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I

The Anglo-American system of common law presents to the philosophical student of human history the challenge of an enigma, the mystery of a miracle. Uncreated by regal fiat, it nevertheless vibrates with a life all its own; threatened with extinction by competing systems, Chinese-like it invariably absorbs the invader for its own greater glory. The common law plunges its millenary roots into the era of feudal agriculturalism, yet it flourishes in the shadow of skyscrapers, and is fertilized by the black soot of steel-mills. Changing and yet unchanged for a thousand years, hoary with age yet contemporaneous in effectiveness, it seems to defy the rhythm of growth and decay. What can be the secret of its enduring vitality? By what device does the common law manage to ward off every attack and emerge revivified from the conflict?

No inquiry is fraught with greater significance, no investigation laden with greater consequence for the future development of our civilization than this one concerning the nature of our common law heritage. For once again a formidable attack has been launched against the traditional system of American law. To the front lie the serried ranks of those who would replace the common law by the rigidities of a code, while harassing the flanks move the newly arrived cohorts of those who would substitute for the tried values of legal supremacy the vagaries of bureaucratic arbitrariness. Against the opponents on all sides, no contemporary jurist has held the field for the common law more valiantly than Mr. Justice Stone. In his scholarly writings and in his judicial opinions, for over a period of three decades, he has interpreted the genius of the common law as a pattern of thought, a way of judicial behavior, and an ethical force woven into the warp and woof of our national life. By example more persuasively even than by precept he demonstrates that our legal system is far from moribund; and in these parlous days of ethical and intellectual frustration, when to re-valuate old values is not only a duty but a necessity, it may be profitable to

examine Mr. Justice Stone's philosophy of law and civilization for the insight and also for the inspiration that may be derived therefrom.[1]

II

It is one of the paradoxes of human nature that we tend either to deify or to desecrate the objects of our interest. Inveterately romantic, we either elevate human phenomena to the unreal heights of sanctity or else debase them to the equally unreal depths of limbo. No subject has suffered more from this trait of human perversity than jurisprudence. In its long history law has been made to run the gamut of definitions from the divine to the diabolical, from the ineffably oracular at Sinai to the morbidly psychoanalytic at Yale.

That the law is neither superhuman nor subhuman is the belief of Mr. Justice Stone. He recognizes that legal institutions arise and develop in the course of history. They are rooted in society, and bear the cumulative impress of experience. "After all," says Mr. Justice Stone, "law is the product of human experience. Into its warp and woof have entered human interests, human needs, human emotions, and notions of ethics and philosophy which are the product of our racial experience."[2] That this essentially human—and humane—characteristic of the law has tended in recent years to be minimized may perhaps be explained in no small measure by the triumphant development of the physical sciences with their theoretical emphasis upon mechanism and their concomitant practical extension in the field of automatic appliances. "The extraordinary development of the mechanical side of our civilization," suggests Mr. Justice Stone, "has perhaps given us our mechanistic philosophy of social institutions."[3] It would be erroneous to infer from this, however, that he underestimates the achievements of science or that he contemns the truth-seeking spirit which animates it. "Without abatement of the scientific spirit," he admonishes, "we can do much to humanize law and law study."[4] What Mr. Justice Stone wishes to emphasize is that the law need not be enthralled to a narrow conception of science, and that it should be permitted to unfold itself in keeping with its own inherent genius, guided by a philosophy that is faithful to the lessons of

[1]The immediate occasion of this discussion is the recent publication of a selected group of Mr. Justice Stone's opinions entitled PUBLIC CONTROL OF BUSINESS. New York: Howell, Soskin. 1940. For the purposes of this article, however, only Mr. Justice Stone's writings in theoretical jurisprudence have been drawn upon.

[2]H. F. Stone, Introduction to F. C. HICKS, MEN AND BOOKS FAMOUS IN THE LAW (1921) 11-12.

[3]H. F. Stone, *Obedience to Law and Social Change* in PROCEEDINGS OF THE BAR ASSOCIATION OF NEW HAMPSHIRE (1925) 37.

[4]H. F. Stone, Introduction to F. C. HICKS, MEN AND BOOKS FAMOUS IN THE LAW (1921) 12.

history and responsive to the exigencies of an ever-changing civilization.

Envisaged from a thoroughgoing humanistic perspective the law is seen to be, in the words of Justice Holmes, "the witness and external deposit of our moral life."[5] And any adequate definition of the legal aspect of society, as Mr. Justice Stone clearly sees, would involve nothing less than a systematic philosophy of civilization. "Since law is an essential element in and a product of social organization," he asseverates, "any complete definition of law would be impossible without a complete theory of society."[6] Organically related to every other aspect of human life, the law would be relegated to the status of a ghostly epiphenomenon, a formal mockery, were it divested of that content of pathos and bathos, of the sublime and the ridiculous which constitutes the life of the workaday world. A proper understanding of the law necessitates envisaging it in all its inter-relationships.[7]

To recognize that the law derives from and effects the entire social environment does not necessarily imply that it cannot be theoretically differentiated from other institutionalized functions. The law is not co-extensive with the community as a whole. Even in a totalitarian state many areas of necessity escape specifically legal control. Even the Inquisition bit off more than it was able to chew. The law may order a man to smile and shout *Heil;* it cannot compel him to parallel that muscular exercise with a joyous sentiment in his heart. The law may order a wife to share her husband's couch; it cannot constrain her to love him. And contrariwise no cause of action lies against a spouse for bestowing her heart at a distance upon numerous heroes of the silver screen.[8] There are limits to the scope of legal efficaciousness. In its very natnre as a utilitarian instrument, the law can hardly be more than the "external deposit" of the moral life—a relatively superficial force moving on the political surface of civilization. Like the state itself, the immediate source of its power, the legal institution functions well to the extent that it is nourished by the wellsprings of public conscience.

