Volume 70
Issue 3 *Dickinson Law Review - Volume 70, 1965-1966*

3-1-1966

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By BURTON R. LAUB*

A few weeks ago, I received a letter congratulating me upon my election as Dean of Dickinson School of Law. It was from an old lawyer who retired some years ago and went to Australia to live out his days. He was never a great lawyer, but he was always a good thinker, and because he said something which stimulated me, I would like to pass it on to you. This is what he wrote:

> As Dean of a law school, you will sit in on the death scene of the common law which we studied, and you will help to midwife the birth of a new one. In a few years, the law schools will face a decision which will be hard to meet; they will have to determine how best to teach the law at a moment when the old is merely historical and the new has not yet crystallized. Although the schools will need the help of the Bar, I wonder whether it shall be given.
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> Since I came out here, the requirement of consideration for a contract has been modified, privity is no longer an element of products liability, State powers have been emasculated, individual rights have grown faster than those of society, new dimensions have been given to actions for the invasion of privacy and for emotional distress, a flux from one form of action to another in the midst of litigation is an accepted practice, and powers formerly considered exclusively within the prerogatives of elected officials have been delegated to public authorities. If the old common law is not dead, it is certainly on the way out. In America, the cry is already being framed in the public throat, 'The king is dead - long live the king!'

My immediate reaction to this was that my friend was merely expressing that vice of old age - resistance to change. On reflection, however, I began to see that he was right, at least in part. It cannot be denied that we are in the throes of a great legal revolution. Not only this, we are also undergoing a subtle mutation in the theories of government, and I hope to comment on this later, but that which disturbed me most was this sentence: "Although the schools will need the help of the Bar, I wonder whether it shall be given." Knowing that the Bar has been tried often and seldom found wanting, I thought this statement to be unreasonably uncomplimentary to the profession I love. Again upon reflection, however, I believe that my friend has merely misinterpreted the

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* Dean, Dickinson School of Law. These remarks were the text of a speech given before the Dauphin County Bar Ass'n on December 2, 1965.

silence of the Bar at this stage of the matter. It is not a symptom of unconcern, but rather uncertainty.

Historically, the law has been content to wait upon change, moving slowly behind new customs lest that which might be plausible and impermanent fasten itself like a barnacle upon the body of the law and have to be scraped therefrom by a painful and time-consuming process. But now the law has taken the lead; it does not hesitate to advance on a pro hac vice basis, knowing that even though that which is desirable today may become anathematic tomorrow, the law can swiftly descend to destroy an erroneous concept in a single judicial opinion. The aphorism no longer holds that the law moves on leaden feet.

What are the symptoms of the new climate? One of its hallmarks is a growing impatience with the distrust of established political processes. Because normal legislative procedures are relatively slow, and because all geographical areas do not have identical social aspiration, legislation is often unpopular. The people are beginning more and more to look to other aspects of government for the settlement of public problems, and almost by universal consent, the courts have been selected as the proper medium for this purpose. The role of the courts in public affairs has acquired a new dimension indeed.

It is not unnatural, therefore, that the concept of judges and the judicial function be also altered. The electorate still demands legal competence in nisi prius judges, but society is not so particular with respect to the justices of the highest courts. Whenever a new justice ascends the bench, not much thought is given outside the legal profession whether the new man is well-grounded in the law; most seem interested only in whether his social outlook is to the left, the right, or on dead center. There have been outcroppings of this philosophy in the past. Over one hundred and fifty years ago, it was said that ". . . courts are, or ought to be, schools of public morals."[1] This idea did not catch on until recent years. The extent to which it has been accepted can be seen from what Mr. Justice Harlan said in a 1963 speech to the American Bar Association. I quote from him:

> One of the current notions that hold subtle capacity for serious mischief is the view that all deficiencies in our society which have failed of correction by other means should find a cure in the courts. Some people apparently believe that the judicial rather than the political process is more likely to breed better solutions of pressing and thorny problems. This is a compliment to the judiciary, but untrue

1. Commonwealth v. Sharpless, 2 S. & R. 91, 103 (Pa. 1815).

to democratic principles.[2]

The impingement upon courts of social law rather than a system of relatively inflexible principles has brought about a cascade of tumbling precepts; some of which are new, some of which are merely branches of old concepts. More and more, appellate judges feel the urgency for expressing their own social outlooks in the disposition of cases before them. In multi-judge courts, unified opinions are becoming rare. The constant barriage of dissenting and concurring opinions may some day find fulfillment in that paradoxical phenomenon—a unanimous dissent.

