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SOCIOLOGY OF LAW—A STUDENT'S CONCEPT

The Anglo-American lawyer is inclined to restrain his interest to the legal order; he becomes a specialist in the decisions rendered by the courts. The attorney, unfamiliar with present day methodology of the social sciences, is easily bewildered by the writings and judicial decisions of the sociological jurist. Part of this bewilderment may be at once eliminated by distinguishing two concepts of "law." The lawyer may conceive of the law as "that which is backed by the force of politically organized society."¹ An inadequate amount of attention is directed toward the sources of law, its trends and its functions. Sociologists have a different meaning, and emphasize the functional phase of law. It is, they say, an institution of social control, an instrument in ordering human conduct. For its survival and betterment society uses law to control the individual. Sociologists have written of primitive societies which regulate their members without the support of any legal tribunals. Non-legal means of regulating the individual are by no means limited to primitive groups, but exist in all societies. These social controls are to be found in the United States of 1947, even though our country has developed a highly complex and extensive system of law. Thurman Arnold dramatically emphasized the importance of one such control: "It is therefore not the content of the governmental creed which molds institutions, but the imaginary personalities which make up the national mythology. . . . Let me designate the heroes of a nation and I care not who writes its constitution."² The Sociologist Gurvitch defines the law as an attempt to realize in a given social environment the ideas of justice through regulation based on a determined link between claims and duties.³

Many social controls function quite independently of the sanctions and force of politically organized society; other social controls are a part of the jurisprudence of a society. Sociology has been working with jurisprudence towards a better understanding of law and of what lies behind the phenomenon of legal order. Sociology is a study of the cultural patterns, social patterns, social symbols, and collective spiritual values and ideas in their functional relations with social structures. Ruth Benedict points out that a person's behavior can be understood only after comparing it with the whole social pattern; the single act in response to a situation has no meaning or definition when viewed alone. The Dobu Indian Chief was considered abnormal by the members of his society because he was ambitious.⁴ In the same way law is

1. Pound mentioned this narrow concept of law in his preface to Georges Gurvitch's *SOCIOLOGY OF LAW*, p. IX (1942).

2. ARNOLD, *FOLKLORE OF CAPITALISM* 34 (1937).

3. GURVITCH, *SOCIOLOGY OF LAW* 50-60 (1942).

4. BENEDICT, *PATTERNS OF CULTURE* (1934). The author observed the absence of rivalry and competition in the Dobu culture, an extreme contrast to present day culture of the United States. The possession of this character trait by a member of our culture is considered normal; in fact, a person not possessing ambition is considered abnormal.

only one aspect of social control, and when viewed alone the law has little meaning. An understanding of law requires not only a knowledge of legal principles, but also an understanding of the law as a part of social control, and in turn a comprehension of social control as a part of the whole cultural pattern. Schreier recognized the need for a more comprehensive view, thus: "The postulate of completeness in legal science can be met only by a complete grasp of social life as conditioned by law and by non-legal agencies whose activities play a decisive part in the control of an individual."⁵

Though an individual masters the principles of law and of social control, these alone do not afford him with a complete comprehension of jurisprudence. In 1748 Montesquieu wrote of various factors influencing the law: ". . . the rules of law are relative to the physical configuration of the country, whether the climate is glacial, torrid or temperate; to the quality of the terrain, its situation and size; to the type of life led by its people, whether they are tillers of the soil, hunters or herdsmen; . . . to the religion of the inhabitants; their inclinations, their wealth, their number, their commerce, their mores and their manners."⁶ Certainly this list was not considered by Montesquieu as an all inclusive one. For example, consider another potent influence, the distribution of wealth among the members of a society. Each enumerated factor has a different degree of influence on the various groups, depending upon the whole concrete situation and the beliefs of the society in question.

