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The Open Court

A MONTHLY MAGAZINE

Devoted to the Science of Religion, the Religion of Science, and the
Extension of the Religious Parliament Idea

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CHICAGO

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The Monthly Open Court

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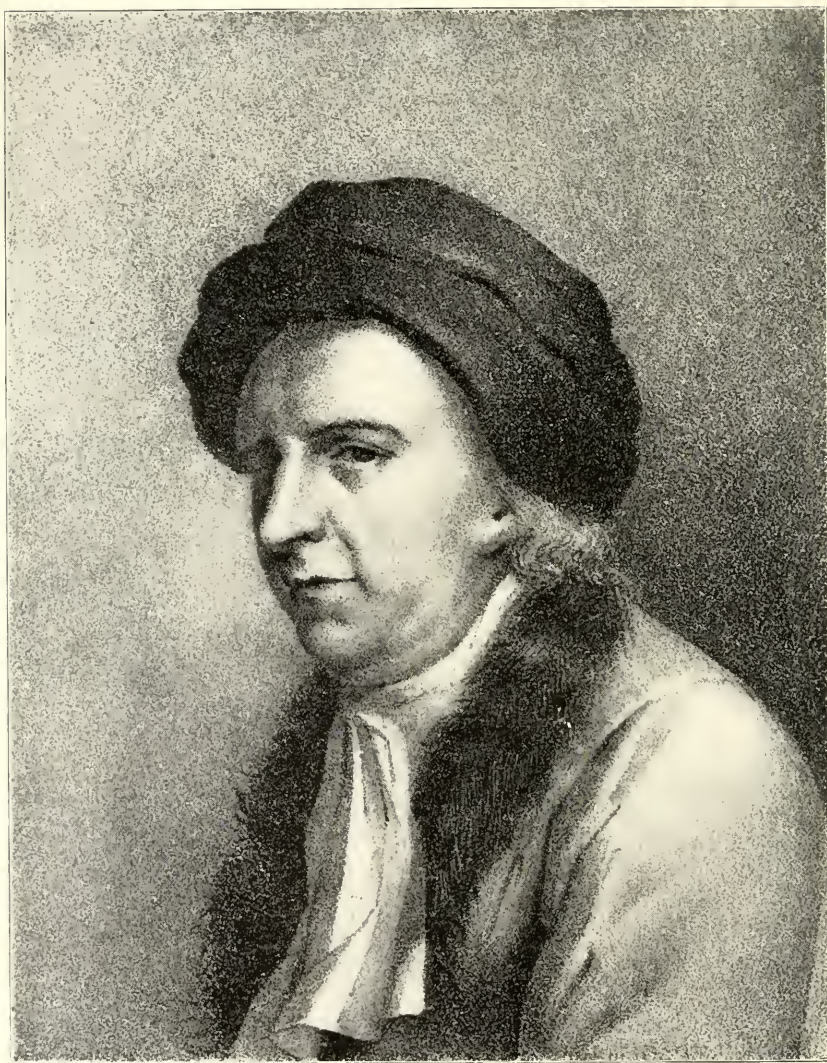
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LEONHARD EULER.

(1707-1783.)

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AN INTRODUCTION TO THE STUDY OF ETHNOLOGICAL JURISPRUDENCE.¹

BY THE LATE JUSTICE ALBERT HERMANN POST.

ETHNOLOGICAL JURISPRUDENCE, the most recent branch of the science of law, so richly elaborated by every method of research, has still to battle for its existence. Wide circles in the world of juridical learning utterly ignore it, or assume a hostile and at best sceptical attitude towards it. Neither the history of law nor the philosophy of jurisprudence has accorded it scientific recognition, and even the tenability of the principles upon which it is based has been characterised as highly questionable.

It is universally true that every new departure in science at first meets with opposition, and that it cannot aspire to recognition until it is in a position to present results that are incontrovertible. Only by presenting such results can it acquire recognised standing in the roll of the sciences, and only by the elaboration of these results can it repel definitively the attacks directed against it. But this process may be expedited by giving in the clearest and most explicit terms possible a sketch of its underlying principles, and so in the present case, while ethnological jurisprudence is still in the initial stages of its development, it will not be amiss, in the interests of our study, to attempt a substantiation of its scientific pretensions. We shall, by so doing, at least throw obstacles in the way of superficial criticism from the traditional standpoint.

