Introduction To Law And The Legal Process

SECOND EDITION

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Second Edition

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PREFACE

There is no need to restate here the views announced in the preface to the first edition. It will suffice to say that we reaffirm, after careful review, the thoughts expressed in the earlier preface.

This second edition is on all counts a genuine and complete revision. We leave to our readers, especially those who used the first edition, the appraisal and certification of this judgment. Among the many particulars worth noting are these that follow.

Three chapters—those dealing respectively with Torts, Issues in the Administration of Justice, and Statute of Frauds—are deleted: the first two because the topics cannot be covered adequately or meaningfully within the space available, and the last because the subject is too refined for our purposes. They are replaced by two new features: a Comment on Due Process and a Chapter on Criminal Process. Both items cover current socio-legal issues of great pitch.

Several chapters have been rewritten from scratch, to reflect recent changes and new concepts. Examples are the chapters covering the following subjects: assignments, beneficiaries, and products liability; discharge; illegal bargains; jurisdiction and conflict of laws. The two former chapters on federalism and pluralism have been combined and rewritten anew, and some parts, notably those on diversity of citizenship and judicial supremacy, are accorded more comprehensive treatment, in light of current developments. In the remaining chapters there is substantial revision, usually with abridgment or condensation, occasionally with some expansion. Examples are: the subject of liquidated damages and penalties is condensed, because the former treatment was copious to a fault; the distinction between estoppel and apparent authority is abandoned, as being too fanciful; but the discussion of imputed negligence and workmen's compensation is expanded a bit, to reflect new developments.

The cases now follow the text in each chapter and are thus brought within the covers of this volume. Some of the cases appeared in the earlier casebook, many are new.

Of course, the problem is the old and perennial one of making choices. We decided that on balance the items deleted or condensed or abridged were expendable when contrasted with those added or expanded or retained intact.

This volume represents a division of labor. Mr. Cataldo prepared Chapters 5, 6, 8, 15; Mr. Kempin, 1, 2, 7, 11; Mr. Stockton, 10, 13; Mr. Weber, 3, 4, 9, 12, 14.

We conclude by expressing sincere thanks to all who read and used the former edition. Special thanks are due those readers and reviewers who honored us with their criticisms.

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CHAPTER 1 NATURE, MEANING, AND SOURCES OF LAW

When we begin to think about what the word "law" means, we are likely to see a series of mental pictures—a quiet courtroom, its black-robed judge seated solemnly behind the bench; a policeman running down a suspect; a lawyer pleading before a jury or sitting in his office talking earnestly with a client; or a library lined with ponderous books bound in somber colors and holding in their brittle pages the ancient and complicated lore of the law. None of these is completely the law, but all are part of it. When this montage of impressions clears and we try to think about the essence of the law, we may come to the conclusion that the books hold the key—that the law is an amalgam of any number of rules.

There is much truth in this view of the law and in the notion that if you know the rules you know the law. The reason for wanting to know these rules is, of course, so that you may know the answers the courts will give to a problem presented to them tomorrow. This may have been what Mr. Justice Holmes had in mind when he said: "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."

THE LAW AS A PROCESS

It may be rewarding, to look at the law from another standpoint. Let us go back to the montage and see what else is there. The people in the pictures are all doing something. They are active, not passive. The judge is deciding a dispute, the policeman is catching a suspect, and the lawyer is pleading a case or advising a client.

What is the common task in which these people are engaged? We might say that they all are engaged in the administration of law. We might also reduce these activities to their lowest common denominator and say that they are all trying to see that society in general gets along with a minimum of conflict. They are ordering the affairs of men. They are advising people how to avoid conflicts with each other and with the government. They are attempting to settle arguments that have arisen, either informally or formally, through court action. They are attempting to discourage conduct that is antisocial. In short, the law is a means of social control.

Seen this way, the law is not passive, but active. It is not a thing, but a process. Out of its process it distills the rules and approaches by which men try to guide their conduct and by which their conduct is judged. The rules are a means, not an end, and are constantly being reevaluated in the light of changing circumstances and conditions.