Considerations of this kind may perhaps serve to explain why Mr. Justice Stone is inclined to follow Professor John Chipman Gray in distinguishing between the nature and the sources of the law, and in defining the former as "the sum total of all those rules of conduct for which there is state sanc-

[5]O. W. HOLMES, COLLECTED LEGAL PAPERS (1920) 170.
[6]H. F. STONE, LAW AND ITS ADMINISTRATION (1915) 3.
[7]I would like to guard against being misconstrued as denying any value whatsoever to the formal approach to the study of the law. Doubtless the formal approach may in some instances prove a most serviceable pedagogical device. In this discussion we are concerned, however, with a definition of the law as a human phenomenon in its actual social context.
[8]Said Chief Justice Bryan, one of the early English judges: "The thought of man shall not be tried, for the devil himself knoweth not the thought of man." Quoted by H. F. STONE, LAW AND ITS ADMINISTRATION (1915) 33.

tion."[9] Remove the political organization known as the state, and humanity in its myriad patterns of more or less enduring consociation remains. Slightly effected perhaps by this operation, the manners and customs, the folkways and folklore of the people will nevertheless survive essentially untouched. One thing, however, will be lacking: a consciously formulated body of precepts for ironing out inevitable disputes, vested in an organized group endowed with the power to interpret and enforce these established rules of human relationship.

It is not necessary to subscribe to Hobbes' over-fearful imagination of a *bellum omnium contra omnes* in order to recognize that because of the complexities of modern life the concept of law would lose all realistic significance were it not predicated on the safe existence of the state in the background of judicial behavior. The state sanctions but does not itself to any considerable degree supply the content of the law. That content, as was seen, the law derives from the same source wherefrom the state itself receives its credentials, namely from the underlying *mores* and the circumambient climate of opinion. In differentiating it from etiquette, custom, religion and ethics, Mr. Justice Stone merely yields to the requirements of an ineluctable division of social labor, without in any way loosening the law from its moorings in the total life of the community.

III

The recognition that law is a function of the culture of any given epoch conjures up one of the most central and baffling paradoxes of jurisprudence. Humanity, like all the other aspects of nature, changes as it floats on the stream of time. The temporal process, however, operates cumulatively, and is oblivious of the mathematical divisions inscribed on the artificially contrived calendar. In its spontaneous flux, time brands with no perceptible symbols the interwoven stages of its continuous passage. To the crudely conceptualized observation of the student of social phenomena, history of necessity presents the spectacle of a *fait accompli*. It is only after a change has already occurred that in our finitude we first become aware of it. The dynamic quality of social growth filters through the finest analytical net, leaving in the meshes of our intelligence only the crystallized deposit of a reality that is already past.

To live in the past while ever moving forward into the future, such is the poignant paradox of human existence. And from the coils of this paradox jurisprudence cannot escape. As an instrument of social control, the law has no choice but to function within the framework of a culture which

[9] H. F. Stone, Law and Its Administration (1915) 3.

in its nature constitutes the relatively stabilized backwash of a stream which itself flows on unceasingly. Doomed to function always in the past, the law is faced nevertheless with the necessity of adjusting itself to the changes which the future inevitably brings in its wake. It is this baffling perplexity which Mr. Justice Stone doubtless has in mind when he says that "the problem, above all others, of jurisprudence in the modern world is the reconciliation of the demands, paradoxical and to some extent conflicting, that law shall at once have continuity with the past and adaptability to the present and the future."[10] Because the future is as yet unborn, and the past no longer wholly faithful to the shifting panorama of a civilization in perpetual motion, the requirement that it be both continuous with the past and adaptable to the future places upon the law a burden which is as difficult to bear in practice as it is perplexing to apprehend in theory.

The foregoing analysis of the paradoxical relationship of law with the temporal process serves to explain the existence, which it is so fashionable to denounce, of what may be called a juridical lag. Such denunciations, however, reflect greater glory upon the generosity of the emotions than upon the profundity of the intellect which inspires them. For the law is rooted in the cultural environment, and to be objective in its quest for justice it must be guided by standards derived from a critical study of the *mores* of the community within which it functions. In the words of Mr. Justice Stone, "law cannot rise above its source in the customs, morals, and social experience of the people to whom it is to be applied. . . ."[11] A cultural phenomenon, the law derives all its meaning within the context of civilization, and any effort to transcend the realm of social existence would tend to convert the law into a mystical aberration bereft of all human significance.

Because the law is thus limited in its scope by the underlying totality of communal life, it necessarily lags behind the moral values and social ideals of the group whose disputes it is called upon to conciliate. "It is inevitable," writes Mr. Justice Stone, "it is inevitable that law can never realize completely or keep pace wholly with the moral aspirations of mankind, not only because they lack that definiteness along their outer boundaries which must characterize law, but because moral standards must become generally settled and accepted by society before they can find expression in law as an established rule of conduct. The moral rule must be a settled principle of social conduct before law can or should attempt to make that principle mandatory upon all members of the community."[12] And elsewhere he further elaborates

[10]H. F. Stone, *The Common Law in the United States* in THE FUTURE OF THE COMMON LAW (Harvard Tercentenary Publications 1937) 129.
[11]H. F. Stone, *Obedience to Law and Social Change* in PROCEEDINGS OF THE BAR ASSOCIATION OF NEW HAMPSHIRE (1925) 34.
[12]H. F. STONE, LAW AND ITS ADMINISTRATION (1915) 34.

the same thought when he says that "it is the element of slow maturity, the necessity for the requisite interval of time for condensation and just appraisement of human experience which constitute both the strength and weakness of any system of law. Slow growth gives that toughness of fiber, that solidity of structure which have made the common law the dependable prop of the state throughout the English-speaking world. But it is inevitable that at times in the history of human affairs, the swift progress of events with the attendant accumulation of undigested data of experience should outstrip the development of the law, since the necessary process of condensation of our observation cannot keep pace with an accelerated human experience."[13] The juridical lag is not the product of a sinister conspiracy hatched by reactionary judges, but derives its characteristics from the paradoxes of the temporal process within which civilization unfolds itself, and results from the very nature and function of the legal institution as an organ of social control. Under penalty of the sheerest arbitrariness, the law is obliged to wait for its standards till the social flux, slowing down as it joins the accumulations of the past, begins to present an intelligible pattern of normative behavior for the judge and legislator to apply.

