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LAW AND SOCIAL WORK¹

By ROSCOE POUND*

A recent writer on philosophy of law tells us that the science of law has to do with rule, idea of right, and life. It has to do on the one hand with the imperative of the lawgiver, and on the other hand, with the will of the individual. Thus it is between the world of what-ought-to-be and of moral values, upon the one hand, and the world of what is practicable and of what-is, upon the other. He speaks of this as the tragedy of legal thought. But if thinking about law is embarrassed between what ought to be and what may be, the practical working of the law is no less embarrassed between the claims of the general security and those of the individual life.

In the statement of the purpose of this conference we are told that it exists to "facilitate discussion of the problems and methods of practical human improvement." A social philosopher would see in it, therefore, an institution working along with legal institutions toward the maintenance, furtherance and transmission of civilization, which he takes to be the end of law. Social worker and lawyer should be co-workers upon different portions of the task of enabling men to develop human control over nature, both physical nature and human nature, to its highest possibilities. For the law is but a specialized part of the whole regime of social control. Its aims are those of social control. Its ultimate justification is the justification of social control. Its agencies and sanctions are but specialized and systematized agencies and sanctions of social control. Indeed, the historical jurist has always refused to differentiate law from the wider idea of social control. When he speaks of law he thinks of social control as a whole. It is the analytical jurist, looking exclusively at the phenomena of the maturity of law, who insists upon a distinction.

¹ This was Dean Pound's address before the Indiana Conference on Social Work, held at Elkhart, Oct. 8-14, 1927.

* See biographical note p. 223.

In modern society social control through the force of politically organized society has become paramount. All other agencies operate in subordination to the law. In its claims it has all but taken over the whole field of upholding the conditions of the social and economic order, whereby we maintain, further, and transmit civilization. But while potentially the whole field is subject to law, many other agencies, some determinate and acting consciously and of set purpose, and some indeterminate acting with less conscious and less definite purpose, perhaps achieve the larger part of the task. The part that falls directly and immediately upon the law is maintenance of the general security. How to maintain the general security in a human world which is ever in transition is the immediate problem of the science of law.

For things human are always in transition. The Heraclitean dictum that everything flows is at least true of life. Life consists in adjustment to environment, and adjustment involves change. Social life is adjustment to an environment which is both physical and human. Each of us must fit into his physical surroundings and his human surroundings. Hence law, which is both a product and a condition of social life, must continually adapt itself to change. Like the life which it orders, it is in continual transition. Yet it seeks to be stable in this process of transition. It seeks, as it were, to give stability to institutions and doctrines and precepts which are changing and must change. Legal institutions must be stable because the economic order, in which our civilization has culminated, presupposes the general security. Yet those institutions govern life, and the essence of life is change. Thus law and legal institutions must be stable, and yet they cannot stand still. They must reconcile the freedom which is life and the restraint which is civilized life. They must reconcile the general security and the individual life. They must keep a due balance between the need of stability and the need of change.

In practice, the balance has inclined sometimes toward one side and sometimes toward the other. In the last century it inclined definitely to the side of stability. The last half of the nineteenth century was relatively a period of social and political and economic stability. A homogeneous society thought chiefly of the security of acquisitions. A settled political order thought chiefly of the stability of institutions. A pioneer society thought chiefly in terms of freedom; but in the conditions of life in a rural, agricultural society, that meant the minimum of interference with free spontaneous self-assertion which was

required to keep the peace and maintain private property. Today, on the other hand, the balance seems to be inclining to the side of change. The heterogeneous society of our urban industrial centers thinks more about the claims of the individual life. A political order in process of adjustment to urban life leads to scrutiny of the purpose of each institution and consideration of how far institutions achieve those purposes in action. The conditions of life in an urban industrial society call for great increase in the number of legal adjustments, since they involve multiplied points of contact of man with man and a continually widening area of overlapping or conflicting claims. Transition is a much more significant factor in the law of today than it was half a century ago.

