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TRIBUTE

Daniel J. Dykstra: Truly a Somebody with Something to Say

*Daniel Wm. Fessler**

Dan Dykstra, my senior colleague to whom this issue is dedicated, has taken emeritus status. If this meant that he would no longer grace a classroom or would withdraw to some far off retreat I would have no occasion to write. Sensible people do not celebrate a grievous loss. But the happy fact is that Dan is still with us though spending a bit more time with family, friends, and nature. It is this continuing presence which we celebrate, and I am honored to offer these thoughts. My specific task is to speak of my colleague as a teacher. That is a rewarding assignment made difficult only by the need for a decorous brevity.

More years ago than I would like to remember, I chanced upon a long-time friend of my father with whom I had lost touch. In my youth he had encouraged me to become active politically. I now informed him that I had become a school teacher. He shook his head and replied: "To be good at that job you don't have to be somebody; you do have to have something to say." As I hope to demonstrate, my colleague, Dan Dykstra, has been very good at that job, and the fact that he has undeniably become somebody should not hide his primary quality as a man who

*Professor of Law, University of California, Davis.

has had something to say.

THE MAN:

For those of you who only know the man from a distance, let me briefly sketch the biographical facts. Daniel J. Dykstra was born in Fremont, Michigan in 1916. With Dan's father, a Protestant minister, Dan's family followed the call of local congregations in Michigan, Illinois, North Dakota, Iowa, and Wisconsin. Wisconsin became the primary seat of his formal education. Dan graduated from high school in Baldwin, Wisconsin in 1934. In 1938 he earned a bachelor of science degree with distinction in American History from Wisconsin State Teachers College.

From 1938 to 1942 Dan taught in a high school in Fredric, Wisconsin. It was there that he met another teacher, Lily Salay. Dan and Lily were married in 1942. They happily remain so today. They are the parents of two children: Ann Marie and Daniel Jr. The former is a Ph.D. candidate at the University of Pittsburgh, the latter is an attorney practicing with the government in Norfolk, Virginia.

From 1942 to 1945, Dan served as a supply officer with the United States Navy. He saw service off North Africa. In 1945 he left the Navy and entered law school at the University of Wisconsin. In 1947, he graduated first in his class. Graduation was followed by further study at the University of Wisconsin, this time as a Rockefeller Fellow. In 1950 Dan was awarded one of the rarest degrees in American higher education, a Doctorate in Juridical Science.

Two years before the letters "S.J.D." were added to his resume, Dan re-entered life as a school teacher. The high school in Frederic, Wisconsin, was replaced by the Law School at Drake University in 1948. One year later, Dan accepted an invitation to join the faculty of the University of Utah.

It is perhaps a sufficient sketch of his success at Utah to observe that within six years Dan had moved from the rank of Associate Professor to Dean of the College of Law. It should be noted that all this took place at a time in which movement toward the title "Dean" was widely regarded as progress. Dan held the post of Dean from 1954 to 1961. At this point we might have lost Dan as a teacher. In 1961 he was asked to become the Academic Vice President of the University of Utah. He accepted and held the post until 1963, when he returned to full time teaching.

Three years later, Dan and Lily came to Davis. Dan had accepted the invitation of his long-time friend, Ed Barrett, to become a founding

member of the faculty at King Hall. They have remained colleagues ever since. In 1971 Dan succeeded Ed as the Dean of the Law School. In those turbulent years he lent grace and wit to a steady hand at the helm. In 1974 he stunned the faculty with the announcement that he had accepted the deanship on a temporary basis and was determined to return to the classroom.

From the beginning Dan's teaching and research have concentrated on corporations, securities regulations, and torts. I'll have a few words to say on Dan's research in a moment. Before I do I must acknowledge that both Utah and Davis have been forced occasionally to share Dan with other student bodies. He has served as a visiting professor at Wisconsin, Texas, Stanford, Pennsylvania, Minnesota, Hastings, and Hawaii. In 1959 Dan served as a Fulbright Professor of Law at the University of Melbourne. In 1971 he went to the opposite geographic extreme, visiting at the University of Oslo.

It would be inaccurate to create the impression that all of his formal honors and recognition have been accorded by distant faculties. In 1981 Dan was the recipient of the William and Sally Rutter Distinguished Teaching Award at Davis, established by two great benefactors of excellence in legal education and awarded by popular and collegial acclaim.

By this point it should be clear that Daniel J. Dykstra has long been "somebody" in legal education. But to say this is to note, not explain the significance of the man. That explanation lies in the "something" which he has been saying for nearly fifty years. The message was first imparted to high school students in Frederic, Wisconsin. With elaboration, it has been directed at students and practitioners of the law for nearly forty. And it is reflected in the written scholarship to which I have adverted.

