provided only on one assumption, *viz.*, that the experience of the reaction of the social ego *immediately* arouses an impulse to a certain action, *i.e.*, without the impulse being called forth by the subject's evaluation of the action from any point of view. If that be a correct account of the state of affairs on experiencing the reaction, it would imply that the social ego presented itself as commanding the individual. The individual would then be driven to regard the social ego as a commanding power within him, in order to

explain to himself the state of his feelings, which would resemble that which occurs when a person receives a command. In that case the complete explanation of the feeling of duty would include the assumption that the individual objectifies the social ego into an inner commanding power.

(b) *Difference between the state of consciousness of the recipient of a command and the feeling of obligation. The connexion of the latter with the consciousness that the action, from the objective standpoint, is a duty. Explanation of this from the form of the direct expression of the feeling.*

However, granted that the kinship between the "I must" of the recipient of a command and the "I am under an obligation to" of duty is obvious, we can raise the question whether the latter *really is* of the nature of an imperative. In investigating this we will consider a peculiar state of consciousness, which seems to be bound up with the feeling of impulse in the feeling of duty, and without which the latter would seem to lack the character of feeling of *duty*. The purely imperative "Thou shalt," like the "I shall" of a complete or incomplete intention, cannot be expressed in the form of a judgment. This was explained in (4) as follows. What is here expressed is not a single state of consciousness, but a simultaneous association of a feeling of impulse and the idea of an action, in which the former receives its special expression. The reception of an imperative, which is only the reproduction of the simultaneous association which is expressed by the command, cannot therefore be expressed in the form of a judgment either. But the situation is otherwise with the feeling of duty. Here the expression does take the form of a judgment: "This action *is* my duty" or "I *am* under an obligation to act in this way." It seems to follow from this that the feeling of duty involves a consciousness of duty as something real, and that this consciousness determines the expression.

Nevertheless, there seems to be an insuperable difficulty in understanding such a state of consciousness. Westermark holds that it must be understood as an awareness of the fact that omis-

sion of the action is liable to arouse moral disapproval, and this disapproval is for him the feeling of duty itself.[1] But in that case the feeling of duty itself would be possible in the absence of awareness that an action is a duty. But this seems to be impossible even on Westermark's own view. For, according to him, the moral feeling as such is marked out *inter alia* by the idea of its impartiality which is essential to it.[2] Against this there seems to be nothing to object, at any rate so far as concerns the feeling of duty. But he must define impartiality as having regard to rights which are objective.[3] But rights obviously cannot be regarded as objective unless duty, which is their correlate, is also objectified.[4] But it is plain from other reasons too that his consciousness of duty in the objective sense cannot be awareness that an action is liable to arouse moral disapproval. For I can have that awareness as a purely disinterested spectator of my own or another's mental life without my will being thereby necessarily directed in any way towards omitting such an action. But it seems impossible that consciousness of a duty to act in a certain way should be present without the will being directed in any way towards the action in question. This "under an obligation to" surely expresses a conscious conative impulse, and therefore it seems impossible that it should have any meaning unless such an impulse is actually present. Besides, we are here concerned with consciousness of duty, and not with consciousness of a certain feeling of duty. It is obvious that we sharply distinguish between duty and feeling of duty. In passing judgment upon the feelings of duty which are present in oneself one may even decide that it is one's duty not to allow oneself to be led by a feeling of duty which immediately arises, either because the consequences of the action have not been fully thought out or because the feeling seems to be

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[1] *Ursprung und Entwicklung der Moralbegriffe* I, 1907, pp. 1 *et seq.* cfd. with pp. 114 *et seq.*

[2] *Loc. cit.*, pp. 85 *et seq.*

[3] *Loc. cit.*, p. 101.

[4] Cf. my essay in *Psyche*, 1907, *On moral-psychological Questions*, pp. 285 *et seq.* (In Swedish).

determined by "impure" motives. In regard to other men we distinguish still more sharply between their more or less morally imperfect feelings of duty and their real duties. We say: You ought to develop a purer feeling of duty in yourself. All this would be meaningless if feeling of duty were identified with duty.

But, on the other hand, it seems equally impossible to regard the state of consciousness in question as the discovery by us of a certain quality of the action which is for us the characteristic of its being a duty. By investigating the action we may, no doubt, discover that it has, *e.g.*, such properties that it promotes general welfare, and we may decide that it is a duty on that account. But the characteristic of being a duty is certainly not for that reason identical with the property thus ascertained to be present. If it is the case, as has been represented above, that this "having a duty to" is an expression for a certain conative impulse, it seems impossible to regard duty as a property of a certain action. As has already been shown, it is a peculiarity of feeling that its content cannot as such be inserted into a context of independent reality, and therefore also cannot be regarded as a real property of an object. It is only in the actual experience itself that such an insertion into the context of independent reality can take place.

But against this the following objection might be raised. It might be said that the very fact that we are conscious of duty as an objective characteristic in the action shows that this "being under an obligation to" cannot, as is here suggested, be a mere expression of feeling, but that it must express a predicate in a judgment which characterizes a certain action of mine. As to this, the first point to notice is that the fact that the word "duty" occurs as a grammatical predicate in a sentence in the indicative form, does not prove that a real judgment lies behind the sentence. This is true, however much the sentence may be the naturally forthcoming expression for a real state of consciousness which lies behind it. It is certainly not impossible that other things beside judgments, *e.g.*, associations of different experiences, should express themselves in a sentence in the indicative form. It remains therefore to enquire in this special case whether such

a sentence really does express a judgment. Let us then consider more closely how things really stand in the case of a sentence containing the word "duty." "This action is a duty for me." Such an expression is exactly equivalent to the following: "This action ought to be undertaken by me" or "it ought to be actualized by me." So "duty" is equivalent to "ought-to-be". But in that case I should, in the judgment which lies behind the sentence, be representing to myself a certain modification of existence itself as a real characteristic of the action. I should thus be ascribing to the modification of reality an absolute reality. But this is as impossible as that I should be able to regard a certain limitation in what is black as absolutely black. Or, to put it in another way: I should, in one and the same act of consciousness, ascribe reality in the absolute sense to the action, in so far as I take it as possessing a real characteristic, *viz.*, oughtness-to-exist, and at the same time say that it merely ought to exist. So there cannot be a genuine judgment at the back of the utterance of the sentence. But, if what is peculiar in the "ought" of duty cannot be a term in a judgment, because it would then be a modification of existence, it must be of such a nature that it cannot function as a cognized term in the context of reality. But this is exactly what is peculiar to a feeling-content as such. Thus it is shown that there lies at the back of the "ought" of duty a feeling. That this feeling is a conative one follows from the fact, stated above, that in our consciousness of duty we feel ourselves driven towards a certain course of action without being determined thereto by any valuation.

It would seem, then, that here too there is only a simultaneous association of a feeling of conative impulse with the idea of an action, and that only the *verbal expression* of this association is a sentence in the indicative form. This might be explained by supposing that the idea of the determinate character of the action is predominant at the time when the speech-reflex operates, and that it forcibly inserts the expression of the feeling into the expression of the determinate character of the action. In that case the expression of the feeling would not remain independent, as

it does in the imperative "thou shalt" or the optative "would that." The latter expressions, in spite of being in the sentential form, do not in the least suggest that the content which they express is a property of the action commanded or of the event desired, as the case may be. On this view, there would not really be an awareness of duty in the objective sense; there would merely be a sentence couched in such a form that it produces the misleading impression that there is a judgment at the back of it. But against this solution of the difficulty must be set the fact that the duty-sentence in its indicative form does not remain a mere *flatus vocis*; it influences my way of thinking. It really is the case that "being under an obligation" functions as a logical term. From its supposed presence in one instance I conclude to its presence in another, exactly as if I were really dealing with a genuine property of the object itself. Here is an illustration. "I am under an obligation to avoid *this* action because it would be a theft." Here plainly the starting-point is that a theft is something which one is under an obligation to avoid. *This* action ought then to be avoided, because it would be a theft. It is impossible that this conclusion should seem to us to be cogent unless we actually thought of obligatoriness as a property which belongs to the object itself and remains the same in all the combinations into which the object may enter.

It is of interest here to consider an analogous case from the region of value. Suppose I say "Would that he might soon arrive!". Every attempt to translate the sentence into a genuinely indicative form, *e.g.*, "His early arrival is something which would-that-it-might-happen," is a mere *flatus vocis*. Every attempt to find a basis for the connexion between the arrival and this "would-that-it-might-happen" is doomed to failure. I cannot intelligibly ask myself "Why would that it might happen?". The reason for this is of course that the expressions which are here used are by no means adapted to the genuine indicative form. This implies that here there is not attached to the sentence any idea of something as having this or that character. What determines the utterance is merely a simultaneous association of the feeling of

pleasure with the idea of the person's early arrival. The expression of the feeling here keeps its independence. This checks the transition to a sentence in the genuinely indicative form, to which a genuine judgment could be attached. But suppose that the expression takes the form: "It is desirable that he will soon come." Even here it is certainly the case that what originally lies at the back of the utterance is a feeling of pleasure and the idea of the actuality of a certain event, provided that a meaning really is being expressed. For even here it is a genuine wish which is being expressed. It should be carefully noted that one is here by no means expressing one's consciousness of the presence of a wish, as would be the case if the utterance had taken the form "I wish that he may soon arrive." In the case now under consideration the utterance has, after all, taken the indicative form. And "desirability" has here acquired the character of a property belonging to an object. It is now a logical term, as is plain from the fact that we believe ourselves to establish the desirability of this or that on the desirability of something else. It is desirable that he should soon arrive, one might say, because it is desirable that I should soon find out how a certain business transaction has gone off. Here what is secondarily desirable gets that property from the fact that it includes the more determinately specified way in which what is primarily desirable, *viz.*, the information, comes to be; and the latter retains its value-property in this its more concrete specification. But, on the other hand, every attempt to determine what desirability, as a property of a certain event, could be is doomed to failure. It cannot be identified with the fact that the event actually is desired; nor is it a property of the latter, considered as an item in the context of reality, which might be discovered by analysis of that context.

Compare now with the above example of an expression of a valuation the following example of an expression of a conative impulse. A person feels himself tempted to commit a theft, and his overcoming of the temptation expresses itself in a simple "No, I will not behave so badly." There is no genuine indicative form to which an actual judgment could be attached. Here a sim-

ultaneous association of the feeling of a conative impulse with the idea of omitting the action—in this case, a resolution—expresses itself, whilst preserving the independence of the expression of the feeling. But it may be that a motive which has influenced this overcoming of temptation was a feeling of duty, which expresses itself in saying to oneself "It is my duty not to give way to temptation." Here we do not merely have a simultaneous association of the kind described. "Duty," which here corresponds to "will" in the former example, has become a property immanent in the omission of the action, which one deals with as if it were a logical term. So we have here a parallel to the psychological situations in the two examples of dissimilar expressions for valuations.

The difficulty which is common to both cases, *viz.*, how to understand the possibility of regarding value or duty, as the case may be, as an objective property, should now be capable of a single solution. In each case there is no other ground for the objectification except the indicative form of the expression for the simultaneous association which is present. The expressions "value" and "duty," and others to which we ascribe similar meanings, considered as terms in sentences in the indicative form, refer primarily to a background of feelings in simultaneous association with ideas of something as an item in the context of reality with its own peculiar property. These associations express themselves in sentences in the indicative form, because the cognitive element predominates in determining the expression and forces the expression for the feeling in among the expressions for the objective properties of presented objects. Such sentences are, in the first place, not just arbitrarily formed conglomerations of words, as, *e.g.*, "The stone is a gorilla," but are reflexes which arise unconditionally from the underlying state of consciousness and are comparable with interjections. Secondly, they are not characteristic of an isolated individual, but are determined in every case by the individual's membership of a social linguistic community, so that similar states of mind in different persons who use the same language are similarly expressed. But, through

their unconditional and extra-individual character, such sentences apparently acquire just the same properties as sentences which really express underlying judgments. It is perfectly natural, then, that the expression leads to an attempt to form a genuine judgment in connexion with it.

Suppose that a person tells me something and that I believe him. His story causes me to form judgments, bound up with my belief in the reality of the thing narrated, in connexion with his utterances. Even if I do not believe the narrator, his story nevertheless leads to the formation of judgments in connexion with his utterances. But in the latter case there is a consciousness that the only reality here is the idea of the event. The reason is that every idea of a certain state of affairs as real has at least a tendency to carry with it an involuntarily and extra-individually determined expression, *viz.*, a sentence in the indicative form. It follows from this that the idea of a state of affairs is generally accompanied by the apprehension of such a sentential expression. But this makes it equally natural that the converse should happen, *i.e.*, that the apprehension of a sentence in the indicative form (provided that the sentence is not a mere conglomeration of words, and provided that it is not a mere expression, on the part of the subject who apprehends it, of an underlying judgment) carries with it by association the idea of a certain state of affairs as real. But the idea which thus arises is not just any idea. Every ideal content, other than that which has for its involuntary and extra-individually determined expression just that sentence which is apprehended, carries with it a different expression. From the latter there would follow an apprehension of an expression which would conflict with the original apprehension. Therefore, in so far as the original apprehension persists it carries with it just that idea which has for its involuntarily and extra-individually determined expression the apprehended sentence. It should be noted that it is just the extra-individual character of the involuntary expression which makes communication possible. In making the communication the only intention in the communicator is his intention to arouse in the person addressed certain chosen

ideas, by bringing to his notice the involuntary and extra-individually determined expression-reflexes for those ideas. The utterances themselves are not in any way formed deliberately, in so far as a real community of speech exists, as is here assumed. It is only in so far as this is not the case that the communicator deliberately translates the expressions, which he would naturally use in communicating his thoughts, into sentences which will arouse the intended ideas in the person addressed, in view of the latter's ways of giving involuntary and extra-individually determined expression to those ideas. On the assumption of social community of speech, the one and only intention which need be involved in the person addressed is to pay attention to the communicator's utterances in order that the corresponding ideas may be evoked. But the ideas which are connected with the utterances attended to arise involuntarily from the apprehension of the latter, and are thus homogeneous with the communicator's own ideas in consequence of the social community of speech. It is only in so far as this community is lacking that a deliberate search for the communicator's own ideas, *i.e.*, an effort at interpretation, is involved. But even here it depends on a translation of the given expressions into those which are natural to the person addressed. Once that has happened the ideas of the matter to be communicated arise immediately.

Let us suppose, then, that simultaneous associations of feelings with ideas of a state of affairs as actual express themselves, in the way described, involuntarily and in an extra-individually determined manner, in sentences in the indicative form and containing as elements expressions of feeling, such as "value", "duty", or the like. Then a peculiar consequence follows in regard to the subject's own train of ideas. When a genuine judgment-experience expresses itself in a sentence in the indicative form this gives rise to a new judgment-experience only in another subject, with the same ways of expressing himself, who apprehends the utterance. Nothing of the kind happens in the subject himself who expresses his judgment. But, in the case now supposed, the utterance necessarily reacts on the subject. For, according to what has been said

above, every apprehended sentence in the indicative form, provided that it is not a mere conglomeration of words and also that it has not already behind it an actual experience of judging, carries with it such an experience. The question now is: What kind of judgment-experience results? Obviously the subject in the new judgment is the thing which is conceived as real and qualified as valuable, or the action conceived as real and qualified as dutiful, as the case may be. But what are "value" or "duty" as predicates? Now anything that one might think of concretely here would give rise to a judgment-experience which would have a different involuntary and extra-individual expression from that which is actually occurring, and therefore would not accord with the latter. If, nevertheless, some judgment-experience must arise in connexion with the sentence in the indicative form, this must lack all concreteness in regard to "value" or "duty", as the case may be, considered as predicates. That is to say, with these words one has before one's mind only the idea of a property in the abstract, a certain something regarded as present in the thing or the action of which one is thinking, without being able to form any idea of what that property is. One cannot in any way conceive this something except as a reality which determines the expression. Still, it is quite natural that, whenever the words recur as terms in sentences of the kind described, with an associated feeling behind them, one thinks that one is again in presence of the same quality, the same something to which every concrete idea is inadequate, which belongs to the word in question, *e.g.*, "value", "duty", and so on. But, when once such ideas have become developed, although their only basis is in spontaneously occurring sentence-formations with expressions of feelings as terms in them, we operate with this imagined something as if it were a logical term. We are not prevented by the fact that we lack all concrete ideas of it, and that, when all is said and done, we can conceive it only as that which determines a certain expression.

We have here before our eyes a prototype in ordinary consciousness of the Scholastic way of thinking. Here too it is a question

of spontaneously formed sentences, which have their basis, not in any unitary state of consciousness, but in associations, though not in this case associations of feelings. Here too these sentences lead to the idea that there really is a certain something which determines the expressions, although every concrete representation of it is lacking. "After all, the words must make us think of something." So one works with this something as if it were a logical term, one brings it into connexion with other terms, states its properties, draws conclusions with it as a term in the premisses, and so on. *E.g.*, "That which is *causa sui* produces its own reality or exists necessarily." The word '*causa sui*' expresses an underlying association. Into this there enter on the one hand fluctuating ideas of sensible realities, and these ideas jostle each other aside and succeed each other so that no concrete characteristic is retained before the mind. On the other hand there enter into it ideas of causal connexion which jostle and succeed each other, so that here too all concrete determinateness goes up in smoke. The expression is "a simple reality which is cause and effect in one, *i.e.*, *causa sui*." The simplicity comes from the first factor in the association, and cause and effect from the second. But in the sentence "That which is *causa sui* produces its own reality and therefore exists necessarily" a third associated factor plays its part, *viz.*, the notion of the idea of a thing as cause of that thing. This makes possible the separation between cause and effect, which is always necessary. Thus one believes that there really is something which the phrase "*causa sui*" expresses, although one has not the least idea of *what* it is. "That which is *causa sui* has effects distinct from itself." Here one factor in the association predominates in the expression. "But these effects are immanent in it." Here another factor plays its part, *viz.*, "*causa immanens*." In using this expression too, one believes in the presence of a certain something which is supposed to be a property of that something which is expressed in the phrase "*causa sui*," and so on to infinity!

The final result is that there does actually exist an idea of this or that action as really a duty, bound up with a conative impulse.

But that which is here thought of is merely an unrepresentable something, which is connected with the expression "duty", "obligation", etc., and which cannot be distinguished except by reference to just that expression. One assumes the existence of a something which is "duty," or rather something which the word "duty" denotes. What produces the idea is the occurrence of this expression as a term in a sentence in the indicative form, which has arisen from an underlying simultaneous association of a feeling of conative impulse with an idea of a certain action as real. The process is as follows. A feeling of conative impulse is united with the idea of the reality of a certain action. Owing to the idea being predominant when the expression is being formed, this combination expresses itself in a sentence in the indicative form, *viz.*, "This action is a duty." To the sentence is attached the idea of this action as having a certain property which answers to the name "duty". It should be noted that in this latter idea the action is not conceived as real in the same sense as it was in the original idea of the action, *i.e.*, it is not conceived as belonging to the context of reality whose elements are concrete and perceptible. It is conceived as real only as having that essentially imperceptible quality which is "duty". It exists in the world of "duty", not in "our" world. If it also belongs to the context of sensible reality, *i.e.*, if it actually happens, this has nothing to do with its reality as a duty. This implies that the same action, which exists as a term in an imperceptible reality, *viz.*, the world of duty, exists also as a term in the perceptible world.

(c) *The idea of the correctness of the action in accord with a norm which determines the feeling of obligation and its expression.*

We must now investigate more closely that idea of the action which, on our view, would be one of the two terms in the simultaneous association which lies at the basis of the idea of duty. The question is whether there is any special characteristic which is regularly thought to be present in the action. In this case the property of being a duty must be connected immediately with

just this characteristic. There is actually such a peculiar property. The action is regularly thought of as being that which is *right* or *proper* under the actual circumstances. What is one thinking of here?

In consequence of the undoubted kinship between the feeling of duty and the state of feeling of the recipient of a command, one might suppose that the conceived rightness means that it is just this action which is commanded by a certain will, let us say the will of society. But, in so far as we are dealing with the consciousness of right which goes along with the feeling of duty, the primary question which always arises when confronted with a will which issues a command is: "Is it right to obey?"

That is to say, the action, of which rightness may possibly be predicated, is not ultimately the action which is commanded, but obedience to the command. The particular action which is commanded then becomes right merely because it falls under the species of action which obedience entails. But it is, of course, meaningless to take obedience to the command as right action, if this means the action which is commanded in that very command. Certainly a superior power can command obedience to the commands of a subordinate power. And a person can command obedience to his own past or future commands. But it is impossible in a command to order obedience to that command itself.

One could, however, look at the matter from the opposite point of view and say that the rightness of an action means that the omission of it is the object of a reaction on the part of a superior will. Still, to regard such an action as right presupposes that the reaction itself is held to be righteous. But if a reaction, however powerful it may be, can always be questioned in respect of its righteousness, its righteousness can never consist in the fact that it happens, no matter what forcefulness it may possess. We must not be misled here by the circumstance that the way in which society reacts does in fact exert an influence on our judgment about the rightness of a reaction, and therefore also on our decision whether an action is right or not. We do not mean by the righteousness of the reaction of society the mere fact that it oc-

curs. It should be noticed that the reaction of society against certain actions gets its strength from the conviction that here not only power but also right is vindicated. The individual is of course influenced by that conviction.[1]

But reference to an expected result of the action as determining its rightness is also mistaken in this connexion. For it can never appear to us as a duty actually to bring about a certain external state of affairs; at the utmost our duty would be to strive for it to the best of our ability. For, otherwise, the rightness of an action would be its property of being the right means of attaining the external result. In that case an involuntary mistake about the means would imply that I had acted wrongly. But anything of the kind is unreasonable from the standpoint of the rightness which is concerned with the consciousness of duty. Yet it might seem that, when we hold that one person's right is determinative of another person's duty, the rightness of an action would mean its property of subserving the interest of the possessor of the right in a certain respect. In another connexion we shall consider more closely the possibility of carrying out the interest-theory as applied to subjective right. But let us suppose that the idea of

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[1] Gareis (*Vom Begriff Gerechtigkeit*, 1907, p. 11) contends that the righteousness of a reaction originally meant its accordance with the feelings of pleasure or displeasure of society. But he lands in a curious conflict with himself when he (i) describes rightness itself as one with "the feeling of pleasure or unpleasure" of "the community," but (ii) immediately afterwards agrees with Windscheid's saying: "Right is, not what I regard as right, but what the community to which I belong has recognized as right and has, on that account, asserted to be right." (p. 21). Thus "the community" itself recognizes something as *being* right. It cannot therefore at the same time regard its own recognition as identical with the right, for the recognition presupposes that what is right is already there. But in that case, of course, the individual too cannot regard this recognition as one with the right; he can accept the community's point of view and its consequent way of reacting only in so far as he considers that the former really is directed to what is right and that the latter is, for that reason, right. This obviously presupposes a rightness which is above the community, and which therefore cannot be identical with the latter's way of feeling pleasure or unpleasure. There is a similar fallacy in Stark, *Die Analyse des Rechts*, 1916, p. 175.

a person's right is the idea of a rightful interest. Still, the rightness of the corresponding action cannot be determined by its property of forwarding that interest. If I have bought and paid for an article, I have a right to demand its delivery. It is then always right for the seller to satisfy my demand. This rightness is wholly independent of whether my real interests would be hurt by the delivery of the article, which is always a possibility, *e.g.*, if I have bought a medicine which would in fact be injurious to me. The fact is that the interest of the person who has the right corresponds to the rightness of a certain action on the part of the party who is under an obligation only in so far as the furtherance of that interest demands an action which is already determined as right. That is to say, the interest is not something which is rightful in relation to the other party when taken in abstraction; it is rightful only in so far as it is bound up with a certain determinate action on his part which it is right for him to do. But in that case it is obviously meaningless to say that the rightness of the action consists in its property of promoting the rightful interest. The latter is itself rightful only in so far as its promotion requires just that action which would be the right one. A certain action, which is assumed to promote another person's interest, has primarily the property of being the right one; and the person's interest is rightful for that reason.

It is, therefore, mistaken to refer (as is sometimes done)[1] the right action, in the sense which is relevant to the consciousness of duty, to certain supposedly objective values, for the realization of which a certain action on the part of certain persons would be of vital importance. No doubt we can, in such cases, also talk of a right action, in the sense of one which is objectively correct as being the condition for realizing a certain supposedly objective value. But this correctness depends entirely on the actual results of the action, and is quite independent of what the agent may have expected to be the result of it. This way of judging the rightness of an action is altogether foreign to that conception of right

[1] See, *e.g.*, Schlossmann, *Der Vertrag*, 1876, p. 316.

which belongs to the consciousness of duty.—Suppose one says that it is right for the militarily trained citizens of a state to fight for their fatherland's existence because the latter has an objective value. As regards the sense in which rightness is used, this has exactly the same meaning as when one says that a good provision of artillery is objectively valuable as a means, because it is a condition for the existence of the fatherland. That is to say, the fight for the fatherland and the fighters themselves are treated merely as means to a value which stands above them. But the fact that a person who acts rightly, in the sense which is relevant to the consciousness of duty, stands out as having a non-instrumental objective value, is plain from the respect which is felt for him. This valuation becomes all the more marked in proportion as the sense of duty stands forth as determinative for the action, and in proportion as the motives which it overcomes are strong, *i.e.*, in so far as the action presents itself as really right. For it is of the essence of this that the sense of duty should be determinative and that it should be strong enough to overcome the temptations to alternative actions.—What we have said does not exclude the possibility that the action which is marked out by being of essential importance for the realization of an objective value may also be marked out as just the one that is right in relation to the sense of duty. (*N.B.* it would be an action to the best of one's ability directed to such realization.) Our ideas of objective values are actually dominant in the world of practical thinking, and they are determinative also of the nature of our ideas of duty. But that such an action is also right from the standpoint of the sense of duty means something quite different from its objective correctness as a means.

It might, again, be suggested that rightness means a maximum of immediate pleasure or a minimum of immediate displeasure concerning this action in comparison with all others which are possible on the occasion. But it is easy to see that actions which are morally indifferent or are regarded as wrong might also be chosen on such grounds. In this connexion we may specially note the fallacy of referring here to aesthetic pleasure, as Herbart and

others do. For, if "beauty" is a value-predicate in an object, we are thinking of that object, not in its real character, but as the content of an image. The picture is beautiful for a spectator. It is not the cloth, together with the pigments which are spread upon it, which the beauty is thought to belong to, but only the content of the image which one gets from it. But in the case of the rightness of an action it is a question of the action itself and its real character. That a certain action is the right one means that the actual undertaking of it is right.

It seems to follow from this that nothing whatever external to an action is the criterion for its rightness from the standpoint of sense of duty. It does not matter whether the external reference be to a commanding will, or an external consequence, or the immediately greatest pleasure or least displeasure concerning the action. From this again it seems to follow that the action stands out directly as the one which is right for me, in the sense that it belongs to *me* quite literally. If I do not act in that way, there must be something external to me which has forced itself in and prevented my true self from playing its part. Such an action is, therefore, from the point of view of preserving my autonomy, something mistaken and wrong. Of course this way of looking at the matter presupposes a distinction between an ideal ego, I as such, and an empirical ego, I in my empirically given limitations. The latter falls short of its own essence in its wrong action.

Nevertheless, such an interpretation of the state of consciousness in question, which has been common in rationalistic systems since Kant, presents certain difficulties. We must keep firmly in mind that the question here concerns that property of the action which is bound up with the feeling of conative impulse which belongs to the sense of duty. It is just with the idea of the *rightness* of the action that the feeling of obligation is bound up. We must therefore demand such an explanation of its content as really will make intelligible its power of combining with itself such a feeling of conative impulse as the feeling of obligation in fact is. Now it is undoubtedly true that the idea of self-preserva-

tion plays a most important part in our willing wherever the "self" is endangered. But there is no experiential support for the view that this idea determines our will in such a way that we feel ourselves bound just because our own free valuation is not determinative. On the contrary, it would seem that in normal cases the strongest immediate unpleasure would attach itself to the thought of annihilation, and that this unpleasure would produce a specially high valuation of a life-preserving action and at the same time a conative impulse towards such an action. In view of this, the essential feature in the feeling of duty, according to the present theory, would be valuation of a certain action as a means to avoiding loss of one's own autonomy. The feeling of obligation would then depend on the fact that what determines the valuation of the action is the displeasure felt at this loss of autonomy. The pang of conscience would be a feeling of unpleasure at having suffered a loss of autonomy through acting contrary to my true self. The fear of the pangs of conscience need not, in that case, be an essential factor in the feeling of duty (which, as argued above, would be an impossible view); it would merely be the direct unpleasure at the thought of a possible loss of autonomy. It might then be said that the above argument, regarding the purely conative character of the feeling of duty, is unsatisfactory because it has failed to take account of this way of looking at the matter. Nevertheless, on this view, the essence of the pangs of conscience would be unpleasure at the *result of the action*, *viz.*, the loss of autonomy, and not at the *action itself* as undutiful. That the latter, however, is the essential feature in it is most evident in remorse over wrong-doing. Here it is decidedly the infringement of another's *right* which is determinative of the unpleasure. But what is another's *right* if one's own duty towards him is eliminated in thought?

Besides this we must take account of the following fact. If I present a certain action to myself as belonging to my true self, so that any other action would mean the repression of the latter, I must so conceive the matter that the willing of the action is essential to myself in its true meaning. For an action belongs to me

only through my willing it. But how can I come to regard the willing of a certain action as essential for my innermost self? One might answer, with the rationalists, that this self is one with pure reason, considered as the power of self-determined thinking and therefore in practice as a purely rational will. This is experienced in the consciousness of duty as demanding such an action as is in accordance with practical reason. Against this it needs only to be objected that self-determined thinking is the same as pure consciousness, *i.e.*, consciousness which is conscious of nothing. But this is merely a philosophic fiction. In reality there is only one reasonable answer to the question. It is only if I feel that a conative impulse to a certain action ought unconditionally to be realized that it acquires such importance that I ascribe it to my real self and regard any hindrance to its transition into an intention as a repression of my autonomy. The following point should be noted. In the idea of the inner and essential, as opposed to the outer and unessential, in the self, we are thinking of something autonomous, altogether independent of everything else, and therefore determinative in respect of all else. But I cannot regard the willing of a certain action as belonging to this autonomous entity unless at least the impulse to it already exists and is assignable to it. But in what sense can a conative impulse be held to belong to what is autonomous in us? Not in the sense that its realization or transition into an intention can never be checked by anything else, and therefore always takes place and is determinative in relation to everything else. Such a conative impulse does not exist. So the assignment of a conative impulse to that which is autonomous in us cannot be based on its domination in our actual conative life.—All that remains, then, is that this assignment is something which refers to the realm of ought; that the conative impulse is dominant in so far as it unconditionally (*i.e.*, independently of everything else) *ought* to be realized. The ego is regarded as having an inner essential will, because certain conative impulses stand out as dominant, in the sense that they, so to speak, have an unconditional *claim* to be realized. Any checking of them is a check to our autonomy, in the sense that the self which they constitute

through the fact that they *ought* to be realized is not determinative in *actual* life.[1]

It follows that one is guilty of circularity if one seeks to explain the power, possessed by the idea of an action, to evoke the feeling of conative impulse which is present in the feeling of duty, by alleging that the action is essential to true autonomy. An action cannot be regarded as essential for that purpose unless the willing of it is held to belong to the initiative of the innermost ego. And this is impossible unless the feeling of duty is already present.—The real position is as follows. It is the presence of the feeling of duty, in combination with the idea of a certain action as the right

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[1] This point of view, taken by ordinary consciousness, is reflected in philosophical attempts to deduce the ought of duty from the fact that a certain volition belongs to the essence of the ego. In reality it turns out that what is meant by the essence of the ego in this context is the willing which is essential in the sense that it unconditionally *ought* to be carried out. Thus the position is logically circular. I will take as an example Schuppe's synoptic presentation of this way of thinking in his book *Der Begriff des subjektiven Rechts*, 1887, pp. 6—7. A certain "thinking, feeling, and willing" is to be ascribed to "the specific notion of man, consciousness-in-general." *Therefore* it has objective validity, in the sense that it "is valid for everyone". This validity does not, however, mean that it actually exists in everyone. For there is always "the possibility of deviating from this essence of one's own". Instead the validity is alleged to consist in the fact that such "thinking, feeling, and willing" is demanded of everyone. This and only this is the meaning of ought. From this it is plain that the mode of thinking, feeling and willing in question does not belong to consciousness in general (which is here identified with our own essence), in the sense that it always exists in every conscious being. But, in that case, how can it be said to belong to consciousness as our essence? This can be asserted only in respect of the validity which, according to Schuppe, is a *consequence* of its belonging to consciousness as such, *i.e.*, merely in respect of the fact that it *ought* to exist in every conscious being. One might object that it can always be shown to belong to the consciousness, which is our own essence, in the form of a disposition. But how can anything be described as a disposition in our own *essence*, *i.e.*, in that which is determinative in us, unless it actually manifests itself as dominant? But, if the mode of action in question cannot be said to be an *essential* disposition, in the sense that it always in fact comes into action, quelling all opposition and taking the lead of all the forces in us, how can it be described as an *essential* disposition if it does not even present itself as so dominant that at least it *ought* always to take the lead in us?

one, which leads to the idea that we are here concerned with an action or a volition, as the case may be, which is of essential importance for the preservation of one's autonomy. The mediating term here is the idea, which is bound up in the way already described with the feeling, that the action or the willing of it, as the case may be, ought unconditionally to happen, *i.e.*, that the impulse ought unconditionally to pass over into a resolution and that it is therefore a factor in my true self. This idea of the importance of the action or the volition may afterwards react on the feeling of duty, and strengthen its motivating power through its peculiar intensity as a feeling. But this idea can never be the idea of the rightness of the action, which arouses the feeling of duty.

So the question of what we mean by the rightness of an action, in the sense involved in consciousness of duty, remains unanswered. If now the view put forward above is correct, *viz.*, that the feeling of duty is akin to the state of feeling in the recipient of a command, in so far as there is in both cases a conative impulse independent of valuation, then the proper course for pursuing the enquiry is plain. We must enquire whether, in view of our knowledge of the way in which such impulses arise, we can suggest any characteristic which could produce such an effect if it were ascribed to the action. This characteristic could then be taken to be the content of what we mean by the rightness of an action, in the sense involved in consciousness of duty.—At the same time, however, it must be explained how such a characteristic can be ascribed to a certain action.

Suppose we ask ourselves what are the factors which, in our experience, are capable of producing a conative impulse independently of all valuation. We find that there are two, *viz.*, command and habit, which are specially relevant in explaining the idea of the rightness of an action. We have already considered the significance of command in this connexion. As regards habit, it is certainly true that it primarily shows its power in the fact that certain ways of acting, which have become "habitual," are mechanized, so that they take place automatically, *i.e.*, without the intervention of genuine volition. But if, for one reason or

another, the habitual action does not take place, we may naturally assume that the power of habit nevertheless exerts itself, *viz.*, in an incomplete innervation or in an incipient movement in the direction of the mode of action in question. But the check produces a feeling of unpleasure, and in that way the checked innervation or movement emerges into consciousness. The psychical correlate to it is willing, which here takes the form of a feeling of conative impulse towards the action but without any intention. In this case the feeling of unpleasure is not determinative of the willing, in the sense of being its motive. The two arise together from a common cause, *viz.*, the checked innervation or movement.

Let us now investigate the authorities with the power of command, under whose influence the individual member of society comes. First we may mention the person who brings one up. The individual in his upbringing is subject to a whole mass of orders. "You must not do that! You must observe that!" Then there are the laws which hold in the society. The individual finds that the doing of some actions and the omission of others are bound up with reactions, in accordance with these laws, which are painful to him. It is no wonder that they come to represent for him an awe-inspiring power which commands and forbids. Then, again, the traditional belief in divine powers, who are held to issue commands and prohibitions, plays its part. And, in the present connexion, the general social milieu in which one lives is particularly powerful. One's environment reacts unfavourably against the doing of certain actions and the omission of others. This acts on the individual as if an indefinite commanding power stood over him. Finally, we must mention the commanding power exercized by persons in possession. Actual possession, supported by an unorganized or an organized social force, gives authority against those outside. The owner thus acquires the power to assert himself against the latter, as a power which makes the demand: "Hands off my property!"

It should be noted that, in a primitive society, with its idea of a common origin and with less developed individuality in its members, these forces act in a unified way and support each other.

But even in a modern society they co-operate to a certain extent, at any rate within certain social strata. There is *one* form of co-operation between different commanding powers which always exists, *viz.*, between those which are effective within the social circle to which the individual belongs and with which he feels himself bound up. What, now, is the consequence of this co-operation? Well, the thought of certain ways of acting carries with it the awareness of "That shall be done! That must be done!" or in general of an expressed command; whilst the thought of others carries with it the awareness of "That must not be done!" or in general of an expressed prohibition or rather an expressed command to avoid them. Here the commanding authority loses its individuality, and all that is left is the word of command, presented in a fluctuating image, auditory or visual. But, owing to its involuntary entry along with the thought of the action, it retains its suggestive power, *i.e.*, it sets up the mental state corresponding to it, *viz.*, a feeling of conative impulse in connexion with the action or the omission of it. Suppose, now, that the individual finds that such a combination between the same actions and "must be done" or "may not be done" commonly occurs among the members of the same social group. Then the belief naturally arises that a "must be done" or "may not be done" belongs objectively to certain actions. Thus there is formed the idea of a system of positive or negative ways of acting as connected with an expression of command. This system "must" or "ought to" be unconditionally carried out, and it produces an impulse towards observance of it. When he is about to act in a way which conflicts with the system another action presents itself as that which "must be done" or "ought to be done." Thus a certain action comes to stand out as that which is right in relation to the system which is bound up with the expression of command. It thus gets ascribed to it a property, the apprehension of which carries with it an immediately evoked feeling of conative impulse, which is bound up with the action which has come, in the way described, to be regarded as right. It should be noted here that one can always withdraw oneself from the influence of

a commanding authority by not paying attention to it, by "turning a deaf ear to it." Again, such a power, through its personal character, is not exempt from the influence of all kinds of external circumstances, which make it uncertain whether it will hold to the command which it has once given. According to Homer even the gods can be bribed. But the conviction that a certain system of ways of acting is objectively connected with a "must be done" carries unconditionally with it a judgment on any particular action in accordance with it, in so far indeed as the possibility of an action contrary to the system is contemplated at all. The idea of the "right" mode of action, which thus arises, carries unconditionally with it a feeling of conative impulse. For here we are concerned with modes of action which seem to have this "must be done" bound up with them *from their very nature.* This makes the conative impulse in accordance with them unconditional, and thereupon there follows attention to the special character of the particular action.

Let us now consider the conative power of habit. Here we must note that the immediate conative impulse which arises from habit has, in accordance with the above analysis of command, the same natural expression as the latter. The expression of a command is simply an expression for a conative impulse combined with the idea of another person's action. Suppose, now, that a general habit, *i.e.*, a custom, is formed within a social group. Then it follows from the above that, in every case where any tendency to a different action arises as an obstacle in the way, there appears an unconditional "must be done," *i.e.*, an expression of command. Since this expression of command is regularly combined with the same ways of acting in all members of the group, it naturally follows that it is regarded as an objective property belonging to that way of acting. Thus in connexion with custom there arises the idea of a system of ways of acting, having the expression of command as an objective property, which carries with it a feeling of conative impulse and leads to a judgment on each particular action, as explained above. Still, it is obvious that a person cannot, in one and the same state of consciousness,

accept different systems as having the expression of command as an objective property in complete isolation from each other. We must therefore suppose that custom and the above mentioned commanding powers either co-operate to form a single system of conduct with the objective property in question, or that they lead to the formation of different systems of conduct, each of which is accepted from a different point of view, these being in conflict with each other. If the individual comes to entertain these various points of view, the consequence will be an insoluble conflict of duties within him.

In this connexion it should be remarked that, in primitive society, custom seems to play the predominant part here, and commanding authorities, political, religious, or social, function in accordance with it. But, as development goes on, there seems to follow a relative repression of custom in forming the system of conduct in question, and a predominance of disapproval of certain ways of acting which is derived from directly apprehended social values.—The following fact should also be noted here. Suppose that the thought that there really is a system of the kind described has arisen, through the co-operation of custom and authoritative forces, in consequence of the regular connexion within a certain society between the idea of certain actions and the expression of a command. Then the way is open for filling out this system by means of interests, even of a merely individual nature. Let it be granted that the formation of the thought of the system presupposes a regular connexion within the society between particular actions and the expression of a command, and that therefore the system must originally have the character of being universally valid in relation to the group. This in no way prevents this thought from becoming individualized when once it has been formed. Since a person now has the idea that a certain system of conduct "ought" to be carried out, he can regard particular actions as belonging to this system, in so far as the latter holds for him in a certain situation. In determining such actions all kinds of factors may play a part. Still, however important individual interests may be, for obvious reasons, in determin-

ing what is the right action for me in a particular case, I always consider, in so far as the decision involves the sense of duty, that the only thing relevant is to know which way of acting is in accordance with the system of conduct which "ought" to be carried out. It may be that, in my opinion, the system demands a peculiar action in the circumstances in which I am placed. But I always hold that the same action would be right for another person with the same individual peculiarities placed in the same situation. It should be said that a tendency towards such individualization accompanies the development of the moral consciousness.

Suppose that the above explanation of the content of the idea of a right action, in the sense involved in the consciousness of duty, is correct. Then the idea of a "righteous" judgment is the idea that the judgment correctly pronounces as to the actions which are right for the parties concerned in the given case, when account is taken of the system of conduct which has the objective property that it "ought" to be carried out.

The probability that the proposed explanation is correct is increased by the light which it throws on various facts connected with the consciousness of duty.— We imagine to ourselves, under the name of "the voice of conscience," a commanding power within us which thus determines for us the right course of action. But, if we really stood merely in the position of the recipient of a command when we hear "the voice of conscience," there would only arise a feeling of conative impulse bound up with the idea of a certain action. The experience could not, then, give us the idea that a certain action is *objectively* right. But that is just what it does, in so far as "conscience" acquires for us a theoretical meaning, as pointing out the right action and thereby determining the feeling of duty. So the question arises: "Whence comes the misleading idea of a commanding power within us which is determinative of right action?" From the above explanation the answer is obvious. Conscience, in its theoretic aspect, is nothing but the idea, which arises in particular cases, that a certain action is in accordance with the system of conduct which has the expression of a command as an objective property, or, as we say, that

it is in accord with the moral law. This action itself has therefore this "must" or "ought" as an objective property. But the expression of a command leads one's thoughts inevitably to a commanding will. And so one inevitably lands in the contradiction that the action, on the one hand, has the expression of command objectively bound up with it, and yet, on the other hand, has it bound up with it only through the intervention of a certain will.

In the common notion of justice we regard certain actions as duties in relation to another person as possessing rights. Here, then, the fundamental idea is that the personality of the latter is the objective ground of the existence of certain duties. Yet it is natural for us to express the state of affairs in question by saying that the possessor of rights can make certain demands or claims on the person who has duties towards him. Here, now, are two heterogeneous ways of looking at the matter, connected with each other. On the one hand, we regard certain actions as duties because they are indicated in a certain way by another person, *viz.*, the possessor of a right, as desired by him. According to the law, *i.e.*, rules which are binding alike on the possessor of rights and the subject of duties, certain actions on the part of the latter, which the former indicates in a certain way that he wishes performed, thereby acquire the objective character of duties. Here it is a matter of complete indifference in principle whether the indication of the wish has the character of a claim or not. That the possessor of the right is the basis of the obligation means merely that the dutiful action derives that property through its connexion, in the way described, with him. But, when one describes having a right as the possibility of making a claim, duty is conceived as arising from a demand on the part of the possessor of a right. The notion of a claim as the essence of having a right is necessarily connected with the notion of a demand as determinative of duty. This concatenation of heterogeneous points of view can also be simply explained by the hypothesis here suggested. That an action is a duty for a certain person just because it is the object of an expressed wish on the part of another means only that this is the property to which the expression of command,

as an objective character of the action, is referred. But the expression of command leads to the thought of a commanding will. This must be referred in the first instance to the person whose expressed wish is the objective ground of the dutiful character of the action. He is regarded as having the power to impose an obligation by putting forward a claim to the action.

A third fact which strengthens one's confidence in the correctness of the hypothesis is the following, which we shall examine more fully a little later. This is the general tendency to regard the property of an action of being commanded by the state-authority as identical with the property of being a duty. This fact too can be simply explained by our hypothesis, as we will show in detail.

According to the point of view here put forward, what is called the moral norm is conceived as a system of conduct objectively bound up with an expression of command. Now it is certainly plain that such a notion must be completely devoid of truth. In conceiving the expression of command as a real property of an action one takes it as actual, not in "our" world, but as a term in a wholly different context of reality, *viz.*, the world of "ought." But this supersensible world gets its character from a factor of such palpably sensible nature as an expression of command, taken from the sensible world. This seems unreasonable in view of the reverence which is felt for the moral norm. Could such a palpably false idea produce reverence even in a consciousness steeped in modern culture? Is it not impossible to suppose that one should want to fall down and worship the very expression "It must be done" or "It must not be done?" As regards the first point, we must remember that the expression has a suggestive conative significance. Since it is the involuntary expression of a conative impulse, it calls forth, when it presents itself immediately as something objectively bound up with a certain action, an impulse towards that very action. But thereupon our interest is directed to the action, and any disturbing reflexion is checked. Not the least question of the truth of the assumption arises. Nor is the expression of command, in so far as it is ascribed to the action, conceived as a mere expression. Certainly it arouses the thought of a com-

manding will, and to that extent is conceived as an expression of command. But this belongs to another context of ideas. This latter certainly acts in the same direction as the actual "ought"-idea, but is not equivalent to it. It does not involve any kind of reflexion upon *this* idea, either as regards its truth or as regards the nature of its content.

This brings us to the second question. How can we reverence a mere expression? We do not reverence it *as* an expression, we reverence it in its sensible existence as an image. There is no insuperable difficulty in understanding this. It must be noticed that the expression in question produces in us an inevitable impulse to a certain action, *viz.*, the feeling of duty. But, as has already been mentioned, we ascribe this impulse, because it "ought" to be fulfilled, to our own true self; so that we seem to ourselves to preserve our own autonomy only if we let it pass over into a genuine intention. But this impulse, through endowing us with a real "self" and making possible real self-maintenance, gets attached to it the same intrinsic value which we ascribe to our ego in the proper sense. On the other hand, it arouses in us a feeling of obligation through the absence of any valuation in the conative impulse. Thus it acquires at once the character of something binding upon us and of an intrinsic value. But reverence just is a feeling which is bound up with such a context of ideas. The honouring of the flag provides an analogy to this. We honour it, not as a bit of cloth with such and such colours, but because the image of it has the power of evoking in our consciousness something else which is valuable for us. The value of the latter is transferred to its symbol.

It is far from being the case that reference to the reverenced moral norm, as that which determines for us what is right and as the ground of our obligation, constitutes a counter-instance to the theory here put forward. On the contrary, just the actual acceptance of such a norm can be made the basis of a direct proof of the essential correctness of the theory which we assert. The existence of the accepted moral norm could be expressed as the fact that there exists a rule for determining what actions ought

to be done in particular cases. By this rule one does not mean an ordinance of a will. For, if that were so, one would understand by the duty which is based upon it, not a property of the action itself, but merely the fact that it is commanded. Moreover, the norm would not then be regarded as valid for the determining will itself. Even if we do insert the idea of a determining will into the thought of the moral norm, *e.g.*, a divine will, we do not suppose that this arbitrarily legislates. We assume that it demands of us just what is in accordance with the norm, and that it derives its authority from its own moral content. Thus the moral norm itself is for us an objective rule, even though the thought of a legislator is smuggled in in an unsystematic way. This does not exclude the possibility of holding that its occurrence in its full purity in an individual depends on external circumstances which determine the degree of his moral development. But the existence of such an objective rule can be described as the fact that there exists a system of conduct which unconditionally ought to be carried out. The question now is: *What* is it that is thus described? Here the content of the grammatical predicate "ought to be carried out" presents special difficulties. The first question is: "Is there a genuine judgment at the back of the sentence in the indicative, in which the predicate has a meaning which accords with the suggestion made by the grammatical predicate of the sentence?" In that case, as has already been explained, we should describe a certain modification of "being," *viz.*, "oughtness-to-be," as a real characteristic. But, according to the above argument, this is meaningless.[1] The next question is: "Is there no judgment whatever behind the sentence in the indicative, but instead a simultaneous association of states of consciousness which expresses itself in a sentence of the kind which normally expresses a judgment?" In that case one of the two terms, in reference to the expression "ought," must be a feeling. But of what kind? Now we must notice that it is just the assumption of a moral norm which arouses in us the feeling of duty. What determines this feeling is indeed the idea that the

[1] See above p. 135.

action is right. But the feeling of duty, as has already been shown, is a feeling of conative impulse devoid of valuation. So the state of consciousness which is present in the acceptance of a norm evidently cannot be a valuation-feeling associated with the idea of a certain action. So it can only be a conative feeling which, in combination with the idea of a certain action, gets its expression inserted as a predicate-term in a sentence in the indicative form. Such a sentence would then, in its turn, produce the assumption of a certain something, which determines the expression, in the way which we have already explained. But that is just what is characteristic of the feeling of duty in contrast with other conative feelings. The expression of feeling "must be done" or "ought to be done" or "bound to" is here, and here only, a predicate in a sentence in the indicative. This in turn produces, as we have already more fully explained, the consciousness of actual duty which is involved in the feeling of duty. So it might seem that it is the feeling of duty which is at the back of the "must be done" of the norm. But this is impossible; for, as we have said, it is just the acceptance of the norm which *produces* the feeling of duty. So the state of consciousness which lies behind the expression must be an actual judgment. But, as we have already pointed out, the predicate of this judgment cannot be regarded as the content of an idea of which the grammatical predicate is an expression. Thus the only alternative left is this. The real predicate in the judgment which lies in the background can only be the grammatical predicate itself, *viz.*, this "must be done," as it is presented in an image. Or else it must be something else which, although it does not have the grammatical predicate as *its* expression, yet gives rise to the latter. The only way in which this can be conceived is that this other thing carries with it the image of the grammatical predicate itself, and thus causes it to be used in the formation of the sentence. The associative link can only be the power of the image of the predicate to function in a similar way as evoker of the same kind of feeling as that other thing itself. It should be noted that whatever we may take as the predicate in the judgment which is the acceptance of the norm becomes

an object of attention only through its power to evoke a feeling of duty. This power in it must therefore be that which determines the ideas which it carries with it. Only other ideas which have a similar determining power can attract attention to themselves in the consciousness of a moral norm. This suffices to show that the predicate in the normative judgment must be either (i) the grammatical predicate of the sentential expression, considered as the content of an image, or (ii) something which has the power to cause a conative impulse in the same way, but *is* not the actual meaning of the predicative expression. Now the image of the grammatical predicate of the normative sentence, *i.e.*, "ought to be done," can of course arouse a conative impulse merely as an expression of command or volition. So the other thing, which may possibly be the predicate of the normative judgment, must, since it acts in the same way, also be an expression of command or volition.