Economic doctrines have been a great influence on Anglo-American law; *laissez faire* was a strong mutative force on our law during the Nineteenth Century. Certain aspects of this doctrine of absolute economic freedom have been altered, and the most conspicuous change has been the limitation on the concept of contractual relations as a free accord between the individual wills of the bargaining parties. State legislatures have limited the extent of the rule's application as to contract law by means of statutes, which are mandatory on the contracting parties. Certain clauses, by statute, are made an integral part of insurance contracts though the bargaining parties make no mention of the provision in the written agreement. In fact, the statutes often provide binding restrictions on the insurer although the contract of insurance may be inconsistent with the legislative enactment. Many transactions, which are still called contracts, represent only adhesions to legal concepts, without will on the part of one of the contracting parties, e. g., contracts for labor, transportation contracts, and contracts for gas, water or electricity. Under the modified contractual law the contracting party possessing the superior bar-

5. Schreier, *Die Zukunft der Rechtswissenschaft* in JURISTISCHE BLÄTTER (Vienna), May 21, 1927, p. 147.

6. Translation may be found: GURVITCH, *SOCIOLOGY OF LAW* 76 (1942).

gaining power must accept the jural order imposed on him, which order he cannot modify.⁷

A specific illustration should be mentioned to show the power of economic forces to change a rule of law. It is a common belief of our society that a thief should not be allowed to deprive the true owner of his property. The true owner of stolen property is entitled to recover its possession though the property is held by one who purchased from the thief, the purchaser having paid the thief full value for the property without knowledge or suspicion of the theft. The doctrine of *caveat emptor* permitted the original owner to replevy the property when found, and so the buyer lost the property because the seller's title was defective. As a result, purchasers hesitated to buy property, realizing that it could be taken from them by an unknown holder of title. This hesitancy to purchase property retarded the free and expeditious exchange of goods, which exchange was considered essential to our modern system of high speed production. On the one hand, our common beliefs would not permit a thief to deprive a true owner of the right to recover his property by means of its sale to an innocent third party for value. On the other hand, our economic interests demanded that a good title be given to the innocent purchaser in order to expedite the flow of goods through the process of production. The rule of law, as applicable to negotiable instruments and negotiable documents of title, has been changed by statutes so that the purchaser of a note may obtain from the thief an interest which prevails over the claims of the original owner of the note.⁸

That the "official law" bows before social and economic pressure is shown in another way. The attempt to enforce federal prohibition laws ended in failure, and in their repeal.⁹ The mores¹⁰ of the American people were in conflict with the "official law" and, as expected, the mores prevailed. In a like manner any criminal statutes considered by society to be too severe will be meliorated or ignored by the judges, the prosecutors and the jurors.¹¹

Lawyers and judges are actively engaged in the application of the techniques of social control to concrete cases before them. Law is one of the agencies, or phases, of social control. Law is more formal and often more obvious, especially to the historian, than other institutions of social control such as the family, the church and religion, art, education and science. In

7. GURVITCH, *op. cit. supra* note 3, at 131.

8. NEGOTIABLE INSTRUMENTS LAW § 57. UNIFORM SALES ACT §§ 32, 38.

9. U. S. CONST. AMEND. XVIII as repealed by U. S. CONST. AMEND. XXI.

10. For a definition of mores see: SUMNER, *FOLKWAYS* 59-60 (1906).

11. *Time*, Oct. 6, 1947, p. 28, col. 1: "At Pikeville, Ky., Crawford Casebolt, a 13-year-old seventh-grader convicted of using a pistol to rob a man of an auto, a watch and \$4.84 in cash, was sentenced . . . 'to spend the rest of his natural life at hard labor,' the minimum sentence possible under Kentucky's armed robbery law."

Time, Nov. 3, 1947, p. 11, col. 1: "Crawford Casebolt has been paroled and is now at Boys Town."

modern society the trend is for law to become an increasingly more important means of social control. Dean Roscoe Pound noted that demand for the socialization of the law in this country has come almost wholly, if not entirely, from urban centers.¹² In the urban community the primary-group-controls of the play group, the family, and the neighborhood, have lost much of their influence. At the same time, effectiveness of the church and religion on the individual's behavior has declined. An attempt has been made to replace these weakened controls by means of laws, and laws multiplied by more laws. Growth of densely populated cities has brought about many mutations in the law. Apartment buildings and overcrowding of closely constructed houses have increased the density of population; such close living together demands a redefinition of human and property rights. The mutual interdependence of urban populations requires the downfall of existing rights. The general welfare of the community calls for the yielding of certain absolute, but minor, rights of the individual. City governments have effected changes in citizens' rights through their zoning laws, even though some cities have not yet enacted such ordinances. Zoning restrictions on real property prohibit such a use as would be detrimental to the owner and possessor of adjacent property.

