1930

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LAW IN ACTION AND SOCIAL THEORY¹

FOWLER VINCENT HARPER

I. FUNCTIONAL APPRAISAL OF LAW

LAW in the books may be musty and dry, but law in action has to do with life. What is more it has to do with social life. Just as physical life depends upon conditioning to physical environment, so social life depends upon conditioning to social environment. "Each of us must fit into his physical and human surroundings."² This evolutionary process of adaptation to environment,³ may take place on the social side in two ways, (1) by adjustments of the mores, i.e., popular customs which comprehend a judgment that they in some way make for communal welfare and which exert a pressure upon the individual to conform;⁴ (2) by adjustments of a purposive nature when the adaptation is made by means of various agencies which affect the conduct of men in their relations with each other and with groups. Law, from the functional standpoint of the sociologist, is one of the most important and vital agencies for social control. It is through law, along with other agencies, that the conduct of persons is so regulated that human beings "fit" into the increasingly complex social and human surroundings of life, and that a certain necessary uniformity in behavior in given directions is produced.

Thus one way to think of law is from the point of view of its actual function in the social order, just as we may think of religion, custom, and morality as meeting certain vital and

¹ The author wishes to acknowledge gratefully his indebtedness to Professor Herman Oliphant, who offered many valuable suggestions during the preparation of this article.

² Pound, Introduction to *Sayre's Cases on Criminal Law* (1927), p. xxix.

³ Cf. Keller, "Evolution in Law," *Yale Law Journal*, XXVIII (1919), 769, 778.

⁴ See Sumner, *Folkways* (1907), pp. 28, 34, 63-64.

essential needs of human beings, without which social life would be impossible or at least less satisfactory. Law, in this sense, will be regarded as a specialized form of control exercising the systematic pressure of politically organized society.⁵

We have, then, to ask how law performs its function as an agency for social control. It does so by meeting those needs or demands of certain groups of men in society which actually gave rise to its origin, in so far as those needs and wants still prevail in the social order, and by meeting such additional needs or demands as may be thought, from time to time, more properly to fall within the effective range of legal action. Thus we come to regard law as affording protection for certain social interests which somebody wants protected or accident gets protected and to such extent as experience and experiment demonstrate as appropriate for legal action.

A great jurist has arranged a scientific scheme of interests which the law protects.⁶ Like any other scientific classification of phenomena, it is appropriate and desirable for certain purposes and inadequate for other purposes. While this scheme is arranged in terms of individual interests, public interests, and social interests, and although traditional ways of thinking have misled men into assuming that individual interests were protected for their own sakes, as ends in themselves, law protects individual interests only because, and to the extent that, they represent certain social interests. These interests, protected and safeguarded by law, are not to be thought of as pure sociological fiction but are in fact derived from actual observation of legal phenomena disclosing what interests the law has actually afforded protection for, and disclosing at the same time the manner and method of such protection.⁷

⁵ Pound, *supra*, note 2.

⁶ See Pound, *Introduction to American Law* (1921), pp. 3-4. See his "Theory of Social Interests," *Publications of the American Sociological Society*, IV (1920), 15, 23 ff.

⁷ The reader may be referred, for example, to the chapter and section headings of the best of the modern casebooks on torts, *Bohlen's Cases on Torts* (2d ed.; 1925):

Among the various social interests protection for which is continually afforded in many diverse forms in the law is that which grows out of the compelling need in any group to be secure against those forms of action and courses of conduct by individuals which threaten the existence of the group. This, perhaps, is the paramount social interest. Wherever its pressure is felt in law other interests give way, depending on the comparative intensity of the conflicting and opposing interests. "It is not too much to say that law arose and primitive law existed simply to maintain one narrow phase of this interest, the social interest in peace and order."⁸

This, however, has not always appeared as the real state of affairs. The culture of the seventeenth and eighteenth centuries helped to disguise juristic thinking as it disguised many other types of intellectual endeavor. Preceding this era in the common law, jurists had already discovered how to secure this paramount social interest in peace and order by allowing remedies to injured individuals as well as by prosecution in the name of the state. With the triumph in the common law of natural-law philosophy which, it is not without significance, coincided with the development of equity jurisprudence, the individual right and the individual conscience became the legal as well as the moral guide. As Pound has put it,

Naturally in that period legal history was written from an individualist's standpoint and was interpreted as a development of restrictions on individual aggressions to assure individual freedom of action. On the contrary, individual freedom of action as an end is something which came into juristic thinking in modern times as we began to be conscious of a social interest in the individual life. The social interest in the general security dictated the very beginnings of law and individual legal rights are but

"Direct Invasions of the Interest in Bodily Integrity"; "Direct Invasion of the Interest in Freedom from Apprehension of Either a Harmful or Offensive Bodily Touching"; "Direct Invasion of the Interest in Freedom from Confinement"; "Direct Invasion of the Interest in the Exclusive Possessor of Real Property"; "Privilege To Intentionally Invade Interests of Personality and Property"; etc.

⁸ See Pound, "Theory of Social Interest," *supra*, note 6, at p. 24.

means which were gradually worked out in the endeavor to maintain that social interest.⁹

Thus it is that the law apparently creates rights to protect individual interests. What it is doing, however, is simply devising new means to protect a new social interest—one that has arisen in comparatively recent times.

