Hume's theory of law, which he worked out as a part of his general philosophical system, was based in his own eyes on the employment of a new approach to the problem of knowledge. It is easy, he says, for one of judgment and learning to perceive the weak foundation even of those systems of philosophy which have obtained the greatest credit. Principles taken upon trust, consequences lamely deduced from them, want of coherence in the parts, and of evidence in the whole, these are everywhere to be met with in the systems of the most eminent philosophers, and seem to have drawn disgrace upon philosophy itself. This was a view which he had entertained since the age of eighteen. At that time he could find in the books which he read "little more than endless disputes"; he therefore sought for himself, "some new medium by which truth might be established." In philosophy, the thoughts of youth are centered generally upon questions of method, and Hume was no exception. In the spring of 1729 he found the medium which he sought. "There seemed to be opened up to me a new scene of thought," he wrote, "which transported me beyond measure, and made me, with an ardor natural to

young men, throw up every other pleasure or business to apply entirely to it.” Hume proceeded to distinguish himself from most other young men who believed they had found a new way to truth by actually applying his method to the problems which occupied the men of his time. By the age of twenty-six his book was almost complete, and he had written the greatest single work in the whole range of English philosophy.

Hume's "new medium" through which he proposed to redeem philosophy was the experimental method; it was to be focussed upon a new subject matter—human nature—which would result in the establishment of a Science of Man. Hume maintained that all the sciences bear some sort of a relation to human nature; even mathematics and physics are in some measure dependent on the science of man, since they lie under the cognizance of men, and are judged of by their powers and faculties. Other sciences, such as logic, morals, and politics, have a connection with human nature which is more close and intimate. In any event human nature is the only science of man, and up to Hume's time had hitherto been the most neglected. He believed that human nature was not modifiable, and that there was a general course of nature in human actions, as well as in the operations of the sun and the climate. There are also characters peculiar to different nations and particular persons, as well as common to mankind. The knowledge of these characters is founded on the observation of a uniformity in the actions that flow from them; and this uniformity forms the very essence of necessity. Nevertheless, a distinction exists among the various sciences with respect to the certainty of their knowledge. Algebra and arithmetic are the only sciences in which we can carry on a chain of reasoning to any degree of intricacy and yet preserve a perfect exactness and certainty. Knowledge derived from the other sciences is only probable. In the field of the science of man there is a further difficulty which is not present in the natural sciences. We are unable, in

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1 Treatise, xx.
2 Treatise, xix.
3 Treatise, 273.
4 Treatise, 537.
5 Treatise, 402.
6 Treatise, 71.
estimating human affairs to perform controlled experiments. We must therefore in the science of man "glean up our experiments" from a cautious observation of human life, and take them as they appear in the common course of the world, by men's behavior in company, in affairs, and in their pleasures. Hume thought that when experiments of this kind are judiciously collected and compared, we may hope to establish on them a science, which would not be inferior in certainty, and will be much superior in utility to any other human comprehension.\(^7\)

There are many obscurities in Hume's application of his "new medium," but in substance he appears to be advocating an application of the comparative method to the study of sentiments and institutions. His avowed aim is to deduce general principles from a comparison of particular instances.\(^8\) Those instances are not to be derived one by one from an experimentum crucis, but are to be found, as his practice shows, in history. Since Hume cited Bacon as among those who had "begun to put the science of man on a new footing,"\(^9\) we may take it that he shared the still popular belief that modern science is inductive, in contrast with the science of past times which was supposed to be deductive. Nevertheless, he drew a valid distinction between knowledge which is certain and that which is probable; or in other words, between inferences which are necessary and those which are probable. It is true as contemporary logic has shown, that the evidence for universal propositions which are concerned with matters of fact can never be more than probable. But the crucial question which arises when we apply Hume's method to social phenomena is: How probable is the universal proposition which is constructed by this method? From the vast range of social data which history offers us it is a poor philosopher who cannot construct a reasonable number of propositions to exemplify the theory to which he is wedded. In Hume's hands the comparative method suffered from this rudimentary weakness. But his insight trans-

\(^7\) Treatise, xxiii. \(^8\) Enquiry, 174. \(^9\) Treatise, xxi.
Hume's method, and he was able to arrive at a view of both society and law which contains many elements that are at the foundation of much of today's social and legal speculation.

**Justice**

Hume's posthumous fame is founded to a considerable degree on his analysis of the idea of causation. But in the scheme of the *Treatise* the idea of justice occupies as important a place as that of causation and is no less extensively treated. Since his day philosophy, for the most part, has abandoned any interest in the subject matter to which the idea of justice is usually attached, and his examination of the idea has not received a consideration which at all approaches the attention paid to his analysis of causation. His conclusions with respect to the idea of causation are held to be of great significance in philosophical thought; his final determination of the meaning of justice is no less significant, though scarcely recognized, for the understanding of social and legal phenomena. It is of special concern to the student of jurisprudence since, unlike the theory of justice propounded in Plato's *Republic*, it is a theory of legal justice as distinguished from an ethical one.

It was Hume's central contention that "reason is, and ought only to be the slave of the passions, and can never pretend to any other office than to serve and obey them." From this doctrine he proceeded to prove that moral distinctions are not derived from reason. He argued that reason is concerned with the discovery of truth or falsehood, which he held to consist in an agreement or disagreement either with respect to the real relations of ideas, or with respect to real existence and matter of fact. Whatever, therefore, is not susceptible to this agreement or disagreement is incapable of being true or false, and can never be an object of our reason. Now it is plain that our passions, volitions and actions cannot fulfill this condition, since they are original data, complete in themselves and imply

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10 *Treatise*, 415.
no reference to other passions, volitions and actions. It is impossible therefore to pronounce them either true or false and to be either contrary or conformable to reason. From this argument Hume concluded that actions do not derive their merit from their conformity to reason; and that as reason can never immediately prevent or produce any action by contradicting or approving of it, it cannot be the source of moral good and evil, inasmuch as the application of value terms to action possesses such an influence. Hume's attempted syllogism here may be defective, but his point at least is clear.

