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SECTION II.

OF THE NATURE OF LAWS IN GENERAL.

LAW, in its most general and comprehensive sense, signifies a rule of action; and is applied indiscriminately to all kinds of action, whether animate or inanimate, rational or irrational. Thus we say, the laws of motion, of gravitation, of optics, or mechanics, as well as the laws of nature and of nations. And it is that rule of action which is prescribed by some ***superior***, and which the ***inferior is bound to obey***.

law = power

condition of reality

Nietzsche partly right (might makes right)

"Supreme Being" = ultimate might

creation necessarily implies Creator

Thus, when the ***Supreme Being*** formed the universe, and created matter out of nothing, he ***impressed certain principles*** upon that matter, from which it can never depart, and without which it would cease to be. When he put that matter into motion,

he established certain ***laws of motion***, to which all movable bodies must conform. And, to descend from the greatest operations to the smallest, when a workman forms a clock, or other piece of mechanism, he establishes, at his own pleasure, certain arbitrary laws for its direction,—as that the hand shall describe a given space in a given time, to which law as long as the work conforms, so long it continues in perfection, and answers the end of its formation.

Newton's Laws of Physics (1687)

See *Physics of Law* essay

If we farther advance, from mere inactive matter to ***vegetable and animal life***, we shall find them still ***governed by laws***, more numerous indeed, but equally fixed and invariable. The whole progress of plants, from the seed to the root, and from thence to the seed again; the method of animal [*39] nutrition, digestion, secretion, and all other branches of vital economy; are not left to chance, or the will of the creature itself, but are performed in a wondrous involuntary manner, and guided by unerring rules laid down by the great Creator.

principles of biology

This, then, is the general signification of law, a rule of action dictated by some superior being*;* and, in those creatures that have neither the power to think, nor to will, such laws must be invariably obeyed, so long as the creature itself subsists, for its existence depends on that obedience. But laws, in their more confined sense, and in which it is our present business to consider them, denote the rules, not of action in general, but of *human* action or conduct; that is, the precepts by which ***man, the noblest of all sublunary beings, a creature endowed with both reason and free-will***, is commanded to make use of those faculties in the general regulation of his behaviour.

two categories of law: deterministic and free will

Enlightenment view of man, later counterbalanced by Reformation view

Man, considered as a creature, must necessarily be subject to the laws of his Creator, for ***he is entirely a dependent being***. A being, independent of any other, has no rule to pursue, but such as he prescribes to himself; but a state of dependence will inevitably oblige the inferior to take the will of him on whom he depends as the rule of his conduct; not, indeed, in every particular, but in all those points wherein his dependence consists. This principle, therefore, has more or less extent and effect, in proportion as the superiority of the one and the dependence of the other is greater or less, absolute or limited. ***And consequently, as man depends absolutely upon his Maker for everything, it is necessary that he should, in all points, conform to his Maker's will.***

dependency requires obedience

total dependency requires total obedience

***This will of his Maker is called the law of nature*.** For as God, when he created matter, and endued it with a principle of mobility, established certain rules for the

"will of Maker" anchor for "law of nature" and "laws of human nature"

perpetual direction of that motion, so, when he created man, and endued him with free-will to conduct himself in all parts of [*40] life, he laid down certain immutable ***laws of human nature***, whereby that free-will is in some degree regulated and restrained, and gave him also the faculty of reason to discover the purport of those laws.

Considering the Creator only as a being of infinite *power*, he was able unquestionably to have prescribed whatever laws he pleased to his creature, man, however unjust or severe. But, as he is also a being of infinite *wisdom*, he has laid down only such laws as were founded in those relations of justice that existed in the nature of things antecedent to any positive precept. These are the ***eternal immutable laws of good and evil***, to which the Creator himself, in all his dispensations, conforms; and which he has ***enabled human reason to discover***, so far as they are necessary for the conduct of human actions. ***Such, among others, are these principles: that we should live honestly, should hurt nobody, and should render to everyone his due; to which three general precepts Justinian (a) has reduced the whole doctrine of law.***

non-negotiable laws (all men, all times)

use reason & revelation to discover

three precepts of Justinian (6th cen. Byzantine Roman Emperor)

derived from Hebrew Decalogue & Talmud, Greek Philosophers & Stoics (Aristotle, Plato, Marcus Aurelius), Roman Republicans (Cicero)

found in many ancient codes

But if the discovery of these first principles of the law of nature depended only upon the due exertion of ***right reason***, and could not otherwise be obtained than by a chain of ***metaphysical disquisitions***, mankind would have wanted ***some inducement*** to have quickened their inquiries, and the greater part of the world would have rested content in ***mental indolence***, and ignorance its inseparable companion. As, therefore, the Creator is a being not only of infinite *power*, and *wisdom*, but also of infinite *goodness*, he has been pleased so to ***contrive the constitution and frame of humanity, that we should want no other prompter to inquire after and pursue the rule of right, but only our own self-love, that universal principle of action***. For he has so intimately connected, so inseparably interwoven the laws of eternal justice with the ***happiness*** of each individual, that the latter cannot be attained but by observing the former; and, if the former be punctually obeyed, it cannot but induce the latter. In consequence of which mutual connection of justice and human felicity, he [*41] has not perplexed the law of nature with a multitude of abstracted rules and precepts, referring merely to the fitness or unfitness of things, as some have vainly surmised,

skeptical of reason alone; man mentally indolent

needs "some inducement" or contrivance

law of self-love

universal principle

precursor to Golden Rule (love neighbor as you love yourself)

synergistic, enlightened self-interest

but has graciously ***reduced the rule of obedience to this one paternal precept, "that man should pursue his own true and substantial happiness."*** This is the ***foundation of what we call ethics, or natural law***; for the several articles into which it is branched in our systems, amount to no more than demonstrating that this or that action tends to ***man's real happiness***, and therefore very justly concluding that the performance of it is a part of the law of nature; or, on the other hand, that this or that action is ***destructive of man's real happiness***, and therefore that the law of nature forbids it.

happiness = ultimate standard

truly universal desire

life, liberty, and the pursuit of . . . .

but "true" and "real" happiness (conforming to design), not untrue or unreal happiness (e.g., hedonism, drugs)

This law of nature, being coeval with mankind, and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force and all their authority, mediately or immediately, from this original.

