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# Keeping the Law Alive

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In an address to the Chicago Bar Association in 1916, Mr. Brandeis chose as his subject what he was pleased to term "The Living Law." We may borrow that term in briefly discussing the obligation of the law to the living present; the duty of keeping current with the problems with which it attempts to deal; of marching *pari passu* with the life it assumes to control. Of the nature of that control it is elsewhere said:

"Within the range of its assumed control over human conduct, the law touches humanity in almost every phase of its aspiration, motivation, and achievement. It traces with authority the intricate lines which define human relations, determines within them the ambit of the individual and of society. It may, and it does, fix the minimum of social duty and the maximum of social adventure."[1]

The public is prone to regard a court whose decisions fail to reflect the prevailing tempo of social advance and demand as reactionary. Much has been said and written about the social "lag" between the courts and the progress they are called upon to serve, the frontiers where decisional factors are supposed to lie. Perhaps the criticism has no justification in many cases where in its hesitant advances society has not consolidated its conquered territory—so stabilized itself in the new adventure as to reflect the mores to which the courts must pay some deference in readjusting the law, or in the making of new rules. But that there may be such a "lag," not attributable to the commendable conservatism of the courts, and one which in the area of its incidence may greatly impede, if not deny, justice must be conceded.

The Brandeis address was a plea for "social justice" and an arraignment of the existing law: "The law has everywhere a tendency to lag behind the facts of life." Later, in 1926, Justice Cardozo, doubtless impressed with the same slackness, and rightly divining some of its causes, suggested a Ministry of Justice, whose office should be advisory to the courts. We follow, for the moment, the episodical movement relating to these more distinctly social demands.

Through the awakened conscience of the people, or because of the intensive demands of politically important pressure groups, as you like to have it, revolutionary changes were brought about in national legis-

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[1] UNIVERSITY OF NORTH CAROLINA SESQUICENTENNIAL PUBLICATIONS: A STATE UNIVERSITY SURVEYS THE HUMANITIES, p. 175 (1945).

lation and in the attitude of the courts toward the humanistic element in the conduct and incidence of industry, commerce, business, employment, and service. The struggle has been in the field of contract and employment, and remains there. The commerce clause of the Federal Constitution, always a fertile field for legal exploitation, has been extended and re-extended in the Wage and Hour Law, and its interpretation, until, in a recent case in the United States Supreme Court, the late Chief Justice Stone in a dissenting opinion described the build-up, or the rationale of the main opinion as reminiscent of "the house that Jack built."[2] That phase of social justice enormously advanced in recognition under favorable Congressional action and tenuously drawn court interpretation.

Today, however, under the menace of another sort of social experience, spelled out in the alphabet of cold, hunger, and economic collapse, the Congress is constrained to re-examine the subject, and presumably the courts may later be called on to decide whether social justice may not have another side, hitherto ignored. Labor has been given the wings of Icarus and has flown too near the sun.

But meanwhile, in the Supreme Court of the United States both Justice Cardozo and Justice Brandeis, in the epoch-making liberality of their opinions, expanded the basis of judicial interpretation, bringing into it new concepts of government with respect to the use of property, new definitions of public interest, new distinctions as to absolute and relative rights, and in all these respects greatly revitalized and enlarged the judicial function.

"Social justice," always an intriguing and glamorous expression, is too narrow in its ordinary connotation to indicate the broad basis of the demand for rapprochement between the law and the subject of its control, or the extent of the field in which the propriety of the demand is so often manifested. Any failure of the law to respond, in the amplitude of its service, to the growth of society and its multiplied activities in relations not so obviously humanistic, is certain to impede the flow of justice through the courts and diminish the security of both the individual and society. In this larger aspect of the subject we may encourage a study and appraisal of the work of the courts in keeping the law up to date. The "lag" is still there for those who look for it, and, unfortunately, for some who do not.

[2] Borden v. Borella, 325 U. S. 679, 685 (1945): "No doubt there are philosophers who would argue, what is implicit in the decision now rendered, that in a more complex modern society there is such interdependence of its members that the activities of most of them are necessary to the activities of most others. But I think that Congress did not make that philosophy the coverage of the Fair Labor Standards Act. It did not by the 'house that Jack built' chain of causation bring within the sweep of the statute the ultimate *causa causarum* which result in the production of goods for commerce."

Society is not wholly destroyed by any one court decision. Only the litigant parties are candidates for that distinction. It licks its wounds and carries on. Fortunately only a small number of transactions pass through the clearinghouse of the courts, or to put it otherwise, become pathological and reach the clinic. In contract men learn the hard way that contracts are made to live by, not to law by; they arbitrate, compromise, agree. In negligence the contending parties at least know the rules of the game and do battle on the unequal ground afforded them by the court.

