

Texas Intellectual Property Law Journal
Spring, 1993
ON LAW & LOVE -- THE TWIN PILLARS OF FREEDOM⁴¹
Dean Howard T. Markey^{a1}

Copyright (c) 1993 by the State Bar of Texas, Intellectual Property Law Section; Howard T. Markey

I suggest, Ladies and Gentlemen, that our Freedom stands on two pillars--on Law and Love. Only law can hold at bay what Learned Hand called the beast that leads men to injure each other and to abuse the powers of government. Only law can tame the technological juggernaut that threatens, as Thoreau feared, to make humans only the tools of their tools. Only law can keep the likes of perverted science from making lamp shades of human skin, as Hitler's minions did. But to do all that law needs love. Even good law cannot support freedom if the pillar of love be removed. Like you and I, law will wither and die without love. The heartbeat of a free society is the administration of justice--but none of us has ever seen the administration of justice. All we have ever seen is people--lawyers, judges, legislators, litigants, clerks, and staff persons.

As the school men say, we should first define our terms. What do we mean when we say "law"? There are many kinds. One permits me to do as I wish but forbids me to injure you. America began with that type of law. Now there is another kind. It forbids me to injure me. Then there are the insurmountable "laws" of science. No one punishes a rock for falling. There are the "laws" of chance. There is Murphy's Law, which says if it can go wrong it will. And then there is O'Brien's law that says "Murphy was an optimist."

Someone once defined law as "the subjection of human conduct to governance of rules for the purpose of assuring order." But is this an adequate definition of legitimate law in a free society? Lord Denning said no, because "it has nothing to do with morality. It lays down rigid rules which must be obeyed without question of whether those rules are right or wrong. Without religion there can be no morality and without morality there can be no legitimate law. To draw a line between law and morals is to overlook the reason why people obey the law."

Now that great jurist did not mean that the only reason people obey any law is its moral content. He knew that people, at least for a time, will obey a law solely out of fear. What he meant was that the moral content of a law is the only reason people will obey that law when the police are not looking.

By definition, every society must have order. That order, which is the very meaning of society, can come from only two possible places. Either from above or from below. Order must either be imposed from above by a dictatorial government in a totalitarian society, or be created by people in a free society who order their own lives in accord with some generally agreed upon broad sets of values.

One short, clear statement sums up the proposition: No society can be both free and dishonest.

Unless the law rests on accepted moral and ethical values, its only claim to legitimacy is physical force--cruel, unmitigated, unlimited, murdering, force. And, as we have recently seen in Moscow and Eastern Europe, that law will be ignored when the policeman isn't looking.

In this experiment in liberty we call America, we are attempting to build, for the first time in history, a free society that includes people with different religions and with no religion. With different cultural backgrounds and with different initial languages. There have been slippages, but I believe we still retain basic core norms of moral and ethical values that transcend differing views on religion, culture, and politics.

***60** President Reagan spoke frequently of the "crucial values of family, work, neighborhood, religion, and personal freedom--values that most Americans, whatever their racial, ethnic, or religious heritage, hold dear." Solicitor General Rex Lee pointed to the exercise every day of moral values in our judging of government officials. Our newspapers still print reports of moral and ethical infractions on the front page, because, thank God, those infractions are still newsworthy.

Speaker Tip O'Neil said, "The spiritual revolution surrounding Christianity and the political revolution begun in 1776 are alive and well" and when you think about it, there is no essential difference between the Constitution's requirement that one's property not be taken without due process of law and the Decalogue's command: "Thou shalt not steal."

Building and operating a society both pluralistic and free involves monumental problems. But problems are the sparkle in the

wine of life and law. Think about it. A life having absolutely no problems would be a total bore. So we have problems, but I am hopeful. I am an optimist. Optimism means hopes and dreams, and hopes and dreams are the engines of our progress, and mighty hopes and mighty dreams are the uniforms of heroes. From all I see the hope and dream of keying legitimate law as a strong pillar of our freedom is, in O'Neil's words, "alive and well."

