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Emerging Patterns in American Law

MURRAY L. SCHWARTZ*

The assigned title of my talk is “Emerging Patterns in American Law.” It is at least mildly presumptuous for me to address any audience—let alone a judicial one—on the current state of a branch of the law; it would be inordinately presumptuous to attempt to cover the corpus juris, even were we to read it together responsively. But my charge goes beyond that.

For the necessary implication of the title is that my task is to predict what American law is likely to be, down the road. You should be advised that I lack some credibility in that role, for I began my career as a predictor with a forecast that there would be an Adlai Stevenson landslide, not only in 1952 but also in 1956. I have not fared much better in the following two decades.

In self-defense, I should refer to the fact that there is an inexorable mathematical limit on the accuracy of one’s predictions. Economist Kenneth Boulding has pointed out that if we predict the state of affairs 100 years hence, and are 99 percent correct for next year and for each year thereafter, we shall be only 36 percent correct when the 100 years has passed. Using the same approach, but reducing the degree of accuracy to a more reasonable 90 percent per annum, I calculate that a prediction of the state of affairs ten years hence can be only one-third correct.

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The remarks which constitute the text were delivered to the Conference of California Judges at the annual meeting of that body in Fresno, California on September 20, 1976. They were also delivered in somewhat modified form to the annual meeting of Joint Advisory Committee of Continuing Education of the Bar in Monterey, California on October 9, 1976. Some of the remarks were drawn from the author’s introductory chapter, “Law and the American Future,” from the volume of the same name, published by the American Assembly and Prentice-Hall, in 1976.

This may explain why an expert is defined as one who can explain satisfactorily why his predictions went wrong.

Finally, and this will conclude my apologia, I cannot remove from my own thinking the fact that 1984, the year Orwell made famous, will both come and go during the forthcoming decade.

In considering the patterns of law that are likely to emerge, I start from the premise that there is a symbiotic relationship between the organization of a society and its patterns of law, so that events that affect social organization also affect patterns of law. There are many natural phenomena that affect how a society is organized, and which should be considered in any forecast of the future. Some, however are outside my own capacity for speculation, even though they clearly will affect our law if they occur. Thus, I shall exclude such natural, cataclysmic events as a new Ice Age, development of varieties of insects and other forms of life that are resistant to our defenses against them, and extensive droughts that bring persistent, world-wide famine. I should also like to exclude from consideration changes in social organization and law that are the consequence of unanticipated discovery and invention, as for example, fire, the wheel, the steam engine, even the use of the horse in warfare which Jacob Bronowski asserts in his *Ascent of Man* changed the course of conquest over the globe. Perhaps nuclear catastrophe should be added to this list.

I confess to you I also do not know how to think about such biological discoveries as cloning—the ability to create perfect replicas of existing human beings without conception. Some possible scientific discoveries are discouraging as well as mind-boggling. However, other technological developments bearing profound consequences for our society and its law are upon us; they cannot be ignored, and I shall try to put a selected few of them and their impacts in context.

What, then, I shall talk about are a few selected, illustrative topics: demography, technology through the vehicle of communications, dispute-resolution, both large and small, and if time permits some speculation about a philosophical theme or two.

Let me begin this foray into the future with a look into the past. Since this is our bicentennial year, it may be helpful to contrast some vital statistics at the time our nation and its legal system were founded with those of today.

In the two centuries between 1790 and 2000, we shall have grown from four to 275 million persons. Our annual birth-rate has declined in two centuries from 55 persons per 1,000 to 15, while our life expectancy has increased from 40 years at birth to over 70. Looking ahead on this front, in the beginning of the twenty-first century (less than 25 years away), one out of every seven persons in the United States will be over 65—as contrasted

with one out of ten today—and within that group there will be 100 females for every 65 males.