Fortunately, in preserving the social pattern, the law has an ally in one of the strongest social forces known to the race: The urge to conformity; the tendency inherent in man which recognizes a teleological purpose in life constantly lifting it upward; which, incidentally, argues for the same teleological purpose in the law. "It isn't done," is a sanction for correct behavior with an unnumbered multitude who never come within the toils of the law. We may be thankful that when the thing which some regard as our distant progenitor dragged himself out of the ocean and attempted to stand upright, he was surrounded by his fellows. Otherwise he might have crawled back again into the deep.

I would not attempt to minimize the enormous influence of law in controlling the conduct of men. This, however, is due more to the standards it sets up than to its menace; and the respect paid to the courts is, therefore, in proportion to the recognized integrity of their decisions.

The responsibility of keeping the law current in its more immediate application to the affairs of life, in matters not purely of local concern, rests with the legislature or the courts, or both, in accordance with their respective powers and the propriety of their exercise when the occasion arrives. Of the two, because of the "first aid" principle as an administrational necessity, emphasis on responsibility, and sometimes priority, must carry the initiative to the courts. There are other reasons. The law in the hands of the judge is more delicately poised, more flexible, more expertly adjusted; is more readily responsive to the axiom *ex facto jus oritur*. The convincing reason, however, is that the field in which the need for adjustment is more often felt, instances which advertise the existing inadequacy of out-moded rules most frequently encountered, is peculiarly and traditionally that of the court—the field of judge-made law.

Broadly speaking, we assign to the legislative body the care of substantive law and to the judiciary what we distinguish as adjective law. The distinction is not so finely drawn nor is the division of authority so institutionally established as to be exclusive. Judges have had immensely to do with the substantive structure of the common law, and,

under a constitution of limitations rather than one of grants, the legislature may make any law which is able to run the gauntlet of the courts of last resort. However, the legislature seldom intervenes in the field of law peculiarly assigned to the courts unless the judiciary itself has expressed a *non possumus;* and there can be no justifiable reason for declaring such inability on the ground that the rule is of long standing unless it has become a rule of property, tolerated or protected under the doctrine stare decisis. Otherwise it is the fault of the court in whose hands revision has been too long overdue.

Resentment against "judicial legislation" is illogical when it challenges authority. The challenge becomes significant only when the judge-made law is oppressive, or when, in passing upon the constitution or statute, the court has violated all reasonable rules of construction and has set up a substitute rule which destroys the intended purpose and impairs an outstanding right.

The inevitability of the judicial process in the genesis and development of law is a fact which carries with it its own responsibility: wise use of the power and initiative in its exercise.

The constitutions of many states have a provision similar to ours which requires that the legislative, executive, and supreme judicial powers of the government shall be kept separate and distinct from each other.[3] Paradoxically, this provision itself is a proper subject of judicial construction. That construction must be made in the light of history and with an understanding of the indestructible nature of the judicial function, wherever the accepted form of government contemplates the distribution of justice under law—the adjustment of remedy to right through judicial investigation. It does not exclude the courts from their partnership with constitutional conventions and recognized legislative bodies in building up the great body of our law.

Of necessity we attribute to the judges the function of interpretation and construction. Construction of the written law, as we are sometimes surprisingly reminded, is only a special instance of interpretation. Interpretation broadly describes the office of the judge and imports into that office the character of lawgiver, no matter whether the law is derived from some well-known outer field or a source more obscure.

Courts make the law in both a real and technical sense. Indispensable to any definition of law as an enforceable rule of human conduct is the element of *authority,* the thing which enables it to take toll of person, liberty, or property. Whether the rule goes back to Napoleon or Justinian, Christ, Moses, Hammurabi, or, at the dead end of precedent, is just plucked "out of the blue," it becomes law when officially pronounced or applied under the imprimatur of some agency of the government

[3] N. C. CONST., Art. 1, §8.

clothed with jurisdictional power. A supreme appellate court is such an agency, holding its sessions continuously or when occasion requires, and constantly weaving its patterns at every sitting. Since *Marbury v. Madison,*[4] and similar decisions in all the states[5] of the Union in which the power is assumed by the courts to lay the acts of the legislature against the background of the constitution and declare them void when they offend, and in turn interpret the constitution, there is practically no ceiling above the supreme appellate court other than that which an informed conscience inclines it to accept.