It is to be observed, then, that if law protects individual interests exclusively for the reason that they are involved in protection of certain social interests, each individual interest should be referable to some corresponding social interest. Here it is necessary to examine the implications and bases of this sociological appraisal of law to find a theory of society that will fit the phenomena which the history of the common law reveals.

II. THE SOCIAL THEORY BEHIND LAW

We are pretty much committed to the view that no longer is there any merit to be derived from conceptions of the state which present it as some ideal entity possessing the classic and traditional attributes of indivisible and illimitable sovereignty. This notion, perhaps expedient at one time, seems to have outlived its usefulness. More and more we are regarding the state from a sociological viewpoint and in the words of an eminent social scientist, "We are no longer satisfied with the pious abstraction that government exists for the 'good of the governed' or for the advancement of Christian virtues in the community."¹⁰ We recognize the state as a composite of various groups existing to further various common and related interests, and while we need not go so far as Gumplowicz and others in concluding that government is merely the agency of exploitation of the many by the dominant few,¹¹ nor yet to the benevolent view that the state is exclusively calculated to rec-

⁹ *Ibid.*, p. 26.

¹⁰ Barnes, *Sociology and Political Theory* (1924), p. 100.

¹¹ Cf. also Oppenheimer, *The State* (1914), p. 25.

oncile all conflicting interests,¹² we nevertheless conclude that the state with its agency, the government, operating through law, marks the regulation and organization of the strife between various conflicting interests espoused by their respective interest groups. While law may not always succeed in completely reconciling and harmonizing all interests, nevertheless, its primary function is to adjust the conflicts and work out the problems of the conflicting groups within as pacific and as desirable bounds as possible.¹³ We are to understand that it is no mere accident that the words "adjustment" and "justice" have a common root.

We do not regard the law, then, as a moral science which only the elect can master,¹⁴ nor are we longer concerned with it as the pure creature of logic, producing a mechanical system of abstract rights and duties. Rather we are to emphasize the human side of law and recognize that here we have a device which society has evolved for purposes of expediency as one of the most effective instruments for control. What we actually have is primarily groups and interests. Secondarily, of course, there are individuals, but it is the group and interest aspect or the group-interest that seduces the scientific curiosity. "What we actually find in this world, what we can observe and study, is interested men—nothing more and nothing less. This is our raw material and it is our business to keep our eyes fastened to it."¹⁵

The orthodox sociologist in these days conceives of government as the adjustment of these interests. Only in the legislature, however, does he see the great battle ground of the interest groups, and because the battle there is obvious and overt, he thinks it is confined to the legislature. Thus, log-

¹² See Bristol, *Social Adaptation* (1915), p. 327.

¹³ Bentley, *Process of Government* (1908), chaps. x and xi. See Small, *General Sociology* (1905), pp. 224 ff.

¹⁴ See Bentham, *Principles of Morals and Legislation* (1823), pp. 17-18 and note.

¹⁵ Bentley, *Process of Government* (1908), pp. 211-12.

rolling, he will assume, is the characteristic of legislative technique.¹⁶ From the point of view of the jurist, however, the conflict of interests is even more intense, though more subtle, in the actual evolution of the common law. As we shall see, social pressure is exerted none the less here than elsewhere.

But the adequate sociological outlook upon law presupposes an intelligent conception of social organization and the relationship of law and the state thereto. Now it has been pointed out that the community is invariably the center of spontaneous and voluntary common life. It may be regarded as the most creative factor in modern civilization.¹⁷ We are learning to think of a community as a complex of individuals, institutions, associations, and customs with the underlying principle expressed in the word itself, something involving communal features, something in common.¹⁸ As Dewey says, "There is more than a verbal tie between the words common, community and communication."¹⁹

We regard society as something slightly apart from community, namely, the social organization of the community. Here we find various groups or associations, both of a purposive nature, designed to achieve some definite and avowed end,²⁰ and of a non-purposive nature, depending upon the condition in society in which men find themselves. In other words, men consciously group themselves together to attain certain avowed ends, and are grouped together from the point of view of their social activity in gaining or seeking ends. The grouping, it is to be noticed, in either event, is based upon human activity.

¹⁶ Cf. Barnes, *supra*, note 10, at p. 105. See also Barnett "Legislative Log-Rolling," *Oregon Law Review*, VIII (1928), 141.

¹⁷ See Barnes, *supra*, note 10, at p. 36, summarizing MacIver, *Community: A Sociological Study* (1924).

¹⁸ Cole, *Social Theory* (1920), pp. 25-26.

¹⁹ Dewey, *Democracy and Education* (1916), p. 5. See also Parks and Burgess, *Introduction to the Science of Sociology* (1918), p. 36.

²⁰ See Barnes, *supra*, note 10, at p. 36.

The underlying principle here we can recognize as that of function. By function we mean the activity involved in gaining certain ends—the activity of one group or association in its relation to others, both individuals and groups. Thus to know the function of a group, we must first know its purposes.²¹

But in the very idea of purpose we postulate certain interests. To say that a person or group has this or that purpose, we obviously imply that the person or group has this or that interest. In turn the terms “function” and “purpose” applied to groups involve a reference to some method of evaluation, as they place each group into relation both to its own members and to other groups and institutions of which society is constituted. We see at once that to criticize the social function of a group or association it is necessary that there be some common standard of evaluation.²² Evaluation of ends can be made only with reference to consequences of the realization thereof. Hence, when two apparently competitive ends are presented, their collateral consequences must be considered. Thus if they can both be regarded as means to a further end, their relative value can be determined. The “further end” thus provides the standard of evaluation. This is a process of elaboration. In any method of evaluation, some preferred end must remain tentatively unquestioned.²³ Thus we refer them to the community in order to apprehend their relative significance—in other words, in order to evaluate the social function of the group.

