

High Technology, the Human Image, and Constitutional Value

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During this conference we're looking at how the legal system is supposed to respond to the problems, especially in the area of privacy and intellectual property, that the new technology may create. But it's a mistake to look at that problem as entirely a static one. The existence of this technology itself and its implications will change the process even as the process is trying to cope with the implications of the technology.

And I don't mean this in a trivial way, though in a trivial way there are some signs. Some might date the menopause of the common law, that is, the decline of judges' confident mastery of the law's growth, to the introduction of the dictating machine. In the old days, judges wrote their opinions by hand. Holmes, in fact, wrote standing up. He wrote a three or four page opinion; it was written by a human being; you could read it, you could know it, and you could understand it. Now, of course, those of you who have the curse of being lawyers realize that Supreme Court opinions not uncommonly exceed one hundred pages. That's just the dictating machine and the electric typewriter. Now that the Supreme Court is introducing word processing equipment, God save us all. The process will never be the same:

There are other straws in the wind. A recent Supreme Court case that only a lawyer could love involved this problem: the defendant's name had been misspelled from the beginning. The case got to the Supreme Court of the United States. The clerk of the Supreme Court, being a very fastidious man, noticed the misspelling. He established that throughout this litigation the name had been misspelled. It was a minor problem: how many "l" 's in Millhollin? So the Supreme Court wrote its opinion, beginning with this footnote to the caption itself: "Because legal research catalogs and computers are governed by the principle of consistency, not correctness, we feel constrained to adhere to the erroneous spelling." This is, in other words, the first instance I know of in which the Supreme Court was asked to choose between the convenience of the computer and the truth. The computer won.

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From the days of Elizabeth I, the Lord Chief Justice of England wore on each lapel an "S." One "S" stood for *sapience*, (wisdom) and the other "S" stood for *science*. Ever since, it has pleased the law to cloak itself in science because science seems firm and hard and can be used to obscure a lot of choices. This idea has had a special appeal in the United States from the very beginning. Again, as lawyers know, of course, the first time the United States Supreme Court struck down a statute was *Marbury v. Madison*, saying that an unconstitutional statute was not law. This was wildly attacked by the Jeffersonians as improper. Then, shortly afterward, one of President Jefferson's appointees to the Supreme Court had to strike down a statute that was wildly unpopular with the Jeffersonians, but he couldn't say it was unconstitutional. So he wrote a fascinating opinion, saying that the statute violated the law of nature (i.e., science). It was therefore invalid, not because it was unconstitutional — because we (Jeffersonians) don't do that in this country — but because it violated the principles which set a limit even to the powers of the Deity Himself, namely, the laws of nature. That's a clue to what's going to happen. Often when the Supreme Court wants to pretend, "We're not doing this, this is not *our* value choice," it searches for some basis in scientific value. And this is what I think is likely to make significant the impact of dramatic new technologies on the way the Supreme Court works.

There's a central theme here that constitutional law, what the Supreme Court says, is usually based on some image of human life — what the good life is and what people are all about. You can't do law unless at your core you have some view of what people are like. Throughout this century, not often for better, this conception of the human image in constitutional law has been heavily influenced by the dominant technological or scientific view of the day.

Take this case from the beginning of the century. Berea College was a college founded in Kentucky to provide racially integrated higher education. That wasn't the most dramatic thing. The most dramatic thing was that it was to provide higher education for blacks, which was rare enough, even in a separate black institution, but Berea was integrated. The Kentucky legislature outlawed integration in higher education. Berea College brought suit which, in the end, found its way to the Supreme Court, arguing that there was a constitutional right for a private college to make its own policies — in this case, integrative, against the segregative, racist state legislature. The state legislature had relied heavily on "scientific evidence." The state called (I'm sorry to say) the man who was generally regarded as the leading anthropologist of his day. This was the beginning of a scientific image of man, which is what the name "anthropology" means. This fellow, following the Civil War, had gathered a huge collection of spent bullets. He had then collected the skulls of black soldiers, white soldiers, and soldiers who had some black and some white ancestors. He filled their skulls with shot. This was, of course, a measure of intelligence that preceded the Stanford-Binet test . . . slightly. He discovered you could get more spent bullets into the

skull of a dead white soldier than you could get into the skull of a dead black soldier. But you could get more into the skull of a dead black soldier than you could get into the skull of a mulatto soldier. This proved that mongrelization of the races resulted in the degeneration of both. And we all know what happens in college, even in the nineteenth century at Berea College. If black and white students go to the same school, the race will be mongrelized. Therefore, there was a compelling scientific justification in terms of the human image which justified suppressing racial integration for the protection of the scientific qualities of the race.