The recall of judicial opinion, once advocated by a celebrated chief justice of our own supreme court, has been, on occasion, indirectly practiced by our own legislature, as will be seen in the annotations of some of our earlier decisions. But the legislature has not at all times been happy in its attempts to wrest primacy from a department which always has the "last say." Several provisions of the North Carolina Constitution, notably Article V, Section 3, requiring that tax shall be levied only for a public purpose, and Article VII, Section 7, providing that municipalities shall not levy a tax except for a necessary purpose, have practically vested in the courts a sort of hegemony over certain aspects of social progress which they have exercised with commendable caution, but sometimes under suspicion of creating the social lag to which I have referred.[6]

Such is the power of the court and such the domain of its exercise.

While they have a few letters of the alphabet in common, the words "power" and "propriety" do not mean the same thing. Conceding that the galaxy of the law has many coal sacks in which guiding luminaries shine but feebly, if at all, and that there is not infrequently the necessity of judicial resort to discretionary devices in the act of innovation, it is not conceivable that within that field judges should have a desire to play their deuces wild, or indulge their ideologies, or parade the personal equation. Nevertheless, the initiative is theirs; they must carry the ball when presented to them.

All lawgivers would like to hand down the perfect law, to preserve in it the essentials of truth, beauty, symmetry that run through visible nature and the invisible abstractions of art; to exemplify the ethos, the thing that makes us glad that when the Council of the Immortals met to plan nature, Dali and Picasso were not on the board. That has been the dream of would-be lawmakers from time immemorial. It was no

[4] 1 Cranch 137 (U. S. 1803).

[5] In Bayard v. Singleton, 1 N. C. 5, 1 Martin 48 (1787), North Carolina may have priority in declaring the authority of the appellate court to hold a statute void for unconstitutionality. And see the concurring opinion of Justice Iredell in Calder v. Bull, 3 Dall. 386, 398 (U. S. 1798).

[6] Purser v. Ledbetter, 227 N. C. 1, 40 S. E. 2d 702 (1947).

doubt in the mind of John Locke when he wrote the Constitutions of the Carolinas—hopelessely ideal and ideally hopeless. The inspiration toward perfection should never be forgotten even when the necessity of the moment leaves the impress of asymmetry on the work. But lawmakers have the mores to consider, because a democratic government cannot go far outside of the norm fixed by the genius of the people in establishing its standards. The law cannot be perfect while the subject to which it is functionally related is yet imperfect; and when that perfection is attained there will be no need for law. Law and life must grow together toward perfection. The steady, stabilizing office of the law during this progress of normal growth is inseparable from the theory of distributive justice, discriminating regard for the human factors to which that growth is accredited, and those who may be affected by its changing conditions. And in that direction lies the duty of the judge both to the law and to those in whose behalf it is invoked.

Justice Cardozo, writing in *The Nature of the Judicial Process,* clearly portrays the obligation of the law to the mores; its origin in experience and its adoption after multiplied instances have exemplified its necessity or commended its propriety. Justice Holmes also refers the origin of the law to experience.[7] In both of these discussions there is a suggestion of the method of trial and error in both the law and the social movements which inspire it. But it is to be noted that these treatises deal with the subject philosophically and objectively, without special reference to the exigencies we are now considering. We can readily appreciate the vastness of experience in the age-long conflict and attrition out of which have emerged the permanent institutions on which our liberties depend, and they should be inviolate. But during the centuries that developed and crystallized the common law and equity jurisprudence, it seems to me the necessity for a living law must have been felt as it is today and the timely response made to that end must, by accretion, have contributed largely to the building of the institutions we now so greatly admire, and on which we confidently repose. I especially regret that Justice Cardozo did not have more to say about the time element in the acceptation and adoption of legal principles, and the importance of their application while the rights under review are still outstanding. That pertains, perhaps, more properly to a discussion of judicial duty. However, to rights which die while the law is seasoning there is no *nunc pro tunc* relief. Addison, I think it is, wrote a delightful story of the courtship of Methuselah which lasted during some

[7] "The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellowmen, have had a good deal more to do than the syllogism in determining the rules by which men should be governed." HOLMES, THE COMMON LAW.

centuries and finally culminated in happy marriage. Now life is shorter, moves on faster wings, is more crowded with pregnant incident.

The practical question is whether, when those responsible for the law have accumulated sufficient data on social movements and social needs and have adjusted and compared them into a reasonable rule of law, and after society has already had its fling, leaving a path paved with unavenged injustice, broken hopes, ruined fortunes, it is not too late. No law can be predicated upon an autopsy of society.

