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LAW IN THE COMING YEARS*

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The skeleton of a 15,000 year old mastodon was recently unearthed in New York State. It was found to have twice the level of mercury content permitted by the United States in meat for human consumption.¹ One possible inference from this fact is that the level of mercury pollution has tended to decline over the last 15,000 years. That suggests that our concern over the environment is misplaced. It also suggests that you had better be careful about eating mastodon. But everything considered, as the broadcasters say, the soberer inference is that every conclusion is fortuitous in the absence of adequate data. A single fact may chance to be informative or it may chance to be misleading, and we cannot know which is the case.

This leads directly to my first point, that the law never answers any question. It does not say yes or no to anything. All it can do is to state certain principles, leaving their application, and hence the event of judgment, to an appraisal of the facts. For example, the law struggles toward a definition of duties in any particular relation but, after a few generalized precepts, abandons the effort by leaving the matter to the judgment of what is conjectured to be a reasonable man. Thus the trier of the facts is commissioned, within very broad limits, to impose what he may consider a socially justifiable norm of conduct.

This approach sweeps across the law from liability for physical injury, at one extreme, to the responsibility of corporate directors, at another. But the reasonable man is the ultimate hypothetical. He cannot be seen, heard or felt, for by definition any particular person departs from the idealized abstraction in one way or another.

*The John Randolph Tucker Lecture, delivered at Washington and Lee University, May 11, 1974.

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¹ELECTRICAL WORLD, Oct. 1, 1971, at 139.

This inconclusive character of the common law is even more startling in today's legislation. Undigested oceans of fact roll over the Capitol in Washington. The very techniques for their analysis are unknown and are thus controversial as well as indeterminable. Under these pressures Congress often abandons any effort at specificity and contents itself with a brief gesture toward the goal to be pursued, leaving to an administrative agency free choice as to how far it will go. The 1972 amendments to the Federal Water Pollution Control Act² are an illustration. The goal is the elimination of pollutant discharges into navigable waters of the United States. The order is that this goal shall be approached by the Environmental Protection Agency in two stages, though each is imprecise. By 1977 the standard is to be "the best practicable control technology currently available."³ By 1983 the standard is to be "the best available technology economically achievable."⁴ Both standards are to be superseded upon a finding that they are not stringent enough to "assure protection and propagation of a balanced, indigenous population of shellfish, fish, and wild life."⁵ It would be hard to imagine any vaguer standards or any wider zones of freedom for the fact-finding agency. What is "economically achievable" depends altogether on one's notion of economy. A spender and a saver would not be likely to agree. An economist would say both are wrong: the standard of economics means that there can be no determination based solely on cost; there must be a judicious balancing of cost and benefit. Thus a whole new universe of discourse is introduced.

The example set by Congress for imprecise statements is now being followed by the administrative agencies. Thus the Environmental Protection Agency has ruled under the Clean Air Act⁶ that the promulgation of air quality standards shall not "allow significant deterioration of existing air quality in any portion of any State."⁷ "Significant" is defined in the dictionaries as rich in meaning. You can picture the gratified clients after this kind of an exposition and the confidence with which they would undertake new programs of plant expansion.

²33 U.S.C. Supp. II, § 1311 *et seq.* (1972), formerly ch. 758, § 301 *et seq.*, 62 Stat. 1155 (1948).

³33 U.S.C. at § 1311(b)(1).

⁴*Id.* at § 1311(b)(2).

⁵*Id.* at § 1313(d).

⁶42 U.S.C. § 1857 (1970).

⁷40 C.F.R. § 50.2(c)(1972); *sustained with unexpected consequences in Sierra Club v. Ruckelshaus*, 344 F. Supp. 253 (D.D.C.), *aff'd mem.*, 4 ERC 1815 (D.C. Cir. 1972), *aff'd by an equally divided Court*, 412 U.S. 541 (1973).

Under these Congressional or administrative directions we face a strange world. The data are both unknown and illimitable. There is no set of agreed principles by which they can be weighed. New procedures must be devised.

It is not enough to say that computers will come to our rescue, because they function only in the manner for which they have been programmed for the task in hand, much like an alarm clock. We must resort to students of statistical method. They can point the way toward the capture of a random sample. They can plot a wilderness of dots and so harmonize them by the method of least squares as to imprint upon them a moving curve that elucidates their common tendency. At the command of mathematicians are also multiple regression equations by which they can determine the coefficient of correlation between any sets of variables. They can, in short, bring to the lawyer's aid the resources of the econometric, the demographic and other sciences. Even geology appears now and then, sometimes near at home. These are strange desk-mates for Lord Coke or Blackstone. But in the lawyer's study today, he must work arm in arm with them. His daily task has thus overnight become inter-disciplinary.

