Invasive Government and the Destruction of Certainty

by Ridgway K. Foley, Jr.

Law exists. It exists in the inexorable rules of consequence which govern the universe, including the inescapable rules attendant upon human action. It exists in positive or man-made rules and orders imposed by human beings, acting singly or in concert, upon other men.

Men search for justice as a quality of law in both senses of the term. If a precise and acceptable definition of law has eluded scholars and students, so also have the quality and the essential characteristics of justice proven chimerical. Attempts at definition often produce tautologies; attempts at analysis often bring forth murk. Solutions to such eternal and complicated inquiries sometimes commence with simple beginnings, and this essay addresses one simple element of justice prevalent in the common law tradition, the requirement of predictability.

I. Predictability as an Aspect of Justice

A commonplace tautology equates justice with fairness, without any feint at content or elucidation. Nonetheless, "fairness" in the common law tradition gives birth to the beguiling beauty of equality. Equality, in the guise of Cain, cultivates a leveling egalitarianism, quite apart from sound tradition or good sense. Equality, in the garb of Abel, calls for like treatment in similar situations: it is "fair" or "just" if commoner and king each must keep their uncoerced promises, avoid trespassing upon the next-door neighbor's land, and restore gains secured by deception and malevolence. The grand phrase, "equality under the law," properly conveys no more than this notion.

Certainty represents an essential component of this sort of fair or just behavior. Occupants of all stations in life start legally equal if each individual understands that similar responses will follow like acts or omissions. The common law participated in a sentiment that every man should know the law and govern his actions accordingly. This presumption—less a fiction in the fifteenth century than in the twentieth—obviated any defense of the unintended consequence; one could not avoid an unpleasant outcome by the subjective assertion that he did not understand his act to be unlawful, or that he did not contemplate a specific binding result. Derided by some modernists as unduly formalistic, the certainty of the common law allowed men to organize their activities and to accommodate their behavior to regular, common, known rules of order, similar in concept to the natural rules of order of the physical and praxeological universe.

II. Two Aspects of Certainty

Each individual participates in a search for certainty. The desire for predictable consequences inheres in each of us. Men cannot function in a random world; a rational aspect compels us to behave in a manner consonant with anticipated results. Hence, if we lived in a

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universe where the sun rose in the east one morning, in the west the next midday, and not at all during a third discrete period of time, none of us could carry on an existence bearing any semblance to life as we know it. If our actions produced highly irregular results, if our attempts to communicate afforded outrageous responses, if our physical world displayed no orderliness, all sanity would disappear forthwith. Order, regularity, and certainty represent necessary touchstones for human endeavor since development and achievement presuppose a natural order and a capacity to cope with, and learn from, our nature and our world.

Nonetheless, consider this countervailing truth: It is possible, indeed likely, to seek a predictability beyond our ken. If men possessed perfect hindsight and foreknowledge, if they could be "as gods" (Gen.3:5), a perfect predictability, an absolute certainty, would appertain. Each actor would understand causality and responsibility perfectly, and each act would bring forth precisely intended results. While such a utopia would not need to deal with the unintended consequence and with the thwarted expectation, the issue of moral conduct would remain to perplex that supposed society of perfect knowledge. A presupposition of absolute certainty need not necessarily incorporate an assumption of propriety: an all-knowing being could will to destroy or enslave his neighbor as the tyrants of the twentieth century have so amply demonstrated.

Of course, no such perfect knowledge appertains in the real world. One is tempted to add that no unflinching regularity appears in our life and in our world; to yield to such a temptation is to suffer seduction by a pervasive siren. Analysis compels the student to differentiate the orderly natural world from the imperfection of the human actor. The natural order consists of perfect regularity by definition: It is rational and not random, and effect follows cause in an inexorable fashion. Human behavior—part of that natural universe of things, forces, and events—likewise calls forth predictable and certain results.

