Confrontation and Conflict Resolution

One of the most attractive features of law has been its capacity to adapt to new substantive issues while retaining traditional forms. This flexibility of law was noted by Maine in his classic treatment of the legal fiction. More recently, the capability of common law in accomplishing this purpose has been graphically portrayed by such uncommon lawyers as Jerome Hall in *Theft, Law and Society* and E. H. Levi in *An Introduction to Legal Reasoning.*

Such scholars would willingly agree, however, that common law cannot necessarily make all the adaptations necessary to match the pace of rapid social change. The rush of events can lead to new demands that require more radical changes in the law than are permitted by the gradual process of redefinition so dear to the heart of the common lawyer. In such circumstances, as Gilmore has pointed out, it may be necessary to rationalize a varied and conflicting set of decisions, capturing its essential features through uniform or model codes which serve to guide our legislatures.

These modes of adaptation are based on the premise, however, that a normative consensus exists and that the legal process need only formulate it in a manner appropriate to new circumstances. In the past, our society has, with one or two exceptions, been able to locate such a consensus which was acceptable to a power majority of the population. This has been possible, in part, because decision-making was the accepted prerogative of recognized elites. Where new power groups emerged, such as organized labor, their claims to a share in decision-making were recognized through the legislative process and through the cooptation of their leaders into positions of power, prestige, and wealth.

In recent years, new groups have coalesced with a rapidity which made such cooptation difficult. While the inequalities resulting from past powerlessness persist, the power to disturb the fabric of society is likely to be used to throw the system into a state of disequilibrium. If demands for change occur too rapidly to permit a gradual yielding of power and benefits, polarization may occur. Those in charge have insufficient time to adapt to new demands. They may accordingly react by questioning the legitimacy of claims made upon the system. Accompanying this attitude may be a firm refusal to reexamine the procedures by which claims to change are considered. From the perspective of those seeking recognition of new interests, this response may lead to a rejection not only of the existing power elite, but also of the legitimacy of a system which is used to frustrate the fulfillment

of their aims. The previously powerless are led, in consequence, to an increasingly alienated attitude which, combined with the use of newfound sources of power, can throw the established social order into chaos. Each side reacts by discrediting the good faith of the other and consensus concerning substantive and procedural norms becomes increasingly difficult to attain.

Such is the process which seems to be occurring in regard to the claims of two previously powerless groups, blacks and students. At first, these groups attempt to use the channels—such as they may be—for pressing their claims. Even where channels are open in principle, previous disuse means that early efforts are clumsy and ineffective. Moreover, those with established power have typically developed a habitual indifference or hostility to the claims of the previously powerless, so that the initial response is negative. How else can we explain the tenacity of segregation after *Brown v. Board,* the landlord-oriented court response to withholding of rents by tenants in retaliation for substandard housing, the long dead-letter status of the Civil Rights Act of 1966? More often, however, the law itself reflects the powerlessness of the protesting group. When the dean of a great university declares himself as indifferent to student demands for change as he would be to their preference for strawberries, he is of course reflecting the kind of indifference which is based on years of unilateral power. But the indifference in this instance is bulwarked by procedural and substantive rules, backed by the law, which formalize the powerlessness of the students and sanction the indifference of the administrator. When this formal situation becomes apparent to the previously powerless, it contributes to their conviction that the whole system must be changed. When protest is met with force rather than conciliation, it may strengthen the conviction that counterforce alone can produce the necessary change.

The crucial question in such situations is whether substantive and, if necessary, procedural changes can be made which optimize the positions of the opposing parties in a manner that corresponds to their new power relations. If this can be accomplished early enough, it can prevent polarization. This is not to say that far-out positions will not be advocated and adopted by extremists of both groups. But extremism is typically the path of a few—and therefore less dangerous—if a moderate route appears viable to many.

