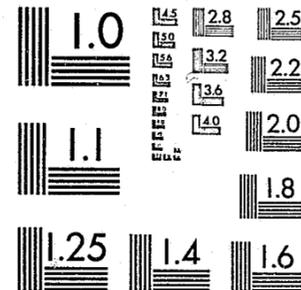


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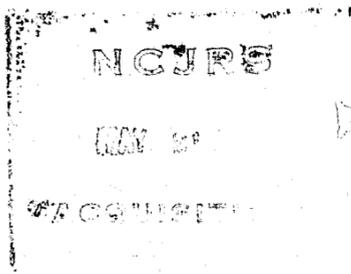
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Ministre de la Justice et  
procureur général du Canada

Minister of Justice and  
Attorney General of Canada

"People, Law and Technology"

An Address  
by

The Honourable Mark MacGuigan  
Minister of Justice and Attorney General of Canada  
to the  
People's Law Conference

Saskatoon, Saskatchewan  
May 2, 1984

When we ask what role technology should play in the future of our legal system, the answer at first seems deceptively obvious. In the pursuit of justice we need all the help we can get, and we would be foolish to ignore the methods and procedures that have led to the staggering progress of science and technology. So to the extent that technology can make the law more effective in achieving its ends, it should play a very central role in our legal system.

I think that this obvious answer is also the correct one. But at the same time it conceals some very difficult and perplexing issues that call for careful examination. The staggering progress of technology has been a mixed blessing for society, bringing with it enormous problems we have yet to resolve. In fact, Theodore Roszak suggests that "we have become so technologically musclebound that the major preoccupation of our technics is ... to unscramble the chaos of its own making" -- not the most glowing recommendation for a technological approach in law.

It has been said that technological progress and innovation over the last fifty years has been greater than that of all the preceding millenia combined, and we are just beginning to realize the consequences of this progress -- the impact of industry on the environment, the possibilities of genetic

engineering or behavioural control on a massive scale, the threat to privacy and freedom posed by information and communications technology. It often seems that we are beginning to overtake the future -- or that the future is invading the present before we are quite prepared to meet the challenge.

Optimists suggest that the future imposing itself upon us will bring the flowering of civilization, an age when man will finally conquer the environment and bring an end to poverty, disease and human suffering. But I think many people fear that the future is really a nightmare, where individual control over our own lives is continually eroded by the marvels of science, ultimately to be destroyed by the oppression of technology running out of control.

If the goal of law is the enhancement of human freedom and dignity, we may begin to wonder if technology is a useful ally in the pursuit of justice. The sociologist R.K. Merton once defined technology as "the quest for continually improved means to carelessly examine ends." While we need improved means for achieving justice, we cannot afford to be careless about the ends of justice. We must examine the meaning and purpose of our legal system with care. And we must ask how technology can support rather than undermine that system.

That is what this conference is all about, and I do not pretend to have all the answers to these questions tonight. But I think it may be helpful to begin with a general look at the impact of technology on the law, as a background for discussion. In particular, we should look at the impact of technology in three areas: the substance of the law, the enforcement of law, and the nature of the legal process.

Technology affects the substance of law by presenting new problems and conditions with which the law must deal. Thus someone invents the elevator, which proves to be a very effective device for moving people up and down in buildings; but it also proves to be a dangerous device if improperly maintained, so the law imposes certain regulations to ensure public safety. Someone invents the computer, which becomes essential for our systems of credit, manufacturing, transportation, education and communications; it also makes possible new forms of abuse and victimization as gigantic information banks are built up and used indiscriminately, and the law must begin to prescribe conditions and safeguards that were not needed before.

The law may not always respond quickly to technological innovation, and its response may often seem misguided. But it does respond. Unfortunately, this means that we get more laws, and the modern legal system has grown into a maze of complex rules, regulations and procedures, administered by continually expanding bureaucratic institutions. In societies where technological development is limited, the role of law in ordering social relations is also limited. But in technologically complex societies, law takes on a more central role as an instrument of social control; and large-scale bureaucratic organizations dominate any relationship involving employment, commerce, education, health or welfare.