The search is for procedures that will lead to an objective and systematic appraisal of the onrushing multitude of new facts. Without such procedures it is only too likely that we will ignore or frustrate the policy of law by returning from an exploration of fact with no more than our own subjective preconception. This result is not unknown. In the weeks preceding the 1973 invasion of Israel, her intelligence officers were presented with undeniable evidence of climactic Egyptian military preparations for crossing the Canal. But the expert analysts said, No, we must think in terms of 1967, the Egyptians would not dare. Finally when actual troop movements were observed, the same experts declared that these were for autumn maneuvers and that the chance of war was zero.⁸

It is true that the law is in constant change. But in all probability it is more predictable, at least at short range, than the resolution of the immense factual issues that it now commands us to assimilate. My second point, therefore, is that the law in action today depends most sensitively upon this factual assimilation and the inferences of quality or probability that we draw from it.

An illustration of their novelty and difficulty is provided by the effort of the automobile manufacturers to reverse the action of the Environmental Protection Agency in denying a one-year suspension of the emission limitations. The issue turned on the effectiveness of

⁸N.Y. Times, Oct. 31, 1973, at 1, col. 5 & at 16, col. 4.

available control technology, an issue that would appear to be simpler than the "protection and propagation of a balanced, indigenous population of shellfish." But the Court of Appeals for the District of Columbia, reviewing the evidence of experts, held that the factual record was inadequate and remanded for supplemental findings. When they were received, the majority of the Court said:

It is with utmost diffidence that we approach our assignment to review the Administrator's decision on "available technology." The legal issues are intermeshed with technical matters, and as yet judges have no scientific aides. Our diffidence is rooted in the underlying technical complexities. . . .⁹

Attesting the sincerity of these words, the Court remanded again for further factual inquiry. Judge Bazelon, concurring in result, said:

Socrates said that wisdom is the recognition of how much one does not know. I may be wise if that is wisdom, because I recognize that I do not know enough about dynamometer extrapolations, deterioration factor adjustments, and the like to decide whether or not the government's approach to these matters was statistically valid.¹⁰

Such differences are not confined to the law. Many experts say that we are running out of energy but Dr. Wilfred Beckerman says, Nonsense: the immensities of pollution control are "a simple matter of correcting a minor resource misallocation."¹¹ The economy, he says has continued to improve since the days of Pericles and it makes no difference that "one day we might run out of some raw materials," because "we manage very well without lots of products that have never been discovered" and indeed "there are infinitely more products that we manage without than those we manage with."¹²

But one plain fact is that the population of the world is increasing. This is fastest in those southerly regions that are often referred to as the developing countries. In India, for example, all governmental encouragement of birth control was abandoned recently as a useless expense. Even within any one country the growth is differential. Rural dwellers, lacking employment, imagine that comfort and riches may be found in the metropolitan centers. They congregate in Cal-

⁹International Harvester Company v. Ruckelshaus, 478 F.2d 615, 641 (D.C. Cir. 1973) (per Leventhal, C.J.).

¹⁰*Id.* at 650-51 (Bazelon, J., concurring).

¹¹Beckerman, *Economists, Scientists, and Environmental Catastrophe*, 24 OXFORD ECONOMIC PAPERS (New Series) 327 (1972).

¹²*Id.* at 337.

cutta, in Athens, in Buenos Aires, beyond all resources of the community to support and in proportions that threaten instability to the whole economy.

If these trends continue, and no one has yet found an effective veto, one development for the future substance and practice of the law is clear. As the numbers of humanity increase in any geographic area, the frictions among people will be multiplied. Greater outlays from the common treasury must be provided for the needy, for health, for rapid transit. More numerous and more specialized services by government will be needed to maintain safe and satisfying conditions of living. The costs escalate unpredictably. They necessitate new taxes and blaze like wildfire through inflation, which is seemingly irreversible now in our western world. This in time means that confidence in government itself is undermined.

The task of the lawmaker and of the law practitioner will thus require, year by year, more and more depth of perception into the true trend of events, more and more fidelity to the basic policies implicit in law and more and more compassion for the erring and suffering humanity who depend so fatefully upon the wise discharge of these responsibilities.

Clearly the frictions resulting from increase in population density are greatly exacerbated when some important raw material becomes difficult for any reason to obtain. It is sufficient to remember the long lines of frantic motorists struggling to get to the gasoline stations. We have abruptly moved from an economy of abundance to an economy of scarcity. First of all this means an increase in price. Secondly, this price revolution, if it persists, will make economically possible, indeed economically imperative, research and development for alternative supplies of energy, from the atom, from coal, from other sources. Even apart from economics, the military defense of our country requires emancipation from the dictates of a foreign state, surrounded by the naval might of the Soviet Union.