It would be one-sided, however, to place upon the dialectical exigencies of social evolution the entire blame for the inherent conservatism of law. Its own inner technique combines with the outer social determinants to put a brake upon whatever Icarian propensities the common law may harbor. This technique is of course the one familiar under the name of *stare decisis,* and is characterized by the obedience to precedent. "The English common law which obtains generally in the United States," Mr. Justice Stone reminds us, "is a law of precedent. By this is meant that the decision of a court, when it takes the final form of a judgment, operates not only to dispose of the rights of the parties to the particular litigation pending before it, but it constitutes a precedent to be followed in the decision of all like cases which may arise in the future. Every decision is thus an authority which determines what the law is, and is a source of law to govern future cases."[14] To follow precedent means to endeavor to bring to bear upon the solution of a current dispute the cumulative wisdom of preceding generations in so far as it has proved itself in the solution of similar disputes. Doubtless abused in many instances by unimaginative judges, the technique of *stare decisis* reflects a trait of the rational mind which turns spontaneously for assistance, when faced by a problematic situation, to those who previously had acquired experience in dealing with an analogous predicament. For a

[13]H. F. Stone, *Obedience to Law and Social Change* in PROCEEDINGS OF THE BAR ASSOCIATION OF NEW HAMPSHIRE (1925) 31.
[14]H. F. STONE, LAW AND ITS ADMINISTRATION (1915) 16-17.

judge to refuse to profit by the experience of his predecessors would be not only a denial of his own birthright as a rational being; it would be also a wanton neglect of his duty as a dispenser of justice.

To follow intelligently the method of precedent, it may be affirmed, is to be guided by experience—by the cumulative experience of the ages. One need not indulge in fanciful contrasts with civilian systems, nor disparage their greater architectonic symmetry, in order to appreciate the benefits which must accrue to the common law as a result of its highly empirical temper. Since "no rule of the common law is ever formulated or declared apart from an actual controversy,"[15] and since "the law is applied by a judge who knows the existing rules of law and who by his study of the case and by experience in the practice of his profession and as a judge knows how those rules work in their application to other controversies,"[16] it is to be expected that judge-made law, based on the creative fusion of reasoned authority with present experience, will produce a system characterized simultaneously by realism and certainty.

In legal parlance, as in life generally, certainty does not mean an unfailing mechanical necessity. It means rather the probable occurrence of a reasonably anticipated event. It means regularity and generality within the limits of human finitude and the framework of shifting circumstances. Legal certainty means that if all things are equal, and allowing for factors whose decisiveness are in no two human situations absolutely identical, then a litigant may expect that a decision in his case will not differ arbitrarily from the decision handed down in a series of similar cases previously adjudicated. Generality and certainty in the law are ideals that stand opposed to irresponsible impressionism and arrogant subjectivism; they do not symbolize, as some contemporary carieaturists would have us believe, the quintessence of judicial automatism, nor would they inspire the rationalization into a legal principle of the mechanical behavior of Robots.

The common law technique of a critical interpretation of precedent satisfies the legitimate craving for a reasonable degree of stability in human affairs, and thus fills a social need which is not without a moral value. "As civilization becomes more advanced, and social organization becomes more complex," writes Mr. Justice Stone, "the greater becomes the necessity for a system of law which sball be reasonably certain in its application to the usual affairs of the citizen. Uncertainty in law, when it occurs in the modern state, results necessarily in an inextricable confusion in which loss and injustice to the individual are inevitable consequences."[17] Without under-

[15] *Id.* at 37.
[16] *Ibid.*
[17] *Id.* at 11-12.

estimating those practical and ethical benefits which the technique of *stare decisis* makes possible, it should be obvious, however, that this precedent-following technique, so native to the common law, unconsciously tends in its effect to widen beyond necessity the gap between judge-made law and the ever-changing conditions of social life; while in its reliance upon authority as well as experience it also operates quite paradoxically to breed within its own empirical system the very multiplicity of contradictory rules which the common law, by its allegiance to precedent, endeavored to avoid. Fearful of transcending the realm of the known and the knowable, the common law runs the risk of forgetting that the past is itself a growing area to which the future is constantly adding new fringes, and that a proper respect for precedent does not necessitate a supine worship of authority when under the stress of changed circumstances it loses its social utility. Imperceptibly the dynamic aspect of *stare decisis* tends to be overlooked, and as a result we are confronted no longer by a necessary lag between law and culture, but by a mass of archaic rules and principles which are as baneful to the legal system as they are unjustifiable. By a similar process, due to the slackening of judicial vigilance, does the respect for precedent tend to yield chaos instead of order, eccentricity instead of generality. Under the stress of experience, with the passage of time, certain rules are bound to lose their authoritative significance; yet to these enfeebled precepts we continue to pay an empty homage. Thus contradictory rules begin to pullulate in the body of judge-made law, and instead of a source of order and certainty, precedents tend to become a cause of anarchy and confusion. So true is it that even the best human devices threaten in the long run to negate their own purposes, and serve to enhance evils which in their original condition are not wholly without a justification.

