

2000 DANIEL J. MEADOR LECTURE:
SPECULATING LAW: BEYOND CIGARETTES AND SWISS
BANKS

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This Essay is about “Speculating Law,” an awkward term that requires some explanation. Much of the study of law in the distant and recent past was about finding natural law. Just as murder was unlawful because it was naturally so in a world where law was needed to overcome anarchy, so too it was assumed that there was a right and natural answer to many legal conflicts and questions. I am eager to expand the definition of “natural” beyond its religious and philosophical roots to mean something like “stable.” Natural law implies that there is some right answer that we have all come from or should head towards; it is a claim of ideal convergence on a correct answer to problems of social control. In areas where one expects, prays for, or educates toward such convergence, the tasks of the judge and the legislator are fairly clear. These jobs are sometimes difficult because of the occasional tension between democratic principles and these right answers, or means and ends, but by and large lawmaking is a well-defined task.

But what about when there is no right answer, or when it is beyond our capacity to discern the nature of the right answer? In some cases, the judge and legislator have different, but still rather clear, roles. For example, we have no reason to think that there is a single correct income tax rate or tax base, for that matter, but we have reasons to need governments and, therefore, tax revenues from one source or another.

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Some countries rely on income taxes, others on value-added taxes, and so forth. And despite perennial claims about the value of harmonization and uniformity, it is plausible that the non-convergence or variety in law we experience will define our landscape forever. There is no reason to expect convergence, and even less of a reason to think that if there is (or ought to be) convergence, there is one tax base and rate schedule that is the correct one for any and all concerned jurisdictions.¹

U.S. law relies heavily on an income tax, and our judges learn to cope with it. They interpret the underlying statute as best they can, with occasional attention to the fundamentals that make up a sensible and wise income tax. Most good judges know little, and need to know virtually nothing, about comparing tax systems. If we were to switch to a flat tax or to a value-added tax, that change would be manageable, and there is little today's judges do that affects the likelihood or timing of such an important change. Given the direction this Essay takes presently, it might be useful to add that if we were to legislate a new tax base, it is inconceivable that there would then be retroactive liability for the failure to switch to such a value-added tax today. We might (or might not) give a break to those who will lose out because of the legislative about face, but it is virtually impossible to imagine that we would penalize those who lose by insisting that they owe yet more for our failure to have moved to a value-added tax much earlier.

It is a third category that I dwell on here. There will be questions regarding when we sense convergence in law, at least in our own legal system, but at the present time we can barely see the possible locations of convergence, and we have no confidence in our ability to guess the stable end point. We intuit that some contested matters today will have clear answers, or at least stable resting points in twenty or perhaps one hundred years, even as we recognize that we cannot be sure today where or in what direction those stable end points are. I am most interested in examples that raise questions of liability by or to private parties, but because much of my argument works for public law issues—and these generate easy illustrations of the sort of uncertainty I have sketched—my examples are drawn from private and public law alike. With unlimited space, and reader patience, it would be fun to begin with some examples that might have been offered in 1900 and are stable today, but I will leave those for historians. In this year 2000, we might predict that by 2100 there will be stable legal rules with respect to same sex marriage, capital punishment, property rights as to photo-

1. See READINGS IN PUBLIC SECTOR ECONOMICS, 463-503 (Samuel H. Baker & Catherine S. Elliot eds., 1990) (noting that the search for an optimal tax system is "probably the longest lived of all research efforts in public sector economics, and . . . is showing no sign of concluding.").

copied or downloaded material used in classes, the exclusionary rule, the Microsoft case, affirmative action, and a few more. Just as we now find it hard to believe that slavery, women's ability to own property, and other matters were once contested issues, most of the current subjects of litigation and legislation that I have listed here will no doubt be resolved and uncontroversial in the distant future. Moreover, with respect to some examples, say global warming, abortion, and capital punishment, we do not even know the direction of the eventual convergence.