We may look at the achievements of past civilizations, which in many respects outrivaled ours, and at the jurisprudence which may have had a part in regression and downfall, and say, "there should have been a law." It is more useful and dynamic to say, "there should be a law," and make it or find it in the bosom of an able and upright judge.

Natural physical law may only be a description of the behavior of natural bodies. But when the apple ceases to fall, the pendulum to swing, and the planets to revolve in their orbits, the laws concerning them, I do not doubt, will be written off the books of God. Human laws may reflect behavior, and even contemplate its continuance or repetition in pattern, but unlike physical laws they do not describe behavior, they mold it. Law is a compelling force which weeds out aberrant factors from intelligent human conduct in its relation to the social complex. It is an exigent question how long it must remain in the cloister.

The limitation on immediate action by the court in any particular case is that it must do justice under law and not under a sudden inspiration of equity felt under the impact of the special incident. The judge cannot abolish rules in the particular case and substitute for them the conscience and discretion of the judge. However well that worked in the days of Samuel, it is not in our system today. Wigmore, in *A Panorama of the Judicial Systems of the World,* suggests that more discretion be given to the judges, and that may be advisable in certain connections; but the English-American system favors rule by law. Individual litigants must abide by a law, the continuance of which is necessary to do justice to thousands which follow. Nevertheless, "modification implies growth; it is the life of the law."[8] It seems at least clear that the time for action has come when the court can perceive behind the case presented a social or economic change, fertile of innumerable situations of like character which would render application of the old rule oppressive and unjust. It is inconceivable that justice should lag when the power, the opportunity, the necessity, and the propriety all meet and wait upon the occasion.

We may make some practical application of the necessity of alert-

[8] Washington v. Dawson & Co., 264 U. S. 219, 236 (1924) (Brandeis, J., dissenting).

ing the law from well-known conditions. In these United States there are forty-eight legislatures and as many courts of last resort engaged in making laws; the legislatures biennially or annually, and the courts continually, or at every sitting. In addition to this there are the federal courts and the Congress doing the same thing. Leaving out of the picture for the present the federal jurisdiction, all these commonwealths and the laws they make are insulated from each other by state lines. But state lines do not destroy the continuity of the widespread economy, industry, traffic, communications, or the identical nature of the problems they present to the courts for solution, and the common interest the people have in them. As wide as this territory is, it has been in a very real way increasingly narrowed to a comparatively small community by the facilities of communication, traffic and travel. The speeding up of all these facilities and the variety and immediacy of the problems they present, and the common interest we have in their uniform and nationwide solution throws a new light on the necessity of a living law, presents it in a new aspect.

There are multiplied chances of disagreement in business matters where manufacturers, dealers, middlemen, retailers, and consumers are scattered over a space of a thousand miles; where transportation companies criss-cross the country with their fleets of trains or trucks, making multiplied contacts, enhancing the probability of negligent injury. There is occasion here for the law to move up.

In many important particulars it has done so, either by the enactment of uniform or reciprocal laws, or decision of the courts, drawn together by the necessities of the situation and the reasonableness of the rules adopted in pioneer cases having that purpose in view. Uniform laws have been adopted with reference to commercial paper, sales contracts, warehouses, and other matters not within the line of this discussion; and there is a strong trend in decision throughout the country for the courts to get together on rules of evidence and methods of procedure in negligence cases, particularly where nationwide enterprises and their activities are involved.

By way of illustration we may mention two subjects in which uniformity seems to be a desideratum, and in both of which our own court maintains an insular position, not only territorially, but in point of judicial outlook: The mode of proof in negligence cases relating to injuries by motor trucks operating under license over wide territories where the contacts and probability of injuries are notably increased, and matters of identity and liability are more difficult to prove under existing rules;[9] and the question of coverage in workmen's compensation

[9] Carter v. Thurston Motor Lines, 227 N. C. 193, 41 S. E. 2d 586 (1947); Note, 25 N. C. L. Rev. 491 (1947).

acts under statutory definitions which are common throughout the country.[10] But here these now seem to be subjects of legislative rather than judicial action.

In this connection it may not be amiss to notice that the ineptitude of the law as administered by the courts to afford more immediate, secure and certain control and relief in expanding social and economic problems has given rise to numerous commissions and administrative boards, theoretically invested with summary powers of procedure, especially with regard to the rules of evidence. As the result of appeals the rigidity of court rules is frequently imported into the proceedings of these bodies and the purpose of summary investigation and decision is largely defeated.[11]

Mr. Pound advocates the return of many of the subjects dealt with by these boards to the regular courts; and because of the importance and nature of the rights dealt with and the humanistic elements frequently involved, no doubt this would be done if the courts could avoid the tendency to put new wine into old bottles, and, incidentally, could appreciably reduce the interval between appeal and hearing.