The courts and their work in settling disputes are only a very small part of the law, albeit an extremely important one. Many persons are never involved in litigation, and most persons only rarely so.

People usually order their affairs in a way that accords with the current state of the law. If they get into arguments with their fellow men they usually settle them peacefully. There are, of course, a certain minimum number of disputes that are not settled peaceably. Sometimes one party or the other, or both of them, wants a solution that is manifestly unfair. Sometimes even though both are men of good will, they have an honest difference of opinion that even their lawyers cannot solve. Sometimes this disagreement is about what happened between them, which we call the facts. Other times they disagree about what should be done about the facts, which we call the law. In such cases they probably will refer the problem to those impartial bodies we call the courts.

In order to have a legal system we must have some way in which such arguments can be referred to an impartial body for an answer that both parties will accept. Once we have a system under which one of the parties can require the other to submit the argument to such an impartial body, and a way to make the loser submit to the decision of that body, we have the rule of law.

A Typical Case

For the purpose of seeing how such a case can arise, and what goes into its decision, let us look at an English case decided in the year 1879. This case is chosen not because it is unusual, but precisely because it illustrates the common, everyday character of the law. The name of the case is *Sturges v. Bridgman*. Here are the facts as reported by the court:

"The Plaintiff in this case was a physician. In the year 1865 he purchased the lease of a house in Wimpole Street, London, which he occupied as his professional residence.

"Wimpole Street runs north and south, and is crossed at right angles by Wigmore Street. The Plaintiff's house was on the west side of Wimpole Street, and was the second house from the north side of Wigmore Street. Behind the house was a garden, and in 1873 the Plaintiff erected a consulting-room at the end of the garden.

"The Defendant was a confectioner in large business in Wigmore Street. His house was on the north side of Wigmore Street and his kitchen was at the back of his house, and stood on ground which was formerly a garden and abutted on the portion of the Plaintiff's garden on which he built the consulting-room. So there was nothing between the Plaintiff's consulting-room and the defendant's kitchen but the party-wall. The Defendant had in his kitchen two large marble mortars set in brickwork built up to and against the party-wall which separated his kitchen from the Plaintiff's consulting-room and worked by two large wooden pestles held in an upright position by horizontal bearers fixed into the party-wall. These mortars were used for breaking up and pounding loaf-sugar and other hard substances, and for pounding meat.

"The Plaintiff alleged that when the Defendant's pestles and mortars were being used the noise and vibration caused were very great, and were heard and felt in the Plaintiff's consulting-room, and such noise and vibration seriously annoyed and disturbed the Plaintiff, and materially interfered with him in the practice of his profession. In particular the Plaintiff stated that the noise prevented him from examining his patients by auscultation for diseases of the chest. He also found it impossible to engage with effect in any occupation which required thought and attention.

"The use of the pestles and mortars varied with the pressure of Defendant's business, but they were generally used between the hours of 10 a.m. and 1 p.m.

"The Plaintiff made several complaints of the annoyance, and ultimately brought this action, in which he claimed an injunction to restrain the Defendant from using the pestles and mortars in such manner as to cause him annoyance.

"The Defendant stated in his defence that he and his father had used one of the pestles and mortars in the same place and to the same extent as now for more than twenty-six years. He alleged that if the Plaintiff had built his consulting-room with a separate wall, and not against the wall of the Defendant's kitchen, he would not have experienced any noise or vibration; and he denied that the Plaintiff suffered any serious annoyance. . . ."

This was a simple dispute between two neighbors. Each man thought he was right. Neither of them was either a "good" man or a "bad" man. They had a disagreement, however, which they could not solve unaided. That was why the case was brought to court. As observed in the statement of fact, "The Plaintiff made several complaints of the annoyance, and ultimately brought this action."

