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PHILOSOPHY OF LAW AND COMPARATIVE LAW

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There is a growing and healthy interest both in philosophy of law and in comparative law in America today. This suggests consideration of the relation of philosophy of law to comparative law, of the function of philosophical method in the science of law, and of the problems of the science of law at the moment as to which philosophy of law may or even must be of help, and of what present-day philosophies of law may be expected to do for them.

When comparative law was a comparison of the legal precepts on given subjects in one system with those obtaining on the same subject in other systems an analytical method was employed. It was true even in this stage of development that historical method was not to be ignored. What legal precepts are depends much upon what they have been and how they have come to be what they are. But a fruitful comparative law must involve more than comparison of legal precepts, important as that is. There should be comparison of systems of law as systems, not merely precept by precept.

History has played a decisive part in the development of systems of law more than once. A taught tradition is a decisive element in a system. Two distinct long traditions, the one going back to the Roman juriconsults of the classical era, the other to the teaching of the law of the King's Courts by medieval English lawyers, have kept their identity since the Middle Ages. They have put their mark upon the significant features of the respective systems and have set the two systems off as independent however much either may have borrowed something from the other at one time or another. Whatever the Continental law borrows it Romanizes. Witness the community (matri-

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monial property) regime borrowed from Germanic law. Whatever the Anglo-American law borrows it Anglicizes. Thus the doctrines of admiralty as to collisions have been made over in recent times in the United States to the Anglo-American law of torts. Whenever anything is taken over from the one system into the other it is made to fit into the system into which it is received and takes on new form and color. From the Middle Ages the Continental lawyer and the English lawyer have had a different bringing up. The course of the taught tradition is for the most part determined by the most conspicuous analogy at hand when lawmaker or jurist or judge has to work out an answer to a new problem. In order to understand a system of law, therefore, we must get at the basic ideas and analogies of the beginnings of its taught tradition.

Moreover, comparative law must involve comparison of the authoritative techniques and received ideals which govern the development and application of legal precepts in the judicial and administrative processes. For these, philosophical method is required no less than historical method. Even in comparing the course of legislation, decision, and juristic doctrine on the same point in different jurisdictions, the ideals, jural postulates, and ideas as to the end of law are highly significant. Such things are not well understood without the help of philosophy.

When human beings are associated in groups or societies, divergent drives, competing desires, conflicting ambitions, cause friction and unless the conflicts are put down, the causes of friction are held to a minimum, and a reasonable ordering is achieved, the association or society will be disrupted by internal strife or will fall apart or dissolve. Hence organization of society involves some regime of social control and the most highly developed social control is the regime of adjusting relations and ordering conduct by the systematic application of the force of a politically organized society which we call the legal order. This general task of the legal order takes form in a number of sub-tasks as they might be called. The simplest is one of what Llewellyn calls "trouble cases," situations of conflict which break up the peace and order of society, lead to private war or obstinate assertion and obstinate denial of claimed expectations. These have, in the development of the legal order, been dealt with in a great variety of ways, by restricting, limiting, and finally suppressing private war, by arbitration and coerced compromise becoming legal procedure, by penal treatment extending to execution, by discretionary action of patriarch or king, by compelling recourse to judges, and by different devices for determining the facts behind the contentions of the disputants. Another

sub-task is, to use the words of Llewellyn, "the channelling of conduct, habit, and expectation in such fashion as to prevent or reduce the emergence of such trouble-cases; and especially in a mobile society such as ours there is the peculiarly important job of rechannelling conduct, of creating new habit and expectation appropriate to the changing conditions of personal and group life, still without touching off too unmanageably much in the way of trouble-cases." Both experience and reason enter into the performance of these tasks of social control. To understand them we must resort to history and to philosophy. But they are by no means so simple as the abstract formulas of philosophers make them appear. Accepting William James's proposition of seeking the more inclusive order, we may unify the categories of sub-tasks by putting as the task of law the satisfying of human desires or demands or expectations, looked at as a whole, with the least friction and waste so far as this can be achieved by a regime of adjusting relations and ordering conduct by applying the force of a politically organized society.

