The Law School as a Center for Policy Analysis

Arthur Selwyn Miller
"And the wind shall say: 'Here were decent Godless people,
Their only monument the asphalt road
And a thousand lost golf balls.'"

— T. S. Eliot, "The Rock"

**INTRODUCTION**

Although this conference is devoted to the interrelations of science and technology and the legal process, and the gist of my remarks will be so directed, I should like to state at the outset that such a focus has the merit of convenience and necessity only. Let no one think that what is being discussed here can be confined even within the broad and amorphous limits of the title of the conference. Difficult as that subject matter is to corner and corral, it nonetheless is part of a larger whole. We need, in short, an "ecological" approach to the subject matter, something holistic rather than atomistic in nature. Law and the legal process, in other words, are part of the total community process (a community, as Fraser Darling so cogently pointed out in the 1969 Reith Lectures, that encompasses much more than man alone but all of "nature"), and should be seen and studied as such. To spin off any part of it for concentrated scrutiny has merit only to the extent that it permits viewing it in some depth; but it must be constantly kept in mind that someone, at some time, must put the pieces together. That "someone" may well be the lawyers, that dull, even dreary lot who at present are about as close to being the American class of "generalists" as there is — although the economists, those pseudoscientists, might dispute that claim. But if lawyers are to do that job, they will need much more by way of tools and intellectual equipment than they presently have. As of now, they are ill equipped to deal with most problems of current social importance, let alone the arcane area of science and technology. The lawyer who knows no economics is, as Brandeis said, a menace to his client. And the lawyer not privy to the meaning of science or of science policy-making simply is a legal mechanic, practicing, as Dean Eugene Rostow once said, a rather esoteric craft of small social value. We do not like to think that lawyers have small social value, or indeed that we as legal educators are engaged in trivia amidst the buzzing, booming confusion of life. But unless we change our ways, and change them drastically, that

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is just where we are going to be, something like the medieval scholastics who wasted their time chopping logic over what Aristotle had to say.

In this paper I should like to essay a few tentative propositions about the interrelations of science and technology and law; and also of their importance for American universities, including the law schools. The propositions are advanced only as possible hypotheses that require further study and explication. If I speak dogmatically, it is because of the need to conserve time, not because of the inherent nature of a vastly complex subject matter. Here, as elsewhere, dogma is intellectual death. In what follows, these propositions have been split into two categories: first, the impact of science-technology on the legal system; and second, its meaning for legal education.

Before doing so, however, I should like to state one basic assumption and also the value premise upon which the exposition proceeds. The assumption is this: That man now lives on the knife edge of ecological disaster and that unless he mends his ways, and soon, we will soon be in a new Dark Age—one from which *homo sapiens* will never emerge. The "Ice Age Cometh" is my assumption. The likelihood that he will mend his ways is not very high, but try he must. There can be no more important task for anyone.

As for the value premise (which I believe, with Gunnar Myrdal, anyone who works in the area of social affairs should disclose), let me state, far too tersely, that the humanistic values underlying the ideals of the American constitutional order should be sought after as ends in themselves. As matters now stand, science and technology, for what doubtless are multiple reasons, are ends in themselves, with those ends being aided and abetted by the American legal profession and the political order. That situation should not last, indeed, it cannot last, if the ecologists are correct, as I think they are. To stave off the dark and murky depths of the new social Ice Age, which is hard upon us, may be the most critical challenge that mankind has ever faced. Our task in this conference is to probe into the question of what lawyers can contribute to the alleviation of that dread prospect.

I. SCIENCE-TECHNOLOGY AND THE LEGAL SYSTEM

I begin with a truism: That science-technology means change, rapid and awesome almost beyond measure, with a consequent primary need for effective management of that change. Daniel Bell has put the matter well: "Perhaps the most important social change of our time is the emergence of a process of direct and deliberate contrivance of change itself. Men now seek to anticipate change, measure the course of its direction and its impact, control it, and even shape it for predetermined ends." Behind that process of social change are the ac-
accelerating impacts of a multitude of scientific-technological developments, undertaken as a deliberate course of public policy.

