Soil Mechanics

& LEGAL CHANGE

revolution within the juvenile court

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Social Action and Legal Change

SOCIAL ACTION

LAW IN ACTION

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Preface

This study was inspired by the conviction that "a story needed to be told"—namely, that of the controversial events or small-scale revolution that led to revision of California's juvenile court law in 1961. The tense struggles among opposing groups and factions, clashes between colorful personalities, and the unprecedented strategic bypassing of "normal" legislative usages under the generalship of an astute lawyer-lobbyist seemed too prizeworthy to be allowed to slip into history unchronicled by social science. Fortunate timing made funds available to the Center for the Study of Law and Society from the Office of Juvenile Delinquency and Youth Development of the Department of Health, Education, and Welfare. And I was given maximum freedom, without which this kind of investigation would have been difficult.

The evolving requirements of the study very shortly surpassed mere historical reporting, presenting a challenge to analyze critical issues of contemporary justice as they affected minors and parents. It became clear that contemplated changes by law in the ideology and structure of the California juvenile courts posed basic questions about the viability of human integrity in the face and context of bureaucratized court procedures. Whether children were entitled to a measure of civil rights, whether a court could combine paternalistic procedure, rehabilitation enterprises, and organizational expediency with fairness and justice to the child became for the first time subject to official inquiry,

professional debate, and legislative scrutiny. If juvenile justice was to be made a dominant value, the thorny question of how law revision could best secure its prerequisites in the structure and procedure of the juvenile court had to be answered.

Overarching these humanistic and instrumental questions was a larger, sociological query as to how change of such magnitude could take place after decades of dilapidated growth and stagnation in the existing juvenile court law. Some sort of socio-legal theory, as well as provisional interpretation, was imperative if the materials were to be made subject to orderly and more profound analysis. The burden of such a theory is taken up in Chapter One, which sets forth a conception of paradigms, normal evolution, and revolution in law. Subsequent chapters in turn apply the theory to the data, reserving special attention in Chapter Five for considering resistance to legal change and the processes by which it gives way to consolidation of revolution and initiation of the adaptive process of normal law. Finally, there is discussion of substantive aspects of juvenile justice as it comprehends human affect and meaning, touching on what some would regard as existential elements of justice.

No hard methodology was followed in this research. Data came from numerous field interviews, documents, archives, letter files, and committee and commission reports. Several studies "in depth" were made of selected juvenile courts, and toward the end a questionnaire was circulated to all chief probation officers in the state, of which 98 per cent responded.

I am deeply appreciative of the time and assistance given me by officials of the California Youth Authority, legislators, judges, hard-working probation officers, and by Jack Pettis and Cy Shain. For his cogent criticisms as well as warm personal encouragement, I give special thanks to Sheldon Messinger.

If there is an apposite moral to be had from the study, it is that "revolution from within" is still possible. The establishment is not beyond succor.

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Introduction

What follows is an account and analysis of social action designed to reform procedures in the juvenile courts of California. In general, it deals with the social action that led to legislative reform, truculent resistance to the action, and the consequences of these. My twofold task is to describe and account for what amounted to a small-scale revolution in the laws regulating the juvenile courts of the state, and to inquire into the consequences this revolution had for practices in the courts and related agencies of law enforcement. At the same time, this study has a bearing on a theory of legal change. Accordingly, it is addressed to three questions: (*a*) a general query as to how law, particularly procedural law, develops on a long-term basis; (*b*) more specifically, under what conditions and by what processes revolutionary changes in law occur; and (*c*) to what extent social change can be directed or controlled by means of legislative enactments.