Another product of the new thought is an increase in litigation. Litigants have begun to accept the invitation to litigate matters on uncertain grounds, some in the hope of gaining a quick profit from an outlandish and untenable approach to liability, others being prompted by a sincere desire to justify their faith in justice and the righteousness of their causes. There can be no question but that the public has become "rights conscious"—so much so, that one of our large television networks recently saw fit to devote a lengthy program to the subject.

Since the State finds its highest meaning in the definition and protection of rights, litigiousness is not necessarily a vice. A litigant who demands a hearing in court may be conferring a favor on the State by affording it an opportunity to function along traditional lines. It was alleged by Aristotle that Solon framed his famous Code in obscure language in a deliberate attempt to encourage litigation, thereby giving the State a chance to exercise and increase its authority over the people. Litigiousness, however, is part of the problem; whether its ascendency is a factor in court backlogs is an interesting speculation.

The movement of law has taken it largely from a system of State autonomy to one of Federalization. Federal standards are being impressed upon the states with increasing frequency, and today, a federal district judge is almost as important as the judges of the highest state courts. Although it was once said by the Supreme Court of the United States that what may be punished as crime rests with the state legislatures to whom the people in their sovereign capacities have delegated the law-making power, this is no longer law. States may not have free rein in proscribing certain conduct, nor are they free in other areas of self-government. Federal jurisdiction has interposed in such tender spots as legislative apportionment, voting qualifications, jury selection and school

2. Harlan, *Keeping the Judicial Function in Balance*, 49 A.B.A.J. 943 (1963).

management. Indeed, state courts are rapidly becoming nothing more than irritating stop-overs on the way to the Supreme Court at Washington.

Federal decisions say the states may not make criminal such things as drug addiction which is nothing more than an involuntary affliction having the aspects of a disease. If extended, this will mean that punishment may not be inflicted for sexual perversion and the town drunk may not be locked up over night. Where federal jurisdiction has invaded a field, the states are powerless to legislate. Thus, state statutes forbidding counterfeiting of public money and treason are no longer effective. On this theory, our "tax anything" act may become inoperative in some of its aspects. Nor do the states have absolute power in the adjective phases of litigation. By an exercise in semantics which leads the thought from one constitutional provision to another, federal standards have been imposed upon the states in search and seizure, the admissibility of confessions, the manner of waiving constitutional guarantees, and the finality of criminal judgments, if there is any such finality at this time. New and appealing slogans have appeared and old ones have been resurrected; "the silver platter" doctrine and the "poison fruit" doctrine have begun to appear once more in the cases, along side of such expressions as "one man, one vote."

In our own Commonwealth the new techniques have begun to appear with regularity. Without attempting to catalogue all of the old doctrines which have recently been buried, it might be sufficient to illustrate with the recent overthrow of the charitable immunity theory in tort actions, the adoption of the "most significant contacts" theory of conflicts of laws, and the recent overthrow of the old doctrine governing the timeliness of an action in habeas corpus. Stare decisis in Pennsylvania has begun to have a new look; it is not the rigorous tenent of which Blackstone wrote. As he expounded it, it went like this:

> This prevents the scale of justice from wavering with every new judge's opinion . . . he being sworn to determine according to the known laws and customs of the land, not delegated to pronounce new law, but to maintain and expound the old one. The exception is where the former determination is incorrect, much more if it be clearly contrary to divine law. But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old from misrepresentation. They do not decide that the former decision was bad law, but that it was not law.[3]

3. 1 BLACKSTONE, COMMENTARIES *59-60.

In its new dress, stare decisis does not forbid the courts to reverse a prior decision on the basis that it was not law, although this is still retained as an element. The new look, however, allows a court to conclude that although prior law was the law in the setting in which it was pronounced, it is not now law in the context of our expanding economy. If we are to create a new common law, and apparently this is what is happening, this added factor is important.