What is required as a result is the development of what Donald A. Schon has called "an ethic of change." If law, as Chief Justice Earl Warren once said, floats on a sea of ethics, then the direct consequence for the legal system and for lawyers is starkly apparent. Schon says this:

The concept of an ethic of change very nearly appears as a contradiction in terms. Our norms are precisely norms for stability. We hold on to our norms and objectives, stand fast by them, keep them, and because we do, maintain a steady course which enables us to dispense with an ethic of change. Our moral heroes . . . are generally those who stand firm in the face of challenge . . . . We are apt to see change of objectives and norms, when it occurs, as inconstancy.

And yet the problem of the development of an ethic of change now confronts individuals, organizations (companies and others) and our society as a whole. The individual asks, How shall I act when the foundations of myself (and the roots of my action) are disappearing? The company asks, How can we find our way into the future and maintain our integrity when it is no longer clear what business we are in . . . ? Our society asks, How are we to guide our course now that the instrument of technology has eroded our objectives and we are deprived of the illusion of a stable state toward which we are heading?

Schon is not quite correct in that last sentence. We may indeed be heading toward some sort of "steady state" — but it is one which none of us will welcome and out of which man himself might not emerge.

Law is the instrument of stability about which Schon talks. It has developed in the past by denying that change took place, that being the central core of the declaratory theory of law. The essential problem derives from the fact that the juristic order has been undermined by a rampant science and technology. Historical law, if it meant anything, was a set of interdictory rules of "thou-shalt-nots" which purportedly circumscribed citizen and government alike. We are now beginning to perceive the deep, pervasive manner in which that notion has been undercut. In the United States, the movement away from Blackstone's declaratory view of the law began at least as far back as Holmes's famous lectures, *The Common Law* (1881). By 1908 Pound was able to say that "jurisprudence is last in the march of the sciences away from the method of deduction from predetermined conceptions." Then came the legal realist movement, which forever shattered classical jurisprudence (although something of a reversion to neoclassicism is now apparent in some quarters, the capacity of the human mind for self-delusion being well nigh infinite). We now know the inadequacies of the Blackstone conception of law as a set of known rules applied by a judge, as well as the inadequacies of the Holmes-Cardozo notion that law is a prediction of what a court will do with a given set of facts. What the scientific-technological revolution has produced is a public
law explosion, one that has made public law dominant in the American legal system. That means that law has changed from static system to process; or as Rosinski has said, we are witnessing the transformation of man's way of life "from an 'existence' into an unending 'process'."

But here, as elsewhere, facts have a way of outgalloping theory. Hence, we are still bound by a set of intellectual conceptions that have been smashed beyond repair and in our law schools we continue to adhere to a system of education that by and large consists of parsing the opinions of middle-aged or elderly men who happen to sit on appellate courts and who have to decide, from time to time, a few of what Karl Llewellyn aptly called "hospital" cases. It is odd indeed that in law schools we study the pathological and thereby think that we know the norm. As the immortal "Sporting Life" would have put it, "it ain't necessarily so"; or perhaps better, it just ain't so. We have only the foggiest notion about the role of law in society, of how it actually operates. We do not even know, for that matter, what our graduates are doing in a professional sense. For the most part, legal curricula tend to be guided by what might appear on bar examinations. All that can mean is that the bar examiners — the bar as a whole — are hopelessly behind time. We have a professional organization, it might be noted, in the Association of American Law Schools, that to my knowledge has made no attempt whatever to change the completely inadequate system of examinations for admission to the bar.

