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Coping with Uncertainty in the Law

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COPING WITH UNCERTAINTY IN THE LAW*

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I speak to you this morning, as Chief Justice of the Connecticut Supreme Court, from the vantage point of a generalist, a utility infielder, and part-time politician. It seems to me that the study of the law is a life-long challenge because of the never-ending opportunity to reflect upon novel questions or upon new versions of old questions. Why does this opportunity never end? Why are there so many unresolved issues in the law? Why can't the judges get it straight, once and for all? In short, why can't the legal system, whatever its other failings, at least deliver on the promise of certainty that the general public takes to be a hallmark of the law?

Those of you who do not suffer from amnesia will remember how your first days in law school were bedeviled by uncertainty. It was not just an encounter with unfamiliar nomenclature and obscure proce-

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dural hang-ups. Those obstacles were minor roadblocks. More unsettling was the fact that burgeoning familiarity with methods of legal analysis did not suffice to eradicate uncertainty. One of the early adjustments that all of you had to make—for sanity, if not for survival, in your professional careers—was consciously and stoically to abandon all hope for discovering neat, precise, ineluctable verities. You learned that there are no dispositive or definitive principles; in the well-known words of Justice Oliver Wendell Holmes, there is no "brooding omnipresence in the sky."[1] At best, in law school, there are questions that help to frame the issues, to define the context and to identify the role that various participants may usefully play in the process of facilitating the just resolution of disputes.

I come to you as a bearer of bad news. Graduation from law school and admission to the bar will not protect you from further disconcerting encounters with uncertainty. It would be comforting indeed if legislatures could enact and judges could craft specific rules of law for the definitive resolution of legal controversy. It is not to be; uncertainty is endemic in the law and always will be. The pervasiveness of uncertainty in the law is not merely the fabrication of esoteric academic minds but is crucial to our understanding of what law can or cannot do.

There are no doubt countless factors that contribute to uncertainty in the law, such as the vagaries of factfinding, the ambiguity of statutory language, and the obscurity of directions from the United States Supreme Court that come to us in the form of opinions divided four, three and two. This morning, however, I want to focus on just three factors that make for uncertainty in the law.

First, courts must respond to changes in our scientific environment, to new discoveries about causation in fact, to new risks associated with new developments. Litigation about asbestosis and about diseases caused by Agent Orange, about cancer associated with DES and about the risks of nuclear waste—all these are examples of areas in which litigation simply did not exist fifteen years ago.

Second, courts must respond to changes in our economic and political environment, to changes in our patterns of economic organization and to the resultant changes in governing legislation. Of these factors, new legislation is the most immediately and most conspicuously destabilizing. Every change in the tax code, or in the criminal code, has

1. Southern Pac. Co. v. Jensen, 244 U.S. 205, 222 (1916).

profound implications for existing case law and statutes because legislative intent can never anticipate the infinite variety of disputes that may arise. When the legislature, for example, modifies some historical aspects of the law of rape, or of kidnapping, that legislation inevitably raises questions about the continued viability of related crimes that were not redefined and about related evidentiary rules that were not reconsidered.[2]

Third, courts must respond to changes in our moral environment, to greater sensitivity to the rights of minorities and women and children and the aged and the handicapped and students and teachers—the list, thank goodness, keeps growing. Litigation about discrimination, about unfair treatment in the workplace and in the community, engages every court in the country. That litigation increasingly turns to state law, and state constitutions, as federal courts retreat from the commitments of the Warren Supreme Court.[3] As attorneys in our state have been known to lament, invocation of state constitutional rights of unknown etiology and indefinite scope adds another layer of uncertainty to constitutional adjudication.

The effect of changes in our technological, political and moral climate is to bring to courts cases for which there are no binding precedents. Many of these are cases in which the judiciary is being asked to respond to questions that are systemically different from the judicial experience of the past. Courts are familiar with their role of trying to reconstruct what happened yesterday: who caused that automobile accident; what were the terms of that contract; was that transaction taxable? The new jurisprudence is of a different order entirely because it involves courts in planning for the future. Despite their imperfect access to an unclouded crystal ball, courts are involved in devising remedies for discriminatory inequality in school systems, for inadequate treatment in mental hospitals, for unsafe housing for the dispossessed, and for unsatisfactory custodial arrangements for children caught up in family instability.