But a serious objection can apparently be made against the theory which we have put forward. Suppose that it is the expression of command, in its individual image-form, which is ascribed as a real property to a system of conduct conceived as something which "ought to be realized." Then every variation in the expression would imply that a *different* property is ascribed to the system. In that case I could not identify the moral norm which is presented to me with that which is presented to another person, if a different expression of command is natural to him because, *e.g.*, he uses another language. Nay, if the expression in myself should glide from one form of words to another, from an auditory to a visual image, from the image of a word to that of a gesture of command, and so on, there should in each case be a different real property in the system of conduct. Here we must note the following point. We must distinguish between the actual existence of judgments with different contents in different subjects or in the same subject, whether simultaneously or successively, and a subject's power to distinguish contents from each other. The contents of judgments may be different, and yet it may happen, for one reason or another, that they are taken as

identical. In reality there is a variation in the content of the judgment with every variation in the expression of command. But that does not prevent one, in viewing the varying content, from having the idea that the one thing which truly belongs to the system of conduct and which really is ascribed to it in all these judgments is something common to the varying expressions, and that the various ways in which this common content is presented are merely accompanying images. It is not surprising that one should get the idea of something common as the essential feature, since there really is something common here which alone gives to the expressions their power, *viz.*, just their property of being expressions of command. But the following fact should be noted. The common feature which one ascribes to the system of conduct when viewing the various judgments, and which one takes to be that which really is ascribed to the system in each case, is not the property of being an expression of command. For it is impossible that one should really be able to regard the expression of command reflectively as a property of a system of conduct. Nor is that on which consciousness is focused a meaning common to the various expressions. What it is is that which is common to the expressions in the abstract. Nothing concrete whatever is before the subject's mind except these expressions themselves, in which he assumes something common to be present. In this way there is formed the idea of a moral norm which is presented to different subjects and to the same subject in all the variations of the expression of command. It must be added, however, that this idea is only the product of subsequent reflexion upon certain judgments about a system of conduct which has a concrete expression of command as an objective property; *viz.*, judgments which are the basis for determining what is the "right" action, and which, amidst all variations in the expression of command, have in common the power of producing a feeling of duty bound up with a determinate action. What is really efficacious, however, is always the concrete sensible form of the expression.

(d) *The relation of the idea of a norm to the consciousness of duty.*

We must now consider in more detail the relation of the idea of a norm to the actual consciousness of duty. According to the theory here put forward, the former is merely the idea that a system of conduct has, as a real property, a certain expression of command which is presented in an image. The idea of the right action in a given case is connected with this in the following way, *viz.*, that in this case only a certain action is in agreement with the assumed system of conduct, and it is thereby itself connected with the expression of command. The idea of a norm itself produces, through the expression of command which is present in it, a direct conative impulse towards judging of certain actions in accordance with the system of conduct. If the idea should arise that only a certain action is the one which accords with the system in the given case, then that idea produces a direct conative impulse towards just that action. This impulse is the feeling of duty. The consciousness of real duty is a phenomenon attendant on the feeling of duty. There occurs a feeling of conative impulse, free from valuation, which is directly linked with the idea of a certain action as the right one in the sense supposed. In the involuntary expression of this linkage the idea of the property of *rightness* in the action is predominant, and this makes the special expression of feeling into the grammatical predicate of a sentence in the indicative form. This sentence gives rise to the idea of a certain something, which has no place in the sensible world, but which is expressed in the characteristic expression of the feeling of duty. Thus no actual feeling of duty lies at the back of the consciousness of a norm itself, as it does in the case of consciousness of duty. If, then, I present certain actions to myself as 'duties' *in abstracto*, this has here no real obligatory significance, because the feeling of duty is lacking. In principle it is an expression of command which confronts us in imagination in the consciousness of a norm. But, once the feeling of duty has been amplified *through* the consciousness of a norm, its natural expression can function as stimulus to a direct feeling of conative impulse in the

same way as an expression of command. It can then act as a substitute for an expression of command as a call to attention.

In connection with this it must now be further pointed out that there is the following difference between the idea of the right action and the idea of the action as a duty. Since the former refers to an accepted system of conduct, having the objective property "must be done," it determines what is right in the present case only by determining what is right in *such cases as this*. But the idea of duty does not refer to a class of actions, but to one particular action determined in accordance with the idea of what is right. In so far as the feeling of duty is a feeling of conative impulse, it is necessarily bound up with a determinate present action. No doubt I can resolve in general to act in a certain way under such and such circumstances. That seems not to be a determinate present action, since I do not know when or even whether these circumstances will arise. But, even if we seem here to be concerned with a general mode of procedure, yet one does not decide on that course of procedure without reference to a particular case in which the rule is to be applied. This particular case is my own future individual life of action, in which I decide to carry out that rule. I can feel myself to be under an obligation always to pay on demand debts that have fallen due. But, even if the ground of my feeling of duty is the idea that to pay debts on demand when they fall due is always right, yet I feel myself under an obligation to apply the rule only as regards my individual future life. The feeling of duty in question is thus evidently an impulse towards setting the organism upon such a course of procedure.

But, it might be said, it can happen that the consciousness of a norm, and therefore also the idea of the right action in the present case, involve no feeling of duty. Yet it is a fact that, if the natural result of the idea of the right action, *viz.*, the feeling of duty, does not actually occur, the idea itself vanishes. It is unable to maintain itself in consciousness. It should be noted (i) that all interest in the right action as such is determined by the feeling of duty. The thought of self-respect or avoidance of self-

reproach, the idea that I can preserve my true autonomy only by doing the right action, the fear of the pangs of conscience, in fact everything which links my interest with such an action, rests upon an already present feeling of duty. But, if no interests are bound up with the action as being right, I shall also have no interest in my practical life to retain the idea of the rightness of the action. (ii) As we have already pointed out, it is just the feeling of duty and the interests which are bound up with it which are in a position to check all reflexions which are disturbing to the conviction that an action is right. Without this it would be impossible to repress the suggestion that we are here really concerned only with perceptible expressions of command which cannot be genuine properties of an action, and in particular the dangerous question whether the conviction is true or not. (iii) The perceptible expression of command, taken as a real property of the action, cannot retain its perceptual character, *i.e.*, cannot occur with the same liveliness which it has in a genuine powerful command, unless the feeling of conative impulse immediately follows. Thus the absence of the feeling of duty in connexion with the idea that an action is right implies that the latter is only a weakened image of that which we actually present to ourselves when the idea is practically effective. But the occurrence of the feeling of duty always depends on peculiar psychological conditions. Therefore the maintenance of the idea of the rightness of an action does not depend *merely* on logical factors, *i.e.*, on the correct subsumption of the action under those ways of behaving which are held to belong to the fundamental system of conduct.

Let us suppose that, before the occurrence of a feeling of duty, there are already adequate motives in a certain case for an action, *e.g.*, an act of honesty, which appears to be right on abstract logical grounds. These motives may include as many elements as you please which are alien to the sense of duty, *e.g.*, the thought that I shall gain certain external advantages by acting honestly in the present case. Under such circumstances what are we to say about the conditions for the occurrence of a feeling of duty in connexion with the idea of the rightness of the action? The following fact

should be noted here. Suppose that an action follows without any conflicting motives coming into play, bound up with the idea of another course of action, and without any special difficulties in carrying out the action which arouse the feeling of energy. Then no specially emphatic conative impulse is present in an "I shall do this"; certainly not one which passes over into a genuine resolve. If I have already decided to go for a walk, no special conative impulse to put on my overcoat obtrudes itself. In our case where the motives, apart from the feeling of duty, can be taken for granted as tending in the direction of what is right, the action already exists in embryo in the already initiated psychophysical adjustment. If there should be a feeling of duty, it would be concerned with the maintenance of that adjustment. But when, as in the case supposed, all motives for its cessation are powerless against the existing motives for the action, the conditions are absent for the occurrence of a special feeling of conative impulse connected with the idea of maintaining the adjustment. Since no counter-motives with real motive-force exist, there are also no difficulties in carrying out the inner intention which might lead to a special feeling of energy.

But suppose now, on the contrary, that the motives are not decisively in favour of honesty, apart from the feeling of duty, whether it be that the motives for dishonesty exactly counterbalance those against it or that they overbalance them. Then there is a real possibility of the occurrence of a feeling of duty, bound up with the idea of honesty as right or with the idea of abolishing an incipient tendency to act dishonestly which has already arisen. And undoubtedly the more strongly the dishonest motives act, the more distinctive the feeling of duty may be. But, in view of the relation already indicated between the idea of right and the feeling of duty, it follows that the stronger the temptation to the opposite course of action is, the more impressive the idea of the right action may become. It can reach its maximum intensity when the feeling of duty is the *only* possible motive for right action. And so this idea can be more distinctive in proportion as the temptations to be overcome are stronger. Moreover, it follows

also that, in judging of an already accomplished right action, the idea of its rightness presents itself with all the more liveliness the more the feeling of duty has been the dominant motive and the greater the temptations to be overcome have been. This has led to its being asserted that, in order for an action to be right, in accordance with the moral consciousness, it is *necessary* that the only motive for the action should be the idea of its rightness operating through the feeling of duty. This, however, is unreasonable. For in that case I could not have as my motive the idea of the rightness of the action, since the action could never present itself as right apart from a pre-existing idea of its rightness considered as a motive. Instead the fact is that it is always the action itself to which rightness is ascribed. But, when one contemplates the action beforehand and when one judges of it afterwards, the idea of its rightness is pushed into the background in proportion as the feeling of duty does not play, or has not played, any part in the decision. To this should be added that this circumstance has nothing to do with the fact that, in order that the result of an action may be ascribed to me, it must have been so far intended by me when I undertook the action that the idea of its resulting therefrom was present to my mind. An action is never made wrong through an effect which was not in this respect intended. This has of course nothing to do with the question whether rightness itself must be the motive for a right action.

From what has been said above the following conclusion also follows. The wrongness of an action, *i.e.*, its being in conflict with the line of conduct which is right in the given case, does not come into prominence, either at the moment of decision or in retrospective judgment upon it, unless a feeling of duty is present either directly or as an aftereffect of one which formerly existed. (In the latter case it would be one which arouses remorse.) The following fact might seem to conflict with this. After an action has been done it may be asserted that there was a morally blameworthy lack of attention to its consequences or to its wrongness, although no feeling of duty to be more attentive was experi-

enced at the time. It should be noticed, however, that there is a feeling of duty to be attentive in general in such matters or to practice such moral hygiene that one's attention to the consequences or to the wrongness of one's actions does not sink below a certain level. One's judgment upon a lack of attention as being wrong in a certain case should ultimately refer to the property, in this failure, of manifesting a defect in general moral self-discipline.

In this way also should be explained the fact that we, who are inclined to judge like cases alike, take account, in judging the rightness or wrongness of other men's actions, not only of their agreement or disagreement with what is objectively right or wrong in the present case, but also of the agent's degree of development in respect of his consciousness of duty in general, which we estimate in accordance with our own ideas of what the moral law demands. Yet certain other factors act here in the opposite direction, and these become plain if we notice what happens in ourselves, from the psychological standpoint, when we regard others as under an obligation.

(e) *On the possibility of consciousness of another person's duty.*

It might now seem, in view of what has been said about the dependence of the consciousness of duty on the feeling of duty, as if we could not possibly have any consciousness of real duties in others. At the most this "You ought!" would consist of a reference to the action which is right for the other person in a certain case, in the sense that it is the action which, in the given case, is in accord with the system of conduct which has a perceptible expression of command as a real property. But, according to the above theory, one's idea of the rightness of an action could not occur with the same impressiveness under such circumstances when it concerns another person as when it concerns oneself, if only the feeling of duty can maintain that idea. But it is incredible that one should not be able to have as lively an idea that a certain action is right for another person as that an action is right for oneself. Now we must maintain, in the first place, that a feeling of just the same nature as that which we call

a feeling of duty very well may be linked with the idea of a certain action on the part of another person. This is a feeling of conative impulse, devoid of valuation, in respect of another's action as right. In discussing command we have tried to show that a feeling of conative impulse, linked with the idea of another person's action, must be supposed to lie at the back of the expression of command in the person who gives the order. There is therefore no difficulty in principle in supposing such a feeling as we have suggested.

There are, moreover, two facts which can scarcely be explained without postulating the existence of such a feeling. One is moral indignation. It may be the case that this is at any rate intensified by all kinds of affective factors which have nothing to do with the feeling of duty, *e.g.*, self-interest which is infringed by the wrong action, or sympathy with another person as suffering an injury. But one cannot explain in this way the specifically moral factor which characteristically enters when the feeling of right is outraged. Here the anger depends essentially on the idea that a *right* has been infringed. The indignation is not determined by the mere fact that oneself or others have suffered through the action; what is emphasized is the fact that the infliction of the suffering bears the character of an infringement of right, and is therefore a *wrong* action. But on what can one's interest in the fact that another should act *rightly* be grounded? Note that we are concerned here with an interest in this which is altogether independent of all further consequences, and one whose infringement can cause the strongest indignation. Here it cannot be a question of such interests as proceed from one's own feeling of duty. For such interests are related only to my own right action, and they are in no way infringed by wrong action on the part of another. But equally it cannot be a question of one's interests in the moral well-being of the wrong-doing party, in his preservation of his true autonomy, self-respect, or anything of the kind. In that case the reaction towards the infringement would not be anger but sorrow. It must therefore be a question of a direct interest in a certain action by another person, as that which alone agrees with

the norm for the given case, *i.e.*, as that which "*should* be done." Now, so far as concerns oneself, the direct interest in an action as that which "should be done" is grounded merely in the power of the expression of command to arouse a direct feeling of conative impulse. It is therefore unintelligible how an action, as that which "should be done," could function in a different way when it concerns another person. Since in the one case the idea of the rightness of the action does not produce any direct pleasure in the latter, it cannot do so in the other case either; for in both cases that which excites interest is the same, *viz.*, the rightness. The general rule holds also that the most immediate psychological effect of experiencing an expression of command or of *volition* is a conative impulse; just as experiencing the expression of a judgment calls forth the corresponding judgment, and as the awareness of an expression of feeling calls forth the corresponding feeling, as its most immediate psychological consequence. So in moral indignation there must occur an immediately arising conative impulse, which is bound up with the idea of a certain action on the part of another as the right one. It is this fact, that the actual action conflicts with our will, which produces displeasure and therefore anger with the guilty party. And undoubtedly this is a kind of anger which, far from being checked by moral considerations, is egged on by a feeling which, like the real feeling of duty, we ascribe to our true self and therefore regard with the same kind of respect. The same reasons which argue for the dependence of moral indignation on a certain conative feeling hold also for the dependence of esteem or disesteem for another person on the same feeling. It is plain that disesteem cooperates with moral indignation, which is closely allied with it; both these feelings are supported by the same reverence as the feeling of duty itself. *Écrasez l'infâme!*

The other fact which is of importance here is the feeling of right in so far as it manifests itself in a demand upon another person to respect one's own or another's rights. This demand is of a different nature from that which consists in putting forward a legal claim. In the latter case we are concerned with a demand

which it is right to respect because respect itself is as such the right action. But in the former case it is a question of a claim on an action, whose rightness does not consist in respect for the demand, but is valid apart from all reference to the latter. Again, this demand is not determined by interests in the background which are foreign to rightness as such, as is the case both in putting forward a legal claim and in morally indifferent or even unrighteous claims. But what is determinative is just the idea that the action demanded is right, as respecting another person's rights. Now we have already explained that in any kind of demand there occurs a feeling of conative impulse in connexion with the idea of a certain other person's action. In our case what determines this feeling is the idea of the rightness of the action in question. In view of the arguments just put forward, concerning the dependence of moral indignation on a feeling of conative impulse devoid of valuation, it is impossible to suppose that a feeling of direct pleasure in what is right is inserted between this idea and the very conative impulse which it determines.

From this we can now draw the following conclusion. It is by no means *necessary* that the "You ought!" should involve nothing more than indicating what action is in accordance with the norm in the given case for the person addressed. It can very well include consciousness of a genuine duty for him to act in a certain way. Instead of the feeling of duty, its analogue in connexion with the thought of another's action can serve as the basis for the consciousness of duty. In view of the account given above, it can further be said that the idea of the rightness of a certain action on the part of another person cannot have the necessary degree of impressiveness unless this analogue to the feeling of duty is operative. Moreover, we may point out that the feeling of conative impulse, independent of valuation, directed toward another's action considered as right, must be subject to the same psychological conditions, *mutatis mutandis*, for its occurrence as the feeling of duty. That is to say, it becomes operative only if there are certain obstacles to the performance of the right action on the part of the other person. It develops to its highest intensity when,

in our opinion, wrong action has already happened, and it then produces the moral indignation which we have already discussed. It is, however, also obvious that, when we judge the actions of others as right or wrong, the liveliness of the idea does not depend on the intensity of the feeling of duty in those who are the objects of our judgment. All that is needed is that a feeling of the kind described should be present in the person who makes the judgment. The feeling for rightness can react with the greatest vigour against the action of others as an infringement of right, although no definite feeling of duty is present in those who are the objects of the judgment. Yet, this tendency is counterbalanced by the fact that our judgments on our own actions as right or wrong are dependent on the intensity of the feeling of duty at the time of the actions.[1]

(f) *The idea of the justice of compulsion as an equivalent for neglect to act rightly.*

Bound up with the idea of the rightness of an action is the idea of the justice of compelling a person, who has acted wrongly or merely omitted to act rightly, to make a reparation equivalent to the right action which he has failed to perform. If I refuse to hand over another person's property when I have been informed of the facts, it is just, not merely that the thing should be taken from me, but also that compensation should be demanded of me for the damage done to the owner through my refusal. It should, however, be noted in the first place that, from the point of view of justice, *compulsion* to make an equivalent reparation need not be the most immediate consequence of wrong action. It may happen that justice demands in the first instance that the agent himself should make a reparation equivalent to the right action which he has failed to perform. If I have taken something, knowing it to be another's property, the immediate consequence, from the point of view of justice, of my wrong action is an obligation upon me to give it up and to compensate for the damage. But the final

[1] Cf. above, p. 170.

demand of justice is always that the equivalent act of reparation shall be enforced, so far as this is at all possible. In the field of criminal law the equivalent in question is of such a nature that only compulsion can be envisaged as a legal consequence.

It should further be noted that the reparation which is *regarded* as equivalent to the omitted right action may stand in a more or a less direct relation of correspondence to the latter. In the above-mentioned examples of infringement of rights of property the right action which has been omitted consists either in handing over the thing and avoiding injury to the owner's interest in the thing, or, as the case may be, in the repression of the impulse to appropriating another's property and thereby possibly infringing the interests which he has in the property. In such cases, if the owner is regarded as the possessor of rights, whose legal claim is to be respected, the rightness of the equivalent reparation is determined by applying, to the situation which has arisen, the same norm which determines the rightness of the omitted action. The situation is different, e.g., in a case where the wrongness consists merely in failure to attend to the possibility of damaging another's property which is involved in a certain course of action, where the owner is regarded as one whose legal claim is to be respected. If, in this case, compensation for damage, if such should occur and the injured party should demand it, is regarded as an equivalent reparation, this does not result directly from applying the norm which determines the rightness of the omitted action. According to that norm, that which ought to have existed was merely a certain degree of attention as safeguarding the owner's legal claim; it was not the repression of an impulse to injure, which was not present here.—The lack of any direct connexion with the omitted right action is still more obvious when the latter consists in a certain respect for the rights of the community and when the equivalent reparation consists in suffering punishment. Suppose that the wrong consists in wilful murder, and the omitted right action consists in repressing the impulse to this out of respect for the rights of the community. Then it might seem that one could

only deduce, by applying the fundamental norm to the given case, that the equivalent reparation should be—not punishment, but resurrection of the dead man. It may be that in certain respects the punishment can be regarded as making recompense for injuring certain social interests, *e.g.*, through the force of example, through bringing the law into contempt, through disturbing the general feeling of security, etc. But in general the criminal had not directed his attention to the injury which he might do in those respects. In such cases the omitted right action, for which the punishment should be the equivalent reparation, would be attention to the injurious consequences of the action to society. If so, the punishment, regarded as an equivalent reparation, would have to consist in compulsion which brings about attention in future. The greatest effect in this direction would surely be produced by compulsory courses on the social harmfulness of certain actions. But the sense of justice would certainly not regard such compulsion as in any way an equivalent reparation. Only if awareness of the social injury which results from the action demonstrably existed when the crime was committed, would recompense for the latter by a punishment in the ordinary sense present itself as an equivalent reparation, provided that such recompense is determined by applying the fundamental norm to the situation which has arisen from the negligence.—The lack of immediate connexion between the omitted right action and the punishment as an equivalent compulsion is most obvious when, as happens in the idea of retaliation, the equivalence is held to consist in the criminal suffering a penalty corresponding to that which he has caused. This suffering at the most satisfies the revengeful desire of the individual or the community to triumph over the foe; it in no way offers a compensation for the injury which the criminal ought to have avoided inflicting. The victim of a robbery does not get back his property through it, and society does not get the social damage made good.

In order to understand the origin of the idea of an equivalent reparation it is necessary in such cases to go back to the social interests which evoke the demands from which the idea of the

basic norm originates. A certain degree of attention to the possibly harmful effects of an action upon another person's property is regarded as respect for his rights, and therefore as the action which "ought to take place." This is derived from a social interest, whether universal or confined to a class, which has led to the consequence that laws, gods, and one's environment are regarded as commanding this attention. What is determinative here is the common interest in the security of the individual against damage to his property through the actions of others. But this interest is not secured merely because a "You must pay attention," supplemented by a "You must, if you are aware of the fact that an action will injure another's property, repress the impulse to do it," sounds in the individual's ears. For this it is necessary further that the force of the command should be strengthened by the awareness that one must make reparation, if there should be lack of attention and it should lead to damage, and that one will in fact be *compelled* to do this if one does not do it voluntarily. So, in conjunction with the formation of the idea of powers which command attentiveness, the common interest also gives rise to (i) an imperative "You must make reparation for the ill-effects of your lack of attention," and (ii) a general inclination to demand the effectuation of compulsion. But, through this link with interest, the idea that one ought to be attentive out of respect for another's rights becomes linked with (i) the idea that one ought to make reparation for damage, if it should happen in consequence of infringing a norm and if reparation should be claimed of one, and (ii) the idea that compulsion will be exerted, if reparation is not made voluntarily, just because reparation *ought* to be made but has not voluntarily been made. In this way the compulsion itself acquires the character of something that *should* happen, as being in the last resort the reparation equivalent to the original omitted right action. In all this the original possessor of the right remains as the person whose legal claim must be satisfied, and that is why failure on his part to demand it annuls the demand for compulsion. That only a certain degree of attentiveness is regarded as right, and as entailing the consequence in question

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if it should be lacking, depends of course on the counter-influence of other social interests, *e.g.*, the common interest for that degree of freedom of movement which is essential for the individual's feeling of well-being and for such mutual intercourse as forwards social prosperity.—Similar remarks apply to the formation of the idea of powers which command certain actions. In connexion with this there develops, through the social interest (whether of the community as a whole or of a class) in checking tendencies which are regarded as more or less dangerous to the community or the class, a general tendency towards a system of compulsion. This system is concerned with the omission of these commanded actions, and it is determined by the degree of dangerousness of these tendencies. It thus comes about that the thought that certain actions "ought to be done," in view of the interests of the community or of a class, is linked with the thought of certain compulsive reactions, *viz.*, "punishments," as consequences of omitting such actions. In this way the compulsion too acquires the character of an equivalent reparation to the community or to the class, which "should happen" or is "just." Here too the interest in question is counterbalanced by other common interests, *e.g.*, the interest for limiting the suffering of the individual so far as possible.—When, according to the idea of retaliation, suffering "ought" in justice to be inflicted on the criminal corresponding to that which he has inflicted, the intermediate link is a social feeling of revenge, which arises from the infringement of the interest which has led to the idea that certain actions are commanded.

But what should be particularly noted is that the justice of the compulsion does not primarily entail that any given person or group of persons should exert it. What should happen is primarily the compulsion itself, and it must of course happen as an equivalent for the right action which was originally omitted. The justice of the compulsion means simply that it rightly happens to the *object* in accordance with the norm for what "should be done." It is only secondarily that the idea that a person or group of persons "should" exert the compulsion gets attached to this. Retal-

iatory justice is merely the counterpart to the rightness of the action which has been omitted. So the idea of it must be regarded as acting in a corresponding way, *i.e.*, it must be supposed to cause a feeling of conative impulse, devoid of valuation, linked with the idea itself. The special reverence which is felt for such a conative impulse, as an expression of the true self, thus provides an explanation of the absolute value which is ascribed to the fulfilment of justice, and also of the special intensity of the demand for justice. From this conative feeling must also be derived the idea of compulsion as something owed by the wrong-doer. We have seen that the idea of one's own duty rests upon a simultaneous association between a conative impulse, devoid of valuation, and the idea of a certain action of one's own as right. We have also seen that the idea of another's duty rests upon a similar feeling in combination with the idea of a certain other person's action as right. We now see that the idea of the obligation to submit to compulsion rests, in the same way, upon a similar feeling in combination with the idea of compulsion as right.

(g) *The idea of the justice of compulsion without reference to a precedent wrong, and its connection with the feeling of revenge.*

It should, however, be noted that the idea of the justice of compulsion also arises directly, *i.e.*, without reference to the idea of an ignored right. When Nestor, in Homer, relates that the Epeans had a debt (χρεῖος) to pay to the Pythians by reason of a previous attack[1], a debt which could be paid only by a plundering-raid on the part of the latter, there is no suggestion that the people who made the original attack had done anything wrong. Yet they are due to pay for the evil which they wrought, in the sense that it is just that they should be subjected to suffering through a plundering-raid. The justice of the compulsion was attached to the circumstance that the Epeans had plundered in the territory of the Pythians, without any ground being alleged

[1] *Il.* XI, 686, *et seq.* A similar expression as to the reason for an alleged plundering raid of Odysseus. *Od.* XXI, 16.

why it should be just. Achilles' cry that Hector or the Trojans should pay for Patroclus' death is of exactly the same nature.[1] Hector had not, in Achilles' view, done anything dishonourable in killing Patroclus in defence of his native city. But Odysseus' words, that he would not stay his hand until Penelope's suitors had paid for their transgressions (ὑπερβασίην)[2], have a quite different character. In this case an actual ground is given for the duty to pay, *i.e.*, in other words, for the justice of the compulsion, *viz.*, that the action with which justice was connected involved a wrong, *i.e.*, exceeding the right measure. The compulsion then presented itself as a reparation equivalent to an omitted right action, and as such it was just.—In Aeschylus' *Eumenides* the demand that the guilt shall be more closely investigated, by enquiring whether the original action was wrong in the actual situation, is set against the blind lust of the Erinyes for revenge. Yet even the latter is presented in the guise of right, for δίκη itself demanded that the matricide Orestes should be handed over. This enquiry should take place by means of a preliminary investigation before certain experts in the law, *viz.*, the gods, at which the contending parties, *viz.*, the Erinyes as accusers and Orestes as defendant, were to bring forward pleas and counter-pleas. From the Erinyes' point of view this demand was an infringement of their rights on the part of "the younger gods." Here is obviously represented the progress in moral reflexion which accompanies the transition from the legal stage of the blood-feud to the settling of disputes between individuals or families by judgments having the force of law. Even the blood-feud has its own view of right. The demand for revenge is simply the actualization of justice in respect of the subject who originally inflicted suffering. And neglect of it, on the part of the injured individual or of the family which has been injured in one of its members, therefore implies a wrong which lowers personal worth. For justice should be actualized. But it is plain from the endless circle of the blood-

[1] *Il.* XVIII, 93, and XXI, 133.

[2] *Od.* XXII, 60 *et seq.* Cf. the analogous use of the expressions ἀτάσθαλον ὕβριν, *Od.* XXIV, 352. βίην ἀνδρῶν ὑπερηνορεόντων *Od.* XXIII, 31.

feud that the action, to which the justice of inflicting suffering on the agent is referred, is not regarded as a wrong. Since it is just that revenge should be demanded in turn upon him who has revenged the injury inflicted, although the latter only did his duty, it follows that the justice of the compulsion is independent of whether the original action was right or wrong. But with the repression of the blood-feud through the need of peace, which demands a powerful legal order standing above the contending parties, and through social feeling, there arises the thought that compulsion is righteous only as an equivalent for a right action in regard to which the subject of the compulsion has fallen short. But such a reflexion carries others in its train. It must be enquired whether the subject can be regarded as self-determining in general, and more especially at the moment when he did the wrong action, *i.e.*, as a real practical ego to which a happening can be ascribed as its work. Otherwise, omission to act in a certain way cannot be regarded as depending on the subject as a real agent, for it is part of the notion of the latter that his inner self should really be determinative of his behaviour in practical matters. But, on the supposition that there is imputability, it must further be enquired, not merely whether, but in what way, an omission to act rightly occurs; whether, *e.g.*, there is a deliberate fault or merely a lack of attention. This, of course, affects the nature of the just compulsion, in so far as it is to be equivalent to the omitted right action. Note that this distinction was made even in the archaic Athenian blood-tribunals:—Aeschylus' drama represents the founding of the areopagus. All such reflexions are strange to the Erinyes' notions of justice, where the only relevant fact is that an injury exists, caused by the action of someone.

But what is most important of all is that the development from the idea of the justice of compulsion without regard to a precedent wrong-doing to the idea of its justice as lying in a reparation equivalent to the omitted right action provides for the first time a measure for the just degree of compulsion. It is plain that it is the feeling of revenge which is active in the primitive idea that it is right that one should suffer for inflicting suffering, regard-

less of whether one did so rightly or wrongly. But revenge is, of its very nature, measureless. Its motto is certainly not an eye for an eye and a tooth for a tooth, but a head for an eye and a head for a tooth. So primitive justice is without measure. To do as much harm as *possible* to one's enemies is right, according to the Greek morality against which the Platonic Socrates contends. But now there enters the following curious circumstance. According to the idea of retaliation, which is still active to this day in the penal law, the amount of suffering which the culprit ought to endure is, notwithstanding the obvious kinship between retaliation and the demand for revenge, equal to that which he inflicted but not greater. It is impossible to doubt that this mitigation of the feeling of revenge is derived from the thought of punishment as something which ought to be equivalent to the crime, or rather as a restitution of just that right which the crime has ignored but which nevertheless ought to be realized. The feeling of revenge certainly continues to operate here in two respects. In the first place, the fact that an agent is held responsible for the result without regard to his intention shows that the thought of the wrong action as the ground and the measure of punishment has not sufficiently asserted itself against the primitive notion of justice, and that therefore the feeling of revenge is operative. Secondly, the fact that the reparation which is regarded as equivalent is merely a corresponding degree of suffering can be explained only as a consequence of the feeling of revenge. It cannot be regarded either as following from a direct application of the basic norm or as an expression of society's interest in safeguarding its own values. But the counteracting forces must not be overlooked. Regard to the original wrong, as the measure of the justice of the reaction, brings with it forces which repress the importance of the feeling of revenge in determining the equivalent reparation. In so far as the original action is considered as a wrong, the thought of the rights of the injured party comes into the foreground. It is this which should be upheld by the reaction. But here the interests come into play, which are determinative for the norm which ordains what is right. In order that

the reaction should be just, it must be limited to upholding the right of the injured party. Therefore, if no direct application is possible of the norm which ordains what is right to the case of its infringement, the only factor which can be concerned in determining the equivalence is consideration of the interest which lies behind the right. Thus, in the first place, private punishment is transformed into a claim for damages.[1] When the right which is infringed by the wrongful act consists merely in the right to be immune from intentionally harmful actions on the part of others, or again in the right to require due attention on their part to the consequences of negative or positive behaviour in this respect (all this within definite limits), the just reaction can consist only in compulsion to compensate for damage. In this way the interest on which the right is based is safeguarded. On the other hand, punishment is retained, as the just reaction against one who infringes the right of the community or of a class to a certain mode of behaviour on the part of the individual. And it is thus regulated, not from the standpoint of revenge, but from that of the interests which determine the norm underlying the right. What is needed for safeguarding those interests, and nothing else, becomes determinative for the just punishment.

Thyrén (*The General Principles of Penal Law*, 1907, pp. 47 *et seq.*, and cf. also his *The Principles for Reform of the Penal Law*, 1910, pp. 33 *et seq.* Both in Swedish) treats the idea of guilt, in the sense of deserving punishment, as being what is specifically characteristic of the notion of retaliation, but not of the notion of prevention. He seems to regard these two ideas as the only ones which can be taken into account in determining the ground and the measure of punishment. But this is hardly correct. The sharp distinction which is drawn between *dolus* and *culpa* in determining the degree of punishment has nothing to do with the idea of retaliation, which is concerned only with the actual result, but is connected only with the degree of dangerousness in the tendencies evinced in the action. Yet there is no doubt that the general sense of justice regards *dolus* as in itself more deserving of punishment than *culpa*, and that it reacts strongly against the injustice of their being put on a level in the sight of the penal law. The thought here is that punishment is

[1] Cf. Ihering, *Geist des römischen Rechts*, II, pp. 113 *et seq.*; Schlossmann, *Der Vertrag*, 1876, p. 315, n. 1; and Regelsberger, *Pandekten* I, 1893, p. 222.

just only when it is resorted to in accordance with what the rights of society or of a social class demand when those rights are infringed. But what these rights demand in such a case is determined by the same interests which are the basis for establishing certain negative or positive actions as duties towards society or that class. Since those interests are concerned with checking dangerous tendencies to action, that punishment is just which is needed for that purpose. It may be required either as a realization of a threat of punishment which acts in that direction, or to counteract tendencies which have already manifested themselves, or as a remedy for the damage which their manifestation involves. The motives for punishment may be social hygiene and in no way the feeling of revenge; but none the less, in the commonsense notion of justice punishment is connected with the idea of *guilt* in regard to the rights of society. In no department of law does so strong a reaction against "injustice" occur as in that of penal law.

Thyrén seems here to be specially influenced by the view that guilt presupposes acceptance of the freedom of the will. The doctrine that punishment is essentially a means of prevention is alleged to be logically incompatible with that assumption, since free will as such cannot be regarded as capable of being influenced. (See, *e.g.*, *The Principles* . . . I, p. 37.) But the situation is certainly greatly oversimplified here. (i) One may presuppose the freedom of the will as a condition of guilt, in the sense that the behaviour, in order to involve guilt, must be characterized by an omission to take account of what is right, although the agent could have freely chosen to act rightly. In that case belief in the possibility of influencing the will is not logically excluded in *every* sense. All that is assumed here is *moral* freedom as a condition of guilt. But this in no way conflicts with the view that the will is necessarily determined by the strongest motive, and therefore can be influenced, *in so far as* the will moves in the non-moral sphere when moral motives are set aside, and within that sphere has to decide for a certain motive. The criminal can certainly be supposed to have been free in his criminal behaviour, in the sense that his choice of the wrong course, in so far as it involved the setting aside of moral motives, was free. Yet it may be reasonable to wish so to influence him that, if in future he should not allow himself to be determined by moral motives, the non-moral sphere will be so constituted that the motives within it, restraining him from action which is wrong from the external point of view, will prevail. At the very most it is belief in the possibility of *moral* improvement by influence which is logically excluded by the assumption that the freedom of the will is a necessary condition for guilt. (ii) It is very questionable whether, in demanding the freedom of the will as a condition for guilt, one has not merely the following in mind, *viz.*, that practical behaviour

must depend upon the immoral character of the practical ego, *i.e.*, a morally bad will, if it is to involve guilt. When infancy, idiocy, or mental disease is regarded as excluding the freedom of the will, and with it guilt, the essential point is merely that the practical behaviour in such cases, even though it be in the highest degree contrary to what is right, does not depend on an immoral character in the personality itself. In the moral idiot, *e.g.*, moral motives are never set aside, because such motives do not exist. In the idea of freedom the thought of causelessness or contingency in self-determination in certain directions is always counterbalanced by the thought of causality or necessity. For in the idea of freedom the direction of the will to this or that action is always thought of as *grounded* in the will itself, and as proceeding *necessarily* from its constitution. And in the thought of guilt *this* side of the notion of freedom, *viz.*, the idea of the will as a cause, plays a predominant part. (iii) Owing to the illogical combination of the idea of causelessness and that of causality as regards the choice of an action, which is involved in the idea of freedom, this idea is a hybrid one from which we can equally arrive at the notion that the will can be influenced or that it cannot.

That the idea of the justice of punishment in the modern conception of justice is referred to the rights of society, and not to retribution, is specially emphasized by Heimberger in his work *Der Begriff der Gerechtigkeit im Strafrecht*, 1903.

Makarewicz, in his sketch of the development of penal law in his work *Einführung in die Philosophie des Strafrechts*, 1906, shows a complete lack of attention to the above-mentioned complex of ideas. This appears in principle in his definition of a criminal action (pp. 79—80). This is defined as an action, done by a member of a social group, which is regarded by the other members of the group as so harmful or as betraying such a degree of anti-social disposition that they react publicly and collectively by trying to deprive him of some part of his stock of values, *i.e.*, his "goods." It is claimed that this is the correct way of defining it, because it preserves the essential connexion between crime in the modern sense of the word and more primitive phenomena which are akin to it. The following question arises here: Is the reaction, in every instance which the author regards as a crime, really determined by the opinion of the group that the action is universally harmful or that the disposition which it betrays is antisocial? He himself mentions that the punishment is often determined by a *conviction of justice* (p. 87). Now, is this conviction, which, according to the author, may refer to supposed divine law and which certainly becomes more emphatic as the level of moral culture rises, really the same as regarding the action as universally harmful in a very high degree or as betraying a very high degree of antisocial disposition? The fact that it serves a person right that the demands of

justice shall be supplemented by punishment has, as such, nothing to do with the ascription of these characteristics to an action, even if it be just the actions which have those characteristics that are regarded as rightly deserving punishment. Nor need the thought of them be active in a social reaction which is determined by the demand for justice. This is plain when the idea of the justice of the punishment is determined by moral indignation at the course of action as infringing old "holy" customs. Even if absence of social reaction is regarded as dangerous to society, because it brings with it the wrath of the gods, it is still the divine law itself which is held to have been infringed and it is this infringement which has to be justly punished. Similarly, when the state regulates and supports "private punishment" (which is treated by the author as genuine punishment on p. 251). Here undoubtedly the governing idea is that it is just that the criminal should suffer for the satisfaction of the injured individual. The thought of general harmfulness or anti-social disposition is here plainly subordinate. When the injured individual, according to the legal rules, has himself to take vengeance under certain circumstances, he is so far from being regarded as acting for the state that, on the contrary, when the state acts directly as an avenger on his behalf, it is regarded as representing the injured party. (See the examples adduced by the author himself in the middle of p. 257.) But the difference between the two points of view as to what is determinative of the social reaction becomes especially obvious when injury to the one person or the few who are in supreme authority is regarded as "crime" *par excellence*. The author himself reflects on this circumstance (pp. 136 *et seq.*), but considers it to depend on the fact that what injures the mighty is held to injure all. But it is only necessary to remember how little a man from the common herd weighs in comparison with the chiefs, according to the Homeric view, *e.g.*, in order to understand that it was not the harm done to all such men which made actions that are injurious to the mighty into crimes. The idea of the divine right of the mighty, as dominating under such conditions the whole juridical outlook and determining the notion of "crime", is surely here ignored in a remarkable way. When the writer, in order to defend his dogmatic theory in this connexion, uses such a hackneyed phrase as that a people always has "such a form of government as the majority desires to have" (p. 239), he overlooks the compulsive activity of more or less openly superstitious ideas of law among peoples at the lower levels of culture.

It might now be questioned whether the notion of crime supported by the author could be sustained except at two opposite poles, *viz.*, (i) in reference to the lowest stage of culture, where the people immediately takes vengeance for particular actions which are generally harmful or which exhibit an anti-social disposition, and (ii) the modern tendencies

to regard the reactions of the state against so-called crime from the standpoint of the *conscious* exercise of social hygiene. Here the notions of justice which are concerned with the ideas of rights and duties do indeed lose all significance. But how is it with those actions on which punishment is imposed in the transitional stages, *i.e.*, in point of fact the stage of development characteristic of all civilizations which have existed up to now? To this should be added that one might feel doubtful as to how far the expression *Verbrechen*, *crimen*, etc., may not have acquired its meaning at just that stage under the influence of the sense of justice which demands punishment, and whether for that reason such a definition as that given by the author does not altogether misrepresent the meaning which the expression has for common-sense.

Our next task is to explain the idea of the justice, independently of previous wrongdoing, of compulsion or of the liability to compulsion. That liability to compulsion here means the same as that which is founded upon the omission of a right action is at once plain from the fact that the latter gradually develops out of the former. It is also plain from the fact that in both cases the justice of the compulsion is regarded as the ground of the liability to it, even though the justice is founded in the one case on a previous wrong and in the other case is independent of it. But the liability to be subjected to punishment because of previous wrongdoing corresponds, in the sphere of suffering, to the duty to act in a certain way. So the idea of liability here treated must be regarded as parallel to the idea of duty in the strict sense. That is to say, it issues from something analogous to the feeling of duty; in this case it is a feeling of conative impulse, devoid of valuation, associated with the idea of one's own or another's suffering as just. Note now also that one regards liability to suffer as a debt to be paid, just as if it concerned a genuine action which one was under an obligation to do. (A Greek expression for being the object of another's vengeance is δίκην διδόναι, *i.e.*, to give to the avenger his right.) The justice of compulsion must be regarded in this case too as parallel to rightness in a certain action. It thus means that suffering is in a certain case right, in regard to what "should" or "ought to" happen, *i.e.*, is bound up with a concretely presented expression of command; just as the rightness

of an action means that in a certain case it "should" or "ought to" take place. The question now is: How does an expression of command here come to be regarded as objectively bound up with a certain suffering, independently of any previous wrong for which the suffering would atone?

We have already explained the idea of the objective connexion of an expression of command with a certain action by the influence of commanding authorities, real or imaginary, and of custom. Neither of these factors is here in a position to provide a ground of explanation, since both command and custom relate only to actions. We need to find a third factor, which can call forth the idea of an expression of command as bound up with a suffering. Since an expression of command as such is an expression for a feeling of conative impulse devoid of valuation, and since it functions as such, we need here a factor which has the power to call forth such a feeling in connexion with the thought of a person's suffering. What suggests itself immediately here is the feeling of revenge, which undoubtedly is determinative of the primitive idea of justice with which we are here concerned.

In a pure outburst of anger the action is, in the first instance, of the same kind as other involuntarily occurring affective symptoms. Its kinship with reflex action is obvious.[1] In its primitive form an outburst of anger is not directed on to any determinate object. The child breaks out against his surroundings without discrimination. Still, it is natural that, in proportion as the experienced suffering, which is the cause of the anger, is definitely associated with a certain object as its occasion, the outburst is directed on to just that object. If the object is an animal organism, the reaction includes a depressing of its vitality, and this involves infliction of suffering accompanied by a heightening of one's own vital feeling. The reaction is as such an element in the reacting organism's process of self-preservation, and subserves the latter in its direction *against* the attacker for the benefit of the attacked. But along with the process of reacting there follows

[1] Cf. Westermarck, *Ursprung und Entwicklung der Moralbegriffe* I, 1907, p. 18 and Windelband, *Ueber Willensfreiheit*, 1904, p. 204.

in the subject, if the latter experiences resistance, a feeling of vital impulse or urge, which is associated with the idea of depressing the attacking organism's vitality and at the same time inflicting suffering upon it and therewith heightening one's own vital feeling. "He shall pay dearly for his deed!" At this stage for the first time anger has become feeling of revenge. Now this feeling, as the psychical side of the reflex-like innervation, is in itself independent of all valuation. In a fit of anger I do not clench my fists because I take any special pleasure in that action, but it happens involuntarily. So the corresponding feeling of an impulse to strike down my opponent must be equally involuntary. But a consequence of its presence is the pleasure in striking out. "As the fulfilment of every desire is attended with pleasure, so too does the fulfilment of the desire which is bound up with enmity produce its own special experience of pleasure."[1] It is important to distinguish clearly between the reactive action which is determined by the *purpose* of self-preservation and the reaction which springs from anger. In the former case the basic state of mind is pleasure in self-preservation. From this there follows the decision and thereupon the action. But in the latter case what is primary is the action directed towards striking down the attacker and defending oneself. From this there follows, in case of resistance, the will to do so and thereupon the pleasure in triumphing over one's foe. In the first case, therefore, the pleasure in inflicting defeat is by no means measureless. It has its measure in its utility. It is possible that what is conducive to self-preservation is that the enemy should be struck down only within certain limits, and that to exceed these would be harmful. The vanquished, if preserved, may be useful, *e.g.*, as a slave. The humiliation of an enemy may be harmful, provided that he can be made harmless without it, because of the feelings of revenge which it may arouse in him. But in the second case every mitigation, arising from the situation itself, is lacking. Since it is the reactive action, and not the pleasure in self-preservation, which is here primary, self-preservation in its concrete wholeness does not

[1] Westermarck, *loc. cit.*, p. 33.

come into the picture. It enters only as self-defence *against the enemy*. This abstract self-preservation is of course best attained by his complete suppression. Of these two ways of reacting in the service of self-preservation, the latter, with all its inferiority in other respects, is nevertheless superior to the former in so far as it is not "sicklied o'er with the pale cast of thought," which may be a decisive advantage in acting.—To this we need add only one further reflexion on why revenge against a personal enemy carries with it a specially outstanding pleasure in inflicting suffering on him. One delights, not in depriving him of life, which would seem to be the really effective thing from the point of view of self-preservation, but in doing this in such a way that he will experience the greatest possible suffering in the process. The primitive man casts his enemy's body to the dogs in order to deprive him of the advantage which he might get from ritual burial. It might be thought that the ground of this is cruelty, in the sense of an abnormal pleasure in another's suffering. But really the state of feeling in revenge is of quite a different kind. It should be noted that the more closely akin an animal organism is to my self the easier it is for me to put myself into its state of feeling. Now suffering as such is an expression for lowered vitality. What I take pleasure in, in the feeling of revenge, is to feel my own vitality heightened at the expense of the attacker, *i.e.*, to be superior to him. Through the connection between suffering and the lowering of the vital force the latter becomes the more striking the greater the suffering is. Suppose, now, that I am concerned with a personal being in whose state of feeling I can easily put myself. Then the pleasure of revenge must be just the pleasure of triumphing over him through seeing him suffer. One can strike down even an adder in revenge, but one's interest here is more immediately directed to annihilating him, because his suffering cannot have the same import as a sign of lowering of vitality and therefore as heightening one's own feeling of vitality. But in revenge one wants to break one's personal enemy physically and spiritually upon the wheel merely in order to see him in the dust before one's eyes.

But it should now be noticed here that the idea, with which the involuntary conative impulse is connected in the feeling of revenge against a personal object, is not so much the idea of undertaking the reactive action as of that which constitutes the goal at which it is directed. We have seen that, in so far as suffering endured is associated with the idea of a certain personal object as its cause, the original reaction, as a phase in the process of self-preservation, must be directed towards lowering the vitality of that object, and in particular inflicting suffering on it, with a concomitant heightening of one's own threatened vitality. It is therefore necessary to keep the idea of this effect vivid. Unless the idea in question acts as a point to be aimed at, the action loses its self-preserving power. So the idea follows just as involuntarily as the action itself. The idea which arises and is immediately bound up with the innervation, is therefore associated, not so much with the idea of the action itself, as with that of its effect, which latter idea is predominant at the moment of acting. Therefore the expression for it is: "He shall suffer for his action and give me satisfaction for it." That is to say, the expression is a genuine utterance of a command or the expression of a feeling of conative impulse devoid of valuation, but it is essentially linked with the idea of another's suffering and not with that of one's own or another's action.