This does not portend the end of our world. As the London *Economist* has said:

[T]he biggest and most commonly misunderstood technological development of our time . . . [is] the increased elasticities of supply and substitution in nearly everything.¹³

Thus it portends, rather, the development of a new world. Granted the indispensability of new energy resources, ways will in time be found to make them available. But at a price. It may well be expected

¹³THE ECONOMIST, Nov. 10, 1973, at 11.

that our years of cheap energy are gone and that our institutional arrangements must be refashioned on the basis of new techniques of production, new methods of utilization and greatly increased costs. Such substitution of resources would be in accord with our economic history:

For the last 200 years, energy seems to have had a higher elasticity of supply than anything else except transport. Indeed, the accelerating elasticity of supply of these two things is what the industrial revolution since Watt's steam engine has been largely about.¹⁴

So far two developments have been mentioned, population change and resource change. We must now add one third element, the speed of change, which is so convulsive as to threaten the ability of consciousness to adjust to the unknown future that so suddenly becomes today.¹⁵

All these circumstances reinforce the law's grand objective to protect the weak against the strong, even beyond our traditional goal of preserving competition, toward the more socialist goal of promoting egalitarianism if that can be done while preserving individuality.

To summarize, law in the coming years may show the following characteristics:

(1) The articulation of law may be in terms of ever more and more general standards, thus leaving decision in particular cases ever more and more to the resolution of factual issues;

(2) The data presenting the factual issues, and the methods for their evaluation, will more and more require economic, mathematical and other nonlegal techniques for their disposition;

(3) The pace of change in the basic preconditions of society will necessitate more and more frequent legal formulations and readjustments; and

(4) The new formulations will increasingly protect the defenseless against the power of groups in their competitive struggle and may ultimately face the dread need to protect the State itself against the divisive powers of groups, or else yield to anarchy or autocracy.

¹⁴THE ECONOMIST, Jan. 5, 1974, at 13.

¹⁵A. TOFFLER, *FUTURE SHOCK* (1970). These are changes not only in the conditions of living, but even in our basic judgments of worth. J. MONOD, *LE HASARD ET LA NECESSITE* (1970).

Let us now turn from the tenor of the law itself as it may well be in the coming years to the methods these developments will impose on its practitioners. The easiest comment deals with mechanical changes, since they are already upon us.

We are abandoning the lawyers' traditional haunt, the library, at least under the terms we have known it until now. The cost of space is forcing us to microfilm all the older books, though we may still savor the sense of a good physical volume in the more current reports. All files except the most current are likewise being microfilmed and in many instances sent to Vermont, or other remote places of refuge. Our time and finances will be handled by computer.

Instead of the Victorian scrivener, with his symmetrical handwriting (which was often paid by the word), we will compose our documents with the electronic aids now known as magnetic cards, which permit unlimited modifications. Instead of the printer, we will reproduce our own briefs by the MT/ST, as now permitted by the most up-to-date rules of court. Our correspondence will be largely by memory typewriters. Our dictating will be done through machines. Our telecommunications will be instantaneous and worldwide. We will typewrite by telex to Singapore and transmit documents by wire through the telecopier, thus virtually abolishing distance and putting the lawyer in the same building with his client half the world away.

The bar can hardly expect a new Aristotle who is master of all learning. More probably labor law, financing law, antitrust, *etc.*, will need separate lawyers with distinctive expertise in these special fields. Substantial business enterprises are often concerned in each of these fields and many more. Thus the characteristics of American business call for large law offices with multiple and coordinated talents. Moreover, as the business grows it encounters additional and diversified social constraints. The law office must grow correspondingly.

The law office will normally function, on any matter of importance, through a team. For economy in the interests of the client, it will increasingly be staffed with para-legal assistants for the performance of research, reporting and document supervision that do not require legal training. The responsible lawyer normally has the aid of a younger associate lawyer and in more complicated cases the number will need to be increased in proportion to their complexity. In addition, an older lawyer is often needed. His task, beyond guiding the team, is basically to aid their communication with the courts by focussing on fundamentals, decompressing the technicality of their product and resolving it into simpler terms.

This is by no means to underrate the capabilities of judges. They

are not specialists and hardly experts in every particular field that comes before them for adjudication. Certainly they are not as deeply conversant as the lawyer who has worked long hours, or indeed perhaps years, on the case. But they have a feel for the shape of the law and its direction. Though some judges now manifest a predilection for writing their opinions in fancy terms that would have been a delight to Moliere, the great strength of judges is the simplicity and realism of the perspective they can bring to bear. You might say a judge is half way between an expert and a reasonable man.

