

4-1-1950

Justice Versus Law: Herein of the Failure of Law

Basil H. Pollitt

Follow this and additional works at: <https://repository.law.miami.edu/umlr>

Recommended Citation

Basil H. Pollitt, *Justice Versus Law: Herein of the Failure of Law*, 4 U. Miami L. Rev. 332 (1950)
Available at: <https://repository.law.miami.edu/umlr/vol4/iss3/5>

This Article is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact library@law.miami.edu.

JUSTICE VERSUS LAW: HEREIN OF THE FAILURE OF LAW

BASIL H. POLLITT *

A few years before Roscoe Pound ascended the throne in the law school world and became its mighty lion, he unfurled his royal mane and burst upon the American Bar like a brilliant galaxy of newly discovered stars. At the time this event occurred Pound was almost thirty-six years old—approximately the same age as his fellow-townsmen, William Jennings Bryan, of Lincoln, Nebraska, had been when he also burst upon the national horizon some ten years previous with his famous "Cross of Gold" speech at the Democratic National Convention in 1896. Pound had already achieved local recognition in Nebraska as a member of the Bar in active practice, as a judge, as Dean of the State Law School, and also (strange as it may seem) as a botanist.¹ A year earlier he had attracted the attention of metropolitan law firms, law teachers and the better class of law students by the publication of his well known article (still read today) on "The Decadence of Equity."² The event which catapulted Pound into the national legal arena was his famous address in 1906 before the American Bar Association on "Causes of Popular Dissatisfaction with the Administration of Justice." Forty years later, having of course written extensively on the problem in the meantime, Pound wrote on "A Generation of Improvement of the Administration of Justice,"³ and found that things were better on the whole. It is a little difficult for this writer to agree with Pound on this point. What improvement there has been, has been merely on the surface. Such improvement lies more in the field of mechanical administration than in the fundamentals of justice. Pound was of course talking about "Justice According to Law," as to which see Pound's famous article under that title.⁴

An entirely different and somewhat opposing theory of how justice works is presented by Judge Jerome Frank of the Court of Appeals for the Second Circuit. Judge Frank's theory is that the judge decides problems of

* Formerly an associate of Burlingham, Veeder, Masten and Fearey in New York City; Professor of Law, New Jersey Law School; Judah Philip Benjamin Research Fellow, Harvard Law School; Special Assistant to the Attorney General, etc. Author of articles in *Georgetown Law Journal*, *Minnesota Law Review*, *Kentucky Law Journal*, *Florida Law Journal*. Now a retired member of the Miami Bar.

The writer inscribes this article to the memory of Harold Remington, America's outstanding authority on Bankruptcy, a fine trial lawyer and a great man.

1. Walter, *Legal Ecology of Roscoe Pound*, 4 *MIAMI L.Q.* 178 (1950).
2. 5 *Col. L. Rev.* 339 (1905).
3. 22 *N.Y.U.L.Q. Rev.* 369 (1947).
4. 13 *Col. L. Rev.* 698 (1913); 14 *Col. L. Rev.* 1, 103 (1914).

justice almost entirely from the subjective angle. The danger in this thesis is that once we admit its tenability we are liable to yield to it in its totality and thus make law into a hodge-podge.⁵

At present there is much talk in academic circles about the "School of Vienna" and its principal leader, Professor Kelsen, and his theory of "Pure Law" and of norms. There is also talk of the brilliant Russian legal teacher Petrazhitzky and his psychological theory of law. Mention is also made of a German named Lask. A number of writers point out that the whole theory of justice is inconvenient, disturbing, and even mischievous in a legal order built on a quest for certainty and repose. A few writers go so far as to deny the idea of justice.

In earlier years Frank was supported in his theory of realistic jurisprudence by Professor Karl N. Llewellyn of Columbia University. Llewellyn has taught commercial law subjects and has been a Commissioner on Uniform State Laws from New York. Some horny-handed son of toil, some ruffian with a Peglerian cast, has suggested that this is merely Yale and Columbia "ganging up" on Harvard. But perish the thought.

Nearly all the foregoing writings have dealt with what is known as Judicial Justice, and this brings us to our first main heading:

I

JUDICIAL JUSTICE IS IMPEDED BY A NUMBER OF FACTORS

There are many facts in the legal system as it actually functions which tend to hinder and impede, and thereby to defeat, justice as it is sought to be administered in the courts. In a previous article on the subject this writer has enumerated and discussed a considerable number of these factors. No list however can be all-inclusive because the variety of combinations is almost endless. In addition to the factors pointed out in the previous article the following matters defeat judicial justice:

Too Little Study of Justice. Justice as such is hardly touched upon in our law school curriculum. This subject is usually studied only in Jurisprudence, but Jurisprudence is seldom taught except as a graduate course. The result is that most lawyers never make a scientific study of justice. Is it not possible to teach Jurisprudence as an undergraduate course in law school and thereby let the student tackle the problem of justice? Surely such an experiment would be worth while.

