

# University of Pennsylvania Law Review

FOUNDED 1852

Formerly  
American Law Register

---

---

VOL. 99

MAY, 1951

No. 7

---

---

HARLAN FISKE STONE ASSAYS SOCIAL JUSTICE,  
1912-1923†

By ALPHEUS THOMAS MASON \*

In 1935 a former Columbia Law School colleague sent Mr. Justice Stone a copy of the constitutional law examination he had just given his Harvard Law students. "Since you know more constitutional law now than you used to when you were a teacher of equity," Professor Thomas Reed Powell suggested, "you may be able to answer my questions."<sup>1</sup> "You are mistaken," Stone replied. "I know less constitutional law now than I did when I taught equity, but that isn't saying much. What little I did know is being rapidly overturned by the Court."<sup>2</sup>

After a full decade on the nation's highest court, Stone exhibited the modesty of an expert. With the benefit of "some years of observation of the judicial process behind the scenes," he even welcomed "popular comment on judicial decisions." "I have no patience," he wrote, "with the complaint that criticism of judicial action involves any lack of respect for the courts. Where the courts deal, as ours do, with great public questions, the only protection against unwise decision and even judicial usurpation is careful scrutiny of their action and fearless comment upon it."<sup>3</sup>

But in 1915, when he gave the Hewitt lectures on *Law and Its Administration*<sup>4</sup> at Cooper Union, he distrusted "popular clamor" against the law, courts and Constitution. "The spirit which . . .

---

† In the preparation of this article, the author has had the assistance of Paul Tillet, Jr., A. B., J. D., Research Assistant, Princeton University.

\* A. B. 1920, Litt. D. 1947, Dickinson College; Ph. D. 1928 Princeton University. Ass't Professor of Political Science, Duke University, 1923-25; Professor of Politics, Princeton University, 1925-1948. McCormick Professor of Jurisprudence, Princeton University. Author, *BRANDEIS, A FREE MAN'S LIFE* (1946).

1. Letter, T. R. Powell to H. F. Stone, May 28, 1935.

2. Letter, H. F. Stone to T. R. Powell, May 31, 1935.

3. *Id.*, Dec. 16, 1935.

4. Published in book form as *LAW AND ITS ADMINISTRATION, COLUMBIA UNIVERSITY LECTURES* (1915). Hereinafter cited as *STONE*.

dictated virulent attacks upon the court" he then described as "a spirit essentially lawless and subversive of all orderly judicial procedure."<sup>5</sup> He, along with other high-ranking members of the American bar, was then profoundly disturbed with the waning respect for the law, for lawyers and for judges—and with good reason. Two years before these lectures were delivered, Justice Holmes had interpreted the "attacks upon the courts" ominously as "an expression of the unrest that seems to wonder vaguely whether law and order pay."<sup>6</sup> In this lecture series addressed to a popular audience Stone tried to allay or explain "present discontents," rather than probe what lay back of the popular clamor. "I found the task of making the lectures interesting to a popular audience," he wrote Nicholas Murray Butler, March 3, 1915, "and at the same time making them scholarly enough to avoid being 'trashy' a difficult one."

Certain underlying causes of complaint were plain enough. In the transition from agrarian to urban society, incident to the rise of industrialism, the independent small business man had fallen before trusts and monopolies; entrepreneurs had been forced to become workers for someone else; workers themselves had become mere cogs in an industrial machine which depended on sharp division of labor for mass production and upon mass production for its profits. No longer could all men reasonably expect to become independent in their own shops and on their own land. Workers were now dependent on big companies for their jobs, and responsibility for their welfare shifted necessarily from themselves to their employers, and ultimately to government. By 1915 it was clear that government alone could modulate the typical industrial cycle—acquisition, growth, concentration—and provide social and economic correctives attending the process. But when society, disrupted by a-political forces of technology and finance capitalism, attempted to weave again, through democratic action, the delicate web of community, the high priests of the law stood stubbornly by their icons.

In politics there had been a significant shift from "legal justice to social justice." Implicit in an ever-growing body of legislation was the realization that government must keep order not only physically but socially, that law must protect a man from the things that rob him of his freedom, whether the oppressing force be physical or of a subtler kind. Statutes, giving expression to this new social spirit, were widely contested in the courts, and lawyers and judges, imbued with the relentless spirit of individualism, blithely construed them away, or set

---

5. *Id.* at 152.

6. Speech at a dinner of the Harvard Law School Association of New York, Feb. 15, 1913. Published as *Law and the Court* in COLLECTED LEGAL PAPERS 292 (1920).

them aside as unconstitutional. The traditional content of individual liberty and property thus remained unchanged while the substance of these basic civil rights had undergone revolution.<sup>7</sup> With cool and awesome confidence, the court even-handedly accorded unequals a vacuous equality, oblivious to Thorstein Veblen's dour observation of 1904 that "this conventional principle of unmitigated and inalienable freedom of contract began to grow obsolete from about the time when it was fairly installed"; obsolescent, of course, not in point of law, but in point of fact.<sup>8</sup>

It was this frustration of social legislation by judicial application of outmoded legalistic concepts that stirred angry and vociferous protest, evoking during the first decade of the 20th century popular slogans demanding recall of judges and of judicial decisions, proposing radical amendments of the Constitution, and even suggesting its abolition.<sup>9</sup> This hostility disturbed Stone profoundly. In his own state, criticism of the Court of Appeals had been "so loud, so ill-tempered, and so misguided, as to startle those who have respect for and faith in our institutions."<sup>10</sup> "Perhaps in no period," Dean Stone noted, "and certainly not in the present generation, have law and lawyers been so much the subject of popular discussion and criticism as at the present day."<sup>11</sup>

What troubled him especially was that vague, indefinable "political aspiration" called "social justice." "The prevailing social unrest," he explained, "the impatient desire for speedy, not to say hasty, recognition of scarcely yet formulated theories of social welfare, have found expression in criticism of our whole system of law administration. This public discussion of law and lawyers has resulted in the coining of a new phrase"—"social justice."<sup>12</sup> Dean Stone was not sure just what was "intended to be expressed by the phrase." When used as a "political theory of social welfare" or "as a political war cry," he disclaimed any interest in this "fantastic" social fad.<sup>13</sup> He was very

7. "Political as well as economic and social science noted these revolutionary changes," L. D. Brandeis observed in 1916. "But legal science—the unwritten or judge-made laws as distinguished from legislation—was largely deaf and blind to them. Courts continued to ignore newly arisen social needs. They applied complacently 18th century conceptions of the liberty of the individual and of the sacredness of private property. Early 19th century scientific half-truths like 'The survival of the fittest,' which translated into practice meant 'The devil take the hindmost,' were erected by judicial sanction into a moral law." Brandeis, *The Living Law*, 10 ILL. L. REV. 461, 463 (1916).

8. VEULEN, *THE THEORY OF BUSINESS ENTERPRISE* 274, 275 (1904).

9. Brandeis, *supra* note 7, at 464.

10. STONE at 152.

11. *Id.* at 40.

12. *Ibid.*

13. *Id.* at 41.

much concerned when, as was often the case, social justice was coupled with "the notion that judges, in the administration of common law rules, and especially in formulating new rules of law, should consciously endeavor to mold the rules of law to conform to their own personal notions of what is the correct theory of social organization and development, even though the result should be in many cases to disregard or overturn established rules of law."<sup>14</sup> One reason why he agreed to give the Hewitt lectures was the conviction that ill-feeling might be ameliorated if "certain fundamental notions" about law and its administration could be made "part of the intellectual equipment of every intelligent citizen."<sup>15</sup>

The lecturer was drawn inexorably into the discussions then rife, growing out of the "celebrated" *Ives* decision of 1911. In this case, a court manned by judges whom Stone described as of "unquestioned integrity and of great learning and ability"<sup>16</sup> invalidated the recently enacted Workingmen's Compensation law. "To impose upon an employer, who has . . . committed no wrong, a liability based solely on a legislative fiat," the Court ruled with mathematical precision, "is taking the property of *A* and giving it to *B*, and that cannot be done under our Constitutions."<sup>17</sup> Whatever the wisdom or unwisdom of workmen's compensation, it marked a radical departure from the common law. "The theory," underlying the legislation, the court said emphatically, "is not merely new in our system of jurisprudence, but plainly antagonistic to its basic idea."<sup>18</sup> At common law the burden of on-the-job injuries fell on the workers themselves, on their families, or on local charities. The New York statute had sought to substitute for the atomistic concept of liability, based on individual fault, the principle that economic enterprise should bear the full cost of its normal operation.

Stone's sympathy for the plight of the injured workman is implicit in his recognition that in modern industry there is, under the most careful management, "a pretty definite amount of injury to workmen." He was certain that such economic loss "should not fall upon the employee in the trade, but should be added to the cost of production."<sup>19</sup> "Tremendous industrial changes" had rendered obsolete the common law defenses of the employer. "It cannot fairly be said," he declared, "that the industrial employee is free not to assume the risk

---

14. *Ibid.*

15. *Id.* at 2.

16. *Id.* at 150.

17. *Ives v. South Buffalo Ry.*, 201 N.Y. 271, 296 (1911).

