The Precarious Relationship of Law and Society

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Introduction

In order to understand the purpose of law and the manner of its implementation, concepts of logic and ethics must be considered. The conflict between the traditional view of law and the social science view of law presents many challenges, not least of which are moral considerations. The traditional view purports that law is a self-contained system of logic, and that social and moral considerations should not interact with this logical reasoning.[1] The social science view of law asserts that law is firmly imbedded in society, and that "social and moral considerations affect law at almost every turn, and law has social and moral impact".[2]

Is our legal system autonomous from society, or a vital part of a give-and-take relationship between law and social change? Through examining instances in which law has influenced social change, and when social change has influenced law, this paper will illustrate why law is necessarily embedded in society. The direct and indirect consequences law brings society will also be demonstrated. These concepts are discussed at length by sociologist Steven E. Barkan, and his development of these ideas will be relied upon for definitions. The relationship between Supreme Court decisions and society's collective conscience will be discussed. It will also be shown that since legislation can bring about powerful social change, laws must be implemented which run parallel to society's norms and values.

[1] Steven E. Barkan, *Law and Society: An Introduction* 8 (2009).
[2] Id.

Logic vs. Morality?

A famous parable exposing the conflict between the traditional view of law, the notion that the legal system is in a reciprocal relationship with society, was published by Harvard Law professor, Lon L. Fuller in 1949, in "The Case of the Speluncean Explorers". In this fictitious case, five explorers were trapped in a cave for 32 days. On the twentieth day, their rescuers informed them that they would not be saved for another 10 days. The explorers realized that in order to avoid death by starvation, they would have to eat one of their companions. The rescuers agreed. On the thirty-second day, four explorers were rescued, while one had been eaten. The four surviving men were sentenced for murder. The defendants explained to the court that the five explorers rolled dice in order to decide who was to be eaten, and that consent was given by the losing man that he shall be killed. After the men were sentenced to be hanged, they took their case to the Supreme Court of their land. Although the five justices each rendered a different opinion, the court's ruling upheld the explorers' convictions. Chief Justice Truepenny concluded that the defendants had indeed committed murder, citing that "Whoever shall willfully take the life of another shall be punished by death".[3] However cold and emotionally detached this ruling may be, Justice Truepenny's ruling illustrates the logical, traditional approach to law. According to Ronald Dworkin, constitutional law scholar, ". . . Fuller has done more than any other American philosopher of law to retain for jurisprudence the job of finding connections between law and morals."[4] In the fictitious case presented by Fuller, one can easily see how moral considerations can be situated in a

[3] Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 Harv. L. Rev. 616 (1949).
[4] Ronald Dworkin, *Philosophy, Morality, and Law – Observations Prompted by Professor Fuller's Novel Claim*, 113 U. Pa. L. Rev. 668 (1965).

dichotomous position to the formal, logical functions of law. This can lead to the dysfunction of law and society, where there is a conflict between a ruling and the conscience of society.

Filling in the Constitutional Blanks

America's common law system allows most legislative decisions to be based on precedent. Unlike the civil legal system, the common law system is not codified. As a result, our laws take shape over time. A decision made by a judge today may last as the prevailing rule for centuries to come. This human agency puts the power to originate, improve, or terminate laws into the hands of judges and legislators. Since the ratification of our Constitution, a great deal of this law-making has filled in the constitutional blanks.

Looking at a simple example, the last clause of the 8th Amendment "nor cruel and unusual punishments inflicted", begs clarification.[5] What constitutes cruel and unusual punishment? Since our forefathers did not specify guidelines, and our common law system allows for legislators to shape these definitions, these guidelines will inevitably change throughout time, and will conflict between different law-makers.

In the famous ruling of *Trop v. Dulles* (1958), Chief Justice Warren included this powerful statement in reference to the 8th amendment's lack of clarity: "The amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[6] Warren's ruling has been used as precedent in countless cases. One example is its use in determining the permissible age of a defendant to be executed. *Thompson v. Oklahoma* (1988) ruled that the 8th Amendment and the Trop

[5] U.S. Const. amend. VIII.
[6] *Trop v. Dulles*, 356 U.S. 86 (1958).

standard doesn't allow for the death penalty for defendants under the age of sixteen.[7] Following, *Stanford v. Kentucky* (1989) ruled that the 8th amendment permits the use of the death penalty for juvenile defendants who are under the age of eighteen, and above the age of fifteen.[8] Most recently, *Roper v. Simmons* (2005) reversed *Stanford* by ruling that it is in violation of the 8th amendment to execute defendants under the age of eighteen.[9]

Law as an Obstacle for Social Progress

The symbiotic relationship law and society maintains has the potential to be a vehicle for great social change. However, in the past, it has been used as interceptor of this change, reinforcing inequality. The text of the 14th Amendment also allowed freedom of interpretation: ". . . nor deny to any person within its jurisdiction the equal protection of the law."[10] The 1896 Supreme Court Case, *Plessy v. Ferguson* filled in the constitutional blanks of the first section of the 14th amendment. The clarification in question was: Was it in violation of the equal protection clause of the 14th amendment for Louisiana to arrest a black man for sitting in the "whites only" section of a train? With only one dissenting opinion, the court ruled that under the Separate but Equal Doctrine, it was not unlawful to discriminate by segregation. Justice Brown writes, "In the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races unsatisfactory to either."[11]

[7] *Thompson v. Oklahoma*, 487 U.S. 815 (1988).
[8] *Stanford v. Kentucky*, 492 U.S. 361 (1989).
[9] *Roper v. Simmons* 543 U.S. 551 (2005).
[10] U.S. Const. Amend. XIV, § 2.
[11] *Plessy v. Ferguson* 163 U.S. 537 (1896).