Moral distinctions, therefore, are derived in Hume's view, from a moral sense. This is the sense which causes us to feel satisfaction in the contemplation of virtue, and uneasiness in the presence of vice. But is it possible to carry the analysis further and determine what acts upon the moral sense to cause it to manifest emotions of approval? Hume answers that approval is bestowed upon whatever is useful to its possessor or to others, or upon whatever is immediately agreeable to its possessor or to others. This was the part of the Treatise which caused Bentham when he read it to exclaim, "I felt as if scales had fallen from my eyes... That the foundations of all virtue are laid in utility, is there demonstrated, after a few exceptions made, with the strongest evidence: but I see not, any more than Helvétius saw, what need there was for the exceptions." At this point Hume found it necessary to assume the existence of another principle. The emotion of approval is a general one, and is not confined to the person involved; it is extended to the presence of happiness wherever located. We frequently bestow praise on virtuous actions, Hume observes, performed in very distant ages and remote countries, where the utmost subtlety of imagination would not discover any appearance of self-interest, or find any connection of our present happiness and security with events so widely separated from us. Hume accounts for the universality of moral approbation

11 Treatise, 458.  
12 Treatise, 471.  
13 Enquiry, 208.  
14 Fragment on Government (Footnote).  
15 Enquiry, 215-216.
on the basis of what he terms the principle of benevolence. The notion of morals implies some sentiment common to all mankind, he writes, which recommends the same object to general approbation, and makes every man, or most men, agree in the same opinion or decision concerning it. It also implies some sentiment, so universal and comprehensive as to extend to all mankind, and render the actions and conduct, even of remote persons, an object of applause or censure, according as they agree or disagree with that rule of right which is established. Hume insisted that these two requisite circumstances belong alone to the sentiment of humanity or benevolence. Thus Hume arrives at the existence of this sentiment in accordance with his empirical method. Men in fact do bestow their approval upon conduct which is agreeable to others, and, hence, men are benevolent.

With this argument as a background Hume takes up the discussion of the idea of justice, which in his system serves both an ethical and a sociological function. In ethics, since he has asserted that what is approved is pleasant or promotes human happiness, he must account for the fact that in adhering to certain standards we not infrequently follow a course which seems unpleasant to ourselves or to others. Sociologically, he had to determine whether the principle of benevolence was sufficient to account for the functioning of society, or whether fully to explain its operations some additional elements were necessary.

Hume began by observing that the social virtues of humanity and benevolence operate chiefly in particular cases, not as part of any system, and with no view to the consequences resulting from the concurrence, imitation or example of others. A parent flies to the assistance of his child, transported by the sympathy which actuates him and without reflection on the sentiments or the rest of mankind in like circumstances. In such cases the motivating actions contemplate a single individual object, and pursue the safety or happiness alone of the person, loved and

\[\text{Enquiry, 272.}\]
esteemed. This is sufficient to satisfy the activating impulses. And as the good, resulting from their benign influence, is in itself complete and entire, it also excites the moral sentiment of approbation, without any consideration of further consequences. On the contrary the action of the individual who stands alone in the practice of beneficence is enhanced in value in our eyes, and joins the praise of rarity and novelty to its other merits.\(^\text{17}\)

But this is not the case with justice. As a social virtue it is highly useful, or indeed absolutely necessary to the well-being of mankind; but the benefit resulting from it is not the consequence of every individual single act. It arises from the whole scheme or system concurred in by the whole or greater part of society. General peace and order are the attendants of justice; but a particular regard to the particular right of one individual citizen may frequently, considered in itself, be productive of pernicious consequences. Riches, inherited by a bad man from his parents may be an instrument of mischief, and the right of inheritance in that case would be hurtful.\(^\text{18}\) Thus a single act of justice is frequently contrary to public interest; and were it to stand alone, without being followed by other acts, may, in itself be very prejudicial to society.\(^\text{19}\) But however single acts of justice may be contrary to public or private interest, it is certain that the whole plan or scheme of which justice is a part, is highly conducive, or indeed absolutely requisite, both to the support of society, and the well-being of every individual. It is necessary that society be regulated by general inflexible rules,\(^\text{20}\) and exceptions should not be made in hard cases, otherwise the utility of the whole system will disappear. Such rules as are adopted are intended as best may be to serve the public interest; but it is impossible for them to prevent all particular hardships, or make beneficial consequences result from every individual case. It is sufficient, if the whole plan or scheme be necessary to the support of civil society, and if the balance of good, in the main, thereby preponderates much above that of evil.

