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THE LIVING LAW.[1]

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The history of the United States, since the adoption of the constitution, covers less than 128 years. Yet in that short period the American ideal of government has been greatly modified. At first our ideal was expressed as "A government of laws and not of men." Then it became "A government of the people, by the people and for the people." Now it is "Democracy and social justice."

In the last half century our democracy has deepened. Coincidentally there has been a shifting of our longing from legal justice to social justice, and—it must be admitted—also a waning respect for law. Is there any causal connection between the shifting of our longing from legal justice to social justice and waning respect for law? If so, was that result unavoidable?

Many different causes contributed to this waning respect for law. Some related specifically to the lawyer, some to the courts and some to the substantive law itself. The lessening of the lawyer's influence in the community came first. James Bryce called attention to this as a fact of great significance, already a generation ago. Later criticism of the efficiency of our judicial machinery became widespread. Finally, the law as administered was challenged—a challenge which expressed itself vehemently a few years ago in the demand for recall of judges and of judicial decisions.

Many different remedies must be applied before the ground lost can be fully recovered and the domain of law extended further. The causes and the remedies have received perhaps their most helpful discussion from three lawyers whom we associate with Chicago: Professor Roscoe Pound, recently secured for Harvard, who

1. An address delivered before the Chicago Bar Association, January 3, 1916.

2. Of the Massachusetts Bar.

stands pre-eminently in service in this connection; Professor Wigmore; and Professor Freund. Another Chicago Professor, who was not a lawyer but a sociologist, the late Charles R. Henderson, has aided much by intelligent criticism. No court in America has in the last generation done such notable pioneer work in removing the causes of criticism as your own Municipal Court under its distinguished Chief Justice, Harry Olson. And the American Judicature Society, under the efficient management of Mr. Herbert Harley, is stimulating thought and action throughout the country by its dissemination of what is being done and should be done in aid of the reform of our judicial system.

The important contribution which Chicago has made in this connection makes me wish to discuss before you a small part of this large problem.

The Challenge of Existing Law. The challenge of existing law is not a manifestation peculiar to our country or to our time. Sporadic dissatisfaction has doubtless existed in every country at all times. Such dissatisfaction has usually been treated by those who govern as evidencing the unreasonableness of law breakers. The line "No thief e'er felt the halter draw with good opinion of the law," expresses the traditional attitude of those who are apt to regard existing law as "the true embodiment of everything that's excellent." It required the joint forces of Sir Samuel Romilly and Jeremy Bentham to make clear to a humane, enlightened and liberty-loving England that death was not the natural and proper punishment for theft. Still another century had to elapse before social science raised the doubt whether theft was not perhaps as much the fault of the community as of the individual.

Earlier Challenges. In periods of rapid transformation, challenge of existing law, instead of being sporadic, becomes general. Such was the case in Athens, twenty-four centuries ago, when Euripides burst out in flaming words against "the trammelings of law which are not of the right." Such was the case also in Germany during the Reformation, when Ulrich Zäsius declared that "All sciences have put off their dirty clothes, only jurisprudence remains in its rags."

And after the French Revolution, another period of rapid transformation, another poet-sage, Goethe, imbued with the modern scientific spirit, added to his protest a clear diagnosis of the disease:

"Customs and laws, in every place
Like a disease, an heirloom dread,
Still trace their curse from race to race,
And furtively abroad they spread.
To nonsense, reasons self they turn;
Beneficence becomes a pest;
Woe unto thee, thou art a grandson born!
As for the law, born with us, unexpressed
That law, alas, none careth to discern."

The Industrial Revolution. Is not Goethe's diagnosis applicable to the twentieth century challenge of the law in the United States? Has not the recent dissatisfaction with our law as administered been due, in large measure, to the fact that it had not kept pace with the rapid development of our political, economic and social ideals? In other words, is not the challenge of legal justice due to its failure to conform to contemporary conceptions of social justice?