A timely question remains to be answered by the sociologist of law: Has this multitude of laws been a successful substitute for the broken down social controls of our society? This phenomenal growth in the body of the law is the result of an attempt to replace by legal regulations other social controls, so deteriorated as to influence little the behavior of individuals in a society. The breakdown of primary groups has been most frequent in urban centers.¹³ A corollary of this deterioration of the family and the neighborhood has been a diminution of the influences of primary-group-controls over the social behavior of individuals. For example, the household has been replaced to no small extent by juvenile courts and courts of domestic relations.

At the insistence of sociologists and jurists there has been a development of two separate spheres of social science. The need for team play between law and sociology was recently recognized, and there has been increasing cooperation between them toward common objectives. Dean Pound, encouraged by recent developments in the sociology of law, wrote: "Perhaps the most significant advance in the modern science of law is the change from the analytical to the functional standpoint."¹⁴ The functional attitude requires that judges, jurists and attorneys keep in mind the relation between law and living social reality. The jurisprudence of the United States, developed during the existence of our pioneer agricultural society, must be adapted to our typically

12. POUND, *THE SPIRIT OF THE COMMON LAW* 129 (1921).

13. GIST AND HOLBERT, *URBAN SOCIETY* 306 (1945).

14. POUND, *Administrative Application of Legal Standards*, *PROCEEDINGS AMERICAN BAR ASSOCIATION*, 441, 449 (1919).

urban, industrial society of the Twentieth Century. During the past fifteen years there has been an encouraging trend in this country in that greater emphasis has been placed on the maximum satisfaction of collective needs and less concern is shown over the freedom of individual wills.

Law tends to be stable, fixed, and to lag behind the advances in our changing society. Our law developed in response to the demands of an agricultural society, but during the last six decades this country has experienced a rapid rate of urbanization. When the law is too inflexible, revolt is the inevitable result. Dean Pound considers our law quite flexible, and as an example he points to the law relating to the common carriers, which first developed during a transportation age of carrying goods and passengers by horses. In the last century this country has seen the development of the railroad, the truck, the automobile, and the airplane as means of transportation. Each new development has speeded up communication and the flow of merchandise. Our laws for the common carriers have been adapted to meet new demands made of them. Nevertheless, there has been a marked tendency for the law to lag behind our scientific and mechanical development. However, cannot this same indictment be brought against other social sciences? A society's law tends to lag noticeably behind its morality and philosophical thought. The latter ordinarily move ahead of law and are important factors in the mutations of law. Morality, by its structure, is more dynamic, more revolutionary, more mobile, more directed towards the future than is the law. By its nature law is more attached to traditional practices than to acts of innovation, more dependent on economic realities, and more associated with the balance of many forces than is morality. It should, however, be mentioned that the reverse situation is possible: that law may advance too far beyond the morality of a society. This phenomenon exists only during unusual circumstances, such as the last phases of a revolution or during major legal reforms when legislative measures surpass the morality which helped to demolish the old law. Such anticipations of law over morality generally provoke reactionary behavior. This occurrence has been so extremely common during the late stages of revolution that counter revolution has been considered as just another phase of a revolutionary era.¹⁵

On numerous occasions the courts of law have been severely criticized for following precedent. At this time, we should consider the three arguments of Justice Cardozo in support of the courts' practice of following the rulings made by them in previous decisions involving similar fact situations. "Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right."¹⁶ Knowing

15. *Revolution and Counter Revolution*, 7 ENCYC. SOC. SCI. 367-376 (1931).

16. Mr. Justice Brandeis, dissenting in *Burnet v. Colorado Oil and Gas Co.*, 286 U. S. 406 (1932).

that the court will follow the rules established by its previously decided cases, a decision furnishes a norm to guide our conduct. His second argument is that court adjudications are used to define and determine the scope of various interests in property when the ownership rights have been divided. It is essential that the grantor know the legal effect that will be given to the phraseology used in his conveyance; the purchaser will hesitate to buy or develop property which may be burdened with an insecure title and with a risk of loss of his investment. Cardozo's third argument in support of *stare decisis* is as follows: If a group of cases involve the same point of law, the parties expect the same decision by the court. It would be a gross injustice to decide alternate cases on opposite principles. If a case was decided against me yesterday when I was defendant, I shall look for judgment in my favor today when I am plaintiff. To decide differently would be an infringement of my rights.¹⁷ Adherence to precedent must be the rule rather than the exception if litigants are to have faith in the administration of justice in the courts.¹⁸

