CHAPTER TWO

MECHANICAL SOLIDARITY THROUGH LIKENESS

I

The link of social solidarity to which repressive law corresponds is the one whose break constitutes a crime. By this name we call every act which, in any degree whatever, invokes against its author the characteristic reaction which we term punishment. To seek the nature of this link is to inquire into the cause of punishment, or, more precisely, to inquire what crime essentially consists of.

Surely there are crimes of different kinds; but among all these kinds, there is, no less surely, a common element. The proof of this is that the reaction which crimes call forth from society, in respect of punishment, is, save for differences of degree, always and ever the same. The unity of effect shows the unity of the cause. Not only among the types of crime provided for legally in the same society, but even among those which have been or are recognized and punished in different social systems, essential resemblances assuredly exist. As different as they appear at first glance, they must have a common foundation, for they everywhere affect the moral conscience of nations in the same way and produce the same result. They are all crimes; that is to say, acts reprised by definite punishments. The essential properties of a thing are those which one observes universally wherever that thing exists and which pertain to it alone. If, then, we wish to know what crime essentially is, we must extract the elements of crimes which are found similar in all criminological varieties in different social systems. None must be neglected. The juridical conceptions of the most

inferior societies are no less significant than those of the most elevated societies; they are not less instructive. To omit any would expose us to the error of finding the essence of crime where it is not. Thus, the biologist would have given vital phenomena a very inexact definition, if he had disdained to observe monocellular organisms, for, solely from the contemplation of organisms of higher type, he would have wrongly concluded that life essentially consists in organization.

The method of finding this permanent and pervasive element is surely not by enumerating the acts that at all times and in every place have been termed crimes, observing, thus, the characters that they present. For if, as it may be, they are actions which have universally been regarded as criminal, they are the smallest minority, and, consequently, such a method would give us a very mistaken notion, since it would be applied only to exceptions.[1] These variations of repressive law prove at the same time that the constant characteristic could not be found among the intrinsic properties of acts imposed or prohibited by penal rules, since they present such diversity, but rather in the relations that they sustain with some condition external to them.

It has been thought that this relation is found in a sort of antagonism between these actions and great social interests, and

[1] It is this method which Garafalo has followed. No doubt, he seems to renounce it when he realizes the impossibility of drawing up a list of acts universally punished (*Criminologie*, p. 5), which is excessive. But he finally reverts to it, since, in sum, natural crime is, for him, that which runs counter to the sentiments which are everywhere at the basis of penal law; that is to say, the invariable part of the moral sense and that alone. But why would a crime which ran counter to some particular sentiment in certain social systems be less a crime than others? Garafalo is thus led to refuse the name of crime to those acts which have been universally recognized as crimes in certain social systems, and accordingly, to retrace artificially the elements of criminality. The result is that his notion of crime is singularly incomplete. It is vacillating because its author does not trouble himself to enter into a comparison of all social systems, but excludes a great number that he treats as abnormal. One can say of a social fact that it is abnormal relative to the type of the species, but a species cannot be abnormal. The two words cannot be joined. As interesting as is Garafalo's attempt to arrive at a scientific notion of a delict, it has not been made with a method sufficiently exact and precise. This is shown by the expression *natural delict* which he uses. Are not all delicts natural? It seems probable that here is a return to Spencer's doctrine, which treats social life as truly natural only in industrial societies. Unfortunately, nothing is more incorrect.

it has been said that penal rules announce the fundamental conditions of collective life for each social type. Their authority thus derives from their necessity. Moreover, as these necessities vary with societies, the variability of repressive law would thus be explained. But we have already made ourselves explicit on this point. Besides the fact that such a theory accords too large a part in the direction of social evolution to calculation and reflection, there are many acts which have been and still are regarded as criminal without in themselves being harmful to society. What social danger is there in touching a tabooed object, an impure animal or man, in letting the sacred fire die down, in eating certain meats, in failure to make the traditional sacrifice over the graves of parents, in not exactly pronouncing the ritual formula, in not celebrating certain holidays, etc.? We know, however, what a large place in the repressive law of many peoples ritual regimentation, etiquette, ceremonial, and religious practices play. We have only to open the Pentateuch to convince ourselves, and as these facts normally recur in certain social types, we cannot think of them as anomalies or pathological cases which we can rightly neglect.

Even when a criminal act is certainly harmful to society, it is not true that the amount of harm that it does is regularly related to the intensity of the repression which it calls forth. In the penal law of the most civilized people, murder is universally regarded as the greatest of crimes. However, an economic crisis, a stock-market crash, even a failure, can disorganize the social body more severely than an isolated homicide. No doubt murder is always an evil, but there is no proof that it is the greatest of evils. What is one man less to society? What does one lost cell matter to the organism? We say that the future general security would be menaced if the act remained unpunished; but if we compare the significance of the danger, real as it is, and that of the punishment, the disproportion is striking. Moreover, the examples we have just cited show that an act can be disastrous to society without incurring the least repression. This definition of crime is, then, completely inadequate.

Shall we say, in modifying it, that criminal acts are those which *seem* harmful to the society that represses them, that penal rules express, not the conditions which are essential to social life, but those which *appear* such to the group which observes them? But such an explanation explains nothing, for it does not show why, in so large a number of cases, societies are mistaken and have imposed practices which by themselves were not even useful. Surely this pretended solution of the problem reduces itself to a veritable truism, for if societies thus oblige each individual to obey their rules, it is evidently because they believe, wrongly or rightly, that this regular and punctual obedience is indispensable to them. That is why they hold to it so doggedly. The solution then amounts to saying that societies judge these rules necessary because they judge them necessary. What we must find out is why they consider them so necessary. If this sentiment had its cause in the objective necessity of penal prescriptions, or, at least, in their utility, it would be an explanation. But that is contradicted by the facts; the question remains entirely unresolved.

However, this last theory is not without some foundation; it is with reason that it seeks in certain states of the subject the constitutive conditions of criminality. In effect, the only common characteristic of all crimes is that they consist — except some apparent exceptions with which we shall deal later — in acts universally disapproved of by members of each society. We ask ourselves these days whether this reprobation is rational, whether it would not be wiser to see in crime only a malady or an error. But we need not enter upon these discussions; we seek to determine what is or has been, not what ought to be. Thus, the reality of the fact that we have just established is not contestable; that is, that crime shocks sentiments which, for a given social system, are found in all healthy consciences.

It is not possible otherwise to determine the nature of these sentiments, to define them in terms of the function of their particular objects, for these objects have infinitely varied and can

still vary.[2] Today, there are altruistic sentiments which present this character most markedly; but there was a time, not far distant from ours, when religious, domestic, and a thousand other traditional sentiments had exactly the same effects. Even now, negative sympathy for another does not, as Garafalo wishes, alone produce this result. Do we not have the same aversion, in times of peace, for the man who betrays his country as for the robber or the murderer? In a country where monarchical sentiment is still strong, do crimes against *lèse-majesté* not call forth general indignation? In democratic countries, are injuries to the people not inveighed against? We can not thus draw up a list of sentiments whose violation constitutes a crime; they distinguish themselves from others only by this trait, that they are common to the average mass of individuals of the same society. So the rules which prohibit these acts and which penal law sanctions are the only ones to which the famous juridical axiom *ignorance of the law is no excuse* is applied without fiction. As they are graven in all consciences, everybody knows them and feels that they are well founded. It is at least true of the normal state. If we come upon adults who do not know these fundamental rules or do not recognize their authority, such ignorance or insubmissiveness is an undeniable sign of pathological perversion. Or, if it happens that a penal disposition exists for a long time although opposed by all, it is because of very exceptional circumstances, consequently, abnormal; and such a state of affairs can never long endure.

This explains the particular manner in which penal law is codified. Every written law has a double object: to prescribe certain obligations, and to define the sanctions which are attached to them. In civil law, and more generally in every type of law with restitutive sanctions, the legislator takes up and

[2] We do not see what scientific reason Garafalo has for saying that the moral sentiments actually acquired by the civilized part of humanity constitute a morality "not susceptible of loss, but of a continually growing development" (p. 9). What permits him thus to limit the changes that will come about in one sense or another?

solves the two questions separately. He first determines the obligation with all possible precision, and it is only later that he stipulates the manner in which it should be sanctioned.[1] For example, in the chapter of the French civil code which is devoted to the respective duties of married persons, the rights and obligations are announced in a positive manner; but no mention is made of what happens when these duties are violated by one or the other. We must go otherwheres to find this sanction. Sometimes it is totally lacking. Thus, article 214 of the civil code orders the wife to live with her husband; we deduce from that that the husband can force her to remain in the conjugal domicile, but this sanction is nowhere formally indicated. Penal law, on the contrary, sets forth only sanctions, but says nothing of the obligations to which they correspond. It does not command respect for the life of another, but kills the assassin. It does not say, first off, as does civil law: Here is the duty; but rather, Here is the punishment. No doubt, if the action is punished, it is because it is contrary to an obligatory rule, but this rule is not expressly formulated. There can be only one reason for this, which is that the rule is known and accepted by everybody. When a law of custom becomes written and is codified, it is because questions of litigation demand a more definite solution. If the custom continues to function silently, without raising any discussion or difficulties, there is no reason for transforming it. Since penal law is codified only to establish a graduated scale of punishments, it is thus the scale alone which can lend itself to doubt. Inversely, if rules whose violation is punished do not need a juridical expression, it is because they are the object of no contest, because everybody feels their authority.[2]

It is true that sometimes the Pentateuch does not set forth sanctions, though, we shall see, it contains little more than penal dispositions. This is the case with the Ten Commandments as they are found formulated in chapter XX of *Exodus* and chapter V of *Deuteronomy*. But the Pentateuch, although it

[1] Cf. Binding, *Die Normen und ihre Uebertretung*, I, pp. 6 ff., Leipzig, 1872.

has the function of a code, is not, however, a code properly speaking. Its object is not to unite in a single system and to make precise the penal rules of the Jewish people; it is so far from being a codification that the various parts of which it is composed seem not to have been formulated in the same epoch. It is above all a résumé of all sorts of traditions by which the Jews explained to their satisfaction and in their fashion the genesis of the world, of their society, and of their principal social practices. If, then, it prescribes duties which assuredly were sanctioned by punishments, they were not ignored or unknown to the Jews, nor was it necessary to make them manifest. On the contrary, since the book is only a tissue of national legends, we can rest assured that everything that it contains was engraven in every conscience. It was essentially a problem of reproducing and stabilizing the popular beliefs on the origins of these precepts, on the historical circumstances in which they were believed to have been promulgated, on the sources of their authority. Thus, from this point of view, the determination of punishment becomes something accessory.[4]

It is for this reason that the functioning of repressive justice tends to remain more or less diffuse. In very different social systems, it does not function through the means of a special magistracy, but the whole society participates in a rather large measure. In primitive societies, where, as we shall see, law is wholly penal, it is the assembly of the people which renders justice. This was the case among the ancient Germans.[5] In Rome, while civil affairs were given over to the praetor, criminal matters were handled by the people, first by the curile comitès, and then, beginning with the law of the Twelve Tables, by the centurial comites. Until the end of the republic, even though in fact it had delegated its powers to permanent commissions, the people remained, in principle, the supreme judge of this

[4] The only true exceptions to this particularity of penal law are produced when the act is committed by the public authority which created the delict. In this case, the duty is generally defined independently of the sanction; we will later consider the cause of this exception.

[5] Tacitus, *Germania*, ch. xii.

type of process.[6] In Athens, under the legislation of Solon, criminal jurisdiction partly rested in the Ἡλιαία, a vast assemblage which nominally comprised all the citizens over the age of thirty.[7] Then, among Germano-Latin peoples, society, in the person of the jury, intervened in the exercise of these same functions. The diffused state in which this part of judicial power is thus found would be inexplicable, if the rules whose observation it assured, and, consequently, the sentiments to which these rules corresponded, were not immanent in all consciences. It is true that, in other cases, the power is wielded by a privileged class or by particular magistrates. But these facts do not lessen the demonstrative value of the preceding, for, simply because collective sentiments are enforced only through certain intermediaries, it does not follow that they have ceased to be collective while localizing themselves in a restricted number of consciences. This delegation may be due either to the very great multiplicity of affairs which necessitate the institution of special functionaries, or to the very great importance assumed by certain persons or certain classes and which makes them the authorized interpreters of collective sentiments.