Now what should judges and legislators do about these matters while we await the judgment of history and the inexorable forces that we cannot quite sort out? If judges were perfect prophets, the answer would be plain though perhaps discomfiting. On the one hand, we might wish for judges to do all they could to move us toward the inevitable settling point, either because this will prove to be just, in a manner of speaking, or because it will lessen the costs of transition. If, for instance, a judge had been a perfect prophet fifty years ago with respect to tobacco regulation, certain kinds of environmental pollution or even communications technology, it is easy to see that there would have been substantial social benefits from that judge pushing us more quickly, with an earlier determination than we in fact experienced, toward the "correct" legal rule. On the other hand, there is the familiar counter-argument that even a prophetic judge might pause long and hard in order to leave certain kinds of decision-making to duly elected legislators. Indeed, given that the division of labor between judges and elected legislators is not my subject here, it might be appropriate to substitute "legislator" for the "judge" at every point in this Essay. What should a humble legislator do about global warming, drug legalization, and the like? These are questions that will almost surely seem to have a correct if not obvious answer—but fifty years too late for any mortal legislator.

It is in a world without perfectly prophetic lawmakers that we have the problem to which I refer with my title of "Speculating Law." Many problems await solutions that are simply unknown for the time being. The lawmaker who listens to a complaint today about a product that allegedly contributes to global warming or some case about the right degree of police searches or gender profiling is likely to be speculating rather than reasoning. The confident judge may simply be revealing his or her own cultural biases or reacting to popular opinion by doing what today seems progressive or politically correct. The same is true for an elected lawmaker who confronts these difficult issues. Legislation on these matters may be responsive to temporarily ascendant interest groups, or it may be hopeful speculation, but it is not a

process of either finding the law or engaging in reasoned lawmaking. Inevitably, such speculation amounts to signaling as to one person's or one group's thoughts as to the likely path of the culture and its laws. It is not at all obvious that elected or appointed lawmakers are suited for this role.²

The easiest cases for our speculating lawmaker are those where most of us are mere speculators, but where some of the involved parties are in fact likely to be well informed. One idea is that retroactive liability can make those who are able to anticipate the future save the day today, so long as they have the means to effect change.³ If we expect to find one day that manufacturers in industry X have in fact a few cheap ways to solve the global warming problem, then we need to let them know now that when that day comes we will make them pay for all the harms that they might have prevented by anticipating our future knowledge and their liability. This will give these manufacturers the incentive to rush us toward the solution. An especially tricky situation is when those who know best are not in direct control of those who need to take the precautionary steps. But even when knowledge and control are in the same hands, it will be difficult to encourage optimal change because well-situated and potentially responsible parties can be expected to try even harder than they presently do to fight off legal change because of the added fear of retroactive liability.

Still, the basic concept of encouraging private anticipation—especially where public officials are likely to be mere speculators as to future technologies and the like—is not as radical as it first seems. It is as if our speculating judge and legislator said:

Look, we might mess this up, but we have confidence that one day we will know how to measure these costs and benefits (broadly conceived). At that time, the society is likely to agree on an answer, and when that happens, our rule will be one of retroactive liability on those of you who, as it turns out, should or might have known better and done more before we amateurs figured it all out. We want to encourage you to speak up early on or to simply reform your ways sooner rather than later, and given that talk is cheap, the best way to do this is to establish a

2. Lawmakers may provide a kind of foil for thinking about likely trends. Indeed, there is something of an expressive function here, because when we read judicial opinions or hear about statutes passed in some place, we have a chance to hear what it all sounds like and to deliberate ourselves about the path of our laws. We have all had this experience of reading a decision or listening to a politician, even when the substance is something we favor at the present, and knowing in our hearts that what is being said is completely atonal. We know it will seem silly in a generation, and we know that it is time to change. We did not know it until we saw it.

3. See Saul Levmore, *Changes, Anticipations, and Reparations*, 99 COLUM. L. REV. 1657 (1999).

legal culture in which you know that you will be penalized later on for failing to help progress along earlier.

Retroactivity has its problems, of course. Successor liability may be too extreme; change may come about because various things have changed and not in a way that implies that this change should have come about earlier. I am not touting full retroactive liability everywhere, but I am about to suggest an interesting advantage of retroactivity.⁴

Where the front line of lawmaking is speculative, lawmakers might recognize that their decisions are asymmetrically irreversible; stalling in favor of one side can be undone later more easily than if these lawmakers guess now in favor of the other side. In these cases, purposeful delay is sensible. In tort cases this nearly always means deciding against liability, if only because it is easier to impose retroactive liability on most defendants than it is to recover payments from numerous individuals. But this also means that lawmakers should be less hesitant to impose retroactive liability, or its punitive damage equivalent, once they are confident about the socially desirable solution to what was once a vexing problem. It also means that plaintiffs or interest groups must be counted on to bring up these matters in the future, which is to say they must not believe too strongly in precedent and the like.

