The Unwritten Law

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The phrase, the unwritten law, which came into prominence twenty-five or thirty years ago, gained wide circulation through the press in connection with certain notorious murder trials. We have all heard of the unwritten law but we seek in vain for a statement of it in our law books. All of us, however, have a fairly clear idea of its meaning. It has been the plea of justification offered in murder trials where the slain man has been guilty of some moral offense against the defendant or against some member of his family. The conduct of the slain man turns popular sympathy from him and creates such sympathy for the slayer that the latter’s acquittal meets with approval.

The application of the unwritten law is, in effect, a popular rising above the law by juries who really interpret the will of the people. The danger in such a course lies in the possibility that disregard for all law may be encouraged. The remedy is to be sought in removing the causes which give rise to the occasions on which the unwritten law is appealed to and in raising popular ideals to the standards set by statutes.

Neither our statute law nor our common law recognizes any such defense as that invoked in the unwritten law. The nearest approach to it to be found in legal works or in court decisions seems to be

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a statement in the fourth volume of Blackstone’s Commentaries, where the learned writer discusses justification in homicide. After considering the "cooling time" that should intervene to make a case of manslaughter one of murder, he says: "So if a man takes another in the act of adultery with his wife and kills him directly upon the spot, though this was allowed by the law of Solon as likewise by the Roman civil law (if the adulterer was found in the husband's own house), and also among the ancident Goths, yet in England, it is not absolutely ranked in the class of justifiable homicide, but it is manslaughter. It is, however, the lowest degree of it, and therefore in such a case the court directed the burning of the hand to be gently inflicted, because there could not be a greater provocation."

The common law as found in Blackstone, in the works of other legal writers, and in our court decisions, and the statute law, which includes not only the enactments of Congress, of our State legislatures, and of the legislative departments of our municipalities, but also our State and Federal Constitutions, are the only sources of law recognized by our lawyers and judges in the trial of cases. If we do not find in either of these sources any authorization of a jury to acquit a man when he is tried for killing one who has broken up his home or has dishonored a member of his family, the question naturally arises as to whether there is not another source of law. Repeated acquittals by juries in such cases seem to lead us to the conclusion that there is, or that possibly the juries themselves are really making law for each particular case as it arises.

This is what really happens in criminal cases for the jury acquits a man of the offense charged even though the judge lays the law down flatly that the prisoner is guilty. The jury may disregard the law as the judge sees it and apply the law as the jury sees it. There can be no question as to the power of the jury to do this. They have had the power to return such verdicts as they saw fit from early times.

Originally juries were selected from the localities where the offenses which gave rise to suits or prosecutions were committed. They were selected because they were already familiar with the facts. The judge instructed them as to the law involved and they made their findings wholly or in part on their own information concerning the case.
This method gave the jury a great deal of power for it was very difficult for the court to say that a jury was giving a false verdict. Whenever a judge was certain a false verdict was returned, he might fine the members of the jury just as he did when they were guilty of some misconduct. In one case recorded in the time of Queen Elizabeth the jury prepared two verdicts. They proposed to hand in one if the judge would stand for it but if he would not, the other was to be their verdict. The judge imposed a fine on them.

Then came the famous Bushnell's case in 1670, where the jurors were fined because they refused to return a verdict as directed by the court against one William Penn and others for unlawful assembly and trespass. On appeal to the higher court it was settled once for all that a judge could not fine a jury for returning a verdict against the weight of evidence. The only remedy left was to sue the jury for attaint. This, however, was not effective since the suit had to be tried before a jury which was more than likely to acquit the first jury of any offense. Bushnell's case really ended the attempt on the part of the court to control a jury.

From that time to the present, trial by jury has been one of the chief means of checking the exercise of arbitrary power on the part of those in authority.