WORDS OF REVOLUTION!

Declaration of Independence ("laws of nature" and "nature's God")

E.g., slavery: Blackstone (*Rediscovering Blackstone* at 7); Jefferson ("tremble" in *Notes on Virginia*); George Mason ("infernal traffic" at Constitutional Convention; Abraham Lincoln ("gross outrage on the law of nature") in *Man of Ideas* at 21); Martin Luther King ("our willingness to break laws" in *Letter from Birmingham Jail*)

But, in order to apply this to the particular exigencies of each individual, it is still necessary to have recourse to reason, whose office it is to discover, as was before observed, what the law of nature directs in every circumstance of life, by considering what method will tend the most effectually to our own substantial happiness. And if our reason were always, as in our **first ancestor before his transgression**, clear and perfect, unruffled by ***passions***, unclouded by ***prejudice***, unimpaired by ***disease*** or ***intemperance***, the task would be pleasant and easy; we should need no other guide but this. But every man now finds the contrary in his own experience; that his reason is corrupt, and his understanding full of ***ignorance*** and ***error***.

reason exists, but is partly corrupted (Reformation view)

revelation remedies corrupted reason

This has given manifold occasion for the benign interposition of divine Providence, which, in compassion to the frailty, the imperfection, and the blindness of human reason, [*42] hath been pleased, at sundry times and in divers manners, to discover and enforce its laws by an ***immediate and direct revelation***. The doctrines thus

delivered we call the ***revealed*** or ***divine law***, and they are to be found only in the Holy ***Scriptures***. These precepts, when revealed, are found upon comparison to be really a part of the ***original law of nature***, as they tend in all their consequences to ***man's felicity***. But we are not from thence to conclude that the knowledge of these truths was attainable by reason, in its present corrupted state; since we find that, until they were revealed, they were hid from the wisdom of ages. As then the moral precepts of this law are indeed of the same original with those of the law of nature, so their intrinsic obligation is of equal strength and perpetuity. ***Yet undoubtedly the revealed law is of infinitely more authenticity than that moral system which is framed by ethical writers, and denominated the natural law***; because one is the law of nature, expressly declared so to be by God himself; the other is only what, by the assistance of human reason, we ***imagine to be that law***. If we could be as certain of the latter as we are of the former, both would have an equal authority; but, till then, they ***can never be put in any competition together***.

Judeo-Christian revelation (Douglas, J., in Zorach v. Clauson (1952))

"original law of nature" leads to "felicity" (happiness)

philosophical "nature law" is mere imagination of men

Upon these **two foundations**, the ***law of nature*** and the ***law of revelation***, depend all human laws; that is to say, no human laws should be suffered to contradict these. There are, it is true, a ***great number of indifferent points*** in which both the divine law and the natural leave a man at his own liberty, but which are found necessary, for the benefit of society, to be restrained within certain limits. And herein it is that human laws have their greatest force and efficacy; for, ***with regard to such points as are not indifferent, human laws are only declaratory of, and act in subordination to, the former***. To instance in the case of murder: this is expressly forbidden by the divine, and demonstrably by the natural law; and, from these prohibitions, arises the true unlawfulness of this crime. Those ***human laws that annex a punishment*** to it do not at all increase its moral guilt, or [*43] superadd any fresh obligation, *in foro conscientiæ*, to abstain from its perpetration. ***Nay, if any human law should allow or enjoin us to commit it, we are bound to transgress that human law, or else we must offend both the natural and the divine.*** But, with regard to matters that are in themselves indifferent, and are not commanded or forbidden by those superior laws,—such, for instance, as exporting of wool into foreign countries,—here the inferior legislature has scope and opportunity to interpose, and to make that action unlawful which before was not so.

Jefferson: "law of nature" and "nature's God"

many "indifferent points"

positive law mere "declaratory" on matters covered by natural law embedded "in form of conscience"

e.g. - murder is common law; Va. statutes merely define punishment

"Nay . . . . bound to transgress"

rejects pure positivism defense (e.g., Nuremburg Trials – basis for international law of human rights)

what kind of transgression? armed conflict (per Declaration of Independence) vs. civil disobedience (per Apostle Peter, Martin Luther King, Gandhi, et al.)

If man were to live in a ***state of nature***, unconnected with other individuals, there would be ***no occasion for any other laws*** than the law of nature, and the law of God. Neither could any other law possibly exist: for **a law always supposes some superior who is to make it**; and, in a state of nature, we are all equal, without any other superior but Him who is the author of our being. But ***man was formed for society***; and, as is demonstrated by the writers on this subject, **(*b*)** is neither capable of living alone, nor indeed has the courage to do it. However, as it is impossible for the whole race of mankind to be united in one great society, they must necessarily divide into many, and form separate states, commonwealths, and nations, entirely independent of each other, and yet liable to a mutual intercourse. Hence arises a ***third kind of law*** to regulate this mutual intercourse, called "***the law of nations***," which, as none of these states will acknowledge a superiority in the other, cannot be dictated by any, but ***depends entirely upon the rules of natural law, or upon mutual compacts, treaties, leagues, and agreements between these several communities***: in the construction also of which compacts we have no other rule to resort to, but the law of nature; being the only one to which all the communities are equally subject; and therefore the civil law **(*c*)** very justly observes, that *quod naturalis ratio inter omnes homines constituit, vocatur jus gentium.*

law presupposes superior

man = social

international law = natural law & joint consent (there being no superior other than Creator)

