

WHAT IS THE COMMON LAW*

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IN THE Psalm De Profundis, as it stands in the Vulgate, differing from the text with which we are familiar in King James's version, the psalmist cries out, in a noble passage, *propter legem tuam sustinui te Domine*—because of thy law have I abided thee, O Lord. The regularity of the operations of nature, as compared with the wilfulness and inconstancy of human behavior; the steadfastness and predictability of the moral order, as compared with the want of principle and untrustworthiness of the ungodly, gave strength to the faith of the psalmist in an eternal who makes for righteousness—in an eternal who stands behind the regularity and certainty of the natural and the moral orders. How to promote and maintain such regularity and certainty in human behavior, through morals or religion or education or government has been a chief concern of humanity. How to promote and maintain them by the ordering of relations and adjustment of conflicting interests and determining of disputes has been the chief concern of organized humanity. Moreover, not the least part of that concern has been to insure regularity and certainty in the processes of ordering, adjusting, and determining. When one reflects on what has been done in the development of order and system in these processes, and weighs against the abuses incident to the political order the gains which that order and system have brought us, he may well paraphrase the psalmist and say: Because of thy law am I content with thee, O state.

When Aristotle wrote of man that he was a political animal, he put the emphasis on the adjective where the psychological thinker of today would put it on the noun. He thought of a government of laws (for that idea like so many others in politics and jurisprudence goes back to his writings) as the natural, *i.e.*, the ideal, government. Ordering of conduct and

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It has seemed appropriate to publish this address as a tribute to Professor Hinton, to whose memory it might well be dedicated because of his thoroughgoing but intelligent and well-founded faith in the common law and especially the fundamentals of common-law procedure as an enduring possession of English-speaking peoples.

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adjustment of relations according to law and a separation or distribution of the powers of government, whereby a legal check is imposed on authority, seemed to him the significant things where the realist of today sees only a pulling and hauling of conflicting desires rationalized by traditional formulas. Today order in the ordering, system in the adjustment of relations, and checks upon authority operating in accordance with principles logically applied, are under suspicion everywhere. A group of jurists which is most heard from denies them reality. Nor do history and experience formulated in legal precepts appeal to these realists as more than illusion. Although in political and juristic thought the Nineteenth Century is characteristically the century of history, the later Eighteenth and the Nineteenth Centuries are marked by increasingly rapid development of the physical sciences. In the Nineteenth Century these sciences become more and more specialized and differentiated and are increasingly behind a growing industry which in turn stimulates research and invention and so furthers the growth of the sciences. Toward the end of the last century the increased importance of the physical sciences for civilization has its influence upon political and juristic thought, and in the present century modes of thinking derived from or devised on the analogy of those sciences have been undermining what had been held to be the foundations of jurisprudence.

There is a clear gain for all thought in the habits of close observation of phenomena and subjection of theories to the test of such observation which the physical sciences have been teaching us. But the assumption that all our organized bodies of knowledge must be remade to the methods of the physical sciences, which the hegemony of those sciences in the present has made fashionable, is as ill taken as the assumption that the physical sciences might be laid out *a priori*, which prevailed in the hegemony of metaphysics.

If in the era of faith in reason we took it for granted too lightly that human conduct might be subjected to rational principles, and adjustment of human relations might be carried on by rationally conceived formulas, yet the teachings of contemporary psychology, so far from undermining the work of ages of legal development, serve to show us how great has been the achievement of law and politics, by which the fundamentally unrational has been tamed to reason and law and order, and thus the research and experimentation and investigation which have given us the modern physical sciences have been made possible. It is not an accident that jurisprudence and ethics and politics grew up and reached what may prove their maximum before there was much development of the physical

sciences. The latter, indeed, could not have arisen nor gone far had it not been for the stability and security brought about and maintained by the former. If not so striking to the eye at first glance, the subjection of human behavior to the exigencies of civilized life by ordered application of the force of politically-organized society which has developed in the western world since the chaos of the earlier Middle Ages, is quite as significant as anything which has been done in the same time toward the harnessing of external nature to man's use.