IV

That the common law, like any human achievement, is far from a Platonic archetype of immutable perfection; and that the shortcomings of our legal system can and must be eliminated, no contemporary jurist is keener to recognize than Mr. Justice Stone. Imbued with a more discriminating admiration than Sir John Fortescue who in his *De Laudibus Legum Anglie* waxed so far ecstatic as to exclaim that "there is not pretense to say or insinuate to the contrary but that the laws and customs of England are not only good but the very best . . . you must acknowledge them to be not only good laws but such in all respects as you yourself could not wish them to be better," Mr. Justice Stone, sobered by five centuries of experience, is impelled more calmly to avow that "as practicing lawyers we are accustomed to think

of the law as an almost changeless and permanent thing, and yet our knowledge of the history of the common law reminds us that its story has been one of change and progress which has been greatly accelerated in times of rapid social and economic change."[18] A human institution, the law is subject to all the imperfections and all the vicissitudes to which the flesh is proverbially heir. By the same token it is amenable to all the ameliorations which the ingenuity of man can devise for the improvement of the human lot. Man is indeed the measure of all things legal.

The juridical lag is to some extent an inevitability; it is not a virtue. The past, to be sure, is continuous with the present and the future, so that "in law as in other human affairs we forget and place at hazard the future when we disregard the past."[19] The necessity of taking into account the achievements of the past before leaping into the future does not imply, however, a passive acceptance of outworn authority; nor does it carry with it the obligation to walk unswervingly within the limits traced by the hands of the honored dead. "History is more than a catalog of events," declares Mr. Justice Stone, "history is more than a catalog of events or an appeal to precedent. Rightly viewed and used, it is the record of the past, measured and valued in terms of progress. Knowledge of how that progress has been achieved, as well as insight into the nature and effect of those influences which have hindered and on occasion have thwarted it, is the beginning of that wisdom with which we may hope to insure the progress of the future."[20] Precedents are valuable not as archaeological curiosities, but as the cumulative dictates of experience, as shortcuts to social control. Precedents lose their juridical prerogatives to the extent that in the course of human development they cease to serve the cause of progress.

The plethora of conflicting and archaic rules stemming from a mechanical application of *stare decisis* does not make for legal progress. Accumulating empirically in response to the specific needs of individual controversies, growing in rank profusion under the protection of what may be called an unconscious theory of juristic *laissez faire,* bereft of any internal principle of coherence, the rules pronounced in each isolated case inevitably developed with the passing of the centuries into a congeries of contradictory and often inconsequential precepts. Thus the very strength of the common law, its pragmatic empiricism, turned out to be its greatest weakness, and militated

[18]H. F. Stone, *Changing Order and Responsibility of the Bar* in NEW JERSEY BAR ASS'N YEAR BOOK (1921) vol. II, p. 53.
[19]H. F. Stone, *Obedience to Law and Social Change* in PROCEEDINGS OF THE BAR ASSOCIATION OF NEW HAMPSHIRE (1925) 39.
[20]H. F. Stone, Review of W. W. COOK, CASES AND OTHER AUTHORITIES ON EQUITY in (1926) 35 YALE L. J. 646.

against that quality of certainty which was its proudest boast. "Every new citation," cautions Mr. Justice Stone, "every new digest, every new compilation which we eagerly seize upon to lighten our labors, comes, like Banquo's ghost, to confront us with the disquieting reality that the common law system of precedent which our forbears have cherished for some ten centuries cannot continue indefinitely to develop solely through the medium of reported decisions."[21] Also in jurisprudence *laissez faire* seems to have failed.

The evils which impair the common law invite constructive reform; they do not spell bankruptcy. The presence of anachronisms testifies to the inescapable influence of time's corrosive alchemy; it does not imply that the legal corpus in its entirety is corrupted. Nor does it follow that any alternative system would be immune to the same defects which derive from the dynamic quality of life itself. Hence Mr. Justice Stone is in the forefront of those who champion a rational restatement of the common law in order to purge it from inconsistencies and to adapt it more closely to the needs which the unparalleled social changes of recent years have created.[22]

Unlike a code, the Restatement is not repugnant to judge-made law; rather it is predicated upon the self-corrective and creative potentialities of the common law. "One of the striking phenomena of the development of the common law since it was transplanted to these shores," Mr. Justice Stone notices, "is the ever-accelerated speed with which its boundaries have been extended, and its content multiplied and refined."[23] This expansion must be attributed not only to outer legislative forces but also to the inner flexibility of our legal system itself which responds to judicial guidance, and yields spontaneously, albeit cautiously, to the changing pressure of enlightened public opinion.

The great judges who have guided the common law successfully through channels encumbered by the débris of revolutionary eruptions and seething under the maelstrom of mass hysteria, were fully aware of the relativity of human values. They recognized, in the words of Mr. Justice Stone, that "moral standards vary from generation to generation and that a legal rule which conformed to the moral standards of one period might fall far short of

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[21]H. F. Stone, *Some Aspects of the Problem of Law Simplification* (1923) 23 COL. L. REV. 319, 320.

[22]The entire article entitled *Some Aspects of the Problems of Law Simplification,* (1923) 23 COL. L. REV. 319-337, may be said to be a manifesto on behalf of the Restatement which has already proved itself to be of inestimable value. In this connection it may be interesting to compare Mr. Justice Stone's views with those of his late colleague, Mr. Justice Cardozo. *Cf., A Ministry of Justice* and *The American Law Institute* reprinted in BENJAMIN N. CARDOZO, LAW AND LITERATURE (1931) 41-69, 121-141.

[23]H. F. Stone, *The Common Law in the United States* in THE FUTURE OF THE COMMON LAW (1937) 120; and *passim.*

the standards of another."[24] In its inherent power to implement this ethical relativism lies perhaps the unique secret of the perdurance of the Anglo-American system of law.