LEGAL CHANGE

The sociologist seeking to discover regularities in the process of legal change gets caught between the heavily theoretical bent of modern sociology and the critical, pragmatic themes present in much American legal philosophy and writing on the history of law. A close focus on historical factors by earlier writers tended

to fix the idea that no generic theory of law is possible, and that "principles" at best are applicable only to discrete bodies of the law.[1] Similarly, early sociological jurisprudence and "legal realism" were not highly productive of theory, but rather ran heavily to negative criticism, even nihilism. Sociologists currently inquiring into the law run the risk of being overly concerned with its immediate problems or merely applying their methodology to studies in the well-trodden area of the judicial process.[2]

The abortive efforts in years past to develop a science of law and the confused state of legal theory today may well be the result of excessive preoccupation with case law and the search for principles that guarantee absolute certainty in predicting the outcomes of cases.[3] Hope for a broader theory of law also has been deferred by the older idea that legislative change is catastrophic, or at best a spurious intervention into an otherwise pragmatic process of legal growth. Thus codification of law has been more the subject of polemics than of research. Finally, the fast-welling growth of administrative law in the present century and the difficulty of integrating it with case law of the courts has clouded the horizons of those searching for recurrent uniformities in legal development.

An underlying problem may have been that researchers thus far have failed to address themselves fully to problems peculiar to interrelationships among judicial, administrative, and legislative processes. Furthermore, there has been a lack of recognition of the importance of distinguishing between procedural law and substantive law, with too much emphasis on the latter. It is very likely that a generic sociological theory of law, to be profitable,

1. See W. S. Holdsworth, *Some Lessons from Our Legal History* (New York: Macmillan, 1928), p. 110.

2. See Harry Jones, "A View from the Bridge," *Law and Society*, special supplement to *Social Problems* (summer 1955), especially 44ff; also Jerome Skolnick, "The Sociology of Law in America," *ibid.*, pp. 34–9.

3. For example: Frederick Pollock, "The Science of Case Law," in *Essays in Jurisprudence and Ethics* (London: Macmillan, 1882), Chap. IX. Llewellyn, in seeking to correct the nihilism of early legal realism, insisted that the behavior of judges was not adventitious, and the need was to look for patterns and tendencies in case series, rather than for conformity to rules and principles. However, he, like others, concentrated on cases. (Karl Llewellyn, *The Common Law Tradition* [Boston: Little-Brown], 1960).

will have to be oriented to the study of procedures, and the formal and informal organization of administrative agencies and legislatures, as well as courts, rather than to substantive principles of law.[4]

PROCEDURAL REFORM

Procedure as a general topic of interest, of course, has not been neglected by legal historians and philosophers; concern with procedure has antecedents in primitive law, Roman law, and medieval law. Endeavors to reform legal procedure have a lengthy history in England and other civil-law countries, and numerous legal changes in nineteenth-century America justify calling it a century of procedural reform, notable for widespread legislative codification of court rules as well as of substantive law.[5] The twentieth century likewise has witnessed important reforms in legal procedure, the most impressive being those of Federal Rules of Civil Procedure, brought about by joint action of the U.S. Congress and the U.S. Supreme Court. These reforms in turn stimulated a number of states, including California, to follow the lead of the federal courts in simplifying their procedures.[6] Finally, beginning with the 1950's, there has been a rapid series of far-reaching and controversial appellate decisions in federal and state courts explicating rights of the accused in adult criminal proceedings.[7]

4. This is closely akin to Llewellyn's view that research should start with "remedies," conceived in a modern sense of behavior. Karl Llewellyn, "A Realistic Jurisprudence: The Next Step," in *Essays on Jurisprudence From the Columbia Law Review* (New York: Columbia University Press, 1963), pp. 149–83.

5. Edwin W. Field, *Recent and Future Law Reforms* (London, Pamphlet in University of California Berkeley Library 1843); Max Rheinstein (ed.), *Max Weber on Law in Economy and Society*, (Cambridge: Harvard University Press, 1954).

6. Peter Freund, "The Essentials of Modern Reform in the Litigative Process," *Annals of the American Academy of Political and Social Science*, Vol. 287 (May 1953); Arthur T. Vanderbilt, *The Challenge of Law Reform* (Princeton: Princeton University Press, 1955), Chaps. I, III.