The sticking point resides in the finity of mankind: to turn Niebuhr's thought counterclockwise and to render it more accurate, we are "disorderly men in an orderly universe." Our world, including the results of our activities, is perfectly predictable, yet our knowledge lacks such perfection. We assess historical causality poorly, if at all; is it any wonder that we consistently skew our predictions for the future? If any individual understood the past and could comprehend the future, he would achieve unparalleled material success: Such a lawyer would win every case and receive both prompt and full payment of his fee; such a physician would cure every patient, for he would avoid the incurable and the noncomplying; such an investor would purchase only stocks that soared, and he would sell them at their zenith.

The jurisprudential concept of certainty, then, must be perceived against this curious backdrop of human duality. Man requires regularity, yet a quest for absolute certainty proves to be a vain and unproductive act. An appropriate philosophy of law must accept the inherent regularity and perfection of the natural law of cause-and-consequence; concurrently, it must assess the role of a man-made law (posited rules and orders) designed to govern human beings who cannot survive in a random, rule-free world, and who crave predictability even to the point of impossibility, given man's flawed nature. Moreover, the scholar must never overlook the flawed nature of the *maker* of positive law: no man possesses any demonstrable edge over others in the management of human affairs other than his own!

Hence, the issue of legal certainty thrusts an incredibly complex equation before us. Review these factors, from the myriad which concatenate to cause our perplexity:

(1) An orderly natural universe of great complexity;

(2) Myriad individual actors inhabiting that universe, exhibiting these traits, among others:

(a) Incomplete knowledge

(b) Variable knowledge among members of the species

(c) Positive and sinister motives

(d) Inability to function in a random environment

(e) A desire for absolute certainty;

(3) A necessity for positive rules and orders to allow societal development, e.g.,

resolution of disputes and prevention of aggression;

(4) A disharmony between some positive law and the overriding natural law;

(5) The creation and application of positive law by individuals beset with the very limitations observed in point 2 above.

III. Common Law and Continental Tradition: A Comparison

One salient inquiry within this complicated matrix is whether, and to what extent, positive law provides, and ought to assure, predictability. Once again, recourse to the history of our common law affords essential insights. The codified Continental tradition differs mightily from the common law in several particulars, e.g., a professional class of decision-makers, an absence of community adjudicators, a strict bureaucratic formalism, and a denial of the individual rights tradition.

For our present purposes, the overweeningly remarkable and disparate attribute of the Continental system of jurisprudence appears in the imposition of pre-existent and detailed codes of conduct upon a society already fettered by the absence of individual decisional rights and by the presence of control by a professional adjudicatory and administrative class. Most systems of law outside of the Anglo-American mainstream proceed from the premise that all power inheres in the state; the state may cede some powers to inhabitants and perhaps label those choices "rights," but the power to convey incorporates the power to reclaim. The state in this conceptual framework prescribes and proscribes human activity by means of detailed codes, edicts, and decrees, customarily written in the more advanced nations, emanating from the sovereign monarch or legislative body. In essence, the modern codifiers differ little from Hammurabi, Justinian, and Napoleon.

Clearly, the Continental practice calls forth many conceptual and practical difficulties. In the present context, pervasive codes establish the apex of formalism. Human beings must act, or refrain from acting, precisely as set down by the single or collegial dictocrat. The administrator represents the worst of bureaucratic myopia: If the code contains no specific directive, activity must cease, for the state cannot countenance interstitial innovation. Prior restraint cuts off the chain of creative consequence, grubbing out the bud of change.[1] No matter that human frailty prevents any king or parliament from anticipating all possible (or even likely) choices and events, and from setting forth clear and wise rules governing all related circumstances in advance; one fact holds invariably true: Six millennia of recorded failure has not diminished the social tyrant's zeal significantly.

Simply put, the Continental system at its most zealous represents the climax of the human predilection for perfect certainty observed heretofore. Perversely, that quest for predictability proves useless: A codified world may be sterile, dull, and uncreative, but it certainly is not necessarily predictable, except to the extent that stultifying positive law always impedes human creativity and betterment.