Even more, our jurisprudants — those who are called to the important task of thinking about law in the grand manner — simply have not come up with any marginally adequate substitute for the mechanical jurisprudence of Blackstone. At a time when the human race is about to fall on its face, what we seem to get is a plethora of logic-chopping with judges larded with some unreadable, at least largely unread, behavioralism (which tends to be half-Freud and half-fraud). I should also mention the work of that sterling collection of legal intellects, the American Law Institute, they who sit around and conjure up black letter rules of law at precisely the time in history when the Holmesian prediction about the lawyer of the future not being the black letter man, but the master of economics and statistics, has come into reality. America's crime rate soars to incredible heights, and the ALI produces a model penal code. Foreign affairs are at their most abrasive point in our history, and the ALI comes up with the Restatement of Foreign Relations Law. I put it to you that this is not enough, that the American people are not getting value received for the money invested in the law schools and for the salaries of highly paid professors who have not, as Dean Robert McKay has recently said, had a really new idea in legal education in several decades.
Some way must be found to preserve and enhance humanistic values through the legal system. There can be no higher task to which our legal thinkers can be called. The time is long past for the encyclopedists — Williston and Wigmore and Corbin and the rest — and the time is also past for the hornbook authors, as the *ne plus ultra* of legal scholarship. (I do not speak of the unspeakable — those books called casebooks, derived after the pattern set by that brilliant neurotic, Christopher Columbus Langdell; most of them are not worthy of mention.)

There are a multitude of futures possible, Olaf Helmer tells us in his volume *Social Technology*. He goes on to say that "appropriate intervention can make a difference in their probabilities. This raises the exploration of the future, and the search for ways to influence their direction, to activities of great social responsibility." To discharge this responsibility more than perfunctorily, "we must cease to be mere spectators in our ongoing history, and participate with determination in molding the future. It will take wisdom, courage, and sensitivity to human values to shape a better world." The problems are not merely technical; for as Hasan Ozbekhan has said, "We do not quite understand the complex legal, jurisdictional and, ultimately, constitutional mechanisms that are involved." But are we meeting that challenge in our law schools, in the profession, or, indeed, in our governmental institutions? The answer is easy: We are not. But the prescription is harder.

Let me digress a moment on Ozbekhan's point of "constitutional mechanisms." I think it is now all too apparent that the American Constitution, written in 1787 and interpreted by the Supreme Court, with a patina of extra constitutional custom and usage, is an anachronism. As a structure of government, a way of ordering and allocating power, it simply is not adequate to the needs of the present and the emergent future. But where in the entire legal profession do we glimpse even a glimmer of a suggestion that we ought to have a new fundamental law? I know of nothing along those lines. On the contrary, our constitutional scholars think it the highest form of scholarship to argue about activism versus self-restraint by the Supreme Court and to write learned, but largely unread, expositions dissecting in tedious detail what that Court said in one or more cases. If we are to meet the challenges of science and technology, we must think largely and grandly, we must make our minds bold, we must strike out and take a leap into what Morris R. Cohen once called the "dark future." Our Constitution, both in its formal sense and in what Lord Bryce called the "practical" Constitution, needs extensive revision and updating to make it — and thus the governmental structure — more viable and able to meet present and emergent needs.
That provides a rough transition to my second point — that science and technology have effectively undermined the political order. This may be seen in constitutional terms in the changing relationships within the misnamed “separation of powers” of the national government, the most significant of which is the steady aggrandizement of power in the Executive; in the evolution of the federal system from one that could accurately be termed “dual federalism” to a situation where the national government is dominant and the states ever more mere administrative districts for centrally established policies; and in the steady erosion of the twin lines between “public” and “private” and “foreign” and “domestic.” Of possible even greater importance, however, is the desuetude of representative democracy, which has degenerated into a system of what Theodore Lowi calls “interest-group liberalism.” I assume here, as does Lowi, that something different existed in the past; that assumption may not be accurate, for we may be merely awakening, at long last, to a situation that has always existed in this country. But what can be said, at the very least, is that even the ideal of representative democracy is being slowly washed away by the tides of numberless developments in science and technology (and their creatures, not the least of which is the giant business corporation). Replacing that simplistic notion of how American constitutional government works is “government by expert” — a notion greeted with hosannas three decades ago by James M. Landis (and others) — which means in final analysis government by technocrats, they who man what Galbraith calls the “techno-structures” of the “new industrial state.” Technology is anti-democratic; it works, as Henry Kariel has said, toward the consolidation of power. Ralph Glasser, and also Galbraith, have recently argued that the consumer has lost his economic sovereignty; what I say here is that the citizen has lost political sovereignty.