Too Many Statutes. There are too many new laws passed annually, there

5. See FRANK, *LAW AND THE MODERN MIND* (1930); *IF MEN WERE ANGELS* (1942); *FATE AND FREEDOM* (1945); *COURTS ON TRIAL, MYTH AND REALITY IN AMERICAN JUSTICE* (1949). Frank's permanent reputation will probably rest on his book, *Law and the Modern Mind*. The book is undoubtedly one of the most influential publications of our generation. Judge Frank's stature continues to grow and bids fair to rival Dean Pound.

are too many amendments. What we need is more effective, even, fair and universal enforcement of laws already on the books. Of course some new laws are needed, since we live in a dynamic, changing society, but let us keep the number to a minimum. There are also too many patently unconstitutional statutes enacted by our legislative bodies. Legislative reference bureaus are not a complete answer to the problem. Why not have legislative committees on constitutionality in every legislative body, with the ablest lawyer members on such committee?

Exaltation of Crimes Against Property. Crimes against property rights are punished or are punishable with much greater severity than some other crimes, such as for example sexual indignities. The State of California has just started a trend in the opposite direction.

Sell-Out by the Governing Body. In a considerable number of states gambling is legal if done at a race track, that is, a spot where the state shares in the revenue. Try to bet on the same horse or dog, running in the same race, at a "bookie" joint or parlor and you are a criminal. This part of our legal order does not make sense, because it makes the criminal nature of the act depend entirely upon the place where the act is committed. The state has in effect sold out. Similarly in some American cities a certain proportion or amount of the annual revenue is calculated on the assumption that fines from gambling will bring in a certain amount of money. This practice tends to tie the hands of judges in imposing prison terms and further invites gamblers to ply their illegitimate trade. It is another sell-out and brings about uneven and hypocritical enforcement of the laws against gambling.

Non-enforcement of Laws Because of Public Opinion. President Truman calls the Taft-Hartley Law a slave labor law and does not actively or enthusiastically enforce it. He believes public opinion is against it. The same thing occurred during Prohibition with respect to the 18th Amendment and the Volstead Act. A similar situation some times develops on the local scale in cases of lynching or mob violence. This is wrong. The only sure guide for law enforcement officers is the law on the books. Public opinion is too arbitrary and capricious a light to guide the feet of those directly concerned with the administration of justice. Opinion may be mistaken, exaggerated, ephemeral, entirely the result of propaganda.

Common Law System of Contentious Procedure. This phrase is borrowed from Dean Pound. In our system of trials with or without a jury, each litigant is represented by a champion, that is, an attorney, who is bent on developing only his own client's side of the case rather than finding out the truth as a whole. Under such a system, *superior forensic eloquence* will almost inevitably affect the result. Such eloquence will charm the judge, dazzle the jury, befuddle the inexperienced witness. We will have to change our system of trials from sporting contests into serious quests for truth.

Antiquated Rules of Evidence. The rule against the admission of hearsay evidence came into being in a period when jurymen were much less intelligent and educated than they are today. Query: If judges sitting without a jury can receive hearsay evidence and not be affected by it to the detriment of justice, why could not our modern juries be also entrusted with hearing a little hearsay in the discretion of the trial judge? Are not jurors as intelligent as trial examiners in an administrative proceeding?

Law has also failed on a world wide scale in a larger field of justice and this fact brings us to our next main heading.

II

THE FAILURE OF LAW IN THE GENERAL FIELD OF JUSTICE

Law lies at the very base of human society. It permeates all our relations, motivates in larger or smaller degree all our actions. It is the texture out of which human conduct is woven. Nevertheless, law has failed to bring about justice between man and man, using the word justice in the Aristotelian sense of giving each man his due. This failure on the part of law is partly due to the inability and incapacity of law to control certain phases of human behavior, such as crime, health, religion and sex. When dealing with such problems, law can never entirely succeed, in fact is doomed to failure, until there is a moral regeneration of the individual human being.

In the following fields of human relations law has failed, in some of them more than in others—in a few of these fields it works fairly well:

War. Alexander sighed for new worlds to conquer. Caesar thought he had stopped the Barbarians from the North, when he conquered Gaul, invaded Britain, and crossed the Rhine. The French and British Kings thought they had achieved a lasting peace when they ended the Hundred Years War. Metternich and Talleyrand believed they had settled the affairs of Europe at the Treaty of Vienna. Woodrow Wilson had the same idea when he signed the Treaty of Versailles and set up the League of Nations. All these dreams and visions of great rulers were nothing but a snare and a delusion. There is such a thing as international law but it certainly has not stopped war.