Now this vision of the human image, a scientific one, is, of course, closely related to the then-popular ideas of evolution which contributed enormously to a lot of *good* things about the law. If my theme today were the good things about the law, I'd talk about them. I'll just brush them aside now, saying it's obvious that the idea of evolution leads to our concept of a flexible legal system, of a law not written in stone, of a hope for change and improvement. But there's a negative side also to this scientific concept of the human image. Consider these two cases, one of which is remembered for its good qualities. The case is *Muller v. Oregon*. In *Muller v. Oregon*, the Supreme Court for the first time held that the state could regulate maximum hours of work. And as such, this was a case which ushered in the progressive era and an unbroken line of developments from which Ralph Nader ultimately springs: government regulation of business for the good of consumers and workers and so forth. *Muller v. Oregon* itself, however, upheld only a law limiting the work hours of *women*. It was in this case that a young (actually, middle-aged, my age) Boston lawyer named Brandeis filed the first brief in the Supreme Court ever based on social science. To this day such a brief is called a Brandeis brief. Brandeis convinced the Supreme Court, with contemporary scientific reasons, that there were valid, objective principles to permit the state to regulate the working hours of women, those principles being based on the inferiority of women. He had a ninety page brief, drawing from the leading scientific or so-called scientific sources of the day (respectable in their period, anyway — the right kind of peer reviews and professorships and so forth) pointing out that because women had a biological imperative to care for children, because they were weaker, because they lacked certain kinds of mental toughness, they simply could not be exposed to the same workplace that men could.

There's a famous case decided by Holmes a few years later: *Buck v. Bell*. Here's the textbook version of what happened in that case. A feeble-minded woman was incarcerated in an institution. She bore an illegitimate child. This illegitimate child was also feeble-minded. This illegitimate child, in turn, at the age of fourteen had another illegitimate child who was also feeble-minded. Therefore, the state determined to sterilize the pack of them. And was this constitutional? Yes, said Holmes, in the famous quotation: "Three generations of imbeciles is enough." This is the precedent on which, by the way, some of the Nazi war

criminals accused of compulsory sterilization and euthanasia attempted to rely at the Nuremberg trials, establishing that what they had done was in line with even the great jurist Holmes. In fact, Steven Jay Gould recently went back to look at all the evidence. The only reason to suppose the eldest woman was an imbecile was that she had a mental age of seven years, eleven months on the brand new Stanford-Binet test. This made her an imbecile, middle grade, on an unvalidated, brand new test. The daughter had been placed in a foster home. The man in the family of the foster home in which she was placed raped her. She became pregnant. At that time, there was no institution to accept minor pregnant women on welfare. The only place that would accept her was a home for the feebleminded. That placement constituted her diagnosis of being feebleminded. When a social worker visited her later in her own home, she was working a crossword puzzle and living normally. Her daughter, aged six months, was diagnosed as an imbecile, based upon only the following: a social worker one day talked to a six-month-old child of one parent who happened to be a prominent political figure and also saw the six-month-old daughter of this woman. The social worker testified that the daughter seemed slow in some way; she couldn't really quite figure out how. The daughter, of course, was also a resident of the institution for the feebleminded because she was nursing and her mother was in the institution.

Now the point of all that is not, of course, that Holmes was a bad man. He expected to find these things to be true because he came to this case under the influence of a biological, anthropological image of man. People are a certain way in 1920, scientists, tough-minded and hard-thinking people believed, because of their genes. And so you find three people in an institution; you don't need to know more than that; it's what you'd expect. Why look further? That's the nature of the human condition, so sterilize them.