Daniel Bell maintains, with some accuracy, that the United States is becoming a “post-industrial society,” with the “new men” of power being the “scientists, the mathematicians, the economists, and the engineers of the new computer technology.” (Let me add parenthetically that I think Galbraith and Bell seriously oversimplify the question; I am inclined to agree with Loren Baritz and Jean Meynaud that the technocrats are “servants of power” rather than real power-holders.) It is sobering, or at least should be, that Bell does not mention the lawyers. That omission tends to bear out the earlier observation of political scientist Robert Wood, who, in an important paper, discussed the change in nature of governmental decisionmaking. Perhaps Emmanuel G. Mesthene’s use of Wood’s paper will usefully point up the situation:

The decision-maker’s options ... [formerly] were legal options. They were confined to interpretation of the rules. Political scientist Robert
Wood has made this point very clearly. The Politician... always winds up asking the same fundamental questions, namely, "Can we do this?" In times when changes in the physical world were very slow, governments operated as if such changes were nonexistent. The ground rules were fixed, so that "Can we do this?" — Wood calls it the persistent political question — meant that is a question that lawyers answer. The politician's toolkit, consequently, looked like a lawyer's. It contained "bargaining skills, propaganda skills, and violence skills .... The political order obviously required leaders and advisors with the lawyer's special skill in value clarification, his verbal capacity, and his experience as an intellectual jobber and contractor who could make a strong case wherever one was required." The effect of this century's very rapid advance in science and technology is, in Wood's view that: "It subtly shifts the emphasis of the persistent political question 'Can we do this?' from the consideration of legal restraints to consideration of physical restraints. In these circumstances, it is not surprising that the ranks of senior career personnel of the federal government, executives, advisors, and specialists, have been increasingly filled by the scientific skill group."

The question "Can we do this?", in other words, today more and more means, not "Can we do it within the rules?", but "Can we change the rules?" The physical conditions of political action are no longer fixed, because science and technology can make physical changes occur much faster than they ever did in the past . . .

As with politics, so with law, economics, culture, and society; man's ability, derived from his technical prowess, to change his physical world at will and massively removes the only heretofore inviolable constraint on the shape and development of his social systems and institutions. This poses an unprecedented challenge to the public intelligence as society strives to achieve the wisdom necessary to contain and channel the very great physical power that science and technology have given to man ....

Let me put the point another way, and more succinctly: A few years ago, Dean Don K. Price in his well-known book, The Scientific Estate, asserted that the main lines of our public policy in the future will likely be determined more by scientific and technological developments not presently foreseeable rather than by political doctrines that we can now state. Let us ponder that for a moment. What it means is that the shape of things to come, if Price is correct, is going to be mainly influenced by what the lads in white gowns in the laboratories will do. Present law and present political doctrines will have little to say.

I think that Price likely is right, and that is another sobering thought for lawyerdom. At the very least, it means that lawyers will have to deal with both microproblems and macroproblems of science and technology. Already lawyers are at least knee-deep in the former, although it is surely fair to say that they are floundering around rather than dealing with the situation adequately. The spate of environmental suits filed around the country, medico-legal questions, much of substantive administrative law — all these and more, deal with the details, the microcosmic aspects, of science and technology. There is a rather
large literature on segments of this. But little or no attention has been paid to the macrocosmic aspects, those that call for institutional change and for social invention to preserve humanistic values. This leads me to the main point in this paper. But before getting there, I should like to digress again for a moment to note that it is not only the preservation of humanistic values that is important, but also their enhancement and their spread. For many Americans, those values have been sadly lacking throughout American history. We should forego the “Fallacy of the Golden Age,” that notion that at some unnamed time in the past, all was sweetness and light. The past, for most people, was drab and dreary, whether they were peasants or those who worked in the “dark, satanic mills” of the early industrial revolution. In other words, although we can note that we have careened to the precipice of ecological disaster, in this country, at least, more people enjoy more economic well-being than at any time in our past (or in human history). “Hunger U.S.A.” does exist, but probably on a rather lesser scale than in the past.