What would have happened had there been no way to refer this dispute to the court? We can only guess. It is extremely improbable that these parties would have come to blows about it. Probably the physician would have put up with the annoyance, or perhaps he would have rebuilt his consulting room in such a way as to keep out the noise and vibration. The confectioner, therefore, would have "won." Would this have been unjust? Is there any reason why the confectioner should have moved these mortars when they had been used in the same place for such a long time? Didn't he have the "right" to keep them there? On the other hand, didn't the physician have a "right" to be free of this noise and vibration, so that he could study in quiet and effectively treat his patients?

The appellate court decided the case in favor of the plaintiff, and its reasoning was as follows:

". . . It has been proved that in the case of the mortars, before and at the time of action brought, a noise was caused which seriously inconvenienced the Plaintiff in the use of his consulting-room, and which, unless the Defendant had acquired a right to impose the inconvenience, would constitute an actionable nuisance. The Defendant contends that he had acquired the right, either at Common law or under the Prescription Act, by uninterrupted user for more than twenty years. In deciding this question one more fact is necessary to be stated. Prior to the erection of the consulting-room no material annoyance or inconvenience was caused to the Plaintiff or to any previous occupier of the Plaintiff's house by what the Defendant did. . . . Here then arises the objection to the acquisition by the Defendant of any easement. That which was done by him was in its nature such that it could not be physically interrupted; it could not at the same time be put a stop to by action. Can user which is neither preventible nor actionable found an easement? We think not. . . . The laws governing the acquisition of easements by user stand thus: Consent or acquiescence of the owner of the servient tenement lies at the root of prescription, . . . and . . . a man cannot, as a general rule, be said to consent to or acquiesce in the acquisition by his neighbour of an easement through an enjoyment of which he has no knowledge, actual or constructive, or which he contests and endeavours to interrupt, or which he temporarily licenses. It is a mere extension of the same notion to hold that an enjoyment which a man cannot prevent raises no presumption of consent or acquiescence. Upon this principle it was decided in *Webb* v. *Bird,* 13 C.B.(N.S.) 841, that currents of air blowing from a particular quarter of the compass, and in *Chasemoor* v. *Richards,* 7 H.L.C. 349, that subterranean water percolating through strata in no known channels, could not be acquired as an easement by user. . . . It is a principle which must be equally appropriate to the case of affirmative as of negative easements; in other words, it is equally unreasonable to imply your consent to your neighbour enjoying something which passes from your tenement to his, as to his subjecting your tenement to something which comes from his, when in both cases you have no power of prevention. . . . To put concrete cases—the passage of light and air to your neighbour's windows may be physically interrupted by you, but gives you no legal ground of complaint against him. The passage of water from his land on to yours may be physically interrupted, or may be treated as a trespass and made the ground of action for damages, or for an injunction, or both. Noise is similar to currents of air and the flow of subterranean and uncertain streams in its practical incapability of physical interruption, but it differs from them in its capability of grounding an action. *Webb* v. *Bird* and *Chasemore* v. *Richards* are not, therefore, direct authorities governing the present case. They are, however, illustrations of the principle which ought to govern it; for until the noise . . . became an actionable nuisance, which it did not at any time before

the consulting-room was built, the basis of the presumption of consent, viz., the power of prevention physically or by action, was never present.