But suppose now that the members of a family or of some larger social group have feelings of revenge in common because of an injury inflicted by another person or group of persons. Each of them then eggs on the others with expressions of revenge, whether these be words or threatening gestures or other equally involuntary manifestations. When the individual perceives such expressions in himself or in the others he associates them with the idea of the suffering of the aggressor or aggressors. Since he finds the idea of this suffering associated with the perceptibly presented expression in the case of all the others too, nothing can be more natural than that he should assume there to be a factual connexion between the suffering in question and the expression of revenge. But in that way the suffering becomes something

which has, under the actual circumstances, the property that it "should happen." But at the same time and in consequence of this a norm is given, which runs as follows. He who is ever in the same situation as this aggressor, whether the sameness refers to the general character or even to the special character of the situation, "shall" as such be made to suffer in order to heighten the self-feeling of the injured party. Therefore it is right, in view of this norm, that this person or these persons should suffer. And now the sluice-doors are open. The idea of the suffering as having the expression of command as an objective property, or as being right, produces in this respect a feeling of conative impulse. That feeling, through its association with the idea, produces, in the way already explained, the consciousness of this or that person's obligation to make recompense by suffering. At this stage the passion for the accomplishment of justice arises. Through its kinship with the feeling of duty it is the object of the same reverence as the latter. It seems to us to belong to our *true* self, and it must be fostered on pain of losing that self.

6. Synoptic account of the relationship and the difference between the state of mind of the recipient of a command and that which is associated with the idea of obligation. Explanation of the tendency to regard legal norms as at once imperatives and statements about duty in the sense in which the commonsense notion of justice understands it.

We have now set forth, in (4) and (5), our investigation of (i) the psychological content of command, and (ii) the nature of the idea of duty and other notions which are essentially connected with it. In this way it should have been made clear what is the kinship, and what is the definite difference, between the state of mind of the recipient of a command and that which occurs in connexion with the idea of duty. In each case there is present a feeling of conative impulse, devoid of valuation, associated with the idea of a person's own action. In each case this

feeling is produced through the influence of the expression of command. Finally there arises in both cases a feeling of compulsion which is referred to the expression of command as what is binding. But there the likeness ends. In command the expression acts through the recipient's peculiar relation to the giver of the order. But in the case of the idea of duty the expression acts independently in its concrete perceptible form. It appears as an objective property of the action, with the idea of which the feeling of conative impulse is associated. This action is referred to a norm, *viz.*, the idea of a system of conduct as something which essentially goes along with the expression of command, and it stands out as the one which is right from that standpoint. Thus it comes about that a consciousness of an obligation to do the action, which is wholly absent in the case of the recipient of a command, is bound up with the feeling of duty. That which determines the feeling of conative impulse, *viz.*, the expression of command, is here regarded as an objective property of the action. Therefore the expression of the feeling cannot retain its autonomy in the expression for the association between itself and the idea of the action as right. Instead it enters as a predicate-term in a sentence in the indicative, *viz.*, "The action, as being right, is my duty." On this basis is raised the consciousness of an indeterminate something which expresses itself in duty and the like.

But, in so far as the expression of command is taken as a real property of a system of conduct, the idea becomes possible of a certain action being the right one for another person in a given case. Here the expression of command produces a conative impulse in reference to another person's action, when the idea of its rightness occurs. And in such cases the conative impulse manifests itself as moral indignation and the demands of the sense of justice, and it gives rise to a consciousness of an obligation on the part of the other person to act in this way. For the recipient of a command as such the fact that the same command may also be issued to other persons is something which is in itself of no conative significance. His desire that others shall or that they

shall not obey the command, or his indifference in regard to this, depends on his own special interests.

Moreover, the idea of duty carries with it the thought that submission to a compulsion, which appears as an equivalent reparation for an omitted right action, is something obligatory, whether it concerns oneself or another. Once the expression of command has become a real property of a system of conduct, as happens in the case of the idea of duty, it is transferred to the compulsion which is regarded as equivalent to the omission to act in accordance with that system. So in any actual case the idea of the rightness of the compulsion produces a conative impulse towards it, *viz.*, a feeling of obligation in regard to it and, along with this, also an idea of real obligation. For the recipient of a command as such the compulsion which is attached to the order, in case of disobedience to it, is merely a fact, whose consequences as regards himself he seeks to avoid so far as may be. In reference to others compulsion is significant for him only through his special interests, positive or negative.

Finally it should be remarked that the feeling of conative impulse which belongs to the idea of duty, regarded as that which "ought" to prevail in the soul, and also other conative feelings which are allied to it, acquire a special sanctity. They do so because they are ascribed to my real self, so that I seem to myself to lose my autonomy, which has the highest affective value for me, if I fail to carry them into action. The norm itself acts through such conditions and through its power to attach reverence or respect. Esteem is attached to right action and disesteem to wrong action. This most important world of feelings is foreign to the recipient of a command as such.

Let us now imagine a social group, within which fictitious or real commanding authorities act in unanimity. The power of command necessarily suffers from certain defects so long as the expression of command is not transmuted, in the consciousness of the members, into a real property of a system of conduct identical for them all. It seems uncertain to the members that the commanding authorities will keep to their commands in every

situation. So their suggestive power is not present under all circumstances. How far the individual will be positively or negatively interested or indifferent in regard to the general carrying-out of the commands will depend on circumstances external to the power of command itself. If it is an oppressive minority which bears sway, each individual may be influenced by commands addressed to himself, but on the whole his interests are opposed to the carrying-out of the system. The compulsion, which is threatened in case of disobedience, if it should affect an individual, will be merely an evil which interests him only negatively. And, if he hates the whole system because he belongs to the oppressed class, he will be negatively interested in regard to such exercise of compulsion in general. But suppose that the expression of command acquires power to act autonomously, as a supposed real property of a system of conduct identical for all. Then these defects will disappear. The idea of a possible lack of steadfastness in the will of the commanding authorities will now be irrelevant, and so too will be the different degrees of suggestive force in different circumstances. When an action presents itself as that which is right in a certain case in accordance with the norm, the expression of command inevitably engenders a feeling of conative impulse, to which a mighty world of feelings, of the kind described, attaches itself, thus increasing its force. The interest in favour of the action with which the expression of command is united in a particular case is now unconditionally present, alike when it concerns oneself or others; an interest which is reinforced in its operation by the world of feeling mentioned above. The compulsion which is threatened in case of disobedience now becomes a righteous compulsion, in respect to which one feels oneself and others to be liable in that case. It is plain that the social group in which such forces are active gains in consistency and therefore in the power of self-preservation. Nevertheless there is another side to the matter. Suppose that the system of conduct which has the expression of command connected with it as an objective property acquires an opposite character for various groups or for various classes within the same

group in consequence of opposed interests, so that what is right for the one group or class is wrong for the other. In that case, if enmity should arise, it takes a specially embittered form. Each one, in exerting pressure on the other, believes himself to be realizing the demands of objective rightness.

However, it is now clear, in view of the account given above, that the state of consciousness of the recipient of a command readily passes over into that which accompanies the idea of duty, and that conversely the latter carries the former with it, under certain circumstances, notwithstanding the fundamental difference between the two. It is only necessary that fictitious or real commanding authorities should assert themselves effectively and unanimously in a society, in order that the expression of command shall be transformed into a supposed real property of a system of conduct and that the idea of duty shall enter. And, if once the abstract idea arises that there is an unconditionally binding norm, there arises a tendency to connect it with commanding authorities which assert themselves effectively and consistently. This happens through regarding the expressions of command which issue from such authorities as normative. This is, of course, particularly true when he or they who command are wise enough to adapt themselves more or less to the content of already existing norms. If a tyrant's ordinances are astutely adapted to the current ideas of rightness, the people very readily come to regard them as authoritative confirmations of real duties. That, on the other hand, there is a tendency to think of a commanding will in connexion with the idea of duty, has already been shown.[1] In this way also can be explained the tendency to confuse, on reflexion, the state of consciousness of the recipient of a command with the consciousness of duty.

A flagrant example of this is provided by von Kirchmann's treatment of the unconditional ought in his work *Die Grundbegriffe des Rechts und der Moral* 2. Aufl., 1873. According to his view the ought is given in a feeling of respect for a commanding "immense" physical power, which

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[1] See above, pp. 157 *et seq.*

is regarded as infinite. In relation to this the individual appears as powerless. The same feeling of respect is alleged to be present in the feeling for the majestic and sublime in certain natural phenomena (pp. 51, 53, and 57). In this the fact is overlooked that the ought, in the consciousness of duty, is connected with the action itself as a real property. When it is a question of the relationship to a commanding authority as such, the ought is attached to obedience; but, as we have pointed out, this cannot be commanded in the command itself. But the ought need not in any way be connected with a commanding authority. The action which is characterized as right in respect to the "moral law" can be regarded as having that character without any reference to such a power. The author himself mentions this (p. 56. Cf. p. 125), but regards it as involving forgetfulness of the original commanding authority. But in that case the respect, in which the ought is alleged to be given, would have acquired a quite different character from that which belongs to the feeling according to the author. The ought can also be connected at one and the same time with formal obedience and with the action commanded. This happens if the commanding power appears, not merely as commanding *in abstracto* and as entitled to do so, but as commanding the very action which is *right*. Such a double-sidedness undoubtedly exists in the child's feeling of respect for his parents' commands, and also, in the higher religions, in "reverence" for the commands of the divine will.

But von Kirchmann also overlooks altogether the element of valuation in respect, and, with it, in the consciousness of duty which belongs to it. Respect is felt only for that which is regarded as *worthy* of respect. That is to say, the idea of an inherent inner value in the object is an essential feature in respect. A commanding power, even if it be infinite, is not respected merely as such. It is respected only if it appears as entitled to command, *i.e.*, able, by indicating its wishes, to determine duties for others and thereby to present the respect-inspiring norm itself. In the region of personality, we undoubtedly reserve the highest reverence for a person, whether he commands or not, who stands forth through his way of life as the embodied moral norm itself. It is unreasonable to suppose that we could reverence purely natural phenomena merely because of their might.

It is plain that what von Kirchmann describes in his treatment of respect as the ought-feeling is really the state of consciousness of the recipient of a command in regard to the imposing authority which issues it and thereby with its "thou shalt," acts suggestively on him. But a confusion has occurred in consequence of the fact that this state of consciousness and that which is present in the consciousness of duty so easily pass over into each other.

In this way it now becomes intelligible that there should be an ever-present tendency in jurisprudence to regard legal rules as statements as to what ought to happen, *notwithstanding* that they are also regarded as imperatives. Here we are concerned with conceived imperatives, which seem to issue from an authority or a system of authorities, and which assert themselves effectively and unanimously in a society. As a result the expression of command easily transforms itself in the popular consciousness into an objective property of a system of conduct. The fact that this system is regarded as holding only for the members of the society in question, and only so long as the authorities who officially determine the system adhere to it, does not alter the fact that it is regarded as a part of the absolute system of norms. The latter appears to be adjusted for a particular society, with regard to the existing situation, by the officially determinative authorities. That the content alters means only that a change in the situation causes the authorities to decree a different content as that which "ought to be actualized." Conversely, the idea of such a system, with "ought to be actualized" as an objective property of it, easily passes over into the idea of imperatives. So nothing is more natural than that one who contemplates the facts should have a tendency to regard a legal rule as at once an effectual imperative and a statement, regarded as authoritative by the members of a society, about what actions "ought to be undertaken."

Bierling (*Juristische Prinzipienlehre* I, 1894, p. 17) defines a legal rule as a certain imperative, and (p. 43) the "recognition" of it as habitually respecting it. But, two pages later, he says that, in every such recognition, there is recognized a claim on the one hand and a duty on the other. This is asserted without the slightest argument; just as if an imperative as such would involve an assertion of duty for the person commanded, based on the very fact of the command, and therefore also an assertion concerning the issuer of the command as entitled to do so. It is alleged that this assertion is recognized to be correct in and through the influence of the imperative.

According to Dernburg (*Pandekten*, 4. Aufl., 1914, p. 44) substantive law is "that ordering of the relationships of life which is maintained by the general will". Thus, it would seem that a legal norm can be only an assertion about the ordering of the relationships of life which the general

will is prepared to uphold in a certain case. But, according to p. 88, subjective right is "that share in the good things of life which accrues to a person in a human society". The legal order only safeguards and models subjective right, but does not create it. Thus a legal norm which vindicates a right is an assertion about the share in "the good things of life" which actually accrues to the individual in a certain case; or else, from the standpoint of duty, it is an assertion about the action for another's advantage which actually ought to happen in a certain case.

Radbruch (*Grundzüge der Rechtsphilosophie*, 1914, p. 161) says that the content of an imperative can only be given by the words "this ought to be." Therefore jurisprudence, which has only to give the contents of imperatives, does quite rightly in "making the concept of duty its own". As if the "thou shalt" of the imperative were the same as the "this is what you ought to do in this case" of duty.

Salomon (*Das Problem der Rechtsbegriffe*, 1907, p. 47) takes as his starting-point a wholly unproved proposition of Lipps that the "experience" of a foreign will acquires "a peculiar affective character of 'objectivity,' *i.e.*, a property of oughtness," and he concludes from this that the reception of the content of a foreign will in law carries with it the idea of an objective ought.

Binder defines legal propositions as hypothetical imperatives addressed to the state-organs. (See, *e.g.*, *Rechtsbegriff und Rechtsidee*, 1915, p. 259.) As an example of such an imperative he adduces at the same place the following: "If a person has lent money to another, and the latter has promised to repay it, the judge shall order him to make the repayment." (B. G. B. § 607.) Here the order is thought of as asserting a certain relationship as existing objectively, and the oughtness of a certain action is thought of as a term in that relationship.

In Merkel's *Juristische Enzyklopädie* § 3 it is said that the judge's pronouncement, which is here held to make evident the nature of the legal rule, contains a "You *should* respect the limits which I have laid down. You are *under an obligation* to do so." It is further asserted that in this respect the pronouncement manifests itself as "a command." Of the two sentences in question only the first could possibly be regarded as a command. But the second, too, which is regarded as having the same content as the first, is treated as a command. The same confusion occurs in Hellwig, *Wesen und subj. Begrenzung der Rechtskraft*, 1901. According to p. 1, declaratory judgments are authoritative declarations about the parties' legal relationships, *i.e.*, their respective rights and duties. According to p. 5, a condemnatory judgment is an "order to the debtor to make payment" which is put on the same footing as "the establishment of the duty to pay."

Opposite to the tendency to the confusion which we have just treated is the very common tendency to regard the social feeling of revenge as the essential feature in the feeling of duty.[1] We have seen that the state of mind of the recipient of a command, who is subjected to the social authority, very easily passes over into the idea of duty; and that the idea of commands passes easily into the thought of an authoritative pronouncement as to what ought to be done. In the same way, the social revenge-feeling easily passes over into a definite attitude towards the infliction of suffering, which is determined by the idea of the righteousness of the suffering. As we have already shown, all that is needed is that the words "He shall suffer for his actions!", expressive of vengeance, shall sound in the ears of all the members of a society, associated with the idea of the suffering, and straightway the idea of an inner connexion between suffering and the expression of revenge will arise. Along with it there arises also the idea of a norm concerning what "should happen" to a person who inflicts suffering on others; and in the particular case it appears as just, in accordance with the norm, that the injurer shall suffer. At that stage there has arisen, from the social revengeful feeling, a feeling of conative impulse, determined by the idea of the righteousness of suffering, which is directed towards ensuring that suffering is inflicted upon the object of the revengeful feeling. But this idea comes under the control of the idea that suffering, inflicted through compulsion, is righteous only as an equivalent to the omission of acting according to one's duty. It thus becomes necessary, in order that vengeance may function without perturbation, that the object of it should be regarded as a wicked individual. But in this way the social revengeful feeling passes over into (i) a demand for the punishment of the guilty through inflicting suffering on him which can be regarded as equivalent to the right action which he has omitted, and (ii) moral indignation, *i.e.*, a feeling of revenge determined by the fact that the moral impulse towards, or the demand for, right action on the part of another (which is the counterpart in respect of others to the feel-

[1] Examples are Adam Smith, John Stuart Mill, and Westermarck.

ing of duty) is in operation. The fact that this demand is left unsatisfied causes a feeling of displeasure, which is transferred to the guilty person and calls forth a revengeful feeling. The demand for just punishment, as also moral indignation, can also be turned inwards on oneself when one impartially judges one's own actions, and it then becomes a reaction against a violation of the sense of duty. Since, now, the line of demarcation between the direct social feeling of revenge, on the one hand, and the above-mentioned feelings of moral reaction, on the other, is vague, it is easy to regard the latter as merely varieties of the former. Now the analogon of the feeling of duty in reference to other persons, or the feeling of duty itself, as the case may be, is most strongly marked in these reactive feelings. Therefore the tendency arises to regard this feeling itself as in essence identical with the social revengeful feeling.

7. **The practical aims of jurisprudence give rise to a tendency to regard legal norms, from the standpoint of the imperative-theory, not only as both imperatives and factual statements about obligation, but also as valid statements about obligation. They thus give rise to a tendency to confuse the property of being demanded by the legal will with the property of being a duty in the sense in which the commonsense notion of justice understands that word. For the same reason there is a tendency, on the basis of the declaration-theory, to regard the supposed declarations of will in law as valid statements about duty. The mediating term is a surreptitious notion of command.**

But let us suppose that a person who contemplates rules of law finds, not only that they are actual imperatives, but also in contemplating them feels himself to be receiving commands, *i e.*, that he "recognizes" them as such. The consequence will not only be that he has an inclination to regard them as authoritative pronouncements to the people as to "what ought to be done," without distinguishing this from their imperative charac-

ter. He himself will tend to regard them, for that very reason, as actually authoritative in that respect. But in that case the fact that an action is commanded by the state-authorities becomes identical with its being an actual duty. In that way law is conceived as at once an actual reality and a system of authoritatively established duties, and jurisprudence is conceived as at once a purely theoretical and a practical science.

But at that point the way is clear, in spite of the imperative-theory, for determining the content of the law in accordance with principles which are data of one's own consciousness of justice. According to that view I have duties, not only in respect of the state-organized society considered as having rights, but also in respect to private individuals or complexes of such. That to which the obligatory character of an action is referred is either its property of being the content of a desire, indicated in a certain way, on the part of the state or an individual or a complex of individuals, *i.e.*, a "claim," or its property of appearing to forward their interests. Thus the distinction between public and private law is introduced into the legal system, although it is claimed that all rules of law as such are imperatives issuing from the public authorities. Suppose that the action commanded is, for that very reason, an authoritatively established duty. Suppose, further, that what is commanded is either that one should respect, within certain limits, the desires, indicated in certain ways, of certain individuals or complexes of such, or that one should have regard to their interests. Then the obligatory nature of the action depends on the presence in those persons of such desires or of certain interests which demand that kind of action. It does not depend on the fact that it is commanded by the state, although this is nevertheless alleged to be what makes it a duty. And the rule of law in question belongs to private law. But suppose that what is commanded involves no requirement to respect the desires or the interests of private individuals or complexes of such. Then the property of being commanded by the state is regarded as that which makes it a duty, and the rule of law belongs to public law.

According to the commonsense feeling of justice coercion by the authorities is justified only as a compensatory reaction for failure to perform one's legal duty. But as such it is something to which the offender has made himself liable. Accordingly, when the confusion mentioned above exists, rules of law concerned with coercion are regarded from two points of view. In spite of their imperative character they are regarded, not only as expressing duties on the part of the organs of the state, but also as determining the coercion which is due to those subject to the law as requital for their failure to carry out their legal duties. The coercion in question has, again, either the character of private law or of public law according to whether it is or is not brought into action by the desires of individuals or complexes of such, expressed in a certain way, or by their interests. In the former case it is a compensatory reaction to which one has made oneself liable by infringing the right of individuals or complexes of such; in the latter it is concerned with a previous disobedience to the orders of the state regarded as law. According to the commonsense feeling of justice the state authority has a duty, both towards the public interests and also towards individuals and complexes of such, to assign to itself and to them those rights which objectively spring from their relationships. It has also a duty to protect, if necessary, by coercion rights which have already been assigned. In this way legal claims by individuals against the state come to be considered. If once the confusion mentioned above exists, one can even imagine imperative rules of law issuing from the state authority, in which its own duties towards the community and the individual are laid down. This is specially plausible, since the organs of the state seem to be commanded to pay attention, within certain limits, to the wishes of individuals expressed in certain ways.

It should be noted that this way of looking at the matter serves to muffle up the difficulty in the imperative-theory which otherwise stares one in the face. The difficulty is that one can never know whether the commanding power really holds to its original volition in this or that particular case; and, if so, the application

of law becomes impossible.[1] If the commanded action is a duty of its own intrinsic nature, then its property of being commanded is one that inheres in the action itself independently of the volition of him who commands it. The action is commanded in *every case* in which the conditions are fulfilled under which it was originally commanded, for the command to act in a certain way in such circumstances is an intrinsic property of the action, *viz.*, its obligatoriness. In this way it seems as if the difficulty of interpretation which is inherent in the imperative-theory were resolved, *viz.*, the difficulty that it seems impossible, at any rate under modern constitutional conditions, to determine with confidence the actual intention of the legislator as to how a rule of law is to be applied in this or that case.[2] If the rule of law is the authoritative expression of what is obligatory in such and such circumstances, one must use in interpreting that expression the presupposed direct intuition of duty, *i.e.*, in effect one's own sense of justice. Within the framework of the expression one must choose that interpretation which can be regarded as ensuring that real justice shall be done; but this must always be in accord with the fundamental principles which are applied on the whole in the region of law in question and which always have the highest authority. The intention of the legislator is now given. According to the present assumption it *must* be intended that that system of actions shall be regarded as normative which really is so in the special circumstances of the society in question. If one's interpretation is in accordance with the assumed direct intuition of duty, one must consider oneself to have discovered the precise volition of the legislator, provided only that one keeps within the framework of the expression and that one is in accord with the fundamental principles current in that department of law. Nor does there seem to be any obstacle either, notwithstanding the imperative-theory, to filling in gaps in the law by analogy, "the nature of the case," justice, and equity, when applying a law. In the particular case of analogy we seem in this way to have

[1] See above, pp. 106 *et seq.*

[2] See above, pp. 74 *et seq.*

gained a criterion for applying it correctly. Suppose that a certain ruling is to be regarded as the expression for what really is obligatory, provided only that it can be taken to be a pure application of a more general legal principle. Then the same principle should be applied, regardless of whether the legislator did or did not have it in mind, to other cases which have not been expressly legislated for but which must be judicially decided, except in so far as other conflicting legal principles affect the question. In determining how far a certain rule of law can be described as a mere application of a more general legal principle in order to be regarded as expressing a duty, there are of course two decisive factors. One is a man's own sense of justice; the other is an investigation of the general principles governing the department of law in question.

It should be noted further that the case supposed, *viz.*, that the individual investigator of law feels himself affected by the legal imperatives under consideration, and that they have for him, as for the people in general, an authoritative character as announcements of actual duties, is by no means a mere possibility. In point of fact jurisprudence as such has a definite practical aim, *viz.*, to help in carrying out the existing law. Those who practise jurisprudence come therefore to feel that, just because they investigate law, they are its servants. It is therefore natural for them to "recognize" the legal imperatives which are presented to them, and from this there naturally follows an inclination to regard them as valid assertions of what ought to happen. This tendency is strengthened by the possibility, which such a point of view offers, of overcoming the difficulties which beset the pure imperative-theory. To this must be added the following fact, which will be developed in Section 9. The imperative-theory itself depends on influences from a certain way of looking at law which is active in the practice of law in daily life. This point of view, however, is there connected with, and not clearly distinguished from, the notion of rules of law as authoritative definitions of what is right in the strict sense.

In spite of all this, however, it might be thought logically im-

possible to entertain such a confused idea as is involved in identifying the property of being commanded with a property of obligatoriness inherent in the commanded act. But the requirements of life are stronger than those of logic. It will be found that the confusion in question really does in general beset the supporters of the imperative-theory in jurisprudence. Nay, in this respect there is scarcely any difference between the followers of this theory and those who support the other possible form of the will-theory, *viz.*, that law is a system of declarations as to what the state-authority has decided shall happen. From the practical point of view it does not matter whether rules of law present themselves as imperatives or as such declarations of will. The supposed declarations of volition, which seem to issue from a sovereign will, act as commands in two ways. In the first place they act directly on the organs of state, through which alone the realization of such volitions can take place; and secondly they act indirectly on all who are subjected to the power of the state, in so far as the actions or omissions, to which the state announces that it will react coercively, present themselves as forbidden. The confusion in question is therefore equally natural for the supporters of this form of the will-theory in jurisprudence as for the supporters of the imperative-theory. On the declaration-theory this confusion naturally takes the following form. (i) The content of an enactment by the state-authority appears as something which the state, for its part, is under an obligation to enforce. (ii) The contradictory opposite of the action or omission against which the state-authority has decided to react appears as an obligation on those who are subject to its authority. (iii) The coercion which the state has decided to exercise appears as a deserved requital.

8. Various juridical theories which indicate the confusion.

In the following investigations of the view taken in regard to the question at issue by contemporary writers on the principles

of jurisprudence we must confine ourselves to setting forth the predominant lines of thought in the more important of the authors who favour either or both of the two forms of the will-theory.

(a) *The notion that the idea of legal duty is co-ordinate with moral duty.*

The constantly repeated talk, among those who regard rules of law as imperatives or declarations of volition, of an obligation as resting upon one or other of the parties in a legal relationship, suggests at the very outset that they have confused the property of being commanded by the state-authority (either directly, or indirectly through a declaration of its volition) with the property of being obligatory. If a rule of law is an imperative or a declaration of volition, the only legitimate sense in which one can talk of a duty is that an action is directly or indirectly demanded in respect of a certain person. But duty, in the ordinary sense of the word, has nothing to do with anything of that kind. On the contrary, if a rule of law imposes upon a person whom it concerns an obligation in the ordinary sense of the word, then the rule of law itself is not an imperative or a declaration of volition. It is instead an authoritative announcement of the fact that he is under an obligation to act in such and such a way, even if the action which he is said to be under an obligation to perform should happen to be the carrying out of an order which has been given to him. The use of the word is often defended on the ground that "obligation" no doubt means here something quite different from what it means in the moral sphere, and that it must not be confused with moral obligation, but that the two have a common characteristic, *viz.*, the fact that an action is commanded by a sovereign will. But, even if it be true that, when I am conscious of a moral obligation, I feel myself to be the object of a command from a will which stands over and above me, still this does not coincide with the meaning of the obligation. For that which distinguishes the consciousness of moral obligation under all circumstances is that one feels this "command," in comparison

with all other commands, to be authoritative.[1] Just this command, before all others, *ought* to be obeyed; or, to put it quite plainly, to obey this command is the only *right* course of action. If any will, no matter how powerful, orders me to rob and to plunder, it is not the case that the moral "command" is for me just another which conflicts with the former and strives with it for influence over me. It is clothed with a special sanctity through standing out as the command which I *ought* to obey. Suppose, then, that we are to understand by moral obligation that one *ought* to act in a certain way. Then there is no common genus whatever, under which there fall both this kind of obligation, and that which is called legal and is said to consist merely in the fact that one is the object of the commands of a certain external power. For the latter denotes a *de facto* relationship, and the former an "ought to happen." And there is no common genus for the purely factual and the "ought." By using the predicate "ought to happen" we refer an action to an altogether different category from the factual. That an action "ought to be done" is regarded as something which holds true altogether without reference to whether it actually is done or not. But the point of view of genus and species plainly requires that the terms of the comparison belong to *one and the same* category. Suppose that, in spite of this, it is thought that one can use the expression "legal obligation" in accordance with ordinary usage, and that in doing so one is concerned with a species of the genus obligation. Then it is likely that one is thinking of duty in the legal sphere as really analogous to duty in the moral sense, *i.e.*, one is thinking that the command which issues from the state-authority *ought* to be obeyed. Suppose now that one also takes the rule of law, in which the duty is laid down, to be an imperative or a declaration of volition. Then one confuses, directly or indirectly, being the object of a command with the duty to obey the command.

Hold von Ferneck (*Die Rechtswidrigkeit*, I, 1903, p. 75) tries to show that duty in general, including both moral and legal duty, consists in

[1] In the same sense J. Buttler; cf. the way in which Wundt distinguishes between impulsive and imperative motives.

the fact that an action is commanded by a social power which exercises a social-psychological pressure through the consequences that follow on omission (p. 80). In that case it is a duty to conform to changes of fashion, or to submit to a brutal power in a community, *e.g.*, a tyrannical pack of thieves. But what has "duty", in that sense, to do with what we mean by duty? Yet it is plain that, when Hold v. Ferneck draws a parallel between legal and moral duty, he has in mind something really akin to moral duty. But, since a rule of law must, on his view, be an imperative issuing from the state-authority, he arrives at a completely unreasonable account of what is involved in the notion of duty. Holland (*Jurisprudence*, p. 81) says that there is a "legal duty" when the active or passive promotion by other parties of the wishes of the party who has a right "will be enforced by the power of the state". But what has such a declaration on the part of the state, that it intends to force a person to perform or omit a certain action, to do with an obligation on that person? It is only Holland's very superficial definition of moral duty—"When such furtherance is merely expected by the public opinion of the society in which they live, it is their moral duty"—that can lead to the belief that anything of this kind can be called a real duty. (For a criticism of Holland's definition, see Gray, *The Nature and Sources of the Law*, pp. 11 *et seq.*) Of course the author really means something quite different by "moral duty," although he incorrectly defines the content of his own thought; and so he also is thinking of something different when he talks of "legal duty" as something parallel to moral duty. But he here confuses that other meaning with the fact that a certain coercion is threatened. According to the explanation which we have given above, the connecting link must be the power of such a declaration to function as a demand for action; for in general the idea of duty easily passes over into the idea of a demand, and *vice versa*. Gray (p. 14) rightly insists that moral "duty" involves an "ought". In spite of this he treats "legal duties", which, according to him, are "the acts and forbearances which an organized society will compel", as a species side by side with moral "duty" (p. 13). He neglects to tell us what the genus "duty" in general is supposed to be. The same obscurity exists in Regelsberger, *Pand.*, I., 1893, pp. 59 and 60. Law consists of certain prescriptions; yet it contains an ought, which is parallel to the moral ought.

In Kohler, *Einführung in die Rechtswissenschaft*, 4. Aufl., 1902, p. 63, we find the following passage: "But nowadays the debtor does not become a slave, nor does debt carry with it the germ of slavery. The debtor is only under an obligation, *i.e.*, the law makes a certain demand on him. The legal system has here made use of a notion which is indispensable to the nature of ethics. For ethics is the theory of duty; only moral obligations, because they are not legal obligations, cannot be enforced

by law." Here a legal duty means that something is commanded to someone by the law. And yet the only difference between these duties and those which are moral is that the latter cannot be enforced by a legal process. In Heerwagen, *Die Pflichten als Grundlage des Rechts*, 1912, p. 64, we read: "We call a legal duty that state of a member of a community in which he is commanded by the highest authority in his community to act in a certain way." That the author here supposes there to be a genuine analogy to moral obligation is plain from the fact that legal obligation in a state is represented as a duty "to obey the directions of the state-authority" (p. 149). This has obviously nothing to do with the mere fact that one is the object of a command.

The relation between legal obligation and command is often represented in the following way. The state-authority, it is said, creates by its commands an obligation in its subjects, in the sense of a duty of obedience. Here it is plain that one has a feeling that there is a difference between the fact that an action is commanded and its being a duty. But nevertheless obligation continues to be regarded as something which is given with the mere command.[1]

[1] A criminal act, according to Graf zu Dohna, *Rechtswidrigkeit*, 1905, p. 70, is contrary to duty from the individual's standpoint because he "has neglected the obligation imposed on him by that legal command". That the "imposed" obligation is to be understood in the ordinary sense appears plainly from p. 14. Zitelmann (*Irrthum und Rechtsgeschäft*, 1879, p. 222) argues against the theory that rules of law are imperatives. For an imperative contains, as Sigwart has shown, an individual non-transferable feature. But a rule of law is meant to hold universally and must be regarded as a judgment. But then it is said on p. 223 that this judgment has the following peculiarity. "The synthesis of concepts in the judgment is valid only because the lawgiver wills it. The lawgiver had the power to impose by his will on the subject a certain predicate (that of being under an obligation), which did not previously belong to him. In promulgating the norm the lawgiver brings about in reality the connexion of those facts which he at the same time asserts in his judgment to be connected." Now (i) it is evident that this state of "being under an obligation", which comes into existence through the legislator's will in and through his announcement of its existence, cannot be identical with the fact that the legislator wills that a certain action shall happen. For his will is here directed to the production of that "predicate" in the subject. But (ii) it also cannot mean merely that the legislator commands a person to act in certain a way. In the first place, the command can hardly be regarded as a predicate in the subject who receives it. In the second place, the command is considered here merely as the activity

Opposed to this is the theory that obligation arises in and through the effect of the legal imperative on the subject, although it is not identical with that effect.

Bierling (*Jur. Prinzipienlehre* I, 1894, pp. 40 and 47) asserts that to analyse the notion of "legal validity" comes to the same thing as to analyze the fact that certain imperatives are accepted as rules for intercourse in communal life within a certain limited circle of individuals, so that "fellow-members", as subject to claims upon them which they recognize, stand over against "fellow-members" as makers of those claims. Since "acceptance" of the imperatives is nothing but habitually respecting them (see above pp. 198 *et seq.*), this amounts to saying that their "legal validity" is identical with the fact that, as demands, they constantly influence the members of the community. But this is by no means consistently maintained. The identity presupposes that actual validity means actual acceptance. But, according to Bierling, only imperatives of the first order, *i.e.*, the constitutional laws in a state, are objects of direct acceptance. There is also an indirect acceptance, which is "the completely necessary consequence of the other". This refers to imperatives of the second order, *e.g.*, laws which rest upon the force of the constitutional laws (p. 46). Obviously there can be no question of an actual acceptance here, for we cannot always assume the occurrence of a process of drawing "logical consequences". Yet even this not invariably actual acceptance is taken to mean *actual* legal validity. This is enough to make one suspect that Bierling, after all, means by "legal validity" something other than the fact that imperatives are accepted in the way suggested. On p. 128 he speaks also of acceptance as "the ground of validity". In other parts of his work similar modes of expression are often used. (See, *e.g.*, II, p. 319.) "In virtue of direct acceptance" and "In virtue of indirect acceptance" certain imperatives "are valid". This makes it clear that

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by which the legislator's will calls into existence the state of "being under an obligation". If this state be anything to do with what we elsewhere call "obligation", how can the legislator be thought with any show of reason to create it in the subject by his utterance except through imposing the act as a duty? The mere utterance obviously cannot bring about such a result. (Cf. Seligmann, *Beiträge zur Lehre vom Staatsgesetz und Staatsvertrag*, 1886, p. 34.) It would seem, then, as if Zitelmann thinks that, when a legislator utters a legal judgment, a command issues from him which creates in the person who receives it a "state of being under an obligation". The latter is at once something different from the command itself but given in and through the latter. In a similar way Hölder (*Über objektives und subjektives Recht*, 1893, p. 10) talks of command as creating obligation in law.

"legally valid" has for Bierling another meaning than merely being accepted. It is only *grounded upon* acceptance. But, since the only factual feature in law as such is the actual (direct) acceptance of fundamental imperatives, one is led to the conclusion that "legal validity" does not mean any factual relationship which belongs to law. One is then led inevitably to the view that Bierling, notwithstanding statements to the contrary, has in mind what is most usually meant by the binding force of the law, *viz.*, that the imperatives *ought* to be followed. (Cf. Radbruch, *Grundzüge der Rechtsphil.*, 1914, p. 169.) But there is no need for us to remain in doubt. In the treatment of "legal validity" in the second part (p. 318) we read: "Where this primary fact (acceptance) is present, the legal validity and the obligatory force of the ordinance concerned is beyond question." Again (p. 139): "But undoubtedly the duty of observing a legal norm which one has recognized follows from one's own recognition of it." That Bierling, when using the word "legally valid", is thinking of the obligatory force of an imperative, of its being something that "ought to be obeyed", is made certain by these passages taken along with the following fact. He talks in many places of rights and duties as existing objectively; and he equates the mere acceptance of imperatives, *i.e.*, the regular influence which they exert, with the recognition of a claimant's right or one's own duty. But this "ought to be obeyed" is given, according to him, in and through the actual influence of the imperative. In principle Bierling follows Grueber, *Einführung in die Rechtswissenschaft* in Birkmeyer's *Encycl. des Rechts*, 2. Aufl., 1904, p. 14. The same peculiar ambiguity in the notion of the "validity" of a law appears. "The law" (*i.e.*, the "positive law") is defined as "the collection of norms which are accepted as binding within a determinate community by the members of that community for their behaviour in it in accordance with its purposes". In this way the "validity" of a law is identified with its being accepted, which here, as with Bierling, means both the actual power of a norm to function as a demand and its obligatory character. But immediately after this it is said: "Norms are valid because (*N. B.*!) the members feel themselves bound." Thus "validity" both *is* and *depends on* the commanding power of the norm on him who receives it. That here what is meant is the same as "ought" appears plainly on p. 16. Even those laws which are promulgated against a society's convictions of justice are genuine law in so far as they are accepted as binding norms. "The magistrate therefore ought to base his decisions only on this authoritatively established law" (*N. B.*!). Therefore it is held that a norm is made into an "ought" in and through its power as a command over him who receives it. In conclusion it should be remarked that the genuinely theological theory of duty, which starts from a commanding divine will as the basis of all duty, whether moral or legal, depends on the same

confusion. See, *e.g.*, Hertling, *Recht, Staat, und Gesellschaft*, 1906, p. 30. "And so the final solution" (of the problem of duty) "is that man ought because God wills".

(b) *The assumption that the state-authority is itself under legal obligations.*

This confusion shows itself in a startling way when a rule of law is regarded as an imperative or declaration of volition on the part of the state, and when therefore a legal duty is regarded as consisting in the fact that an act is commanded or accords with what the state-will has resolved, and yet it is held that the state itself is under legal obligations. Obviously, in thinking of the latter kind of obligation, one must have in mind something other than a command or declaration of volition on the part of the state; for here we are concerned with an obligation which is incumbent on the state itself which issues commands or declares its volitions. This must be a real ought. But, since legal obligation here is supposed to have the same meaning as when it applies to those who are subject to the power of the state, it must be thought of as a real ought in the latter case too. But this idea is confused with the other. At this point recourse is had to the proposition that a state can issue commands to itself. But it is plain that this is merely a plaster to cover the confusion of thought. Admittedly the notion of giving an order to oneself is not as such unreasonable, in so far as one can reinforce one's own intentions by the powerful resolve "I must do that."[1] But any possible command to oneself presupposes always an intention to perform the commanded action in the person who is the object of the self-command. But the obligation in question is always a duty to carry out a *certain* intention, and therefore a duty to command oneself in a *certain* way. It therefore stands above the person who issues commands to himself and so cannot be identical with the fact that an action is commanded by the latter.

Cf. Schuppe, *Der Begriff des subjektiven Rechts*, 1887, p. 86. In Ihering, *Der Zweck im Rechte* I, 3. Aufl., 1893, p. 320, law is defined as "the sum-

[1] Cf. above, p. 125.

total of *compulsive norms* which hold within a state". A norm is "*an abstract imperative for human action*" (p. 331). But, it is said, an imperative is significant only when uttered by someone who has power to impose this restriction on an alien will. "It is the stronger will which prescribes to the weaker the line of conduct which the latter is to follow" (pp. 330—331). It is distinguished from a mere maxim through being of "binding nature". Legal obligation here means simply the property of being the object of a compulsive norm issuing from the state. None the less, on p. 357 "the two-sided obligatory force of a norm" is spoken of as marking out the genuine condition of legality. By this is meant that legal norms are binding, not only on those subjected to the power of the state, but also on the state itself. For a genuine condition of legality to exist it is necessary that the state-authority "should grant in fact to them" (*i.e.*, legal norms), "so long as they exist, that universal validity which is ascribed to them in principle". (Same page.) The obligation in question is itself of a legal nature (p. 366). Everyone, and therefore the state-authority also, who fails to act in accordance with the legal norms commits a "breach of law" (ein Unrecht) (p. 358). Even the monarch in a monarchical constitution has legal duties (p. 329). It is plain that the obligation which concerns the state-authority has nothing to do with the primary notion of legal obligation, which was alleged to be merely the property of being the object of an imperative issued by the state and directed to a "weaker will" than that of the state itself. Obviously two notions of obligation, one of which involves the thought of a genuine ought, are here confounded with each other.

Stammler is guilty of the same confusion when, on the one hand, he takes a rule of law to be a coercive order which "has authority over the private individual"; and yet, on the other hand, distinguishes it from a merely arbitrary coercive order in so far as the giver of it is himself bound by it. (For the first statement see *Wirtschaft und Recht*, 1896, p. 129; and for the second p. 497. Cf. also *Theorie der Rechtswissenschaft*, 1911, p. 170.) "Authority" or obligatoriness here is obviously ambiguous.

Holland (*Jurisprudence*, p. 81) defines legal duty as such action as "will be enforced by the power of the state"; but says on p. 124 that it is self-evident that the state has legal duties, "though it has the physical power to disregard . . . them". If legal duty means what it is said to mean in the former quotation, it cannot be applied to the state itself; for it cannot compel itself to act in a certain way. Something quite different, which must be a genuine ought, is in mind when one talks of the legal duties of a state. On p. 349 we undoubtedly find something opposed to this, for it is said that the sovereign power itself can never act unconstitutionally or illegally. But this is merely an expression of the inconsistent standpoint which comes out particularly clearly when, in spite of all this, he

talks in the same connexion of a "constitutional law" which determines the "component parts" of the sovereign power and delimits their respective spheres of authority (p. 350).

G. Jellinek's treatment of obligation in the juridical realm may also be cited as an instance of the confusion of ideas which we have noticed. On the one hand, we are told that the organs of the state are laid under an obligation by the state-will, in so far as the latter commands its servants to conform their will to the law. (*Allgemeine Staatslehre*, 3. Aufl., 1914, p. 478.) On the other hand, this obligation on the organs of state is alleged to be nothing but an obligation laid by the state-will upon itself, on the ground that the latter will is embodied in the will of the organs. This laying of an obligation upon itself by the state-will is referred, on the one hand, to the Kantian doctrine of autonomy as the ground of obligation. (*System der subjektiven öffentlichen Rechte*, 1892, p. 185, and *Allg. Staatsl.*, p. 480.) On the other hand, it is regarded as analogous to binding oneself by a promise, without acceptance of the promise, in private law. (*System* loc. cit., and *Allg. Staatsl.*, p. 370.) Here it is easy to separate no less than three different senses in which "obligation upon the state-will" is used. (i) So far as it exists in the commands of the state-will to its organs, it means merely that certain persons in the state are the object of certain commands. (ii) The state-will itself is actually thought of as under an obligation; and this is explained by reference to autonomy in the Kantian sense, which is here regarded as the state-will issuing commands to itself. In so far as this view is taken, obligation means genuine duty, though it is confused with the merely apparent duty which consists in being the object of a command. The reference to Kant shows that a genuine ought is being contemplated; whilst the connexion with commanding oneself implies that something other than being the object of a command is meant. The state-will would be under an obligation to carry out just *that* intention which is presupposed for the command issued by itself to itself. So the obligation cannot depend on the fact of the command. (See text.) (iii) In so far as the obligation upon the state is held to be analogous to that of the maker of a promise in connexion with the promise which he has made, it is regarded simply as a duty in the ordinary sense of the word. To that extent it is quite independent of the commands of the state, but rests upon a rule, superior to the state, which makes the promise binding. Since the state-authority is held to be the only power which commands in law and thereby creates duties, this rule must be thought of as an objective norm, in the sense in which the theory of the law of nature conceives it. Curiously enough, it looks as if the author, in the passages quoted, wished to give greater weight to his acceptance of this rule of natural law by mentioning that it is actually valid in *positive private law*. It has been

"recognized from of old"! (Cf. Krabbe, *Die Lehre der Rechtssouveränitet*, 1906, p. 8.) These three meanings appear in different statements, but the author seems not to realize that different ideas are involved.

Beside Jellinek, the following writers may be mentioned as supporting the confused theory that the state lays an obligation on itself by issuing commands to itself:—Thon, *Rechtsnorm und subjektives Recht*, 1878, p. 142; Wach, *Der Feststellungsanspruch*, 1889, pp. 28 *et seq.*; Tezner (Grünhuts Zeitschrift, Bd. XXI, p. 164)—who describes it as merely an "auxiliary notion"; Stark, *Die Analyse des Rechts*, 1916, pp. 176 *et seq.*—who confuses conflict of desires with issuing commands to oneself; and Binding, *Die Normen und ihre Übertretung*, I, 2. Aufl., 1890, p. 63. Against Binding is Seligmann, pp. 96 *et seq.*

(c) *The theory of legal obligation as founded on the will of the state-authority but yet as valid against another persons's right.*

The confusion between being under an obligation in the sense of being the object of a certain command, and in the sense of having a duty to act in a certain way, is also palpable when, on the one hand, it is held that the commands of the state-authority are the basis of legal obligation, whilst, on the other, obligation is regarded as correlated with another person's right. The confusion at once becomes obvious when it is alleged that a necessary condition of obligation is the right of the state-authority to claim obedience to those orders by which it is said to create obligation. The power of the state-authority to command to which everything ought to be reduced if obligation consists in being commanded, obviously cannot consist in the state's right to command. Therefore another idea must have entered here without being distinguished. The idea of the state's right to claim obedience to its commands is meaningless if it does not presuppose a corresponding duty to obey. But if this latter duty is to be identical with the fact that obedience is commanded it presupposes another command, in which obedience to the first command is commanded. If now the power of this second command to create an obligation rests upon a right to claim obedience to it, then a duty to obey it is presupposed. On the same supposition this would require a third command enjoining obedience to the sec-

ond, and so on to infinity. Plainly, if the commands of the state-authority derive their power to create an obligation from the right of that authority to be obeyed, we must eventually come to a duty of obedience which does not itself depend on a command. And what can this be except an objective ought?[1]

But the confusion is still more glaring if a person, who asserts that a legal duty is an action commanded by the state-authority, at the same time holds that the duty is correlated, not with a right in the state, but with a right in another individual. On the present supposition a person stands in relations of obligation within the legal sphere only to the commanding state-authority itself, from which he receives his orders. It alone creates the obligation by its volition to make those subject to it act in a certain way. Suppose now that this power should ordain that the wishes of a third person, expressed in a certain way, are to be respected; or that it commands such actions as can be regarded as conducive to his interests. Even so one does not come into a relation of obligation to that person. By expressing his wishes he does not exercise a power of command in any legal sense whatever, which would act upon the obliged party and constitute his obligation. Nor does he give rise to the obligation through his will or his interests. The only ground of the obligation is the will of the state-authority to forward his wishes or his interests. In fact, the whole theory of the subjective rights of private individuals as corresponding to duties in others, and of duties existing towards private individuals as possessed of rights, and with it the distinction in principle between private and public law, is incompatible with the imperative-theory. To this it might be objected that the correspondence in question merely means that the intention of the state-authority in issuing its commands is in the last resort directed to fulfilling the desires or interests of individuals endowed

[1] Binding (*Op. cit.*, pp. 96—97, and *Handbuch des Strafrechts*, I, pp. 183 *et seq.*) provides a typical example of this kind of confusion. Cf. critical remarks on this in my essay *State and Law*, 1904, p. 27, and also Cathrein, *Recht, Naturrecht, und positives Recht*, 1909, p. 137 and Loening, *Ueber Wurzel und Wesen des Rechts*, 1907, p. 16.

with rights, so that this intention is not directed to ends which are over and above the individuals. But (1) such a view is by no means consistent with the modes of expression used, which indicate a quite different underlying idea. According to them the duty in question is towards the private individual himself as possessing rights, and breach of obligation is an infringement of *his* right. (2) It cannot possibly be maintained that the law-enacting social power really has, in the cases considered, as its final intention only to secure the individual's wishes or interests. The subjective rights of private individuals are in question mainly in cases where it is left to the individual to make his wishes or interests respected by appealing to the courts if they are infringed. But it cannot be maintained that in such cases the social power would leave out of sight all interest in its own advantages—those of a class or of the general public—, nor that such rules of law would be enforced without at least a partial reference to those advantages.[1] Moreover, since rules of law can be promulgated in the interests of animals as well as in those of private persons, we could speak of subjective rights for animals in accordance with this principle.[2] Yet in fact there is no question of such rights.

It should be noticed that this way of looking at the matter can be explained quite naturally if we take the standpoint of the commonsense notions of justice. From that point of view an individual has a right, in so far as an action is made a duty by the fact that it is the object of a desire which he has expressed in a certain way or that it contributes to further his interests. Here one starts from an objective norm. This is held to involve as an essential factor the following consequence. A private individual's wishes within certain limits, if they are expressed in a certain way; or his interests, if they can be held to be bound up with certain actions on the part of others; ought to be secured within certain limits. If the rightness of a certain action can be deduced from the content of such a norm, it ought to be done

[1] See Thon, *Op. cit.*, p. 110.

[2] Thon, *Op. cit.*, pp. 177 and 247, and Gray, *The Nature and Sources of the Law*, p. 42.

because it is the right of a certain person, and to that extent it is a duty towards him. It is not the intention of the legislative authority, determined in one way or another, which is the ground of the duty; its ground is the person himself, in so far as the fundamental norm endows him in the above mentioned way with "the right to be respected." Those who support the view that rules of law are imperatives, when they are treating the theory of the subjective rights of private individuals and the distinction in principle between private and public law, confuse *this* idea with the notion of a duty as a commanded action. And in a confused way they think of the state-authority which issues commands as establishing authoritatively the content of the objective norm in and through its commands.

