Legal Gridlock

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A Critique of the American Legal System

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"Law reflects but in no sense determines the moral worth of a society.... The better the society, the less law there will be. In Heaven there will be no law, and the lion will lie down with the lamb.... The worse the society, the more law there will be. In Hell there will be nothing but law, and due process will be meticulously observed."

Grant Gilmore, The Ages of American Law
(Yale Press, 1977) pp. 110–111

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Preface

I have studied, taught, spoken and written about the law for most of my adult life. So I am well acquainted with its virtues and vices. Sometimes it miscarries. More often it achieves approximately what we expect of it. But it is an imperfect system. And we expect too much.

As a social system, it should — indeed must — adjust to changes in circumstances. But, if we expect too much, it will inevitably fall short. The rule of law, and our expectations of it, are what this book is about.

Acknowledgments

During my forty-two year career as administrator, researcher, teacher, and consultant, it has been my good fortune to work with some of the legal profession's finest people. This book has been influenced by them in ways they will never know.

One of the earliest and most enduring influences was my friend and colleague David J. McCarthy, then Associate Dean, but subsequently Dean of Georgetown University Law Center in Washington, D.C. Six months consulting with Edgar and Jean Cahn about the establishment of an experimental law school (Antioch) also was illuminating. Twelve years in Washington, observing the federal government in action, didn't hurt either.

Concentrated thought on the subject began, however, during my two years as Assistant Executive Director of the American Bar Foundation. I worked with a blue-ribbon committee studying legal education, and liaised with a consultative group advising Barbara Curran's mammoth study of "The Legal Needs of the Public."[1] In the former role, I compared the use of the case method in graduate business and law schools. In the latter, my eyes were opened as never before to the numerous ways that lawyers serve clients, and how those clients regard the service they receive.

All my previous research and thought was brought into sharper focus when I was selected to be Project Director for a distinguished commission tasked with a "cradle to grave" study of "lawyering in New England."[2] Jack Hoy, Director of the New England Board of Higher Education, was remarkably prescient in his belief that education had a profound influence on professional

behavior and that professions in turn had a huge impact on the economy. Tom Salmon, chair of the Commission, a small-town lawyer and former Governor of Vermont, was masterful in helping a very diverse group of commissioners agree to an unexpectedly large number of conclusions. Subsequently, the work of the Commission had a profound influence on an American Bar Association study of legal education and practice, headed by ABA President Robert MacCrate.[3]

The retirement of a good friend, Chief Justice Edward Hennessy of the Supreme Judicial Court of Massachusetts, was the first occasion I had to put my "gridlock" theories on paper.[4] They have grown a great deal in scope and complexity since.

My studies abroad, at Cambridge, Exeter, Edinburgh, the University of London's Institute for Advanced Legal Studies, and the Inns of Court (Lincoln's Inn), acquainted me with the influence of U.S. businesses and law on foreign legal practice and vice versa (public international law), the extent to which American law firms have established themselves abroad, and the degree to which national laws are becoming harmonized (particularly in the European Community). Of special help to me in these inquiries were the late Dr. Kurt Lipstein, Professor of European Law (Clare) and Vice-Chancellor Emeritus, Sir David Williams, Q.C. (Emmanuel), and Alan Dashwood, formerly Director of Legal Services for the European Council and Director of the Centre for European Legal Studies (Sidney Sussex)—all at Cambridge.

Studies at the University of Auckland introduced an Asian dimension, where the law is more opaque and often quite contrary to Anglo-American principles. Of great help to me were Aneurian Hughes, then the European Ambassador to Australia and New Zealand, and the work of Professor Peter Drysdale of the Australian National University in Canberra.

Last, but certainly not least, I am deeply indebted to three hard-working and resourceful research associates, Geoff Enns, Jesse Hart, and Sylvie Charles; two excellent research librarians, Bob Menanteaux and Kelly Kunsch; and a superior secretary, Nanette Bradshaw, for their many contributions to this work.