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R. J. Aldisert[1]

Legal Science Versus Science in Law

From the viewpoint of the layman, there is something awesome about judicial power. The judges have unbridled power, which they are free to exercise or withhold at will. They are free to promulgate new laws as well as interpret freely the old. There are no parameters to judicial authority.

Moreover, because the public perceives that there are those known as good judges and those known as bad, the layman has devised a precise scientific method whereby the measure of a judge can be obtained with computer-like accuracy.

The premiere standard of measurement utilized by this scheme of "judge-judging" is Does he know the law? If, indeed, he does know the law, this means he knows most, if not all, of the federal and state statutes; most, if not all court precedents; and that he can summon and apply instantly and properly these rules and their various interpretations. When so applied, the system designates the applicator a "good judge."

Thus, permeating these lay impressions of judges is the notion that the law is always clear; existing somewhere in black letters, waiting merely to be summoned. These lay impressions we know to be most unrealistic.

But, there are also misimpressions of the judicial process created or perpetuated by lawyers and judges alike. That is, there are those who foster the impression that the decisional process is limited to finding a precedent; a process merely of search and comparison; a search for some predigested solution, wrapped in plastic, bearing a label and a court registry number.

These lawyers and judges would limit matching the "colors" of the case at hand against the "colors" of many sample cases spread out on a desk, with the sample nearest in shade providing the applicable rule. Although this is a simplistic view of the judicial process, many judges and most lawyers seldom get beyond this color match process in any case.

This distorted view of the judicial process overlooks the all too frequent situation where competing analogies supply a hint or clue, but where authoritative command is lacking.

What lawbook, computer printout, or scientifically designed body of rules dictates these answers? Is there a scheme prescribing the formulation of solutions to those cases of novel tint and hue? Is there a science of the law as there is in other professions? If so, what are its bounds? Of what stuff is it made?

The forensic pathologist summons the criteria of the laboratory. The toxicologist calls upon his test tubes. The criminalist, his comparison microscope and all the formulae of ballistic science. The examiners of questioned documents have their recognized techniques. The pyschiatrists, odontologists, the pharmacologists—you name the medically trained scientist, and you can also name nationally recognized standards.

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[1] Judge, United States Court of Appeals for the Third Circuit, Pittsburgh, Pa.

There is measure, methodology, system, regularity, to the discipline of the conventionally scientific professions. There is also science in the legal profession.

But here, legal science describes a reasoned body of principles for the administration of justice; a body of principles, not a compilation of detailed rules or a compendium of regulations.

Roscoe Pound told us that the antithesis of this body of principles "is a system of enforcing magisterial caprice, however honest and howsoever much disguised under the name of justice or equity or rational law."

This is a difficult concept to articulate because nine out of ten laymen, and an equal proportion of modern day law students, feel that every case can be judged by asking a simple question, Is it fair? Fairness, like beauty, is in the eye of the beholder.

So, the first lesson we would learn is that legal science does form some parameters, some limitation on the part of judges to decide cases other than by whim, caprice, or personal inclination.

Yet, although it is desirable that there be a certain degree of scientific law, the symmetry of law should represent only a means to an end, because law must not degenerate into what Professor Pound, in 1908, termed mechanical jurisprudence, wherein the quality of the law is determined by the niceties of its internal structure rather than by the results it achieves.

Roman law, in its decadence, furnishes a striking example of this. Originally based on *a priori* principles, it degenerated into a jurisprudence of rules, not a jurisprudence of principles.

The tendency of scientific law to become mechanical is, of course, founded in the layman's love affair with technicalities, his unabashed admiration of ingenious technicality, his feeling, largely fed by Hollywood movies, novels, and Perry Mason, that the presence of technicality is a manifestation of cleverness, that good law needs a certain ballast of mysterious technicality.

Thus, the layman believes that a contract signed in pencil or with a ball point pen or on Sunday is no good; that notice must be delivered by registered or certified mail or personally delivered by a process server.

A good trial lawyer always throws in a bit of this mystique of specious technicality to appeal to this attribute of the average man on the jury. The constant ravishment of photographs in evidence is an example, felt tip markings with arrows, indicating the locations of automobiles and pedestrians and what have you.

My thesis then emphasizes the necessity for scientific law, but not too much; that there be certainty in the law, but not too much; that there be stability in the law, but not too much.

If all this be so, what is the stuff of which decisions are made? How do we achieve the stated goals of judicial administration: certainty, impartiality, and permanence? Holmes said: "The life of the law has not been logic; it has been experience." How then can we have scientific law if logic is replaced with experience, whether personal to the judge, or general in the history of his fellows?

Indeed, does not Holmes' statement confess a lack of stability in the law; that law is the product of subjective magisterial caprice? Although I cannot provide an answer to this, I recognize at least this much: there is a difference between *why* a judge reaches a decision and *how* he reaches it; that judges generally begin with a vague anticipation of a conclusion, or at least of alternative conclusions.

This is why we decide, or at least why we arrive at a tentative conclusion. But, again, I can provide no pat answer in determining whether, in reaching this conclusion, the legal

principles command the result, or the result summons the necessary supporting principles. What came first—the result or the principles?

There has been insufficient analysis of the decision-making process of judges. We are exposed only to the written opinions of the judiciary; and these reveal how a decision was reached, and furnish hardly the merest clue as to why it was reached.

Holmes had difficulty with slavish adherence to logic in the decisional process. He saw the obvious problem that we can go forward with our logic, with our analogies, and with our philosophies until we reach a certain point, the point at which the paths of logic diverge.