Common law theory proceeded from radically different conceptual premises. In the first place, an evolving concept of natural, individual rights early eroded the authoritarian and absolutist English monarchy. True, Great Britain suffered under venal tyrants and false doctrines, in similar fashion to other nations. Nonetheless, at least as early as the Magna Carta, the subject intruded upon the sovereign's self-proclaimed habitat, and compelled a declaration of rights quite apart from privileges transitorily ceded by the state.

At least five centuries witnessed the ebb and flow of the struggle between power-corrupt demigod and resistant citizen. From the Magna Carta to Lord Coke and beyond, the individual slowly established the theoretical base from whence emerged the individualistic political theory of John Locke and the incipient market economic analysis of Adam Smith. While it remained for the fledgling United States to give full bloom to the fragile flower of liberty, certainly the nineteenth century witnessed the blossom throughout much of the Anglo-American world, in thought if not completely in deed.

In the second place, the common law tradition proceeded upon tenets more fearful of prior restraint than the Continental premise. The common law operated on the notion that

law existed, to be found by the judge and applied to concrete situations and real disputes. Certainly, English Parliaments enacted statutes, and British administrators provided some desultory regulation, but for centuries the common law decried pervasive codification as unworkable and unwise. Instead, the common law permitted free development of human choice without inhibiting pre-existing rules; when the interests of two or more individuals appeared to collide, and the parties could not settle the matter amicably, the dispute was brought before one of the king's courts for final resolution.

The judge sought to adjudicate by reference to pre-existing general principles which he applied to the case at hand; the jury—a device rooted in the Saxon Witan and significantly different from any institution in the Continental scheme—evolved as the body which applied the community standard of justice to the resolution of factual disputes. Unlike the Continental counterpart-edifice, the jury arose from the community, served its purpose, and returned to its daily life; the judge gained office after service at the bar or in other distinguished roles; neither jury nor judge represented a professional class of decision-maker in the mode of the rest of Europe.

IV. The Decline of Juristic Certainty

At the turn of the twentieth century, the jurisprudential analogue to John Dewey and John Maynard Keynes commenced a campaign of derision against the common law tradition. The Instrumentalists, led by Oliver Wendell Holmes, Jr., Karl Llewellyn, Roscoe Pound, and Lon Fuller, railed against "formalism" and in so doing subverted the unique Anglo-American system so carefully constructed over the centuries. From shallow beginnings, the Instrumentalists seized control of the robes in less than a half-century; today, save for a few splinter movements of little merit and less persuasion, the Instrumentalist revolution is complete[2] and few thoughtful voices of rebuke can be discerned above the babble.

The Instrumentalist attack focused upon legal method and produced a shaky and unpredictable relativism in place of the substantial certainty unique to our heritage. The Instrumentalists criticized their "formalistic" precursors for dryly logical reasoning, for an internal legal symmetry borne of predictability, and for their perceived indifference to "social effects." As a result of this frontal assault upon the established order, the radical realist substituted sociology for jurisprudence and *ad hoc* jural orders for predictable results. In the course of this enterprise, the law has become a gigantic game show, with the prevailing litigant resembling the successful contestant capable of guessing correctly if fortuitously.[3]

Pertinent to our concern with certainty is the Instrumentalists' criticism of what they pejoratively termed "the theory of legal abundance." A pinion of common law theory considered all legal principles to be pre-existent, all-encompassing, complete, and comprehensive; as a consequence, the judge merely found and applied the law to a dispute set before him.

The Instrumentalist challenged this view: He argued that law is, or ought to be, nascent, fragmentary, and inchoate in all manner of ways, leaving great latitude to the lawmaker to sculpt rules and orders to fit particular situations and to meet changing times. As in most ideological altercations, inept phrases and muddled values inhibited the Formalist/Instrumentalist combat. The fundamental soundness of the common law lay in its resistance to prior restraint and in its allegiance to a belief in an overriding natural law to which all positive law ought to conform in order to achieve the best possible (but not perfect) result. In truth, the principles "found" and applied by the King's Bench, the Court of Common Pleas, and later, in the commercial Law Merchant, reflected emerging principles necessary to a free but orderly society.

