MODERN SOCIETY AND PRIMITIVE LAW*

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INTRODUCTION

An inaugural lecture can be used for different purposes. Sometimes it is a display of learning. This is satisfying only for the lecturer and those responsible for his appointment. Sometimes it illustrates the development of the new professor's subject. This is particularly appropriate, though, for the holder of a foundation chair in a subject new to the University. Very often it presents the lecturer's opinions about education. Teachers of law seem unusually introspective in this way. Another justifiable use is as a manifesto, setting out what the professor wants to achieve, and what hopes he has for his subject and his students. This can be dangerous. A radical Frenchman appointed to a chair of political economy in the last century is said to have been sacked at the end of such an inaugural lecture. I have not been able to find the source of this story, though I am sure I have friends more successful at finding precedents if they think it necessary. But the temptation is irresistible. I want to make two points, that society is going to change greatly in the next 30 years, and that if we are to have the law we need, it will be the result of the efforts of ordinary people.

The modern society of which I speak is that of present-day Tasmania: the primitive law is of the same time and place. Even in matters of interplanetary travel, present man will appear primitive when studied by his grandchildren. His law looks rudimentary to some of his contemporaries. Lawyers are concerned with the control of social relations, the ways in which one man is connected to others, as individuals, groups or society as a whole. They work to ensure that we have the kind of society we want. Who wants? Many here would like it to stay as it is. The privileged always do. But it will not. All our experience shows that change is inevitable. But "the mode in which the inevitable comes to pass is through effort".[1]

What kind of change should we want and work for? What can we expect society to be like? What kind of law will it need?

THE NEW WORLD

1. THE SCIENTIFIC AND TECHNOLOGICAL REVOLUTION

For a scientist to predict the future of science, even a few years ahead, is incautious. For a layman it is foolhardy. Yet, to find out

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1 O. W. Holmes Jr., *Collected Legal Papers*, London Constable 1920, p. 305.

how the law must change, it is necessary to prophesy not only developments in science and technology, but also the effects they will have on society. This gets harder all the time. The great division of the world into rich and poor countries is a division between industrially advanced nations and those in which there is no mature industrial system. But now, faster than the undeveloped countries are industrializing their economies, the highly developed countries are taking advantage of their near monopoly of scientific and technological expertise to undergo another change that has been called the scientific and technological revolution.[2]

In the kind of society which was formed after the industrial revolution, a large labour force, working together on machines owned by other men, produced larger quantities of the same kinds of product as had before been produced by craftsmen with their own tools. The machine did the job the craftsmen had done, broken down into its several operations. It was served by a labour force trained to perform only some limited function, and it replaced man's physical strength with steam and later electric power.

The new developments in production processes deserve the name of the scientific and technological revolution because there is a qualitative change in the structure and dynamics of production. The changes are far more fundamental than mere refinements in machinery. It is now possible to create materials with whatever properties are required. The sorts of jobs that need to be done by men are changing. Manual work, machine minding, computing, information storing, even designing, are being taken over by machines created for the purpose. Most exciting of all, science has itself become the fastest growing of productive forces. Technology plays its part at all stages of production. It is clear that the advances are not just in the means of labour, as they were in the industrial revolution, nor are they in the form of improvements in existing methods. They are a continually accelerating stream of fundamental changes in the productive forces themselves. Automation gives us a new continuous automatic mechanical production process. The idea has been worked out and already applied in respect of many kinds of work from routine office work to the production of beer.

Man's labour power can be replaced by the creatures of science, so that science itself becomes the major productive force. Production depends less upon the strength or skill of the operator and more on man's understanding of nature and his ability to make it work for him, that is, on science and technology.

Simple automation equipment is now widely used. In Australia there is already more advanced cybernetic equipment in operation,

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[2] Many of the ideas and much of the information on which this part of the lecture is based have come from Radovan Richta (ed.) *Civilization at the Crossroads: Social and Human Implications of the Scientific and Technological Revolution:* Sydney Australian Left Review Publications, 1967.

which controls complete production units in which the only functions of labour are in creating the machinery and maintaining it and in creating programmes and deciding when to use them. Further sophistications will come with the greater use of computers in the processes of production and then in commerce and transportation and other service industries.

Imagination is the most valuable commodity and its stimulus is the vital ingredient in a successful society. We are reaching the stage in human development at which humanism for the first time becomes more than a fond hope.