In this transition perhaps the most significant feature, from the jurist's standpoint, is the continually growing emphasis upon the claims of the individual life. Jhering, who first saw the change which has gone so far since his death, put it thus: "Formerly high valuing of property, lower valuing of the person; now lower valuing of property, higher valuing of the person." How far this has gone in a generation of legal development in this county, may be seen if we note the rise of limitations on the use of property and restraints upon the anti-social exercise of legal rights; if we consider what has happened to the owner's *jus abutendi*, if we compare the doctrines as to spite fences or malicious interference with a neighbor's well or unreasonable interception of surface water or of percolating water which now obtain with those which were accepted a generation ago. It may be seen if we note the changed attitude of the courts toward housing laws and zoning laws; the growth of limitations on freedom of contract, the growth of limitations on the owner's power of disposition of property where the owner is husband or parent and the property is needed or used for the purposes of a family; the growth of limitations on the power of the creditor or injured party to exact satisfaction, as, for instance, by statutes for the payment of judgments in installments; the change from a regime of private ownership of wild game and private rights as to running water which has been making such things *res publicae* in so many jurisdictions; and most significant of all the change of attitude as to the legal position of married women and the claims of parents with respect to children. On every side, the claims of the individual life have been calling for modification of old doctrines and working out of new ones. Also they have called for new methods of applying legal precepts in action.

Increased regard for the individual life has brought about two movements which have been going on throughout the world. First, there is a movement for individualization of justice, and a response to this movement may be seen in the rise of administrative justice. A significant and apparently permanent phenomenon in Anglo-American law is the development in the last two decades of administrative adjustment of relations and forestalling or summary handling of controversies by boards and commissions. In antiquity the chief activities of politically organized society were war and religion. In the modern state the chief activities are legislation and administration. Both of these seem to be growing at the expense of the traditional or customary element in public justice. Instead of leaving all, or nearly all, controversies to be determined after the event by tribunals applying customary standards of decision, ascertained and worked out and made into grounds of decision by means of a customary technique, the modern state more and more forestalls controversy by prescribing rules through legislation, or deals with the conditions that produce controversy by subjecting conduct, and especially the conduct of enterprises, to the guidance of administrative regulation.

Everyday experience may remind us how far the change from judicial inquiry and judicial application of customary standards after the event has gone in the modern city. A generation ago there were no traffic rules for ordinary vehicles, and no traffic policemen. Beyond a custom of turning to the right, everything was left to the judgment and good sense of pedestrian and driver. If one went out upon the street on coming to a crossing he exercised his own judgment as to when and where and how he should cross. When a driver came to a crossing he also exercised his free judgment. Each made up his own mind for himself at the crisis of action. If injury resulted, the judgment he had formed for himself was looked into after the event by a jury which then told him whether or not he had lived up to the customary standard. But today lines down the middle of roads tell where to drive, lines upon the pavement tell where to cross the street, and other lines tell where to park cars. Signals and signalling traffic officers tell when to cross the street and when to stop and await one's turn. This change is typical of what has been happening on every side. We now seek to handle concrete situations concretely at the time they arise, and in the place where they arise instead of referring to abstract generalizations and treating them out of their setting of time and place. We seek to prevent rather than to cure after the event. We give individualized

treatment to the case in hand instead of generalized treatment to an abstract situation.

Indeed no one should be more familiar with this change than the social worker. He has seen parallel changes in his own experience growing out of the same conditions which are bringing about changes in the law. He remembers how a generation ago we treated not lunatics but "the lunatic." We did not give the needed help, medical or otherwise, to this or that human being afflicted with mental disease, we made general provision for insanity in the abstract. He remembers how fifty years ago, instead of providing for specific children according to the exigencies of the character and antecedents and condition of each, we made provision for "the child." He remembers how a generation ago we did not relieve this or that case of poverty as such in view of its special cause and circumstance, but instead dealt with the abstract "pauper" and consigned to a common poorhouse the vagrant, the worn-out toiler, the drunken unemployable, the victim of disease, the imbecile and the abandoned child. He remembers that a generation ago instead of seeking to give individualized penal treatment to criminals we punished "the criminal." The same contrast which may be drawn between the judicial justice of the nineteenth century and the administrative justice of today is no less valid as between the charities and corrections of fifty years ago and the social work of today.