There are numbers of ways in which attorneys and courts respond to pervasive uncertainty. By far the poorest is to pretend that the world

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2. *See, e.g.*, State v. Jenkins, 198 Conn. 671, 504 A.2d 1053 (1986) (a more recently-enacted sentencing provision permitted a lesser penalty for a more serious degree of offense, but until the legislature takes corrective action, the most recent statute controls in order to avoid a constitutional confrontation).

3. *See, e.g.*, State v. Kimbro, 197 Conn. 219, 496 A.2d 498 (1985) (holding that article first, section 7 of the Connecticut Constitution affords more substantive protection to citizens than does the fourth amendment of the federal Constitution in the determination of probable cause).

has not changed and to take refuge in linguistically plausible analogies that give the appearance of a safe harbor. As advocates, I urge you not to deceive yourselves; just about any case is distinguishable, just about any statute is ambiguous. Illusory analogies do not serve to focus the mind on where the action is. For courts, the discipline of appellate judging, which requires the writing of articulate and reasoned judicial opinions, automatically provides a powerful corrective to simplistic reasoning. Among judges, it is well known that sometimes, quite dramatically, "the opinion just won't write."

Another response, with which I have a great deal more sympathy now than I did as a new judge eight years ago, is to temporize. Every judge is acutely aware of how far removed courtroom proceedings are from absolute truth. There may well be other participants in the process of dispute resolution, such as legislators and lay jurors, and, even more importantly today, administrative agencies or arbitrators. The best role for a court to adopt may be to insist on procedural regularity to assure the litigants a fair and timely opportunity for a reasonable hearing before an impartial tribunal, but otherwise to defer to these alternate decision-makers.

I do not mean to suggest that deference is always uncontroversial. The City of Middletown was understandably upset, a few years ago, when the court upheld state regulators who had permitted the Hartford Electric Light Company's plant in that community to burn contaminated mineral oil containing PCBs.[4] The State Health Department was recently disappointed, I am sure, by the court's unreadiness to permit a departmental reorganization to modify an anti-discrimination order of the Commission on Human Rights and Opportunities.[5]

Nor is insistence on procedural regularity always uncontroversial. Procedural regularity may require the state to assume the cost of providing attorneys for those accused of non-support,[6] or of having fathered a child out of wedlock.[7] Due process may require a court to suppress grand jury transcripts while grand jury proceedings are in-

4. City of Middletown v. Hartford Elec. Light Co., 192 Conn. 591, 473 A.2d 787 (1984) (plaintiffs lacked standing to challenge proposed burning of oil containing PCBs; as to several other counts, plaintiffs failed to sufficiently prove facts to sustain their cause of action).

5. Department of Health Serv. v. Commission on Human Rights and Opportunities *ex rel.* Mason, 198 Conn. 479, 503 A.2d 1151 (1986) (in contempt proceeding, trial court is not authorized to modify remedial order resulting from administrative finding that alleged contemnor engaged in discriminatory conduct).

6. *See* Lake v. Speziale, 580 F. Supp. 1318 (D. Conn. 1984).

7. Lavertue v. Niman, 196 Conn. 403, 493 A.2d 213 (1985).

complete.[8] This winter, the court made itself unpopular with the media when it required the Freedom of Information Commission to abide by its own statutory time limits for the disposition of its own cases.[9] Procedural regularity usually takes time, often costs money, but always is essential.