18. *Ibid.*

19. *STONE* at 71.

of his employment or that he stands on a plane of equality with the employer in entering into the contract of employment." "Changes of condition so extensive," he went on, "could only be adequately and promptly met by comprehensive legal changes necessarily worked out by legislation."<sup>20</sup>

The New York State legislature had, in fact, been motivated by these stern social realities in passing the Workmen's Compensation Act of 1910. Yet the Dean expressed sympathy, even respect, for the political and constitutional theory underlying the *Ives* decision, quoting at length and with approval, the court's reasoning:

The right of property rests not upon philosophical or scientific speculations nor upon the commendable impulses of benevolence or charity, nor yet upon the dictates of natural justice. The right has its foundation in the fundamental law. That can be changed by the people, not by legislatures. In a government like ours theories of public good or necessity are often so plausible or sound as to command popular approval, but courts are not permitted to forget that the law is the only chart by which the ship of state is to be guided. Law as used in this sense means the basic law and not the very act of legislation which deprives the citizen of his rights, privileges or property. Any other view would lead to the absurdity that the Constitutions protect only those rights which the legislatures do not take away. If such economic and sociologic arguments as are here advanced in support of this statute can be allowed to subvert the fundamental idea of property, then there is no private right entirely safe, because there is no limitation upon the absolute discretion of legislatures, and the guarantees of the Constitution are a mere waste of words.<sup>21</sup>

"This language," the lecturer told his Cooper Union audience, "may well commend itself to the thoughtful, and lead to the conclusion that the proper method of securing the economic benefits of workmen's compensation, if such legislation is to go beyond the limits above indicated, is 'by the orderly process of constitutional amendment rather than by making a universal test of the right to take private property for the supposed economic advantage to result therefrom.'"<sup>22</sup> Stone's endorsement is even more specific. He agreed that the workmen's compensation statute did "deprive the employer of property without any common-law liability on his part, and the mere fact that the deprivation . . . was economically desirable, did not constitute the taking due process of law."<sup>23</sup>

---

20. *Ibid.*

21. 201 N.Y. 271, 294 (1911). Quoted in STONE at 151.

22. *Id.* at 152.

23. *Id.* at 151.

The speaker did not pause to tell his audience that the ruling was largely ignored in other jurisdictions. He did not call attention to a decision of the United States Supreme Court upholding federal workmen's compensation for employees of interstate carriers.<sup>24</sup> Nor did he point out that five state courts—Kansas, Ohio, Washington, Wisconsin, and Massachusetts—approved workmen's compensation legislation within a year after the Court of Appeals nullified the New York statute.<sup>25</sup> However, the lecturer did call attention to the fact that, among 749 opinions handed down by the New York Court of Appeals in 1911, only the *Ives* decision had stirred the febrile pens of ardent social reformers.<sup>26</sup> "Certainly . . . the volleys of criticism which have been directed toward the *Ives* case . . . [were]," Stone concluded, "entirely disproportionate to any practical inconvenience which flowed from that decision."<sup>27</sup>

But whose "practical inconvenience" was involved? In what terms could it be measured? There were some 60,554 victims of industrial accidents in 1911,<sup>28</sup> many of whom received no compensation largely because the employer was able, thanks to the Court's ruling in the *Ives* case, to invoke common-law defenses which Stone himself considered anachronistic. The embattled decision was promptly corrected by Constitutional amendment in 1913<sup>29</sup>—to Stone the only legitimate remedy open—and he took no little satisfaction in noting that the amendment was drafted, initially at least, by persons connected with Columbia Law School.<sup>30</sup>

What precisely is Stone's position on the *Ives* case? Was he seeking to support, minimize or explain it? One who reads these lectures in book form may not find clear answers to these questions. Stone had stated his position more incisively in 1912 when Edward T. Devine bitterly attacked the *Tenement House* decision of the New York Court of Appeals, ruling that an "apartment house" is not a "tenement" and therefore the strict provisions of the Tenement House Act of 1901 were not applicable to the plaintiff's "high grade" apart-

24. Second Employers' Liability Act Cases, 223 U.S. 1 (1912).

25. 27 THE SURVEY 1906 (1912).

26. STONE at 188.

27. *Id.* at 190.

28. *Report of the Commissioner of Labor, New York State, for the year ending Sept. 30, 1911*, 1 ANNUAL REPORTS OF DEPARTMENT BUREAUS 150.

29. Amendment to Art. 1 of New York Constitution, adopted at general election, Nov. 4, 1913. 4 LAWS OF NEW YORK, EXTRAORDINARY SESSION 2492 (1913).

30. ANNUAL REPORTS OF COLUMBIA UNIVERSITY, 1911-12 at 70. In his report to the President of Columbia University for 1911-12, Dean Stone mentioned the receipt of a gift to promote scientific study of legislative drafting and reported use of the fund to prepare several pieces of legislation, among them, the amendment under discussion and a workmen's compensation statute adopted by the Federal Congress.

ment.<sup>31</sup> "Another bad decision" was the caption Devine, professor of sociology at Columbia University and editor of *The Survey*, gave his scorching editorial.<sup>32</sup> "Under the present decision," the editor commented scornfully, "a tenement house is not a tenement house if it has a bath-tub—unless it happens to be in Buffalo."<sup>33</sup> After a merciless, non-legalistic analysis of the Court's legalistic reasoning, Devine concluded: "We hold it to be essential, as a condition of retaining popular respect for courts in general, that such decisions as this one . . . [and] the decision of a year ago destroying the workingmen's compensation act<sup>34</sup> . . . should be held up to the reprobation and scorn which they deserve. . . . We . . . cannot well be silent when justice is subverted and when social advance is stupidly and unnecessarily blocked. . . . The fundamental remedy lies not in amendment . . . but . . . in a process of education through which it will eventually be brought home to judges and their successors that such blundering with human lives . . . is not good law any more than it is good economics, philosophy and morals."<sup>35</sup>

"The radical way out of the deplorable situation created by such rare and unaccountable decisions as these," the editor suggested, "lies in the education of the judges."<sup>36</sup>

To Stone, Devine's editorial was "typical of much of the criticism of our courts appearing in current newspapers and magazines."<sup>37</sup> The tone of the comment, the Dean wrote the *Survey* editor, "surprises and shocks me, and not any the less so because I am inclined to the opinion, after a brief examination of the statutes involved, that the correctness of the decision of the court is open to some doubt."<sup>38</sup>

For Dean Stone the question involved in the *Tenement House* decision was "purely one of statutory construction."<sup>39</sup> Comment by "the trained lawyer" on the method by which the Court ascertained its principles was, he agreed, not only "permissible" but "desirable, since it tends to the proper development of the law and an accurate understanding of those principles which should govern judicial decisions."<sup>40</sup> But Devine's "startling" suggestion that the Court would

---

31. *Grimmer v. The Tenement House Department of the City of New York*, 204 N.Y. 370 (1912).

32. 27 *THE SURVEY* 1891 (1912).

33. *Id.* at 1893.

34. *Ives v. South Buffalo Ry.*, 201 N.Y. 271 (1911).

35. 27 *The Survey* 1895, 1896, *passim*.

36. *Id.* at 1895.

37. Stone, "The Tenement House Decision," Letter to the Editor, 27 *THE SURVEY* 1893 (1912).

38. *Ibid.*

39. *Ibid.*

40. *Ibid.*

have rendered a different decision in the Workmen's Compensation Act case if it had "foreseen just what a reception the opinion was to have," could "only be founded either upon the theory that justice reposes in the bosoms of those who can shout the loudest, or that the judges of the Court of Appeals would violate their oaths of office for the sake of satisfying popular clamor."<sup>41</sup>

"The view that it is possible to base judicial decisions upon some vague notion of social justice," Dean Stone reminded the editor, "finds frequent expression in these days of hasty and ill-considered criticism. Social justice may mean anything, and therefore, as a basis of judicial decision, means nothing, . . . it is usually used as a term descriptive of the particular remedy which the critic of courts desires very much, but is unable to obtain from the courts by the application of his particular theories of judicial legislation. Abstract justice, or social justice, cannot exist under a system administered by mere man, apart from that approximate justice which is administered by our courts, according to a system of rules and principles. Not abstract justice, not social justice, therefore, should be our quest, but justice according to law; and, in order that justice according to law may approximate abstract justice, let us direct our criticism of the courts toward the rules and principles of decisions, not toward the intelligence or motives of the judges, and let us value the correctness of their decisions by the skill and accuracy with which they apply those rules and principles."<sup>42</sup>

In 1915, as in 1912, Stone viewed censure of the courts as a serious business, a function properly confined to lawyers, law school teachers and students. He impugned the layman's competence in this area and set up standards of criticism hard, if not impossible, for him to meet.

"The School of Law, in which I have the honor to be a teacher," he wrote the *Survey* editor, "is much engaged in the criticism of judicial opinions. Neither teachers nor students consider that in so doing they are guilty of any disrespect to the courts, or that they act in contempt of the institution which is vital to the perpetuation of a

41. *Id.* at 1984.

