

4-1-1970

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Recommended Citation

Smith, Nicholas A. (1970) "An Approach to Legal Theory and National Disunity," *North Carolina Central Law Review*: Vol. 2 : Iss. 1 , Article 7.

Available at: <https://archives.law.nccu.edu/ncclr/vol2/iss1/7>

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AN APPROACH TO LEGAL THEORY AND NATIONAL DISUNITY

NICHOLAS A. SMITH*

The legal system of a society does not exist in splendid isolation, occupying some quiet ancillary spot apart from the reality of social stress. The formal object of a legal structure is conflict resolution; and law which is not concerned with the settlement of disputes might best be given another name. Since disparate interests are by definition part of complex society, the efficacy of a legal system in dealing with disruptive social forces is central to the issue of social survival. Without reference to the substantive political and ethical questions involved in the waging of the Vietnam War, some discussion of the effects of war dissent and responses to dissent on American society can be offered within the frame of general theory.

It was the belief of Dean Pound that the law serves and is developed by social interests. The law, said Pound, is "a social institution to satisfy social wants."¹ Consistent with this definition, the Dean saw the end of law as the maximization of the claims, demands, and expectations felt by men in civilized society. The logical consequence of Pound's approach is that legal and sociological inquiry cannot be kept sealed in separate compartments. Not only must the expectations of various social groups be taken into account, with hopes of bringing them into harmony, but the necessary level of order and security must be maintained by legally constituted authority. The paramount social interest, according to Pound, is the general security. The ordering of human conduct which is essential to bringing different social groups' interests to fruition must be the prime concern of the law.

There is implicit in Pound's sociological jurisprudence an ordering of values—the predominance of the general interests over the interests of any particular group. The law seeks justice for divergent groups and individuals according to the principle articulated by Cicero in the phrase "to each his due."² Yet the added dimension of total group interests

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¹ ROSCOE POUND, *AN INTRODUCTION TO THE PHILOSOPHY OF LAW* (1922).

² A good discussion of the thought of Marcus Tullius Cicero is found in

must be weighed because, in Bodenheimer's words, "Justice demands that freedom, equality, and other basic rights be accorded and secured to human beings to the greatest extent consistent with the common good."³ This general postulate of the primacy of common interests, of course, is not exclusive to Dean Pound or even to the sociological school of jurisprudence. It is expressed in the ancient maxim *salus populi est suprema lex*—the welfare of the people is the supreme law. The relevant legal doctrines of natural law, utilitarianism, and almost every other jurisprudential approach can have much to say about this particular issue. It is enough for the purpose of the subject being discussed here to indicate that law must often determine what is in fact the common good, and then balance it against special interests. Both of these judgments are pertinent, since some theoretical model must exist for arriving at a definition of common interests and since some guidelines must be sought in actually choosing between them and the particular interests in question. It will not do, for example, to arbitrarily declare that public policy represents the common good without some stated means of expressing such policy. Nor would it seem just to place *any* common interest above *any* private one with no regard for qualitative as well as quantitative properties. We can countenance the condemnation of one man's house to accomplish the convenience of all other members of the community through the building of a new highway. It is doubtful that we could as easily justify under present theory the perpetual physical torture of a single man if that alone could result in a faster flow of traffic on some already existing road. In considering the issue of common-versus-special demands, then, the two problems of definition of interests and weighing of interests must be taken into account.

This difficult task—evaluating competing social demands and assigning priorities to them—is not the only one which calls for clarification by our legal theories today. It is also not the only one arising from the disputes which domestic disunity presents to our legal system. Another broad issue which has always confronted legal thinkers, and particularly has done so in the period since rapid advances in technology have begun to dramatically influence the conditions of life, is the question of how the law shall provide for both stability and change in society. Even given the need for a level of order which is fundamental to the achievement of

BODENHEIMER, JURISPRUDENCE: THE PHILOSOPHY AND METHOD OF THE LAW 13 (1962).