In referring the interests of the group to the community, there are two factors involved: first, the extent of the community that is affected by the interest (by which the social value of a given interest must depend upon the number of the indi-

²¹ Cole, *supra*, note 18, at p. 53.

²² *Ibid.*, at pp. 54–55.

²³ See Buermeier, Cooley and others, *Introduction to Reflective Thinking* (1923), pp. 218–20.

viduals and number of groups of the community which are affected thereby—in other words, the community interest will depend in its last analysis upon the number of “interested men” involved); again the social value of the interest will further depend upon the importance to the community of such interest. This will depend upon a scientific application of the principle of utility, within the limits of the critical judgment of those members of the community who have commanded the general respect and reputation for being best able to formulate ideals of human welfare. Beyond this, it would seem impossible to go.

The common law has always protected, in a veiled way, the group interest. There is no exclusive individual interest. Men do not live in isolation. Men live in organized and unorganized association with others. Thus in cases in which the law regulates prices (for public utilities) or conditions of work (in industries), it is striking a balance—not between individual interest of those who sell and those who buy certain commodities or the individual laborers and the individual owners—but between group interests of vendors and consumers and of laborers and of hirers. So in a private lawsuit between A and B for A’s trespass upon B’s land, it is not A and B that the law regulates in their conduct with each other, but owners of land, as a group, and persons, for one reason or another, trespassing thereon. Thus it is the groups that conflict, and it is group interests that the law deals with, balancing them, not upon any “fundamental principles of justice,” but upon a seasoned and experience-based consideration of communal welfare, or social utility.

The most insignificant suit between two petty disputants over a contract is dealt with socially on the basis of great group interests which have established the conditions and the bounds for it. All law is social. Every bit of law activity may, it is true, be stated as a sum of individual “acts”; but every bit may also be stated in group terms, and this latter is our method of statement here. We do not ignore John Doe’s doings, but we

state John Doe's doings just as they are given us, with all their social meanings, values, and realities.²⁴

Thus we might expect the law to consist of a body of materials not at all related in a logical and consistent manner, but with relations determined by the principle of function. This as a matter of fact is exactly and precisely what we have. Jurists have sought from time to time for the comfort and satisfaction of illusory exactness and certainty. Accordingly, attempts have been made to develop and cultivate a legal order which was of such logical perfection and adequacy that results could be accurately and scientifically predicted in advance. We are finding, however, that the only basis for prediction which gives any promise of satisfactory results is the basis of observed experiment and scientific study of the legal order, as a functional phase of social organization. In other words, we must master the law as social phenomena based upon sociological facts. We are learning to criticize rules of law on the basis of their efficacy in adjusting group interests by a reference to their significance to the community.

And what is it that we mean by social interests or group interests as opposed to the interests of the individual constituents of the group or community? In the first place, we must not impute to the groups or to the community a reality which does not in fact exist, nor need we impute to the community or the groups an existence of a metaphysical nature. We will not think of the state, the community, the group as existing in and for themselves. We will not impute to them a being or a mind or a will or an interest which is not there in fact. We will think only of the interests, the wills, the beings, and the existences of those who are members of the community or the groups.²⁵ On the other hand, we will not make the equally fatal mistake of thinking of the community or the groups as the mere sum of their individual members in their individual

²⁴ Bentley, *Process of Government* (1908), p. 277.

²⁵ Cole, *supra*, note 18, at p. 22.

capacities. We will not think of a society as the sum of the individuals composing it as such. Thus we avoid the immemorial philosophical problem of the *one* or the *many*. We deny that we have to choose between these two equally embarrassing explanations of the existing phenomena.

Groups and society are not composed of individuals as such alone nor is the community or the group explained by imputing to it some real existence in a monistic system. On the other hand, we recognize that individuals are individuals when acting individually, but something different when acting co-operatively. Thus we distinguish between the individual as such and the individual when co-operating with others in a group. We detect a difference between the individual will acting independently and the will acting in conformity with the standards and desires of other similarly interested wills. Hence, we conceive of co-operating individuals or co-operating wills as distinct from individuals. This co-operation brings into existence a relationship between individuals which produces something different from a mere totality of the individual members thereof. The *results* are different. Accordingly we repudiate both the *one* theory and the *many* theory and seek refuge in the equation that individuals in co-operation are equivalent to society—in other words, many in co-operation produce one. This conception is helpful not only for social theory but for ethical theory as well.²⁶ It follows that it cannot be without fruit for juristic thought. Thus we may develop the notion of group desires, group needs, and group interests and group morality.

In *Queen v. Instan*,²⁷ Lord Coleridge, in a famous dictum, said: "It would not be correct to say that every moral obligation involves a legal duty; but every legal duty is founded in a moral obligation. A legal common law duty is nothing else

²⁶ See S. Klyce, "Fundamentals of Non-Dogmatic Ethics," *International Journal of Ethics*, XXXIX (1929), 61.

