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THE FUTURE LEGAL PRACTITIONER IN THE UNITED STATES: WHAT TRAINING HE MUST RECEIVE

BY ROBERT B. YEGGE*

BEFORE discussing some of the specific issues which Dr. Moore has outlined for us in terms of their relevance for legal structure, and hence for the legal curriculum of the future, I would like to remind him of some remarks he made at another time and place. I am not so sure that we could not substitute the word "lawyers" for the words "social scientists" in the following quote from Professor Moore's presidential address to the American Sociological Association last year:

> Have we, in short, any obligations as social scientists [lawyers] to start taking account, not only of the changeful quality of social life but also of the fact that some portion of that change is deliberate? Do we, still as social scientists, [lawyers] have anything positive to add to the fulfillment of human hopes for the future, or are we always fated to counsel the eager traveler that "you can't get there from here"?[1]

I would suggest that as professionals charged with knowing and teaching about the nature of order in our society, we lawmen *do* know that a portion of change is deliberate, and we cannot and will not counsel that there are no answers to the problems involved.

I.

An insightful paper by Wendell Bell and James A. Mau of Yale University entitled "The Future as the Cause of the Present"[2] emphasizes that the future can be studied scientifically, taking due account of the past and present. A point made by these scholars is that a major contemporary theme is "the rise of human mastery." Professor Moore commented on this when he said:

> The art of prophecy, if it is to rest on scientific procedures rather than supernatural inspiration, requires some rather well-machined parts put together in a sensible order. To foretell the future, we should want first to identify probably persistent components of the present.[3]

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[1] Moore, *The Utility of Utopias*, 31 AM. SOCIOLOGICAL REV. 765 (1966).

[2] W. Bell & J. Mau, The Future as the Cause of the Present, 1967 (mimeo.).

[3] W. MOORE, THE IMPACT OF INDUSTRY 111 (1965).

The study of precedent — decisions made in the past — will remain an important emphasis in legal training. However, to the study of precedent will be added a systematic and empirical analysis of *present* structures, formal and informal, which govern and guide legal relationships. Prediction rests upon certain assumptions, as Professor Moore points out. First, it must be assumed that there will be a measure of order. Second, it must also be assumed that there will be survival of the system. "If chaos rules, prophecy cannot, or for that matter, man, survive."[4] This is all to say that the law school cannot merely acknowledge the impact of change. Change is ubiquitous; it is pervasive; it is increasing in rate and effect. The law is now charged with the responsibility of thinking in a new dimension — that of the future. The charge is a difficult one, for the law must maintain order in the face of rapid change.

In discussing human involvement in social change, Bell and Mau record the following accurate summary of the context in which contemporary change is taking place.

> The theory of social change discussed in this paper rests upon the assumption that a major trend of history has been an objective increase in the mastery of man over his environment as well as a shift in his beliefs that this is so. An implication of this is that explanations of social change are only more or less relevant to the events of particular epochs, depending upon how accurate the explanation is in assessing and taking into account the amount of influence man himself may have, and thinks he has, in directing social change. For example, ecological explanations may be of considerable relevance to the behavior of primitive man, since primitive man's chief struggle was against nature, and his life was shaped by that struggle. Ends were seldom questioned and means were often invested with ritualistic significance. Possibly the gods could be persuaded to bring about a desired future event, but fatalism was widespread. Likewise, explanations based on notions of economic determinism or technology, rather than ecology, had considerable relevance for industrializing men and societies of the 17th, 18th and 19th centuries. Ends or goals were still largely unquestioned and clearly defined, but means were increasingly free from religious dogma to be chosen according to criteria of efficiency and economy. Today, traditional ecological and technological explanations are no longer of primary importance in explaining the behavior of men in advanced societies, because in such societies man's chief struggle is with himself and other men, not with nature or the lack of technology, and because both the ends and means of life have been increasingly freed for man to choose consciously. This freedom has been made possible by securing the essentials and amenities of life for most people in advanced societies while creating relatively short hours of productive labor and by advances in philosophy and science, including sociology, that have reduced people's dependence upon superstition and fatalistic conceptions of the future. Of course, this freedom to select both goals and ways of achieving them, which permits some individuals and groups to establish new norms and