³ *Id.*, 207.

justice in society, there still exists a pressure for social change at any particular moment in history. The awesome duty of our legal institutions is not simply to preserve the status quo but to give transitional stability to society. Needless-to-say, the United States Supreme Court has repeatedly faced this dual demand in its epistemological voyage through years which have seen the nation change drastically from the tiny rural land of 1787.

It can be seen that the stability which is essential to the realization of justice cannot be an entirely static condition. To secure for each that which is his due, and to realize the expectations of civilized men, a legal system must admit of change through time. Even the doctrine of *stare decisis*, for example, does not dictate that we look back as doggedly as did Lot's wife, becoming like her a pillar of salt. The issue of stability-change has to be seen in terms of dynamic stability, particularly when faced with a situation of widespread social disunity. We can perhaps accept the guidance of some permanent principles in law while at the same time agreeing with Heraclitus that we can never step in the same river twice.

Still other dilemmas must be raised before a theoretical approach to present challenges to jurisprudence found in national dissension can be formulated. As Edmond Cahn has pointed out,⁴ the plight of democratic man is that he cannot escape the responsibility for the acts and policies of government which participatory democracy imposes on him. The conflict of values which is inevitable in a vast and varied country means that someone or some group is always going to feel pained responsibility for one national policy or another. The paradox is that by being faithful to the ideals of our constitutional democracy, one must inexorably discover himself to be at odds with government policy at some time. One cannot, it seems, be a permanently agreeable and passive citizen and at the same time a good democrat. The issue appears to be shaped around the form which one's dissent should take rather than around its propriety in legal theory. As in the law of conspiracy, legality involves not only a question as to whether an unlawful act has been committed, but also a question as to whether a lawful act has been committed in an unlawful manner.

It is not contrary to legal theory, then, to be concerned when governmental acts are contrary to one's own order of values or to one's "sense of injustice," in Cahn's term. Ample precedent exists—in the acts of

⁴ EDMOND CAHN, *THE PREDICAMENT OF DEMOCRATIC MAN* (1961).

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Antigone, Sir Thomas More, and countless others—for declaring resistance to constituted authority to be a proper issue for jurisprudential scrutiny. That the means as well as the end must be legally evaluated is a truism unnecessary to pursue here. The fact of extant disunity growing out of both policy disagreement and out of the methods adopted to express it cannot be denied in any case. It is with the present situation, the existing disunity, that it is meant for a theoretical approach to be developed. The existing tensions as they have resulted from the methods of war protesters can simply be accepted as social facts with which legal theory and practice must cope.

Connected closely with the idea of citizen responsibility for the acts of elective officials, but still distinct enough from it to warrant mention as a separate issue, is the question of the quality of the nation itself as an entity. Many political theorists, including Thomas Jefferson, who was both a lawyer and a legislator, have acknowledged that the life of the state differs in important ways from the life of individuals. The state, for instance, is not limited by so finite a number of years of lifespan, though it does have a birth and death. Individual men do to a great extent define themselves by their acts, but in the case of a state this is vastly much more determinative of the character of the entity. A state *is* what it *does*. A state can become what it assumes itself to be in its policies. A young state can act—and be—moribund; a revolutionary state can become a defender of the status quo; a just democracy can disregard its documentary origins and obligations to act unjustly. If, then, the individual citizen is, in a sense, part of what his country does as a result of its being a participatory democracy, and if his country is defined by what it does, then he too is defined by his country's policies.

The meaning of this sort of metaphysical-geometric chain is that individuals feel intensely about their involvement in contests of ordering values in national policy. Identification with the acts of the nation, whether in defense of them or disillusionment over them resulting in shame, introduces a personal element to the conflict over policy which further makes it a proper subject for legal theory. Hovering over the entire United States today is an actual case-in-controversy which intimately involves principles of moral and legal equity and which numbers its parties in millions. If the role of law is indeed to provide stability and to regulate change, while at the same time contemplating both social interests in the name of pragmatic social continuity and ultimate ends in the name of purposive humanity, then this conflict must be addressed.

If the law cannot speak to the searing issues of social disunity of our time, and specifically to the question of war dissent, then it will not have done its job.