Now, for the other pillar of freedom, what, in the context of these remarks, do I mean by "Love"? In designing good law for a free society, we need a lodestar--a star to steer by--and in a free society the lodestar of the law is love.

A popular song of my youth was "Love Makes the World Go 'Round." No question that it does--the only question is "which way?" If our families, our society, our law, and justice be the objects of our love, we can help move the world toward peace and harmony. If wealth and power and winning be the role objects of our love, we move the world back toward the caves.

Now, the lodestar of the law in a free society cannot be science. Science, Qua Science, is without values. If science were the lodestar of our law, our society would be ruled entirely by cold, hard, despotic facts, and our jurisprudence would be replaced by a mechanical process that might be called "juriscience."

Nor can economics be the lodestar of the law. For with economics as the sole lodestar for all our law much of our Constitution would be at risk. To cite but a few examples, where is the economic efficiency of a church or religion that produces no products and pays no taxes? Protecting the First Amendment's right of assembly and speech can cost a bundle in police overtime. The Third Amendment requires us to build barracks, forbidding the more economical quartering of soldiers in your house. The Sixth Amendment's right to counsel can be costly. If the law were to deal only with "economic man" and were to make mankind's economic activity its lodestar, we would end by knowing the price of everything and the value of nothing.

Now by "Love" I don't mean sentimentality or the romantic love of a man and a woman. I mean that the law should steer by the star of love for the community, love for our free society, love for the principles of our constitution, love for liberty (our own and everyone else's), love for our fellow citizens (whatever we may think of their actions), love for justice, for fairness in law fairly administered to all, love and respect for the administration of justice--the heartbeat of a free society. I mean what our forefathers meant when they pledged their lives, their fortunes, and their sacred honor--not to a higher standard of living, or to the gross national product, or to any special interest pressure group, or to science, sociology, or economics--but only and simply "to each other." I mean what Schweitzer meant when he defined ethics as merely our concern for others. I mean what historian Kenneth Clark meant when he said a civilization that loses courtesy must die. I mean a love for and devotion to those eminently loveable principles of freedom, equality, justice, and humanity on which our country was established and that DeChardin had in mind when he spoke of the unifying force of love. We must never forget the values that are no less real because unseen--values like mercy and compassion, justice, ***61** individual liberty, reverence for family and the gift of life, the admiration for morality and ethics that resides deep in every human heart, and respect for the dignity and rights of every multi-faceted person with whom each of us shares this planet for such a little while. Those and other values are the moral circuitry, the warp and woof, the very stuff of love for the law in a free society.

I end where I began--with a prayer for all who preserve our freedom in their proper administration of justice--that they will join in a lifelong love affair with an underlying concept of American freedom--what I call its soul--the concept that you, and yours, and I, and all human beings regardless of color or creed or ethnic heritage have certain rights because they are human beings and, as was said in the Declaration, were endowed with those rights by a Creator. That concept, that the state exists for its citizens and not vice-versa, is the newest, shiniest, most revolutionary idea in the political history of the world. Most people on earth have still never heard of it. Many Americans have died to preserve it. It is eminently worthy of our love.

I pray that lawyers will put more lovin' in their lawyerin'-- for then they can always disagree without being disagreeable, then they will abandon the "winning is everything" approach that abuses the judicial process and lowers respect for lawyers, and by seeking always the soothing, saving, solace of settlement, lawyers will join those of whom it was once said, "Blessed are the Peacemakers."

And so, if we Americans truly live and love our values, if we keep our law founded on moral and ethical values, not on mere force, and if we keep love as the lodestar of our law, then our freedom will rest secure on its twin pillars of law and love and perhaps, when our time has run, our song has been sung, and our work is done, the children of our children's children may someday walk the high sunlit uplands of a world at peace--finally--a world at peace with itself, and with its God.

Footnotes

- ^{d1} A speech given at the 23rd Annual Dinner Honoring the Federal Judiciary, sponsored by the Houston Intellectual Property Law Association, February 5, 1993, Houston, Texas.
- ^{a1} Dean of John Marshall Law School, and former Chief Judge of the Court of Appeals for the Federal Circuit and the Court of Customs and Patent Appeals.