Ethnological jurisprudence stands in marked contrast with the tendencies that at present dominate the science of law. Its method of procedure is fundamentally inductive, and has for its starting-

¹ Translated from the German by Thomas J. McCormack

point the customs and jural¹ concepts of all the nations of the earth. Its method furthermore is specifically comparative-ethnological; that is to say, it is on the one hand socio-psychological and on the other hand comparative in the sense that it proceeds by comparison even where the historical connexion between the facts of the jural life is lacking.

It is thus opposed to—

1. Every philosophy of jurisprudence which is essentially deductive in its methods.
2. Every system of jurisprudence founded upon the law of a single nation or a single group of nations.
3. Every system of jurisprudence which is individuo-psychological in its origin.
4. All investigations of historical jurisprudence which on principle do not quit the ground of historical connexion in the treatment of the facts of jural life.

These innovations have given to ethnological jurisprudence its peculiar impress, and it is this peculiarity that demands scientific vindication.

The first point of view that presents itself for the examination of the jural order is unquestionably the individuo-psychological. For the domain of jural life comprehends the action of the forces that emanate from individuals, and the law finds its most immediate expression in the jural sense of the individual. It is daily born anew in the depths of the human soul. Here it appears in the form of passion and desire, so soon as a misdeed is committed, and urges to vengeance and expiation. The written law of statute-books and the courts, however, is but the mediate expression of the jural life.

The first point of view presenting itself is therefore the following: to regard all jural order as the product of the differences and coincidences of the jural sense of human individuals, and to endeavor to explain the same from the nature of man, that is, from the nature of the individual.

This idea still rules supreme in modern jurisprudence. We meet on all sides with arguments explanatory of state and law, which are derived from the nature of the human individual. And seeing that the individuo-psychological method of investigation derives its materials directly from the living source of life, while

¹ "By the adjective *jural* we shall denote that which has reference to the doctrine of rights and obligations; as by the adjective "moral" we denote that which has reference to the doctrine of duties."—*Whewell*. (Quoted by *Translator*.)

the socio-psychological starts from the jural phenomena of the life of all nations, deriving thence its inductions as to the causes which underlie the same, certainly, if it were possible to explain jural life adequately from the nature of the human individual, the individuo-psychological method would have the preference.

But this latter method does not lead far towards the understanding of jural life. The sequence of causes soon vanishes in so inaccessible a sphere as the personality of the individual, and true scientific inquiry is displaced by ingenuity and sophistry.

Viewed from the individuo-psychological standpoint, the facts of jural life are partly matter of our subjective and partly matter of our objective experience.

Matter of subjective experience is merely our own individual jural sense, that is our individual consciousness as bearing upon right and wrong. This individual jural sense is made up of a sum-total of psychical activities, of which we become conscious when from inward or outward excitation we are confronted with the question as to whether something is right or wrong. These psychical activities are partly feelings and desires, and partly judgments, the former tending towards action and the latter tending towards expression by word or sign. Jural feelings are principally feelings of indignation as when an injustice is experienced by an individual, a feeling of fear as when the individual is affected by an inclination to do wrong, a feeling of penitence as when the individual has committed a wrong. With the feeling of indignation is joined a desire for vengeance, with the feeling of penitence a desire of atonement, the former tending towards an act of vengeance and the latter towards an act of expiation. The jural judgments of individuals are not complete judgments; they are based upon an undefined sense of right and wrong. In the consciousness of the individual there exists no standard of right and wrong under which every single circumstance giving rise to the formation of a jural judgment can be subsumed. A simple instinct impels the individual to declare an action right or wrong.

It thus becomes evident that the individuo-psychological analysis of the individual jural sense, in so far as it rests upon subjective experience, can afford only meagre results. All psychical phenomena of the jural sense are, so far as regards our subjective experience, ready-made products. The psychological development of jural emotions, desires, and judgments, is not accessible to our inner experience. The psychological processes whereby we be-

come conscious of jural emotions, desires, and judgments, lie without the reach of consciousness.

Further, subjective observation of the psychical processes from which the jural sense springs, bears the same character as subjective observation of psychical processes generally. Systematic self-observation is impossible, inasmuch as the observing subject and the observed object are one and the same, and the very act of observing thus modifies the object observed.¹ It is likewise impossible to evoke, arbitrarily or artificially, a jural desire or an instinctive jural judgment; they always appear instantaneously and unbidden in consciousness. As material for observation, accordingly, there remains only the recollection of such occurrences in the mind of the individual.