The dispute over the proper nature of legal education⁵ indicates that some sense of uneasiness lies on the legal progression. Law schools have long envisioned their mission as being the production of practical advocates equipped to serve clients with real problems. That they have done so rightly can be stated with some certainty. The choice, after all, is not really between Pericles and the plumber. Lawyers have a social niche to fill which requires effective practicality. This does not erase, however, the fact that lawyers have traditionally been expected to fill other roles as well. If they have not been called on to be full-time Pericleans, neither have they been called on to be full-time plumbers. Cicero, More, Coke, Adams, Hamilton, Jefferson, and many more, were able to render services to their countries which called for some awareness of issues beyond those involved in a single client's case. The law has ever been able to extract great principles transcending particular facts from any and all actual cases. Law and lawyers are called upon today to exercise principled leadership in assuring the nation of its present status in the midst of uncertainty and of its ideological direction as a nation founded on principles of law. Whether lawyers are prepared for the task or not is immaterial. The expectation is that they *do* know more about such things than other men, and that they can make at least constructive contribution beyond the emotional reactions which any citizen can add to the clamor. There may be nothing in a legal education which prepares a man to be a legislator—what *ought* the law to be—or even a judge, but lawyers are expected to be both and more. Which is to say that layman demands of the attorney that he be oriented towards *policy* and not simply towards adjudication. When the policy issues, as those set forth above, are directly related to the realm of legal theory, no excuse exists for a numbing silence emerging from the bar. The problem is not so unique as to paralyze lawyers and reduce them to unexpert noncontributors. Mr. Justice Turlidge once said that the law and freedom are inconsistent in the ultimate and can destroy each other, but that neither can long endure without the other. This paradox is the stuff of law and its latest culmination in war dissent and resultant serious disunity should not short circuit legal minds.

In past times, of course, some stress situations in society have done

⁵ Many of the issues relevant to the proper education of lawyers are discussed in various articles of 54 VA. L. REV. (1968).

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exactly that. Charles Dickens *Bleak House* is an excellent representation of the failure of the legal profession in a period of high claims and low performance. The death of the Lord Chancellor is spoken about as follows:

The Lord Chancellor of that Court, true to his title in his last act, has died the death of all Lord Chancellors in all Courts, and of all authorities in all places under all names soever, where false pretences are made, and where injustice is done. Call the death by any name Your Highness will, attribute it to whom you will, or say it might have been prevented how you will, it is the same death eternally-inborn, inbred, engendered in the corrupt humors of the viscious body itself, and that only—Spontaneous Combustion, and none other of all the deaths that can be died.⁶

Which introduces the additional element which lies beneath the overt issue of war dissent—a growing disillusionment with society and its institutions leading to revolutionary temper. Revolutionaries have often cried “Let’s kill the lawyers first!” Whether they have done so more for the affirmative bad acts of lawyers or for the failure of lawyers to lead and make contributions in prerevolutionary times of disappointment is a conjectural question. Nevertheless, we do not need to forecast actual violent revolution to appreciate that some potential exists for an ultimate finding that lawyers were called and did not answer—that an ideological gloom had descended on their state and that they, like Dickens’ Lord Chancellor, sat “in the very heart of the fog.” All of England’s barristers were busy “tripping one another up on slippery precedents, groping knee-deep in technicalities” and staying in a courtroom like a dark well where you could look in vain for truth at the bottom. It would have been well for the lawyers of the day to have remembered the Old Testament admonition that “the letter of the law killeth.” One cannot escape the feeling that if the spirit of the laws is to prevail, the spirit of the lawyers may need to be invigorated. Perhaps writers of Dickens’ talent do not presently abound, but apparently many do not lack his bitterness. The heritage of the law admits of room for creative thought and action in time of social challenge, but it also admits of challenges unmet and bitter disappointment rampant. This is still another paradox relevant to the problem here; the law can be both bright promise and hopeless haze.

