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INTERPRETATION OF LAW

GILBERT E. BRACH*

SEVERAL years ago in an address to the Racine County Bar Association I started by saying, "The spirit of unrest today is not confined primarily to economics and politics, but also to the subject which is most vital to all of us, namely the law. Social problems created by new social conditions due to the growth of industrial centers tax our system of jurisprudence and it is not uncommon to hear the lawyer exclaim when working amidst the maze of decisions that are ground out by the various courts, 'Where do we stand?' "

This may be said to be more true today, for as each year passes we must accept new concepts of the law. There are some who will read this paper who can look back and remember when there was a reverence for the rules laid down by the courts, and when it was comparatively easy to tell a client, "This is the law," and the client could complacently rely thereon. But today there is a vast difference.

There are those who adhere to the school of juristic thought, that it is better that the law be fixed though it may work a hardship. It is admitted that fast rules make harsh law, but it is contended that this inures to the benefit of a sounder jurisprudence. This may be summed up in the doctrine generally referred to as *stare decisis*. On the other hand, there are those who believe that law has a definite function to perform in our social and political structure, and the underlying duty of the court is to discover the law applicable to the instant facts.

In our law schools the former doctrine is still taught and stressed, if the ideas expressed by the recent graduates may be said to be a criterion of the teaching. No doubt the instructor is placed in this position, because under the case method of teaching, he relies upon the decisions of the court to convey to the student mind certain principles in a given subject. Perhaps this is the correct rule to follow with the student, but it does pave the way for some serious shocks which trouble the student for some years to come. I shall refer to this again later.

In order to appreciate the conclusion reached by our courts and the juristic thought applied to the conclusion reached, it must be determined whether justice shall be founded upon an express rule or upon a right. If it is founded upon an express rule, justice is then meted out in accordance with legal values rather than in accordance with social values.

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The study of juristic thought resolves itself into the various schools of jurisprudence. These are the Analytical, the Philosophical, the Historical and the Sociological. One little realizes the part these schools of juristic thought have played in the interpretation of law.

The thought expressed that the law is unchangeable and depends upon the natural law which can be discovered by rational speculation represents the Philosophical School of juristic thought. Each rule of law therefore must stand the test of reasonableness. It gave an opportunity for fine distinctions and is the foundation for the axiom, what would a reasonable man do under the same or similar circumstances?

Wherever the law is made to conform to a concept based upon a legal axiom, there is little opportunity for progress in the law. It lags in its function to find justice, or as is commonly called, the equities, for it is based strictly upon legal values.

There is also the school of juristic thought that desires to measure the past in the light of the present, rather than to measure the present in the light of the past. This makes for a rigidity in the law, convenient perhaps to the jurist, but usually lacking in social justice. This may be termed the Historical School of juristic thought.

Can you not see the opportunity for the legal mind, trained in technicalities, steeped in the history of the past, enjoying the pure logic of a sylogistic conclusion? But what of the justice to the litigants? What of the equities of either? It always was and always will be to some far more important that a principle be fixed than to ultimately discover justice.

Law is a constant growth. It grows with changing conditions. Economic conditions, political thought, new social environments all stamp their indelible mark upon the law. In each case it is necessary to discover the law. It is not a fixed principle, but depends rather upon social justice and the inherent equities in each case. The student of the law should study it in the light of human achievement; he should interpret it in the light of justice and the inherent equities involved.

When Judge Winslow in *Borgnis vs. Falk Co.*, 147 Wis. 327 held constitutional the Workmen's Compensation law, he threw aside legal axioms, cast aside the doctrine of *stare decisis*, and in the light of human achievement and in the light of social justice said:

"It is a matter of common knowledge that this law forms the legislative response to an emphatic, if not a peremptory, public demand. It was admitted by lawyers as well as laymen that the personal injury action brought by the employe against his employer to recover damages for injuries sustained by reason of the negligence of the employer

had wholly failed to meet or remedy a great economic and social problem which modern industrialism has forced upon us, namely, the problem of who shall make pecuniary recompense for the toll of suffering and death which that industrialism levies and must continue to levy upon the civilized world. This problem is distinctly a modern problem. In the days of manual labor, the small shop with few employes, and the stage-coach, there was no such problem, or if there was it was almost negligible. Accidents there were in those days and distressing ones, but they were relatively few, and the employe who exercised any reasonable degree of care was comparatively secure from injury. There was no army of injured and dying with constantly swelling ranks marching with halting step and dimming eyes to the great hereafter. * * * To speak of the common-law personal injury action as a remedy for this problem is to jest with serious subjects, to give a stone to one who asks for bread. The terrible economic waste, the overwhelming temptation to the commission of perjury, and the relatively small proportion of actions, condemn them as wholly inadequate to meet the difficulty."