42. *Id.* at 1983, 1984. A former colleague and friend explains Stone's reactions to popular criticism of the *Ives* and *Tenement House* decisions in terms of personalities. "He was considerably affected," Powell remarked, "by the personal and intellectual quality of the man who advanced various views. He had no respect for Devine, a professor of Sociology at Columbia, and Devine's criticism of the *Ives* case influenced Stone to support or apologize for it and minimize it in his Carpentier (Hewitt) Lectures. However, when Goodnow and Chamberlain (Columbia Law School Professors) criticized the *Ives* decision, Stone with his respect for them was ready to consider their views calmly and to give weight to the fact that they held them." Letter, Powell to Alfred McCormack, quoted in Letter, McCormack to A.T.M., Nov. 15, 1950.



free government. In the discussion of judicial opinions, however, the following canons are carefully observed:

1. That all criticisms should be intelligently directed toward the rules and principles which must necessarily govern judicial decisions.

2. That such criticism should be fair and made with respect for the courts, as the best instrumentality for the administration of justice which humankind has as yet devised.

3. That abstract or social justice as a test for the correctness of judicial decisions is absolutely without value.

4. That the fact that one or many members of the community who very much desire the establishment of a legal principle are actuated by good motives does not establish that the principle is sound, or will, in the generality of cases, promote justice.

“Do you not think, Mr. Editor,” Stone asked, “that *The Survey* might properly and wisely adopt these canons of criticism?”<sup>43</sup>

Stone’s vehement protest against Devine’s assumption that laymen can properly criticize or “educate” judges, when they err in interpreting the language of constitutions and statutes, reflects basic theories of law, of courts and constitutions. “Law,” Stone defined in his opening lecture, as “the sum total of all those rules of conduct for which there is state sanction.”<sup>44</sup> It is “pre-eminently a practical system administered by human agencies.”<sup>45</sup> In its making, experience and specialized knowledge are more important than theory. “Whatever the desirability of a certain result, . . . whatever its theoretical excellence,” he emphasized, “there are practical limits to the extent to which the regulation of human action may be successfully and efficiently carried.”<sup>46</sup> Involved in the new-fangled sociological approach was a “theory of legislation,” “an attempt to formulate law on the basis of the legislator’s view of what is sound public policy.”<sup>47</sup> Even those whose business is to legislate, Stone reminded his audience, “are not always accurate observers or infallible prophets.”<sup>48</sup> The judge, by contrast, is controlled “by stubborn facts proven in court, and he is sobered by the ever-present realization that by his judgment he is determining the rights of individuals” immediately before him.<sup>49</sup> For this reason Stone

43. 27 THE SURVEY 1983, 1984 (1912).

44. STONE at 3.

45. *Id.* at 8.

46. *Id.* at 8, 9.

47. *Id.* at 42.

48. *Ibid.*

49. *Id.* at 38.

gave short shrift to "sociological jurisprudence"—the notion that "legal science ought to be founded upon generalizations from a descriptive sociology." <sup>50</sup> "As a principle of judicial decision," the lecturer concluded, "certainly nothing could be more destructive of [the] essential qualities" of the common law.<sup>51</sup>

For Stone legal change was a process by which governing rules come to "slow maturity." The legislator and the judge play their respective roles. The legislator is concerned with what is "good public policy" and must necessarily "seek to ascertain the opinion of the community" of which he is a representative and to which he is responsible.<sup>52</sup> But not even the legislator has *carte blanche*. Besides constitutional restriction, he must be wary, lest he jeopardize respect for law, in giving legal sanction to a moral precept which long experience has not yet crystallized into a "settled principle of social conduct."<sup>53</sup> The judge's function is even more circumscribed: "to ascertain whether the facts proved in the case . . . are controlled by rules of law which may be found in the precedents."<sup>54</sup> If legal rules can be found to fit the facts at bar the judge is bound to apply them "regardless of his personal notions of what may be 'social justice.'" <sup>55</sup>

Stone admitted that in "the rare instances where precedents afford no controlling principle, the judge will naturally consider the opinion of experts as embodied in the writings of those learned in the law."<sup>56</sup> He will also be guided by considerations of "settled custom or usage of the community," and "if necessary to the settlement of the question" by "his own notion of what is sound public policy."<sup>57</sup> But in this severely restricted area of judicial law-making, the court must not think of itself as "an interpreter of public sentiment."<sup>58</sup> The success with which he discharges his function will depend on how completely he insulates himself from the pressures of the community of which he is a part.

The Judge "need not, and indeed ought not, listen," Dean Stone declared, "with his ear to the ground to ascertain from popular clamor the latest expression of the 'newest thing' in social welfare. His function is not political or legislative to enact the popular will or what he

50. *Id.* at 42.

51. *Id.* at 52.

52. *Id.* at 43.

53. *Id.* at 34.

54. *Id.* at 43, 44.

55. *Id.* at 44.

56. *Ibid.*

57. *Ibid.*

58. *Ibid.*

may mistakenly believe to be the popular will. His function is judicial, to act as the judge in ascertaining and applying established principles of law when they offer a guide and in accordance with his conception of right and wrong when there is no other guide."<sup>59</sup> Justice, as Dean Stone defined it, meant "justice according to law as formulated and declared by the courts."<sup>60</sup>

From this it followed that fault-finding based on the refusal of courts to be guided by principles of "social justice" or on "the supposed excessive recognition" of the "rights of property" is "thoughtless,"<sup>61</sup> even "subversive."<sup>62</sup> The very notion of individual property is "the great distinction" between civilization and lawless savagery.<sup>63</sup> "Impair the 'rights of property' . . . and you strike at one of the great foundations on which civilized society rests."<sup>64</sup> Basic to any system of justice according to law is public faith. "No amount of law reform will ever give legal justice to a people who themselves are indifferent to it or who are controlled by passion or prejudice, or class selfishness."<sup>65</sup>

Stone's admonition to "impatient reformers" was akin to that expressed in 1912 by his future colleague on the United States Supreme Court, George Sutherland: "to follow the constitutional stairway step by step may be a slow and tiresome process, but it at least assures us of a safe arrival."<sup>66</sup> "The history of the subject in New York," Stone declared optimistically, "emphasizes the fact that there is a direct and orderly method of correcting the erroneous determinations of courts, if such are made, and of bringing the provisions of our Constitution into harmony with the popular will without resorting to ill-tempered abuse of the courts."<sup>67</sup> Stone was likewise in accord with the former Utah Senator on the Constitution.<sup>68</sup>

59. *Ibid.*

60. *Id.* at 33.

61. *Id.* at 60.

62. *Id.* at 152.

63. *Id.* at 61.

64. *Ibid.*

65. *Id.* at 193.

66. *The Courts and the Constitution*, 37 REPORTS OF THE A.B.A. 371, 376 (1912), an address delivered at the 85th annual meeting of the American Bar Ass'n, Milwaukee, Wis., Aug. 28, 1912.

67. STONE at 155.

68. "If constitutional and orderly government is to endure," Sutherland has said, throwing down the gauntlet to "social justice," "there is but one course for the courts to follow, and that is to set their faces steadily and unswervingly against any palpable violation of that great instrument, no matter how overwhelming in the particular instance may be the popular sentiment, or how strong the necessity may seem, for if the door be opened to such violation or evasion on the ground of necessity we shall be unable to close it against expediency or mere convenience." *The Courts and the Constitution*, *supra* note 67, at 391.

Our Fundamental Law, the Dean told his Cooper Union audience, is a "body of legal rules or precepts which regulate or control governmental action."<sup>69</sup> "The sole object and purpose . . . should be to give stability to government and to protect individuals from oppression, both by the established agencies of government and by temporary majorities which may control some branch of the government."<sup>70</sup> Stone, like Sutherland, seemed to think of a constitution more as a barrier than as a gateway, more as a charter of rights than as a grant of power, more as a "lawyer's document" than as "a vehicle of the nation's life."<sup>71</sup> It is, Stone declared, "nothing more or less than a check on the arbitrary and oppressive exercise of governmental power, which cannot be hastily set aside or overturned, and which cannot be affected by the clamor or the action of mere temporary majorities."<sup>72</sup>

Stone accepted without question the historical and judicial foundations of the Supreme Court's broad-gauged censorial power over legislation. "The power to restrict and control governmental action must be," he reasoned, "lodged somewhere,"<sup>73</sup> and it is best that this authority be lodged with the courts. "Is there after all," he asked rhetorically at the end of his lecture on constitutional limitations, "any body in our governmental scheme which is, judged in the light of our experience, by the method of its selection and its freedom from untoward influences, better qualified to exercise this power or to whom it may be more safely intrusted than the judiciary?"<sup>74</sup> "Judges are trained," the lecturer continued, in the common law and are moved to decision not by "whim or caprice" or "enthusiasms about social conditions" but "by stubborn facts proven in court."<sup>75</sup> They are bound to follow settled principles of law so far as they afford a guide. Judicial decisions are "therefore justly and properly . . . a conservative force in the community. They protect the rights of those whose rights may be overlooked or temporarily obscured by public clamor or in

69. STONE at 128.

70. *Id.* at 129.

71. WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 157 (1907).

72. STONE at 130.

73. *Id.* at 158.

