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David W. Peck

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Recommended Citation

David W. Peck, *Our Changing Law*, 43 Cornell L. Rev. 27 (1957)
Available at: <http://scholarship.law.cornell.edu/clr/vol43/iss1/2>

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OUR CHANGING LAW*

David W. Peck†

As the lectureship, under which this address is given, was established in honor of Robert S. Stevens, in recognition of his contributions to the Cornell Law School and to the legal profession as a whole, it is appropriate that tonight's text bear reference to him whom we honor. Under the chosen title—Our Changing Law—all of my remarks could be related to Dean Stevens and this address made biographical, for the course of the law in this century has paralleled his career as practicing lawyer and law teacher, and our changing law can be traced in the curriculum of this Law School under his leadership.

I will not be biographical, however, because he would not want me to be. But I shall take as the period for consideration, the years he has served as a member of the faculty here, and as the point of beginning the year 1921, in which Dean Stevens became a regular member of the faculty. That year marks the beginning of a stage of legal development which can be called the current stage. It is unequalled in legal history for the rapidity and profundity of change.

The year 1921 was one of awakening from depression. The depression, following the brief boom immediately after the first world war, was short but serious. Bottom was hit hard and fast with the realization that what lay ahead was not merely the chance of recoupment but the challenge of reconstruction. A broad new base of business growth and expansion was required to lift the economy and population out of encircling gloom.

The decade of the twenties was certainly a fulfillment of a dream. We need not pause for a critique of the base on which a top heavy economy was built. Imagination and initiative of businessmen were allowed full play and inspiration was matched by determination. Companies were put together, ventures were undertaken, securities were floated on what seemed an endless chain basis. Investment companies and holding companies mushroomed. Pyramiding profits was both a philosophy and practice. The theory of the ever expanding economy was expounded and accepted as gospel. The stock price index was taken as the barometer of the economic weather.

Practice of the law fitted into the step and pace of the business and financial entrepreneur. The corporation lawyer came into his own. If

* This article was originally presented as the Second Annual Dean Robert S. Stevens Lecture, delivered at the Cornell Law School on April 27, 1957.

† See Contributors' Section, Masthead, p. 66, for biographical data.

lawyers were swept along in the frenzy and failed to exercise the restraint which their natural conservatism would have dictated, they at least established a professional position in the empire building. The lawyer moved from the occasional counsel to the constant advisor. The growing volume and elaborateness of corporate creations, the reaching out for capital funds, the vast increase in security issues and the general growth of business, greatly extended the lawyer's field as it intensified his work.

The trend was not only an expansion of the lawyer's domain; it was also a diversion. Business law was so demanding and engrossing that the more traditional functions of the lawyer were neglected. Litigation in commercial centers was eschewed as something unworthy, or at least uninteresting and unremunerative as compared with an office practice. Many large law offices had no litigation department or regarded one as a mere adjunct or accommodation to the "green goods" department. A single litigating partner was the quota in most of the large offices. Not all of them looked with equanimity on the condition. A senior in one office was wont to say, "The time will come when this office will cease to be a house of issue and become a law office again." His words were prophetic.

The bubble which burst in October 1929 had a profound impact upon the law and the practice of law. It was some time before the event was recognized as more than a rude but temporary shock. As the months of deflation turned into years of depression, however, the understanding dawned that an era had ended.

The early Roosevelt years were ones of picking up the pieces and putting them together in a new pattern. The shift was from big business to big government. Government tried to fill in all the gaps, prime the punps—but much more, it attempted to reconstruct the economy on the basis of state initiated, financed and managed enterprises, and the close regulation and control of private business. Administrative agencies exhausting alphabetic combinations in their designations were created to operate state ventures and regulate every segment of the economy—agriculture, industry, commerce and finance. Taxes began to take a heavy toll. The intimate involvement of all business with government and the impact of taxes on all transactions gave rise to new needs for legal services in business and government. The administrative agencies became a large employer of young lawyers, and made government legal service a new career. Lawyers representing private clients were confronted with a combination of challenging problems and tasks in the conservation, reorganization and rehabilitation of hard hit businesses.

Negotiation, cooperation or battling with government bureaus became a major part of law practice. Tax law and administrative law became broad new specialties.