Often the best that we are able to achieve is a rough compromise between two conflicting expectations urged in good faith and confident belief in their intrinsic justice by strong groups in society. Dicey long ago showed how this was the best English law had been able to do as to libel. In the same way we have found by hard experience in America that in labor disputes some tolerance of disorder is a political necessity even where logic would call for a strict enforcement of law. Such things cannot be dealt with by simple theories of rights or ethical pronouncements as to right and wrong. But it does not follow that our only resource is arbitrary expression of a lawmaker's will on the one hand, or arbitrary determination of an administrative agency on the other hand. Nor does it follow that authoritative legal precepts are a delusion; that, as the skeptical neo-realists assert, judicial decisions are results of, are determined by, the individual characteristics and surroundings of the men who decide, not by the law in the sense of the body of authoritative norms of decision nor of the received technique of applying those norms. The things which hold down the personality of the judge and insure in practice a reasonable certainty, predictability and uniformity in the judicial process as a whole are: (1) That the decisions which go to shape the law are decisions of a bench of judges, not of a single judge, and the idiosyncracies of individual judges are counteracted and held back by the give and take of discussion in the consultations which precede decision; (2) criticism by the bar which on the whole keeps a vigilant eye on the course of decision and makes the opinion of the profession known and hence is a strong force for certainty, uniformity and predictability; (3) criticism by jurists

and teachers of law in the legal periodicals, and (4) uniform training of the judges in their formative years which leads to identity of attitude toward legal precepts and their interpretation and application, and a received idea of values and body of received ideals as to the end and purpose of social control and so of law. Here we get help, even if only help, from philosophy.

What are the problems of the science of law at the moment which call for philosophical method? One set of problems grow out of the rise of the service state and its effect upon Anglo-American constitutional law. It is characteristic of the service state to make lavish promises of satisfying desires which it calls rights. Thus, in the spirit of the service state some projects for world declarations of rights recently proclaim a right of every one everywhere to "release from the bondage of poverty" and a right in all men to "just terms of leisure." When a constitution promises such things to every individual those who draft it do not ask themselves whether such provisions are laws, parts of the supreme law of the land, or only preachments of policies which no court can enforce and no executive and no legislative body can be made to regard. Such preachments enfeeble a legal constitutional structure. As they cannot be enforced they lend themselves to a doctrine that constitutional provisions in a written constitution which declares itself the supreme law of the land and contains a bill of rights declaring specific liberties, which have been secured to Englishmen since the contests between courts and crown in the seventeenth century, and to Americans from the beginnings of our constitutional policy, by legal remedies in the courts available to all injured individuals, may be disregarded at any time in the interest of political policy of the moment. They weaken the whole constitutional polity which we have built up in the United States. Setting up such things in a declaration of guaranteed rights makes a farce of constitutions. Guarantees which are no more than promissory declarations of policy not only deceive, they go to undermine those which are enforceable and made to be enforced.

Rise of the service state, the state which, instead of preserving peace and order and maintaining the general security, takes the whole domain of human welfare, except the welfare of our souls in the hereafter, for its province and would cure all economic and social ills through its administrative activities, has affected American constitutional law at another point. After experience of resumption of grants and revocation of franchises at every turn of fortune in seventeenth-century England, and of colonial legislation interfering with enforcement of contracts and revoking charters, Americans put in our federal constitution a prohibition of state legislation impairing the obligation

of contract. This constitutional provision has, in large part at least, become a mere preaching. Legislation impairing or doing away with the practical legal means of enforcing promises is upheld in a doctrine that a power of the legislature to relieve promisors of liability is implied in the sovereignty of the state and is to be read into every contract as a tacit term thereof. This has gone along with a notable relaxation of morals in the breakdown of the feeling of duty to perform promises. What is called the prediction theory of obligations is taught. There is no longer any strong feeling of moral duty to perform, and impairment of the legal duty as well undermines a main pillar of the economic order.

Anglo-American systematists have thought of public law as only a specialized branch of private law until the growth of administration under the service state compelled them to look to Continental Europe for some new systematic ideas. The effect of rise of the service state upon American constitutional law is only a phase of a movement which has been going on in private law throughout the world and is recasting the theory of obligation and of liability to respond for injury or loss by others along new lines involving fundamental questions of the philosophy of law.

In 1715 Strykhus said: "Agreements are to be kept . . . this maxim has proceeded from the mouth of God, and for that reason God is bound by a pact, and the devil and the prince, and there is no greater justice than to observe pacts." In contrast we read today that a promise is no more than a prediction that the promisor will be able and willing to render some specified performance at some future date. We read of "the principle of favor to the debtor," and of what Ripert calls ironically "the right not to pay debts." This is connected with the growth of what Josserand calls "contractual dirigism." When contracts are made for people by the service state they do not feel any strong moral duty to adhere to them. If the state makes them let the state take care of performance.