That alternatives for response to challenge exist is true not only

⁶ CHARLES DICKENS, *BLEAK HOUSE* (1853).

for the legal profession but also for government. Policy can always be good or bad, appropriately responsive or not. Some theoretical reference to the nature of response and to its effect on the nature of the whole problem is now in order. While above it was briefly mentioned that the life of the state differs in some vital ways from the lives of individual men, it must now be added that a great deal can be gained from viewing the state as a living entity. There exist several important parallels which can be derived from biology to the benefit of a statement of the problem faced in America at present. Some of those advantages relate specifically to the idea of the role of response in determining the character of the total challenge-response problem.

Dr. René Dubose of the Rockefeller University has written that "the severity of a microbial or toxic disease is determined as much by the intensity of the body response as it is by the characteristics of the microbe or toxin involved."⁷

Likewise, the response to an ideological invasion of the "body politic" may itself determine in great measure the severity of the struggle. Excessive or ill-conceived responses will aggravate the situation, even making a real problem where only an imaginary one was before. In short: the war dissent itself is not the full extent of the present problem of disunity. It is rather that the existence of dissent together with the responses to it rendered by government join to create a problem of wider dimension than simply the advent of unilateral uproar. In politics, it must be a truism to say that what people *think* is true can be more important than what *is* true, and indeed that what enough people believe to be true will in fact become operationally true as a social fact. When a challenge is believed to be of huge and formidable size and the response is geared to that belief, the challenge does in fact become serious regardless of whether it was originally or not. This is reflected partly in the military principle of economy of force, which recognizes that over-reaction can itself create new problems.

Dr. A. E. Clark-Kennedy wrote about the nature of disease in such a way as to further aid a conceptual comparison with the ills of the state.⁸ Diseases, he said, "are clearly not entities each with an independent existence." A disease is not a *thing* which overtakes a man, rather it is a reaction between the individual body-mind and his environment. Here again the definitive effect of the reaction must be noted.

⁷ RENÉ DUBOSE, *MAN, MEDICINE, AND ENVIRONMENT* 75 (1968).

⁸ A. E. CLARK-KENNEDY, *HUMAN DISEASE* 228 (1957).

Rebellion, it would seem, cannot exist by itself in uncomplemented splendor. Dissent requires policy before it can be brought to life, since there can be no dispute with a non-existent judgment (—though one could dispute the absence of action itself, which would still be actively reacting to some extant fact, and would not qualify as dissent without basis).

This phenomenon becomes important for the purpose of analyzing legal theory as related to war dissent when it is realized that the levels of responsibility to be anticipated on the two sides of the war dispute are not the same. Youthful demonstrators and dissenters are just that—youthful. One reason cited by authorities for not taking their advice is their inexperience and juvenility. It should not be surprising to find unsophisticated political behavior on the part of “children”—this point having no reference to the possible merits of the dissenters’ complaints but being directed purely to method and response. What would be surprising would be for sophisticated and mature policy makers to initiate responses which did not recognize the role of the response in *determining* the scope of the problem, and which therefore might be expected to worsen the problem rather than solve it.

This dilemma, then, is that “the road to hell can be paved with good intentions.” Put another way, ignorance may not be bliss.

At this point the beginnings of a theoretical approach can be made. Just as we may tend to think of a disease as an actual entity which is waiting to attack us, rather than as a complex reaction between an organism and its environment, we tend to think of legal concepts as having independent existence. Law deals with abstractions as well as with reality—the corporation, for example.⁹ This very beneficial habit of making practical use of abstract legal concepts can cause trouble if one grows to believe that the concepts have concrete and independent existence, and are therefore not so amenable to change. We cannot alter the number of eggs in a basket by thinking in terms of a different number, though we can instantly modify the number of heirs or tenants in common upon the arrival of another relative on the scene. Thinking of legal concepts as realities tends to make them less flexible. If we take the Hegelian position that the state is the highest order of existence on earth, for example, then the idea of the nation can very quickly become

⁹ Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935). See also DAVID LLOYD, *THE IDEA OF LAW* 285-299 (1964).

dysfunctional and men can exist to serve the state's pleasure. If we take the Categorical Imperative of Kant, which commands actions to be such that they could always be universals, and sanctify it as an inviolable case rule, then bad law will result as soon as a slightly different fact situation presents the same issue in bare principle. We avoid the latter result through the use of legal fictions and institutionalized jury fact-finding, which can disregard the court's instructions when the fact situation demands individual treatment. We nevertheless do pay some homage to Kant by claiming universal case rules applied through *stare decisis*.