Litigation took a new lease on life but in a different form and forum. The reach of government regulations and the activity of the administrative agencies gave rise to substantial litigation over the application, and alleged violation, of new provisions of law and administrative rules and regulations. This litigation was before the agencies themselves, which were given the power of sitting in judgment over their own charges. The agencies became a fourth branch of government, combining legislative, executive and judicial functions.

In legal significance, the thirties can be denominated the decade of administrative law. The significance lay not only in the varied nature and enlarged volume of the legal work engendered, but also in the shift of judicial power from the court establishment to the administrative establishment.

Two thoughts combined to promote the idea of annexing judicial authority to administrative authority. One was the notion that a particular expertise in the subject of regulation was required to qualify the judicial judgment. The other was that court processes were too slow to meet the need of expedition in determining the issues involved in administrative proceedings. The expertise and expedition were found at the same time in the agencies themselves. Quite naturally, the body that made and administered the rules could deliver incidental judicial judgments with equal authority and dispatch.

It is not within the province of this lecture to evaluate the premise on which administrative agencies have been given a judicial function or to comment on their discharge of that function over a period of years. It is safe to predict that the area of administrative law will not grow less. Whether it would be well to separate out the judicial power and vest it in a judicial body like an administrative court is a question which invites serious consideration.

The war period affected law practice as might be expected, reducing litigation and connecting most legal work in some way with war objectives. The emphasis was on procurement, negotiation and renegotiation of government contracts; regulations keying nearly everything to the war effort, and adjustments to meet war demands and priorities. But the significant changes wrought by war were in the aftermath. I would highlight two for their effect on the practice of law. One is the reconciliation of business and government with mutual recognition of the place and position of each in the scheme of things. The other is the

world consciousness which has come to enter into nearly every calculation and to dominate many.

Although there was some rapprochement between government and business in the late thirties, the healing of the breach, caused by governmental actions and trends and antagonistic attitudes between the two sides, still had a long way to go when war descended. War threw government and business together, and out of necessary cooperation grew reconciliation of aims and actions.

The enlarged functions and regulating activities of government have now been accepted as necessary and proper. They have, however, been limited as compared with the early Roosevelt years. Business has been given more leeway and encouragement. The tug-of-war between business and government has been fairly well resolved and a balance struck on more of a partnership than an adversary basis. The more favorable business climate, strong trade unionism, social security and unemployment insurance, sounder management and business statesmanship, have combined to build a vigorous and expansive post-war economy on a broad, solid base.

The economy has also grown in complexity, in the interrelation of the many facets of production, pricing, labor relations, fiscal practices, money management, taxes, security regulations, legislation and the run of regulations. There are more delicate and intricate mechanisms to watch and synchronize.

The economic expansion and complexity have increased the demand for, and upon, lawyers. The extension has been in three dimensions: The lengthening list of legal specialties, while the specialties themselves have grown in intricacy, size and importance and require greater concentration for mastery of the problems and material; the breadth of comprehension required in general counsel as the legal labyrinth traverses the multifiends of law; the depth of knowledge and understanding necessary above or below a legal plane, in economics, politics and sociology, which affect and are intimately related with law and the conduct of any business.

The world confluence has brought international law out of the tower into the center. Speed of transportation has all but obliterated time and space; an explosive incident in any part of the world sets off an international chain reaction. Economic and military aid on a large international scale, as well as growing normal trade across national lines, have bound us into a world wide political economy. Thus, there is an international consideration in nearly every contemplation.

International law today is vastly more than the conventional law be-

tween nations. It is private as well as public law within and across national boundaries. The lawyer today must have international insight and vision. He surely works on the periphery, if not in the middle, of an international orbit. He cannot be unconscious of world politics, world economics and world law. The schools of international legal studies being established at several of the universities are pointed recognition of the growing importance of international law in the workaday world. The present practical occupation and opportunity of the lawyer in connection with world trade are featured in the current issue of the monthly publication of The Association of the Bar of the City of New York, in an article entitled "Organizing World Trade—A Challenge for American Lawyers."

In these thirty-six years, between 1921 and 1957, there have been significant changes in the substantive law and in the nature of litigation and work in the courts. The Court of Appeals of Cardozo was essentially a common law court. His notable opinions were rendered principally in common law cases. In them we see the fruition in substance and expression of the common law—the common law brought to modernity.