When this occurs, the choice must be made between completing logical arguments. Resort must be made to something other than legal philosophy; resort must be made to history, to tradition, or to public policy—that is to say, to the interests of social welfare.

We are now going through an era where social welfare or public policy has dominated the decisions of the court. There is no field of the law where the dictates of social welfare or public policy dominate as in the interpretation of the federal constitution.

For example, what is really meant by the term "strict constructionist" as applied to Supreme Court justices? Is this not really a shorthand method of expressing a desire to move the balance in the application of social welfare, of public policy—of moving this balance more in the direction of the interest of society, or the public order, than towards the protection of individual rights? away from the protector of individual rights which was a hallmark of the Warren Court?

In shirt sleeve language, this means: you federal judges are coddling criminals that we criminalists and police scientists convict, and you federal judges are setting free!

Thus, a strict constructionist is one who, as a matter of public policy, moves the balance away from the protection of the individual and toward the interest of ordered society.

Thus viewed, the contours of scientific law do appear in an analysis of jurisprudence. They appear not with the neat precision of traditional disciplines of the physical sciences. They do not have the incontrovertible classifications of fingerprints or even the precise measurements of the old Bertillon school; nor the predictability of the chemical tests of a toxicologist. But at least legal science in the common law sense is comparable to the approach of the ballistic scientist or the forensic pathologist, for these disciplines all relate the specific to the general, as disciples of the practice of inductive reasoning.

We must conclude that there is science to the law because basic principles are present, from which specifics integrate to form general principles of law.

The molders of jurisprudence today have abandoned the mechanistic Roman approach, or the rigid concepts of German conceptual dogma—Begriffsjurisprudenz. The emphasis today is result-oriented jurisprudence. It is a studied effort to produce a given result. A result determined often by the dictates of social welfare or public policy.

And it is this result-oriented jurisprudence which effects an interface with the conceptual jurisprudence popularized by the layman.

The modern revolution in the law of torts provides an example. Take three controversial areas: no-fault liability, malpractice, and products liability. Some form of no-fault is already present in some states, and, in all candor, for the other states, the question is not Will it come? but When is it coming? The distinguished dean of the Georgia Law School, Professor Lindsay Cowen, spoke on this very day of the draft of a uniform bill on motor tort reparation lien, drafted by the Commission of Uniform Steel Laws of which he is the chairman. My own guess is that medical malpractice and products liability cases will next take their leave of the court system. Fault liability was predicated on the twin concepts of punishment and reparations. Public policy suggested that it was preferable that there be reparation to the victim, where at all possible. Where the reparation was furnished by the

third party, the insurance carrier, there was, at first, no heed paid to the punishment of the tortfeasor. The interposition of insurance afforded reparation to the victim but it also removed one of the conceptual bases for fault liability: punishment of the wrongdoer. At first, this departure from the basic tenets of tort liability was not significant. So long as other members of the community were not affected, the presence of insurance was *res inter alios acta*, or, as the layman would say, none of your business.

The death knell of the liability concept in automobile cases began to sound once the public became aware that it had to share the risk of the negligent driver in the form of across-the-board increased premiums. So long as the increased premium was limited to the negligent driver, there was no social problem because the person who did the harm was paying the price.

But when the public became involved and was made to share this cost, the negligent act of one driver did become the business of other members of society. What in theory was a private or moral transgression became, in fact, a problem of society because sociological considerations of result-oriented jurisprudence dictated that it was preferable that reparations be guaranteed the victim than punishment be visited upon the wrongdoer. For this precise reason I predict that the change will come in malpractice. The price the medical profession has had to pay for the relatively recent removal of procedural and evidentiary barriers to liability is now being passed on to society in the form of "defensive" medicine, that is, over-treatment, over-consultation, over-hospitalization, and over-charging. Because the cost of defensive medicine in America is now of national, public concern, malpractice is no longer a private, moral transgression. It no longer qualifies as a classic private tort. It is now a national social problem.

Similarly, in a fleeting glance at the presently popular tort of products liability, to the extent the resulting expense occasioned by strict liability will be passed on to the public, to the extent the line is crossed from a private moral fault to a public social problem, this tort, too, will take its leave of the courts.

Thus, history tells us that when the incidence of private wrongs escalates numerically, when the private wrong becomes a public problem, inevitably we see interposition of parliament, state legislatures, and Congress into what was theretofore judge-made common law.

But even absent legislative interference, it can be demonstrated that to the extent a given result is desired, and is in fact produced and induced by result-oriented jurists, the validity of the result will be maintained only to the extent there remains fealty to the underlying principle of conceptual jurisprudence. Once the desired result is completely stripped of conceptual legitimacy, a new remedy invariably appears to satisfy the demands of society.

Thus, the history of law is the sum total of the contributions of men of science. These scientists have worn robes. Some of these robes were white, in the tradition of the laboratory. Other robes have been black, the trappings of the halls of justice. Some have been scientists of the electron microscope; others, disciples of political science, whether theoretical, academic, or pragmatic.

Superficially, there may be wide diversity in the classic scientific approach of test tube and microscope and computer technology as contrasted with the Federal Reporter and Corpus Juris Secundum. But, I suggest to you that moving in its mysterious ways, the most unpredictable is the omnipresent science of law itself.

As Cardozo said: "Reconciliation of the irreconcilable, the merger of antitheses, the synthesis of opposites, these are the great problems of the law." These are the great problems of any scientific discipline.

Federal Building
Pittsburgh, Pa. 15222