William Seagle
The History of Law, 1946

BOOK I

LAW

"No tolerably *prepared candidate in an English or American law school will hesitate to define an estate in fee simple; on the other hand, the greater a lawyer's opportunities for knowledge have been, and the more time he has given to the study of legal principles, the greater will be his hesitation in face of the apparently simple question, What is Law?*"

— SIR FREDERICK POLLOCK

CHAPTER I

THE ELEMENTS OF LAW

1. THE NATURE OF LAW

THE QUEST for law has been proceeding for thousands of years. It is supposed to be the most precious heritage of Western civilization. We are told indeed by an Italian legal philosopher that "the Aryan is a juridical race."[1] We dream of "a government of laws, not men." But at the very outset of any approach to the law we discover a rather astounding and embarrassing fact: it is said to be impossible to say exactly what law is. The question what is law is the dark cat in the bag of jurisprudence. A lawyer could not answer the question — even for a fee!

It is only necessary to assemble the very briefest anthology of definitions of law to realize this. Many "definitions" of law are simply wonderful exercises in tautology. The law has frequently been declared to be simply the embodiment of either religion, reason, force, custom, morality, or ethics. But if the law is unknown, then one unknowable has simply been substituted for another. A German professor once even explained to a class of law students

that "*die Rechtswissenschaft ist die Wissenschaft vom Recht*" — that is, that legal science is the science of law.[2] It is really remarkable that the following should all be offered as definitions of law. Apparently jurists and philosophers reserve the right to give words any meaning they choose. Thus:

Demosthenes: "That is law, which all men ought to obey for many reasons, and especially because every law is an invention and gift of the Gods, a resolution of wise men, a corrective of errors intentional and unintentional, a compact of the whole state, according to which all men who belong to the state ought to live." [3]

Cicero: "Law is the highest reason implanted in nature, which prescribes those things which ought to be done, and forbids the contrary." [4]

Hooker: "A Law is properly that which Reason in such sort defineth to be good that it must be done." [5]

Grotius: "A rule of moral action obliging to that which is right." [6]

Blackstone: "A rule of civil conduct prescribed by the supreme power in a state, commanding what is right, and prohibiting what is wrong." [7]

Amos: "A command proceeding from the supreme political authority of a state and addressed to the persons who are the subjects of that authority." [8]

Jhering: "The sum of the rules of constraint which obtain in a state." [9]

Gareis: "Law in the objective sense of the term is a peaceable ordering of the external relations of men and their relations to each other." [10]

Tolstoi: "Rules established by men who have control of organized power and which are enforced against the recalcitrant by the lash, prison, and even murder." [11]

Russian Penal Code, Article 590: "Law is a system of social relationships which serves the interests of the ruling classes and hence is supported by their organized power, the state."

The eminent English jurist Sir Frederick Pollock, who has been quoted at the head of this chapter, is not alone in his confusion. Similar confessions have been made by no less eminent jurists of many nations and climes. "At the beginning and the end of the study of jurisprudence," said the illustrious German jurist Gierke, "there stands as a matter of course the question what is law." [12]

The German philosopher Kant observed: "The jurists still seek a definition of their concept of law," [13] although he was bold enough

to supply a definition himself. And the American Dean Pound has recently observed: "From the beginning the question, What is Law? — the problem of the nature of law — has been a battle-ground of jurisprudence. More than one important book of jurisprudence has been wholly occupied with this question. But in recent times there has been a growing impatience with it and disinclination to engage in the kind of argument which it involves. Bluntschli compared it to Pilate's question, 'What is truth?' and many who propound it today, like Pilate, wait not for an answer." [14] While formerly the definition of law was admitted to be difficult, it is now much more frequently declared to be unnecessary or impossible. It is dismissed as a dispute about words. "Obviously," remarks one impatient jurist, who does not believe that nature abhors a vacuum, "law can never be defined," and the purpose of "obviously" is obviously to forestall any questions. Another realist asks: "But what is the law," and he answers: "A complete definition would be impossible and even a working definition would exhaust the patience of the reader." [15] Others speak of establishing not a definition but simply a "centre," a "core" for discussion. It is suggested that a definition need be neither "true" nor "false" since it is simply a "tool." [16]

Now, the law is not unique in failing to supply a glib and ready answer for the fundamental problem of its science. Æsthetics, for instance, is in almost as pitiful a state. What is poetry? What is art? Art has sometimes been defined as the achievement of "significant form," which may help to explain why æsthetic speculation is so unpopular. Really to know what we are talking about is not perhaps always a first requisite of discussion. But there is this important difference in talking about the nature of law. Nobody goes to jail for being unable to say why a painting by El Greco or Matisse, as well as the drawings of the cave men, are art. But it does seem somewhat strange and inappropriate that a man should suffer the inconvenience of being hanged or compelled to pay an unjust debt if we cannot say what law is.

