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THE TYRRELL WILLIAMS MEMORIAL LECTURE

The Tyrrell Williams Memorial Lecture was established in 1948 by the family and friends of Tyrrell Williams, a distinguished member of the faculty of the Washington University School of Law from 1913 to 1946. Since its inception, the Lectureship has provided a forum for the discussion of significant and often controversial issues currently before the legal community. Former Tyrrell Williams Lecturers include some of the nation's foremost legal scholars, judges, public servants, and practicing attorneys.

The Honorable Shirley M. Hufstedler, former Ninth Circuit Judge and distinguished public servant, delivered the 1991 Tyrrell Williams Memorial Lecture on the campus of Washington University in St. Louis, Missouri on February 20, 1991.

THE ONCE AND FUTURE LAW

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Scholarly and choleric debate has raged for years over whether a law school should require a two or a three-year program. I believe that law school should be confined to the second year. In the first year, the faculty knows what is going on and the students are baffled. In the third year, the students know what is going on and the faculty is baffled. Why not spend all of the time in the second year, when everyone happily gets the act together?

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Students entering law school do not *begin* the study of law, because, while law has beginnings, law study has no starting line. Instead, students are plopped in the middle of a web, oblivious to the strands of law surrounding them and to the directions in which each strand leads. The hapless student soon realizes that he or she is enmeshed, as first one and then another law teacher twangs the web and starts to reel in the student body. Although law teachers are web spinners, be assured that they otherwise bear no resemblance to spiders. No law teacher has ever devoured a student, although rumors suggest that a few professors have been known to munch on students.

Lawyers are a disputatious lot. Law schools are crammed with lawyers, budded and budding, and ringed with alumni. Alumni, critical elements in the debating mix, are all self-styled legal education experts. Their presence alters the debate because they cannot be subjected to rigorous cross-examination without jeopardizing the funding of the school.

Certitudes are hard to come by these days, but it is almost a sure thing that alumni can be counted on to assure each other, and the current class, that, when they were students, the school was better and a lot harder than it is today. Moreover, the longer the lawyer has been out of school, the harder and the better the old school was. So when Curmudgeon '40 meets Curmudgeon '39, the conversation goes like this: "What is this school coming to? We have Washington University graduates these days who think that trover is a pup's name. Why, I haven't seen a one of these young whippersnappers who could identify a springing use if it pounced on him." "No wonder, Tybalt, the place is littered with escapees from Yale who fill the kids' heads with nonsense like housing policy, pollution, and law and psychiatry."

Stripped of nostalgia's edited amnesia, history reveals that law schools are in fact far superior to what they once were. Law professors generally are not more brilliant, scholarly, or empathetic than they were in bygone days. Rather, the quality of law students has escalated dramatically. The result is that fine law schools have never before had student bodies as challenging as they are now.

Despite all of the quarreling about legal education, some consensus has developed. One of the areas of agreement is that during the first and second years of law school students should learn a core curriculum of basic substantive law, elementary procedure, and legal method. With some fussing about details, the hard-core law usually consists of the lawyers' traditional grist: contracts, torts, constitutional law, criminal law,

commercial transactions, family law, trusts, wills, property, procedure, legal writing, and elementary jurisprudence.

By the end of the first year, students are supposed to know how to get in and out of the law library, how to find a case while there, and how to read and to understand it. Students have met the "reasonable man," that marvelous tower of prudence, who threads his perilous way through every kind of travail and always behaves in his impeccably reasonable way. They have lived with Ms. Palsgraf[1] during her most exciting day, can drop *res ipsa loquitur* into a conversational gap, and can murmur *stare decisis* on moonlit nights. Having survived the early Socratic Wars, students, have begun to think in questions. In short, law students are well along in the process of learning how to think like lawyers.

So much for the good news. The bad news is that legal education, even in the best law schools, is not good enough to prepare lawyers to think about, let alone to handle, all kinds of major problems with which they now must grapple. The deficiencies are even more glaring when we contemplate the issues with which lawyers must deal in the near future.

I do not doubt that lawyers are going to continue to provide traditional legal services for the foreseeable future. They are going to try lawsuits, plan estates, merge corporations, draw contracts, minister to sickly businesses, counsel clients, and eject tenants. Those of you who become general practioners in some communities may perform all of these services for your clients. However, those of you who become associates in large metropolitan law offices will be required to specialize, sometimes in areas of the law for which you have received no law-school training at all. If you become a litigator, you will produce and consume enough paper to reforest a town, though you will have very little opportunity to try a civil lawsuit.