In colonial days the royal governors found very little satisfaction in trying those who opposed their high-handed methods before juries drawn in the colonies and they resorted to the expedient of sending offenders to England for trial. This was one of the grievances of which the colonists complained when they were about to take up arms against the mother country. In the long run it has mattered little what measures might be taken by those in power so long as those who opposed them must be tried by juries drawn from the people themselves. Popular interests were sure to be well protected in the end, for the people always had an effective veto in the jury system. The jury has stood between the individual and the exercise of arbitrary power. It has been the great bulwark of individual rights and popular liberties.

Historically, the jury has played a greater part in criminal prosecutions than in the settlement of private disputes. This is partly due to the fact that in civil suits if the jury goes against the weight of the
evidence or seeks to make the law to suit itself, its power is limited since the judge may set the verdict aside and order a new trial. This is not possible in criminal cases because the United States Constitution provides that the life of no one shall twice be put in jeopardy for the same offense. Consequently, when a jury once acquits a prisoner, his life has once been in jeopardy for that offense and the judge is powerless to set the verdict aside and order a new trial although the finding may have been clearly against the weight of the evidence and the prisoner clearly guilty of the offense charged.

In a criminal trial the judge may tell the jury that the law is so and so, and if they find certain facts to be true they will return a verdict of guilty, or a statute may embody the point of law involved in the clearest language possible, nevertheless the jury may totally disregard both the judge’s instructions and the statute and return a verdict according to its own fancy. When they do this, they are really making the law for the particular case. This is the prerogative of our juries and no one can punish them for finding as they do. They are really the law makers of last resort in each criminal case.

This is undoubtedly the reason why in times past the Anglo-Saxon has so tenaciously clung to his right of trial by jury. It was when Charles I. of England attempted to ignore the right to trial by jury and to impose fines and punishments through the famous Star Chamber court that the English people became thoroughly aroused, overthrew the royal government, and established the Commonwealth.

Today jurymen are the judges of the facts presented at the trial. They are no longer selected because they themselves are acquainted with evidence in the particular case on which they are to pass judgment. They are now chosen rather because they are not familiar with the facts and have not formed an opinion as to the rights of the respective parties or the guilt of the defendant. They are drawn from the community at large each term of court and are supposed to be representative citizens. Necessarily they bring with them a fairly accurate idea of public opinion. It is safe to say that they are influenced by public opinion and that they would not acquit a man really guilty of murder if they did not have public sentiment behind them.
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They really reflect the popular will in each case as it is presented. Consequently when we find juries repeatedly acquitting those charged with killing because the slain man has been guilty of a moral wrong, we must conclude that it is the popular will that the killing is justified in such cases and that the defendants have defenses good as a matter of law.

This is law making in which judges and lawyers have very little to do. In fact, it is usually made in the face of instructions by the presiding judge that the law is quite the contrary to that which they have decided governs the particular case. The unwritten law then comes directly from the people of the community and is a matter that is entirely out of the hands of lawyers and judges as such.

It has been suggested that it is the function of the Legislature to embody the will of the people in statutes and that since the unwritten law apparently reflects the popular will in such cases, the Legislature should incorporate it in our statutes. To do so, however, would seem to be useless because juries would still have the power to say what the law in the particular case is and would still be in a position to disregard the statute, if in the meantime popular opinion should change and demand that there should be convictions in such cases. If the court should feel that the verdict should be set aside on motion of the prisoner's counsel and a new trial be granted, a second jury, reflecting the will of the people, would also find the defendant guilty. The court would then conclude that the first jury was right and that the particular case did not come within the provisions of the statute. In such a case the objection to a second trial that it would be putting the life of the prisoner twice in jeopardy contrary to the Federal Constitution would not be raised since the new trial would be at the request of the prisoner himself.