But we have not defined crime when we say that it consists in an offense to collective sentiments, for there are some among these which can be offended without there being a crime. Thus, incest is the object of quite general aversion, and yet it is an act that is only immoral. It is in like case with the reflections upon a woman's honor accruing from promiscuous intercourse outside of marriage, from the fact of total alienation of her liberty at another's hands, or of accepting such alienation from another. The collective sentiments to which crime corresponds must, therefore, singularize themselves from others by some distinctive property; they must have a certain average intensity. Not only are they engraven in all consciences, but they are strongly engraven. They are not hesitant and super-

[6] Cf. Walter, *Histoire de la procédure civile et du droit criminel chez les Romains*, tr. fr. § 829; Rein, *Criminalrecht der Roemer*, p. 63.

[7] Cf. Gilbert, *Handbuch der Griechischen Staatsalterthümer*, I, p. 138, Leipzig, 1881.

ficial desires, but emotions and tendencies which are strongly ingrained in us. The proof of this is the extreme slowness with which penal law evolves. Not only is it modified more slowly than custom, but it is the part of positive law most refractory to change. Observe, for example, what has been accomplished in legislation since the beginning of the nineteenth century in the different spheres of juridical life; the innovations in the matter of penal law are extremely rare and restricted compared to the multitude of new dispositions introduced into the civil law, commercial law, administrative law, and constitutional law. When we compare the penal law which the Twelve Tables set up in Rome with that which we find there in the classical epoch, the changes that are observable are small indeed compared to those induced in the civil law during the same period. From the time of the Twelve Tables, says Mainz, the principal crimes and delicts are constituted: "During ten generations, the catalogue of public crimes had added to it only some few laws which punished thievery, brigandage, and perhaps the *plagium*." [8] As for private delicts, we encounter only two new ones: rapine (*actio bonorum vi raptorum*) and damage unjustly caused (*damnum injuria datum*). The same phenomenon is universally found. In lower societies, law, as we shall see, is almost exclusively penal; it is likewise very stationary. Generally, religious law is always repressive; it is essentially conservative. This fixity of penal law evinces the resistive force of the collective sentiments to which it corresponds. Inversely, the very great plasticity of purely moral rules and the relative rapidity of their evolution show the smaller force of the sentiments at their base; either they have been more recently acquired and have not yet had time to penetrate deeply into consciences, or they are in process of losing strength and moving from depth to surface.

One last addition is still necessary in order to make our definition exact. If, in general, the sentiments which purely

[8] *Esquisse historique du droit criminel de l'ancienne Rome*, in *Nouvelle Revue historique du droit français et étranger*, 1882, pp. 24 and 27.

moral sanctions protect, that is to say, diffuse sanctions, are less intense and less solidly organized than those which punishment, properly called, protects, nevertheless there are exceptions. Thus, there is no reason for believing that the average filial piety or even the elementary forms of compassion for the most apparent evils today consist of sentiments more superficial than those concerning property or public authority. The wayward son, however, and even the most hardened egotist are not treated as criminals. It is not sufficient, then, that the sentiments be strong; they must be precise. In effect, each of them is relative to a very definite practice. This practice can be simple or complex, positive or negative, that is to say, consist in action or abstention, but it is always determined. It is a question of doing or not doing this or that, of not killing, not wounding, of pronouncing such a formula, of going through such a rite, etc. On the contrary, sentiments such as filial love or charity are vague aspirations towards very general objects. So penal laws are remarkable for their neatness and precision, while purely moral rules are generally somewhat nebulous. Their inchoate nature very often even makes it difficult to render them in a short formula. We may quite generally say that a man ought to work, that he ought to have pity on others, etc., but we cannot determine in what fashion or in what measure. There is room here, consequently, for variations and nuances. On the other hand, since the sentiments which are incarnate in penal rules are determined, they have a much greater uniformity. As they cannot be understood in different ways, they are ever the same.

We are now in a position to come to a conclusion.

The totality of beliefs and sentiments common to average citizens of the same society forms a determinate system which has its own life; one may call it the *collective* or *common conscience*. No doubt, it has not a specific organ as a substratum; it is, by definition, diffuse in every reach of society. Nevertheless, it has specific characteristics which make it a distinct

reality. It is, in effect, independent of the particular conditions in which individuals are placed; they pass on and it remains. It is the same in the North and in the South, in great cities and in small, in different professions. Moreover, it does not change with each generation, but, on the contrary, it connects successive generations with one another. It is, thus, an entirely different thing from particular consciences, although it can be realized only through them. It is the psychical type of society, a type which has its properties, its conditions of existence, its mode of development, just as individual types, although in a different way. Thus understood, it has the right to be denoted by a special word. The one which we have just employed is not, it is true, without ambiguity. As the terms, collective and social, are often considered synonymous, one is inclined to believe that the collective conscience is the total social conscience, that is, extend it to include more than the psychic life of society, although, particularly in advanced societies, it is only a very restricted part. Judicial, governmental, scientific, industrial, in short, all special functions are of a psychic nature, since they consist in systems of representations and actions. They, however, are surely outside the common conscience. To avoid the confusion[9] into which some have fallen, the best way would be to create a technical expression especially to designate the totality of social similitudes. However, since the use of a new word, when not absolutely necessary, is not without inconvenience, we shall employ the well-worn expression collective or common conscience, but we shall always mean the strict sense in which we have taken it.

We can, then, to resume the preceding analysis, say that an act is criminal when it offends strong and defined states of the collective conscience.[10]

[9] The confusion is not without its dangers. Thus, we sometimes ask if the individual conscience varies as the collective conscience. It all depends upon the sense in which the word is taken. If it represents social likenesses, the variation is inverse, as we shall see. If it signifies the total psychic life of society, the relation is direct. It is thus necessary to distinguish them.

[10] We shall not consider the question whether the collective conscience is a conscience as is that of the individual. By this term, we simply signify the

The statement of this proposition is not generally called into question, but it is ordinarily given a sense very different from that which it ought to convey. We take it as if it expressed, not the essential property of crime, but one of its repercussions. We well know that crime violates very pervasive and intense sentiments, but we believe that this pervasiveness and this intensity derive from the criminal character of the act, which consequently remains to be defined. We do not deny that every delict is universally reproved, but we take as agreed that the reprobation to which it is subjected results from its delictness. But we are hard put to say what this delictness consists of. In immorality which is particularly serious? I wish such were the case, but that is to reply to the question by putting one word in place of another, for it is precisely the problem to understand what this immorality is, and especially this particular immorality which society reproves by means of organized punishment and which constitutes criminality. It can evidently come only from one or several characteristics common to all criminological types. The only one which would satisfy this condition is that opposition between a crime, whatever it is, and certain collective sentiments. It is, accordingly, this opposition which makes crime rather than being a derivative of crime. In other words, we must not say that an action shocks the common conscience because it is criminal, but rather that it is criminal because it shocks the common conscience. We do not reprove it because it is a crime, but it is a crime because we reprove it. As for the intrinsic nature of these sentiments, it is impossible to specify them. They have the most diverse objects and cannot be encompassed in a single formula. We can say that they relate neither to vital interests of society nor to a minimum of justice. All these definitions are inadequate. By this alone can we recognize it: a sentiment, whatever its origin and end, is found in all consciences with a certain degree of force and pre-

totality of social likenesses, without prejudging the category by which this system of phenomena ought to be defined.

cision, and every action which violates it is a crime. Contemporary psychology is more and more reverting to the idea of Spinoza, according to which things are good because we like them, as against our liking them because they are good. What is primary is the tendency, the inclination; the pleasure and pain are only derivative facts. It is just so in social life. An act is socially bad because society disproves of it. But, it will be asked, are there not some collective sentiments which result from pleasure and pain which society feels from contact with their ends? No doubt, but they do not all have this origin. A great many, if not the larger part, come from other causes. Everything that leads activity to assume a definite form can give rise to habits, whence result tendencies which must be satisfied. Moreover, it is these latter tendencies which alone are truly fundamental. The others are only special forms and more determinate. Thus, to find charm in such and such an object, collective sensibility must already be constituted so as to be able to enjoy it. If the corresponding sentiments are abolished, the most harmful act to society will not only be tolerated, but even honored and proposed as an example. Pleasure is incapable of creating an impulse out of whole cloth; it can only link those sentiments which exist to such and such a particular end, provided that the end be in accord with their original nature.

There are, however, some cases where the preceding does not explain. There are some actions which are more severely repressed than they are strongly reproved by general opinion. Thus, a coalition of functionaries, the encroachment of judicial authority on administrative authority, religious functions on civil functions, are the object of a repression which is not in accord with the indignation that they arouse in consciences. The appropriation of public goods leaves us quite indifferent, and yet is punished quite severely. It may even happen that the act punished may not directly hurt any collective sentiment. There is nothing in us which protests against fishing and hunt-

ing out of season, or against overloaded conveyances on the public highway. But there is no reason for separating these delicts from others; every radical distinction[11] would be arbitrary, since they all present, in different degree, the same external criterion. No doubt, in any of these examples, the punishment does not appear unjust. But if it is not enforced by public opinion, such opinion, left to itself, would either not object to it at all, or show itself less insistent. Thus, in all cases of this type, delictness does not come about, or does not entirely derive from the vivacity of the collective sentiments which are offended, but comes from some other cause.

It is surely true that once a governmental power is instituted, it has, by itself, enough force to attach a penal sanction spontaneously to certain rules of conduct. It is capable, by its own action, of creating certain delicts or of increasing the criminological value of certain others. So, all the actions that we have just cited present this common character of being directed against some administrative organ of social life. Must we then admit that there are two kinds of crimes coming from two different causes? Such an hypothesis cannot be considered. As numerous as the varieties are, crime is everywhere essentially the same, since it everywhere calls forth the same effect, in respect of punishment, which, if it can be more or less intense, does not by that change its nature. But the same fact cannot have two causes, unless this duality is only apparent, and basically they are one. The power of reaction which is proper to the State ought, then, to be of the same sort as that which is diffused throughout society.

And where would it come from? From the depth of the interests which the State cares for and which demand protection in a very special way? But we know that the subversion of even deep interests does not alone suffice to determine the penal reaction; it must still be felt in a very decided way.

[11] We have only to notice how Garafalo distinguishes what he calls true crimes from others (p. 45); it is but a personal judgment which does not rest upon any objective characteristic.

How does it come about that the least damage done to a governmental organ is punished, although many much more severe disorders in other social organs are reparable only civilly? The smallest injury to the police power calls forth a penalty, while even repeated violation of contracts, or constant lack of correctness in economic relations only asks amends for the loss. Doubtless, the system of direction plays an eminent role in social life, but there are others whose interest is of great importance, yet whose functioning is not assured in this fashion. If the brain have its importance, the stomach is an organ which is likewise essential, and the sicknesses of one are menaces to life just as those of the other. Why is this privilege accorded to what is sometimes called the social brain?

The difficulty resolves itself easily if we notice that, wherever a directive power is established, its primary and principal function is to create respect for the beliefs, traditions, and collective practices; that is, to defend the common conscience against all enemies within and without. It thus becomes its symbol, its living expression in the eyes of all. Thus, the life which is in the collective conscience is communicated to the directive organ as the affinities of ideas are communicated to the words which represent them, and that is how it assumes a character which puts it above all others. It is no longer a more or less important social function; it is the collective type incarnate. It participates in the authority which the latter exercises over consciences, and it is from there that it draws its force. Once constituted, however, without freeing itself from the source whence it flows and whence it continues to draw its sustenance, it nevertheless becomes an autonomous factor in social life, capable of spontaneously producing its own movements without external impulsion, precisely because of the supremacy which it has acquired. Since, moreover, it is only a derivation from the force which is immanent in the collective conscience, it necessarily has the same properties and reacts in the same manner, although the latter does not react completely in unison. It repulses every antagonistic force as would the

diffuse soul of society, although the latter does not feel this antagonism, or rather, does not feel it so directly. That is, it considers as criminal, actions which shock it without, however, shocking the collective sentiments in the same degree. But it is from these latter that it receives all the power which permits it to create crimes and delicts. Besides, not coming from without or arising from nothing, the following facts, which will be amply developed in the rest of this work, confirm this explanation. The extent of the activity which the governmental organ exercises over the number and the qualification of criminal acts depends on the force it receives. That can be measured either by the extent of the authority which it exercises over citizens, or by the degree of gravity recognized in crimes directed against it. But we shall see that it is in lower societies that this authority is greatest and this gravity most elevated, and moreover, that it is in these same social types that the collective conscience has the most power.[12]

Thus, we must always return to this last; that is whence, directly or indirectly, comes all criminality. Crime is not simply the disruption even of serious interests; it is an offense against an authority in some way transcendent. But, from experience, there is no moral force superior to the individual save collective force.