Yet we have economic determinists and psychologists and positivists and realists with us in increasing number with mouths speaking great things, and challenging the significance and reality of what we had taken to be the chief agency in this harnessing of internal nature to the tasks of civilization, if not, indeed, challenging the reality or the effectiveness of that harnessing itself. Moreover, they challenge the rational and historical methods on which we had built our faith in the last century. However content we may be with what we have taken to be our achievements, jurists must cast about how to meet these challenges. They must ask what is to be the future of law, especially what is to be its future in an age of machinery and of physical sciences. Furthermore, the English-speaking lawyer must ask what is to be the future of the common law.

A philosopher of the last generation, writing on the nature of existence, felt bound to devote a preliminary chapter to the question, "Does anything exist?" In an age of skepticism and hard-boiled realism, one who considers the future of the common law must first ask whether there is a common law, and if so what it is.

Nor is such a question so easy of answer. The materials of an Anglo-American law library are increasingly heterogeneous. Legislation is departing in every different way in every different jurisdiction from what were common rules or common dogmas for the English-speaking world. New types of question, arising in different jurisdictions, are receiving different judicial answers. There is not a little judicial experimenting with some subjects which the last century had taken to be settled. Administration is taking whole provinces of justice out of the purview of adjudication and is increasingly restive under judicial attempts to subject its actions to the measure of legal principles or the scrutiny of courts. Yet, when we examine these phenomena more closely, we do seem to see something universal, permanent, enduring, behind them; something binding our administration of justice to that of England and Ireland and Canada and Australia; something binding our administration of justice not merely to that of Blackstone's time, not merely to the classical com-

mon-law era, the time of Sir Edward Coke, but even to the medieval English law. We seem to find something which gives form and consistency to the legislation which pours forth biennially or even annually from the lawmaking bodies of a federal government and forty-eight states. We seem to find something which gives consistency and unity to the mass of decisions coming forth from forty-eight supreme courts, each with full authority to declare the common law, from the federal Supreme Court and ten circuit courts of appeals, and from the courts of England and Ireland and Canada and Australia. Most of all, there is indubitably something which enables English and Irish and American and Canadian and Australian lawyers to read each other's books and understand each other's arguments and apply each other's judicial decisions and adapt each other's legislation as surely as they are unable to understand the arguments and read effectively the books and apply the authoritative texts of the non-English-speaking world. This something we call the common law. But what is it?

In the last century, an era of assured knowledge, when men had few doubts about most things, and a philosopher could even write a chapter on the unknowable indicating that he knew all about it, jurists were debating and were far from agreed as to the nature of law. Today they are even less agreed. But for the lawyer's needs three things get the name of law, which for practical purposes we are not called on to seek to unify, namely, the legal order, the body of authoritative materials of judicial determination—the body of received materials in which those who decide cases are held and hold themselves bound to find the grounds of decision—and what Mr. Justice Cardozo has happily styled the judicial process—the process of determining controversies in accordance, so far as may be, with the authoritative materials for decision. When we speak of the common law as a system we use the term "law" in the second of these senses. But in not infrequent usage we have in mind both the second and the third. What, then, is a system of law?

Much of recent thinking about law ignores what Maitland calls the toughness of a taught tradition. A system of law is essentially a taught tradition of ideals, method, doctrines, and principles, continuous as long as the course of teaching remains unbroken. The common law is a system of this sort, a tradition of taught law, continuous in England from the establishment of an organized teaching in the Inns of Court to the decay of that teaching in the Sixteenth and Seventeenth Centuries, and then, as remade in the age of Coke, continuous in the several lands of the English-speaking world from the Seventeenth Century. Sir Henry Maine speaks

of the peoples who are ruled by the civil law as having "built the débris of the Roman law into their walls"! But it is more than the débris of Roman rules of law that binds together the laws of France and Italy and Spain and Latin America, on the one hand, and the legal thinking and technique and doctrine of Central Europe on the other. It is more than the débris of the rules of medieval English land law and medieval English procedure that binds together the laws of England and Ireland and the English-speaking British dominions and the United States.