[*44] Thus much I thought it necessary to ***premise*** concerning the law of nature, the revealed law, and the law of nations, before I proceeded to treat more fully of the principal subject of this section, ***municipal or civil law***; that is, the rule by which particular districts; communities, or nations, are governed; being thus defined by Justinian, **(*d*)** "*jus civile est quod quisque sibi populus constituit.*" I call it *municipal* law, in compliance with common speech; for, though strictly that expression denotes the particular customs of one single *municipium* or free town, yet it may with sufficient propriety be applied to any one state or nation which is governed by the same laws and customs.

all this to "premise" man-made law

Municipal law, thus understood, is properly defined to be "a rule of civil conduct prescribed by the ***supreme power in a state***, ***commanding what is right and prohibiting what is wrong***." Let us endeavour to explain its several properties, as they arise out of this definition. And, first, it is a ***rule:*** not a transient sudden order from a superior to or concerning a particular person; but something permanent, uniform, and universal. Therefore a particular **act of the legislature** to confiscate the goods of Titius, or to attaint him of high treason, does not enter into the idea of a municipal law: for the operation of this act is spent upon Titius only, and has no relation to the

man-made law still power equation

goal: reward right, punish wrong (i.e., legislate societal morality)

first quality of true law: general rule that binds everyone (not, e.g., bill of attainer)

community in general; it is ***rather a sentence than a law***. But an act to declare that the crime of which Titius is accused shall be deemed high treason: this has permanency, uniformity, and universality, and therefore is properly a *rule*. ***It is also called a rule, to distinguish it from advice or counsel***, which we are at liberty to follow or not, as we see proper, and to judge upon the reasonableness or unreasonableness of the thing advised: whereas our obedience to the *law* depends not upon *our approbation*, but upon the *maker's will.* Counsel is only matter of persuasion, law is matter of injunction; ***counsel acts only upon the willing, law upon the unwilling also***.

[*45] It is also called a *rule*, to distinguish it from a *compact* or *agreement;* for a compact is a promise proceeding *from* us, law is a command directed *to* us. The language of a compact is, "I will, or will not, do this;" that of a law is, "thou shalt, or shalt not, do it." It is true there is an obligation which a compact carries with it, equal in point of conscience to that of a law; but then the original of the obligation is different. In compacts we ourselves determine and promise what shall be done, before we are obliged to do it; in laws, we are obliged to act without ourselves determining or promising anything at all. Upon these accounts law is defined to be "*a rule.*"

Municipal law is also "a rule *of civil conduct.*" This distinguishes municipal law from the natural, or revealed; the former of which is the ***rule of moral conduct***, and the latter not only the rule of moral conduct, but also the ***rule of faith***. These regard man as a creature, and point out his duty to God, to himself, and to his neighbour, considered in the light of an individual. But municipal or civil law regards him also as a citizen, and bound to other duties towards his neighbour than those of mere nature and religion: duties, which he has engaged in by enjoying the benefits of the common union; and which amount to no more than that he do contribute, on his part, to the subsistence and peace of the society.

civil law regulates "moral conduct" of "citizens" – not articles of religious faith – the two are separable, but related

(e.g., religion tells me to give to the poor; the irreligious progressive tax code ensures that I do so)

It is likewise "a rule *prescribed.*" Because ***a bare resolution, confined in the breast of the legislator, without manifesting itself by some external sign, can never be properly a law***. It is requisite that this resolution be ***notified to the people*** who are to obey it. But the manner in which this notification is to be made, is matter of very great indifference. It may be notified by universal tradition and long practice, which supposes a previous publication, and is the case of the common law of England. It may be notified *viva voce*, by officers appointed for that purpose, as is done with regard to proclamations, and such acts of parliament as are appointed [*46] to be publicly read in churches and other assemblies. It may lastly be notified by writing, printing, or the

second quality of true law: fair notice

(e.g., procedural due process & ex post facto)

like; which is the general course taken with all our acts of parliament. Yet, whatever way is made use of, it is incumbent on the promulgators to do it in the most public and perspicuous manner; not like ***Caligula***, who (according to Dio Cassius) wrote his laws in a very small character, and ***hung them upon high pillars***, the more effectually to ensnare the people. There is still a more unreasonable method than this, which is called making of laws *ex post facto;* when after an action (indifferent in itself) is committed, the legislator then for the first time declares it to have been a crime, and inflicts a punishment upon the person who has committed it. Here it is impossible that the party could foresee that an action, innocent when it was done, should be afterwards converted to guilt by a subsequent law; he had therefore no cause to abstain from it; and all punishment for not abstaining must of consequence be cruel and unjust. **(*e*)** All laws should be therefore ***made to commence in futuro***, and be notified before their commencement; which is implied in the term "*prescribed.*" But when this rule is in the usual manner notified, or prescribed, it is then the subject's business to be thoroughly acquainted therewith; for if ignorance, of what he *might* know were admitted as a legitimate excuse, the laws would be of no effect, but might always be eluded with impunity.

But farther: municipal law is "a rule of civil conduct prescribed *by the* ***supreme power*** *in a state.*" For legislature, as was before observed, is the greatest act of superiority that can be exercised by one being over another. Wherefore it is requisite to the very essence of a law, that it be made by the supreme power ***Sovereignty and legislature are indeed convertible terms; one cannot subsist without the other***.

third, true law only comes from true source of power

sovereignty = legislature (people)

[*47] This will naturally lead us into a short inquiry concerning the nature of society and civil government; and the natural, inherent right that belongs to the sovereignty of a state, wherever that sovereignty be lodged, of making and enforcing laws.