"It is said that if this principle is applied in cases like the present, and were carried out to its logical consequences, it would result in the most serious practical inconveniences, for a man might go—say into the midst of the tanneries of Bermondsey, or into any other locality devoted to a particular trade or manufacture of a noisy or unsavoury character, and, by building a private residence upon a vacant piece of land, put a stop to such trade or manufacture altogether. The case also is put of a blacksmith's forge built away from all habitations, but to which, in course of time, habitations approach. We do not think that either of these hypothetical cases presents any real difficulty. As regards the first, it may be answered that whether anything is a nuisance or not is a question to be determined, not merely by an abstract consideration of the thing itself, but in reference to its circumstances; what would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey; and where a locality is devoted to a particular trade or manufacture carried on by the traders or manufacturers in a particular and established manner not constituting a public nuisance, judges and juries would be justified in finding, and may be trusted to find, that the trade or manufacture so carried on in that locality is not a private or actionable wrong. As regards the blacksmith's forge, that is really an identical case with the present. It would be on the one hand in a very high degree unreasonable and undesirable that there should be a right of action for acts which are not in the present condition of the adjoining land, and possibly never will be any annoyance or inconvenience to either its owner or occupier; and it would be on the other hand in an equally degree unjust, and, from a public point of view, inexpedient that the use and value of the adjoining land should, for all time and under all circumstances, be restricted and diminished by reason of the continuance of acts incapable of physical interruption, and which the law gives no power to prevent. The smith in the case supposed might protect himself by taking a sufficient curtilage to ensure what he does from being at any time an annoyance to his neighbour, but the neighbour himself would be powerless in the matter. Individual cases of hardship may occur in the strict carrying out of the principle upon which we found our judgment, but the negation of the principle would lead even more to individual hardship, and would at the same time produce a prejudicial effect upon the development of land for residential purposes. The Master of the Rolls in the Court below took substantially the same view of the matter as ourselves and granted the relief which the Plaintiff prayed for, and we are of opinion that his order is right and should be affirmed, and that this appeal should be dismissed with costs."

What, then, did the court do in deciding this case? What was the role of legal "rules"? First the judges had to find out all the relevant facts in the case and the positions taken by the plaintiff and defendant. The plaintiff contended that under the facts the defendant was committing a nuisance, which might be defined as a use of land in such a way as to create a disturbance that materially inhibits another landowner in the enjoyment of his premises. The defendant, on the other hand, claimed that he had acquired a right to create the noise and vibration by doing so for a period of twenty years under the doctrine of prescriptive user, or easement. The practical impasse between plaintiff and defendant was thereby transmuted into legal terms.

The court found that a nuisance existed unless the defendant had acquired a right by user. It then looked for the basis of the rule that continued use for twenty years gave one a right to continue to use it in perpetuity and found, on the basis of past cases, that the rule was based on the idea that failure to object to the use was the equivalent of consent. As applied to the facts of the case, however, the physician could not have objected until he built his consulting room, and the noise and vibration became both noticeable and objectionable. Therefore, since he could not have objected, his lack of objection did not constitute approval. The defendant had not acquired rights by prescriptive user, because his objectionable

use had not continued for twenty years.

It was, therefore, not the rule that was important, but the reason behind the rule. The reason behind the rule enabled the court to find that the rule did not apply in this instance—this case constituted an exception to the general proposition.

Having concluded that the physician was in the right theoretically, the court was not satisfied but went on to consider the possible effects of the decision in other and supposititious cases. Testing the rule in the theoretical cases of the blacksmith and the tanneries led the court to the conclusion that the application of the rule, taking into account the reason behind it, would be in accordance with desirable public policy.

The process of decision making, therefore, was to transmute the dispute from layman's terms into legal language, determine the rule in question, examine the policy basis for the rule, and consider the long-range effects of the decision. The case, therefore, while deciding the dispute between the parties, was a link in the legal chain between past and future cases.

The ultimate task of the law is to settle disputes such as these if all other avenues and approaches prove futile. This was a "civil" case, between two individuals. The same analysis can be applied to a "criminal" case that may result in fine or imprisonment. There, however, the accused is engaged in a dispute with all of society, and not just one person. He has broken a "rule" that is set up for the protection of all.

Other Means of Social Control

Law is not the only means of social control or the only means by which disputes can be avoided or settled. One may say with considerable accuracy that although law sets standards of conduct and is the final arbiter, it also is the institution that, in many cases, upholds the minimum standards. There are many other factors that influence behavior and aid in the settlement of disputes.

The precepts of religion, for instance, may impel us to be honest. Indeed, the concepts of honesty found in religion and ethics may be much higher and more rigid, in particular instances, than those set up by the law. The mores of the groups to which we belong also control our actions, in addition to and despite the existence of law. Neighborhoods, clubs, professions, friends—all these groups have standards we feel compelled to meet. Sometimes, indeed, the standards of groups may be even more stringent than the sanctions and penalties of the law, and may even come into conflict with the law.