Adapting itself to changing circumstances and values, the law perforce is obliged to look beyond its own confines. To it does not apply the poet's injunction:

> "Veux-tu découvrir le monde,
> Ferme tes yeux, Rosemonde"—

It is not by introspection that the kaleidoscopic physiognomy of the external world can be discerned. "We ought not to be completely absorbed in the technique of the law," counsels Mr. Justice Stone. "Who," he asks rhetorically, "who could . . . suppose that law could exist and function separate and apart from science or from adequate understanding and appreciation of the significant facts of modern life which affect social right? The questions which come to us are rooted in history and in the social and economic development of the nation. To grasp their significance our study must be extended beyond the examination of precedents and legal formulas, by reading and research in fields extra-legal, which nevertheless have an intimate relation to the genesis of the legal rules which we pronounce."[25] Jurisprudence, to be progressive, must be fertilized by the other social disciplines.

Envisaged from the broader perspective which a sociologically impregnated jurisprudence discloses, the law is recognized to be a teleological process developing with its cultural environment in the deliberate quest for justice. Faithful to the general tendencies of modern philosophical thought under the propulsions of the Darwinian influence, the implied stagnant perfectionism of Coke and Blackstone is rejected for a frankly dynamic viewpoint. Legal rules are seen to be in the nature of hypotheses or tentative plans of action, subject to the pragmatic test of social efficacy. In a recently enunciated passage which leaves very little to be desired, Mr. Justice Stone summarizes this progressive doctrine which has become familiar under the name of sociological jurisprudence:[26]

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[24]H. F. Stone, *Francis Marion Burdick* (1920) 20 COL. L. REV. 727.

[25]H. F. Stone, *Fifty Years Work of the Supreme Court* (1928) 14 A. B. A. J. 435.

[26]The association of the phrase "sociological jurisprudence" with the name of Mr. Justice Stone necessitates a word of explanation, for on various occasions, especially in his LAW AND ITS ADMINISTRATION (1915), written when he was Dean of the Columbia University Law School, he has expressed an unmistakable antipathy to the name, if not to the doctrine of sociological jurisprudence. With the passing of the years he has continuously modified and qualified his original antagonism to the doctrine which he opposed more for the abuses which he feared it might encourage than for its principles. That he has not hesitated to modify his earlier opinions is of course a tribute to his

> "We are coming to realize more completely that law is not an end, but a means to an end—the adequate control and protection of those interests, social and economic, which are the special concern of government and hence of law; that that end is to be attained through the reasonable accommodation of law to changing economic and social needs, weighing them against the need of continuity of our legal system and the earlier experience out of which its precedents have grown; that within the limits lying between the command of statutes on the one hand and the restraints of precedents and doctrines, by common consent regarded as binding, on the other, the judge has liberty of choice of the rule which he applies, and that his choice will rightly depend upon the relative weights of the social and economic advantages which will finally turn the scales of judgment in favor of one rule rather than another. Within this area he performs essentially the function of the legislator, and in a real sense makes law."[27]

Legislating within limits set by tradition and insight, the judge is a creative agent capable of molding the common law according to a philosophical pattern of social well-being. Under his intelligent control the juridical lag can be reduced to that minimum which inheres in the nature of things alone, and which sets a rational albeit fugitive term to man's inveterate idealism.

Because the judge does in a genuine sense make law it should not be inferred, however, that his creative activity is as untrammelled as that of the legislator. While Mr. Justice Stone admits that "the power of appellate courts to limit or modify the application of rules of law, and in extreme and exceptional cases to overturn precedents, when wisely and prudently exercised, is the very life of the law,"[28] he takes pains to emphasize the dangers of judicial subjectivism, and invites attention to the fact that "in calling the written law judge-declared or judge-made law it must not be supposed that such law represents the mere whim or caprice of the judge who declares it."[29] And he proceeds to explain that "what has led to the overruling of precedent . . . is not the personal theories of the judges as to what consti-

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intellectual integrity. A careful study of all his published writings, including his book reviews, convinces me, however, that Mr. Stone was always a "sociological jurist" *malgré lui,* and that his original strictures, while based on a misunderstanding of the doctrine as expounded by Dean Roscoe Pound, were nevertheless motivated by a legitimate opposition to the dangers of an unbridled juristic impressionism buffeted by gusts of popular frenzy. Extended interpretations of the doctrine of sociological jurisprudence may be found in Moses J. Aronson, *Cardozo's Doctrine of Sociological Jurisprudence* (1938) 4 J. Soc. PHIL. 5-44; and by the same author, *The Juristic Thought of Mr. Justice Frankfurter* (1940) 5 J. Soc. PHIL. 150-173; *Roscoe Pound and the Resurgence of Juristic Idealism,* to be published (October, 1940) J. Soc. PHIL. and *Tendencies in American Jurisprudence,* in (July, 1940) U. OF TORONTO L. J.

[27]H. F. Stone, *The Common Law in the United States* in THE FUTURE OF THE COMMON LAW (1937) 140-141.

[28]H. F. STONE, LAW AND ITS ADMINISTRATION (1915) 47.

[29]*Id.* at 16.

tutes 'social justice,' but the pressure of facts proven in court which lead ultimately to the recognition that 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."[30] Unfelicitous in expression and thus lending itself to the ravages of what may be called the higher chicanery which constitutes the besetting curse of so much philosophical literature, Mr. Justice Stone's meaning is nevertheless clear. Without minimizing the necessity of a *lebensanschauung* to preside over the choice of conflicting precedents which must be made as "an appraisal and comparison of social values,"[31] he wishes to bring out that while the legislator "is not bound by existing rules of law, and is concerned with them only incidentally in connection with the process of formulating new law,"[32] the judge, on the contrary, in the exercise of his creative function, is hedged by standards of objectivity which should not be ignored. Precisely because the legislative function exists, in the words of the late Justice Cardozo, to "eradicate a cancer, right some hoary wrong, correct some definitely established evil which defies the feebler remedies, the distinctions and the fictions, familiar to the judicial process,"[33] it is all the more necessary for the judge, in guiding the law, to exercise those restraints which obviate the dangers of personal whimsicality. Any other method would produce not legal progress but a tyranny of caprice less tolerable even than the confusion wrought by the anachronisms which it is the function of the inventive judge to nullify.

