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# VI. Additional Essays on the Dedication Theme

## On Legal Stability and Change

*Edwin W. Patterson\**

The paradox, "law must be stable and yet it cannot stand still," expresses one of the basic metaphysical aspects of law. Is law a Being or a Becoming? Some would answer this question by saying that the law is always a Becoming, a part of the eternal flux of human actions and conditions. It is impossible, they may say, to enclose the law in a logical system of norms, however well sanctioned. The important things, then, are the *motivations* of the persons who effectuate legal change (assuming these persons can be pointed out, which is not always the case) or their justifications for change, their *reasons* given to others in the community in the form of legal evaluations: policies, principles, or ends-in-view. This view of law is an important one today. Never before, I believe, has there been such persistent questioning of a good many legal norms. The Becoming is about to swallow up the Being.

The late Professor Morris R. Cohen pointed out that it would be impossible to detect change without the conception of some stable situation with which to compare it. Change *from what*? So in law it has proved to be very useful to adopt, for several purposes, a photo-flash of the body of law as viewed at some twenty-five milliseconds of time. A better analogy for legal analysis is the accountant's balance sheet, reported as of December 31, of a given year, of the assets and liabilities of a life insurance company. Such a sheet can be highly reliable as to its main items, yet it will contain some minor guesses such as, "losses not yet reported." So if the literary sources of the law are examined expertly as of any December 31 or any other date, the set of rules, principles, policies, and standards can be formulated with a fair degree of reliability. By using broader concepts and classifications the assemblage can be given a status resembling, yet hardly approximating, the perfect system of the logician.

This second way of dealing with a body of law may be called

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analytical, and in its broader reaches it becomes analytical jurisprudence. It is sometimes called "legal positivism," a term that I dislike because of its association with Auguste Comte on the one hand, and on the other hand because of its being confused with a later movement known as "Logical Positivism." A third reason for rejecting this term, "legal positivism," is that various writers, including especially some of the natural-law followers, have applied this label and then assumed that analytical jurists are necessarily not interested in what law ought to be or even in what it is coming to be. Both of these assumptions are false. Even such a minor increment to analytical theory as Holmes' prediction theory of law was intended to explain the work of the counselor or advocate, and in the latter part of the same essay he urged that judges should have reasons of social advantage for their decisions. This looks to the law of the future. Holland, Salmond, and Paton, in addition to engaging in legal analysis, have all discussed what law *should* be. Only Kelsen maintains, it seems, an extreme position on this point. The hardest things for me to accept in Kelsen are his "and nots."<sup>1</sup>

This controversy between the schools in the United States has not become bitter or vituperative, and I fervently hope it may not. If the foregoing sketch is correct, both analytical jurists and ideal-law men take account of both the Being and the Becoming of law. Differences in emphasis and on some issues remain.

But, it may be said, the analytic jurists look only at the letters of the text and give them a literal meaning. Now I have known lawyers and judges who did just that, and I do not recommend them. I know of no legal theorist who does. In truth, may we not say that the Being of law, *its* peculiar kind of "existence" (if any), is in a realm of meanings, and in this realm the range of possible "oughts" of a legal norm or doctrine are to be included. To give but one example, does not the requirement of "mutual assent" for the formation of a (certain type of) contract imply the expectation concept, the concept of individual autonomy, and also the concept of bargain or exchange? I am inclined to believe it clearly includes the first two and that the third, bargain, distinguishes this type of contract from gift promises, enforceable because of a seal or estoppel.

The pressure for new laws may come from within the legal profession, or from outsiders. The latter more frequently happens. The law has been asked to do things hardly conceived to be possible, for example, to coerce employer and employees to "bargain collec-

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1. Kelsen's analysis of subordinate lawmaking explains in another way (than the one suggested here) the relation between the Being and the Becoming of law. See my *Hans Kelsen and His Pure Theory of Law*, 40 CALIF. L. REV. 5 (1952).

tively." How could a court shape a decree that would do? The demands came from thousands of workers who were unemployed in 1932-1933, as well as from the labor unions. Fortunately the drafting was done by a brilliant lawyer, and the legal changes brought about by the Wagner Act<sup>2</sup> were important and, for the most part, I believe, useful. On the other hand, the legal changes brought about by *Brown v. Board of Education*,<sup>3</sup> in which the Supreme Court ordered Negro pupils admitted without discrimination to schools attended by predominantly white pupils, have not been as fully and smoothly effectuated. There are several differences between the two situations, yet the principal one, I believe, is that the Court-made rule lacks an administrative agency, such as the National Labor Relations Board, to work out details at a level into which judges do not customarily enter.

Responses to demands for legal change should be made by the legislature, and not usually by the courts, who are not situated to call public hearings before adopting injunctions or rules. Legislation has, indeed, been the usual method of legal change. Law in its society must respond to some of the demands or pressures that come from its society. The objectives of a proposed change may be clear, yet the organs of government are justified in choosing and even admonished to choose the best means of attaining these ends with the least sacrifice of other ends, or in refusing to act if no effective and justifiable means are available.

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2. National Labor Relations Act, 49 Stat. 449 (1935), 29 U.S.C. §§ 151-66 (1958).

3. 349 U.S. 294 (1955).