Since the adoption of the federal constitution, and notably within the last fifty years, we have passed through an economic and social revolution which affected the life of the people more fundamentally than any political revolution known to history. Widespread substitution of machinery for hand labor (thus multiplying hundred-fold man's productivity), and the annihilation of space through steam and electricity, have wrought changes in the conditions of life which are in many respects greater than those which had occurred in civilized countries during thousands of years preceding. The end was put to legalized human slavery—an institution which had existed since the dawn of history But of vastly greater influence upon the lives of the great majority of all civilized peoples was the possibility which invention and discovery created of emancipating women and of liberating men called free from the excessive toil theretofore required to secure food, clothing and shelter. Yet, while invention and discovery created the possibility of releasing men and women from the thraldom of drudgery, there actually came, with the introduction of the factory system and the development of the business corporation, new dangers to liberty. Large publicly owned corporations replaced small privately owned concerns. Ownership of the instruments of production passed from the workman to the employer. Individual personal relations between the proprietor and his help ceased. The individual contract of service lost its character, because of the inequality in position between employer and employee. The group relation of employee to employer with collective bargaining became common; for it was essential to the workers' protection.

Legal Science Static. Political as well as economic and social

science noted these revolutionary changes. But legal science—the unwritten or judge-made laws as distinguished from legislation—was largely deaf and blind to them. Courts continued to ignore newly arisen social needs. They applied complacently 18th century conceptions of the liberty of the individual and of the sacredness of private property. Early 19th century scientific half-truths like "The survival of the fittest," which translated into practice meant "The devil take the hindmost," were erected by judicial sanction into a moral law. Where statutes giving expression to the new social spirit were clearly constitutional, judges, imbued with the relentless spirit of individualism, often construed them away. Where any doubt as to the constitutionality of such statutes could find lodgment, courts all too frequently declared the acts void. Also in other countries the strain upon the law has been great during the last generation; because there also the period has been one of rapid transformation; and the law has everywhere a tendency to lag behind the facts of life. But in America the strain became dangerous; because constitutional limitations were invoked to stop the natural vent of legislation. In the course of relatively few years hundreds of statutes which embodied attempts (often very crude) to adjust legal rights to the demands of social justice were nullified by the courts, on the grounds that the statutes violated the constitutional guaranties of liberty or property. Small wonder that there arose a clamor for the recall of judges and of judicial decisions and that demand was made for amendment of the constitutions and even for their complete abolition. The assaults upon courts and constitutions culminated in 1912. They centered about two decisions: the *Lochner* case,[3] in which a majority of the judges of the Supreme Court of the United States had declared void a New York law limiting the hours of labor for bakers, and the *Ives* case,[4] in which the New York Court of Appeals had unanimously held void its accident compensation law.

The Two Ritchie Cases. Since 1912, the fury against the courts has abated. This change in the attitude of the public towards the courts is due not to any modification in judicial tenure, not to amendment of the constitutions, but to the movement, begun some years prior to 1912, which has more recently resulted in a better appreciation by the courts of existing social needs.

In 1895 your Supreme Court held in the first *Ritchie* case[5] that

3. *Lochner v. New York*, 198 U. S. 45.
4. *Ives v. South Buffalo Ry. Co.*, 201 N. Y. 271.
5. *Ritchie v. People*, 155 Ill. 98.

the eight hour law for women engaged in manufacturing was unconstitutional. In 1908 the United States Supreme Court held in *Muller v. Oregon*[6] that the Women's Ten Hour Law was constitutional. In 1910 your Supreme Court held the same in the second *Ritchie* case.[7] The difference in decision in the two *Ritchie* cases was not due to the difference between a ten hour day and an eight hour day; for the Supreme Court of the United States has since held (as some state courts had held earlier) that an eight hour law also was valid; and your Illinois Supreme Court has since sustained a nine hour law. In the two *Ritchie* cases the same broad principles of constitutional law were applied. In each the right of a legislature to limit (in the exercise of the police power) both liberty of contract and use of property was fully recognized. But in the first *Ritchie* case the court, reasoning from abstract conception, held a limitation of working hours to be arbitrary and unreasonable; while in the second *Ritchie* case, reasoning from life, it held the limitation of hours not to be arbitrary and unreasonable. In other words,—in the second *Ritchie* case it took notice of those facts of general knowledge embraced in the world's experience with unrestricted working hours, which the court had in the earlier case ignored. It considered the evils which had flowed from unrestricted hours, and the social and industrial benefit which had attended curtailed working hours. It considered likewise the common belief in the advisability of so limiting working hours which the legislatures of many states and countries evidenced. In the light of this evidence as to the world's experience and beliefs, it proved impossible for reasonable judges to say that the legislature of Illinois had acted unreasonably and arbitrarily in limiting the hours of labor.

