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IN PURSUIT OF THE ART OF LAW

GORDON A. CHRISTENSON*

The following is the address given by the author upon his installation as Dean of The American University Law School, on October 31, 1971.

In all beginning dwells a magic force for guarding us and helping us to live.

Hermann Hesse, *The Glass Bead Game*

Seven years ago on this campus Chief Justice Warren presided over livery of seisin of the new John Sherman Myers Law Building and dedicated the place to human service in the law. Today, we meet in simple ceremony, returning once again to the magic of our beginnings at the sabbatical year.

This time the ritual should not so much honor me as bring us together—students, faculty, staff, community—in sharing our doubts as well as our dreams. We have been through much in this century, culminating in the destruction of strong leaders in the sixties. These events

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have placed a heavy burden on the law and all of us. For only a few thousand years of the one million years of human evolution, law has kept our taboos—our thirst for vengeance, our instincts toward violence, our capacity to kill. It has also kept our hopes. We have held law in fear and esteem, as if it were God, sometimes irreverently, occasionally with demands. And in all of this there is wholeness in the playfulness of ritual that helps us all to live.

The law's power and poetry, however, are not simply games, for law places reasoned limits on what we may do to each other. It gives us the concrete ability to say no, to dissent, and thereby gives us the limits and spaces of an art form.

In denying to itself the temptation of becoming a council of state, the Supreme Court has let us retain this pleasurable art, refusing to hand it over to a state religion, a state ideology, or a state public morality. Without a great refusal of this kind we would have no way to resist the state's own sense of justice or to be even slightly encouraged to hold the state accountable. Our art of the law can now limit the state, because it is a form of expression of primitive powers that have been with us long before the state.

At the center of an autonomous university, a law school needs its own healthy powers, using the art of law even to seek justice which often hides. Of all institutions, law schools have the power of play in intellectual combat which seeks to understand reasoned limits. The capacity of the commitment to action in the public good is also vital, however, for the impulse of the state to go beyond freedom will not be curbed by legal graffiti, by words alone. Especially in Washington, a healthy irreverence in action is essential for survival.

Law schools must also help people with their freedom. This duty is painful and we do not face it very well. The law always has been artful enough to use fictions when it does not like to give honest reasons. You might say that law schools recognize man's brutal instincts toward vengeance and violence only indirectly, in the form and process of law. Before beginning, before guarding us and helping us to live, the law must first renew our understanding of the forms to tell us what we are doing to each other.

Let me begin it. After each traumatic event of the past decade, each of us, I am sure, with all the animal instincts of our long past, wanted to do something to get even. While we suffered loss, most of us learned to restrain the feeling. Yet it lingered and smoldered, joining yet another revulsion against human slavery which had lingered and smoldered longer. In our innocence and new world naivete, we thought that the Garden was still ours to have or even return to after we awoke from

the sleep of Adam. When we awoke, we found ourselves lost, bitter, cynical, doubting that we could find our own way toward any kind of justice. Rootless, afraid of change, yet change-provoking, we realized the hypocrisy of wanting peace and love while harboring hate and wanting vengeance. And in our driven persistence to seek release, we released the demon mob within us all. It rose in terror and fear against the stranger and outsider and against ourselves.

The mob did what the Supreme Court has refused to do. We let it condemn and exclude those who are not in our own image: old people, young people, the unemployed, the poor, criminals, the minorities, strangers. And to help us live with the results, we legislated. We passed the burden back to the state because there seemed to be no standards; our priorities had gone bad; no-one knew what was going on. We tried to make our own laws to help us face our animal past.

Our common law has generally put form to biological forces through adversary proceedings. The art form of the trial according to law is an orderly combat of human aggression under rules. Our mass love affair with the orderly violence of football follows a similar game form giving pleasure for a victory by number rather than by blood.

I have heard some teachers say that primitive notions have no place in our law. We might examine them with bemused distance in jurisprudence or history courses. We might also study the law of primitive man through Indian tribes or the Eskimo. We generally teach, however, that we are beyond primitive law. In a highly civilized country with an elaborate and independent judiciary and a Bill of Rights, we believe we are not savages.

This view is a serious mistake. It keeps the art of the law from tapping its most useful and creative powers. Consider, for example, our sense of injustice at work in the various wars on poverty, hunger, cancer, consumer abuse, discrimination, environmental pollution, and so on. The battles are waged with the vengeance of nomadic tribal feuds. They are vengeful assaults on injustices. While assaults by vigilantes may not be the same as the pursuit of justice, the form of the art lies nonetheless in the primitive notion of restoring or creating a balance. Understood in this light, vengeful powers can be turned artfully into creative powers.

Let us look at other primitive art forms—for example, one eye equals one eye or our sociological form of balancing interests. Consider their use in the clear and present danger test which limits free speech by weighing it against imminent dangers to the national security. Better still, look at the art of accommodation of procedural rights to order. We can easily point to a very inartistic and ugly use of primitive legal art. I mean the flat statement that the Supreme Court should trade off the

rights of individuals who are suspected of criminal behavior against the so-called rights of society. Here, the balance is between the statistics of reported crimes and those of the opinion polls. Potentially, the pernicious doctrine means that *every* human being might be presumed guilty when the state says so. In eliminating the limits, the state has denied law its art.

We should not like to think that justice blindly stands in the middle of a bad balance of quantity. There surely should be room for some creative artistry in the name of justice. If the reapportionment decisions, for example, rest on a numbers game of restoring balance in representative government by the one-man-one-vote maxim, a census bureau computer could make better decisions than a judge, but the artistry would be sterile. The quantitative measurement of increase in crime, to take another example, cannot mean that an individual accused of crime should be protected less. I believe that the Court's sense of justice on these matters requires the most delicate art, going well beyond platonic harmony in number and form.