²⁷ (1893), 1 Q.B. 450.

than the enforcing by law of that which is a moral obligation without legal enforcement." It has been contended that this is inaccurate; that when the common law sometimes imposes liability without fault, for example, there is legal but no moral liability.²⁸ But it is to be observed that even here there is clearly a duty arising out of morality, though not individual morality. When we put our emphasis upon rational²⁹ group morality rather than personal morality, we find the basis of the common-law rule as surely moral here as elsewhere, and Lord Coleridge's statement stands unimpeached. The problem is always whether the law *ought* to raise a legal duty from the moral duty, and this is eminently a problem of making law; and it is to this task that the pragmatist method of cautious advance from case to case is peculiarly applicable.

The making of law now becomes a process of interpretation on the part of the lawmakers, and primarily of the court, of the desires and the interests of the community. Upon a reasoned and intelligent weighing of these interests will depend the activities of legislatures and of courts. The sociological standard is therefore inevitable. The lawmaker must project his decision into the future and anticipate its consequences there. If, on the whole view, a given adjustment of the conflicting interests gives promise of a satisfactory and highly beneficial result for the community as a whole, his proposed decision becomes law. It is submitted that it is not too much to say that this is the real process behind the entire development of the common law. It is of no slight significance to notice that when a determined anticipation of the future consequences is proved by experience to be erroneous, the common law has not hesitated to retreat and strike out in a new direc-

²⁸ See Lefroy, "Basis of Case Law," *Law Quarterly Review*, XXII (1906), 293, 297, note 2; *ibid.*, p. 303.

²⁹ As distinguished from the half-conscious motive arising from mere life in society, e.g., custom, folk ways, etc., see Dewey and Tufts, *Ethics* (1908), p. 38 and chap. iv.

tion.³⁰ The legal decision, then, becomes nothing more or less than a hypothesis.³¹ It is based upon a science of probabilities as to consequences.

Thus we substitute for an abstract notion of ideal justice an empiric and pragmatic view of the future. It is possible, then, to form a fairly accurate conception of justice by designating it as a "sociological probability." Thus, just as physics is beginning to view the material universe as consisting primarily of "statistical probabilities," the pragmatist jurist will view justice as a sociological approximation of what will be necessary to make law square with future experience in view of the standards and criteria of life as he knows it. Hence, we claim no quality of universality for justice. We concede it to be nothing more than a hypothesis, in other words, a sociological probability.³²

In the same spirit of realism, how are we to regard the law? It has been said by eminent jurists that the law as we know it at any given time can be nothing more than a prophecy of what a court of justice will in fact do under a given set of circumstances.³³ We will then think of law as merely a prediction of what interpretation a court will place upon the facts of experience as they apply to the given conflict of interests. We have then, it is to be observed, a working conception of law, which can be described by nothing so well as a "juridical probability."

From our present viewpoint, then, we may regard the law as nothing more than a "juridical probability," the purpose of which is to adjust the conflicting interests which continually press for recognition and protection in accordance with the "sociological probabilities" of the consequences of this or

³⁰ Pound, "Courts and Legislation," *Science of Legal Method* (1921), p. 214.

³¹ This thought is developed somewhat more elaborately in my article, "Some Implications of Juristic Pragmatism," *International Journal of Ethics*, XXXIX (1929), 269.

³² Cardozo, *Growth of the Law* (1924), pp. 68 ff.

³³ *Ibid.*, p. 52.

that rule of law. With this notion of law and justice, we have machinery competent to cope with the problem as presented in the light of a scientific social theory. It is now submitted that there is available an explanation of existing social phenomena which squares with all the facts of experience as we know them in the legal order. We will have occasion to look into several branches of the common law to see if we can detect the working of the principles as explained and described here. We need not concern ourselves with the purported reasons given by the courts, except in so far as these reasons explain a deeper pressure behind. Rationalization of conduct will depend largely upon the manner and method of the thinking of the times. An objective view and a study made from the vantage point of time and apart from immediate environmental influences may reveal the deeper sources from which the common law has emerged.

III. THE DEVELOPMENT OF THE "SCIENCE" OF LAW

Consider the technique of the common law. How loath have the judges been to lay down general rules for the government of concrete cases in the future! J. Maule, in *M'Naghten's case*,³⁴ said that he

felt a great difficulty in answering certain questions submitted to the court; first, because they were not put with reference to a particular case which might explain or limit the generality of their terms; secondly, because no argument had been heard upon them; and, thirdly, because of a fear that the answers might embarrass the administration of justice when they might be cited in criminal trials.³⁵

We shall consider the development of certain rules of law, together with deviations from their logical implications, as the pressure of social interests has been felt. The rule of the criminal law developed that consent to the taking was defense to larceny.³⁶ But where it was necessary to entrap the criminal

³⁴ 10 Clark & F. 200.

³⁵ Cf. Pound, "Foreword to Magna Carta," *Oregon Law Review*, VIII (1929), 61.