> "The most effective means of multiplying the productive forces of society and of human life is inevitably found to be the *development* of man himself".[3]

It is often said that scientific progress causes social problems. So it does, but it also gives the clues to their solution and provides the only basis on which a good and fair society can be built. It is the job of the lawyer, with other social scientists, to take the offered chances.

2. THE SPEED OF CHANGE

In all periods of history the old and tried method has eventually become backward and retarding, and there has been the need to change. What is so new about modern society is the pervasiveness of the need for change and the speed with which changes take place. Our own century has already seen changes more extraordinary than all that have gone before. At the beginning of this century it took nearly forty years for a scientific discovery to be put to practical use, longer than an adult lifetime then. Now it takes ten years, less than a quarter of a working life. Time is expanding for us as space shrinks. One revolutionary advance in knowledge follows another, in the most basic theory, not only in traditional sciences but arising from new sciences and interdisciplinary work. It has been said that half our scientific discoveries have been made in the last 15 years and that 90% of scientists who have made original contributions are alive now.[4]

The world now spends on science a hundred times as much as it spent before the War. The amount doubles every six years or so, and the number of scientists every ten years or so. Of course it would be a pleasanter prospect if we did not know that more than half of all these resources was being spent on more and more sophisticated armaments.

3. THE EFFECTS ON SOCIETY

What has all this to do with law? I can show *that* only when I have gone the further step of prophesying what effect the scientific and technological revolution will have on society.

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[3] Richta, op, cit. p. 20.

[4] ibid. pp. 180-184.

For most people today, work is quite unsatisfying. Work is a way of earning a living and paying for the escapism which starts when work ends. There is little opportunity for a man to develop his individual faculties and find his own fulfilment. But, even in the first stages of automation, this kind of work is displaced for some people. The operations of production no longer require human operatives and man finds other activities of a different kind. The new occupations are those of job-setters and fitters, and the numbers in these categories are even now growing much faster than those of skilled machine operatives, both in the U.S.A. and the Soviet Union. The new occupations of the automation age call for greater engineering and technological skills. The time is not far off when the gulf between mental and manual work will be bridged and cease to have its present social significance.

A basic dispute between men has been whether man is most natural and therefore happiest when grabbing for his own gratification or when he is building for the future of his community. The Christian and the Marxist would agree that man is fulfilled by co-operation. The time has come when this is no idle speculation. The scientific and technological revolution has thrust the problem upon us. The real competition in the world, the sharp conflict between capitalist and socialist, will be where it should be. It will not be simply an economic struggle. There can be no military solution. It will depend on which kind of society proves itself capable of shaking off the old order which the industrial revolution imposed on us and opening up the possibilities which flow from the development of man as an end in itself.

The key is education. The specialized scientist who today finds it necessary to work in an interdisciplinary way does not do so because he likes it but because he finds he has to. The disciplinary divisions are losing their old meaning. Only with a broad base can the scholar follow a specialism concentrating his special interest and skill and creativity. At the root of the new education is the creation and care of the individual's capacity for continual development.

I cannot give my students an education which will provide them with knowledge to last them their lifetimes. They will have to cope with basic changes throughout their working lives. The clear division between education and work is going to disappear. Half of what a scientist learned as a student twenty-five years ago is outdated now. Even now a technician's knowledge is out of date in ten years. This problem is, of course, well known to the lawyer. There is no alternative to learning throughout working life. Education has to be most concerned with imparting interest, zeal and standards rather than knowledge. The young can only be developed by teaching them the skills needed to give them access to sources of knowledge and the critical faculties with which to discriminate and make the

best their own. Within my normal working life I would expect to see specialized qualifications, leading to a lifetime in one job, giving way to an education intended to cultivate and succeeding in cultivating a person able to adapt *himself* and train *himself* for a wide range of jobs. The computer will make the soaking up of knowledge even more unnecessary than it is now. It will act as an extension of the human brain, as an information or knowledge bank, leaving the brain free to cogitate, choose and invent.

In the industrial age, art and music and literature have been on the fringe of human life, playing a large part only for a tiny minority of people. The scientific and technological revolution thrusts them back into the middle of things. Development of this new society depends on the development of individual men. When production reaches a certain stage, progress in education, improvement of services, cultural advances, indeed anything which stimulates or refines man's thinking, become the highest kind of production. The present dichotomy between productive and non-productive loses what meaning it ever had. All kinds of services, welfare and health and sports schemes, travel, cultural activities of all kinds, become directly productive. The advance of people as a whole and the development of each individual become decisive in a society's progress. Beauty and fineness of feeling become as important as reason and utility.