There are other prudential devices that courts can invoke to permit time for further developments to illuminate and perhaps to defuse controversy, and thus to minimize the costs of uncertainty. The late Alexander Bickel, a distinguished member of the Yale Law School faculty, wrote eloquently of the passive virtues, of the desirability, sometimes, of making haste slowly, particularly in areas of the law where there is a perceived need to build community consensus.[10] In implementing state constitutional rights to public education, state courts have engaged in spirited criticism of present institutional and statutory failings but have coupled their criticism with self-restraint by way of remedies, so as to create an opportunity for legislative reentry into principled political decision-making.[11] In our late-lamented case involving the Freedom of Information Commission, there was a second issue concerning the extent to which municipal agencies could rely on the attorney-client privilege to justify meeting in executive session.[12] At stake was statutory language that was both controlling and obscure. By not deciding that issue, the court created an opportunity for members of the legislature again to take the laboring oar and to clarify the underlying policy choice that was theirs to make.[13]

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8. *In re* Final Grand Jury Report Concerning the Torrington Police Department, 197 Conn. 698, 501 A.2d 377 (1985).

9. Zoning Bd. of Appeals of N. Haven v. Freedom of Information Comm'n, 198 Conn. 498, 503 A.2d 1161 (1986) (holding that the statutory time limits are mandatory). On May 30, 1986, the Connecticut legislature enacted Public Act No. 86-408, § 2(a), conditionally validating actions of the FOIC in regard to pending cases not heard in conformity with statutory time limit.

10. A. BICKEL, THE LEAST DANGEROUS BRANCH, 111-98 (1962); *see also* Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 YALE L.J. 1567 (1985).

11. *See* Horton v. Meskill, 172 Conn. 615, 376 A.2d 359 (1977); *id.* at 195 Conn. 24, 486 A.2d 1099 (1985) (after holding that existing statutory financing of public education was unconstitutional, the trial court was correct in retaining jurisdiction while the General Assembly was offered an opportunity to take legislative action).

12. 198 Conn. at 501, 503 A.2d at 1163 (because the statutory time requirements were held to be mandatory, the court did not reach the issue of whether oral communications between the Z.B.A. and its attorney were privileged so as to justify an executive session).

13. On May 30, 1986, the Connecticut legislature enacted Public Act No. 86-226. It added the following section to CONN. GEN. STAT. §1-21g: "(b) An executive session may not be convened to receive or discuss oral communications that would otherwise be privileged by the attorney-client relationship if the agency were a nongovernmental entity, unless the executive session is for a purpose explicitly permitted pursuant to subsection (e) of Section 1-18a." 1986 Conn. Legis. Serv.

Another prudential virtue has its origin in the teachings of legal realism. Widespread recognition of the significance of the particular fact patterns in which controversies emerge has made courts exquisitely sensitive to the dangers of over-generalization. Tip-toeing through the minefields of the unknown, courts have learned to take refuge in holdings expressly limited, in a recurrent phrase, "to the circumstances of this case." In the contemporary writings of American courts, no single phrase occurs more regularly than this one.

Not all litigation, however, permits deference or allows invocation of the passive virtues. In the face of uncertainty, courts must resolve some questions, regrettably, because courts are not the best, but the only available decision-makers. Courts are acutely aware that many questions on their new agenda involve matters on which they have no special expertise. Adjudications about the future needs and conduct of the mentally ill, and of children, depend upon psychological judgments that the best-trained psychiatrists say that they are unable to make. None of us can say with confidence whether cloning and modifying genes is so perilous to the public health and welfare that courts should enjoin such research. When litigants have exhausted other channels, however, when the political process is unresponsive, and when other institutions in society have, in effect, thrown in the sponge, it is courts that must respond to our society's self-fulfilling prophecy that for every problem, there ought to be a law.

Some of the most agonizing cases in this category are also the most dramatic examples of the interaction of the three vector forces of science, politics, and morality. I refer to the profoundly troubling disputes about termination of medical care for apparently critically ill children, accident victims, and old people. These cases come to courts with a new scientific overlay because modern medicine can, I am told, keep almost all of us alive, in a manner of speaking, almost indefinitely. They come to courts with the political overlay of statutes that make the termination of life the crime of murder or manslaughter or suicide, and that authorize so-called living wills in only the most restricted of circumstances. They come to courts with the moral overlay of a conflict in rights that are basic to all of our other hard-won freedoms. On the one hand there is the right to live, a right whose importance is underscored both by the Holocaust and by the Hippocratic oath. On the other hand, there is the right to privacy and to liberty—the right to exercise per-

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334 (West).

sonal control over the quality of the lives we and our loved ones live. These cases come to courts at a time when some courts and commentators are skeptical about the responsiveness of the professional caretakers in the medical profession, to whom courts would like to be able to defer. Sensitive to the threat of tort liability and even of criminal prosecution, those responsible for the management of medical care understandably may limit their own exposure to risk by supporting the continuation of treatment for patients despite the considerable psychic and financial costs that such medical decisions may entail.