³⁶ See *MacDaniel's Case*, *Fost. C.L.* 121, 168 *Engl. Repr.* 60.

and the defendant did not know of the assent, it was held to be a crime.³⁷ Here the judges tried to employ logic to rationalize the situation and find the assent "unreal." The truth was that the assent was quite real and the case is illogical in view of the current conception of larceny. The judges, however, knew that any other rule would not work, that it might embarrass the administration of criminal justice in the future. In other words, as the pragmatist would say, they were looking to the consequences in the future. Observe also the rule that consent is no defense in prosecution for assault, although it is a defense to an action in tort for the same acts.³⁸ The reason is that experience has shown the better rule for each situation and, as Justice Holmes has said, the life of the law is experience rather than logic.

Again, it is a commonplace of criminal law that while intoxication in general is no excuse for crime, yet it will be a defense if one is so drunk that he is incapable of entertaining the specific intent that some crimes require.³⁹ But when it came about in specific cases that drunken persons stabbed others to death or nearly so, it was laid down that drunkenness could not affect the question of malicious intent when defendant had used a dangerous instrument.⁴⁰ It was felt that the defendant ought to be punished and for practical purposes; he had the necessary intent.

The courts have purported to assume that the burden of proof in insanity cases must be deduced from "fundamental premises" of criminal law. Thus the presumption of innocence as a premise has given rise to a brood of monsters in the form of absurd decisions amounting in actual practice to raising a presumption of insanity whenever the accused raises the

³⁷ *Eggington's Case*, 2 East. P.C. 666.

³⁸ Cf. *Commonwealth v. Collberg*, 119 Mass. 350, with *Galbrath v. Fleiming*, 60 Mich. 405. See Bohlen, *Studies in Torts* (1927), p. 577.

³⁹ *People v. Jones*, 263 Ill. 564.

⁴⁰ *Rex v. Meakin*, 7 Carrington & Payne. 297.

issue.⁴¹ Other courts have changed premises and by employing logic instrumentally have followed quite as satisfactory a process of reasoning to arrive at a fundamentally opposite but infinitely more valuable result.⁴²

Professor Holdsworth has shown how the logic of the conception of a corporation dictated certain deductions to Blackstone for very good "reasons," but expediency, the desires of the community, the social mind, convenience—in short, justice, or, if you please, social adjustment, has produced opposite results in law. "Practical convenience," says Holdsworth, "rather than theoretical considerations have from the days of the Year Books onward determined what activities are possible and what are impossible to a corporation."⁴³

Accordingly, the corporation, though mindless, may commit crime; though soulless, it may entertain not only the *mens rea*⁴⁴ but a specific intent.⁴⁵ "The real problem," says Laski,⁴⁶ "is simply whether we dare afford to lose such hold as we possess over the action of groups in the affairs of social life—the more particularly in an age predominantly associational in character."

Now in considering how the law protects these various social interests, it frequently, if not invariably, happens that the social interests involved are overlapping and conflicting. Seldom, if ever, is it merely a case of giving or withholding a given protection for a given social interest. Out of life grows

⁴¹ A note in *Oregon Law Review*, VIII (1929), 190, contains many authorities.

⁴² See *State v. Quigley*, 26 R.I. 263, 58 Atl. 905.

⁴³ See Holdsworth, *History of English Law*, v. ix, 51–52, quoted by Cardozo, *Paradoxes of Legal Science*, pp. 65–66.

⁴⁴ *Regina v. Panton*, 14 Vic. L. Rep. 836 (Austr.).

⁴⁵ See *Telegram Newspaper Co. v. Commonwealth*, 172 Mass. 294. Cf. *Reed v. Bank*, 130 Mass. 443, in which a corporation was held civilly liable for malicious prosecution.

⁴⁶ Laski, "Basis of Vicarious Liability," *Foundations of Sovereignty and Other Essays*, pp. 250, 289.

the inevitable conflict of interests, and it is to these conflicting interests that the law is applied as an agency for balancing and weighing and determining just how far this social interest will be protected at the expense of that interest. Ideally, of course, the object is to protect as many interests as possible at the least sacrifice of the totality of social interests involved in the conflict.⁴⁷

It is further obvious that the intensity of the pressure of these social interests will vary under an infinite variety of circumstances, conditions, and situations. Thus it is difficult, if not impossible, for the law to work out a scheme of protection which defines and delimits the exact boundary within which any given social interest (hence, such individual interests as may be referred to it) will be protected. Much more satisfactorily can the law develop certain principles—that is, generalized hypotheses or assumptions of protection—and standards—that is, methods for determining the application of these principles in concrete cases, as they arise. In this way the body of what we know as the common law has developed. Thus it is that the common law has consisted of a body of materials not the least important of which is the technique of procedure to be applied by a learned and trained profession.⁴⁸

The common law, from the very beginning, soon developed a technique which allowed for the expanding and shrinking of rules of law to lend effective protection to conflicting interests. In the early stages, frequent development of a legal principle upon the grounds of “convenience” are noticed.⁴⁹ This rule could not apply or that one was not to prevail because it would be “inconvenient.” Littleton declared that “the law will sooner suffer a mischief than an inconvenience,”

⁴⁷ Pound, “Theory of Social Interests,” *Publications American Sociological Society*, XV (1920), 15.

⁴⁸ Pound, “Law of the Land,” *Dakota Law Review*, I (1921), 99.