The Two Night Work Cases. Decisions rendered by the Court of Appeals of New York show even more clearly than do those of Illinois the judicial awakening to the facts of life.

In 1907, in the *Williams* case,[8] that court held that an act prohibiting night work for women was unconstitutional. In 1915, in the *Schweinler* case[9] it held that a similar night work act was constitutional. And with great clearness and frankness the court set forth the reason:

"While theoretically we might [then] have been able to take judicial notice of some of the facts and of some of the legislation now called to our attention as sustaining the belief and opinion that night work in factories is

6. *Muller v. Oregon*, 208 U. S. 412.
7. *W. C. Ritchie & Co. v. Wagman*, 244 Ill. 509.
8. *People v. Williams*, 189 N. Y. 131.
9. *People v. Charles Schweinler Press*, 214 N. Y. 395.

widely and substantially injurious to the health of women, actually very few of these facts were called to our attention, and the argument to uphold the law on that ground was brief and inconsequential.

"Especially and necessarily was there lacking evidence of the extent to which, during the intervening years, the opinion and belief have spread and strengthened that such night work is injurious to women; of the laws as indicating such belief, since adopted by several of our own states and by large European countries, and the report made to the legislature by its own agency, the factory investigating commission, based on investigation of actual conditions and the study of scientific and medical opinion that night work by women in factories is generally injurious, and ought to be prohibited. * * *

"So, as it seems to me, in view of the incomplete manner in which the important question underlying this statute—the danger to women of night work in factories—was presented to us in the Williams case, we ought not to regard its decision as any bar to a consideration of the present statute in the light of all the facts and arguments now presented to us and many of which are in addition to those formerly presented, not only as a matter of mere presentation, but because they have been developed by study and investigation during the years which have intervened since the Williams decision was made. There is no reason why we should be reluctant to give effect to new and additional knowledge upon such a subject as this, even if it did lead us to take a different view of such a vastly important question as that of public health or disease than formerly prevailed. Particularly do I feel that we should give serious consideration and great weight to the fact that the present legislation is based upon and sustained by an investigation by the legislature deliberately and carefully made through an agency of its own creation, the present factory investigating commission."

Eight years elapsed between the two decisions. But the change in the attitude of the court had actually come after the agitation of 1912. As late as 1911, when the court in the *Ives* case[10] held the first accident compensation law void, it refused to consider the facts of life, saying:

"The report [of the commission appointed by the legislature to consider that subject before legislating] is based upon a most voluminous array of statistical tables, extracts from the works of philosophical writers and the industrial laws of many countries, all of which are designed to show that our own system of dealing with industrial accidents is economically, morally, and legally unsound. Under our form of government, however, courts must regard all economic, philosophical, and moral theories, attractive and desirable though they may be, as subordinate to the primary question whether they can be moulded into statutes without infringing upon the letter or spirit of our written constitutions. In that respect we are unlike any of the countries whose industrial laws are referred to as models for our guidance. Practically all of these countries are so-called constitutional monarchies in which, as in England, there is no written constitution, and the Parliament of law-making body is supreme. In our country the federal and state constitutions are the charters which demark the extent and the limitations of legislative power; and while it is true that the rigidity of a written constitution may at times prove to be a hindrance to the march of progress, yet more often its stability protects the people against the frequent and violent fluctuations of that which, for want of a better name, we call 'public opinion'."

On the other hand in July, 1915, in the *Jensen* case,[11] the court

10. *Ives* v. *South Buffalo Ry. Co.*, 201 N. Y. 271.
11. *Jensen* v. *Southern Pacific Co.* (N. Y.), 109 N. E. R. 600.

holding valid the second compensation law (which was enacted after a constitutional amendment), said:

> "We should consider practical experiences, as well as theory, in deciding whether a given plan in fact constitutes a taking of property in violation of the constitution. A compulsory scheme of insurance to secure injured workmen in hazardous employments and their dependents from becoming objects of charity certainly promotes the public welfare as directly as does an insurance of bank depositors from loss."