Law as we understand it in the modern world has been a taught tradition into which teachers fitted legislation and the results of judicial or professional empiricism from the time when the first plebeian Pontifex Maximus began to give consultations in public so that students could attend and take notes. Out of this beginning of teaching grew the traditional teaching of the schools of jurists in the earlier empire. Out of that in turn grew the teaching of the ecumenical doctors in the Eastern empire in the Fifth Century. From this there is a link with law teaching at Ravenna in the earlier Middle Ages, and thence to the teaching at Bologna in the Twelfth Century. From the latter there is a continuous tradition of teaching to the present wherever throughout the world the modern Roman law prevails. In the same way, a tradition of teaching from the pleaders of the beginnings of English law in the King's courts, attested by the name apprentice which belonged to the junior bar down to the age of Coke, became a tradition of teaching in the Inns of Court, and when that decayed a tradition of teaching by lawyers who had pupils in their chambers. Thence in America it was carried on by lawyers trained in the Inns of Court, by their pupils in independent America as lawyers training pupils in their offices, by schools which grew out of expanded law offices, and finally by academic law schools which gradually replaced those of the apprentice type.

Note the general lines of such a development through teaching. With the rise of professional lawyers distinctions come to be drawn between the often oracularly-expressed rules of primitive codes in the endeavor to give each rule more precise definition. Then cases begin to be distinguished as to those coming within and those without particular rules. Presently principles come to be put behind the distinctions and for convenience of teaching and learning are put in the form of maxims. Soon these principles become the basis of further distinctions and thus become starting points for legal reasoning. At this point teaching begins to make itself felt in the working out of broad doctrines to unify the principles, and the teacher's ideal of a body of logically interdependent precepts, born of the exigencies of instruction, begins to organize the received pre-

cepts in order to make them teachable, and so begins to make them more easy to find and to apply. Thus a tradition of organization of the law through principles and doctrines arises and makes for certainty of application, taking care of the need for stability, as the professional and judicial application to concrete cases makes for a continual unsettling of the details of the teacher's logical organization and overhauling of the doctrines and so takes care of the need for change. As the two correct each other a system of law grows up and achieves and maintains a balance between the general security, which calls for stability, and the individual life, which demands change. So long as the balance between the teacher and the practitioner is preserved, the taught system, into which legislation and new institutions and adaptations from without and novel adjudications are carefully fitted, becomes a powerful instrument for making a body of legal precepts effective for its purposes.

It is not, then, any body of fixed rules established at any fixed time or by any determinate authority, it is not any body of authoritative permanent or universal premises for legal reasoning, it is not any body of legal institutions, which we may believe is to have a long and distinguished future as an agency of justice among English-speaking peoples. It is rather a taught tradition of the place of adjudication in the polity of a self-governing people. It is rather a taught tradition of voluntary subjection of authority and power to reason whether evidenced by medieval charters or by immemorial custom or by the covenant of a sovereign people to rule according to declared principles of right and justice. It is rather a tradition in which judging holds the chief place, not administering. It is rather a traditional technique of finding the grounds of deciding controversies by applying to them principles drawn from recorded judicial experience.

From one standpoint we may think of the common law as a system—as an organized body of doctrines and principles, and even to some extent still of rules for the adjustment of relations and ordering of conduct. From another standpoint we may think of it as a tradition—either as a tradition of deciding, so far as tribunals are free to decide, or as a tradition of teaching and writing. From yet another standpoint we may think of it as a frame of mind—as the frame of mind, or perhaps better as a manifestation of the frame of mind, of a masterful people which has made its way in every quarter of the earth and yet has always imposed upon itself limitations of free action while still seeking to be free through requiring reasoned adherence to principles on the part of those who wield governmental authority over it.

In speaking of the common law as a system, I have spoken in terms of a

system of authoritative grounds of decision which yield precepts for adjustment of relations and ordering of conduct. I am not unaware that for the moment it is more fashionable to speak of law as a body of predictions or as a body of threats. But I submit that the law is not made up of predictions. Instead it is made up of bases of prediction. Moreover, what from the standpoint of one seeking advice as to the conduct of an enterprise may be regarded as a body of threats, from the standpoint of the judge is a body of precepts for decision getting its aspect of threat from the assured conviction that the several precepts will be applied to causes as they arise and so entail inconvenient consequences upon those who ignore them.