DEFINITIONAL CARROUSEL

Thus far the word *law* has been used to refer only to the rules that relate to the conduct of man as a member of society. There are, however, other meanings of the term law, and an understanding of these may throw some light on the nature of the legal system. These range from "laws" that are not made by men, to those that group action creates, and finally to those that are the subject of conscious enactment.

Physical Laws

First, there is "law" as used in reference to nature. From the era of the Greeks men have yearned to know the laws of nature. Both professionals and amateurs have observed what goes on in the world and have attempted to organize the collected data into some understandable order. Their findings have resulted in the discovery of many physical laws of nature. Over the centuries methods of reasoning have changed. The Greeks formulated axioms that were arrived at by speculation and from which simple deductions were made. Modern science, on the other hand, involves the induction of theories from observable phenomena; its theories are confirmed by other researchers to prove the validity of their conclusions. The task of both systems, however, has been the same—to determine the laws of nature.

These natural and physical laws do not depend on any consensus for their validity or on the vote of any legislature for their enactment. Dissent from them is in vain. The imprisonment of Galileo Galilei in 1633, for promulgating the doctrine that the earth

revolves around the sun rather than the other way round, in no way changed the fact. Law, when used in this sense, refers to a physical or natural relationship that is observable in nature or provable by experiment. It cannot be altered by men, and we can only submit to such laws or use them for our own best purposes.

"Societal" Laws

Law acquires a somewhat different meaning when applied to philosophical systems that are concerned with the actions of people rather than the actions of physical substances and bodies. Here we are concerned with "laws" that reflect the interactions in society, sometimes consciously but often unconsciously directed.

Nevertheless, in such studies as economics, for instance, investigators have ascertained the existence of some basic laws, such as the "law of supply and demand." The processes of observation, organization, and logic, and the scientific method are still involved. In these laws, however, the human element intrudes. We are no longer concerned with inanimate or unthinking forces of nature, but with the activities of men who cogitate, who have emotions, and who have wills and desires of their own. It is conceivable that conscious reorganization of society can change the underlying social structure to such an extent that the old laws become obsolete, and new laws control. However, in some areas of human activity the phenomena observed by the investigators may be so diverse and varied as not to permit the formulation of laws. For this reason, for instance, the Prussian general Karl von Clausewitz concluded that there were no such things as the laws of war. War, he claimed, was too complex a phenomenon to be reduced to irrefutable law. He felt that the most that could be derived from observation were principles, rules, regulations, and methods.

Ethics and Law

It should be noted that the search for physical laws or for the laws of group action is without ethical content. The scientist observes the movements of bodies in space without thought of ethical implications; and the economist observes how an economic system operates without concerning himself with values. When and if this knowledge is to be put to use, values and ethics become important. The laws controlling nuclear fission are not of themselves moral or immoral, but the use to which such knowledge is put has obvious moral implications.

The law with which we are concerned, however, differs in this respect. Governmental authority governs what should be done as well as what is done. Our legal system is concerned with ethical values and with concepts of "justice." It is consciously made by legislators and judges. It is based on authority that is expressed through human agencies.

Determinate and Indeterminate Authority

The authorities that control our actions come from many different sources. Some are discoverable and definable; these we call *determinate* authority. Others are vague and undefinable; these we call *indeterminate* authority. Indeterminate authority may be illustrated by reference to ideas of "honor," or "morality," or "fashion." Each of these certainly influences one's actions, yet none can be fully defined. In addition, they may differ depending on the group in question. Student groups set one standard, neighborhoods set another, nations have their own standards. Fashion, honor, and morality may differ in each.

Other authority is determinate. This type of authority finds its source in some human organization. It may be a club that creates rules for its members. It may be an organization that claims to speak on behalf of some superhuman or divine authority. In the area of religion, for instance, vast and involved systems of rules and regulations have been devised. Canon law is an important area of law that is binding on its adherents and enforced by the organization.