Next to and along with the movement for individualization of justice comes demand for and movement toward preventive justice. The law is given effect by means of sanctions. These sanctions or means by which developed legal systems seek to attain their end are punishment, redress and prevention. Punishment is the oldest and crudest mode of securing human claims or vindicating rights. Even today, as a general rule, men begin to deal with a new subject by imposing a penalty. It is only after experience of the ineffectiveness of retributive methods that they learn some better mode of treatment. In modern law punishment is appropriated almost exclusively to the immediate securing of social interests as such by means of the criminal law. Also on the whole we have learned that the effective domain of the criminal law is relatively narrow. On the civil side of the law there are a few remnants of an older condition in which punishment was resorted to for the everyday vindication of private rights. But even in criminal law we have now come to think and speak of penal treatment rather than of punishment. We recognize that except for satisfying a certain instinct of men to hurt someone when things go wrong, punishment simply

as such has proved futile on the criminal side of the law as we had long known it to be on the civil side.

Legal redress is either specific or substitutional. In specific redress the wrongdoer is compelled to do specifically what he has wrongfully left undone, or to undo what he did wrongfully. He is required to restore that which he holds which belongs to another, and if necessary officers of the law will take it from him and deliver it to the person entitled. In substitutional redress the law awards an injured person a substituted equivalent in the form of a sum of money at the expense of the wrongdoer.

Specific redress is possible in the case of possessory rights, and acts involving purely economic advantages. A court can repossess a plaintiff of a farm but it cannot repossess him of his reputation. It can make a defendant restore a chattel but it cannot compel him to restore the alienated affections of a wife. It can constrain a defendant to perform a contract to sell land, but it cannot constrain him to restore the peace of mind of one whose sensibilities have been grossly invaded. For most cases in everyday life substitutional redress by way of money damages is the most practicable resource. Hence this has been the staple remedy of the law. But this remedy is obviously inadequate except where the purely economic side of existence is involved. The law may measure in money the value of a horse or the value of a commercial contract or the value of use and occupation of land. On the other hand, it is difficult to reach a definite measure of actual money compensation for a broken limb, and it is downright impossible to value the feelings, the honor, or the dignity of an injured human being. Kipling tells us what the Oriental thinks of our legal conception of the individual honor, dignity, character and reputation. He says: "Is a man sad? Give him money, say the Sahibs. Is he dishonored? Give him money, say the Sahibs. Hath he a wrong upon his head? Give him money, say the Sahibs." That the Oriental's point is well taken is clear enough. But serious practical difficulties stand in the way of specific redress in such cases. Complaint is often made that the law secures property and contract more elaborately and more adequately than it secures personality. The reason is not that the law rates the latter less highly than the former. It is that the legal machinery of redress is intrinsically well adapted to securing the one and is ill adapted to securing the other.

Prevention is not so definite nor so well developed a remedial category. In general it must take the form of interference in advance to prevent disobedience of a rule of law or provision in

advance to meet and obviate the conditions which make for anti-social conduct. As an ideal it should mean provision for reaching the causes of anti-social conduct instead of treating the resulting conduct by itself. It should mean provision for mitigating or obviating the situations that lead to infringement of rights instead of relying wholly upon punishment and redress after the event. Development of prevention as a legal remedy has only begun. What we have in the way of prevention is for the most part relatively crude interference by injunction to prevent immediately threatened physical infringements of economic claims, and in recent years to prevent interference with nationwide economic functions which are under the protection of the federal government. In England injunctions are used to prevent defamation and there is an increasing tendency in this country to use them in order to protect personality. But the deeper possibilities of prevention have received little attention from lawyers. While it seems clear that preventive justice must play a large part in the law of the future, there is much prejudice against it in the minds of commonlaw lawyers.