There is, moreover, a way of checking up on the result at which we have just arrived. What characterizes crime is that it determines punishment. If, then, our definition of crime is exact, it ought to explain all the characteristics of punishment. We shall proceed to this verification.

But first we must find out what these characteristics are.

II

In the first place, punishment consists of a passionate reaction. This character is especially apparent in less cultivated societies. In effect, primitive peoples punish for the sake of punishing,

[12] Moreover, when the fine constitutes the whole punishment, since it is only a reparation whose amount is fixed, the action is on the limits of penal law and restitutive law.

make the culpable suffer particularly for the sake of making him suffer and without seeking any advantage for themselves from the suffering which they impose. The proof of this is that they seek neither to strike back justly nor to strike back usefully, but merely to strike back. It is thus that they punish animals which have committed a wrong act,[13] or even inanimate beings which have been its passive instrument.[14] When punishment is applied only to people, it often extends further than the culpable and reaches the innocent, his wife, his children, his neighbors, etc.[15] That is because the passion which is the soul of punishment ceases only when exhausted. If, therefore, after it has destroyed the one who has immediately called it forth, there still remains force within it, it expands in quite mechanical fashion. Even when it is quite tempered and attends only to the culpable, it makes its presence felt by the tendency to surpass in severity the action against which it is reacting. That is whence come the refinements of pain added to capital punishment. Even in Rome the thief not only had to return the stolen object, but also pay retribution of double and quadruple the amount.[16] Moreover, is not the very general punishment of the *lex talionis* a satisfaction accorded to the passion for vengeance?

But today, it is said, punishment has changed its character; it is no longer to avenge itself that society punishes, it is to defend itself. The pain which it inflicts is in its hands no longer anything but a methodical means of protection. It punishes, not because chastisement offers it any satisfaction for itself, but so that the fear of punishment may paralyze those who contemplate evil. This is no longer choler, but a reflected provision which determines repression. The preceding observations could not then be made general; they would deal only with the

[13] See *Exodus*, xxi, 28; *Leviticus*, xx, 16.

[14] For example, the instrument which has aided in the perpetration of murder. — See Post, *Bausteine für eine allegemeine Rechtswissenschaft*, I, pp. 230–231.

[15] See *Exodus*, xx, 4 and 5; *Deuteronomy*, xii, 12–18; Thonissen, *Etudes sur l'histoire du droit criminel*, I, p. 70 and pp. 178 ff.

[16] Walter, *op. cit.*, § 793.

primitive form of punishment and would not extend to the existing form.

But to justify such a radical distinction between these two sorts of punishment, it is not enough to state them in view of their employment of different ends. The nature of a practice does not necessarily change because the conscious intentions of those who apply it are modified. It might, in truth, still play the same role as before, but without being perceived. In this case, why would it transform only in that aspect which better explains its effects? It adapts itself to new conditions of existence without any essential changes. It is so with punishment.

It is an error to believe that vengeance is but useless cruelty. It is very possible that, in itself, it consists of a mechanical and aimless reaction, in an emotional and irrational movement, in an unintelligent need to destroy; but, in fact, what it tends to destroy was a menace to us. It consists, then, in a veritable act of defense, although an instinctive and unreflective one. We avenge ourselves only upon what has done us evil, and what has done us evil is always dangerous. The instinct of vengeance is, in sum, only the instinct of conservation exacerbated by peril. Thus, vengeance is far from having had the negative and sterile role in the history of mankind which is attributed to it. It is a defensive weapon which has its worth, but it is a rude weapon. As it has no realization of the services which it automatically renders, it cannot, in consequence, regulate itself; but it responds somewhat haphazardly to blind causes which urge it on and without anything moderating its activities. Today, since we better understand the end to be attained, we better know how to utilize the means at our disposal; we protect ourselves with better means and, accordingly, more efficiently. But, in the beginning, this result was obtained in a rather imperfect manner. Between the punishment of today and yesterday, there is no chasm, and consequently it was not necessary for the latter to become something other than itself to accommodate itself to the role that it plays in our civilized societies. The whole difference derives from the fact that it

now produces its effects with a much greater understanding of what it does. But, although the individual or social conscience may not be without influence upon the reality that it clarifies, it has not the power to change its nature. The internal structure of phenomena remains the same, whether they be conscious of it or not. We thus reach the conclusion that the essential elements of punishment are the same as of old.

And in truth, punishment has remained, at least in part, a work of vengeance. It is said that we do not make the culpable suffer in order to make him suffer; it is none the less true that we find it just that he suffer. Perhaps we are wrong, but that is not the question. We seek, at the moment, to define punishment as it is or has been, not as it ought to be. It is certain that this expression of public vindication which finds its way again and again into the language of the courts is not a word taken in vain. In supposing that punishment can really serve to protect us in the future, we think that it ought to be above all an *expiation* of the past. The proof of this lies in the minute precautions we take to proportion punishment as exactly as possible to the severity of the crime; they would be inexplicable if we did not believe that the culpable ought to suffer because he has done evil and in the same degree. In effect, this gradation is not necessary if punishment is only a means of defense. No doubt, there would be danger for society in having the gravest acts considered simple delicts; but it would be greater, in the majority of cases, if the second were considered as the first. Against an enemy, we cannot take too much precaution. Shall we say that the authors of the smallest misdeeds have natures less perverse, and that to neutralize their evil instincts less stringent punishments will suffice? But if their motives are less vicious, they are not on that account less intense. Robbers are as strongly inclined to rob as murderers are to murder; the resistance offered by the former is not less than that of the latter, and consequently, to control it, we would have recourse to the same means. If, as has been said, it was solely a question of putting down a noxious force by an opposing

force, the intensity of the second would be measured solely by the intensity of the first, without the quality of the latter entering into the consideration. The penal scale would then encompass only a small number of degrees. Punishment would vary only as the criminal is more or less hardened, and not according to the nature of the criminal act. An incorrigible robber would be treated as an incorrigible murderer. But, in fact, if it were shown that a misdoer was definitely incurable, we would feel bound not to chastise him unduly. This is proof that we are faithful to the principle of retaliation, although we apply it in a more elevated sense than heretofore. We no longer measure in so material and gross a manner either the extent of the deed or of the punishment; but we always think that there ought to be an equation between the two terms, whether or not we benefit from this balance. Punishment, thus, remains for us what it was for our fathers. It is still an act of vengeance since it is an expiation. What we avenge, what the criminal expiates, is the outrage to morality.

There is, indeed, a punishment where this passionate character is more manifest than elsewhere. It is the disgrace which doubles the majority of punishments and which grows with them. Very often it serves no purpose. What good is it to disgrace a man who ought no longer to live in a society of his peers and who has superabundantly proved by his conduct that the most redoubtable threats are not sufficient to intimidate him? Disgrace is called upon when there is no other punishment, or as complement to a quite feeble material punishment. In the latter case it metes out double punishment. We can even say that society has recourse to legal chastisement only when the others are insufficient; but then why maintain them? They are a sort of supplementary, aimless aid, and can have no other cause for being other than the need of compensating evil with evil. It is a product of instinctive, irresistible sentiments, which often extend to the innocent. It is thus that the place of crime, the instruments which have served it, the relatives of

the culpable, sometimes participate in the opprobrium in which the criminal is involved. But the causes which determine this diffuse repression are the same as those of the organized repression which accompany the former. It is sufficient, moreover, to see how punishment functions in courts, in order to understand that its spirit is completely passionate, for it is to these passions that both prosecutor and defense-attorney address themselves. The latter seeks to excite sympathy for the defendant, the former to awaken the social sentiments which have been violated by the criminal act, and it is under the influence of these contrary passions that the judge pronounces sentence.

Thus, the nature of punishment has not been changed in essentials. All that we can say is that the need of vengeance is better directed today than heretofore. The spirit of foresight which has been aroused no longer leaves the field so free for the blind action of passion. It contains it within certain limits; it is opposed to absurd violence, to unreasonable ravaging. More clarified, it expands less on chance. One no longer sees it turn against the innocent to satisfy itself. But it nevertheless remains the soul of penality. We can thus say that punishment consists in a passionate reaction of graduated intensity.[17]

But whence comes this reaction? From the individual or from society?

Everybody knows that it is society that punishes, but it might be held that this is not by design. What puts beyond doubt the social character of punishment is that, once pronounced, it cannot be lifted except by the government in the name of society. If it were a satisfaction given to particular persons, they would always be the judges of its remission. We cannot conceive of a privilege imposed unless its beneficiary could renounce it. If it is society alone that employs the repression,

[17] Moreover, this is what those who find the idea of expiation unintelligible themselves recognize, for their conclusion is that, to be put in harmony with their doctrine, the traditional conception of punishment must be totally transformed and reformed from top to bottom. This is because it rests and has always rested upon the principle which they oppose. See Fouillée, *Science Sociale*, pp. 307 ff.

that is because it is attacked when individuals are, and the attack directed against it is repressed by punishment.

We can cite cases, however, where the execution of punishment depends upon the desires of particular people. In Rome, certain misdeeds were punished in a manner to profit the wronged party, who could renounce it or make it an object of compromise; such were robbery unseen, rapine, slander, damage unjustly caused.[18] These delicts, which were called private (*delicta privata*), were different from crime properly speaking, whose repression was pursued in the name of the city. We find the same distinction in Greece and among the Hebrews.[19] Among more primitive peoples punishment sometimes seems still more completely private, as the custom of the *vendetta* would seem to prove. These societies are composed of elementary aggregations of quasi-familial character, and are easily described by the word *clans*. But when an attack has been made by one or several members of a clan against another clan, it is the latter which itself punishes the offense to which it has been subjected.[20] What seemingly increases the importance of these facts is that it has very often been contended that the *vendetta* was primitively the unique form of punishment. But, then, it would have first consisted in acts of private venegeance. But if today society is armed with the right to punish, it can be, it seems, only because of a sort of delegation of individuals. It is only their representative. It guards their interest for them, probably because it guards them better, but these interests are not properly its own. According to this principle, they would avenge themselves. Now it is society which avenges them, but as penal law could not have changed its nature according to this simple transfer, there would be nothing social about it. If society appears to play a preponderant role in it, it is only as a substitute for individuals.

But, as common as this theory is, it is contrary to facts better

[18] Rein, *op. cit.*, p. 111.

[19] Among the Hebrews, robbery, violation of trust, abuse of confidence, and assault were treated as private delicts.

[20] See especially Morgan, *Ancient Society*, p. 76, London, 1870.

established. Not a single society can be instanced where the *vendetta* has been the primitive form of punishment. On the contrary, it is certain that penal law was essentially religious in its origin. It is an evident fact in India and Judea, since the law which was practiced there was considered revealed.[21] In Egypt, the ten books of Hermes, which contained the criminal law with all other laws relative to the government of the State, were called sacerdotal, and Élien affirms that, from earliest times, the Egyptian priests exercised judicial power.[22] The case was the same in ancient Germany.[23] In Greece, justice was considered as an emanation from Zeus, and the sentiment a vengeance from God.[24] In Rome, the religious origins of penal law are clearly shown both by old traditions,[25] and by archaic practices which persisted until a late date, and by the juridical terminology itself.[26] But religion is an essentially social phenomenon. Far from pursuing only personal ends, it exercises, at all times, a constraint upon the individual. It forces him into practices which subject him to small or large sacrifices which are painful to him. He must take from his goods the offerings that he is compelled to present to the divinity; he must take time from his work or play in which to observe rites; he must impose upon himself every sort of privation which is demanded of him, even to renounce life if the gods ordain. Religious life consists entirely in abnegation and disinterestedness. If, then, in primitive societies, criminal law is religious law, we can be sure that the interests it serves are social. It is their own offenses that the gods avenge by punishment and not those

[21] In Judea, the judges were not priests, but every judge was the representative of God, the man of God. (*Deuteronomy*, i, 17; *Exodus*, xxii, 28.) In India, it was the king who judged, but this function was regarded as essentially religious. (Manou, VIII, v, 303–311.)

