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Modernization of the Law

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THE MODERNIZATION OF THE LAW*

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The necessity for the continuous adaptation of the law to the needs of the time, if the law is not eventually to break down, is a fundamental problem deserving of extensive consideration. We are all familiar with the judicial process of applying old principles of law to new situations of fact. The related process of discarding old law when it no longer works satisfactorily is more reluctantly applied because of mistaken notions concerning the doctrine of *stare decisis* but is equally essential to the life of the law. Nothing is more commonplace and at the same time more fundamental than the perpetual conflict between the demand for stability and certainty in the law and the need for change to meet new conditions. In no age has the problem been more acute than in our own, for never before has the velocity of social change been as great as now.

The common law necessarily lags behind social change and reflects it rather than anticipates it. When the lag becomes too great because the courts fail to respond to new conditions, recourse to legislation is the indicated remedy. Some of the legal problems of our day, however, are too complex for statutory solution exclusively; often the facts of a particular evil are only partially known, the best remedy or remedies are not clearly perceived by the legislature, or all of the effects of the various possible remedies are not susceptible of being accurately forecast, but the evil to be overcome is keenly felt. In these circumstances the legislature is likely to create an administrative agency and to authorize it to promulgate regulations, to prosecute violations of the enabling act and the regulations adopted thereunder and to adjudicate thereon as the most satisfactory way available of ascertaining facts concerning the evil legislated against and of testing the various possible remedies and their direct as well as their indirect effects on the body politic. One of the greatest shortcomings of this method of bringing the law in line with the needs of the times is that the legislature, once it has passed the necessary enabling statute, is likely to forget all about the problem and to leave it

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† See Contributors' section, Masthead, page 503, for biographical data.

exclusively and for an indefinite time in the hands of the administrative agency, which is sure to grow like the green bay tree. Whoever heard of an administrative agency, other than a wartime or emergency organization, solving its problem and turning its future activities back to the ordinary processes of legislation and judge-made law? Whoever heard of a legislature periodically studying its administrative creatures to determine whether they were longer needed or whether their work could be improved?

Another body of law of which we know very little and concerning which we rarely stop to think is the ordinances that are passed in such a bewildering variety in every municipality in the land. It would be interesting, for example, to check the number of times that the average well-intentioned citizen violates municipal ordinances in the course of driving his automobile on a single day's journey.

Each of these four great bodies of law—judicial decisions, statutes, administrative regulations and adjudications, and municipal ordinances—varies widely, as one considers the different subjects of the law, in its degree of adaptation to modern needs. The degree of response at any particular point in each of the four bodies of law is likely to be dependent on the urgency of the social pressures exerted thereon. In this process the older, better settled and more fundamental parts of the law naturally tend to be unduly neglected and to be taken for granted.

When we attempt to take an over-all view of our law for the purpose of seeing what can be done to free it from the barnacles of time, to modernize it to meet current needs, and to rationalize and simplify it, we are immediately struck by the vast volume of printed material that must be scrutinized. Coke had to deal with 5000 reported cases, Mansfield with 10,000; today it is estimated that the number of reported judicial decisions in the English language is somewhat under 2,000,000. In the biennium 1946-1947, 56,701 pages of statutes were added in this country to the 267,777 pages already contained in 274 volumes of codes, revisions and compiled statutes published for the delectation of the profession and of the public. Nor is the legislative pace flagging, for in the biennium 1948-1949 the statutory output increased to 79,193 pages, a gain (if that be the proper term) of 39% over the preceding biennium.

It is impossible to give comparable figures for the administrative agencies, for the simple reason that much of their legislative and adjudicatory output is not published. In the field of Federal administrative regulations the 1949 edition of the Code of Federal Regulations fills 45 volumes with 20,809 pages. The 1950 supplement contains 4308 pages and one must also, of course, consult the Federal Register which in 1949

contained 7952 pages, and 9562 pages in 1950. These figures for Federal administrative regulations exclude all specific legislation relating to rule-making and all administrative interpretations of particular cases which do not appear in the Federal Register and which are generally very lengthy. When we turn to the Federal administrative decisions we find that in the court year 1949-1950 the reported cases of four agencies alone—the Bureau of Internal Revenue, the Tax Court, the National Labor Relations Board, and the Interstate Commerce Commission—filled ten volumes as against six volumes of reports covering all the Federal district courts and seven volumes covering the eleven circuit courts of appeal.