Furthermore, if it really is the function of the Legislature to embody in statutory form the popular will wherever it makes itself manifest, to be consistent, we should write upon our statute books a law to the effect that our administrative officers may nullify or set aside such laws as they see fit whenever in their judgment it is the wish of the community that the enforcement of certain laws shall be suspended. Such a suggestion may seem a little startling at first thought but the French have a similar provision in their code. Cer-
taint executive officers in France may suspend the enforcement of a law under certain conditions, whenever such an emergency arises that in their judgment it is expedient to do so. In practice, we have the same thing, for our administrative officers have the power not to enforce laws and they do avail themselves of this power whenever they feel that non-enforcement will meet with popular approval. Then by non-enforcement of laws through administrative officers, the people have an effective means of vetoing measures that do not meet with their approval; for successful enforcement of laws in the final analysis depends upon the support of public opinion.

An executive officer is very certain to act, and promptly, if he feels that the people demand it of him. He knows that if he does not, his chances of retaining his office or of securing other public offices depends upon his meeting with public approval. In fact, administrative officers are usually quick to respond to the spirit of the times. If they feel there is a demand for rigid enforcement of a measure, self interest prompts their course of action. If they feel that enforcement is likely to meet with real opposition, few have the courage to proceed in it. When Lord North tried to impose his unpopular stamp act upon the American Colonies before the Revolution, he found that the local officers on whom was placed the burden of carrying out the act, preferred to resign rather than to incur the hatred of their neighbors.

One naturally asks, then, what is the function of legislative enactments if they are not to reflect the popular will at all times? It has been suggested that statutes are to set standards to which we wish to raise popular ideals; in other words, that the work of the legislature, apart from passing acts of a private nature, is standard setting. If the standard is too far in advance of popular ideas there is a very great possibility that the law will not accomplish its purposes. If it is so far ahead of the times that people do not approve of it, it will not be the law enforced by them through juries and executive officers drawn from their midst.

If these premises are sound it must follow that it is not sufficient to write a law upon the statute books. As few laws enforce themselves the real work still remains to be done. Popular ideals must be raised to the standard set by the statute so that public sentiment will be behind its enforcement and make administrative officials perform
their duty in bringing those who violate the law before the courts and also prompt juries to convict such offenders. This is especially true where the law is as far reaching as the prohibition legislation. If there are communities that have not been brought to approve the amendment and to live willingly by its provisions, it is clear that the work of education is not yet complete. If we were to find that this legislation were hailed with joy in every part of the country and no effort were needed to enforce it, we should very properly conclude that the legislation were either needless or might have been enacted years before it was.

From the fact that to embody the so-called unwritten law in our statute would be both useless and wrong on principle, it does not follow that there cannot be legislation that will help to lessen the occasions on which it will be appealed to. It is a goal worth working for, as nearly everyone will agree that to allow an individual to take the law in his own hands and to act as judge, jury and executioner at one and the same time is contrary to the spirit of our laws, wrong on principle, and a real menace to society. Doubtless the unwritten law never would have received the public sanction that it apparently has in some quarters, had it been certain that victim of the one on trial would have been properly punished at the hands of the law so that the act of the accused was wholly needless. Any measures that look towards the betterment of social conditions and morals are sure to work towards this end.

A greater respect for law and government can be inculcated in our citizens. Vice-President Sherman once said that respect for law has built up this country of ours. He might have added that respect for those in authority has played its part too. At the present time we seem to be passing through a period of lawlessness and lack of respect for those in authority. A prominent government official under the present national administration in an address recently delivered before the American Bar Association deplored the present contempt for law and the revolt against the spirit of authority. It would, indeed, be very interesting to know just how great an influence a book written by this speaker had in bringing about this "present revolt against authority." Surely he spared neither the art of the sophist
nor that of the satirist to bring into contempt the one who then occupied the highest office in the land.

Those idealists who struggled to establish popular government and thereby to put the enforcement of laws into the hands of the people by means of jury trials and popular election of administrative officers, saw the necessity of popular education and did all in their power to promote it.

The task then is one of restoring at the present time the higher ideals that prevailed before the war swung us into the present reign of materialism. This is not wholly the task of the church and school for every organization or lodge can play its part.