[22] Thonissen, *Etudes sur l'histoire du droit criminel*, I, p. 107.

[23] Zoepfl, *Deutsche Rechtsgeschichte*, p. 909.

[24] "It is the son of Saturn," says Hesiod, "who has given justice to men." (*Works and Days*, V, 279 and 280.) "When mortals commit . . . wrong acts, Zeus in his wisdom metes out proper punishment." *Ibid.*, V, 266. Cf. *Iliad*, XVI, 384 ff.

[25] Walter, *op. cit.*, § 788.

[26] Rein, *op. cit.*, pp. 27–36.

of particular persons. But offenses against the gods are offenses against society.

Thus, in lower societies, the most numerous delicts are those which relate to public affairs; delicts against religion, against custom, against authority, etc. We need only look at the Bible, the laws of Manou, at the monuments which remain of the old Egyptian law to see the relatively small place accorded to prescriptions for the protection of individuals, and, contrariwise, the luxuriant development of repressive legislation concerning the different forms of sacrilege, the omission of certain religious duties, the demands of ceremonial, etc.[27] At the same time, these crimes are the most severely punished. Among the Jews, the most abominable attacks are those against religion.[28] Among the ancient Germans, only two crimes were punished by death according to Tacitus: treason and desertion.[29] According to Confucius and Meng-Tseu, impiety is a greater crime than murder.[30] In Egypt, the smallest sacrilege was punished by death.[31] In Rome, the height of criminality is found in the *crimen perduellionis*.[32]

But then, what of the private punishments of which we gave some examples above? They have a mixed nature and invoke at the same time the repressive sanction and the restitutive sanction. It is thus that the private delict of Roman law represents a sort of intermediary between crime properly called and the purely civil breach. It has traits of both and is marginal on the confines of the two domains. It is a delict in the sense that the sanction fixed by law does not simply consist in a restoration of things to their original state; the delinquent is forced not only to repair the damage he has caused, but he must also expiate the deed. But it is not completely a delict since, if it is society that metes out punishment, it is not society that is mistress of its application. It is a right that it confers on

[27] See Thonissen, *passim*.
[28] Munck, *Palestine*, p. 216.
[29] *Germania*, XII.
[30] Plath, *Gesetz und Recht in alten China*, pp. 69 and 70, 1865.
[31] Thonissen, *op. cit.*, I, p. 145.
[32] Walter, *op. cit.*, § 803.

the wronged party who alone freely exercises it.[33] Moreover, the *vendetta* is evidently a punishment which society recognizes as legitimate, but which it leaves to particular persons to inflict. These facts only confirm what we have said of the nature of penality. If this sort of intermediate sanction is in part a private thing, in the same degree it is not a punishment. The penal character is less pronounced as the social character is more effaced, and inversely. It is far from true that private vengeance is the prototype of punishment; it is, on the contrary, only an imperfect punishment. Far from attacks against persons being the first which were reprised, in origin they are only on the threshold of penal law. They are raised in the scale of criminality only as society is more fully distressed by them, and this operation, which we do not have to describe, is not reducible simply to a transfer. On the contrary, the history of this penality is only a continuous series of encroachments by society upon the individual, or rather on elementary groups that it contains within its scope, and the result of these encroachments is to displace individual law more and more by social law.[34]

But the above characteristics appertain quite as well to diffuse repression which follows simply immoral actions as they do to legal repression. What distinguishes legal repression is, we have said, that it is organized; but in what does this organization consist?

When we think of penal law as it functions in our own societies, we consider it as a code where very definite punishments are attached to equally definite crimes. The judge is given a certain latitude in the application to each particular case of these general dispositions, but in its essential lineaments, punishment is predetermined for each category of delictuous acts. This planned organization does not, however, constitute punishment,

[33] However, what accentuates the penal character of the private delict is that it implies infamy, a true public punishment. (See Rein, *op. cit.*, p. 916, and Bouvy, *De l'infamie en droit romain*, p. 35.)

[34] In every case, it is important to notice that the *vendetta* is an eminently collective thing. It is not the individual who avenges himself, but his clan. Later, it is to the clan or to the family that restitution is made.

for there are societies where punishment exists without being fixed in advance. There is in the Bible a number of prohibitions which are as imperative as possible, but which are not sanctioned by any expressly formulated punishment. There is no doubt about their penal character, for, if the texts are silent as to the punishment, yet they express such a horror of the act that we cannot for a moment suppose that it went unpunished.[35] There is every reason for believing, then, that this silence of the law comes simply from the undetermined nature of the repression. And, in effect, many instances in the Pentateuch teach us that there were acts whose criminal value was incontestable, yet whose punishment was established only by the judge who applied it. Society knew well enough that it was in the presence of a crime, but the penal sanction which should have been attached to it was not yet determined.[36] Moreover, even among punishments which are enunciated by the legislator, there are a great many which are not specified with precision. Thus, we know that there were different sorts of punishment which were not put on the same level, and moreover, in a great number of cases the texts speak only of death in a general manner, without saying what kind of death ought to be inflicted. According to Maine, the case was the same in primitive Rome; the *crimina* were prosecuted before the assembly of the people who fixed with their sovereign will the punishment according to a law, at the same time as they established the reality of the fact incriminated.[37] Besides, even until the sixteenth century, the general principle of penality "is that the application was left to the discretion of the judge, *arbitrio et officio judicis*. . . . Only, a judge was not permitted to invent punishments other

[35] *Deuteronomy*, vi, 25.

[36] "And while the children of Israel were in the wilderness, they found a man gathering sticks upon the sabbath day. And they that found him gathering sticks brought him unto Moses and Aaron, and unto all the congregation. And they put him in ward, *because it had not been declared what should be done to him.*" *Numbers*, xv, 32–34. Another time, it was a question of a man who had blasphemed against the name of the Lord. He was arrested, but they did not know what to do with him. Moses himself did not know and went to consult the Lord. (*Leviticus*, xxiv, 12–16.)

[37] *Ancient Law.*

than those which were customary."[38] Another result of this power of the judge was to make entirely dependent upon his judgment even the qualification of the criminal act, which, consequently, was itself not determined.[39]

It is not, then, in the regulation of punishments that the distinctive organization of this type of repression consists. It is, moreover, not in the institution of criminal procedure. The facts that we have just cited show quite well that that remained faulty for a long time. The only organization which meets us everywhere that there is punishment properly so called is that resident in the establishment of a tribunal. In whatever manner it is composed, whether it comprises all the people, or only a select number, whether or not it follows a regular procedure as much in the instruction of the affair as in the application of the punishment, because the infraction, instead of being judged by each, is submitted to the consideration of a constituted body, because the collective reaction has a definite organ as an intermediary, it ceases to be diffuse; it is organized. The organization will be more complete the moment it exists.

Punishment consists, then, essentially in a passionate reaction of graduated intensity that society exercises through the medium of a body acting upon those of its members who have violated certain rules of conduct.

Thus, the definition we have given of crime quite easily explains all these characteristics of punishment.

III

Every strong state of conscience is a source of life; it is an essential factor of our general vitality. Consequently, everything that tends to enfeeble it wastes and corrupts us. There results a troubled sense of illness analogous to that which we feel when an important function is suspended or lapses. It is then inevitable that we should react energetically against the cause that threatens us with such diminution, that we strain

[38] Du Boys, *Histoire du droit criminel des peuples modernes*, VI, p. 11.
[39] Du Boys, *ibid.*, p. 14.

to do away with it in order to maintain the integrity of our conscience.

In the first class of causes which produce this result, we must put the representation of a contrary state. A representation is not simply a mere image of reality, an inert shadow projected by things upon us, but it is a force which raises around itself a turbulence of organic and psychical phenomena. Not only does the nervous current which accompanies the ideation radiate to the cortical centres around the point where it originated and pass from one plexus to the next, but it gains a foothold in the motor centres where it determines movements, in the sensorial centres where it arouses images, sometimes excites beginnings of illusions and may even affect vegetative functions.[40] This foothold is as much more considerable as the representation is itself more intense, as the emotional element is more developed. Thus, the representation of a sentiment contrary to ours acts in us in the same sense and in the same manner as the sentiment for which it is a substitute. It is as if it had itself become part of our conscience. It has, in truth, the same affinities, although less lively; it tends to evoke the same ideas, the same movements, the same emotions. It sets up a resistance to the play of our personal sentiment and, accordingly, enfeebles it by directing a great part of our energy in an opposing direction. It is as if a strange force were introduced by nature to upset the free functioning of our psychic life. That is why a conviction opposed to ours cannot manifest itself in our presence without troubling us; that is because, at the same time, it penetrates us, and finding itself in conflict with everything that it encounters, causes real disorders. Of course, in so far as the conflict ensues only between abstract ideas, there is nothing disastrous about it, because there is nothing deep about it. The realm of ideas is at the same time the most elevated and the most superficial in conscience, and the changes which it undergoes, not having any extended repercussions, have only feeble effects upon us. But when it is a question of

[40] See Maudsley, *Physiologie de l'esprit*, tr. fr. p. 270.

a belief which is dear to us, we do not, and cannot, permit a contrary belief to rear its head with impunity. Every offense directed against it calls forth an emotional reaction, more or less violent, which turns against the offender. We inveigh against it, we work against it, we will to do something to it, and the sentiments so evolved cannot fail to translate themselves into actions. We run away from it, we hold it at a distance, we banish it from our society, etc.

We do not pretend, of course, that every strong conviction is necessarily intolerant. The current observation suffices to show the contrary. But external causes neutralize those whose effects we have just analyzed. For example, there can be a general sympathy between adversaries which sets bounds to their antagonism and attenuates it. But this sympathy must be stronger than this antagonism; otherwise it would not survive. Or else the two parties, face to face, turn from the conflict realizing that it solves nothing and content themselves with the retention of their former situations. They tolerate each other, not being able to conquer. The reciprocal tolerance which puts an end to religious wars is often of this nature. In all these cases, if the conflict of sentiments does not engender its natural consequences, that is not because it does not harbor them; it is because it is hindered in their production.

Moreover, they are useful as well as necessary. Besides arising from the causes producing them, they contribute to their maintenance. All violent emotions really appeal to supplementary forces which come to render to the attacked sentiment the energy which the contradiction extorts from it. It has been sometimes said that choler was useless because it was only a destructive passion, but that is to see only one of its aspects. In fact, it consists of a superexcitation of latent and disposable forces which come to the aid of our personal sentiment in the face of the dangers by re-enforcing them. In a state of peace, the sentiment is not sufficiently armed for conflict. It would be in danger of succumbing if the passionate reserves were not available at the desired moment. Choler is nothing else than

the mobilization of these reserves. It may even come about that the aid so evoked being more than needed, the discussion may have as its result the greater affirmation of our convictions, rather than their weakening.