Thinking of it first in its aspect of a body of precepts, we must hasten to repudiate a conception of law as an aggregate of rules, *i.e.*, of precepts attaching definite detailed legal consequences to definite detailed states of fact. This conception of law, derived from the Byzantine Roman law, in which precepts of the traditional law had been given legislative authority or put in legislative form, so that there seemed to be an aggregate of pronouncements of the will of the emperor, was given currency for the modern world by the law teaching in the Italian universities and the academic theory that the Corpus Juris was binding legislation for an empire embracing all Christendom and continuous with that of Constantine and Justinian. Accordingly, each text of the Digest was designated as a *lex*. Bentham, writing from the standpoint of the legislative reform movement of the Nineteenth Century, thought of statute as the type of legal precept, and his pronouncement that law was an aggregate of laws, and his conception of a law as a rule of law, became established in English analytical jurisprudence. One need spend no time upon Fortescue's doctrine of the continuity of such an aggregate of rules in England from pre-Roman Britain; a doctrine repeated by Hale and taken up by Blackstone, from whom it was often accepted in panegyrics of our law in the last century. Even in a reasonably modified form it is not easy to maintain a doctrine of identity or continuity of rules of law for the common-law world. Even in the most stable part of the law, the law of real property, legislation in England and legislation in our states have gone different ways and have done away with the unity that existed from Blackstone's time to the last generation. One need only pick up a volume of Canadian reports or Australian reports or English reports or reports of different states of the Union in order to see that the actual precepts by which justice is administered differ notably as you go from place to place. Diversity of geographical conditions, diversity of economic conditions, diversity of

social conditions lead to palpable diversities in the legal precepts which obtain in the different English-speaking jurisdictions. Moreover, when we look back over our legal history, we cannot but be struck with the relatively short life of rules of law, *i.e.*, of legal precepts affixing definite detailed consequences to definite detailed states of fact.

This conception of law as an aggregate of rules of law and the extreme nationalism which has grown up since the world war have led many jurists of Continental Europe to write and speak as if there were no longer such a thing as the civil law; as if there were now only the law of France, the law of Germany, the law of Italy, and so on. But one who thinks of law as something more significant than a body of rules obtaining for the time being and looks beneath the surface of this nationalism, can but see a real unity of spirit and technique and doctrine; he cannot fail to see that the tradition, coming down from the Italian universities is still effective in enabling the lawyers of those lands to understand each other and use each other's texts and develop each other's ideas. There is, in this sense, still a civil law and a world of the modern Roman law.

A somewhat better case can be made for finding unity and continuity in certain principles. And yet when we come to look for a fund of common principles differentiating the common law from the civil law, tying the law of America today to that of England in the time of Coke and to the law of England, and Ireland, and Canada, and Australia, today, we shall find them very elusive. A few fundamental ideas of justice are common to civilized peoples. A small body of axioms of justice we share with the civil law. But more than one supposedly fundamental principle by which we set much store in the last century and which can be traced to a beginning in the text books of that time was never universally true in the law of English-speaking lands, and is rejected or in course of rejection today.

More may be said for finding unity and continuity in legal institutions. It may be said that there are certain peculiar common-law institutions which mark our system in contrast to the civil law and are to be found wherever the English law has spread. One thinks at once of the doctrine of precedents, of the supremacy of the law, and of trial by jury. I shall have to speak of the supremacy of law in a moment in another connection. As to the doctrine of precedents, it has been relaxing in more than one American court within the memory of those now at the bar. Our practice by no means gives the weight everywhere to a single decision which the books of the last century claimed for it. Moreover, whatever the theory of the civilians, in practice, as recent continental treatises have come to

admit, the course of decision of the courts has come to be a form of the law almost everywhere: As to trial by jury, the civil jury is well-nigh extinct in England and there are clear signs that it is moribund in this country. Even the criminal jury is under attack, and legislation modifying it is urged in more than one state. Perhaps the abiding universal common-law institution is that mode of trial of cases as a whole which has grown out of the exigencies of jury trial. But such was the Roman mode of trial and the needs of causes involving expert evidence as well as the practice of administrative tribunals have been pushing us in more than one connection in the direction of inquisitorial rather than controversial procedure.