A good and open society in which individual values in the pursuit of happiness are protected and made possible demands artistry from its lawyers as well. We all know that a modern lawyer's art must be basic enough to reduce any problem to its simplest elements. What we cannot teach is how a lawyer becomes an artist. We can only provide a place for the student to learn the limits of law and the love of human beings which give the artist his form and his power.

This kind of study of law is at least as old as the University of Bologna, founded in the thirteenth century by a group of law students. These sons of wealthy merchants, who disliked the servitude of apprenticeship, employed law teachers to instruct them and free them in the pursuit of their profession. American law schools, being only a century old, have reflected the same artful balance between a systematic academic study of law and a practical, sometimes affectionate, apprenticeship with a member of the bar. We know about the criticisms: law schools do not adequately prepare students for practice; they teach only "how to do it" skills; they are too theoretical; they are too remote from courts and from the poor and the needs of communities.

I asked some law students to think about what lawyers do. One replied, "You do not need de Tocqueville to tell you that, whatever else lawyers do in America, they govern. Law schools, however, have been slow to catch on." Somehow quite by accident, if not through the games of the gods, law schools have resisted the plague of specialization. President Levi of the University of Chicago, who is also a great artist, explains that the law has replaced the classics in educating leaders. Such

a central position for the place of law in a university further illuminates Robert Hutchins' warning against linking law too closely with specialties of behavioral research or any other single specialization. Rather, its center should afford critical links to all knowledge, including the sciences and humanities, but always with irreverence and always with the basics of analysis, skepticism and lucidity. Whenever Don Juan has appeared, through Mozart, or Shaw, or Camus, he has never been without these basics for the practice of his art.

Similarly, lawyers, whether in defense of the accused, in protection of the poor, or in the creative solution of a complex policy question, must have the same tools of analysis and perspective. In preserving our precious position as one of the last places for graduate training in generalism, we take pleasure in recalling the founding of the University of Bologna by students of the art of law and see why today the law should be at the heart of the university.

Our law faculties in such a strategic position must create the fierce autonomy of intellect and affection which can sustain the artistry of law. They may enjoy money, but within limits, perhaps as judges do. Universities, however, should pay the best law professors salaries comparable to those paid the best judges and in return expect to find an even stronger commitment to students and each other. Law professors should have the grace of excellence not only as teachers and scholars, but also as active and independent artists in the world. They should have the distance from themselves that allows them to laugh and yet personal caring for students and each other that bears the pains of compassion. They must be tough-minded and emotionally secure as advocates of creative action in the public good and must be confident enough of their grounds of being to consider failure in a great cause to be irrelevant. Yet they must be open enough to let students see the quality of their inner and outer lives at work. They must avoid the temptation to withdraw behind fences of specialization without the correlative strength of a conscious and whole world view.

Tenure and academic due process also have their places in preserving academic freedom. But sometimes they coerce conformity and exclude those who are too independent to bend to a common ideology. Faculties of secure men and women using an improved tenure system could attract new teachers, even stronger, more diverse in outlook. Our art must include richness and variety, limited only by quality and commitment. We should rejoice and be glad for the pleasures of diversity. No student or teacher should fear being different. An artist takes no pleasure in imitating.

The adjunct faculty, in a place like Washington, should provide art-

istry from the professional world, maintaining an outside perspective which is very healthy for students and faculty engaged in pure academic law.

The pursuit of the art of law should be especially exciting for law students. They must have the support of the entire law school community so they may learn to organize and direct their own passions. They must be supported in their right to dissent from conventional wisdom. They must feel part of a whole that finds difference healthy and the skills of preserving diversity praiseworthy. Students will find that the skill and poetry of law in action is as delicate and passionate as a love affair. Holmes said the same thing better in his life's work. The same limits and playfulness indeed demand clarity and simplicity. They are matters of a lifetime of pursuit and repose. Beyond the primitive bludgeonings of power, beyond the thrusts of vengeance in toppling authority, beyond the temporary victories and defeats, we find a supreme artistry in the resourcefulness of students when they save passion for important matters.

To spend energy in pursuit of a just cause, students must make conscious choices. Restraint in choice gives a balance to the pursuit and makes the art whole. I think it is very important, for example, that students spend time in their final year in independent pursuits requiring choices, whether in the community or on academic problems, or in combination. As law students learn the autonomy of their own intellect, they should experience commitment to conscious action. They should learn the cost and meaning of risk. They should learn for themselves the ethical difference between action for the sake of avenging and action for the sake of creating. This challenge will demand more not less work of students.

"If God is dead," said Ivan in *The Brothers Karamazov*, "all things are morally possible." Students know that in pure carnival, in celebration of the death of God, anything is indeed possible. It is easy enough to stir the demons or be lazy. It is quite another task to acquire the tools of critical thought, to use law as a creative form of action. If and when you law students now here represent interests or govern, what will be your art? Will your advocacy or decisions be imitative and unauthentic? Will you act purely on the patterns of victory and defeat which mark politics? Will you be poorly educated and at the mercy of obsolete skills and knowledge?

Legal education should flow between the inner life of the law and its outward action. Each should always be in tension with the other. Each should be evaluated in relation to the other. From the spaces within this play, the art of the law may be pursued, but not without the rigors of

analysis and not without slightly irreverent action.

As for this law school community at this time and place, we shall be with the Court in refusing to give up the pleasure of limit and form. We shall need each other and all the affection we can give to each other very much. Only with each other can we maintain that fierce autonomy of reasoned limit in action without which there could be no pursuit of the art of law at all.