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THE NEW JURISPRUDENCE

It has been said of Austin's famous work on jurisprudence that his conclusions follow with irresistible force if once his premises are granted. Shall we try to break this welded chain, or shall we test his premises in the light of recent science? In my judgment the latter is the only course. Logic has not changed in fifty years, but a flood of light has been thrown on the ways in which social life has been upbuilt. The dogmatism of the fathers does not become the sons. They must test all the cherished dogmas of departed days.

Austin builds his system without regard for the origin of the principles he uses. There is ample excuse for this when the mental attitude of the age in which he lived is taken into account. English thought had been grooved by the history through which the English people had gone, and from it had risen a group of dogmas with a common background to give them apparent unity. Nothing is harder to dissolve than the chemical union of ideas that history creates.

To test Austin's premises I shall introduce a contrast he overlooked. Laws are *attractive* that of themselves induce regular action, or they are *coercive* when imposed by authority. The latter, Austin calls positive law, and to it he confines his attention.

The sovereign thus becomes the source of all law, and to him all regular coordinating action is due. This naturally leads to the contrast of divine and human law, the law-maker in the one case being God, and in the other, public authority. In both of these cases the power to do right is from above, and the tendency to do wrong is from below. Grant as a premise the depravity of man, and the grip of Austin's reasoning begins to tighten. It becomes irresistible when current notions of theology are blended with defective views of nature to give positive law a standing its contents do not deserve. Back of Austin's logic is a theology and a view of nature open to question. If they are wrong, Austin's positive law sinks from its commanding place into a group of unimportant details.

It is usual to make pleasure the motive of law, and in a vague sense it is true. But pleasure has no objective measurement, and as a result it has little direct effect in creating law. Economy of action is really the immediate force, for it is measurable in the habits and conventions it creates. These forces are always active, and grind out their results regardless of social authority or personal scruples.

This analysis differs from Bentham's in that it does not put pain on a par with pleasure in creating law. He makes laws the result of the sanctions that enforce them, and thus makes all law the result of the pains that penalize wrong-doing. It is, however, the fear of pain, not pain itself, which is the law-making force. Commands take their rise from the fear of evil which the control of superiors can suppress. If men had no fears, commands would be of no avail, as they have their sanction in the evils their obedience prevents. I agree with Austin in saying that a sanction is the evil incurred if commands are disobeyed. There are no sanctions unless the violation of law brings punishment, and punishment could not enforce law without the presence of fear in the mind of the subject. Commands thus presuppose a defective world in which fear dominates.

Law is made by the gradual adjustment of men to each other and to their environment. These relations become a part of the moral code as social justice, and to it the rulings of courts and the enactments of legislature must yield. Legislators may

submit to law or violate law, but they do not make law. Nor are the decisions of courts law; they are merely precedents. Commands must always give way to social law, and thus bring life into harmony with the objective processes that create adjustment. God's commands are but a concrete expression of this natural law. The two are one; but men must find the command through the natural law, and not by the reverse process.

From these facts come a well-defined issue. Austin says a *law is a species of command.* I affirm that *a command is a species of law.* Back of these assertions lie pictures of the universe that must be contrasted to make our differences clear. Austin starts from the concept of an oriental potentate whose word is law. This fact is covered up because he speaks in terms of God's law, and not of human laws. But his concept of God comes from Eastern religions where God is pictured in the garb of an absolute ruler of the kind with which they were familiar. The concept of God no longer needs such pictures. His laws are not specific commands with definite punishments; they are the expression of the pressure that nature and society put on men to secure the conservation and advance of society. Social laws have definite rewards for conformity and vague punishments for disobedience. Sovereign law, on the contrary, has definite punishments for disobedience and few advantages of conformity. Fear and pain here become dominant motives, while pleasure remains a vague impulse. Such a picture of law is a result of the history through which religion and government have gone. We have broken down the political concepts of this old epoch; we should outgrow the views of God that have the same source.