Article 1134 of the French Civil Code put emphatically the obligatory force of a contract: "Agreements legally formed take the place of law for those who have made them." Planiol tells us that this obligatory force had a twofold basis: "A moral idea, respect for the given word; and economic interest, the necessity of credit." But the idea of a contract as a making of law for themselves by the parties fitted in with the idea of promotion of free individual self-assertion as the end of law which obtained increasingly after the sixteenth century and was characteristic of the maturity of law in the nineteenth century. Comparison of a contract to a law was, indeed, traditional.

Ulpian so put it in the Digest. Domat had repeated it. The nineteenth century metaphysical jurists, to whom freedom of the individual will was the central point in their science of law, developed and refined it. The free wills of the parties had made the law for them. The courts could no more change this than any other part of the law. Even the legislator was bound to respect it as to contracts of the past. That idea was put in the constitution of the United States.

This high valuing of contract has been disappearing all over the world. In France it was covered up for a time by what Austin would have called spurious interpretation. By assuming that the will of the parties had not been fully expressed, courts could discover in contracts terms which were not there and were not in the minds of the parties and could modify the terms which they found there. French legislation went further and gave judges power to suspend or rescind contracts and change their conditions. The parties no longer made law for themselves by free contract. In this as in everything else the omniscient state makes the law for them. Partly there was a moral idea here. Contracts might be improvident or changes in the economic situation might affect the value of the promised performance or of the given or promised equivalent. Partly there was a political idea of helping debtors under severe burdens in time of economic crisis. This is akin to an idea we shall see at work in the theory of liability everywhere—a humanitarian idea of lifting or shifting burdens and losses so as to put them upon those better able to bear them. Belief in the obligatory force of contracts and respect for the given word are going, if not gone.

It means a shift to a directed economy. Planiol well says: "If the state undertakes to direct the economy itself it cannot admit the maintenance of contract relations contrary to those it envisages. Contracts of long duration become impossible where in all cases they are exposed to revision of their clauses. Legal relementation is substituted for contractual relementation. The contract is no more than the submission of the parties to an obligatory regime."

Things have not gone so far in the English-speaking world, but they are moving in the same direction. Standard contracts, administrative prescribing of contract provisions and control over making, performing and enforcing of contracts are becoming everyday matters.

In the history of the Anglo-American common law we see continually more extended securing of claims to performance of agreements and promises as such until the rise of administrative agencies with control over contract begins a new development in another direction. In Roman law down to Justinian we see the same continually

wider securing of claims to promised advantages. So it is in the modern Continental law from the Middle Ages to the end of the nineteenth century and coming of the doctrine of favor to debtors and of contractual dirigism in the present century.

Natural law put the sanctity of promise and agreement at the foundation of law. The nineteenth-century metaphysical jurisprudence found a like fundamental sanctity in the free will with which agreements were entered into and the terms of agreements were fixed. Neither of these are suited to the course of development of the law of contracts as it seems coming to be. At least as to the Anglo-American law of contracts revived philosophical jurisprudence has a real opportunity. The constantly increasing list of theoretical anomalies in the law of contracts as it stands in America today shows that analysis and restatement have exhausted their possibilities. Given an attractive philosophical theory of making and enforcement of promises, with some aid from legislation to afford a starting point, the courts in a new period of growth may shape the law to a principle adequate to its purposes as now understood, and judicial empiricism and legal reason will bring about a workable system on modern lines.

A closely related change is going on in the law as to liability to answer for loss or damage incurred by others. As we look back on the development of the law on this subject in each of the legal systems of the modern world we may see a succession of five ideas as to the basis of such liability.

(1) At first we have a simple idea of causation, the vengeance idea. The beginnings of law asked simply, did the defendant do the physical act which damaged the plaintiff? If he did he aroused a desire for vengeance in the injured person which would lead to private war and disturbance of the peace of society. One who so endangered the general security must buy off the desire for vengeance he had awakened.

(2) The idea of fault, culpable causation, a moral idea. This substituted the general morals for the general security as the underlying idea. "The law of today," said Ames in 1908, "except in certain cases based upon public policy, asks the further question 'was the act blameworthy.' The ethical standard of reasonable conduct has replaced the unmoral standard of acting at one's peril."