If an exhaustive study is made of the interpretation of the law for social interests, it is easy enough to criticise, because of its weaknesses. What methodological guide has the lawyer or the judge? If the lawyer cannot turn to the decided case and say to his client, "this is the law, because the court passed upon this question," where does he stand? If the doctrine of *stare decisis* is to be relegated (and it appears to be), what becomes of the doctrine of persuasive and imperative authority? One could with some assurance turn to a decided case and say, this is imperative authority, for the court has already passed upon this question, or, this is a good case because an outside court has passed upon the question, and it is very strong persuasive authority. But if the court is searching for the social interest, if it is ferreting out the equities in the given case, one cannot be certain. This is one of the most difficult problems for all of us to understand, and especially the young man who has been taught some of the theories and the principles of the older school of juristic thought. Where is the judge going to turn for guidance when searching for the social interests? He must call upon his philosophy, upon his experience, and upon his knowledge in arriving at his conclusion. He may even go to the special pamphlets and reports of committees studying special questions for his authority, as did Judge Rosenberry in the case of *State ex rel. Hammann, et al. vs. Levitan, State Treasurer, et al.*, 200 Wis. 271, 228 N. W. 140, and for which he was roundly criticised by many of the members of the Wisconsin Bar. This case is a good example, however, of the problem that confronts the student of the law, and especially if he fails to assume the attitude that law as a concept is for social justice.

If law is in constant development and growth, then it would appear to be most necessary in studying the facts in a particular case to endeavor to arrive at the probability in which the court will view the case. It is necessary to determine where the social interest or the equities in the case lie. To do this requires knowledge and experience which cannot be taken entirely from the books or from any particular category of learning.

Judge Cardozo, who is one of the strongest adherents of the new school of juristic thought says of this school in "The Nature of the Judicial Process":

"If you ask how he is to know when one interest outweighs another, I can only answer that he must get his knowledge just as the legislator gets it, from study, experience and reflection * * *. He, the judge, must balance all his ingredients, his philosophy, his logic, his analysis, his history, his customs, his sense of right, and all the rest, and adding a little here and taking out a little there, must determine as wisely as he can, which weight shall tip the scales. If this seems a weak and inconclusive summary, I am not sure that the fault is mine. I know that he is a wise pharmacist who from a recipe so general can compound a fitting remedy."

If the recipe as given by Judge Cardozo is the one that the judge is to use in determining social justice, doesn't it seem as though the duty of the lawyer to his client, in the light of such an interpretation of the law, is to determine as closely as he can from his experience and his knowledge what the probabilities of the law are, in the eyes of the court, and the light in which the court will view his case?

I shall take the liberty of referring to several late Wisconsin cases to illustrate the difficulty which a student of the law has in determining the probability of the law by the court.

In the particular case quoted, Justice Owen wrote both decisions. In *State ex rel Harbach vs. City of Milwaukee*, 189 Wis. 184, 206 N.W. 210, he said, speaking generally of education:

"If the field of legislation upon the subject of education belongs to the state, it belongs to it in its entirety. If the cause of education is not a subject of municipal regulation, the municipality cannot touch it or interfere with it in the slightest degree. School buildings are an essential agency in the state's educational scheme, and to allow municipalities a voice in the construction, repair, control or management of the school buildings within their borders is to yield to them the power to frustrate the state's plan in promoting education throughout the state. If power be granted to interfere in this respect, there would be no logical remedy to municipal interference with the district schools. This court has held that the ward schools of the cities of the state are district schools within the meaning of Article 10 (3) of the Constitution."