The step from this view to mine is a long one, but in conformity with the advance that has taken place in modern thought. Man is not in servile relations to a ruler. He is a part of a process of increasing adjustment. The good of yesterday becomes the bad of today not because of altered commands, but because the environment, the needs, and even the nature of man have changed. The law is thus the force which drives men from what they are into some better situation. Each new process of adjustment creates a new law and new motives for its enforce-

ment. One cannot answer the question as to why he acts differently today from what he did yesterday by saying he was commanded. He is moved by forces within and without, and to them he must look for the source of his law. Adjustment is thus the fundamental pressure in creating regular action, and regular action is the index of the law. Law is therefore not a static unit to be codified in commands, but the objective expression of all that act on men in their ascent towards social harmony. There is in law no sovereign. It is a system of rewards and not of punishments. A new jurisprudence must give this objectivity to pleasure before it can gain rational approval.

Adjustment is the external mark of relations out of which happiness comes. We cannot readily test the number of units of pleasure each person gets, but we can test the growing power to get happiness by the increasing adjustment that progress secures. Law is the result of the regular action which the pursuit of pleasure creates. How can these adjustments in activity be measured? Only in answering this question is jurisprudence carried back to its source. What forces did Bentham and Austin overlook which if coordinated in the light of recent science can give objectivity to social law and thus dispense with penal codes and appeals to authority?

The law-making effect of adjustment is shown in the economy it creates. The conservation of energy is a fundamental human need, and to secure it regularity of action ensues. Each habit or custom has its origin in the economy its existence promotes. The change comes in the inventive individual, and is passed along to other individuals by imitation or by the conscious recognition of the resulting advantage. Then the new economy becomes the source of family and group action, and finally it becomes the law of the nation and a part of the moral code. Long-standing habits can cease to be marks of adjustment, but then some coercive force is at work counteracting the natural effect that economy had to improve habits and customs. This happens when habits and customs are transformed into commands and are perpetuated by the punishment that their infraction imposes.

One great force in creating social law thus becomes plain. Adjustment demands economies, and these are transformed into habits through imitation or experience. Such economies are prevented, or at least minimized, by the existence of strong passions inherited from the animal world. Rational forces are ineffective against organic impulses, for the force that counteracts them is not reason, but sentiment. Passions are natural; sentiment is acquired. Adjustment cannot by direct means alter passions, but it can evoke and foster sentiments suppressing them. The transition from a natural to a social state has come through the evolution of sentiments that promote cooperation and brotherly love. Each new social mechanism produces some sentiment which increases the hold that society has on the individual. It is this acquired law, the law of love, loyalty, and brotherhood, that is of importance as a measure of adjustment. Each new sentiment indicates some mechanical adjustment that society is making, which becomes effective when an increase of sentiment makes group activity more vigorous. Adjustment is thus measured through its mechanical devices to increase economy or their effects in emotion. Both are parts of one whole and are indexes of the same law-making forces.

These two forms of activity are direct and act on individuals either through their habits or through their emotions. Authority and sovereignty are the expression of centralized law. Direct action, on the other hand, creates decentralized law. No one formulates the law of a tribe. The motive to conformity acts on each individual through his habits, language, and emotions. He acts as others act because he feels and thinks as they do. Deviations in thought and feeling would create new groups, each with a common consciousness. This consciousness is the only binding force, and from it all conformity is derived. In larger groups, however, this simple force will not suffice. Emotion emphasizes the small compact group of brothers; interest calls for larger groupings in which discordant elements, natural and racial, exist. Economy and emotion now come into conflict. Self-interest presses for larger social relations than emotion would evoke. Authority is then the expression of this larger interest coercing the emotions each locality produces. It is cen-

tralized, while emotion is decentralized; it is coercive, while the forces exciting emotion are attractive; it is indirect, delegated or pragmatic, while emotion is the driving force of direct action. Neither force can, however, be supreme; and between them an endless series of compromises is effected.

What we call law is the result of many stages of human development, each of which has left some mark on juridical systems. Man did not start his career servile and dependent. His only law was the direct action imposed by self-interest. Law in this sense may be defined as interest transformed into emotion through the pressure of adjustment. Social law demands new motives and makes a contrast between the impulse that leads to an act and the consequences that flow from it. The attitude in doing is moral; the consequence is law. The consequence, and not the motive, thus gets the first place, and coercive action displaces voluntary effort. Commands are a necessary element in institutional life.