Administration has thus far proved the most effective agency of administrative justice. Thus we may understand the growth of administrative justice which has gone forward so rapidly in the last twenty-five years. Administration had little place in the pioneer, rural, agricultural society of the last century. It belongs to a busy age. It is appropriate to a crowded urban industrial society with a complex economic organization and minute division of labor. In such a society economic adjustments are so delicate and all things are so specialized that men cannot wait for long drawn out investigation after the event in order to know their rights and duties and liabilities. What they may do and what they may not do must be prescribed authoritatively in advance in an accessible and intelligible form. They must be guided or advised or directed in many things so that they may do well the other things which are their immediate task. The illustration of traffic officers in our city streets, and even in our country roads, puts graphically what is required in the way of administrative regulation in all sorts of connections under the conditions of today. For administration does for an increasing number of activities exactly what the traffic officer at the corner does both for automobile driver and for pedestrian. The efficacy of the work of the traffic officer is in the individualized nature of his directions as compared with generalized legal precepts. The economic organization of today demands an individualization in the handling of many things which was not needed in the sim-

pler rural agricultural society of the past. When the points of contact between men are relatively few, general lines and rough compromises expressed in rules of law suffice for the exigencies of justice. When the points of contact are multiplied as in the metropolitan city of today, and individual claims conflict and overlap on all sides, we must have fine lines and delicate discriminations which are not made easily by means of rules of law.

Rules of law are made by eliminating the particular circumstances and fixing the common circumstances in a series of cases. In some parts of the law this is entirely practicable. In the law of property and in commercial law where one fee simple is like every other and one promissory note is like every other so far as its significant elements go, this method of elimination and generalization suffices to give a working rule. But elimination of circumstances in order to get a rule makes the rule unworkable as a self-sufficient practical compromise between the claims of participants in the infinitely variable situations involved in human conduct and in the conduct of enterprises. When the points of contact involved in human conduct become more numerous, and the friction of that contact becomes more acute, in a crowded world, individualization in the legal treatment of conduct begins to encroach upon the domain of legal rules and legal conceptions. We meet this need of individualization for the purposes of judicial justice by means of legal standards, that is, by framing legally defined measures of conduct which are to be applied by or under the direction of tribunals.

In the framing of legal standards the law does not seek to generalize by eliminating the circumstances, nor to particularize by including them. It seeks to formulate the general expectation of society as to how individuals will act in the course of their undertakings. Thus it seeks to guide the common sense of a jury or the expert intuition of an administrative commission when either has to judge of particular conduct under particular circumstances. We may agree that titles to land and the negotiability of bills of exchange and promissory notes ought not to depend on circumstances. Such matters should be and are governed by rules which attach definite detailed legal consequences to definite detailed states of fact. Such rules are not left to juries or commissions. When the facts are ascertained the rules are applied by a mechanical logical process. On the other hand, it is impossible to determine in the abstract once for all what is due care in driving for every driver who will ever drive. It is impossible to lay down in the abstract once for all for an abstract railroad running through an abstract region

what is a reasonable railway service, and to apply the result to all railroads thereafter by a logical process. In such cases modern law resorts to legal standards devised to guide the triers of fact or the administrative commission in applying to each unique set of circumstances their common sense resulting from their experience.

Legal standards are the judicial response to the need of individualization just as the setting up of administrative tribunals and increasing reliance upon administration is the legislative response thereto. Each is ultimately a response to the conditions of a crowded, urban, industrial society, and of a complicated economic order resting on a minute division of labor. The same conditions that brought each into existence are making and must make for a greater development of preventive justice.