⁴⁹ Winfield, “Public Policy and English Common Law,” *Harvard Law Review*, XLII (1928), 76, 80.

by which he is to be understood as implying that individual rights are not to prevail over the social good, although he doubtless knew not that he meant it. As Professor Winfield has said:

Now Littleton was very much the child of his age, and these phrases "inconvenient" and "against reason" are of common occurrence in the Year Books. The whole of that era was one of rapid building of our law, and it had to be developed more by analogies, by logic, and by a broad perception of what was wanted than by precedents of which there were few compared to the mass that exists in more modern law. I doubt whether Littleton identified "inconvenience" and "against reason" with what we now call public policy. . . . But very likely Coke in his writings and reports turned what he borrowed from Littleton into something a little more technical and certainly more farreaching—something which formed the substance of public policy for later generations to shape.
⁵⁰

The learned author again says:

If one can extract any meaning from him [Coke], it seems to be that the law prefers the public good to private good, and that if it has to choose between prejudice to the many and mischief peculiar to individuals, the individual must suffer.⁵¹

Writers have admitted that the development of the common law has depended largely upon the cautious feeling of the public pulse, i.e., upon the judge's notion of what is conducive to the welfare of the community in view of the mores of the times, when new cases were presented. It is suggested at least by implication, however, that this is the course of evolution "unless the same point has been formally decided."⁵² "Where there is no governing precedent, direct or indirect, justice and other principles of right and wrong, the fitness of things, convenience, and policy, make case-law."⁵³ It is submitted that this proposition becomes more accurate and more

⁵⁰ *Ibid.*, pp. 76, 81.

⁵¹ *Ibid.*, pp. 76, 82.

⁵² Cf. Austin, *Lectures on Jurisprudence* (5th ed.), p. 634. Cf. also Lefroy, "Basis of Case Law," *Law Quarterly Review*, XXII (1906), 293-94.

⁵³ Lefroy, *supra*, note 52, at p. 295.

nearly represents the explanation of the growth of the common law without the qualification. The effect of precedent, of course, is not to be minimized, but the deeper principle involved is that precedent has been followed to achieve certainty and uniformity only when these ends were evaluated higher than other social interests.⁵⁴

It is not the following of precedent, merely as such, that makes the common law or that lends continuity to the developed body of legal materials which we think of as the law of the land, nor is it any persistent universality of any of our fundamental dogmas. Scarcely any of the broad principles of the Year Books are to be found in recognized form in the modern reports. Pound says,

More important, however, is the frame of mind that lies behind this traditional technique of the common-law lawyer. It is a frame of mind which looks at things in the concrete, not in the abstract; which puts its faith in experience rather than in abstractions. It is a frame of mind which prefers to go forward cautiously on the basis of experience from this case or that case to the next case, as justice in each case seems to require, instead of trying to refer everything back to supposed universals.⁵⁵

As the body of legal materials accumulates, however, and the practice of looking to judicial experience and custom takes stronger hold, rules, worked out for concrete cases and types of cases, have a natural tendency to extend themselves, both by *stare decisis* and by analogy. But with slight variations in facts and circumstances, when a different social interest makes itself felt, or presses more intensely for recognition and protection, so an "exception" is made to the "general rule," or perhaps a "fiction" will be employed which affords the desired protection to the new social interest or to the one which exerts the added pressure. In this manner, the "science" of law develops, using science in the sense of the analytical jurist, and the new social interest makes its appearance in the body of law in the form of a "reason" for the exception or the

⁵⁴ Cf. Cardozo, *Nature of the Judicial Process* (1921), pp. 151 ff.

⁵⁵ *Op. cit.*, p. 109.

fiction. Thus we acquire the paraphernalia of science and categories, classifications and rules are developed.

An example or two will suffice to illustrate. Let us consider one of the best known of the general rules of the law of agency. It is commonly said that the law imputes to the principal and charges him with all notice or knowledge relating to the subject matter of the agency which the agent acquires or obtains while acting within the scope of the agency.⁵⁶ It is sometimes said that the reason for this rule is that there is a reasonable inference that the agent will impart the information to his principal.⁵⁷ However, it is worth while noticing that the law "conclusively presumes" that such knowledge has been imparted from the agent to the principal,⁵⁸ which suggests that, whatever might have been the original rationale of the rule, it no longer depends upon such reasoning. It is said that it is required by a sound public policy.⁵⁹ Here public policy is another name for the social interest in the general business morals. A sound commercial policy requires that business be carried on upon such a basis. Thus it is in these cases that it is immaterial whether the agent has actually imparted such information to the principal or not.

As well settled as this rule is, it is equally well settled that when the agent is acting adversely to the principal, the rule does not apply.⁶⁰ Some of the courts argue speciously that inasmuch as the original rule was based upon the duty that the agent owed to tell his principal and the corresponding pre-

⁵⁶ *Kennedy v. Green*, 3 Mylne & Keen. 699.

⁵⁷ See *The Distilled Spirits*, 11 Wall. 356, 367.

⁵⁸ *Dresser v. Norwood*, 17 C.B. (n.s.) 466.

⁵⁹ Cf. Mechem, "Notice to or Knowledge of an Agent," *Michigan Law Review*, VII (1908), 113, quoting from *Kennedy v. Green*, 3 Mylne & Keen 699: "Policy and safety of the public forbids a person to deny knowledge while he is so dealing as to keep himself ignorant, and yet all the while let his agents know, and himself perhaps profit by that knowledge. In such a case it would be most iniquitous and most dangerous to give shelter and encouragement to all kinds of fraud, were the law not to consider the knowledge of one as common to both, whether it be so in fact or not."

