

## FORM AND SUBSTANCE IN THE LAW

by *Ewell E. Murphy, Jr.*

### I

The substance of the law is its characterization of human conduct in the abstract. For example, the law tells us that an offer and an acceptance make a contract, that negligent harm is a tort, and that an unexcused intentional death is murder. In this sense *contract*, *tort*, and *murder* are purely theoretical classifications, without practical consequence.

The form of the law is the procedure by which these abstract characterizations are applied, through the mechanism of the courts, to the particular conduct of actual persons. Here the theoretical classifications take on practical consequences. The contract-breaker and the tort-feasor are made to pay money damages; the murderer is jailed or killed.

Law schools emphasize the apparent distinction between form and substance by separating "form" courses — like Procedure, Evidence, and Jurisdiction of Courts — from "substance" courses — like Contracts, Torts, and Criminal Law. In the through-the-looking-glass world of Conflict of Laws, where results hinge upon whether a given rule is thought to be procedural or substantive, distinguishing between form and substance becomes a substantive matter in itself. It is not surprising that in the workaday vocabulary of lawyers form and substance become complementary concepts, polarizing into opposites.

But this a false dichotomy. The law mingles its elements of form and substance too diffusely for polarity; they are too creatively interdependent to be merely complementary. Considered thoughtfully, the interplay of form and substance in the law presents three paradoxical truths. Researching the law's origins with the acumen of a Maitland, we find that *form creates substance*. Probing the law's pretensions with the gentle skepticism of a Galbraith, we conclude that *form conceals substance*. Stripping the law

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of its syllogisms, looking through verbiage to find function, we glimpse the more fundamental truth that *form constitutes substance*. A historian's truth, a skeptic's truth, and a philosopher's truth: these are the three facets of form and substance in the law.

## II

We would like to believe that substance preceded form when English law began. In our reverie we see King Arthur summon Sir Launcelot, hand him a copy of the Court-Martial Manual, and send him off to subdue the Welshmen by the book. Unfortunately for our romantically logical imagination, it did not happen that way. The common law did not begin with a book or a system. It was stitched together *ex post facto* from the patches and tatters of a million isolated judgments, each of them concerned not with legal theory but with the practical solution of a concrete dispute. Launcelot left with a sword, not a book. To judge the Welshmen the King sought a Merlin, not a Launcelot — and did not command him to administer a coherent body of law, but simply to decide hard cases.

English-speaking lawyers did not rediscover the primacy of form over substance until the nineteenth century. Then our legal scholars, spurred by their German colleagues, began to study the common law as a historical phenomenon rather than a philosophical system. Sir Henry Maine's book, *Ancient Law*, was a landmark of the new technique. F. W. Maitland followed with his legal histories, exhaustively researched and impeccably stated. In Boston the young Holmes wrote a remarkable volume, *The Common Law*, which still stands as the most eloquently argued array of legal insights ever produced on this continent.

Their consensus was that the substance of the common law is best understood as the consequence of the formal procedural writs — the Forms of Action — by which medieval English claimants were permitted to bring suit in the King's courts. "So great is the ascendancy of the Law of Actions in the infancy of Courts of Justice," Maine asserted, "that substantive law has at first the look of being gradually secreted in the interstices of procedure."<sup>1</sup> Maitland put it more epigrammatically: "The forms of action we have buried, but they still rule us from their graves."<sup>2</sup> Holmes agreed: ". . . whenever we trace a leading doctrine of substantive law far enough back, we are very likely to find some forgotten circumstance of procedure at its source."<sup>3</sup> Implicit in this emphasis on procedure is the postulate that law does not preexist but is created by the very act of judging. "The only authoritative statement of right and wrong," Maine said, "is a judicial sentence after the facts, not one presupposing a law which has been violated, but one which is breathed for the first time by a higher power into the judge's mind at the moment of adjudication."<sup>4</sup>

That these observations do not fall strangely on our ears is a measure of the profound influence legal historians have had on the teaching of law in the twentieth century. Whether honored in the breach or in the observance, the case system has become the hallmark of American lawyers' training. This system assumes that actual judicial opinions are the brick and mortar of the law. In examining opinions students are taught to winnow the *ratio decidendi* from *obiter dicta*, in the belief that a judge's acts are more significant than his reasoning. The stress is on specifics rather than generalities, on results rather than explanations, on case-by-case adjudication rather than consistency or logic. The case is the thing. Clustering individual decisions into habituated trends, rationalizing those trends into rules, fitting the rules into a logically consistent body of law — this is the work of centuries. But first comes judging, before the law; it is a case of form creating substance.