Still another drawback to the employment of subjective observation for scientific inquiry is the fact, that it is almost utterly impossible to distinguish in general between jural feelings, desires, and judgments, and moral feelings, desires, and judgments.

Scientific inquiry attains more favorable results when it adopts as the subject of investigation the expressions of the individual jural conscience in the external world of sense—that is, the phenomena of the individual jural sense as appearing in acts on the one hand and in words and signs on the other. Here self-observation discovers facts which are represented as events in the outward world of sense, and which are consequently subject to external observation. True, the observation of the outward expressions of the individual jural conscience in acts, words, and signs affords scarcely more material for the psychological analysis of the individual jural sense than the direct inward observation of the same. The material for observation increases, however, if the observer, not confining himself to the expressions of his own jural sense, compares with these the expressions of the jural sense of other people, or even compares the expressions of the jural sense of other people with each other.

From this method dissimilarities in the phenomena of the jural consciousness appear at once, and these are in a high degree adapted to throw light upon its nature. In the first place it is possible to distinguish differences in the jural sense of individuals according to their ages. It is possible to follow the jural sense of children in its development. We are also able to fix degrees of jural sense in youth and manhood, perhaps too in old age.

¹ Comte, *Positive Philosophy*, abridged by Rig; German translation by Kirchmann, 1883, I. p. 13 ff. Wundt, *Logik*, 1883, II., p. 482.

It will be possible, furthermore, to point out variations of jural sense between the male and female sexes. Then further, there are to be noted marked irregularities of jural sense resulting from derangement; which derangement may rest on biological as well as sociological causes. Mental diseases, affecting the whole consciousness of the individual, affect the jural sense also. Besides these, there are a great number of persons whose jural sense, though not disturbed by any psychical disarrangement, is far below the normal state; namely, criminals. Such persons, endowed with a jural sense of a socio-pathological kind, furnish the material for a separate branch of psychology; viz., criminal psychology. Marked irregularities in the individual jural sense may be further distinguished according to the social circle in which the individual moves. Even in a single nation these irregularities are quite considerable; according to caste, culture, occupation, politics, religion, and the like. Yet the most considerable deviations are to be found between the jural consciences of different peoples, and they are more considerable according as the difference in civilisation is greater, or as the development of the same has been more unique.

In all these ways it would be possible to observe the expressions of the individual jural sense and by a process of individual-psychological comparison to arrive at scientific results. It is evident, though, that it would be difficult to collect the material for observation, and that the observations of individuals themselves to this end would be subject to innumerable sources of error.

These observations could not acquire scientific value unless made upon the most extensive plan, and with persons of different ages, different sex, different intellectual ability, different social standing, and different nationality; and unless the material accumulated were so considerable that all the sources of error in individual observation could be eliminated. To limit the observations to a narrow field, would necessarily yield incorrect results; for it is now beyond question that the jural sense of individuals is subject to the most varied differentiations. The most distorted presentation of all, however, is produced when the inquirer confines himself mainly to his own individual jural sense, and persuades himself that this should determine the conduct of humanity. He has here merely systematised his own jural consciousness; manifestly a doleful scientific result.

How is it possible to observe the manifestations of the individual jural sense, which appear only instinctively and occasion-

ally, exhaustively enough to obtain really valuable scientific material for a causal analysis of the jural order? It is unquestionably hopeless.

And even were it possible to proceed thus, we should be far from exhausting in this way the *data* of jural life. Jural life, as a social province, is by no means made up of immediate expressions of the individual jural sense only; there are also mediate and indirect expressions of the same in it. The positive laws of nations with their statutes and provisions, have, it is true, their first origin in the expressions of the jural sense of individuals. But after these have become positive laws they are no longer the immediate expressions of the individual jural sense, but the objective products of the jural sense of whole spheres of social development, of countless individuals with variously formed jural consciences—individuals of existing generations as well as individuals that have long passed away.

It would be a manifestly precarious attempt to seek the explanation of these phenomena in the nature of the human individual itself. Unlimited scope would be given to caprice and imagination.