For historical reasons we have very little in the way of preventive machinery in our common law. In the Roman law judicial power was in the magistrates, and an administrative civil justice has obtained in Roman-law countries from the beginning. With us administration of justice had a purely judicial development and administration is something which we are having to learn. Our courts of equity developed their methods and theories of jurisdiction partly under civil law influence and at a time when the centralized absolute government of Tudor and Stuart kings was importing many administrative ideas from the Continent. Thus we have a certain preventive jurisdiction in equity. Courts of equity will enjoin threatened injuries to property rights and will construe trusts and will advise trustees as to their duties. But until recently when the declaratory judgment began to be introduced cautiously by legislation we required that one break a contract before a court would tell him what it meant. We required the parties to instruments to guess at their meaning and act upon their guesses at their peril. In most jurisdictions one must commit a trespass in order to find out whether he has a right of way, or commit an assault if he would test his neighbor's claim to such a right. Unless a friendly district attorney will consent to participate in a suit in the nature of a bill of peace, if one wishes to test the constitutionality of legislation curtailing the free exercise of his powers he must run the risk of going to jail in order to find out what are his rights. The beneficiary of a will can do nothing to establish the facts which show its validity so long as the testator is alive. And a testator can do nothing to establish those facts; but the matter must await his death, it may be fifty years hence, when the question of his capacity at the time it was made will become

a controversy between claimants under it and claimants against it. It is such things that give point to Mr. Dooley's gibe that it is the function of the probate court to see to it that every member of the bar gets a fair chance at what the deceased cannot take with him.

Bar association committees in this country have been urging legislation to provide preventive remedies in civil cases through declaratory judgments. Likewise the gradual but persistent and continual enlargement of the powers of courts of equity to grant injunctions, and the continually growing use of injunctions as a means of police, especially in industrial disputes, show that a movement for preventive justice is gaining ground. Moreover, with the setting up of modern municipal courts in our large cities we have begun to devise bureaus of justice to which the citizen may resort in order to know his rights instead of leaving him to guess at them at his peril and then judging his conduct after the event. But this cautious development of preventive justice on the civil side of the law is but a small part of the matter. It leaves untouched the great field of the criminal law; a field in which more than anywhere else preventive justice may achieve great things.

Substantially all of the energies of our elaborate punitive justice are devoted to dealing with offenders after the offense. The police are an agency of prevention. But for the most part the police operate as an agency of forcible prevention at the crisis of action. Juvenile courts have done much incidentally in the way of preventive activity directed to the ultimate causes of delinquency. Our agencies of probation and parole struggling with many adverse conditions and in most jurisdictions laboring under a burden of defective organization and insufficient equipment have done much in the same direction. Yet making full allowance for these things, it remains true that our legal treatment of delinquents is not preventive but is punitive in its whole conception and administration. In effect what there is in the way of preventive justice in the domain of the criminal law is achieved not by legal but by extra legal agencies. For the most part it is done not by the agencies of the law but by social workers.

What we need above all else in this connection is co-operation. As things are there is almost a complete want of co-operation in our agencies of criminal justice. There is lack of co-operation between state and nation. There is lack of co-operation between state and state. There is lack of co-operation between locality and locality in the state. There is lack of co-operation

between the official agencies of justice in the community. There is lack of co-operation between the extra legal and legal agencies everywhere. Most of what has been done to remedy this condition—a condition natural in a pioneer, rural, agricultural community, and utterly out of place in the urban, industrial society of today—has been done by or at the instance of social workers. Those who urge co-operation on the large scale which is demanded by present day conditions find a serious obstacle in the general fear of centralization. But co-operation does not mean centralization. On the contrary it is the alternative of centralization. Take such situations as that presented in the well-known Dodge extradition. Dodge, who was wanted in New York for perjury, had fled to Texas. In the endeavor to get him from Texas to New York, four extradition warrants became necessary. There were four habeas corpus proceedings; there was an injunction suit, an appeal, a clash between federal and state jurisdiction, and ultimately it required the extra-legal activities of a masterful detective to put Dodge on a boat and send him to New York without waiting for legal authority. Such things as this will compel centralization unless we learn co-operation. The same sort of story may be told for almost every step in the enforcement of the criminal law against those who are in a position to invoke the possibilities of our atomistic organization of criminal justice.