Social law, however, is not always coercive. A partly centralized form of it is effective in some fields. Of this type of law we have many instances, but no name for the phenomena as a whole. The best-developed part of it is international law, a term it would be difficult to make general enough to have it serve as a generic name for all similar facts. I shall therefore call it *federal law*, because this term brings out its composition better than the word "international." The problem of federal action is to give each group that which it wants most, and to take from it what is least valued. The essence of federal law is compromise and mutual aid. A net advantage comes to each group in the shape of a bonus they appreciate. The important point is that the assent is given after the consequence is known, and hence can be accurately measured by each party in its own terms. The work of a board of labor conciliation is a type of such action. Here the problem is to find what each contestant values most and which of his demands are least urgent. Only on this basis can agreements be reached which will have a compelling force on each group. Each group then enforces its contracts through its own emotion. The gain of the united effort is sufficient to give a net gain to each participant. This is possible in all industrial

affairs and in many international relations. Larger social and industrial groups of today are the result of this process, and those of tomorrow will show the effects of this pressure even more plainly.

With these views I think most persons will agree so long as the reasoning is confined to industrial relations. Here it will be admitted we can get on without a penal code, but not in the more intricate relations of civil life. The answer I make is not that we should abolish civil penalties, but that we should seek to understand how they arose and by what means they are continued. Civil law is the result of a long process of development, of which we can see only the final stage. It thus seems dogmatic and arbitrary. Austin's commands are so simple that it seems almost a sacrilege to dissect them in order to show their origin. And yet there was a time when each law was a pragmatic rule to which all concerned gave assent. The blending of small groups into larger ones was the result of interest, and to make the new unity effective the specific laws of each locality had to be codified into an organic whole. The general law thus became the law that was found to be common to all the groups.

We see this process plainly in the formation of Roman law; if we had the facts it would be found to be equally true of the law of every composite state. The law of great empires was not the arbitrary *dicta* of some ruler, but a codification of existing laws according to pragmatic principles. Of this fact we have a good example in the Code Napoleon. This was not Napoleon made, but was obviously a restatement and reorganization of existing French laws. Could we get at the facts, all seeming commands would dissolve into pragmatic rules, giving wider application to the principles on which happiness, peace, and prosperity depend. The command is but a clamor to hide the identity of the real makers of law, who thus gain a standing which as persons would have been denied them. A judge is originally not the enforcer of law, but its interpreter. He gained his ends by decisions that appealed to both the interested parties, or to their belief that the new rule was but a broadening and perfecting of that already contained in their customs, usages and local law. This function the judge still retains. It is true he

enforces, but he interprets and compromises as well. Effective law must always be pragmatic in essence and cooperative in origin. The pains that laws inflict should never obscure the true source of their power. Modern states need industrial mechanisms and political centralization, but they need equally well the direct action of emotion and the pragmatic influence of thought. The real power is in the emotion and the thought, and not in the mechanisms that centralization imposes. Emotional impulse and conscious pragmatic adjustment are the two great forces of progress, and we neglect them at our peril.

Law thus goes through two stages before it reaches the mechanical form which has so great a hold on legal thought. The direct action of emotion and the pragmatic influence of thought are not now absent even if their effects are obscured. Arbitrary rule is a thing of the past. As cooperative industry displaces the coercive subjection of the masses, and popular rule replaces class domination, law will reshape itself in accord with our inner motives. Passive obedience is no longer a virtue. Decentralization evokes a bolder spirit which will remold our sentiments to meet modern needs. To make this view of law clear I shall follow the example of Austin and put its contents in a table.

LAW		
IMPULSE		CONSEQUENCE
	Origin	
Attractice Law		Pragmatic Law
	Expression	
Direct Action	Federal Law	Positive Law
	Motive	
Emotional appreciation	Rewards	Punishments
	Spirit	
Artistic	Coöperative	Servile
	(Examples)	
Honor	International law	Centralized industry
Fellowship	Commercial law	Institutional pressure
Loyalty	Group action	Sovereignty
Thrift	Labor unions	Penal codes
Equality	Public associations	Constitutional limitations
Self mastery	Social codes	Executive control
Fidelity	The rules of sport	Class supremacy
Service	Legal interpretations	Judicial power