THE SCHOLAR:

While leading his class in terms of academic average, Dan also served as the Note Editor of the Wisconsin Law Review. That journal was the vehicle for his first three articles. Each was prepared in connection with his status as a Rockefeller Fellow and S.J.D. candidate. All reflect the influence of Willard Hurst and Dan's undergraduate emphasis on American history. What ties these early works together is Dykstra's initial insistence upon the value of commonwealth and the necessity that the legal profession regard itself as clothed with a public as well as a private mission.

Corporations in the Day of the Special Charter[1] examined the ". . . early charters granted to lumber, log driving, booming and river improvement conditions" in Wisconsin from the 1860's through the adoption of a constitutional amendment in 1872 that prohibited the practice of special chartering. Dykstra painted the exploits of the "pinery kings" with vigor. What he saw of their relationship with the legislature he did not like:

> Economic history subsequent to the years under consideration exploded at least for temporary periods the "promoter minded, boom mentality" which dominated this early formative period of corporation law. Frequent depressions revealed the necessity of enacting legislation which regulated more carefully not only the formation of corporations but also their subsequent activities. They made the plight of creditors and investors the subject of legislative concern and much progress was made in filling in the gaps noted in the corporation law. . . . This transition in emphasis must be borne in mind in analyzing current corporation statutes. It must also be considered in weighing the suggested modifications, for its growth was the product of necessity, the necessity of protecting more adequately the lay investor and creditor.[2]

Two months later, the second installment of this trilogy focused upon the long-term impact of the special concessions gained by many of the early corporate entities engaged in timber exploitation.[3] Dykstra found the combination of a legislature too eager to please and supplicants too eager to ask deadly to the public interest:

> These conclusions, if correct, behoove the leaders and spokesmen of industry only to approach and petition the government for rights and privileges consistent with the general overall welfare of our economy. They reveal that the policy of looking to government for every possible advantage and of "getting all you can get while the getting is good" may frequently be short-sighted. If in the days of a simpler economy, the legislature came to realize, as it did, that it could not delegate power to a certain industry without eventually assuming the role of regulator and arbitrator, it is certain that today in our more complex economy the reaction to legislation too heavily weighted in favor of a particular industry or a special segment of our economy will be more immediate and more articulate, and will more surely result in new demands for more governmental remedies.[4]

The third installment, *Legislation and Change*,[5] saw Dan rise to the defense of those who sought to use the government as regulator and

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[1] Dykstra, *Corporations in the Day of the Special Charter*, 1949 WIS. L. REV. 310.

[2] *Id.* at 334-35.

[3] Dykstra, *Corporations in the Day of the Special Charter: II*, 1949 WIS. L. REV. 469.

[4] *Id.* at 493.

[5] Dykstra, *Legislation and Change*, 1950 WIS. L. REV. 523.

arbitrator to promote a "Fair Deal" in Washington, D.C. Dan lamented the validity in the public perception that identified the legal profession with forces of reaction in society:

> The legal profession has throughout the past century shown considerable inventive genius and much ingenuity in creating and establishing new forms of business enterprise, new instruments to aid commercial transactions, and new patterns of financial reorganization. It is none the less true, however, that outside this general framework of legal activity the average lawyer has remained traditionally conservative, clinging to that which is and fearing that which seeks to be. It is perhaps natural that this should be so. The practitioner, concerned as he is primarily with the problems of individual clients and compelled by necessity to secure immediate results, views social, political, economic changes as making more uncertain, and thus more unpredictable, that which is already difficult to ascertain. Trained to look to the past to find his guides to the present and the future, he sees new laws, new regulations, new administrative directives obliterating the guideposts which he has come to hold dear and sacred.
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> Because this is true lawyers as a class have vigorously fought much of the regulatory legislation of the past several decades and have been frequently allied with the opposition in battles to secure major social and economic reforms.[6]

Having staked out his premise and alerted the reader to his sympathy with the Truman Administration, Dykstra reverted to the historical analysis for which the Wisconsin Law School was then justly famous. He took as his text the interplay between the advocates of change and the voices of reaction in water use reflected in Wisconsin legislation to regulate the construction of dams in the period 1848 to 1900. To his discomfort, he found the footprints of the organized bar leading down a path of reaction. Up to a point Dykstra was willing to excuse the record of attorneys who "guided the interests of their clients in an age when social consciousness was just beginning to emerge above the concepts of extreme frontier individualism."[7] Of greater concern was his perception that history was repeating itself. He asked hard questions about lawyers' tendency to accept handsome remuneration in the technical service of clients without offering counsel with respect to the social and economic consequences of their handiwork. He concluded:

> Certainly the public utterances of many lawyer politicians and much of the counseling of special labor and corporate clients reveal that these questions cannot, as yet, be answered in the affirmative. Thus, the American

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[6] *Id.* On the generally conservative tenor of the legal profession Dykstra cites Edgar Bodenheimer, his future colleague on both the Utah and Davis faculties. *Id.* (citing Bodenheimer, *The Inherent Conservatism of the Legal Profession*, 23 IND. L.J. 221 (1948)).