The danger persists, though, that we may begin to think of an abstraction in the service of a principle as a "thing." If this happens and we "let the tail wag the dog" of law, then conceptual reasoning in law has become ill-equipped to deal with increasing challenge. If hardened conceptual thought accepts the idea of a legal situation once "given" as permanent, and the boundaries of the situation are in fact shifted by events, then legal thought might as well stay in Dickens' chancery. The specific application of the need for alert flexibility to the dissent problem is this: law must be seen as a *process* rather than a thing if it is to be able to deal with changing social situations in such a way as to provide stability and regulate change.

This view of law, of course, is that of Professors Lasswell and McDougal at the Yale Law School, and is a part of their "policy science" approach to jurisprudence.¹⁰ It may be that the views of these two men can be added to the theories of an anthropologist, Dr. Gregory Bateson, who visited New Guinea in 1936, and that the resulting statement can cast some light on America's crisis in dissent.

A brief summary of the pertinent aspects of policy science must now be undertaken: law must be viewed as a continuing process of authoritative decision, rather than as a system of inflexible precedents and rules. The paramount objective of social policy is the protection of human dignity. Law is the sum of the formal power decisions in a community, and should be "goal oriented" rather than entirely determined by precedent or doctrine. This hardly does justice to Lasswell-McDougal as a super-brief statement of some of their complex ideas. It seems necessary here, however, only to refer to the policy aspects of the system—to the future oriented legal decision which is made with realization of the

¹⁰ For a summary of the Lasswell-McDougal theory see McDougal, *Jurisprudence for a Free Society*, 1 GA. L. REV. 1 (1966).

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effect it will have on the community as its major determinant, and is not made subservient to a prior case rule in the main.

To McDougal the role of the lawyer is "that of asserting leadership in the establishment and maintenance of processes of authoritative decision adequate to secure our preferred public order."¹¹ The critical issue is the degree of enlightenment about the requirements of common interest which the lawyer is able to apply in seeking to guide the community through situations for which our constitutional doctrine provides no automatic solution—as in the case of disunity from intense anti-war dissent and reaction to it. If the lawyer cannot get complete understanding from the past experience of the courts, he would, it seems, be justified in looking elsewhere for clues. One place that he might look is at the Iatmul people of New Guinea.

Professor Bateson formulated the theory of "schismogenesis" as a result of his study of the Iatmul.¹² He defined schismogenesis as "a process of differentiation in the norms of individual behavior resulting from cumulative interaction between individuals." It is a process in which each party reacts to the reactions of the other. It may be "symmetrical," says Bateson, in which case the reactions are risingly competitive. It may also be "complementary," in which event the increasing dominance of one individual or group is reacted to by the other by his becoming more submissive. An international war, therefore, is by definition a symmetrical schismogenesis with increasing effort and determination on both sides resulting as each reacts to the other. Bateson might today have recourse to the term "escalation" to express the same thought.

Either form of schismogenesis—symmetrical or complementary—can end in total estrangement of the two groups involved. The distance between the groups in a schismogenic situation increases as the process continues. This divergence can be arrested, however, if some contrary force balances the repelling forces—as when a man and wife remain together in mutual hostility because of feelings of responsibility to the children; or as when the locally feuding members of two clans are summoned by their common king to combat a common outside enemy. If the schismogenic drift is in fact arrested, the factions may not have returned to a state of mutual fondness or ever indifference. They may be in a condition of "dynamic equilibrium," as opposed to static stillness. That

¹¹ *Id.*

¹² GREGORY BATESON, *NAVEN* 175 (2d ed. 1958). See particularly chapter XIII and the 1958 Epilogue. Bateson's theory of negative feedback in a social system is also pertinent.