And yet, in the face of all, this method of studying the Science of Jurisprudence is still greatly in vogue, and meets with unqualified approval from contemporary students. They endow the human individual with certain instincts, the social instinct and the instinct of self-preservation: or they will have it pursue different ends according to its constitutional bent, happiness, liberty, etc., and upon these phantasms they build their structure as becomes the kindly heart and academic culture of the philosopher. These artistic productions are often charming reading, often teem with clever conceits, and give us a pretty picture of how blissful all would be, were it not so different in the world. If these works did not claim to be more than light and entertaining reading, we might joyfully welcome them. But they pretend to be more; they assert that they are scientific, and would actually influence the practical mechanism of the jural order. Herein is their danger. Ethnological Jurisprudence, in my opinion, must stand aloof from all attempts to define State and Law on the basis of individual psychology. And now to the discussion and proof.

* * *

It is not only in the province of Jurisprudence that we find attempts to explain the phenomena of social life on the basis of individual psychology. This method is common to all the other so-

cial sciences. It rests upon a broad and fundamental psychological principle, which at the present day shows signs of instability and will sooner or later be completely overthrown.

All human science takes on a different form, according to whether we assume that the nature of man can be determined from his *ego* alone, or that the soul and *ego* of man are not identical but that man is conscious of a portion only of his psychical activity. In the first instance, the psychology of the individual is the irreversible basis of human science; in the second, we have to look about us for broader foundations. Ethnology, and likewise ethnological jurisprudence, is founded upon the second view. It assumes that, in the individual consciousness, only a small portion of his psychical activity is manifest to the individual and that the greater part is lost to his consciousness. It regards individual psychology, therefore, as no proper basis of science.

That which we call our consciousness is in any case but an infinitesimally small portion of the totality of psychic life active within us. It hovers like a tenuous and shimmering cloud above an unfathomable ocean. All manner of images rise from the depths of our soul, yet few assume such sharpness of contour as to be recognised. By far the greater portion of our spiritual life remains unknown to us. By far the greatest portion of the spiritual life of which we are conscious, is known to us only as the resultant product of unconscious psychical processes, and not as something in process of production. We remain totally unconscious of those spiritual activities which touch most nearly the vital centre of our being, the activities which create on the one side an *ego* and on the other a world. At the instant a child first becomes conscious of itself, the *ego* and the world are already existent: their birth is concomitant with the act of consciousness. The unconscious activities of the soul have shaped them, until, appearing as ready-formed products, they give rise to that radical contrariety by which man becomes conscious of himself and a world. We remain utterly unconscious, too, of those psychical workings which give to the world its sensible character and to the *ego* its spiritual. Our world, in every phase in which it is accessible to us, is virtually a product of psychical activities acting unconsciously within us. Light, heat, color, sound, taste, smell, pressure, weight, even space and time, do not belong to the world as such: on the contrary they are creations of mental activities, corresponding to the psychological activities of our sensory and central organs, and project without a world created within.

Rokitansky¹ expresses himself upon this subject as follows :

“ We see the world that surrounds us by means of light ; but it is now known that light does not exist as such apart from us ; on the contrary it is vibrations of ether, which we transpose into light, and recognise as such, by means of mechanisms of specific irritability located beyond the sensory organs proper. Thus we ourselves illuminate space and come to know things therein through their relation to light ; we acquire knowledge not only as to their surface and outlines, but also as to their inner constitution. It is likewise the vibrations of sounding bodies of different magnitude and velocity, taken up and communicated to us by the air, that we convert into sound and tone. And so, too, the things which we perceive through impressions upon the other senses, are, apart from our conception of them, quite different, and undoubtedly consist of the molecular or molar motions of matter. It must strike every impartial person as strange that we recognise as external objects things of which the conception is really formed within us. How does this come ? There is undoubtedly a subjective organic activity present here.

“ This much is known : that the impelling power in obedience to which we project objects conceived, outside the subject conceiving them, must lie in the inward organisation of the mind ; that the conception of things in space is a function of the organs of our cognitive faculty which even in dreams creates in our imagination an external world.

“ The perceptible world about us is essentially a creation of our personality ; it is by the functioning of inner organs that objects appear as things outside of us, as things of definite quality and form, of definite size and greatness. Further, when we behold in the genesis of things and in their different stages and mutations a succession and a connexion, we say that the succession takes place in *time* and that the connexion between the changes is a *causal* one. But when we ask ourselves how we arrive at these conclusions, it turns out that we do so by virtue of subjective forms which must lie in our organisation and by means of which we are in fact enabled to apprehend successions and connexions.”

Even the world that remains after we remove the mantle of sensible phenomena, the world of ether and matter vibrations, is still not the world proper ; it is the world only as it appears to human cognitive activity.