7. Edward Barret, "Police Practices and the Law," *California Law Review* 50 (1962), 11–55.

While nineteenth-century legal reform movements appear to have sprung from humanitarian motives, or perhaps from the quest for a more universal form of justice, those of the twentieth century have been fathered by administrative concerns, technological and organizational complexities, and sheer population growth. The large absolute increase in law matters reaching the courts, intruding from many precincts of society, plus the multiplication of courts and judges, pose pressing questions as to how the judiciary should be organized, what policies it should follow, and what its relationship to the large-scale organization of the "administrative state" should be. The administration of a mounting body of public law, and the actions of numerous quasi-judicial administrative agencies regulating the lives of corporations and associations, as well as licensing individuals to practice professions and occupations, have tremendously magnified the importance of legal procedure in modern society.

LEGAL REVOLUTION

A great deal of legal development is or has been evolutionary, in the sense of being a gradual, cumulative growth of rules, one building on another. Most pronounced in specific case decisions of the judicial process, this growth can nevertheless be observed in legislative amendments and codifications of existing laws, as well as in the daily decisions of administrative agents of government. To some extent even regulatory commissions and boards become bound by precedents of prior decisions and evolve systems of law.[8]

If, however, organic growth is a feature of legal development, so is revolution, taking form in discrete changes, discontinuities, or "new departures" in legal ideas and practices. This was clearly recognized by Holdsworth in his comments on legal theories:

8. For an example, see Philippe Nonet's study, "Administrative Justice: A Sociological Study of the California Industrial Accident Commission," Ph.D. dissertation, Center for Study of Law and Society, University of California, Berkeley, 1966.

> Some theories have not been ephemeral. They have provided an illuminating generalization of new facts, which has been generally accepted, and they have therefore shaped public opinion in the new age and made them accepted commonplaces which . . . are powerful agents in moulding a constitution. . . . They have opened up new points of view to which old rules and principles must be adapted.[9]

Frequently cited examples of revolutionary law are those that stirred reforms of the eighteenth and nineteenth centuries in England—above all, Jeremy Bentham's principle of utility.[10] Others to which revolutionary impact has been credited are the concepts of sovereignty, of incorporate persons and incorporate groups.

Revolutionary reforms in law, procedural reforms especially, that occurred in the nineteenth century in both England and the United States were mainly legislative. They were accomplished only in the face of extensive and powerful resistance from practitioners of the law, namely lawyers and judges, a fact all the more impressive when one considers their peripheral origin, being fomented by a few persons either marginally committed to the legal system or outside it completely.[11] Equally impressive was the dramatic publicity and public opinion marshaled to initiate legislation of these reforms, as seen in the activities of English and Scotch law societies at the time, and in Charles Dickens' legal caricatures.[12]

The ubiquity and stubbornness of resistance to radical legal change suggests that, as a system or systems of law mature, con-

9. *Some Lessons from Our Early History*, p. 111.

10. *Ibid.*, p. 192; see also Jeremy Bentham, *A Fragment on Government* (London, 1776); also his *Principles of Morals and Legislation* (New York: Hafner, 1948).

11. Vanderbilt, *loc. cit.*; Field, *loc. cit.*, 25f; David D. Field, "Law Reform in the United States and Its Influence Abroad," *American Law Review* (1891), pp. 518, 521; Caleb P. Patterson, *The Administration of Justice in Great Britain* (Austin: University of Texas Press, 1936), Chap. IV. Arthur E. Sutherland, "The Machinery of Procedural Reform," *Michigan Law Review* 22 (1922), 295.

12. *Bleakhouse* (London: Bradbury and Evans, 1853); William Holdsworth, *Charles Dickens as a Legal Historian* (New Haven: Yale University Press, 1928); Robert Neely, *The Lawyers of Dickens and Their Clerks* (Boston: The Christopher Publishing House, 1938).

ditions are created that make anything beyond minor adaptive alterations in the systems unacceptable to those who are identified with them. This becomes manifestly clear when attention is extended beyond the law as a system of concepts to its concomitant practices and associated organization.

