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The Creative Power and Function of Law in Historical Perspective

Harry W. Jones*

I.

The creative work of legislators, administrators, judges, and practicing lawyers is far more than a "response" to social change. Throughout recorded history, law itself has been one of the greatest of the forces of social change. Change and stabilization are, as Donald Young has reminded us, part of the same social process, and law is at the heart of that process.¹

Let us concede, and readily, that the command theories of law embodied in the writings of Bodin, Hobbes, and Austin exalted unduly the pervasiveness of law's imperatives as the controlling influence on the behavior of men in society. At times these writers seem almost to be proceeding on a conclusive presumption that men in society do only and whatever the law's imperatives tell them to do in every activity of their lives—as if the tragedy of Antigone had never been written or the battles of resistance to laws deemed "unjust" never fought.

By contrast, historical jurists like Savigny, and later institutional jurisprudents like Ehrlich, over-corrected the error of the imperative theory and conveyed an equally one-sided impression of the reciprocal relation between law and social change. They and their successors, in effect, come close to reading the legal imperative out of the party as a molding influence on social development. Social institutions are seen as "arising spontaneously" in society—not by leave of the law—and social developments viewed as phenomena somehow insulated and apart from direction or influence by law. This notion of law happens, as Professor Markham has made clear,² to fit in with certain *laissez faire* theories of a limited role for law-government in society, according to which the course of social development is not to be "managed" but left to private persons, and law is to assume only the minimum functions of maintaining public order, settling disputes,

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1. Young, *The Behavioral Sciences, Stability, and Change*, 17 VAND. L. REV. 57, 58-59 (1963).

2. Markham, *Economic Aspiration and Method*, 17 VAND. L. REV. 29 (1963).

and, at most, adjusting conflicts of social interest as these conflicts arise in an otherwise undirected society.

The fact of the matter is that law, and certainly the law of our own tradition, has not been content with this minimum role, and has never been a mere bystander in the process of social change. I need no remote historical examples here, for the wider role of law is sufficiently demonstrated in our own history. The Constitution of the United States and, perhaps even more strikingly, the work of John Marshall and his colleagues in the formative period of American constitutional law, reflect a bold confidence that Americans could, through the power of law, cast their political and economic institutions in accordance with a known and sought design. Alexander Hamilton, the principal architect of our economic structure, viewed American resources in this purposeful way, and, on his example, federal law was used to create the conditions necessary for the encouragement of American industry and trade. Similarly in the several states, during the early and crucial decades of American political development, the power of law was employed, as Willard Hurst has demonstrated, "to help determine priorities among competing uses of our scarce working capital"³ and otherwise to transform an essentially agrarian society into a developed economic community.

The history of labor-management relations in England and later in the United States is similarly a chronicle of the successive uses of law as an instrument of sought change. In the early stages, statutes of laborers and court decisions threw the power of law against the rise of unions of workmen and in favor of individual, man-to-man negotiations between employer and employee ("master and servant," an older era would have called them). As labor organizations increased in respectability and political power, the use of law as a support to the management side was restricted by statute after statute—one thinks of the Norris-La Guardia Act⁴—and ultimately, in the 1930's, Section 7(a) of the National Industrial Recovery Act,⁵ and its successor the Wagner Act,⁶ for the first time put the power of law affirmatively on the side of labor's right to organize. These successive legal interventions were more than "response" to changing labor-management relations; they were themselves the crucial force in making labor unions and labor-management relations what they are today. If society is dissatisfied with these creations of law, correction will have to come from law and not from impersonal social forces. If

3. HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH CENTURY UNITED STATES* 53 (1956).

4. 47 Stat. 70 (1932), 29 U.S.C. §§ 101-15 (1958).

5. Ch. 90, § 70(a), 48 Stat. 195 (1933).

6. 49 Stat. 449 (1935), as amended, 29 U.S.C. §§ 151-66 (1958).

further illustrations were needed of law as a force of social change, I would suggest that the enactment and expansion of social security legislation has had a more profound influence on American social institutions and attitudes than anything that has arisen "spontaneously" in society in my time or in yours. Social security, one might say, is Merrimon Cuninggim's "ethical aspiration"⁷ given life and substance by law.