¹ *Der selbst. Werth des Wissens*, 1869, p. 6, et seq.

The psychical operations, too, that create our ego are totally hidden from us.

And even the greater part of those psychical operations of which we *are* conscious, are presented to consciousness as finished products, the genesis of which took place in unconsciousness. Ratiocination alone is effected wholly in consciousness. Feelings and desires come to consciousness as results only, and many judgments are not logical judgments, but incompleted ones, lying, with the principle upon which they were formed, in the province of the unconscious.

If all this be correct, it is evident that our consciousness is in no wise fitted for the thorough comprehension of human nature ; for only an insignificant portion of our spiritual life ever becomes immediately conscious. What we are able to fathom by self-contemplation is soon exhausted. Yet unlimited is the province of knowledge that opens before us, if to the inward observation of self we add outward observation by the senses ; in other words, if, from the phenomena of unconscious psychic life as expressed in the outward world of sense, we draw inferences as to the unconscious activities at work within us.

To this end the whole sensible world presents itself. Our sensible world is not the real world-in-itself. It is merely a world-image, made by man, created by human psychical activities. From this, therefore, we shall be able to gather a great part of our unconscious psychical life, and thus come infinitely nearer the essence of our being than would be possible through the introspective observation of our own psychical activities.

In this way we arrive, not at the psychology of the past, which attempted to unfold the nature of man from the ego, but at a psychology which will endeavor to disclose the same from the world-image created by man.

* * *

Among the phenomena of our sensible world which admit of inferences as to unconscious psychical activities, the phenomena of social life assume a prominent place.

And social life, though made up of the activities of individuals, supposably in possession of free will, is also essentially instinctive, resting upon the more or less unconscious impulses of the individual. Whosoever has had to do with the more intricate problems of ethnology, will entertain no doubt whatever of this fact.

Turn where we will in the domain of social life, we shall every-

where see fixed social laws at work, everywhere meet with a tendency of development, which leading through centuries and centuries, makes towards some definite end, and of whose aims the individuals comprehended in the movement have no idea. Contemplate the history of the growth of language, the development of forms of divinity, of art, of legal institutions, even of fashions and utensils; they come, grow, and go, like things of life. There is but little here that is the product of individual reflexion; almost everything is of organic growth. The individual follows blind impulses and coercive social conditions; the individual most frequently intends the very opposite of what he produces by his work, and all that he does accomplish, unless fitting in with the course of organic development, will soon come to naught.

That the individual in social life acts for the most part instinctively, we may ascertain by self-observation and by the observation of other individuals. A man, in speaking to another, employs the words he needs quite instinctively; they come to him, as a rule, without further reflexion. He need not know anything of the grammar of the language he speaks, and yet may employ the language with the greatest ease. A man who is confronted with the question whether he is acting advantageously or not, whether he is committing an act of justice or injustice, generally decides from pure instinct, occasionally from feeling, but seldom through clear reasoning, and then always liable to the danger of mistake. A poem, a melody, a picture, a statue, arises before the mind's eye of an artist: something comes to him. Not until something comes to him, can he elaborate it further by thought. Creations that are not unconsciously born in the artist are not works of art, although every artifice of æsthetic manipulation have been employed. Every original and powerful idea in science is born of unconsciousness like a stroke of lightning.

We need but glance at every-day life to become convinced of how instinctive in its workings the whole mechanism of human existence is. Take the habits and customs of ordinary social life. When do we ever hear of reasons for acting in this manner or in that. We act so because things are not otherwise than they are, because we must, because others do so. We all know how impossible it is to convince a person who can advance no reasons for his conduct, that his way of thinking is wrong. If there were a possible prospect of being able to do this in the case of a man, it would certainly fail with a woman, whose springs of life are pre-eminently more instinctive than man's. In fact, a man who does not act and

live instinctively is ridiculed and despised : he is no longer capable of inspiration and enthusiasm for any cause.

The deposits, therefore, of the unconscious workings of the human mind in the customs and conceptions of nations, are a source of incalculable importance to the understanding of the human soul ; and the history of social activity furnishes an infinitely more copious material to this end than could be obtained by introspection and observation of the psychical life of a single human individual. An important part of our psychical life, which for the most part does not directly appear in consciousness, can thus be gathered from the customs and conceptions of the peoples of the earth.