The new age of science needs creation and invention, and demands life-long education, all-round abilities, human sympathy, mobility and adaptability, an idea of the way forward and the feeling of responsibility which comes from playing a full part in controlling the world.

PRIMITIVE LAW

I have called our law primitive because it *is* primitive as a human construct compared with a moon landing, not only in the results but in the techniques of achieving them. I leave to the expert the task of persuading you that it also looks primitive when compared with the laws of so-called primitive people. But it does seem odd that we should feel so superior to a native of New Guinea because of the bone through his nose and yet feel that our judges need $200 worth of horsehair on their heads to do their jobs properly. We cling to the mumbo jumbo of oaths and the mummery and fancy dress (none more passionately than the newly admitted lawyer) as tokens of our separateness, or even exclusiveness, and as a defence against the layman's scorn of the poverty of our skills. We blind with science, and that is as near to science as we get.

1. CRIMINAL LAW

We say that we work on the assumption that a man is innocent until he is proved guilty. We pride ourselves on our superiority in this respect over the lesser breeds without the Common Law, like the

French and Germans and Russians. Our pride is quite unfounded. If we looked closely at their procedure we would find that in *effect* they are just as careful to put the burden of proof on the prosecution and as efficient at giving the accused the benefit of any doubt as we are.

But how do we stand up to their scrutiny? We put the accused in the dock, where every juryman knows only criminals stand; we gentlemen of the law then talk down to him, addressing him in a way that is not heard elsewhere in this country, by his surname only, so that no one in court should mistakenly believe him to be worth as much consideration and respect as an ordinary man. We sometimes keep him in gaol for months until we find evidence of his guilt. While he is there, if he is young, he will be corrupted sexually and by being taught the tricks of crime. In addition to the mindless barbarity of prison, we have that sophisticated punishment, the fine. It is not incumbent on a judge or magistrate to fit the fine to the wealth of the offender. The court does not usually have much evidence of his state of wealth, especially if he is undefended, as most accused are. It is obvious to a child that a fine of $100 is disastrous to a young man earning $50 a week and having a young family, or to an old pensioner, but no more than a nuisance to a rich man. Fines proportionate to wealth would not give the poor a special indulgence, just equal punishment. Sweden, Finland, Switzerland and Cuba achieve this by sentencing "the offender to a number of day-fines, in accordance with the gravity of his offence. Then the court determines the monetary value of each day-fine as an approximation of the offender's daily income, with reference to his financial obligations, the number of dependents, his productive capacity, and any other factors affecting his wealth".[5]

2. COMPENSATION FOR ACCIDENT VICTIMS

We have had for many years a system of insurance whereby a man who loses his earning capacity because of an accident at work receives a payment, a grudging and inhumane one it is true, for some of the time he is off work. If his accident occurs when he is not at work, he is within no such scheme. In particular, if he suffers in a motor accident, he has only such insurance cover as he himself has arranged, which is unusual, and a chance of damages against the one who caused the accident. It is often a slim, often an illusory chance. The victim must prove that some other person, the defendant, was to blame for the accident and that the accident caused the injuries.

Every family of five is likely to produce one road accident victim, so the actuaries say. As far as criminal sanctions are concerned, I do not think we shall get very far as long as there is no social stigma against bad or drunken driving. As long as we have the kind

[5] D. A. Western, Fines, Imprisonment, and the Poor, (1969) 57 *California Law Review*, p. 778 at p. 813.

of misguided attitude which, for example, thinks it is unsporting to have spot checks, we can do nothing effective in the short term. Much more in need of educational therapy is the outlook, common to most of us, that it is disgusting to kick a cat but acceptable to drive home from a party in a state which makes us dangerous and potentially lethal to other human beings. It is not increasing punishments but the knowledge that you will be found out in something which makes you disliked and looked down upon by your fellows that will cause a change in conduct.

But whatever the solution to the problem of the anti-social driver, there is an obvious need to look after his victim. At present he may, if he can raise the stakes, the legal costs, have a gamble on getting a lump sum. The procedure is not merely a lottery, it is a charade. I am by nature too timid to describe it for you. I prefer to give you a description by Windeyer, J., adopted by the late Sir John Barry.[6]

> "The real consideration in my view is that the whole system of negligence actions is outmoded in ordinary accident cases. The actions are utterly unreal. We live in an insurance age, we live in a motorised and mechanical age. People are suffering from accidents which are part of the hazards of the times we live in; they arise not out of and in the course of our employment but out of and in the course of our daily lives . . . The time will come, I am sure, when we will abandon this pretence of a contest between a plaintiff and a defendant, one maintained by one insurance company, the other by another . . ."