In the curmudgeons' generation of lawyers (my own), law firms were primarily local and, comparatively speaking, small. A "large" law firm had twenty lawyers. Today, law firms have become both trans-national and international. We consider a metropolitan law firm of fewer than 100 lawyers small. The megafirms today are farther removed from those of the 1940s than the law firms of the 1940s were removed from firms of the 19th century.

Not only has the practice of law changed, and changed dramatically,

1. Palsgraf v. Long Island R.R., 162 N.E. 99 (N.Y. 1928).

but lawyers today fill many other roles in our society for which traditional legal training prepares them very little, if at all.

Lawyers in our society have always assumed public roles in far greater numbers than their percentage of the general population can explain. They have occupied a majority of chairs in the executive and legislative branches of government, and they have a monopoly on the judiciary. Lawyers continue to sit on more than their aliquot share of business and charitable boards, commissions, and foundations. More than any other identifiable group, lawyers have shaped and often directed public policy at every level.

The role of lawyers has changed drastically in recent years because social, political, and economic structures, here and abroad, have changed drastically. The once stark lines between dependence and independence, between public and private action, and between foreign and domestic affairs have blurred almost to the point of obliteration. The industrial revolution, the technological revolution, the biomedical revolution, and the gender revolution affect every aspect of our daily lives.

To respond to these convulsive changes, Americans pass laws. The more helpless we feel in coping with change, the more laws we pass, punctuated, of course, by studies to discuss the problems about which we are too frightened to legislate. The statement, "there ought to be a law" is not merely a cliche; it is an expression of the American psyche.

The endless bog of statutes, ordinances, by-laws, regulations, and judicial decisions in which we now live evidences the level of American anxiety. We no longer can house them in their pristine state. We reprint them on gnats' eyeballs and retrieve them by computers. Even if we wrote them in standard English, and we often do not, no one can read them all, let alone live by them. Yet, this incredible mass of laws intrudes upon each of us in everything we do. Unfortunately, lawyers wrote most of these laws, and we have had no small part in imposing them on ourselves and on everyone else.

Who voted for this legal explosion? Nobody did, not even lawyers. We accomplished this through the tyranny of small decisions and the power of technology to give us the means to elevate our little follies into national and international disasters. For any comfort it may be, lawyers did not create the industrial revolution, the post-industrial society, or the interdependence of the inhabitants on our planet, and nobody voted for any of them.

As you would expect, much has been written about how we got our-

selves into this fix and how to get ourselves out of it. As usual, occasional kernels of thought lurk underneath lots of chaff. John Barton, a Stanford law teacher, wrote one of them. Professor Barton's thesis in his article, "Behind the Legal Explosion,"[2] is that in the past, the primary system regulating society and social relationships was not enacted law, but culturally inculcated customs and traditions. "Where law and custom are closely coupled," he says, "it is the custom or the ethos that primarily shapes behavior and enforces law. Most men therefore obey the law, and most dispute settlements coincide closely with the norms of the law."[3] What has happened, he contends, is that the congruence of law and ethos has shattered. We no longer have a shared core of values and customs to make us cohesive. Instead, we have tried to glue ourselves together with bonds of law, a method that now has proved resoundingly unsuccessful because the law has become more and more artificial. The more intractable are the substantive issues, the more elaborate are the procedures we devise to postpone decisions on hard questions to try to avoid the necessity of ever making a decision on the merits.

Professor Barton's thesis is sound. I quibble with him only in his failure to analyze more deeply the old ethos and what happened to it. Professor Barton's assumption that cultural values were widely shared is only partially true. The dominant members of the society shared and accepted the values he assumes. These same people also enacted and enforced the laws. Therefore, it is not in the least surprising that the dominant cultural values and the laws were mutually reinforcing.

The dominant members of American society were white, protestant men. Non-white men and women of every color were omitted from the value system. Until very recently, it would have been as idle to ask those Americans omitted from the dominant ethos whether they subscribed to the values imposed on them as it would have been to conduct a poll among medieval serfs to find out if they liked the feudal system. In both cases the questions and the answers would have been irrelevant. Until very recently, American women and a majority of non-white men had no education, no property, no vote, and hence no choice. The old ethos has not disappeared, but the pluralistic value systems that were heretofore submerged have surfaced. White men still dominate every level of the American structures of power, but they no longer have a monopoly, and

2. John Barton, *Behind the Legal Explosion*, 27 STAN. L. REV. 567 (1975).
3. *Id.* at 574.

they can no longer successfully impose their views on everyone else at home and abroad.

