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## **Predictability of the Law; Its Relation to Respect for Law\***

GEORGE G. BAILEY\*\*

On May 1, 1958, the United States celebrated the first "Law Day U. S. A." The date of May first was selected to counteract the May Day celebrations of the Communist world, and the purpose was to present to our people and to the world in general the concept of freedom and justice under the rule of law. The legal profession was called upon to spearhead the celebration of Law Day and in the interim years the lawyers have responded in an increasingly effective manner. But admittedly Law Day is but an embryo of what it should and must be. Participation by the Bar is only token participation, and if we who live by the law are not impressed with the absolute necessity for such an observance, we need not anticipate that it will have much effect upon the lay public.

There is one aspect of Law Day which, although frequently mentioned from the beginning is not given sufficient emphasis. Not only leaders of the Bar, but many lay persons and government officials have spoken of their concern about increasing violation of the law and of the lack of respect for law. And so, it is not surprising that the necessity for educating our people about democracy under the rule of law, and through understanding, bringing them to law observance and respect for law must be an integral part of any successful program. The Law Day proclamation of President Kennedy for the year 1962 laid stress on this ideal in these words:

“. . . just as freedom itself demands constant vigilance, it is

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\*\* Past president, West Virginia Bar Association; current president, West Virginia State Bar.

essential that we nurture through education and example an appreciation of the values of our system of justice and that we foster through improved understanding of the function of law and of independent courts an increased respect for law and for the rights of others as basic elements of our free society: . . . .”

We can have no quarrel with those who say that an intense sense of justice burns in all Americans, or that respect for and adherence to law is engrained in our average citizen. But it is equally true that where the law does not continue to produce justice and protect his rights and freedoms, this same intense sense of justice will force the individual to law violation and disrespect for law. People will not observe laws they regard as ridiculous. Neither will they forever respect laws that are enacted for the benefit of successful minority pressure groups and which literally trample upon the individual rights and freedoms of others. The new constitutional concept that the rights of the individual guaranteed by the Fourteenth Amendment of the Constitution of the United States are paramount to the right of the several states is thus causing much concern.

Whether we realize it or not, the practicing lawyer is seriously affected by this state of affairs. We make our living by advising clients of their legal situations. In a few instances where the law is well settled we can give a definite and unqualified answer to a client. But much more often and particularly in the last decade or so, our answer must be both qualified and indefinite. Mr. Justice Holmes once said that the practicing lawyer is engaged in a profession of “prediction” and “prophecy,” and that the law is the prophecies of what the courts will do in fact.<sup>1</sup>

There would be few who would argue this statement today. The difficulty is that today’s practicing lawyer, while familiar with the necessity of predicting the law, feels that he is fast becoming a legal crystal-gazer or legal soothsayer. Court interpretation is sweeping away many of the familiar guideposts. Many legislative acts are so conflicting and ineptly drawn that they present an enigma. It seems to have become the universal practice of legislatures to devote sections in every act to stating (1) their purpose, and (2) their intent, and then to define the peculiar and unusual meanings of

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<sup>1</sup> HOLMES, THE PATH OF THE LAW.

terms used therein. All of this rather than relying on their ability to use the English language in its normal and accepted sense. If the practicing lawyer can no longer predict the law for his client with some degree of confidence and accuracy, then it is certain that this situation is having some effect upon the layman who is completely unschooled in the law. Perhaps there is a direct relation between the frustration of today's lawyer and the result of numerous bar association surveys which indicate that while clients appear to have faith in the ability of their own lawyer they have neither faith in, nor respect for, the courts or lawyers in general. The danger is most apparent. Should the people lose faith in the lawyers, the courts, and ultimately the rule of law, then there will be no rule of law, nor courts, nor lawyers. Some of us may find employment in enforcing the commands and edicts of the government, but most of us may join the ranks of the unemployed.

Because I might be misunderstood, I want to say now that I am not arguing for certainty of the law. I am not saying that the law must be exact or certain. Indeed, the law must be fluid and elastic. It must be subject to change to meet the needs of a shifting and changing society. All of this is not only desirable but necessary. But at the same time, the law must always have a degree of certainty, a degree of predictability, and more than a degree of stability, or the rule of law will not survive. Change for the sake of change must be scrupulously avoided.

There are some recognizable factors affecting the law today which tend to make the law more unpredictable than necessary. It is these factors or tendencies which we must understand, and which we must oppose or guard against. These are some of the factors or tendencies which are most apparent.