In Binder, *Rechtsnorm und Rechtspflicht*, p. 1, we read: "It is regarded as self-evident by modern jurisprudence that to one man's right there corresponds another man's duty. Legal duty is thought of as the immediate consequence of the legal norm, *i.e.*, of a command directed by the sovereign power to its subjects. This in turn confers a right on those towards whom there exists a legal duty defined by the legal norm." If this is correct, "modern jurisprudence" rests upon a deplorable confusion.

Windscheid (*Pandekten*, I, p. 87) tries in the following way to maintain, from the standpoint of the command-theory, the idea of a private individual's subjective right as something corresponding to another person's obligation. "The legal system (die Rechtsordnung) . . . has issued in view of a concrete state of affairs, an order to act in a certain way; and it has made over to the person on whose behalf the order has been issued the right to use it or not. It leaves him free to make use of the order or not, and, in particular whether he will or will not put into action against those who oppose it the means provided by the legal system . . . The legal system has issued the order for his benefit, it has made its command his. The law has become *his* right." In this way a private individual's subjective right, as something answering to another man's duty, becomes "a power of will or a sovereignty of will lent to him by the legal system". (Similarly in Gray, op. cit., p. 19; Kierulff, *Die Theorie des gemeinen Civilrechts*, 1839, p. 154; and Neuner, *Wesen und Arten der Privatrechtsverhältnisse*, 1866, p. 11.) The abalienation of the power of command of the "legal system" referred to is conceivable only if the private individual can be said to exercise an actual power of command in a legal sense when he asserts his rights. But, if I as householder "forbid"

another person to enter my house, only the expression of the prohibition has legal significance. It gives rise to a situation such that "the legal system" thereupon forbids entry to the owner's dwelling. And, from the standpoint of the imperative-theory, the latter prohibition is the only one that is relevant in respect of a person's legal duty. In fact the only way in which the expression of the prohibition need affect the person to whom it is addressed is the following. He knows that the situation has arisen in which the "legal system" will issue its prohibition, and therefore, according to the present theory, the duty not to enter the house undoubtedly exists in such a case. Still less can it be said that the power of the possessor of a legal right, to take action in the courts, if he will, in order to vindicate his right against the recalcitrant party, implies a transference of the "legal system's" power of command. Not even formally can an action-at-law be described as a command issued by the plaintiff to the defendant. (Against this attempt of Windscheid to construct duties on the basis of the imperative-theory see several similar remarks in Hölder, *Natürliche und juristische Personen*, 1905, p. 110.)

For the same reasons we must reject Thon's attempt (*Op. cit.*, p. 133) to construct on the same basis the rights of private individuals in private law by laying the chief stress on the power of the owner of a right to employ the means of retaliation against law-breaking. (Cf. Pagenstecher, *Zur Lehre von der mat. Rechtskraft*, 1905, pp. 2 *et seq.*, and Regelsberger, *Op. cit.*, p. 76.) The individual cannot acquire in this way any real power of command in the legal sense. But, from the standpoint of this theory, only such a power of command could justify us in speaking of a private individual's rights as corresponding to another person's duties. (That Thon is thinking of such a correspondence emerges clearly from the antithesis which he makes between a private prosecution in criminal law and a private "claim" in private law, p. 137. In the former case, he insists, the culprit is "not in general under an obligation to the injured party". He would, therefore, be so towards one who put forward a claim for restitution of damages or for the fulfilment of a neglected duty.) Duncker (*Die Besitzklage und der Besitz*, quoted by Windscheid, *op. cit.*, p. 89, n. 3) can justly claim, from the standpoint of the command-theory, that private rights, as conceived by Thon, are not such in the ordinary sense of the word, and that from the legal point of view there are only duties.

Similar remarks must be made about Jellinek's construction of "subjective public rights" from "the possibility of setting legal norms in motion in the individual interest" (*System der subj. öffentl. Rechte*, p. 48); or, more accurately, from the claims which arise from such a "power" as a property of a legal personality as such (p. 49). The property in question, which constitutes personality in the legal sense, is the power as-

signed to the individual in virtue of his position as member of the state to set the state-power in motion in his own interests, and it is the basis of claims on the latter (p. 53. Cf. pp. 77 and 81, and *Allg. Staatslehre*, pp. 418 *et seq.*). In the first place, what we are concerned with here is the ability to call effectively upon the state's legal protection. (*System*, p. 77.) Let us suppose that, in his subjective-public claims, the individual has a right against the state, in the sense that he imposes an obligation on the latter. We must remember that all legal rights, according to Jellinek's theory, rest upon the power of the state. It would follow that the individual's claim implies the exercise of a power, transferred to him by the state, to demand in his own interest something from the state itself. Suppose now that a private person, *e.g.*, makes good a so-called claim to legal protection from the state in a court of law. Is the real situation that he makes a forceful demand, which influences the state-authority to make good his claim? Not in the least. That which alone is determinative for the state in such a case is the circumstance that procedural law in combination with substantive law ordains certain legal consequences if certain legal proceedings are instituted, provided that certain factual conditions laid down in substantive law are fulfilled. The individual can of course make use of this power which resides in the law. But he cannot in the least exercise any influence on the state by a demand which derives its force from the power to make use of the law. In a similar way the individual can make use of the forces of nature. But the power that he thus acquires from them does not empower him to demand anything effectively of them. He can also, by committing a crime, set the state into punitive action, without thereby acquiring any power of effectively demanding action from it. So "claim to legal protection" and other subjective "claims" in public law are not by any means made rights through transference of the state's power to make effective demands. The description of them as rights is wholly derived from the idea that the law which is concerned with them is a true expression of rights and duties in the sense in which the popular notion of justice understands those terms.

The assumption, which is sometimes made, of a special "grant" to the "possessor of a right" corresponding to an "order" to the party who is "under an obligation" in no way alters the situation. (See, *e.g.*, Merkel, *Jur. Encycl.* Sects. 16, 71—73, and Seligmann, *Op. cit.*, p. 29.) This "grant" can be reasonably regarded only in the following light. The state-authority issues a command, in the interest of the possessor of the right, to the party who is under a direct obligation to him; it issues another command, to the state-organs, to enforce on the obliged party an equivalent of his obligation if he should disobey the former command, provided that the possessor of the right claims such enforcement; at the same time, it declares its intention to protect the possessor of the

right in the said way. By such a declaration only the direct or indirect intention to secure the interests of the possessor of the right is assigned as the ground for issuing these commands. But that declaration does not in any way represent the possessor of the right himself as the ground of those commands; nor does it make the duty, (consisting in the property of the action to be commanded) a duty towards him.

(d) *Executive coercion in the sphere of the law of property is treated, in conflict with the positive content of the law, by the imperative-theory as presupposing previous disobedience to a command. The reason for this is the demand by the commonsense notion of justice that an obligation must have been infringed if coercion is to be justifiable, and the confusion of the property of being commanded by the legal will with the property of being a duty as understood in the commonsense notion of justice. The untenable defence, by the declaration-theory, of coercion as presupposing an infringement, not of a personal obligation, but of a right as a state of affairs demanded in abstracto, rests on the same demand of the commonsense notion of justice and on the same confusion.*

The confusion between duty, in the sense of a commanded action and in the sense of a genuine ought, appears also in the treatment of executive coercion in the sphere of the law of property. To begin with we will consider the treatment of it on the basis of the imperative-theory. One usually starts from the assumption that the coercion in question presupposes that the object of it has transgressed a legal demand. The coercion is to be understood only as the legal consequence of transgressing such a demand. Now the first point to notice is this. From the point of view of the imperative-theory, taken in the abstract, there is no necessity why the state should demand executive action from its organs against certain persons for the advantage of others only in those cases where the object of that action has actually infringed a demand directed to him. On the other hand, suppose that one takes the fundamental framework of the law of property to be the notions with which the common-sense view of justice operates, *viz.*, rights and duties as correlated properties of dif-

ferent individuals. In that case the interest which the state protects by legal coercion is a right with its correlated duty. If, now, one confuses duty, in the meaning which the commonsense view of justice attaches to it, with duty as an action commanded by the state, one arrives inevitably at that necessity. One man's right extends just so far as the other man's correlated duty, and therefore it can be infringed only by breach of duty on the latter's part. Therefore executive coercion for upholding the right of the former can take place only on the assumption of breach of duty on the part of the latter. But coercion, which affects one person for the advantage of another, is justified, according to the common-sense notion of justice, only when it is a question of upholding the right of the latter.[1] If, now, one regards legal duty as arising in and through the demands of the state, it follows that executive coercion in the law of property presupposes infringement of a demand of the state. Of course this does not imply that, when executive coercion in the law of property is associated with a previous infringement of a demand of the state, this *must* depend on a confusion between an action being demanded by the state and its being a duty as understood by the commonsense view of justice. It might be the case that the actual content of the law itself is of such a nature that, starting from rules of law as demands by the state, one was driven to adopt the view that executive coercion in the region of the law of property presupposes a previous infringement of a state-demand. But suppose, on the contrary, that it should appear that the actual content of the law is such that, under certain circumstances, no account whatever is taken, in reference to the coercion in question, of whether or not a previous infringement of existing imperatives has taken place. In that case we have the strongest reason to suspect that one starts by taking the common-sense notion of rights and duties as correlated as the determining factor in the law of property, and that then one confuses "duty" with being an action commanded by the state. Under such conditions this would be the only possible way of explaining the acceptance, *in conflict with* the factual nature

[1] For this reasoning, in all its naivety, see Salmond, *Jurisprudence*, p. 71.

of the positive law, of such a principle as that executive coercion in the law of property presupposes a previous infringement of a state-command.

If we now enquire as to the actual content of the law in this respect, there can be no doubt that it conflicts with the theory in question. Suppose that a person, while he still has legal capacity, has accepted a bill-of-exchange; but that, when it falls due, he has lost that capacity through becoming a lunatic, and that no guardian has been as yet appointed. It may happen that the debt is distrained for, although no-one can be held to have infringed any demand of the law. But suppose, now, that in such a case a guardian is appointed, but that he neglects to pay the debt. The debt is collected, out of the ward's property. The person who can be regarded as infringing a legal command in this case is not the ward. He very likely cannot understand the demand. It cannot therefore be held with any plausibility to be directed to him; and, on account of his assumed incapacity for legal acts, he *cannot* carry it out. It is addressed to his guardian. Yet it is not the latter's property on which the distraint is levied. No doubt he may be liable to pay compensation for losses incurred by his ward on account of his negligence. But the distraint here mentioned falls, not upon him, but on the ward. Obviously the same argument can be extended to all cases where a distraint is levied on property belonging to a person who is of legal incapacity.[1]

But take another case. A business-man, through circumstances beyond his control which he could not have foreseen, gets into a situation in which he is unable to satisfy his creditors. He is made bankrupt and a distraint is levied, although it is impossible to say that he has infringed any command of the law. It always lies in the nature of an imperative, in so far as it is directed to a sub-

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[1] Cf. here Thon's objections against Zitelmann's and Hold v. Ferneck's attempt to transfer the obligation which is infringed, in the case of persons who are not legally competent, to the guardian. (Ihering's *Jahrbücher*, Bd. 50, *Der Normenadressat*.) And cf. Fischer's comments (*Die Rechtswidrigkeit*, 1911, p. 28).

ject's will, that it presupposes that he really can carry out the demand. Where this power is assumed to be absent the imperative is not addressed to that person.[1] Besides, if there were in the content of the positive law a connexion between executive coercion and a previous infringement of a demand, there ought to be an enquiry made, before every such executive action, as to whether the obliged party really was in a position to fulfil his *praestandum*. That is, it ought always to be enquired whether *culpa* at any rate is present. Moreover, the degree of the coercive measures ought to depend in some way on whether *dolus* or mere *culpa* was present. But, at any rate so far as concerns the settlement of fixed monetary debts, the law in general makes no such investigations.[2]

Such being the case, the theory in question can be maintained only if one arbitrarily leaves such facts out of account, or if one distorts the notion of a demand to such an extent that it loses all contact with what common-sense understands by it and indeed loses all meaning, so that nothing but the word remains.

According to Merkel, *Jur. Encycl.*, Sect. 272, every "infringement of a right", which is here treated as the precondition for executive coercion even in civil law, involves as such an element of "disobedience" to the demands of the law. So such "disobedience" can exist even in an infant-in-arms, since its property can be the object of executive coercion, etc. Similarly Binding, in the first edition of his work *Die Normen und ihre Übertretung*, I, 1872, pp. 135—141, contends that a "wrongful act", which he regards as the preconditon for coercion even in the sphere of the law of property, is a culpable illegality. (Here norm = imperative.) But in this connexion Binding remarks that a person who has previously been innocently in error can be made guilty by being enlightened and

[1] "It would be illogical to *lay the debtor under an obligation* to perform something which he is not in a position to do." (Binder, *Rechtsnorm und Rechtspflicht*, p. 39.)

[2] Cf. Bekker, *Grundbegriffe des Rechts*, 1910, p. 271. The above-mentioned circumstances are completely ignored by Schlossmann (*Der Vertrag*, 1876, pp. 346 *et seq.*) in his attempt to treat culpability as a condition for coercive action on the ground of non-fulfilment of promise. Goos (*Lectures on general Jurisprudence*, I, 1889, p. 94. In Danish.) draws the conclusion from such circumstances that a rule of law cannot be in its essence a command.

above all by a legal judgment, *viz.*, if, in spite of being informed of his legal obligations, he fails to fulfil them. But it is not until he has thus become guilty that the possibility of executive coercion enters. But how can one who is not responsible for his actions, yet whose property is liable to distraint, be put into a state of "guilt"?

Ihering (*Das Schuldmoment im römischen Privatrecht*, 1879, pp. 5 and 6) speaks of an "objectively wrongful act", in the sense of an innocent infringement of legal norms (where norm = imperative), as a possible ground for the use of executive coercion in the sphere of civil law. In this he is followed on the whole by Hälschner (*Gerichtssaal*, 1869 and 1876) and Wach (*Gerichtssaal*, 1873) and several other important authorities. (On this see Fischer, *op. cit.*, pp. 122 *et seq.*) If a person, who is responsible in the legal sense for his actions, has, through error or some other circumstance which eliminates guilt, happened to infringe another's rights, his *will* is undoubtedly concerned in the action through which the infringement occurs. He wills precisely that action. For that reason one can say that a real infringement of a legal norm has occurred, and not merely a chance injury of a person's interests, comparable, *e.g.*, to a hail-storm. Accordingly there can be a question of executive coercion against a person in such a situation. But how can a person be held to infringe a legal demand merely through willing a certain external action? If he does not recognize that the legal demand concerns the action, it does not concern him with regard to that action. In order that a demand on a person shall have any meaning whatever, he must obviously receive its content into his consciousness. In this connexion I quote Fischer (*op. cit.*, p. 119), who approximates to Thon and Bierling here. The question concerns an action against another person, who holds possession of a thing in good faith, but is legally deprived of it for the benefit of the plaintiff, and where the defendant has to pay the costs. "The fact that the outcome of an action-at-law is often very doubtful should not lead us astray. However uncertain the right that is sued for may be, at the moment when the judicial decision is made the legal system cannot acquit the defendant from the reproach that he has not already conformed to it while the action was still pending." Is the "legal system" crazy, when it "reproaches" a person for an infringement of a legal demand which, in consequence of subjective conditions, has never been addressed to him? Moreover, it is clear that Ihering's "innocent wrongful act" does not cover all the cases where executive coercion can occur in civil law without previous guilt. This is true even in the case of legally responsible persons. It is impossible to maintain that a business-man, who has become bankrupt without committing any legal offence, wills his own bankruptcy. But in the case of persons who are not legally responsible for their actions this whole point of view is plainly inapplicable.

In view of the fact that even legally non-responsible persons can be objects of executive coercion in the sphere of the law of property, Thon considers (*Rechtsnorm und subjektives Recht*, p. 92) that he must hold "that the legal system recognizes obligations in those who are not legally responsible". Here the matter is brought to a point, and the divergence between positive law and the assumption that executive coercion in the law of property presupposes a real breach of a legal norm is concealed beneath an absurdity. What can it mean to say that the state-power makes demands on infants-in-arms and persons suffering from general paralysis? The case is not improved if one tries (as Bierling does in his *Jur. Prinzipienlehre*, III, 1905, p. 176), to support it with such arguments as that children (even infants-in-arms?) are instructed in the demands of the law, and that this would not be done unless such demands concerned even them. Undoubtedly Nagler's assertion holds good (*Der heutige Stand der Lehre von der Rechtswidrigkeit*, 1911, p. 66): "Formal logic is certainly not on their (Thon's and Bierling's) side; the logical conclusion from their premisses is Merkel's doctrine" (*i.e.*, that legal responsibility is required for illegality).

Beling (*Die Lehre vom Verbrechen*, 1906, p. 140) tries to save the idea of objective or innocent illegality (where norm = imperative) by diluting the notion of demand to such an extent that scarcely anything of the word's original meaning remains. Objective illegality is possible because to be "illegal" merely means "not to act in such a way as the legal system willed". Here "willed" means, not "demanded", but "desired". Yet here the desire is to function as a demand in respect of the action. The consequence is as follows. The "legal system" can obviously have in view, in the case of certain regulations, *e.g.*, laws about trade, the improvement of commerce. Therefore the state of commerce which exists at the time when these regulations are made must be to a certain extent in conflict with the wishes of the authorities; for the "legal system" wants them to be improved. Consequently, the activities which make up commerce are to some extent in conflict with the wishes of the authorities; commerce is therefore, in the supposed case, illegal.

Karl Adler (*Unverschuldetes Unrecht*, 1910, p. 17) seems to be guilty of the same absurdity when he insists, against Thon, that legal prescripts cannot refer to those who are legally irresponsible, although the interests which are asserted in such prescripts are protected even against such persons; and yet gives as an example of an "innocent wrongful act" a damage done by a person who is not legally responsible for his actions. Here certainly an action is regarded as itself in conflict with the law, though it merely conflicts with the wishes which are the occasion for legal prescripts being addressed to those who are legally responsible for their actions.

But suppose that, in spite of all that has been said, one obstinately holds to the theory in question. Then, as stated above, there is only one possible explanation. One must have made the common-sense notion of rights and correlated duties the basis of one's conception of the law of property; and then have confused duty, in this sense, with the property of an action of being commanded by the state.

An appendix to the above is the theory that a judgment condemning a person to make reparation, in the sphere of the law of property, presupposes a previous infringement of a state-command, *i.e.*, "illegality". Since this is in conflict with the actual facts, recourse is had, as in the case of executive coercion, to the idea of an objective illegality. Thereupon the absurdities already exposed re-enter. Here is an example. A person, who was in good faith in possession of another person's property, and then lost possession through an adverse legal judgment in favour of the other party, would have been in objective conflict with a legal demand which nevertheless could not in any sense be regarded as having been directed to him. The explanation for this view, which is usually put forward along with the above-ementioned theory about the legal presuppositions of executiv coercion, must be the following. The adverse legal judgment must be regarded as an exercise of coercion on the part of the state against the individual. As such it can be justified only as coercion to make restitution equivalent to a neglected duty towards the other party in whom the right is vested. But a duty in the legal sphere is held to be the same as an action commanded by the state.

Precisely the same holds good of the interpretation which is often given, on the basis of the imperative-theory, of the duty of indemnification. Considered as a legal reaction against a previous injury to another person, it must be interpreted as arising from a previous infringement of a legal demand or from an illegal action. The necessary consequence is that at least *culpa* must have existed on the part of the injurer. Now this conflicts with the positive content of the law. (*E.g.*, the obligation to pay damages for an injury done by an irresponsible person, or the similar

obligation on the part of a railway-company in certain cases in spite of the absence of guilt.) So one has recourse to the absurd idea of objective "illegality."

The absurd consequences of the theory that the infringement of a legal demand is a presupposition of executive coercion in the law of property, and of the similar assumption in the case of adverse legal decisions and of liability for damages, have led to the following view. It is suggested that rules of law in the sphere of the law of property are, not imperatives, but "primarily authorizations" or declarations of rights. The state announces that it will protect against other persons an interest based on certain facts. On that view the question whether a person has or has not infringed a legal demand is irrelevant to the question whether the state will take proceedings against his property. The only point of importance is whether the other person is enjoying advantages at the expense of the interest in question or can be regarded as causing injury in respect of it.

This fully justified reaction against the view of legal coercion within the sphere of the law of property which usually accompanies the imperative-theory nevertheless proves to be itself infected in a curious way with the essential weaknesses of the view which it criticizes. The situation is commonly described as follows. Suppose that the subjective right, *i.e.*, the interest, which is to be protected against other persons in virtue of certain facts on which it is founded, is established. Then it follows that the possessor of the right "ought to *have* what he is entitled to, *i.e.*, to get the benefit which the existing law desires to allot to him."[1] Executive coercion is now simply the state's reaction towards a situation in which the actual facts fail to correspond to the person's rights, *i.e.*, the required situation.[2] Suppose, now, that what is meant here were that the existing law desires that a person shall actually enjoy a certain "benefit", in so far as certain factual conditions are fulfilled; and that, because of this desire, it reacts against his failure to enjoy it, in so far as another person

[1] Sjögren, *The Forms of Illegality*, 1894, p. 106. (In Swedish.)

[2] *Op. cit.*, p. 107.

is the cause of this or derives an advantage from it. In that case no comment would be needed. But that is certainly not what is meant. Instead of the desire of the will of the law, as the ground of the reaction, one introduces the idea of a legal *ought*. This in turn carries with it the idea of a demand on the part of the law, if law is in principle will. The subjective right itself does not mean merely that the enjoyment of a certain benefit is guaranteed *in relation to other persons*. It means, primarily, that the person *ought* actually to enjoy it. That the benefit is guaranteed is merely a consequence of the fact that the person has a right to it in that primary sense; and executive coercion presupposes an infringement of this right. But it is clear that, if the possibility of enjoying the benefit is in general something which, from the legal point of view, *ought* to exist or is demanded, then also from the legal point of view *every* limitation on that possibility *ought* to be eliminated. This is a necessary legal demand, consequential upon the original one. But it is plain that a limitation on that possibility, *i.e.*, a discordance between fact and right, can arise through circumstances which have nothing to do with relations to other persons. If my horse impales himself on a post in a fence and dies, my subjective right suffers. A wrong has occurred.[1] Thereupon the legal demand for compensation automatically comes into force. But it is not the case that such a demand cannot be maintained merely because of natural obstacles to realizing it; it is in principle alien to the law of property. And so the whole theory falls to the ground.[2] The fundamental mistake is that one introduces the idea of a legal ought which is connected, not with any human action, but with the mere existence of something which is not dependent only on human action. If law is regarded as will, a legal ought must be a demand. And then a demand is conceived as directed, not to a human will, but to a mere state of affairs in the abstract; which is nonsensical.

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[1] Cf. Binding's quite serious description of the destruction of my sailing boat by a storm as a "wrong". (*Die Normen und ihre Übertretung*, 2. Aufl., 1890, p. 301.)

[2] Cf. my essay *State und Law*, 1904, p. 95.

At this stage there can be no doubt as to the ground of this theory. The theory, it will be remembered, is used, not only to explain executive coercion in the limited sense within the region of the law of property. It is used also to explain the possibility of an adverse judgment in this region in the absence of previous guilt, and to explain the possibility of liability for damages in the absence even of *culpa*. One sets out from the principle that legal coercion or legal reaction in the sphere of the law of property cannot in general take place unless a previous *infringement of law* has occurred. But an infringement of law can only be regarded as the infringement of a legal demand. Suppose now that one recognizes that it is a mistake to think that, in the sphere of the law of property, a demand directed to the person against whom the law reacts must have been infringed. Then one has recourse to an abstract demand, directed to no-one in particular, that a person in general should enjoy a benefit in so far as the legally relevant factual conditions are fulfilled. With failure to satisfy this demand there is connected an advantage to another party, or else he is the cause of this failure. He has certainly not in that way infringed any demand directed to him. Nevertheless the law is infringed. And the person who benefits from this or is the cause of it must become the means whereby the concordance between fact and right is restored. But the very presupposition here, *viz.*, that an infringement of the law (and therefore, from the standpoint of the will-theory, an infringement of a legal demand) must exist as a condition for a legal reaction within the sphere of the law of property, rests on the following two points. (i) The demand made by the common-sense notion of justice that a right with its corresponding obligation must be infringed in order that a legal reaction in the sphere of the law of property may be *justified*. (ii) The confusion between a legal duty in the proper sense and the fact that an action is demanded. Here, as a result of the intractable nature of the content of the positive law, this obligation or this demand, as the case may be, is hypostasized into a property which attaches to the content of the right

without reference to any person who is under the obligation or is the object of the demand.[1]

Sometimes, however, the declaratory theory in the sphere of the law of property merges imperceptibly into the imperative-theory for the following reason. It is infected with the two main features of the imperative-theory, *viz.*, its dependence on the demands of the common-sense notion of justice, and its confusion between a legal duty in the proper sense and the property of an act to be demanded by the law. Primarily it is insisted that a rule of law in this region is a declaration that coercion will take place under certain circumstances. But it is considered also that the precondition for the occurrence of this coercion is a previous breach of a personal duty. But, according to the will-theory, a legal duty must be determined by the will of the law. Yet the word "legal duty" cannot here mean merely that neglect to perform a certain action will entail compulsion to make an equivalent performance; for the duty is here alleged to be the condition for the coercion. Therefore the creation of the legal duty by the will of the law must be thought of as a primary demand that this action shall be done. It is this demand which must be infringed in order that coercion shall take place. But in that case the rules of law which declare that there will be such and such coercive measures are based on rules of law which are imperatives, and the imperative theory shows itself to be fundamental. But then the difficulties of this theory in view of the content of the positive law make themselves felt, in so far as it is held that coercion should depend on the infringement of a demand directed to a person. The cause of this must be the two factors above men-

[1] The origin of the theory is obvious in the following remarks of Nagler, who in principle takes the same view as Sjögren and Binding on the state of objective illegality as the foundation for executive coercion in the law of property: "Moreover, the compulsion to make satisfaction is grounded in the illegal situation. Whether the fulfilment of a claim is freely accorded to the efforts of the claimant himself, or whether appeal has to be made to the organs of the state to secure it, there must always have been infringement of a primary legal duty through which the illegal state of non-fulfilment has arisen." (*Der heutige Stand der Lehre von der Rechtswidrigkeit*, 1911, p. 71.)

tioned, *viz.*, (i) dependence on the demand of the common sense notion of justice in regard to coercion exercized against one person's property for the benefit of another, and (ii) confusion between duty in the ordinary sense and the property of an action to be legally demanded.

According to Holland, *Jurisprudence*, p. 80, a juridical right simply means the protection, declared by the state-authorities, of certain wishes; and the corresponding "duty" is the coercion which, it is declared, will be exercized in favour of the wishes of others within certain limits. (p. 81). But, in spite of this, Holland divides all rights into "antecedent", which are prior to any "wrongful act or omission", and "remedial", which are consequent upon such an act or omission. Corresponding to this there should be a distinction between "antecedent" and "remedial" duties. According to p. 157 an "antecedent right" exists without reference to whether any wrongful act or omission has taken place. The occurrence of "remedial rights", according to p. 310, always depends on a previous infringement of "antecedent rights". According to p. 307, when an infringement takes place a new right arises in respect of the injured party and a new duty in respect of the injuring party. (Cf. p. 164.) In this connexion the maxim of Roman law is quoted: *Ante litis contestationem debitorem dare oportere, post condemnationem judicatum facere*. The above-mentioned division of rights and duties is even held to be a principal division of them (p. 159). What is meant here is, *e.g.*, that an owner has a right, prior to any infringement, to keep his property intact against all and sundry; and that everyone has a corresponding duty to avoid appropriating or damaging it without the owner's consent. But, if an infringement of this right or a breach of this duty should have taken place, the owner acquires a special new right against the culprit, *viz.*, to have the thing restored to him or the damage compensated; and the culprit acquires a correlated new duty. But now we must notice the peculiar circumstance that it has not been announced that any "antecedent right" will be protected or that any "antecedent duty" will be enforced. It is clear that, if in general when an "antecedent right" is infringed or an "antecedent duty" is neglected it is declared only that a new "remedial right" will be protected or a new "remedial duty" enforced, the "antecedent right" is never protected and the "antecedent duty" is never enforced. And yet, according to Holland, this is essential to the notion of rights and duties. What then is the meaning of a "right" and the corresponding "duty" when these are characterized as "antecedent"? Since Holland strongly insists that the *will* of the state is determinative in the sphere of law, and that it can express itself only in making demands, the

notion of a command to do or to avoid a certain act for the benefit of another person must be at the back of his mind. And at that stage we arrive at the situation expounded in the text.

The way in which Goos seeks to distinguish between primary and secondary rights is very closely allied to Holland's theory of "antecedent" and "remedial" rights. The primary right is a "good" to which there corresponds in another party a "restriction on his freedom of action". This restriction need by no means be a duty, in the ordinary sense, but may be a purely objective limitation. This is the case in private law. The secondary right is an exercice of power, and this takes the form of an "interference with the goods" of another party. This occurs when the primary right is infringed. (*Lectures on General Jurisprudence*, I, pp. 151 *et seq.* In Danish.). One cannot help asking oneself: In what does the objective "restriction on freedom of action" consist, to a break of which the state reacts by its coercive "interference with goods"? This cannot itself consist in the circumstance that a coercive "interference with goods" is attached to a certain state of affairs. Since Goos too regards the will of the state-authority as determinative of the law, the only way in practice to give a meaning to the theory is by the thought of the state demanding a certain objective relationship.

In Kelsen's theory of a declaration of will as the basis of executive coercion we have a clear case of what we have pointed out in the text, *viz.*, an appeal to the common-sense notion of justice combined with a confusion between a genuine ought and the property of an action of being legally demanded. It runs as follows: "The judgment, which is justified on the basis of the legal system, that the state will inflict punishment or exercise constraint on a person if he behaves in a certain way, compels one to hold that that person has a legal duty to act in the opposite way to this." (Hauptprobleme der Staatsrechtslehre, 1911, p. 207.) Whence does this compulsion arise? There is no doubt that for Kelsen it is a question of an ought in the proper sense in reference to legal duty. (See my essay *Is positive law an expression of will*? above, p. 53.) So the explanation must lie in the thought that, unless this were so, the punishment or the constraint could not be *justified*. But, on the other hand, Kelsen does not clearly distinguish the idea of ought from the idea of the state-will. (See above, pp. 52 *et seq.*) The way in which this will becomes effective in connexion with an ought, the breach of which is the condition for punishment or coercion, can only be by demanding a certain kind of practical behaviour.

(e) *Binding's norm-theory in penal law, which fails to give an adequate account of positive law, depends on the demand of the ordinary feeling of justice that a personal obligation must have been infringed if punishment is to be justified, and on the same confusion.*

Finally, we will consider the way in which the legal nature of punishment is often treated, for it is illuminating in relation to the confusion which we have been discussing. We will pay special attention here to Binding's theory, which has had a great influence in Germany.[1] According to this theory the state's right to punish is conditioned by transgressions of a legal norm. The latter may either be given implicitly in the provisions of the penal law, or it may be a norm given in another law to which the penal provision refers. Here "legal norm" = state-imperative. *E.g.*, in the penal regulations concerning murder and manslaughter there is contained the state-imperative: "thou shalt not (except in certain cases allowed by law) kill a human being." The occurrence of punishment is legally conditioned by transgression of this norm.[2] So the state's right to punish rests upon its right to be obeyed in the orders which it issues.[3]

On what can such an assertion be based? Not on "the nature of the case," on the fact that punishment presupposes guilt in order to be justifiable. For, from the standpoint of the common-sense notion of justice, there is no reason why punishment should not be inflicted on every injury to the common interests, provided it is accompanied by consciousness of the nature of the action or that it would be so accompanied if adequate attention had been paid to the question. Perhaps it should be added that either a moral consciousness of guilt must be present or its absence must depend on a culpable lack of attention.[4]

But the assertion cannot be based on the nature of the positive

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[1] In Swedish jurisprudence this view is in principle favoured by Hagströmer. (*The general part of the penal law*, p. 97. In Swedish.)

[2] *Die Normen und ihre Uebertretung*, 2. Aufl., 1890, pp. 42 *et seq.*

[3] *Op. cit.*, pp. 96—97.

[4] Cf. Mayer, *Rechtsnormen und Kulturnormen*, 1903, pp. 78 *et seq.* and Kohlrausch, *Irrtum und Schuldbegriff*, 1903, pp. 33 *et seq.*

penal law either. In the first place, it is plain that, if a foreigner is punished for an action committed in a foreign territory, his "crime" cannot possibly have consisted in transgressing the orders of the state which *punishes* him. For those orders had no validity for the agent at the time when he performed his act. But in the present theory an action is defined as punishable in virtue of the property of involving an infringement of the punishing state's right to have its orders obeyed.

Again, real disobedience to an order presupposes real acquaintance with the latter. If it is not received into the consciousness of the person commanded, it cannot be regarded as having been conveyed to him or as being properly addressed in his direction. It is indeed possible for an action to imply real disobedience to an order, even though the agent *when he performs it* did not have this "thou shalt" or "thou shalt not" actually before his mind. But this can be said only if the action can be regarded as determined by, or as an expression of, a previous lack of respect for an order actually received and understood. He has not given to the consequences of his actions or to the contents of the command that degree of attention which he would have done if he had been obedient to the order which he did receive and understand. It is only in so far as the present action is determined by, or is an expression of, such previous actual disobedience that it can itself be held to involve disobedience. So the degree of disobedience and guilt must be determined, not only by reference to the lack of accordance with the command which was displayed by the person in his actual state of knowledge of it, but also by reference to the degree of knowledge which was present at the time when he committed his original act of disobedience. If the legal norm in question is contained only implicitly in the penal regulations, this implies (i) that in order for there to be actual guilt there must be actual knowledge of the conditions which in practice involve punishment, and (ii) that the degree of guilt must be judged, *caeteris paribus*, according to the degree of such knowledge which was present in the original act of disobedience.[1] But the fact is

[1] Cf. Kohlrausch, *Op. cit.*, pp. 46 and 58.

that the degree of knowledge of *the penal law* in general is quite irrelevant to the question of legal liability to punishment.[1]

But Binding asserts that knowledge of the legal norms in question would be possible in so far as one knows by practical experience that "numerous actions are incompatible with the interests of our life under the rule of law". Therefore knowledge of them can always be presupposed in any person who is responsible for his actions.[2] But this line of thought cannot be carried through. This is evident from the following fact. Acts which seem to be incompatible with "the interests of life under the rule of law", and which are not expressly forbidden in any legal norm outside the penal law, are not in every case forbidden by a legal norm which is contained implicitly in the penal law. We might take as an example the selling of denatured spirit in knowledge of the fact that it will be put to harmful uses. So the individual may know that an act is incompatible with the interests of life under the rule of law, and yet, through inadequate knowledge of the penal law, he may be convinced that it does not infringe any state-imperative. Moreover, this notion of "the interests of life under the rule of law" is too vague to enable all and sundry to decide whether and how far an action contravenes such interests. At the time when punishment was introduced in Sweden for distilling spirit for household consumption, was it clear without question to everyone that such action conflicted with the interests of

[1] According to Kohlrausch (*Op. cit.*, p. 41) this is the "prevalent" view. Makarewicz (*Einführung in die Philosophie des Strafrechts*, 1906, pp. 403 *et seq.*) describes the opposite view as belonging to a lower level of culture, as does also Berolzheimer (*System der Rechtsphilosophie*, V, 1907, p. 94).

Beling (*Op. cit.*, pp. 180 *et seq.*) is driven by Binding's norm-theory, which he accepts in principle, to assert that consciousness of the *juridical* illegality of an action is essential for *dolus*. But (i) in this he is hardly in agreement with the accepted rules for applying the law. (ii) He lands in the most extraordinary contradiction with himself, for on p. 183 he takes as sufficient the consciousness that "some legal ordinance or other is in conflict with one's behaviour". This certainly need not be a consciousness of a law which holds for the person in question, and it certainly does not necessarily include consciousness that *his* action is illegal. Cf. also Stark, *Die Analyse des Rechts*, 1916, p. 143.

[2] Pp. 44 *et seq.* Similar reasoning in Hagströmer, *Op. cit.*, p. 152.

life under the rule of law? When it is a question of deciding how far an action conflicts with a legal norm which is only implicit in the penal law, only that law itself can be safely taken as the basis of decision.[1]

From the fact, adduced by Binding[2], that certain penal statutes refer to independent legal regulations belonging to regions outside the penal law, it does not follow that liability to punishment is conditioned by the latter, regarded as genuine legal imperatives. The regulations in question need be no more than declarations on the part of the state-authority about the order which it will support or which it would wish to support. Naturally the penal law, in certain of its articles, refers to rules belonging to the law of property. But these, according to Binding himself, are merely such declarations. The penal regulations need not therefore be anything but declarations that the guilty infringement of this order will, under certain circumstances, entail punishment. The fact that knowledge of this order and of the existing legal facts is in general a necessary condition of guilt, unless the ignorance depends on carelessness, need not depend upon anything but the fact that in such cases the action does not appear to be culpable.[3] (An example would be the following: In ignorance of a newly introduced law forbidding it, or in ignorance of existing legal facts, one takes possession of another man's property in a way which is in general permissible.)

But the explanation of this point of view is self-evident if one assumes that it is based on the following way of looking at the matter. In order that punishment may be justifiable it is necessary that an infringement shall have taken place, not merely of

[1] Cf. Kelsen, *Op. cit.*, p. 281. Hagströmer's reference to the consciousness of right and wrong, as sufficing in the way mentioned in the text to make a person punishable in all actions which fall under the penal law, provided that it tells him that he has done wrong in the moral sense, is unsatisfactory. For what is required is knowledge that an action infringes an actual legal imperative. One may very well be convinced that an action infringes the moral law, and yet mistakenly suppose that it does not conflict with *positive* law.

[2] Pp. 70 *et seq.*

[3] Mayer, *Op. cit.*, p. 85, n. 12.

an objective ought as in the case of coercion in connexion with the law of property, but of a genuine personal duty as understood by the common-sense notion of justice. But in the legal sphere the will of the state is the only determining factor. So within that sphere a personal duty can mean only that an action is commanded by the state-authorities. And so personal duty, as understood by the common-sense notion of justice, is confused with the property of an act of being commanded by the state-authority. Accordingly, from the legal point of view, punishment presupposes transgression of an actual legal norm. But where is this to be found? Either implicitly in the penal law, or in the regulations to which it refers. The necessity of guilt for punishment thus becomes immediately clear, since real disobedience to a command presupposes failure of the *will* to conform to it. The correctness of this explanation is confirmed by the fact that Binding[1], in reference to the fundamental imperative, regards the state as at one and the same time creating the personal duty and having the *right* to be obeyed. The confusion in question shows itself openly here.

See above, p. 217, note. Perhaps the confusion in question appears most obviously as the ground for the norm-theory of penal law in Beling, who is in principle a supporter of that theory. He says (*Op. cit.*, p. 117): "In so far as manslaughter is illegal one *may* not kill; or conversely the norm 'Thou shalt not kill' teaches us that manslaughter is illegal." On p. 115 "norm" and "imperative" are declared to be synonymous. On pp. 117 and 128 "illegal" and "contrary to a norm" are said to be the same. So the result is as follows. The fact that, from the legal point of view, one may not kill, includes the fact that killing conflicts with a legal imperative, that it is legally forbidden, and conversely. Obviously the proposition 'One may not kill', considered as an assertion made by a teacher of the theory of penal law, is not itself an imperative. He issues no commands when he utters it, but merely uses "ought" to describe an objective property of the suppression of tendencies to kill. The confusion between the property of an action to be commanded and "ought" in its proper meaning is here quite clear. How this confusion lies at the basis of the norm-theory of penal law appears strikingly in the way in which that theory is advocated. It is said on p. 116: "He would

[1] See above, p. 235.

be a very queer lawgiver who did not tell a man that he ought to do so-and-so, but was content to mention the consequence (*i.e.*, the punishment) without indicating the cause of it." Cf. Oertmann, *Rechtsordnung und Verkehrssitte*, 1914, p. 27: "How can the duellist reasonably be punished if he has not infringed any norm?" What is the "cause" which it is necessary to adduce here in reference to the punishment as effect? Just this, that one *may* not act in a certain way. The penal law must not be, as it is, *e.g.*, with Hold v. Ferneck, a mere threat. There must also be an *ought* which has been transgressed before the punishment supervenes. Why? No other reason can be suggested except that there would be a lesion of the ordinary sense of justice if the lawgiver did not refer to a transgressed ought when he lays down a penal consequence. The lawgiver would in that case be "a queer fellow". But could not the lawgiver refer in such cases to moral duties? No, "that would degrade the law to a Cinderella". It must itself determine duties in order to act as a great living power (pp. 115 to 116). But these legal duties are identical with the property of the action to be demanded in special legal imperatives.

In the present context the differences between the Binding-Beling theory of legal norms and Mayer's theory of cultural norms are not of fundamental importance. The latter also sets out from the axiom that punishment of its nature presupposes breach of duty (*Op. cit.*, p. 15). That the duty in question cannot be held to be given along with a legal imperative follows, on his view, from the fact that law (except administrative law) does not contain any commands to private individuals, but only to the organs of the state as such. But, instead of legal imperatives, cultural norms are, according to him, the foundation of duties. By cultural norms he means "the sum-total of commands and prohibitions which affect the individual as religious, moral, or conventional demands, or as demands of his intercourse with others or his calling" (p. 17). The common starting point is therefore that punishment presupposes real breach of duty, and that the duties in question are constituted by and through certain commands. The difference is only in the nature of the commands.

(f) *The confusion lies at the basis of the theory that the interpretation and supplementation of legal rules in accordance with the commonsense notion of justice represents the real will of the legislator.*

Only the above-mentioned confusion can explain the peculiar way in which difficulties of interpretation are overcome when an attempt is made on a positivistic basis to establish the intention of the actual lawgiver for the purpose of making a correct legal

decision. And only so can we explain similar attempts to deal with gaps in the law. Side by side with investigations on the meaning to be attached to the statements of an historical legislator, we find assertions about the meaning which a legislator who was (in the author's opinion) *reasonable* must have had in a given utterance, *i.e.*, a legislator who was both invariably consistent and had his eye on typical cases to which the rule is to be applied. If, however, there should be gaps in the existing system of rules, they must be filled by analogies or even by appeals to "the nature of the case" or the principles of equity. Nevertheless, this filling of gaps is performed on the basis of positive law being a system of imperatives or declarations of will. The positive law has gaps:—and yet it is without gaps.[1] This contradictory point of view becomes intelligible only if one bears the confusion in mind. The positive law is at once (i) the actual legislator's command or declaration of will, and (ii) the system of rights and duties objectively valid in a certain society, *i.e.*, the normative system of conduct in relation to a person's rights considered as determining the correct behaviour for another person within that society. The actual legislator *must* therefore be identical with a reasonable legislator in the sense described above. When the historical method fails to give an interpretation, or leads to contradictions, the objective method is used. And still one keeps to the meaning which the actual legislator had in his commands or his declarations of will. Again, the actual legislator as such is not infallible: he therefore leaves gaps in his regulations. But there are no gaps in the normative system of conduct. And, since the actual legislator establishes that system by his regulations, the latter are without gaps. So one has only to appeal to analogous applications of the legislator's *legal ideas*, or, if that will not work, to settle what is objectively correct by directly ascertaining the meaning of the norm as applied to particular cases (by reference to the "nature of the case" or equity). Nevertheless, the results thus reached are to be regarded as *actually* commanded or as *actually* declared by the legal authority to be its will.

[1] A typical representative is Bergbohm (see above, pp. 74 *et seq.*).

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Particularly typical in this respect is the account in Kohler, *Über Interpretation von Gesetzen*, Grünhutz *Zeitschrift*, Bd. 13, pp. 8 *et seq.* of the "final and highest task" of the interpretation of law. This is described as the establishment of the "fundamental legal rules" which can be abstracted from the law. Through them all difficulties and doubts about the application of the law in particular cases resolve themselves. Since these "fundamental legal rules" are valid as interpretive principles, they obviously have themselves legal validity. Therefore the distinction, which is drawn on pp. 48 *et seq.*, between mere interpretation and the use of analogy as forming new laws is unfounded. According to the author, the use of analogy is based also on these legal rules. But now one asks oneself what view is one to take of the principles in question. It must be noted that, according to the author, they are not identical with those rules of law which can be induced from the contents of the law as rules which hold good in the generality of cases. These cannot be made a basis for determining the law (p. 8, n. 11). Nor is it a question of the principles which the legislator actually had in mind (pp. 7 *et seq.*). Nor again is it a question of the actual intentions of the law (p. 15, n. 42). The latter may be used as a basis only for the lower interpretation, whose function it is to act as auxiliary to the higher interpretation by determining for the latter the actual content of the law (pp. 19 *et seq.*). It is now clear enough that Kohler considers it to be an initial datum for the interpreter that the particular rules of law are mere practical applications of certain supreme legal principles. This is of the nature of law, which is a spiritual organism, instinctively produced (pp. 2 *et seq.* and 51). But, if they are not real causes of the actual existence of the several rules of law, and yet are genuine principles and not mere abstractions, the only remaining possibility is that they are the grounds on which the ideal validity and the binding force of the special contents of the law rest. Therefore the real question for the higher interpretation is this: On what does the ideal validity, which is taken for granted, of this or that rule of law rest? This is further supported by a closer inspection of the questions which are used as examples. We will cite an example. In reference to the legal rules concerning the right of property of a usufructuary in products of the soil which he occupies the question arises: "Through what act is the property in products of the soil which he occupies acquired? Is it acquired in virtue of the law of real property, or through a declaration of conveyance on the part of the owner?" (p. 13). It is plain that what is required here is to assign the ground for a certain usufructuary's *right*, considered as already existing, and not for the fact that the legal authority maintains for him the possibility of enjoying certain advantages as against outsiders. Further support is given to our view by Kohler's comparison

between a juridical investigation and the analysis of a work of art in order to discover the reasons for its aesthetic effect (p. 3); and by his comparison of it to the investigation of the principles of the unity of nature (p. 15). It is only in this way that we can understand how the author can regard the principles in question as genuine rules of law. The principles of law must themselves have ideal validity if they are to function as grounds of explanation for the ideal validity of special rules of law. In this way the law itself becomes for Kohler an objectively valid system of propositions about rights and their correlated duties, which is based upon certain supreme rules of law. Since, nevertheless, law is to be the content of the highly mysterious "will of the law," the confusion mentioned in the text is fundamental for Kohler's theory of the higher interpretation, as it is also for the confused theory of the scientific validity of analogy.

The same explanation must be given of the fact that it can seem natural and necessary that the legislator should hold in every particular case to the intention which he has once declared, although such an assumption ignores the relativity of any actual will.[1] From the normative system of conduct one can deduce with logical necessity that in such and such a case such and such an action is a duty in respect to another person's right. But the will of the actual legislator, as determinative of that system, is identical with it. Therefore, if he wills such and such behaviour in general, he *must* in every particular case carry through that intention.[2]

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[1] See above, pp. 105 *et seq.*

[2] Cf. Schuppe, *Der Begriff des subjektiven Rechts*, 1887, p. 151. "Subjective right is an act of volition of the objective law. In general, and therefore *in abstracto*, the latter wills as follows: 'Whosoever has such and such characteristics, or stands in such and such relations to another, or has done or suffered so-and-so, shall have such and such advantages or disadvantages, or shall be under such and such obligations, or suffer so-and-so, etc.' Wherever and whenever these conditions are fulfilled *in concreto* the objective will of the law becomes actual, and at that moment the person in whom they are fulfilled has the corresponding subjective right which timelessly arises from it. . ." What is spoken of here is a supposed actual human will which is the objective law. This desires to guarantee to the person in question certain advantages in every case where the conditions originally laid down for the occurrence of a subjective right are present, and it thus creates that subjective right. So there would be in the state an entity which knows infallibly in every case how far the con-

(g) *Stammler is obliged to identify jurisprudence with its own object because of the same confusion.*

How deeply rooted the confusion in question is in the very tissue of juridical thought, so to speak, appears clearly in the attempt of the philosophical jurist Stammler to develop philosophically the identity between being an object of the state-will's regulations, on the one hand, and the duty of submitting oneself to those regulations, on the other. The possibility of a *science of ends* is worked out as follows. There is an *existent*, not only in reference to perceptions (where it is given through their co-ordination according to special methods in a unitary consciousness), but also in reference to willing. This existent is constituted by arranging "the contents of purposes in a fundamental unitary species". There is a scientific establishment of "that which we *ought to will*, a doctrine of the *being* of given contents of volition, a systematic treatment of human ends and strivings".[1] To this belongs *jurisprudence*, which is concerned with a certain species of 'organizing volition'. It is 'organizing' in that it makes the willing of one person a means to another person's ends. Its specific peculiarity is that it is 'inviolable' and 'sovereign'.[2] So jurisprudence, as a science of ends, has for its object the relationship of means to end which is set up by the 'inviolable' and 'sovereign' volition in its regulation of the subordinate volitions. These relations are regarded as *real*; and this of course implies that jurisprudence is the science of the ought, determined by the legal volition, as

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ditions laid down by itself for the occurrence of a subjective right are fulfilled, and which equally infallibly acts in accordance with those conditions. This completely fictitious assumption would be inexplicable if one did not know that Schuppe regards the "objective legal will" as in itself objectively valid (see, *e.g.*, *Op. cit.*, p. 7) and normative. The objective 'ought-to-be' of the norm is of course valid in every particular case in accordance with the general rule. But it is also one with the 'objective legal will'. So that will also acts in every particular case in accordance with its general resolutions. And, as a presupposition for this, it has a complete knowledge of everything legally significant that happens within the region in which its volitions are valid.