Our statements as to consciousness in general are likewise true of the jural sense. The jural sense by no means exhausts the totality of psychical processes which constitute the jural life of a man. More properly, the majority of these processes come into the jural consciousness as results, as feelings and desires, or as instinctive jural judgments ; while the genesis of these psychical formations are hidden in unconsciousness. But in the jural institutions and conceptions of nations a great deal of jural life comes to light that remains unknown to the individual, and so it is possible to penetrate much farther by this method into the cognition of the human mind in its jural aspects than was possible by the observation of one's own jural sense or by observing the expressions of the jural sense of single individuals.

But apart from this broad psychological standpoint, the very nature of Law itself indicates that the individuo-psychological method can lead to nothing, and that only the socio-psychological method can produce satisfactory results. It will appear on closer observation that the individual jural sense is not the creator of the jural order, but on the contrary, that the individual jural sense is a product of law as a sphere of social life. Only in so far as the jural sense is *consciousness per se* are we concerned with a biological basis ; in so far, however, as it is a *jural* consciousness, the foundation is sociological. The human consciousness has a physical basis in the central organs of the body, but we should search in vain in the human body for an organ that is the seat of the moral or jural sense. A human being, reared in a state of perfect isolation, would think because he possessed a brain and had to use it in the struggle with nature. But we should find no trace of a moral sense or a jural sense in such a person. They are both the exclusive product of life in human society. They first arise through

adaptation to the social relations in which men live, and not until this adaptation is perfected does human consciousness acquire, among innumerable other notions, conceptions of right and wrong, of rights and obligations.

The jural order, therefore, is not to be explained from the nature of the human individual, but from the nature of the social bodies in which it has been evolved. And it is only from this source that the individual jural sense also becomes intelligible.

Although the jural sense acts purely from instinct within us, it is nevertheless the creation of social and not of individual factors. This will appear from the fact that it acts in opposition to individual inclination. How are we to find one biological basis for the two psychical forces that come into conflict when the individual becomes possessed of an inclination to commit a crime and his jural sense restrains him from it? And if there be no biological basis, then the psychological theory that a person can control his sensuous inclinations by the innate rational faculty rests upon imagination. In reality the controlling element here is not a biological or an individuo-psychological factor, it is a socio-psychological one.

The most telling proof that the individual jural sense is not a biological but a sociological product is found in the circumstance that, apart from the changes it suffers as consciousness proper (through age, insanity, etc.), its content is determined by the character of the social community in which the individual lives or has grown up. Were this not the case the jural sense of Frenchmen, Germans, Russians, and Chinese, who had attained the same degree of intellectual culture, would be one and the same. But this is obviously not the case. Identity of jural sense means identity of social organisation.

* * *

The individuo-psychological standpoint, accordingly, is inadequate for the explanation of the facts of jural life and we must expect really valuable scientific results only from a socio-psychological analysis of jural phenomena.

The socio-psychological method proceeds, in its investigation of the causes of jural life, not from the human individual, but from the forms which Law assumes in society, from jural customs, jural conceptions, and jural institutions as they are met with in the life of nations themselves. All these forms arose originally from expressions of the individual jural sense, and these expressions are in their turn founded upon social instincts developed by life in hu-

man society. By frequent repetition and the elimination of concrete notions, these expressions gradually lose their individual character. They become expressions of the corporate jural sense of a concrete sphere of social development. In this way a nation acquires a set of jural customs and jural conceptions, which regulate its acts and judgments, and whose conservation is entrusted to the government of the social sphere in which they were evolved. In this so-called positive law, the organic law of a nation assumes an objective form. It is a precipitate, in a social shape, of the jural sense, just as religious rites, forms of divinity, and doctrinal faith are the precipitates of the religious sense, or human language of human thought. In the positive law of a definite epoch lies, essentially, the normal jural sense of the totality of individuals embraced within a single sphere of social development, as founded upon the jural order transmitted from previous generations.

These positive laws constitute the combined data of the socio-psychological investigations of jural life; and they are full of promise. In the evolution of positive laws the creative national genius has instinctively accomplished a scientific work, such as could only be obtained by thoroughly analysing the utterances of the jural sense of all the individuals that now live or ever have lived within the social sphere governed by the positive law in question.

The study of the individual jural sense is thus in reality unnecessary, and the science of jurisprudence may begin at once with the analysis of positive laws.

The question now arises as to what method of conducting the analysis of jural life, as a field of social activity, will be most productive of results. And this question we shall answer in our second and concluding article.