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Falling Rocks and Rising Risks in New Lands of Law†

*Roger J. Traynor**

Five years ago, on the road to an old mountain town, I observed that the age-old risks of falling rocks continued to haunt new roads, and that the risks had grown commensurate with construction and traffic. No miracle of engineering was ever a safety match for the perpetual motion of the earth and its people.

A comparable observation could be made of law. True, we have dislodged many dangerously situated rocks such as obsolescent or confusing precedents that were once perched to fall on some hapless passerby. New outcroppings have appeared, however, signifying the risks that attend our development of new areas of law. Like good mountaineers, we must take our bearings anew, the better to keep on a rational course.

In doing so, we are bound to accept, and to utilize as best we can, the navigational aids of the time and place, the late twentieth century in an economy increasingly devoted to services as well as products, functioning under the traditions of the common law and multifarious statutes as well.

If the greatest modern change in the law is the shift in emphasis from property to people, the greatest change in lawmaking is the shift in predominance from courts to legislatures. The guideposts along the mountainous paths of the law were once mainly the marking tablets of courts. The engraving was a slow and often inefficient process; the lettering bore old-fashioned dips and curves. The guideposts nonetheless were majestic enough to command attention, even when any resemblance between their dictates and a changing scene around them had become strictly incidental. Even when they no longer made much sense, even when narrow logic had overtones of lunacy, and dull readings of once bright precedents had undertones of retardation, these guideposts evoked a reassuring continuity and stability. They are still there, but now they are obscured by formidable poles

† Based on a speech to the Utah State Bar, Park City, Utah, 8 June 1972.

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and fences posted with the motley directions of the legislators, of Congress and state assemblies and town councils and sundry Authorities and Boards.

It cannot be otherwise. As people and their wants multiply, so do laws. We have come a long way from a wilderness where those who sighted the signs of unoccupied property shrewdly built fortunes on adverse possession. Such a concept of the common law, once admirably designed to encourage active use of the land, has lost much of its applicability now that most of us live in the glass houses of cities. Statutes proliferate to spell out permis-sible or prohibited uses of property in relation to the community. A man's property is no longer his domain to rule as he pleases so long as he makes at least token use of it. Moreover, despite his increasing prosperity in terms of well-being and longevity, he is himself less a free agent than ever in relation to a state that busily prescribes traffic rules for his procession from the cradle to the grave.

It may be less a paradox than a symptom of the expanding dimensions of our lives that along with new constraints upon us, we also enjoy greater protection than ever of basic freedoms. The state has become a formidable omnipresence that, with judicial prodding, never ceases to read us our rights. Two major risks in our new lands of law ensue, each threatening the delicate balance between the individual and the state, a balance as essential as any in ecology. The first risk is an excess of constraint by the state, beyond the inevitable regulation that attends a complex economy. The second risk is an abuse of freedom by a small number of people at the expense of many others, an abuse that ironically opens the way for the state to intervene with more rules.

Consider first the risk of excessive constraint. For all the seeming efficiency of legislative mass production, it can often operate irrationally. The very hyperproductivity of legislators in their expanding fields of lawmaking exemplifies the riches and perils of an age of plenty, its abundance and attendant pollution. Too often the branches of spreading bureaus are unwittingly working at loggerheads.

Receptive we may be to new riches in the law, but we cannot let them accumulate in such haphazard heaps that they confuse the law at the expense of rational reform. Hence, as legislators increase their already massive output of statutes, judges must correspondingly enlarge their responsibility for keeping the law a coherent whole. Now it behooves them to clarify confusing or conflicting statutes not merely in the context of precedent, for the sake of stability, but also in the context of the expanding rights of all people in a democratic society, for the sake of justice.

In this modern perspective there is new significance in the old-fashioned tablets of the courts.