The social sciences themselves grew out of this crude attitude; by the 1950's there was a different image of the human condition, a different scientific image, based no longer on the biological or anthropological physical characteristics. These were the days of social psychology, of make the world better through understanding. The dominant problem, of course, in the 1950's in this country was racism. In the 1940's it had been war. Both of these problems, respectable scientists, sociologists, psychologists, and social psychologists believed, were the products of ignorance and misunderstanding. If only people could know each other better, this hostility would disappear. Thus, we would create the United Nations where we would all meet and avoid war. We would end the problems of racism if little black children and little white children went to school together. Ignorance breeds fear, fear breeds hatred, and these are facts.

There are psychological studies that prove this in the methodologies of the early 1950's. So the Supreme Court when it decided *Brown v. Board of Education* (for anybody's money, *the* great case of this century), rather than saying that racial discrimination is wrong said instead that

scientific studies demonstrate that if black and white children went to school together they would learn better and they would get along better. And, therefore, the Supreme Court was able — in a kind of buck-passing exercise — to say to the South, look, this isn't *our* idea. This is not a value choice we are making that you people have perpetuated a despicable evil too long. This is something we read in the *American Journal of Social Psychology*. It is science, not morality.

The same strain (but I won't run over this at any length) runs through many of the criminal justice opinions on which the liberal reputation of the Warren Court was based. Social scientific studies explain that poverty causes crime and that poor people are convicted because they don't have lawyers. Therefore, give them a *Miranda* warning and then they won't confess, they won't be convicted, and the problems of poverty and crime will be cured. The problem, as was quickly discovered by adept police officers, was *that the Miranda warning is an effective ploy to get people to confess*. It projects an image of fairness and receptivity; a criminal who has just been told his rights may say "what a swell guy that cop is," and then *proceed* to talk. *Miranda* hasn't had much impact on anything real. I don't want to dwell on the details beyond trying to describe the kind of relationship I'm looking at: that the scientific outlook of the time creates an image of what people are like. And this image of what people are like then determines, in the end, how the Court comes to address the great value choices which must be made.

I have been talking about the past because it's easier to see that relationship when it is not a process of which we ourselves are a part. Now I want to try to speculate about the development of technological sophistication made possible by the computer. Current technology invites us to look at all social problems as problems we have to resolve with a variety of (as we now say) "inputs" from various fields. We'll have some hard scientific data, we'll have some binding directives, we'll have intuitions of justice, moral impulses, a sense of tradition. In making a complex decision, we will draw different factors in different ways. That's what it means to exercise judgment, to make a decision.

The advent of computer sophistication creates an inevitable dichotomy between hard, quantifiable, measurable, usable data — the "good stuff," the stuff you can run on your program and it gives you an answer — and, on the other hand, all the "other stuff," which you can't really run very well on your computer. You can put it in, but you put it in a special category — it's all the same, whatever you call it. Maybe you call it a matter of taste, maybe you call it an aesthetic judgment, maybe you call it a choice made by the decision-maker, maybe you call it the responses given by the people that you're surveying — who then disappear as people because you've got their responses, which are hard data. But whenever you analyze a problem in this fashion, you inevitably break it into two parts. There's nothing wrong with that in principle. But in practice, the computer is so good, and the rest of it is just as bad as it always was, that the computer, the hard data,

the tough-minded, analytical style come to dominate. And those values which can be represented in a quantifiable way — the technological values, the facts, the science — not as a result of some decision, but *naturally* come to assume a dominant proportion.

I know, we all know, that people who work with computers in a sophisticated way are aware of this problem. They call it the GIGO problem — Garbage In, Garbage Out. But having said that, you've said about all you can say. It's our business to run the programs; the other guys bring us the garbage, and we run it through. Then they get a projection, put it on the spread sheet, and they go broke because they try to sell toothpaste in Erehwon. We predicted that if people in Erehwon *would* buy three times as much toothpaste as they had, then they would be able to, and they just didn't; that's not our problem. That's soft data; that's somebody else's problem. Nobody listens to the old salesman in baggy pants when he says, "You know, I don't think people brush their teeth in Erehwon at all. Shouldn't we start with toothbrushes?"

This is the frontier of computer work — the problem of artificial intelligence. How do you work with, or how do you develop, a computer program that is more sophisticated, that can deal with uncertainty or complexity? I once had a psychotherapeutic session with a computer. I sat down, logged in, and the computer said, "How do you feel, Patrick?" I said, "I feel like throwing up." And the computer said, "Why do you feel like throwing up?" I said, "Because I'm sick to my stomach." And the computer said, "Can you put that another way?" And I said, "Well, I feel like throwing up." And the computer said, "Perhaps it would be better if we talked about a subject you feel more comfortable discussing, Patrick."