\(^{17}\) Enquiry, 303.  \(^{18}\) Enquiry, 304.  \(^{19}\) Treatise, 497.  \(^{20}\) Enquiry, 305.
Thus Hume takes the position that a legal system to be socially useful must adhere strictly to its rules even at the expense of injustice in individual cases. Aristotle's view, of course, was different. He thought that equity should rectify law where law was defective because of its generality, and his discussion makes it clear that he had in mind both the unprovided case (where the matter for decision is not covered by the law) and the hard case (where the matter is covered but the application of the law would result in an injustice). Hume's argument is addressed to the hard case alone, and his conclusion is the one that has prevailed in the Anglo-American legal system. As early as the fourteenth century the maxim developed that a "mischief" (an injustice in a particular case) would be permitted rather than an "inconvenience" (a departure from the law). Hume's own argument is expressly stated in the sixteenth century by St. Germain, the earliest of the founders of the English equity system: "It is much more provided for in the law of England that hurt nor damage should not come to many than only to one." No other attitude seems consistent with the development of a mature system of law. "A community," Maine observed, "which never hesitated to relax rules of written law whenever they stood in the way of an ideally perfect decision on the facts of particular cases, would only, if it bequeathed any body of judicial principles to posterity, bequeath one consisting of the ideas of right and wrong which happened to be prevalent at the time. Such a jurisprudence would contain no framework to which the more advanced conceptions of subsequent ages could be fitted. It would amount at best to a philosophy marked with the imperfections of the civilization under which it grew up." Nevertheless the problem still remains. A system of law must consist of a body of invariable rules or it will neither grow nor persist; at the same time it must do substantial justice. Perhaps the only feasible solution is the one proposed by Aristotle and

21 Eth. Nic. 1557b.  
22 Rhet. 1374a-1374b.  
23 Doctor and Student I, c. 18.  
24 Ancient Law (World Classics ed.) 62.
restated for contemporary thought by the Swiss Civil Code of 1907 and various modern jurists: The judge must not sacrifice the law to do justice in the hard case, but within the "interstitial limits" of precedent, custom, and the judicial process he possesses an area of discretion which is ample for the requirements of abstract justice.

Hume advances several arguments to support his contention that public utility is the sole origin of legal justice and the sole foundation of its merit. He begins by imagining four situations in which justice would be totally useless, and he then attempts to show that its essence is thereby totally destroyed and its obligation upon mankind suspended. (a) Let us suppose that nature has bestowed on the human race a complete abundance of external conveniences so that every individual finds himself fully provided with all that his most voracious appetite can want. For what purpose make a partition of goods, Hume asks, where every one has already more than enough? Why give rise to property, where there cannot possibly be any injury? Why call this object mine, when upon the seizing of it by another, I need but stretch out my hand to possess myself to what is equally valuable? Justice, in that case, being totally useless, would be an idle ceremonial, and could never possibly have a place in the catalogue of virtues. However, little reflection is needed to show us that this particular argument is without merit. Property is valued because it satisfies some need; but what is desired by a particular individual is not determined alone by its scarcity. Sentiment, religious ideas, aesthetic appreciation, and other factors all enter into the valuing process. The possessor of a family heirloom will not exchange it for a similar article in better condition and of greater monetary worth. A Melanesian who is within the Kula exchange places a high value upon his shell necklace and armshell, although similar shells are available.

25 Aristotle, *Rhet.* 1375b, would limit the application of equity to well defined classes of cases, e.g. mistakes and accidents. For the present day view see Cardozo *The Nature of the Judicial Process* (1922) Lecture III. The provision of the Swiss Civil Code of 1907 is quoted by Cardozo, *op. cit.* 140.

26 *Enquiry*, 183 et seq.
everywhere and for the mere appropriation. He values them because, like many of our collections of crown jewels which are ugly and even tawdry, they are enmeshed in a web of historic sentimentalism.  

(b) Hume reverses his supposition and imagines a society where there is such a want of all common necessaries that the utmost frugality and industry cannot preserve the greater number from perishing, and the whole from extreme misery. He believed that in such a case the strict laws of justice would be suspended, and give place to the stronger motives of necessity and self-preservation. Is it any crime after a shipwreck, he asks, to seize whatever means or instruments of safety one can lay hold of, without regard to former limitations of property? This same case was put by Cicero and answered by him the other way; it was also determined adversely to Hume by an American court. Here again other considerations than mere utility are determinative of the question. In the American case a sailor in charge of a foundering long boat caused a certain number of men to be put overboard to keep the vessel afloat. He was convicted on the theory that selection by lot was the only proper method. In this case utility did not enter, and abstract justice alone was insisted upon, a rule which it does not appear ethically possible to have otherwise.  

(c) Hume assumes a supply of goods as at present, yet all men moved by perfect benevolence. Every man, upon this supposition, being a second self to another, would trust all his interests to the discretion of every man, without jealousy, partition or distinction. The whole human race would form only one family, where all would be in common, and be used freely, without regard to property; but cautiously too, with an entire regard to the necessities of each individual, as if our own interests were most intimately concerned. This example, however, does not prove that there would be no system of legal justice established, but only that the legal justice which is implied would be self-executing.  

(d) Finally, Hume assumes
a state of complete anarchy, the *bellum omnium contra omnes* of Hobbes. In such case, a virtuous man's particular regard to justice being no longer of use to his own safety or that of others, he must consult the dictates of self-preservation alone, without concern for those who no longer merit his care and attention. Of course an individual present in a community in which no system of legal justice obtains cannot conform to what is nonexistent. But in the ethical sphere, where Hume seems to place his argument in this instance, the possibility of the operation of justice is not eliminated by the example. It seems to be implied in the case Hume puts that conduct which exceeds the "dictates of self-preservation" would be unjust, as in the wanton killing of innocent children. This same principle is recognized in the Anglo-American legal system. A criminal has fewer rights than an innocent man, but he nevertheless is accorded some measure of protection by the law. A man in danger of his life at the hands of a criminal may use no greater violence in defense of his person than is necessary to protect himself.

Hume argued that the common situation of society is a medium amidst all these extremes. Therefore the ideas of property become necessary in all civil society; hence justice derives its usefulness to the public; hence alone arises its merit and moral obligation. Once the laws of justice have been fixed by the views of general utility the harm which results to any individual from a violation of them is a source of the blame which attends every wrong. A violation of the laws of justice is a wrong to the individual because it disappoints expectations which the rules allow; it is also a public wrong because it is a violation of the general rules of equity.