(1) *The abrupt change in interpretation of the Constitution of the United States.* During the past decade we have experienced an abrupt change in the heretofore accepted interpretation of many provisions of the Federal Constitution. Few of the constitutional principles taught in the law schools of the country thirty years ago now remain. Even though we admit that the law, and particularly constitutional law, must be susceptible to change and the needs of a progressing and developing social order, it can hardly be argued that the degree of change which has so speedily occurred was compelled for this reason. Rather are we led to the conclusion that a majority of the present Justices of the Supreme Court of the

United States possesses a different philosophy of constitutional government than did their predecessors. No longer can we be shocked by the statement that the Constitution means what the Supreme Court says it does. Any argument that courts do not make law is an open mockery. "Judges, then, do make and change law."<sup>2</sup> But if we are now prepared to openly recognize this fact it should not disturb us, for it has always been true. The shame of both the courts and the legal profession is that they have consistently screened this fact and kept it hidden from the lay public. However, the lay reaction to recent decisions of the Supreme Court, widely expressed in editorial columns of newspapers and magazines, in sermons from many pulpits, and from rostrums in miscellaneous public gatherings, should convince us that this secret now stands revealed. The probative effect of this revelation upon respect for the rule of law is disturbing.

The effect of this abrupt change in constitutional interpretation is also disturbing to the practicing lawyer. But we have experienced change before, and if we recognize that there is change and familiarize ourselves with the extent of the change, then predictability is not impossible. As a practicing lawyer I would respectfully suggest that the task of predicting the law would be much easier if courts would openly and clearly overrule prior conflicting decisions. The practice of extended rationalization and overruling by implication to the extent that prior decisions may be in conflict is neither honest nor helpful to the lawyer or to the courts. Many recent decisions of the Supreme Court of the United States have been the subject of extended discussion. Perhaps the three most widely known are the segregation cases<sup>3</sup> in 1954, *Baker v. Carr*<sup>4</sup> (the Tennessee apportionment case) in 1962, and *Engle v. Vitale*<sup>5</sup> (the New York school prayer case) in 1962. While there can be no doubt that all of these cases made changes in theretofore accepted constitutional principles, not a single prior decision is expressly overruled. This was too much for Mr. Justice Frankfurter, and the opening sentence of his dissenting opinion in *Baker v. Carr*<sup>6</sup> is: "The Court today reverses a uniform course of decision established by a dozen cases, including one by which the very

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<sup>2</sup> FRANK, LAW AND THE MODERN MIND 33 (1931).

<sup>3</sup> *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954).

<sup>4</sup> 369 U.S. 186 (1962).

<sup>5</sup> 370 U.S. 421 (1962).

<sup>6</sup> 369 U.S. 186, 266 (1962).

claim now sustained was unanimously rejected only five years ago." The Court opinion did not admit that it overruled or even limited any case.

(2) *The trend toward uniform laws.* Few lawyers doubt the value of uniform laws. Their desirability and utility are generally accepted. Yet I would suggest that they make the law less predictable. The popularity of the uniform law is merely a present exemplification of the ancient desire of man to make law exact and certain. We should not forget that the Code of Justinian and The Code of Napoleon were examples of the desire for certainty and exactness, and that no codification has ever proved successful. Codification ignores the fact that courts must and do legislate. It is impossible to write a specific rule for every situation. Detailed codification clearly expresses a lack of faith in the courts and in judicial decision. It literally hurls the courts into the task of determining the intent of the legislature when in fact it had no intent. To some extent we are familiar with the recently adopted Uniform Commercial Code. I would doubt that this Code will simplify the West Virginia lawyer's task of predicting the law. And if uniformity of law is to be the paramount consideration, why not resolve the matter by dissolving the legislatures of the several states and leaving the field of the Congress.

(3) *Unwise legislation.* A very great part of the legislation that is enacted today is the result of concentrated effort on the part of the pressure group or lobby. Nearly all of such legislation is designed to achieve a special privilege or object, with the result that the rights or privileges of others are curtailed or regulated. Few laws are designed to meet a generally recognized social need of all of the people. This is so generally understood that specific examples are unnecessary. But the penchant of legislatures today toward hasty and ill-considered action is the basic reason for the enactment of much unwise legislation. Legislatures simply do not take the time to consider the effect of proposed legislation prior to its enactment. Resultant confusion does not make the law predictable. Let me cite a local example of hasty legislation. In 1961 the Legislature of West Virginia was requested by certain administrative officials to change the assessment date for property taxes from January 1 of the tax year to July 1 of the preceding year. Reasons for the change appeared valid and desirable. County officials would have more time to prepare the landbooks and issue

bills, taxpayers could receive their bills earlier in the tax year, and local levying bodies could adopt their budgets and lay their levies prior to the beginning of their fiscal year. But what about the citizen taxpayer? We now find that after the purchaser of real estate takes a deed for his property he may have to pay two years of taxes assessed and billed in the name of the seller, that assessors must back-tax redeemed delinquent property for two years instead of one, that sheriffs must keep additional and special tax records for the months of May and June in order to make the settlements required by law, that errors made by assessors have increased greatly, and that general confusion reigns. The weeping and wailing of the victim taxpayer is heard throughout the counties of West Virginia. All of this confusion is the result of a simple but hasty change of date.

