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LAW AS A FORCE FOR SOCIAL PROGRESS*

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In the study and practice of law there is one basic tension that constantly recurs. That is the tension between law as an occupation and law as a mission. This tension makes itself felt in law school, permeates the scene in private practice, dominates the legal academic world, and is central to any career in government legal service. Law as an occupation involves the use of law as an instrument for carrying on the social order in its current form. Law as a mission seeks to utilize the concept of law and legal institutions as a means of achieving new social goals. Many lawyers, perhaps most, engage in both forms of legal activity. Nevertheless, the underlying tension remains and, especially at this stage in your legal life, forces itself upon your attention.

The contours of law as an occupation are relatively clear-cut. There are, of course, many problems to be faced: the ethics of legal

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practice, the extension of legal services to all segments of the community, improvement in the efficiency of the legal process. But, on the whole, law as an occupation operates within the boundaries of the status quo. Law as a mission is more far-ranging, more complex, more subtle. It must operate at the edges of the legal process without moving out beyond the legal process altogether. It must seek to develop new rules for the advancement of the social order where the lines of advance are untried and obscure. Hence law as a mission requires constant examination, cultivation, and support.

The manifestations of law as a mission in our society make up a glorious tradition. In terms of the Supreme Court, that tradition finds expression in cases such as *Brown v. Board of Education*, establishing the basis for civilized race relations; *Baker v. Carr*, assuring more equal distribution of legislative power; *Gideon*, *Miranda* and others, attempting to secure fairness in our system of criminal justice; *Griswold v. Connecticut* and *Roe v. Wade*, creating a right of privacy for our new world of high technology. It is to be noted that the judges who created and expounded these developments in the law are considered the great judges of their times. They set the standard against which present and future judges are to be measured.

So also the great social movements of our time have rested in significant part upon law as a mission. Within my lifetime we have had the New Deal, which undertook to forge the mechanisms for greater social control over our economic destinies; the civil rights movement, which aimed at making the promise of equality more of a reality in our society; and the movement for women's rights, which sought to eradicate the injustices which have held back half of our population. In the academic world we have had legal realism, critical legal studies, and other schools of thought that have attempted to bring legal doctrines into greater conformity with the basic facts upon which these doctrines are predicated. So the tradition of law as a mission continues to be a vital and powerful one.

Today we are confronted, however, with an increasing challenge to law as a mission. In part this attack is openly political, as in the call for appointment of only those judges who are committed to a so-called "strict construction" of the Constitution. In part the assault on law as a mission emanates from the legal academic world, as in the proposals for narrowing or weakening the scope and force of the first amendment. In part the challenge comes from a new phenomenon in the intellectual life of this nation: The creation of think tanks that concentrate on

building a theoretical justification for the status quo or make plans for a return to the past. The movement is supported, and indeed at times given an ominous coloration, by fundamentalist groups that preach intolerance of the ideas of those who do not adhere to their litany. In this state of affairs it is important to pause briefly and examine the problems, the techniques, and the underlying assumptions involved in the use of law as a force for social progress.

There are at least five major points of attack upon law as a mission. The first is that such an approach abandons the core element of any legal system, namely objectivity and neutrality. One is left, it is argued, with a purely result-oriented technique that is intellectually a fraud and fundamentally incompatible with the basic function of law. The force of this objection depends upon what level of the decision-making process is under observation. At the level nearest the surface, notions of objectivity and neutrality play a significant role. But ultimately, as Justice Douglas was fond of saying, where you come out on a novel legal problem depends a great deal upon where you go in. At the deepest level the application of principles of "neutrality" simply means acquiescence in the current state of affairs. And most of us would not be willing to settle for that as an adequate description of the role of law in a developing society.

The second line of attack comes from the opposite direction. It asserts that in the long run the law is impotent to change the world. The legal system, it is contended, will surely be dominated by the most powerful forces in the society, and hence will simply reflect and reinforce the status quo. Again, at one level there is much truth in this analysis. But it ignores one basic element in the law as a distinctive set of principles, rules, attitudes, and techniques. That is the concept of universality. The rule of law, at least in theory, applies to all individuals and groups in the commonwealth. Hence the liberties claimed by the dominant forces of the society are also legally available to the dissident individual and to the submerged group. If the system is working properly the unorthodox idea can get a hearing and up-coming groups can build a following. It was exactly in this manner that rising capitalistic groups utilized feudal laws to gain legal support for their position and program.

The third point of attack upon law as a mission emerges from the contention that the inevitable result of expanding social controls is totalitarianism. The argument is that effective social controls can be imposed upon a complex world only through the use of force that crushes

all opposition. Hence it is preferable to let laissez-faire hold sway. History gives some support to this position. But the final chapter has yet to be written. Intellectual approaches to the problem have tended to focus upon extremes. They urge either unrestrained individualism or total subservience to the collective will. What is needed is the right combination of individual rights and social responsibility. And it is exactly at this point that the law and legal institutions can play a decisive role. Perhaps in the long run we can avoid the abyss of totalitarianism through alterations of consciousness, and the law as we know it can be dispensed with. But I suspect that that day is far off. In the meantime, we will have to depend also upon legal ways of thought and action.

The fourth point of attack parallels the third. Rather than the use of force to achieve the necessary controls over society, the governing forces will resort to persuasion and manipulation. The result will be control by bureaucracy. And the bureaucracy will function by the rules without regard to the needs of the individual case, leaving the citizen frustrated, helpless, and uncared for. The dangers of such an outcome are manifest. But we should not lose hope. There is no reason to believe that, over the years, bureaucracy cannot be taught. It can even learn when to follow its own rules and when not to. In any event, there is no way to avoid the problem. We must face it head on.

The final objection urged against law as a mission centers on the role of the courts. It is not the function of the judiciary, the argument goes, to be activist. Expansive judicial review is anti-democratic, not guided by principle, and beyond the competence of the judicial branch of government. Discussion of the proper scope of judicial review has been endless. Many an academic career has been based almost entirely upon participation in that controversy. Yet, in the end, what can be said about the proper scope of judicial review in the American system? It comes down to little more than this: The courts should take history into account, but not to the exclusion of the present; the courts should pay attention to the language of the Constitution or other charter, but not follow it slavishly; the courts should be open to innovation, but not to the extent of destroying the legal system; the courts should be ahead of the country, but not too far ahead; the institution of judicial review has worked rather well in America, but is not necessarily appropriate for the rest of the world. Judgments of this sort are difficult to make in abstract, generalized terms. As applied to concrete cases they depend upon the extent to which the judge is in tune with the needs, hopes, and aspirations of the nation.

Ultimately the validity of law as a mission is based upon three propositions, none of which can be proved by logic or by empirical research. The first is that law as a mission rests upon a set of moral principles, implicit or explicit. If one presses the inquiry back far enough one eventually enters the realms of morality. There is no way of avoiding this destination, and in the end it cannot be hidden. Second, the guiding principle of those who seek to use the law in the spirit of mission is belief in the idea of progress—the faith that humankind can move forward toward a better civilization. And third, the method of proceeding toward that end is not by sterile adherence to a rigid set of formal rules; rather, it requires a substantial measure of feeling and intuition, a sense of goals to reach and realities to keep in mind, and a kinship with the world that is part of the world and part beyond it.

Finally, where will the faith necessary to pursue law as a mission come from? In major part it must come from the young, the energetic, the not-yet cynical. That means it must come from you. There will be achievements and failures, but the task must be undertaken. We wish you success on the journey.