Perhaps I shouldn't fault the computer. As a matter of fact, this whole program cost \$76, and my real psychotherapist costs that every hour. So I was off cheap. But we're still a long way from a very effective kind of artificial intelligence, and yet artificial intelligence dominates. The book-bright students (the students who will be running society thirty years from now, running the courts, the legislature, the whole schmeer) read a book now called *Godel, Escher, Bach*. The book is the work of a brilliant computer scientist who shows how mathematics, art, and music are all linked together. Well, of course, they are in a way an eternal braid. Godel's a great mathematician. Escher, as you no doubt know, is an artist who specialized in mathematically fascinating drawings — optical illusions. Bach is of course a very, very great composer, but among his musical gifts is one thing that fascinates computer buffs — his ease in the counterpoint. He must have been able to think like a computer, to have all those melodies going so that they all harmonize, an incredible task. It becomes almost irrelevant that the B Minor Mass inspires awe and stirs the human soul. Not long ago, students took to Camus, Hemingway, Picasso — not artists whose greatness could be expressed quantifiably. But Bach is the greatest contrapuntal writer in the history of music, and Escher's drawings evince a mathematical complexity that would boggle even a very fine program. We are founding

a world in which artificial intelligence is . . . what? Feeling. Soft. One has *indeed* (not measured) the course of history to be this or that — that's feeling. As yet we don't have a science of artificial *feeling*. When cocaine ever becomes legal and cheap, we'll have the artificial feeling to go with the artificial intelligence.

The point I'm trying to make is that there is a category of things which are not feeling but are not scientific either. There exists a category of human judgment something more than "I like chocolate," but something less than "two to the i pi minus one equals almost zero." "Almost," because on a calculator you have to round it off. Take, for example, a simple case: artistic criticism. Critics are subjective — it doesn't mean anything, there's no truth, I don't know much about art, I know what I like. But it's still true that it is possible to look at a drawing my son has drawn next to whatever you like, whether an Escher or a Picasso. You can discuss rationally why one is a better drawing than the other. Somebody could still even say, "Well, I like this one better." But there is a series of arguments about why this one is better than the other one that is not just "I like it," but is discussion in terms of criticism. Much, of course, of law, of legal analysis, is the same stuff. It's more than just "I'm a Democrat, therefore, I like criminals," or "I'm a Republican, therefore, I like money," but it isn't hard and objective and quantifiable. Look, for example, at the case of a deformed infant, seriously retarded with a variety of medical problems — Baby Doe, Baby Jane Doe. If you root your view in technology, you come down just to two choices. On the one hand, the situation is all quantifiable. If the baby has an operation, there will be a 93% chance of this and a 47% chance of that. If the baby grows to maturity with Down's Syndrome, there will be an 81% chance of this and a 37% chance of that. On the other hand, what do you have? The taste of the parents. Some parents like kids with Down's Syndrome because they like all kids; some parents don't. If you break the problem down, putting on one side a whole range of human considerations and lumping them all together, just like the question of, "Do parents have a right to teach their kids French or not?" and then on the other side this seemingly precise prediction that the child will be like this in all probability, the precision of the one almost always outweighs and obscures the complexity of the other. Yet one cannot reach a convincing resolution to a problem like that without imagining the agony of the parents in making the decision, without imagining the life of the child, not on the .3 probability of this but on the real life of that child. And, of course, one needs to know more about who made these probability judgments, what perspective they made them from, what their motivation in making them was.

The inevitable consequence (if you'll pardon the too-simple metaphor) of running the problem through a computer will be that the key question, which is the relationship between parent and child — whether the action or decision is motivated by love and concern for the family and what the parents believe to be the best interest of the child, or some shallower, baser, or less-informed consideration — will be totally obscured because

one just can't quantify the difference among loving, mistaken parents, accurate, semiloving parents, and callous, indifferent parents. So, we will too often turn to the quantifiable, to the known, in order to obscure and, in the end, therefore, to eliminate the critical moral judgments which otherwise have to be made.