Fear of Foreign Aggression. Today a terrible, a paralyzing fear, stalks the people of the world—a fear of the atom bomb, a fear of chemical and bacteriological warfare, a fear of some new giant among the nations seeking a larger place in the sun, a fear of Genocide. Against all these fears stands only the frail bulwark of the United Nations. May this bulwark hold up, may law not fail us again in this hour of our need.

Domestic Violence. Law has broken down in the field of violence on the home front. Crime, suicides, brutality, all continue to flaunt themselves and raise their ugly heads unabated. Compare Borchard's book, *Convicting the Innocent*.

Poverty. Here again law has almost totally failed despite such legal devices as bankruptcy, exemptions, homesteads. The subject of old age security will be considered *infra*.

Ignorance. When we think of education the name of Horace Mann at once comes to our mind. In this field law has succeeded fairly well through such devices as compulsory education, truancy laws, Land Grant Colleges and municipal universities.

Disease. In the field of health all law can do is to aid medicine. Law has done tolerably well along these lines. Law has aided medicine in the conquest of yellow fever, smallpox, diabetes, the social diseases, and in other respects.

Shelter. Law has done a considerable amount of good here through Housing Acts, Rent Control, Tax Exemption, Public Lands, building codes, etc. Law has only made a start in this direction and much remains to be accomplished on the world-wide scale.

Nourishment. Famine exists perennially in many countries. It is possible to raise and process enough food but law has failed to discover a method of equitable distribution, this despite such men as Herbert Hoover and Harvey W. Wiley and such institutional aids as Departments of Agriculture, Soil Conservation, Pure Food Laws and Milk Control.

Treatment of the Criminal and the Insane. Here again law has almost totally failed. Not only are these unfortunate miseries treated with the greatest brutality, particularly if they do not "co-operate," but little attempt is made to rehabilitate them.

The Right to Work, Herein of Labor. Labor improvement has been mostly a case of self-help through Guilds and Unions and also through such leaders as Marx, Engels, Gompers, William B. Wilson, and John L. Lewis. Law has aided Labor or at least obeyed its dictates by establishing Departments of Labor, abolishing slavery and involuntary servitude, and enacting such statutes as Employers' Liability Acts, Workmen's Compensation Laws, Safety Regulations, Section 7 of the original N.I.R.A. and the Wagner Act.

Security. Law is doing more and more in this field. The dreadful County Poor House is almost a thing of the past and let us hope that the practice of putting the aged sane in mental hospitals will also soon disappear. The Townsend Plan under the name of the Welfare State is upon us. Up to now law has merely alleviated the problem through measly Social Security benefits and Widows Pensions and welfare assistance. The time has come for law to take over generally as it has already done in the case of Railroad Employees and Civil Service servants of the Government.

Transportation. Law has done much in this field also but it has failed to conquer the fundamental difficulty, that of insolvency. We have had federal incorporation of railroads beginning in the Civil War period, and all kinds of financial aid and regulation of common carriers. Nevertheless, the fundamental

problem remains: How are we to prevent our common carriers from going insolvent, stock holders being squeezed out and most of the money going to reorganization managers and large New York law firms?

Recreation. This word brings to mind chariot races, triumphs, gladiators, feudal tournaments, bullfights, the Olympic games, etc. Rulers in all eras have made a point of entertaining the populace but on the whole law has left this field to private action. On occasions law will set up commissions and help enforce the rules of games.

Fine Arts. Law has accomplished more in this field than in that of recreation generally. Here we think of municipal opera, public band concerts, W.P.A. art projects, and more recently of UNESCO. Our copyright laws, our Library of Congress, our public museums are evidence of the aid that law gives.

Personal Rights. Law, and particularly the Supreme Court of the United States, has done a splendid job in protecting our rights of freedom in religion, press, speech, assemblage and the other guarantees of liberty set up in our various Bills of Rights.

Religion. Law has four choices in the field: (a) absolute freedom as in the United States (but compare the Mormons and Christian Scientists); (b) the banning of all religion as was tried for a time in Russia (but even here there was a Society of the Godless and a state of doubt or even total disbelief may be a form of religion, as some of our courts have held); (c) set up an established church and allow dissenters as in England; (d) allow an established church only, as was tried in early times in parts of Europe. This method has never worked satisfactorily.

The basic trouble is that each religion becomes intolerant of the others and tends to persecute the other sects if law will permit. The reader will at once recall numerous historical examples of such persecution.

Veterans. As the old Roman jurist put it, the safety of the state is the highest law. It is also said to be sweet to die for one's country. Consider Stephen Crane's *The Red Badge of Courage*. For a brief period after each war a feeling of revulsion sets in and the public is inclined to discount these old 'saws.' Let us hope that the United Nations will tend to make this feeling permanent. The business of being a hero cannot be confined to wartime only. It is a permanent job. Law rightly does a great deal for veterans, perhaps too much for the able bodied. It has been ever thus since the days of Marius and Sulla in ancient Rome.