And as our lives are subjected to more comprehensive but increasingly obscure and impersonal regulation we may well wonder about the future of individual freedom and autonomy.

As Tom Kent says,

"Rapid technological changes...mean that more and more things that the individual used to do, or in which he shared as a member of a family or a small community, are replaced by activities that are necessarily those of large-scale organizations...A society that lives that way is necessarily a more governed society. It is also a society in which...[the individual] is more and more dictated to by large and largely anonymous forces over which he has no sense of control or even, for the most part, influence."

Thus it may seem that in responding to technological development the law, like technology, is running out of control. It is clear that the law must deal with the changing conditions presented by technology, but I think the time is rapidly approaching when we will have to develop a new kind of response. As people become increasingly alienated from the rules that affect their lives, the traditional approach of merely imposing more and more regulations may prove incapable of operating effectively.

The problem of finding an appropriate legal response is perhaps most difficult when technological innovation touches upon our very notions of human identity. For example, as biological and medical science progresses, people are faced with new options in their lives and traditional legal assumptions are brought into question. New techniques allow doctors to extend human life for incredible periods of time; but these techniques are incredibly expensive. Who should benefit from them? Those who can pay? Those who have friends in the medical community? Politicians first, tax collectors last? Do people have the right to refuse this kind of treatment?

Artificial insemination has raised the phenomenon of "surrogate" parenting. What does this do to the legal concept of a "parent"? What does it do to the general concept of human dignity?

Genetic engineering promises to become a genuine possibility for the human species. Should the law be concerned? Does the prospective child have any rights in the matter? Should it just be a matter between parents and their doctor? What does the concept of "human species" mean in such a case?

In a very real sense these kinds of questions force us to ask not only who we are as human beings, but who we want to become -- how we will choose to define ourselves. Thus does hard-headed technology force us into the uncharted borderlands of ethics and metaphysics. It is not an area where impersonal regulation is yet at home; but it is an area with which the law will have to deal, and I've already noticed increasing pressure for the law to make substantive pronouncements on these issues.

Similar questions arise when we consider the enforcement of the law. Ever since Mr. Holmes of Baker Street mastered the art of "scientific deduction" -- with his encyclopaedic knowledge of cigar ash and the varieties of mud to be found in England -- technology has offered a dazzling array of instruments to assist in law enforcement.

When we are investigating a crime, we would like to come up with positive identification of the criminal. Science came up with the fingerprint kit, and has since developed a variety of other methods for testing traces that the criminal leaves behind -- laboratories analyze strands of hair, match threads of fabric to garments, or match bullets to guns.

These are methods for testing traces left at the scene of a crime. We can also use tests to determine not only the identity of the criminal but the nature of the crime. For example, under the laws I have proposed on impaired driving, blood samples may be taken to determine whether a suspect involved in an accident was impaired.

Drunk drivers are killing innocent people on our highways, and the use of blood samples is an important step in making the law a more effective response to this very serious problem. Even so, I think we must be very careful when we allow the law to forcibly invade a person's body for any reason. That is why I am proposing that blood samples can only be taken under very strict conditions. The conditions are designed to insure full respect for the rights and the integrity of the person concerned.

Blood samples allow us to extract physical evidence from a suspect's body. Suppose we go a step further, and invade the suspect's mind? We have lie detectors now. In the

future we may be able to tap into a person's brain waves and literally read his or her mind. Such technology may give us the best positive identification of the criminal; but does this mean that such use of technology is desirable? What about confessions extracted under hypnosis? Or with the use of a truth serum?

Of course, another aspect of law enforcement is crime prevention, and technology also has much to offer here. One effective method of prevention is surveillance -- when you go into a bank or an office building, you notice the video cameras and you realize that somewhere someone is watching you. And we find this to be reasonable, although we may get a little nervous when we see cameras appearing in washrooms.

Technology now lets us take surveillance a step further. Electronic bugging is an obvious example. Perhaps we could also bug people's brains, with little alpha-wave scanners implanted at birth that set off alarms when someone's thoughts turn to criminal intent.