is; there may be schismogenic forces but they are equaled by reciprocating forces demanding attraction. It can be argued that the Vietnam War is in a state of approximate equilibrium as a symmetrical schismogenesis, not because the Viet Cong and the United States are attracted to each other, but because of the intrinsic nature of the Communist "war of liberation." It is the deliberate policy of the Communists to avoid decisive battle except when sure of victory. The Viet Cong rely on protracted war lasting for years to demoralize America. The Communists themselves have introduced the element of equilibrium, not because they desire a long term stalemate but because they want to evade short term defeat. The war is in a state of dynamic equilibrium and will most likely remain so until the Viet Cong sees an opportunity to break the equilibrium by attaining victory.

Bateson also theorized that if a schismogenesis between groups is allowed to proceed to a certain point, the behavior patterns of the members of the groups will be altered as they relate to each other. The inter-group schismogenesis can cause intra-group schismogenesis. It is not surprising that a protracted Vietnamese War which does not conform to the American idea of what a war—a schismogenesis—should be, would cause intra-group strife in America. The distorted war in Vietnam has created distorted conflicts at home. Because of the nature of the domestic conflict, in which groups of Americans oppose other groups of Americans, a new schismogenesis has begun. The domestic, intra-group schismogenesis, must be called either symmetrical or complementary. Inasmuch as the dissenters do not fade away with increased government pressures against them but instead become more vociferous still, the process must be called symmetrical, competitive.

The present status of the domestic schismogenesis can in no sense be called dynamic equilibrium. The continuing war and the continuing protests against it, as well as the demoralizing effect of the draft on young people, show no immediately likelihood of cessation.

Two schismogeneses exist—one between the United States and the Viet Cong and North Vietnam, and the other between factions within the United States. The former schism is in at least temporarily arrested stages of leveled hostilities; the latter is not in a state of equilibrium but is increasingly competitive. Given the two schismogenic processes at work, one in equilibrium and the other still proceeding in lineal directions so that the groups are becoming still more alienated, some judgment as to which is more dangerous to America can be made.

Domestic groups can, of course, rival each other and still feel loyalties to common ideals or standards which may bring about a state of equilibrium. In this respect, it becomes very meaningful that most dissenters speak about the "false values" of the older generation, which is to say of the policy makers. Once unquestioned values are now criticized if not condemned. Commonalities of symbols are difficult to find, much more so common active loyalties. The contra-divisive forces of attraction which could bring about equilibrium may exist, but apparently do so at such basic levels of emotional ties that they may not be evoked until the inertial tendencies of the schismogenesis have rendered it either irresistible, or capable of being arrested only at great cost in morale. Toynbee does assert¹³ that the successful response to challenge is a definitive element in the raising of a society's energy and capacity, whereas failing to meet a challenge well decreases the same resources.

Every culture which has contained disparate and hostile—overtly or covertly—elements has not flown apart as the result of snowballing schismogenesis. Society does not always react to reactions in a suicidal whirl until centripetal force tears the social fabric. Why not?

Of the methods by which schismogenesis can be brought under control, one of the major ones which could perhaps be applied in the contemporary situation is for deliberate admixture of the types of schismogenesis to be created. The squire who owned the village might play ball with the villagers on one day each year, thereby competing with them equally in symmetrical schismogenesis whereas he usually related to them as master to servant in complementary schismogenesis. The same process applied when the officers of a British ship served mess to the men on one day. Tension was taken out of the relationship by means of mixing, temporarily, the forms of schismogenesis.

In many tribal cultures application of the same principle serves to prevent tribal disintegration. Extremely dominant men allow the women to dress as men at designated times and take on their dominant demeanor.¹⁴ Some African kings have had to obey the institutionalization of this process in pronounced form—as when the king had to parade naked before his people on a certain day while they made fun of him, a custom not unlike the Roman habit of mocking triumphant generals as

¹³ ARNOLD J. TOYNBEE, *CHANGE AND HABIT: THE CHALLENGE OF OUR TIME* 54-88 (1966).