(3) The idea of control of the causing factor as determinative of liability to repair loss or damage, a return to the idea of a basis in the general security. Notice that this idea was coming in and gave Ames pause in 1908. He says that the basis is blameworthy action except

in certain cases "based upon public policy." The public policy to which he referred was the social interest in the general security which called for holding men without regard to fault where they maintained things or employed agencies likely in ordinary experience to get out of hand and do damage, unless at their peril of answering for resulting damage they restrained these things and agencies and kept them within bounds. Cases of liability without fault within this category have steadily multiplied in Anglo-American law in the present century, and liability for wrongs done by agents and servants which covered up liability without fault by a fiction of representation identifying servant with master and agent with principal, had a long and detailed development.

(4) The idea of ability to pass the loss on to the public, the so-called insurance idea. We were all to bear the losses falling upon any of us as risks of life in civilized society, and, as means of achieving that just distribution of the burden of loss, the law should impose the loss in the first instance upon those able to pass it on to the public at large through charges for service in the case of public utilities, or price of goods manufactured in case of products of the factory, or prices for products raised in agriculture.

(5) Parallel with or else out of the so-called insurance idea a new basis of liability has been increasingly advocated in recent years and is making headway. It looks like an idea of greater ability to bear the loss as a ground of liability. It is urged as a humanitarian idea but is often coupled with the insurance idea which under administrative regimes of the time is fallacious in actual application.

A shift from the idea of liability as attached to fault to some newer basis of liability not based on morals nor primarily upon the general security has been going on throughout the world. It is quite as marked in the law of Continental Europe as in Anglo-American law. But what it is and what idea is behind it can be shown sufficiently for the present purpose from American law, and I shall confine myself to American illustrations.

At the beginning of the present century, and increasingly since, judges and law teachers have been saying that something more was in the air than imposition of liability without fault in order to maintain the general security where the person to be held had the right and power of control of the thing or agency to which loss or damage was attributable. Fifty years ago Mr. Justice Holmes, speaking for the Supreme Court of Massachusetts, answering a type of argument frequently made today, said it was not plain that a man's misfortunes or necessities would justify shifting damages to his neighbor's shoulders.

A decade later Judge Jeremiah Smith, discussing the growth of liability without fault, suggested a new category, arguing that this sort of liability was not a tort category at all. Only procedural reasons led to referring it to tort, just as procedural reasons had led jurists to refer liability for restitution to prevent unmerited acquisition of benefits to contract and to speak of "contract implied in law" or of "quasi-contract." In the same connection in speaking of the doctrine of the "attractive nuisance," one of the steps toward a general doctrine of humanitarian liability, he said: "The apparent assumption is that all the children in the world are mere waifs and strays, and that the duty of caring for them must be imposed upon the land owner *because the law can find no one else to bear the burden.*" The point is in the words in italics, but I have supplied the italics. At the Harvard Tercentenary, later, in a lecture entitled, "The Common Law in America," Mr. Justice Stone spoke of "a vast system of statutory rights and liabilities, founded upon the idea, new to English law, that the basis of liability is not the fault of a wrongdoer, but such a method of distributing the burden of loss as accepted social policy dictates." Accordingly a law teacher recently, writing on "Touchstones of Tort Liability," suggests that a new touchstone which is emerging is "legal fault," which he defines as "a falling below the standard of conduct set by those forces in society which have the power of social control." But liabilities are being created where there is no conduct. Moreover the term legal fault gives us only what Jhering called a dogmatic fiction. It is *legal* fault because it is not fault, or fault in a Pickwickian sense, like "promise implied in law" because there was no promise, or "condition implied in law" because there was no condition.

What is the social policy of which Mr. Justice Stone spoke? What moves those who, as Professor Stone of Tulane tells us, have the power of social control, to impose liability for purely legal fault? A writer of a book on Legal Theory has assayed an answer. He says: "Practical necessity forced all systems alike not only to seek evidence of fault in conduct rather than in a state of mind, but increasingly to shift emphasis in the law of torts from moral blame to social responsibility." But what is the basis of this social responsibility? The last century would have said it was duty to repair injury due to fault. Fifty years ago we were beginning to say it was right and power to control the things and agencies that caused injury. What are we to say now under the extensions of liability that are developing? There is much to suggest that it is the duty of those of greater means to come to the assistance of those of lesser means. Shall we say that this is

again a moral idea? Planiol points out that at first abandonment of respect for contract was masked by a pretense of interpretation. Note in the same way how giving up of the idea of fault is sought to be masked by a dogmatic fiction of legal fault or by saying that fault is in conduct rather than intention. Will some one presently impute fault to possession of superior means and vouch the case of the Good Samaritan? But his exertion to help out the injured was voluntary, not coerced by the state.