74. *Ibid.* Justice David J. Brewer had expressed a similar view in 1893: "But the great body of judges are as well versed in affairs as any, and they who unravel all the mysteries of accounting between partners, settle the business of the largest corporations and extract all the truth from the mass of sciolistic verbiage that falls from the lips of expert witnesses in patent cases, will have no difficulty in determining what is right and wrong between employer and employees, and whether proposed rates of freight and fare are reasonable as between the public and the owners; while as for speed, is there anything quicker than a writ of injunction?" *The Movement of Coercion*, 16 PROCEEDINGS OF THE N.Y. STATE BAR ASS'N 37, 43 (1893). Stone also gave qualified approval to Brewer's views on the labor injunction. See STONE at 102, 104.

75. STONE at 16, 38.

times of political excitement. They are the bulwark of the minority against the tyranny of temporary majorities.”<sup>76</sup>

For those who complained that courts in interpreting the Constitution too often neglect considerations of “social justice,” Stone had a ready answer. Their idea, he explained, “is . . . that in passing upon the constitutionality of so-called social legislation, the courts should accept as conclusive the opinion of the legislature as to the economic desirability of the statute.”<sup>77</sup> “This requirement,” Stone reiterated, “can be met only by a change in the structure of our law by constitutional amendment; that is to say, it is now primarily a political instead of a legal question.”<sup>78</sup>

Throughout this discussion there is little to suggest that the judicial yardstick, whether constitutional or statutory, is often so vague and elastic as to leave considerable room for the operation of human will and discretion. There is no hint that the judge, however hard he tries, may not be able to remove himself completely from the wiles of demagogues, the antics of pressure groups or the sting of an aroused public opinion. There is no indication that the judge himself may have emotional and intellectual preferences preventing him from operating as a legalistic automaton. Yet Benjamin Cardozo, himself a judge, tells us: “The great tides and currents which engulf the rest of men, do not turn aside in their course, and pass the judges by.”<sup>79</sup> And two years before Stone gave these lectures, Justice Holmes had observed: “Behind the logical form [of judicial decision] lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding.”<sup>80</sup> In contrast with Stone, Justice Holmes suggested that the judges “recognize their duty of weighing considerations of social advantage.” If they did this, if they considered “more definitely and explicitly the social advantage on which the rule they lay down must be justified,” Holmes suggested that judges might “hesitate where now they are confident, and see that really they were taking sides upon debatable and often burning questions.”<sup>81</sup>

The primary burden of Stone’s lectures had been to prove that the “fantastic” theories, and “impractical aspirations” then parading under the sleazy banner “social justice” were “political war cries,” not

---

76. *Id.* at 48.

77. *Id.* at 153.

78. *Id.* at 154, 155.

79. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 168 (1928).

80. HOLMES, *COLLECTED LEGAL PAPERS* 181 (1920).

81. *Id.* at 184.

valid "principles of judicial decision." Agitators had undermined popular faith in legal justice and substituted for it "the notions of social and political quacks." Such criticism was not only wrong but vicious. There had been, Stone conceded, occasional miscarriages of justice. But for these "failures" the "remedy, . . . like the fault, lies . . . not primarily in our legal system, but with human nature itself."<sup>82</sup> The refrain running through the lectures had been: "Without public faith and belief in justice according to law any system of law, however skilfully devised, is but an empty form."<sup>83</sup>

In 1915, within a few months after Stone lectured, another lawyer, Louis D. Brandeis, also explored the causes of discontent. "In the last half century," Brandeis noted, "our democracy has deepened. Coincidentally there has been a shifting of our longing from legal to social justice, and—it must be admitted—also a waning respect for law. Is there any causal connection," the Bostonian inquired, "between the shifting of our longing from legal justice to social justice and waning respect for law? If so, was the result unavoidable?"

Brandeis, like Stone, suggested that there were "many different causes" contributing to this unhappy plight, but he asked: "Has not the recent dissatisfaction with our law as administered been due, in large measure, to the fact that it had not kept pace with the rapid development of our political, economic and social ideals? In other words, is not the challenge of legal justice due to its failure to conform to contemporary conceptions of social justice?"<sup>84</sup>

Brandeis had found the answer to his query in 1908 when he demonstrated the relevance of factual knowledge, sociological data, to constitutional interpretation. In presenting a brief to the United States Supreme Court<sup>85</sup> he had introduced unconventional non-legalistic "facts" to show how long hours are, as a matter of fact, dangerous to women's health, safety and morals, that short hours are socially and economically advantageous. In going beyond the lawyer's conventional "facts" and legal precedents, he proved that legal justice could catch up with social justice.

Brandeis won handsome praise from a bench of elderly, conventionally minded justices, indicating that judges need not be screened from all knowledge of the living world.<sup>86</sup> The Court's favorable de-

82. STONE at 29.

83. *Id.* at 193.

84. Brandeis, *The Living Law*, 10 ILL. L. REV. 461, 463 (1916).

85. This brief presented in *Muller v. Oregon*, 208 U.S. 412 (1908) marked the first appearance of that type of brief now known in the legal profession as "the Brandeis brief."

86. For Justice Brewer's laudatory language see 208 U.S. 412, 419.

cision also indicated that the real barriers are rigid habits of judicial thought, that what was needed was not an amendment of the Constitution but an amendment of "men's minds." "What we need," Brandeis observed in 1916, "is not to displace the courts, but to make them efficient instruments of justice; not to displace the lawyer but to fit him for his official or judicial task." To qualify lawyers and judges for "harmonizing law with life," Brandeis advocated broader education—"the study of economics and sociology and politics which embody the facts and present the problems of today."<sup>87</sup> In this way judges, he thought, might free themselves of the public scorn Dean Stone deplored.

But could Stone accept this avenue of escape? In the Hewitt lectures he had observed: "The pressure of facts proven in court which lead ultimately to the recognition that the established precedent does not work well, either because it does not harmonize with other earlier rules or because of change of conditions or because it does not square with the settled moral sense of the community . . . has led to the overruling of precedent."<sup>88</sup> In a subsequent lecture he took the view that only the "facts" immediately related to the particular controversy—the findings of fact by courts—are reliable. These are the facts "so far as it is humanly possible to ascertain and know them," and they appeared to Stone in sharp contrast with the "hasty or imperfect generalizations such as too often characterize sociological investigations where the data are not submitted to the scrutiny and searching tests which characterize the trial of an action at law."<sup>89</sup> Whether he meant by "stubborn facts proven in court" the kind of sociological data Brandeis utilized, or stereotyped legal "facts," is not clear.

Stone, however, was explicit on the steps necessary to fit the members of the bar for modern practice. "For the leadership of the advocate and the legal scholar, the march of economic development has tended," he said, "to substitute the leadership of the business lawyer, who at his best is the skilful, resourceful solicitor, a specialist in corporation law, and who, at his worst, is the mere hired man of corporations."<sup>90</sup> Like Brandeis, he considered "present tendencies . . . fraught with danger to our institutions unless they are effectively checked." But his suggestions for a remedy had to do primarily with "more exacting requirements for admission to the bar which conform to sound educational standards, and the stimulation and preservation

---

87. Brandeis, *supra* note 84, at 468, 470.

88. STONE at 47.

89. *Id.* at 55.

90. *Id.* at 176.

in every possible way of the professional spirit and corporate feeling of the bar.”<sup>91</sup> There is no mention of the Brandeis’ corrective for the “distorting effects” of modern specialized practice—lawyers and judges equipped “with the necessary knowledge of economic and social science.”<sup>92</sup>

At the end of the lectures, President Butler thanked Dean Stone warmly for “having undertaken this task, as well as for the brilliancy and success with which you have executed it.” Butler passed along the “chorus of praise” rising from judges, lawyers and others who had heard one or more of the talks.<sup>93</sup> That same year the lectures were published in book form and thus reached a wider audience.

Both favorable and unfavorable comment was forthcoming from the reviewers. One commentator agreed that Stone had achieved his stated purpose—“to discuss before a lay audience some of the more fundamental notions which underlie our legal system, and thus by aiding a better understanding and possibly removing some popular misconceptions of law and lawyers to contribute to the cause of good citizenship.”<sup>94</sup> “The author of the lectures before us,” the reviewer said, is neither an “unfair” critic nor an “unmeasured” eulogist of our legal system. “The qualities of clear thinking, of thorough knowledge, and of lucid expression, which have won him eminence as a lawyer and teacher, enabled him to hold the attention of his Cooper Union audiences, and make his exposition of the fundamental notions underlying our legal system simple, readable, and instructive. In no other publication can the layman find a more interesting or satisfactory interpretation of the genius of the common law.” The chapter on Law Reform was singled out as especially “worthy of careful study.” “It shows clearly,” the reviewer commented, “that a true reformation even of our procedural defects is not to be effected by legislative waving of a magician’s wand, but by the slow process of stimulating in the public mind the love of justice, of educating it as to the nature of law and the grave importance of delegating its administration only to those who are fit to bear that responsibility”<sup>95</sup>—that is, to lawyers and judges.<sup>96</sup>

91. *Id.* at 177.

92. Brandeis, *supra* note 84, at 470.

93. Letter, N. M. Butler to H. F. Stone, March 29, 1915.

94. STONE at v (foreword).

95. 102 THE NATION 314, 315 (1916).