But we know what degree of energy a belief or a sentiment can take solely because it is felt by the same community of men in relation with one another; the causes of this phenomenon are now well known.[41] Even as contrary states of conscience enfeeble themselves reciprocally, identical states of conscience, in exchanging, re-enforce one another. While the first detract, the second add. If anyone expresses before we do an idea which we have already thought of, the representation that we gain from it contributes to our own idea, superimposes itself, confounds itself with it, communicates to it whatever vitality it has. From this fusion grows a new idea which absorbs its predecessors and which, accordingly, is more vivid than each of those taken separately. That is why, in large assemblies, an emotion can acquire such violence. It is because the vivacity with which it is produced in each conscience has repercussions in all the others. It is not even necessary for us to experience a collective sentiment by ourselves, through our individual nature alone, for it to assume such an intensity for us, for what we add to it is after all a little thing. It suffices that we be not occupied refractorily to it, so that, penetrating from outside with a force that its origin gives it, it may impose itself upon us. Since, therefore, the sentiments which crime offends are, in any given society, the most universally collective that there are, since they are, indeed, particularly strong states of the common conscience, it is impossible for them to tolerate contradiction. Particularly if this contradiction is not purely theoretical, if it affirms itself not only by words, but by acts — when it is thus carried to its maximum, we cannot avoid rising against it passionately. A simple restitution of the troubled order would not suffice for us; we must have a more violent satisfaction. The force against which the crime comes is too intense to react

[41] See Espinas, *Sociétés animales, passim.*

with very much moderation. Moreover, it cannot do so without enfeebling itself, for it is thanks to the intensity of the reaction that it keeps alive and maintains itself with the same degree of energy.

We can thus explain a character of this reaction that has often seemed irrational. It is certain that at the bottom of the notion of expiation there is the idea of a satisfaction accorded to some power, real or ideal, which is superior to us. When we desire the repression of crime, it is not we that we desire to avenge personally, but to avenge something sacred which we feel more or less confusedly outside and above us. This something we conceive of in different ways according to the time and the place. Sometimes it is a simple idea, as morality, duty; most often we represent it in the form of one or several concrete beings: ancestors, divinity. That is why penal law is not alone essentially religious in origin, but indeed always retains a certain religious stamp. It is because the acts that it punishes appear to be attacks upon something transcendent, whether being or concept. It is for this very reason that we explain to ourselves the need for a sanction superior to a simple reparation which would content us in the order of purely human interests.

Assuredly, this representation is illusory. It is ourselves that we, in a sense, avenge, ourselves that we satisfy, since it is within us and in us alone that the offended sentiments are found. But this illusion is necessary. Since these sentiments have exceptional force because of their collective origin, their universality, their permanence, and their intrinsic intensity, they separate themselves radically from the rest of our conscience whose states are much more feeble. They dominate us; they are, so to speak, something superhuman, and, at the same time, they bind us to objects which are outside of our temporal life. They appear to us as an echo in us of a force which is foreign to us, and which is superior to that which we are. We are thus forced to project them outside ourselves, to attribute what concerns them to some exterior object. We

know today how partial alienations of personality thus come about. This mirage is so inevitable that, under one form or another, it will grow until a repressive system appears. For, if this did not follow, we would not need collective sentiments of more than mediocre intensity, and in that case there would no longer be such a thing as punishment. Shall we say that the error will dissipate itself as soon as men are conscious of it? But we hardly know that the sun is an immense globe; we see it only as a disc of a few inches. This information can teach us to interpret our sensations; it cannot change them. Besides, the error is only partial. Since these sentiments are collective it is not us they represent in us, but society. Thus, in avenging them, it is surely society and not ourselves that we avenge, and moreover, it is something superior to the individual. It is thus wrong for us to seize upon this quasi-religious character of expiation and consider it as a sort of parasitic hypostatization. It is, on the contrary, an integral element of punishment. No doubt, it expresses its nature in a somewhat metaphorical manner, but the metaphor is not without truth.

Moreover, we know that the penal reaction is not uniform in all cases since the emotions which determine it are not always the same. They are, in effect, more or less lively according to the vivacity of the offended sentiment, and also according to the gravity of the offense suffered. A strong state reacts more than a feeble state, and two states of the same intensity react unequally according as they are more or less violently opposed. These variations are produced of necessity, and, moreover, they have their uses, since it is right that the appeal of forces be related to the importance of the danger. Were they too feeble, it would be insufficient; too violent, it would be a useless loss. Since the gravity of the criminal act varies in relation to the same factors, the proportionality that we observe everywhere between crime and punishment establishes itself with mechanical spontaneity, without there being any necessity for making learned suppositions for its calculation. What gives crimes grades is also that which gives punishments grades. The

two scales cannot, consequently, fail to correspond, and this correspondence, to be necessary, must be useful at the same time.

As for the social character of this reaction, it comes from the social nature of the offended sentiments. Because they are found in all consciences, the infraction committed arouses in those who have evidence of it or who learn of its existence the same indignation. Everybody is attacked; consequently, everybody opposes the attack. Not only is the reaction general, but it is collective, which is not the same thing. It is not produced isolatedly in each one, but with a totality and a unity, nevertheless variable, according to the case. In effect, while opposite sentiments oppose each other, similar sentiments attract each other, and as strongly do they attract as they themselves are intense. As contradiction is an exasperating danger, it adds to their attractive force. Never do we feel the need of the company of our compatriots so greatly as when we are in a strange country; never does the believer feel so strongly attracted to his co-religionists as during periods of persecution. Of course, we always love the company of those who feel and think as we do, but it is with passion, and no longer solely with pleasure, that we seek it immediately after discussions where our common beliefs have been greatly combated. Crime brings together upright consciences and concentrates them. We have only to notice what happens, particularly in a small town, when some moral scandal has just been committed. They stop each other on the street, they visit each other, they seek to come together to talk of the event and to wax indignant in common. From all the similar impressions which are exchanged, from all the temper that gets itself expressed, there emerges a unique temper, more or less determinate according to the circumstances, which is everybody's without being anybody's in particular. That is the public temper.

Moreover, it alone has a specific use. In fact, the sentiments thus in question derive all their force from the fact that they

are common to everybody. They are strong because they are uncontested. What adds the peculiar respect of which they are the object is that they are universally respected. But crime is possible only if this respect is not truly universal. Consequently, it implies that they are not absolutely collective. Crime thus damages this unanimity which is the source of their authority. If, then, when it is committed, the consciences which it offends do not unite themselves to give mutual evidence of their communion, and recognize that the case is anomalous, they would be permanently unsettled. They must re-enforce themselves by mutual assurances that they are always agreed. The only means for this is action in common. In short, since it is the common conscience which is attacked, it must be that which resists, and accordingly the resistance must be collective.

It remains for us to say why it is organized.

This last character will be explained if we realize that organized repression is not opposed to diffuse repression, but is distinguished from it only by a difference of degree; the reaction has more unity. The very great intensity and the very definite nature of the sentiments which punishment properly so called avenges, clearly accounts for this more perfect unification. If the traversed state is feeble, or if it is traversed only feebly, it can only determine a feeble concentration of outraged consciences. On the contrary, if it is strong, if the offense is serious, the whole group attacked masses itself in the face of the danger and unites, so to speak, in itself. They no longer are content with exchanging impressions when they find the occasion, of approaching each other here or there according to chance or the convenience of meeting, but the agitation which has gradually gained ground violently pushes all those who are alike towards one another and unites them in the same place. This material contraction of the aggregate, while making the mutual penetration of spirits more intimate, also makes all group-movements easier. The emotional reactions of which each conscience is

the theatre are thus in most favorable condition for unification. If they were too diverse, however, whether in quality or in quantity, a complete fusion between these partially heterogeneous and irreducible elements would be impossible. But we know that the sentiments which determine them are very definite, and consequently very uniform. They participate in the same uniformity, and, accordingly, quite naturally lose themselves in one another, compounding in a unique resultant which serves as their substitute and which is exercised, not by each alone, but by the social body so constituted.

Many facts tend to prove that such was, historically, the genesis of punishment. We know that, in origin, the assembly of the people in their entirety functioned as the tribunal. If we look at the examples we just cited from the Pentateuch,[42] we shall observe these things as we have just described them. As soon as the news of a crime gets abroad, the people unite, and although the punishment may not be predetermined, the reaction is unified. In certain cases, indeed, the people themselves executed the sentence collectively as soon as it had been pronounced.[43] Thus, when the assembly became incarnated in the person of a chief, he became, totally or in part, the organ of penal reaction, and the organization guided itself conformably to the general laws of all organic development.

Thus, the nature of collective sentiments accounts for punishment, and, consequently, for crime. Moreover, we see anew that the power of reaction which is given over to governmental functionaries, once they have made their appearance, is only an emanation of that which has been diffuse in society since its birth. The one is only the reflex of the other. The extent of the first varies with that of the second. Let us add, moreover, that the institution of this power serves to maintain the common conscience itself. For it would be enfeebled if the organ which represents it did not partake of that which inspired

[42] See above, p. 95, footnote 36.

[43] See Thonissen, *Etudes*, etc. II, pp. 30 and 232. The witnesses of a crime sometimes play a preponderant role in the execution.

it and the particular authority that it exercises. But it cannot participate in it unless all the acts which offend it are opposed and combatted as those which offend the collective conscience, even though the collective conscience is not directly affected.

IV

Thus, the analysis of punishment confirms our definition of crime. We began by establishing inductively that crime consisted essentially in an act contrary to strong and defined states of the common conscience. We have just seen that all the qualities of punishment ultimately derive from this nature of crime. That is because the rules that it sanctions express the most essential social likenesses.

Thus we see what type of solidarity penal law symbolizes. Everybody knows that there is a social cohesion whose cause lies in a certain conformity of all particular consciences to a common type which is none other than the psychic type of society. In these conditions, not only are all the members of the group individually attracted to one another because they resemble one another, but also because they are joined to what is the condition of existence of this collective type; that is to say, to the society that they form by their union. Not only do citizens love each other and seek each other out in preference to strangers, but they love their country. They will it as they will themselves, hold to it durably and for prosperity, because, without it, a great part of their psychic lives would function poorly. Inversely, society holds to what they present in the way of fundamental resemblances because that is a condition of its cohesion. There are in us two consciences: one contains states which are personal to each of us and which characterize us, while the states which comprehend the other are common to all society.[44] The first represent only our individual personality and constitute it; the second represent the collective

[44] To simplify the exposition, we hold that the individual appears only in one society. In fact, we take part in several groups and there are in us several collective consciences; but this complication changes nothing with regard to the relation that we are now establishing.

type and, consequently, society, without which it would not exist. When it is one of the elements of this latter which determines our conduct, it is not in view of our personal interest that we act, but we pursue collective ends. Although distinct, these two consciences are linked one to the other, since, in sum, they are only one, having one and the same organic substratum. They are thus solidary. From this results a solidarity *sui generis*, which, born of resemblances, directly links the individual with society. We shall be better able to show in the next chapter why we propose to call it mechanical. This solidarity does not consist only in a general and indeterminate attachment of the individual to the group, but also makes the detail of his movements harmonious. In short, as these collective movements are always the same, they always produce the same effects. Consequently, each time that they are in play, wills move spontaneously and together in the same sense.

It is this solidarity which repressive law expresses, at least whatever there is vital in it. The acts that it prohibits and qualifies as crimes are of two sorts. Either they directly manifest very violent dissemblance between the agent who accomplishes them and the collective type, or else they offend the organ of the common conscience. In one case as in the other, the force that is offended by the crime and which suppresses it is thus the same. It is a product of the most essential social likenesses, and it has for its effect the maintenance of the social cohesion which results from these likenesses. It is this force which penal law protects against all enfeeblement, both in demanding from each of us a minimum of resemblances without which the individual would be a menace to the unity of the social body, and in imposing upon us the respect for the symbol which expresses and summarizes these resemblances at the same time that it guarantees them.