Few articulate defenders of natural law would assert that all juridical principles for all time are written down in a code-book, wherein the clever judge can turn to just the right page and find his solution. Rather, certain rules of order and causality apply to human action, just as precisely as the physical rules of gravity and thermal dynamics govern the corporeal universe; adherence to these rules of human action in resolving disputes—as nearly as any fallible being can follow precise principles—will, on the whole, produce the most harmonious out-

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come. The misplaced Instrumentalist derision replaced a relative certainty and a societal open texture with an unhappy formless formalism, where prediction becomes the exception, not the rule, and all of us reside at the whim of today's lawgiver.

One should not lay sole responsibility for the deterioration of legal certainty at the Instrumentalist door. Nor should one indulge in the supposition that a perfect predictability flourished in, say, the eighteenth or nineteenth centuries, only to be obliterated in a recent *coup d'état*. The seeds of Continental-style staleness flourished, to a greater or lesser extent, throughout our juridical history, and the ultimate culprit may well be an aspect of human nature to which the Instrumentalists pandered.[4] After all, while man craves predictability, he likewise displays traits of envy, arrogance, and tyranny which, plied with a false assurance of certitude, guarantee his downfall.

Those who slight the Socratic dictum ("I know not; yet, I know that I know not.") presume to assess causality accurately and events comprehensively, and to practice perfect morality. Despite their affectation of correctness, they misapprehend the nature of man and the order of his universe; therefore, they necessarily come a cropper.

Mankind is neither perfect nor perfectible; we are *individuals* capable of improvement, but the best of us always fall short of the standard. One dimension of our finiteness appears in our very inability to observe, relate, analyze, and effect events and our own actions in perfect fashion. The result we achieve often is not the result we will. We predict poorly. We comprehend history selectively and imperfectly. We decipher the ineluctable moral order and natural law of our existence in a substandard manner. Thus, we may crave juridical certainty but our fallible nature impedes us from perfect achievement and our whimsical cockiness warrants that perverse and unintended repercussions will occur. Those who seek predictability at the expense of personal liberty end up enslaved to the feeblest of minds and the most inferior mode of behavior.

V. A Demonstrable and Pervasive Deterioration

The dubious may seek proof that legal predictability is declining. Evidence abounds. The loss of certainty pervades every jural nook and cranny. A few select examples will demonstrate the point.

First, consider the law of contracts, that body of rules and orders which concerns the enforcement of promissory obligations. Perhaps in the dim and distant common law past all promises uttered were subject to strict enforcement: After all, the literalists of pre-Norman times burned fallen trees and slaughtered cattle if these inanimate objects or animals caused a human death. In any event, the Chancellor soon ameliorated the harshness of strict enforcement where, e.g., promises were induced by fraud, duress, or overreaching. Certainly, one ought not be held bound to perform an act which is the product of compulsion or deceit.

The history of the common law of promissory obligations makes one point patent: The law has slowly but surely evolved to an ameliorative stance wherein a promisor whose expectations are thwarted or whose forecast is flawed stands a likelihood of relief from his obligations, in whole or in part, at the expense of a promisee who forecasts more correctly and who now experiences punishment (in the form of *his* thwarted expectations) for accuracy. The Chancellor's Romanist/Continental influence provided the seed of many of these doctrinal devices—e.g., unilateral or mutual mistake, impossibility, commercial frustration—and modern legislators have carried on the tradition, e.g., the doctrine of commercial unreasonableness and other "public policy" pretenses. The result: Parties to a contract do not know if, and to what extent, the courts will enforce their voluntary bargain.