To find a creative, moderate course which will reconcile conflicting groups requires unusual skills. In these situations, a sociolegal approach

may be particularly valuable. Lawyers learn, through the experience and anticipation of conflict, to formulate agreements which reconcile conflicting interests. The best of them have shown the ability to devise organizations (even new forms of organization) which serve systematically to reconcile such conflicts. Social scientists interested in law have studied the functioning of law-in-action enough to know how often it does not work as intended. By now, they are becoming aware of some of the reasons: that practice frequently diverges from principle; that uncontrolled discretion can be used in a biased manner; that professionals use their technical expertise to the disadvantage of amateur, disorganized clientele; that centralization of decision-making, justified on grounds of objectivity and universalism, may frustrate the legitimate aspirations of underprivileged local groups.

Putting these two kinds of knowledge together, lawyers and social scientists should be able to contribute to the solution of such problems. In instances where polarization appears probable, sociolegal scholars might ask a set of questions, along some such lines as the following:

(1) What indices are available for measuring the strength of protest?

(2) Is it possible to define a point beyond which further protest will diminish the chances of peaceful accommodation?

(3) What channels are available to protesters by which their demands can be considered?

(4) To what extent are these channels sensitive to the strength of the protesters, as well as their opponents?

(5) To what extent are these channels accepted by conflicting groups as legitimate? profitable? likely to increase rather than erode their power?

(6) If available channels do not adequately absorb and resolve conflict, how might they be modified, supplemented, or replaced?

(7) What kinds of channels are most effective in resolving given kinds of conflict and in providing opposing parties with a sense of effectiveness and justice in redressing their grievances?

Attention to such questions need not carry a commitment to any narrowly defined value position. The nature of dispute resolution is an intellectually challenging enough problem so that it can be a source of interest to the "value-free" scientist as well as the action researcher and policy maker. Nor is it likely, given our diversity of values and the imprecision of social science, that studies in this area will compellingly dictate one and only one possible means for channelling and resolving disputes. Rather, a focus on this kind of problem may help to locate alternatives to confrontation. These may vary widely in their

acceptability to disputing parties. That kind of diversity can be frustrating to those who insist on simplistic solutions. In a polarized world, one Kerensky may be crushed, many Kerenskys may seem like so much random noise. To avoid this, it is vital that efforts to find new modes of conflict resolution begin before polarization and that they continue with increasing vigor in the face of intensification of conflict. Efforts of this kind, if undertaken with intelligence and integrity, can acquire vitality from the intensity of the extremes and, under the pressure of need, can create a stronger basis for a just social order.

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Beginning with the next issue of the *Review*, Samuel Krislov of the University of Minnesota will take over as Editor-in-Chief. The present editor wishes to express his gratitude for the many contributions which have made it possible to complete the first three volumes of this journal. The Russell Sage Foundation, in addition to providing the basic financial support, has been a continuing source of ideas and encouragement. In particular, Leonard S. Cottrell, Jr. permitted us to draw freely on his seemingly limitless resources of experience and wisdom. Valuable aid has come also from the Law and Society Association under its first two Presidents, Harry Ball and Robert Yegge. Sheldon Messinger, Chairman of the Association's Publications Committee, skillfully relieved the editor of many technical problems. Sara Miller McCune of Sage Publications suffered patiently through many unmet deadlines and contributed in countless ways toward making the *Review* professionally respectable.

As to editorial content, thanks are due to the Editorial Advisory Board, many of whose members took the initiative in providing manuscripts and suggesting innovations which have strengthened the publication. A special word of praise is due to the student editors who worked long hours in reviewing and editing manuscripts, under the leadership of Fred DuBow and Jeffrey Fitzgerald. During the past year, Katherine Piepmeier contributed greatly with her editorial and organizational skills. Finally, Sali Balick served efficiently and pleasantly as editorial secretary from the start of the publication to the present.

The efforts of these and many others were motivated, I believe, by a belief in the importance of the work of the *Review*. All of us have felt that the journal could help to define the emergent field of law and social science, to enunciate its goals and suggest ways in which they could be achieved. In the exploration of uncharted space, it would be enough for us to feel that we have aimed tolerably well and provided sufficient momentum for the next stage.

—RICHARD D. SCHWARTZ