The only true and natural foundations of society are the wants and the fears of individuals. Not that we can believe, with some theoretical writers, that there ever was a time when there was no such thing as society either natural or civil; and that, from the impulse of reason, and through a sense of their wants and weaknesses, individuals met together in a large plain, entered into an original contract, and chose the tallest man present to be their governor. ***This notion, of an actually existing unconnected state of nature, is too wild to be seriously admitted***: and besides it is plainly contradictory to the revealed accounts of the primitive origin of mankind, and their preservation two thousand years afterwards; both which were effected by the means of

society = result of "wants" and "fears"

skeptical of Locke's "state of nature" theory in *2d Treatise of Civil Government*

single ***families***. These formed the ***first natural society***, among themselves; which, every day extending its limits, laid the first though imperfect rudiments of civil or political society: and when it grew too large to subsist with convenience in that pastoral state, wherein the patriarchs appear to have lived, it necessarily subdivided itself by various migrations into more. Afterwards, as agriculture increased, which employs and can maintain a much greater number of hands, migrations became less frequent: and various tribes, which had formerly separated, reunited again; sometimes by compulsion and conquest, sometimes by accident, and sometimes perhaps by compact. But though society had not its formal beginning from any convention of individuals, actuated by their wants and their fears; yet it is the *sense* of their weakness and imperfection that *keeps* mankind together; that demonstrates the ***necessity of this union***; and that therefore is the solid and natural foundation, as well as the cement of civil society. And this is what we mean by the original contract of society; which, though perhaps in no instance it has ever been formally expressed at the first institution of a state, yet in nature and reason must always be understood and implied, [*48] in ***the very act of associating together: namely, that the whole should protect all its parts***, and that every part should pay obedience to the will of the whole, or, in other words, ***that the community should guard the rights of each individual member, and that (in return for this protection) each individual should submit to the laws of the community***; without which submission of all it was impossible that protection should be certainly extended to any.

family unit = first natural society

growth of race required "necessity of union"

social compact = deal that all for one, one for all – trade off

For when civil society is once formed, government at the same time results of course, as necessary to preserve and to keep that society in order. Unless some superior be constituted, whose commands and decisions all the members are bound to obey, they would still remain as in a state of nature, without any judge upon earth to define their several rights, and redress their several wrongs. But, as all the members which compose this society were ***naturally equal***, it may be asked, in whose hands are the reins of government to be intrusted? To this the general answer is easy; but the application of it to particular cases has occasioned one half of those mischiefs, which are apt to proceed from misguided political zeal. ***In general, all mankind will agree that government should be reposed in such persons, in whom those qualities are most likely to be found, the perfection of which is among the attributes of Him who is emphatically styled the Supreme Being; the three grand requisites, I mean, of wisdom, of goodness, and of power: wisdom, to discern the real interest of the community; goodness, to endeavour always to pursue that real interest; and strength, or power, to carry this knowledge and intention into action***. These are the

Jefferson: all men are "created equal"

leaders should have Creator's attributes of goodness, power, wisdom

natural foundations of sovereignty, and these are the ***requisites that ought to be found in every well constituted frame of government.***

How the several forms of government we now see in the world at first actually began, is matter of great uncertainty, and has occasioned infinite disputes. It is not my business or intention to enter into any of them. However they began, or by [*49] what right soever they subsist, there is and must be in all of them a supreme, irresistible, absolute, uncontrolled authority, in which the *jura summi imperii,* or the rights of sovereignty, reside. And this authority is placed in those hands, wherein (according to the opinion of the founders of such respective states, either expressly given, or collected from their tacit approbation) the qualities requisite for supremacy, wisdom, goodness, and power, are the most likely to be found.

The political writers of antiquity will not allow more than three regular forms of government: the first, when the sovereign power is lodged in an aggregate assembly, consisting of all the free members of a community, which is called a ***democracy***; the second, when it is lodged in a council, composed of select members, and then it is styled an ***aristocracy***; the last, when it is intrusted in the hands of a single person, and then it takes the name of a ***monarchy***. All other species of government, they say, are either corruptions of, or reducible to, these three.

By the sovereign power, as was before observed, is meant the making of laws, for wherever that power resides, all others must conform to and be directed by it, whatever appearance the outward form and administration of the government may put on. For it is at any time in the option of the legislature to alter that form and administration by a new edict or rule, and to put the execution of the laws into whatever hands it pleases; by constituting one, or a few, or many executive magistrates: and all the other powers of the state must obey the legislative power in the discharge of their several functions, or else the constitution is at an end.

In a ***democracy***, where the right of making laws resides in the people at large, **public virtue**, or **goodness of intention**, is more likely to be found, than either of the other qualities of government. Popular assemblies are **frequently foolish** in their contrivance, and weak in their execution; but generally mean to do the thing that is right and just, and have always a degree of patriotism or public spirit. In [*50] ***aristocracies*** there is more ***wisdom*** to be found, than in the other frames of government; being composed, or intended to be composed, of the most ***experienced*** citizens: but there is ***less honesty than in a republic***, and ***less strength*** than in a

democracy: "goodness of intention" but weak and foolish

aristocrats: wise and experienced, but not honest or strong

monarchy. A ***monarchy*** is indeed the most powerful of any; for, by the entire conjunction of the legislative and executive powers, all the sinews of government are knitted together, and united in the hand of the prince: but then there is imminent ***danger*** of his employing that strength to improvident or ***oppressive*** purposes.