We thus explain why acts have been so often reputed criminal and punished as such without, in themselves, being evil for society. That is, just as the individual type, the collective type is formed from very diverse causes and even from fortuitous

combinations. Produced through historical development, it carries the mark of circumstances of every kind which society has gone through in its history. It would be miraculous, then, if everything that we find there were adjusted to some useful end. But it cannot be that elements more or less numerous were there introduced without having any relation to social utility. Among the inclinations and tendencies that the individual has received from his ancestors, or which he has formed himself, many are certainly of no use, or cost more than they are worth. Of course, the majority are not harmful, for being, under such conditions, does not mean activity. But there are some of them remaining without any use, and those whose services are most incontestable often have an intensity which has no relation to their utility, because it comes to them, in part, from other causes. The case is the same with collective passions. All the acts which offend them are not dangerous in themselves, or, at least, are not as dangerous as they are made out to be. But, the reprobation of which these acts are the object still has reason for existing, whatever the origin of the sentiments involved, once they are made part of a collective type, and especially if they are essential elements, everything which contributes to disturb them, at the same time disturbs social cohesion and compromises society. It was not at all useful for them to be born, but once they have endured, it becomes necessary that they persist in spite of their irrationality. That is why it is good, in general, that the acts which offend them be not tolerated.[45] Of course, reasoning in the abstract, we may well show that there is no reason for a society to forbid the eating of such and such a meat, in itself inoffensive. But once the horror of this has become an integral part of the common conscience, it cannot disappear without a social link being broken, and that is what sane consciences obscurely feel.[45]

[45] That does not mean that it is necessary to conserve a penal rule because, at some given moment, it corresponded to some collective sentiment. It has a *raison d'être* only if this latter is living and energetic. If it has disappeared or been enfeebled, nothing is vainer or worse than trying to keep it alive artificially

The case is the same with punishment. Although it proceeds from a quite mechanical reaction, from movements which are passionate and in great part non-reflective, it does play a useful role. Only this role is not where we ordinarily look for it. It does not serve, or else only serves quite secondarily, in correcting the culpable or in intimidating possible followers. From this point of view, its efficacy is justly doubtful and, in any case, mediocre. Its true function is to maintain social cohesion intact, while maintaining all its vitality in the common conscience. Denied so categorically, it would necessarily lose its energy, if an emotional reaction of the community did not come to compensate its loss, and it would result in a breakdown of social solidarity. It is necessary, then, that it be affirmed forcibly at the very moment when it is contradicted, and the only means of affirming it is to express the unanimous aversion which the crime continues to inspire, by an authentic act which can consist only in suffering inflicted upon the agent. Thus, while being the necessary product of the causes which engender it, this suffering is not a gratuitous cruelty. It is the sign which witnesses that collective sentiments are always collective, that the communion of spirits in the same faith rests on a solid foundation, and accordingly, that it is repairing the evil which the crime inflicted upon society. That is why we are right in saying that the criminal must suffer in proportion to his crime, why theories which refuse to punishment any expiatory character appear as so many spirits subversive of the social order. It is because these doctrines could be practiced only in a society where the whole common conscience would be nearly gone. Without this necessary satisfaction, what we call the moral conscience could not be conserved. We can thus say without paradox that punishment is above all designed to act upon upright people, for, since it serves to heal the wounds made upon collective sentiments, it can fill this role only where these

or by force. It can even be that it was necessary to combat a practice which was common, but is no longer so, and opposes the establishment of new and necessary practices. But we need not enter into this casuistical problem.

sentiments exist, and commensurately with their vivacity. Of course, by warning already disturbed spirits of a new enfeeblement of the collective soul, it can even stop attacks from multiplying, but this result, however useful, is only a particular counter blow. In short, in order to form an exact idea of punishment, we must reconcile the two contradictory theories which deal with it: that which sees it as expiation, and that which makes it a weapon for social defense. It is certain that it functions for the protection of society, but that is because it is expiatory. Moreover, if it must be expiatory, that does not mean that by some mystical virtue pain compensates for the error, but rather that it can produce a socially useful effect only under this condition.[46]

The result of this chapter is this: there exists a social solidarity which comes from a certain number of states of conscience which are common to all the members of the same society This is what repressive law materially represents, at least in so far as it is essential. The part that it plays in the general integration of society evidently depends upon the greater or lesser extent of the social life which the common conscience embraces and regulates. The greater the diversity of relations wherein the latter makes its action felt, the more also it creates links which attach the individual to the group; the more, consequently, social cohesion derives completely from this source and bears its mark. But the number of these relations is itself proportional to that of the repressive rules. In determining what fraction of the juridical system penal law represents, we, at the same time, measure the relative importance of this solidarity. It is true that in such a procedure we do not take into account certain elements of the collective conscience which, because of their smaller power or their indeterminateness, remain foreign to repressive law while contributing to the assurance of

[46] In saying that punishment, such as it is, has a *raison d'être*, we do not intend to suggest that it is perfect and incapable of betterment. It is very evident, on the contrary, that having been produced, in great part, by very mechanical causes, it can be but very imperfectly adjusted to its role. The matter is only a question of justification in the large.

social harmony. These are the ones protected by punishments which are merely diffuse. But the same is the case with other parts of law. There is not one of them which is not complemented by custom, and as there is no reason for supposing that the relation of law and custom is not the same in these different spheres, this elimination is not made at the risk of having to alter the results of our comparison.

CHAPTER THREE

ORGANIC SOLIDARITY DUE TO THE DIVISION OF LABOR

I

The very nature of the restitutive sanction suffices to show that the social solidarity to which this type of law corresponds is of a totally different kind.

What distinguishes this sanction is that it is not expiatory, but consists of a simple *return in state.* Sufferance proportionate to the misdeed is not inflicted on the one who has violated the law or who disregards it; he is simply sentenced to comply with it. If certain things were done, the judge reinstates them as they would have been. He speaks of law; he says nothing of punishment. Damage-interests have no penal character; they are only a means of reviewing the past in order to reinstate it, as far as possible, to its normal form. Tarde, it is true, has tried to find a sort of civil penality in the payment of costs by the defeated party.[1] But, taken in this sense, the word has only a metaphorical value. For punishment to obtain, there would at least have to be some relation between the punishment and the misdeed, and for that it would be necessary for the degree of gravity of the misdeed to be firmly established. In fact, however, he who loses the litigation pays the damages even when his intentions were pure, even when his ignorance alone was his culpability. The reasons for this rule are different from those offered by Tarde: given the fact that justice is not rendered gratuitously, it appears equitable for the damages to be paid by the one who brought them into being. Moreover, it is possible that the prospect of

[1] Tarde, *Criminalité comparée*, p. 113.

such costs may stop the rash pleader, but that is not sufficient to constitute punishment. The fear of ruin which ordinarily follows indolence or negligence may keep the negotiant active and awake, though ruin is not, in the proper sense of the word, the penal sanction for his misdeeds.

Neglect of these rules is not even punished diffusely. The pleader who has lost in litigation is not disgraced, his honor is not put in question. We can even imagine these rules being other than they are without feeling any repugnance. The idea of tolerating murder arouses us, but we quite easily accept modification of the right of succession, and can even conceive of its possible abolition. It is at least a question which we do not refuse to discuss. Indeed, we admit with impunity that the law of servitudes or that of usufructs may be otherwise organized, that the obligations of vendor and purchaser may be determined in some other manner, that administrative functions may be distributed according to different principles. As these prescriptions do not correspond to any sentiment in us, and as we generally do not scientifically know the reasons for their existence, since this science is not definite, they have no roots in the majority of us. Of course, there are exceptions. We do not tolerate the idea that an engagement contrary to custom or obtained either through violence or fraud can bind the contracting parties. Thus, when public opinion finds itself in the presence of such a case, it shows itself less indifferent than we have just now said, and it increases the legal sanction by its censure. The different domains of the moral life are not radically separated one from another; they are, rather, continuous, and, accordingly, there are among them marginal regions where different characters are found at the same time. However, the preceding proposition remains true in the great majority of cases. It is proof that the rules with a restitutive sanction either do not totally derive from the collective conscience, or are only feeble states of it. Repressive law corresponds to the heart, the centre of the common conscience; laws purely moral are a part less central; finally, restitutive law is

born in very ex-centric regions whence it spreads further. The more it becomes truly itself, the more removed it is.

This characteristic is, indeed, made manifest by the manner of its functioning. While repressive law tends to remain diffuse within society, restitutive law creates organs which are more and more specialized: consular tribunals, councils of arbitration, administrative tribunals of every sort. Even in its most general part, that which pertains to civil law, it is exercised only through particular functionaries: magistrates, lawyers, etc., who have become apt in this role because of very special training.

But, although these rules are more or less outside the collective conscience, they are not interested solely in individuals. If this were so, restitutive law would have nothing in common with social solidarity, for the relations that it regulates would bind individuals to one another without binding them to society. They would simply be happenings in private life, as friendly relations are. But society is far from having no hand in this sphere of juridical life. It is true that, generally, it does not intervene of itself and through its own movements; it must be solicited by the interested parties. But, in being called forth, its intervention is none the less the essential cog in the machine, since it alone makes it function. It propounds the law through the organ of its representatives.

It has been contended, however, that this role has nothing properly social about it, but reduces itself to that of a conciliator of private interests; that, consequently, any individual can fill it, and that, if society is in charge of it, it is only for commodious reasons. But nothing is more incorrect than considering society as a sort of third-party arbitrator. When it is led to intervene, it is not to put to rights some individual interests. It does not seek to discover what may be the most advantageous solution for the adversaries and does not propose a compromise for them. Rather, it applies to the particular case which is submitted to it general and traditional rules of law. But law is, above all, a social thing and has a totally different object than the interest of the pleaders. The judge who examines a request

for divorce is not concerned with knowing whether this separation is truly desirable for the married parties, but rather whether the causes which are adduced come under one of the categories foreseen by the law.

But better to appreciate the importance of social action, we must observe it, not only at the moment when the sanction is applied, when the troubled relation is adjudicated, but also when it is instituted.

It is, in effect, necessary either to establish or to modify a number of juridical relations which this law takes care of and which the consent of the interested parties suffices neither to create nor to change. Such are those, notably, which concern the state of the persons. Although marriage is a contract, the married persons can neither form it nor break it at their pleasure. It is the same with all the other domestic relations and, with stronger reason, with all those which administrative law regulates. It is true that obligations properly contractual can be entered into and abrogated solely through the efforts of those desiring them. But it must not be forgotten that, if the contract has the power to bind, it is society which gives this power to it. Suppose that society did not sanction the obligations contracted for. They become simply promises which have no more than moral authority.[2] Every contract thus supposes that behind the parties implicated in it there is society very ready to intervene in order to gain respect for the engagements which have been made. Moreover, it lends this obligatory force only to contracts which have in themselves a social value, which is to say, those which conform to the rules of law. We shall see that its intervention is sometimes even more positive. It is present in all relations which restitutive law determines, even in those which appear most completely private, and its presence, though not felt, at least in normal circumstances, is none the less essential.[3]

[2] And even this moral authority comes from custom, which is to say, from society.

[3] We must restrict ourselves to general indications, common to all the forms of restitutive law. Otherwheres will be found (Book I, ch. vii) numerous proofs

Since rules with restitutive sanctions are strangers to the common conscience, the relations that they determine are not those which attach themselves indistinctly everywhere. That is to say, they are established immediately, not between the individual and society, but between restricted, special parties in society whom they bind. But, since society is not absent, it must be more or less directly interested, it must feel the repercussions. Thus, according to the force with which society feels them, it intervenes more or less concomitantly and more or less actively, through the intermediary of special organs charged with representing it. These relations are, then, quite different from those which repressive law regulates, for the latter attach the particular conscience to the collective conscience directly and without mediation; that is, the individual to society.

But these relations can take two very different forms: sometimes they are negative and reduce themselves to pure abstention; sometimes they are positive and co-operative. To the two classes of rules which determine these, there correspond two sorts of social solidarity which we must distinguish.

II

The negative relation which may serve as a type for the others is the one which unites the thing to the person.

Things, to be sure, form part of society just as persons, and they play a specific role in it. Thus it is necessary that their relations with the social organism be determined. We may then say that there is a solidarity of things whose nature is quite special and translates itself outside through juridical consequences of a very particular character.