### III

Twentieth century man regards himself with a skepticism that would have shocked Grandmother. This is the Age of Pop-Psych; we have all become amateur psychoanalysts. The naughty new words of the Viennese consulting rooms — like "ego," "id," "repression," and "wish-fulfillment"—have long since passed into the sturdy American vernacular of Norman Vincent Peale and Dear Abby. It is a post-Freudian platitude that men's motivations run too deep for self-detection, that self-consciousness is a powerful vehicle for self-serving rationalization.

But with skepticism has come tolerance. If I am, willy-nilly, ruled by my subconscious desires and deceived by my conscious mind, how can I expect a more creditable performance from you? So we come to assume and accept a degree of self-delusion in each other. The greater the gap between a man's announced purposes and his obvious motives, the more likely we are to react with empathy rather than with indignation.

Unfortunately we have not yet come to view our legal institutions with the same tolerant skepticism that we bear for our neighbors. We like to take the poetry of our constitutions as literally as the prose of our income tax regulations. We fall, time and again, for the fallacy that the dynamics of social relationships can be embalmed forever in the letter of the law. We forget that the law, like the human personality, develops self-consciously, is sometimes moved by urges too primordial to mention, often misrepresents its motives, and nearly always wears a mask of order and consistency.

The law is a vital, thrusting, growing thing, as earthy and elemental as the society it serves. But the law covets respectability, and long ago it learned Emerson's lesson that a foolish consistency is the hobgoblin of little minds. "The lawyer's truth is not truth, but consistency, or a consistent

expediency."<sup>5</sup> To secure its sway over little minds the English common law took the hobgoblin of consistency for its patron saint and the syllogism for its sacrament. Its credo was the doctrine of *stare decisis*, which asserted that judicial decisions must follow the precedents of previous cases. In theory courts never made law, but merely applied existing law to the facts at hand. If precedents were obscure courts were supposed to interpolate mechanically with the impersonal calipers of analogy; only Parliament could legislate.

This, of course, is nonsense; or, to put it more politely, it is a good general proposition that does not bear close analysis — a sort of telescopic truth and microscopic falsehood. Measured institutional change has always been the price of national survival. "Those societies which cannot combine reverence to their symbols with freedom of revision, must ultimately decay either from anarchy, or from the slow atrophy of a life stifled by useless shadows."<sup>6</sup> Judge-made law must change, no less than legislature-made law. Judges must legislate, in the sense that every application of law to facts and every choice between competing analogies involve change, however imperceptible. And those applications and choices are inescapably influenced by the judges' own subjective preferences. As Holmes said:

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.<sup>7</sup>

In form [the law's] growth is logical. The official theory is that each new decision follows syllogistically from existing precedents. . . . On the other hand, in substance the growth of the law is legislative. . . . The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned.<sup>8</sup>

This is the skeptic's truth: that the judging process is objective and logical in form, but subjective and intuitive in substance. This truth provides a significant insight into the legislation-by-case-law practiced by English common law courts. It is even more illuminating in the United States, where courts claim the right to interpret, not only case law and statutes, but the very Constitution on which our nation is grounded.

From the viewpoint of our English heritage the American system gives judges a remarkable degree of power. The English Constitution is a wispy pastiche of tradition and sentiment, as old as memory and as inchoate as tomorrow. When English courts interpret it they can hardly be accused of usurping the formal amendment process, because there is none. The voice of Parliament, in any event, is final; English courts may interpret statutes but

have no authority to declare them unconstitutional. If Parliament should tonight pass by a majority of one a statute abolishing every English freedom won since 1066 the Queen's judges would have no choice but to enforce it.

The American Constitution, in contrast, is a tangible twelve-page document containing specific if idealistic rules for the governance of an underdeveloped eighteenth century agricultural society. It establishes a precise amendment procedure. It creates a Supreme Court but accords it no specific authority to interpret the Constitution or to declare legislation unconstitutional. Given the explicitness of the document and the rather subordinate role it assigns to the judiciary, in 1789 one would have guessed that the American system was truly a government of laws, not of men, and that constitutional amendment, rather than the courts, would have the final voice in the political development of the nation.

Such a guess would have reckoned without the energetic ingenuity of Chief Justice Marshall, since whose day we have allowed the Supreme Court to exercise the quasi-amendatory function of adjusting constitutional provisions to meet the felt necessities of newer generations. Ours is a peculiarly American compromise between the unwritten English Constitution, which can be changed with a stroke of the Parliamentary pen, and the rigid written constitutions of Continental Europe, which in theory cannot be changed by parliaments or courts but in practice are periodically upset by revolution. There are, in effect, two mechanisms for amending the American Constitution: the formal procedure described in Article V and the informal procedure of judicial interpretation. In practice the latter has been the more pervasive. Except for the Bill of Rights (which was bargained for as part of the ratification package) and the Civil War Amendments (which were coercively instituted) formal amendment has produced only relatively minor changes, many of them procedural in character. The informal process of amendment by judicial interpretation has made far more sweeping constitutional revisions, including the legitimation of the great social revolution of our time.