As the law had been there could be no recovery if the injury or loss suffered was due to no one's fault. This proposition had come down from Roman law. Where injuries resulted without any one's fault, or where no one had control of the thing or agency causing the loss, it was taken for granted that each of us must bear the risks which are inevitable in human existence. The first inroad upon this proposition was made when legislation made the employer liable for injuries in accidents in the course of employment occurring without fault of any one. Here there was an extension of the ground of liability for causation under the control of the person held. But a movement is going on beyond the analogy of that idea and on a wholly different proposition which may well remake the whole theory of liability.

In the last century the general security was generally taken to be the paramount social interest. In the English-speaking world, until the present generation, security has meant security from aggression or fault or wrongdoing of others. Today "security" is being used to mean much more—how much more it is not easy to say. At least it is made to include security against one's own fault, improvidence, ill luck, and even defects of character. Thus there is an extension of liability beyond a basis in the general security as understood in the past. Indeed, there is more than an extension. There is emergence of a new idea and building a new presupposition upon it. All new social ideas, until experience has brought about a firm grasp of them, are likely to give us caricatures for a time in their experimental development. Thus a developing humanitarian idea seems to think of repairing, at some one's expense, all loss to every one, no matter how caused. It seems to presuppose that in civilized society every one must be able to expect a full economic and social life. To fulfill this expectation, to guarantee the expected full economic and social life, the law seems more and more to be called on to find for every victim of loss and every one who for any reason cannot keep the pace of attaining his expectations, what I have called an involuntary Good Samaritan to pull him out of the ditch, bind up his wounds, set him on his way and pay his hotel bill.

Forty years ago this began to be urged in the form of what was then called the insurance theory of liability. In one phase of this humanitarian movement there was a real and immediate shifting of the burden from the luckless individual who was injured to the public at large. It used to be that the state could not be held for injuries to individuals through the wrongful acts of public officers. The officers who wrought the injury were personally liable to repair it. But throughout the world there has been for a generation a tendency by legislation to provide that public funds shall respond for injuries to individuals in the course of operation of governmental agencies. Legislation in America has been extending the doctrine of *respondeat superior* to the government. Here, just as in case of injuries due to wilful or negligent action of servants of public utilities or of great industrial enterprises done in the course of their employment, the wrongdoing servant is seldom able to satisfy a judgment for damages in this time of multiplying limitations upon the power of creditors or injured parties to exact satisfaction of judgments for debts or damages. The proposition is that losses incidental to services performed for the benefit of all of us should be borne by all of us. If we adopt Duguit's teaching that the state is simply a great public service company, the extension to it of liability under the doctrine of *respondeat superior* is understandable.

Here, however, as in the case of liability of private employers for what is done by their employees in the course of their employment, there is liability only for a wrong done. There has been no extension to the state of absolute liability on the ground of causation without fault. Legislation has increasingly created, in order to maintain the social interest in the general security, offenses which dispense with criminal intent and impose penalties for creating danger to health or safety although the offender has used all due care and has knowingly done nothing more than put on the market a carefully manufactured article, fully inspected and of a kind in itself in no wise dangerous, which nevertheless bursts or otherwise develops a defect and causes injury. There are now strong proponents of extending civil liability without fault to such cases.

In a recent case in California one of the outstanding state judges of today in a concurring opinion, which he has since repeated in another case, proposed extension of the liability of manufacturers for injuries to purchasers of manufactured articles made to be sold in the market, put in circulation accordingly, and ultimately acquired by the person injured. He said: "I believe that the manufacturer's negligence should no longer be singled out as the basis of a plaintiff's right to recover.

In my opinion it should now be recognized that a manufacturer incurs an absolute liability when an article he has placed upon the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to a human being."

This goes beyond the jural postulate of liability without fault as heretofore known to Anglo-American law. Under that postulate the defendant must at his peril restrain an object or activity that has a tendency to get out of hand and do damage. Even if he takes all due care he is liable for something which he maintains getting out of hand and doing damage. But here he is not maintaining anything and nothing has got out of hand. He has put something on the market intended to go through a number of hands and ultimately reach a purchaser who will use it. If in this activity he fails in any respect to exercise due care and subjects others to an unreasonable risk of injury, he is liable for injuries resulting from his negligence. If the defect causing the injury existed latent when he put the article on the market, if up to that time he had complete control of it, and the defect could not have existed and been undetected except in ordinary experience through negligence, then the ordinary principle of negligence supplemented by *res ipsa loquitur* will suffice for a satisfactory result. But if all we know is that when the article came to be used by the plaintiff it proved defective and injury resulted, with nothing to show how or when the defect developed nor to demonstrate that it must have existed in the defendant's hands, we have to find a new principle of liability.