Sir John went on:—

> "This method of trial is wasteful and cumbersome; its hollow pretences and intricate but often meaningless dogmas make it a scandalous travesty of what the law and the courts are supposed to stand for. Its persistance is largely due to political timidity and lethargy, fostered perhaps by those who have vested interests in the continuance of the system."

Can scientific study produce a just solution to this problem? Indeed it can. A Royal Commission in New Zealand in 1967 produced what is needed, in the Woodhouse Report.[7] It is sound, practical, imaginative, durable, indeed, as you have gathered, I like it. It extends its scope beyond road accidents, for the simple reason that there is no excuse for limiting it in that way and there is every good reason for having one omnicompetent machinery for compensating the victims of any accident. What earthly reason can there be for distinguishing a man who cannot work because he was hit by a car from one who lost a finger in the machine he works on or indeed one who ran the

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6 Sir John Barry, *Compensation Without Litigation*, address to Southern Tasmanian Bar Association, 1963 (mimeographed) pp. 8, 9 quoting Sir Victor Windeyer, (1961) *Australian Law Journal*, p. 149.

7 *Compensation for Personal Injury in New Zealand: Report of the Royal Commission of Inquiry*, Wellington, Government Printer, 1967.

lawnmower over his foot last Saturday afternoon? His need is the same. He has lost his earning ability, or had it reduced, and needs money to take the place of his usual earnings.

Some still argue that the only way to stop malingering is to keep compensation payments below what would have been earned. This is quite unscientific. First, no one knows how much malingering there is, or whether it really is a problem. Lawyers who act for insurance companies have, I find, a quite different view from doctors who actually see and get to know the alleged malingerers. Secondly, the underpayment and pinching of all sufferers to get at the odd malingerer is just as fair as hanging ten men because you know that the murder must have been committed by one of them. A committee under the chairmanship of Neasey J. has been set up to provide an acceptable answer for Tasmania. When the time comes for their report to be considered, it is hoped that an objective approach and scientific standards of enquiry will prevail and that the self-interest of a few will not be allowed to triumph over the welfare of all. As the Woodhouse Report says, "the ultimate validity of any social measure will depend not upon its antecedents but on its current and future utility". Tasmania is an ideal laboratory for this exciting and necessary social and legal experiment.

3. COMMERCIAL LAW

Lest you should think that my criticisms of the law and indeed my whole thesis are based on an irresponsible urge to redistribute wealth, let me take as my next example a piece of nonsense that has nothing to do with the disparity of law for rich and poor. I have chosen the example not because it causes widespread injustice and resentment. Like many other legal rules that need reform, it strikes only occasionally, as haphazard and destructive as lightning.[8]

When a confidence trickster persuades you to sell your car to him in return for a dud cheque, by telling you that he is some other person whose name makes you trust him, he will have to give the car back when the deception is discovered. But what happens if he has already sold it to someone else, say a car dealer? Will the law make the dealer give it up to you? If he is in on the fraud, the law will help you. What happens if he is not? You might be forgiven for expecting that, where two innocent people suffer from the wrong of a third person, the law would have some machinery for distributing the loss between them, either equally, or if we were really serious about justice, according to some proportion depending upon their respective responsibility for the fraud, for most confidence tricks depend on the avarice of the dupe.

[8] The problem is dealt with in more detail in Derek Roebuck, 'The Crisis of Contract,' (1969) *U. of Tasmania Law Review*, p. 191, where a possible apportionment scheme is described.

But what do we find when we look at the present law? The outcome all depends on whether you have made a contract with the imposter or not. If you have, then it is said that something called "property" in the car passes to the imposter. He can then pass this "property" to the dealer. Once the dealer has "property," you cannot get the car back. This property is a legal concept, a lawyer's construct. It is not quite the same as ownership. But whatever the juristic nature of "property", the law is that the dealer keeps the car. You can have whatever damages you can recover in an action against the imposter, an action that is rarely worth bringing.