[1] *Theorie der Rechtswissenschaft*, 1911, p. 61. Cf. pp. 336 *et seq.*

[2] *Op. cit.*, pp. 101 *et seq.* and 105 *et seq.*

valid for the subordinate wills. Note that sovereignty implies that the "individual will" is "no longer free" to accept or reject the regulations of the "organizing" volition; or, in other words, that the former receives from the latter "its instructions that it must not of its own accord depart from the place which has been assigned to it".[1] But, on the other hand, jurisprudence is concerned with a certain actual willing, which aims at making the willing of one person a means to the ends of another. Thus jurisprudence becomes at one and the same time a science of actual willing and of the obligation to subordinate oneself to that willing.

The philosophical foundation for this lies in a subjective intellectualistic theory of knowledge, according to which a perception is objective in the sense that it can be co-ordinated in a system of perceptions in the unity of consciousness according to a certain method. Similarly, a volition becomes objective, *i. e.*, is concerned with objective relationships of means and end, through being co-ordinated in a system of volitions according to a certain method, which is determined in jurisprudence by the unity of the 'inviolable' 'sovereign' volition. Note that the category of a subject of rights, which is fundamental for juridical thought, is the notion of "determinant final terms in legally ordered series of purposes"[2], and that it is compared with the category of causation in its application within the sphere of perception.[3] In both cases the end in view is to arrive at objectivity, in the sphere of perception or of volition, as the case may be, by the application of these concepts. The consequence is that jurisprudence has to determine scientifically the relations of means and end, which thereby become real, by undertaking more deliberately and with more thorough analysis the very same synthesis which legal willing itself involves.[4] That is to say, jurisprudence *is* itself that

[1] *Op. cit.*, p. 97. In Stammler's disciple Graf zu Dohna (*Rechtswidrigkeit*, 1905, p. 14) duty, in the Kantian sense, is described as the central notion of law.

[2] *Op. cit.*, p. 199.

[3] *Op. cit.*, p. 200.

[4] *Op. cit.*, pp. 186 and 359.

legal willing which it treats of, raised to a higher level of self-consciousness and with its various factors more clearly distinguished. But, when jurisprudence ascribes to that willing such and such special contents, this means only that this content exists in abstraction from other contents provided that an adequate degree of attention and discrimination is directed to given purposes. For willing which is not sufficiently self-conscious and does not sufficiently discriminate its purposes there is of course a certain content which is correlated with unconsciousness or confusion. That degree of self-consciousness or clearness which legal willing has, as jurisprudence, it likewise has as the object of jurisprudence. That is to say, it *is* its own object, absolutely speaking.

The relation between jurisprudence and its object as conceived by Stammler, which we have now indicated, manifests itself also in various special points. The categories of 'legal sovereignty' and 'legal subjection' are defined in the following way. The former is "the line of thought of a legal will, according to which it *contains in itself* the object of its decisions". The latter is "the co-ordination of legally connected contents of will as *means* for a *connecting* will".[1] These notions are "necessarily determinative forms of the thought which determines a particular striving as a legal willing".[2] That is to say, they are forms of thought which impose conditions, by the application of which a volition is specified as legal.[3] Thus juridical thinking itself is concerned with the idea that certain 'organized' volitional contents are the means for an 'organizing' volition; whilst, on the other hand, this idea is characteristic of the legal volitional consciousness itself, which is the object of juridical thinking.

General logic "must now be supplemented by a *logic of jurisprudence*, which shall be an epistemological clarification of the *legally* willing consciousness."[4] So jurisprudence is "the legally

[1] *Op. cit.*, p. 209.

[2] *Ibidem.*

[3] *Op. cit.*, p. 211.

[4] *Op. cit.*, p. 265.

willing consciousness", which is, however, also the law itself. In the logic of juridical thinking the doctrine of rules of law corresponds to the doctrine of judgments in general logic.[1] A rule of law is thus a judgment of jurisprudence itself. The judgments of jurisprudence are not judgments *about* the occurrence of rules of law; they *are* rules of law.[2]

Whenever one regards positive law as a system of actual judgments about duties and about the worth of actions, and also regards the science of positive law as itself concerned with these duties and values, one is guilty of a confusion between the science and its object. If I regard a given judgment as true, I have not only that judgment itself as my object; I also contemplate directly the reality which the judgment is about, and see that it is constituted in the way which the judgment asserts it to be. But, if one thinks that the mere assertion of the actuality of the judgment is an assertion of the reality of its object, one has confused knowledge about the judgment with the judgment itself. In such knowledge I should make a judgment which is identical with its own object; and this is nonsensical. The reason why one is inclined to make this confusion in connexion with jurisprudence has already been stated, so far as concerns the will-theory. Legal willing is regarded as systematic judging about duties. In consequence of the feeling of subordination to the will in question one regards this judging as true. Thus genuine duties are established through the mere existence of the legal willing. Thus knowledge of legal willing, as it actually occurs, is taken to be the same as knowledge of duties. But legal willing is the same as systematic judging about duties. So the science of this judging becomes itself a science of duties, and the confusion between the science and its own object is established.

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[1] *Op. cit.*, p. 266.

[2] As a typical example of a rule of law in this connexion the following proposition from the Twelve Tables is quoted (p. 311): "*Si pater filium ter venum dabit filius a patre liber esto!*" So the science *of* Roman law itself contains the judgment: "*Si pater . . . liber esto!*" and asserts it on its own behalf. This is of course meaningless unless that science itself *is* Roman law.

It is interesting, in this connexion, to notice that Binder, who has written a large work (*Rechtsbegriff und Rechtsidee*, 1915) in order to clarify the true state of affairs by means of a critical discussion of Stammler's fundamental notions, himself ends, like Stammler, by identifying jurisprudence with its own object in consequence of his failure to see clearly what that object is. On p. 117 he opposes the legal to the natural *point-of-view*. The former, he says, presupposes ethical freedom, the latter causal determination. The reason for this assertion is that, according to Binder, the idea of man's ethical freedom is essential for law. (See p. 60, and cf. p. 106. The point is made especially in reference to penal law on p. 117.) But this amounts to saying that the legal *point-of-view* must have as its content the content of law itself; which establishes the identification between the science and its object. On p. 117 it is *law* itself which is opposed, as teleological, to natural *science*, as proceeding on the principle of causation; as if law were a species of science alongside of natural science.

In Kohlrausch, *Irrthum und Schuldbegriff*, 1903, p. 30, we read: "If we divide the whole corpus of the sciences into *descriptive and genetically explanatory*, on the one hand, and *critical* or *normative*, on the other, we must assign law (N. B!) to the latter department." One might think that it was merely by a slip that *positive law* itself is here spoken of as a science. But lower down on the same page all possible doubt of the author's real meaning is removed. For there it is said that *legal dogmatics* is not in principle a descriptive or a genetically explanatory science, since its aim is "to establish the content and the range of application of legal propositions" ("Feststellung des Inhalts und der Tragweite der *beurteilenden* Sätze," *i.e.*, in the law). For that reason it would itself be a normative science. The only possible basis for such reasoning must be that jurisprudence is held to incorporate into itself those rules of law which it considers. In so doing, however, it becomes identical with its own object; and so the law itself becomes a normative science. To confirm this still further we read immediately afterwards: "The character of a *normative science* belongs in the clearest possible way to the *penal law*. From the dogmatic standpoint this is the codification of those actions which are, from a certain point of view, right or wrong."

Stammler's theory, however, does not depend merely on the nature of ordinary juridical thought. He is not merely a jurist; he is also a philosopher, and a Kantian philosopher to boot. But the Kantian ethics is a typical instance of rationalistic voluntarism; and the same kind of confusion, though in a peculiar form, is essential to the latter. One starts from a purely rational will

as determining what is right in the practical sphere. According to Hegel this will has objective reality in the state-power. The will in question is then regarded, not merely as determined by pure reason, but as identical with it. The pure autonomous thinking, which in virtue of its autonomy is absolute knowledge, is, in so far as it is knowledge of the objectively right in practice, a will which has no external object but autonomously wills itself. So the fact that a certain action is right becomes identical with its being the content of a certain volition. This volition, however, in willing the action merely wills itself and is thus absolute. Rightness is thus conceived as being, on the one hand, objectively present in the action as such; and, on the other, as the property of that action of being the content of an absolute volition. (As if the fact that an action is the content of a volition could possibly be a property which belongs to the action as such![1]) It is now also plain that all knowledge of the rightness of an action is identical with the absolute willing of that action, and so is identical with its own object. This theory also can be explained by the psychological fact already exhibited above, *viz.*, the vague boundary-line between the state of consciousness of a person who receives a command and that which is associated with the feeling of obligation. This circumstance fosters the confusion between the fact that an action is commanded and its property of being right. According to what has been said above, the latter property means that the action is that which is prescribed in the given situation by that system of conduct which normatively or objectively "ought to be realized". The rationalistic version depends on being conscious that the assertion that an action is objectively right is not based on any knowledge about that action

[1] In this way we may explain such peculiar propositions as the following statement of Kierulff (*Die Theorie des gemeinen Civilrechts*, 1, 1839, p. 3) with its strong tincture of Hegelianism. "By being actualized it" (*i.e.*, "the law", which immediately before has been defined as "the universal objective will") "shows its truth and the falsehood of any divergent individual judgment". Thus a will shows its own truth. Cf. a similar statement about a judicial decision being at once the universal will *in concreto* and objective truth (pp. 42 and 269).

as an item in the order of nature, and on the assumption that it must therefore be based on a special kind of super-sensuous knowledge. Thus the juridical way of thinking proves to be akin to rationalistic voluntarism. And the two together have been the motive-force for Stammler's theory.

9. The consistent carrying through of the will-theory, without admixture of foreign elements, would deprive it of its real scientific significance, viz., that of elucidating the non-logical ideas which are operative in actual life.

But, in demonstrating the frequency of the confusion which we have been discussing, we have criticized only the usual form of the will-theory and not that theory as such. Still it can be shown that the scientific value of the theory would not be increased even if it were consistent on this point. In my paper: *Is Positive Law an Expression of Will?* I have tried to show that it is impossible to indicate any will such that rules of law could be held to be its commands or declarations. What is the origin of this way of looking at the matter? About this question there can be no doubt. The law seems, to those who are subject to it, as if it contained on the one hand commands and on the other declarations of decisions, issuing from a superior and consistently operative will. This point of view is all the more natural if the sense of justice in a community is not satisfied with the existing law or if it is not homogeneous throughout the various classes of society, and if nevertheless the positive law is consistently enforced, or, as we say, the 'authorities' have the requisite power. In so far as the legislative authority appears as itself subject to rules of law, on which its actual power rests, this supposed legal will is ascribed to the 'state', conceived anthropomorphically as a unitary power soverign over all the private members of the community. The reality which underlies this fiction is a conglomerate of forces which co-operate within a certain group of men to maintain the

legal system.[1] Just as this idea is conditioned by the fact that legal regulations are actually enforced in spite of protests from the sense of justice of individuals, so in turn it is a factor in the above-mentioned conglomerate of forces and as such contributes to the authority of legal regulations. The notion that there is here an irresistible will, which issues orders or declares its decisions, exerts a pressure on the individual and thereby contributes to the maintenance of law. This idea, which is active among those subject to the law, has its correlate in the way in which the legislative authority conceives and displays its own position. It conceives and displays itself either as exercizing its personal power in legislation—*Sic volo, sic jubeo*—or as an organ of the 'state-will' through which the latter declares its content. Now the will-theory regards the law from the same point of view as is implied in the above-mentioned fictional way of looking at it current in a community subject to law. It is therefore itself unscientific, but it nevertheless brings into the light an idea which actually is effective in law.

It should be noted, however, that there is another idea, besides the one just mentioned, which is active in the life of a community subject to law. Sometimes the one and sometimes the other is preponderant, but there is no hard and fast line between the two. The first point to notice is that the way in which legal rules are constructed by the legislative authorities suggests a quite different idea about law from that just mentioned. It has already been shown that the thought of the rights of the community and also the idea of the rights of private individuals inevitably suggest that the popular notion of rights and corresponding duties here plays its part. Now the legislative authorities consistently represent the law as if it consisted in determining the public right of society and the rights of private individuals, either against the former or at any rate against each other. That is to say, rules of law are represented as correct pronouncements about rights and duties, in the sense in which they are understood in the popular

[1] *Op. cit.*, Sect. 4.

notion of justice.[1] Suppose now that the above-mentioned will-theory also plays its part. Then the correctness of these pronouncements is represented as depending on a supreme legislative will *e.g.*, 'We ordain in the name of the state'—, just as if a will could make an utterance true. But such a way of representing the case from the side of the legislative authorities would be pointless unless it were accepted by those who are subject to the law. But this is the case. It may be that it is an exaggeration to suppose that the subjects in general "recognize" the law as the correct expression of what is just. But in certain respects there is always an inclination to do so. Suppose that an individual's sense of justice is in general in conflict with the positive law. Still, when it is a question of his own interests at any rate, so far as they are protected by the law, he feels quite certain that his own real rights are being vindicated when the law upholds his interests. And, on the other hand, his feeling of justice is aroused to react when they are infringed. Furthermore, it should be noted that certain circumstances create a tendency to regard positive law in general as the true expression of existing rights and duties, even if the popular sense of justice is dissatisfied with it on other grounds. To the popular notion of justice it seems to be implied in a right that there should be a special authority whose duty it is, in the event of the right being infringed, to enforce a restitution which shall be equivalent to the infringed right for the injured party. But it is only if there exists a legal system, which is maintained, that an authority exists to which this duty can be ascribed. The rights, which the sense of justice of the individual demands without reference to an existing legal order, fail to be actual rights in so far as no authority exists which can be regarded as having the duty to maintain them if they should be infringed. The executive power in a society derives its real force from the power of the legal system, and must therefore act in accordance with

[1] From this comes also the idea that the legislator's task is to realize justice. "Right is that which ought to be righteous law, whether or not in fact it is righteous law." (Radbruch, *Grundzüge der Rechtsphilosophie*, 1914, p. 39.) Cf. Stammler's statement that the law is an attempt to realize genuine right.

the latter. Those rights which are enacted in the positive law may be wrong in respect of their content, but they have not the formal defect just mentioned. Moreover, it seems plain to the popular notion of justice that genuine rights involve the demand that, in cases of conflict, the true juridical relationship shall be settled, as the basis for coercion if that should be necessary, in accordance with objective rules, which stand above the subjective opinions of individuals and are equitably applied. Now it may be that the rules which the positive law puts forward as objective determinations of rights do not satisfy the individual's demands for objectivity. But there is one respect in which they always fulfil their function, *viz.*, that the demand for their equitable application can be fulfilled by certain persons empowered thereto by the legal system, in particular by judges. On the other hand, no alternative rules, even though they be correct in their content in the opinion of individuals, can fulfil the demand that certain persons shall apply them equitably for making authoritative legal decisions. These advantages, which belong to the rights which are guaranteed as valid by positive law, are real grounds which incline the individual to regard them as genuine rights, even though they may conflict with his own sense of justice. To this must be added the natural tendency, already discussed, to make expressions in the form of commands which are effectively and systematically operative into objective properties of the actions to which they refer. This happens even when the 'command' is purely fictitious. The actions referred to thus come to be regarded as 'duties'. Thus in actual life in a community under the rule of law the idea of law as an authoritative pronouncement about rights and duties exists and is active side by side with, and not clearly distinguished from, the idea of law as an expression of will. Now the will-theory is of value scientifically only in so far as it brings to light an idea about law which exerts an actual influence in the life of a community subject to law, though it describes that idea unscientifically in fictional terms. But it is also clear that it is one-sided from this point of view unless it also takes account of the actual, if illogical, complement which

that idea has in real life. Since the theory itself regards the law from the point of view of those taking part—whether as legislators or as subjected to the law—in the life of a legally organized community, it is clear that it can do this only at the cost of logical inconsequence. For that point of view is internally inconsistent. What the will-theory would gain in consistency by eliminating all thought of rights and corresponding duties as given by and along with the commands and declarations of will issued by the state-authority, it would lose in one-sidedness. For its scientific value is rooted in the fact that it brings to light the point of view which is actually operative in the life of a legally organized community. This implies that the confusion which we have been discussing is, in a certain sense, of essential importance for the scientific value of the theory. Its common occurrence in the will-theory depends also to a large extent upon this.

In order to throw further light on the matter we may here devote a few words to the will-theory combined with the doctrine of natural rights in reference to positive law. The doctrine of natural rights is here taken in its widest sense as a theory which considers that a person has duties towards another person or persons possessing rights independently of positive law. Here positive law is undoubtedly regarded as a system of imperatives or declarations of will on the part of the state-authority. But it is held that the duty to submit oneself to these is determined by a deontic relationship which exists independently of positive law. *E.g.*, it may be held that the essential factor is the duty which an individual has, under the law of nature, to keep a contract which he has made either with other members of the society or merely with the holders of power in the state. Or one may start from the state as a corporative or organic unity of persons, and may consider that the end which it subserves marks out certain persons as supreme wielders of power to realize that end. This end may be defined as a formal rational right (Boström); or more materially as 'individual, national, or universal human interests' in so far as they are to be actualized by means of activities which are 'centralized in accordance with a plan and work by external means'.

(Jellinek.) In any case each particular member is under an obligation, towards this unity with its peculiar end, to submit himself to its commands or declarations of will. All right in respect of which a duty holds is thus rooted in the corporation or organism itself, regarded as having a certain end. But this right is not itself grounded in positive law.

The positively determined 'legal relationships' are as such by no means actual deontic relationships, if we view them consistently even though they may happen to coincide with rational deontic relationships. For all duties in respect of *positive* law reduce to the duty of respecting a right in another person or persons which exists independently of positive law. Suppose we confine our attention to the corporation-theory or organism-theory, which is of more interest under modern conditions than theories of natural rights which are based on the rights of individuals with respect to each other, when we are concerned with the state-power. In that case all duties in respect to the positive law reduce to the duty towards the corporation or organism with its special end. Its right is not established by positive law, but justifies legal coercion. In this way there is certainly not in principle any confusion between the willing of the state and its objectively valid establishment of rights and duties, although the individual is under an obligation to submit to those imperatives and declarations of will from the state which refer to him. For the latter duty is not established by the volition of the state. Nevertheless, for the reasons stated above, one is led, inconsistently with the fundamental point-of-view of the theory of natural rights, to regard the state itself as able to establish by imperatives and declarations of will actual deontic relationships both between the state and the individual and between individuals. Thus Jellinek, in the sociological part of his general theory of the state, justifies legal coercion by reference to the ends of the state conceived as above.[1] It seems to follow from this that all duties in regard to positive law refer simply to the state itself as having a natural right to exercise authority in view of its own ends. But in the part which deals with

[1] *Allgemeine Staatslehre*, 3. Aufl., 1914, pp. 230, 236, and 264.

the juridical theory of the state he talks, regardless of this, of the state as being a *legal* power only through self-limitation by means of positive law.[1] So the right of the state is now held to be determined by *positive* law. On the other hand, he talks of the state itself as establishing genuine public rights for its members through self-limitation.[2] One arrives at a formal divorce between opposed truths, each of which holds good before a different tribunal: —a *forum sociologicum* and a *forum juridicum*. In the former all duties in respect of positive law appertain to the law of nature. In the latter the same duties appertain to positive law. In the former the only subject which possesses rights correlated with these duties is the corporative unity of persons conceived as having an end of its own. In the latter the legally limited state-*authority* and the individual members of the state are also subjects possessing rights.

[1] *System der subjektiven öffentlichen Rechte*, 1892, pp. 184 *et seq.* Cf. *Allgemeine Staatslehre*, p. 386.

[2] *System*, *loc. cit.*, and *Allgemeine Staatslehre*, pp. 416 *et seq.*

IV

Kelsen's Theory of Law and the State

A review of Kelsen's *Allgemeine Staatslehre.* 1925

1. Kelsen's general theory of positive law

It is impossible to understand the scientific significance of Kelsen's treatise on fundamental juridical questions unless one bears in mind the doctrine concerning juridical principles in general and the juridical theory of the state in particular which was prevalent at the end of last century and continued to be so up to the present time. Positive law in its positive character is sometimes regarded (as it is by Bergbohm, Duguit, Bornhac, and others) in accordance with the Austinian power-theory as a decree of the supreme personal power in a society, *e.g.*, of the monarch or of parliament or of both together. Otherwise the positivist theory of law, in its conscious opposition to the theory of natural law, regards law as a decree of the *State*, as that which has supreme power of command within its territory. The 'state' can be regarded either as an organism with a will of its own or merely as a unity of the wills of individuals. On the latter alternative the several organs of the state are held to constitute the will of the unity in question. (Jellinek.) In either case positive law is ascribed to a supreme sovereign will assumed to be actually existing. The imperative-theory is intimately bound up with this. The prescriptions of the law, it is held, are imperatives issued by the sovereign power and addressed to its subjects.

Nevertheless, these ostensibly positivist theories contain a strong trace of natural law. This appears in the first place in the fact that the actual sovereign power is regarded as laying itself under obligations through legal prescriptions. (Jellinek.) So obli-

gation cannot consist in the fact that an action or a forbearing to act is *commanded* by the sovereign power. It acquires, on the contrary, a quite different character. The obligation which arises must be thought of here as depending on a promise made by the sovereign power, which becomes binding in accordance with the principle of natural law: *Pacta servanda sunt*. Moreover, it is said that the sovereign power creates through its imperatives its own rights to be obeyed, and deduces from these rights the authority to punish. (Binding.) The rights in question, to which the duties of the subjects correspond, evidently make legal obligation into something quite different from the mere fact of a command. The situation is thus shifted to the plane of ethical natural law. The subject does not just find himself under the actual pressure of a command, but has also a special duty to submit himself to it. The tincture of natural law also appears in the fact that certain duties are regarded as holding towards other individuals who have corresponding rights, and not towards the state itself. If legal obligation concerned only the commands of the sovereign power, duties would hold only towards the latter. It is obvious that the above way of looking at the matter is determined by the view of rights and corresponding duties which belongs to the theory of natural law, although the content of them is supposed to be decided by the sovereign power and the theory is so far positivistic.

But natural law displays itself most clearly in the customary doctrine of the so-called interpretation of laws and the filling of gaps in the law. Although the judge, in order to be able to perform his functions, must supplement the letter of the law in accordance with legal or juridical analogy, the principles of equity, the spirit of the laws, and so on, he is considered to be bound to apply only the *positive law* which he has to administer. This presupposes that the supplementation of the letter of the law, which is constantly needed, belongs to the positive law itself *before* the judgment is made, although it cannot possibly have existed in the consciousness of the legislator. But, in that case, by what sovereign power can the 'positive law' be decreed? The

extreme positivist Bergbohm writes as follows.[1] The real law is for the judge "always predetermined in every respect, completely water-tight and consistent with itself, at the moment of decision, however much he may have had to struggle beforehand with the indefiniteness, the incompleteness, and the disharmony in the *expressions of the law* in order to drag the latent legal propositions to light". This is a plain announcement of the fact that the law which holds for the judge is something quite different from the content of the will of the sovereign power. If this is taken together with the assumption that private law includes a system of rights and duties in the formal sense of the theory of natural law, it is clear that the theory covertly presupposes a system also as regards the content of natural legal norms. For, otherwise, what could make a law, which is indeterminate in its explicit utterances, "completely water-tight and consistent with itself?"

Into this witches' dance of false and confused ideas concerning the notion of *positive law* Kelsen seeks, on the basis of positivism, to introduce truth and order by shedding all traces of natural law. His critical intentions appear perhaps most clearly in the first of his greater works, *Hauptprobleme der Staatsrechtslehre*, 1st ed., 1911. Against the theory that legal prescripts express the will of the supreme personal authority he objects that the actual will of the sovereign can have no legal significance in regard to an act of the government; no more legal significance can be attributed to the actual intention of a member of parliament at the moment when he gives his vote, perhaps without having read the proposed enactment.[2] Again, the *permanence* of the validity of a law would be inconsistent with its being founded on the always contingent will of a certain person or persons.[3] Against the organic theory of the state he objects that the social-psychological relationships which actually exist in no way coincide with the state in the legal sense. Against Jellinek's theory, that the state itself is a teleological

[1] *Jurisprud. und Rechtsphil.*, p. 384 A.

[2] See, *e.g.*, p. 176, 487, and 552 *et seq.*

[3] P. 460 *et seq.*, and p. 472.

unity of the several wills, which rules through the state-organs, he remarks that such a unity is fictitious, and, even if it existed, could be regarded as an actual will only through a fiction.[1] Against the imperative-theory he asserts strongly that an imperative as such presupposes a recipient who is in some way influenced by it. If legal duties were constituted by imperatives, they would be conditioned by a social-psychological condition of obedience on the part of the subjects which would always be contingent. But such a notion of duties would not coincide with the juridical notion of duties, since the subjects are not in general acquainted with the legal prescripts, and, moreover, are not always certainly influenced by them. The existence of a legal duty has always to be decided independently of such subjective conditions.[2] There would be an unjustifiable identification of legal with moral duty, in respect of their formal structure.[3] Against the theory of moral natural law, *viz.*, that legal duties exist independently of legal prescripts determining means of compulsion, Kelsen raises the following objection. Positive legal duty can be distinguished from moral duty only through the fact that the former is connected with compulsion, and therefore can be constituted only through such legal prescripts. For that reason he rejects Binding's norm-theory.[4] Against the various attempts to regard a right as something substantial, an object of protection, he asserts that it cannot be referred either to an interest or to a will. One could have a right without being aware of it.[5] If we describe it, following Jellinek, as freedom of willing, the basis of natural law reveals itself in the following way. That very sphere of activity which is exempt from norms and should be legally irrelevant, so-called "freedom," is described as a right.[6]

This acute criticism of the usual theory of law, with its falsifica-

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[1] pp. 166—188; cf. p. 698 and *Allg. Staatsl.*, § 3 A, p. 7 *et seq.*

[2] p. 340.

[3] p. 318 *et seq.*

[4] pp. 277, 280, and 296.

[5] pp. 571 *et seq.*

[6] pp. 591 *et seq.*, and cf. also *Allg. Staatsl.*, pp. 55 *et seq.*

tion of reality and its unsound confusion of legal and moral rights, is well worthy of attention both for the philosopher of law and for the jurist. The prevailing theory is not just a harmless doctrine of principles with no practical importance; on the contrary, it plays an important part in the juridical interpretation of laws and other juridical decisions. It is only necessary to mention the ordinary juridical application of the notion of illegality ("Rechtswidrigkeit").

If one compares Kelsen's *Hauptprobleme* with Felix Somlo's famous *Juristische Grundlagen*, in which the latter author defends and develops the Austinian power-theory in conscious opposition to Kelsen's criticisms, one gets the strongest possible impression of the hopelessness of such an undertaking. The author does not once trouble himself to indicate an actual subject of the imperatives, especially in a parliamentary state. *Every* imperative, and therefore not only legal ones, is regarded without exception as a valid empirical ought, and that quite independently of whether it has reached those to whom it is addressed! It is obviously the verbal form of an imperative, which can always be "Thou shalt!", which has given rise to this strange theory of an ought which is given empirically in an imperative. By such reasoning, forsooth, we might conclude that an animal-trainer creates for his animals a valid empirical ought through his commands! The whole book is a collection of absurdities.

No less worthy of attention is Kelsen's own positive theory of law, which has received its systematic formulation for the first time in his *Allg. Staatsl.* Its foundation is the assumption, which it shares with the prevalent doctrine, that "positive law" is to be regarded as a closed system, which is distinct from both the order of nature and morality. Juridical science has, therefore, a peculiar character, which distinguishes it both from the science of the actual structure of society and from moral science. It is of the utmost importance to see where one gets to when one tries, with the help of such a distinguished leader as Kelsen, to pursue such an assumption to the end, without being content with incorrect ideas about reality and an illegitimate admixture of the

moral with the legal point of view. Be it noted that we are here concerned with the presuppositions of a science which touches our most important interests. The law is undeniably a condition of culture itself. Without it, as the Sophist Protagoras already saw, we should never have been able to win the lordship over other species. Although Kelsen has presented his theory systematically for the first time in *Allg. Staatsl.*, it is most easily understood if one starts from his earlier work *Hauptpr.*, because the problems which have led to the theory appear there without concealment. I shall therefore take account of the latter work also.

According to *Hauptpr.*, what is called the "will of the state" has no other physical reality but that which is involved in the actual maintenance of a legal order within a certain region. This actual functioning of the legal order is now said to be the presupposition of every juridical construction.[1] But this is not in any way to mean that the ought itself, which belongs to law as *binding* or *valid*, is to be reduced to an is. The ought as such can, it is said, be deduced only from another ought. For it is an essentially different category from being.[2] The meaning is that jurisprudence assumes that laws which have come into existence in a formally correct way are binding, so that the ought is non-derivable; but jurisprudence would not make this assumption unless such laws were in the main enforced.[3] Therefore, according to *Hauptpr.*, a legal rule is an expression of a judgment about an independent ought which is *sui generis*. But the jurist treats law as the content of the will of the state. Yet the juridical state-will is not a will that belongs to the sphere of natural existence.[4] The ought is completely independent as against the is. That will is in reality only an expression for the *unity* of the ought in question or of the legal order itself.[5] By a legal prescript, as a judgment

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[1] pp. 50 and 56.

[2] pp. 6 *et seq.*

[3] pp. 40, 42, and 44.

[4] pp. 178 *et seq.* and 181.

[5] p. 699. "What is called the state-will is only the expression for the unity of the legal order described as an organization."

about the legal ought, it is laid down that a certain state of affairs belongs to the unity of the ought in question. It is thus clear that, according to Kelsen, a legal prescript contains only a rule for deciding whether particular actions are to be regarded as acts of the *state*, *i.e.*, of the legal unity. This is so, although the actual agents are always certain men assigned by the state for that purpose, who function as state-organs in so far as they carry out the acts of the state.[1] From this it follows, however, that the ought which is given in legal prescripts is to be realized only by the state—the legal unity—itself, and is therefore an ought for the state and not for men. The state-will, which is the bearer of the legal ought, can only be directed to its own actions.[2] "Owing to the nature of its specific will, which is not a real psychological act but only a juridical fiction, the state can will only its own behaviour, never that of other persons, whether they be its subjects or its state-organs."[3]

Kelsen is led to these results by another way also. Since law is essentially an organization of compulsion, the legal ought refers in the first instance to punishment or executive action as the consequence of illegality. But a legal ought, valid for men, could be constituted only by a legal prescript which prescribes punishment or executive action.[4] The duty of the state-organs to carry out the will of the state expressed in a legal prescript, itself rests, not on that prescript itself, but on a special prescript prescribing punishment in the event of their doing otherwise.[5] It is thus clear that the legal ought, as regards its main content, *viz.*, punishment or executive action, holds not for men but only for the state.

But, if the juridical state-will means only the unity of the ought in question, it is obvious that this ought, since it refers to that will itself, *cannot* be infringed.[6] In the case where a certain ought,

[1] pp. 183 *et seq.*, 189, 461, 464 *et seq.*, 484, and 605.

[2] pp. 218, 301, 387.

[3] pp. 435 and 446.

[4] pp. 207, 212, 277, 280, and 296.

[5] p. 527.

[6] p. 249: "An illegality on the part of the state must in all circumstances be a self-contradictory notion."

given in a legal prescript, is not actualized by the state-organ concerned, this means that the unity of the law in regard to this particular ought does not actualize its own content. The *state-will* does not pass over into *action*. But, since nothing can be ascribed to the state-will except that action of the state-organs which is laid down by the ought contained in the legal prescript, there is no actual infringement of the ought in the case supposed. But this would seem to imply that the ought itself lacks the requisite strength in such conditions. If the state-will does not act as it ought to act, this seems to mean that the ought which is involved in it ceases to be valid for the case in question. But this consequence is drawn only subject to severe limitations. Kelsen draws this conclusion only when the disregard by the state-organ of the state-will is to be considered as a legal act in view of some other legal prescript, *e.g.*, in a material erroneous judgment where there is no further possibility of appeal.[1] If he were to draw the conclusion without any restriction, he would come into conflict with his own assumption that the legal ought is in principle independent of existence and that therefore the annulment of a law by its non-application is a juridically inadmissible notion.[2]

The inconsistency in question is not contingent, it springs from the roots of the system. On the one hand, the legal prescript must have within it categorical validity, to the extent that something ought to follow under the conditions laid down. Without this inner categorical validity it is impossible to decide that a legal act occurs when the legal prescript is applied. Yet, on the other hand, the legal prescript must be applied in order that the ought which is contained in it should be valid. Since genuine legal acts must be regarded as issuing from the legal unity itself, the latter is *itself* obviously inactive when a legal prescript fails to be enforced, *i.e.*, the *ought itself* lacks the requisite power. This conclusion has not been drawn by Kelsen, but it has been drawn by his pupil Sander. It upsets Kelsen's view; but, on the other

[1] pp. 246—247.

[2] pp. 50 *et seq.*

hand, the presupposition of any existent legal system—the actual maintenance of a legal organization—which is illogical according to Kelsen, ceases to be so and becomes a factor *in* the system.

Sander emphasizes the correlation between the legal prescript and the legal material, *i.e.*, the state of affairs in which the legal prescript has its reality.[1] This doctrine culminates in the absurd proposition that, in consequence of the legal dynamic, "law generates itself in sovereign legality."[2] However, Sander asserts strongly that, because of the necessity of a legal material, law should be referred to *is* and not to *ought*, as if Kelsen had erred in this particular! But, if in every case a legal prescript renders a state of affairs legally relevant, it *must* have validity in itself, *viz.*, as a judgment which determines *when* a legally relevant state of affairs exists. Suppose that the constitution makes legally relevant the state of affairs which exists in the act of legislating, and suppose that this state of affairs makes other states of affairs, *e.g.*, legal transactions, legally binding; and so on. Then the constitutive legal prescript, however much its reality may depend on that of the correlated state of affairs in other respects, must have validity in itself in order to be able to make that state of affairs legally relevant. This inner validity must, however, in accordance with the assumption, be ideal. Sander does indeed deny as decidedly as Kelsen that the legal connexion between an earlier and a later state of affairs is a causal connexion.[3] But natural necessity in temporal sequence is causal. If another kind of necessity is supposed to be present in a temporal sequence, it is a question of rules which stand above nature but which yet are held to be valid for nature. Why may one not describe such rules as an ought, in order to emphasize their essential difference from natural existence? The peculiarity of such rules, *viz.*, that in spite of their supernatural character they are necessarily actualized in

[1] See, *e.g.*, *Staat und Recht* 1922, II, pp. 1108, 1118 *et seq.*, 1135, and 1155.

[2] p. 1148. That Kelsen does in fact closely approximate to Sander in his *Allgemeine Staatslehre* will be shown later.

[3] See, *e.g.*, p. 1149.

nature, is in no way less startling when it is supposed that instead of an ought a non-natural kind of existence belongs to them.

But Kelsen in no way restricts the legal ought to that which concerns the state and which cannot be transgressed. He says (p. 207): "The judgment, which is justified on the ground of the legal order, that the state would will to punish or take executive action against a person if he were to behave in a certain way, *forces us to the judgment* (my italics) that this person is under a legal obligation to behave in a way which is the contradictory opposite to that which is the condition under which the state would so will." This lands us in a curious situation. The legal ought should as such mean a content willed by the state, and should therefore mark out a certain action as an act of the legal unity itself. But here we have a legal ought which is not concerned with the state itself, and therefore cannot mean an action pertaining to the legal unity itself. There can be no doubt that Kelsen has here allowed himself to be unconsciously influenced by the demands of the sense of justice. Punishment and executive action seem not to be *just* when no legal duty has been transgressed. So such a duty has to be assumed as the precondition of legal constraint. This of course conflicts with the positivist principle. Some extremely curious remarks occur also in connexion with the discussion of this legal duty. Kelsen says, *e.g.*, that behaviour which, according to other statements of his, must be described as a legal duty because there is a legal prescript which decrees punishment for behaviour of an opposite kind, can be derived only indirectly from that prescript, *viz.*, as being the *end* to which it is directed.[1] But the purpose of a law, as being something which lies outside itself, can be ascertained only by sociological and not by juridical considerations.[2] Similarly it is said on p. 273: "To 'infringe' a norm, or to 'transgress' it, means simply and solely to behave in a way which is *opposed to the purpose* of the norm." The legal ought which can be transgressed,

[1] p. 205.

[2] See pp. 57 *et seq.*

the ought which holds for men, reveals itself as a curious hybrid of the juridical and the sociological points-of-view!

Suppose that one now asks what is the upshot of Kelsen's repudiation of the false assertions of the ordinary theory of law. One finds, it is true, that he makes no incorrect statements about social facts; but one finds also that he avoids all risk of doing so because he does not allow jurisprudence to have anything to do with actual social existence! A legal prescript is, in fact, for him a judgment concerning a supernatural existent, which nevertheless (at least in so far as his view is carried out consistently) must be completely realized in the world of nature. But this is an absurd idea. The supernatural juridical system cannot be thought of as even existing alongside of the natural order. For no knowledge of any reality is possible except through relating its object to a systematically interconnected whole. But the supernatural and the natural systems, as being different in kind, cannot be co-ordinated in a *single* system. Therefore, so far as I contemplate the one, the other does not exist for me. But, if the jurist as such must abstract from the natural order, it is to be feared that the legal prescripts which he sets forth will be far too empty. He cannot, *e.g.*, talk of legal transactions as juridical facts, for that becomes altogether meaningless if one may not assume any natural causal nexus. Again, he cannot speak intelligibly of punishment, since a 'punishment' which led to no consequences by way of natural causal connexions could not be called a punishment. He must simply be left gasping for air!

The consequences of the view that the juridical system has an independent reality show themselves in such statements as the following. "If we take the standpoint of one who directs his attention upon physical reality, *everything* that can be cognized from that point of view must be a part of nature. That is to say, it must be described in terms of the specific kind of law which holds in that sphere, *viz.*, causal laws. From that point of view nothing can be presented except in so far as it is describable in terms of physical law, and therefore nature and nature alone exists. In the same way, from the juridical standpoint law and nothing but

law exists, and nothing can count as 'presented' unless it is describable juristically in terms of the specific form of interconnexion which is characteristic of the juridical system. Suppose that one regards the legal organization of the state as sovereign, *i.e.*, takes it to be a completely autonomous system, because it is independent, not deducible from anything else, and not referable to anything else. Then along with the *unity* of the system one has asserted its *uniqueness* and its *exclusion* of every other system, whether it be the order of nature or another system of norms."[1] Since Kelsen asserts in this book that either the legal organization of the state or the law of nations (with the legal organization of the state as a subordinate organization) must be regarded as sovereign, it would follow that the jurist as such must *deny* that there are men in the biological sense! As regards the other systems of norms mentioned above, which it is said must also be excluded from the juridical point of view, we find that it is directly asserted in several places that the jurist from his point of view necessarily *denies* that one *should* act *morally*.[2]

It is therefore not at all surprising that Kelsen should describe as a great mystery the act of legislation (which belongs to the realm of natural existence, and therefore does not exist from the juridical standpoint) in its capacity of specifying the will of the state, *i.e.*, the legal order. He says: "That which takes place in the act of legislation is the great *mystery* of law and of the state, and therefore it is excusable that its essence can be displayed only in inadequate images."[3] One is inevitably reminded of a medieval thinker who discusses the great mystery of the *God-man*!

Kelsen's doctrine concerning the *imputability* of the wrong which is the legal prerequisite to compulsion, is specially illuminating for his point of view. Since the wrong is a factor in a legal prescript and therefore has legal significance, it cannot be im-

[1] *Allg. Staatsl.*, p. 105.

[2] See, *e.g.*, *Hauptpr.* p. 530, *Das Problem der Souveränität und die Theorie des Völkerrechts*, 1920, p. 108, and *Allg. Staatsl.*, p. 105.

[3] *Hauptpr.*, p. 411.

puted to a man as a part of nature. On the contrary, the subject of imputation is, from the juridical point of view, the inner essence of a man, which is raised above all natural willing, feeling, and cognition. We quote the actual words of Kelsen: "The subject of penal responsibility or *guilt* is evidently that construct of the specifically *normative* point of view, the legal subject or subject of legal duties. This, as such, cannot be anything corporeal and belonging to the external world. It also cannot be the bearer of psychic processes bound up with matter, which can be united in the unity 'man' only from the point of view of explanatory teleology. Only the man, and not the person, can 'will' or 'cognize' in the psychological sense; and, if the latter and not the former is the subject of 'guilt', then guilt cannot consist in any kind of willing or cognizing."[1] Again: "The peculiarity of the process of imputation consists in the fact that the action or failure to act is identified with the person—that ideal unity. It is not the action or the omission which is praised or blamed, rewarded or punished and held responsible. It is the person," *i.e.*, this incorporeal unity.[2] Again, on the same page: "Imputation, to speak figuratively, seeks a final point in the innermost part of man. *It is this ideal construct, thought of as within the innermost part of man and as constituting the final point of the process of imputation, it is this and nothing else which is described as 'will' in the terminology of ethics and of jurisprudence.*" It makes one feel indignant, however, that the *man*, who from the purely juristic standpoint has done no wrong, should be exposed to the suffering of punishment, instead of this other-worldly inner unity which alone is *guilty*. In any case it seems completely impossible under such circumstances that the *man* should, as Kelsen says elsewhere, be under an obligation in consequence of a legal prescript which ordains coercion.

The later writing, *Allg. Staatsl.*, gives us further information about this mystical juridical person. A person, as subject of legal rights and duties, is said to be the personification of "the unity

[1] *Hauptpr.*, pp. 142—143.

[2] p. 145.

of a partial system of legal duties and rights".[1] The person of a man would therefore be juridically the partial system of those norms which concern him. It is said further: "It is the person who substantiates a right, who fulfils a duty, who acts legally."[2] Again: "The state of affairs which conditions the act of constraint" (*i.e.*, the wrongful behaviour) "is imputed to the physical person considered as the unity of a partial system of those legal norms which are normative for the conduct of a man in the state of affairs in question."[3] But in that case it is obvious that only the unity of norms just described is the bearer of rights and duties, and that it alone can do wrong. The 'man' is relevant here only as an item in that state of affairs, *viz.*, the wrong, which juridically is entirely referred to the unity of the norms. It is just a plain contradiction when Kelsen also speaks of the man as having rights and legal duties.

Moreover, we are now forced to draw the consequence that the wrong, which has to be referred to a partial system of norms *imposing an obligation*, is itself, as an *act* of such a system, *in accord with obligation*. Statements are to be found in Kelsen in which this conclusion is almost explicitly drawn. He asks, *e.g.*, how a wrong, as being the negation of the law, can belong to the system of that very law, and he thinks that the solution of the problem corresponds to theodicy in theology. It is said: "Theology holds that God wills evil, not indeed directly but still in the last resort indirectly, namely as the condition of purificatory punishment, which is in itself good because it fulfils justice. Similarly, in the deeper jurisprudence wrong appears merely as a state of affairs posited in the legal order as the condition for an act of constraint on the part of the state. Thus a wrong appears finally as a *content of the legal norm*, *of the legal ought*," (my italics) "which represents the will of the state, as one content beside other circumstances which are posited as conditions of an act of constraint."[4] I do not know whether theology regards the just

[1] p. 65. [2] Ibidem.

[3] p. 66.

[4] *Allg. Staatsl.*, p. 79.

punishments of God as the principal form of his goodness, and therefore whether, according to theology, evil is as such the principal means through which God manifests his goodness. *Kelsen*, at any rate, always regards state-compulsion as the fundamental content of the legal ought. So for *him* juridical wrong must be the principal means by which juridical norms actualize themselves. It is then easy to understand how he comes to describe a wrong as a content of the legal ought.

In *Allg. Staatsl.* we find also a particularly illuminating comparison between an action which is in accordance with duty in the ordinary sense — "behaviour which avoids coercion" — and "wrong", with regard to their respective relations to the notion of a legal act.[1] An action of the former kind is a legal act only from the standpoint of that *secondary* norm which defines as a legal duty the action which is the contradictory opposite of that which would involve coercion.[2] But a "wrong" is a genuine legal act from the point of view of the *primary* norm, which is here described as the organ-function of the state; so that the criminal *as such* functions as an organ of the state!

We can make at this point the following very important observation. Kelsen, in proportion as he tries to purify the juridical notion of obligation, by freeing it from fictitious elements, such as the demands of the state authority, etc., and by eliminating moral considerations, approaches instead to primitive superstition and mediaeval scholasticism. It is true that he holds that the mystical juridical person, elevated above the whole of nature, to whom wrong-doing is to be imputed, is only a juridical construct and therefore lacks the palpable reality of the ghosts of superstition. Nevertheless the jurist as such must surely *conceive* something as the subject of imputation for wrong-doing, when he uses his words person, partial system of norms, etc. In so far as he does so he approaches decidedly to the old animistic belief that the *innermost* part of a man—his *animus* or *anima*—is con-

[1] pp. 264—265.

[2] Note that such 'norms' have meaning only by reference to the *purpose* of the law, which itself falls outside the legal system. Cf. above, p. 29.

taminated by his crime, and that for that reason this spirit is to be handed over to the anger of the gods.[1] Compare the statement of Kelsen that it is not the action or the failure to act "which is praised or blamed, rewarded or punished, or held to be responsible, but the person". When we read further how Kelson locates the ground of the possibility of wrong in the law itself, and in so doing refers to theodicy, we cannot help thinking of St. Augustine or other fathers of the church.

Moreover, it is noteworthy that a strong affinity with primitive positivism betrays itself in Kelsen's view of the relation of legal norms to the legislative act. Neither the social importance of maintaining a legal order, nor an axiom given in the consciousness of justice, nor indeed any practical rational ground, may be adduced for the binding force of the legal order. This is just the peculiar feature of Kelsen's form of positivism, that the legislative act produces law which is in principle *direct*, although *one* act can have legal force in consequence of *another* act. It is true that Kelsen talks in *Allg. Staatsl.* of a basic norm which is not the product of a legislative act and which gives to the positive rules of law their force. But the only content of this basic norm is that a certain authority counts as *supreme* or that a certain legislative act has unmediated force: "The juridically admissible, nay indispensable, basic norm has no absolute content. Indeed it has *a priori* no content at all, but is directed to that material *which its sole function is to designate as law*. At one place it designates an autocrat as the supreme authority, and at another the people. But the fundamental contract of the law of nature presupposes that it has an absolute *content*".[2] According to positivism one *may* not enquire as to the ground of the validity of this prescript which designates a certain authority as supreme. It is only one consequence of the view in question that no actual *content* of the law can be deduced 'from the nature of the case'. Only positive law is valid. That faithful disciple of Kelsen's,

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[1] See Hägerström, *Der römische Obligationsbegriff im Lichte der allgemeinen römischen Rechtsanschauung*, I, 1927, pp. 464 *et seq.*

[2] See, *e.g.*, pp. 104, 249, and 251. My italics.

Merkl, says in his work *Die Lehre von der Rechtskraft entwickelt aus dem Rechtsbegriff*, 1923, p. 253 A: "All 'legal principles' which are contained in the framework of positive law, or, in the absence thereof, are derived from the nature of the case, are perhaps valuable materials for a more comprehensive codification, but are in themselves not as yet law but bare law of nature." From the fundamental categorical validity of positive law, which will endure no other validity beside itself, it follows also that every norm has *in itself* a validity which persists indefinitely. Any limitation of the latter must be determined by original *positive* regulations, if it is to be valid at all.[1] According to p. 259 a repealing order "must be expressed by *the same logico-grammatical* means as the other contents of norms".[2] In intimate connexion with this is Kelsen's assertion that, when a superordinate norm is incorrectly applied by the state-organ which is empowered to apply it, the decision is legally binding only if the decision of this authority has been 'explicitly' declared to be without appeal.[3] For that reason a law which has come into being unconstitutionally, but has been published, has in itself no validity, if there exists no law for testing it judicially.

Particularly illuminating is Kelsen's criticism of the theory that a federal state, being based on a covenant, can be dissolved by unanimous *dissensus mutuus*. This theory appeals to certain 'rational' principles for the validity of a covenant under the law of nations. But Kelsen regards the principle *pacta sunt servanda* in international law as an international legal norm which declares the force of treaties to hold good absolutely. For that reason, he thinks, any limitation on the duration of a treaty in international law could be deduced only from the positive content of the treaty. So, if there is no such provision even as a tacit assumption in the

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[1] See Merkl, *op. cit.*, pp. 246—247.

[2] Merkl's own italics. Cf. Kelsen, *Allg. Staatsl.*, pp. 149 and 300.

[3] *Hauptpr.*, pp. 246—247; cf. Merkl, *op. cit.*, p. 293: "It must be emphasized that such a possibility" (*viz.*, that of ascribing to the state such acts as do not fulfil the sum-total of the positive legal conditions for their legal validity) "can be established only through an *express positive legal* regulation."

treaty itself, the treaty *holds eternally*.[1] The consequence of this absolute exclusion of all traces of natural law (as mere ethico-political postulates), and of all sociologico-political consideration of purpose, from the foundation of the legal ought and therefore from its content also, is plain. It carries with it the rejection of the usual methods for applying the law, in so far as they presuppose that the positive law is ascertained by such methods. So we must completely exclude, *e.g.*, the motive of the law, legal analogy, the spirit of the law, equity and reasonableness, judicial practice, and the results of jurisprudence, as principles for ascertaining the positive law. On the ground of the authority given him by law, the judge may have as much liberty as you please, within the framework of the law, to decide particular cases according to his own judgment. And his decisions as such may have the force of law. But still the principles which he applies according to such methods are in no way an expression of the content of the positive law.

