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RULE OF LEGAL RHETORIC

Geoffrey C. Hazard, Jr.*

THESE essays are dedicated to Dean Attanasio, who has long championed the Rule of Law. I too have championed the rule of law. Indeed, I have practiced it by participating in many rule-making enterprises—the American Law Institute’s Restatements, for example, and the American Bar Association Model Rules of Professional Conduct for another example.¹ I still believe in the rule of law. But I have doubts about whether we fully understand the American version of that concept.

The doubts arise from various circumstances:

Many Americans regularly disregard some of our laws, notably the posted speed limits. On any highway marked at 60 mph, most cars will be going about 67–70 mph. Everyone knows this, but we do not take action to raise the speed limits or to eliminate them, as the Europeans have done on their freeways.² It must be convenient to have both a definite rule and an indefinite enforcement policy, perhaps convenient for most drivers and for the highway police.

Many Americans regularly cheat a little bit on their income tax returns, and some cheat a lot. One solution would be to eliminate income tax on incomes below \$100,000, as Michael Graetz has suggested.³ Another solution would be to increase the staff of the Internal Revenue Service, but that agency is very unpopular, particularly these days.⁴

Many business enterprises regard “compliance” with legal regulation as a strategy of marginal observance, based on estimation of the risk of being caught.⁵ The strategy is rational because the formal network of regulation of many businesses, if taken literally, would be very burdensome for many enterprises.⁶ Many governments have a “counter-compliance”

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1. Geoffrey C. Hazard, Jr. was the Director of the ALI for 15 years and Reporter for the Model Rules.

2. See *Current Speed Limit Policies*, European Commission Mobility & Transport (May 6, 2014), ec.europa.eu/transport/road_safety/specialist/knowledge/speed/speed_limits/current_speed_limit_policies_en.htm.

3. Michael J. Graetz, *Taxes that Work: A Simple American Plan*, 58 FLA. L. REV. 1043, 1044 (2006).

4. Luke Wachob, *After Public Outcry, IRS to ‘Reconsider’ Its Attempt to Police Non-Profit Speech*, FORBES (July 29, 2014, 3:00 PM), www.forbes.com/sites/realspin/2014/07/29/after-public-outcry-irs-to-reconsider-its-attempt-to-police-non-profit-speech.

5. See Kristin E. Hickman & Claire A. Hill, *Concepts, Categories, and Compliance in the Regulatory State*, 94 MINN. L. REV. 1151, 1159–64 (2010).

6. See *id.*

strategy.⁷ Under this strategy, the regulations are drafted as over-regulation to counter the discount on typical compliance.⁸ Nominal over-regulation coupled with minimalist compliance yields a zone for negotiation.⁹

Most litigation is settled rather than adjudicated.¹⁰ That has always been the case, but these days it is dramatically so. The settlement ratio in most tribunals is 90% or more of case filings.¹¹ Many appellate courts have systematic procedures aimed at promoting settlements even at the filing stage.¹²

The watchphrase in most legal disputation therefore is “bargaining in the shadow of the law.” That is the title of a now-famous article written several decades ago.¹³ The article specifically addressed divorce litigation, but its thesis is now valid across the legal landscape.¹⁴

Our legal system has become extremely difficult to understand for ordinary citizens, even for smart lawyers. The following is a brief outline of some of the causes of its complexity.

I. “TOO MANY CASES MAKE BAD LAW”

Some years ago, Professor David Luban described our situation in terms of the sheer volume of legal disputes:

America is getting bigger. . . . The number of possible interactions increase much more rapidly than the number of actors Increasing population density, coupled with technological advances in communication, means that the average daily number of interactions per person is undoubtedly increasing. . . . [T]he percentage of interactions that go sour will rise. . . . [M]ore trial courts generate more law, along with more inconsistent decisions, more appeals, more efforts by higher courts to reconcile inconsistencies—[a] buzzing blooming confusion of legal information. . . . Too many cases make bad law.¹⁵

More briefly, the Judicial Conference of the United States put it this way: “Federal law would be a babel.”¹⁶

7. *See id.*

8. *See id.* at 1171.