[4] *Id.*

> values for entire societies, occurs in a context of certain limiting agreed-upon principles of group survival which are seldom extensively violated. Nonetheless, the latitude of decision is quite large. Large enough, for example, to bring new burdens to modern man, especially the burden of knowing both that his life and environment will become what he will make of them *and* that he is not always certain just what he wants, or should want, to make of them. Thus in the most advanced societies, even structural explanations lose much of their compelling relevance and give way to the dominance of moral explanations. But the latter represent a new, secular morality, which is pragmatic and open to social choice and universal consideration. Thus, for modern man, life becomes a journey through time toward a better future that is represented by a series of emergent destinations, each one containing some features that appear more desirable than those of the present but also containing surprises and uncertainties. One surprise is that usually any destination once reached, is simply a way station to another, the ability to envision some better, more distant time or place, being both the blessing and curse of modern man.[5]

We might say that we are living in an era of self-fulfilling prophecy. As Bell and Mau have observed, man has control of his destiny more than ever before. His actions will determine the shape of the future to an ever greater extent in more and more areas.

A. *History*

From a knowledge of his past man can make plans for the ordering of his behavior in the future; and this he has done. Unfortunately, in the law, he has institutionalized reliance on the past. And such unilateral dependence can produce strange distortions as emphasized in the following bit of poor, but frightening, poetic philosophy found in the Colorado case of *Van Kleeck v. Ramer*:[6]

> One day through the primeval wood
> a calf walked home as good calves should;
> But left a trail all bent askew,
> a crooked trail, as all calves do.
>
> Since then, three hundred years have fled,
> and I infer, the calf is dead.
> But still he left behind this trail,
> and thereby hangs my moral tale.
>
> The trail was taken up next day by
> a lone dog that passed that way;
> And then a wise bell-wether sheep pursued
> the trail o'er vale and steep,
>
> And drew the flock behind him, too,
> as good bell-wethers always do.
> So from that day, o'er hill and glade,
> through those old woods a path was made,

[5] W. Bell & J. Mau, *supra* note 2, at 7-9.

[6] 62 Colo. 4, 44, 156 P. 1108, 1121 (1916).

And many men wound in and out,
and bent and turned and dodged about,
And uttered words of righteous wrath,
because 'twas such a crooked path;

But still they followed — do not laugh —
the first migrations of that calf,
And through this winding woodway stalked
because he wobbled when he walked.

This forest path became a lane,
that bent and turned and turned ag'in;
This crooked lane became a road,
where many a poor horse, with his load,

Toiled on, beneath the burning sun,
and traveled some three miles in one.
And thus a century and a half they trod
the footsteps of that calf.

The years passed on with swiftness fleet,
the road became a village street,
And this, before men were aware,
a city's crowded thoroughfare.

And soon the central street was this
of a renowned metropolis.
And men two centuries and a half
trod the footsteps of that calf.

Each day a hundred thousand rout
followed the zigzag calf about;
And o'er his crooked journey went the
traffic of a continent.

A hundred thousand men were led by
one calf near three centuries dead.
They followed still his crooked way,
and lost one hundred years a day;

For thus such reverence is lent to
well-established precedent.
A moral lesson this might teach
were I ordained and called to preach.

For men are prone to go it blind
along the calf-path of the mind,
And toil away from sun to sun to do
what other men have done.

They follow in the beaten track,
and out and in, and forth and back,
And still their devious course pursue
to keep the path that others do.

But how the wise old wood-gods laugh,
who saw the first primeval calf!
Ah! many things this tale might teach; —
But I am not ordained to preach.

B. *Science and Technology*

Man's technology has determined many of his destinies. And the law inevitably gets involved in science and technology. Legal institutions can retard or implement scientific progress; but science

continues to provide new problems for the law. We need to know more about the effects of the legal rules on scientific invention, exploration, and innovation. We need to determine whether these rules channel application of the new developments into broad benefits for the society. Mark Massel, one of our seminar leaders, has observed:

> There are many indications of these interplays. Tort and insurance law influence the establishment of atomic energy plants as well as the development of safety devices in factories and in automotive design. Employee contracts may govern innovation through their control of patents and shop rights. Provisions in government procurement contracts can affect invention and innovation through their power over patent rights, investment risks, and limitations of security. Antitrust laws can sway research and innovation, including changes in methods of distribution. The control of the radio spectrum can encourage or discourage innovation in television and radio. Health and safety standards can affect many types of research and can compel progress in the control of water and air pollution. Criminal law has a bearing on a life and physical science complex, including psychiatry, lie detection, and electronic eavesdropping.
>
> On the other hand, scientific development can affect various elements in the legal system. Improvements in the use of the radio spectrum may permit a considerable increase in the number of broadcasting stations and lessen the importance of licensing and controls. Progress in the life sciences may increase the scope of tort liabilities through new methods of proving damages incurred from sustained cigarette use and radium poisoning. Techniques for capturing various resources of the sea will lead to substantial changes in maritime and international law. More effective means of controlling pollution will promote direct regulation and probably influence torts and contract law. Further development of electronic devices and computer technology may create new legal problems regarding the privacy of the individual.[7]