But in this way the task of jurisprudence is narrowed down into a systematization of the laws according to merely formal principles, without any regard to the requirements of social life or to the 'ethico-political postulates' which are in fact present in the community. And the laws themselves must be interpreted according to their *literal sense*, which alone is objectively capable of being established. (For this reason the necessity of *explicit* regulations with regard to what is desired is emphasized from the point of view of legal policy.) But in this way Kelsen is led back *to the view of primitive positivism* and to the so-called *grammatical* method of interpretation associated with it, which we find in ancient Rome. The act of legislation was regarded as directly creating, in a mystical magical way, the connexion between legal fact and legal consequence which was expressed in *words*.[2]

The position is especially illuminated by considering Kelsen's view of the relation between a *norm* and the *complex* of legal fact and legal consequence. The basic norm is held to establish "a

[1] *Op. cit.*, pp. 222 *et seq.*

[2] See Hägerström, *op. cit.*, pp. 318, 539 *et seq.*, 576 *et seq.*, and 592 *et seq.*

supreme authority, to whose direct or indirect delegation all acts of command, as establishing norms, go back".[1] This means that a superordinate norm creates the connexion between (i) a certain act of norm-establishment as a legal fact, and (ii) the validity of its content as a legal consequence. But it is not only the process of creating norms which acquires its validity from a superordinate norm. The connexion, too, between legal fact and consequence, which is expressed in a norm without reference to the validity of certain acts of norm-establishment, is held to be created *by* the norm itself; and therefore this is held to be true of the connexion between 'wrong' and punishment or executive action as laid down in a norm. Kelsen is never tired of insisting that all legal duties and rights arise *through* norms.[2] There would be nothing remarkable in this if his meaning were that a supreme authority determines that, if A is, then B shall be; or if he meant that in the legal world there are certain rules, according to which, if A is, then B follows. But, according to Kelsen, a norm is essentially a *legal proposition* and therefore a true *judgment* about the connexion between legal fact and legal consequence, so that the object of legal science is the law's own judgments.[3] It follows from this that the true judgment, in which a certain legal connexion is thought of as existing, makes its own content real. A norm, which is a true judgment about a legal relationship, itself creates that relationship, either because it concerns the way in which norms are created or because it signifies the connexion between a 'wrong' and the appropriate punishment or executive action.

Now it is possible that this absurd view, which makes knowledge *of* the existence of a legal relationship to be creative of its existence, is influenced by Kant's critical subjectivism.[4] But, al-

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[1] *Allg. Staatsl.*, p. 251.

[2] See in particular *Hauptpr.*, pp. 705 and 706.

[3] See, *e.g.*, *Allg. Staatsl.*, p. 54: "The law as the object of legal science . . . is a system of judgments, not of imperatives."

[4] It is to be found in an exaggerated form, in spite of other differences of viewpoint, in Kelsen's disciple Sander, who is a declared Kantian.

though Kant, in accordance with his subjectivism, sometimes describes the categorical imperative as a (synthetic) judgment, it nevertheless always has for him its own independent reality as a rational will. As regards empirical knowledge Kant never denies the *empirical* reality of things, even though, from the *transcendental* standpoint, he also describes them as presentations. But it is characteristic of Kelsen's positivism that a norm, as a true judgment about a legal relationship, itself constitutes the latter *from every point of view*. This exaggeration of subjectivism just within the legal realm must depend on the supposedly peculiar nature of law. If we compare the situation with what has just been adduced, we can have no doubt as to what gives rise to it. If a norm is created, certain grammatical propositions must be related to an authority. In that capacity these propositions have *in themselves* in principle, according to Kelsen, the power to make valid that which is expressed in them. The basic norm asserts that an authority is supreme, and it does so without appealing to any reason whatsoever. But that is the same as to say that the grammatical propositions which are referable to that authority have, without any reason, the power to constitute the validity of that which is expressed in them. Now the propositions in question *are*, from the subjective standpoint, judgments about a legal relationship. It follows at once that a judgment about a legal relationship directly gives reality to its own content, and therefore it is also true in itself. So we are landed in the peculiar situation that, in the legal domain, knowledge of reality itself creates that reality. This is the result at which one arrives by assuming that certain *propositions* have a creative power as regards that which is expressed in them, *i.e.*, through a belief in a legal magic of words, or, as Kelsen would prefer to say, in *the great mystery*!

Now it is curious that, although the basic norm, in accordance with which a certain authority is *supreme*, cannot be a *positive* law and therefore cannot exist as a judgment contained in a certain proposition, yet as a *norm* it does become a judgment which, like other norms, makes its own content valid. It is said to 'establish' a supreme authority, just as the authority so constituted

establishes others subordinate to it.[1] But, since this judgment is not that of the jurist but is an object of legal science, it merely hovers in the air. It does not exist in the soul of any individual man, nor does it exist by means of a certain proposition referable to an authority. Really Kelsen ought to have reduced the mystical basic norm to words possessed of power, which nevertheless have not acquired that property on any particular occasion but exist from all eternity! Cf. the Greek notion of the Logos!

For a long time past attempts have been made at least to soften the mysterious primitive positivism based on magical foundations. The validity of the law is explained by purely superstitious assumptions or by those of rational law or by positing social ends as objective. All sorts of notions are trotted out in order to provide a rational basis for the validity of law, *e.g.*, the kingdom of 'God's grace', a fictitious social contract whose validity is based on the principle of the autonomy of the will, the state-organization as embodying the rational purpose of men (Hegel), the spirit of the people as the source of law, and so on. Modern theories of law as inherent in a teleological conative unity of the members of a state and therefore imposing obligations on them (Jellinek), or as recognized by the subjects and therefore binding upon them (Bierling), or as exhibiting the idea of justice in a certain material and therefore valid (Gierke, Radbruch, Krabbe, Stammler), all these are merely disguised forms of the old rational law. The attempt is also made to evade the whole difficulty, as in the imperative-theory, by the explanation that law is only the content of a supreme state-will. This, on the one hand, requires violent fictions, and leads, on the other hand, to an all-pervasive confusion of is and ought. We shall not here enquire whether this same mysterious primitive positivism is not present in the background as a hidden assumption in all these attempts to soften it down or to circumvent the whole question of the validity of law. Now Kelsen discovers with the greatest perspicacity the elements of rational law and the sociological elements as well as the fictions in the prevalent theories of jurisprudence. And he quite rightly

[1] See above, p. 272.

declares the validity of rational law and of social aims to be subjective, and therefore useless as a basis of or element in *objectively* valid law. He must therefore land immediately in the "great mystery" of primitive positivism.

We can, however, raise this question. Is not the idea of a law which exists independently of all legislation, *i.e.*, a law in the sense in which it is understood by the theory of natural law, indissolubly linked, at least for modern thought, with the notion of an obligatory law as such? We shall show, in a second part of this review, how Kelsen in his work *Allg. Staatsl.* discovers with the greatest acuteness, in applying his theory of law to particular legal questions, the elements of rational law in the usual view, and how he excludes these from the solution of these questions. But we shall also show that, despite all his acuteness, rational law plays a most important *positive* part in Kelsen's own theory. Above all it will be made plain that Kelsen, with all his energetic repudiation of rational law, in the treatment of questions of positive law, misunderstands the plain *meaning* of the positive legal rules in question.

2. Special Questions

(a) *Sovereignty*

In his first great work, *Hauptprobleme der Staatsrechtslehre*, Kelsen admits only law in the formal sense to count as a legal prescript. For that reason he regards the functions of the state-organs which relate to a legal prescript as merely applications of law. In *Allgemeine Staatslehre* he regards the application of law by the state-organs as including at the same time a creation of law, *viz.*, in relation to other organs, for which the decision involved in the application of a legal prescript has the force of law. On the other hand, the act of legislation itself is now regarded as an application of legal prescripts of a higher order (*viz.*, the constitution), even though it be at the same time a creation of law. Cf., *e.g.*, the following: "A judicial decision is an application

of law, in so far as we consider its relation to that higher level of the law by which the judgment is legally determined. A judgment is a creating of law, a normative act, in so far as we consider its relation to those legal acts which have to be performed 'on the basis of' the judgment, *e.g.*, executive acts . . . So the same law, which is a creating of law relative to the judgment, is in its turn an application of law relative to a higher level by whose norms the law is determined."[1] On p. 250 it is even said that from such a dynamic point of view "the positive character of law appears as a step-by-step concretization of law".

In this Kelsen refers to Merkl and Verdross. It is, moreover, obvious that he approximates here to the views of Sander, although certain differences of opinion remain. Sander's view has already been sketched.[2] Sander regards the legal system as a series of concrete procedures given in experience, *e.g.*, constitutional legislation, simple legislation, legal procedure, executive action, of which each brings about the next hierarchically in the legal system. In this way the subordinate procedure is connected with the superordinate one, as a legal consequence of the latter, through the legal prescript which is given through the superordinate procedure. This prescript is a judgment which functions as a creative rule. With constitutional legislation the constitutional legal prescript comes into being, and functions as a rule for simple legislation, which itself gives rise to a legal prescript. In this way simple legislation, with the legal prescripts which belong to it, takes its place in the system as a consequence of constitutional legislation, and so on. Here there exists a complete correlation between the legal prescript and the factual legal procedure which is constituted by it. The former would be a legal nullity unless the latter actually existed.[3] It has already been remarked that the legal prescript which is given through a certain procedure must itself be valid if it is to be able to make another procedure legally

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[1] p. 234.

[2] Above, p. 264 *et seq.*

[3] See, beside the previously cited passages, *Das Faktum der Revolution und die Kontinuität der Rechtsentwicklung*, pp. 149 *et seq.*

relevant, and that therefore the whole notion of correlation is contradictory. Moreover, since a legal prescript must express a connexion between successive phenomena which is not that of natural causality, it must have a supernatural content, and therefore cannot in any case relate to natural existence. The difference between Kelsen and Sander, *viz.*, that law signifies an *ought* according to the former and an *is* according to the latter, is therefore not essential. As regards the contradictory idea of correlation Kelsen seems to have accepted the opinion of Sander, since on p. 251 he ascribes the positivity of law to the hierarchic concretisation of the latter.

Nevertheless, the fact that Sander rejects Kelsen's doctrine of the necessity of a basic norm in the logico-juridical sense is closely connected with the above-mentioned superficial difference between the two. This basic norm is supposed to express the validity of the primary act of positing law. Since it cannot be a positive law, it cannot, according to Sander, fall within the sphere of legal experience, for this has to do only with actually given procedures.[1] But it can be objected that no 'experience' could prove the validity of 'legal prescripts' given through an actual procedure, *e.g.*, an act of constitutional legislation; for legal prescripts, according to both Kelsen and Sander, express a connexion between facts which is independent of the natural order. The validity of such ideal propositions must always be presupposed, if it is to be possible to talk of a legal system independent of nature. And, if we assume a series of legal procedures, such that those which precede make those which follow legally valid, we must presuppose the ideal validity of the legal prescript which is given through the original procedure. In this way Kelsen's basic norm (in the logico-juridical sense) is given.

Verdross, in his work *Die Einheit des rechtlichen Weltbildes*, seeks in common with Sander to evade this consequence. Even if the constitution of the law of nations, which is held to determine the validity of the principle *Pacta sunt servanda* and of customary law, has itself arisen on the basis of natural law, yet it is, accord-

[1] See *Staat und Recht*, II, pp. 1138 *et seq.*

ing to Verdross, of positive nature "if and when it is incorporated in the hierarchic structure of the law. For it then becomes the rule for those legal prescripts which are referred to it as their principle and which make it concrete."[1] Here we are concerned with the fact that "definite acts of the state are referred to the law of nations."[2] Verdross fails to see that there is here a μετάβασις εἰς ἄλλο γένος. In order that positive law should exist as a legal system distinct from the system of nature, in the sense understood by Kelsen and Sander, the basic legal prescript must impart to the acts described in it as legally relevant such a character that certain other acts become legal consequences of the former. (It must, *e.g.*, impart to treaties made by a state such a character that acts of the state which should be done in accordance with a treaty become legal consequences of the latter.) But in that case the basic legal prescript must have independent validity. The fact that appeal is often made in practice to the "constitution of the law of nations" is merely a sociological fact which in no way proves the validity of that constitution. It therefore does not prove the existence of a legal system, in the sense understood by Kelsen and Sander, nor the existence of a legal ought of any kind. The absurdity of this view is most readily seen in the light of the following consideration. Verdross's constitution of the law of nations, which is certainly neither contractual law nor customary law, must be regarded in the practice of the state as purely natural law. Yet it is alleged to acquire a different kind of validity from that which natural law has of its own nature just because it is appealed to in the practice of the state as natural law!!

It has been shown that a basic norm, which is presupposed by the jurist without being able to be founded on 'experience', is essential if the assumption is to be maintained of a self-subsistent legal system or of a science free from 'meta-juristic' elements. We must now consider Kelsen's account of this basic norm as determining sovereignty.

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[1] p. 117. Cf. with p. 126.

[2] Cf. *loc. cit.*, p. 61.

Both the positive and the negative basis of Kelsen's doctrine of sovereignty is to be found in the ordinary idea of state-sovereignty. According to this the state is sovereign as possessing an original right of command in regard to its subjects and within its own territory, to which there corresponds a duty to respect the latter on the part of other states. Actual power to maintain a legal order by its own forces is a condition of the right in question. In contrast to this is the municipality, which has only a derivative authority. (Nevertheless sovereignty is also often spoken of confusedly as a mere original power of command possessed by the state. But it is obvious that, in spite of such expressions, it is a right which is being thought of. The mere factual power may always have been supplied by the help of stronger states. One has only to think of the recent formation of states under the aegis of the Entente.) Now the individual state is under an obligation to other states, not only to respect their territorial integrity, but also to behave in certain ways determined by international rules arising from treaties or custom. But, whether a state fulfils its obligations under the law of nations or not, its orders are valid within its territories so long as it maintains a legal order by its own forces. The fact that the right is in general ascribed to a state, which has been wronged under international law, to attack the territory of the offending state unless satisfaction is given by it, is merely a consequence of the primary claim that the rules of international law should be respected.[1] We neglect here complications which may arise through theories of semi-sovereign states, and so on.

There can be no doubt that this view belongs to the sphere of natural law. The original right of the state in regard to its subjects certainly cannot itself consist in any ordinance of the state. Actually one thinks of a supernatural power which belongs to the essence of the state, although this mystical power is determined by the actual power of ruling. In a corresponding way the external rights of the state are thought of in terms of natural law. The right of territorial integrity is just as original as the right in re-

[1] See Strisower, *Der Krieg und die Völkerrechtsordnung*, 1919.

gard to its own subjects. If one talks of a special 'recognition' as a condition, one lands in a contradiction. For the ground of the binding force of the recognition must lie in the principle of natural law: *Pacta servanda sunt*; whilst this principle presupposes for its application parties which confront each other as practically independent. The validity of the customary law of nations can also not be referred to an authority. For of what kind could such an authority be? Could it be those states, considered as forming a community, which habitually follow certain rules? But actual application of certain rules in the practice of states cannot make the rules in question into laws, for the states in applying them are not intending to legislate. It is only an occasion which leads states to regard themselves as justified and laid under obligations in accordance with the rules. In the same way, *e.g.*, noble birth is an occasion which gives rise to certain duties. *Noblesse oblige!* But it does not on that account itself ordain anything! Here again what is determinative is merely a consciousness of justice which arises naturally. Contractual law actually rests on the psychological force of the principle: *Pacta servanda sunt*. To what confusion it leads when the standpoint of positive law is applied to international law can best be seen in the theory of Jellinek and others that international law is constituted by the will of the state which is under an obligation. 'Positive law is certainly constituted only by the will of the state. The law of nations is positive law. Therefore . . .' A typically confused train of thought! The later volition of the state not to fulfil those of its obligations which arose through an earlier volition certainly dissolves the obligation, if there is no law above the will of the state. Truly a remarkable legal obligation!

But the basis of natural law in all this is shown particularly clearly by the following fact. The right of military action on the occasion of suffering a wrong under international law is regarded as an immediate consequence of the originally existing right of the injured state. Here there is certainly no judicial authority, provided with executive power, which can effectively regulate the exercise of the right. Therefore the existence of the right must

include as an essential part of it that every state must protect its own right, when that is infringed, according to its own estimate. If, as sometimes happens in recent literature on international law[1], war is regarded as a phenomenon outside the sphere of law and therefore the existence of a special and ultimate coercive measure under the law of nations is denied, there ceases to be any sense in talking of the actual rights of individual states. Nothing remains but a system of moral rules. But, since nevertheless certain rights are assumed to belong to states, this assertion becomes a glaring contradiction. It is as if one called a wooden handle without a blade a knife. The state of affairs which thus arises is, however, what the theorists of natural law call 'the state of nature,' which is by no means supposed to be without a law, but only to be without a supreme authority which effectually regulates the vindication of rights.

It should now be noted that this way of viewing the facts in terms of natural law in no way brings the law under a unifying principle, and therefore does not support the idea of an actual system of law. For a norm, in the sense appropriate to natural law, means only *the existence* of certain rights with corresponding duties in the relevant persons. A norm is not a higher principle which constitutes the rights in question. This lack of a unifying principle shows itself in various ways in international law as actually applied. An act of a state can be contrary to international law. Nevertheless it is always valid within the state, and is therefore an actual exercise of law, although the injured state itself exercises its rights when it protests against this act and if necessary employs force.[2] Nay more:—Unless war as the extreme act of coercion under international law is inconsistently excluded, each state becomes for itself the highest court of appeal for deciding on the justice of the war. So each of two belligerent states takes *legal action against the other*, if they both appeal to international law.

But for Kelsen it is impossible that there should fail to be a

[1] Cf. Strisower, *loc. cit.*

[2] See Verdross, p. 163.

unity in the domain of the legal ought. According to him, the state is a system of legal norms. If the state is regarded as sovereign, this must mean, according to him, that the legal order of the state has independent validity, so that the basic norm, which must always be presupposed, expresses the validity of the special constitution of the state. Because of the necessary unity of the law, it is then impossible to recognize anything as law except what is either included in the constitution of the sovereign state in question or is made into law by it. According to him, international law could then of course be valid, because the individual sovereign state recognizes it in its constitution. But this amounts to saying (i) that every breach of international law on the part of a state which recognizes that law is to be regarded as an unconstitutional enactment[1]; and (ii) that the legal order of every other state acquires validity, even within that state itself, through being recognized in the constitution in question. (In this recognition the state-organs which exist according to the constitutions of the various states are recognized as legal in so far as they function in accordance with international law.) On this view a plurality of sovereign states from one and the same juristic standpoint would be a legal impossibility. But one would always be able to regard one's own state juridically as sovereign in which case all other states would from the juridical point of view be subordinate to this one.[2] The assumption in question of a basic norm would indeed be a mere hypothesis, but it would always be one which is irrefutable from the juridical standpoint, because the basic norm which has always to be presupposed cannot itself be positive law. "The material which is to be interpreted as law is not law *a priori*; it becomes so only by means of the legal hypothesis by which it is so interpreted".[3]

It is very interesting to compare this construction of international law, which Kelsen describes as possible, with that of Jellinek. The latter represents every state as provided for itself with orig-

[1] *Allg. Staatslehre*, p. 123.

[2] *loc. cit.*

[3] p. 129; Cf. p. 307.

inal sovereign right in internal matters, and holds that external obligation arises through self-commitment. This leads to the dissolution of the legal unity and to the assumption of a plurality of mutually independent metaphysical powers. Kelsen, on the other hand, regards it as an at least possible legal view that the British Empire, *e.g.*, should be subordinate to the Swedish or the Norwegian state as an ordinary municipality to the state to which it belongs. The former point of view is of course more closely related to the legal metaphysics which is alive in the common consciousness; the latter is more consistent, but wholly unrelated to reality.

However, Kelsen, whilst recognizing the juridical possibility of the above-mentioned point of view, prefers another way of constructing the legal unity. For the former would, he thinks, be connected with a subjectivist theory of knowledge[1] and would lead "in the last resort to a complete negation of law".[2] The other juristic construction, which he prefers, would assert the "primacy of the system of international law", and would deduce the validity of the legal orders of the several states from a general norm which would determine the condition of statehood in reference to international law. This norm would be given through the general recognition, in advance, by the community of international law with regard to a new state. The condition in question would be this, that "an independent dominion over men within a definite territory is established".[3] The consequence, however, is now that a "state-act" which is contrary to the law of nations is also invalid within the territory.[4] Suppose that we were to accept the view that the laws of the individual state are derived from the law of nations, and that the state-organs, which exist in accordance with the constitution of a state, function legally, even within

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[1] pp. 130 *et seq.*

[2] p. 132.

[3] pp. 126—127.

[4] p. 125. Cf. Kelsen's writing, *Das Problem der Souveränität und die Theorie des Völkerrechts*, 1920, pp. 146 *et seq.*, on which Kelsen's theory of international law is more elaborately based.

the state, only on the basis of general recognition. Then obligations under international law would indicate the limits of the legal power of the acts of the state-organs, even within the state. But here Kelsen has departed, for the sake of consistency, from the actual living conception of law, just as he did on the first-mentioned hypothesis, and he lacks all basis in reality.

Verdross tries to avoid this consequence and to remain in touch with reality. He conceives a "constitution of international law". This is supposed, on the one hand, to determine the validity of international treaties and of customary law, and, on the other hand, to constitute directly *eo ipso* the inner competence of the state as an independent sphere of law. It does this because it designates the state-organs, which exist in accordance with the special constitutions of individual states, as organs for acts of the law of nations.[1] We have already shown that this "constitution of international law" is just pure natural law, and that the *de facto* recognition of this natural law in the practice of states is a merely social-psychological fact which can in no way affect the question of legal validity. It is completely mistaken to describe the "constitution" in question as "a delegating principle"[2] or as "assigning" inner competence to the several states. Its content is simply the following. Because of the right of self-determination of the states, the special constitutions independently determine the state-organs and the legal validity of certain acts within the state. But at the same time the individual states are responsible before international law, which is valid according to this same "constitution", for their acts, which are always valid within their own territories. That is to say, it is involved in its very content that law lacks a unifying principle.

Nevertheless, the difference between Kelsen and Verdross is not essential. Kelsen too introduces a basis of natural law which is incompatible with the unity of law. For, according to him, there belongs to international law a special means of coercion, *viz.*, war. War, he says, "is permissible, in the sense of the norms of

[1] pp. 126 and 134.

[2] p. 131 A.

international law which relate to it, only as a reaction, *i.e.*, only under quite definite conditions laid down by international law".[1] But the law of nations does not posit any objective court of appeal, which would decide who is in the wrong, and therefore on which side the war is a legal act. Therefore, he says, "both coercion and resistance to coercion are counted equally as war by the law of nations, and therefore as legal acts".[2] That is to say, each party can establish before itself as final court of appeal that it has suffered a wrong in international law, and can declare war. The states and "the organs which declare and wage war", become "in the first degree organs of the international legal order".[3] Nay, international law does not merely permit war on the occasion of an international wrong being suffered; it enjoins this, though the injured state is to decide in every case "according to its own judgment" as to the duty in question.[4] So when, as is usually the case, both the belligerents appeal to international law, both coercion and resistance to coercion are objectively lawful, nay they ought to occur. The basis in natural law of the living international law here appears without disguise. Since the rights of the individual states are not constituted by any higher power, the right to exercise force on suffering a wrong, which is bound up with every right as a power, is established and exercised by each party for itself *in concreto*. It is obvious that such metaphysical assumptions of original supernatural forces, rooted in ancient superstitions, must goad nations who feel themselves injured in their "rights" to bloody wars, as Lundstedt has brilliantly shown in his work *Superstition or Rationality in Action for Peace*, 1925, p. 161 *et seq.* One drapes oneself in one's own egoism with the cloak of an "organ of international law". Men have always desired *panem et circenses*. But the use of a costume, which has been sewn in the work-room of a metaphysic of international law based upon ancient superstition, on the occasion of conflicts of interest

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[1] p. 125.
[2] p. 213. Cf. p. 248.
[3] p. 112.
[4] *Das Probl.*, pp. 264—265.

which already suffice to excite nations against each other, is nowadays far too expensive a pleasure. No doubt the law of nations contains highly natural rules, for that co-operation which is useful to all states, and these must be respected if a state is to take part in the general intercourse and is not to meet with universal mistrust. But the cloak of natural law is nowadays an obvious cultural danger.

But, since Kelsen's theory seeks to derive the validity of state-law from international law, it reverts as a whole to an ancient superstition concerning the supernatural power of the state, which has become a cultural danger. This is so notwithstanding decided tendencies in the opposite direction.

(b) *The functions, the forms, and the organs of the state.*

In *Allg. Staatsl.* there is an exhaustive discussion of the functions of the state in the light of Kelsen's view of the state as the unity of law. A legal prescript is held to be primarily an ideal rule of coercion. Therefore only those acts are primarily to be ascribed to the state which are an application of such rules, whereby this application itself can produce new coercive law. It is therefore clear that the so-called administration is not a genuine act of the state, if it does not have the character of an application of existing rules of coercion. It merely involves such action of the "state-organs" as shall enable them to avoid being subject to legal coercion themselves. If, *e.g.*, "the state" through its "organs" builds hospitals, runs railways, etc., this is not a primary act of the state, but only the "behaviour in avoidance of coercion" of the active individuals in question. So these function as state-organs just as little as private individuals who fulfil their secondary legal obligations and thus keep free from legal coercion.[1] Conversely, private legal transactions must be regarded as a primary state-function, since they are both an application of higher coercive legal prescripts and a production of new ones.[2] The whole of the usual view of state-functions is thus stood on its head.

[1] pp. 238 *et seq.* This latter point has been treated above, p. 271.

[2] p. 236.

The inversion is best seen, however, in Kelsen's account of the relation between a judicial decision and an administrative act in so far as the latter ordains compulsion. The coercive rules of administrative law are, according to him, concretized by the administrative authority in essentially the same way as the so-called civil and penal laws are concretized by the courts. "An administrative authority establishes the existence of the state of affairs which is laid down by the general norm as the condition for an act of coercion, and attaches to it the consequence of a breach of the law, the so-called administrative coercion, *e.g.*, fine, loss of freedom, or executive action. Thus the act of an administrative authority can be described, with the same correctness or incorrectness, as being, like a judicial decision, the determination of contested or obscure law."[1] The only difference is alleged to be of a technical kind concerning organization, *viz.*, that the courts are independent. Through the modern tendency to convert administrative procedure into a form of judicial procedure, even this distinction would tend to evaporate.[2]

Here, however, Kelsen is fighting, not against an abstract theory, but against the living ideas of law which manifest themselves in the statutes. According to these ideas, a judicial decision in civil and criminal cases is from time immemorial a protection of already existing legal rights; in the civil law of rights individualized through an object, in the penal law of general legal interests. These rights in the wider sense, with the corresponding duties on the part of others, and with the right which attaches to them of exercising coercion in the event of their being infringed, originate, in so far as they are material, from the substantive law. But they are completely independent of the formal rules of legal processes, which are secondary in relation to the substantive law. In the procedural rules the state makes use of its *imperium* in order to regulate the mode of exercizing the coercive powers which are involved in the rights themselves. With this is bound up the following consequence. On the one hand, impartiality in weigh-

[1] p. 238.

[2] *Loc. cit.*

ing the interests of the parties is a principle for the laws in question. (Consider the will-theory and the confidence-theory in regard to the law of contract.) On the other hand, the judge has to establish the actual legal state of affairs which existed before the case was tried, and therefore he is necessarily regarded as completely bound. Here there are notions of natural law concealed in the legal conceptions which are shared by the legislator; but these are hidden because of the power of the legislator to regulate the content of the legal relationships which exist prior to the procedural rules. The case is quite otherwise with administration. According to the living view of law, the state does not here use its *imperium* to uphold already existing rights. It uses it for the purpose of the general welfare, and therefore the administrative authority is free to decide in each case, within the limits laid down for it, from the point of view of utility. It may be that here too ideas from natural law concerning the rights of individuals have crept in, so that even here one talks of "the public rights" of individuals. But, even so, these rights are always admittedly established in the public interest and not through weighing the interests of the parties concerned. And in administrative coercion the state is obviously determined only by its own interests.

Now Kelsen has indeed given no thorough analysis of natural rights. He ascribes to them the meaning that a certain sphere of natural freedom may not be infringed by positive law.[1] This is only a possible inference from the basic theory. "Natural" rights are undoubtedly imagined metaphysical forces in regard to certain actions towards other persons. And these forces, if attacked, generate from themselves a similar force to exert coercion. Such rights certainly exist independently of physical powers, and apart even from the help of the state-power. Yet it is the foundation in natural law of the common distinction between genuine judicial decision and administrative action which leads Kelsen to reject this distinction.

It is, however, extremely questionable to regard a legal prescript, as Kelsen does, as imposing an obligation in a different

[1] p. 59.

sense from that in which the prescript itself does so. The civil and penal laws, according to their own meaning, impose obligations in such a way that they establish certain rights (rights in the proper sense of the word and general legal interests) with powers of coercion attaching to them. It is in respect of these rights that the obligation exists, and the function of the judgment is to make the concrete pre-existing legal relationship indubitable. Again, administrative regulations, of their own nature, impose obligations in virtue of their being issued by the authorities. But, on Kelsen's view, the binding force of legal prescripts has a quite different significance. It includes in both cases the feature that the actual application of the rules of coercion through concretization on the part of the state-organs is an act belonging to a certain ideal complex, *viz.*, the Law. This is a meaning of imposing obligations which no legislator before Kelsen's time ever dreamed of. And yet the legal obligation must originate in the meaning of the legal prescript itself.

But what is still more questionable is the following. Suppose that the meaning of legal prescripts derived from ideas of natural law is to be ruled out, as with Kelsen, then, not only the formal sense of an obligation, but also its *content* in matters of private law and criminal law becomes quite different. According to the view of law which is alive in legislation also, the judge has certainly to establish the concrete legal situation which actually existed before the case was brought before him. Therefore, on this view, there must be other rules of law beside the always inadequate statutes. Jurisprudence has actually developed and will develop rules, essentially from the standpoint of equity upon the basis of legal material, *viz.*, the laws themselves in the first instance and the practice of the courts in the second. Now these rules are regarded as "positive law" just as much as the statutes. For Kelsen these rules, as not having come into existence constitutionally and as founded upon natural law, are merely ethico-political postulates. So even the content of legal obligation is for Kelsen different from that which agrees with the sense of the

statutes. And yet, according to Kelsen, statute-law is determinative for the legal ought.

Exactly the same peculiarity shows itself in Kelsen's account of the various forms of state. "A state-form is a legal form considered as a form of production of law."[1] This definition, which has to be interpreted in the well-known Kelsenian way, makes it necessary to ascribe at any rate to some historical constitutions a quite different obligatoriness from that which is obviously intended in them. We stumble upon presuppositions belonging to natural law both when we consider the historical system of ideas from which various constitutions originated and when we consider the living legal conceptions in which they have continued to exist. These give to the obligations created by these constitutions both a quite different formal meaning and a different content from those which they should have according to Kelsen. Here are some examples. Consider, *e.g.*, the theory that, in a constitutional monarchy, the monarch alone gives positive force to the laws, whilst the consent of Parliament has a merely negative significance as a *conditio sine qua non.* Kelsen regards this theory as one which conflicts with positive law and which is put forward on account of certain ethico-political postulates. The monarch is held to give the legal command, and the Parliament together with him to determine the legal content. This is said to conflict with the constitutions in question, because, according to them, the consent of both is necessary for the validity of a law.[2] Consider, again, the fact that a judge in a constitutional monarchy is described as a secondary organ (a deputy) in relation to the monarch, and that the Parliament is similarly described in relation to the people, although constitutionally both are completely independent. This is held also to conflict with positive law.[3] In these cases too, it is alleged, it is merely a political tendency which expresses itself.

Nevertheless, the "theories" in question are stated explicitly

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[1] p. 321.

[2] pp. 281 and 330 *et seq.*

[3] pp. 316 *et seq.*

in these constitutions themselves. The old Bavarian constitution of 1818 (Tit. II, Sect. 1) ran as follows: "The king is the supreme ruler of the state, he unites in himself all the rights of state-authority, and exercizes them under the conditions issued by him and laid down in the present constitutional charter." Cf. with this Tit. VII, Sect. 2: "Without the advice and consent of the Orders of the kingdom no general law ... may be ... promulgated." Tit. VIII, Sect. 1 ran: "Jurisdiction issues from the king ..." But Sect. 3 says: "The judges are, within the limits of their official authority, independent . . ." There can be no doubt whatever that the meaning of these formulas is that the state-authority possesses certain supernatural powers of ruling, to which corresponds the duty of obedience on the part of the subjects of the state. These powers are possessed by the king. So it is plain that he alone can give to acts of legislation the force of law. But, if he gives orders outside the limits of the constitution, he is not using the powers in question and therefore he imposes no obligation. The consent of the Estates is therefore not a power from which the binding force of the laws can in any way be derived, since they possess no sovereign power. But it is a condition for the use of the mystical powers of the king. Correspondingly, the judge, deciding independently, can of course make his decision binding only by making use of the powers of the king. Such a point of view undoubtedly prevails in the original constitutions of constitutional monarchy in the XIX-th Century, and it is only through the victory of parliamentarianism that it has been undermined, so that gradually only the phraseology has remained. Along with this point of view, which manifests itself in the constitutions themselves, there goes, as an immediate accompaniment, the following. The parliament must not make it impossible for the king as the supreme authority in the state, *e.g.*, by refusing to grant taxation, to carry out his own policy of government. And thus the clotted mysticism receives a practical significance, which is lost only with the collapse of the mysticism itself through the triumph of parliamentarianism. Similar remarks must of course be made about Kelsen's criticism of the theory

that the popular representation merely exercizes the powers of the people itself.

The fact that Kelsen criticizes the above theories as contrary to the constitution, in spite of their resting on the very meaning of the latter, can be understood only by reference to the fact that he uses a different conception of the legal ought from that which they use. Suppose that the legal ought is held to consist in the fact that certain acts belong to a particular ideal complex, *viz.*, "the legal system". Then the only question to be asked concerning the constitutions which are basic for the determination of these acts is this:—Under what circumstances does an act have this character according to them? In that case there is no occasion to trouble about anything but the objective nature of the conditions under which a constitution declares an act to impose an obligation. But suppose that, as is undoubtedly the case in certain constitutions, the imposing of an obligation is held to be valid only in regard to certain mysterious powers of the state-authority, which powers are possessed by certain persons but can be used by others. Then it is useless to ask, as Kelsen does, merely about those features of the relevant conditions which can be established by external observation. From a purely objective point of view the alleged paramount position of the constitutional monarch certainly conflicts with the conditions laid down in the constitution for the binding force of legislation. But what is meant is not something objective, which could be established by external criteria, but occult powers of rulership which are held to be present only in the king and not in the parliament. This does not of course exclude the possibility that in certain cases the king can use his occult powers, and thus impose obligations, only with the assent of parliament. Much the same must be said of other such theories which Kelsen criticises. Since the meaning of certain constitutions is mystical in the way described above, it is mere monstrosity when Kelsen talks in such cases of a contradiction against those constitutions; for as a "positivist" he is claiming to derive the legal ought directly from the constitutions.

Finally we must say something about Kelsen's application of

the notion of a state-organ. As is well known, he relates this notion to the legal order, so that the latter itself works through the state-organs. The act of an organ is, according to him, "imputed to" the legal order. Now, on Kelsen's view, the legal order is a system of judgments. But what can it mean to say that judgments, which certainly have no interests to be realized, employ men as their organs? Hitherto it has been said of state-organs in the legal sense that the rights of the state to advance its interests are exerted through the organ. This is intelligible, because on that view the state is a unity of certain men with common interests, and this unity should have rights to further those interests and to use by means of an organ the occult powers resident in these rights for that end. But for Kelsen the legal order itself, *i.e.*, the judgments of the law, is supplied with mysterious powers. It is supposed to act through the organ, using its legal powers, but without any end which this exercize of power might serve. These modes of expression would have been impossible for Kelsen, if he had not, without noticing it, borrowed from the natural way of looking at things. For him, though he does not notice it, an organ of a legal order is the same as an organ of a legal community constituted by that legal order. On p. 171 we read: "If we determine the appropriate sphere of activity of an organ by reference to the order which instituted that organ for the production of norms, *i.e.*, if we determine it by reference to the legal basis of its existence, then it is only directly an organ of the legal community which is constituted by the order which instituted the organ." Immediately afterwards it is said: ". . . the ascription of the function of an organ to a partial order—the description of an act as the act of a partial community." Obviously both expressions are intended to have the same meaning. But the legal order is supposed to be a system of judgments. The "community" constituted by it must, however, obviously be a community of men. How then can they be treated as identical? There is here a slip in Kelsen's thinking. But, if he had not slipped in this way, he could never have put forward his theory of state-organs as organs for the judgments of the law. Only the transition to a community of men, as posses-

sors of the organs, can give a meaning to his words. On p. 334 *et seq.* Kelsen says that, even in a despotism, *i.e.*, a completely unlimited monarchy, the ruler must be regarded as the organ of the order in question. "It is therefore an impossible idea that the ruler of any community whatever, of any social group constituted by a compulsive order, should not be the organ of the latter." So a despot, who feels justified in treating his people as slaves, is the organ of this group of slaves! You might just as well say that an animal-trainer, who has a right over his animals, is an organ of the lions, the tigers, and the horses! A slip in one's thinking which may be necessary in some ways may become dangerous in others.

Nevertheless, Kelsen's theory, with the various forms which it has taken among his pupils, is very well worthy of attention. In particular it cannot but be useful to jurists, who wish to attain to real clearness about their own presuppositions, to study thoroughly the *Allg. Staatsl.*, which expounds the system of ideas in question in a concentrated yet clear treatment with a wealth of material as basis. In the present review I have been able to touch only upon certain questions of principle. Suppose that one actually makes the assumption, which has been made from time immemorial, that the jurist, as guiding the judge, reveals a law which stands above the latter and is valid for him. Suppose, further, that it is assumed that this law does not consist in rules which a judge has already actually applied and which exist in virtue of their actual application, and that it does not consist in rules whose application would be useful for certain ends. Suppose, on the contrary, that the law consists in rules which have a special objective existence, independent of such social-psychological force as they may happen to possess, a force which must be limited in the case of all social rules. No one who holds these views can afford to ignore Kelsen. Suppose that the natural law is excluded as merely subjectively valid, and reference to social ends is excluded as "meta-juristic", from the exposition of existing constitutions and laws, and therefore that the conclusion is drawn that there must be a special kind of juristic

knowledge which is not concerned with the law of nature. Then Kelsen's position must be accepted, and it is his merit to have fearlessly drawn the consequences.

Through Kelsen's work it is, however, obvious that mediaeval scholasticism still has a stronghold, not only in theology, but also in jurisprudence, and that this bears the traces of its origin in the Roman *pontifices*. In *Allg. Staatsl.*, p. 332, Kelsen says: "In the mind of a primitive man the supernatural origin of the norm becomes the idea of the divine nature or the divine origin of the ruler." This is said to be superstition. But why should it be so? Is not the ruler juristically the organ of the supernatural law? Is he not, therefore, supernatural for juridical cognition? But the stronghold of scholasticism in jurisprudence has been so greatly weakened by Kelsen, through his demolition of all its outworks, that it can hardly defend itself further against the attacks of sound reason.

V

The Conception of a Declaration of Intention in the Sphere of Private Law. 1935

'Is Saul also among the prophets?' Roughly speaking, what has a philosopher to do with jurisprudence? Whilst it was still held that an objective rational law is of importance as the basis for interpreting actual laws, and even more so as something which stands over and above those laws, the line of separation between philosophy and jurisprudence was not hard and fast. But it has now penetrated into the common consciousness that only *positive* law can serve as a basis for legal decisions, and that rational law (if such there be) is of importance only as an ideal for legislation, or, as Stammler puts it, as the *rightful* and not necessarily the *actual* law. So jurisprudence has become one of the special sciences. Like physics and chemistry, *e.g.*, its function is merely to establish the facts within a certain region, to reach general principles by induction, and to make deductive inferences from the inductively established results. The representatives of the special sciences have long ago issued to philosophers the command 'Hands off!' But what induces a certain boldness in the philosophers, notwithstanding this command, is the fact that the *notions* which are used for describing what is actual may very well be delusive. If they disclose to analytic scrutiny a contradiction, they are notions only in appearance. In that case there is merely a concatenation of words without meaning. And the alleged fact, which is supposed to have a nature defined by the 'notion', would be no fact at all. Ever since Socrates' time it has been held that one of the highest tasks of philosophy is to analyze notions which are in common use in order to attain a *real* world of scientific concepts, which must be internally coherent. For the reality, with which science is concerned, cannot be de-

scribed by means of judgments which contradict each other. No doubt it is always possible to put such judgments into words, but these words have no meaning. Therefore no science which claims to describe reality can evade a conceptual analysis of this kind.

1. What is envisaged when a certain fact within the sphere of private law is described as a declaration of intention?

All lawyers know how fundamentally important the notion of a declaration of intention is in jurisprudence. Private 'legal transactions', whether one-sided or mutual, *e.g.*, offers, acceptances, agreements, etc., are universally regarded as declarations of intention. But even laws, ordinances, and judicial decisions are at least sometimes regarded as declarations of intention on the part of the state. But, since the latter usage of words is not established, and in any case the existence of a state-will is disputed, I have here confined the enquiry to the sphere of private law, where there is no doubt that this point of view is appropriate.

The question, then, is this. What is to be understood when it is said of a private individual that he makes a declaration of intention having legal content? At first sight it might seem that the question is trivial. Of course one means that the person makes a statement concerning his volition in reference to certain legal relationships. But the case is not quite so simple. A volition presupposes, not merely a proposed end, an aim, but also a *course of action* by means of which this is thought to be capable of attainment. Otherwise there is no question of a volition, but at most a wish that something might happen. The object of a person who makes a legal declaration of intention as a private individual is perfectly plain; he aims at the coming into existence of a certain legal relationship. A person, *e.g.*, who enters into a contract for the purchase of a certain house, has for his object that the house shall become his property on the conditions laid down in the contract. But this makes obvious at the same time also what is the course of action which the buyer must decide upon in order

to attain his end. The action required is evidently just that *declaring of intention* which is what the contract from his point of view involves. Whenever a declaration of intention having legal content is made, the end in view is that a certain legal relationship shall come into being. And the action, which is the means to realizing this end, is the declaring of a particular intention. The latter is, therefore, the immediate content of the volition. But it is then obvious that the intention declared in regard to the legal relationship has as its content the act of declaring it. But at this point the question concerning the content of a declaration of intention in the sphere of private law ceases to be trivial. The declaration of intention would be a declaration concerning the volition to make just that declaration. This declaration which one wills to make would in turn be a declaration of the volition to make just that declaration. And so on to infinity. Take, *e.g.*, an offer of an article for sale. What is it, considered as a declaration of intention? A declaration of a *volition* to make an offer of the article for sale. The offer which one declares oneself willing to make is itself a declaration of one's *volition* to make it. So I never catch up with the offer itself. The dog chases its own tail. In order that a volition may be declared it must be possible to state it without the declaration itself being included as content in the volition.

Let us consider a contract to deliver something. One engages oneself to deliver a certain quantity of oats within a certain stated period for a price payable on demand after the goods have been received. What is declared in such a contract? It is clear from the foregoing that it cannot be a volition to bind oneself mutually to carry out the above-mentioned undertakings. For the action, by means of which that end is to be attained, just *is* the declaration which constitutes the contract. But could it be said that the parties to the contract simply inform each other of certain mutual rights and duties which already exist or will arise in future? No; for the position is that only the mutual declaration itself can bring about the intended legal relationship. That a piece of information about a reality should play any part in bringing that reality into

existence is absurd. An astronomer who made a statement about the position in which the planets would be at a certain moment, and then asserted that they will take up this position because of his statement, would at once show himself to be crazy. Now a declaration of intention in the sphere of private law is always a declaration concerning certain legal relationships or certain rights and duties. From this it follows that the 'declaration of intention' in question does not express either an awareness of the actual nature of one's own volition or an awareness of certain rights and duties as actually existing, but yet it does indicate an idea of certain rights and duties. That is to say, it expresses what is called an *imagination*, as opposed to a *judgment* which is as such an awareness of reality. In so far as the contract for delivery becomes legally effective, it does so *inter alia* because the respective declarations give a common expression to the imaginative idea of (i) the purveyor's duty to deliver to the other party a certain amount of oats within a certain time, and the other party's right to demand this delivery of him if he should delay, and (ii) the other party's duty to pay a certain sum after receiving delivery, and the purveyor's right to demand this payment of him.

On the other hand, it is obvious that it is not sufficient for the existence of a genuine 'declaration of intention' in the sphere of private law that a certain imaginative idea about rights and duties should be expressed. Suppose that A and B together draw up a written draft of a contract of delivery; but neither of the parties, as we say, binds himself to anything. The draft is to serve merely as basis for a *possible* future agreement. Plainly in this case too an imaginative idea is expressed in common concerning mutual rights and duties arising. But no one would regard such a draft as a mutual declaration of intention. *What* is it then that needs to be added? It is clear from the foregoing argument that it cannot be a declaration that one now also wills that the legal situation detailed in the draft shall become actual. Still less can it be a mutual announcement that one is actually committed to the respective actions.

In order to understand what more is necessary for the coming

into existence of a declaration of intention in the sphere of private law it is absolutely indispensable to take note of the fact that language does not only express *ideas* or communicate *ideas* in social intercourse.

If I tell someone that a horse has bolted, I do certainly express a certain idea and I intend to communicate this idea to him. But, if I ask '*Who* comes there?', I neither express a certain idea nor do I intend to communicate a certain idea to the person questioned. Certainly grammarians say that the principal parts of a sentence are the subject (that of which something is asserted) and the predicate (that which is asserted of the subject). But in the above interrogative sentence there is nothing about which anything is asserted. For the word 'Who', which here functions as grammatical subject, does not express the idea of anything of which the predicate 'comes' is asserted. Why then does the questioner say 'Who'? By doing so he gives expression to his desire to gain certainty about a matter in regard to which he lacks it. He sees that a person is coming. But he lacks all knowledge of his name, and he strives to get rid of the feeling of dissatisfaction associated with this lack. This *striving* is undoubtedly accompanied by the idea of a future state of certainty as an end, in which the present state of dissatisfaction will have ceased. But in itself it is in no way an idea. The word 'Who' is a reflexive expression of this desire, and the questioner directs this utterance to the other person in the hope that the latter will give him the desired certainty. Suppose I say: '*May* the weather be fine.' I certainly express an *idea* of future fine weather; but in using the word 'May' I also express something which is in no way an idea, *viz.*, the feeling of pleasure which is associated in me with that idea. In these cases the relevant words are expressions for actual practical attitudes or actual feelings.

But certain words or verbal forms, on the other hand, serve in social intercourse as means to *evoke* a certain practical or emotional attitude. An instance is the imperative form. Suppose a person issues a command to another, *e.g.*, 'Go away' or 'You must go away'. This is not, as is often alleged, a declaration of his own

volition. For the object of the volition is to make the other person take his departure, and here the command serves as a means and is therefore the action to which the volition is directed. But a declaration of one's volition cannot be the content of the volition which is declared. The imperative form, like a gesture of command, has in social intercourse simply the function of mechanically influencing action in a certain direction. Legislation constantly uses the imperative form, *e.g.*, '*Let* it be so', '*Let* him know', 'He *shall* be punished', etc. And it obviously does so because of the psychological effect which the imperative form has, *especially* when there is authority behind the words, as there is in legislation which is in constitutional form. But a person who as a private individual makes a legal 'declaration of intention', whether alone or in conjunction with others, functions as a legislator within a certain sphere, either by himself or with them. In so far as the declaration has legal effect, he has behind him, in making it, the authority represented by the law governing the validity of such declarations of intention. And so the imperative form acquires a special force in this case too. It is natural that the state-legislator, who thus puts the private individual in the position of legislating within a certain region, requires the latter to use the same technique as himself, *viz.*, to function as making regulations. Moreover, when a person says that he *binds himself* in regard to another person as acquiring a claim on him, he has in view an imperative 'I *must* do this or that for you'. This imperative, which primarily concerns the speaker, has the effect on the other party that he feels himself empowered to demand the performance in question. Just as I am influenced by this ' I *must*' in a passive way, so the other party is influenced in an active way by the 'You *shall* be able to demand this performance of me' which is tacitly or explicitly bound up with it. This psychological effect on both parties, which is brought about by the use of the imperative form, is present in every promise made to another person, even when it is not legally binding. It provides the basis for co-operation between persons who are free with respect to each other. When the promise is of a legal nature the only addi-

tional factor is that it is declared that certain rights and duties of a legal nature *shall* come into being. That just such declarations acquire what is called legal validity through legislation does not depend only on the fact that the legislator wishes to leave to private individuals freedom to determine their mutual relationships *in their capacity of* legislators. It depends also on the fact that the use of the imperative form in the above-mentioned way exerts a psychological influence, active and passive respectively, on the parties concerned, from its own nature and quite apart from the legal consequences of a breach of a legally binding promise.