It takes no seer to suggest that our concentration on youth—and surely no society in history has ever worshipped its young as has our own—will have to shift in emphasis, if not in focus, to the aged. Problems of discrimination against the aged may disappear as that voting bloc becomes ever more powerful; perhaps the legal structure will have to protect against the political power of that group. An illustration is the problem of pension and retirement funds. To the extent, as in the case of Social Security distributions, current payouts to the retired are funded through current pay-ins by the employed in the form of taxes, we may reach the point where the employed are spending their energies supporting the retired rather than themselves. Indeed, our increasing longevity may exacerbate that problem, as the compulsory retirement age is progressively lowered to make room for the young. We have not seen the end of the struggle between the young and the old.

The ratio of males to females in the over-65 age group may affect our legal prohibition against polygamy. Just as conduct which once was proscribed as adultery and fornication is now accepted if not honored with merit badges, so the ratio of females to males may force a shift in our law proscribing more than one mate, to rewarding the elderly male who has more than one wife, if indeed our concept of marriage and the nuclear family survives, an issue to which I shall return shortly. Parenthetically, the violent-crime rate should fall during this same period as the percentage of the principal crime-committing age group falls, but white collar crime is likely to increase for comparable reasons. Given traditional bureaucratic tendencies and the extensive law enforcement apparatus, we can expect an increase in the rate of prosecution of white-collar crimes as the number of violent crimes decreases.

Still on the statistical side and comparing 1790 with today: our household family size has been halved from six persons to three; the average number of children born to women has dropped from six to two. In 1790, 95 percent of the population lived in rural areas; that percentage has dropped below 25, as the urban centers have continuously expanded and merged. This migration to the cities has been specially marked in the case of blacks, some 73 percent of whom, as late as 1910, lived in rural areas, as contrasted with the 81 percent who in 1970 lived in urban areas.

We have not, by any measure, eliminated discrimination or antagonisms based on race or ethnicity, but we have achieved, in one generation, a truly remarkable shift of treatment—both legal and social—of our minorities. Tomorrow's legal problems in the areas of ethnicity and race will, in my view, fall into two categories. The first is in the nature of continued legal measures to eradicate the residue of official, quasi-official, and even private

discrimination. The second is composed of that group of policy issues reflected in the shorthand phrase, "reverse discrimination," providing favored treatment—sometimes to the exclusion of others—because of race or ethnicity.

If we are vigorous in our prosecution of discrimination because of race or ethnicity, my prediction is that, whatever may be the immediate results in the reverse discrimination category, these problems will take on a different perspective, a perspective based on socio-economic status, or class. That is, we shall see the legal arena's attention and formulation of the issues shift from race or ethnicity to wealth or poverty-based classifications.

I am tempted to say that sex will not pose a problem in the future—but you might interpret that as either braggadocio or resignation on my part. What I would mean, if I were to make that statement, is that in an incredibly short time—five, ten years—the legal and social status of women in the United States has been largely transformed. As significant as the battle over the Equal Rights Amendment appears to many to be, its adoption is likely to have more symbolic than operational consequences. It is unthinkable that the move toward full equality will not proceed at least until the claims of discrimination from the other sex reach an equilibrium point. Community property law may truly become a two-way street. The female constituency is too large to be denied full equality.

It is tempting to speculate but hard to know what factors caused this sudden transformation. Invention—the washing machine and the pill—played its part. The upheavals of the late Sixties seem to have served as catalyst, and perhaps in this respect we are experiencing the new morality heralded in that time, although I detect little other significant change resulting from that period.

Be that as it may, to say that problems of sex discrimination will diminish or disappear does not mean that the new equality will not produce new legal patterns. We contemplate a world in which there is no specialization by sex. The assignment of women to the home has shifted from a lifetime tour of duty to a relatively brief stay on location. Even the woman who adheres to the traditional role and has two children by her late twenties, staying home to raise them to young adulthood, will still have some 30 years of life ahead. Thus, she will have a two-phase life—a short phase of reproductive and domestic preoccupation, and a longer phase of more worldly and nonreproductive functions. In social terms this must produce a change in sex roles and relationships. In legal terms it means at least that those provisions of our law that are based on the husband as the breadwinner and the wife as the homemaker will have to be re-examined in the light of these new assumptions.