It must be conceded that the manufacturer may anticipate some hazards and guard against the recurrence of them. Accordingly the chief proponent of absolute liability argues thus: "Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business." As to the power of the manufacturer to insure, one might remark that those who buy automobiles can have and probably very generally carry accident insurance. This is not equally true of those who drink Coca Cola or other carbonated drinks, which seem to account for most of the cases in the recent reports. But all the establishments that put carbonated soft drinks on the market are by no means great corporations with ample means of procuring insurance, and the argument as to ability to pass the loss on to or distribute it among the public has little force under the administrative regulation of utilities and administrative control of enterprises which obtain today.

It should be noted that workmen's compensation does not go so far as the proposition before us, since it only covers injuries and losses in the course of the employment, although both administrative agencies and courts are tending to make that category very elastic. Also workmen's compensation has been coming to extend widely to cases of injury through fault of the employee himself which were at first excluded. Moreover, projects are now being urged to turn over the whole subject of traffic accidents on the highways to an administrative board to be dealt with on the analogy of workmen's compensation and, indeed, extend beyond that analogy.

Proponents of absolute liability support the proposition by the absolute penal liability imposed by the Pure Food and Drug Acts and like legislation. This legislation is directed to maintaining the general security by putting heavy pressure on the manufacturer to use the highest diligence in supervising the process of manufacture and choosing and inspecting the materials used and inspecting the finished product. As the penal liability is absolute the only escape can be a maximum of care and diligence which will so far as possible preclude defects.

But if the general security is what is aimed at, is it not sufficiently upheld by the penal legislation? Why in addition impose an absolute civil liability for perhaps hundreds of thousands of dollars damage without fault? This liability, added to that for negligence of employees, may put an intolerable burden upon enterprise. One may agree that an idea that all of us should bear the losses and injuries which potentially afflict each of us makes a strong appeal. But under the circumstances of life in the welfare state, in which the cost of government has become enormously multiplied and all manner of heavy demands upon already over-burdened public resources appear to preclude adding any more, there is inevitable reluctance to press the idea to its conclusion by direct and immediate imposing upon government the repairing of losses and injuries without fault of any one.

In the bureau organization of the service state today the proposition as to passing damages for losses incurred by no one's fault on to the public by way of employer or public utility or industrial enterprise is fallacious. One bureau or commission fixes rates for service. Another fixes or may be fixing prices. Another has control of wages and hours. A jury or some administrative agency fixes responsibility and assesses the damages or the amount of accident compensation. Each of these agencies operates independently, subject to no effective coordinating power. Those that control rates and prices are zealous to keep the cost to the public as low as may be. Those that control the imposition of liability on employers are apt to be zealous to afford the maximum

of relief to the injured or to their dependents. With continual pressure upon industry and enterprise to relieve the tax-paying public of the heavy burdens our recent humanitarian programs involve, the practical result is likely to be that the burden is shifted arbitrarily to the most convenient victim. There is very little if any validity to the proposition that compensation for loss or injury without fault of the utility or enterprise is passed on to the public.

But the deceptive doctrine that we are all of us insuring each of us in that way makes for growing acceptance of absolute liability. One state court has now pronounced for it as to manufactured articles and it is proposed to incorporate it in the new commercial code in preparation by the Commissioners on Uniform State Laws and the American Law Institute. Furthermore, a teacher in one of the great American law schools argues for abolition of the doctrine of the independent contractor in our law of Agency. Our law is that *respondeat superior* applies where there is right and power of control over the person immediately acting. Where the actor is an independent contractor there is no such control. But frequently the independent contractor has no means sufficient to be reached on execution. Hence we are told losses and injuries are left unrepaired, which must not be. In the same spirit one of the justices of the highest court of the land intimates that the requirement of causation is artificial and should be abrogated. Suppose X determines to commit suicide and stands at the corner waiting for a bus or heavy truck as the chosen agent of self-destruction. When one comes along he throws himself beneath its wheels and is killed. If causation is eliminated and fault too, should not the transportation or trucking company repair the loss to the widow and children? Thus we achieve high humanitarian purposes by the easy method of using the involuntary Good Samaritan as the Greek playwright used the god from the machine. Looking at realities, however, it is the method of Robin Hood or that of Lord Bramwell's pickpocket who went to the charity sermon and was so moved by the preacher's eloquence that he picked the pockets of everyone in reach and put the contents in the plate.