The bulk of state administrative law, both regulative and decisional, remains unpublished. In no state is there anything comparable to the Federal Register, although twenty states do require some kind of publication of administrative regulations. Very few state administrative agencies publish their decisions and when they do, the decisions generally appear in their much delayed annual reports. Consequently it is quite impossible even to estimate the total output of state administrative law.

Nor can anyone hazard a guess as to either the number of volumes of ordinances that have been published by the thousands of municipalities throughout the United States or the number of ordinances that are being passed by them every week of the year. This material may scarcely be called literature, but it nevertheless is surely law, to a large degree unknown law. Any lawyer that has ever had to page a volume of ordinances or tried to ascertain at the average municipal clerk's office if an ordinance had been passed on a particular topic since the publication of the latest compilation will agree as to the desirability of finding some way to minimize the output of this particular kind of law and to render it more accessible.

Bulk, sheer bulk, is an inevitable characteristic of our lawmaking processes. It is a characteristic that is magnified in a Federal system such as we have in this country in contrast, for example, with the single system of courts of Canada. But Anglo-American lawyers gladly accept the burden of bulk in our law as the necessary price that we must pay for its adaptability and flexibility in contrast to the rigidity of the systems of law that are founded on codes. We do have just grounds for complaint, however, in the unknowability of our statutes, our administrative law and our ordinances. As we have seen, much of it never appears in print at all, a considerable part of what is published appears at a very late date, a large part of it is either not indexed at all or poorly indexed and there is no uniform or accepted scheme of indexing or of classification

and arrangement for publication. All of this is eloquent evidence of the distaste of lawyers generally for statutes or administrative law and ordinance law in contrast to judicial decisions. We have no general digest or encyclopedia of these great bodies of law such as we have for the output of the courts. The only comprehensive treatise on American statute law ever attempted is Professor Frederic J. Stimson's pioneer work published 64 years ago in 1886. It is significant that the phrase "administrative law" has come to mean administrative procedure. Few people seem to realize that there is such a thing as substantive administrative law, for which administrative procedure is a mere handmaiden. Nobody has ever attempted a comprehensive treatise on American administrative law either at the Federal or state level. By some unscientific and seemingly esoteric and quite indescribable mental process the average lawyer manages to grope his way through the mazes of the legislation of his own state, but he would never dare to hazard the risks attendant in seeking out the statute law of some other jurisdiction, as he frequently ventures to do in dealing with judicial decisions from other states. If he wants to know something about the legislation of any state other than his own, he realizes that he must perforce retain counsel in the alien jurisdiction. By reason of the lack of mechanical facilities similar to the apparatus we have had for decades in dealing with judicial decisions, we are barred from the free trade and borrowing, which are the lifeblood of modern brief-writing and of the judicial process, and from the ready experimentation with statutory expedients that Mr. Justice Holmes esteemed so highly as one of the great virtues of a federal system.[1]

The mass of our statute law and its inaccessibility are not our only difficulties with this great field of law which has been responsible for so much of the progress of our jurisprudence from a very early date. The causes of our distaste for statute law are as obscure as they are unreasonable. Even among the highest authorities we may note the tendency to exalt judicial decisions at the expense of legislation. Thus we find Blackstone invoking Coke as authority for the havoc legislation has wrought in our otherwise perfect common law:

> The common law of England has fared like other venerable edifices of antiquity, which rash and unexperienced workmen have ventured to new dress and refine, with all the rage of modern improvement. Hence frequently it's symmetry has been destroyed, it's proportions distorted, and it's majestic simplicity exchanged for specious embellishments and fantastic novelties. For, to say the truth, almost all the perplexed questions, almost all the niceties, intricacies, and delays (which have sometimes disgraced the english, as well as other, courts of justice) owe their origin not

[1] Noble State Bank v. Haskell, 219 U.S. 104 (1911).