But if you can show that there is no contract between you and the imposter, no property passes, and you can make the dealer give back the car, leaving ***him*** with the doubtful action against the imposter. But now see how unscientific the law really is. Everything is going to depend on whether you have a contract with the imposter. His deception of you does not stop a contract coming into existence: "contracts induced by fraud are voidable, not void" says the law—dogmatically of course. This is an a priori rule, not one based on any scientific study of social relations. It means that you can avoid the contract for fraud if you can stop the imposter before he sells the car to the dealer.[9] In my example, as most often in real life, you have had no chance to do this. What are you to do? Can you show in some other way that there is no contract between you and the imposter? You can if you prove there was what the law calls "mistake of identity". "Mistake of identity makes a contract void", says the law, equally dogmatically. How then do you prove mistaken identity? You have to convince the court that when you offered the car to the imposter, you offered it not to the person actually in your presence at the time but to the person he pretended he was! There is a nice little job for a judge. By the time you are in the witness box, you will be well aware of the significance of the distinction. The distinction is quite unconnected with reality, and it is not surprising that you will be able quite honestly to say that of course you only really meant to sell to the man the imposter said he was. But the judge has to decide whether, whatever you say now, you really meant to offer the car to the man you were actually talking to. Of course, this is all nonsense. The essence of the mistake is that you thought that there was only one man. There could not otherwise have been a deception.

It is very easy to work out a way of doing justice by apportionment, though care has to be taken in what is apportioned. There is no need to set out the scheme in detail here. The point that I am trying to make is that a little science would make all the difference. Problems of formulating legal principles must be solved by empirical study of

9 It is not quite as simple as this, see *Car and Universal Finance* v. *Caldwell* [1965] 1 Q.B. 525.

the social conflicts that arise, by studying the social relations in which they occur both in their normal and disturbed conditions.

Another historical survival which affects us all much more is the cheque. Over hundreds of years, the bill drawn on a banker instructing him to pay out of the drawer's account a sum of money to the payee has acquired a number of legal characteristics, the most distinctive of which is negotiability. This means that the piece of paper is capable not only of transferring value but of giving the recipient more rights than the person from whom he got it had. This used to be of some commercial significance. A creditor could rely on the financial standing of any name on the bill and not bother about the validity of the transaction by which his debtor came by it. But this has nothing to do with the modern use of cheques. Not one in a million cheques is intended by the drawer to be endorsed by the payee. All I ever want of a cheque is that it should transfer value from my account to the named payee and no one else. All I want is a simple form of mandate. What do I have to do to get it? The banks will not give me one. I have to use a cheque form and cross out "or bearer," and write across the face "not negotiable" between two transverse parallel lines. As one of my students wrote, "one transverse parallel line is not enough".

All over the country, and in many other countries, there are clerks scratching away doing this. It must cost thousands of dollars a day. It is not enough to say that you can have "not negotiable" stamped on your cheques. Why have all this hocus pocus at all? One would have thought that the introduction of computers into banks would have made a simple form necessary. All that needs to be read by the machine is the account number, the amount and the payee, and possibly the date. Could it be that the banks know that when the transfer of credit is stripped of its trappings it can be seen clearly as a job best done by a post-giro system and not by them?

4. FAMILY LAW

This is the area of the law which hits many ordinary people hardest and one in which much has been done to reform the system, so that we have not many feudal laws left. My most fundamental criticism is of the need to make a divorce into a fight, even if only a mock battle. If a wife or husband wants legal advice about a matrimonial dispute and goes to a solicitor, he will listen to that spouse's story and want to do what he can to resolve the differences. The lawyer would dearly like to hear the other side of the quarrel and to take the sting out of it. But he cannot interview the other spouse. Or if he does, he must not act for either in any litigation which follows. This is as it should be, but it is not conducive to reconciliations once the matter gets to the lawyers. Moreover there should be no need to rake over all the things in the marriage which the parties would both be happier to forget and probably would otherwise have had a better

chance of forgetting. The embarrassment of the parties is painful even to the seasoned divorce lawyer, and there is nothing like an audience of wigs and gowns to put a party at ease when explaining the sexual difficulties of the marriage.

One of our feudal survivals is the legal impediments which still attach to the status of illegitimacy. Something has been done to remedy this, it is true, but the possibly anti-social behaviour of the parents is still being atoned for by the child.[10] Other unjustifiable relics are the crude provisions for the validity and construction of wills, which seem to have been contrived to prevent the testator doing what he wanted to do.

The list of bad laws is endless, but there must be an end here. Those which I have described are some of my hobbyhorses. Any lawyer can give you his own list of primitive horrors.

WHAT IS TO BE DONE AND WHO WILL DO IT?

Roscoe Pound said "When the lawyer refuses to act intelligently, unintelligent application of the legislative steamroller by the layman is the alternative".[11] Such a statement, from a great legal scholar, is an indication of the unconscious professional arrogance which is at the root of the problem. We lawyers assume that law reform is as much our monopoly as litigation. But law is a system for preventing and resolving serious social conflicts. It will only do a proper job when not only experts but ordinary people have an interest in and play a full part in its creation and implementation. No minority group or elite has the skill or knowledge or commitment to have charge of ordering social relations in this way, not judges nor practising lawyers nor academic lawyers.