96. Outlining the essential requirements of effective law reform, Stone had observed: “Law should be reformed by lawyers, for they have the knowledge, experience, and special training essential to the task of planning reforms and carrying them out, provided they are inspired with the sincere desire to correct the faults and abuses of an existing system.” STONE at 223.



Other reviewers were less fulsome in praise. Morris R. Cohen, describing Stone's volume as "decorous and unexciting," saw it as an indictment of "those perverse infidels who would push the fallible methods of modern science into law and religion," as dedicated to the "pious aim" of strengthening "the traditional American faith that God can govern his chosen people only through a constitution, courts and lawyers." The Dean, Cohen noted, "has felt peculiarly called upon to rebuke the adherents of sociologic jurisprudence who would make judicial decisions in regard to large public questions depend upon the fallible and sometimes hasty human sciences of sociology and economics . . . Why need the Supreme Court find out from lay experts the exact hygienic effects of working more than ten hours in a bakery, when it can readily settle the matter by listening to two lawyers?"<sup>96a</sup>

"The author has succeeded admirably," Louis N. Robinson wrote in the *University of Pennsylvania Law Review*, "with a task that needed doing, . . . to give the layman an idea of the legal system." But the reviewer criticized Dean Stone as not "thoroughly acquainted with present-day social philosophy." "He would improve the machinery of law and make it more efficient," Robinson continued, but "he seems to think that nothing else is really needed. . . . Now, admitting that changes in the direction he indicates would be important steps toward reform," the reviewer commented, "it must also be admitted that the 'non-expert' critic, whom the author has in mind as one to be silenced, would still remain dissatisfied." The reviewer therefore placed Dean Stone in "a group of men . . . who have caught the gospel of efficiency, but who have not seen the vision of efficiency aiding and actively promoting new ideals." "To be more efficient in doing the old things," Robinson wrote disdainfully, "is . . . cold comfort to those who have seen the inadequacy of doing some of these at all."<sup>97</sup>

Robinson also queried Stone's treatment of the judicial process: "His [the author's] attitude with respect to the position of a judge in dealing with the constitutionality of measures is illustrative of his inability to meet the just demands of the present age. He but restates the arguments of the conservatives and makes no reference to the 'forward-looking' decisions which have been made in recent years, particularly with reference to labor legislation. . . . The layman knows that these can be made and no legal quibbling will make him believe

---

<sup>96a</sup>. The New Republic, June 23, 1917. Unsigned review, generally credited to Morris R. Cohen.

<sup>97</sup>. Robinson, Book Review, 65 U. OF PA. L. REV. 708, 709 (1917).

that they cannot. . . . The judges' "familiarity with life," of which Stone spoke so confidently, this reviewer dismissed as naive. The Dean had succeeded, Robinson agreed, in his major objective, but the reviewer was doubtful whether the author had done much, if anything, "to remove misunderstanding and hostility."<sup>98</sup>

In the Hewitt lectures Dean Stone had made a point of disabusing his audience of the ingrained popular belief that "every ill the flesh is heir to could be cured by legislative fiat."<sup>99</sup> The next year he had opportunity to give fuller exposition to his thought, when Truxton Beale invited him to write an introduction to Herbert Spencer's chapter, "The Sins of the Legislators," in *The Man versus the State*.<sup>100</sup> Beale contributed an introduction to Spencer's mid-19th century bible of laissez-faire, and prefaced each chapter with an essay by a well-known American, including, besides Dean Stone, Senators Elihu Root and Henry Cabot Lodge, President Nicholas Murray Butler, David Jayne Hill, Charles W. Eliot, Judge E. H. Gary and former President William Howard Taft.

"It would be unfair," Beale commented somewhat self-consciously, "to stigmatize" this group of "eminent living Americans" as "reactionaries."<sup>101</sup> But, obviously, the editor had chosen the commentators with great care. "This series of essays will be republished," he wrote, "to demonstrate the necessity of a return to conservatism. . . . They will demonstrate that business enterprise as well as personal liberty is in danger of being lost in the labyrinthine mazes of officialdom. . . . They will attack the apparently inexhaustible faith in law-made remedies and show that the belief in the sovereign power of political machinery is a gross delusion. . . . They will point out the childish impatience of the American people with slow and natural remedies—the only sound ones—and will show that quick remedies are almost always quack remedies. . . ." <sup>102</sup>

In his introductory essay Stone did not explore Spencer's favorite topic of state intervention in the economic system except to query his "extravagant conclusions."<sup>103</sup> "When Spencer applies the theory of natural selection to the problem of what in our day is called 'social legislation', he trenches," Stone observed, "upon what has now become debatable ground. . . . The promotion of social efficiency through natural selection, when applied to modern social life, is not in-

98. *Ibid.*

99. STONE at 217.

100. SPENCER, *THE MAN VERSUS THE STATE* (Beale ed. 1916).

101. *Id.* at 1, 2.

102. *Id.* at 3.

103. *Id.* at 237.

consistent in principle with the exercise of social prophylaxis through legislation. The fact is that under modern social conditions benefits are not always conferred upon either individuals or groups in accordance with merits, and the unfit do survive in fact and perpetuate their species to become sources of weakness to the social structure." Nevertheless, Stone concluded that "Spencer's vigorous warning furnishes food for thought and will perhaps inspire with caution the zealous advocates of such sweeping legislative changes as are involved in the many proposals for the various types of pension law, and minimum wage statutes, and modern legislation of similar character."<sup>104</sup>

The pages in Spencer's chapter that received Stone's special approval were those inveighing against an assumption—more prevalent in America than in England—that law-making, unlike the ordinary crafts, requires no special knowledge or apprenticeship. For a simple handicraft such as shoe-making, Spencer had observed, a long apprenticeship is essential. "The sole thing which needs no apprenticeship is making a nation's laws." The assumption was as monstrous for Stone as it had been for Spencer.

"The complete interdependence of the social organization," Stone declared, "requires that the regulative power of legislation be used with caution and only after careful study of the phenomena of social causation, and this in turn must lead to the study of all social phenomena as biological developments having their origin and their analogies in the individual human life. Their nature and development will be revealed in the comparative study of different societies. Their application to the problems of legislation will be ascertained by the comparative study of legislation. The legislator is morally blameless or morally blameworthy, according as he has or has not acquainted himself with these several classes of facts."<sup>105</sup> Spencer's indictment of sins of legislators, resulting from failure to prepare for the law-making task, required, in Stone's opinion, "no modification or restatement." Indeed, he traced the "growing lack of that respect for law which must be at the foundation of every adequate and efficient legal system" to the "Sins" Spencer had excoriated.

Stone went on to consider another "sin" Spencer did not particularly emphasize—"disregard of form in legislative drafting." "The drawing of a legislative act," he wrote, "requires exceptional training, experience and skill. . . . No legislation can be enacted which does not have its effect, and oftentimes a serious effect, upon the existing law, written or unwritten, or both. He who thus undertakes to in-

---

104. *Id.* at 240, 241.

105. *Id.* at 239, 240.

terfere with our complex legal system should not only know the exact legal situation to be affected by the proposed legislation, both historically and as a matter of existing law, but he must know how the desired change can be accomplished by correct legal methods without the enactment of provisions which conflict with or do not harmonize with existing law intended to be preserved.”<sup>106</sup>

By 1945 Stone was Chief Justice. He had rounded out two decades on the Nation's highest court and had established a firm reputation as a “liberal”. That year a correspondent,<sup>107</sup> happening upon his introductory essay to the chapter in Spencer's 19th century classic, was curious to know the circumstance leading to Stone's participation in Beale's project to chart, via Herbert Spencer, a “return to conservatism.” In reply Stone recalled that for some years after 1911 he had been a member of the New York City Bar Association's watchdog Committee on the Amendment of the Law. Until about 1917 this committee “conceived its principal function to consist in the opposition to objectionable measures and wrote few memoranda in approval of meritorious legislation.”<sup>108</sup> Its recommendations, the Chief Justice remembered, “were often the basis of amendments of proposed legislation or a veto of legislation which had been adopted. Possibly for that reason,” he suggested, “Mr. Beale called on me and asked me if I would write some comments on Spencer's chapter on ‘The Sins of the Legislators’.”<sup>109</sup>

“Also, I should like to know,” this 1945 correspondent asked, “whether your views remain the same.” “A vast change,” the Chief Justice replied evasively, “has taken place in the quality of legislation since that day. Largely through the efforts of a group of us at Columbia University, Congress was induced to set up a drafting agency to assist in the drafting of bills, which has resulted in a good deal of improvement. This, of course, has nothing directly to do with the study of social and economic problems to which legislation is to be applied. This varies greatly with the draftsmen of the bill as originally proposed and the committee having the bill in charge.”

In 1915, Stone had been more concerned with the mechanical defects of the law than failure of the courts to make legal justice coincide with social justice. He agreed that the law was open to criticism, and he was peculiarly sensitive to the necessity of “public faith in and belief in justice according to law.” He knew, too, that “general dissatisfac-

---

106. *Id.* at 241, 242.

107. Letter, William J. Newman to H. F. Stone, Jan. 3, 1945.

108. *Report of the Committee on the Amendment of the Law*, N.Y.B.A. Yr. Bk. 131 (1917).