> to the common law itself, but to innovations that have been made in it by acts of parliament; "overladen" (as Lord Coke expresses it) "with provisoes and additions, and many times on a sudden penned or corrected by men of none or very little judgment in law." This great and well-experienced judge declares that in all his time he never knew two questions made upon rights merely depending upon the common law, and warmly laments the confusion introduced by ill-judging and unlearned legislators. "But if," he subjoins, "acts of parliament were after the old fashion penned, by such only as perfectly knew what the common law was before the making of any act of parliament concerning that matter, as also how far forth former statutes had provided remedy for former mischiefs and defects discovered by experience; then should very few questions in law arise, and the learned should not so often and so much perplex their heads to make atonement and peace, by construction of law, between insensible and disagreeing words, sentences, and provisoes, as they now do."[2]

We find even Sir Henry Maine minimizing the importance of legislation: "the agencies by which Law is brought into harmony with society . . . seem to me to be . . . Legal Fictions, Equity and Legislation. Their historical order is that in which I have placed them."[3] But as Holdsworth points out: "This general proposition . . . will not fit the facts of English legal history . . . Legislation has played a great part in the making of English law from the very earliest period . . . and more especially at the important turning points of its development, has always been one of its most important sources."[4]

Despite the importance of statute law, its political origin, involving the give and take inherent in large bodies representing conflicting interests, its anonymous character, and the lack of special training of most legislators have conspired to bring about in many states a lack of legal craftsmanship in the difficult art of bill-drafting, all of which have, in turn, combined to justify the attitude of the bench and bar toward legislation generally. One has but to compare the uniform acts drafted by the National Conference of Commissioners on Uniform State Laws or the work of the great lawyers who in the period following the American Revolution adapted the then existing English and colonial statutes to the needs of their respective states, with the legislation that is ground out year after year in many of our legislative mills, to realize that there is justification for the general discontent with our statutory output. The lack of legislative craftsmanship in many jurisdictions makes not only for uncertainty, but for much otherwise avoidable litigation. It is small wonder, then, that a foreign lawyer whose professional life is concentrated on the written law finds it difficult to comprehend a system of

2 BLACKSTONE, A DISCOURSE ON THE STUDY OF THE LAW 8-9 (1798).

3 MAINE, ANCIENT LAW 22 (10th ed. 1905).

4 HOLDSWORTH, SOURCES AND LITERATURE OF ENGLISH LAW 2 (1925).

jurisprudence where one great source of law not only is concededly an inferior product in the main, but is also by reason of our lack of professional tools unknown and, in fact, unknowable to the members of the bar, except in their own state and then generally only by grace of some professional sixth sense. Most of all is he astonished by the indifference of the bench, the bar, and the law schools generally to this deplorable situation.

These deficiencies in our law are not mere matters of scholarly concern, they have very practical implications. If a client desires advice on a problem of statutory law in each of the 48 states, his lawyer, to be safe, would have to seek the advice of 47 different lawyers in every state beside his own. If a lawyer were asked by a client for advice on a problem of administrative law in the 48 states, the problem would be infinitely more difficult, for he would be bound first to seek out, if he could find him, an expert in the field in each of the 48 states (including his own) and get the advice of each before he could safely advise his client. Surely this is an intolerable state of the law and one which has been overcome in large part in the field of judicial decisions.