C. *Humanities*

The humanities, too, have an important stake in the deliberate and purposeful future planning which man can do and is doing. Frederick L. Polak has observed:

> In setting himself purposefully to control and alter the course of events, man has been forced to deal with the concepts of value, means and ends, ideals and ideologies, as he has attempted to blueprint his own future. As long as the prophet-propitiator was acting only as a divine transmitter of messages from on high, man felt that he was accepting his ethics ready-made, with no alterations allowed. In a later stage man staggers under the double load of not only having to construct his own future but having to create the values which will determine its design.[8]

Polak's observations are particularly relevant for law. Law is about values. In order to construct or "design" a legal blueprint

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[7] M. Massel, Legal Institutions in a Changing Society: The Need For Appraisal, 1967 (lecture, mimeo.).

[8] F. POLAK, THE IMAGE OF THE FUTURE: ENLIGHTENING THE PAST, ORIENTING THE PRESENT, FORECASTING THE FUTURE 36-37 (1961).

for the future, value questions, on which the humanists are experts, must be solved.

For example, the Supreme Court in *Hickman v. Taylor*[9] gave the lawyer's work product a qualified immunity from discovery. The legal and historical basis for, and the actual practice under, the rule has been widely debated. Courts have issued many divergent opinions about specific applications of the rule. Glaser has pointed out: "Plainly no survey of attorneys can decide whether work product should be discoverable, what documents ought to be considered work product, and the conditions justifying their discovery. These are policy decisions depending on the rule-maker's values and his estimates of the probable consequences for litigation resulting from each possible rule."[10] The value content of the education of a potential rule-maker is critical to the orderly development of law.

* * * *

We must get there from here. Lawmen, probably more than any other single occupational group, affect decision-making beginning at high policy levels in our government right down through the decisions which may affect the course of dealings between neighbors. As decision-makers, lawmen have some notion about the future. Accordingly, they must be aware of the structure — present and future — of their society. They must be aware of the solutions of the past; they must be aware of the developing technology; and they must be able to assess, in terms of values and goals, the factual knowledge that is available to them. Accordingly, this conference on liberalization of the law school curriculum focuses on how the fields of history, science and technology, social science, and philosophy may find their way into legal study.

II.

Let us now examine the specific subject: "The Future Legal Practitioner in the United States: What Training He Must Receive." Necessarily we must draw on Professor Moore's analysis of the "Changes in American Social Structure." I suggest also that we must draw on those persistent elements of the future just discussed.

Dr. Moore traces some themes of change which are clearly observable in changing legal practice. *Occupational specialization* is conspicuous in legal practice. Almost every lawyer has a specialty. Look around. There are trial lawyers and office lawyers. Generally, the office lawyer brings in a trial man when an occasional case reaches the courthouse steps. A trial lawyer relies on his office

[9] 329 U.S. 495 (1947).

[10] W. Glaser, Pretrial Discovery and the Adversary System, at vii-7, 1966 (mimeo.).

counterpart to handle strictly office matters. Some of the specialization is by exclusion. It is usual, if not general, that even the "general practitioner" has certain areas in which he will not practice, notably domestic relations and criminal law. With the exponential growth of law and legal principles, it becomes increasingly difficult for one to be an effective "general practitioner." Indeed, for the protection of the public, specialized training would seem to be demanded. The fact of specialization follows in part from the explosion of knowledge in areas such as science and technology where the legal principles have grown, multiplied and become more specific at an extremely rapid rate. With the intricacies of American life, not only is specialization in knowledge of the law required but specialization in knowledge about the field which the law covers is frequently demanded of legal counselors. Accordingly, it is increasingly important that the lawyer know not only the law of a certain field but the subject matter as well.

Specialization raises some serious value questions. To a certain extent, specialization protects one from a moral obligation. It is more comfortable to draw away and be protected from large policy questions by announcing your technical expertise. If it be true that "humanity is overcome by competence," then the lawyer's obligation to understand the place of his specialty in the larger value structure of his community and society is intensified.