What I think should be seen, however, is the new social context in which we live. A rampaging science and technology, plus high affluence, plus overpopulation in this country, have run us close to the peril point in natural resources, while simultaneously stoking the fires of envy and frustration among the peoples of the rest of the world. This situation poses a host of public policy problems beyond the scope of this conference. Suffice it to say that we can now be vaporized by nuclear bombs, asphyxiated by pollution, or bred to death by too many people. All have scientific roots. John Platt, biophysicist at the Mental Health Research Center at the University of Michigan, put some of my point in focus in a trenchant article in the November 28, 1969 issue of Science: After discussing overpopulation and pollution and nuclear war, he goes on to say that:

[T]he next decade is likely to see continued crises of legitimacy of all our overloaded administrations, from universities and unions to cities and national governments. Everywhere there is protest and refusal to accept the solutions handed down by some central elite. The student revolutions circle the globe. Suburbs protest as well as ghettos, Right as well as Left. There are many new sources of collision and protest, but it is clear that the general problem is in large part structural rather than political. Our traditional methods of election and management no longer give administrations the skill and capacity they need to handle their complex new burdens and decisions. They become swollen, unresponsive — and repudiated.

We may, Platt goes on to say, have less than an even chance to survive until 1980.

This statement may seem uncertain and excessively dramatic. But is there any scientist who would make a much more optimistic estimate after considering all the different sources of danger and how they are increasing? The shortness of the time is due to the exponential and multiplying character of our problems and not to what particular num-
bers or guesses we put in. Anyone who feels more hopeful about getting past the nightmares of the 1970's has only to look beyond them to the monsters of pollution and population rising up in the 1980's and 1990's. Whether we have 10 years or more like 20 or 30, unless we systematically find large-scale solutions, we are in the gravest danger of destroying our society, our world, and ourselves in any of a number of different ways well before the end of this century.

Who among the futurologists have told us that, when they project their scenarios into the year 2000 or 50 years hence? Very few. And where in the domain of legal education is there recognition that Platt's gloomy views merit attention and study? I put it to you that, save for a few isolated individuals who are toiling in the murky depths of the bureaucracies we call universities and law schools, that recognition is minimal at best. And I further say that that response — rather, that failure to respond — simply must be altered. No one expects lawyers to do it all but surely we as humans are entitled to ask of the academic lawyers that they devote substantial, perhaps principal, time to the problems that Dr. Platt so forcefully discusses.

It will not do, I might add, to minimize the threat or the manifold problems. That would be all too easy — in fact, I surmise that this will be the reaction of many who may read this paper. However, the Panglossian attitude was, as you know, a satire; when Voltaire had him say that all is for the best in this best of all possible worlds, he was telling us just the opposite. So, too, with Pollyanna and with Mr. Micawber, he who was always saying that something would turn up to solve any problem that might be vexing him at the moment. That sort of attitude simply is not adequate; anyone who is not a pessimist today does not know what the problems are. No literate person in the last third of the 20th century can be optimistic about man's future. One can have a blind faith but that's about all. This does not mean, I emphasize, that attempts should not be made to resolve the problems of the human condition. Indeed they should; and, as Platt says, on a crash basis. But we are never going even to approximate suitable solutions unless the right questions are asked and the proper problems posed. And we had better begin with the realization that science and technology are not going to save us from our follies. Platt recognizes this:

We need full-time interdisciplinary teams combining men of different specialties, natural scientists, social scientists, doctors, engineers, teachers, lawyers, and many other trained and inventive minds, who can put together our stores of knowledge and powerful new ideas into improved technical methods, organizational designs, or "social inventions" that have a chance of being adopted soon enough and widely enough to be effective.

I have dwelled at some length on the nature of the problem, simply because I feel that unless we begin with a realization of what faces us
as humans we will have no chance at all to do anything effective. For that matter, there would be no need for such a conference as this unless one of its unstated, underlying assumptions was the belief that Dr. Platt is by and large correct. In sum, our juristic order, our political order, and our social order have been shattered by what Platt calls "the crisis of crises," by which he means that all of the crises we are now faced with are made even more dangerous because they come on top of each other. Historical movements are coalescing into a crescendo. We are facing an institutional crisis of truly monumental proportions, one in which our instruments of governments are being challenged and being seen as faulty and in need of repair, even replacement.