The old order has been shattered by the impact of multiple shooting wars and by even more far-reaching revolutions in theology, politics, sociology, economics, technology, and the physical sciences. The combination of these forces has made it impossible for that still powerful white male minority to continue to impose their value systems universally. They must respond at the law-making level to some of the demands made upon them, domestically and internationally, by those who want their fair share of the world's bounty; otherwise they cannot politically survive.

No one yields power gladly. A large part of the artificiality of the law, to which Professor Barton calls our attention, is attributable to efforts to retain control while at the same time appearing to yield to demands. The extraordinary jungle of regulations applicable to the welfare system, for example, cannot be explained simply by the American penchant for law-making or by incompetent draftsmanship of epic proportions. Is it not plausible that the legislators and rulemakers really do not want to make it easy for poor people to share very much?

I do not wish to convey the impression that I believe that the enormous amount of social welfare legislation enacted during the last fifty years was written by legislators to preserve their own positions. A great deal of it resulted from truly generous and humanitarian impulses. The problem is more subtle. A majority of legislators, judges, and other decisionmakers still respond to the very ethos that Professor Barton identified, without any consciousness of guilt and without any appreciation of the impact that the multiple revolutions have had on the state of the human condition. Their educations, formal and informal, did not prepare them for an objective appraisal of their own attitudes, or for undertaking a holistic view of astonishing variety and bewildering complexity with which they must somehow deal.

Mr. Justice Holmes has been quoted frequently for the observation: "The rational study of law is still to a large extent the study of history . . . for historic continuity with the past is not a duty, it is only a necessity."[4] And his contemporary, Mr. Justice Cardozo, with equal confidence, said:

> Life casts the molds of conduct, which will some day become fixed as law.

4. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897), *quoted in* John M. Kernochan, *The Distribution Right in the United States of America: Review and Reflections*, 42 VAND. L. REV. 1407, 1408 (1989).

> Law preserves the molds, which have taken form and shape from life. [T]he judge is under a duty, within the limits of his power of innovation, to maintain a relation between law and morals, between the precepts of jurisprudence and those of reason and good conscience.[5]

Both statements were essentially valid at the time they were spoken, but they are, at best, half-truths today. The study of law to a large extent is still the study of history, and law is just as good as it ever was to solve historic problems. The trouble is that many of the issues now confronting us have no historical antecedents, and law can no longer simply follow the molds of life when mankind has the means to recast at will the molds of life itself. Mr. Justice Holmes' famous apothegm, "a page of history is worth a volume of logic,"[6] is simply irrelevant if we do not have a line, much less a page, of history to examine, and if we are unable to apply logic because we cannot locate a premise with a laser beam.

Public awareness of the scientific revolutions is very dim, and few lawyers or judges are better informed than the general public. The only major public debate upon matters involving sophisticated technology has centered on military weaponry and nuclear energy, and the level of debate on these topics has not been edifying. The implications of current research in genetic engineering, biochemistry, and microbiology have scarcely rippled the surface of national consciousness. The same observations are equally applicable to the fields of communications technology and micro-electronics.

The closest we have come to touching even the periphery of the awesome issues that science and technology pose is the controversy over abortion and, to a lesser extent, the debate about a right to die. Few Americans are completely oblivious to the abortion uproar, even if they have never heard of *Roe v. Wade*.[7] Thousands of Americans know something about life support mechanisms and their effect upon comatose, injured, or terminally ill patients, even if they have never heard of Karen Ann Quinlan or Nancy Cruzan.

We have learned a few things from *Roe v. Wade, In re Quinlan*,[8] and *Cruzan v. Director, Missouri Department of Health*,[9] but they are not reassuring. In none of these cases was any complicated scientific or techni-

5. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 133-34 (1921).
6. New York Trust Co. v. Eisner, 256 U.S. 345 (1921).
7. 410 U.S. 113 (1973).
8. 355 A.2d 647 (N.J. 1976).
9. 110 S. Ct. 2841 (1990).

cal data involved. No difference in medical opinion exists on such straightforward facts as the development of the human fetus or the extent of organic brain damage that vegetative human beings have sustained. The technology used to terminate a pregnancy, or to give or remove a mechanical life support system also is simple. The cases are extraordinarily hard because they raise ethical, moral, and philosophic questions, as well as basic issues of governance, with which we are ill prepared to deal. Who decides whether we will be born or whether we are alive or dead? Does the state bear or share the decision? Is the decision left to the individual? If so, to whom? What principles apply to the decision and in whose philosophic, ethical, or religious framework?