Lawyers have become *ecologically* redistributed. Recent figures clearly show that the number of lawyers in rural communities is diminishing, a trend which is offset by the growing number of lawyers in urban areas. This observation is merely a replication of ecological redistribution in most fields of endeavor. The redistribution of lawyers has had its *organizational* implications as well. *Bureaucratization* and growth in size of legal practice units is clearly observable. At the same time, the need for legal services is becoming more and more centralized. Thus, with some obvious exceptions, the practice of law is becoming increasingly collective. On the one hand, there is in-house practice for an established organization and on the other hand there is an increase in the size and number of law firms. Business, political, social, and legal aid organizations are realizing the need for in-house counsel. Legal departments and legal staffs in non-legal organizations increase daily. Each year the number and size of law firms are increasing. To hang out one's shingle is becoming increasingly difficult. As in clinical medicine, a team of legal advisors is increasingly used. In fact, economic facts today indicate that lawyers in large firms who specialize earn more than the lone practitioner, and hence the pressures toward collectivity are intensified. As Moore has observed, decisions at the legal practice

level are becoming increasingly "collective." And in this process, as one exercises collective judgment, the need for examination of underlying values is further increased.

Another manifestation of specialization follows Moore's charge that participation by a larger number of persons in society in available services is imminent. This increase in demands will also apply to legal services.

Lawyers have many incompetencies. There are sub-professionals, not lawyers, who can handle certain legally related problems with efficiency at least equal to that of lawyers. And the services of these para-legal people are more available to the society than are the services of the legal fraternity. The title insurance companies competently prepare title opinions in the form of title commitments. Insurance adjusters are experts in negotiation and settlement. Professional estate planners have in-depth knowledge of tax and legal rules and regulations, and they give sound advice. In fact, some of these sub-professional specialists have greater competence in their areas than do many general legal practitioners. Clearly, a larger base of the population has access to these para-legal people than to the professional lawman.

It is curious and unfortunate that few people enter the law with a "calling." This lack of calling is a function of non-interest of the lawyer in broad policy questions. With the exception of some stout-hearted and much-to-be-admired public servants, the lawyer goes to the law to make money. In law school he dreams of being a corporate lawyer so that he can manipulate dollars and solve the commercial problems of his clients. No wonder, then, that the organized bar meets the pressing need for para-legal assistance for a large share of the population with subjective negativism. If "equality" before the law is to be recognized, we have a major manpower shortage. There are not enough lawyers to go around for all the services ultimately demanded. It has been observed that a mere three hours more of legal service per year for each of the nation's 55 million families would require 40 percent more lawyers in the United States. Clearly, something has to give. "If you don't serve the public as it needs to be served," warned ABA President Kuhn, "the public will force some kind of change in the profession."[11] Development of para-legal professions is predestined.

Our medical brethren early recognized the importance of a para-medical professional: the nurse. They incorporated the training of these para-medical people into the medical school curriculum. Now, I am told, American medical education is examining the con-

[11] TIME, Aug. 20, 1965.

tent of this indispensable training. Legal education has not even recognized the parallel problem. Yet, if we are to meet the predicted equality and meet the challenge of increased participation by all members of society, the law school must take steps at least to study potential training of para-legal occupational aspirants or, alternatively, we will see this function assumed by other, more socially concerned institutions.

Indeed *pluralism* is a major contemporary theme and promises to be even more important in the future. The law has, in a certain sense, tolerated demands for equality. But the evidence shows that we may be at a point of disengagement. Attorney General Katzenbach, at the American Bar Association Convention in 1965, reported:

> Too often the poor see the law as something which garnishes his salary, which repossesses his refrigerator, which evicts him from his house, which channels his welfare, which binds him to usury, which deprives him of his liberty because he cannot afford bail. Small wonder, then, that the poor man does not respect the law.[12]

In the arena of science and technology, the law school must realize that the quilled pen has become obsolete. Whether lawyers like it or not, the computer has and will continue to refine the West Digest System and Shepard's Citations. As Shepherd S. Bailey, Jr., Director of the Princeton University Library, has observed:

> The combination of the computer with remote copying technology will make some types of publications obsolete, such as scholarly journals, symposia, and certain kinds of reference works. It will be necessary to publish only the indices, perhaps with summaries or digests, and the wanted article can be transmitted on demand from a central station.[13]

Technology poses at least two questions for legal education. On one level, what are we doing about exploring the applications of this technology to legal education? If it is true that a basic purpose of law school is to teach the potential lawyer "how to find the law," what is going to happen when technology intervenes in the law library, which should be soon? At another level, what are we teaching our students about the uniquely new concept that a publisher may be selling not a book, but an image of a book which, unlike the traditional paper cloth-bound version, is easily reproduced in violation of copyrights?