Both types of human authority involve sanctions for the infraction of their rules. Indeterminate authority, however, has indeterminate sanctions. To flout a given standard of honor, or morality, or fashion certainly involves a penalty, but it is in the

form of disapprobation or ostracism and is not enforced by any organized body. In the case of determinate authority, however, the lawmaker contemplates not only the rules, but also the punishment that follows their breach. A club can fine a member; a church can excommunicate him.

Law of a Sovereign Political Authority

At this point we finally come to law as we shall mainly think of it. It is determinate authority set down by some sovereign political organization. Its requisites are few, but firm. There must be a sovereign power capable of enforcing its standards. The sovereign power may be a tyrannical dictator or it may be a New England town meeting in which the views of all are heard. It requires, in other words, some form of government in order to exist. In this sense of the word the law of the jungle is no law at all.

The law of any given government will reflect the desires of the lawgiver. In the unitary state, or dictatorship, the desires of one may conceivably control. In a democratic form of government the people, through their representatives, make the law, and in theory at least, majority opinion should control. But in either event it is the state itself that is the source of law in the sense we shall use it.

Sources of the Term "Law"

Until the tenth century a common Anglo-Saxon word for what we call law was *doom,* applying both to the judgments of courts and to the law that was written down. Another term was *riht*—a person might have held land by *folcriht* (folk right). Both terms succumbed to the term *law.* which was derived from a Scandinavian word, *lagu.* meaning something that is settled or laid down.

We may posit three categories of thought about law: (1) the concept of abstract justice or what is ideally right, (2) the concept of justice enforced by determinate authority, and (3) the concept of enforcement of norms and rules by determinate authority alone, eliminating abstract justice. The first category does not describe a legal system, but rather an ethical, philosophical, or jurisprudential system. There is no determinate authority stemming from sovereign power to enforce it. The second category refers to law in general and is called *droit* in French, *recht* in German, and *diritto* in Italian. These resemble the English word *right,* but *right* is not used in that sense—it is more likely to be used to describe the first category. In Latin the word describing the second category is *jus.* Our word *law,* on the other hand, is used to mean the third category and has no special ethical implications. Its equivalents are the Latin *lex,* the French *loi,* the German *gesetz,* and the Italian *legge.*

In addition, the non-English words mentioned in the second category refer to the legal system in general and not to a specific statute, ordinance, or rule. The words mentioned in the third category perform that latter function. In English the word *law* is used both for the legal system and in specific instances.

English usage permits, however, the word *right* to be used to apply to one's affirmative claim against another person. The word *right* in this sense is a species of property belonging to a person by force of law. It is to be distinguished from the use of the word *right* in the first category—that of abstract justice. So it is one thing to say that "I have a right to life, liberty and the pursuit of happiness" and another to say "I have a right to sue you for damages for breach of this contract." The German *recht,* for instance, may be used in the first (abstract justice) or second (justice through the legal system) senses, but to give the sense of the English *right,* German must use *subjectives recht* (subjective "law") as distinguished from *objectives recht* (objective "law").

PROCEDURAL LAW AND SUBSTANTIVE LAW

In order for a court to operate effectively, and perhaps in order for it to operate at all, regular procedures must be established. These procedures include the means for getting a case into court and the rules by which the trial is to be conducted. Procedures often affect rights, for if there is no procedure to attain a given result, the result

will not be obtained. *Procedural law* is sometimes called *adjective law.*

These are to be distinguished from *substantive law.* Substantive law is what we ordinarily think about when we think about the law. One wants to know what his rights and duties are. Substantive law tells us, for instance, that we have a right to eject trespassers from our property, and that we have a duty to drive with ordinary care. It also tells us how to go about achieving a given legal objective. It tells us, for instance, what we must do if we want to make an effective will to dispose of our property after death, or how to form a corporation.

To the extent that it is part of a person's rights, procedural law is substantive in nature. Criminal procedure, for instance, gives us a right to have a lawyer, the right to be advised of our Constitutional rights, and the right to confront witnesses against us.

Civil Law and Criminal Law

Suppose a person commits an assault and battery? What are the possible legal consequences if he is apprehended? First, he has committed a crime. The state can bring a *criminal* prosecution or action against him. If found guilty he may be fined, and he may be imprisoned. That is not, however, the end of the matter. The person he assaulted has a private action we call a *civil* case. He can sue the assaulter for damages that may consist of doctor's bills, lost wages, and pain and suffering.