The Struggle Continues. The court re-awakened to the truth of the old maxim of the civilians *ex factor oritur jus.* It realized that no law, written or unwritten, can be understood without a full knowledge of the facts out of which it arises, and to which it is to be applied. But the struggle for the living law has not been fully won. The *Lochner* case has not been expressly overruled. Within six weeks, the Supreme Judicial Court of Massachusetts, in supposed obedience to its authority held invalid a nine hour law for certain railroad employees.[12] The Supreme Court of the United States which, by many decisions had made possible in other fields the harmonizing of legal rights with contemporary conceptions of social justi e, showed by its recent decision in the *Coppage* case[13] the potency of mental prepossessions. Long before it had recognized[14] that employers "and their operatives do not stand upon an equality," that "the legislature being familiar with local conditions is primarily the judge of the necessity of such enactments";[15] and that unless a "prohibition is palpably unreasonable and arbitrary we are not at liberty to say that it passes beyond the limitation of a state's protective authority."[16] And in the application of these principles it had repeatedly upheld legislation limiting the right of free contract between employer and employee. But in the *Adair*[17] case, and again in the *Coppage* case,[18] it declared unconstitutional a statute which prohibited an employer from requiring as a condition of his securing or retaining employment, that the workman should not be a member of a labor union. Without considering that Congress or the Kansas legislature might have had good cause to believe that such prohibition was essential to the maintenance of trade unionism, and that trade unionism was essential to securing equality between employer and employee, our Supreme Court of the United States

12. *Commonwealth v. B. & M. R. R.* (Mass.) 110 N. E. R. 264.
13. *Coppage v. Kansas,* 236 U. S. 1.
14. See 219 U. S. 570.
15. See 219 U. S. 569.
16. See 238 U. S. 452.
17. *Adair v. U. S.* 208 U. S. 161.
18. *Supra.*

declared that the enactment of the anti-discrimination law was an arbitrary and unreasonable interference with the right of contract.

The Business Men's Protest. The challenge of existing law does not, however, come only from the working classes. Criticism of the law is widespread among business men. The tone of their criticism is more courteous than that of the working classes; and the specific objections raised by business men are different. Business men do not demand recall of judges or of judicial decisions. Business men do not ordinarily seek constitutional amendments. They are more apt to desire repeal of statutes than enactment. But both business men and working men insist that courts lack understanding of contemporary industrial conditions. Both insist that the law is not "up to date." Both insist that the lack of familiarity with the facts of business life results in erroneous decisions. In proof of this business men point to certain decisions under the Sherman Law, and certain applications of the doctrine of contracts against public policy—decisions like the *Dr. Miles Medical Co.* case,[19] in which it is held that manufacturers of a competitive trademarked article cannot legally contract with retailers to maintain a standard selling price for their article, and thus prevent ruinous price cutting. Both business men and working men have given further evidence of their distrust of the courts and of lawyers by their efforts to establish non-legal tribunals or commissions to exercise functions which are judicial (even where not legal) in their nature, and by their insistence that the commissions shall be manned with business and working men instead of lawyers. And business men have been active in devising o' means of escape from the domain of the courts, as is evidenc y the widespread tendency to arbitrate controversies through committees of business organizations.

An Inadequate Remedy. The remedy so sought is not adequate, and may prove a mischievous one. What we need is not to displace the courts, but to make them efficient instruments of justice; not to displace the lawyer, but to fit him for his official or judicial task. And indeed the task of fitting the lawyer and the judge to perform adequately the functions of harmonizing law with life is a task far easier of accomplishment than that of endowing men, who lack legal training, with the necessary qualifications.

The training of the practicing lawyer is that best adapted to develop men not only for the exercise of strictly judicial functions, but also for the exercise of administrative functions, quasi-judicial in

19. *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U. S. 409.

character. It breeds a certain virile, compelling quality, which tends to make the possessor proof against the influence of either fear or favor. It is this quality to which the prevailing high standard of honesty among our judges is due. And it is certainly a noteworthy fact that in spite of the abundant criticism of our judicial system, the suggestion of dishonesty is rare; and instances of established dishonesty are extremely few.