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Crumbling certainty damns the ethical promisor to an uneasy reliance; it permits the less scrupulous to enter silly deals with the glib assumption that, if all else fails, the legal system will bail him out. Consequently, parties make less efficient use of time, energy, ideas, and materials, and employ limited resources less carefully. In Japan, commercial transactions are never really "final" in the Anglo-American sense; solemnly written contracts are constantly "renegotiated" as times, conditions, and knowledge advance; the American scene more and more resembles its Oriental counterpart in this regard.[5]

Second, the law of real property affords additional proof. Over the centuries, real property rules and orders concentrated upon the law of titles and the devolution and transfer of land, with little or no heed paid to the *use* of property. While all titles emanated from the sovereign in jural folklore, the owner assumed that he could use his land as he saw fit. If, in some rare instance, his use of realty harmed a neighbor (e.g., escaping waters or wild beasts or the like), the law courts provided a forum and a recourse whereby a judge and jury could sort out the problem without any broad impediments of prior restraint. In the area of common law concentration—titles and transfer—a few fairly well-defined and formal rules developed over time, providing a known and certain framework for the maintenance and devolution of the principal form of wealth in Medieval England and, indeed, in Colonial and post-Revolutionary America.

The predictable past has become the uncertain present, particularly with regard to the employment and enjoyment of real property. Sovereign ownership of all land constituted a noxious and unnecessary fiction; nonetheless, in most instances until recently, indulgence in this fictive conjecture brought forth precious little practical harm: The laws of nuisance, negligence, and ultrahazardous activity, while containing an embryo capable of destroying the moral private property order, were reined in by judicious judges and common sense, leaving an owner in "fee simple absolute"[6] relatively unhindered as he sought the best use of his land in his subjective sight.[7]

Today, one cares little about titles, transfers, and competing private ownership rights.[8] Instead, the landowner fears the shifting sands of *public* claims upon his private real property, by virtue of land use regulation, direct condemnation for all manner of newly minted "public purposes," zoning rules and restrictions, inverse condemnation, and a covey of their legal siblings. Even more vexing is the fact that a landowner may buy real property for use in a particular manner and for a specific purpose lawful at the time of purchase, invest substantial sums in planning and improvements, only to discover to his horror and detriment that some public (busy)body with neither investment nor good sense (nor "right" in any acceptable sense of the word) has declared that the owner's specific piece of property may not be used for his desired purpose and, sometimes, for *no* reasonable purpose whatsoever.

Terminology makes no difference: In various jurisdictions the effective body may be known as a county commission, a city council, a land development bureau, a community planning organization, a neighborhood association, a design review committee, or one of myriad other designations. The end result does not vary: unpredictable and devastating interference with private property rights, underlain by the type of legal uncertainty that breeds frustration and political fixes.

Third, a review of the law of employment relations reveals additional stark uncertainty. The market flourished and all participants prospered precisely because entrepreneurs remained at liberty to deploy labor and capital in rapid response to the changing demands of the consumer. Planning resulted from voluntary action imposed upon individual assessment and analysis; those who forecast most accurately gained

the greatest success, since they were the creators and suppliers of the most desired goods, services, and ideas. Contract, not coercion, regulated the market for labor as well as the supply of capital and the sale of products. In order to redeploy swiftly in response to market command, employers and employees often eschewed restrictive or lengthy workplace contracts: The dissatisfied workman could pull up stakes at will, just as the owner or the manager could sever the employment relationship at the end of its term.

Today, the law has skewed the workplace relationship in both an unfair[9] and an unpredictable fashion. Rules proscribing all manner of discrimination and discharge, even in the face of contrary voluntary contractual bargains, impose an unpredictability beyond measure upon the market. Some contend that American labor has priced the United States out of world markets; perhaps so, but more saliently, fewer and fewer enterprising and innovative entrepreneurs display any willingness to assume risks in an arena fraught with wholly unprecedented snares. For example, once an employee enters into a work relationship, the employer may be legally bound to feed, house, insure, and support him for the rest of his days, no matter how clumsy or inept, or how dangerous and distasteful, or how unproductive or hindering he may become. The "right to a (or this) job" slogan is fast becoming a political and economic reality.