Or take the issue of the rights of defendants in criminal cases. Should we exclude unconstitutionally gathered evidence or should we not? It is now possible to demonstrate by mathematical studies that the exclusionary rules have a fairly insignificant effect on police conduct. These studies may or may not be correct, and people can answer them by doing different studies in a different way. So now, everybody's off and running on these statistics. What do they show? Well, in the end, I'm convinced they're going to show that the exclusionary rule doesn't have much effect on deterring most police conduct for a variety of different reasons. So we're going to throw it out. Or if, on the other hand, we find it does, we'll keep it. No one is going to talk (because you can't quantify this) about what it means to live in a society in which police officers routinely violate the Constitution and nothing happens except that society ratifies the consequences of that unconstitutional action. Now I can't quantify that. I don't mean to say I know, what it means to live in a society like that. It probably isn't terrible; it's not awful to live in England, for example. But that's an important question. If we just don't talk about it because we can't (again, pardon the crudeness of the metaphor) run it through the computer, our social lives will be impoverished and our computers as happy as they can manage to be. No one will ever say exactly that's what we're doing. It will just ooze that way. What will be lost is a subtle but important distinction between two arguments. On the one hand is the reflex liberalism that a cop should not violate the Constitution. On the other hand is the not necessarily liberal conviction that it is one thing for the law to be violated and another for society openly to tolerate law violations. The difference here is as fundamental as the difference between Ralph Nader and Socrates. But even a demographer could tell us that Nader and Socrates each qualify identically as one featherless biped.

Another example is the problem of affirmative action. It's a fact (for better or worse, there are many explanations, but I'm not now concerned with what they are) that in most institutions of higher education which admit students some minority races do not have statistically the same profile as others do. The question is what do you do about this? The argument can take two different directions. One, those who have been excluded by the application of mathematical or statistical criteria can challenge the criteria themselves. They can say, well, it's true that I only got a score of 3.7 when the average is 4.2, but that test is culturally biased, and therefore it's not a valid, objective procedure. To run *me* through a computer you need to input an additional .5 points, and then you can put me into the entering class. And you can then have an argument about whether there is or is not cultural bias. Well, it's a good argument. I don't think anyone yet knows the answer.

Yet the more we talk about that, the less we concentrate on the real choice, a decision between two great moral claims. One is the moral claim of those who have been the victims of denial of currently meaningful access to the resources of society (a valid claim, it seems to me) against another also important claim that white persons who cause no injury to these individuals should not be the ones to pay the price. Those are both non-quantifiable claims. They are exceedingly difficult, I think, to reconcile in a conscientious and satisfactory way that would convince somebody who didn't already agree with us. That process is so hard, and it's much easier to show that there is or is not cultural bias, which there may or may not be, but it will miss the point. It will dominate the decision-making because we are comfortable, or we will become comfortable with the seeming objectivity of that particular process, rather than giving full weight to the other different claims. The other claims are just all *feelings*. You equate the same feelings, the feelings of a hateful racist who wants to kill black people, with the feelings of some perfectly decent person who believes that affirmative action is wrong for complex reasons. These feelings are not the same. On a public opinion poll, they come out the same, and they go into the computer the same, but they're not. And that answer will be obscured even though, as I say, everybody will say, "Well, we know this is important, but we don't know what to do with it." When you don't know what to do with it, in the end it just stops coming up on the printouts further and further down the line.

A final example, rather along those same lines, I think, is the question about pornography. The city of Indianapolis, for example, has recently debated the relationship between pornography and violence against women. This debate has not been for the sake of public education but instead for the purpose of justifying a prohibition of some sexually exploitative material. Although not itself an academic exercise, this debate has grown in part from the fact that Professor Donnerstein at the University of Wisconsin has shown a series of violent movies and dirty movies to a bunch of people; some of the people who have seen violent movies seem to be desensitized to rape and those who have seen dirty movies don't seem to be, but some of those who have seen violent and dirty movies do seem to be even more desensitized than those who have seen either violent movies or dirty movies. Some people are more aroused by violent movies than dirty movies. Some people, he said, shouldn't be shown the movies (even experimentally) because they had the profiles of rapists and he wouldn't be responsible for what happened. This information is fascinating stuff, and I'm sure we all wish Ed Donnerstein every success in his academic career. Still, let's not forget the real question, which is how we shall balance two different interests, tastes, concerns, moral principles, whatever you call them — how you balance the two against each other. On the one hand is, of course, the evil of ever allowing society to dictate reading matter for anybody; on the other hand is the fact that violent pornography, whether it causes harm or not, is a pollutant, a bad thing. We've got to make a choice between

those two things. They are arguments or concerns of a different order. They are not just two different answers on a public opinion poll. If what you want in the end are the right answers on a public opinion poll, just do a public opinion poll, run it through the computer, and dispense with the legislature. You'll get a democracy, for a while, but not much of a constitutional system.

