

THE SPIRIT OF LAWS

Scientists and lawyers deal with different kinds of laws. The laws of nature which the scientist tries to discover are inviolable. The law of gravitation, for example, or Newton's three laws of motion, cannot be disobeyed.

Human laws do not share this characteristic. The moral obligation imposed by man-made laws results precisely from the fact that it is possible to break them. That is why everyone censures an outlaw but no one blames the falling apple.

This fundamental distinction is of such ancient origin, its truth so apparent, that one should scarcely need to mention it. Except that there are times in the history of civilizations when the difference seems to be forgotten, and ours is preeminently one of them. A substantial number of Americans now make it their business to examine the interstices of our society for unregulated areas where some spontaneous act of free will might cause trouble. This they diligently try to forestall, apparently in hope of establishing in the realm of human affairs a predictability to rival what we find in the realm of physical nature, where everything happens of necessity, or not at all.

This demand for the perfect, uniform code of conduct is a

recurrent phenomenon, and books on the subject have clothed the walls of many spacious libraries. There is, for example, a notable one by Montesquieu, in which he observes:

"...the intelligent world is far from being so well governed as the physical....This is because, on the one hand, particular intelligent beings are of a finite nature, and consequently liable to error; and on the other, their nature requires them to be free agents..."

Montesquieu called his book The Spirit of Laws because he said,

"...I do not pretend to treat of laws, but of their spirit; and...this spirit consists in the various relations which the laws may bear to different objects...."

And that may well be the crux of our problem: Too many of our laws have the wrong objectives.

Everyone from the President of the United States to the hot dog vendor on a New York street corner cries out against the torrent of indecipherable government regulations, yet the real affliction is not what the regulations say, but the spirit that motivates both them and the laws supporting them. Our lawmakers and regulators alike seem to have forgotten that they are not physicists, and that we are not mere physical bodies or quanta of energy swarming about in space, but intelligent beings whose nature requires us to be free agents.

Commendable efforts are now under way to simplify the rules and regulations, if not the laws, by writing them in plainer English, and for this no citizen can fail to be grateful. Can we also hope that when the thickets of ambiguity have been cut away, someone will then take a hard look at what remains? For, if the intent of a rule is wrong to begin with, it cannot be made right by simplifying its language.

It is equally true that even if all our laws and regulations could be translated into models of precision and clarity, there would still be too many of them. In the long run, they are defeating their own purpose because they have increasingly narrow applications.

Their generality has been, in the tradition of jurisprudence, the basis for differentiating rules of law from particular decisions or decrees. This naturally leads to the question of whether the words "law" and "regulation" should be used interchangeably. The answer is No — but they are.

It was either Madison or Hamilton, writing as "Publius" in The Federalist Papers, who warned:

"It will be of little avail to the people that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood...or undergo such incessant changes that no man, who knows what the law is today, can guess what it will be tomorrow."

That was part of the argument for making our Senate a continuing body, under the Constitution, rather than a periodic assemblage of part-time legislators. Obviously, it did not solve the problem.

What the Founding Fathers did not anticipate, of course, was the phenomenal growth of "regulatory" agencies which, in the course of insuring that our laws were properly executed, would imperceptibly assume the mantle of legislators. It is unfortunate that our founders could not foresee this, because then they might have left us some suggestions concerning what to do about it. Most of them were, after all, disciples of John Locke, who was quite emphatic in his belief that "... the legislative cannot transfer the power of making laws to any other hands, for it being but a delegated power from the people, they who have it cannot pass it over to others...."

The constitutionality of our modern regulatory system is, however, beyond serious question, the expenditure of vast wealth and millions of hours of litigation having long since confirmed it. Our last, best hope may be for a new spirit of self-restraint among the regulators, and more concern by the legislators about what is being done with their laws.

At the moment, there are more signs of the concern than the

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restraint. Maybe it would help to remind those who persist in the dream of an American society as well regulated and predictable as Isaac Newton's Universe that the first of his laws has a name.

It is called Inertia.

There are plenty of signs of this, too.