The jurisconsults distinguish two kinds of rights: to one they give the name real; to the other, that of personal. The right of property, the pledge, pertains to the first type; the

of this truth for the part of this law which corresponds to the solidarity which the division of labor produces.

right of credit to the second. What characterizes real rights is that only they give a preferential and successoral right. Thus, the right that I have in the thing excludes anyone else from coming to usurp what is mine. If, for example, a thing has been successively hypothecated to two creditors, the second pledge can in no wise restrain the rights of the first. Moreover, if my debtor alienates the thing in which I have a right of hypothecation, that is in no wise attacked, but the third party is held either to pay me or to lose what he has acquired. But for this to come about, it is necessary that the bond of law unite me directly and without the mediation of any other person to the thing determinate of my juridical personality. This privileged situation is, then, the consequence of the solidarity proper to things. On the other hand, when the right is personal, the person who is obligated to me can, in contracting new obligations, give me co-creditors whose right is equal to mine, and although I may have as security all the goods of my debtor, if he alienates them, they come out of my security and patrimony. The reason for this is that there is no special relation between these goods and me, but between the person of their owner and my own person.[4]

Thus we see what this real solidarity consists of; it directly links things to persons, but not persons among themselves. In a strict sense, one can exercise a real right by thinking one is alone in the world, without reference to other men. Consequently, since it is only through the medium of persons that things are integrated in society, the solidarity resulting from this integration is wholly negative. It does not lead wills to move toward common ends, but merely makes things gravitate around wills in orderly fashion. Because real rights are thus limited, they do not cause conflicts; hostility is precluded, but there is no active coming together, no consensus. Suppose an agreement of this kind were as perfect as possible; the society

[4] It has sometimes been said that the quality of fatherhood, that of son, etc. were the object of real rights. (See Ortolan, *Instituts*, I, p. 660.) But these qualities are only abstract symbols of divers rights, some real (right of father over fortune of his minor children, for example), others personal.

in which it exists — if it exists alone — will resemble an immense constellation where each star moves in its orbit without concern for the movements of neighboring stars. Such solidarity does not make the elements that it relates at all capable of acting together; it contributes nothing to the unity of the social body.

From the preceding, it is easy to determine what part of restitutive law this solidarity corresponds to: it is the body of real rights. But from the definition which has been given of them, it comes about that the law of property is the most perfect example of them. In effect, the most complete relation which can exist between a thing and a person is that which makes the former entirely dependent upon the latter. But this relation is itself very complex, and the different elements which go to make it up can become the object of many secondary real rights as well, such as usufruct, servitudes, usage, and habitation. We can then summarily say that real rights comprise the law of property in its different forms (literary, artistic, industrial, mobile, immobile) and its different modalities such as the second book of the French Civil Code regulates. In addition to this book, the French law recognizes four other real rights, but they are only auxiliary and eventual substitutes for personal rights: these are lien, pledge, gift, and hypothecation (articles 2071–2203). It is proper to add to them all that relates to the law of succession, wills, and, consequently, absence, since it creates, when declared, a sort of provisory succession. In effect, an inheritance is a thing or group of things in which the inheriting parties or the legatees have a real right, which may be acquired, *ipso facto* upon the decease of the owner, or may be available only by judicial act, as happens with indirect heirs and legatees of particular station. In all these cases, the juridical relation is directly established, not between one person and another, but between a person and a thing. The case is the same with testamentary donation, which is only the exercise of the real right which the owner has over his goods, or at least that portion of them which are disposable.

But there are relations of persons to persons which, though not real, are nevertheless as negative as the preceding and express a solidarity of the same nature.

In the first place, there are those which the exercise of actual real rights occasion. It is inevitable that the functioning of these should sometimes call forth the very persons of their detainers. For example, when a thing is added to another, the one who is reputedly owner of the first by that act becomes the owner of the second; only "he must pay to the other the value of the thing appropriated" (article 566). This obligation is evidently personal. Likewise, every owner of a separating wall who wishes to raise it must pay to the co-proprietor the loss accruing from the change (article 658). An individual legatee is obliged to address himself to the residuary legatee in order to obtain the deliverance of the thing bequeathed, although he may have the right to it from the death of the testator (article 1014). But the solidarity which these relations express does not differ from that of which we have just been speaking. They have been set up only to repair or prevent an injury. If the detainer of each real right could always exercise it without ever going beyond its limits, each would remain unto himself, and there would be no place for any juridical commerce. But, in fact, it endlessly happens that the different rights impinge on one another so that we cannot invoke one without encroaching upon others which limit it. For instance, the thing in which I have a right is found in someone else's hands; such is the case in a legacy. In another case, I cannot enjoy my right without harming some one else; such is the case with certain servitudes. These relations are then necessary in repairing wrong, if it has been done, or in preventing it; but there is nothing positive about them. They do not cause the people whom they put in contact with one another to concur; they do not demand any co-operation; but they simply restore or maintain, in the new conditions which are produced, this negative solidarity whose circumstances have troubled its functioning. Far from uniting, their task is rather to separate

what has been united through the force of things, to re-establish the limits which have been transgressed and replace each in its proper sphere. They are so well identified with the relations of a thing to a person that the codifiers did not make a place apart for them, but have treated them just as they treated real rights.

Finally, the obligations which arise from a delict or quasi-delict have exactly the same character.[5] In truth, they force each to repair the damage which his fault has caused to the legitimate interests of another. They are thus personal, but the solidarity to which they correspond is evidently wholly negative, since they consist, not in serving, but in not harming. The link whose break they sanction is altogether external. The only difference there is between these relations and the preceding is that, in one case, the break comes from a fault, and in the other, from circumstances determined and foreseen by the law. But the troubled order is the same; it results, not in concurrence, but in pure abstention.[6] Moreover, those rights whose violation gives rise to these obligations are themselves real, for I am owner of my body, of my health, of my honor, of my reputation, in the same respect and in the same manner as I own the material things which are mine.

In short, the rules relative to real rights and to personal relations which are established in their turn form a definite system which has as its function, not to attach different parts of society to one another, but, on the contrary, to put them outside one another, to mark cleanly the barriers which separate them. They do not correspond to a positive social link. The very expression of negative solidarity which we have used is not perfectly exact. It is not a true solidarity, having its own existence and its special nature, but rather the negative side

[5] Art. 1382–1386 of the French Civil Code. — One might join together here the articles on the repetition of the improper.

[6] The contracting party that fails to keep his engagements is, himself, held to indemnify the other party. But, in this case, the damage-interests serve as sanction with a positive link. It is not for having erred that the violator of the contract pays, but for not having carried out the stated promise.

of every species of solidarity. The first condition of total coherence is that the parties who compose it should not interfere with one another through discordant movements. But this external accord does not make for cohesion; on the contrary, it supposes it. Negative solidarity is possible only where there exists some other of a positive nature, of which it is at once the resultant and the condition.

In effect, the rights of individuals, as much in themselves as in things, can be determined only thanks to some compromise and some mutual concessions, for everything which is accorded to some is necessarily abandoned by the others. It has sometimes been said that we can deduce the normal extent of the development of the individual from the concept of human personality (Kant), or from the notion of the individual organism (Spencer). That is possible, although the rigor of the rationalizations may be very contestable. In any event, what is certain is that in historical reality it is not on these abstract considerations that the moral order has been founded. In fact, in order that man might recognize the rights of others, not only logically, but in the practical workaday world, it was necessary that he consent to limit his rights, and, consequently, this mutual limitation could be made only in a spirit of agreement and accord. But, if we suppose a multitude of individuals without previous links between them, what reason could there have been to induce them to make these reciprocal sacrifices? The need for living in peace? But peace by itself is not a thing more desirable than war. War has its interest and its advantages. Have there not been some peoples and, at all times, some individuals in whom it was a passion? The instincts to which it responds are not less strong than those which peace satisfies. Doubtless, fatigue can for a time put an end to hostilities, but this bare armistice cannot be more durable than the temporary lassitude which occasions it. The case is even stronger in respect of the conclusions due solely to the triumph of force; they are as provisory and precarious as the treaties which put an end to international wars. Men have

need of peace only as they are already united by some tie of sociability. In this case, the sentiments which incline them towards each other quite naturally moderate the urgings of egoism; and, from another standpoint, the society which envelops them, not being able to live except on condition of not being at every instant embroiled in conflicts, urges on them, and obliges them to make, necessary concessions.

It is true that we sometimes see independent societies agreeing to determine their respective rights over things, that is to say, their territories. But really, the extreme instability of these relations is the best proof that negative solidarity cannot alone suffice. If today, among cultivated peoples, it seems to have more force, if that part of international law which regulates what we might call the real rights of European societies has more authority than heretofore, it is because the different nations of Europe are much less independent of one another, because, in certain respects, they are all part of the same society, still incoherent, it is true, but becoming more and more self-conscious. What we call the equilibrium of Europe is a beginning of the organization of this society.

It is customary to distinguish carefully justice from charity; that is, simple respect for the rights of another from every act which goes beyond this purely negative virtue. We see in the two sorts of activity two independent layers of morality: justice, in itself, would only consist of fundamental postulates; charity would be the perfection of justice. The distinction is so radical that, according to partisans of a certain type of morality, justice alone would serve to make the functioning of social life good; generous self-denial would be a private virtue, worthy of pursuit by a particular individual, but dispensable to society. Many even look askance at its intrusion into public life. We can see from what has preceded how little in accord with the facts this conception is. In reality, for men to recognize and mutually guarantee rights, they must, first of all, love each other, they must, for some reason, depend upon each other and on the same society of which they are a part. Justice

is full of charity, or, to employ our expressions, negative solidarity is only an emanation from some other solidarity whose nature is positive. It is the repercussion in the sphere of real rights of social sentiments which come from another source. There is nothing specific about it, but it is the necessary accompaniment of every type of solidarity. It is met with forcefully wherever men live a common life, and that comes from the division of social labor or from the attraction of like for like.

III

If, from restitutive law, we take away the rules of which we have just spoken, what remains constitutes a system, no less definite, which comprises domestic law, contract-law, commercial law, procedural law, administrative law, and constitutional law. The relations which are regulated by it are of a totally different character from the preceding ones; they express a positive union, a co-operation which derives, in essentials, from the division of labor.

The questions which domestic law resolves can be put under two headings:

1. How are the different domestic functions assigned? What is it to be a husband, a father, a legitimate child, a guardian?

2. What is the normal type for these functions and their relations?

It is to the first of these questions that the dispositions respond which determine the qualities and conditions required to contract marriage, the necessary formalities for the validation of marriage, the conditions of legitimate filiation, natural and adoptive, and the manner in which a guardian must be chosen.

It is, on the other hand, to the second question that the chapters respond which govern the respective rights and duties of the couple, the state of their relations in case of divorce, annulment of marriage, separation from bed and board, the *patria potestas*, the effects of adoption, the administration of guardianship and its relation with the ward, the role of the

family council as against the first and the second, and the role of the relatives in cases of interdiction and judicial counsel.

Thus this part of civil law has for its object the determination of the manner in which the different familial functions are distributed, and what they ought to be in their mutual relations; that is to say, it expresses the particular solidarity which unites the members of a family in accordance with the division of domestic labor. It is true that we are not accustomed to view the family in this light. We believe, most often, that what brings about its cohesion is exclusively the community of sentiments and beliefs. There are, to be sure, so many things common to members of the familial group that the special character of tasks which devolve upon each of them easily escapes us. That is what made Comte say that the domestic union excluded "all thought of direct and continuous co-operation to a definite goal." [7] But the juridical organization of the family, of which we have just related the essential lines, shows the reality of these functional differences and their importance. The history of the family, from its very origins, is only an uninterrupted movement of dissociation in the course of which diverse functions, at first undivided and confounded one with another, have been little by little separated, constituted apart, apportioned among the relatives according to sex, age, relations of dependence, in a way to make each of them a special functionary of domestic society.[8] Far from being only an accessory and secondary phenomenon, this division of familial labor, on the contrary, dominates the entire development of the family.

The relation of the division of labor to contract-law is not less distinct.

In effect, the contract is, *par excellence*, the juridical expression of co-operation. There are, to be sure, contracts of benevolence, where only one of the parties is bound. If I give something unconditionally to somebody else, if I gratui-

[7] *Cours de philosophie positive*, IV, p. 419.

[8] For further consideration on this point, see Book I, ch. vii of this work.

tously take upon myself a trust or a commission, there result precise and determined obligations which I must perform. Properly speaking, however, there is no union between the contracting parties, since there are duties on one side only. But co-operation is not absent from the case; it is merely gratuitous or unilateral. What is a gift, for example, but an exchange without reciprocal obligations? These types of contracts are, then, only a variety of contracts truly co-operative.