> So it is with reform in law. All the forces of tradition, of established habit, and in many cases of personal interest are united against reform, and the inertia of the busy men accustomed to existing methods and often too old to learn new ones—of men who are content to say "Let well enough alone" without inquiring too closely whether it is "well" or not. . . .[13]

The conservatism of lawyers and judges confronted with proposed changes inheres in the reification of systems of rules by which courts operate. This in turn is reinforced by the existence of a highly specialized legal profession with an outlook made homogeneous by a common reporting system, the reduction of law to accepted textbook sources, and methods of legal education and teaching that transform concepts into precepts.[14]

LEGAL REVOLUTION AND SCIENTIFIC REVOLUTION

Assuming that there are broad similarities between law and science, it is possible that in the absence of any well-worked-out theory of legal change, a theory of scientific revolutions may be useful for determining the processes by which legal revolution comes about, as well as for organizing and interpreting the special data of this study.

Kuhn has argued cogently that the key to scientific revolutions

13. Moorfield Storey, *The Reform of Legal Procedure* (New Haven: Yale University Press, 1921), p. 16.

14. *Some Lessons from Our Legal History*, p. 16; Sutherland, "The Machinery of Procedural Reform," *loc. cit.*; Lord Chorley, "Procedural Reform in England," *David Dudley Field Centenary Essays*, ed. Alison Reppy (New York: School of Law, New York University, 1949), 99f; Henry Fowler, "A Psychological Approach to Procedural Reform," *Yale Law Journal*, Vol. 43 (1954).

is the appearance of new paradigms, which offer categorically different perspectives on facts and which make possible or cause a change of "world view" among scientists.[15] Paradigm innovation must be contrasted with *normal science,* which is essentially a form of puzzle-solving unattentive to facts without relevance to existing or accepted paradigms. Normal science, as the term suggests, has a moral or value base; it is a system demarcating classes of relevant facts worth study, a specially devised technology and material apparatus, together with empirical experiments designed to articulate a paradigm. As such, it carries multifarious commitments of a community of scientists to textbook ideas, methodology, research organization, colleagues, and rules and lines of activity. Paradigms thus are constitutive of the structure of science.

> They . . . prove to be constitutive of the research activity . . . in learning a paradigm the scientist acquires theory, methods, standards together, usually in an inextricable mixture. Therefore, when paradigms change, there are usually significant shifts in criteria determining the legitimacy both of problems and proposed solutions.[16]

According to Kuhn, new paradigms appear because of anomalies, which are facts left unexplained by extant paradigms. As these increase in number, doubts about old paradigms or awareness of their deficiencies spread, and a crisis arises. New paradigms promise to explain or reconcile the anomalies as well as the facts articulated by the old paradigms. Novel paradigms most often are created by youthful scientists, primarily because they are less committed by prior practice to the traditional rules of normal science; they are freer to conceive new images of the world, new sets of rules for problem-solving, and to sympathetically entertain new classes of facts. By the same reasoning, resistance to new paradigms is strongest among older scientists, who have long-standing practical commitments to the established ways of perceiving their worlds of study.

15. Thomas S. Kuhn, *The Structure of Scientific Revolutions* (Chicago: University of Chicago Press, 1962).
16. *Ibid.*, p. 108.

PERILS OF PARADIGMS

Transposing theoretical models from one discipline to another carries a temptation to try to account for too much, or to ignore important differences between subject matter or between classes of facts that may be relevant in one field but not in the other. Nevertheless, a distinction between *normal law* as a cumulative enterprise, and legal revolution as the transition to new legal principles, offers a provocative way of formulating hitherto known but unorganized facts about legal change. The notion of anomalies as facts or cases ill-fitting traditional principles of law, which augment to a crisis prerequisite for the generation of new legal concepts, is equally attractive for the purposes of this study. Locating the sources of resistance to change in the functioning claims of going systems, as well as in ideological loyalties, seems applicable to legal, as well as scientific, revolutions.