If, Hume asserts, we do not accept the theory that justice arises from its tendency to promote public utility and to support civil society, we must then take the position that justice arises from a simple original instinct. That being so, it follows that property, which is the object of justice, is also

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\(^{30}\) Enquiry, 188. 
\(^{31}\) Enquiry, 310. 
\(^{32}\) Enquiry, 201.
distinguished by a simple original instinct. But the rules of property are so infinitely complex we must assume ten thousand different instincts to account for them. A hundred volumes of law and a thousand volumes of commentators have not been found sufficient to account for the ideas involved in the concept of property. Does nature, Hume asks, whose instincts in men are all simple, embrace such complicated ideas, and create a rational creature, without trusting anything to the operation of his reason? Furthermore, where will we draw the line? Have we original innate ideas of praetors and chancellors and juries? Is it not clear that these ideas arise merely from the necessities of human society? In fact, however various may be the particular rules of law, in their chief outlines there is a fair regularity, because the purposes to which they tend are everywhere exactly similar. In like manner, all houses have a roof and walls though diversified in their shape, figure and materials. Thus Hume argues, utility is the only principle that accounts for both identity and diversity. At the present day the ideas of a property instinct, and even of a legal instinct are once again to the fore; but we may accept Hume's arguments as still unanswered, at least until the idea of instinct itself is assigned some intelligible meaning. Thus McDougall,\(^3^3\) who conceives of an instinct as an inherited or innate psycho-physical disposition which determines its possessor to perform a specific action in a specific way, accepts the existence of an acquisitive instinct which is accompanied by a feeling of ownership and possession. However, even assuming there is an innate tendency, apparently observable in children, to grasp and to handle objects, it may represent a form of behavior not primary in itself, but merely a type at the service of a more fundamental need such as hunger. If the idea of instinct is understood in the more watered down sense of response of function to environment we are at the beginning again, and the legitimacy of the idea will turn upon the meaning attributed to the terms. Hume himself recognized that perhaps there were further alternatives to

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\(^{33}\) An Introduction to Social Psychology (15th ed. 1923) 30.
his theory of utility, other than the idea of instinct, although he insisted that his own proposal was the only truly sound one. He suggested that justice may be nothing more than a habit; however, he argued that even in day to day life we have every moment recourse to the principle of utility and ask: What must become of the world, if such practices prevail? How could society subsist under such disorders?  

But the real difficulty with Hume’s position lies not in his arguments but in his presuppositions. He was impressed with Newton’s achievements, and he believed that, like Newton, he had found a principle which had great force in one instance, and that he was therefore entitled to ascribe to it a like force in all similar instances. His analysis took its departure from the basic assumption that society was best analyzed in terms of what promoted its “peace and interest,” what was necessary for the “good of mankind.” On this assumption it is not difficult to argue that the existence of property rules promotes the happiness of mankind; where it is useless to have such rules none would obtain; therefore legal justice is grounded solely in utility. But if we assume that social analysis should proceed on the basis of a different set of concepts we will arrive at a different answer. If we believe, as is the present day tendency, that the fundamental concept in social science is Power, in the same sense in which Energy is the fundamental concept in physics, we will see property as one of the forms of power, and we will conclude that it is responsible for evil as well as for good, and that like other forms of power it should be tamed. But social science is still far short of the knowledge and certainty achieved by physics; and while it is legitimate to argue for the existence of certain fundamental concepts in its domain none so far have been proposed which in practice have exhibited the systematic force of the basic ideas of the exact sciences. Until we have achieved that level of scientific analysis

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84 Enquiry, 203.
85 Enquiry, 204.
86 Enquiry, 192.
87 Russell, Power (1938) 12-13 and passim; Cohen, Law and the Social Order (1933) 41 et seq.
Hume’s theory, together with all similar ones, are at the best shots in the dark which later investigation may or may not show to have hit the target.

THE CONVENTIONALITY OF THE RULES OF LAW

In the *Treatise* Hume was at great pains to prove that justice was not a natural but only an artificial virtue, and his editor is of the opinion “it is pretty plain that he meant to be offensive in doing so.” It is difficult to perceive on what basis this extraordinary appraisal rests. By the time Hume had come to write the *Enquiry* he was so perplexed by the multitudinous senses of the word “natural” that he was inclined to dismiss the question as “vain” and “verbal”; nevertheless, he did not depart from his position. It is obvious, of course, that Hume was raising one of the oldest problems in the history of jurisprudence, and one upon which he had decided views—whether right was right by nature or only by convention and enactment. From the Sophists to his beloved Cicero and to Hooker the question had been endlessly discussed and it would be fruitless to speculate upon the source which suggested it to his mind. But that he handled the matter with what he felt was the deference due the theological and moral atmosphere of his time is clear from the reservations which he attached to his ultimate conclusion.

Justice according to Hume, is approved because of its utility, and this recognition of its necessity is discovered by reason; but inasmuch in Hume’s theory “reason is and ought to be the slave of the passions” the approval we bestow upon justice must be due to something other than reason. Hume therefore raises the question: Why does utility please? We are able through reason to understand the utility of justice in promoting human happiness. What is that to me? Perhaps the

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38 *Enquiry*, xxvii. Hobbes previously had argued that the “pacts and covenants” by which the State was held together were “Artificial.” *Leviathan* 1.


40 *Enquiry*, 307 n. 2.

41 *Enquiry*, 183.