monarchs: strong but dangerous and oppressive

Thus these three species of government have, all of them, their several perfections and imperfections. ***Democracies are usually the best calculated to direct the end of a law; aristocracies to invent the means by which that end shall be obtained; and monarchies to carry these means into execution***. And the ancients, as was observed, had in general no idea of any other permanent form of government but these three: for though Cicero **(*f*)** declares himself of opinion "*esse optime constitutam rempublicam quæ ex tribus generibus illis, regali, optimo, et populari, sit modice confusa;*" yet Tacitus treats this notion of a mixed government, formed out of them all, and partaking of the advantages of each, as a ***visionary whim***, and one that, if effected, could never be lasting or secure. **(*g*)**

each has distinct abilities

need all three branches; tripartite government

a "visionary whim" for most nations, says Tacitus (Roman Senator & historian, second only to Cicero in fame)

But, happily for us of this island, the ***British constitution*** has long remained, and I trust will long continue, a ***standing exception to the truth of this observation***. For, as with us the executive power of the laws is lodged in a single person, they have all the advantages of strength and despatch, that are to be found in the most absolute monarchy: and, as the legislature of the kingdom is intrusted to three distinct powers, entirely independent of each other; first, the king; secondly, the lords spiritual and temporal, which is an aristocratical assemblage of persons selected for their piety, [*51] their birth, their wisdom, their valour, or their property; and, thirdly, the House of Commons, *freely chosen by the people from among themselves*, which makes it a kind of democracy: as this aggregate body, actuated by different springs, and attentive to different interests, composes the British parliament, and has the supreme disposal of everything; there can no inconvenience be attempted by either of the three branches, but will be withstood by one of the other two; each branch being armed with a negative power, sufficient to repel any innovation which it shall think inexpedient or dangerous.

England is exception to this truth

Here then is lodged the sovereignty of the British constitution; and lodged as beneficially as is possible for society. For in no other shape could we be so certain of finding the three great qualities of government so well and so happily united. ***If the supreme power were lodged in any one of the three branches separately, we must be exposed to the inconveniences of either absolute monarchy, aristocracy, or***

separation of powers principle

power corrupts, absolute power corrupts absolutely

democracy; and so want two of the three principal ingredients of good polity, either virtue, wisdom, or power. If it were lodged in any two of the branches; for instance, in the king and House of Lords, our laws might be providently made and well executed, but they might not always have the good of the people in view: if lodged in the king and commons, we should want that circumspection and mediatory caution, which the wisdom of the peers is to afford: if the supreme rights of legislature were lodged in the two houses only, and the king had no negative upon their proceedings, they might be tempted to encroach upon the royal prerogative, or perhaps to abolish the kingly office, and thereby weaken (if not totally destroy) the strength of the executive power. But the constitutional government of this island is so admirably tempered and compounded, that nothing can endanger or hurt it, but destroying the equilibrium of power between one branch of the legislature and the rest. For if ever it should happen that the independence of any one of the three should be lost, or that it should become subservient to the views of either of the other two, there would [*52] soon be an end of our constitution. The legislature would be changed from that, which (upon the supposition of an original contract, either actual or implied) is presumed to have been originally set up by the general consent and fundamental act of the society: and such a change, however effected, is according to ***Mr. Locke***, **(*h*)** (***who perhaps carries his theory too far***) at once an entire dissolution of the bands of government; and the people are thereby reduced to a state of anarchy, with liberty to constitute to themselves a new legislative power.

Having thus cursorily considered the three usual species of government, and our own singular constitution, selected and compounded from them all, I proceed to observe, that, as the power of making laws constitutes the supreme authority, so wherever the supreme authority in any state resides, it is the right of that authority to make laws; that is, in the words of our definition, *to prescribe the rule of civil action.* And this may be discovered from the very end and institution of civil states. For a state is a collective body, composed of a multitude of individuals, united for their safety and convenience, and intending to act together as one man. If it therefore is to act as one man, it ought to act by one uniform will. But, inasmuch as political communities are made up of many natural persons, each of whom has his particular will and inclination, these several wills cannot by any *natural* union be joined together, or tempered and disposed into a lasting harmony, so as to constitute and produce that one uniform will of the whole. It can therefore be no otherwise produced than by a *political* union; by the consent of all persons to submit their own private wills to the will of one man, or of one or more assemblies of men, to whom the supreme authority

is intrusted: and this will of that one man, or assemblage of men, is in different states, according to their different constitutions, understood to be *law*.

Thus far as to the *right* of the ***supreme power to make laws***; but farther, it is its *duty* likewise. For since the [*53] respective members are bound to conform themselves to the will of the state, it is expedient that they receive directions from the state declaratory of that its will. But, as it is impossible, in so great a multitude, to give injunctions to every particular man, relative to each particular action, it is therefore incumbent on the state to establish general rules, for the perpetual information and direction of all persons in all points, whether of positive or negative duty. And this, in order that every man may know what to look upon as his own, what as another's; what absolute and what relative duties are required at his hands; what is to be esteemed honest, dishonest, or indifferent; ***what degree every man retains of his natural liberty; what he has given up as the price of the benefits of society***; and after what manner each person is to moderate the use and exercise of those rights which the state assigns him, in order to promote and secure the public tranquility.

social compact theory: "natural liberty" comes from natural law;

individual gives up only that "degree" necessary as the "price" for order

From what has been advanced, the truth of the former branch of our definition, is (I trust) sufficiently evident; that "*municipal law is a rule of civil conduct prescribed by the supreme power in a state.*" I proceed now to the latter branch of it; that it is a rule so prescribed, "***commanding what is right, and prohibiting what is wrong***."

legislate morality

Now in order to do this completely, it is first of all necessary that the ***boundaries of right and wrong be established and ascertained by law***. And when this is once done, it will follow of course that it is likewise the business of the law, considered as a rule of civil conduct, to enforce these rights, and to restrain or redress these wrongs. It remains therefore only to consider in what manner the law is said to ascertain the boundaries of right and wrong; and the methods which it takes to command the one and prohibit the other.