From this it will be seen that there are three forms of action—conventional, direct, and telic; three forms of change—reaction, revolution and evolution; three forms of enforcing law—the habitual, the emotional, and the pragmatic; and three resulting attitudes—the submissive, the forceful, and the law-abiding. Out of these elements modern society is constructing the network of human emancipation. Social law is the expression of this new freedom and social service its motive. Centralized authority is the mark of partial adjustment, and, although we cannot displace it, we may at least reduce its harshness and severity. The dissolution of sovereign power follows inevitably upon the rise of men from a state of helplessness and depravity to one of personal self-mastery. The problem is to pass through this stage of transition without the jar of revolution or the menace of reaction.

The means for this peaceful solution of our difficulties lies largely, if not solely, in the development of a new attitude towards law, for law is the best expression of orderly growth. The old and the new in law must therefore be clearly contrasted, and there is no better way than to compare the premises of social law with those of the older law so ably expounded by Austin. His law epitomizes the views of nature and of God's rule that past generations held, which are really inconsistent, since in them two discordant views of man and the universe have been blended into one by the pressure of historical conditions. Both concepts, however, emphasize centralized authority, and hence practically they are one. God's law is a command, while natural law is a force; the one predicates the depravity of man, the other his helplessness. Depravity and helplessness are not the same, yet both call for the same coercive powers on the part of the state, and develop the same ideas of justice. It matters not whether we call this law divine or natural, for it is after all clearly representative of an old social order that has been partially, at least, undermined by modern ideas.

Natural law is natural only in contrast with the revealed law of the Scriptures. It assumes the type of environment under which primitive nations lived and the motives that control men in antagonistic tribal societies. To bring it into relation to mod-

ern needs I shall put in parallel columns the basis on which two types of justice depend.

I. LEGAL versus SOCIAL PHILOSOPHY.

	Legal Philosophy	Social Philosophy
First Premise	Human nature reveals its own impotence, and hence the need of external control.	Human wants are dynamic, which tendency of itself creates improving forms of social control.
Source of Discipline	War	Work
Reason for Submission	Sovereign	Prosperity
Measure of Effectiveness	Peace	Income
End to be Secured	Liberty	Progress

II. NATURAL versus SOCIAL JUSTICE.

Natural Justice	Social Justice
The doctrine of Conservation	*The doctrine of* Possession
Struggle	Social Values
Possession	A Living Wage
Equality	Equalized Advantage
Labor Values	Superior Advantage
Personal Rights	Personal Equality
Free Contracts	A Social Mode

Definitions

Natural justice causes the same individuals to be eliminated or subordinated and the same individuals to survive and prosper as would happen in a state of nature.	Social justice restricts both extremes of society, thereby increasing the prosperity of the socially intermediate.

Questions

Which is the more important, Equality of situation or Equality of person?	Is social justice secured by direct action against recognized evils or by wider application of the principles of progress and prosperity?

This table is self-explanatory, but some sources of misunderstanding may remain. The older view of human nature emphasized its defects, and because of them a sovereign was demanded. The newer view starts not from human nature which is investigated with difficulty, but from human wants which are easily measured. The older view emphasized war as the source of discipline and the means through which character is formed.

Work gets this place in the newer scheme. Submission in the older scheme was due to the love or fear of rulers. Today the only sovereign is prosperity. If we accept a gold standard or a tariff, if we permit the continuation of monopolies or a money trust, if we submit to the evils of a rising cost of living or of a bad distribution of wealth, we do it because it is demanded by prosperity, and not because of commands from superiors. We measure this prosperity in income just as our ancestors tested governmental efficiency by the peace it brought. Formerly men strove for liberty and rallied to its call; the new ideas are centered about progress.

The first two doctrines of natural justice are not a part of divine justice as formulated by religion. They are however in harmony with modern views of natural processes and deserve a place on that score. The doctrine of possession is scarcely altered by being socialized. The great change comes from the contrast of labor values with social values. The older jurisprudence grew out of primitive conditions where labor was the chief origin of wealth, and hence the courts view all wealth as the result of individual toil and sacrifice. Present facts do not justify such a view. Everyone is a social debtor and should account for what he gets from society when he asks society to consider his claims. The primitive man thought he received his income through his contact with nature, and hence viewed his income as self-made, and not as society-made. In the latter case a budgetary relation exists between each man and society, the assets of which have a social origin.