⁶⁰ *Innerarity v. Bank*, 139 Mass. 332, 1 N.E. 282.

sumption that he would so tell him, the rule should not apply when the agent acting adversely to the principal, could not be expected to impart such knowledge to the principal.⁶¹ This, however, will not do. It was a sound public policy, the social interest in the general morals and business ethics and the desire to encourage commerce, that caused the original rule to be adopted. The need for such protection is obviously wanting when the agent acts adversely to his principal. Another reason is sometimes given here, that inasmuch as the pretended agent is really acting on his own account, since adversely to his principal, he is not acting within the scope of his authority.⁶² The fallacy here is so elementary as not to need discussion. Other varieties of the same proposition are sometimes given to account for the exception. The real reason back of the exception is that the change in factual circumstances has changed the intensity of the competing social interest. Now it is thought that it is not necessary to hold the principal for the protection of commerce, or perhaps it is thought that commerce as a whole would be encouraged more by allowing men to deal through agents without attaching such a high degree of liability.

Again, there is an exception even to this exception, for when, in spite of the fact that the agent was acting adversely to his principle, it is necessary for the principal to trace his claim exclusively through the "tainted source" it is held that he is bound by the agent's knowledge.⁶³ The legal reason given here is that if the principal cares to ratify and indorse the acts of the agent, he cannot accept the advantages without also assuming the burden which makes him liable for the fraud.⁶⁴ But this is not so much a legal reason as a moral one,

⁶¹ See *Innerarity v. Bank*, *supra*, note 60.

⁶² See *In re Plankington Bank*, 87 Wis. 378, 58 N.W. 784. See Mechem, *supra*, note 59, at p. 129-30.

⁶³ See *Bank v. New Milford*, 36 Conn. 93.

⁶⁴ In many of these cases it is frankly recognized that the rules themselves are illogical enough, but that the general "social policy" demands the results. Cf. J. Stone,

and the social interest is so patent as easily to account for the deviation. The significant thing is to notice how when one social interest presses harder the logic of the law gives way to allow the necessary and desired protection, thus establishing an exception to the logical rule. The legal "reason" for the rules and exceptions invariably mask beneath their specious plausibility the real dominating nature of the social interest responsible for the rule.

Again, the principle of *respondent superior* has raised serious problems for legal logic. It is well settled that a master is liable for the torts of his servants if committed in the line of their service, although unauthorized and perhaps actually prohibited—and even when colored with the actual personal malevolence of the servant. Vicarious liability is firmly established in the common law, and while attempts have been made to explain it on the fiction of "implied authority"—an irrational doctrine—or the equally fictitious doctrine of identity of legal personality, we still want a satisfactory account for the phenomenon. Fictions may describe, but they do not account for results. Why do we have the fiction? It is quite clear. Because we needed it to fit the law and conduct to the facts of life.⁶⁵ And when the logical implications of the fiction prove inadequate to the present economic and social order, courts must ignore such a priori limitations and push forward to results which meet the demands of communal life.⁶⁶

To look to the same branch of the law for another illustration, consider the case of *Pickering v. Busk*.⁶⁷ This is a leading case involving the general rule that when a principal has

justifying the results in *Gleason v. Seaboard Airline R.R.*, 49 Sup. Ct. Rep. 161-62: "Undoubtedly formal logic may find something to criticize in a rule which puts in the principal liability for the acts of his agent done without the principal's knowledge or consent and to which his own negligence has not contributed, but few doctrines of the law are more firmly established or more in harmony with accepted notions of social policy than that of the liability of the principal without fault of his own."

⁶⁵ See Laski, "Basis of Vicarious Liability," *supra*, note 46, at pp. 272-73.

⁶⁶ *Ibid.*, pp. 290-91.

⁶⁷ 15 East 38.

acted in such a way as to produce a situation which would ordinarily be calculated to lead the average prudent man to believe that another is the owner of personal property and a third person acts upon such belief the principal will subsequently be estopped from denying the ownership. The act constituting the estoppel in *Pickering v. Busk* was allowing the agent to have possession of personal property. Mere possession alone, however, is not enough to estop the true owner from asserting his title. In *Pickering v. Busk* the agent was one who ordinarily sold his own property; subsequently, the rule of the case is that when the possession of personal property is intrusted to one whose ordinary business it is to sell for himself or another such property, third parties will be justified in relying upon that person's apparent ownership.⁶⁸

In *Levi v. Booth*,⁶⁹ the owner of a diamond had intrusted the same to an itinerant vendor of diamonds with the authority to get an offer for the diamond. The agent, however, disposed of the same as his own, and subsequently the real owner was allowed to recover the ring from the bona fide purchaser. Here the rule is apparently conflicting with the decision in *Pickering v. Busk*. How, then, may the divergence be accounted for? In both cases the agents were dealers. In both cases they were intrusted with possession. In both cases the third party dealt with the agent relying upon his apparent ownership of the property. The cases are usually treated as being contradictory. They are, however, quite satisfactory. If we look to the real consideration behind *Pickering v. Busk*, it is observed to be the social interest involved in promoting trade and encouraging commerce. It is highly desirable that the public be entitled to rely upon the possession of personal property by regular dealers as cutting off any rights of undisclosed principals. Accordingly, it may very well be that a "sound public policy" will demand the protection of those

⁶⁸ *Mechem on Agency* (2d ed.), sec. 2112.