We know that none of us welcomes responsibility for deciding questions that, even arguably, involve the life or death of human beings. We do not trust anyone else to decide the questions affecting ourselves. Few appreciate that nondecision of these issues is also a decision, because a nondecision on termination of a pregnancy or on removal of an artificial life support system also affects life and risks death.

The medical profession, for the most part, has been reluctant to the point of paralysis in reaching any judgment. Legislators have run for cover. Judges have decided the issues because, until very recently, no other members of government have been required to face the responsibility of decision.

Regardless of your views on the results or the persuasiveness of the reasoning in the opinions, you should find it unsettling that lawyers presented these cases and judges decided them. You should be disturbed because you then have an inkling of the depth of the legal and philosophic problems that are created by mankind's ability to intervene in the processes of life and death.

History provided a lot of footnotes for *Roe*, but little substantive or philosophical help. Legal philosophy and theological principles, developed when only God could control life processes, do not easily retain their vitality when humanity has increasingly arrogated to itself the tasks once left to divine providence. We have not reached consensus about the morality of intervention; worse, most of us do not even know how to think about it.

Our lack of a coherent philosophy, coupled with the traditional incapacity of the law to keep pace with the recent past, means that law, lawyers, and judges are ill-equipped to deal with the dilemmas presented by current and future science and technology. Discoveries in microbiology,

biochemistry, and genetics are being made at a dizzying rate. The developments of technology, such as electron microscopes and computers of extraordinary capability, combined with discoveries in microbiology, genetics, and biochemistry, have opened vistas of biological and genetic engineering of awesome scope. The capacity for good and evil that flows from these events staggers the most fervid imagination.

Scientists are now probing the innermost secrets of cells. They are learning the mechanisms by which cells are directed to grow and to stop growing, to differentiate themselves into liver, brain, or kidney cells. That research can lead to the defeat of cancer, the possibility of regenerating lost, diseased, or injured human organs or other body parts, and to halt or possibly reverse the aging process. It can also lead to a new world of domination and dehumanization.

Scientists use asexual reproduction of mammalian cells to reveal the details of the cells' biochemical and genetic life. As you know, various kinds of lower life forms and some kinds of plants reproduce asexually. Offspring grow from adult cells without the joinder of male and female cells. Scientists call such a sexual offspring clones, and each clone is an exact genetic copy of its parent cell. Laboratories studying basic biochemical and genetic structures regularly clone human cells. No one is trying to produce a full-grown human clone, but the means to do so someday may be possible, unless research is stopped cold or seriously restricted.

Non-scientists are somewhat more familar with the technique for transplanting bits of DNA from one cell into a completely different cell, despite neither cell's having had the remotest relationship to the other before this genetic sleight of hand. Using recombinant DNA techniques, a scientist can transform a plant cell into a wholly different plant cell, or can combine a mammalian cell with a plant cell, much to the astonishment of Darwin's ghost. Like cloning, the use of recombinant DNA can teach us an enormous amount about cellular functions and structure, and, like cloning, it has other potentials for good. But it also has its fearsome mien because it also may have the potential to produce life forms that will destroy other living organisms, including us, or to so far distort evolution as to alter every life process as we know it.

Scientists engaged in this research are not oblivious to the implications of their work. Not all of them, however, are as sensitive to the potential effects of their research as they ought to be, or as willing as we want them to be to accept moral responsibility for that uncertain future that they are

shaping. Those scientists who are fully sensitive to the moral responsibility for research decisions should not be compelled to bear that burden alone. Just as law is too important to be left to lawyers, so also is science too important to be entrusted entirely to scientists. Scientists have the potential for greater good for humanity than do lawyers, but so also have they a potential for even greater harm.