In any discussion pointed to the necessity of keeping the law alive, accomplished in part at least by discarding out-worn rules and precedents which are impotent to help and potent to harm, and establishing other precepts, we cannot, in ordinary sequence, avoid a reference to the use of precedent. It is an old subject, perhaps trite, and I wish to avoid its clichés; I may be able to suggest a new angle. No student of the growth of law and its proper application to present problems has ever denied the value of precedent, whether found in our own decisions or those of respectable courts abroad, but in the improper use of precedent undoubtedly lies the greatest handicap of the law, the greatest failure on the part of courts in its proper application. It is certainly not expected that a court may accomplish much toward finding the truth, a fitting solution of problems which are not local, by constantly weaving in its own cocoon. A mechanical resort to comparing and fitting cases from whatever source the precedent is drawn is committed to chance and doomed to failure. The practice conduces much, perhaps, to the ease of decision and to the support of a preconceived opinion, if there is any, in behalf of which the precedent is sought; but it does not guarantee either the soundness of the thing found nor its fair application to a just solution of the question posed. Mechanical methods in judicial decision result in pushbutton opinions which depend for their validity on the selection of the stops. When an opinion is based on no

[10] Edwards v. Publishing Co., 227 N. C. 191, 41 S. E. 2d 592 (1947).

[11] STANSBURY, NORTH CAROLINA EVIDENCE §4 (1946); Note, 19 N. C. L. REV. 568 (1941).

greater philosophy than "we have said," the question immediately arises whether we have not said so much, and so variantly, that the "profession" may be puzzled to know when we said what we meant.

Justice Cardozo observes: "Some judges seldom get beyond that process in any case. Their notion of their duty is to match the colors of the case at hand against the colors of many sample cases spread out upon their desks. The sample nearest in shade supplies the applicable rule. But, of course, no system of living law can be evolved by such a process, and no judge of a 'high court, worthy of his office, views the function of his place so narrowly. . . . The man who had the best card index of the cases would also be the wisest judge.'"

"Whoever in discussion adduces authority uses not intellect but memory," said Leonardo da Vinci.

The validity of precedent depends on the soundness of its reason and its expression of living truth within the frame of the case in hand. No mechanical device for search and detection of that truth will replace the skill, wisdom, and intelligence of the judge making the research. When that truth is pressed home the question becomes one of horizons.

There is seldom a precedent which through mere affinity settles down upon the "four corners" of the case in hand. It requires pinching, stretching, tucking in, and poking with the finger of intelligence. The act of appropriation, resting as it often does upon selection from a vast reservoir of conflicting or doubtful expressions and studious comparison, tests the ability and skill of the judge and probes the purpose of the comparison. The great tenets of the law which might easily solve the problem often lie obscurely behind clouds which must be dispelled and for the same reason, when even minor aberrance is present in the decision, they suffer by attrition. It takes a tool as finely pointed as that of the original graver to retrace the pattern of the law with fidelity.

And this leads us to the truth often expressed, that the greatest guarantee of certainty and security in the administration of the law, and its living aptitude to do justice upon the facts of any case, lies in the personnel of the court.

The virtues of Samuel and of Micah[12] do no more than balance the ledger of expected rectitude. To these must be added the reasonably keen mind, intellectual honesty, broad legal training, and indefatigable industry. These will be immensely implemented by familiarity with the arts and sciences, the analogies they afford, the breadth and compass they give to the intellectual faculties; the sense of proportion, of relation, of perspective conducive to orderly thinking. Just as essential is a full experience of life, not photostated and examined in a cloister, but met at first hand in the "daily walks of life."

[12] I SAMUEL 12:3-5; MICAH 6:8.

I would not omit from this an appreciation of the teleological purpose of the law as driving towards an ideal of truth and symmetry, the pursuit of which, evasive as it is, is often the greatest pleasure and inspiration to those who serve at bench or bar.

"The contribution which courts make to sound jurisprudence is an incidental and abstract thing, a matter of slow accretion, often leaving much vicarious sacrifice and suffering in its wake. The most genuine and enduring contribution we can make to that end is to do justice in the particular case, while the right is still alive, on principles which are worthy to survive."[13]

[13] Carter v. Thurston Motor Lines, 227 N. C. 193, 201, 41 S. E. 2d 586, 592 (1947) (dissenting opinion).