There are occasions in which the state can bring a civil action. Actions for delinquent taxes, to condemn a property through eminent domain, to recover for breach of contract, and the like can, of course, be brought by the several governments.

One basic distinction between criminal and civil law, therefore, is the consequences of the case. In a criminal case the consequence is some form of penalty, such as fine or imprisonment. In the civil case the consequence is a money judgment, or a court order to do or not to do something.

Another way of looking at it is that criminal law is an action by society against an individual for breaking its rules. A civil action is, on the other hand, a case brought by a "person" (individual, corporate, or governmental) to enforce his private rights.

Civil Law and Common Law

The term *civil law* is also used in another and entirely different context and that is to describe the legal systems of most of the non-English-speaking world. These systems can trace their origins and theory back to Roman law, although the use of the term "civil law" to describe Roman law as a system dates only from the sixteenth century. This system of law is followed in most European countries, except for Soviet Russia and the Iron Curtain countries; upon the advent of the communist governments the latter modified a system basically oriented toward Roman civil law. In the English-speaking world the civil law is followed by Scotland, the State of Louisiana, and the Province of Quebec. Many nations that were late to industrialize adopted the civil law system by free choice. They include Japan, Ceylon, Thailand, Tunisia, the Philippines, Lebanon, Algeria, and the Union of South Africa. Other nations use the civil law because they were originally founded and established by European civil law countries; these include the Central and South American nations.

The English-speaking world, however, with the exceptions mentioned of those portions that follow the civil law, follows a system known as the *common law.* Much of our common law is nonstatutory in form, and is found only in decided cases. The large body of law found in past decided cases is what we mean by the common law. In addition, the common law consists of those cases that interpret and govern statutes, which constitute an evergrowing part of our law. In the last analysis statutes mean only what the cases that interpret them say the statutes mean. To the extent that interpretation is the creation of law, cases create law by interpreting statutes.

SOURCES OF LAW

In dealing with the sources of the law, we can refer to its simplest sense and inquire

where to find the law, or we can use the term in a more philosophical sense, and mean where the law comes from, either directly or indirectly.

Where does one go to find out what the law is? One goes to primary and secondary sources. Primary sources are original sources that spring from some legal fountainhead. Secondary sources are explanations of primary materials by someone learned in the law.

Primary Sources

Primary sources are of three varieties: constitutions, statutes, and cases. Constitutions govern the organization of the political state and its relations with its citizens; statutes are enacted by legislatures in the various states and by the federal Congress; cases are the decisions of all the courts of the several states and of the federal courts. Obviously the constitutions of the several states are supreme in their jurisdictions, subject only to the federal constitution that in many areas governs the operation of state statutes and constitutions. Statutes are next in the legal hierarchy of authority, subject only to the constitutions. Cases perform three functions. First, under the common law system they provide answers for those questions that are not answered by statutes. Our statutes do not purport to cover all human activity, as do the statutes of the civil law countries; the gaps are filled in by cases. Second, cases perform the function of interpreting statutes. Often statutes are somewhat ambiguous in their application to particular situations, and the courts determine how they are to be applied. Third, courts in the United States have the power to declare statutes unconstitutional. State courts can determine that state statutes do not fit the provisions of state or federal constitutions and are therefore void and of no effect. The federal courts can decide whether state or federal statutes conform to the federal Constitution.

Secondary Sources

Secondary sources of law include the commentaries upon these primary sources by lawyers, judges, law teachers, and others. Here there is no formal hierarchy of authority. The weight or importance of these sources depends on the respect in which the author or editor is held. The secondary sources include various books and treatises on law, and articles written about law, mainly in law reviews. There are also books of annotations on the law, which take up particular narrow subject matter areas, and a few "encyclopedias" of the law, either in its entirety or in particular fields. Official comments, such as Attorney General's opinions on the interpretation of statutes, are likewise valuable although not binding on a court. These sources often help to obtain a picture of an unfamiliar field, references to primary sources, and the opinions of informed critics of the law.