For this purpose every ***law may be said to consist of several parts***: one, *declaratory;* whereby the rights to be observed, and the wrongs to be eschewed, are clearly defined and [*54] laid down: another, *directory;* whereby the subject is instructed and enjoined to observe those rights, and to abstain from the commission of those wrongs: a third, *remedial,* whereby a method is pointed out to recover a man's private rights, or redress his private wrongs: to which may be added a fourth, usually termed the *sanction,* or *vindicatory* branch of the law; whereby it is signified what evil

three functions of law: declaratory,- directory, remedial, sanction

or penalty shall be incurred by such as commit any public wrongs, and transgress or neglect their duty.

With regard to the first of these, the ***declaratory*** part of the municipal law, this depends not so much upon the law of revelation or of nature, as upon the wisdom and will of the legislator. This doctrine, which before was slightly touched, deserves a more particular explication. ***Those rights then which God and nature have established, and are therefore called natural rights, such as are life and liberty, need not the aid of human laws to be more effectually invested in every man than they are; neither do they receive any additional strength when declared by the municipal laws to be inviolable***. On the contrary, no ***human legislature has power to abridge or destroy them, unless the owner shall himself commit some act that amounts to a forfeiture***. Neither do divine or natural *duties* (such as, for instance, the worship of God, the maintenance of children, and the like) receive any stronger sanction from being also declared to be duties by the law of the land. The case is the same as to crimes and misdemeanors, that are forbidden by the superior laws, and therefore styled ***mala in se***, such as murder, theft, and perjury; which contract no additional turpitude from being declared unlawful by the inferior legislature. For that legislature in all these cases acts only, as was before observed, in subordination to the great law-giver, transcribing and publishing his precepts. So that, upon the whole, the ***declaratory part of the municipal law has no force or operation at all, with regard to actions that are naturally and intrinsically right or wrong.***

"natural" rights don't need to be created or, for that matter, declared by the state

e.g., Ninth Amendment

state can't take away absolute "natural" rights, but man can forfeit them – like violating mala in se "natural" law duties

"declaratory" law always subordinate to natural law of right & wrong

[*55] But, with regard to ***things in themselves indifferent***, the case is ***entirely altered***. ***These become either right or wrong, just or unjust, duties or misdemeanors, according as the municipal legislator sees proper, for promoting the welfare of the society, and more effectually carrying on the purposes of civil life***. Thus our own common law has declared, that the **goods of the wife** do instantly upon marriage become the property and right of the husband; and our statute law has declared all ***monopolies*** a public offence: yet that right, and this offence, have ***no foundation in nature***, but are merely created by the law, for the purposes of civil society. And sometimes, where the thing itself has its rise from the law of nature, the particular circumstances and mode of doing it become right or wrong, as the law of the land shall direct. Thus, for instance, in civil duties; obedience to superiors is the doctrine of revealed as well as natural religion: but who those superiors shall be, and in what circumstances or to what degrees they shall be obeyed, it is the province of human laws to determine. And so, as to injuries or crimes, it must be left to our own

matters of indifference – pure positive law e.g.'s

legislature to decide, in what cases the seizing another's cattle shall amount to a trespass or a theft; and where it shall be a justifiable action, as when a landlord takes them by way of distress for rent.

Thus much for the *declaratory* part of the municipal law: and the *directory* stands much upon the same footing; for this virtually includes the former, the declaration being usually collected from the direction. The law that says, "thou shalt not steal," implies a declaration that stealing is a crime. And we have seen **(*i*)** that, in things naturally indifferent, the very essence of right and wrong depends upon the direction of the laws to do or to omit them.

The ***remedial*** part of a law is so necessary a consequence of the former two, that laws must be very vague and imperfect [*56] without it. **For in vain would rights be declared, in vain directed to be observed, if there were no method of recovering and asserting these rights, when wrongfully withheld or invaded.** This is what we mean properly, when we speak of the protection of the law. When, for instance, the *declaratory* part of the law has said, "that the field or inheritance, which belonged to Titius's father, is vested by his death in Titius;" and the *directory* part has "forbidden any one to enter on another's property, without the leave of the owner:" if Gaius after this will presume to take possession of the land, the *remedial* part of the law will then interpose its office; will make Gaius restore the possession to Titius, and also pay him damages for the invasion.

no right without a remedy

With regard to the *sanction* of laws, or the evil that may attend the breach of public duties, it is observed, that human legislators have for the most part chosen to make the sanction of their laws rather *vindicatory* than *remuneratory*, or to consist rather in punishments, than in actual particular rewards. Because, in the first place, the quiet enjoyment and protection of all our civil rights and liberties, which are the sure and general consequence of obedience to the municipal law, are in themselves the best and most valuable of all rewards. Because also, were the exercise of every virtue to be enforced by the proposal of particular rewards, it were impossible for any state to furnish stock enough for so profuse a bounty. And farther, because the dread of evil is a much more forcible principle of human actions than the prospect of good. **(*k*)** For which reasons, though a prudent bestowing of rewards is sometimes of exquisite use, yet we find that those civil laws, which enforce and enjoin our duty, do seldom, if ever, propose any privilege or gift to such as obey the law; but do constantly come armed with a penalty denounced against transgressors, either expressly defining the

nature and quantity of the punishment, or else leaving it to the discretion of the judges, and those who are intrusted with the care of putting the laws in execution.