Since it is impossible to change from one legal coat to another without disturbing settled principles, we are all sitting in the draft of a jurisprudential hurricane which is swirling about our heads. Old concepts have been toppled and new ones created; the law has blown every which way. In the midst of this blast the lawyer has become uncertain as to the course and ultimate resting place of the law, and he is not quite sure whether he has a burden to discharge. In his daily practice, he finds it difficult to keep abreast of his turbulent world, and he sometimes has fears whether he can properly advise his clients.

Nor are the nisi prius courts in better shape. They are still bound by stare decisis in its primitive form, but they never know whether the law quoted in today's opinion will be the law tomorrow when the case goes up on appeal. The new awareness of constitutional rights on the part of litigants, especially in criminal trials, has placed trial judges in a vulnerable position. A trial judge has become very much like a corpse at a funeral—a necessary item to make the affair a success but unable to fashion the proceedings to his liking. More and more, trial judges have become the real defendants in the cases; the target of many trials is more the creation of reversible error than the achievement of justice.

Judge Medina's communist conspiracy trials are illustrative of what has begun to happen in the courts.[4] There, the conduct of defendants and their counsel was so egregious that Judge Learned Hand was moved to comment that the judge ". . . was sorely tried for many months of turmoil, constantly provoked by useless bickering, exposed to offensive slights and insults, harried with interminable repetition."[5] And if you think this was an exception because the defendants were merely using Judge Medina as a whipping boy to demonstrate a social point, I direct your attention to *United States v. Bentvena.*[6] One of the defendants climbed into the jury box, walked along the inside rail, pushing jurors and screaming

4. See United States v. Sacher, 182 F.2d 416 (2d Cir. 1950).
5. United States v. Dennis, 183 F.2d 201, 226 (2d Cir. 1950).
6. 319 F.2d 916 (2d Cir. 1963).

vilifications at the other defendants and the judge. One defendant threw the witness chair at the cross-examining United States Attorney, narrowly missing him and crashing into the jury box. Other defendants feigned attempted suicides, illnesses and accidents, while still others claimed they had been drugged by the officers of the law. In my own experience I have had a party shout out while a witness was on the stand, "He's a God damned liar", and one convicted criminal stated on the witness stand that he would match his own credibility against mine any old day. Being uncertain of public regard for trial judges, this was a challenge I dared not accept.

I have cited these illustrations merely to point out that when the settled course of law is disturbed, undreamed of problems begin to arise. In the climate of the prevailing social law, the shadow of error hovers over every court, and it has become sport to tantalize judges into taking false steps. I do not carry the banner of anyone who infringes another's rights, courts included, but I wonder whether self-created error is not an implicit waiver of some constitutional guarantees. To date, I know of no decision which squarely decides this point.

Many great minds have concluded that current trends are essential, and who is to say that what is happening is good or bad? Certainly, no individual may have the effrontery to be dogmatic one way or another. Constitutional guarantees have always been there, and if the recent decisions are only definitive and explanatory of such rights, they ought not to be overthrown. Many of them appeal to one's sense of justice and logic; others are open to question. Since nothing is totally good or totally bad in a man-made world, some intensive examination of the situation seems in order. The public needs answers to many questions: Are we on the proper course? Should the law continue to reflect judicial convictions or should the will of the people find expression only in legislative and congressional halls? Should the trends be strengthened, weakened, modified or abolished? Have we reached a saturation point where gains must be consolidated and additional change is not needed? All of these—and more—require examination and answer. It has been said that government cannot be stable in an unstable world, and perhaps the new law is merely a phenomenon of a chemicalization of social ideas, but eventually we must find stability. It cannot be found without leadership, nor can it be found without recognition of the circumstance that progress does not lie in motion alone.

The problem of changing laws is not new. Aristotle wrestled with it. "The law," he said, "has no power to command obedience

except that of habit which can only be given by time, so that a readiness to change from old to new laws enfeebles the power of the law."[7] Shakespeare, however, had a different thought. "We must not make a scarecrow of the law," he said, "setting it up to fear the birds of prey, and let it keep one shape, till custom make it their perch, and not their terror."[8]

It was inevitable that what has happened should cause many spectres to arise from the turbulence. Some believe that a serious imbalance exists between the enforcement of rights between society and the individual. Others believe that the law has gone soft on anti-social elements, and still others believe that the courts have put the stamp of approval on claims of police excesses, thus weakening respect for law and making its enforcement relatively impossible. Law professors have written a myriad words in promoting or attacking these fears, but the organized Bar has not chosen up sides.