Lawyers are fond of telling one another how special they are. They pretend that they, as a profession, are champions of the individual against the state, swallowing without even tasting the greatest problem of all, how far an individual should have to give up his privileges for the benefit of other individuals grouped together in a society, and forgetting that whenever a lawyer can be seen, stoutly championing the individual, there is one on the other side trying to do him down. The truth is that the special quality of a lawyer is that he will (for a fee) act for anyone, however unprepossessing or unpopular his client's claim or defence may be. Lawyers are fond too of stressing how much more ethical they are than the members of other professions. I wonder where the evidence is. I doubt whether the proportion of actuaries or chartered accountants or architects or doctors in gaol for offences against their clients is any greater than that of lawyers. Why should we suppose that the standard of work of a lawyer is

10 In this matter Australia is less advanced than New Zealand or the United Kingdom.

11 Roscoe Pound, *The Spirit of the Common Law* Beacon Press Boston, 1921, p. xviii.

any higher than that of the veterinarian or picture-framer? I know of no evidence that cowboys or cat burglars have any less sense of solidarity. There may be plenty of evidence of all these things, but I do not think the lawyers' boasts are based on it. And in any case, if we really are gentlemen, ought we not to wait for others to tell us how marvellous we are? It is strange that there are statues of Justice, of Law, even of The Judge, but none to my knowledge of The Lawyer. Could it be that there are technical difficulties in sculpting a figure slapping itself on the back?

Of course, without this narcissistic facility for self-adulation we should not get any praise at all. The public image of the lawyer is twisted and tarnished. We have throughout our history got a very bad press. We assume that it is quite unjustified, but is it? Those who want to read a catalogue of the profession's shortcomings should read Michael Zander's "Lawyers and the Public Interest".[12] It is enough to show that the profession is hardly fit to have sole control of the law's future. I hasten to stress that I consider myself to be making these criticisms from the inside, as a lawyer, not as an outside critic. I know the qualities of individual lawyers and of the profession as a whole, but it is not for me to list them. Please believe that this pleasant quotation from "The English Dance of Death" is quite inapposite:

> And thus the most opprobrious fame
> Attends upon the attorney's name.
> Nay, the professors seem ashamed
> To have their legal title named.[13]

What about the judges? Would it not be wisest to leave lawmaking to them, either through the gradual development of case law or by their co-operative review of the law? Surely the record of the common law judges shows they can be trusted to do what is best without fear or favour! Let us look at some of the great ringing names, Bacon and Ellenborough and Mansfield.

Sir Francis Bacon, Baron Verulam, Lord Chancellor, polymath, natural scientist, writer of noble prose, framer of noble thoughts,[14] eventually confessed to bribery and corruption. As a later Lord Chancellor, Campbell, said,[15] "Bacon, doubtless, sometimes decided against those who had bribed him: but this was inevitable where,

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12 Michael Zander, Lawyers and the Public Interest: *A Study in Restrictive Practices,* London, London School of Economics and Weidenfeld and Nicholson, 1969.

13 Of course, this had nothing to do with academics. It was an expression in 1815 of the ridicule poured on the attorneys for their attempt to shake off public dislike by changing their name to solicitor. See Michael Birks, *Gentlemen of the Law,* London, Stevens 1960, p. 144.

14 Such as the appropriate "He that will not apply new remedies must expect new evils: for time is the greatest innovator," culled from that ever present source of inspiration, my desk calendar (10th June 1969).

15 John, Lord Campbell, *Lives of the Lord Chancellors &c.,* London, John Murray, 4th edn. 1857, pp. 115 and 116.

as occasionally happened, he had received bribes from both sides". and, summing him up, "Notwithstanding his giant intellect, his moral perceptions were blunt, and he was ever ready to yield to the temptation of present interest".