One institution, however, has proved universal and significant in the polity of the English-speaking world, namely, the common-law judge. In the Roman empire and in the tradition of the civil law the judge is a part of the administrative hierarchy. At common law he is independent. He wields the royal authority to do justice. He is not accountable to administrative superiors. In the words attributed by Coke to Bracton, he decides under God and the law. His independence is guaranteed by great constitutional documents or by express constitutional provisions everywhere. Throughout the English-speaking world we have conserved the common-law authority of the courts and the common-law conception of the judicial office as to finding and declaring the law.

Characteristic ideas and doctrines and a characteristic technique are more significant. For one thing, there is the idea of relation. I have spoken of this in detail on other occasions. It is enough here to remind you of the constantly-recurring double titles in our digests: principal and agent, parent and child, husband and wife, guardian and ward, landlord and tenant, master and servant, principal and surety, vendor and purchaser. No amount of systematic borrowings by our teachers from the civilians has availed to supplant law of domestic relations by family law, nor these traditional relational titles by conceptual ones such as agency, guardianship, suretyship, or sale. These double titles have a significance reaching far deeper than mere vocabulary. From the beginning common-law courts have been solving legal problems in terms of relation. They have made postulated relations the starting points of reasoning with respect to men not in relations. They have even sought for and one might say conjured up relations where none existed. As the chief systematic idea of the modern civilian is that of legal transaction (*acte juridique*, *Rechtsgeschäft*) the chief systematic idea of the common-law lawyer is relation. Where the Nineteenth-Century civilian sought for the will of

the parties as deducible from what they did, the common-law lawyer and judge have sought to discover and enforce the duties and liabilities fairly incident to the relations in which the parties find or have put themselves. It is not too much to say that this idea of relation is the central one in the common law.

Along with the idea of relation, and like that idea an inheritance from the Middle Ages, is the mode of thought and ideal behind the doctrine of the supremacy of the law. The change wrought in England by the Revolution of 1688 and the resulting over-shadowing authority of Parliament greatly narrowed the scope of that doctrine from what it was in the hands of the judges in the Fifteenth Century who held a statute infringing the fundamental medieval distribution of powers between the spiritual and the temporal "impertinent to be observed," or in the hands of Coke and his brethren in the Seventeenth Century. In America we maintained the medieval idea of distinct spheres of authority and developed it to its logical conclusions. In the medieval English polity there was the sphere of the King's courts, the sphere of the ecclesiastical courts, the sphere of the sea law. There was the sphere of royal competence, the sphere of parliamentary competence, the sphere of judicial competence. In each case the sphere was thought of as defined by law, and the limits of the sphere were a matter of law. Hence in this country, where we have hewed to the older English polity in this respect, political questions are largely legal and so in some sense legal questions become political. But if the legislative supremacy brought into English polity in 1688 has precluded a universal development of the supremacy of law in its details and consequences, the idea behind it, the idea, to use the phrase which Coke made classical, of ruling under God and the law, pervades the polity of half the world in a common-law conception of administration and adjudication. There are those today who would think of everything which is done officially as law. Such is not the common-law teaching. Not administration as law but the requiring of administration to conform to rule and form and reason is the common-law ideal. We do not think of administration as parallel with law, but as a process under law. From the time when an English court of the Fourteenth Century refused to allow a collector of the fifteenths for the King to distrain the cattle of a subject without a warrant under seal, Englishmen and their descendants and those who have cast their lots with them have insisted that administration was under and part of the legal order and so under the body of authoritative precepts or standards governing all human action. They have insisted that the political order is not outside of the legal order and above it, but rather that

it is the political side of the legal order, or the legal order seen from the political side. The antithesis of their doctrine is the proposition recently maintained by jurists of Soviet Russia, that in the socialist state there can be no law but only administrative ordinances and orders.