109. Letter, Stone to Newman, Jan. 11, 1945.

tion with the administration of justice" was "not confined to the radical section of the community." This, in fact, was conspicuous among the factors driving him to search for remedies, for basic correctives that would go deeper than the "sentimentalism" he associated with the clamorous exponents of social justice.

The very mass of judicial decisions, increasing like the annual outpouring of new statutes, ruffled the calm faith of the legal profession that all was well with the common law. Chancellor Kent in 1820 had lamented "the multiplicity of law books", but his complaint seemed frivolous to the twentieth century lawyer struggling to track legal doctrines through 100 times the 240 volumes on Kent's shelves. Despite the valiant, though uncoordinated effort, of lawyers, teachers and judges to "reconstruct parts of the law in the light of the whole and with reference to those social functions which it is the business of law to facilitate and control," the lush growth of precedent had turned the formal garden of the common law into a veritable jungle. Uncertainty and confusion born of complexity, dragged out the process of finding and applying the law. The inevitable delay became another point of popular irritation—another reason for the declining respect.

Nor were the "ingenious devices" of private publishers a lasting solution. "Every new citator, every new digest, every new compilation . . .," Stone remarked, "comes, like Banquo's ghost, to confront us with the disquieting reality that the common law system of precedent which our forebearers have cherished for some ten centuries cannot continue indefinitely to develop solely through the medium of reported decisions."<sup>110</sup> "To hope that such a mass of precedent can be penetrated even with the aid of digests and glossators" is, he declared emphatically, ". . . to indulge, Micawber-like, in the illusion that something, we know not what, will turn up to remedy the growing difficulties of our situation."<sup>111</sup>

Stone was profoundly disturbed by this many-sided threat, and gave way to a militancy he seldom exhibited. "No price is too large," he said in 1923, "for the preservation and perpetuation of a great system of law. . . ."<sup>112</sup> In 1915 he had looked nostalgically to the past, wishing, as it were, that modern society could be reconstituted to accommodate the "aristocracy" of the bar.<sup>113</sup> By 1921, however,

---

110. Stone, *Some Aspects of the Problem of Law Simplification*, 23 COL. L. REV. 319, 320 (1923). The substance of this paper was delivered before the Association of the Bar of the City of New York, Feb. 8, 1923. Hereinafter cited as *Law Simplification*.

111. *Ibid.*

112. *Id.* at 333.

113. STONE, c. VII, especially at 159-165.

he recognized that "we are now reaching a state in our social and economic development" when impending changes "must inevitably have a profound effect in future development of our law." He noted "the tendency of society to become stratified into more or less distinct and permanent social classes, the tendency for the social position of the individual to become static, . . . the growing complexity of social, industrial and commercial relationships, . . . changes entailing social, economic and political consequences, raising new problems requiring the application of study and scientific methods to their solution."

"Sooner or later," he observed, "these consequences must find expression in the field of law by the modification or adaptation of the common law. . . . This will be brought about not only by judicial decree but by scientific legislation, by the reorganization of Courts, by the creation of more expeditious procedure, and one more nicely adjusted to the convenience and substantive rights of litigants."<sup>114</sup>

Stone upbraided the bar for its failure to exert "the commanding influence" it should "rightly exercise in the development of our legal institutions" and compared his profession unfavorably with the constructive leadership conspicuous in medicine, science and engineering. "I have never been able," he had said of the common law in an address to New Jersey lawyers in 1921, "to regard it as having reached perfection or as a fixed and changeless system."<sup>115</sup> By 1923 he went further and listed "failure to appreciate the social and economic significance of facts or the relation of law itself to social well-being . . ." among the influences affecting ". . . adversely the judicial declaration of law."<sup>116</sup>

These same far-reaching social forces had been operative in 1915, but Stone then saw no need to overhaul and reconstruct the legal system. In 1921, however, he recognized that even democratic pressures might properly have a subordinate influence on the course of justice. "The difficulty in the past," he observed, "has been that the lawyer has not felt under any social or business necessity of making his product fit the wearer of it. In a society organized on aristocratic lines our profession may for a very considerable time maintain itself without minding whether the shoe pinches or not. But in a democracy such as ours, the lawyer must not only know where the shoe pinches, he must endeavor to make a shoe that fits."<sup>117</sup> Returning to the theme

---

114. *Changing Order and the Responsibility of the Bar*, address at annual meeting of the New Jersey State Bar Association, Feb. 26, 1921, published in N.J.B.A. Yr. Bk. 1921-22, at 49, 52.

115. *Id.* at 55.

116. *Law Simplification* at 321.

117. *Changing Order and the Responsibility of the Bar*, *supra* note 114, at 65.

of the Hewitt Lectures, he said: "Above all he must take an active interest in informing the public how shoes are made and the very real difficulties which attend the production of a suitable product."<sup>118</sup>

Law could be stretched or shrunk to regulate new activities of communities just as shoes can be modified to fit feet. An occasional shrill complaint was no more evidence of a need for a different system of law than a blister proved that men should wear wings instead of shoes. The common law could be made to work in the twentieth century if its doctrines were clarified, simplified and adjusted here and there to relieve growing pains. In 1923, he told how the need for reform had arisen: ". . . the common law system carries within itself elements which sooner or later will compel its reconstruction in important particulars and its restatement with reference to considerations which cannot be sufficiently examined and correlated in the course of litigations. . . . These elements are: the multiplication of its authoritative literature; the vague and shifting content of its terminology; the uncertainty and confusion and lack of symmetry which is gradually permeating our law through the accumulation of precedents which are out of harmony with its system and its social objective."<sup>119</sup>

Most leaders of the bar and the profession generally adhered steadfastly to Stone's faith in legal justice. All believed that the great body of the common law remained as it had been throughout the centuries: ". . . the greatest exposition of the principles of justice and right that the brain of man has devised."<sup>120</sup> For practitioners, jurists and instructors alike, the primary difficulty facing the law was the plethora of precedent produced regularly by the 48 state courts and the federal judiciary. Elihu Root counseled his brethren that if something were not done, the law would be lost "in the wilderness of single instances."<sup>121</sup> Lawyers could no longer hold to "the comfortable doctrine that law is the fruit of custom to be picked and eaten as we find it."<sup>122</sup> "Such placid optimism," Cardozo remarked, "sanctified abuses by viewing them as part of an inevitable order."<sup>123</sup> "Certain

118. *Ibid.*

119. *Law Simplification* at 337. Stone found a ready example of "the vitality and persistence" of false doctrine in "the history of the common law view of the invalidity of arbitration agreements." For his opinion of the utility of commercial arbitration contracts, along with serious criticism of the methods of choosing arbitrators and proposals for integrating the arbitration device with law, see *The Scope and Limitation of Commercial Arbitration*, 10 *PROC. ACAD. POL. SCI.* 501-509 (1922-24).

120. *Law Simplification* at 326.

121. Quoted in Hadley, *Historical Background of Plan for Restatement of Law*, 9 *A. B. A. J.* 203, 206 (1923).

122. Cardozo, Book Review, 37 *HARV. L. REV.* 279, 281 (1923).

123. *Ibid.*

at least it is," the same spokesman warned in 1921, "that we must come to some official agency unless the agencies that are voluntary give proof of their capacity and will to watch and warn and purge—unless the bar awakes to its opportunity and power."<sup>124</sup> "In substance our law is excellent, full of good sense and justice," said Henry T. Terry, voicing the overwhelming sentiment of the bar. "But in respect to its form it is chaotic. What it needs at present more than anything else is a complete and systematic arrangement."<sup>125</sup>

Unrest and dissatisfaction within the profession thus met and combined with popular agitation for reform. Professional planning for improvement, however, was directed mainly toward preserving legal justice. Leaders of the bar wanted to create a private agency to keep the relentless torrent of decisions within the channels cut for law by the intellect of man—"by employing the skill and expert knowledge of our profession," as Stone explained, "to begin the great task of bringing to our law that simplicity and symmetry of form which will enable it to endure, the source and guaranty of justice and right for uncounted generations yet to come."<sup>126</sup>

Increasingly, Stone's energies went into improvement of the law from within. Between 1920 and 1922, he kept a file labelled "Anachronisms"—startling examples of legal rules out of joint with the times—intending some day to write an article on the subject. He gave much time and thought to how reform should be accomplished. Codification was not the solution: "To place our law after centuries of free development on a Procrustean bed of unyielding statutory law" could only result in struggle of "the spirit of the common law to free itself from its statutory bondage." Codification, "exact and precise statement of legal rules", would "fetter our judges and rob our law of its really great contribution to legal science—its elasticity and adaptability to new situations."<sup>127</sup>

Stone now gave more sympathetic consideration to "sociological jurisprudence", defined as the effort "to establish in our legal thinking that trinity of juridical theory—logic, history, and the 'method of sociology'—as the source of all true legal doctrine." Though paraded by its exponents as path-breaking, Stone no longer considered the "methods of sociology" shocking or even new.

"It is not a novel idea, that in declaring law the judge must envisage the social utility of the rule which he creates. In short,

---

124. Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 113, 124 (1921).

125. Terry, *The Arrangement of the Law*, 17 COL. L. REV. 291 (1917).

126. *Law Simplification* at 337.