[*57] Of all the parts of a law the most effectual is the **vindicatory**. For it is but lost labour to say, "do this, or avoid that," unless we also declare, "this shall be the consequence of your non-compliance." We must therefore observe, that the main strength and force of a law consists in the ***penalty annexed to it***. Herein is to be found the principal obligation of human laws.

Legislators and their laws are said to *compel* and *oblige:* not that by any natural violence they so constrain a man, as to render it impossible for him to act otherwise than as they direct, which is the strict sense of obligation; but because, by declaring and exhibiting a penalty against offenders, they bring it to pass that no man can easily choose to transgress the law; since, by reason of the impending correction, ***compliance is in a high degree preferable to disobedience.*** And, even where rewards are proposed as well as punishments threatened, the obligation of the law seems chiefly to consist in the penalty; ***for rewards, in their nature, can only persuade and allure; nothing is compulsory but punishment.***

stick more effective than carrot

e.g., fixed sentences, suspended sentence, recidivism statutes

It is true, it hath been holden, and very justly, by the principal of our ethical writers, that human laws are binding upon men's consciences. But if that were the only or most forcible obligation, the good only would regard the laws, and the bad would set them at defiance. And, true as this principle is, it must still be understood with some restriction. It holds, I apprehend, as to *rights;* and that, when the law has determined the field to belong to Titius, it is matter of conscience no longer to withhold or to invade it. So also in regard to ***natural duties***, and such offences as are ***mala in se****:* here we are bound in conscience; because we are bound by superior laws, before those human laws were in being, to perform the one and abstain from the other. But in relation to those laws which enjoin only **positive duties, and forbid only such things as are not mala in se, but mala prohibita merely, without any intermixture of moral guilt**, [*58] annexing a penalty to non-compliance, **(*l*)** here I apprehend conscience is no farther concerned, than by directing a submission to the penalty, in case of our breach of those laws: for otherwise the multitude of penal laws in a state would not only be looked upon as an impolitic, but would also be a very wicked thing; if every such law were a snare for the conscience of the subject. But in these cases the alternative is offered to every man; "either abstain from this, or submit to such a penalty:" and his conscience will be clear, whichever side of the alternative he thinks

distinguish mala in se vs. mala prohibita

proper to embrace. Thus, by the statutes for preserving the game, a penalty is denounced against every unqualified person that kills a hare, and against every person who possesses a partridge in August. And so too, by other statutes, pecuniary penalties are inflicted for exercising trades without serving an apprenticeship thereto, for not burying the dead in woollen, for not performing the statute-work on the public roads, and for innumerable other positive misdemeanors. Now these prohibitory laws do not make the transgression a moral offence, or sin: the only obligation in conscience is to submit to the penalty, if levied. It must however be observed, that we are here speaking of laws that are simply and purely penal, where the thing forbidden or enjoined is wholly a matter of indifference, and where the penalty inflicted is an adequate compensation for the civil inconvenience supposed to arise from the offence. But where disobedience to the law involves in it also any degree of public mischief or private injury, there it falls within our former distinction, and is also an offence against conscience. **(*m*)**

I have now gone through the definition laid down of a municipal law; and have shown that it is "a rule of civil conduct prescribed by the supreme power in a state, ***commanding what is right, and prohibiting what is wrong***;" in the explication of which I have endeavoured to interweave a few useful principles concerning the nature of civil government, and the obligation of human laws ***Before I conclude this section, it may not be amiss to add a few observations concerning the interpretation of laws.***

i.e., "fixed" rules of construction per Justice Curtis in Dred Scott dissent

the "law" of reading law

When any doubt arose upon the construction of the Roman laws, the usage was to state the case to the emperor in writing, and take his opinion upon it. This was certainly a bad method of interpretation. To interrogate the legislature to decide particular disputes is not only endless, but affords great room for partiality and oppression. The answers of the emperor were called his rescripts, and these had in succeeding cases the force of perpetual laws; though they ought to be carefully distinguished by every rational civilian from those general constitutions which had only the nature of things for their guide. The emperor Macrinus, as his historian Capitolinus informs us, had once resolved to [*59] abolish these rescripts, and retain only the general edicts: he could not bear that the hasty and crude answers of such princes as Commodus and Caracalla should be reverenced as laws. But Justinian thought otherwise, **(*n*)** and he has preserved them all. In like manner the canon laws, or decretal epistles of the popes, are all of them rescripts in the strictest sense. Contrary to all true forms of reasoning, they argue from particulars to generals.

The ***fairest and most rational method*** to interpret the ***will of the legislator*** is by exploring his ***intentions at the time when the law was made***, by signs the most natural and probable. And these signs are either the ***words***, the ***context***, the ***subject matter***, the ***effects and consequence***, or the spirit and reason of the law. Let us take a short view of them all.

everyone does it

but some reverse order of preference, see Breyer interview

1. ***Words*** are generally to be understood in their ***usual and most known signification***; not so much regarding the propriety of grammar, as their general and popular use. Thus the law mentioned by Puffendorf **(*o*)** which forbade a layman to *lay hands* on a priest, was adjudged to extend to him who had hurt a priest with a weapon. Again, terms of art, or technical terms, must be taken according to the acceptation of the learned in each art, trade, and science. So in the act of settlement, where the crown of England is limited "to the princess Sophia, and the heirs of her body, being Protestants," it becomes necessary to call in the assistance of lawyers to ascertain the precise idea of the words "*heirs of her body*," which, in a legal sense, comprise only certain of her lineal descendants.