[7] Dykstra, *supra* note 5, at 540.

> bar cannot claim that it is occupying a position and providing the leadership that it should occupy and provide in the mid-twentieth century.[8]

Within less than a year Dykstra returned to the relationship between the state and the regulated market. In *Legislative Favoritism Before the Courts*,[9] his targets were the demands for protection and most-favored status by members of the business community:

> It is an amusing, though not insignificant, fact of current political life that the most vigorous breast beaters against government regulation and interference are at the same time the most persistent seekers of government favor and protection. I refer to those collectively known as "business men." While their spokesmen fervently condemn with dire warnings the increasing governmental control over all phases of economic life, special units organized for this very purpose are constantly exerting pressure on law makers — local, state and national — seeking ordinances, statutes, regulations and favors which will enhance their position on the economic horizon.[10]

Dykstra detailed the myriad state and local enactments designed to protect "local" business from the competitive invasion of larger economic entities. Dykstra repudiated the effort to "home town" the forces of external competition not merely on the grounds of market distortion, but because of the difficulties encountered by the judiciary when approached by the losers. While voicing mild alarm at the specter of substantive judicial review of legislative judgments in state and federal courts, Dykstra was equally concerned with the problems of motive in determining whether to accept such legislation. His suggested solution began with the frank advice that:

> whether we like it or not the era of governmental supervision of trade areas, of business practices, and of the entrance of new competitors into given occupations and professions is here to stay. Admittedly, this is a difficult reality for many to face, yet the truth is that economic groups and the public at large have too much at stake to make possible the renunciation by government of its current role on the economic scene.[11]

The second phase of Dan's solution prescribed heavy involvement of the academy:

> In view of this fact, it is recommended that intensive, yet comprehensive, studies be made by competent economists and political scientists to evaluate the economic effects of measures similar to those noted in this article. The immediate consequences of such a survey should be the equalization of obvious and indefensible inequities, existing because of such measures.

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[8] *Id.*

[9] Dykstra, *Legislative Favoritism Before the Courts*, 27 IND. L.J. 38 (1951).

[10] *Id.* at 38.

[11] *Id.* at 56.

> Wide publicity concerning the impact of this legislation on the economy should force some pressure groups to temper their more extreme demands, and should make their more responsible leaders, who often are lawyers, take greater cognizance of the long-term consequences of their requests.[12]

Dykstra the teacher was never more evident than in *Molding the Utah Corporation: Survey and Commentary*,[13] a terse epistle to the Utah bar from the Dean of the College of Law. The Dean had earlier made known his disappointment with the legislature's failure to produce a first-class corporations statute.[14] His 1960 effort was addressed to the practicing lawyer who used a form book or routine office practice in lieu of any effort to appreciate the client's needs when framing the articles of incorporation of a new venture:

> To a greater extent than is generally realized, lawyers are the architects of the legal-economic structures by means of which most business is conducted. This is particularly true in reference to corporations, for, while in theory lawyers may be retained to do the bidding of clients, they frequently are the creative and directing force in shaping ultimate ends. For this reason, the structures which lawyers build via corporate articles, by-laws and stockholder agreements should not be viewed by them as routine devices necessitated by statute and molded by form books; they are rather the keys which often determine how and what may be done by those subject to their mandate.[15]

The man who had earlier called for long-term study by economists and political scientists[16] departed from his earlier pattern of historical analysis[17] to examine the content of articles of incorporation filed in fifty recent corporate formations. He did not like what he saw. While the overwhelming proportions of these entities represented attempts to incorporate proprietorships or partnerships with fewer than four active participants, the articles reflected the thoughtless imposition of "a uniformity of content more appropriate for publicly-held corporations with dispersed ownership and pyramidal control than for the 'partnership like' structures which were brought into being."[18]

Dan Dykstra's success as a teacher both within and without the classroom can be traced to the clarity of his message. He has never

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[12] *Id.*

[13] Dykstra, *Molding the Utah Corporation: Survey and Commentary*, 7 UTAH L. REV. 1 (1960).

[14] Dykstra, *Gaps, Ambiguities and Pitfalls in the Utah Corporation Code*, 4 UTAH L. REV. 439 (1955).

[15] Dykstra, *supra* note 13, at 1.

[16] Dykstra, *supra* note 9, at 38.

[17] *See* Dykstra *supra* note 1; Dykstra, *supra* note 3; Dykstra, *supra* note 5.