Moreover, the employer's choice in the initial hiring process recedes almost as rapidly. George Roche described a "balancing act"[10] in academia a short time past; legislators and jurists have brought their act to the once-private market. In many jurisdictions and endeavors, the purchasers of services (owner, employer, manager) may not choose the best and the brightest: The invasive state tells him whom he shall employ and under what terms and circumstances—perhaps for a lifetime.

Government edicts do not consider quality, or the reciprocal right of the buyer of labor to his contractual rights: Instead, these norms look to a fictive balance of singular factors, e.g., age, race, religion, gender, sexuality, political persuasion, and the like. Given the expanding universe of "employee rights" in the areas of discrimination, discharge, work conditions, and benefits, to name but a few, no one can predict the cost of an enterprise with any assurance. One sure result: withdrawal of capital (goods, innovation, incentive) from the labor-intensive sector of the market, or a transfer from the capital market to the consumptive process entirely. Such market dislocations ultimately harm all participants; oddly enough, the greatest harm visits the very "classes" sought to be protected, aided, or encouraged.

Examination of every crack and crevice in the juridical structure reveals the rot of an enveloping unpredictability. Successive Congresses and legislatures create and tinker with ever-more-complicated rules and regulations, creating ever-changing codified "rights" of action and correlative prohibitions in verdant fields long void of coercive control. Legislation governing "hazardous waste" and other "environmental" conditions and uses, the trade and transfer of securities, the entry into any number of professions and enterprises, and all manner of business practices and combinations illustrates the point. The proliferation of revenue laws, especially in the disguise of "tax reform" producing a volume equivalent in size to the Manhattan Telephone Directory, further complicates the life of the ordinary citizen. The quantum extensions of liability in the several commonplace fields of tort or civil wrongs perplex the employer, producer, and national creative genius and increase litigation to the point of critical mass.[11] Substitution of wavering and often whimsical orders for known principles of choice-of-law where the rules of two or more jurisdictions come into real or apparent conflict[12] further befuddle one who tries to plan his life with any measure of good sense and foresight. Even the rules of evidence and proof shift subtly, unsettling the litigant who founded his case or defense upon the once-predictable past.

VI. Legal Unpredictability: Cause and Effect

Earlier sections of this essay have identified several causes of the developing uncertainty which plagues the United States. The pre-eminent causal factors merit reiteration.

First, we have gradually but inexorably strayed from our common law roots. We have adopted the most inefficacious features of the Continental system—codes of prior restraint, invasive bureaucracies, mandate states—concurrent with a loss of the refuge of natural individual rights. Thus, we have discarded a belief both in the natural rights of each individual and in a natural universal law against which all positive law ought to be measured. As we blithely ignore our tradition, our conditions more and more resemble those unpleasant and unproductive hovels and multitudes from whence our ancestors escaped.

Second, the specific aspect of this first and overriding reason resides in our finite human nature. It is all very well to blame the Instrumentalists, but charlatans have seduced men and women for countless centuries: Unfortunately, the ideological brigand appeals to the fallible and sinister attribute in each of us.We do crave certainty— a secure and pleasant life where all of our choices produce desirable and fulfilling results. The statist panders to our inherent deficiencies by sweetly assuring us that perfect certainty and absolute predictability is possible, if only we cede the power to plan and regulate to the all-wise codifier. Walt Kelly's Pogo wisely announced "we have met the enemy, and they is us"; few twentieth-century sages have uttered any greater truth.

One would be remiss to ignore a third causal factor, bred by the general and specific features set forth: Unpredictability breeds further unpredictability as ensuing legislators, jurists, and administrators attempt to right patent wrongs created by the faulty constraints concocted by their predecessors. When planning is consigned to the political process, the bad judgments of the lower level creatures who occupy the seats of power become magnified and encrusted upon a society and an economy which ought to be mobile and reactive to the changing desires and the improving fund of knowledge of its inhabitants. Few of us readily admit error or failure; the legislator who creates a flawed program partakes of this human trait; hence, legislators tend to make similar and increasingly foolish choices as the world they try to manage unravels. Last year's assembly could not bind the present batch of lawmakers;[13] as a result, the content of the law and the rules of procedure vary, often drastically, leaving a confused and frustrated citizenry in its wake.