42 *Enquiry*, 212 et seq.

43 *Enquiry*, 217.
application of justice will result in an increase of general human happiness, but bring only misery to the individual. Hume answers this problem by observing that the ultimate ends of human actions can never, in any case, be accounted for by reason, but recommend themselves entirely to the sentiments and affections of mankind, without any dependence on the intellectual faculties. Reason is not alone sufficient to produce any moral blame or approbation. Utility is only a tendency to a certain end; and were the end totally indifferent to us, we should feel the same indifference towards the means. It is requisite that a sentiment should here display itself, in order to give a preference to the useful above the pernicious tendencies. This sentiment can be no other than a feeling for the happiness of mankind, and a resentment of their misery; since these are the different ends which virtue and vice have a tendency to promote. Here therefore reason instructs us in the several tendencies of actions, and humanity makes a distinction in favor of those which are useful and beneficial. Thus sympathy with the public interest is the source of the moral approbation which attends justice. We begin therefore with the proposition that justice, although an artificial virtue, owes its moral approval to a feeling.

Hume initiated his argument in the usual manner of the period. He began with a quest for the First Origin, and inasmuch as the discovery of that elusive condition defies, in the nature of things, the customary historical analysis, he fell back upon invention. He assumed that man in a solitary condition was ill equipped by nature to secure food, clothes and shelter. It is through society alone that he is able to supply his needs. But in order to form society, it is necessary not only that it be advantageous, but also that men be sensible of its advantages. However, it is impossible, in their wild uncultivated state, that by study and reflection alone, they should ever be able to attain this knowledge. Fortunately another necessity exists which may justly be regarded as the first and original

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\[44\] *Enquiry*, 293. \[45\] *Enquiry*, 286. \[46\] *Treatise*, 500. \[47\] *Treatise*, 485.
principle of human society. This necessity is the sexual drive which unites man and woman and preserves their union until a new tie takes place in their concern for their common offspring. This new concern becomes also a principle of union between the parents and offspring, and forms a more numerous society. In time, custom and habit operate on the impressionable minds of the children, make them sensible of the advantages which they may reap from society, and fashion them by degrees for it.48

This view of the origin of society is deceptively plausible and has had many adherents. However, it may be answered on several grounds. If taken in a strict historical sense, it is completely speculative and may therefore be dismissed. If taken as a logical reconstruction, it is inconsistent with many of the facts of ethnology, on the basis of which alternative theories of greater plausibility can be constructed. Thus, as Briffault 49 maintains, the primitive social instincts of humanity, which constitute the bond that knits that primitive social group and actuates its collective mentality, thus affording the conditions of all human mental and social development may not be the sexual instincts; they may be the maternal instincts and the ties of kinship that derive directly from their operation. This hypothesis would account for the fact that in many societies the family group, in the patriarchal sense, does not exist. Finally, if Hume's theory is taken as a sociological concept, the comparable but more complex theory of Aristotle, recently revived by Mead, promises greater usefulness. Man is by nature a social animal, said Aristotle; but he alone of all animals possesses the power of speech 50 which means that nature has fitted him for a social life. He is the best of all animals when perfected, but he can realize perfection only in society; therefore society is philosophically prior to the individual in the sense that the whole is prior to the part; it is also prior in time in the sense that the individual is not

48 Treatise, 486.
49 The Mothers (1927) 518.
50 Politics 1253a. Mead, Mind, Self and Society (1934) 277 et seq.
complete until he becomes a part of it. Without society and the elements it adds to man's personality, he would be either a "beast or a God." As Rousseau was later to remark, one becomes a man by being a citizen.

Hume argued that there are three different species of good of which we are possessed: the internal satisfaction of our minds, the external advantages of our body, and the enjoyment of such possessions as we have acquired by our industry and good fortune.\textsuperscript{51} We are perfectly secure in the enjoyment of the first; someone may tear the second from us, but it can be of no advantage to him. The last only is both exposed to the violence of others, and may be transferred without suffering any loss or alteration; at the same time, there is not a sufficient quantity of them to supply every one's desires and necessities. The fact that a society has come into being is not sufficient to protect these goods, the proper care of which is the chief advantage of society. Our natural uncultivated ideas of morality would, in fact, increase the hazards which attend ownership. The remedy, then, is not derived from nature, but from artifice; or more properly speaking, nature provides a remedy through reason for what is irregular in sentiment. For when men, from their early education in society, have become sensible of the infinite advantages that result from it; and when they have observed that the principal disturbance arises from those goods, which Hume calls external, and from their looseness and easy transition from one person to another; they must seek for a remedy, by putting those goods, as far as possible, on the same footing with the fixed and constant advantages of the mind and body. This can be done after no other manner, than by a convention entered into by all the members of the society to bestow stability on the possession of those external goods, and leave everyone in the peaceable enjoyment of what he may acquire. This convention is not of the nature of a promise; for promises themselves arise from human conventions. It is only a general sense of common interest; and this sense all the

\textsuperscript{51} \textit{Treatise}, 487.
members of the society express to one another, and it induces them to regulate their conduct by certain rules. Two men who pull the oars of a boat do it by an agreement or convention, although they have never given promises to each other. After the convention is entered into there immediately arise the ideas of justice and injustice; and then those of property, right and obligation.

To avoid giving offense, Hume remarks he must observe, when he denies justice to be a natural virtue, he makes use of the word natural, only as opposed to artificial. In another sense of the word, as no principle of the human mind is more natural than a sense of virtue, so no virtue is more natural than justice. Mankind is an inventive species; and where an invention is obvious and absolutely necessary, it may as properly be said to be natural as any thing that proceeds immediately from original principles, without the intervention of thought or reflection. However, Hume observes, although the rules of justice are artificial, they are not arbitrary.