It is thus clear that what must be added to the mere expression of an imaginative idea concerning rights and duties, in order that there may be a 'declaration of intention' in the legal sense, is the *imperative form*. So, if one merely declares 'I transfer the right of ownership to you' or 'I make this offer' or 'I accept the offer', one is thereby uttering an imperative. For a transference of the right of ownership, considered as a certain declaration, means the declaration that the thing *shall* now be the recipient's. An offer, considered as a certain declaration, means that the rights and duties mentioned in the offer *shall* come into being, provided that the recipient makes a corresponding declaration. Acceptation means that the rights mentioned in the offer *shall* come into force. Thus, a 'declaration of intention' within the sphere of private law is, in its essence, a declaration made by a private individual, which expresses in the imperative form an imaginative idea concerning the coming into being of certain rights and duties. This, of course, tells us nothing as to how far such a declaration is legally efficacious. The circumstances under which the latter condition is fulfilled are determined by law, supplemented by custom having the force of law. Whenever a 'declaration of intention' thus acquires juridical relevance, one has in mind a declaration of the kind described, no matter how the idea may be expressed. So the proposed definition leaves it undetermined how far it is necessary that the person himself *intends* to make an imperative declaration, or whether it is enough that his overt actions *present themselves* as expressing such an intention. The fact that

it is no part of the definition that the declaration shall be directed to a certain person depends on the fact that this is not necessary in all cases though it is required in some. This is the case, *e.g.*, with a testamentary disposition.

It remains, however, to investigate *what* a person who makes a 'declaration of intention' has in mind when he expresses an imaginative idea of rights and duties coming into being. But before we begin this there are two preliminary questions to be discussed.

2. On the possible relevance of error as a discrepancy between the intention and the declaration in a 'declaration of intention'

(i) It is impossible that a discrepancy between the volition to bring about a certain legal state of affairs by means of a declaration, and the declaration considered as a declaration of that same volition, should be relevant. For, as is plain from the preceding argument, such a declaration is an impossibility.

(ii) A discrepancy between the volition to bring about a certain legal state of affairs by means of a declaration, and the content of the declaration considered as an imperative of the kind described above, is possible. But, as such, it cannot be relevant. For what is relevant here would consist in a certain opinion about the legal consequences of the declaration made by the person. To say that he aims at bringing about a certain legal state of affairs by means of his declaration means that his action is determined by his belief that the declaration really will lead to a certain legal result. But, whether this belief be correct or incorrect, *it* cannot exert any influence on the legal result. For a belief as to the actual consequences which a certain action will have cannot exert any influence on those consequences.

(iii) A discrepancy between the intention to make a certain declaration and the declaration itself may be relevant, if it arises either (a) because one does not intend to use the words in question, or (b) because one uses them intentionally in the belief that

they express something other than that which they actually do.[1] For here what is relevant is not a belief about the actual legal consequences, but a belief which is not related in any way to the legal system. It is with the relevance of such discrepancies that § 119 of the *Bürgerliches Gesetzbuch* is really concerned, if one overlooks its mistaken mode of expression.

(iv) If the other party understands that the person who makes a 'declaration of intention' does not do so for any legal purpose, but for some other reason, *e.g.*, in jest or by way of giving an example, this can be relevant. This is not *because* a certain opinion concerning the nullity of the declaration from the legal standpoint exists here. It is because the person who makes the declaration is *prescribing* something only in appearance, since, although he makes it in the imperative form, he shows at the same time that he does not wish it to function as an imperative. The imperative is present only in appearance. But here the person who makes the declaration may be mistaken through believing erroneously that the other party cannot misunderstand it. So it seems that a discrepancy between the object and the character of the declaration may be relevant. In reality what is relevant is whether the declaration is understood as having or as not having the character of an imperative. This is what § 118 of the *Bürgerliches Gesetzbuch* is concerned with. "A declaration of intention which is not meant seriously, and which is made in the expectation that its lack of seriousness will not be misunderstood, is null and void." On the other hand, the content of § 116 is from an objective standpoint quite meaningless. It is intelligible only as a consequence of a perverted view of the nature of a 'declaration of intention' in the sphere of private law. This § runs as follows: "A declaration of intention is not null and void merely because the person who makes it makes secretely reservation that he does not will what he has declared . . ." Here there can be no question, as there

[1] An example of the former possibility is the case of a misprint. An example of the latter would be the case of an Englishman who should undertake to transport goods 5 Swedish miles in the belief that a Swedish mile is the same length as an English mile.

was in § 118, of the relevance of a certain opinion concerning the nature of the imperative as being or not being a genuine imperative. Here the person who makes the declaration is supposed to regard it himself as a genuine prescript. What is assumed to *be able to* be relevant is the fact that the person making the declaration does not *will* in his own mind that it shall hold good. Certainly the relevance of a secret mental reservation is here ruled out, but the ruling of it out by means of a special legal provision implies that it is regarded as a possibility. The declaration has all through the character of an imperative in the sphere of private law, and the person who makes it must be under no illusion on that point. The only difference between it and an otherwise valid declaration is that the person who makes it does not *will* that it should come into force. But, since its coming into force depends on the legal system, this non-willing means that one believes that it will not be enforced by the legal system. If one believed that the declaration has legal force, one would not make it unless one desired that it should come into force. In this way it would be *possible* for a certain belief about the nature of the legal system to be of significance to the system itself. But this is absurd. But the view which lies behind this is historically intelligible. The 'declaration of intention' is regarded as an actual declaration of a volition, which is not just the volition to make that declaration as the action by which the desired result is to be attained. If this volition does not exist, the declaration is false and therefore ought not to be valid. Therefore a special legal provision is needed to annul this consequence in the case of a secret mental reservation. What, then, is supposed to be the object of this volition, which is alleged to be present but not to have the making of the declaration as its content? And by what action is the volition supposed to attain its end? Its purpose is, of course, the bringing into being of a certain legal state of affairs described in the declaration. But the action, by which the result is to be brought about, can only be an *inner* action, since it is *not to be* the overt declaration. The inner means which is employed can only be the *intention* itself that the desired legal state of affairs shall come

into being. That is to say, it is held that one can act on the external world through the mere intention. This is indeed possible in *one* case, *viz.*, when it is a question of one's own external actions. The intention to move one's arm has indeed the effect that one's arm is moved. But in no other case is it possible, unless telepathy be possible in certain cases. It is here assumed that every person would be able by mere intention, at any rate in collaboration with others who have a similar intention, to act directly on the world of legal existents. Yet, on the other hand, the impossibility of this is recognized when it is acknowledged that a *declaration* of the mystical intention is necessary in order that the legal consequences should come into being. But at this point this whole way of looking at the facts collapses. For it is now plain that, in a declaration of intention, there is no other effective volition except that which has for its content the making of the declaration itself, as the overt action by which the effect is brought about. And the declaration itself cannot be a true or a false announcement concerning a volition which is aimed directly at the effect, *i.e.*, a volition which would presuppose that one believes oneself to be able to produce the effect by the mere intention. If the law should demand such a volition as a prerequisite for the coming into being of the effect, it would come into conflict with itself; for, according to the same law, a *declaration* of that volition is necessary.

But this brings us to the question: How has this perverse conception of the so-called declaration of intention in the sphere of private law, *viz.*, that it is a declaration concerning a volition, arisen?

3. The historical causes which have led to the view that declarations of intention are declarations concerning a volition

In Roman law it is only in one special case that one could possibly speak of a declaration of intention within the sphere of private law as a declaration *about* a volition. This is in reference to testaments.

According to Ulpian (*Reg.* XX, 1), it is part of the definition of a testament that it is declaration (*contestatio*) of our volition (*mentis nostrae*; or, in Modestinus D. 28, 1.1, *voluntatis nostrae*) confirmed by solemn witnesses. But in this case 'volition' means the same as 'wish'. This is plain from the fact that, according to Gaius I.2,247, *volo* is the correct expression in a *fideicommissum* But there it means merely 'I request' or 'I beg'. Now it is to be noted, however, that (i) *fideicommissum* lacked validity in civil law, and (ii) the mere declaration *volo T . . . heredem esse* . . . is invalid, and the solemn form for appointing an heir to be an inheritor is instead the imperative *heres esto*. (Gaius I. 2, 117.) So, just in so far as it is a declaration of intention in the sense of *wish*, the testament is invalid. It is thus plain that the above-mentioned definition must have quite a different meaning from that which it seems at first sight to have. The testament is not a declaration which states that the testator wishes so-and-so in regard to his property after his death. It expresses his wish only in the sense that he *prescribes* that which he wishes. That which he *prescribes* is what he wishes. This is only in appearance the same as an announcement concerning the actual occurrence of a certain state of mind. Really it means that the testator gives an imperative expression to the idea concerning the fate of his property after his death with which his wish is bound up. Such an idea is obviously not an awareness of anything as already actual, and therefore the expression of it cannot be a statement of any fact whatever. This does not exclude the possibility of *concluding* from the occurrence of the prescription that the testator has wished so-and-so. That does not make the prescription *itself* a *statement* of what he wishes.

If the testament, according to the Roman view, cannot be a statement concerning the testator's wish, as something actually present, it is still less a statement concerning his *volition* in the proper sense, *i.e.*, an actual intention. But, when one speaks nowadays of 'declarations of intention' in the sphere of private law, one certainly does not mean a statement concerning the presence of a mere wish. It is a question of a volition in the proper sense.

This is because it is clearly seen that an actual prescription or an imperative is always a necessary condition of what is called a declaration of intention. Now a prescription concerning something always involves more than the utterance of a wish. It always includes an intention to actualize what is wished. So, if what happens is interpreted as a declaration of a certain state of mind, it must be regarded as the declaration of an intention. As regards things other than testaments, which are described in modern legal terminology as declarations of intention within the sphere of private law, *e.g.*, a promise, there is no trace in the literature of Roman law that they would be regarded as a *signum* or a *declaratio voluntatis*. But this description is very common in the doctrine of natural law, which is indeed the origin of it.

Let us see how things stand there. We have already spoken of how the law uses the imperative form, *viz.*, because of its psychological effect, especially when there is authority behind the words of command. In this case, however, the power is of an impersonal kind, at any rate in constitutional *régimes*. It lies in all that mechanism, depending on all kinds of co-operating social and psychological factors, which upholds such a *régime*. On the other hand, it does not lie in any personal political power in the so-called legislator. When 'parliament' has participated in the legislation there is only in appearance a personal commanding authority. In reality all that there is is a certain form, in accordance with which such pronouncements must be produced if they are to count as laws. The absence of a *personal* power behind legislation is shown particularly clearly by the fact that those who are influential in making it are themselves subject to any law when once it has been promulgated. Laws are thus not imperatives in the usual sense, *i.e.*, commands *issuing* from a certain authority. Their force therefore does by no means rest only on their imperative form. This is indeed important from the psychological point of view and it is in fact a distinguishing mark of actual laws. But a law as such is characterized only by the fact that it occurs as an item in a whole system of pronouncements of universal scope, produced in a certain way and issued in a cer-

tain form, which do in fact get their ideal content actualized in society.[1]

Suppose, nevertheless, that one talks of the 'legislator's' intention in reference to a law, and takes this to be relevant in the application of laws. What this really refers to is the fact that the making of laws in general presupposes discussions within that body which functions as the constitutive authority, and that it also presupposes a certain intention in the person or persons who brought forward the proposal. It is the wishes which then occurred, in so far as they influenced the formulation of the law, which may be relevant and which are called 'the will of the legislator'. This holds good, although no personal power here exists which gives the law its force, and therefore no personal wishes *in themselves* are at all relevant. In this case it is merely the content of the law as such that has legal force. But in *interpreting* the letter of the law it is necessary in doubtful cases to pay regard to what is *called* the intention of the legislator.

But the situation is of a different kind when a genuine personal power is regarded as the ground of the force of the legislation. This is when an autocrat is held to have the right to legislate for the people *according to his own will and pleasure*. It may be that even in such a case, the laws in fact acquire an impersonal force, based on the legal mechanism, and that they even bind the legislator himself so long as they endure, just as in a constitutional *régime*. But, in so far as the idea of the autocrat's personal right is theoretically maintained, obedience to the laws is in theory determined by the belief that he personally desires this obedience. On that view the autocrat is personally *a legibus solutus*. But in that case the laws, as imperatives, have a different nature from that which they have in the other case. They may be as directly influential as you please, like any other commands with authority behind the words. But, since the autocrat is here held to have the right to legislate for the people at *his own will and pleasure* per-

[1] As to this see the introduction to my work: *The Roman Concept of Obligation*, above pp. 1—16.

sonally, it is *his* wishes which stand out as the *determining* factor. Thus, when the imperatives are reflected upon, they come to stand out as *one* source of information about his wishes. Suppose that one can get to know these in some other way, or suppose that they should appear to have altered after he issued the order although that order has not itself been revoked. Then the wish which he has indicated in any of these ways is the only one that is important. But, when the mere intimation of a wish is effectual, and when it is so *simply and solely* because in this way the autocrat's wishes become known, it looks as if the wish itself had power to bring about its object, and therefore as if it were identical with a genuine volition, *i.e.*, an intention. So it is not a mere wish on the autocrat's part which is intimated, but his *will. Sic volo, sic jubeo* . . .

A further consequence of this is that law itself is grounded in the autocrat's will. If now he is considered in his relations to other autocrats, one will stands over against another will. And what each wills *within his own region* binds the other's will, *i.e.*, imposes an obligation on the latter. Each is sovereign within his own region. Internally, sovereignty consists in the fact that the autocrat's will does not derive its right from any higher human will. Externally, it means the duty of every other autocrat to respect the will of the ruler in so far as it confines itself within the region where he has a right to rule. This makes it clear what is the sovereign's legal position with respect to the territory which constitutes the limits of his right as ruler. In accordance with this he disposes of it just as if it were itself a person subordinate to him. He disposes of it in despite of any possible rival. Everyone, not only his subjects but also foreign rulers, is under an obligation to respect his will: his subjects, in the sense that they are bound to follow the declarations of his volitions; the foreign ruler, in the sense that he is bound not to disturb his authority. Moreover, if the whole of the autocrat's right is founded in his will, there is one and only one way in which a transference of this right, in whole or in part, can take place. The individual autocrat must declare his intention to transfer the whole or a part of

his right, and the person to whom the right is to be transferred must declare his intention of accepting it.

Now the theory of natural law included the idea that all right of ruling over others rests upon their transference of a primitive right of ruling, *viz.*, the individual's natural right to rule over himself, over his body and his actions, and even (in so far as an original right of property was assumed) over his natural property. This transference could take place only by a mutual declaration of intention. In conflicts between prince and people during the latter part of the middle ages the secondary nature of the princely power was asserted. It was, so to speak, split up into a mass of autocratic rights, *viz.*, that of each individual over himself. And the private individual thus received his own realm of authority, like the prince, where his will was supreme. In regard to it, all others were under an obligation to respect it. And transference of rights could take place only in the same way as between princes. It now became usual to regard the transference of the individual's right to the ruler as conditional. It was done under the condition that the latter upheld and also guarded the natural rights. It was then obvious that his ordinances must be in agreement with the system of natural law, and that transference of rights, even in the *status civilis*, could take place only through a declaration of intention. In particular, a promise in the sphere of private law, when regarded as a transference of a right, became an abdication of a part of one's freedom by means of a declaration of intention. Freedom is a primary right in the sense that one's own actions constitute the object of one's own autocratic rights. Actions are subjected to the agent's will, as subjects are to the will of their ruler. And by a declaration of intention which constitutes a promise one abdicates a part of this autocratic right. The recipient acquires instead, through making a corresponding declaration of intention, an autocratic right in regard to those actions with which the promise deals.[1]

We have thus exhibited the historical origin of the perverted

[1] See my essay on Nehrman-Ehrenstråle in *Memoir of the Code of 1734* § 24. (In Swedish.)

modern view that imperative stipulations, in the sphere of private law, which express ideas concerning the occurrence of rights and duties, are *declarations of intention* in the proper sense of the word, and therefore produce their effect *as such*. This historical origin will be further illustrated and confirmed in what follows.

4. What idea has one in one's mind in making a declaration of intention in the sphere of private law, in so far as one is thinking of the coming into existence of rights and duties in connexion with it?

In answering the above question it is convenient first to enquire what is understood by 'rights' and 'duties' in a *law* within the sphere of private law. Certainly such a law expresses in an imperative form the idea of 'rights' and 'duties'. Such a law is undoubtedly of decisive importance in giving effect to a 'declaration of intention' in accordance with the content of the declaration. This is true also of customary law, which is also regarded as determining 'rights' and 'duties' as something which ought to happen, although in this case there are no propositions expressed in a certain form.

In order to answer the latter question it is necessary to enquire what the 'legislator' has in view when he brings about the occurrence of a certain pronouncement concerning 'rights' and 'duties', which has the character of a law.[1] This is the same as to enquire what he knows concerning the consequence of such a pronouncement. It is plain that what he knows, from his knowledge of the effectiveness of the legal system, no matter what may be the cause of that effectiveness, is the following. He knows that what is described, either in laws within the sphere of private law or by some other method with the same content, as the rights and duties arising in certain situations, will in fact come into existence in the actual world. It will come into existence there in such

[1] What is to be understood by the word 'legislator' has been explained above, pp. 311 *et seq.*

a way that the 'possessor of the right' in most cases receives the advantages to which he is 'entitled' as against the person who is ' under the obligation', and that conversely the latter party in most cases acts as he is 'under an obligation' to act. This effect of legislation within the sphere of private law on the whole always happens. If the 'possessor of the right' needed *generally* to have recourse to a legal action, and if the person who is 'under the obligation' needed *generally* to be compelled by that means, it would be impossible to maintain the system of actions-at-law itself.[1]

But the 'legislator' also knows something further. He knows that anyone who fulfils the requirements of procedural law, especially as regards establishing the facts presupposed in the substantive law, will in general get a judgment against the defendant, which will in the last resort be enforced. Here it is a matter of complete indifference whether the facts in question *really* existed or not. Although in law 'rights' and 'duties' are attached to the *existence* of certain facts, anyone who can fulfil the requirements of the courts, especially as regards proofs, enjoys advantages which are at least equivalent to those which should accrue to the person who is described as 'possessing a right'. This, of course, does not prevent a person, whose case is supported by the actual facts to which he appeals, from getting satisfaction through a lawsuit. But in the lawsuit the question is simply whether or not the legal requirements in regard to the facts are satisfied. It may happen that the defendant has already satisfied the plaintiff's demands. If so, this operates only in the following way. The fulfilment, in regard to just this fact, of the requirements of the courts in the matter of proof concerning relevant facts, causes the plaintiff to lose his case.

But this makes plain what the idea of 'rights' and 'duties', which is expressed in the imperative form in every law within the sphere of private law, is really about, in so far as the 'legislator' had in mind something which he really knew would be actualized by means of the law. It is always a thought of the above-mentioned actual order of things; *i.e.*, the idea that, when

[1] We shall discuss this immediately.

certain facts exist, a person will as a rule enjoy certain advantages as against a certain other person or persons. But it is also an idea of something else, *viz.*, that legal proof in court, of the facts which the law regards as relevant, gives to a person of power, ultimately backed by compulsion, of getting at least an equivalent for the advantages which, according to the law, he should enjoy if the facts are as stated. It is evident, however, that the law becomes ineffective, *if* the person whom it designates as the possessor of a right against another person or persons neither receives the advantages in question gratuitously nor is able to fulfil the requirements of the courts. In that case the right amounts to nothing. This is of course presupposed in the law. On the other hand, the law has an effect, which does not agree with its text, if a person can in a lawsuit fulfil the legal requirements of proof without the alleged facts really existing. But even this effect follows from the law's own content. For even laws within the sphere of private law necessarily refer to legal processes, and give effective rules for them.

All this, however, holds only on the assumption that the 'legislator', in giving an imperative expression to certain ideas of 'rights' and 'duties', has in mind what he really can *know* to be the consequences of doing so. Another question is this. Does the legislator *believe* that he is *merely* bringing about such actual conditions; and does he therefore mean by 'rights' and 'duties' *only* what has been alleged above? But the following at least is now clear. Suppose that a private individual makes a 'declaration of intention' within the sphere of private law, with the object of bringing about the legal consequences corresponding to it, and that he believes that it will have this effect through actual law or through custom having the force of law. Such a person, in giving expression in imperative form to the idea of certain rights and duties coming into existence, has the following belief. He believes himself to know (and he therefore always has in view in making his declaration) that an actual situation of the kind contemplated will come into existence in accordance with the ideas thus imperatively expressed. He must therefore, like the legislator himself,

mean by the 'rights' and 'duties', which he says will come into being, just such a factual situation. It is only necessary to make the following reservation here. A private individual cannot be sure that just *his* case may not be one of the exceptional cases in which recourse to the courts is necessary, either because of the recalcitrance or the impotence of the party who is under the obligation, or because of difference of opinion about the meaning of the declaration, or for some other reason. So the most that can be said here is that he means such a *de facto* set of order of things as would ensure, *either* that what is called a 'right' will in fact be obtained from the party who is under the 'obligation', *or* that the party who owns the 'right' would acquire a power of the kind described through a process of law. But, just as with the legislator, so here with the 'declaration of intention' within the sphere of private law, the question remains whether there is not something *further* in what is understood by 'rights' and 'duties'.

Before entering upon this question, we must investigate what the judge understands by 'rights' and 'duties', when he makes a decision on the basis of law or custom. Suppose he decides in the plaintiff's favour by recognizing that a certain 'right' belongs to the latter. He cannot possibly mean by this that the plaintiff *actually* will obtain, if necessary by legal compulsion, so far as possible an equivalent for the advantages which belong to him, according to law or custom, if the facts appealed to in the case are as alleged. For the plaintiff will obtain this equivalent only *through* the judge's decision. So the judge cannot make the actuality of the plaintiff's obtaining this equivalent the ground for his decision. Suppose that the judge, as is natural, understands by a 'right' what the legislator understands by it according to the view stated above, *viz.*, a certain actual state of affairs, to which there corresponds as an alternative a power, backed by compulsion, as described above. Then he can merely proclaim that the plaintiff ought to have the disputed 'right', and, no doubt, in such a way that the opposing party 'ought' to be subjected to a certain compulsion. If he uses the expression 'is entitled', he is merely

expressing the *idea* of a right, not his *knowledge* of its existence. But he causes it to be realized *through* such an utterance in accordance with the ideal content of the law.

Here, for the sake of clearness, we raise the following question. What investigation does a judge, in a case in private law, make the basis of his decision? We ask first what it is that he investigates in view of the law or custom in the sphere of private law. This question will be treated, however, only from the point of view of a judge who understands the following by what the law (or custom having the force of law) calls a 'right' or a 'duty'. He is assumed to understand by this something which *can* occur in the actual world, *i.e.*, a certain social state of affairs, which includes, as an alternative, a power conditioned by the rules of procedure in the courts. Here again the first question to be asked is whether he applies the legal 'ought' to the actual case. The answer is a decided No! For the law's utterance 'It *shall* be so!' is merely a phrase, which does not express any kind of idea, but serves as a psychological means of compulsion in certain cases. But it is only from ideas that any logical conclusion can be drawn. On the other hand, the ideal content of the law is of course used in the case in question. And it is only for *psychological* associative reasons, and not for *logical* ones, that the result which he reaches by this application presents itself to him as an ought.

Next we can raise the following question. 'Rights' and 'duties', founded on law or on custom having the force of law, cover two alternatives, *viz.*, (i) a direct action by one party for the benefit of the other, in accordance with the law or custom, or (ii) a power conditioned by the rules of procedure, of one party to set the law in motion against the other, whereby an equivalent can be obtained for the latter's neglect to perform the action. This power is either expressly stated in the law or tacitly understood in the custom to belong to the plaintiff, on condition that he can establish the facts which he alleges in his suit. But with *which* of these alternatives is the judge concerned, in so far as he seeks to realize the ideal content of the law in the case before him? Suppose that there is no doubt about the facts. Suppose, further, that the plain-

tiff asserts, and the defendant does not deny, that the defendant has not so far fulfilled, by his own free actions, the legal conditions which (in the plaintiff's opinion) are contemplated by the law as applied to the present case. Suppose, finally, that the defendant denies that the meaning of the law is what the plaintiff asserts it to be, though he does not contest the facts alleged by the plaintiff. On these suppositions, the judge of course investigates the case only from the point of view of the second alternative, *viz.*, the legal position as regards the law administered by the courts. He can do nothing concerning the first alternative. Supposing that the plaintiff has the law on his side, the judge would be talking nonsense if he decided that the plaintiff has a right in the former sense. The ideal content of the law cannot be realized in that way.

But take the case now that plaintiff and defendant agree on the meaning of the law as applied to the present case, and that the judge accepts their interpretation, but that they disagree as to the facts relevant to the case, even, *e.g.*, as to whether the defendant has not already fulfilled his obligations to the plaintiff. Then the judge would investigate the case according to the rules of the courts concerning evidence and the burden of proof. This implies that, here too, if the plaintiff wins, it can only be the second alternative that comes into the question; there can be no question of adjudging to the plaintiff a right in the sense of something that exists prior to the suit.

So the conclusion is as follows. Whether the dispute is concerned with the ideal content of the law or custom or with facts, a judge whose conception of 'rights' and 'duties' is determined by what he knows can be actualized in the physical world, he can never take account in his decision of 'rights' existing prior to the legal process. It is plain that it is here assumed that the case at issue really is of such a kind that it really could be decided exactly in accordance with established rules of law or custom. If this is not so, the judge himself functions as a legislator for the case. But we are not concerned with that.

We come now to our original question. Does not the 'legis-

lator' in the sphere of private law, and also the private individual who makes a 'declaration of intention' within that sphere, after all really mean by 'rights' and 'duties' something more than a certain actual social state of affairs? It does seem as if common-sense draws a distinction between having a 'right' and *enjoying* it, and between *being* under an 'obligation' and that obligation being fulfilled even under compulsion. Still more does it seem to distinguish between having a 'right' and being able to win in a lawsuit in consequence of the rules of evidence and the rules concerning the burden of proof. This difference shows itself also in the common view of a lawsuit as a means of actualizing in the physical world 'rights' and 'duties' which existed before the suit was undertaken. Here it is held that the possibility of suing is something which belongs to the person who has the 'right' as a consequence or a function of his right in the primary sense. In the same way, it is held that the subjection of the person who is under an 'obligation' to the compulsion of the court is a consequence of his 'obligation' in the primary sense. If the notion of a 'right' includes as one alternative under it the possibility, under certain circumstances, of acquiring by process of law an equivalent to the advantage to which one is entitled; and if the notion of a 'duty' includes under it as one alternative being subject to compulsion by the courts; then it is clear that these cannot be a *consequence* of the existence of a 'right' or a 'duty' respectively. For, in that case, neither could exist without that which is said to be an effect of it. But an effect is always something other than its cause. But what does a 'right' or a 'duty' mean, if empowerment by the courts or subjection to them, as the case may be, is regarded as a consequence of its existence? It is plain that it would by no means follow from the existence of a 'right' that there is a power to compel by process of law the party who is under an 'obligation,' unless the notion of the 'right' included that power, and unless the notion of being under an 'obligation' included being subject to this power. But the power and the subjection would here exist quite independently of any occurrence in actual life. It is clear that it need not manifest itself even as

an actual power given by the courts. For, according to the commonsense view, one can have a 'right' without the conditions required for obtaining such a power being fulfilled. It may be, *e.g.*, that one cannot prove the existence of the facts required, when the burden of proof rests with oneself. Compare the state of affairs here with the situation which arises if 'right' and 'duty' have the meaning previously suggested. According to that view, they are related to actual circumstances in the following way. A 'right' means that he who possesses it either (i) will obtain from the party who is under the corresponding 'obligation' the advantage to which he is 'entitled', or (ii) will acquire from the courts a power of compulsion, provided that he fulfils their requirements, particularly in the matter of proving the facts which the law explicitly states or which custom tacitly implies as conferring the 'right'.[1] It is then clear that there is nothing whatever left of 'rights' or 'duties,' if *neither* of the two alternatives is fulfilled. It is true, no doubt, that it always holds good that, *if* this or that condition were fulfilled in the actual world, the 'right' or the 'duty' would become something actual. Such a connexion is expressed imperatively in a law, and is thought of by anyone who relies upon custom, as that which ought to happen. But it is also part of the idea thus presented, to which the ought is attached, that, if the conditions for exerting compulsion by process of law are not fulfilled and yet the action demanded is not performed, then the 'right' comes to nothing. But, according to the usual way of looking at it, as soon as the facts exist which are connected in law or custom with the occurrence of a 'right' or a 'duty' within the sphere of private law, the 'right' or the 'duty' in question becomes a reality, even if the person who has the 'right' neither actually enjoys the advantage attaching to it without recourse to the courts nor is able to fulfil the conditions required in order to obtain an equivalent by process of law.

It is, therefore, clear that the 'legislator' in the sphere of private

[1] Similar remarks apply, *mutatis mutandis*, to the person who is under an obligation.

law *also* thinks that the effect of a legal enactment concerning 'rights' and 'duties' is the coming into existence of a power (and a state of subjection to that power) which falls outside the physical world. As regards juridical 'obligation' in particular, this is supposed to be present in the 'obliged' party, be it noted, quite regardless of whether he does or *can* fulfil it, and even of whether he actually feels any obligation whatever to perform the action which is said to be his 'duty'. The actual enjoyment of the advantages, to which one is said to be 'entitled' as against the person who is under the 'obligation', now becomes a mere exercise of the supernatural 'right' which one has. This 'exercise' issues from the 'right'; but the latter exists independently, even if it cannot be exercised because of natural obstacles. Conversely, the action which is 'obligatory' is merely a fulfilment of the duty which exists independently of it. The authority who applies the law thus comes to be in the position that he can actually declare that the plaintiff *has* a certain right and the defendant a certain duty; and he can make this declaration, *as a true statement*, the basis for decisions concerning executive coercion. Even if the 'legislator' *also* understands by 'rights' and 'duties' a certain social state of affairs which he aims at realizing, as we have shown to be the case, yet the idea of 'rights' and 'duties' as supernatural powers and bonds is present and active throughout. The latter is connected with the former point of view in such a way that the contemplated social state of affairs is regarded as a consequence of the existence of these rights and duties. And the very names 'rights' and 'duties' are based on this. But in this way legislation is supposed to be armed with a power of acting directly in the supernatural world, and by means of such action producing effects in the physical world.

Moreover, if the idea of 'rights' and 'duties', which is expressed in a legal imperative in the sphere of private law, has this supernatural meaning, then a person who makes a 'declaration of intention' within that sphere, in the knowledge that it will be effective through law or custom having the force of law, will have the same idea of 'rights' and 'duties.' He too will think of the

social state of affairs, which is to arise, as a mere consequence of supernatural relationships of power.

Before going further in this matter, we would point out that the supposed supernatural power or obligation, as the case may be, is a logical absurdity. It is held to refer to a reality which is elevated above the physical world. Yet, on the other hand, every 'right' is supposed to have as its *object* an advantage which belongs to the physical world, and every 'duty' is supposed to have as its object a certain way of acting in that world.

5. To what part of a person is a right or a duty, in the supernatural sense, assigned?

As regards '*duty*' it is obvious from the nature of the case that it belongs to the *will* of the person who has the duty. It exists there as an inner bond, whether the person notices it or not. As regards the 'right' which corresponds to another's 'duty', it is, because of this correspondence, a bond which binds the other party's will. This emerges also from the fact that to the person who has a 'right' there is ascribed a 'claim' upon another person, *i.e.*, a demand for a certain action. Through this demand the other party is under an 'obligation' to perform the action demanded. Suppose that one demands, in the actual world of legal transactions, the payment of a monetary debt by another person. Certainly there lies behind the demand always an open or tacit reference to the legal consequences of default. But the 'claim', which is here in question, is held to be itself a condition of the legal consequences. It cannot, therefore, be conditioned as regards its possibility by those threatened consequences. But it is not an actual demand either. The actual demand is connected intrinsically with the claim only in being a legal fact from which in certain cases the claim is held to arise. In other cases no actual demand whatever is needed. If, *e.g.*, the date for payment of a debt is fixed, one has a 'claim' to be paid directly that date arrives without it being necessary to send out a letter of demand. The demand which is involved in the 'claim' is to that extent not a

natural demand, *i.e.*, it belongs to another world than the physical. It should be noticed, further, that the 'claim' exists only through a desire or an interest, in the owner of the right, directed to that to which he is entitled as regards the party who is under the obligation. Thus the wish or interest itself, as falling within the legitimate sphere of the possessor of the right, is that from which the demand issues. This fact, that the wish which falls within the legitimate sphere of the possessor of the right, or the 'legitimate' interest, itself 'imposes an obligation' on the other party, is thus the same as the existence of a 'claim'. It is now obvious wherein the demand attaching to the 'claim' consists. It is the fact that the wish or the interest of the possessor of the right binds the party who is under the 'obligation,' just as if the wish or the interest were able in the course of nature to exert a real demand on him. But, in so far as the wish or the interest itself imposes this mysterious supernatural bond on the will of the party who is under the 'obligation', it is an active *will*. It is then a matter of indifference whether one ascribes the 'right' to the volition or to the mere wish or interest. It comes to the same thing in the end. But this volition, which is identical with the wish or the interest, and which binds the will of the party who is under the 'obligation' quite regardless of whether that will as a natural phenomenon experiences pressure, is, like the bond itself, a pure myth.

We have here spoken of the wish *or* the interest, as that which gives rise to the claim. This pair of opposed alternatives corresponds to a conflict which exists between different juridical theories concerning the nature of private rights. The one, represented by Romanists, especially *Windscheid*, emphasizes the right of determination of the arbitrary will. What they have in mind by this will is primarily an arbitrary wish. Actual volition, as the bearer of a claim, *presupposes* the existence of the claim itself. But, if the arbitrary wish is the bearer of the claim, it manifests itself as an arbitrary volition through the power which the 'claim' involves. The other theory, represented in Germany by *Ihering* and in Sweden by *Nordling*, holds that a claim, with which no

real interest, *i.e.*, no real value for the individual, is associated, is null and void. It therefore regards interests as the bearers of claims. But, in consequence of the claim, the interest becomes an actual volition; though not an arbitrary one, but one which is reasonable from the individual's point of view. The following is an example. The right of property includes the fact that the owner's wish to keep the thing, or his interest in the thing, binds other men's wills as being a supernatural volition. When the owner disposes of the thing according to his will, he is said to exercise his right. This means that in such a case the supernatural volition, in which his right is founded, is active also in real life. By *this* volition he has control over the thing, however much he may be excluded in practice from disposing of it. By this volition he binds other men's wills in such a way that they are excluded, from the point of view of the supernatural world, from all power of hindering the owner from disposing of the thing. The case is parallel to the fact that a sovereign in a state is thought to exclude the sovereign of any other state from every attempt to dispose of his territory or to exercise dominion over the people who inhabit it. But, so far as the owner *actually* controls the thing, he realizes his volition in real life. A right to demand something would have the following meaning. It means that the wish or the interest of the possessor of the right from the same point of view, regarding the action on the part of the 'obliged' party with which the right is concerned, binds the latter party as being a supernatural volition. In so far as the former demands in actual life of the latter the performance of the action in question, he actualizes in the physical world the supernatural volition which binds the other party, and in so doing he merely exercises his right. Thus a person who is entitled to demand something really occupies, *within the sphere of his 'right'*, the same kind of position as a ruler in respect of his subjects.

We have now thrown light, by means of the modern conception of the nature of 'rights' and 'duties', on the view that a legally relevant declaration concerning rights and duties, made in imperative form by a private person, is a *declaration of intention.*

Both 'rights' and 'duties' refer to and belong to the *will.* How, then, can a person, *e.g.*, freely bind himself in respect to another, and thus renounce a part of his right to freedom for the other's advantage, except of his own volition?[1] This volition must be the efficient force here. The declaration, which is indeed indispensable if any effect is to be produced, can then be significant only as an announcement concerning the volition. But the volition which is announced cannot be one which issues from the announcer's *natural* will. For the latter has the declaration itself as its *content*, and therefore cannot be announced by that very declaration. That which is declared must be instead that mystical volition, effective through the mere wish or interest, in which the 'right' that is renounced is supposed to be lodged. And this holds good, notwithstanding that the mystical will is obviously confused with the natural will. Precisely the same may be said of the acquisition of a 'right', conditioned by the renunciation of his right by the original possessor of it. But the same holds also of the case where one person directly lays another under an obligation without the latter's co-operation, so far as that is possible.[2] The actualization of the original right, which occurs in such cases, seems to be effective through the volition, in the mystical sense, of the owner of the right. And the declaration looks like an announcement concerning that volition.

We have already explained in the following way the view which is prominent in the term 'declaration of intention' within the sphere of private law. We take it to have arisen from the splitting up, by the theory of natural rights, of the right involved in the sovereign's will into the sovereign rights of each private individual over his body, his property, and his own actions. The real sovereign's right, being founded in his will, can be transferred to another person by the sovereign's own volition together with the recipient's volition to accept it. In the same way the private

[1] Note that the right to make a demand has, within its sphere of legitimacy, the same character as a ruler's right over his subjects.

[2] Examples are a master giving an order to his servant, a landowner forbidding entrance to his land, and so on.

individual's sovereign rights can be transferred by him to another individual primarily by his own volition. Although this really should hold in the state of nature, it was considered that the same principle held in the *status civilis*, which is founded by the original contract and is subject to the law of nature. Here this same point of view is placed in direct connexion with the modern view of the 'rights' and 'duties' of private individuals as grounded in their wills. But this view is itself identical with that of the theory of natural rights. So both forms of explanation lead back to the same original source.

6. On the 'jural basis' of the legal validity of a 'declaration of intention'

(a) *The will-theory*

It is clear from what has gone before that, if a private individual expresses in imperative form the idea of 'rights' and 'duties', this *can* have effects, provided that one understands by 'rights' and 'duties' a certain actual social state of affairs of the nature described. But it is also clear that, in accordance with the usage of these words, the only connexion between this social state of affairs and the rights and duties is that the former is a consequence of the existence of the latter. The actual content of these can never be actualized, since it includes incompatible elements. But the belief that law or custom, and therefore a 'declaration of intention', really actualizes the supernatural reality to which 'rights' and 'duties' belong carries with it all kinds of other mystifications. *One* element in this mystification is the fiction of a state-will as the will from which legal imperatives issue. Through these imperatives this will is the ground of 'rights' and 'duties' within the sphere of private law. To this state-will is ascribed the primary right of sovereignty, and in that way it becomes a supernatural power which is in a position to create 'rights' and 'duties' in private individuals. One is forced to elevate the actual legal imperatives above the sphere of real life, in order that they may be

able to function in the supernatural world. In so far as it was held that a certain person in the state had the right to rule *at his own will and pleasure*, he was armed with divine power. But there was, of course, then a palpable reality which was the bearer of the divine power. In proportion as this view lost its influence over men's minds, and the *general interest* was given instead the primary sanctity in the sphere of law, the power to create 'rights' and 'duties' in private individuals was assigned to the latter. In that way legal imperatives, which evidently were the immediately creative factors in this respect, were assigned to this interest; and it became, as the ground of them, a *state-will*. It now became the bearer of that divine dignity which had originally been ascribed to the concrete sovereign.

But what is a state-will? The state obviously includes not only persons who have come of age, but also minors. Nay, sucklings and idiots also belong to it. Is it alleged that there is therefore a will common to them all, which is declared in the laws? At that stage the inflation of the human to something divine has reached its acme. And at that point all concrete reality has vanished. Moreover, since it is undoubtedly from actual men that the legal imperatives issue, the question arises in what relation these men stand to the state-will. Let us consider an absolute monarchy or dictatorship, in which the principle of the *interest of the state*, and not the ruler's *own will and pleasure*, is regarded as the supreme law. In that case the ruler as legislator must be identical with the state-will. But, since this will is to be the state's own will, whilst all the individual citizens belong to the state, and moreover the ruler has an individual body (which the state-will has not), he is *not* identical with it. The difficulty is supposed to be overcome by introducing the notion of symbolization, which in this case takes the form that the ruler *represents* the state-will. Now what is characteristic of a symbol in the sphere of practical life, where it means something which is identified with and yet is different from that which it symbolizes, is this. The emotional attitude towards that which is symbolized is directed to the symbol because of its likeness to the former. That is to say, it functions in

the emotional life as if it were that which it symbolizes. It therefore presents itself as actually identical with the latter, although it is different from it. This is the basis of the power of symbolic magic. One represents, *e.g.*, the desired totem-animal and thereby experiences the same feelings as if it were actually there. And so one believes that by means of the representation one has actually brought it into being. It is the same here. Because the ruler as legislator seems to actualize the interests of the state he reminds one of the supposed state-will. He thus attracts to himself the emotional attitude, the feeling of loyalty, which occurs in reference to this supernatural and highly mystical power. In his person one worships it. Thus he stands forth as being the state-will itself. Yet he is it merely because he represents it; a flagrant, but psychologically intelligible, contradiction. The same odd way of looking at things manifests itself when, on the other hand, the 'people' is regarded as having sovereignty, whether it be directly, as the doctrine of natural rights teaches, or as being itself the representative of the state-will, according to the modern point of view. But the most immediate ruler under modern conditions is parliament, regarded as a person, created by 'the choice of the people' and therefore calling to mind the people's will itself. And so parliament becomes, through the confusion that arises from this emotional attitude, the 'representative' of the popular will, identical and yet not identical with the latter. And so on.

But the mystification which is of most interest here is a different one. It is concerned with the so-called jural basis for the power of creating 'rights' and 'duties' which belongs to a declaration of intention within the sphere of private law. Is not the basis for this, law and custom, regarded as decisions of the state authority? It should be noted here that, in order to be able to bring about such effects, even the state authority comes to be regarded as depending on an independently existing legal order. The state authority does not produce *ex ovo* a supernatural system of private rights and duties. Such a system must indeed exist in itself independently of the above-mentioned actual social state of affairs, which in fact comes into being through law and custom. But

what the state authority produces is merely *such* a supernatural system as leads to this state of affairs as its consequence. As *positive* law it is essentially bound up with this consequence. But where does the *pure* supernatural system exist, which is always presupposed? Well, that exists in the *commonsense notion of justice*. Whether this is held to be innate in man, as the theory of natural rights teaches, or is supposed to be a product of the historical development of a particular people, as the historical school holds, it is a consciousness of an ideal law which exists quite regardless of whether the corresponding social state of affairs is actualized or not. The legislator, *i.e.*, the state authority, must make this supposed ideal law his basis in the sphere of private law, in order that his regulations shall be really binding in the supernatural sense. That is the meaning of the talk about a jural basis, *ratio juris*, for a rule of private law. In answering the question of the jural basis one clears up the question of how the ideal law manifests itself in these cases. Certainly there is a complication which arises here, *viz.*, that a large part of private law, in regard to its special content, cannot be referred to commonsense notions of justice, but must be explained by social purposes. But the state authority, as legislator in the sphere of private law, is determined by two principles, *viz.*, the ideal law or justice and the good of the state. Both together are regarded as the basis of its competence in this sphere. But we need not consider that complication here, where it is a question of the basis of the legal force, in principle, of a 'declaration of intention'. On this matter the opinion which occurs in ordinary juridical reflexions is that there is a real *jural basis*, and therefore a genuine ideal law, which makes a law or custom within the sphere of private law binding, in so far as it validifies the 'declaration of intention'.

What, then, is this jural basis? In order to answer this question we will first enquire what kind of volition it is that is announced in a declaration of intention. It cannot be a volition to produce a certain legal result through the declaration. For the declaration, which is the content of the volition, cannot be a declaration of that same volition without being a declaration of itself. So the vo-

lition which is declared must be a volition to actualize a certain legal state of affairs without any external means. That is to say, he who has the volition must assume that he can bring about what he desires through his mere wish. Such a power cannot be one that is mediated by law or custom. For no law or custom can make a mere wish, without any external emergence, have legal consequences. So it is assumed that a person can bring about a certain legal state of affairs without law or custom. Now it has already been shown that the 'will' which is in question, when expressions in the imperative form of ideas of 'rights' and 'duties' are regarded as declarations of intention, is the will regarded as bearer of rights. This is connected with the very idea of a right as such. A 'right', considered as a claim, is bound up with a mere wish or interest falling within a certain sphere. Through this the owner of the right lays an obligation on others. He thus has a *will* which is effective through the mere wish or the mere interest. But, since the claim itself falls within the supernatural world, the volition, which is announced in the 'declaration of intention', is itself also supernatural. In so far as the content of this volition, which is effective without any external means, is aimed at altering existing legal relationships, it determines such relationships within the limits of its own sphere of legal validity. It needs only to be noted that the person to whom a right is transferred must himself be willing to accept the right. It is this purely inner act of volition, effective in itself, which is announced in a declaration of intention.

But, now, the volition to bring about a certain legal consequence by means of a declaration cannot itself be a jural fact presupposed in law or in custom. For, in order to be an effective volition, it presupposes law or custom itself. The jural fact can be nothing but the declaration itself, and this cannot be a declaration of the same volition. But *neither* can the supernatural volition, which is supposed to be declared in the 'declaration of intention' itself, be a jural fact which becomes effective through law or custom. For it is supposed to be effective without any external means. So this volition, which is set above law and custom,

is significant only as a basis for the legal force of the law or the custom. The so-called will-theory, which starts from the notion of a pure inner volition, effective without outward action, as determinative of the legal effect of a declaration of intention, is thus not a theory concerning that which is the relevant jural fact according to law or custom. It is, instead, a theory concerning a jural basis, provided by ideal law, for the legal effect of the so-called declaration of intention. And the following point should be noted. This theory is closely connected with a certain view of the ideas, which we find expressed in imperative form in daily life, concerning the occurrence of 'rights' and 'duties'. The view is that those imperatively expressed ideas are declarations *concerning* a volition which is effective independently of the declaration. This does not exclude the possibility that such a view may be of importance for the actual legal system. But in that case the real jural fact is always the declaration, and not the volition; although, according to the theory, the declaration is effective only if it expresses the *ideas* about rights and duties which were present in the mind of the declarer when he made his declaration. To this should be added the following fact. Since no transference of a right can possibly take place without the recipient's own 'volition', a declaration cannot *in any way* bind him who makes it until the person to whom it is addressed has accepted. That is to say, if the declaration is revoked before it is accepted, this annuls all legal consequences, even if the revocation should not come to the other party's knowledge before he has accepted. (Or, at any rate, if the revocation certainly reached the other party before he sent off his acceptance but *after* he had received the offer.) Now this must certainly not be regarded as a logical consequence of the will-theory. For here we are concerned with actual life, where the supernatural ideas cannot have application; in the natural sphere the declaration *is* by no means a declaration of a volition.

Consider now the first point, *viz.*, the demand that the declaration must really express the idea of 'rights' and 'duties' which was in the declarer's mind when he made his declaration. This

conclusion can be made to seem valid only through a confusion between the mystical volition, which is said to be declared, and the volition which aims at bringing about a certain legal consequence by means of the existing legal system. As regards the second point, it is certainly true that, according to the theory that the will is the bearer of rights, no 'right' could pass to a recipient without his volition. But it is only if one confuses the will as bearer of rights with the will which aims at bringing about a certain legal consequence by means of the existing legal system, that acceptance is necessary for the reception of a right. Yet in both cases the application is psychologically natural because the confusion is psychologically natural. For it is only the volition to bring about a certain legal consequence *by means of* a declaration, which occurs in actual life. The mythical will, which is supposed to bring about immediately the renunciation or the reception of a right, and which is supposed to be merely made known to others through the declaration, does not exist in the same world. So the former has to function for the latter.

(b) *The reliance-theory*[1]

The application of the will-theory in the way described above proved unsatisfactory, however, from the standpoint of the interests of *social intercourse*. Before it had yet become necessary in the northern countries to break with the theory in this matter by law or recognized custom, jurisprudence sought to introduce an application of law in a different direction from that in which the will-theory would naturally lead. This was attempted in Denmark by Julius Lassen, who had been preceded by Goos and Aagesen, and in Sweden by Nordling.

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[1] As regards the reliance-theory I would refer from the first to Lundstedt's critical account of it in *Obligationsbegreppet* I and II. (In Swedish). Here I will merely complete his argument by adducing new arguments to strengthen the conclusion that Lassen, in founding the theory, is dependent on a line of thought which belongs to the theory of natural rights. (The argument of Lundstedt is now to be found also in his work *Die Unwissenschaftlichkeit der Rechtswissenschaft* II: 1 (1936), pp. 135—181 Ed.)

According to the new theory, a promise would be binding before its acceptance, so that the recipient of a promise became endowed with a right and the giver of it became bound at the very moment when the promise was *received*. This was so, even though the acceptance must always take place after a certain time, which was in agreement with an overt or tacit stipulation in the promise, provided that an acceptance was in any way demanded in the latter. Whether such a theory necessarily involved a breach with the will-theory was regarded as doubtful. For why could not the receiver of the promise be regarded as having acquired a conditional right on receipt of it, which he could make unconditional by accepting it? Could he not quite well be regarded, without making any open declaration, as *willing* to receive a right, subject to his own future acceptance as a condition, even if he had not directly declared his willingness to have such a right? In any case such an application of rights seemed to be correct in view of the importance in social intercourse of being able to rely on a promise once it has been given.

We ignore here the question whether or not some other theory than the will-theory is needed in this case. But, as regards the other natural consequence of the will-theory, *viz.*, the relevance of the promissor's mistakes as to the implications of a promise which he has given, it was obviously harder to maintain a different application of law whilst retaining the will-theory. But the abolition of this relevance, assuming that the recipient of the promise acts in good faith and has behaved with normal carefulness in understanding the promissor's intention, is important for social intercourse, in view of the importance of being able to rely upon a promise once it is given. The restriction that the recipient of the promise should not act in bad faith and should not be abnormally careless in understanding the promissor's meaning is necessary. For, otherwise, the promissee would be able deliberately to make use for his own advantage of the promissor's mistakes, or at any rate would not need to exercise normal carefulness in order to derive advantage from them. Prevention of dishonest practices and the demand for normal carefulness in un-

derstanding the promissor's intention are plainly also in the interest of social intercourse.