9. *See id.*

10. Bruce L. Hay & Kathryn E. Spier, *Litigation and Settlement*, in HARV. L. SCH. JOHN M. OLIN CTR. FOR L., ECON. & BUS. DISCUSSION PAPER SERIES, available at http://www.law.harvard.edu/programs/olin_center/papers/pdf/218.pdf.

11. *See id.*

12. ROBERT J. NIEMIC, *MEDIATION & CONFERENCE PROGRAMS IN THE FEDERAL COURTS OF APPEALS: A SOURCEBOOK FOR JUDGES AND LAWYERS*, 3 (2d ed. 2006).

13. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

14. *See id.*

15. David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO L. J. 2619, 2642–46 (1995); *see also* Michael Moffitt, *Three Things to be Against (“Settlement” Not Included)*, 78 FORDHAM L. REV. 1203 (2009).

16. COMM. ON LONG RANGE PLANNING, JUDICIAL CONFERENCE OF THE U.S., *LONG RANGE PLAN FOR THE FEDERAL COURTS*. 19 (1995).

II. AN ACTIVIST JUDICIARY

Since American courts are relatively activists in redefining the law, in every case lies the possibility that the law will be changed from what it was when the case began. Trial judges in our system reflect a diversity in political philosophy that expresses the largely political basis of their appointment as judges. In most other legal systems, the judges are appointed primarily according to traditional professional criteria, and thus are comparatively homogenous in outlook.¹⁷ There has been much comment recently on the activism of the present Supreme Court of the United States. Careful empirical studies support this observation¹⁸. However, it should also be remembered that the Supreme Court in the past has been very activist in other directions. The most dramatic example is *Brown v. Board of Education*,¹⁹ a decision we have come to see as entirely appropriate but which at the time was revolutionary.

III. INATTENTION TO SYSTEM MAINTENANCE

Our governmental units are preoccupied with maintaining the status quo and creating new reforms. As a consequence of these preoccupations, they give inadequate attention to clearing up confusion in the system as it exists at any given time. There are many examples: the gross underfunding of most public pension programs;²⁰ agencies of the same government using different telephonic and electronic communication systems, which in the case of the 9/11 catastrophe in New York meant that police and fire teams could not communicate with each other,²¹ and in the case of the new Affordable Care Act, it has been extraordinarily difficult to coordinate communication among various federal government agencies;²² most major construction projects, public or private, face prolonged delays because they must comply separately with uncoordinated directives from diverse regulatory authorities;²³ a famous one, now finally corrected, was that each of the U.S. armed forces participated in combat without a single coordinating commander.²⁴

An important lack of coordination has long existed in the relationship between background, state law, and adoption of new federal legislation

17. GEOFFREY C. HAZARD, JR., JOHN LEUBSDORF & DEBRA BASSETT, *CIVIL PROCEDURE*, 591–92 (6th ed. 2011).

18. Margaret L. Moses, *Beyond Judicial Activism: When the Supreme Court is No Longer a Court*, 14 U. PA. J. CONST. L. 161 (2011).

19. *Brown v. Bd. of Ed. of Topeka, Shawnee Cnt'y, Kan.*, 347 U.S. 483 (1954).

20. CONG. BUDGET OFFICE, *THE UNDERFUNDING OF STATE AND LOCAL PENSION PLANS* (2011).

21. THE 911 COMMISSION, *THE 911 COMMISSION REPORT*, at 280–85 (2004).

22. See DENVER DEP'T HUMAN SERV., DENVER DEPARTMENT OF HUMAN SERVICES COMMUNITY SERVICES GRANT NEEDS ASSESSMENT: EXECUTIVE SUMMARY 3 (2014).

23. Christopher J. Mayer & C. Tsunel Somerville, *Land Use Regulation and New Construction*, available at <https://www0.gsb.columbia.edu/mygsb/faculty/research/pubfiles/519/519.pdf>.