No less characteristic and universal in the common-law world is our technique of decision; our technique of finding the grounds of decision in the authoritative legal materials, of shaping legal precepts to meet new situations, of developing principles to meet new cases, and of working out from the whole body of authoritative materials the precepts appropriate to a concrete situation here and now. The civilian is at his best in interpreting, developing and applying written texts. From the time that the Law of Citations gave legislative authority to the writings of the great jurisconsults, he has thought of the form of the law as typically that of a code, ancient or modern. His method has been one of logical development and logical exposition of supposedly universal enacted propositions. His whole tradition is one of the logical handling of written texts.

In contrast the common-law lawyer is at his worst when confronted with a legislative text. His technique is one of developing and applying judicial experience. It is a technique of finding the grounds of decision in the reported cases. It is a technique of shaping and reshaping principles drawn from recorded judicial decisions. Hence while to the civilian the oracles of the law are academic teachers, the books of authority are codes, and the text books are commentaries upon codes, to the common-law lawyer the oracles are not teachers but judges, the books of authority are reports of adjudicated cases, and the text books are treatises on subjects of the law developed through comparison and analysis of recorded judicial experience.

If we think of the common law as a taught tradition of decision, it is a tradition of applying judicial experience to the decision of controversies. If we think of it as a tradition of teaching and writing, it is one of teaching a systematic application of this technique and writing systematic expositions of the results of its application. Moreover, it is a tradition which has its roots in the Middle Ages and so was shaped in its beginnings as a quest for reconciling authority with reason, imposed rule with customs of human conduct, and so the universal with the concrete.

I have spoken of the common law, in the sense of the universal and enduring element in the law of the different English-speaking peoples, as from one point of view a frame of mind. For behind the characteristic doctrines and ideas and technique of the common-law lawyer there is a significant frame of mind. It is a frame of mind which habitually looks

at things in the concrete, not in the abstract; which puts its faith in experience rather than in abstractions. It is a frame of mind which prefers to go forward cautiously on the basis of experience from this case or that case to the next case, as justice in each case seems to require, instead of seeking to refer everything back to supposed universals. It is a frame of mind which is not ambitious to deduce the decision for the case in hand from a proposition formulated universally, as like as not by one who had never conceived of the problem by which the tribunal is confronted. It is the frame of mind behind the sure-footed Anglo-Saxon habit of dealing with things as they arise instead of anticipating them by abstract universal formulas. It is noteworthy that there are signs of a movement toward this concrete mode of thought in recent juristic writing on the Continent.

We must not be blind to the attacks upon the common law, as I have sought to describe it, which are going on in every quarter, though, perhaps, most aggressively and persistently in the United States. An era which rejects history is scornful of anything which has its roots in the Middle Ages. In this spirit many who accept the idea of law as an aggregate of rules of law assume that historical continuity means the continuous existence and application by the courts today of a body of rules established in the Middle Ages. An era of hurry, turning to administration in order to get things done in a rush in advance of thorough consideration, is troubled because the common-law world had no public law till the latter part of the Nineteenth—one might almost say, till the Twentieth Century. Many today lament that the attempt of Bacon and the crown lawyers to set up an alien public law in the Seventeenth Century failed completely. Also in the United States the realists and on the continent a type of nationalist consider the idea of a state ruling according to law and not according to will as superstitious or as decadent. They scoff at the idea of a people solemnly covenanting by constitution or bill of rights to hew to announced principles of right and justice and to reason, and striving by continued adherence to judicial construction of their covenant to make it real in their political behavior.