It seems incredible that the Bar, which has always been in the van for social betterment, has allowed these and other unexamined and undissected rumours to run rampant among the people without any attempt to reach a solid conclusion. There should be direction and purpose in all societal endeavors, and there is no leadership outside of the organized Bar which appears sufficiently equipped to give the present endeavors either momentum or braking power.

The United States Supreme Court has proclaimed it a guaranteed right of lawyers to criticize the courts, and if necessary, such criticism should be indulged. Criticism, however, is seldom an effective weapon unless it also be accompanied by suggestion for improvement. Courts are courts, and judges are men, and men differ in their philosophies. Lawyers—as men—are almost certain to have differing philosophies from some judges on social matters. In Italy, there is an aphorism among lawyers, "Res iudicata facit de albo nigrum et de quadrato rotundum"—the judgment of the courts turn white into black and square into round. This is merely expressive of the views of a critical antagonist; it is not helpful. Leadership does not consist in looking at the scenery through dirty glasses; it consists in preparing the landscape to conform to aesthetics.

I have always thought that lawyers have made a covenant with God. In their commitment to him they have agreed to address themselves to the creation of a congregate society in which love and harmony prevail. Historically, lawyers have lived up to

7. ARISTOTLE, POLITICS (Book II).
8. *Measure for Measure*, Act I, scene 1.

this contract. Notwithstanding that the philosophy of Jesus of Nazareth conflicted with the childhood teachings of a jewish lawyer, it was an honorable counsellor of the law who claimed Jesus' body and buried it in his own tomb. It was the self-constituted lawyer Daniel who saved Susanna from the perjury of the elders, and it was Gamaliel, a great doctor of the laws who saved the Apostles from death with one of the most stirring jury speeches in all history. It was the lawyer Andrew Hamilton who braved the wrath of the powerful in his defense of John Peter Zenger, and legal minds prepared the Declaration of Independence, the Emancipation Proclamation, the Gettysburg Address and the Monroe Doctrine. Lawyers everywhere have stood on the side of humanity, not only to save man from the inhumanity of his kind, but from the outstretched tenacles of overreaching government as well. It is too late for lawyers to become bystanders in the parade of progress. Having shouldered the burden of man, they may not set it down.

DeToqueville, an early commentator on America in her formative years, had this to say more than 125 years ago:

> The profession of law is the only aristocratic element which can be amalgamated in America without violence with natural elements of democracy. I cannot believe that a republic could subsist if the influence of lawyers in public business did not increase in proportion to the power of the people.[9]

Thus, in a few simple phrases, this writer has encapsulated the historic role of the lawyer as the stabalizing catalyst in moments of public need.

I do not profess to know how far we have traveled along the road nor how far our momentum will carry us. I do not profess to sit in judgment whether what has already taken place is good or bad, but, as Shakespeare said, "when the wind is southerly I know a hawk from a handsaw."[10] I know, for example, that although individual lawyers, judges and law professors have made contributions with words of caution and advice, there has been no unified course of action settled upon by the organized Bar—unless, of course, the Bar by its silence has given tacit approval. But even tacit approval or mere sufferance is no substitute for intelligent leadership. The weakness of public opinion is that it is expressed only in the living room and not broadcast with effectiveness. It needs an amplifier, but first, it needs consolidation. The Bar can serve both functions. If there is evidence of that occasional despotism which sometimes exists in all countries,[11] the Bar must help

9. DeToqueville, Democracy in America.
10. *Hamlet*, Act II, scene 2.
11. Dunn v. Commonwealth, 6 Pa. 384 (1847).

slay it in its tracks. If what has occurred is salutary, the Bar must foster it.

Neutral men are the allies of error. Truth is not only violated by uttered falsehood; it may be equally outraged by solemn silence. Bad laws, like a vermiform appendix serve no useful purpose when they are dormant; active they become deadly. They must be excised. Good laws which remain unexecuted are like a blacksmith's bellows; they breathe but do not live. The Bar must ferret out each and act accordingly. Morality, after all, consists largely in making a public choice and sticking to it. If we would give meaning to our lives, we must live completely and know what we are living for.