In the case of *State ex rel Board of Education of Racine* against the City of Racine, the same judge speaks of education as follows:

"The board of education is dealing with a special subject. It is necessary for it to visualize the future educational necessities of the city and to plan to meet such necessities. On the other hand, the common council is the fiscal authority of the city. It knows and understands the financial conditions of the city and the general municipal problems imposing burdens upon the taxpayers. Exorbitant demands of the board of education might very well make it impossible to carry forward other municipal undertakings of the greatest importance. There is sound policy in centralizing the taxing authority where a proper balance and proportion may be fixed and maintained in the matter of tax levies for all municipal purposes."

And quoting further in the decision, the judge refers to certain statutes showing that the board of education is merely an arm of the municipal government, he states:

"All of these provisions and others might be cited to indicate the legislative purpose that school affairs shall constitute a municipal function in cities, and that the board of education is merely a city agency the same as the board of public works."

The reader should analyze both cases cited, because in the one the court lays great stress upon the fact that education is a state function, whereas in the other, to sustain its conclusion, it says that the board of education that administers the law relative to education is an arm of the common council, the same as the board of public works. It would seem that the court has paved the way for some grave questions in these two decisions, but on the other hand, looking at this matter through the glasses of social interest, the first case was written in December, 1925, and the second case was written in May, 1931, and there was an entirely different atmosphere, economic and political, when the second case was written. True, education may still be a matter of the state, but if the common council is the fiscal authority, then it would appear that the entire control and destiny of education is actually in the hands of the common council.

Thus it is difficult sometimes to appreciate the probability of the law as the court is liable to express it.

This is not set forth in the spirit of criticism, because that is not the function of this paper, but is merely set forth to illustrate one of the difficulties that a student of the law has to contend with.

A criticism, however, of this school of juristic thought is the opportunity for expediency to slip into a prescription such as Judge Cardozo has set forth, which will only tend to palliate temporarily our social and economic ills.

One can point now to cases in the respective states where expediency predominated because an agricultural or industrial interest was at stake. Must the court rely upon the sociologist, the scientist, the agriculturist, the industrialist, the economist to draw its conclusion, or will there be some ministry of justice, basing its decision upon the interpretation of all philosophy, science, industry, customs, with fact everything that makes for a better understanding in the relations of our social and economic life?

A second criticism of the sociological school of juristic thought raises the question, whether or not the voice of the social scientist is infallible in determining what "is the justice according to law."

But in spite of the criticism of this school, the courts are more and more turning to it in determining the social and economic questions that come before it.

With each session of the legislature trying to outdo the one gone before in passing laws, the problem of the interpretation to be placed upon them must of necessity require some time and thought. Many of these laws must in time either stand or fall before the scrutiny of the courts. Some of these laws deal with the municipalities and the state, still others deal with crime and the regulation thereof; others deal primarily with taxation; still others deal with the welfare of the general populace. The courts in interpreting the law always start out with the premise that the statute is amendatory of the common-law. No doubt this is the stumbling block in the interpretation of many statutes. The statute is passed because the common-law has ceased to supply a remedy, and still the court, if it follows the rule of *stare decisis*, calls upon the common-law in its construction, and so long as the human language remains an imperfect instrument, and is subject to a variety of interpretations, then the legislative will must be construed by the courts in order to determine the meaning.

The written law differs fundamentally from the customary or common law in that it begins with an abstract rule. Why then can the court not interpret this rule in the light of present and existing conditions?

With conditions as they are, the task of the lawyer becomes more difficult each day. He cannot place a given set of facts within a rule and positively inform his client that such is the law. What is true of the negligence cases is becoming so in more branches of the law. We have today in our jurisprudence some of the principles of the Roman law, and some of the principles of the common-law. We are still trying in many phases of the law to administer justice in a complex society by means of frontier principles. Perhaps a better understanding of the situation that we are confronted with will make

us more careful in our scrutiny of those men who are to interpret the law on the bench. The government that we have sworn to uphold depends for its existence upon the administration of the law. The lawyer is the agent who stands between chaos and orderly government. In order that he may better carry out his duty to a maximum degree and in order that he may better appreciate his responsibility he must always keep in mind that he is an administrator of law. Perhaps this responsibility may be better fulfilled by adhering to the old schools of juristic thought and the doctrine of stare decisis; perhaps by breaking all fetters and setting forth on uncharted courses to seek social justice. In either event, as ministers of justice, we must not forget that the law must keep pace with the time. It must grow in order to function, and in order to function, it must first of all be understood by those who are to administer it.