¹⁴ Anyone of a number of texts on social anthropology will provide various examples. The primary source for the purposes of this discussion is Bateson's study of the Iatmul.

they passed. Even the great Zulu king Shaka, who was known to have men killed capriciously simply as a device to maintain power by terror, tolerated the traditional court functionary whose duty it was to follow the king about shouting out all of his faults in a loud voice. Shaka apparently realized the value of this institutional admixture of schismogenesis forms.

Whether the present American administration shares that awareness seems doubtful. Criticism from the press has come under direct attack by the Vice President, and even the courts have begun recently to subpoena unshown television news film. The Attorney General apparently referred to the Republican Ripon Society as "juvenile delinquents" on a televised interview. The President has announced that he will not listen to protesters and that nothing they can do will sway him. It would appear that the dissenters themselves cannot accomplish any admixture of schismogenesis in the eyes of the policy makers, and further that institutional admixtures such as represented by the press and by Shaka's crier of criticism will be vigorously discouraged. Viewing the situation in the light of theoretical considerations previously raised, one cannot help but wonder whether the policy makers are acting dysfunctionally.

A failure to perceive the nature of the domestic conflict seems to compound the problem. If the administration takes the position that power conferred by the "silent majority" justifies its attitude of scorn towards dissenters, it is taking a stand which implicitly recognizes the conflict as complementary—which states an expectation that the dissenting elements should be quiet and go along with the majority, should let those who have power employ it. No possible attitude could be imagined to bring about the worsening of a symmetrical schismogenesis than to regard one participating group as if it were the passive side of a complementary schismogenesis.

The hoped for admixture calls for release of tension whereas the present administrative policy towards dissenters cannot but create tension. No real disorder need be permitted, any more than the captain of a naval vessel yielded actual command by serving mess once a year. It cannot be denied, however, that too much devotion to the *shadow* of power and dignity may ironically erode the very *substance* of both.

It takes a naval captain of some maturity, one imagines, to perform menial service for his crew without losing his command presence. A schismogenic situation calls out for leadership which can assert its own

identity without constant reference to the reactions of others. A leadership policy which requires repeated inquiries—"How am I doing?"—and can define itself only in terms of others' reaction to it, is too hollow to end schismogenesis or to "bring us together." Misreading of the nature of the conflict will rather create more conflict.

The proper role of the law and of lawyers, then, is not to adopt a stance of inspiring fear in the hearts of dissenters of certain recrimination—a policy consistent with Machiavellian political ideals but not with a jurisprudential realization of the common good. The proper role of the law is to perceive the *actuality* of the common good and to seek its realization within constitutional principles. Andrew Hamilton set a superlative precedent for American lawyers by defending the idea of a free and critical press even before the Revolutionary War was fought. In the still formative stages of the present socially revolutionary feelings among American youth, lawyers perhaps have an opportunity to act similarly. A recent national commission of private citizens suggested that newspaper reporters be subject to government regulation by licensing, possible a coincidental development, but one which fuels rather than dampens the furnace of schismogenesis.

The concept of schismogenesis need not be discussed further except to cite one local example of how its theories have been tested. In Washington, D. C. peace demonstrators were met by policemen who had obviously been ordered to be friendly during the Vietnam Mobilization Day demonstration. Dissenters anticipating hostile police were politely and even enthusiastically treated. The result was that extremist Weathermen demonstrators were unable to provoke widespread violence and that the tone of the entire mass demonstration was markedly cooled. One way to slow schismogenesis, says Bateson, is to suddenly change the rules under which it has been progressing.

The jurisprudential issue which requires choosing between the common good and special causes asks for both a model of the means to discover the common good and a qualitative calculus which can balance given common interests against given special interests on some other basis than quantitative utility. At this point that issue should be fitted into the theoretical approach advocated here. Philip Wylie discusses the concept of right-wrong choices in biological terms.¹⁵ He begins his analysis with the simple *tropism*, the earliest possible event in the history

¹⁵ PHILIP WYLIE, *THE MAGIC ANIMAL* 58 (1968).

of life on earth in which affirmative choice of alternatives was presented. The principle operating then and now, says Wylie, is species continuum. Not the law of individual self-preservation but the higher law of species preservation will predominate. If the "body politic" analogy can be carried further, the survival of the democratic United States is the most preferable alternative, and that requires value judgment as to what principles of democracy are essential and must not be lost.