I have demonstrated, I hope, that there is much that remains to be done in making the existing law accessible before any systematic attempt can be made to modernize and simplify it. The task is of such magnitude that it cannot be attempted by judges or practicing lawyers. It is to the law schools that we must turn for help. We must also seek the aid of the law professors in the writing of systematic texts on every phase of the law as it is. What we most need in every branch of the law is works of the authority of Williston, Wigmore, and Scott. Too much of the intellectual effort of the law faculties over the last three quarters of a century has gone into the editing of casebooks and the writing of law review articles. Both are important but we are paying too high a price for them if they mean the loss of great texts. Here again the bulk and the inaccessibility of our law are strong deterrents; the writing of a great textbook is now the work of a lifetime. Gone forever are the days when a jurist like Story might turn out a shelf full of books. The law schools of the second half of the twentieth century, while developing clinical facilities to match those of the medical schools and experimental laboratories like those of the engineering colleges, must also learn to keep pace with these institutions in research and writing. It is significant to observe that we have been as backward in law librarianship as we have been in making the law available and in writing great texts. We have no generally accepted legal bibliographical classification; curiously enough, Title K, set aside for law by the Library of Congress, is the only

major classification that has not yet been published, although work on it has been in progress for half a century.

Once the law has been made available, once it has been expounded in great texts by our able scholars, how shall we proceed with the grand task of adapting it to the needs of our time? This enterprise to be effective must be the work of legal scholars, of practicing lawyers, of judges, of legislators, of administrators, of business leaders, of labor leaders, and of social scientists working cooperatively in a law center. Their task will be stupendous. In these days of big business, of big labor organizations, and of big government, they shall have to exert their greatest efforts to give each individual the maximum freedom in every sphere of activity, consistent, however, with like freedom in every other individual and with the safety and welfare of the state as a whole. They shall have to think in terms of peace and of war, including cold war, and they shall have to consider enemies within the country as well as outside. They shall have to deal with crime, both sporadic and organized. On their wisdom will depend in large degree the happiness of the individual and the welfare of the nation, and perhaps of the world. In what greater task could the law schools possibly be called upon to participate? And what task is more imperative in these days of confused thinking and of uncertain objectives?

This great enterprise of modernizing and simplifying the law is of necessity a long-range project. There are aspects, however, of the improvement of the law that will not wait. Here the pertinent question is, what does the public generally think of the law and the courts in the troubled times in which we live? I shudder when I think of what the public might well condemn in the law, particularly in legislation, in administrative law, and in many parts of the common law that no longer suit our changing economic and social needs. Fortunately for the courts and for the legal profession, the complaints of the people are not directed primarily at the substantive law itself, but rather at the men who administer the law in the courts and the way in which they do it. Not so many years ago a national poll revealed that 28% of the people did not believe that the judges of their local courts were honest. The important consideration here is not only whether the judges were in fact dishonest; the equally important fact is that 28% of the people *believed* their judges were dishonest. Without respect for the judges there can be no respect for the law they administer. Without respect for the law in a country where the people elect their rulers and determine the form of government there can be little hope either for individual freedom or for the permanence of our institutions. Obviously, the first step in law reform is to bring about a

condition where no citizen in the entire country will have the slightest cause for lacking faith in the integrity of the judges. I suspect the doubts of 28% of the people as to their local judges arise in large measure because of the obvious contacts between the judges and politics in running for judicial office and in getting ready to run for another term. These doubts as to the judiciary cannot be avoided where candidates for judicial office are obliged to run on a partisan political ticket. The appointment of judges rather than their election, followed by the strict enforcement of the Canons of Judicial Ethics, would serve to eliminate virtually all the criticism. Where for political reasons appointment proves to be impossible as a method of judicial selection, resort should be had to the American Bar Association plan of judicial selection, whereby the incumbent runs for reelection on his own judicial record and if his record is approved by the voters he continues in office without being obliged to engage in a popularity contest or to make promises, open or secret, that no judge could live up to without violating his judicial oath.

We would do well when we are thinking about popular ideas of justice to remember that the people get their ideas of our courts and of our laws from the courts that they most frequent. That court, of course, is the traffic court, to which 10,750,000 defendants were hailed last year. If a traffic ticket can be 'fixed' in a traffic court, are the people not justified in thinking that a case may be fixed in the courthouse or at the capitol? Let there be no doubt as to the extent of 'the fix' in this country: in one city in New Jersey 14,529 tickets were not responded to in a single quarter as compared with 607 tickets in the corresponding quarter following the introduction of the nonfixable traffic violations ticket, and these relatively few tickets were issued to nonresidents passing through the state and not intending to return. Yet only one state has a nonfixable traffic violations ticket along with some thirty cities in Michigan, the City of Chicago, and a few other municipalities. Let no one think the change is easy—too many people are addicted to 'the fix'—but no single step in the administration of justice will do more to bring about general respect for the law.