A well-justified criticism of the courts has been that jurists have in times past allowed words to have finality *per se*, tending to identify the techniques of law as ends rather than means, so that Justice Cardozo was prompted to write: "A fruitful parent of injustice is the tyranny of concepts."¹⁹ Thurman Arnold devoted two books to a clarification of our confused thinking which resulted from our devotion to words and symbols.²⁰ Georges Gurvitch noted that the sociologists, too, were addicted to symbolism, and wrote that "the doctrines of Sociological positivism, naturalism, behaviorism and formalism have been destructive to the development of sociology, as well as the sociology of law."²¹

There is a widening gulf between traditional law and the reality of law; this is a problem of our epoch. The jural formulas have proved themselves incapable of capturing the flow of real life. There is a constant need for legal innovation, but this step should not be taken without calling in the sociology of law. Sociology is often absent from legal education and never occupies the place to which it is entitled; and we find that the jurists have given birth to sociological jurisprudence in this country.

During the last century a high degree of specialization has developed within the professions, particularly in the fields of education, medicine, and law. Problems have arisen as a result of this specialization. As an example, medical research has been, of necessity, confined largely to the laboratory and the

17. MILLER, *THE DATA OF JURISPRUDENCE* 335 (1903).

18. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 34 (1921).

19. CARDOZO, *PARADOXES OF LEGAL SCIENCE* 61 (1920); *cf.* *Hynes v. New York Central Ry. Co.*, 231 N. Y. 229, 131 N. E. 898, 900 (1921).

20. ARNOLD, *THE SYMBOLS OF GOVERNMENT* (1935); ARNOLD, *FOLKLORE OF CAPITALISM* (1937).

21. GURVITCH, *op.cit. supra* note 3, at 14.

practicing physician must rely on research centers for the development of technical analysis and scientific advancement. Specialization has been less extensive, but nevertheless exists in the legal profession. A troublesome problem resulting from specialization in the professions is the viscosity and paucity of communication between practitioner and research center.

In the specialization of law, there appear to be three main categories: those of the practitioner, the sociologist, and the philosopher. The practitioner of jurisprudence is no less than a social engineer. He is in close contact with the facts of life. He must constantly revise his ideas and remold his theories to meet the fact situations to which they apply. To the practitioner are entrusted the problems of application, and the use of techniques in fitting the principles to concrete cases. It is the function of the legal philosopher to give to the practitioner the criterion of jural values which aid in attaining concrete goals. The sociologist of law contributes for the use of the jurists an objective description of the social reality of law, valid in a given milieu. The work of the sociologist stops with the objective meanings, with the study of chances of probability and chances of social behavior. The verification of the objectivity of these meanings, it should be remembered, belongs to the philosopher of law. Successful coordination of sociologists' and jurists' functions was illustrated by Justice Cardozo in his lectures, *The Nature of the Judicial Process*.²² It was in 1907 that the highest court of New York declared unconstitutional the statute forbidding night work for women.²³ Eight years later, with a fuller knowledge based on investigations of social workers, the New York court held a like statute to be reasonable and valid.²⁴

If judges have misinterpreted the mores of their day, or if the mores of an earlier day are no longer those of today, those decisions ought not to tie the hands of their successors. History and precedent is only one of the departments of knowledge available to the judges and lawyers for their information, inspiration and decision. Justice Cardozo's view is that the "judicial process," in the main, reveals a conflict between two groups of interests: on the one hand, the social interests in the uniformity, the security and the predictability of the law; and on the other hand, the social interests in equity and fairness of the immediate social interests presented by each controversy. How is the judge to know when one interest outweighs the other? The answer is obtained from knowledge, study, reflection and from experience on the bench; in brief, from life itself.

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22. William L. Storrs Lecture Series, 1921, before the Law School of Yale University; CARDOZO, *NATURE OF THE JUDICIAL PROCESS* 81 (1921).

23. *People v. Williams*, 189 N. Y. 131, 81 N. E. 778 (1907).

24. *People v. Schweinler Press*, 214 N. Y. 395, 108 N. E. 643 (1915).