V

In the ebb and flow of history, the common law has not always remained true to those ideals of equity and flexibility which are the secret of its enduring vitality. Like all things human it has had its moments of lassitude and inertia. Forgetful of the noble audacity which enabled it to prosper under the most diverse circumstances, the common law permitted itself to succumb temporarily in the course of the nineteenth century to the lure of a deceptive notion of immutable perfection, and the static views of the Cokes came to triumph over the more dynamic outlook of the Mansfields. The effect of this allegiance to an illusory conception of legal self-sufficiency coupled with an extravagant interpretation of the principle of the separation of governmental powers, was to create on the part of judges a peculiar

[30] *Id.* at 47.
[31] H. F. Stone, *The Common Law in the United States* in THE FUTURE OF THE COMMON LAW (1937) 127.
[32] H. F. STONE, LAW AND ITS ADMINISTRATION (1915) 43.
[33] BENJAMIN N. CARDOZO, THE GROWTH OF THE LAW (1924) 134.

hostility toward statutory enactments. In this unfriendly attitude of judicial specialization is grounded the superstition, still taught in many law schools as an elementary truism, that statutes in derogation of the common law are to be strictly construed. Imbued with a parochial jealousy of its traditional prerogatives, and dominated by an ideal of static perfection, the judiciary looked askance at statutes as intruders to be treated with cold courtesy, of course, but without any hospitality. "The statute was looked upon as in the law but not of it," complains Mr. Justice Stone, "a formal rule to be obeyed, it is true, since it is the command of the sovereign, but to be obeyed grudgingly, by construing it narrowly and treating it as though it did not exist for any purpose other than that embraced within the strict construction of its words."[34] Motivated by a spirit of narrow departmentalism, judge-made law warred against statutory law, and the legal household became divided against itself.

Antagonism begets antagonism, and confusion thrives on internal dissensions. The failure of the common law sympathetically to accept and assimilate the fiat of the legislature contributed to the growth of a widespread attitude of lawlessness which doubtless had its roots in causes more profound than the technical principle of strict constructionism. The latter was a factor, however, in slackening the pace of the law at a time when the transition from an older order of rural life to a novel industrialism made rapid legal change particularly imperative. Under these circumstances the undue rigidity of the common law struck the popular imagination, always ready to release its emotional energy, and judge-made law entered into a period of partly justifiable discredit. "It is difficult to appraise the consequences," writes Mr. Justice Stone, "it is difficult to appraise the consequences of the perpetuation of incongruities and injustices in the law by this habit of narrow construction of statutes and by the failure to recognize that they are as significant as recognitions of social needs and rightly as much a part of the law as the rules declared by judges. A generation ago no feature of our law administration tended quite so much to discredit law and lawyers in the lay mind. A narrow literalism too often defeated the purpose of remedial legislation, while a seeming contest went on with the apparent purpose of ascertaining whether the legislatures would ultimately secure a desired reform or the courts would succeed in resisting it."[35] In the struggle for supremacy between the judiciary and the legislature when cooperation was most to be desired, the ultimate purposes of the law as an instrument of social welfare went unattained.

[34]H. F. Stone, *The Common Law in the United States* in THE FUTURE OF THE COMMON LAW (1937) 133.
[35]*Ibid.*

The common law's necessity is the codifier's opportunity. It matters not that guided by an erroneous eighteenth century philosophy of rationalism the judges themselves were to blame for the low estate into which the common law had fallen. To the extent that judicial declarations were discredited as an instrument of progress, statutes gained in prestige as the expression of contemporary opinion and as the uniquely potent agency of translating new social ideals into official legal behavior. "Forgetting that social custom and the average moral standards of the community are more potent in the control of human conduct than formal law," deplores Mr. Justice Stone, "we nevertheless seem to regard statute making as the chief and only ultimate agency of social reform and the never failing means for the minute regulation and control of all human activities."[36] The center of legal gravity came to be shifted from courts to legislatures, from judge-made rules to statutes.

Faith in the unbounded efficacy of statutes leads by a logical process finally to the glorification of a full-fledged code. Oblivious of our own experience with attempts on a limited scale to codify various branches of commercial law, and ignoring the lessons taught by the more thoroughgoing experiments of other countries which, unlike ourselves, move within the orbit of the Roman law tradition, impetuous reformers, out of the depths of their despair with the inadequacies of what may be called the muddling characteristic of the common law, would substitute in its place a *corpus juris* patterned after the continental systems. That such a proposed code, by its qualities of internal consistency would charm the intellect with its esthetic elegance, and that it would shine with an artificial splendor unknown to the more rugged and battle-scarred common law, can hardly be gainsaid. Mr. Justice Stone, however, together with many of the greatest leaders of the Anglo-American bar and bench is inclined to be skeptical concerning the superior effectiveness of a code over judge-made law when it comes to the supreme test of social control in a dynamic civilization. Not only are we faced by the difficulty which can doubtless be overcome by education that the American lawyer is not accustomed to the civilian way of thinking and to him codification "has always been anathema," but a more serious objection resides in a consideration based on our own past experience. Mr. Justice Stone invites attention to the fact that "the limited codification of commercial law subjects in this country has not proved so successful a method of law simplification as to encourage the hope that the other and more complex branches of our law may generally be simplified by that method."[37] Between the ideal and its

[36]H. F. Stone, *Obedience to Law and Social Change* in PROCEEDINGS OF THE BAR ASSOCIATION OF NEW HAMPSHIRE (1925) 37.