The present legal age is one of statutory law. The tendency is to codify the common law and meet all the new problems that arise by legislation. This development has been a natural one, apiece with the ever changing complex of today's society. The common law established the basic principles. Additions, adjustments, variations and improvisations to meet rapidly changing conditions and constantly arising problems require the ready adaptability of legislation. Correspondingly the main occupation of appellate courts has become the construction and application of statutes and squaring them with constitutional provisions.

The trial courts have undergone a metamorphosis. At the turn of the century they were occupied with commercial litigation and equity cases. Less than twenty-five per cent of the cases were personal injury cases. These were principally from streetcar accidents, and only half of them were settled. Half were actually tried. By 1921, the accident cases had gained the ascendancy and the flood of personal injury litigation began to inundate the courts. Resulting congestion and delay changed the character of work in the courts.

Businessmen, who had become increasingly vocal in their complaints about lack of accommodation and dispatch in the court handling of commercial cases, came to the conclusion that the courts held little promise of improvement and that other means would have to be devised for the economical and expeditious disposition of commercial controversies. The

trend toward arbitration started and has since proceeded at an accelerated pace, so that now commercial litigation has substantially left the courts. Sixty trade associations maintain arbitration tribunals which have largely replaced the courts in the commercial community.

Close to ninety per cent of the cases in the Supreme Court of New York are now personal injury cases, and the volume of this type of litigation is so pressing that it has burst the bounds of the traditional trial process and driven litigants, lawyers and judges to the truncated treatment of cases by settlement procedures. Now, a mere five per cent of the cases travel the full route of a trial.

Our changing law can be observed by a glance at a law school catalogue. When Dean Stevens assumed his professorship, the courses were nearly all basic common law courses. The most advanced studies were in the Law of Public Carriers and Municipal Corporations. Taxation, as a practical course, did not enter the curriculum until 1945.

Today, Administrative Law is a first year course. Advanced studies include Business Regulation, Trade Regulation, Accounting, Labor Law and seventeen "Problem Courses" in such fields as International Business, Legislation, Law of Cooperatives, Corporate Finance and Government Contracts.

As short a time ago as 1921, law was taught and thought of as a self-contained discipline, apart from all other disciplines. That was the year when the Court of Appeals—Cardozo alone dissenting—held that a child, born maimed and deformed because of a pre-natal injury suffered through another's fault, had no cause of action because at the time of injury it was not in being. The law in its cloister could deny with equanimity physiological facts.

Today, lawyers, law teachers and judges recognize that the law is not apart, but is a part of the whole body of disciplines and facts and forces of life, interwoven in a vast complex. Correspondingly, the lawyer today must be better informed and prepared and more versatile than his ancestor. The interrelation of law with economics, government, the physical and social sciences, and world relations, requires a broad-gauged practitioner, one oriented in many fields, intent on continuing education, capable of assimilation and adaptation.

H. G. Wells in his volume entitled "Work, Wealth and Happiness of Mankind" refers to the "enormous influence wielded by solicitors," but regrets that most of them are taken away from school at a time when their minds most need expansion, and that in their "dingy offices" they never learn "social biology, economics, or the elements of literary culture." Perhaps Wells was right in his commentary of the day. But

it can now be said that the insight and outlook, which he found lacking in the solicitors of his time, are not only a virtue but a necessity in the modern lawyer. Dean Stevens and now Dean Thron and their associates on the faculty of this Law School have given due scope to legal education in these precincts and prepared the minds of oncoming generations of lawyers for that continuing education which is the life of a lawyer.

The future can be predicted from the past. Almost surely the demands for and upon lawyers will increase. The closer living between people, the developments of science, the necessary regulation, accommodation and cooperation between an infinite variety of conflicting interests, will call for an enlarged array of talents, depth of insight and breadth of vision on the part of lawyers. We may confidently expect the profession to rise to its calling.

If there is any area about which a concern should be expressed, it is about our own house, the courts, which are our particular responsibility. It is something of a paradox that as the need of a place and means of resolving controversy has increased, the courts have contracted in the reach of their services. Modernity requires the prompt and speedy consideration and disposition of disputes—economy as well as expedition in juridical methods. The means will be found. I leave it to you to ponder whether court processes can and will be adapted to the discharge of the demand.

Changing law is not only a course; it is a challenge. It is a challenge to lawyers, not only to keep abreast with the general social and scientific advance, but to give direction to our own procedures, that the profession may discharge its responsibilities and realize its opportunities.