Superior advantages are localized in ways that permit of their exploitation by a few. The right of the state to prevent an exploitation of the masses follows from this fact. Those who possess local advantages must yield control when public advantage demands a general use of local resources. A case of this kind is now awaiting decision by the American people. The State of Columbia controlled the region where the Panama Canal is building. What compensation is due Columbia? Under the doctrine of sovereignty Columbia has unlimited claims, which could, if recognized, block the building of the canal. Is there any difference between the right of a nation to a neck

of land that prevents international commerce and its right to prevent the free passage of ships through a straight that borders her shores? We refused to pay tribute to the Moors in Africa, and to Denmark for entrance to the Baltic. Shall we pay tribute for a similar right to cross the Isthmus of Panama?

The application of the doctrine of equalized advantage is of importance as it affects both external and internal trade relations. A protective tariff is an attempt to equalize environmental advantage. By it the local advantages of particular regions are taken from their possessors and distributed more widely among the workers of the world. If these local advantages have a social origin, this process has a justification. The same problem arises in internal trade in connection with transportation. The rates to the seaboard are fixed not on the basis of cost, but with the view of equalizing the trade of various cities. New York has the highest rate; and other ports have rates inversely to the cost of transportation. This is a case of equalizing advantage. It has a justification if the local advantages of each city and transportation route are not the result of the labor expended by the people interested in the various cities or routes, but are socially created. A good rule for foreign commerce would be: Give to all sections the same advantage and to each section some advantage over the outside world. The same rule in internal trade would be: Give to each section an equal advantage in production and transportation, and to each section some protection for its local advantages. Such principles are only partially recognized in the courts and by legislators, but will in time gain general recognition. The doctrine of a social mode deserves a co-ordinate place with these axioms. In any combination where nature or evolution has had a controlling influence, the numerical arrangement of its unit is such that the larger number will be at the center, with a reduction in numbers as the extremes are approached. This can be represented in a curve rising at the center and falling off in each direction. This center, called the mode, should grow at the expense of the extremes. The social mode of any group is its organized element—the trade union, employers' association, and industrial groups of all sorts. Their action represents the progressive part of each social

unit. The individual has no rights against the mode of his group, unless the group itself is convicted of unsocial acts. Cut-throat competition and sweatshop workmen represent survivals whose elimination is desirable.

If this analysis is correct the primary basis of all law is in the direct action that is enforced by emotion, and its social expression is in the federal law to which blending groups or growing nations assent. The positive law of Austin, on the other hand, is the result of mechanical action brought about by centralized authority. In principle there is a gulf between these vital sources of law and its mere mechanical expression in statutes or by the courts. The difference between Austin's scheme and mine, however is not great, and the passage from one to the other is easily made. The reason for this is that Austin is not true to his premises in the system of law he develops. With him laws are in theory commands and the expression of the centralized power of a sovereign, but in practice Austin does not follow Hobbes in accepting the word of the sovereign as final. Such an acceptance would narrow public law as the verbal inspiration of the Scriptures narrows divine law. Austin never looks to a sovereign as the source of law in the way so many religious teachers turn to the Scriptures to find God's word. Law really comes from the re-interpretation and unification of old codes, and not from the personal power of a sovereign. Jurisprudence, he tells us, "Is the science concerned with the exposition of the principles, notions, and distinctions which are common to systems of law," and to make this emphatic he puts it in italics. In doing this he has wandered from his original principles and accepted a doctrine that undermines them. What are these "principles, notions, and distinctions" but the doctrines that arose in decentralized communities through the general assent of their members, and were made a part of general law when these communities were blended into a centralized state?