But a tradition with its roots in the Middle Ages is not without advantages in the society of today where we seem to be moving toward something very like a new feudalism, and as to the need of a public law, something quite unknown to the received common law, we in the United States have done much to develop one on common-law lines and with common-law materials. Nor is it by any means assured that absolutist ideas and institutions will prevail in English-speaking lands in the

Twentieth Century any more than they succeeded in prevailing in Seventeenth-Century England. There has been a long succession of attacks upon our legal tradition. In the Sixteenth and Seventeenth Centuries there was a movement to supersede it by a public law on Romanist lines, conceived in terms of centralized absolute royal authority and administrative supremacy. In the Seventeenth and Eighteenth Centuries there was a movement to supersede it by formulated reason, rejecting reported judicial experience and seeking to make a new system out of whole cloth. There was a like movement in early Nineteenth-Century America. Later in the same century there was a movement to supersede the common-law tradition by the system and refined academic conceptions of the modern Roman law. At the same time, from another side, there was a tendency to supersede the tradition by local legislation and a cult of aberrant local decision. For a season the ideal of a local law, not definitely given up as a result of the economic unification of the whole land, was promoted by the decadence of professional organization, professional education, and qualifications for admission which obtained in the United States in the second and third quarters of the Nineteenth Century. Again, in Twentieth-Century America there have been two movements to supersede the tradition, the one by setting up administrative tribunals and agencies with increasingly wide jurisdiction over all manner of activities and relations, as free as possible from judicial review or control, and the other by popular control of decisions, either by recall of judges, replacing those who hewed to the law by those who would reject it or make of it a body of empty exhortations, or by review of decisions at a popular election substituting the political expediency of the moment for the reasoned development of principles derived from experience.

No phenomenon of our political or social history is more marked than the vitality of the common-law tradition in the face of these movements. Indeed, persistence and vitality have characterized it since the Middle Ages. Note its vitality as against the reception of Roman law in the Sixteenth Century; as against the tendency to political absolutism in the Seventeenth and Eighteenth Centuries—in the contest between courts and crown in Seventeenth-Century England and between lawyers and colonial governors and between colonists and the crown in Eighteenth-Century America. Note its vitality as against political hostility to things English after the American Revolution, as against the hostility to law and lawyers in the depression following that revolution, as against the competing French and Spanish law in the formative years of many of our states, and in spite of the throwing of so many of our courts into politics

and decline of professional training and lowering of standards of education and admission to practice which were incident to the rise of democracy after 1800. Note also its vitality as against the rise of the executive to leadership in our American polity in the Twentieth Century.

Note above all the vitality of the common-law idea of relation, which Nineteenth-Century jurists held archaic and stigmatized as feudal, and had sought to replace by Romanist conceptions, and the vitality of the common-law doctrine of the supremacy of the law even under attack from the strongest interests of the time. In truth, the idea of relation responds to what is now held to be the very nature of human society—not an aggregate of individuals but a complex of associations and relations whose inner order is the foundation of the law. Likewise, the idea behind the doctrine of the supremacy of the law responds to a deep-seated urge in human nature not to be subject to the arbitrary will of a fellow man. It expresses experience of the ill effects of repression which is sustained abundantly by the researches of modern psychology. These two features of the common-law tradition, expressing experience of life and experience of administering justice, have developed our private and our public law respectively.

In an eloquent passage in his *Geist des römischen Rechts*, Jhering tells how Rome thrice dictated laws to the world and thrice bound the peoples in unity—first, while the Roman people were yet in the fullness of their strength in unity of the state, again, after the downfall of the Roman state in unity of the church, and again, following the reception of Roman law in western Europe at the end of the Middle Ages in unity of law; at first, with external force through the might of weapons, then later by the might of the spirit. England has never *dictated* laws to the world. But England, too, has been able to bind peoples in unity of law through the might of the spirit. For it is the spirit of English law of the Seventeenth Century, the spirit of its taught tradition, the spirit of its technique of decision, the frame of mind behind its conceptions of the relation of government and governed, and its doctrines as to adjudication and administration, shaping experience to the exigencies of diverse climes and mixed peoples of diverse stocks, which has enabled English law to divide the world not unequally with the Roman law. As the texts of the matured Roman law have been a quarry for lawyers and lawmakers and law teachers since the Twelfth Century, so we may confidently believe that the decisions of the common-law courts in the maturity of that system in the Nineteenth Century will be a quarry for English-speaking judges and lawyers and lawmakers and law teachers for generations to come.