[37]H. F. Stone, *Some Aspects of the Problem of Law Simplification* (1923) 23 COL. L. REV. 329.

realization there is many a slip among creatures burdened with the original sin of human finitude.

That codification should in the final analysis prove unsuccessful in overcoming the very difficulties which in the eyes of its sponsors render it necessary, is not to be wondered at. The juridical lag, as was pointed out earlier in this discussion, is rooted in the very nature of social development. Only superhuman omniscience can peer into the future and prepare its reception. A codified system just as much as the common law would be subject to the evils of historical myopia. Like the common law during periods of stagnation, a code too would soon be open to the charge of lagging behind the culture of its day. "However skilfully performed," admonishes Mr. Justice Stone, "and whatever learning and experience may be lavished upon it, the human mind cannot envisage every situation which may arise even in a well-known or well-understood social order or foresee the variations which will take place in a changing and increasingly complex civilization. To place our law after centuries of free development on a Procrustean bed of unyielding statutory law would not make for progress. It would only be the precursor either of stagnation or, what is more probable, of the utter confusion and disorganization which would result from the struggle of the spirit of the common law to free itself from its statutory bondage."[38] Faced by specific applications which it could not possibly have foreseen, a codified system would have to call to its rescue the judiciary, and endow it again with its former common law prerogatives to interpret, to apply and to create the law. Thus a code would serve but to set in relief the technique of judge-made law as an indispensable instrumentality of legal adjustment to continuously changing circumstances.

The alternative to the evils of a code is the creative exercise of the judicial function under the guidance of a critically alert philosophy of the common law. Such a philosophy, which solicits the sympathy of Mr. Justice Stone, would be cognizant of the dynamic forces in society which render constant adaptation imperative, would predicate its legal reasoning upon a tolerant acceptance of the major premise of ethical relativism which a realistic examination of the data of history discloses, and would voluntarily incorporate, as an organic part of the common law system the enactments which articulate the changing social values through the voice of popular legislative bodies. In the light of a progressive philosophy, common law judges would recognize, as they have at the low ebb of their career sometimes failed to do, that "a statute is not an alien intruder in the house of the common law, but a guest to be welcomed and made at home there as a new and powerful aid

[38] *Id.* at 330.

in the accomplishment of its appointed task of accommodating the law to social needs."[39] The common law tradition itself presents favorable precedents for this cooperative attitude, as has been persuasively urged by Dean Pound and his successor Dean Landis.[40] By applying the doctrine of the "equity of the statute," legislative enactments may be envisaged as sources of law, just as much the starting point for judicial expansion and adaptation as any precedent can be. And thus would be satisfied the need for "the better organization of judge-made and statute law into a co-ordinated system,"[41] which nourishes the clamor for codification, in itself as impotent to counteract the juridical lag as it is repugnant to the Anglo-American tradition of judicial creativity.

VI

The problem of the relationship between judge-made law and statute which has been putting the common law to a crucial test such as it has not had to face since its fateful ordeal in meeting the challenge of equity during the seventeenth and eighteenth centuries, has in recent years become exacerbated by a related and analogous perplexity. This newer embarrassment arises out of the questions raised by the development of administrative commissions which overlap in their function the old-established common law tribunals. Endowed simultaneously with legislative, executive and judicial prerogatives, these administrative tribunals were called into being to serve as legal shock troops, so to speak, as highly mobilized agencies, qualified by their expeditiousness and expertness to tackle more efficiently the highly complex and rapidly moving situations created by the revolutionary impact of technology upon industry, and thus to supplement the more cumbersome albeit more disciplined behavior of the regular courts. "Perhaps the most striking change in the common law of this country," affirms Mr. Justice Stone, "certainly in recent times has been the rise of a system of administrative law, dispensed in the first instance through authority delegated to boards and commissions composed of non-judicial officers."[42] Arbiters of justice and instruments of law enforcement, it was to be expected that these novel administrative agencies, infringing as they necessarily do upon a do-

[39]H. F. Stone, *The Common Law in the United States* in THE FUTURE OF THE COMMON LAW (1937) 133-134.

[40]Roscoe Pound, *Common Law and Legislation* (1908) 21 HARV. L. REV. 383; and James M. Landis, *Statutes and the Sources of the Law* in HARVARD LEGAL ESSAYS (1934). See also Ernst Freund, *Interpretation of Statutes* (1917) 65 U. OF PA. L. REV. 227; and JOHN C. GRAY, THE NATURE AND SOURCES OF THE LAW (2d ed. 1938) 152-197.

[41]H. F. Stone, *The Common Law in the United States* in THE FUTURE OF THE COMMON LAW (1937) 134.

[42]*Id.* at 135.

main which for a thousand years has been kept under the jealous guardianship of the common law, should disturb the equanimity and arouse the apprehensions of the judiciary. Reminiscent of the alarm engendered in an earlier period by the expansion of equity jurisdiction under the pressure of economic changes and a resurgent ethical consciousness, today the common law is again caught in the throes of an internal crisis upon the outcome of which depends its whole future destiny under a democratic scheme of political organization.

Just as the pressure of events caused the narrow bonds of ancient writs and forms of action to expand and combine with the more elastic mechanisms of equity, so has the same implacable force of social development in our day outrun the flexibility of a more modern common law, and is challenging it to quicken its pace and associate its talents with the still more adaptable devices of administrative law. These newer devices have become necessary "not by want of an applicable law, but because the ever-expanding activities of government in dealing with the complexities of modern life had made indispensable the adoption of procedures more expeditious and better guided by specialized experience than any which the courts had provided."[43] Because the distinction between administrative commissions and judicial tribunals resides not so much in substantive law as in procedural practices and extra-legal equipment, what is needed for their mutual benefit is a cooperative joining of forces to the end that justice may triumph in our highly industrialized society honeycombed with gigantic interlocking corporations and parcelled into myriads of self-estranged groups blindly colliding with one another.