127. *Id.* at 330.



he must know his facts out of which the legal rule is to be extracted and in a large sense they embrace the social and economic data of his time. Many years ago, Mr. Justice Holmes in classic phrase reminded us that 'the life of the law is not logic but experience.' If this is what is meant by the sociological method and by sociological jurisprudence, it is the method which the wise and competent judge has used from time immemorial in rendering the dynamic decision which makes the law a living force. Holt, Hardwick, Mansfield, Marshall and Shaw employed it long before the phrase sociological jurisprudence was thought of. But can we in any proper sense speak of the application of this principle as a 'method'? Has sociological jurisprudence any methodology, any formulae, or any principles which can be taught or expounded so as to make it a guide either to the student of law or to the judge? History and logic are guides but has sociological engineering been reduced to a science and does it embody such formulae or principles as will enable the judge to render a just decision except by the application of that practical wisdom which characterizes the decision of the great judge and distinguishes him from those who are not so great? If not, then sociological jurisprudence will not tend to reduce the accumulation of anomalous doctrines; it may even add to it. At most it warns the judge and the student of law that logic and history cannot, and ought not, have full sway when the dynamic judgment is to be rendered. It points out that in the choice of the particular legal device determining the result, social utility, the *mores* of the times, objectively determined may properly turn the scale in favor of one and against the other; and it should lead us as lawyers and students of law to place an appropriate emphasis on the study of social data and on the effort to understand the relation of law to them, because by that process we may lay the foundation for a better understanding of what social utility is and where in a given case the path of social utility lies."

"Social engineering," he now agreed, was useful, but it offered no royal road to reform. He still saw the "real problem" as involving "adoption of some device" whereby the development of the common law "may be more systematic and more scientific and whereby the law may free itself of its centuries of accumulations of anomaly and of rules and technique, the reason for which has disappeared or been forgotten, without loss of its vitality and its adaptability to each particular case as it arises."<sup>128</sup> This was not a job for sociologists. Rather, law school teachers must come forward with a solution free from the difficulties inherent in codification and sociological jurisprudence.<sup>129</sup>

---

128. *Id.* at 328.

129. Seavey, *The Association of American Law Schools in Retrospect*, 3 J. LEGAL EDUC. 153, 163-65 (1950).

In 1915 the Association of American Law Schools had formed a Committee on the Establishment of a Juristic Center, to which Stone was named. War intervened, rendering the Committee virtually inactive until 1919. After two years of study the Committee concluded, and persuaded the members of the Association to agree, that "an authoritative restatement of the law" would best accomplish the aim of improving the law by "utilizing American legal scholarship for the purpose of carrying on constructive scientific work, primarily directed to the clarification and simplification of the law and its better adaptation to the needs of life."<sup>130</sup> It was also the conviction of the Committee on Juristic Center that "such a work could only be undertaken with reasonable hope of success, by a permanent organization composed of the leaders of the profession on the bench, at the bar and in the schools."<sup>131</sup> At the 1921 meeting of the Association, the Committee was empowered "to invite the appointment of similar committees" by other lawyers' organizations "for the purpose of creating a permanent institution for the improvement of the law. . . ." <sup>132</sup>

The task to be done required a more formal approach, as well as talent and expert knowledge under common leadership, enjoying the active support and cooperation of the American bar. Beyond all this, it was soon discovered that the project must have more earthy support—money. For this the restatement committee turned, Stone recalled in 1924, to Elihu Root, knowing that "he would be eager."<sup>133</sup> Root, Seavey reports, "with his brilliant mind and his connection with the Carnegie Foundation, saw the possibilities."<sup>134</sup> With the Foundation's support of a preliminary survey and report<sup>135</sup> and upon Mr. Root's injunction: "Don't lose any time," a select group from bench and bar were assembled in New York City, May 10, 1922, "to consider the establishment of a permanent organization." The upshot was the Committee on the Establishment of a Permanent Organization for the Improvement of the Law.<sup>136</sup> Among

---

130. Unpublished statement submitted by the Council of the American Law Institute to the Carnegie Corporation (1923). This statement contains a detailed account of the work of the Committee on the Establishment of a Permanent Organization for the Improvement of the Law, including a prospectus of the project to be carried out by the American Law Institute.

131. *Ibid.*

132. Minutes of the Meeting of the Committee on Juristic Center of the Association of American Law Schools, New York City, May 10, 1922.

133. Unpublished address to the Connecticut State Bar Association at the annual meeting of the Association at Bridgeport on Jan. 21, 1924.

134. Seavey, *supra* note 129, at 163.

135. Letter, William D. Lewis to Stone, April 1, 1922. See also Minutes of the Committee, May 27, 1922.

136. Minutes of the First Meeting of the Committee, May 10, 1922.

other eminent American lawyers, the Committee included William D. Guthrie, Benjamin N. Cardozo, Roscoe Pound, John W. Davis, Learned Hand, John H. Wigmore and Samuel Williston. An Executive Committee was named and directed to report on the method of restating the law and the organization of the permanent institution. Besides Stone, it comprised Elihu Root, Chairman, George W. Wickersham, and William Draper Lewis. During the rest of the spring and summer, Stone spent a great amount of time on committee work, serving as a "critic", attending meetings and reviewing the work of "reporters" engaged full time on the project.

On January 11, 1923, the Committee issued a call to leading lawyers, judges, teachers and representatives of professional groups for a meeting in Washington, D. C., February 23, 1923. "They endeavored," Stone recounted, "to bring together the leading members and the thoughtful minds of the profession the country over to lay their program before them."<sup>137</sup> At the same time, the Committee issued its report on the need for a permanent organization. "There is today," the report stated, "general dissatisfaction with the administration of justice . . . not confined to that radical section of the community which would overthrow the existing social, economic and political institutions."<sup>138</sup> Such dissatisfaction was "dangerous", the report stressed, because "it breeds disrespect for law . . . the cornerstone of revolution."<sup>139</sup> "There are, however," the group continued, "just causes for complaint. Rightly, we are proud of our legal system considered as a whole, but as lawyers we also know that parts of our law are uncertain and unnecessarily complex, that there are rules of law which are not working well in practice, and that much of our legal procedure and court organization needs revision."<sup>140</sup> "In our opinion," the Committee commented, "the most important task that the bar can undertake is to reduce the amount of uncertainty and complexity of the law."<sup>141</sup> Besides this aim, the report also recommended promotion of "those changes which will tend better to adapt the laws to the needs of life."<sup>142</sup>

The law-teacher's plan, Warren Seavey tells us, "was to survey the entire field of Anglo-American law, to discover basic principles,

137. Unpublished address, *supra* note 133.

138. AMERICAN LAW INSTITUTE: REPORT OF THE COMMITTEE ON THE ESTABLISHMENT OF A PERMANENT ORGANIZATION FOR THE IMPROVEMENT OF THE LAW I (1923). Quoted in unpublished statement of Herbert S. Hadley, *The Advisability of the Council of the American Institute of Law Undertaking as its First Work A Restatement of the Law of Crimes and Criminal Procedure*, March 10, 1923.

139. REPORT, *supra* note 138.

140. *Ibid.*

141. *Id.* at 7.

142. *Id.* at 14.

and to state the rules which had been generally worked out in the different states."<sup>143</sup> Essentially, this scheme was a close cousin to the kind of criticism Stone had advocated years earlier in his controversy with Edward T. Devine. His own law review essays had furnished brilliant examples of what could be accomplished. The plan received a psychological fillip early in 1922, when the New York Court of Appeals<sup>144</sup> reversed itself and adopted the core of Stone's article "The Mutuality Rule in New York." The prestige of the proposal was also enhanced by Judge Cardozo's generous praise for the writings of Stone and others, who had taken pot shots at the old rule. Cardozo's application of Stone's contention—"that the only requirement of mutuality in specific performance is that the Court should have jurisdiction and power to compel complete performance of the contract on both sides at the time of rendering its decree"<sup>145</sup> was but one among many examples of how scientific investigations carried on in university law schools could and did inspire courts to reshape and reframe the law.

Special studies by experts also made for marked improvement, but they were not enough, being "sporadic and unsystematic . . . with each individual conducting his researches independently . . . often without the benefit of criticism of others conducting like . . . investigations. . . ." <sup>146</sup> This haphazard approach suffered also from inadequate coverage. "One field may," as Stone observed, "be intensively tilled while another, equally important, may be neglected or only studied partially or superficially."

Stone at once swung his influence and support behind the plan he had helped to draft. Just prior to the Washington meeting he told the members of the Bar Association of the City of New York what the restatement must accomplish: "It must state in detail and with precision accepted rules and doctrines, eliminating or modifying the rule or doctrine not supported by reason or adapted to present-day social institutions and needs . . . it must avoid the formal statement of the law as a closed system, clearly leaving open for future statements, on the basis of judicial decisions as they are rendered, the rules governing the new and unforeseen situations with which the law must hereafter deal as they arise. And finally there should accompany such a restatement, preferably in a separate document, a comprehensive annotation showing the origin and history of each rule and doctrine dealt with in the primary restatement, indicating conflicts of authority and, in

143. Seavey, *supra* note 129, at 164.

144. *Epstein v. Gluckin*, 223 N.Y. 490, 135 N.E. 861 (1922).

145. *Law Simplification* at 323, 324.