Moore has observed that not only is bureaucracy here to stay, but that bureaucracies encourage a "kind of rule-making posture." Indeed, legal systems are manufactured and perpetuated in a bureaucratic organization. The private legal system developed by the bureaucracy is carried out through thorough empirical research of behavior,

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[12] *Id.*

[13] SCHOLARLY BOOKS IN AMERICA, Oct. 1966.

not through uncoordinated accumulated experience. In a similar manner, as Moore has observed, the contemporary executive empirically, carefully, and objectively examines facts (many generated from his "research and development" department) in making decisions. The lawman has been involved in the creation of private systems of law and in the decision-making processes of the bureaucracy in the past. But it is doubtful that the present legal curriculum is teaching him the methodologies for dealing with the new facts of science and technology which are necessary for today's professional advice. The lawyer's education has developed his sense of "common sense" but has not encouraged systematic observation of facts. The knowledge and methodologies of other disciplines, notably the behavioral sciences, are critical to the development of systems of looking at facts.

The future and, for that matter, the present practitioner of law in the United States has many gaps in his training. Notably, the gaps are due to an insulation from reality through an educational experience which unduly emphasizes the study of precedent.

As David Riesman observed in his talk to the Harvard Law School Sesquicentennial recently:

> "Research" in the sense of empirical investigation into the impact of law and lawyer — the intricate two-way traffic between law and social subgroups — is only beginning; it is demanding, and nobody quite knows how to do it, but several people may perhaps do better than a single person if they bring disparate methodologies to the enterprise. . . . The amateurism of the law professor, the fact that he is a layman in terms of social science methods and their intricacies stands him in good stead, in warding off the call of the guilds and in heeding the call of the problems of the future. Yet, as I am sure many law professors do realize, there is a great danger in being too cavalier, too amateur, about the methodological problems within the central social sciences. This is evident in the use of the term "behavioral science" for some of the law sponsored ventures, and it is evident in some of the more interesting volumes of cases and materials which lumped together snippets from psychology, sociology, political science or philosophy without giving the law student any sense of the different languages of these breeds of men, or the intramural problems of knowing whether what seems plausible is actually so.[14]

III.

All is not discouraging in the current curriculum of the law school. A most encouraging sign is that the law schools are beginning to think of problems in functional rather than categorical terms. Thus, we are developing courses in "poverty law" and "urban problems" rather than sticking to the traditional categories of torts, contracts, property, et cetera. The categorical approach necessarily limits

[14] Harvard Law School Sesquicentennial, Sept. 23, 1967.

the considerations which the subject may encompass. The functional approach, on the other hand, forces the professor and the student to see the many faces of a problem, not all strictly legal. I might suggest that a way of "liberalizing" the law curriculum (and by liberalizing I mean introducing the accumulated wisdom of clearly related fields) would be to restructure more of our courses on functional lines. We must all chuckle at the Lord Chancellor in *Iolanthe* when he announced to a group of fellow peers that:

> The Law is the true embodiment
> Of everything that is excellent
> It has no kind of fault or flaw
> And I, my Lords, embody the law.

Allow me to outline, functionally, a problem not frequently considered by the law because it cannot be found in any of the traditional categories. By approaching the problem functionally, the need for legal development becomes obvious.

In contrast to younger people, the older person typically has poor health and low energy; his educational background is comparatively inadequate and out-of-date; he is often deprived of his occupational role; his earnings are cut off, and he is left on a fixed retirement income in the face of rising living standards and declining value of the dollar; he is cut off from the family group as his children leave home, his spouse ultimately dies, and he is left to live alone.

Particularly in the face of advanced technology, the implications of poor health and low energy, as well as inadeqate and out-of-date educational background, are profoundly relevant for the law. Quite candidly, it is dangerous to allow the elderly person to operate that monster of death and destruction, the automobile. The law has recognized arbitrarily that minors are incompetent to perform certain acts. Is it not possible that adult "majors" are similarly incompetent? As with minors, the elderly have difficulty living alone. The law states that minors are dependent and support is decreed. Might it be similarly true that "majors," unable to maintain themselves and likely to become public charges, should be supported by a responsible relative?

The educational levels of the elderly are inferior and clearly less adequate. Statistics on the education of lawyers make it unfortunately clear that very few elderly lawyers completed undergraduate education and a large number of them did not even attend law school. Should lawyers be licensed to practice their professional occupation for only a limited period of time and, indeed, should not all persons be re-examined from time to time on the currency of their knowledge?

The social sciences have given us some facts about "majors"; science and technology has created some serious problems for "majors"; we are aware that the value systems of older people are rich and deep. What has the legal system to say about elderly society? Anything? Shouldn't it?

IV.

It seems clear: We can get there from here. But we can't do it alone.