Family Relations. In the field of sexual behavior and family life the law is almost a total failure. Law's only remedy is divorce and this is not a panacea, merely a partial solution. It would appear that sex is more powerful than law due to its primordial urge, its secrecy. Query: Will law ever be able to cope with adultery, fornication, prostitution? Prostitution is partly an eco-

conomic problem. Even though law can control rape to some degree, what can it do with respect to voluntary manifestations of sex other than utter vain words, that is, declare such acts illegal? Compare Geoffrey May's book, *The Social Control of Sex Expression*.

Dope and Liquor. Here again Law's attempts to prohibit, control and regulate are almost a total failure. Perhaps sumptuary laws can never be enforced. Consider Prohibition, the increased use of marijuana, barbituates. Recall the English opium trade in China, and De Quincey's famous book.

Business and Professional Ethics. Law makes some effort at regulation in this field but on the whole fails for the reason that the philosophy of so many business and professional men is based solely upon the almighty dollar.

Official Corruption. Here again law largely fails. The words of Elbert Hubbard apply: "Those who are in Sing Sing were on their way to Albany, and those who are in Albany just missed Sing Sing." Consider England in earlier days; Grant, Harding, Fall, Tweed, Croker, Hines; the pay-off, lobbying, bribery, sewer contracts, condemnation cases, kick-backs, and the sale of pardons by party executive committees.

The Elective Franchise. Law works a little better here despite goons, slush funds, and propaganda of all sorts. In the long run the people get what they want, or at any rate what they deserve.

Minority Groups. Fifty years ago the *Christian Herald* was full of stories of how the Turks were murdering the Armenians, the Russians were massacring the Jews. Later it was the German nation under Hitler which almost exterminated Jewry. The Jewish race however is virile and resilient and not only survived but triumphed in the end in its new State of Israel. Today we hear talk of Arabs being the displaced race. Law helps to protect minority groups even though it is not completely successful. This fact is strikingly illustrated by the case of the American Negro, who is constantly winning new victories in the courts. The reader will recall numerous examples of these victories in recent years. Law cannot control prejudice, but it can check the legal effects of prejudice.

Administrative Action. A generation ago lawyers disliked and feared administrative bodies. Such dislike was due to the fact that something new and strange had impinged upon their traditional orbit. Today all such ideas have gone. The lawyer is used to administrative law and is no longer particularly fearful of its consequences. It is thought that the lawyer by infusing a good deal of judicial justice has improved the fairness of administrative action.

III

CONCLUSION

A legal order might conceivably be constructed on any one of the three following bases: (1) upon the desire for absolute certainty and predictability,

(2) upon a desire for repose and the maintenance of the status quo, (3) upon justice. The first alternative is impossible in practice because of the infinite variations in human conduct and behavior. The second alternative is likewise unworkable in fact because human society is too dynamic to be kept in a strait jacket. There remains only the third alternative. The end of law is indeed justice. Justice is mankind's eternal aspiration, its highest hope. We have seen however that law as it actually functions in the governor's mansion, in the legislative halls, in the court room, in the mill, the home, the factory, on the farm and along the water front, at times not only impedes judicial justice but also fails in the larger field of justice between man and man. Law functions very well when dealing with inanimate objects and in the more objective fields. Law fails when it runs up against subjective actions and the more basic human urges. What can we do about this problem? The writer offers the following suggestions:

(a) We improve as a social group but not as individuals. There must therefore be individual regeneration.

(b) More cooperation, more planning, is needed, call it by whatever name you will.

(c) Our best brains must be drafted for public service. If this means Technocracy, let it be.

(d) Law and morals must be more nearly identical.

(e) Justice as such must be taught to all persons.

Justice. The blind goddess. There she sits. On her pedestal. Weighing the scales. Sometimes mute. But never deaf to her supplicants. Justice, the lawyer's vestal virgin, the chaste Diana of the court room. She is truly Blackstone's immortal Lady of the Common Law who "sleeps alone." And now there arises a great shout. Here come the lawyers. A mighty throng of them. Surging into the court room. All make genuflections, all do obeisance, before the Goddess. Some only render lip service, others swear eternal homage, and fealty. A few mean to keep their vows. Can they, the lawyers, succeed? Can they achieve justice? Only if they are able to escape from the forest of too many laws and of wrong doing in which Eugene O'Neill's famous character, "The Emperor Jones," met his fate. Only if they show the tolerance, the unselfishness, the self-restraint, and yet withal a burning anger at those who would profane the temple of Justice, like the Jewish prophets of old, like Confucius, Buddha, Socrates, like the Man of Galilee who shed tears for the City. In the words of Cardinal Newman's famous hymn:

*"The way is dark
And I am far from home
Lead, Kindly Light,
Lead Thou me on."*