The trouble with most definitions of terms is that they begin with those terms themselves. But often the root of the confusion is the conception of the function of definition itself — in other words, the definition of definition. There is no doubt that "the patience of the reader" would be exhausted by any attempt to exhaust the complexities of such a phenomenon as law. But the function of all definitions is merely to state the essence of a subject matter, not to describe it in all its infinite variety. Every entity has

much in common with every other entity. A chair, like a horse, has four legs. A definition is no more than a "centre" or "core." But, while a nominal definition may be neither "true" nor "false" since it is adopted arbitrarily for purposes of classification, a real definition must be a genuine proposition. Yet even if a definition is to be regarded merely as a working tool, it will not do to define a subject in such terms that they will lead to fantastic results. It will not do, for instance, to say that the law has to do with cabbages, or even with cabbages and kings.

It seems strange that the essence of such an everyday phenomenon as law should be beyond the grasp of common understanding. The law deals with human conduct, which Matthew Arnold calculated upon some unknown mathematical basis to constitute three fourths, rather than two thirds or seven eighths, of life. To get a clear grasp of the nature of law it would thus seem to be necessary only to distinguish it from other categories relating to human conduct, which are religion, science, morals, and custom. The law, of course, has much in common with all these, but it should also have at least one characteristic which all of them lack. Moreover it should be possible to discover this characteristic without exhausting each one of the related categories. It is the function of legal history to describe the process as the result of which a consciousness of "law" and "lawfulness" arose in human minds. It is the function of a definition, however, to do no more than to state the result of this process of differentiation.

If enough public excitement could be aroused to take a Gallup poll, it would probably show that laymen would have no difficulty in defining law. Only jurists who have had a great deal of training would be discovered to have any doubts. The layman who has had any experience with the law very soon gets a pretty good notion of what it is all about. "There is plenty of law," some immortal has said, "at the end of a nightstick." Carlyle's definition of *laissez faire* economics as anarchy plus a constable would probably serve the layman as a definition of law. To think of law is to think of policemen and sheriffs, judges and jailers, lawgivers and lawtakers (the humble citizen), and to reflect that a large part of the progress of humanity has consisted in the substitution of such instrumentalities as the guillotine, the electric chair, and the lethal chamber for the noose and the axe. Force looms large indeed in all legal experience, and it is this reliance upon force that distinguishes the legal mode of regulating conduct from all competing modes. Since we speak of the majesty of the law, and

suppose that law has a great deal to do with justice, its constant association with force seems rather embarrassing. Hence it must be redeemed and made respectable by restricting its use to politically organized government. In the body politic force is supposed to be held in trust.

Stated in more general and juristic terms, law is a mode of regulating conduct by means of sanctions imposed by politically organized society. Law is "normative"; that is, it prescribes rather than describes. But it not only indicates the range of allowable conduct; it is imperative in form and content. This imperative character it possesses by virtue of its sanctions, which are threats of consequences in case of disobedience. Yet it is neither the imperative nor the normative aspects of law that give it its unique character. It is the fact that the sanction is applied exclusively by organized political government. This is what distinguishes law from religion, morals, and custom.

2. LAW AND ITS RIVALS

FEW WOULD now agree with Demosthenes that "every law is an invention and gift of the Gods." But as we shall see when we come to examine archaic law, many still believe that the origin of most if not all legal institutions is to be traced to religion. The reason for this is that in certain phases of civilization the connection between law and religion was very close, and it is still an important factor in supporting the secular legal sanction. But it is easy to see that, while religion in its unorganized forms is a system of beliefs, in its organized forms it is a system of government. When priests have been called to rule they have behaved like all other rulers. Since the decline of religion it has been necessary to find a secular God for the purposes of the legal order. This God has been called the State.

Probably the central difficulty in discussing law has always been its confusion with morals. The relation of these two categories has indeed been aptly called "the Cape Horn of Jurisprudence." [17] Law and morals have proved a very unhappy couple because, paradoxically, they have had far too much in common. Law and morals represent simply different modes of regulating conduct. Both moral and legal rules involve the application of canons of value: we all are told what we ought to do. The two types of rules differ only in respect of the nature of the sanction by which they are enforceable. Moral rules are left to "public opinion" and vice