When issues of grave public concern are at stake, law's intervention must be forward-looking and well timed. Mr. Marden's address⁸ was sufficient warning that there are occasions when law cannot wait until a social institution or a societal pattern has become hardened and irreversible. Many failures of law in recent history, as for a century with the problem of compensation for industrial accidents, have been situations in which law took indecisive or temporizing action until society was committed to an unsound solution. In our own time, as Mr. Wohlstetter brought home to this conference by his roll call of "inspiring and terrifying" technological possibilities,⁹ we face urgent problems of this character with respect to the economic, social, and international dislocations that will accompany the march of automation and the more widespread use of atomic energy for peaceful industrial purposes. If these developments proceed undirected by society through its governmental instrument, the law, we may be faced with economic *faits accomplis*—undue concentrations of economic power, feather-bedding gone wild—and the task of picking up the pieces will be long and troublesome. Folk wisdom says that it is usually easier to scramble eggs than to unscramble them, and legal history provides powerful confirmation of the proposition.

Thus, as Walter Gellhorn made clear in his fine address,¹⁰ there is always need for the legal equivalent of preventive medicine, for decisive action in advance of perceived contingencies, lest the legal order be left with painful and conceivably hopeless tasks of legal surgery—like those undertaken in the antitrust laws. It is as misdescriptive to describe law's relation to social change in "response only" terms as it would be to characterize Winston Churchill's wartime leadership as a mere "response" to Hitlerism or to describe the New Deal of the 1930's as a "response," and nothing more, to the economic problems of the great American depression.

7. Cuninggim, *Forces of Change: Ethical Aspirations*, 17 VAND. L. REV. 41 (1963).

8. Marden, *The Lawyer's Response to the Demand for Both Stability and Change Through Law*, 17 VAND. L. REV. 125 (1963).

9. Wohlstetter, *Technology, Prediction, and Disorder*, 17 VAND. L. REV. 1-3 (1963).

10. Gellhorn, *Legislative and Administrative Response to Demand for Change*, 17 VAND. L. REV. 91, 92-93 (1963).

Legal philosophers have written almost too much about the influence of societal attitudes and community morality on the content of law's prescriptions and have given too little attention to the ways in which the maintenance of law powerfully influences community attitudes and institutions. Whatever the merits may be on the long-standing jurisprudential debate concerning the supposed "separation" of law and morality, the imperatives of the legal order carry at least *prima facie* ethical rightness to most members of the community. To the ordinary citizen at least, the law does indeed, as Blackstone put it, "command what is right and forbid what is wrong."

More often than not, a legal principle, resolutely enforced, becomes a kind of self-fulfilling prophesy and creates the social attitudes necessary for its acceptance. I shall always remember Sir William Holdsworth's insistence, many years ago, that it is absurd to talk of the influence of the "British character" on the common law without giving at least equal stress to the many ways in which the maintenance of the common law influenced and shaped the "British character." We may, some day, have an example of this, by way of a delayed reaction to the Supreme Court's 1954 decision in *Brown v. Board of Education*,¹¹ at least in such border states as Missouri, Kansas, Kentucky and—shall I say?—Tennessee. On the day after the *Brown* decision, the consensus in the border states was doubtless that the decision was unfortunate in result but still binding on the states as a matter of constitutional obligation. Today there are signs of a slowly emerging consensus that school desegregation is not only a binding legal imperative but was and is a sound moral decision. When law's creative power is fully engaged, it can work in a wondrous way to accomplish "the affirmative stimulations of correct conduct,"¹² as Walter Gellhorn described it this morning.