Moreover, they are very rare, for it is very exceptional for acts of kindness to come under legal surveillance. As for the other contracts, which constitute the great majority, the obligations to which they give rise are correlative or reciprocal obligations, or events already effectuated. The involvement of one party results either from involvement assumed by the other, or from some service already rendered by the latter.[9] But this reciprocity is possible only where there is co-operation, and that, in its turn, does not come about without the division of labor. To co-operate, in short, is to participate in a common task. If this is divided into tasks qualitatively similar, but mutually indispensable, there is a simple division of labor of the first degree. If they are of a different character, there is a compound division of labor, specialization properly called.

This latter form of co-operation is, moreover, in great part, that which contract most generally expresses. The only one which has any other signification is the contract of society, and perhaps also the marriage-contract, in so far as it determines the contributive part of married people in the expenses of the household. Still, for this to be so, the contract of society must put all those associated on the same level, their shares must be identical, and their functions the same. Such a case is never exactly presented in matrimonial relations, in the conjugal division of labor. Over against these rare types, let us put the multiplicity of contracts which have as their object the adjustment of special, different functions to one another: contracts between buyer and seller, contracts of exchange, contracts

[9] For example, in the case of a loan at interest.

between employers and workers, between tenant and landlord, between lender and borrower, between depositary and depositor, between inn-keeper and traveler, between principal and agent, between the creditor and the security of the debtor. In general fashion, the contract is the symbol of exchange. Thus, Spencer has not without justice qualified as a physiological contract the exchange of materials which is made at every instant between the different organs of the living body.[10] Thus it is clear that exchange always presupposes some division of labor more or less developed. It is true that the contracts of which we have just been speaking still have a somewhat general character. But one must not forget that law deals only in generalities, in the great lines of social relations, those which are found identical in the different spheres of collective life. Thus, each of these types of contract implies a multitude of others, more particular, of which it is the common imprint and which it regulates in one sweep, but where the relations established are between very special functions. Thus, in spite of the relative simplicity of this scheme, it suffices to make clear the extreme complexity of the facts which it encompasses.

This specialization of function is, indeed, more immediately apparent in the commercial code which regulates, pre-eminently, the contracts special to business: contracts between commission-agent and principal, between carrier and shipper, between the holder of a letter of exchange and the drawer, between the owner of a ship and his creditors, between the first and the captain and crew, between the granter of a charter and the charterer, between the lender and the borrower in gross, between the insurer and the insured. Even here, however, there is a large gap between the generality relative to the juridical prescriptions and the diversity of the particular functions whose relations they govern, as the important place given to custom in commercial law amply proves.

[10] In his work on ethics.

When the commercial code does not regulate contracts properly speaking, it determines what certain special functions ought to be, as those of the agent of exchange, of the broker, of the captain, of the adjudicator in case of bankruptcy, in order to assure the solidarity of all the parties involved in the commercial field.

Procedural law — which takes care of criminal, civil, or commercial procedure — plays the same role in the judicial scheme. The sanctions of juridical rules of all sorts can be applied only thanks to the interplay of a certain number of functions, of magistrates, of defense counsel, of prosecutors, of jurors, of plaintiffs and defendants, etc. Procedure fixes the way in which they must come into play and relate themselves. It announces what they must be and what part each plays in the general life of the organ.

It seems to us that in a rational classification of juridical rules procedural law ought to be considered only as a variety of administrative law. We do not see any radical difference separating the administration of justice from the rest of administration. Whatever it may be in this view, administrative law, properly called thus, regulates functions badly defined as administrative,[11] just as the preceding does for judicial functions. It determines their normal type and their relations either one with another, or with the diffuse functions of society. We would only have to drop a certain number of rules which are generally put under this rubric, because they have a penal character.[12] Finally, constitutional law does the same thing for governmental functions.

Some may be astonished to see united in the same class administrative and political law and what we ordinarily call

[11] We are keeping the expression currently employed, but it will have to be defined, and we do not feel in position to do that. It seems to us, in the large, that these functions are those which are immediately placed under the action of governmental centres. But many distinctions would be necessary.

[12] And also those concerning the real rights of moral persons in the administrative order, for the relations they determine are negative.

private law. But, first of all, this unification imposes itself if we take as basis for the classification the nature of sanctions, and it does not seem to us possible to do otherwise if we wish to proceed scientifically. Moreover, in order completely to separate the two sorts of law, it would be necessary to admit that there is really a private law, whereas we believe that all law is public, because all law is social. All the functions of society are social, as all the functions of the organism are organic. Economic functions have the same character as the others. Moreover, even among the most diffuse, there are none which are not, in greater or lesser degree, under the supervision of action by governmental bodies. From this point of view, there is only a difference of degree between them.

To sum up: the relations governed by co-operative law with restitutive sanctions and the solidarity which they express, result from the division of social labor. We have explained, moreover, that, in general, co-operative relations do not convey other sanctions. In fact, it is in the nature of special tasks to escape the action of the collective conscience, for, in order for a thing to be the object of common sentiments, the first condition is that it be common, that is to say, that it be present in all consciences and that all can represent it in one and the same manner. To be sure, in so far as functions have a certain generality, everybody can have some idea of them. But the more specialized they are, the more circumscribed the number of those cognizant of each of them. Consequently, the more marginal they are to the common conscience. The rules which determine them cannot have the superior force, the transcendent authority which, when offended, demands expiation. It is also from opinion that their authority comes, as is the case with penal rules, but from an opinion localized in restricted regions of society.

Moreover, even in the special circles where they apply and where, consequently, they are represented in people, they do not correspond to very active sentiments, nor even very often

to any type of emotional state. For, as they fix the manner in which the different functions ought to concur in diverse combinations of circumstances which can arise, the objects to which they relate themselves are not always present to consciences. We do not always have to administer guardianship, trusteeship,[13] or exercise the rights of creditor or buyer, etc., or even exercise them in such and such a condition. But the states of conscience are strong only in so far as they are permanent. The violation of these rules reaches neither the common soul of society in its living parts, nor even, at least not generally, that of special groups, and, consequently, it can determine only a very moderate reaction. All that is necessary is that the functions concur in a regular manner. If this regularity is disrupted, it behooves us to re-establish it. Assuredly, that is not to say that the development of the division of labor cannot be affective of penal law. There are, as we already know, administrative and governmental functions in which certain relations are regulated by repressive law, because of the particular character which the organ of common conscience and everything that relates to it has. In still other cases, the links of solidarity which unite certain social functions can be such that from their break quite general repercussions result invoking a penal sanction. But, for the reason we have given, these counter-blows are exceptional.

This law definitely plays a role in society analogous to that played by the nervous system in the organism. The latter has as its task, in effect, the regulation of the different functions of the body in such a way as to make them harmonize. It thus very naturally expresses the state of concentration at which the organism has arrived, in accordance with the division of physiological labor. Thus, on different levels of the animal scale, we can measure the degree of this concentration according to the development of the nervous system. Which is to say that we can equally measure the degree of concentration

[13] That is why the law which governs the relations of domestic functions is not penal, although these functions are very general.

at which a society has arrived in accordance with the division of social labor according to the development of co-operative law with restitutive sanctions. We can foresee the great services that this criterion will render us.

IV

Since negative solidarity does not produce any integration by itself, and since, moreover, there is nothing specific about it, we shall recognize only two kinds of positive solidarity which are distinguishable by the following qualities:

1. The first binds the individual directly to society without any intermediary. In the second, he depends upon society, because he depends upon the parts of which it is composed.

2. Society is not seen in the same aspect in the two cases. In the first, what we call society is a more or less organized totality of beliefs and sentiments common to all the members of the group: this is the collective type. On the other hand, the society in which we are solidary in the second instance is a system of different, special functions which definite relations unite. These two societies really make up only one. They are two aspects of one and the same reality, but none the less they must be distinguished.

3. From this second difference there arises another which helps us to characterize and name the two kinds of solidarity.

The first can be strong only if the ideas and tendencies common to all the members of the society are greater in number and intensity than those which pertain personally to each member. It is as much stronger as the excess is more considerable. But what makes our personality is how much of our own individual qualities we have, what distinguishes us from others. This solidarity can grow only in inverse ratio to personality. There are in each of us, as we have said, two consciences: one which is common to our group in its entirety, which, consequently, is not ourself, but society living and acting within us; the other, on the contrary, represents that in us

which is personal and distinct, that which makes us an individual.[14] Solidarity which comes from likenesses is at its maximum when the collective conscience completely envelops our whole conscience and coincides in all points with it. But, at that moment, our individuality is nil. It can be born only if the community takes smaller toll of us. There are, here, two contrary forces, one centripetal, the other centrifugal, which cannot flourish at the same time. We cannot, at one and the same time, develop ourselves in two opposite senses. If we have a lively desire to think and act for ourselves, we cannot be strongly inclined to think and act as others do. If our ideal is to present a singular and personal appearance, we do not want to resemble everybody else. Moreover, at the moment when this solidarity exercises its force, our personality vanishes, as our definition permits us to say, for we are no longer ourselves, but the collective life.

The social molecules which can be coherent in this way can act together only in the measure that they have no actions of their own, as the molecules of inorganic bodies. That is why we propose to call this type of solidarity mechanical. The term does not signify that it is produced by mechanical and artificial means. We call it that only by analogy to the cohesion which unites the elements of an inanimate body, as opposed to that which makes a unity out of the elements of a living body. What justifies this term is that the link which thus unites the individual to society is wholly analogous to that which attaches a thing to a person. The individual conscience, considered in this light, is a simple dependent upon the collective type and follows all of its movements, as the possessed object follows those of its owner. In societies where this type of solidarity is highly developed, the individual does not appear, as we shall see later. Individuality is something which the society possesses. Thus, in these social types, personal rights are not yet distinguished from real rights.

[14] However, these two consciences are not in regions geographically distinct from us, but penetrate from all sides.

It is quite otherwise with the solidarity which the division of labor produces. Whereas the previous type implies that individuals resemble each other, this type presumes their difference. The first is possible only in so far as the individual personality is absorbed into the collective personality; the second is possible only if each one has a sphere of action which is peculiar to him; that is, a personality. It is necessary, then, that the collective conscience leave open a part of the individual conscience in order that special functions may be established there, functions which it cannot regulate. The more this region is extended, the stronger is the cohesion which results from this solidarity. In effect, on the one hand, each one depends as much more strictly on society as labor is more divided; and, on the other, the activity of each is as much more personal as it is more specialized. Doubtless, as circumscribed as it is, it is never completely original. Even in the exercise of our occupation, we conform to usages, to practices which are common to our whole professional brotherhood. But, even in this instance, the yoke that we submit to is much less heavy than when society completely controls us, and it leaves much more place open for the free play of our initiative. Here, then, the individuality of all grows at the same time as that of its parts. Society becomes more capable of collective movement, at the same time that each of its elements has more freedom of movement. This solidarity resembles that which we observe among the higher animals. Each organ, in effect, has its special physiognomy, its autonomy. And, moreover, the unity of the organism is as great as the individuation of the parts is more marked. Because of this analogy, we propose to call the solidarity which is due to the division of labor, organic.

At the same time, this chapter and the preceding furnish us with the means to calculate the part which remains to each of these two social links in the total common result which they concur in producing through their different media. We know under what external forms these two types of solidarity are

symbolized, that is to say, what the body of juridical rules which corresponds to each of them is. Consequently, in order to recognize their respective importance in a given social type, it is enough to compare the respective extent of the two types of law which express them, since law always varies as the social relations which it governs.[15]

[15] To make these ideas precise, we develop in the following table, the classification of juridical rules which is found implicit in this chapter and the preceding:

I. Rules with Organized Repressive Sanction

(A classification of these rules will be found in chapter five)

II. Rules with Restitutive Sanction Determining

- Negative or Abstentive Relations
  - Of the thing with the person
    - Law of property in its various forms (movable, immovable, etc.)
    - Various modalities of the law of property (servitudes, usufruct, etc.)
  - Of persons with persons
    - Determined by the normal exercise of real rights
    - Determined by the violation of real rights
- Positive Relations of Co-operation
  - Between domestic functions
  - Between diffuse economic functions
    - Contractual relations in general
    - Special contracts
  - Of administrative functions
    - Between themselves
    - With governmental functions
    - With diffuse functions of society
  - Of governmental functions
    - Between themselves
    - With administrative functions
    - With diffuse political functions