The issues science and technology pose cannot be attacked by historical citations or by invocations of philosophic thought rooted in ancient Greece. Natural law is not a helpful place to begin to think about managing "unnatural" developments. Moreover, the traditional economists' cost-benefit model, though not irrelevant, cannot assist in the creation of a new philosophy; dollar values cannot be affixed to the processes of life, at least as long as we retain enough humanity to have individual consciences and enough hope to believe that we have souls.

Professor Laurence H. Tribe has succinctly stated why analysis of the new technology based on lineal concepts of means-and-ends is inadequate:

> More pervasive than the realm of technologies pursued as ends is that of technologies which, although pursued largely as means, have the effect of significantly altering the ends and indeed the basic character of the individuals and the communities that choose them. Should certain techniques of genetic engineering, for example, be developed? Should research into particular methods of neurological manipulation, to pose another illustration, be publicly subsidized? Attempting to answer questions of this sort entirely on the basis of instrumental analyses (*e.g.*, "What will be the impact of these choices in terms of the present preferences and values of the affected persons?") is bound to miss the most basic point, which is that the answers to questions of this sort will determine not only the degree to which various currently held values will be advanced or sacrificed but also, and most importantly, the ways in which the character of these values (and of the basic conceptions and modes of thought that underlie them) will themselves be defined over time.[10]

Before we can make any headway in learning how to cope with specific issues such as genetic engineering, we have to find means to resolve the paradox created in a society suffering from specialization, ignorance, and information overload. Isaiah Berlin poses this dilemma very well in *Conversations with Henry Brandon*:

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10. Laurence H. Tribe, *Technology Assessment and the Fourth Discontinuity: The Limits of Instrumental Rationality*, 46 S. CAL. L. REV. 617, 642 (1973).

> As knowledge [becomes] more and more specialized, the fewer are the persons who know enough . . . about everything to be wholly in charge. . . . One of the paradoxical consequences is therefore the dependence of a large number of human beings upon a collection of ill-coordinated experts, each of whom sooner or later becomes oppressed and irritated by being unable to step out of his box and survey the relationship of his particular activity to the whole. The experts cannot know enough. The coordinators always did move in the dark, but now they are aware of it. And the more honest and intelligent ones are rightly frightened by the fact that their responsibility increases in direct ratio to their ignorance of an ever-expanding field.[11]

Berlin was not talking about lawyers and judges, but his remarks could not have been more apt if he had named us. Lawyers should be shivering about the responsibilities they wittingly or unwittingly have assumed as societal coordinators. No judge worthy of the robe is not thoroughly dismayed by the duty, not only to coordinate, but to decide an endless array of issues about which he or she is woefully uninformed.

Surely we can forgive legal educators of twenty and thirty years ago for failing to teach us computer technology, microbiology, and macroeconomics. Those fields of knowledge scarcely had been planted at that time. But legal educators cannot now pretend that those revolutions are irrelevant in training lawyers. The notion that lawyers are generalists, or the more paleontological boast that lawyers are the last of the generalists, is false advertising. The law schools, especially the great law schools, must mend their pedagogic ways, or they may well produce only legal historians.

Teaching a core legal curriculum will be relevant to training lawyers for the foreseeable future, although the substance of the core will be modified. But law schools should complete the core education in two years. The student already should have learned to think like a lawyer, and then he or she should start learning how to think like a thinker.

This brings me to the third year of law school, which I lightly tossed away when I began. I threw it away because, more often than not, the third year is not as productive as it should be. For students who are working on the law review or in other activities requiring them to teach each other, the acquisition of those teaching skills may assuage third-year ennui. Some good clinical programs help, but even a bad clinical program can be healthy because it sends pallid students outside to exercise in

11. ISAIAH BERLIN, CONVERSATIONS WITH HENRY BRANDON 25-26 (1968).

the fresh air. These merits, however, do not alone justify retention of the third year in its present form.

Unpatentable though it is for lack of novelty, I would convert the third year into an interdisciplinary program. The only new feature would require the law teachers to attend the classes along with the other students. Dr. Harlan Cleveland has sometimes described existing interdisciplinary courses as a favored academic device for avoiding interdisciplinary thought, by using several professors to teach the same group of students. What too often happens is that each teacher teaches his or her own discipline; it is the students who are expected to be interdisciplinary.

The house of the law always has been a house of many mansions. But the mansions themselves need remodelling. The law schools may be the future architects or, at least, the interior designers. I can be sure only that each of you will live in that house, and what you do to shape it will affect not only you, but countless others with whom we are privileged to share our fragile planet for our brief visits.