At this point, however, there is some divergence, since legal revolutions are consummated more slowly than scientific ones, owing to differences in the testing processes of different fields. For example:

> One can test the value of medicine in its practical effects on selected cases. The result of a few experiments closes debate. The effect of change in the law, or in legal procedure, cannot be tested as quickly, and hence must long remain a subject for discussion with subsequent delay.[17]

Another notable difference between legal and scientific revolutions lies in the obscuring effects of legal fictions on radical transformations in law. Words and phrases may be so interpreted or classes of facts so defined that a whole new pattern of law is furthered under the guise of precedent or *stare decisis*. Jerome Hall, for example, has well described how large and significant changes in informal procedures for mitigating criminal justice

17. Storey, *The Reform of Legal Procedure.*

in nineteenth-century England were sanctioned and concealed through the application of administrative fictions.[18] However, it is intriguing here to recall Kuhn's assertion that scientific revolutions tend to be made invisible by a kind of falsification of scientific history through revisions of textbooks, which lend specious continuity to otherwise fundamental departures from traditional science.[19]

If there is a major weakness in Kuhn's analysis, it is his tendency to see the scientific world as made up primarily of interacting individuals, ignoring, for example, the obvious tremendous effects of the organized support and direction of science by government, corporations, universities, and foundations. Similarly, he fails to touch on the sectarian tendency of scientists, and the formation of "schools of scientific thought." [20]

In any event, it is plain that legal reform, especially that effected by legislation, frequently if not typically takes place through the interaction of groups. Hence, even if the general attributes of the revolutionary process in science described by Kuhn are tenable, they must be modified to allow for the importance of groups in the dynamics of legal reform. Groups are of central importance because they affect processes of evaluation and decision-making, as well as the form and course that resistance to reform takes. In societies in which individuals must seek fulfillment of their values through organized groups to which they give allegiance, a process of evaluation, as contrasted to simple value satisfaction, occurs. This means that values or aims tangential and even contrary to many individually held values must be supported when group decisions are made.[21]

18. *Theft, Law and Society,* rev. ed. (Indianapolis: Bobbs-Merrill, 1952), Chap. IV.

19. *The Structure of Scientific Revolutions,* Chap. XI.

20. Leslie White, *The Social Organization of Ethnological Theory* (Houston: Rice University Studies, 1966), p. 52.

21. See W. F. Cottrell, "Men Cry Peace," in *Research for Peace* (Oslo Institute in Social Research, 1954), pp. 112–25; also Earl Latham, *The Group Basis of Politics* (Ithaca, N.Y.: Cornell University Press, 1952).

SOCIAL ACTION AND PLURALISM

Social action differs from scientific activity in that it is much more concerned with direct action and ends sought than it is with facts, hypotheses, and the relevance of facts to hypotheses. Reform movements of the past often were directed toward changing people, which is to say, changing a whole pattern of values to which they putatively subscribed. Social action in modern-day Western society is less a movement to annihilate existing values and create widespread acceptance of new values than is is a form of planned intervention in an ongoing process to *influence the order in which values of different groups are to be satisfied. The objective is to modify sequences of overt action through influencing decisions at points of power, rather than to change the values of groups and individuals participating in the decisions.* Conversion to the abstract or moral rightness of programs is less important than change in action patterns in particular situations.

This is not to say that unorganized, irrational, expressive social movements born of individual "strain" and "deprivation" have disappeared or lost importance.[22] Nor can it be denied that there are social movements and counter movements best defined and analyzed as "symbolic crusades," dedicated to protecting or advancing whole "styles of life." [23] Nevertheless, the functional pluralism of modern society, and the diversification and complexity of value aggregations and individual value hierarchies, necessarily lead to a means orientation in social action. To survive or succeed, social action quickly takes organized form, utilizes professional staff, relies on research methods and findings, and operates within time and budgetary limitations. At the same time, there is a necessary subordination of expressive, moral, symbolic functions to calculational, strategic, and bargain-

22. For this type of analysis see Neil J. Smelzer, *Collective Behavior* (New York: Free Press, 1963), p. 8.

23. Joseph Gusfield, *Symbolic Crusade: Status Politics and the American Temperance Movement* (Urbana: University of Illinois Press, 1963).