(4) *The march toward centralization.* It is now apparent to all, lawyers and laymen alike, that this country is steadily marching toward a strong centralized federal government. Many recent decisions of the Supreme Court of the United States (including those before referred to), tend to speed us on our way in this direction, and at the same time, the rights and powers of the several states are limited and swept away. Many voices are heard in opposition, including that of the Conference of Chief Justices. We find the dissenting Justices of the Supreme Court itself strongly voicing their opposition. In his dissent in *Mapp v. Ohio*<sup>7</sup> Mr. Justice Harlan says this:

"I regret that I find so unwise in principle and so inexpedient in policy a decision motivated by the high purpose of increasing respect for constitutional rights. But, in the last analysis, I think this Court can increase respect for the Constitution only if it rigidly respects the limitations which the Constitution places upon it, and respects as well the principles inherent in its own processes. In the present case I think we exceed both, and that our voice becomes only a voice of power, not of reason."

And Mr. Justice Frankfurter concludes his dissent in the *Baker* case with this sentence:

"Those who consider that continuing national respect for the Court's authority depends in large measure upon its wise ex-

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<sup>7</sup> 367 U.S. 613, 686 (1961).

ercise of self-restraint and discipline in constitutional adjudication, will view the decision with deep concern.”<sup>8</sup>

The Supreme Court's ever-broadening interpretation of the Fourteenth Amendment of the Constitution, its continued extension of the commerce clause and general welfare clause of the Constitution, and its willingness to approve almost any expansion of the fiscal and regulatory authority of Congress under the power to tax and spend, all unerringly point the way to centralization. On May 27, 1963, the Court handed down its decision in *Sperry v. State ex rel. Florida Bar*<sup>9</sup> to the effect that a person registered with the United States Patent Office may practice patent law in Florida, even though he is not a lawyer and is not licensed to practice in that State. This decision vacated the judgment of the Florida Supreme Court which had held Sperry was engaged in unauthorized practice of law in Florida. Recently the Attorney General of the United States appeared before committees of Congress urging that Administration-proposed civil rights legislation could properly be enacted based upon the commerce clause of the Constitution. Moreover he claimed that it could be effectively enforced within the several states.

I believe it is true that our country is speedily moving toward centralization. If that is true, then the situation demands the sober thought and keen attention of the legal profession. But if it is true, and we are willing to accept it as the present basis of constitutional law, then constitutional law is more predictable than it has ever been before.

(5) *The inept judicial decision.* Nothing is more disturbing or has greater temporary effect on the predictability of the law or on respect for law, than the inept judicial decision. This type of decision has been referred to as “injustice according to law.”<sup>10</sup> Sometimes courts forget that their function is justice, and become enmeshed in legal principles that need not have been applied. Happily, these instances are rare, but still frequent enough to give concern. Perhaps even these rare instances of “hard” cases could be minimized, if judges would honestly recognize that their function is first to arrive at a just result, and subsequently give justification for this result in their written opinions. As an example

<sup>8</sup> *Baker v. Carr*, 369 U.S. 186, 340 (1962).

<sup>9</sup> 83 S. Ct. 1322 (1963).

<sup>10</sup> *Op. cit. supra.* note 2, at 154.



of what I mean by an inept judicial decision, and for a case which I respectfully believe is such a case, I would cite the recent West Virginia case of *In re Stonestreat*.<sup>11</sup>

There are probably many other factors affecting predictability of law and respect for law. I have mentioned those which occur to me to be most apparent. The legal profession, the courts and the legislatures must not lose sight of the necessity for predictability in the law. Hasty and ill-prepared legislation and "hard" judicial decisions must be avoided. Clients are not satisfied with a continuous process of examining their personal and business affairs in order to minimize possible liability. They are never satisfied with the confused, alternative, or indefinite answer. The business or professional man who has spent many hours attempting to comply with a myriad of governmental regulations, many of which conflict with another, becomes irritated and even contemptuous of the law, when we are compelled to subsequently advise that he is in violation of law and has incurred liability. We know that the law cannot be exact or certain. But if, as lawyers, we are engaged in a profession of predicting the law, then, for our own self-preservation, we must insure that the law is respected and that it is kept predictable.

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<sup>11</sup> 131 S.E.2d 52 (W. Va. 1963).