When cases like this come to courts, as they increasingly and regrettably do, courts cannot avoid playing an active role. Let me put to you a case about which I only recently read. A young man in Texas, an Air Force veteran, was injured as a result of a gas leak explosion in which he was blinded, lost the ends of each of his fingers, and, worst of all, was seared with third-degree burns over two-thirds of his body. He was hospitalized for more than a year, during which time he underwent skin grafts, removal of his left eye, unsuccessful repair of ligament damage to his left arm, and amputation of parts of fingers of both hands. His medical care included months of daily immersions in an acidic solution to sterilize his burns, an excruciatingly painful treatment essential to sustaining his life. He repeatedly asked to be permitted to die, and sought legal assistance to pursue his claim in court. His caretakers responded by asking that he be ruled incompetent. The preliminary indications were that the court would neither declare him incompetent nor order the withholding of treatment. He withdrew the case because the very fact of having initiated litigation led to a more caring treatment of his wounds.[14]

There is an unusual follow-up to this case. Blind, disfigured, and largely dependent on others to meet his daily needs, the young man twice unsuccessfully attempted suicide. Then his life took a different turn, however. He returned to school to become . . . a lawyer. Although he now describes himself as leading a rewarding and meaningful life, he is still convinced that he should have had the right to end his life immediately after the accident.

We have not yet had such a case in Connecticut but it is bound to come. A New Jersey court has just decided that for a person who is overwhelmingly incapacitated, not only so-called heroic measures but

14. The young man's experiences are recounted in R. BURT, TAKING CARE OF STRANGERS (1979).

even life-support systems can be discontinued at family request.[15] In searching to balance the most difficult of human objectives, courts will need expert advice from independent medical caretakers, from sensitive psychological consultants, from specially appointed guardians for the patient, from friends, and from family. Courts will act—*must* act—because the case is there. Courts would be the first to acknowledge, however, that judicial intervention in these cases is far from an ideal solution.

Leaving aside its economic costs, litigation takes time. In some medical situations it will exacerbate rather than alleviate the choices that must be made. Litigation invites public comment, and public intervention, in potentially traumatic situations in which the better choice may well be autonomous, private decision-making. Courts therefore fervently hope they will *not* be asked to decide—that as a society we will soon know enough, and achieve enough of a consensus, to resolve these matters without litigation. Until then, however, the responsibility will remain with the courts to resolve these profoundly uncertain questions in a manner that is consistent with the wisdom of science, the demands of morality, and the principles of a just and caring society.

I do not mean to leave you with the impression that uncertainty is invariably a burden. On the contrary, uncertainty creates a window of opportunity for the continual renewal and development of the law. No one has put this thought more eloquently than the late Professor Grant Gilmore, my distinguished former colleague at the Yale Law School, when he said, on the occasion of graduation ceremonies at this law school in 1982: "If it were possible for judges and legislators to achieve absolute clarity in their opinions and statutes, the process of adjusting our rules to reflect changing circumstances would be even more difficult than it now is."[16]

Let me close with another quotation from Grant Gilmore to illustrate why uncertainty in the law is here to stay: "What makes law, its study and practice, qualitatively unlike most other things that human beings do is that we can never be sure of anything."[17] I would add only one caveat: There is one thing of which you can be sure. In choosing a life in the law, you are entering a profession of infinite variety and endless fascination. Welcome!

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15. *In re* Conroy, 98 N.J. 321, 486 A.2d 1209 (1985).

16. Address by Professor Grant Gilmore, University of Connecticut School of Law Commencement (May 22, 1982), *reprinted in* 15 CONN. L. REV. 1, 2 (1982).

17. *Id.* at 3.