The law is older than the authority by which it is enforced. It came from the people and is given back to them renamed and repolished. This was true of the judicial system that the Romans built; it is equally true to-day. Law must be restated so as to express the social thought to which people assent,

but for which law has as yet not found a fitting expression. The new law will not be an arbitrary creation, but simply the social recognition of principles which smaller organizations than the state have already put in operation. Growing groups always make law by a re-statement of their underlying motives and activities. What each group does of its own volition is more clearly seen in the new codification than in the original form. The concrete formulation of many disjunctive actions becomes the general law with the growth of language and thought that permits abstract expression. The law is thus a growth and a distillation, not a command. Centralized action merely expresses in general terms what co-operation and emotion have worked out in detail. And the agent in this change is not the sovereign, but a group of legal expositors who have no other power than the rightness of their judgment. So long as the judge represents the public, their assent is his only authority, and their welfare his only basis of judgment. It is the enforcement of statute law, not its expression, that chains him to precedent and lowers him from his position as a creator to that of a minion of absolute power. These two functions are really distinct, even if blended by long-standing usage. A court can never disregard its original function without sinking into contempt, for its social power is always greater than its political power. When it makes the latter supreme, it forces the evolution of law into emotional channels and checks the growing dominance it should exercise.

Emotion is final, but it should not be supreme. The pragmatic influence of social ends should transform action from revolutionary explosions into a means of orderly evolution, and the court is the best vehicle to secure this end. Legislation is often but a crude groping for a change that the forethought of the judge should have clearly seen. In the free working of smaller associations the principle is ever at hand which is needed for the expression of socialized action. The social law is never new; it is the group law clarified and restated. And who is so well fitted for this work as the judge, if he would but free himself from the trammels of precedent and convention?

The distinction I have made between federal law and restrictive or penal law has long been recognized. It is merely put

here into a new form to meet modern conditions. The *juris gentium* of the Romans and modern equity have at their basis the equality and assent that social law demands. Its source is not a lawmaker but the firmly established rules of earlier societies. There could be no equity if there were no principles to which both parties had previously given assent. The formula may be different and in a language peculiar to each religion or belief, but the essence must be the same or a reinterpretation of the common element is not possible. Federal assent is thus a stage in law-building through which all fundamental concepts must go. The first pressure towards law comes from economy and emotion, the second from mutual assent. The transition from this law to coercive codes comes through the centralization that mechanical action imposes on growing states in the process of unification.

The reverse process takes place when nations have passed beyond the epoch of coercive unity into a realm where decentralization again becomes dominant. Then sovereignty is dissolved, coercion is restricted, and penal codes lose their importance. This decentralizing process is plainly visible in all recent political action. Voluntary action has an increasing power, and the will of smaller groups is imposing itself on the nation through the blending of local interests into a new social law.

From this striving the concept of social justice arises. It is not a formulated code derived from natural or any other predetermined conditions, but rather the consensus of present social activity brought to a common consciousness by the similarity of local struggles for social betterment. Direct action is thus the force back of the change and mutual assent the form through which the new movement shows its power. To these changes the formulated, codified doctrines of past ages must yield. The courts must get their rules not from frigid law books, but from the vital forces of industrial life. He is the best judge who rises above tradition and establishes a new equity between the discordant elements now striving for supremacy. Prosperity is the important fact in the evolution through which all groups are going. Each industrial group has already developed some element of the new law suitable for general adoption, while each needs as well some restraint to be furnished by the social codes

that others have adopted. Out of the readjustment will come unity, but not of the old coercive type. The emotion and welfare of the masses are brought into harmony when legal thought, losing its dogmatic quality, becomes a pragmatic expression of progressive evolution.

We are often told by judges that their province is rigidly to interpret legal doctrines. If they prove inadequate, the legislator and not the court, should provide a remedy. Social legislation is, however, based on emotional demands, and cannot be secured except by an agitation promoting revolution even if it does not create it. The choice is between emotional justice with its evils, and the acceptance of social principles by the court. Slavery in Europe was abolished, not by a sudden revolution, but by increasing the restriction that in the end made slavery unprofitable. In the same way we should secure a living wage. The evils of low standards could be removed if the courts took a liberal view of the law and economic facts involved. There is no prescribed division of powers between the legislative, judicial and executive functions which can be accepted. The natural evolution is for the executive and the judicial to encroach on the legislature. In this way emotional outbursts are prevented, and orderly evolution displaces the crude countermovements of revolution and reaction. The people should pass on what is done, but popular initiative is bad because emotionally impelled. An ideal state would be simpler than our republic, and make less use of legislation.

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