Here Hume has set forth what in its elements is the accepted sociological theory of today. He has described the process through which societary control is formed, and he has correctly emphasized the fact that culture traits, such as the rules of law, are all ultimately the product of invention. Translated into contemporary terms, we have first an emotion of approval or disapproval in a particular case; second, a judgment of approval or disapproval constituting a generalization as to the desirability of cases of this type; third, folkways, mores, and usages, informal non-institutionalized embodiments of previously formed judgments of approval or disapproval, but generally understood and commonly accepted as applying to all cases of this general class; finally, accepted institutions, culminating in law, the formal crystallization of the previously formed judgments of approval or disapproval, into express

Hume

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52 Treatise, 484.
53 For a more complete account of these two factors in their relationship to law, see my Theory of Legal Science (1941) 26-27 and c. 3.
statutes, with definite penalties for violation. Hume's account of the formation of the rules of laws is plainly enough the forerunner of the present day hypothesis. Moreover, he centered his whole account upon the crucial element—that rules of law come into existence through the process of invention. They are inherited from one generation to another, and they are also borrowed from other cultures. But at some stage they had to be originated, and it was this fact which, in his insistence upon invention, Hume always kept in view.

THE NATURE OF LAW

Nowhere did Hume attempt a formal analysis of the nature of law, but it is clear from his text that he thought of it as embracing at least three elements. There was first the general system of morality, which he termed "equity," that guided the judges in the decision of cases. Again, he thought of law in the sense in which jurists now speak of the "legal order"—the regime which adjusts relations and orders conduct by the systematic and orderly application of the force of a politically organized society. Thus he writes, "We are, therefore, to look upon all the vast apparatus of our government, as having ultimately no other object or purpose but the distribution of justice, or in other words, the support of the twelve judges." Hume's vocabulary is not clear and at times he seems to define justice as meaning "property." However, for the most part he treated the two ideas as distinct concepts, and in any event he was perhaps using the term "property" in the broad sense employed by Locke and which embraced the individual's rights

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64 This is Eubank's summary of the results of investigations by Westermarck, Hobhouse, Sumner and others. The Concepts of Sociology (1932) 249.
65 Treatise, 483, 537-38; Enquiry, 188.
66 Pound, Social Control through Law (1942) 40.
67 1 Essays, (1875) 113; see also Treatise, 544. Presumably the reference to the "twelve judges" is to the twelve common law judges who constituted the common law judicial system at the time.
68 Treatise, 484 et seq.; Enquiry, 200-201. Property he defines as anything which it is lawful for a man, and for him alone, to use, Enquiry, 197. See also his denunciation of what he termed the vulgar definition of justice—the constant and perpetual wish to give each man his due. Treatise, 526.
to life, liberty and health. Finally, he thought of law in its customary sense as a body of precepts. Thus Hume distinguished many of the separate ideas which jurists now find in the concept "law."

Political obligation, or submission to authority, was founded by Hume on the interest which all men have in the security and protection afforded by political society. He believed that on the strict observance of what he termed the three fundamental laws of nature—that of the stability of possession, of its transfer by consent, and of the performance of promises—depended entirely the peace and security of human society. These laws are antecedent to government and are supposed to impose an obligation before the duty of allegiance to civil magistrates has been thought of. Upon the first establishment of government Hume is willing to admit that it derives its obligation from the three laws of nature, and in particular from the one concerning the performance of promises. Men would naturally promise their first magistrates obedience, and a promise is therefore the original sanction of government, and the source of the first obligation to obedience. Although the rules of justice are sufficient to maintain any society, men soon discover in advanced societies that a further element must be added if the rules are to be observed. They therefore establish government as a new invention to attain their ends; by a more strict execution of justice they preserve the old or procure new advantages. Our civil duties are therefore connected with our natural duties, and the former are chiefly invented for the sake of the latter. Thus the principal object of government is to constrain men to observe the laws of nature. However, the law of nature with respect to the performance of promises is only comprised along with the rest; and its exact observance is to be considered as an effect of the institution of government, and not the obedience to government as an effect of the obliga-
tion of a promise. Although the object of our civil duties is the enforcement of our natural duties, yet the first (in time, not in dignity or force) motive of the invention is nothing but self-interest. But the interest in obeying government is separate from that in the performance of promises, and we must therefore allow a separate obligation. To obey the civil magistrate is requisite to preserve order and concord in society. To perform promises is requisite to beget mutual trust and confidence in the common offices of life. The ends, as well as the means, are perfectly distinct; nor is the one subordinate to the other.\textsuperscript{63}

Hume's solution of the problem of why men obey the law is essentially a sociological and not an ethical one. It is also the basis of most later thinking on the subject, which has not contributed an analysis which has taken the question much further. Hume's theory, simply stated, is that society is an advantageous condition, and for society to function properly it is to everyone's advantage to obey the rules that permit the attainment of that end. Contemporary thought would add to this statement, as the program of a sound political theory, the conditions that the rules which the government establishes command obedience by virtue of their quality, and that the formation of the rules be accomplished on the basis of the widest possible participation. The first condition presupposes the establishment of some standard of values which political theory has yet to propose; the second begs the question since participation rarely results in unanimity, and with a situation short of that the fact of the government of the dissenters by the majority must still be accounted for. Other elements than self-interest have been suggested as the basis of obedience—utility, which is merely a generalization of Hume's idea; and habit, which Hume himself allowed for.\textsuperscript{64} Hume also admitted the right of revolution on the argument that if interest first produces obedience to government, the obligation to obedience must cease, whenever the interest ceases in any great degree and in a considerable number

\textsuperscript{63} Treatise, 543-544.