146. *Id.* at 332.

the case of conflict or in the case of precepts modified or eliminated, the reason for the adoption of the rule actually incorporated into the restatement."

"I suppose no one would deny," Stone observed, "that a statement of law thus prepared would be the most important and useful law book published since the compilation of the Digest. . . ." <sup>147</sup>

The goal—to remove "the obscurity and uncertainty of the law itself when applied to new states of facts"—though ambitious, could be attained. "There is undoubtedly," Stone remarked optimistically, "sufficient legal talent and expert knowledge in the United States and England to restate the whole body of common law and equity. . . ." <sup>148</sup>

But the mere restatement of the law under private auspices would not, he feared, carry sufficient authority to conquer the over-powering weight of precedent. Therefore, some device must be found to reconcile the novel contributions of cooperative legal scholarship, "which looks beyond the particular case to the law as a whole," with the "principle of *stare decisis*." <sup>149</sup> In a speech to the New York Bar, Stone renewed a suggestion he had made to the Committee for a permanent organization, <sup>150</sup> proposing that state legislatures be asked to approve the restatement, not as a formal statute or code, but as "an aid and guide" to the courts—to give the judiciary freedom to follow "the collective scholarship and expert knowledge of our profession. . . ." <sup>151</sup> His idea was incorporated into the Committee's report, but not endorsed unqualifiedly. <sup>152</sup>

Out of the Washington meeting came the American Law Institute. In opposition to Stone's recommendation, the Institute overwhelmingly decided to issue the judicially-honored private law rules without seeking legislative sanction. "If the work is so well done," the *American Bar Association Journal* prophesied, "that it commends itself to the judgment of the profession sufficiently to be cited in briefs and arguments of counsel and to be quoted with approval by the courts of last resort,

147. *Id.* at 334.

148. *Id.* at 332.

149. *Id.* at 334, 335, *passim*.

150. Letter, Stone to W. D. Lewis, Oct. 24, 1922. With legislative sanction, Stone wrote Lewis, "the restatement would at once have an authority which a restatement not so sanctioned and approved would not possess and at the same time would not fetter the courts as would a formal legislative code. It would give to the courts greater freedom in adopting the rules laid down in the restatement and at the same time would leave them free to deal with those cases when they inevitably arise which are not covered by the restatement and which, on the other hand, has not generally been deemed compatible with a formal legislative code."

151. *Law Simplification* at 336.

152. Hadley, *supra* note 138.

it thereby will become a part of the law of the land. If the work is poorly done so that it does not meet with the approval of the bar and the bench, it will come to naught."<sup>153</sup> Experience proved that Stone had put his finger on the difficulty the *Restatement* would encounter. "Not intended to be a substitute for the cases but only to clarify them," Thurman Arnold remarked in 1935, "it therefore becomes only an additional source of argument."<sup>154</sup>

Nevertheless, formation of the American Law Institute was hailed with high hopes. Deep interest and enthusiasm enveloped leaders of the bar. The Washington meeting drew 355 busy men, including the Chief Justice of the United States and presiding Judges of twenty-one states. A large portion of the remainder were engaged in the active practice of law, and with few exceptions, "every person present paid his own expenses."<sup>155</sup> A Carnegie grant of \$1,075,000 assured a beginning "on a grand scale" with "every facility afforded for the work."<sup>156</sup> At the second meeting of the Institute in 1924, Cardozo termed the ambitious project an expedition "To Rescue 'Our Lady of the Common Law'."<sup>157</sup> Stone himself appraised the movement as "most notable in the history of the common law,"<sup>158</sup> and accepted office as a member of the Council, the Institute's governing body.

Enthusiasm born of the Restatement effort persisted. The labor lavished upon it has been described as one of "three main areas of public policy activity" which "in the first half of the twentieth century . . . gave to the bar some sense of nation-wide corporate purpose."<sup>159</sup> Certainly Stone had been keenly aware of the bar's lack of professional spirit and pride, and valued the Institute as a mark of "professional class consciousness," and willingness to meet "public responsibilities." But it is clear that for him this was only an important by-product, not

153. Editorial, *The Restatement of the Law*, 10 A.B.A.J. 176 (1924).

154. ARNOLD, *SYMBOLS OF GOVERNMENT* 51 (1935). Mr. Justice Brand of Stone's native New Hampshire also saw the problem that had led to Stone's suggestion. "Probably," he said in 1936, "few courts will overrule their prior decisions because they find that the Institute is against them." See Stone, *The Common Law in the United States in THE FUTURE OF THE COMMON LAW* 152 (1937).

Felix Cohen's judgment was more harsh. "The 'Restatement of the Law' by the American Law Institute," he wrote, "is the last long-drawn-out gasp of a dying tradition. The more intelligent of our younger law teachers and students are not interested in 'restating the dogmas of legal theology.'" *Transcendental Nonsense and the Functional Approach*, 35 COL. L. REV. 809, 833 (1935).

155. Unpublished Statement by Council of A.L.I. to Carnegie Corporation, at 5, 6. See also AN ACCOUNT OF THE PROCEEDINGS AT THE ORGANIZATION OF THE INSTITUTE AT WASHINGTON, D.C. (1923).

156. Seavey, *supra* note 129, at 165.

157. *To Rescue "Our Lady of the Common Law"*, 10 A.B.A.J. 347 (1924).

158. *The Significance of a Restatement of the Law*, 10 PROC. ACAD. POL. SCI. 309, 312 (1922-24).

159. HURST, *THE GROWTH OF AMERICAN LAW* 276 (1950).

the central task of the Institute. The job to which he conceived that body dedicated and to which he devoted himself was that of enabling "the common law to live on and do its appointed work as a vital and energizing force in western civilization."<sup>160</sup>

The period covered in this paper coincides roughly with Stone's Columbia Law School Deanship. It was, as the preceding pages show, a time of intellectual turmoil, of increasing awareness that, without considerable modification, the common-law system of Justice could not survive. The system was imperiled from without as well as from within. His problem was to find ways of enabling the law to cope with the impact of industrialism without doing violence to the genius of the common law, or to his intellectual and political inheritance. The *Restatement* met these tests. "It would create a comprehensive and flexible scheme whereby our law might move at once in the direction of enlightened and considered reform with the best expert assistance. . . . It would be free from those exigencies which in America seem inevitably attached to efforts at reform carried on under the direction of public officials and which are inimical to scientific investigation and collaboration."<sup>161</sup> As his understanding of society took on depth and breadth, he gradually reappraised his estimate of the extent to which law could be revised from within to accommodate contemporary demands. "I should be surprised," Justice Stone wrote in 1938, "if there were not a good many things in *Law and its Administration* with which I do not agree today."<sup>161a</sup>

"Social justice," he had exclaimed somewhat intemperately in 1912, "is absolutely without value" as "a test for the correctness of judicial decisions."<sup>162</sup> He then repulsed any suggestion that the sacred vessel of the law should be reshaped to meet the demands of unprincipled howlers and muckrakers. The anguished cries of social reformers suggested "le bon juge" of Chateau-Thierry.<sup>163</sup> But incessant public clamor did have its effect. In 1915 Stone saw "social justice as the basis of the so-called sociological jurisprudence," still dangerous, "foreign to the spirit of the common law, . . . destructive of its essential qualities," nevertheless an idea to be reckoned with—"a theory of legislation." Stone then berated the new methodology as "an attempt to formulate law on the basis of the legislator's view of what is sound public policy based upon his observations of social conditions."<sup>164</sup>

160. *Law Simplification* at 337.

161. *Id.* at 336, 337.

161a. Letter, Stone to B. H. Levy, Oct. 1, 1938.

162. Letter to the Editor, 27 *THE SURVEY* 1983 (1912).

163. Radin, *The Good Judge of Chateau-Thierry and His American Counterpart*, 10 *CAL. L. REV.* 300 (1922).

164. *STONE* at 42.

By 1923 he saw that sociological jurisprudence need not be tied inextricably with the political aspirations of captious "do-gooders." Sociological jurisprudence had a contribution to make, in checking the actual operation of legal rules, in measuring their effectiveness in controlling human behavior, in ascertaining the facts of "social utility." What was formerly denounced as a "political war cry" now became recognized and accepted as the familiar technique of the "wise and competent judge from time immemorial," capable of giving "a new inspiration and a new trend to legal development."<sup>165</sup> "But," he insisted, "we must have other resources if we are to make of the common law the great and abiding system which it may become."<sup>166</sup> For these he looked primarily to the American Law Institute.

Throughout, Stone's fundamental concern had been to preserve the genius of the common law, to restore popular faith in the justice this system produced. In 1922, he believed that by clarifying and simplifying the common law the good in it could be saved. "The great merit of the common law system," he commented, "is that the judges have made their law as they went along, adapting it to the new cases as they actually arise."<sup>167</sup> The *Restatements*, he hoped, would serve as "a point of departure" for revitalizing the process. His approach was thus more cautious and more painstaking than that of the standard-bearers of "social justice." By conservative advance, under the guidance of experts, with due reverence for the past, the essential character of law would be preserved, and public respect restored.

---

165. *Law Simplification* at 328.

166. *Ibid.*

167. Letter, Stone to W. D. Lewis, Oct. 24, 1922.