Airbags in automobiles offer a fresh example of the sort of legal regime contemplated here. If a products liability claim alleging that a defendant car manufacturer should have provided airbags had been brought fifteen years ago, the presiding judge (or perhaps the fact-finding jury) would have been forced to speculate.⁵ Airbags seemed

4. Put slightly differently, retroactive liability is not nearly as foreign as it sounds. In a sense we have such liability in tort law (along with other places) to the extent that a suit can be brought within the confines of a statute of limitations and this suit can try to show that a defendant should not have followed past custom. When such a suit succeeds, defendant pays for past actions that are undertaken with the (mistaken) belief that these actions were nonnegligent. It may even turn out that a statute or regulatory guideline fails to provide a safe harbor. If lawmakers and regulators are good at setting out rules, then there will be fewer such surprises. But it is often the case that new information leads to new rules, and that through tort suits these new rules help to generate some retroactive liability.

5. An early case against an automobile manufacturer for the failure to equip a car with airbags was *Higgs v. General Motors Corp.*, 655 F. Supp. 22 (E.D. Tenn. 1985). The court granted summary judgment for the defendant, noting that cars without airbags met "both consumer expectations and government standards" and therefore did not amount to a design or manufacturing defect. *Id.* at 26. Other early cases denied plaintiffs relief because regulations promulgated under the National Traffic and Motor Vehicles Safety Act impliedly preempted courts from granting relief based on state tort claims. *See, e.g., Taylor v. General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989); *Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988). The Federal Motor Vehicle Safety Standards gave car manufacturers various options for compliance. For example, the 1984 standards mandated a phase-in period for automatic restraints beginning in 1986; by 1989 all cars were required to have some form of automatic restraint unless two-thirds of the population were covered by mandatory seatbelt laws by that

like a clever idea, but who among us could really think sensibly about the costs, benefits, and alternatives? We now know that it was not until 1993 that airbags were legally mandated for 1998 model year cars and thereafter.⁶ And it was well after 1993 before the overwhelming benefits of airbags were obvious.⁷ In the late 1980s automakers argued against mandatory airbags, or so it appeared, and it was hard to know whether they were selfishly stalling or, in fact, absolutely right that an expensive regulatory solution was threatened with insufficient sensitivity to the costs. Readers with an interest in comparative law, and even in thinking about public choice problems with comparisons among jurisdictions as the sources of baselines, might note that foreign automakers and regulators were not rushing to airbags in this period. But, as is often the case, it is hard to know when to pay much attention to uniformity in other countries.

Fifteen years ago a thoughtful judge might have rejected a plaintiff's claim regarding a defendant manufacturer's failure to provide airbags because the judge could have seen an interesting asymmetry, or irreversibility, or even a "real option" situation. If the judge guessed that airbags were desirable and that the failure to provide them should lead to a successful products liability claim, and the judge proved to be wrong in this speculation, our legal system would be strongly disinclined ever to retrieve the money paid by defendant auto makers to lucky plaintiffs because of this errant judicial decision. Even at the legislative level, although a tax-and-compensate scheme might extract money from the old winners, such retrieval systems are difficult to design and even harder to pass as a matter of interest group politics. On the other hand, if the speculating judge had guessed against liability, and then later on airbags came to be seen as a brilliant safety innovation that should have been provided much earlier, courts could then

time. Federal Motor Vehicle Safety Standard, 49 Fed. Reg. 28,962 (1984) (to be codified at 49 C.F.R. § 571.208). These standards did not require airbags but gave car manufactures various choices for automatic restraints, including "automatic" seatbelts. *Id.* See also *Geier v. American Honda Motor Co., Inc.*, 120 S. Ct. 1913 (2000) (holding that federal standards preempt state tort claims).

6. See Federal Vehicle Motor Safety Standards, 58 Fed. Reg. 46,551 (1993) (to be codified at 49 C.F.R. § 571.208) (mandating airbags for cars manufactured after Sept. 1, 1997).