Informal amendment is difficult because the Supreme Court is expected to behave like a court — with consistency and logic — and not like a parliament. Legislative muscle must not show too crudely beneath the judicial robes of precedent and analogy. But the Supreme Court does legislate, as did the common law courts before it, when constitutional tradition becomes grossly unresponsive to public opinion. In small matters the process is inconspicuous, but when the storms of discontent break upon our federal house the Supreme Court must sometimes become the all-too-visible lightning rod which dissipates the thunderbolts of change into circuits of quiet adjustment. It is a measure of our popular misunderstanding of the Court's

function that when the storm is at its height instead of marveling at the lightning we often choose to curse the lightning rod.

The thunderbolts of change have been crashing down for half a generation now, and the Supreme Court has again assumed an activist role in reshaping our political institutions. The greatest innovations have come in areas of volatile public concern: racial segregation, church-and-state, the rights of criminal trial, and legislative apportionment. In each area the Court's trail was blazed by a substantial body of public opinion; and in desegregation, at least, the Court's position, once established, has been occupied and extended by the Congress. But with each innovation the Supreme Court was bitterly condemned for disregarding precedent. Its most vehement critics phrased the issue in terms of hypocrisy and usurpation. Courts are supposed to adjudicate, not legislate, they said; the Supreme Court may only apply the Constitution, not change it. Or in the less fastidious language of the John Birch Society, "Impeach Earl Warren."

This argument misses the point. Courts have always legislated, common law courts as well as the Supreme Court of the United States. Stretching and bending our Constitution is a necessary if thankless task, and we have developed no institution better equipped than the Supreme Court for performing it. Long before Charles Evans Hughes dared to admit it, most Americans realized that, ultimately, "the Constitution is what the judges say it is."<sup>9</sup> But to many thoughtful admirers of the American system the decisions of the Warren Court do present a serious question of degree and technique.

In its zeal to right old wrongs did the Court move too rapidly and with too little regard for the judicial proprieties? Was *Brown v. Board of Education*<sup>10</sup> dangerously ahead of its time in compelling the integration of public school facilities? Would there have been fewer troops at Little Rock and fewer broken windows at Ole Miss if Chief Justice Warren had written less like a sociologist and more like a lawyer when he overruled *Plessy v. Ferguson*?<sup>11</sup> Will history hold with Justices Frankfurter and Harlan that *Baker v. Carr*<sup>12</sup> was an unwarranted meddling in local politics? Is the venerable American institution of public school prayer really inimical to the First Amendment?<sup>13</sup> Do *Gideon v. Wainwright*,<sup>14</sup> *Escobedo v. Illinois*,<sup>15</sup> and *Miranda v. Arizona*<sup>16</sup> require more criminal defense lawyers and better schooled policemen than our infrastructure can provide? Do all these decisions, taken together, so far exceed the conventional scope of judicial amendment as to discredit the Supreme Court as an instrument of government?

We may venture some tentative answers to these questions. With more than a decade of hindsight, public opinion seems to view the *Brown* decision as correct in result and not unreasonably hasty in timing. In any event, with passage of the post-*Brown* Civil Rights Acts the Congress resumed



the initiative in desegregation, and now the Black Power movement appears to have cooled the egalitarian ardor of Congress and Court alike. The principle of *Baker v. Carr* has been applied, through redistricting, to the United States House of Representatives, but formal Constitutional amendment may have the last word to say about the structure of state senates. The school prayer decisions are unenforced, and perhaps unenforceable, in many parts of the nation. The criminal rights cases are widely unpopular, but the verdict of history is not yet in; if the taxpayers answer *Gideon's* trumpet with adequate budget support for policemen and public defenders, perhaps the next generation of economists will arise up and call the Supreme Court blessed for thus diverting excess purchasing power to the public sector. One thing is certain: by the time our federal system has finally assimilated or rejected the activist innovations of the Warren Court the American public will have come much closer to appreciating the skeptic's truth that judicial form conceals legislative substance, at least as far as the United States Supreme Court is concerned.

#### IV

There is a good lesson for lawyers in Scene II of Shaw's play, *Saint Joan*. The setting is an antechamber of the Dauphin's palace. A flimsy test of Joan's supernatural power has been arranged. The Dauphin will be introduced to Joan as an ordinary courtier to see whether she can guess his royal identity. Although the Archbishop knows that it will be easy for Joan to recognize the Dauphin from his clothes and bearing, the Archbishop argues that Joan's success will nevertheless constitute a miracle. Pressed for his definition of a miracle, the Archbishop answers:

A miracle, my friend, is an event which creates faith. That is the purpose and nature of miracles. They may seem very wonderful to the people who witness them, and very simple to those who perform them. That does not matter; if they confirm or create faith they are true miracles.