One of the most lamentable deficiencies of our profession lies in advocacy.¹⁶ I do not mean a peroration like the Scopes trial. In a time when so much is obscure and the vocabulary itself is new, there is special power in simplicity. The advocate should learn to speak by allusion, rather than by profusion. He should be able to move nimbly and give a schematic rendering of a concept or a decision unencumbered by accessory detail. These gifts are equally valuable in the practice of corporate law. The perplexities of new problems and new procedures in the coming years will require an aptitude for simple speech. Otherwise the novel cannot be made familiar. Indeed the measure of lawyers' adaptation to the new demands of coming years may well be the degree in which they have the power of exact statement and instant communication.

Let us look now to our fundamental professional philosophy. A decade ago the word "freedom" aroused tumults of enthusiasm—freedom for everyone, freedom from everything, even "freedom from want." History may inter those words as the last romantic tribute to the democratic form of government. For the future, our creed must be less in terms of freedom and more in terms of service. Other rewards are too transient and deceptive. As Arnold Toynbee said this year to a Britain struggling for air:

We are measuring everything by money . . . and the irony of it is that even our money is melting away.¹⁷

These suggestions are most poignant for the maker or practitioner of the law. He is the heir of our ancient English tongue. He is the legatee of the long struggles in England and this country. He is the recipient, in Law School training, of some acquaintance with these seminal traditions and some discipline in the scrupulous care that must attend upon their application. He knows that the law is never adequate for tomorrow. He knows that it must constantly grow into readiness for tomorrow. That must be with his help.

¹⁶Address by Chief Justice Burger, Fordham University Law School Fourth Annual John F. Sonnett Lecture, Nov. 26, 1973. See 60 A.B.A.J. 171 (1974).

¹⁷N.Y. Times, Mar. 1, 1974, at 29, col. 1.

No nation can afford enough policemen to enforce the law. Likewise there are not enough courts and legislatures to make the law. Since the law, after all, is only a nudge in the right direction, it is basically the lawyer and his client who sustain public order.

Practising lawyers have recently rewritten their code of professional responsibility so as to reflect a deeper and more contemporary sensitivity. But they have not instituted measures of equal merit for the enforcement of that code. Scandals of the last two years are a stain on the honor of our nation. Unless the organized bar can provide a quick and full remedy, the tradition of a lawyer as a companion to the King's conscience may well disappear. The Machiavellian homologue as guide to the Prince would then be all too available as a public stigma.

There is an even more momentous call on the creativity of lawyers. The future needs a new distillation that will arouse the hearts of men in common acclaim. Over time, they are governed by faith and not by appetite. As Edwin Reischauer says:

Greek philosophy gave cultural unity for many centuries to the Hellenic world, contrasting sharply in its durability with the brief flicker of political unity under Alexander.¹⁸

Such a beacon cannot be furnished by a flash of inspiration on the part of any single individual. Historically, it has had to be the product of many minds. "Due process of law," for example, is usually attributed to Magna Carta. But it is not mentioned there. That says only that no one shall be set upon except "by the law of the land." Successive controversies and enactments in the Fourteenth Century developed into the phrase "due process of law."¹⁹ It is not clear that the words, when used, meant anything more than "by customary methods," that is, by methods that were accepted as customary before the moment in question. Today, the words alone, as applied to any given situation, are purely talismanic, without more meaning than *Honi soit qui mal y pense*. But the labors of the courts and the thinking bar have invested them with riches that enthrone the phrase today as the most revered, if Sibylline, monument of Anglo-American jurisprudence.

Faith, however, must be renewed. Each age deserves its own proclamation of what is to be strived for most mightily. The lawyer stands in the center of competing thoughts. His training is to perceive

¹⁸E. REISCHAUER, *TOWARD THE 21ST CENTURY; EDUCATION FOR A CHANGING WORLD* 77 (1973).

¹⁹5 Edw. 3, c. 9 (1331); 28 Edw. 3, c. 3 (1354).

implications, to sense values, to select from the balance of social forces and to renew tradition by his insight.

Ambition and ability are not enough. Social sensitivity and sense of quality are required. Lawyers must look through the written word, like courts, and give it such persistent polarity as will redeem the future. Lawyers, living thus in the mainstream of public need, can, as their journey approaches conclusion, merit the eulogy that Mr. Justice Holmes accorded his comrades in the Civil War:

[W]e who have seen these men can never believe that the power of money or the enervation of pleasure has put an end to them.²⁰

²⁰THE OCCASIONAL SPEECHES OF JUSTICE OLIVER WENDEL HOLMES 4, 10 (M. Howe ed. 1962).