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In like fashion, this paper has elucidated some of the many adverse effects of increased uncertainty in the legal fabric. Again, a summary may place the issue in focus.

In the first place, mankind encounters less difficulty in dealing with the vicissitudes of the natural order than it does with the amorphous mass created by unpredictable human beings. Man must plan and attempt to predict; since he lives in a regular, not random, world, and since he possesses the equipment and acuity to grasp relationships, he enjoys the ability to adapt and adjust to the natural order, albeit imperfectly. By virtue of the complex matrix created when fallible men attempt to order human life and action, the world becomes more random and human endeavor becomes less predictable.

In the second place, economic success depends upon accurate prediction. Since all value is subjective, the successful producer creates and distributes the goods, services, and ideas most desired in the marketplace. Satisfaction of consumer demand requires the supplier to assess those desires, an assessment which requires certainty and regularity in order to avoid mere fortuity. Thus, to the extent that the law renders the legal or permissible results of human activity uncertain, economic efficiency declines into misapplication of scarce resources to satisfy nonexistent or less pressing human wants.

In the third place, unnecessary interference with human activity and needless uncertainty creates significant human unhappiness and anxiety. Creative, innovative, and adventurous ac-

tions spice life and lift the individual from the doldrums, at the same time occasioning the material and mental wealth of the world. Useless dampers on such creative action not only impede personal and societal growth but also cause that mold of frustration which breeds in unnatural cultures. Litigiousness, instability, incivility, shoddiness, sharp practice, dishonesty, and their unpleasant companions become natural sojourners in the mandate state.

VII. A Plea for a Return to the Common Law Tradition

Mankind seeks the holy grail of a predictable world. As with the Crusaders' quest, a perfect solution eludes us. Nonetheless, we ought not give up this grand enterprise as futile; rather, we ought to adjust our legal system so as to permit each of us to seek this destiny and, to the extent of our paltry powers, to achieve it.

I plead not for our return to halcyon days of yore, to a Golden Age achieved and lost. Neither Golden Age nor shining city on the hill ever existed, save in our deepest dreams. Nevertheless, our English forebears understood the rudiments of a legal system which, if properly comprehended and carefully shielded from the dark improprieties of men, could once again serve as the jural landscape for a free, productive, and orderly society. That system—the common law tradition, founded upon a recognition that natural rights inhere in each of us, that all positive law ought to relate consistently to the natural order of things, that no fallible lawgiver ought to be cloaked with a codifying power of prior restraint, that a community system of justice exceeds professional dispute resolution in merit and fairness—proved worthy in the past. In its heyday, the common law provided the foundation for the most exciting and beneficial creativity in recorded history; it also coincided with the most mighty political revolution of all time, when these fragile states in a new world broke away from the barriers of the dull and tasteless past, from a system where tyrants sought to impose absolute certainty and could only achieve stale nonsense, and created a new legal system of freedom resting upon the finest attributes of the past.

The choice is clear: recapture the dream of a free and orderly society governed by a common system of law restricted to its proper bounds, or sink in the mire which continues to impoverish the vast majority of human beings in this world. □

1. For a further analysis of the faults of prior restraint, see Ridgway K. Foley, Jr., "Prior Restraint," 31 *Freeman* (No. 10) 609-614 (October, 1981).

2. Of necessity, this commentary upon the Instrumentalist Revolution is cursory. The subject deserves a deeper treatment; it is not relevant to the more limited point of this essay.

3. For an exploration into the labyrinth of modernism in the choice-of-law milieu, see Ridgway K. Foley, Jr., "Fragmentation in the Conflict of Laws," 47 *Or. L. Rev.* 377-389 (June 1968).