plain meaning rule

everything begins with the text

[*60] 2. ***If words happen to be still dubious***, we may establish their meaning from the ***context***, with which it may be of singular use to compare a word, or a sentence, whenever they are ambiguous, equivocal, or intricate. Thus the proeme, or ***preamble***, is often called in to help the construction of an act of parliament. Of the same nature and use is the ***comparison of a law with other laws***, that are made by the same legislator, that have some affinity with the subject, or that expressly relate to the same point. Thus, when the law of England declares murder to be felony without benefit of clergy, we must ***resort to the same law of England to learn what the benefit of clergy is***; and, when the common law censures simoniacal contracts, it affords great light to the subject to consider what the canon law has adjudged to be simony.

use context only if words ambiguous

context includes preamble, other similar laws

3. As to the ***subject matter***, words are always to be understood as having a regard thereto, for that is always **supposed to be in the eye of the legislator**, and all his expressions directed to that end. Thus, when a law of our Edward III. forbids all ecclesiastical persons to purchase *provisions* at Rome, it might seem to prohibit the buying of grain and other victual; but, when we consider that the statute was made to repress the usurpations of the papal see, and that the nominations to benefices by the pope were called *provisions*, we shall see that the restraint is intended to be laid upon such provisions only.

another context example

4. As to the ***effects*** **and** ***consequence***, the rule is, that where words bear either none, or a ***very absurd signification, if literally understood***, we must a little deviate from the received sense of them. Therefore the Bolognian law, mentioned by Puffendorf, **(*p*)** which enacted "that whoever drew blood in the streets should be punished with the utmost severity," was held after long debate not to extend to the surgeon who opened the vein of a person that fell down in the street with a fit.

literal meaning, if "absurd" in effect requires less literal interpretation

[*61] 5. But, lastly, the most universal and effectual way of discovering the true meaning of a law, ***when the words are dubious***, is by considering the **reason and spirit** of it; or the cause which ***moved the legislator to enact it***. For when this reason ceases, the law itself ought likewise to cease with it. An instance of this is given in a case put by Cicero, or whoever was the author of the treatise inscribed to Herennius. **(*q*)** There was a law, that those who in a storm forsook the ship should forfeit all property therein; and that the ship and lading should belong entirely to those who stayed in it. In a dangerous tempest all the mariners forsook the ship, except only one sick passenger, who, by reason of his disease, was unable to get out and escape. By chance the ship came safe to port. The sick man kept possession, and claimed the benefit of the law. Now here all the learned agree, that the sick man is not within the reason of the law; for the reason of making it was, to give encouragement to such as should venture their lives to save the vessel; but this is a merit which he could never pretend to, who neither stayed in the ship upon that account, nor contributed anything to its preservation.

only if "words are dubious"

"reason and spirit" is motive of legislators (mischief rule)

From this method of interpreting laws by the reason of them, arises what we call *equity*, which is thus defined by Grotius: **(*r*)** "the correction of that wherein the law (by reason of its universality) is deficient." For, since in laws all cases cannot be foreseen or expressed, it is necessary that, when the general decrees of the law come to be applied to particular cases, there should be somewhere a power vested of defining those circumstances, which (had they been foreseen) the legislator himself would have expressed. And these are the cases which, according to Grotius, "*lex non exacte definit, sed arbitrio boni viri permittit.*"

"reason and spirit" is type of "equity" principle, allowing exceptions to the literal application of dubious words

Equity thus depending, essentially, upon the particular circumstances of each individual case, there can be no established [*62] rules and fixed precepts of equity laid down, without destroying its very essence, and reducing it to a positive law. And, on the other hand, ***the liberty of considering all cases in an equitable light must not be indulged too far, lest thereby we destroy all law, and leave the decision of every***

question entirely in the breast of the judge. And law, without equity, though hard and disagreeable, is much more desirable for the public good than equity without law; which would make every judge a legislator, and introduce most infinite confusion; as there would then be almost as many different rules of action laid down in our courts, as there are differences of capacity and sentiment in the human mind.

this *last* method should be last, for it tempts the judge to be a one-man legislature

[(*a*)]*Juris præcepta sunt hæc, honeste vivere, alterum non lædere, suum cuique tribuere. Inst. I.* i. 3.

[(*b*)] Puffendorf, *l.* 7, c. 1, compared with Barbeyrac's Commentary.

[(*c*)]*Ff.* i. 1, 9.

[(*d*)]*Inst.* i. 2, 1.

[(*e*)] Such laws among the Romans were denominated *privilegia*,***** or private laws, of which Cicero (*de leg.* 3, 19, and in his oration, *pro domo,* 17) thus speaks: "*Vetant leges sacratæ, vetant duodecim tabulæ, leges privatis homimbus irrogari; id enim est privilegium. Nemo unquam tulit nihil est crudelius, nihil perniciosius, nihil quod minus hæc civitas ferre possit.*"

[(*f*)] In his fragments, *de rep. l.* 2.

[(*g*)] "*Cunclas nationes et urbes populus aut primores, aut unguli regunt; delecta ex his et constituta reipublicæ forma laudari facilius quam evenire, vel si evenit, haud diuturna esse potest.*" *Ann. l.* 4.

[(*h*)] On government, part 2, 212.

[(*i*)] See page 43.

[(*k*)] Locke, Hum. Und., b. ii. c. 21.

[(*l*)] See book ii. page 420.

[(*m*)]*Lex pure poenalis obligat tantum ad poenam, non item ad culpam: lex poenalis mixta et ad culpam obligat, et ad poenam.* (Sanderson *de conscient. obligat. prael.* viii. 17. 24.)

[(*n*)]*Inst.* 1, 2, 6.

[(*o*)] L. of N. and N. 5, 12, 3.

[(*p*)]*l.* 5, c. 12, 8.

[(*q*)]*l.* 1, c. 11.

[(*r*)]*De Æquitate,* 3.