THE YALE LAW JOURNAL

VOLUME 64 DECEMBER, 1954 NUMBER 2

PRINCIPLES OF LAW AND THEIR EVOLUTION

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The following remarks were delivered by Professor Corbin on October 23, 1954, at a Yale Law School dinner honoring him on his eightieth birthday.

As the students and faculty of the Yale Law School take part in celebrating my eightieth anniversary, I should like to state to them, and to others, what is the most important idea that I have got out of my fifty-seven years of law study, law teaching, and law practice. It is this: the development of our law—common, statutory, and constitutional—is a part of the continuing evolutionary development of life in society. It is this that prevented the teaching of law for more than forty years from becoming a deadly bore. It is this that has given to the study of new cases—probably more than 50,000 of them—an interest that is no less at eighty than it was at twenty-five.

The law that I taught and the law that I wrote were never quite the same from year to year; and you may be sure that there are remarkable differences between the law that was taught me prior to 1900 and the law that I taught in 1942 and wrote in 1950. This does not mean that there is not a large core of similarity. We never escape from history, especially in so short a period as fifty years; but the longer the period, the less is the similarity. Indeed, some of the mores of a people, on which our law is founded, persist so long as to create an illusion of eternity and perfection.

It is this idea of the nature and growth of law that has created a persistent interest in the output of the courts. Opinions, with an occasional golden nugget, are often dull and repetitious of outworn formulas. But they deal with the continuing life and experience of mankind; and the decision, whether well-reasoned or merely instinctive, is evidence of the prevailing mores that underly our ever-growing law.

Just how is the law of 1900 different from the law of 1950? Are not legal principles permanent and eternal? The answer to this is no. Sometimes there is a complete reversal. What promises are enforceable at law? In earlier times, only those that were in a writing executed by sealing and delivery or some other formality. We used to teach that consideration for a promise must be a "detriment to the promisee." In the *Contracts Restatement* we say that it need

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not be. We once taught that contract required a consensus of minds, a concurrence of wills, so that an irrevocable offer was a legal impossibility. How many of the impossibilities of the past are the commonplaces of today.

At one time in the history of this school, some thirty-five years ago, some of our bright young men had lost faith in all supposed legal principles. No two cases are alike. How can you generalize from a mass of variable and conflicting experience? At a luncheon, they posed to me this question: "Do you think that there is such a thing as a legal principle?" I replied at once, "Certainly I do," proceeding, however, to explain that it was not something handed down from on high, not a part of a "brooding omnipresence in the sky." I meant that there are useful generalizations based on long human experience; that although no two cases are ever exactly alike, there are groups of cases that have much in common; that by careful and imaginative analysis and comparison of these cases it is possible to construct general rules, doctrines, principles, which are of great value in directing and in predicting future human and judicial action in similar cases. These are tentative, working rules, the value of which depends upon the industry and the intelligence of the man who makes them, and upon the changes in time and circumstance since they were made.

The difference between a good lawyer and a poor one, between a great jurist and a lesser one, lies in the accuracy and completeness and clarity of his understanding of past human transactions and in his ability to make sound and useful generalizations from them. Of course, these human transactions include much more than merely the litigated cases.

It is a matter of course that the young men and women who have joined in celebrating my anniversary will not accept my views as to the nature of law and its evolutionary development merely because they are mine, even though they are held with conviction at the age of eighty after long years of thought and observation. Others hold quite different views, others who may be wiser men. Throughout my teaching career, my efforts were directed at inducing and compelling my students to acquire a background and a method of analysis that would enable them to form and to maintain opinions and generalizations of their own. The judicial opinions and the "great books" of the past are an essential part of that background, not because one can find the final answer in any of them, but because they bring us down to date in our groping and uncertain human progress and because they are the base from which we take the next step forward.

Not long ago a book by a living philosopher was reviewed in The New York Times. I have not read the book; but the reviewer, apparently in order to show the author's disapproval of present-day teaching and opinion, quotes him as follows: "For the past century, he says, 'the drift of higher teaching, including our teaching of the foundations of law, . . . had been pragmatic in the social utility sense, resting heavily on 'experience' as the chief source of wisdom, guided largely by theories of evolution in social affairs and by the new social sciences, and proclaiming relativity in customs, morals, laws as the highly

flexible principle of judgment for all human culture.' "[1] My own life experience and my study and teaching of the law have forced me to hold substantially the views that he here describes.

At their first recitation, I have often read my students a passage from a series of lectures on *The Nature of the Judicial Process*, delivered at Yale by Benjamin N. Cardozo. That passage is as follows: "I was much troubled in spirit, in my first years upon the bench, to find how trackless was the ocean on which I had embarked. I sought for certainty. I was oppressed and disheartened when I found that the quest for it was futile. I was trying to reach land, the solid land of fixed and settled rules, the paradise of a justice that would declare itself by tokens plainer and more commanding than its pale and glimmering reflections in my own vacillating mind and conscience. I found 'with the voyagers of Browning's Paracelsus that the real heaven was always beyond.' As the years have gone by, and I have reflected more and more upon the nature of the judicial process, I have become reconciled to the uncertainty, because I have grown to see it as inevitable. I have grown to see that the process in its highest reaches is not discovery, but creation; and that the doubts and misgivings, the hopes and fears, are part of the travail of mind, the pangs of death and the pangs of birth, in which principles that have served their day expire, and new principles are born."[2]

So you see that legal rules and principles are not to be scorned because they are tentative, working rules and are subject to change. The greater the jurist who makes or uses them, the greater will be the modesty with which they are laid down. Those of lesser wisdom and more self-conceit will state their doctrines as absolute and eternal. A law that is composed of tentative, working rules is indeed human law; but it is also natural law—it is as "natural" as rain, as "natural" as birth and death.

Well-made, such legal rules and principles may have a long and useful life. They serve the needs and purposes of our daily lives. I know that the ones that I have helped to make can not remain unchanged. It is the function of a new generation to make better ones for the new day. The great books and the old masters have not said the final word; much less have the teachers and writers of the present day.

You may be sure that as long as the Yale Law School is a place of active growth, based upon a thorough and respectful knowledge of human life and experience, and as long as it is a place for free and open and honest minds, its working force of employees, students, and faculty will have an old man's abiding affection and support during all his remaining years.

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1. Chalmers, N.Y. Times, Sept. 26, 1954, § 7, p. 20, reviewing HOCKING, EXPERIMENT IN EDUCATION: WHAT WE CAN LEARN FROM TEACHING GERMANY (1954).

2. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 166-7 (1921).