The very caution of the judicial process gives some assurance that our legal system will not deteriorate into a mindless bureaucracy. The judge is confined by the record in the case, which in turn is confined to legally relevant material, limited by evidentiary rules. So it happens that even a decision of far-reaching importance still concludes with the words: "We hold today only that . . . . We do not reach the question whether . . . ." Circumspectly the engraver of guidepost stops, so as not to confuse the pattern of transition from yesterday to today. The guideposts enable the wanderer to find his way from Park City* to Salt Lake City or San Francisco; from there he can find his way to the moon. Tomorrow is time enough for new guideposts, as the facts of tomorrow come due. There is then time enough for reason to temper each new day of judgment.

Fortunately, independent courts in this free country have demonstrated that individuals have legal recourse against legislative or bureaucratic excesses. The governing Goliaths who would hurl boulders to instill fear in the governed have been deterred on occasion by well-aimed arrows from the courthouses.

At the same time, however, courts are open to the risk of being misused themselves as ad hoc legislatures. In an age of tumult, characterized by scholars as an epochal departure from customs and beliefs that once encompassed standards of conduct, crafty leaders of assorted causes have come to view the bench as a service counter for the dispensation of olympian commands to the legislature in the name of *liberté, égalité, fraternité,* and miscellaneous beautiful relationships. A judge grooved in the rock beat of current times may also be asked to prescribe a pattern for urban or interurban transportation, to render a directive to the legislature on a redistribution of income via the tax laws, or to incorporate into a judicial pronouncement on the zoning of marshlands whatever declaration of foreign policy on continental shelves has been advanced by some ambitious town council. There are also regularly requests for a kindly judicial pronouncement on the right of an individual to do as he or she pleases, free of such chilling considerations as the rights of other individuals. Freedom, in the view of many special pleaders, is not the harmonizing of many individual interests within a variegated society, but the supremacy of the capital I against a lower-case world.

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* The author is a native of Park City, Utah.

As one who has declared himself against the perpetuation of shibboleths that no longer relate to the facts of life, if they ever did, I should like now to add a cautionary postscript against punch lines from the bench to embellish social-planning briefs for the millenium or to brighten librettos about the I, as in Idiopathy. The zealots of law reform or individual freedom too often are as indifferent to exacting standards of quality control as the mechanics of the status quo. Today there are cynics among the zealots who would debase the judicial process into a free-for-all forum. When they are restrained from setting up their soapboxes in the courtroom, they freely hurl their diatribes against such restraints within shouting distance, at times on the very steps of the courthouse.

Those who abuse their unparalleled freedom in this country create risks as threatening as those created by irresponsible lawmakers in our new lands of law. Hence it may be timely to bear witness, from my own life as a judge, to the traditional openness and fairness of our judicial procedures, which are crucial to justice. Foreign visitors to our courts never cease to be amazed at a legal system that affords such meticulous protection to the very demagogues who denounce it. That irony is compounded when bullies not only exploit good causes to give a gloss of credibility to irresponsible lies, but also intimidate normally reasonable people into echoing the lies. I honor the traditions of my sturdy country that encompass a tolerance for irresponsible statements as a price to be willingly paid for an open society. Given that openness, I mince no words in stating my own view that it is irresponsible for anyone to echo such demagogic assertions as the proposition that one group or another in this country cannot get a fair trial, when he is well aware that no country in the world has done more to insure fair trials. They confess cravenness who rationalize such statements as no more than strategic amens to placate rabble-rousers, a pouring of oil on troubled waters. The consequences of pouring oil on troubled waters are as lamentable for society as for the ecology. The addicts of fashion who would not be caught dead with anything but the latest cause should at least be challenged when they parrot the nonsense of wizened gurus and denounce as political trials any judicial procedures for resolving open questions on common garden varieties of crime.