In *Bradwell v. Illinois* (1873), a woman presented a challenge to gender discrimination by insisting that she had a right to practice law in her state as a citizen of the United States as guaranteed by the 14th Amendment. With only one dissenting opinion, the court ruled that the provisions of this amendment did not include practicing law. Further, Justice Bradley, in a zealous assenting opinion to Justice Miller, wrote "The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life."[12]

In these examples, our common law system allowed inequality to essentially be built into the law. Regarded as the supreme law of our land, the Constitution and its amendments provide broad guidelines for law-making. If our system of law is not autonomous, then the direction legislation takes will have an impact on society and the direction of social change.

Law as an Instrument of Social Progress

While there are many examples of legal rulings that reinforced inequality, and therefore slowed social progress, there are also those cases that catalyzed social progress. Most notably, *Brown v. Board of Education* (1955) reversed the Plessy verdict, rejecting the "unconstitutional" separate but equal clause. The ruling famously asserted that separate education is "inherently unequal."[13] The Voting Rights Act of 1965 was aimed at breaking down barriers that prevented African Americans from voting, as was their right under the 15th amendment. Among other points of focus, this Act prohibited literacy tests, which were previously used to disenfranchise black voters.[14] *Loving v. Virginia* (1967)

[12] *Bradwell v. State*, 16 Wall. 130 (1873).
[13] *Brown v. Board of Education*, 349 U.S. 294 (1955).
[14] Voting Rights Act of 1965, Pub. L. 89-110, 79 Stat. 437.

challenged the state's anti-miscegenation laws when a married couple was sentenced to a year in prison for representing different races.[15] The Supreme Court unanimously reversed Virginia's ruling.

A notable example of the Supreme Court shaping laws to run parallel to society's consensus is the question of whether or not those who are mentally retarded may be sentenced to the death penalty. The *Penry v. Lynaugh* (1989) court ruled that, according to the 8th amendment, the death penalty sentence is permissible.[16] *Atkins v. Virginia* (2002) reverses the Penry ruling, with the justices focusing on the Trop precedent and proportionality.[17] One explanation for this change in the law may be that there has been a national consensus since *Penry* that provided a clear direction for law-makers on a controversial matter. Similarly, in his ruling in *Stanford v. Kentucky*, Justice Kennedy cited Article 17 of the United Nations convention on the Rights of the Child, and by doing so, drew attention to the fact that the global consensus insists upon the protection of the rights of persons under eighteen.[18] This reasoning points to the conclusion that law cannot be autonomous from society.

Law and Conscience of Society

The conflict addressed in Fuller's "Speluncean Explorers" is currently illustrated in cases in which proportionality is considered. In *Ewing v. California* (2003), the three strikes law (which provided that if convicted for three felonies, then the defendant shall serve life in prison) was challenged by the

[15] *Loving v. Virginia*, 388 U.S. 1 (1967).
[16] *Penry v. Lynaugh*, 492 U.S. 302 (1989).
[17] *Atkins v. Virginia*, 536 U.S. 304 (2002).
[18] *Stanford v. Kentucky*, 492 U.S. 361 (1989).

defendant, whose last offense was stealing $399 in golf clubs. The court upheld state legislation, against the argument that the punishment was disproportionate to the crime.[19] Considering the growing concern for prisoners serving life terms for non-violent crimes, there is a question of whether or not statutes should always be applied literally. Legal positivists would call for a strict adherence to statues, acknowledging that law is ". . . independent of moral and social considerations."[20]

When law is used as a vehicle for social change, this is perceived as major victories for people and groups it benefits. However, when law attempts to fill the gaps of inequality, why does society take so long to catch up? For example, following the Voting Rights Act of 1965, many rights granted to African Americans were challenged in courts. Perhaps this was caused by the fact that this Act provided a significant change in the relationship between state and federal governments, or because states were not ready to comply with burgeoning concepts of deepening equality. This begs the question, if it is society that urges the evolution of the law, why is it not accepted and implemented immediately?

According to Barkan, law may have an indirect impact on social change due to cognitive dissonance. For purposes of discussion regarding law, he describes cognitive dissonance as follows: "When people hold beliefs incompatible with their situation, they experience discomfort, or dissonance, that prompts them to change their beliefs in order to reduce their dissonance."[21] In other words, if a Supreme Court case rules in discord with their personal beliefs, after a period of time, their beliefs will shift to

[19] *Ewing v. California*, 538 U.S. 11 (2003).
[20] Steven E. Barkan, *Law and Society: An Introducion* 31 (2009).
[21] Id. at 192.

line up with the more popular decision in order to reduce their discomfort. If this is so, then one must conclude that social change led by changes in legislation must require a great deal of patience from the group it is benefitting. While a law may have changed, society may not yet agree with this decision.

Conclusion

The traditional view of law fails to recognize the reciprocal relationship between law and society. Therefore, it fails to acknowledge the depth of the impact law has on society, and the impact society has on law. Without rejecting the idea that law is autonomous from society, the narrative of Supreme Court decisions and our nation's history of social progress will be lost. Law has direct and indirect consequences on society. In cases of the latter, the cognitive dissonance experienced by dissenting societal opinions leads to social change enabled by legislation. As Supreme Court Justice Earl Warren stated, "It is the spirit and not the form of law that keeps justice alive."[22] Our modern conception of justice requires a holistic approach to law considering society, morality, and an appreciation of the malleability of our laws.

[22] Earl Warren & Henry M. Christman, *The Public Papers of Chief Justice Earl Warren* 221 (1959).