What about Ellenborough? Here is a judge in quieter times, whose knowledge of the law and financial integrity have never been questioned. Surely his is the sort of intellect we can admire. Hear him in the House of Lords when reforming legislation is debated.[16] The year is 1827, the subject is spring-guns, the bill is to abolish them. Poaching is rife, godless farm labourers are everywhere wickedly refusing to let their children starve. The law lords join the nobility and the bishops in expressing their indignation at such an irresponsible bill. Ellenborough answers the reformers' emotional argument, that many innocent people are accidentally injured by spring-guns, with dignified logic:

> 'The object of setting spring guns was not personal injury to anyone but to deter from the commission of theft, and that object was as completely attained by hitting an innocent man as a guilty one.[17]'

Ellenborough was Lord Chief Justice and an eager extender of the death penalty. He managed to get an act passed adding ten new capital felonies to the two hundred or more current at the time. Death was already the penalty for consorting with gypsies, being found near a highway with a blackened face or impersonating a Chelsea Pensioner.

The Archbishop of Canterbury and other bishops added their religious disapproval of the lawyer Sir Samuel Romilly's attempts to lessen the barbarity of the death sentence for treason. The killing of traitors was by hanging, drawing and quartering. Without going into all the details, I must point out that the drawing, that is the dragging out of the bowels, had to be done while the victim was still alive and before his eyes. Attempts to soften the torment were met by the Lords' indignant argument "to have the bowels cut out while still alive was the most severe part of the punishment and therefore ought not to be omitted; that to pretend that the judgment could not be executed [because the victim would die too quickly] was to arraign the wisdom and knowledge of all the judges and King's counsel in all the reigns". As a former Lord Chancellor of Ireland said, "to throw the bowels of an offender into his face is one of the safeguards of the British Constitution."[18]

Ellenborough knew where sympathy was properly due: to the judge, "unable to sleep for thinking of the doom he would have to pronounce next day on a heavy calendar of convicts".[19]

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16 See the spirited account in E. S. Turner, *Roads to Ruin: The Shocking History of Social Reform*, Harmondsworth, Penguin 1966, pp. 27 to 36.
17 Turner, op. cit. p. 33.
18 ibid. p. 106. Sarcastically, by George Ponsonby.
19 ibid. p. 107.

At least there is Mansfield, father of our commercial law, who freed the negro slave, in England on his way to the plantations. The case is Somerset's Case in 1772,[20] in which it was said, though not by Mansfield, that "this air is too pure for a slave to breathe in". But there are some jarring notes in the report. Lord Mansfield adjourned the case twice hoping to avoid having to make a decision. "In five or six cases of this nature I have known it to be accommodated by agreement between the parties: on its first coming before me I strongly recommended it here". How you can accommodate, how can you settle a habeas corpus application, without setting the slave free, he did not explain. But he would have preferred not to make a decision which would mean not only this slave but all the others in England would be free. "The setting of 14,000 or 15,000 men at once free by a solemn opinion is much disagreeable in the effect it threatens . . . a loss follows to the proprietors of above £700,000 Sterling . . . An application to Parliament, . . . if merchants think the question of great concern, is the best and perhaps the only method of settling the point for the future".

"But judges are not like that today", you say, "not in our time". Not here, but in other parts of the world which have inherited the English judicial system they are. The present judiciary of South Africa and of Rhodesia contains specimens as disgusting as any of the ones I have mentioned. Perhaps the lowest level of all has been reached by a South African judge rejoicing in the name of Cillie, J., who has just convicted two newspapermen of telling their readers of the atrocities which are part of the official treatment of prisoners in South African gaols and admonished them for it.[21] Perhaps he shares the government's view that it is bad for the nation's morale to be told these rumours. All right minded people know that when a young religious leader is found dead in his cell with electrode burns on his genitals the wounds were incurred as part of routine prison hospital treatment. Perhaps that is why it has been found expedient recently to abolish inquests.

You may object that I have strayed away from Tasmania. I have, but there are ties that hold all of the Common Law together. As Windeyer J. said recently,[22] "Those who insist that the Common Law is on the move should remember that it must always march in step". I think it is more accurate to say that it walks in its sleep.

Perhaps it would be best, then, to leave law reform to the academic lawyers. Perhaps they can be trusted to be objective. I am afraid not. I have already mentioned that great scholar Roscoe Pound, and

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20 *Somerset* v. *Stewart* (1772) Lofft. 1. E. R. 449. Moreover, this was not a case of first impression. The law had been stated clearly by Holt, C. J. in a number of cases, e.g. *Smith* v. *Brown* Cases temp. Holt, 405. See the criticisms of Mansfield by Sir Brian McKenna in (1969) 32 *Modern Law Review* 601, 606.

21 See the account of the case in *The Times* newspaper for Friday July 11th and Saturday July 12th 1969.

22 *Benning v. Wong* (1969) 43 A.L.J.R. 467.

his notions that lawyers were more likely to write good new law than legislators. That greatly revered but understandably unread legal historian, Sir William Holdsworth, shall provide our other example. What about this?