But law's contribution to community morality cannot always be entered on the credit side of the ledger. Professor Pye suggested some red ink entries in his discussion of the harmful effect of certain Western law ideas on the cultures of Asia and Africa.¹³ Because of widespread popular identification of the legally imperative with the morally right, law, when it goes wrong, can bring about the malformation of community institutions and the degradation of community morality. Historians have recorded the disastrous contribution of unsound Roman land law to the decline of the sturdy peasant-proprietor on whom the greatness of republican Rome was built. "*Latifundia perdidere Italiam*" is the classic appraisal, and the lesson is of sharp contemporary rele-

11. 347 U.S. 483 (1954).

12. Gellhorn, *supra* note 10, at 100.

13. Pye, *Law and the Dilemma of Stability and Change in the Modernization Process*, 17 VAND. L. REV. 15 (1963).

vance to our friends in Latin America. The great English law reformers vividly described the effect that savage criminal punishments in England were having on prevailing societal attitudes concerning the sanctity of human life. We are aware, too, of the blighting effects on eighteenth and nineteenth century public morality here and abroad of brutal poor laws and callous treatment of the mentally ill. If these examples were not bad enough, we have seen in our own day the brutalization of the German character by the barbarous Nazi race laws. How easy it is to pass from "I must do this because the law commands it" to "This must be right because the law commands it!"

Those of us who in any way—as lawmakers, judges, administrators, practicing lawyers, or scholars—influence the exercise of law's creative power and function must be ever mindful that no other social institution has so profound an educational influence, for social good or for social ill. Justice Traynor, I suggest, may have been an even more influential *educator* during the past twenty-three years than he would have been had he continued as Professor Traynor. Our unfriendly competitors on the other side of the Iron Curtain are far more sharply aware than we of law's full potential for public education and public indoctrination. But we have unique resources on our side. Throughout the history of the common law, citizen participation in the processes of law-government, as by petition and jury service, has augmented law's educational influence. Let us be sure that the lessons taught by law are the right lessons and that we do not lightly discard the techniques that have made law more effective, as an instrument of public education, in the common-law countries than anywhere else in the world.

II.

"Law must be stable and yet it cannot stand still."¹⁴ As I interpret this theme sentence of our conference, and the corpus of Dean Pound's great work, Pound is saying more than that stability and change are both values—and sometimes conflicting ones—of the legal order. The broader truth, with which Dean Pound would surely agree, is that law cannot be stable, in any effective sense, *if* it stands still. Society changes, typically faster than law. Law's function is the ordering of life in the real world; its imperatives become a dead language when they are no longer relevant to contemporary needs and conditions. Technological advances, population trends, what Philip Selznick called the waning influence of the family and other non-legal controls¹⁵—these and kindred forces keep society forever on the move, and law must move with the society it serves.

14. POUND, *THE PATH OF LIBERTY* 1 (1950).

15. Selznick, *Non-Legal Social Controls*, 17 *VAND. L. REV.* 79, 82 (1963).

Law loses its power and abdicates its ordering function when it loses touch with the dynamics of social life. In aggravated situations, as when the essential rules of a whole legal system are outmoded and the body of ordinary people denied effective opportunity to change them, uncompromising opposition to change can lead to political revolution and so to the loss of all stability in the society. The stubbornly held legal privileges of the *ancien regime* were prime causes of the French Revolution. Outmoded Czarist law of land and persons created at least the atmosphere for the Russian Revolution, and we have seen this more recently in the contribution of the Batista regime to the rise of Castro.

These revolutionary "responses" are the more spectacular, but for us the more remote, incidents in the continuing problem of adjusting yesterday's law to today's society. The less dramatic, but for us more important, point is that archaic law will not long be observed law and is destined to become dead letter. Such legal prescriptions may be "stable" in the sense that they remain unchanged in theoretical content, but they make no contribution whatever to the ordered stability of the society that has passed them by. To borrow Judge Traynor's happy phrase—"the number they have called is no longer in service."¹⁶

Again the historical illustrations are legion. Consider, for example, the privileges of the "established" church in colonial Virginia, after religious diversity had become a feature of colonial society. No dissenting preacher paid attention to these outmoded laws. No prosecutor in his right mind moved to enforce them, not, in any event, after Patrick Henry's triumph with the jury in the Parson's Cause. This had happened, a few generations before, with the laws of blasphemy and criminal libel in England. It had happened with respect to questioning by torture and trial by ordeal throughout most of Europe long before the archaic laws were formally removed from the statute books. It was to happen in America with the Fugitive Slave Law. It happens in our own day with antique statutes prohibiting certain out-of-the-ordinary forms of sexual behavior. No one runs to the barricades, no one presses to repeal the outmoded laws; they are rescinded as "living law" by non-observance.