These dominant views, these principles, of course, are not forged once judges come to the Supreme Court. They are views that are worked out, usually in the universities, where students learn them, professors formulate them; they leak out, they ferment, and people who come to the Supreme Court bring these ideas with them. Holmes, of course, did not himself think up the biological image of man; he learned it from Louis Agassiz at Harvard, and so on. In American legal education, probably the most powerful intellectual movement of the last ten or fifteen years has been the movement called law and economics. Law and economics is devoted to analyzing legal problems upon the assumption that the underlying legal transaction is structured in the best interests of the parties as measured economically. And once you make that assumption an enormous wealth of analytical power (pardon me, again, the computer) then becomes available. Because once you have an economic problem, you can solve it. Sadie comes in to see me, and she wants a divorce from George. Is this a personal tragedy or an opportunity for a new life? How could I know? But if Sadie comes in and she wants \$810 from George and George wants to give her \$603 a month and they have two children and I have some statistics and there's a bargaining process and a model, then I can tell you she's going to get \$713.50 plus or minus \$8.37 — and minus my fee, of course.

The very power of this manner of thinking, or this manner of analyzing, has made the discipline of law and economics enormously productive and fruitful in legal education. Indeed, there are three men formerly in academic life who are usually credited with bestowing intellectual respectability to this movement. One of them is Judge Posner of the Seventh Circuit, another is Judge Bork of the District of Columbia Circuit, and another is Judge Winter of the Second Circuit. According to the *Wall Street Journal*, these men are three of the four people that President Reagan is most likely to put on the Supreme Court of the United States if he has a chance.

The dominant characteristic of the law and economics movement is much like what I'm trying to describe as the technological image of human behavior. Its assumption is that people act for quantifiable reasons. As long as you're acting for quantifiable reasons (you're in business and you're trying to increase your market share of toothpaste) your behavior is predictable because your motivation is simple. It is more money. And it therefore becomes quantifiable and powerful. So law and economics has been enormously successful in analyzing problems of business law — the law of contracts, the law of negotiable instruments, antitrust law, and the like. It has been remarkably less effective, it seems to me, when you deal with areas in which people's motivation is not

primarily economic. There's a famous study by an economist proving that capital punishment is a deterrent. It's a long argument with a lot of multiple regression analysis, but if you look at it closely, it is that we all know people seek desirable consequences and avoid undesirable consequences. This an economist quickly obscures by telling you it's an indifference curve, and people act so as to maximize their utility upon an indifference curve between killing and freedom.

Once we start with the assumption that people are trying to avoid death, we can draw a lot of indifference curves, do a lot of shuffling, run it through the computer many times, and it turns out, no matter how many other assumptions we make, that capital punishment is a deterrent. That seems to me an example of what I mean by the difficulties of this law and economics model (which is one version of the technological model) as it is applied to the problems of constitutional law and value choice rather than to business decision-making. It seems to me that the likelihood of the elevation to the Supreme Court of the three leaders of this movement suggests that I am not worried about some merely speculative possibility.

Well, if that's so, what can we do about it? It would be nice to say, send those cards and letters in, write to Chief Justice Burger and enclose a volume of poetry. This is no way to stop a tide of history. There it is. What can we do about it? Not very much, as far as I know. But there is one thing. At least try not to be intimidated by everybody else who will use these arguments. Try to remember always that the non-quantifiable has not received its full play and that there are significant differences between various kinds of non-quantifiable arguments. Just remember that when someone tells you that your belief that the emerging aspirations of black people of the United States need to receive a full share of social justice is a matter of taste, he may be right. But it is not the same kind of matter of taste as it is when I say that I think that Rolling Rock is better than Budweiser. That's all I have to offer. Thank you.