What seems to be developing as a jural postulate is: "In civilized society men are entitled to assume that they will be secured by the state against all loss or injury, even though the result of their own fault or improvidence, and to that end that liability to repair all loss or injury will be cast by law on some one better able to bear it."

Is it not a task of philosophical jurisprudence to give us a critique and a better formulation of the "accepted social policy" behind the doctrine of the involuntary Good Samaritan?

But contractual dirigism and imposition of liability to repair loss and injury, irrespective of fault, control over the actor, or causation, are not the only new features of the law of today for which we may call upon philosophy of law for help. To adopt Josserand's phrase we have already moved everywhere toward proprietary dirigism. This may be part of a general regime of dirigism. But it is viewed with satisfaction and even promoted by many who by no means believe in an omniscient state. Let us note some items in the growth of state superseding of the liberties and powers of owners. In American law restrictions on liberty of using (*jus utendi*) are added to constantly. Some examples are bill board laws, zoning laws, restrictions on what shall be grown on land in a particular season, limitation of planting and sowing in order to keep up prices of farm products. In some parts of the world this has been carried so far as administrative determination that the owner is not using land to the maximum of its productivity and appointing a receiver to manage it for him. Restrictions on the *jus fruendi* in the form of rent control are an everyday matter. In California the system of administrative adjustment of water rights is accused of setting up a new theory, destroying all priorities and putting each user on an equal footing with every other regardless of the time of origin or basis of his right. A judge of the highest court of that state says of this: "Under this doctrine a long established, and what was thought to be a prior vested right to divert and use a given quantity of water, is not only placed upon a parity with later acquired rights, but an administrative agency of the state steps in and administers the water at the expense of the users. Practically the control of the owner is superseded." Likewise the Supreme Court of the United States, giving up the settled doctrine of the British courts, holds that the foreshore and soil beneath the marginal sea being necessary to national defense, *dominium* and *imperium* there are inseparable, so that although when the Republic of Texas was annexed and its public domain was reserved to it, yet they passed with sovereignty to the United States. If this is carried out it would do away with private ownership of land throughout the country under the conditions of aerial warfare and attack by bombing planes today.

One may look upon what has been happening in the law of contracts, the law of torts, and the law of property as indicating a continually widening circle of satisfaction of human wants. But the one conspicuous human demand which in America was the one chiefly asserted and chiefly respected, namely, the claim to liberty—to free self-assertion or self-determination—is almost disappearing.

Contracts, torts, property are basic subjects of the law as we have known it since the Romans worked out the beginnings of legal system. What has been going on and is threatened in the basic subjects, and what it all signifies for the law as a whole, calls upon us to rethink legal theory. Pressure of unsatisfied claims and expectations upon courts and legislators causes the law to advance here and there before legal theory catches up with it. Certainly courts were much in advance of juristic theory in the last decades of the nineteenth century in America, and it may be that we are seeing a like situation. But if experience enables the law to deal with new situations and conditions, reason develops and organizes that experience and gives it stability and permanence. In contrast with the last century we have in the present century been laying stress on individualization. Stammeler set this movement going and his influence has been strong here. Also in the present century we have felt the need of team work with the other social sciences. Sociologists have been active in promoting this. But we need, in order to meet the tasks of the law today, if it is possible, a received measure of values or at any rate development and formulation of a practical theory of valuing interests. Here above all we need a fruitful philosophy of law. We cannot be content with the "give-it-up" philosophy which has held the ground since the first world war. Also we need philosophical theory of the limits of effective social control through law. The lavish promises of the service state and the broad humanitarian idea which is behind at least the movements in the law of contract and the law of torts, to which I have sought to direct your attention, call for serious study of the extent to which laudable humanitarian ideals may be translated into practical action through law. For that matter not all of social control can be achieved through law. Here is something about which we must be thinking also in view of projects for a world legal order and universal bills of rights or declarations of rights.

American sociological jurists are criticized on the Continent for not being sociological. When Durkheim's methodology was accepted in France it seemed to a French writer a generation ago that we in America must tie to Durkheim's sociology or we could not be sociologists. Others, whom the descriptive sociology had attracted, were sure that sociological jurisprudence could never be anything but a set of generalizations from anthropology. Indeed, it was not long ago that sociological jurists were told that they could never get beyond their historical beginnings in the mechanical sociology. Today Radbruch, for whom as a philosopher I have the highest respect, holds that in America we misuse the term sociology "which designates the

theoretical science of society and excludes valuations of a practical and political nature." But I can remember when, fifty years ago, sociology, in the time of Ward, was called the American science. American sociological jurists, seeking only to approach the science of law from the standpoint of a science of society, are quite warranted in going our own way and refusing to be confined to what seems to us a sterile logicism or to busy ourselves exclusively with methodology.