So far, then, the new theory seems clear. One recommends a certain application of law, determined by reference to the interests of social intercourse. When the judge must himself function as legislator in a special case, where the legal position has not yet been decisively settled by law or by recognized custom, the new theory involves recommending a particular way for the judge to legislate in cases where a question has arisen about the legal consequences of a promise. What, according to the new theory, should be the relevant jural fact in regard to promises, in so far as they are to have legal consequences? Obviously the following two factors are of importance.

(i) The declaration should, on the face of it, when viewed objectively according to current modes of expression, express in imperative form an idea concerning the existence of a certain 'duty', either conditional or unconditional, in the declarer towards the person to whom the declaration is directed, and a corresponding 'right' in the latter. (What 'right' and 'duty' here mean, so far at least as they refer to something that could exist in the physical world, has been discussed above.) (ii) If there is, on the part of the maker of the declaration (the promissor), a mistake as to the objective implications of the declaration, it is required that a person who received the promise with a normal degree of attention to its terms would not have noticed the presence of the mistake. This is expressed particularly clearly in § 32 of the Swedish law of contract, the existence of which was influenced by the new theory. This § runs as follows: "He who has made a declaration of intention, which, through an error in writing or some other mistake on his part, has a different content from what he intended, is not bound by the content of the declaration of intention, in case the person to whom the declaration is directed either noticed or ought to have noticed the mistake."

The new theory was commonly described as the reliance-theory, because the promissee's legitimate reliance on the declaration was

regarded as the relevant jural fact. In view of the causes which have here been mentioned as giving rise to it, it had nothing whatever to do with a jural basis, in the accepted meaning, for the binding force of a promise. In spite of this it did come to be a theory about the latter. We will now show this, though, for reasons of space, we shall take account only of Nordling's and Lassen's theories. But we shall also show that this fact depends on the fact that they started from the *will-theory*, which is essentially a theory about the jural basis.

In the case of the first-named writer the fact is obvious. According to him, a private right is based upon an interest which is legitimate from the point of view of reason. Now, suppose that a person has reason to regard himself, because of the other party's declaration, considered as a *declaration of the latter's intention*, as having been given a right. Suppose, *i.e.*, that he has a legitimate reliance on having been given a right. Then he has a reasonable interest bound up with the declarer's acting in accordance with his declaration. This reasonable interest is now made by Nordling into the jural basis of the binding force of the promise, *although* the reason for the one party believing that he has acquired a right from the other is alleged to consist in the fact that the latter seems to have expressed his intention in a certain way. But the argument thus annuls itself. For then that which gives the right must be the intention which is declared. No doubt it is the belief that the intention has been correctly declared which makes the recipient conscious of his right. So, in the recipient's own consciousness, his right certainly rests on the actual existence of the intention. If he should come to learn that the intention did not exist, he may be able to demand compensation, but he cannot claim a right which owes its validity to the declaration itself.

As regards Lassen, his position is more uncertain. In the first place, it is doubtful what he means by the 'reliance', which is, according to him, the relevant jural fact. It is only necessary to look at the examples of various expressions used by Lassen, which af Hällström produces on p. 80 *et seq*, of his book *On Error* (1931, in Swedish). Here we find expectation that the promise will be

fulfilled, reliance on the other party's (present) intention to perform something (in future); but also, as in af Hällström himself, reliance on the 'contractual will' or on the other party's willingness to accept an obligation. The uncertainty comes out especially strongly in the following passage from the work in which Lassen tries to defend and buttress his reliance-theory against criticisms, *viz.*, an essay on declarations of intention (1905, in Danish).[1] He says there[2]: "It will be obvious that I mean by 'legitimate expectation' the promissee's reasonable assumption that the declaration which has been made to him has the content which he takes it to have . . ." This presupposes a highly peculiar terminology. It is as if one were to say: "When anyone asserts that he has decided to take a journey, I have a legitimate *expectation* that he really has so decided!" If it is said that I have a legitimate expectation that he really will carry out his resolution, that is certainly possible. But that is quite another thing.

The uncertainty shown by Lassen in this connexion is, however, in fact quite natural. The 'contractual will', *i.e.*, the will to create legal effects, which is said to be expressed in the declaration, is in its very nature highly mysterious, since it is supposed to be effective in itself even apart from the declaration. Certainly it is to be described as a volition to bring into existence an obligation. But how can that be done unless the declaration itself is the action by which the legal consequence is brought about? Suppose that we leave the supernatural sphere, which is of little interest for Lassen, as opposed to Nordling, in jurisprudence. Then it is difficult to understand the matter in any other way than that the volition in question means a volition to perform something *in future* for the benefit of another. The declaration then becomes a mentioning of this resolve. One can then speak, of course, of arousing a legitimate reliance upon the correctness of the declaration when once it has been made. In that case we take the reliance to be a reliance upon the person's being *now* resolved to perform so-and-so in future. But there is no sense in saying that the state

[1] Quoted from his *Collected Essays* (1924). (In Danish.)

[2] p. 321.

should protect *such* a reliance. The reliance which is to be protected must include something more. And here we are carried on to a legitimate reliance upon the person's *keeping* the resolution which he has declared, *i.e.*, to a reliance upon the actual fulfilment of the promise, which is aroused by the declaration. This expectation can be protected, it would seem. But now the following objection is raised. Such an expectation is by no means justified unless there already exists a coercive system operating to the advantage of the promissee. And here we have come full circle. What one can legitimately expect in the present case, *i.e.*, the content of the legitimate expectation which is protected by the legal system, is simply and solely the keeping of the promise *in so far as* that is protected by that same system. *Lassen was induced, however, to put forward the above peculiar definition of 'legitimate expectation' by the remark that an expectation of the fulfilment of a promise is legitimate only in so far as it is protected by the legal system.* (See p. 320, towards the bottom.) Here we have got back to our starting-point. The legitimate reliance is a reliance upon the actual existence of that 'contractual will' which is declared to exist. Such a volition is a volition to lay oneself under an obligation, independently of the declaration, which merely announces its existence. What kind of volition is it? Doubtless, the present volition to perform so-and-so. One can legitimately rely upon this. But it is absurd that *such* a reliance should be protected. So it is logically required that there shall be reliance on the continued existence of the volition in future. But here comes in the circle; and so this is not the legitimate reliance in question. It is reliance on the 'contractual will' . . . Lassen does not escape the assumption of a supernatural will. But it is intelligible how he comes to combine all these meanings of 'reliance' without noticing their discrepancies. A 'reliance' upon another person's volition, existing at the present moment, to perform so-and-so in future, is quite meaningless unless one assumes that he will actualize his present volition. Reliance on *the latter* is a genuinely meaningful reliance. And with Lassen this has to replace reliance on having received a *right in the supernatural sense.*

The latter is really contained in the reliance on the 'contractual will', which is declared and therefore does not itself have the declaration as its content. Without this reliance the very supposition of such a will is completely meaningless.

But we must now turn to the question why legitimate reliance ought to be legally protected. In Lassen's time the matter had not been settled either by law or by custom having the force of law. So the question for him was the following: Why should the application of the law take place in this way in accordance with the spirit of Danish law? The primary answer in the work quoted is this: The interests of social intercourse demand that promises can be relied upon. (Cf. p. 278 *et seq.*) This was probably the real reason why the so-called reliance-theory was put forward. But now comes something peculiar. On p. 282 occurs the following. "By this means the real ground of the reliance-theory, *viz.*, regard for security in social intercourse, which is in any case necessary according to the Danish view of law, is made clearer. At the same time a preliminary proof is provided for the proposition that a conflict between the good faith of the promissor and the promissee ought to be solved in favour of the latter, so that, when the promissee has acted in good faith, the promise ought in general to be valid without regard to lack of intention on the part of the promissor. I will now try to assign more accurate limits to the legal principle and to complete my arguments for it, by discussing the objections, based on practical considerations, which have been brought against the reliance-theory and in particular against my form of it." Now this is concerned primarily with the question how far the consequent application of the reliance-theory might not lead to unfairness towards the 'promissor'. In this connexion a 'sharp alternative' is presented. (p. 285) It would seem that either the promissor or the promissee must be exposed to the danger of suffering an 'undeserved loss', according as legitimate reliance or lack of intention, as such, is made the relevant factor. The question therefore arises: "*Which of the parties ought to bear the loss, which cannot be avoided in such a collision?*" The passage runs as follows: "In such a situation there

seems to be no possible doubt that the conflict, where some blame attaches to the one party but not to the other in the relationship, should be resolved in favour of the innocent party. If the promissee's understanding of the declaration is careless, he ought to that extent not to be protected . . . If, on the other hand, the promissor has intentionally or carelessly evoked the relevant legitimate reliance in the recipient of the declaration, the promissor ought to be bound in spite of his lack of intention. That the general rule of compensation for damages would lead only to his being bound to respect the negative contractual interest cannot here, in view of the pressure of the sharp alternative, stand in the way of attaching to his fault (*N.B.*) the more far-reaching consequence."

The meaning must be that, since the promissee must not be disappointed in his blameless reliance, based on the other party's blameworthy carelessness or still more his deceptive intention, he ought not to be satisfied with the mere negative contractual interest. The pronouncement here should be compared with what is said about the negative contractual interest (pp. 283—284). This is a compensation which, in consequence of the difficulty of proof, exists merely on paper. It should be noted that the blame, which is said to attach to the promissor, is based on the fact that he has aroused in the promissee, either through carelessness or by intention, a well-grounded but *false* reliance. In this connexion the author speaks of a '*fault*', for which *compensation* ought to be made. But such blame is meaningless *unless one takes the standpoint of the will-theory of natural law.* To be worthy of blame certainly presupposes that the promise *fails* to get binding force through the promissor's procedure, and therefore that the promissee acquires a false reliance on the promise which is detrimental to him. *Suppose* that one starts from the proposition that a promise, as it exists objectively and therefore without reference to the promissor's intention, has binding force unless the promissee understood or ought to have understood that the promissor had made a mistake. Suppose, further, that one bases this on the proposition that otherwise a person could not rely

on a promise even if he himself, with normal attention, could not discover any mistake on the part of the promissor concerning the implications of the promise, and that this would destroy general confidence in social intercourse. *Then* it would be meaningless to regard the careless promissor as blameworthy merely *because* he had carelessly or intentionally aroused a false idea in the promissee. It is a matter of *complete indifference* what idea the promissee may form concerning the implications of the promise, provided only that he does not understand or ought not to have understood that the promissor has mistakenly expressed the idea which he wished *to express*. The promissor can be 'blameworthy' in that case only from the point of view of his own interests. But then 'blameworthiness' has not the meaning intended.

That a carelessly or deceitfully made promise lays an obligation to performance on the promissor, although from the standpoint of Lassen's will-theory such a promise would not have binding force, depends, according to Lassen's account, on the following fact. The promissor must give *compensation* for his 'fault', and the mere negative contractual interest would be an inadequate compensation.

However, Lassen proceeds to investigate the question whether the application of the reliance-theory ought to be limited to cases where the promissor is blameworthy. He comes to the conclusion that proof, in such an intricate question as the presence of negligence, considered as a certain mental condition, may easily become mere shadow-boxing, no matter who may have the burden of it. If such pleading should be allowed, the really guilty party might easily make himself appear innocent. So we read at the bottom of p. 286: "If it be admitted that regard for the safety of social intercourse demands that a promise shall be binding when the promissor can be convicted of carelessness, then, even if it is held that the innocent promissor ought to be released, the rule of law should at the very most favour him to the following extent. He should be released only when he can show that he *cannot* have acted carelessly, because the promise which he gave could have aroused in the other party the expectation in question

only through circumstances completely out of his knowledge and control as a reasonable and informed person."[1] It should be noted that Lassen in the sequel takes the above restriction on the application of the reliance-theory as the second of the three legal rules which he puts forward. (See p. 293 and p. 299.) On p. 287 we read further: "To this should be added that, when the particular case is looked at directly, it is often forgotten that the ostensible blamelessness of the promissor may be only apparent. It is important to bear this in mind, for, in the vast majority of cases in which the promise is such as to call forth in the promissee a mistaken idea of the promissor's intention, the latter has committed some negligence." One could express Lassen's meaning as follows. In the first place it is difficult to establish absence of blameworthiness, when the promissor makes a mistake, unless it can be shown that he *could* not have acted carelessly. Otherwise, it would be too easy for the promissor to make himself appear to be blameless. In the second place, the promissor very often *is* blameworthy when a mistake arises. Therefore, except in the special case mentioned, we ought to assume that he is to blame. But the basis is that the 'fault' which a person commits against the promissee, in arousing through the promise a false but legitimate expectation in the latter, should be compensated, whether it happens through carelessness or by intention. This plainly indicates a jural basis in natural law for the application of law which Lassen advocates. Since the right to compensation exists in the case in question, not on the basis of law or of custom, but according to the sense of justice, 'defect of intention' should not be relevant unless it can be maintained that the promissor was not even negligent.

The fact that proof of the absence of negligence may be car-

[1] Why is the interest of social intercourse dragged in here? In the preceding reasoning it plays no part whatever in connexion with negligence. Is it, perhaps, because this interest is really the decisive factor for Lassen, but the above-mentioned considerations of justice enter *because* he cannot disentangle himself from natural law? Or is it introduced as an auxiliary principle for a method which is correct apart from it?

ried out only when it can be shown, on the ground of objectively establishable circumstances, that the promissor *could* not have seen that the promise would arouse a false but legitimate expectation in the promissee; and the consequent fact that in *particular cases* even a promissor who was not genuinely negligent might be treated unjustly; these facts concern the *technique of law*. In real life the abstract principle cannot be directly put into practice *without breaking down in the main and on the whole.*

It should be noted that 'the interest of social intercourse' does not *here* play the least part. It seems to be brought in only because it lies in the background and determines the special way in which Lassen develops an argument based on natural law. Or it serves here as an auxiliary principle. It should also be noted that Lassen hides from himself the fact that his standpoint is that of natural law by talking about the demands of '*feeling of justice*' instead of '*consciousness of justice*'. But 'feeling of justice' is itself impossible without a consciousness of justice which includes the assumption of rights which exist in themselves independently of law and custom. It should also be noted that the reasoning quoted above is alleged to belong to the complete 'establishment' of the reliance-theory, but is also supposed to determine the limits of that theory. Moreover, the second of the three legal rules, which Lassen puts forward, which restricts the reliance-theory in favour of the promissor, is based *entirely* on the argument from natural law. On p. 313 Lassen says explicitly that his intention has been to defend the 'view' "that the binding force of a promise rests on its capacity to arouse a legitimate reliance in the promissee". Thus the 'view' defended is *not* that it is important for social intercourse that promises can be relied upon, and that therefore a promise gets its binding force through law and custom. But, since Lassen does nevertheless decidedly defend the latter view too, what is in question here cannot be the factual legal basis but must be something else, *viz.*, the *jural basis* of the law. This is located in the intention of the promissor, together with obligation to make reparation for negligence or for wrongful action.

This way of proceeding is, however, only a natural consequence

of the fundamental assumption that the relevant jural fact is reliance on the promissor's 'contractual will'. This reliance, in spite of all Lassen's twists and turnings, is a reliance on the promissor's intention to bring about *directly* certain legal relationships. So it *is* a reliance on having received a supernatural right which rests upon the promissee's purely inner volition. The reason why *such* a jural fact is relevant *must* lie in rational law, since it presupposes belief in such a law.

But the situation becomes completely clear only when one notices the following fact. Lassen's reasoning here, although he seems to be unaware of it, is in *all* points *in principle* a repetition of that put forward in various writings by Gundling (a supporter of the theory of natural law, who was professor in Halle in the early eighteenth century) concerning the relevance of error, in the sense of non-wrongful 'defect of intention' on the part of a promissor. The foundation is the same. The promissor has through error aroused a false expectation in the promissee. If this has depended on carelessness, there is 'a wrong-doing, though indeed a very subtle one' (Cf. Lassen's talk of a 'fault') against the promissee, and therefore compensation ought to be given. Thus the principle holds that *error in dubio* ought to damage him who has made the mistake. For negligence is to be presumed, since it is present in the great majority of cases, and since proof in such cases is attended with too great difficulties. Though Gundling does not explicitly say so, the consequence is the same as with Lassen, *viz.*, that only where it can be shown, on the ground of objective circumstances, that the declarer *could* not have suspected that the promise would arouse a false expectation in the promissee, is proof permissible. The argument concerning the insufficiency of the negative contractual interest as determining compensation (a principle of compensation which had been maintained by previous upholders of the doctrine of natural law) is to be found in Gundling. The difficulties in deciding the damage would be too great, unless one could keep to the principle that the damage just consists in the fact that the contract is not valid. *Servetur igitur*! As regards the promissee the principle holds that

his knowledge of the fact that the promissor has made a mistake comes under the notion of *dolus*, and *dolus* makes the contract invalid in such a way that the guilty party does not acquire any right through it. It is thus plain that Lassen's argument, as regards its fundamental implications, occurs also in Gundling.

The essence of Gundling's theory is found in the Swedish writer Nehrman in his work *Introduction to the Swedish Jurisprudentia Civilis* of 1729. (In Swedish.) The following is from III,i, § 19. "Nor can an agreement hold, in which both parties are mistaken . . . But if one party deceives himself without the other party causing it, then it is said: *error regulariter imputatur erranti* . . . This is so ordained in order to avoid the many *quaestiones facti* in which the judge would with difficulty arrive at the truth . . . But if the circumstance, concerning which one of the parties is mistaken, should be added as a condition *pacto vel consuetudine*, then it seems that the contract cannot be valid." So the contract otherwise holds good '*regulariter*' in the event of self-caused 'defect of intention' on the part of either party. Add to this only the further fact that *dolus*, under which is included the promissee's awareness of the promissor's mistake, makes the contract invalid, according to Nehrman, in such a way that no right accrues to the guilty party.[1]

So we have now shown that the 'reliance-theory' in Nordling and Lassen was determined in its development by the will-theory which originates in the theory of natural law. This is so even if the initiation of the theory depended on the fact that to carry out the will-theory on the lines of the unrestricted relevance of a lack of intention corresponding to a promise would be detrimental to social intercourse. How could the interests of social intercourse be looked after on the basis of the will-theory? Nordling saved his position by putting forward a new conception in natural law. Lassen took up, without apparently being aware of it, a view about delinquency which already existed in the historical doctrine of natural law. His reasoning must therefore be re-

[1] As regards Gundling and Nehrman, I would refer to §§ 25 and 26 of my essay on Nehrman in *Memoir of the Code of 1734*. (In Swedish.)

garded as more rigid than Nordling's from the point of view of natural law. Nordling undoubtedly presupposes the will-theory, but overturns it by means of a new principle of the binding force of a promise. But Lassen, in the reasoning here quoted, is just as consistent and pure a will-theorist as Gundling and Nehrman. No new ground for the binding force of a promise is advanced. It is a mere illusion to think that legitimate reliance, subject to the limitation which Lassen imposes upon it, would abolish the relevance of 'want of intention' in such a way that a promise would itself be really binding in spite of that defect. It is by no means binding in itself. But the promissor's fundamental obligation to make reparation, because of a negligence which causes the promise not to be binding, forces him to carry out the content of the promise. The fact that he may not appeal even to the venial character of his mistake, except when he can show on *objective* grounds that he *could* not have known that he would arouse a mistaken idea about his intention, depends on the difficulty of proof where actual mental states are concerned. As regards the obligation to make reparation by carrying out the content of the promise, the principle of natural law applied by Gundling in this connexion holds good:—*oritur obligatio ex culpa ad damnum pensandum.* But the will-theory itself is essentially bound up with the perverse view, which originates in the doctrine of natural law, that a promise is a statement *about* a certain intention; and this view in turn is bound up with the modern account of the notion of rights, which is itself inherited from the doctrine of natural law.

VI

On Fundamental Problems of Law. 1939

What is meant by the word *illegality*, if one takes account only of *factual* reality and thus sets aside the moral quality with which that reality in certain cases is endowed? Nothing else than the behaviour, whether it be omission or positive action, which calls forth a certain coercive reaction in accordance with the rules for coercion which are *in general* applied and irresistibly carried out as a matter of fact in a human community. *Legal duty* (legality), in the same context, is nothing else than behaviour with the opposite character. But the coercive reactions which have to be considered in different cases may be of different kinds, *e.g.*, enforced surrender of an object, enforced payment of a loan, enforced compensation for damage, or punishment. In each case the illegality itself is described by the kind of coercive reaction which attaches to the behaviour. It is therefore obviously a mistake, *e.g.*, in the interpretation of a penal law to adduce the requirement of illegality as a necessary condition for liability to punishment. The required illegality, as something that actually exists, just means that the action is of such a kind that it fulfils in various respects the conditions for being liable to punishment. Thus, when both objective and subjective illegality is demanded, the action must fulfil both the objective and the subjective conditions for liability to punishment. So it is meaningless to treat illegality itself as such a condition. If illegality itself does not mean that the action is of such a kind as to fulfil the conditions for being liable to punishment, but means that it is such that it brings about another coercive reaction, *e.g.*, enforced indemnification, then it cannot possibly be treated as a *necessary* condition for punishment.

But suppose it is granted that "illegality" or "legality", as determined with regard to factual reality, are meaningless as special legal categories which are to be applied, *e.g.*, in deciding whether an action is liable to punishment. Suppose it is granted that they are merely expressions, albeit misleading ones, for the fact that one mode of behaviour calls forth coercive reaction whilst the opposite mode of behaviour is free from it. Then another consideration enters if, as commonly happens in jurisprudence, they are referred to a merely fictitious reality, *viz.*, the *commands and prohibitions* of the legal order. "Legality" then means obedience, and "illegality" disobedience, with regard to these. Coercive reaction is then regarded as a *consequence* of disobedience ordained by the same legal order. In that case, in order to determine whether an act is liable to punishment one must of course *first* decide whether it conflicts with the imperatives of the legal order. On this view, however, the legal order is regarded as a personal commanding power, which enforces its commands by the exercise of coercion when they are transgressed. It is personified in a primitive way. But *how* does the legal order function as a "power"? Only in so far as rules for the exercise of coercion which have come into being in a constitutional way, and other coercive rules which have been annexed to them through, *e.g.*, so-called customary law, the practice of the courts, or "*auctoritas iurisconsultorum*", are *actually* applied. The legal order as a power *is* nothing but this actual state of affairs. But the cause of this power cannot be assigned to itself. A factual reality cannot have its cause in itself. If, then, the cause of the actual maintenance of the rules of coercion is ascribed to a powerful will, this will cannot *be* the legal order itself, whose "power" consists exclusively in the actual state of affairs just mentioned.

But, if we investigate the real cause of the maintenance of the rules of coercion, we discover only all kinds of co-operating *imponderabilia*, which together bring about this result, and which it is meaningless to describe as a will. Suppose that the members of a society were not in general inclined already to act in such ways as are free from coercive reaction according to the existing

rules of coercion. Suppose that they were held back from pursuing their own interests outside the limits of the legal order only by reflexion on the risks, reflexions which are always uncertain in their outcome. Then the legal order itself would be an impossibility. Rules of coercion cannot be maintained against a whole community if the actions of its members only *by chance* are such as not to entail coercive action.

The maintenance of the legal order presupposes in the first place what is called social instinct. This expression means that in a certain community the members are inclined, *in general independently of all reflexion*, to follow certain general rules of action, whereby co-operation at least for maintenance of life and propagation within the group becomes possible. A social instinct in the same sense occurs also in animals which form communities. The difference lies in the fact that in human societies the instinct can attach itself to laws which have been consciously created and have come into being in a determinate way and to other rules connected with the legal system. With this is connected the fact that in human societies co-operation is possible for other ends than mere maintenance of life and propagation. In an ant-community the individual ant behaves according to certain rules without being conscious of them. But the same kind of disposition is found in primitive human societies in regard to certain social customs which do not need to be formulated. It is altogether a biological absurdity to divorce the formation of human societies from its connexion with animals which form communities. But the instinct in question is obviously not so reliable, if a person has a direct interest in an action which falls outside the limits of the law or if he is driven by passion to such an action, as it is if he is a mere external spectator of other men's actions. In the main the attitude of an external observer in presence of another man's "illegal" action is that he reacts with moral disapproval in so far as the action takes place by deliberate intention or through carelessness. In this way an individual who is tempted to transgress the given bounds of law becomes subject to the pressure of his awareness of other men's

moral reactions. But he is checked also, even if not so universally, by his own feeling of duty. The direct inclination to action within the bounds of the coercive system brings about the above mentioned moral reaction when a person feels himself tempted to behave otherwise. But, on the other hand, the individual in his relations to others acquires certain feelings of power, which express themselves in *demands* that the latter should act "legally" in the individual's own interest, and, if an actual transgression takes place, in demands for an equivalent compensation for the loss caused thereby. But, just as the feeling of obligation, in so far as it is moral, does not itself *mean* a pressure exerted by the rules concerned with external coercion, so the corresponding feeling of power is not *identical* with that feeling of power which rests on the consciousness of the possibility of setting the machinery of coercion in motion. The former expresses itself in the word "right", which is not based on the idea of *factual* power. Here too the basis is the social instinct, though this does not here operate *restrictively* on one's own interests but issues instead in a *demand* for their vindication. If positive law says "he is entitled" or "he is bound", this means in the former case that he can secure his own interests within determinate limits in ways laid down in the law, and in the latter case that he must restrain the pursuit of his own interests in ways laid down in the law if he would avoid a certain coercive reaction. The use in such cases of words which are the natural expression of the group of feelings mentioned above acts suggestively on those feelings and is thus of importance for the maintenance of the legal order. The existence of a legal community is characterized by the fact that fixed rules for the exercise of coercion are maintained and that the arbitrariness which belongs to terrorism is excluded. This presupposes in every case that a more general moral disposition of the kind described actually exists, depending on the direct inclination to act within the limits which are laid down by certain rules of coercion.

But the directly active social instinct, together with the ethics of legality which depends on it, is not the only factor which is

necessary for the maintenance of the legal order. Where it appertains to the rules in question that the so-called authorities charged with the observance of law will intervene, the latter are immediately prepared to do so in accordance with social instinct. Here the direct tendency to act in a certain way, which is what the instinct means, operates more infallibly than when only individuals are concerned who may have special interests bound up with "illegal" action. A judge does not as a rule consider for a moment whether he actually shall follow the existing law. And, if certain such authorities in exceptional cases do not act according to the rules, other such authorities intervene in their turn against them in accordance with the same legal system. Moreover, the public itself is disposed by the same instinct to uphold the rules of coercion. But in this way there enters yet another factor in the maintenance of law, *viz.*, the individual's fear of external compulsion. This co-operates with and is intimately bound up with the moral pressure. The latter is also strengthened by consciousness of the existence of a systematically exercised coercion in regard to certain actions. Such actions present themselves, in consequence of the *regular* occurrence of coercion, as something evil in themselves. The unfortunate consequence appears as something inherent in the action as such, and this is important especially in the sphere of penal law.

We have now stated the three conditions which are always necessary for the maintenance of a legal order, *viz.*, social instinct, a positive moral disposition, and fear of external coercion. But of these three the social instinct is presupposed by the other two. Without it morality would not lead to such action as is free from legal coercive reaction. Without it such reactions would not be possible as regular occurrences, and therefore fear of external pressure could not become a factor constantly operating in the direction of such action. Nevertheless the other factors are important, because the social instinct does not infallibly act on its own account, but may be overcome by interests or passions which lead to antisocial action. They become active where the directly operating social instinct fails, and, together with the instinct as

directly active in maintaining the rules of coercion, they make possible the stable existence of the legal order as a power. Although it is necessary for the existence of the legal order that the social instinct should operate without question in the majority of individuals and in most cases, it may yet fail in particular cases. But suppose that in such cases the rules of coercion were not constantly maintained, and that consciousness of this fact did not arouse fear of external pressure in those tempted to transgress the given bounds. Then the public would not retain that certainty in regard to its own interests within the limits of the law which otherwise follows from the general functioning of the social instinct. The instinct itself would be subjected to strain and thus the very foundations of the legal order would be put in jeopardy. The moral disposition acts in the same direction.

To this must be added, however, yet another factor acting in the same way, especially in ancient times. The rules of coercion were ascribed to a divine power which, as superhuman, governs independently of the actual dispositions of the members of the community. (We shall deal more in detail later with the historical developments of this point-of-view.) No doubt the very assumption of a divine ruling power, which belongs specially to the society, presupposes a consolidation through social instinct of the human group in question. This alone makes possible the idea of a community over which the divine power rules. And consolidation to a real community *presupposes* that the social instinct attaches to certain common rules of action, by which co-operation becomes possible. And, if coercive rules exist, these must have their foundation in the pre-existing common rules of action. But this does not exclude the fact that a special factor working in the same direction comes into being through the assumption in question, *viz.*, fear of divine reaction in the cases where external compulsion is involved, and, on the other hand, faith in divine help where a person is himself injured by the transgressions of others.

These factors co-operate in maintaining the legal order as a *power*. That is to say, they co-operate as causes which bring it

about that certain coercive rules are systematically applied within a group of men. But they are also, and in this connexion, causes of the maintenance of the legal order, in the sense that the members of the community actually do in the main and on the whole confine their activities within the limits which are set by the coercive rules, and thus co-operate for common ends. But it is absurd to regard the co-existence of these factors as if it were a real powerful *will*, which issues orders and prohibitions, and determines a certain compulsion as the consequence of disobedience and thus enforces the rules which it has given. The legal order is throughout nothing but a social machine, in which the cogs are men. But what about the legislator himself? Surely *he* is a powerful will with the qualifications just stated? But who is such a legislator in a constitutionally governed state? It is really impossible to indicate either any individual or any group of persons whose will could be regarded as sovereign in such a state. When, in interpreting a law, reference is made to the legislator's "will", what is meant is always the intention of that person or those persons who bring the law into existence. But the law itself exists, as an item in the legal order, when certain formal actions connected with a declaration have taken place in due constitutional manner. This is quite independent of the legislator's will. We say that Parliament *resolves* on a law. But everyone knows that "resolution" here means only that in the voting the majority of the *votes* were given for a certain pronouncement in imperative form. Certainly those voting in the majority do then generally intend that the declaration shall actually come into force, *i.e.*, that it shall actually become determinative for the actions of members of the community. But this purpose in itself has not the least significance for endowing the law with force. That which gives to the law its force is merely the *voting*, which has taken place in accordance with certain forms, followed by publication also in due form. Even if the majority, or particular individuals in it, vote quite thoughtlessly for the proposed law, or if immediately afterwards they alter their intentions and make this known, this is completely irrelevant to its force as law. A law

can cease to be in force only through formal abrogation. No one believes that the will of the driver of a car *as such* influences the running of the car. What is determinative is merely certain movements on his part which take effect through the mechanism. The same results follow whether the driver makes these movements voluntarily or involuntarily. But the driver has the *possibility* of determining the course of the car by his will because of the mechanical connexion between his movements and the latter. The same holds *mutatis mutandis* for the legislator. And, if he is himself an autocrat, this implies that, when a genuine legal order exists, the social mechanism is so constructed that it functions immediately in accordance with certain actions on *his* part done in due form.

One could indeed go a step further here and enquire why the social mechanism in a certain society functions in connexion with just this determinate *constitution* and not some other. But there is no occasion to take up this question *positively* here even in the abstract. We need only insist that no constitution, in the sense of the order in accordance with which laws and other regulations must be ratified if they are to acquire force through the above mentioned social mechanism, exists through the mighty will of either the people or an individual. The people itself is merely a mass of individuals without the possibility of a unitary will *unless* there exists a constitution which operates automatically. Even if a single individual should set up a constitution, *e.g.*, with the support of military force, he would himself become dependent on it if it actually functions in the way proposed. It is only if we regard as a "constitution" even an organization of society in which a certain person makes his fortuitous wishes authoritative without depending on any sort of rules in doing so, that we could say that the "constitution" exists through his powerful will. But in that case there is nothing that can be described as a legal order. Mere caprice rules.

What is the origin of the curious modern view that the legal order itself is an authoritatively commanding and forbidding will, which also reacts by coercion when its commands are trans-

gressed? Since on this view the legal order is anthropomorphically made into a sovereign personality, it is necessary, in order to answer the question, to consider how the person of the actual concrete sovereign was originally conceived. It has *universally* been a distinguishing mark of him that he is endowed with *divine* power. He rules "with God's grace". Through this power he has the capacity to bend the wills of the members of the community to his own will. *His* commands make action in accordance with them a moral duty. To this there corresponds the fact that he has the *right*, *i.e.*, a power exalted above all factual conditions of power, to command. He has also, as divine, the power to lay down the consequences which shall follow on actions against his commands, and these consequences thereby become just. But he is sovereign not only morally but also physically. He himself is the ultimate source of all coercion which is exerted according to *his* will. *He* exerts it through his organs. In that way the divinity himself rules over men. When the political sovereign rules by divine power disobedience to his will becomes disobedience to God's will. So the legal order becomes rooted ideologically in the person of the sovereign as divine. Its existence is held to have its foundation in the latter. The instinct which builds up a community thus comes to function only through the mediation of the belief in question. This does not alter the fact, stated above, that the sovereign himself can be regarded as bound by constitutional rules or by laws directly given by the divinity, which create rights or obligations in the community. The meaning of this bond is here twofold. On the one hand, it determines under what conditions he really acts as a divine ruler and does not merely operate as a private individual who usurps for himself a sovereign power which ideally does not belong to him. On the other hand, it lays an obligation on him to keep within certain bounds. As regards constitutional rules, although they are binding upon himself, they can yet be regarded as controlling him in consequence of his own will. This is the case if a ruler, who has previously ruled autocratically, lays down a constitution which is to be binding upon himself. It is always *his* will alone which can give obliga-

tory force to positive laws and other regulations, even if they do not proceed directly from him, just as he alone in the last resort can exert legitimate coercion. And if he, as absolute ruler, binds himself by constitutional regulations, these too derive their obligatory force from *his* commands.

Here in Sweden we find vestigial traces of this point of view, according to which the *king's* will alone is sovereign, even in times when his real power has been whittled away. (It should be noted here that, according to recent researches, the very *word* 'kin' originates in sacred ritual.) In Fredrik I's (of Sweden) ratification of the law of 1734 we read as follows: ". . . therefore have we willed hereby to accept and ratify this law, which we also in virtue of this ratification graciously *command* and *ordain* not only to our faithful subjects but also to all who dwell in our kingdom and territories that they shall . . . but also to all our judicial and executive officers that they shall . . ." The occasion for such a mode of expression is obviously that, according to the traditional view, a law acquires obligatory force only through the king's command. It should be noted also that not only the king's executive officers but also all judges are described as exercising their powers as the king's organs. The form of government of 1809 concludes thus: "All this which is written above WE (*i.e.*, Charles XIII of Sweden) not only ourselves will to be accepted as an irrevocable fundamental law, but also graciously command and ordain that . . ." See further § 4: "It appertains to the *king alone* to govern the realm in the way laid down in this form of government." And § 17, subsect. 1: "The *king's* jurisdiction shall be entrusted to . . ." Note also the introductory words in the publication of the law: "His Majesty has seen fit with the consent of the *Riksdag* to ordain." The king alone ordains and creates obligations, though his ordinances acquire binding force only on condition that the *Riksdag* gives its consent. However much such modes of expression may be formulas retained merely on grounds of ancient usage, the original meaning is nevertheless obvious. The Babylonian lawgiver Hammurabi received his legislative power from the sun-god, as Moses received his from Jehovah. The emperor

of Japan is a god to this day. The Roman emperors were regarded as gods. "Augustus" means the holy one. The English and Swedish kings have not been so regarded. But it is plain from the originally highly significant coronation ceremonies that at any rate they were held to be endowed with a sovereign power emanating from God. In republican Rome, no doubt, it was the popular assembly which had the legislative power. But all decisions in the popular assemblies which exercised the highest legislative functions, *i.e.*, the *comitia curiata* and *centuriata*, required for their legal validity that the leader of the proceedings, as holder of the supreme auspices, *i.e.*, of the power to decide in the last resort through signs as to the will of the gods, had already found the omens favourable. Otherwise the decision was invalid *ipso jure* and bound no one. Through the close relation to the gods which was involved in the holding of these auspices this person had not only the power to command directly with obligatory force but also a power to coerce the disobedient. Livy relates that rebellious tendencies among the mob were on one occasion immediately quelled by the mere appearance of the dictator alone and unprotected. *For they feared the vis dictatoria.* Note that the dictator alone had the highest auspices.

The point of view sketched above found a peculiar development in the law of nature. In the ideological revolt against both the privileges of certain social classes and the guild-system and against the principle of legitimacy in the case of kingly power, it was asserted, especially in the XVIIth and XVIIIth centuries, that no sovereign power, and in particular no superiority on the part of one individual in regard to other individuals, exists originally as divinely instituted. According to the order of nature, which is identical with the order which emanates from the divine reason, each is sovereign over himself in equality with every other. That is to say, his will has divine power to govern himself as acting, within the bounds of course which are consistent with the like power of every other. Through the analogy with the relation between an external ruler and his subjects each individual is doubled. But, as ruler over himself, he can lay him-

self under obligations to others in a like position. He can by a mutual contract with others bind himself to submission to the common will of a plurality of individuals in which all have similar parts. In whatever way it may be decided *what* is to be regarded as the common will, the latter always acquires at second hand, through each individual having bound himself by mutual contract, the divine power of ruling. And, in so far as really binding rules, with legal sanctions attached in case of transgression, exist in a society, the contract must be presumed and the general will must ultimately be that which rules through divine power. The constitutions of the U.S.A. and of France are, as regards their ideology, historically conditioned by this theory. Note the declarations or rights which were made the basis of the constitutions in the American free states and of the French revolutionary constitutions. Rousseau, the philosopher of the French revolution, says: "Justice comes from God; he alone is its source." (*Le contrat social*, 2, 6.) But "justice" consists in mutual respect for the rights of each other as *equals*. It is only because no respecting of my rights is guaranteed in the state of nature that I have no obligation to respect the rights of others in that state. For this reason the "social contract", through which each individual is subjected to the "general will" but also acquires an equal part in its sovereign power, is necessary for the actualization of "justice" as really binding. As embodying "justice" the general will is, then, also divine. By way of comparison we may consider how in Athens the transition took place ideologically from aristocratic government, exercised by immigrant Ionian families who claimed descent from *Apollo patrous*, to democracy. The legal fiction was introduced that *every* Athenian family was descended from the same god. Thus the democracy became legalized.[1]

In more recent times the political sovereign's power was regarded in a different way in the prevalent philosophy of law in Germany and Sweden. The state, as an organic supersensible unity of individuals, has alone the right to impose obligations by commands and prohibitions and to exercise just compulsion in

[1] See Farnell, *The Cults of the Greek States*, 4, p. 160.

case of disobedience. But, as being in itself a merely ideal unity, it needs a person manifesting himself in the external world to exercise its power as its supreme organ. Although, on this view, it is not the divinity, but the state in the sense described above, which is the source of the natural political sovereign's power, the connexion of the latter with the divinity, according to this same theory is obvious. So here too the power of the political sovereign is divine. However the power of the political sovereign may be defined, it has been universally regarded, more or less consciously, as supersensible, and so the ruler himself has been held to be entitled to impose obligations by his commands and to exercise just coercion. It has been universally assumed that the particular legal order which actually exists in the community derives its existence from him in his above-mentioned capacity, quite independently of the actual positive attitude of the members of the community towards that order. This attitude, on the contrary, is itself a *product* of his supersensible will.

The point of view just described is unintelligible unless we take into account the primitive view of gods as having their existence in certain external phenomena, temples, altars, etc., and also in individual human beings. Apart from this reference to the above-mentioned point of view, which is superstitious in its historical origins, it would be impossible to understand how in our days the legal order itself could be regarded as issuing commands and as reacting punitively when those commands are broken. No longer can one be satisfied to believe in a certain personal sovereign power which, because of its supersensible nature, can bend all to its will. So the power to issue norms which impose obligations, and with which coercion in case of transgression is bound up, is transferred to the legal order itself. But the legal order, whose very existence as a power simply reduces to the fact that certain coercive rules are actually maintained through the positive attitude of the subjects towards them, cannot be a power which stands *above* the subjects and imperiously issues commands to them. And it is absolutely devoid of any will of its own. Therefore this whole point of view is completely absurd.

But why have people come to hold the view that laws and other legally binding regulations are commands and prohibitions, issued by a certain power, so fanatically that at length they have ceased to be troubled by obvious absurdities? The cause of this is best seen in the sphere of penal law. Let us consider what is understood by the justice of a punishment. It consists primarily in the fact that the action was such that it deserved just that punishment. The punishment belongs to the action itself. If we have a penal system which is determined merely by the interests of the society or of the individual, the bond between the action itself and the punishment is dissolved. And it is altogether impossible to say that the punishment occurs *by reason of* the guilt of the culprit, which makes him deserve punishment. In that case punishment is inflicted, not on account of what has already happened as such, but merely in view of the need of such reactions for the sake of the public or the individual. But what is it that binds together the punishment, as just, with the action itself? The fact that certain actions carry with them ill consequences through natural causes has nothing to do with this connexion. Here plainly it is a question of a bond of a moral kind. The punishment *ought* to occur by reason of the nature of the act, quite independently of any human end lying outside it. The feature of the action which is the reason why the punishment ought to follow regardless of any human purpose is the following. It is its property of violating the *law of justice*, inherent in "reason" or the consciousness of right, independently of all human legislation, which regulates men's rights and their corresponding obligations and which is itself endowed with divine qualities. It holds good absolutely. The rights and duties laid down in this law do not acquire their reality, as do those laid down in human law, *through* the maintenance of the legal order; on the contrary, "right" exists immediately as a subsistent inner power, independent of the conditions of external power, just as "obligation" is immediately real as an inner bond and therefore independent of the actual maintenance of the legal order. It is, then, this point of view which leads through transference to the opinion that the

rights and duties laid down in human laws have immediately an actual existence, independent of the *factual* maintenance of the rules of coercion which belong to the legal order. On the contrary, the coercive order acquires the meaning that it actualizes in the *external* world the obligations which already actually exist in their own right. Human law is treated as being authorized through the inner law given in the consciousness of right, so that the latter merely gains expression and enters into the external world through human law. Now it is the law given in the consciousness of right which demands retribution for breaches of itself. Retribution must be exacted as a vindication of its own majesty. It stands in exalted greatness above mankind and must vindicate itself, through the demand for retribution, against the criminal. That such a demand is just is obvious, since the law constitutes justice itself. This presupposes that the law in question is taken as a *will* which commands and which reacts in self-vindication against transgression by means of the demand for punishment. But, if the political sovereign is to be regarded as constituting the existing particular legal order in virtue of his supernatural power, as has generally been assumed right up to the most modern times, his penal regulations must be an actualization of the demands for vindication of the law of justice if the positive penal law is to be itself just. But for this reason he must also, as representative of the law of justice and in view of the rightful interests of the *particular* society, determine in detail the demands of the law and ordain punishment according to the importance of the legitimate interests which are infringed by transgression. It is then a natural point of view that he cannot justly punish unless he imperatively announces his determinate volitions and attaches punishment to transgressions of his commands.

It is readily intelligible that all kinds of penal theories should have been put forward in the western world which take account of the interest that a society has in the existence of a penal law which is in some way fixed. For no legislator can ignore the good of society. But this should not divert attention from what has been the deepest current in the general western view of penal

law, *viz.*, that punishment is just only if the person who is to be subjected to it has made himself *deserving* of it through his action, *i.e.*, only on the assumption that he is *guilty*. But in the last resort he is guilty through violating the absolutely valid law of justice itself, which demands retribution. This is itself just, as being demanded by the law of justice itself. It *ought* unconditionally to take place. But, if punishment is inflicted without guilt, it is unjust and itself involves a violation of the law of justice. To take a typical example from the XVIIth century let us hear what Hugo Grotius has to say. According to him, punishment is in its essence a *malum passionis, quod infligitur ob malum actionis*. (*De Jure Belli ac Pacis*, 2, 20, 1, 1) He quotes from St. Augustine the sentence: *Omnis poena, si justa est, peccati poena est*, (§ 3). This implies that no punishment can justly be imposed on anyone unless he has made himself deserving of it through his action. And he has done this if he has violated the divine law of justice. God's *direct* punitive action need in no way be exercised for the sake of the good which it may happen to bring about. Grotius rejects Plato's doctrine that God, as goodness itself, cannot punish for punishment's sake. Since he has the supreme right, exalted above everything human, his punishments, considered as pure retribution, are also just (2, 20, 4, 2). What Grotius has in mind here becomes particularly plain through his reference to the passage in the Book of Proverbs (1, 26) where "Wisdom" speaks as follows: "Since ye have set at nought my counsel and would have none of my reproof, I also will laugh at your calamity and will mock when that cometh which ye fear.' It is a different matter when men exercise the function of punishment. Since men are equals, the justification of punishment requires, not only that it shall be just in the sense explained, but also that some human good shall in fact be realized through it. To take an example from the XVIIIth century, Kant expresses himself even more extremely. He goes so far as to assert that, if a community (which, according to him, always exists as a juridical entity through contract) should be dissolved, and if only a single imprisoned murderer should remain, who had therefore

not already been made to pay for his crime by suffering capital punishment, then the people takes upon itself the murderer's blood-guiltiness. For the XIXth century we need only mention Hegel, whose influence on juridical thought is incontestable. According to him, *law* itself is the spiritual reality in the sphere of the manifestation of objective spirit. In justice is the negation of this reality. Justice vindicates itself as the spiritual reality by negating this negation of itself. This happens especially through punishment as an evil inflicted upon the criminal equivalent to his crime. In the most recent times we have Binding's theory. The right of the state to inflict punishment rests on the fact that the state, as possessor of sovereign right, has imperatively laid down its will. It has the right to vindicate by punishment its *imperium* whenever this will is infringed. The theory is closely related to that of Hegel. At the back of both of them lies the idea of the right of retribution in so far as the injured party has the right of sovereignty. It is a matter of indifference if the possessor of the *imperium* is described as the state or more abstractly as the law. Finally, as regards Sweden, we may bring forward the penal theory of Thyrén which has for long prevailed in that country. That punishment is justified depends on the fact that the criminal has committed a breach of the commands of the state issued for the sake of social values. By his action he lowers the authority of the laws and sets a bad example. He must expiate this by punishment, which thus functions as a kind of social indemnification. But that this is just depends upon the fact that he has transgressed the law's imperatives. It is through this that he is *guilty*, *i.e.*, has deserved punishment. This punishment, then, plainly functions both as *quod peccatum est* and as *ne peccetur*.

The imperative-theory is intimately connected with the idea of punishment as just retribution. The superior power, which justly retributes, must, in order that this may be possible, make its will known through commands. The fanatical adhesion to this theory depends then on the idea that punishment is to be justified as presupposing the criminal's *guilt*. No longer does one persist in the belief in a certain human will, whether that of an individual

or the mystical will of the people, as alone commanding with obligatory force. But one needs such a power in order to be able to maintain the justice of punishment, and in this way one is led on to refer to the indubitable reality possessed by the legal order itself, to which the penal laws belong. The latter thus comes to be described, against all reason, as a will which has divine power, whether this is explicitly stated or not. To this we need only add the following. Suppose that *punishment* is justified only on the assumption of the criminal's guilt as transgressing a legal duty. Then by the same reasoning *every* coercive action in accord with the legal order against a person is justifiable only on the assumption that he has made himself deserving of it through such a transgression. Since, however, a condemnatory judgment in a civil action in no way presupposes that the person concerned has acted in bad faith and thus really disobeyed the legal power the problem of wrong without fault ("*das schuldlose Unrecht*") arose. It should thus be possible to transgress a legal imperative without knowing that it holds in the particular case. To the solution of the problem of how this is possible an extensive juridico-philosophical literature has been devoted!

To conclude this investigation, it must be emphasized that, in this criticism of the imperative-theory, we do not contest, what indeed cannot be contested, that laws and other regulations have the imperative *form*, nor that this form is of psychological importance for the stability of the legal order. That which cannot be maintained, if one takes account of the facts, is merely the assumption of an actual authoritative commanding will, which expresses itself in laws and regulations, and, when its commands are transgressed, reacts *for that reason*. This assumption involves also the absurdity that the supposed will, which is held to lie at the basis of the legal order and to be armed with a *sovereign right* which is regarded in the last resort as divine, should in pure self-vindication exact retribution for disobedience against itself as if it were Israel's Jehovah! At the basis of this lies a transference of natural social feelings of revenge to the supernatural power which is held to be the ground of justice; although this power,

as justice itself, is held to be the highest *good* of the community. Present-day jurisprudence has not the slightest notion of the historical process of development which lies behind such absurdities. Unconscious complexes from the *openly* superstitious point of view of former times hide from it the irrationality of its own standpoint and produce an intense emotional predisposition which it is extremely hard to counteract. Surely a punishment ought to be just! Surely, therefore, a person who is punished must have transgressed against the holy demands of the "legal order"! In this way one feels revolted at unjust punishment as being itself a violation of the ideal justice which should be actualized by the legal order. It is a violation of the right of the victim himself who is punished. But it should be noticed that such a feeling is itself complex. On the *one* hand, it has of course its basis in the above-mentioned inherited view of the conditions for the justice of a punishment. But, on the *other* hand, it has its basis in the feeling of the importance of maintaining the existing laws, and especially the penal laws, for the possibility of co-operation for common ends which a legal order provides. Just as penal laws are necessary for the general security, so too that end is jeopardized if such laws are arbitrarily applied. General uncertainty, instead of security, results. It is therefore natural that an individual who suffers punishment not enjoined by the penal law should become an object of sympathy, for he is a victim of an act which is in itself socially detrimental according to the general social estimation. The feeling of revolt in such cases will therefore always survive, even if feelings originally produced by superstition should lose their power over men's minds.

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