"Remote Causes" or Origins

Authority of State

In using source in its more philosophical sense, we seek the law's origins. The most immediate source of the law, in this respect, is the authority of the state. When the state speaks, through its courts or its legislature, it makes its will known. The entire force of the state—its police, its sheriffs, and its army—is available to enforce its decisions. This aspect of power is, in the most immediate sense, a source of the law.

Even this power of the state to enforce decisions, however, could not long resist the combined opposition of the populace if there were no general acceptance of the law by the citizens. If everybody started to break a particular criminal statute, or if everybody started to conduct his civil affairs contrary to the legal standards, the effect would be a civil insurrection that even the power of government could not control. There must be general acceptance of law by society if the law is to continue as a viable institution. This general acceptance comes out of more remote sources of the law which are, in effect, its ultimate origin. These remote sources can be characterized as custom, religion, and the influence of consciously directed legal thinking, which we might call the *scientific* approach to law.

Custom

Custom, one of the most primitive sources of law, is still a basic and dynamic force. Anglo-American law is, in two different respects, a law of custom. In its origin, historically, the common law was nothing more and nothing less than the custom of the people of England. This custom was relied upon by the courts in making their decisions. As time went on, however, the accumulation of cases decided by the courts created precedents that the courts followed. Thus, customs or usages contrary to these accumulated cases were discouraged. In a very real sense, law became the custom of the courts.

Even today popular custom has its effect. Where the law does not require any given action or inaction the custom of the community can fill in the empty space. One specific application of this principle is in contract interpretation, where custom is commonly used to define specialized words and to imply unexpressed terms. In addition, the legislature, if it believes that the custom of the court, the law, is out of step with the practices of the times, may change the law by statute. This is particularly true in the case of commercial law. The changing customs of the business community constantly force the law to change, both in bringing about new legislation that reflects new ways of doing business and in influencing judicial decisions so that they reflect reality more adequately. Obviously, to the extent that law reflects the customs and desires of the community it is accepted as "good" law by those involved.

Religion

With respect to the standards of conduct and morality it prescribes, religion is also a pervasive influence on legislation and decisions. The religious concepts of the western world have contributed numerous ideas to the law, from the concept of usury to the idea that gambling is a crime. Even if he desires to, no judge or legislator can ignore the dominant religious ethic of the times in which he lives. Thus, by following the general concepts of religious thought, law receives general acceptance in the community.

Speculation, Philosophy, and the "Scientific Approach"

The effect of attempts to achieve a scientific approach to law is another important source of law. In areas not covered by religious or ethical considerations, or not concerned with customs and usages, the law must, at the very least, be a rational and explicable phenomenon. There are many technical questions that custom and religion cannot answer but that must be answered by the courts. Suggestions for answers that might be given by the courts to such questions and rationalizations of answers that have been given in the past depend on the work of men or groups of men who engage in speculation upon these problems.

Sometimes this is done in an effort to develop some overall view of the law to explain its existence and direct its future. This would be a philosophy of law, or jurisprudence in the broadest sense. At other times the scholar may be concerned with a single narrow question. He will try to organize the raw material of the cases into some understandable form to see what the courts, consciously or unconsciously, are doing. Sometimes it results in a treatise or text on a particular branch of the law. The investigator, having ascertained what he thinks is the current state of the law, may then go on to suggest changes or particular applications for the future. In all of this, the investigator is necessarily giving the law the impress of his own intellect.

In the European civil-law countries, the concept of doctrinal development—that is, the gradual formulation of legal doctrine from a variety of individual qualified opinions—by so-called *jurisprudence* has been very important since Roman times. Primary emphasis is given to constitutions and statutes as sources of law. Apart from a very recent West German experiment, European courts have no power to declare statutes unconstitutional. Cases themselves do not constitute binding precedents for future decisions. Very great respect is consequently accorded to the writings of experts in the various fields of law. The statutes, gathered