Like Selden who held that "equity is a roguish thing," for a Chancellor's conscience, he opined, is as variable as a Chancellor's foot, so many contemporary jurists, forgetful that common law judges also have feet,—feet that vary in degree of nimbleness and also cleanliness,—are inclined to look adversely upon the new-fangled administrative processes as "roguish things" fraught with all the dangers of arbitrariness. Of these real dangers, Mr. Justice Stone is not unaware. "As lawyers," he admonishes, "we should see to it that while preserving what is good and efficient in an improved administrative system, it should be held in check by a procedure which recognizes that individuals have rights which cannot be ruthlessly over-ridden by bureaucracy."[44] Eternal vigilance is the price of liberty in administrative law as much as in any other human enterprise.

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[43] *Ibid.*

[44] H. F. Stone, *Changing Order and the Responsibility of the Bar* in NEW JERSEY BAR ASS'N YEAR BOOK (1921) vol. II, p. 62.

To condemn an institution because it is open to abuse on the part of irresponsible individuals is as futile as it is fallacious. By such a negative argument Mr. Justice Stone refuses to be seduced. Granted that administrative commissions have arisen in response to social needs which the common law has shown itself unable effectively to satisfy under the circumstances of our peculiarly complex economic system, the question becomes not whether we are to retain these newer agencies, but rather how to implement them so that they could perform their function with a minimum of imperfection. Says Mr. Justice Stone:

> "Addresses before bar associations twenty years ago, discussing the rise of new administrative agencies, are reminiscent of the distrust of equity displayed by the common-law judges led by Coke, and of their resistance to its expansion. We still get the reverberations of these early fulminations in renewed alarms at our growing administrative bureaucracy and the new despotism of boards and commissions. So far as these nostalgic yearnings for an era that has passed would encourage us to stay the tide of a needed reform, they are destined to share the fate of the obstacles which Coke and his colleagues sought to place in the way of the extension of the beneficent sway of equity. These warnings should be turned to account, not in futile resistance to the inevitable, or in efforts to restrict to needlessly narrow limits activities which administrative officers can perform better than courts, but as inspiration to the performance of the creative service which the bar and courts are privileged to render in bringing into our law the undoubted advantages of the new agencies as efficient working implements of government, but surrounded with every needful guarantee against abuse."[45]

Like all human devices, like the common law itself, government by commission is bound to present instances of undue arbitrariness and venality. These evils can be progressively eliminated by the same method of trial and error, so congenial to the Anglo-American temper, which has enabled the common law to correct itself continuously and to thrive amidst changing circumstances.

That the system of administrative law as already established constitutes no peril to our cherished ideals of due process and of the supremacy of law, seems patent to Mr. Justice Stone. He discerns within the administrative procedures themselves a spontaneous attempt to safeguard and apply, subject of course to the exigencies of their special problems, these basic ideals which are rooted in the *mores* of our culture. And the history of the movement serves to confirm his optimism. "Looking back over the fifty years which have passed since the establishment of the Interstate Commerce Com-

[45]H. F. Stone, *The Common Law in the United States* in THE FUTURE OF THE COMMON LAW (1937) 136-137.

mission," writes Mr. Justice Stone, "no one can now seriously doubt the possibility of establishing an administrative system which can be made to satisfy and harmonize the requirements of due process and the common-law ideal of supremacy of law, on the one hand, and the demand, on the other, that government be afforded a needed means to function, freed from the necessity of strict conformity to the traditional procedure of courts."[46] That the future development of adminstrative law shall not deviate from the ideals of objectivity and integrity set by the original commissions depends in the final analysis, as all honest government depends, upon a public opinion which treasures liberty more than ignominious paternalism, supported by a bench and bar alert, as the founders of our commonwealth were, "to augur misgovernment at a distance and snuff the approach of tyranny in every tainted breeze."[47]

* * *

Animated by a spirit of orderly progress, respectful of the human personality, and guided in its quest for justice by the twin criteria of equity and utility, the common law emerges from an examination of Mr. Justice Stone's doctrine, as one of the liberating forces of our civilization. Cognizant of the lessons of the past, it permits itself to be adapted constantly to the exigencies of an ever-changing present. Free from a stultifying attachment to any doctrinaire absolutes, it is tolerant toward new manners and new morals as they arise and crystallize out of the potentialities of the unfolding future. Because it is a system of judge-made law, under the guidance of judges with disciplined imaginations, it is enabled to reflect the ethical values which prevail at different times and under different circumstances. Implementing its idealism with a pragmatic technique, it controls the social flux not by erecting walls of exclusion but by drawing circles of inclusion. Self-corrective and self-denying, it serves the cause of justice unspectacularly but efficiently. Heeding the voice of enlightened public opinion and assimilating rational reforms, the common law remains unshaken before the negative onslaughts of abstract dogmatists and turns to derision the fevered criticism of impetuous romanticists.

It is in periods of marked transition, like the present, when a new order is in the process of emerging out of the matrix of the old, that the qualities of the common law stand out in bold relief, and point the way to progress without violence. It is good at such critical times to examine the teachings

[46] *Id.* at 135-136. The entire subject is admirably treated by JOHN DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW (1927); and JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS (1938).

[47] This was Burke's inimitable characterization of the American lawyer given in his *Oration for Conciliation with the Colonies.*

of those leaders who have with their wisdom replenished and with their integrity sheltered the flame which illumines the way of justice in Anglo-American civilization. Moreover, the value of such a constructive effort of interpretation may perhaps be considered to be enhanced at this particular moment when a different philosophy of law is illuminating its contrasting way of justice by the light of incendiary bombs and in the glare of bonfires which once were peace-abiding communities, centers of that complex of sublimated forces properly known as Christian civilization.