[18] Dykstra, *supra* note 13, at 21.

departed from a vision of the corporation as the servant of immediate business objectives and long-term social needs. To this end he has insisted that the legal profession accept responsibility for ascertaining client needs and tempering client objectives. The academy has been the better for that message. So, too, have been those who have seen their role redefined as legislators in local, state, and national assemblies.

THE COLLEAGUE:

Dan Dykstra hired me. At the time he made little issue of the fact that I would be expected to teach business organizations and contracts (a rather Tory assignment) to students who were alumni of the "free speech movement." The fact that I did it and am now able to look back on that era of less than two decades ago tells as much about this remarkable "senior colleague" as the plucky endurance of his juniors. In 1971 many students would gladly have omitted any curricular treatment of "business." I can recall my first day and my first class. A student showed up wearing a paper bag over her head. It was later explained that she was making a point that it compromised her image to be seen trafficking in such a tawdry subject. None of this seemed to bother Dan. (As the new Dean he had elected to retain only torts in his teaching assignment!) When I asked if these events fit a pattern he assured me that they did not and that I would do "fine once it becomes apparent that you are raising questions about jobs, money, and fairness." He was right.

I didn't know it then, but "fairness" was the key. Twenty-two years before I substituted for him in the basic business organization course, Dan had written of the necessity of "protecting more adequately the law investor and creditor."[19] Later his defense of the "Fair Deal"[20] could in part be traced to his basic allegiance to the Democratic Party, but I suspect it was equally the product of his attraction to the values implicit in the term. In numerous discussions in hallways and in the office he always managed to convey that sense of commonwealth and decency which make him and his ideas intrinsically attractive.

On a more specific level, Dan's early concern that the legal profession realize that the greatest incidence of client service required solicitude for the problems of a business owned by a few active participants[21] has had a profound influence on me and my colleague, Bob

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[19] Dykstra, *supra* note 1, at 335.

[20] Dykstra, *supra* note 5.

[21] *See, e.g.*, Dykstra, *supra* note 13.

Hillman.[22] The course I currently teach with Dan devotes fully one-half its time to partnerships, joint ventures, limited partnerships, closely held corporations, and related agency concepts. We hope to graduate new lawyers who will surpass the prescription of form books in the service of people.

Last month, we were all delighted when Thomas A. Smith, currently a visiting professor at the University of Colorado, accepted our invitation to join the faculty at King Hall. Dan was excited about Tom's appointment and lobbied effectively to augment the ranks of those here concerned with the problems of the marketplace. I know that Dan sees in Tom yet another opportunity to share ideas. As the one who has enjoyed the benefits of that exchange the longest, I can only wish Tom the joy of the experience. I can also preview the agenda. Nearly forty years ago Dan Dykstra sketched his message, the "something" he would say. His words are worth repeating:

> The question which poses itself . . . is whether lawyers today are frequently pursuing and promoting policies which . . . ignore developing social-economic facts and forces, policies which look only to immediate results for special clients rather than to longer-term considerations for the public at large. Are lawyers, generally speaking, aiding as they should in formulating patterns of conduct which will cause industry and labor to use wisely the power which they have and which will help prevent these forces from achieving too much control and authority with too little protection for the general public? Are lawyers in their counseling of clients and in their public statements reflecting an awareness of modern social forces which is resulting not only in better long-range counseling but also in winning increased respect for the ability and perspicacity of the legal profession?[23]

Measured by Dan Dykstra's high standards I fear that there remains a significant gap between what the individual lawyer and the legal profession should and do seek and achieve. Yet I am confident that for

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[22] *See* D. FESSLER, ALTERNATIVES TO INCORPORATION FOR PERSONS IN QUEST OF PROFIT (2d ed. 1985); Fessler, *The Fate of Closely Held Business Associations: The Debatable Wisdom of "Incorporation"*, 13 U.C. DAVIS L. REV. 473 (198); Hillman, *The Dissatisfied Participant in the Solvent Business Venture: A Consideration of the Relative Permanence of Partnerships and Close Corporations*, 76 MINN. L. REV. 1 (1982); Hillman, *Indissoluable Partnerships*, 37 U. FLA. L. REV. ____ (1985) (forthcoming); Hillman, *Misconduct as a Basis for Excluding or Expelling a Partner: Effecting Commercial Divorce and Securing Custody of the Business*, 77 NW. U.L. REV. 3 (1983); Hillman, *Power Shared and Power Denied: A Look at Participatory Rights in the Management of General Partnerships*, 1984 U. ILL. L. REV. 865.

[23] Dykstra, *supra* note 5, at 540.

those who have had the good fortune to interact with this good man the gap has narrowed. What finer tribute could be paid to an educator and exemplar?