\textsuperscript{64} Treatise, 556.
of instances. That is to say, whenever the civil magistrate carries his oppression so far as to render his authority perfectly intolerable, we are no longer bound to submit to it. The cause ceases; the effect must also cease. However, he rejected as an absurdity the mediaeval doctrine of passive obedience, which had its origin in the right of the Christian minority to resist, at least passively, the actions of an unchristian or heretical authority. We must, he insisted, make allowances for resistance in the more flagrant instances of tyranny and oppression.

In Montesquieu's theory of law Hume found an account which appeared sound to him, and he adopted it in its essential aspects. In general he thought that the authority of civil laws extends, restrains, modifies, and alters the rules of natural justice according to the particular convenience of each community. The laws have, or ought to have, a constant reference to the constitution of government, the manners, the climate, the religion, the commerce, the situation of each society. However, Hume observed that Montesquieu's premises for this conclusion differed from his own. Montesquieu supposed that all right was founded upon certain relations, which was a system, in Hume's opinion, which would never be reconciled with true philosophy. It excluded all sentiment and pretended to found everything on reason; it has therefore, Hume observed, not wanted followers in this philosophic age. He argued that the inference against Montesquieu's basic theory was short and conclusive. Hume admitted that property was dependent on civil laws; civil laws are allowed to have no other object but the interest of society: This therefore must be allowed to be the sole foundation of property and justice, not to mention that our obligation itself to obey the magistrate and his laws is founded on nothing but the interests of society. If our ideas of justice are not in accord with those of the civil law, this is a confirmation, he insists, of his theory. A civil law which is

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65 Treatise, 551-553.
66 For the doctrine, see Kern, Kingship and Law in the Middle Ages (1989) 97 et seq.
67 Enquiry, 196.
against the interest of society, loses all its authority, and men judge by the ideas of natural justice which are conformable to those interests. Civil laws also sometimes, for useful purposes, require a ceremony or form to a deed; and where the formality is not observed, the legal consequences may be contrary to justice; but one who takes advantage of such chicanery is not commonly regarded as an honest man. Thus, the interests of society require that contracts be fulfilled; and there is not, Hume thought, a surer material article either of natural or civil justice; but the omission of a trifling circumstance will often, by law, invalidate a contract, in foro humano, but not in foro conscientiae. In these cases the magistrate is supposed only to withdraw his power of enforcing the right, not to have altered the right. Where his intention extends to the right, and is conformable to the interests of society, it never fails to alter the right—a clear proof, Hume believed, of the origin of justice and property as he had expounded it.

Possession and Property

Hume recognized that the general rule that possession must be stable, although not only useful but even absolutely necessary as he thought to human society, was a formula of too great generality to serve any practical purpose. He therefore proposed to find a method by which we may distinguish what particular goods are to be assigned to each person, while the rest of mankind are excluded from their possession and enjoyment.

It is obvious, he thought, that the reasons which modify the general rule of stability are not derived from any utility or advantage which either the particular person or the public may reap from his enjoyment of any particular goods, beyond what would result from the possession of them by any other person. As a general rule, no doubt it is better that everyone is possessed of what is most suitable to him and proper for his use; but this relation of fitness may be common to several at once,

68 Treatise, 501.
and men are so partial and passionate in disputes involving property that such a rule would be incompatible with the peace of human society. The general rule of stability is not applied therefore by particular judgments, but by other inflexible general rules. When society is first established Hume assumes that property would be assigned to its present possessor. But his real search is for the rules which control the disposition of property after society is once established. The most important of these he found in the ideas of occupation, prescription, accession, and succession. Here he was influenced by his reading of Roman law. Property he defined as such a relation between a person and an object as permits him, but forbids any other, the free use and possession of it, without the laws of justice and moral equity.

Men are unwilling, Hume observed, to leave property in suspense, even for the shortest time, inasmuch as it would open the door to violence and disorder. Thus we have the rule that property belongs to him who first possesses or occupies it; further, if this rule were not recognized there would be no color of reason to assign property to any succeeding possession. Locke's labor theory had held that everyone has a property in his own labor, and when he joins that labor to anything, it gives him the property of the whole. Hume pointed out that there are several kinds of occupation where we cannot be said to join our labor to the object we acquire, as when we possess a meadow by grazing our cattle upon it. Further, the labor theory accounts for the problem by means of accession, which is taking a needless circuit. Finally, we cannot be said to join our labor in anything but in a figurative sense. Properly speaking, we only make an alteration on it by our labor. This joins a relation between us and the object; and then arises the property, in accordance with Hume's principles.

If property belongs to him who first possesses it, what do

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69 For the little that is known of Hume's legal studies as a youth see Greig, David Hume (1931) 64 et seq.
71 Treatise, 505.
we mean by possession? Few, if any, questions have been more discussed by writers on jurisprudence, and neither the Roman nor the English law ever worked out an adequate theory. In modern times the point of departure for speculation on the subject is Kant's theory of acquisition, which in Savigny's hands became the doctrine that possession means physical control, with the intention to hold as one's own—detention with \textit{animus habendi} or \textit{domini}. Jhering, who rejected the idea of \textit{animus domini} defined possession as the externals of ownership. As Buckland says, "a man possesses who is in relation to the thing in the position in which an owner of such things ordinarily is, the \textit{animus} needed being merely an intelligent consciousness of the fact, so that a \textit{furiosus} cannot acquire possession." Savigny thought, as did Hume, that possession was protected in the interest of a public peace, a view which Jhering rejected in favor of the idea that it was an outwork of ownership. There is much in Hume that anticipates this great nineteenth century debate, but the extent to which his influence was a direct one is indeterminable. At all events, his ultimate view is very much the present day one, namely, that the problem is insoluble, a position which, unlike that of contemporary theorists, he attempted to demonstrate.