A sound definition of miracles, the Archbishop's. Not the sort of thing to put in the Catechism, of course, and perhaps a shade too pragmatic to confide in the parish priest, but a useful definition for courtiers and prelates. The essential ingredient of miracles is not their supernatural origin but simply the fact that they are believed in. The test is not miraculousness, but faith.

We must learn to judge a law by its consequences, as empirically as the Archbishop judged miracles. A law is not law because it can be deduced from the Ten Commandments, because it was passed by a legislature, because it can be spun into a syllogism, or because it is printed in a statute book. The essential ingredient of a law is merely that the community ob-

serves it. The test is not legality, but compliance.

More specifically, the operative question is the *probability* of enforcement. When a lawyer says that thus-and-so is "the law" he is merely predicting that a court today would so hold and a sheriff tomorrow would execute that court's judgment. "The prophecies of what the courts will do in fact," Holmes said, "and nothing more pretentious, are what I mean by the law."<sup>17</sup> "[A] legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court . . ."<sup>18</sup> Cardozo defined law as "that body of principle and dogma which with a reasonable measure of probability may be predicted as the basis for judgment in pending or future controversies."<sup>19</sup> The substance of the law, in other words, can be described only in terms of the probability of its procedural enforcement. In Professor Hart's characterization of this view, "There is no law prohibiting murder: there is only a law directing officials to apply certain sanctions in certain circumstances to those who do murder."<sup>20</sup> Holmes and Cardozo would have added that even such a law is not law unless it is probable that the officials will in fact apply the sanctions.

There is a telling illustration of this point in the United States Constitution, which prescribes the substance and proof of treason in the following words:

Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.<sup>21</sup>

A literal-minded reader would conclude that the first sentence states the substance of the law of treason by defining the offense and the second sentence merely describes the form by which treason may be proved. But the actual effect of the two sentences, taken together, is to incorporate the substance into the form, because for purposes of punishing the traitor no conduct—however harmful in substance to the United States—can amount to treason unless it is proved in the constitutional manner. In terms of Professor Hart's paraphrase, the Constitution does not prohibit treason as such, but only such treason as can be proved by two witnesses or by a confession.

The Constitution's definition of treason is a faithful microcosm of all law in that its substance is authoritatively fixed by the form in which it is to be applied. The declaration of a legal standard, standing alone, is never more than theoretical; it is the procedure of enforcement that gives the standard its really consequential enunciation. From the standpoint of the tort plaintiff it may matter little what definition of negligence a court is bound to follow, but it will matter crucially whether that definition is to be applied by a



judge or by a jury. The world's great disparities of criminal justice are not the product of differing codes of criminal law, but the consequence of divergent standards of criminal trial.

Substantive law is in fact coterminous with, and has no practical existence apart from, the mechanics and probability of its enforcement. More penetrating than the historian's truth that form creates substance, more significant than the skeptic's truth that form conceals substance, is the philosopher's truth: Form constitutes the real and only substance of the law.

## NOTES

1. F. W. Maitland, *The Forms of Action at Common Law* (Cambridge, England, 1948), p. 1, quoting Sir Henry Maine.
2. *Ibid.*, p. 2.
3. Oliver Wendell Holmes, Jr., *The Common Law* (Cambridge, Mass., 1963), p. 199.
4. Sir Henry Maine, *Ancient Law* (London, 1907), p. 7.
5. Henry Thoreau, "Civil Disobedience," in S. Commins and R. N. Linscott (eds.), *The Political Philosophers* (New York, 1947), p. 323.
6. Alfred North Whitehead, *Symbolism* (New York, 1927), p. 88.
7. Holmes, *op. cit.*, p. 5.
8. Holmes, *op. cit.*, pp. 31-32.
9. Merlo J. Pusey, *Charles Evans Hughes*, Vol. I (New York, 1951), p. 204.
10. 347 U.S. 483 (1954).
11. 163 U.S. 537 (1896).
12. 369 U.S. 186 (1962).
13. See *Engel v. Vitale*, 370 U.S. 421 (1962), and *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963).
14. 372 U.S. 335 (1963).
15. 378 U.S. 478 (1964).
16. 384 U.S. 436 (1966).
17. Oliver Wendell Holmes, Jr., "The Path of the Law," in *Collected Legal Papers* (New York, 1920), p. 173.
18. *Ibid.*, p. 169.
19. Benjamin Nathan Cardozo, "The Growth of the Law," in *Selected Writings of Benjamin Nathan Cardozo* (New York, 1947), p. 204.
20. H. L. A. Hart, *The Concept of Law* (Oxford, England, 1961), p. 35.
21. U.S. Const., Art. III, §3.