The people, too, dislike the law's delays—a delay in the judge getting on the bench at ten o'clock in the morning, delay in cases being reached for trial, and delay in deciding cases after they have been heard. The first of these delays, that of getting on the bench on time, is merely a bad habit that can be overcome by concerted judicial action. The last of these delays, delay in deciding cases which have been heard, is another bad judicial habit that can be readily overcome by proper rules of administration and an intelligent approach to the judicial process. No judge can

decide more than one case at a time; there is no case that he knows more about than the last case he has heard; he will never know more about it than he does after having listened to the evidence, after having read the briefs and having heard the argument of counsel—and accordingly the thing for him to do is to decide the case then and there. Delays in bringing cases on for trial are due either to a lack of an appropriate number of judges or a failure to use well-known pretrial procedures. Although it sounds mathematically absurd, it is a demonstrable judicial fact that two judges hearing cases from a common list of cases in the same courthouse can try half again as many cases as they could if they were sitting in different courthouses and operating on separate lists. The extent to which this principle may be applied depends on the number of available courtrooms, the number of available trial judges, and the number of available trial lawyers. But subject to these limitations and, of course, within reasonable limits, an increase in the number of judges at a congested spot is the first step in eliminating the law's delays in bringing cases on for trial. It necessarily involves giving someone, preferably the chief justice, the power to assign the trial judges to those counties where they are most needed and to those types of cases for which they are best equipped. Merely increasing the number of judges, however, will not solve the problem; equally essential also are pretrial conferences at which the pleadings are examined in the presence of the judge to extract the issues that are to be tried, at which inquiry is also made to see what facts may be stipulated or what documents admitted in evidence without formal proof, and whether there is need to order trial briefs. The chief purpose of a pretrial conference is a better trial in less time. That in practice three cases out of four are settled at the pretrial conference and before trial is a mere incident resulting largely from the fact that counsel on each side have considered the case for the first time in the light of the evidence that their opponents will produce at the trial. The trial judge should never attempt to force a settlement, but he can often point out to the parties the reasons on each side why a settlement may be desirable.

There is no reason why appellate practice should not be similarly simplified. Why should the entire record below be printed when counsel wish to refer to only a part of it, especially if the entire typewritten record is available for the use of the appellate judges? Why should counsel be forced to prepare long assignments of error, many of which he will abandon on reflection, when he may better state them in his brief as points for argument? Why, assuming that the appellate judges are going to read the briefs of counsel, should they not read them in advance of the argument so that if they have any questions in their minds after reading

the briefs they may ask these questions of counsel at the oral argument? If they do not read the briefs until after the argument, counsel will not be available to answer the questions which may arise in the judges' minds. Moreover, reading the briefs in advance inevitably tends to make counsel more careful in stating the facts and more accurate in the argument of propositions of law. And yet, how few courts resort to this rational procedure! There are upward of thirty appellate courts in which the cases are assigned for the writing of decisions by rotation in advance of the argument, and in a large number of these courts there is no conference of the court following the argument. Every decision of an appellate court, it is submitted, should reflect the views of every judge who votes in favor of it; and his participation in the process should be active and continuous, from the reading of the briefs to the criticism of the ultimate opinion. Anything less is an imposition on the litigants, who have every right to think that their cases are being considered by every judge who sits at the argument.

For those members of the profession—judges, practitioners and law professors—who are truly interested in the preservation of the law and the improvement of the administration of justice at a time when almost every institution seems to be under attack, there can be little doubt that the task that requires our immediate attention is the adoption of sound methods of judicial selection and the introduction into our courts at both the trial and appellate levels of rational, businesslike methods of judicial administration, to the end that when our law shall have been modernized and simplified along the lines that we have been discussing, our courts will be equipped—indeed, will still be in existence—and capable of administering it.