The All Round Lawyer. The pursuit of the legal profession involves a happy combination of the intellectual with the practical life. The intellectual tends to breadth of view; the practical to that realization of limitations which are essential to the wise conduct of life. Formerly the lawyer secured breadth of view largely through wide professional experience. Being a general practitioner, he was brought into contact with all phases of contemporary life. His education was not legal only; because his diversified clientage brought him, by the mere practice of his profession, an economic and social education. The relative smallness of the communities tended to make his practice diversified not only in the character of matters dealt with, but also in the character or standing of his clients. For the same lawyer was apt to serve at one time or another both rich and poor, both employer and employee. Furthermore—nearly every lawyer of ability took some part in political life. Our greatest judges, Marshall, Kent, Story, Shaw, had secured this training. Oliver, in his study of Alexander Hamilton, pictured the value of such training in public affairs:

> "In the vigor of his youth and at the very summit of hope, he brought to the study of the law a character already trained and tested by the realities of life, formed by success, experienced in the facts and disorders with which the law has to deal. Before he began a study of the remedies he had a wide knowledge of the conditions of human society. * * * With him * * * the law was * * * a reality, quick, human, buxom and jolly, and not a formula, pinched, stiff, banded and dusty like a royal mummy of Egypt."

Hamilton was an apostle of the living law.

The Specialist. The last fifty years have wrought a great change in professional life. Industrial development and the consequent growth of cities have led to a high degree of specialization—specialization not only in the nature and class of questions dealt with, but also specialization in the character of clientage. The term "corporation lawyer" is significant in this connection. The growing intensity of professional life tended also to discourage participation in public affairs, and thus the broadening of view which comes from

political life was lost. The deepening of knowledge in certain subjects was purchased at the cost of vast areas of ignorance and grave danger of resultant distortion of judgment.

The effect of this contraction of the lawyers' intimate relation to contemporary life was doubly serious; because it came at a time when the rapidity of our economic and social transformation made accurate and broad knowledge of present day problems essential to the administration of justice. "Lack of recent information," says Matthew Arnold, "is responsible for more mistakes of judgment than erroneous reasoning."

The judge came to the bench unequipped with the necessary knowledge of economic and social science, and his judgment suffered likewise through lack of equipment in the lawyers who presented the cases to him. For a judge rarely performs his functions adequately unless the case before him is adequately presented. Thus were the blind led by the blind. It is not surprising that under such conditions the laws as administered failed to meet contemporary economic and social demands.

The True Remedy. We are powerless to restore the general practitioner and general participation in public life. Intense specialization must continue. But we can correct its distorting effects by broader education—by study undertaken preparatory to practice—and continued by lawyer and judge throughout life: Study of economics and sociology and politics which embody the facts and present the problems of today.

"Every beneficent change in legislation," Professor Hendeson said, "comes from a fresh study of social conditions, and social ends, and from such rejection of obsolete laws to make room for a rule which fits the new facts. One can hardly escape from the conclusion that a lawyer who has not studied economics and sociology is very apt to become a public enemy."

Your former townsman, Charles R. Crane, told me once the story of two men whose lives he would have cared most to have lived. One was Bogigish, a native of the ancient city of Ragusa off the coast of Dalmatia,—a deep student of law, who after gaining some distinction at the University of Vienna, and in France, became Professor at the University of Odessa. When Montenegro was admitted to the family of nations, its Prince concluded that, like other civilized countries, it must have a code of law. Bogigish's fame had reached Montenegro,—for Ragusa is but a few miles distant. So the Prince begged the Czar of Russia to have the learned jurist prepare a code for Montenegro. The Czar granted the request; and

Bogigish undertook the task. But instead of utilizing his great knowledge of laws to draft a code, he proceeded to Montenegro, and for two years literally made his home with the people,—studying everywhere their customs, their practices, their needs, their beliefs, their points of view. Then he embodied in law the life which the Montenegrins lived. They respected that law; because it expressed the will of the people.