As we take a look around, we are uncomfortably aware of certain important areas of social control or concern in which undue insistence that law remain unchanged has meant that law's stability has become that of the butterfly immobilized in amber. This is true, perhaps most strikingly, of the divorce laws in many states, where divorce only for adultery survives as a formal legal norm for a generation in which

16. Traynor, *Better Days in Court for a New Day's Problems*, 17 VAND. L. REV. 109, 123 (1963).

attitudes toward the indissolubility of the marriage bond have changed drastically, and it has become unthinkable that a man or woman of decent manners would charge the other partner publicly with physical infidelity. Indeed, the more rigidly a state's law in the books adheres to divorce only for adultery, the more closely its law in action comes to approximate carefully engineered divorce by mutual consent for those able to afford it. This is abdication by law of its social stability role; in an area of grave social concern, the rule of law has become inoperative.

Similarly, procedural inflexibilities in commercial litigation have ushered in an age of arbitration in which the reasoned principles of hundreds of years of common-law experience are coming to have only peripheral influence on the settlement of commercial controversies and, as Orison Marden has reminded us,¹⁷ even on business counselling in serious matters. Elsewhere in the legal order, the manifest incongruousness of applying horse-and-buggy negligence law to the mass production problem of contemporary automobile accident compensation has brought it about that the classic law of torts, as explained in the schools and in appellate decisions, is applied in but one case in a thousand. The "living law" of automobile accident compensation is, for most of our citizens, the largely unsupervised practice of insurance company settlement. Whatever our estimate of the fairness of these settlements, we are disturbed that the distribution of loss resulting from the operation of motor vehicles is not, in any effective way, within the governance of law.

In the few accident cases that ever go to trial, juries simply will not act as existing legal imperatives would have them act. They proceed according to varying laymen's versions of absolute liability or comparative negligence, and the judges who preside over their deliberations are bitterly or resignedly aware, as they preside over the formal ritual, how far the performance is from the authoritative script—and, perhaps, how intolerable it would be for society if jurymen did, indeed, take their instructions seriously.

This I suggest, is the certain fate of the law of the Medes and Persians. It changeth not, and nobody seems too inconvenienced by its intransigence to change because nobody pays any attention to the outmoded law in the books. But these developments are damaging to the integrity of law, because public cynicism towards all phases of the legal order is inevitable when practice and preachment bear little similarity, and because, in default of proper and workable law, decisions of profound importance to society and its members are inched out lawlessly. Decision according to common sense may be a little

17. Marden, *supra* note 8, at 129-30.

better than decision according to outmoded law, but decision according to just and workable standards is the goal of the legal order, and those of us who believe in the rule of law demand more for our legal institutions than the meaningless stability of a dead language. Contemporary theology is superbly sensitive to the continuing need for redefinition and reconstruction if a faith is to retain its vitality in new situations. Perhaps we have as much to learn from Maritain, Buber, and Niebuhr as from Bentham, Holmes, and Hand about how faith in law is to be preserved in a changing society.

III.