⁶⁹ 58 Md. 305, 42 Am. Rep. 332.

who deal with regular merchants on such a basis. The property rights of the true owner are invaded for the sake of the social interest involved. In the case of *Levi v. Booth*, however, it may very well be that the law is not willing to sacrifice the property rights of the innocent principal when the protection to commerce takes the form of insuring those who deal with itinerant vendors. It is not necessary for a sound public policy to inspire confidence in such commercial enterprises. When, however, instead of an itinerant vendor of jewelry, the agent is apparently a reputable business institution engaged in the ordinary retail trade in jewelry, the result is different.⁷⁰ Thus we find another exception to a general logical rule, the only reason for which is the varying intensity of the competing social interests involved. In these cases the law protects first the social interest in encouraging trade and commerce, and, upon a slightly changing set of facts, it will afford its protection to the social interest in individual life and property.

Again, nothing is better settled in the law of contracts than the proposition that when A and B contract, A's promise to B can be enforced by no one but B, the promisee.⁷¹ This was the general rule at the common law, and yet it was equally well settled that if B were acting as agent for the undisclosed principal the principal could subsequently enforce this promise against A by a suit in his own name.⁷² Likewise, if A were acting as agent for an undisclosed principal, his principal could enforce B's promise by suing the latter's principal in his own name.⁷³ The common law got around the inconsistency by the fiction of agency. The fiction here becomes the premise for the ingenious result. The undisclosed principal can sue and be sued because the mind of the agent *is* the mind

⁷⁰ *Smith v. Clews*, 105 N.Y. 283.

⁷¹ See *Anson on Contracts* (8th ed.), p. 275.

⁷² *Ford v. Williams*, 21 How. 287.

⁷³ *Mechem on Agency* (2d ed.), sec. 1731.

of the principal. Accordingly, the agent's contract is the principal's contract.⁷⁴

The real truth of the whole matter is that here were in competition opposing social interests. The social interest in individual life and freedom of trade and contract is disguised in the general principle of the common law that a man may choose with whom he will enter into contractual relations. This was responsible for the original rule that only parties to the contract could sue. On the other hand, a wise and just "public policy" demanded that the party enjoying the benefits of a contract be compelled to assume its burdens. To make the situation fair all around, it was necessary to allow such party his action in his own name to enforce his rights. Thus, as variations in factual situations raised new social interests to be protected, the consistency of the common law is retained only by the use of a fiction.

To illustrate again how inexact the logic of law becomes when the pressure of social interests is strong enough, let us again go to the law of agency to consider the case of an action brought against an undisclosed principal upon an act or contract which was expressly prohibited by the principal. It is now firmly established that such an action may be maintained and a recovery allowed in all cases when if the agency had been disclosed there would have been a recovery on the grounds of apparent authority.⁷⁵ There is no logical explanation for the rule. There cannot be an implied authority because the principal has expressly prohibited the acts of the agent. It is equally clear that there can be no estoppel because the third party was in no sense misled, the fact of agency being at the time undisclosed. It cannot be said that he "relied" upon the "agent's" authority, as he knew of no agency. The rule has been severely criticized on the ground of its

⁷⁴ See Holmes, "History of Agency," *Harvard Law Review*, IV (1891), 345.

⁷⁵ *Watteau v. Fenwick* (1893), 1 Q.B. 346; *Hubbard v. Tenbroock*, 124 Pa. St. 291, 16 Atl. 817.

fallacious logic.⁷⁶ Purported explanations of the rule are usually quite as illogical as the rule itself or clear examples of question begging.⁷⁷ From our present point of view, however, it is not difficult to find the answer. The cases are thoroughly sound. They are to be regarded simply as exceptions to the general rule. The law here is not only justifiable, but in fact highly desirable. It will not do to have the contrary rule. An unscrupulous principal has too many chances for success. First, he may never be discovered; second, if he is discovered he can allege secret limitations, and usually there is not one to gainsay him. The rule is indispensable to prevent fraud. The social interest in the general morals and a sound commercial policy will not tolerate anything different. If there is hardship upon the principal, it is largely of his own doing, and in any event it is by far the lesser of two evils. But here, again, the science of law suffers in its logical consistency and the general scheme is cluttered with another exception and all because of the intensity of the pressure of certain social interests.⁷⁸

It is thus seen that in the working out even of the minutest details of the common law, the soundness of the results have been tested by principles of expediency and practicability that will fit only into a social theory that accounts for social phenomena as the result of group actions and interactions upon a basis of the social interest involved. The emphasis, in both empirical and rational social science, is thus put upon the principle of function with the close observation and adherence to facts and experience which is necessarily implied. But more of this at another time.

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⁷⁶ See note in *Columbia Law Review*, X (1910), 763.

⁷⁷ *Mechem on Agency* (2d ed.), sec. 1768.

⁷⁸ Cf. note in *Harvard Law Review*, XLII (1929), 685, and Seavey "Rationale of Agency," *Yale Law Journal*, XXIX (1920), 859, 883 ff.