We are said to be in possession of anything, Hume maintained, not only when we immediately touch it, but also when we are so situated with respect to it, as to have it in our power to use it; and may move, alter, or destroy it, according to our present pleasure or advantage. It follows that this relation is a species of cause and effect; and as property is nothing but a stable possession, derived from the rules of justice or the conventions of men, it is to be considered as the same species of relation. However, as the power of using any object becomes more or less certain according as the interruptions we may meet with are more or less probable; and as this probability may in-

\footnote{Buckland and McNair, \textit{Roman Law and Common Law} (1936) 65.}
\footnote{Holmes, \textit{The Common Law} (1881) 206.}
\footnote{\textit{Textbook of Roman Law} (1921) 200. For the references to Savigny and Jhering see Buckland, \textit{ibid.}.}
crease by insensible degrees, it is impossible to determine when possession begins or ends. Nor is there any certain standard by which we can decide such controversies. A wild boar that falls into our snares is deemed to be in our possession, if it is impossible for him to escape. But what do we mean by impossible? How is the impossibility separated from the improbability? And how would that be distinguished exactly from a probability? Hume concluded that we would never find a solution for these difficulties in reason, public interest or the imagination. As for the latter, the qualities which operate upon it run so insensibly and gradually into each other that it is impossible to give them any precise bounds. The same power and proximity will be deemed possession in one case but not in another. A person who has hunted a hare until it falls from exhaustion would look upon it as an injustice for another to rush in before him and seize his prey. But the same person, advancing to pluck an apple that hangs within his reach, has no reason to complain if another, more alert, passes him, and takes possession. Not only may disputes arise concerning the real existence of property and possession, but also concerning their extent. These disputes, Hume thought, are often susceptible of no decision, or can be decided by no other faculty than the imagination. A person who lands on the shore of a small island that is deserted and uncultivated is deemed its possessor from the very first moment, and acquires the property of the whole; because, Hume thought, the object is there bounded and circumscribed in the fancy, and at the same time is proportioned to the new possessor. The same person landing on a deserted island as large as Great Britain extends his property no farther than his immediate possession; but a numerous colony is regarded as the proprietors of the whole from the instant of the debarkment.

When the title of first possession becomes obscure through the passage of time, long possession or prescription will give a

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75 Treatise, 506.
76 Cf. Pierson v. Post, 3 Caines (N.Y.) 175 (1805).
person property in anything he enjoys. Nevertheless it is certain that however everything be produced in time, there is nothing real that is produced by time; it follows, that property being produced by time, is not anything real in the objects, but is the offspring of the sentiments, on which alone time is found to have any influence. We acquire the property of objects by accession, when they are connected in an intimate manner with objects that are our property, and at the same time are inferior to them. Thus the fruits of our garden, the offspring of our cattle, are all held to be our property, even before possession. This source of property, Hume thought, could never be explained except through the imagination. The right of succession he justified on the ground of the presumed consent of the parent or near relation, and from the general interest of mankind which requires that men's possessions should pass to those who are dearest to them, in order to render them more industrious and frugal. Plain utility and interest also require a mutual exchange and commerce; for this reason the transference of property by consent is founded on a law of nature. But the civil laws, and perhaps also the law of nature, commonly require delivery or a sensible transference of the object as a necessary circumstance in the transference of property. This is so because it aids the imagination in conceiving the transference of property; we take the sensible object and actually transfer its possession to the person on whom we would bestow the property. The supposed resemblance of the actions, and the presence of this sensible delivery, deceive the mind and make it fancy that it conceives the mysterious transition of the property. Men have even invented a symbolical delivery to satisfy the fancy, where the real one is impracticable. Thus the presentation of the keys of a granary is understood to be the delivery of the corn contained in it.

In all this Hume has attempted no more than the sketch of a general theory of property justified by a psychological analysis. His basic ideas and his examples, with unimportant

"Treatise, 515."
exceptions, are drawn from Roman law, but in its detail his account lacks the richness of the Roman theory with its endless putting of cases to test the general rule. In some of his insights, as in his theory of possession and in his conception of property as being in essence a relation, he nevertheless anticipated the thought of a much later day.

**Conclusion**

Hume was a pioneer in the attempt to explain law in psychological terms. He began with the fundamental assumption that all our ideas are derived from impressions, and he attempted to show that morality was founded on feeling and not reason. All ethical ideas, including that of justice, are based on a feeling, he thought, of advantage to the person or to others. Justice in particular can be understood only on the basis of sympathy for the welfare of human life generally. Hume's psychology of an endless series of disparate experiences was a force until the passing of the association psychology in the middle of the nineteenth century; but his idea that law should be explained in psychological terms is once again to the fore. Its value is apparent in Tarde's studies, and in Ward's exploration of the psychic factors of civilization. We are told today that every important legal problem is at bottom a psychological problem, and that the rapid rise of psychology in recent years supplies a background for a natural science of society which has hitherto been lacking.\(^78\) No doubt Hume would have found these observations gratifying. But it is well to remember that he was careful to point out there were limits to the method of psychology so far as truth or falsity were concerned. Jurisprudence differed from all the other sciences, he thought, in that in many of its nicer questions there cannot properly be said to be truth or falsehood on either side.\(^79\) The choice afforded the judge turns more often on taste and imagination than on argument.

\(^79\) *Enquiry*, 308.