For example, what about the specific legal institution of marriage? Can it

survive the onslaught of the fungibility of the sexes? If not, what relationships are likely to arise which will require the creation of specific legal consequences? Do the communal living efforts, marriages between gays, serial monogamy ventures, or just plain living together without ecclesiastical or judicial blessing foreshadow new forms of life-sharing which will replace the marriage bed? Here, prediction is a matter of faith, not science, and no one's guess is entitled to disproportionate weight. For what it is worth, my own view is that the basic social unit will continue to be that of husband and wife; that we may witness a higher incidence of different living arrangements; but that these will not persist in any particular form or forms but will rise and fall with other social movements. If there is a new pattern of law which will emerge from these developments, it is that the contract basis of marriage will become ever more important, compared to its Heaven-based, natural law origin.

I have looked backward in order to project a sense of the remarkable ability of our legal system to adapt to massive change in our living patterns. For, as I have indicated, the demography of today bears little resemblance to that of two centuries ago. As an aging, urban, increasingly nonwhite population with smaller families and fewer children, we are a far cry from the population which ratified the Constitution and the Bill of Rights. Looking forward, do we foresee similar or even more massive changes in our living patterns—changes which will require adaptations more like quantum-jumps than incremental developments?

Let us leave demography and look at a different dimension of our world: technology—and how it will affect our law. One does not have to accept in full measure the hypothesis that technological discovery completely shapes social organization and the law to recognize that such discoveries have profound consequences. I should like to present briefly how one such cluster of inventions is affecting and may increasingly affect us and our legal system. I refer to the field of communications, chosen because it seems to have a geometric rate of innovation and because we have relied so heavily on communications for the realization of our essential democratic hopes.

In short, we have today a system of instant, continuous, pervasive and global communications. That this system must have a profound impact on our social order and its law seems indisputable to me. It is not so much the fact that when at home, the American family spends one-third of all waking hours in front of the television screen or that by the time children graduate from high school, they have spent more hours before the TV set than in the classroom—or indeed, at any other pursuit except sleeping. For whether this is bad or good depends on what they would otherwise be doing.

What is important, in my view, is the not-so-subtle transformation of reality brought about by the media. For example, in watching the national

party conventions, I was struck by a new perception of what was taking place. For it seemed to me that both the media and the participants were operating under the assumption that the event was the property of the media. Nothing happened unless the media chose to report it—many times unless it was present—and as concerned as the participants may have been about what was going on, they appeared more concerned about how what was going on would appear in the media.

A second observation has to do with the relationship between the processing of information and its impact upon our political process. Two illustrations will suffice. The growth of the portion of the electorate that classifies itself as independent, rather than as Democrat or Republican, has been attributed to the existence of the mass media, which now perform the function of providing information about candidates and issues, thus eliminating one of the most important reasons for party affiliation. At the same time, it has been suggested that the very substantial proportion of non-voters is a consequence of too much, not too little information, contributing to the individual's sense of impotence in the face of the constant outpouring of information and consequent non-participation.

You may not agree that these phenomena exist in substantial measure, or that if they do, they are undesirable. I cite them as possible consequences of communications which are at odds with *raison d'être* of the protection assured the media: our faith that the first amendment is our means of resolving the problems of our governmental and political processes. Paradoxically, perhaps, this faith in the first amendment seems to have increased during the same period that ownership of the principal media—newspapers, magazines, television—has become more and more concentrated.