The unholy combination of bullies and the cowards who placate them is particularly sinister because their theatrics, purportedly on behalf of striking down one alleged injustice or another, in the end threatens the freedom and justice that so many of us still take for granted. Consider the consequences, for example, of

the tendency to equate the most cynical or brutal lawbreaker with Antigone. Both have broken the law, we are told, for a higher law. I have no quarrel with Antigone, who made a fairly persuasive case for giving her brother decent burial in defiance of an arbitrary order issued by Creon that was itself a violation of established custom. I cannot yet be bullied into believing, however, that terrorists are on the same high plane of lawbreaking when they hijack a plane, or bomb a building in which people are working, or stone at random, in the name of social justice, the windows of shopkeepers who are hardly the proximate cause of social injustice. The Greeks have a word for such guerrillas, but it is not Antigone.

A significant element in the heroism of Antigone distinguishes her from either the publicity-seeking street actors who build up every scene along their way or the anonymous alley cats who destroy everything in their path. There was nothing in her defiance of the state that wreaked injury on innocent people. She would not have understood the cynicism and brutality of the bullies who ride good causes.

It should hardly be necessary to explain that my own declaration against such bullies is not to be interpreted as a declaration against the good causes that they sometimes exploit. So confused has communication become, however, amid the cynical caterwauls of self-styled public saviors, that it has come to prove necessary even amid seemingly rational groups to supplement any critique of the caterwaulers with an oath that I am not now, nor have I ever been, a warmonger or an imperialist or a racist. Indeed, why should I be when people all over the world, and of every conceivable group, bear such startling resemblance to one another in their occasional saintliness, their recurring villainy, and their perennially bumbling humanity?

This ritual over, there may be need of still another, a statement of why I think the time has come to focus on today's social problems without an endless recounting of the sins of the fathers, grandfathers, and distant kin. Since there is not a person alive, from Alaska to Zambia, whose ancestors were all paragons of virtue, the game of *mea culpa* can be played all the way back to original sin, but it is a great waste of time when there is so much real work to be done. Moreover, there have been enough impressive gains in social justice in recent years to give hope of many more, despite the woe-cryers. Among many people, there is at least a will for consensus rather than conflict on the salient interlocking issues of the day. There is a new yearning for moral values to give meaning to material gains. There is even a chance that

we may be able to turn to good social purpose the interest in participatory democracy, once it has emerged from its kicking and screaming infancy.

There is some ground for hope that the growing participation of the young, not only in political life but also in groups such as bar associations, will at least invigorate the democratic process. What an army it would be, young lawyers across the country armed with pens, who could do battle against such basic ills of the democratic process as the chilling costs of elections, the feverish pace of campaigns, and the delusions of grandeur of occasional newcomers in legislative halls who use them as bases of power for disrupting a democratic society. There could be a continuing review of bureaucracy in action, of the excess fat of certain bureaus and the anemia of others. There could be intensive critiques of government budgets. Never have there been more challenges to lawyers, or more high roads open to them along which they can confront those challenges peacefully and effectively. It is for them to take the lead against the mongers of confusion and fear, the ugly substitutes for law and freedom, and to reason why every inch of the way.

We can concede real grievances: widespread delays in courts, antiquated procedures in some states, and the plague of politics in others. Such grievances could be readily remedied whenever bar associations and judicial councils impelled legislatures to set reform in motion. There would be need of only one help more, the sustained support of editors and reporters responsible enough to forego pudding headlines for the hard job of sorting out significant from inconsequential details and assembling them in readable form. If they did that job, they would find readers. With writing and reading once again in season, would there not be a new age of reason?

More than ever, we must count on the men and women of the law, not only to develop new ground but also to minimize the attendant risks for others. Most of all, we must count on the sense of balance that reasonable lawyers can bring to a society seeking to reconcile inevitable government regulation with essential individual freedom. In the West that sense of equilibrium is fostered by the still vivid history of the trek across the wilderness. That heroic trek, sometimes depending on how alertly one balanced the handcart that carried all the belongings for the makings of a new home, has set an example for the perilous expeditions we now confront along the traffic-clogged roads to new lands of law.