7. In 1996 it was estimated that drivers with airbags experienced an 11% reduction in fatalities in all crashes and a 19% reduction in fatalities in frontal crashes. U.S. DEP'T OF TRANSP., NAT'L HIGHWAY TRANSP. SAFETY ADMIN., THIRD REPORT TO CONGRESS, EFFECTIVENESS OF OCCUPANT PROTECTION SYSTEMS AND THEIR USE (Dec. 1996). That report also raised new concerns about an *increased* fatality risk for small passengers, such as those under the age of 13. Of course, airbags had their advocates well before that time. See Federal Motor Vehicle Safety Standard, 49 Fed. Reg. at 28,962 (noting that many consumer groups and health organizations believed that the effectiveness of airbags was unquestionable). But early estimates regarding the effectiveness of airbags had "obvious limitations," inasmuch as they relied on very limited field testing and controlled crash testing. *Id.*

impose liability with retroactive bite (or, just as effective and perhaps more acceptable, punitive damages). This asymmetry with regard to errors suggests the positive prediction—and even the normative argument—that speculating judges err on the side of no liability. Again, the normative argument requires one to believe that future liability will be retroactive or punitive in order to encourage anticipation. Further, this argument looks better the more we think that private defendants (rather than governments or plaintiffs) have better and earlier information about when to invest in these precautions.

An interesting question is whether the argument sketched thus far has equal applicability in public law, or whether there is in that arena no comparable asymmetry. I do not explore this question here, but I think the answer is that the same argument can be made in public law—but less often than in private law. The asymmetry is more likely in those situations where law or popular opinion is inclined to force our government to pay for its errors. For now, I limit the argument about the content of what I have called speculating law to “easy” cases. I might also put the argument in reverse, in which case it is that we should not be shy about retroactive liability because it allows us to defer some lawmaking until we are more likely to get it right. In return for tolerating retroactivity, we gain a valuable option.⁸

There is another step to take before turning to predictions. Consider a firm that sees that it is temporarily absolved of liability by the speculating judge or legislator but knows that the future might bring draconian (retroactive or punitive) liability. I have already emphasized the optimistic story that this firm will have an incentive to anticipate change (and future liability) in a socially useful way. But sometimes such a firm might over-anticipate. It might fear that if it alone anticipates change and invests in a safety precaution, it will be wiped out by less safe competitors before the future proves our firm right. Or it might worry about a competitor that had a first-mover advantage on the path our firm now sees it should take. For such reasons, firms might prefer to go to the legislature in search of mandatory safety rules. And

8. There is a general theoretical point here that the legal system can gain the value of a real option when it can find at least one party to bear the uncertainty. Thus, polluters or auto manufacturers know that if liability comes it will come with retroactivity, so they must anticipate either by taking precautionary actions or by saving in order to make these future payments. One can barely imagine examples where plaintiffs collected judgments but knew that they might have to return the money later as new evidence developed. In many public law cases, the problem with an option (deferral) approach is that “irreparable injury” will be done in the sense that no party can bear a loss now in a way that is simply offset by a retroactive victory in the future. In abortion and affirmative action disputes, for example, a loss under present law is not undone by a later, retroactive victory. In short, we might tie the discussion here to the standard for injunctive relief and to a general theory of timing in legal intervention, but that is not a subject for this Essay.

while they are at it, they might be able to limit the retroactive threat. Thus, Ford Motor might have worried that if airbags were required in the 1980s, Volvo, known for its safety innovations, would have gained market share. Note that this is not a necessary reaction to speculative innovation. In the case of radial tires, for example, automakers seemed happy to offer cars with or without radials. There was no push by manufacturers or consumers for uniformity by way of legislative or administrative intervention and also no real move to competition among automakers along this dimension. Every car was compatible with radials.

But in the case of airbags we might rewrite history and allow the conjecture that American manufacturers were actually pleased to see legislation and regulation that specified a due date for this safety equipment that was five years down the road. This delay removed the urgency to invest in airbag technology. It is also possible that the legislation incorporated some strategic value by specifying characteristics that required expensive adjustments by Volvo, despite its earlier research. Finally, auto makers might have hoped that this legislation would prove to have a kind of preemptive quality, so that a requirement announced in 1993 and effective in 1998 would hinder rather than support claims brought for the failure to install airbags in the late 1980s and early 1990s.

I have described two distinct phenomena. First, there are speculating lawmakers who are, or can be seen as, purposeful dawdlers. And second, there are potential defendants who gain some legislative limitation on retroactive liability even as they bring on mandatory innovation. The relationship between these two steps is that the stalling or temporizing that characterizes the first step raises the stakes for the future and encourages organized investment by potentially liable parties. But even knowing about this secondary effect, there is reason to buy the option of more time in the first step.