Turning to the legal side, the impact of the new technology has surfaced in a number of ways: financing of elections and limitations on expenditures; fair comment, access, equal time and related FCC issues; free press-fair trial, and media and reporter immunity from liability because of and from disclosure. In the main, although not totally, the law—both legislative and judicial—has resolved these issues in the favor of the media: the referent has been the first amendment. I am not urging that these results singly or collectively, are wrong. I do believe, however, that we shall see in the not-too-distant future a pattern of law that is primarily concerned with a reconceptualization of the values and doctrines of the first amendment in the light of the new communications technology. That, to me, is one of the most challenging sets of issues which will confront us.

Futurism is fun and games for some; for others it is a parade of inevitable horrors. In considering where we have been as a basis for predicting where we shall be, I have been struck with how remarkably resilient our legal

institutions have been. After all, our Constitution has been amended de jure only 16 times since the adoption of the Bill of Rights, and one of those amendments repealed another. We have been able to change important elements of our legal structure peaceably, and the resulting system seems to have worked for the well-being of the general population as effectively as any. Can we have confidence that the structure itself will be adequate for tomorrow? What changes will emerge? I should like to discuss, again in brief compass, two topics: dispute resolution and the vindication of the public interest.

There are three trends in the dispute-resolution arena. The first is the judicialization of decision-making, achieved largely through the Due Process Clause: notice and hearing, if not more, are constitutionally required today for categories of decisions which yesterday had been assumed to be within the unquestioned discretion of the decision-maker. I need not elaborate before this audience either the reasons that underlie this trend or its extent. Although there appears to be some controversy about whether judges are overworked—and it would take a good deal of temerity to treat that as a debatable issue before this audience—we now put to our judges more types of disputes than ever before in our history.

A second and related trend can be traced to the cost of litigation and its unavailability to the average person. One attempted solution has been the rise of such substantive law changes as those contemplated by no-fault liability in automobile accident litigation and in divorce; changes in the probate process itself are pending. Systemic changes to the same end include arbitration, ombudsmen, alternative grievance procedures and the like.

A third pattern is the professional response, aimed at making the legal services delivery system more efficient by changes in the structure of the legal profession: in that category I would put the relaxation of the rules against lawyer advertising, pre-paid legal services, group legal services, paraprofessionals and specialization—changes embraced in most cases with less enthusiasm by the professionals than by the proponents.

It is not likely, in my view, that these three trends will converge into a single stream or solution, but rather they will create a dynamic equilibrium. That is, the extension of the Due Process Clause to still more types of decisions will continue, but will be accompanied by the elimination of the bases of controversy through substantive or procedural law change, by the creation of alternative forms of dispute-resolution which will be judicially approved, and by the increased flexibility of the delivery system, including not only those changes I have mentioned earlier, but also major inroads on the doctrine of unauthorized practice, permitting laymen to furnish services that are now the exclusive province of lawyers.

Evidence of underlying problems in our democratic system of representation is furnished by that remarkable phenomenon of the past decade: the public interest law firm. Indeed, the almost unchallenged appropriation of the phrase, "public interest law firm," suggests a universal acquiescence in the premise that our present system of representation too often finds no room for the public interest.

The public interest law firm is not the only manifestation of that concern. To some degree, many of the variations on the theme of dispute-resolution stem from the same vibrations; the back-up centers of OEO Legal Services, the class action and shareholders' derivative suit reflect the same problem; so, too, current attacks on the adversary system and on the total commitment model of the private lawyer in negotiation and counselling have similar roots:

If these are attempted solutions, what is the problem? In gross terms, the problem has to do with alleged or perceived inadequacies in our law-making institutions. The attack would run as follows: Our legislatures are impotent, or, worse, are unbalanced in their representativeness; legislative response to popular or minority interests is too slow or too skewed to be effective. Administrative agencies suffer from two basic flaws. They quickly become the protectors of those they are established to regulate; and they equally quickly take on the archetypal characteristics of bureaucracy, losing sight of the purposes for which they were created, and ignoring the public they are designed to serve. That leaves the judicial branch, which unlike the others, must decide the rule-making issues that are put before it; the problem with this branch of our lawmaking institutions is that in the past not all relevant interests have been represented in the adjudication. The purpose of public interest law is to remedy that deficiency by representing otherwise unrepresented interests before our courts.