> our modern death duties . . . penalize and make it impossible for the most prudent and industrious citizens to have large families, and so the best stocks are not bred from. At the same time our socialistic legislation hands over some part of the produce of these duties to the most needy, who are often the most shiftless and stupid. They see no objection to large families for which the state, i.e. the industrious members of the state, will provide, and so the worst stocks are bred from.[23]

A splenetic opponent of democracy, he is never above avoiding argument by resorting to what "the intelligent majority"[24] or "the most enlightened"[25] think, that is substituting his own prejudice for historical scholarship.

I have gone on too long, proving a simple point, that you cannot leave the laying down of principles for the resolution of social conflicts to experts. It is the responsibility of every citizen to take a critical interest in the future of law reform. Power without responsibility is a great evil that mankind has to overcome by putting the responsibility where it naturally lies, in the people affected.

THE NEW LAWYER

Of course there will have to be experts, lawyers trained to be scientific and not dogmatic, to consider themselves honoured to serve their fellows, not delighting in the exclusiveness of an ancient priesthood. Some of these men and women it will be my job to help to learn. They will need to master the social sciences, to be able to join in interdisciplinary research and work as members of a team with men who are not lawyers. There are those who will doubt whether all this will produce good practical lawyers. To them I say that they will continue to be good sound practical lawyers, with the help of the profession's Legal Practice Course and whatever future improvements there may eventually be to it. But some of them will be *great* lawyers, inventive, creative, committed to helping their fellows by giving them a scientifically organized and tested body of law and a legal system beyond our present dreams.

THE NEW LAW

It will be objected also that I have not described how the new law I speak about will be created. I can only describe the necessary scientific method in outline:[26]

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23 Sir William Holdsworth, *A History of English Law,* Volume XIII, London Methuen, 1952, p. 98.

24 Holdsworth, op. cit. p. 125.

25 ibid. p. 23.

26 Compare the scheme outlined and practised by F. K. Beutel, *Some Potentialities of Experimental Jurisprudence as a New Branch of Social Science,* Lincoln U. of Nebraska Press, particularly at pp. 18, 19.

1. Study the nature of the phenomena which the law now tries to control.
2. Isolate the conflict of interest or other social problem that the law now attempts to regulate.
3. State accurately the rule of law or other method now in use.
4. Observe, measure and describe the effect of this rule on society.
5. Construct a hypothesis to explain this effect.
6. Try to broaden this rule to other similar situations as far as it will go.
7. The result is a law describing what occurs on its application to problems of a particular kind.
8. If the law works inefficiently, or unfairly, then both the originally desired result and the techniques of accomplishing it must be analysed to see whether new law is necessary.
9. By observation of what actually happens between people decide what it is really necessary to control.
10. Work out the best way to do this by constructing hypothetical schemes, and indeed by trying actual social experiments, when we become sufficiently sophisticated, and test them to destruction. It would be helpful to compare legal principles of different times and places. There is an analogy with comparative philology.

Of course this is no more than a sketch. A thorough presentation would take too long and you have already shown great patience.

All that matters is that the law should do a good job for society, for all the individuals it affects. Many things which now control the law's developments cannot be allowed any influence in the future: self-interest, coziness, lethargy, escapism, the urge to be popular, the fear of offending those who cling honestly and with strong emotions to views which are unsupportable by argument. There will be those who say that mine is a Utopian dream. If I suffer from the same faults as my prophetic predecessors I shall have erred by not being imaginative enough. I expect that the world in 2000 A.D. when I am due to retire will be different in ways I cannot dream of. But there is a much more telling answer. We must put our law, our principles for the corporate ordering of social conflicts, on a scientific base. If we do not, we die. We all die as individuals, of course, but most of us feel that it is important that the human race should continue. A few people now have it in their scientific power to destroy it. We must give to the people the scientific power to secure its continuance. The natural sciences must continue to progress. This is as beneficient as it is inevitable. But the social sciences, like an underdeveloped country, must be given a privileged position in the distribution of educational and research resources if they are to catch up.

I promised you that there would be no display of erudition. I am sure that I have kept my promise. I have tried to paint a picture of present society's needs, which can only be done by showing the tension which the future creates with the past. I have not tried to avoid the exposure of the painter that a picture gives, in this case of an ignorant beginner in scientific enquiry into law by the empirical study of social relations and conflicts. My greatest hope is that I shall have left you with a feeling of optimistic unease.