Such a suggestion is bound to call to mind the work of a certain author much discussed this year, because it shocks our sensibilities, just as Orwell's vision shocked readers thirty years ago. But thirty years ago the reader could be forgiven for speculating on the vision as if it were pure science fiction; today it often seems as if we are living in the pages of science fiction and the technology involved is not so far removed from practical reality. We are forced to refine more carefully and more exactly the values that are threatened by certain applications of technology.

I am not by any means trying to suggest that all technology in law enforcement is Orwellian. Indeed, I think that technology offers immense benefits in crime detection and law enforcement; I might mention the joint federal-provincial proposal for a computerized tracing facility to help in the enforcement of maintenance and custody orders.

The point I am trying to make in citing examples that clearly violate our rights and freedoms is that these rights and freedoms are extremely fragile. They must be continually reaffirmed as they are challenged, and technology today is presenting us with possibilities and choices that challenge our commitments as they have never been challenged before. Whenever technology makes something possible, there is a regrettable tendency to make it actual; and it is up to us to control this tendency, to make sure that the enforcement of law does not subvert the very ends of law.

Finally, we must consider the nature of the legal process itself. In a technological society we tend to think of the legal system in terms of technology. Thus we speak of the law as an instrument of social control, a tool that is designed to achieve certain ends efficiently and effectively. Far from rejecting this view I feel that we

have not taken it far enough -- we have not yet developed the full potential of the technology of law. There is a distressing lack of concrete research on the actual effects of law, and we often simply do not know how legal procedures are working in practice.

At the same time, there is a danger in developing a one-sided approach to the law as a method of social engineering. Law is an instrument of social control but control is not an end in itself; law is more properly described as an instrument of social justice. And if we lose sight of the goal of justice, social control loses its meaning.

Technology needs to measure the efficiency of any operation in terms of concrete properties that can be quantified. But when we try to evaluate the legal system in these terms, it is very easy to obscure the complex values of justice and human dignity that are the heart of law. According to Jacques Ellul, it is virtually impossible to transform the value of justice into technical terms, and law can be fully transformed into technology only if "the concept of order and security is substituted for justice as the end and foundation of law".

As he says,

"Under such conditions the traditional equilibrium between the technical and the human elements is quickly lost...we in fact announce the implicit sacrifice of justice and the human being to efficiency...the takeover of law by technique. It has been said that technology becomes authoritarianism when every issue becomes a technical issue; and that is not the kind of law we want."

Fortunately, it is also not the kind of law we have. Yet it often seems as if we are trying hard to move in that direction, as we then attempt to give the law technical credibility. We have filled the law with technical language and detail, understood only by "professionals"; and this effectively isolates the law from the fabric of everyday life. Policies and plans emanate from remote bureaucracies and "experts", and public participation often takes place only after the fact -- the public is left with the option of rejecting a decision, but it is seldom encouraged to take an active part in the act of formulation. The real needs and concerns of people often get lost in the process.

Too often what lay people find is a system that is not only incomprehensible, but dehumanizing -- a system that is more like an assembly line than a system of justice. We speak of people being "processed" by the system, and all too often that is not far from the truth.

More and more people -- including police officers, judges, correctional workers, and lawyers as well as laymen -- are finding that the criminal justice system is simply out of touch with human values. A technological approach that leads to the alienation of people from their own legal system cannot be acceptable -- however glowingly the statistical and technical reports speak of cases resolved and offenders "treated".

This does not mean that we can turn our backs on technology; if the law is to come to grips with modern society, it must come to terms with the technological resources at its disposal. But a technology of law must be a truly human technology, one that demonstrates practical concern for social justice, and one that respects the dignity of the person before the forces of law.

Louis Dudek once wrote that

"The history of technology doesn't come to an end...with the centralized control of society [or with] mass man...If technological progress so far has [reached] the point that every individual feels powerless before the pressures and manipulations of those above him, then the further progress of technology must be to counteract this alienation of control."

This is the kind of progress we need if technology is to be truly an ally of justice. And I believe we can achieve that progress only by opening up the structures of law to human needs and concerns. That is what I have been trying to do as Minister of Justice and that is what I mean by a people's law. And that is why this People's Law Conference on Technology and Justice is especially significant for us all today.

**END**