It is not simply the survival of a nation that happens to be in North America which is dictated but the persistence of the particular species—democratic republic. Wylie's biological observation, to the effect that the natural must be the right in choice, can show us that the common good presumes continuum of definitive common interests, and we can thus assume that some policy should be sought which would lead to an end which does not warp the nature of the nation. Schismogenesis must be stopped, but not at a cost of losing the definitive nature of democracy. It must not be stopped, that is, by sheer repression. Such an alternative would not recognize the participatory nature of government and would strike at not only the means of protest but the idea of protest, as indeed members of the administration seem already to have done.

The common good is found in survival of the properties of democracy and not in mere preservation of duly elected authority's policy. Majority preference is not coeval with the common good concept as a legal idea.

It would seem, therefore, that some values claimed by dissenters should not be submerged by simply invoking the common good. Those values include a right to be considered part of the society rather than disregarded as "juvenile delinquents." Human dignity, after all, is a proper concern of law as defined by Pound, Lasswell-McDougal, and many others. Social expectations must be considered by law and policy, and law has not been the Austinian "command of the sovereign" since Nuremberg. The paramount social interest of general security calls for stability, which is a denial of the aims of schismogenesis and which therefore demands that conciliatory steps consistent with democratic survival be taken. Only a shallow reading of the mandate for general security can interpret it as being authority for immediate peace and quiet only. The paramount social value cannot authorize one to sleep on the railroad track just because a train has been waved on past—surely the rumbling vibration of distant wheels can be felt. Can we be certain that all of those wheels are receding?

John Adams laid down a model for the behavior of attorneys for all time when he defended the British troops who were tried for the Boston Massacre. Believing in the cause of the American Revolution, he nevertheless extended justice to its foes. Principle and the spirit of the law must precede political policy. One cannot doubt that Adams would have represented the soldiers in question even had he known that doing so would prevent him from becoming the second president of a yet unborn nation. He meant to help create not simply a nation, but a just one.

In summary: A proper concern of law is the demands and the expectations of various social groups, the paramount social interest is the common good, which may not be equated with majority will but must consider the continuation of the greater social group as a qualitative entity. The substratum of order which law must provide needs to be a stability which allows for change, and which can regulate the direction of the change rather than merely strive to maintain the status quo. Responses to challenges are as definitive of the problem as are the challenges themselves; the "chicken little" effect of over-response must be evaded, as must responses not addressed to the true nature of the challenge.

Legal theory is not alien to political disunity and its concomitant disputes. The essence of the law demands that it be a creative and guiding force in such times, and that it adopt a goal-oriented policy stance in order to preserve the integrity of a nation unique in the history of legal thought. The mandate of the common good and the general interest must cancel any idea of "the pleasure of the prince."

When Sir Henry Sumner Maine spoke of the idea of "Equity" in the last century, he referred to the "superior sanctity" of those principles by which law is "adopted to social wants."¹⁶ A society which begins to lose its shared ideals of equity, said Maine, will lose cohesion as well. This puts still another way the basic issue: What results when a social group states, "We demand!" and authority responds, "We will not listen!" Entirely aside from the *substantive* policy issues, a problem of *procedural* policy has sprung full-grown into life. Schismogenesis has begun.

Professor Lon L. Fuller has written recently,¹⁷ that the "central indisputable principle" of natural law is the injunction to "Open up, main-

¹⁶ Sir Henry Sumner Maine, *ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS* 27 (1963).

¹⁷ LON L. FULLER, *THE MORALITY OF LAW* 186 (1964).

tain, and preserve the integrity of the channels of communication by which men convey to one another what they perceive, feel, and desire.”

The traditional concern of legal theory with the integrity of the social group goes on. What St. Thomas Aquinas called the *civilis conversatio* remains an essential area of legal thought.