24. See National Security Act of 1947, Pub. L. No. 80-253, 61 Stat. 495 (creating the Joint Chiefs of Staff).

and regulation. The legal aspect of this situation is called the preemption problem: To what extent, if any, does federal regulation of a subject imply that existing state regulation is preempted, that is, displaced partially or entirely? This complicated problem is the subject of an entire book by Alan Untereiner, *The Preemption Defense in Torts Actions*.²⁵ I made a contribution to this discussion in *Quasi-Preemption: Nervous Breakdown in Our Constitutional System*.²⁶

IV. AN UNUSUALLY COMPLEX LEGAL SYSTEM

It is well recognized that our government system is a federation. A federation involves dual sovereignty—the national government and the State governments.²⁷ But our federation is even more complicated. There are substantial differences among the States concerning appropriate public policy in such matters as abortion and same-sex marriage, but also in supposedly more “neutral” issues such as taxation and health care.²⁸ Accepted public policy in Massachusetts or California is virtually anathema in regions such as Texas and Oklahoma, for example.

But there is even greater complexity than generally recognized. In our system there are fifty states but approximately 3,000 counties, and much of our public and legal policy is administered and shaped at the county level.²⁹ For example, basic public education is provided by local government, as is the basic police function and the administration of justice in the trial courts. Housing and zoning also are largely under local control. Many important private activities are similarly situated—churches, civic associations, residential areas, and so on. Congressman Tip O’Neill famously said that “all politics is local.”³⁰

Additional dimensions of complexity result from the separation of powers at both the national and state level. The legislatures can enact but they cannot enforce, and the executive can shape public policy by selective enforcement. The complexities in local government can defy explanation. And judicial authority stands ready, and sometimes receptive, to nullify through judicial review what the other branches and units of government have sought to implement.

V. AN “UNRULY” CITIZENRY

In the United States, law plays an ambiguous role in maintaining the social order. Americans seem to have strong motivation to assert legal rights for themselves, but not so ready an inclination voluntarily

25. ALAN UNTEREINER, *THE PREEMPTION DEFENCE IN TORT ACTIONS* (2008).

26. Geoffrey C. Hazard, Jr., *Quasi-Preemption: Nervous Breakdown in Our Constitutional System*, 84 *TULANE L. REV.* 1143 (2010).

27. See Edward A. Purcell, Jr., *Evolving Understandings of American Federalism: Some Shifting Parameters*, 50 *N.Y.L. SCH. L. REV.* 635, 697 (2005–2006).

28. See *id.*

29. *Overview of County Government*, NAT’L ASS’N COUNTIES (2014), <http://www.naco.org/counties/learn/pages/overview.aspx>.

30. CHRISTOPHER MATTHEWS, *TIP AND THE GIPPER* (2013).

to recognize legal authority. Adjustment of social conflict through claiming and contesting of legal rights plays a very important part in our political culture. . . . The American ethos is hostile to authority as such. Efficiently implementing this set of values would require a peculiar system of social justice. The system would have to be wide open to the reception of legal claims and hospitable to giving them elaborate consideration. The system would be slow to impose final judgment. It would permit social conflict to be articulated in terms of legal rights but prefer that these conflicts ordinarily be resolved by private bargain.³¹

VI. CONCLUSION

In light of the foregoing, we might better think of our system as the Rule of Legal Rhetoric: political pushing and shoving, conducted in legal terminology, typically addressed through negotiation, ending in quasi-public resolutions—a complicated combination of multiple public authorities and decentralized private initiatives.

Our system is so complex that the arguably determinative rules overlap, qualify, and sometimes contradict each other, often in complex ways. So counsel for parties often cannot confidently state that the governing rule is X, only that the governing rule ought to be X but might be X or Y. Also, there are often conflicting views of what the facts are, even after discovery is complete, and different facts are the basis for different applicable rules of law. When that is so, as it often is, the rival contentions frame a problem of negotiation, conducted in the language of rule of law but with both sides coming to recognize that neither has preemptive authority for its position.

31. HAZARD, LEUBSDORF AND BASSETT, *supra* note 17, at 601–03.