In much the same way it is not infrequently said that Americans who write about philosophy of law as an instrument are not philosophers. Very likely we are not. From the standpoint of the pure philosopher it is very likely that we stop where from his standpoint we ought to begin. We are not conducting a sit-down strike until we can be assured as to what is the highest good or as to an absolute universal measure of values and doctrine as to the end and purpose of social control.

American sociological jurists are primarily lawyers, deeply concerned with the practical task of adjusting relations and ordering conduct by application of the force of politically organized society, and the endeavor to do this with a minimum of friction and waste, so that the social order will not disintegrate from failure to achieve the purpose of making it an effective agency of maintaining and furthering civilization. If this could be achieved on simple Thomist or neo-Thomist lines no one would be better pleased than I. It does not seem to have been achieved or notably furthered in this way since the era in which St. Thomas wrote. He did great things for juristic thought of the later Middle Ages. But increasingly effective and continually more complete harnessing of external nature to men's purposes have multiplied the claims and wants and expectations of which the law must take account beyond what he could reckon with.

Kohler accused Jhering of a *ganz unphilosophischer Kopf*. I suppose that describes most of us Anglo-Americans who, like Jhering, are primarily concerned with how things work. I owe much to Kohler's idea of the jural postulates of the civilization of the time and place, to Radbruch's antinomies and his ideas of justice and of morals. I owe much also to Hauriou's great contribution in his idea of the "institution." In common with most Americans who had a scientific training in the '80s of the last century, I was brought up on Comtian positivism and turned thence to Comtian sociology at the beginning of the present century. Studying law in the meantime, like all Americans of the latter part of the nineteenth century, I fell under the spell of Sir Henry Maine and thus of Savigny. Ultimately the radical empiricism of William James seemed to do most in enabling me to see the task of law

and how we go about performing it. Without enlisting as Thomist, or Kantian, or Hegelian, or Comtian, I am helped by much each has to tell me and can use much of what they have worked out in advancing the practical science of law.

Radbruch's antinomies, however, need not lead to an abdication of all claim to impose checks upon administrative or legislative absolutism. As he now sees it, although justice, morals, and the general security, if any of them is carried out with logical completeness, negate each other, yet each includes a certain minimum. If this is not recognized, a system so failing may not claim to be called by the name of law. Thus we get a new sort of revived natural law. But the difficulties American courts are having with our bills of rights in concrete application carry a warning. The nineteenth-century American judges held that the provisions of our federal bill of rights were declaratory of natural law. Now that they are held to have been made applicable to state legislation by the Fourteenth Amendment, it is felt that every provision cannot be imposed upon the states and yet it has not been possible to draw a satisfactory line. Hence a supplementary idea of a "fair trial" is being brought in from the outside to enable the declared rights to be extended at some points and restricted at others. To me Radbruch's later doctrine seems to be one of certain presuppositions of life in civilized society, a set of fundamental expectations or wants which an effective social engineering must contrive to satisfy without ignoring other expectations or wants which men in varying degrees in time and place assimilate to them.

What we can fall back on is experience of how to adjust relations and order conduct in accordance with norms of decision. These norms, discovered by experience are developed by reason. Others are discovered by reason and tested by experience. We are not like Vyshinski to discard reason. But reason working on and with experience is something very different from reason giving us deductions as to infinite details of good and evil, right and wrong, for the complex social order of today.

I have spoken chiefly of some of the problems facing the contemporary jurist. They call for the help of philosophy, but contemporary philosophy is doing little for them. At the end of the eighteenth century the French Revolution had introduced new ideas and men were troubled to reconcile authority and liberty; the authority of the law and the freedom of the individual will in which men were coming to believe. Kant gave us the philosophical theory which governed in the science of law for one hundred years and, indeed, persisted in many places well into the twentieth century. The neo-Kantians are still prob-

ably the most active group and the group of most influence in philosophical jurisprudence today. But the Kantian idea of justice has done its work as the natural law of pure reason had done its work at the end of the eighteenth century. Must we not hope for some new Kant to find the path for the jurisprudence of the era on which we are entering and to give us the theory of justice for another time of fruitful philosophical science of law?