4. A respectable body of thought purveys the wisdom that decision-makers follow the robes, the scholars, and the communicators of the preceding era. In such an analysis, the revolutionary seeks to put forth his ideas in such a form so as to influence the clergy, the press and publishing houses, the wire and visual communications industry, the teachers, the scholars, the writers, and the judiciary. It would serve no useful purpose to deflect this paper from its intended course so as to consider this subordinate proposition. Nonetheless, in passing, I challenge both its veracity and utility, and suggest that ingrained human traits may not be so easily maneuvered or eradicated.

5. Sports fans and movie buffs will notice the constant "renegotiation" of agreements by players, coaches, managers, and the like. This unfortunate phenomenon extends well beyond the habitat of the athlete and the starlet.

6. This is the legal signification of the greatest "bundle of rights" one could own in real property in the common law system.

7. The state power of eminent domain also posed a threat to absolute ownership. In the United States, the Fifth Amendment guarantees of just compensation and a taking for a public use, coupled with the concept of a limited government, provided considerable protection to the private owner.

8. But, consider the unpredictability of the modern law of creditors' rights, where legislators protect favored classes of debtors at whim and will.

9. This essay delves into the decline of certainty; it remains for another day to discuss the imbalance and deleterious effects created in the marketplace by, e.g., Employer Liability Laws, Workers' Compensation Acts, mandatory unionism and the closed shop, affirmative action, and like programs.

10. George Charles Roche III, *The Balancing Act* (La Salle, Illinois: Open Court, 1974).

11. See Ridgway K. Foley, Jr., "The Liability Crisis," 37 *Freeman* (No. 1) 12-27 (January 1987).

12. Note 3, *op. cit.*

13. The Founding Fathers created a United States governed by a written Constitution, designed to eliminate whims of politicians and winds of change. Today, the constitutional limits upon governmental action are greatly attenuated; indeed, the deterioration of predictability seeps into the interstices of our governing document, as individual rights once certain become quite ephemeral and dubious.

Who Is an American?

by Richard R. Mayer

As Americans we are often un-American when it comes to illegal aliens.

The word "illegal" connotes something contrary to the law; yet what more clearly defines our law than those unalienable rights spelled out in the Declaration of Independence or what better describes our land than its heritage as a haven for those wishing to better themselves? Can we logically describe as "alien" those who seek freedom, opportunity, and equality before the law?

America is a unique concept. It is a land whose people are defined not in terms of nationality but of outlook. It is what one believes that makes an American, not skin color, religion, or language.

An American is described by his beliefs, his adherence to certain clear principles not of religion but of religious freedom, not of status but of equality of treatment, not of privilege but of opportunity. By this measure there are many true Americans who do not reside here, and others who vegetate here but are not truly Americans.

There is concern that those who come to this land may take jobs from local residents, secure false social security cards, passports, and drivers' licenses, or go on welfare. But are such regimentation and programs really the American heritage? And is beating someone out of a job by being more willing and competitive really un-American? Such objections come from those who have obtained privileged or protected positions through licensing, certification, seniority, or monopolization and who are not willing to compete in a free and open market.

Do I, because I was born here, have greater claim than one who has made the conscious choice to come to the United States? Do I through mere chance and by none of my own doing have a greater claim to being an American than he who has made the effort?

I think not. I only am an American by being an American, by making that choice daily in my life. And the refugee who makes that choice is also a true American, as much as I—a brother of the spirit, as Americanism is a matter of the spirit. He has the right to live, to provide for himself, and to care for his family, without certificate of occupancy or let from petty official or regulatory agency.

Through our churches and legislatures, we dole out billions of dollars in foreign aid—anything to keep the natives happy (and away from our shores). We charitably give to others, so long as they'll stay where they "belong." But we will not grant them the right to practice Americanism, claiming this as a privilege for those who got here first. This isn't very American. □

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