In particular we need the fullest team play between law and social work. In the urban, industrial society of today our organized social control must more and more deal with the anti-social in its inception and at its source. Characteristically we have left the exploration and development of the field to private agencies. Social workers have accumulated a mass of data and have developed methods and technique which the lawyer must study and must learn how to utilize. In order to bring about the needed team play, in order to make use of all that has been done and is doing for preventive justice through the agencies of social work, we need the same creative spirit and inventive activity which Americans and American lawyers displayed so abundantly in the formative period of our institutions.

What are lawyers doing toward this needed development of preventive justice? What are organized lawyers—for there are notable exceptions among individual lawyers—what are organized lawyers doing to promote this needed team play? We must admit that neither jurists nor law schools nor bar associations have done or are doing much to speak of. In Continental Europe such things fall within the purview of ministries of jus-

tice, and such ministries have been urged for English-speaking jurisdictions. A century ago Bentham argued for a ministry of justice in England. Later it was advocated by Lord Westbury, and in 1918, in an admirable report on reorganization of British government, Lord Haldane stated the case for such an institution most convincingly. Lately it has been advocated in New York by a commission of which Judge Cardozo was a member, and that great authority has urged it in an article in one of our legal periodicals. But it seems unlikely that we shall have ministries of justice in English-speaking jurisdictions in any near future. Lord Birkenhead, in opposing the project, urges that their work would be vitiated by politics, and that they would give us the same deficient and one-sided preparation for law-making which we get as things are. At any rate, it is evident that the public would assume this; and without the confidence of the public, such ministries could achieve little.

And yet something of the sort we must have. Hence I have been suggesting as a substitute organized systematic research in our universities where alone conditions of effective work and guarantees of public confidence seem assured. The alternative is research under the auspices of privately endowed foundations. In either case, undoubtedly, we have assurance of security of tenure, adequate facilities, competent investigators, opportunity of dealing with problems as wholes, rather than in detached local fragments, and scientific spirit and method. But the work of the foundation seems less likely to inspire the needed public confidence. We have seen in many connections how unhappily suspicion of these foundations may operate whenever they venture into controversial fields. On the whole, I suspect, we shall have to fall back upon our universities, with their ample faculties of law and of arts or of philosophy, from which, if systematically organized, effective institutes of research in preparation for legislation could be set up, in which the national and the local would be represented in due balance. For in this connection we must not overlook the fear of centralization which has become so general and so strong. The locally known and locally respected university could give to its work the national aspect which our social and economic unification require, and yet be free from suspicion of seeking to efface the organized locality. Moreover, we cannot overestimate the value of a group of specialists in many lines working together, such as the faculties of a university make possible.

In the law school there is already the foundation of a ministry of justice. Here should be the men trained, filled with the scien-

tific spirit, independent of particular interests, seeing questions as a whole, in their setting not merely of the law of their state, but of the life and law of the nation and of the world. For a law school has not done its whole duty when it has sent forth well trained lawyers to take up the practice of their profession. The lawyer of tomorrow has more to do than merely to earn a livelihood by faithfully representing his clients. He has a creative task before him to be carried out in bar associations, in the legislature and as a citizen, in making our law no less effective as an instrument of justice in the century that is upon us than it was in the century that is past. Nor is the task of the law school done when it has bred lawyers equal to that work. It must learn to do the work of research. It should learn to organize and carry forward the research which must go before creative lawmaking. I look forward to a group of law schools in this country in which legal scholars shall be the means of bringing together the technique and the experience of lawyers and of social workers and of making each fruitful for the advancement of justice—for the furthering of reason and the will of God.