My revisionist airbag story may repeat itself in the case of tobacco. It is remarkable that so few suits succeeded against auto makers for safety devices and tobacco companies for health risks. Looking at these two industries over the last forty years, one would not know that we had experienced a products liability revolution. In the tobacco case, my story must be that lawsuits and early regulatory proposals failed, in part because of the asymmetry of errors apparent to speculating lawmakers, and that companies then "agreed" to the famous surgeon general's warnings and restrictions on television advertising and sales to minors. However, there was an implied absence of retroactive liability for the failure to warn earlier in time.

The important first step of the argument is that where lawmaking is

speculative, there is often—and perhaps ought to be more often—a deferral of liability decisions in favor of the status quo. This requires some tolerance of retroactive liability. The second step of the argument simply says something about what is likely to occur in the space created by the first step. It takes for granted some tolerance of retroactive liability, and suggests that potential defendants will organize and obtain legislative reductions in this retroactive liability. This second part of the story is, of course, not a normative claim, for it is not as if we should welcome this interest group activity.

Students of environmental law will have an easy time recognizing these descriptions. In many environmental cases, there is uncertainty about a risk. The right result in such a case might be deferral for reasons I have now explored.⁹ The point is simply that in some of these cases we should expect defendants or regulated parties to be sufficiently organized and have enough political clout to engineer a legislative solution that offers or implies reduced liability. In other cases we can defer in the presence of uncertainty and then legislate retroactively in order to clean up hazards and, more importantly, encourage other parties to anticipate in the future.

The title of this Essay promised a connection to recent payments by Swiss banks to funds organized, in part, on behalf of Holocaust survivors. I see this piece of recent history as a kind of cautionary tale about legislative solutions that seem stable. Nothing is really settled until all the players have passed from the scene. There was a negotiated treaty after World War II covering assets that moved from Germany to Switzerland during the war.¹⁰ The Swiss government and its banks might reasonably have believed that their potential liability for deposits received during the war was thereby settled. As it turns out, all matters can be reopened with enough political pressure, and a consortium of Swiss banks and their government agreed to make a sizable payment. Not that there is any deterrence effect or encouragement to anticipate future law, for these banks have done no more (and in most cases much less) than disgorge their unjust gains. But the case is a reminder that everything, including apparently stable legislative or political solutions, can be overturned. This is one connection between Swiss banks and the recent tobacco settlement. In both cases, there was every reason for judges, legislators, and interest groups to believe that a mat-

9. In *Reserve Mining*, which involved large scale asbestos dumping in Lake Superior, the city of Duluth worried about drinking water contamination. *Reserve Mining Co. v. Environmental Protection Agency*, 514 F.2d 492 (8th Cir. 1975). We are unsure, however, whether asbestos presents a drinking risk along with the better understood breathing risk.

10. See generally Detlev F. Vagts, *Restitution for Historic Wrongs, the American Courts and International Law*, 92 AM. J. INT'L L. 232 (1998).

ter was settled—but then they were surprised by a reopening just before victims had passed from the scene. These extractions, like other reparative payments, are exceptions to a general pattern of when payments are required by law, and these exceptional examples of reparative payments do not change the deterrence picture because they amount to much less than disgorgement. They are, however, useful reminders of just how speculative lawmaking can be. Moreover, they are pieces of evidence that old issues are often raised for review so that lawmakers do have opportunities to revisit old and seemingly settled matters, as my optimistic version of retroactivity requires.

It is conventional, and even appropriate, to conclude material styled as a public lecture with a moral or some reference to our interpersonal responsibilities in a legal system. I fear I have so emphasized political interest groups and random stabs in the dark by lawmakers that moral uplift is now out of the question. Indeed, my central claim has been that we should be careful before we try to right the world. The more ambitious we are, the more speculating we are likely to be. To be sure, there are areas in which there is no asymmetry between action and inaction, and perhaps no well-situated problem-solvers to motivate. In these cases we may as well forge ahead doing the best we can, even if we are only mildly confident that we can improve on the past. But I have tried to emphasize the presence of a particular class of important problems where buying time may be worthwhile, so long as we are willing to revisit the past later on. In these instances we should remember that many well-intentioned moves in the name of progress have been misguided, at least as history so far has it, and many of these have been costly to reverse. We should not be embarrassed to admit when we have no idea what we are doing, in which case law can be like a good team effort, in which we play our role and buy time for those who come behind us to complete our work.