Change in law is always accomplished at a certain irreducible cost. Old Jeremy Bentham put "security," in the sense of security of expectations, at the very first place in his hierarchy of legal values, and he was entirely right in this ranking. In any society, and particularly in a socioeconomic system as complex as ours, men must be able to plan their future conduct with reasonable assurance that the rules will not be changed after a commitment or investment is made, and the provision of this assurance has throughout history been one of the major tasks of law and lawyers. As a corollary proposition, a certain appearance of inequality sets in when factually similar cases are decided differently, within a short period of time, because of intervening change in the applicable law, and this does violence to a high strategic requirement that justice must not only be done but must also appear to be done. We have the warnings of Aristotle and Thomas Aquinas that the observance of law is achieved largely through "habit," and that undue change in legal rules may deprive law of the precious support of moral obligation and make law enforcement a matter of pure coercion. Finally, and most significant of all, unconsidered change in fundamental law, as in a constitution or long maintained organic statute, may undermine the public consensus on which a nation's entire legal order is built.

These reasons for stability have seemed so compelling to men of law that there is a whole armory of essential legal ideas and institutions imposing limitations on the pace and substantive reach of legal change. To safeguard significant expectations there are constitutional provisions, like the guarantee against impairment of the obligation of contracts, and significant rules of judicial policy, like the presumption, in statutory construction, that an act is not to have retrospective operation. Our basic common-law doctrine of precedent, interpreted in present context, is both a buttress for stability and a way for responsible change. Our tradition that a judicial decision must be reasoned and supported by a written opinion makes it necessary that

new legal departures be announced, explained, and justified. The basic public consensus to which I have referred is safeguarded against unconsidered tinkering with fundamentals by specific constitutional limitations fixing the essential organization of government and putting certain rights of the individual beyond interference by holders of government power.

But these limitations, important as they are, simply put a few outer bounds on the task of accommodation of the competing demands of stability and change. What have we learned, over the centuries of legal experience, as to how this inevitable task of accommodation can best be performed? One thing we have learned is that compromise, the splitting of a bitterly held difference, is an indispensable technique when new and pressing social claims come into conflict with more or less vested interests reflected in the older law. Compromise may be a term of derogation to some ethical philosophers and to a few fundamentalist theologians, but it is the only way in which conflicting interests can be reconciled and so it is the way of wisdom for the law-maker.

We have learned, too, the great value, in legal provisions designed for the long pull, of "the rule that automatically adjusts to change."¹⁸ John Marshall set the tone for American constitutional law when he said: "We must not forget that it is a *constitution* we are expounding,"¹⁹ but the course of creative interpretation of the Constitution would have been far harder if its essential concepts had not been broad enough in formulation to permit reinterpretation in the light of social change, and the pouring of urgently needed new wine into our cherished old bottles. Similarly, our most durable statutory and case law rules are those formulated in standards like "unjustly enriched" or "reasonably prudent man," which, in a sense, adjust painlessly to change and permit realistic re-interpretation. Indeed, men of law have built room for change into the most basic of legal institutions, as witness the leeway for creative reconstruction provided by the broadly drafted codes of civil law countries and by traditional common-law techniques authorizing judicial choice and discretion in the following or distinguishing away of case precedents.

To be sure, there are recurring problems, still unresolved, in the accommodation of the competing demands of stability and change. Some of these old problems are of urgent contemporary significance. One comes to mind at once. As a matter of distribution of political power within the society, *who* does the changing, praetor or assembly, king

18. Kripke, *The Principles Underlying the Drafting of the Uniform Commercial Code*, 1962 U. ILL. L.F. 321, 322.

19. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

or parliament, or, in modern dress, appellate court or legislature? Or this: Shall change, particularly when accomplished by judicial decision, be open or concealed? Is there a case for mystery in legal decision-making, that is, for the justification of new decisions in terms that obscure the fact of change and give the impression to the unlearned that no new wine has really been poured into the old bottle? Is the hidden ball trick a legitimate and necessary judicial device, so that the citizenry, as a whole, will not be disillusioned about "a government of laws and not of men"? These are important problems, on which there is much to be said on both sides, and I would not prejudge them or attempt to offer final answers in the few minutes that remain to me.