I shall not essay an evaluation of these and other contentions. What is important for my present purposes is, first, to understand the concerns that gave rise to and support the concept of public interest law, and, second, to ask, what is its future?

In a direct way, the future of public interest law depends upon financial support. With appropriate funding, I see no end to the number of lawyers who will be attracted to this branch of the profession and no dearth of litigation which may be brought. However, the prospect of termination of foundation support has left the professional public interest lawyers with two principal funding sources: the first, subscription, has had indifferent success; the second, attorneys' fees, has had its legal problems, is uncertain, and runs the continuing *in terrorem* possibility that a reciprocal obligation might be imposed upon unsuccessful plaintiffs. To the extent that particular statutes authorize one-way attorneys' fees, public interest law firms lose their flexibility in the choice of the problem areas they choose to enter.

My crystal ball is unusually clouded when it comes to public interest law, in any of its mutations. Like many other waves of change, it is likely that what will remain will be a viable residue of each of the forms, enough so that from time to time, we will be able to give the machinery a kick.

Having proffered what must seem to be a disconnected and highly speculative menu of subjects—a smorgasbord—I am tempted to label my concluding remarks as a half-baked Alaska. But many of the topics I have touched upon are, for me, instances of the two major conflicts faced by our society and by its law. Neither is new to us; the earlier patterns of each are familiar.

The first of these conflicts is the struggle between centralization and de-centralization. The centripetal forces of transportation and communication have made this world and all its regions a living environment in which traditional macro-measures of space are replaced by micro-measures of time. No longer do we ask how far is another place; we ask how many hours it will take to get there, or how many minutes before we can communicate by phone. As a consequence our centers of power have grown stronger; their ability to monitor and to fashion the behavior of millions has increased many fold. This pressure toward the center—this centripetal pressure—affects all of us. But, as Newton's Third Law of Motion puts it: To every action there is always opposed an equal reaction. And we see throughout the world, the struggles of minorities, sects, groups—some thought long since gone—reasserting claims to autonomy, to separation from the central authority. Scarcely a nation has failed to experience its own separatist rebellion.

In our own country, the struggles have been more or less peaceful; yet tension between the central authority and the hinterland is increasingly manifest: consider the drive toward revenue-sharing, local control, the sudden anti-Washington and more general anti-government moods. Each is an attempt by smaller units to preserve some autonomy in the management of their own affairs. In a substantial sense, this is the underlying reason for the great legal battles over the formulation of the right to privacy and control of government institutions.

But the power of the center is too great; whatever the current mood, technology has made us too interdependent to go our separate ways. This does not mean that the pattern of our law of the future must be monochromatic. To carry the figure too far, the woof of local control must not be obscured by the warp of the center in the fabric of the future. If our traditions suggest that there is an overriding task for the judiciary, it is that of preserving the identity and character of the smaller units—that is, to reinforce the centrifugal forces, even as the centripetal ones press inexorably inward.

This will not be an easy task—if ever it has been in our history. For the

great political philosophical issue of our time—my second major conflict—is that of equality versus individual freedom of choice, and, in my view the achievement of equality turns in very substantial measure on the presence of a strong central government.

I do not mean to underestimate the value of equality. In a grossly unequal society, it is a mockery to talk about values such as individual choice. Yet, as we eliminate the grossest of inequalities, we find the ever-increasing presence of the central government and limitations on individuality—achievement, preference.

The anthropologist Ralph Linton once wrote that “Man is an anthropoid ape who is trying to live like a termite.” How sound was his biology or how loaded his imagery, I shall not debate. But the thought is an important one. As we try to create social organizations composed of equal units, we must be conscious of the other side of the coin: the loss of differences. That task, too, I put to you—for how that pattern of our law emerges will truly determine who and what we shall be. The determination of that pattern is the overriding challenge to the judiciary.