Law's newer problem—and opportunity—concerns the role of the new sciences of society in the process of accommodating the demands of change with the need for legal stability. Donald Young²⁰ and Philip Selznick²¹ spoke so well about this this morning that I cannot resist improvising a footnote of my own to what they said. Law, in a way, has been a technology in search of a pure science, as medicine was until the development of the life sciences, and as industrial technology was before the development of physics and chemistry. Now we have the new sciences of society—still in their infancy perhaps, but mighty articulate infants if we are to judge by Messrs. Young and Selznick—and we have not yet worked out the ways and means of our collaboration. How can lawmakers, judges, and practicing lawyers draw on the insights and methods of the social sciences to achieve a better understanding of social needs and aspirations, to learn with greater reliability when a long-standing legal rule is no longer acceptable in society and has lost vitality as a social imperative? Above all, since the best of lawmaking requires an imaginative projection into the future, how can the behavioral sciences help the man of law make his best guess as to what social conditions will be in the future and as to the possible effects a new legislative variable may have on the total social situation? We cannot further maintain what Donald Young described as the "self segregation" of the legal profession.

It is many years now since Cardozo began his discussion of stability versus change with the mournful observation: "They do things better with logarithms."²² They do, indeed, and I suggest that this is because the task of the architect or the bridge builder is easier than the task of the builder of law. I am weary of being asked, as all lawyers are asked, why progress in law is so much slower in this century than

20. Young, *supra* note 1.

21. Selznick, *supra* note 15.

22. CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* 1 (1928).

progress in the natural sciences, in industrial technology, and in medicine. We court trouble, I think, when we refer incautiously to the "science" of law. As Edwin Patterson has demonstrated,²³ scientific method, even the scientific analogy, has only limited applicability in matters of law and government. Men and communities cannot be confined in experimental laboratories for convenient manipulation of control conditions. Law's laboratories must be abstract constructs, and law's experiments forever "imaginary," as Cardozo called them. But there is more to it than the unavailability of experimental method. Law must choose between values that are not susceptible to quantitative measurement, and there is a political factor to be taken into account in plotting the course of law development, for popularly elected legislators must approve major changes in the legal order. It is as if a new scientific hypothesis, agreed to by the learned and informed, could not be acted on until some popular assembly is first convinced of its ground and promise. Bruno and Galileo had problems of this character, but contemporary natural scientists—unless they venture into weaponry—have none of the political difficulties that concern the law reformer. And, above all, law has the unique task—or shares it with theology and no other discipline—that it must build on accepted foundations, grow within a living tradition, and be forever mindful that change is not net gain, but always purchased at some cost to stability.

The task is endless and endlessly difficult. Law, by its nature and function, is both a science and an art, and the university law schools to which the task of lawyer training is committed must instill in their students both the discipline and hard-mindedness of the natural scientist at work in his own field—for many scientists are notoriously woolly when they move into fields other than their own—and the boldness and piercing perception that transform a good technician into an artist. For, and this is another story into which the addresses at this conference tempt me, we have before us not only unfinished business at home but business virtually unbegun abroad, the dedication of all we know about the creative power and function of law to the great task of transforming historical international conventions into a law for oppressed and insecure contemporary mankind.²⁴

Law as a "heritage" meets both the requirements stated by Merriam Cuninggim:²⁵ it is experience, and it is faith. The record of law in society, by and large, has been a pretty good try, yet hardly such as

23. PATTERSON, *LAW IN A SCIENTIFIC AGE* 24-26 (1963).

24. Here, as elsewhere in this article, I am indebted to FRIEDMANN, *LAW IN A CHANGING SOCIETY* (1959), especially chapter 14, "Social Organization and International Law." See also my *Law and the Idea of Mankind*, 62 *COLUM. L. REV.* 753 (1962).

25. Cuninggim, *supra* note 7, at 50.

to convince us that men of law are worthy of the greatest assignment of our time. But law is our business and our faith, and the way of law is the only way there is. With "patience, flexibility and intelligence,"²⁶ and with confidence in certain still untapped resources of law's creative power, let us be about our—and our Father's—business.

26. Wohlstetter, *supra* note 9, at 13 (quoting Von Neumann).