II. What Can Be Done?

If I have not succeeded in "turning you off" by what has already been said, let us turn our attention to what we in the law schools might do about the crisis of crises. I would like to offer several suggestions, most of them with little discussion and single out one for principal attention. They are:

(1) Law school curricula need thorough revamping. Law schools, at least those that pretend to national status, should offer dual curricula — one designed for those who want to work with the microcosmic problems — the *meum* and *tuum* — of routine existence. These are the lawyers who would draw wills, draft conveyances, and do the other tasks of small social consequence when each task is viewed individually but which, when viewed collectively, provide the very mortar which helps to bind the social structure together. These people, in William Pincus' terminology, would be paraprofessionals.

The other curriculum would be for those who would want to work in the macrocosmic problems — the large areas of public policy, or institutional design and social invention, of participating in multi-disciplinary teams whose mission it would be to help in the resolution of the manifold problems of the human condition.

Of course, having two curricula will require two things: first, law schools will have to know what they want to do, with some high degree of particularity; and second, students will have to elect one of the two curricula. Both of these call for thought and the power of decision, attributes in rather short supply.

(2) Prelegal education can no longer be ignored. Just as the medical schools prescribe what their students should take when in undergraduate school, the law schools should no longer admit any student who applies, provided his grades are adequate. The 3-year curriculum is far too tight; it cannot continue to permit what we are now doing — teaching writing and history and a few other matters sandwiched among courses in substantive law. These the students,
particularly those who elect the second curriculum mentioned above, should bring to law school. They should bring other intellectual baggage as well—some notion of how government works, some economics, at least the history of science (if not science itself), and command of another language.

(3) The content of what is given in law school courses should be rigorously examined to determine if it is "relevant" and meaningful to the needs of the era. Can there be any excuse, in the present day, for Contracts to be given in the hours it now commands using the materials in the usual casebook? The short answer is no. The same may be said for other courses—Administrative Law, for example.

(4) The law school should become truly a part of the university. No longer should it exist as an appendage dangling on the outside. It should get in or get out. I recommend getting in. This may be done in a number of ways. One would be to make it mandatory for all students to take a minimum number of courses at the graduate level, in such subjects as economics, public administration, science policymaking, international relations, and business administration. Another would be the institution of a system that already has a beginning in some law schools, but which could well become more widespread: The combined degree program, whereby a student would get at the end of 4 years both a J.D. and an M.A. in some other discipline. This could be done without added cost to the institution, but with another year's cost to the student. The payoff would be considerable, particularly for those aiming at the "second curriculum" mentioned above.

(5) Law should be taught as a "liberal art," and no one should get an undergraduate degree (B.A. or B.S.) without having taken such a course. That means that those students would be taught rules about law but not rules of law (save in passing). At one time, jurisprudence was considered to be part of a liberal education. It should be made the same again. Law is too important to everyone to be left to the lawyers; and a knowledge about law and the legal system would likely produce spin-off benefits in greater interchanges between lawyers and others. The United States is devoting an immense part of its energy and natural resources to higher education, but this is one part that is sadly neglected. Those courses, when given, should be by lawyers, preferably professors from the law schools. The return benefit to the law school should be quite evident, for the undoubted result will be a deeper and richer knowledge of the law and its role in the social structure.

(6) A new category or categories of professors should be created. One group would be "research professors," they who would spend their time in doing the vastly important tasks of research now being neglected. Their teaching would be limited to small seminars, if anything. The other group would be "university professors," they who would teach
anywhere they wished in the university and offer any course they desired. Admittedly, this group would be small, made up of the very highest caliber persons who could be found.

(7) I come now to my final point, the one that I want to hammer home with some force: The law school should undertake, as one of its principal missions, the task of becoming "a center for policy analysis." If in what I say about this, I appear to speak with the invincible parochialism of one wedded to one discipline or one profession, let me say that this is not my intention at all. A center for policy analysis (CPA), it seems to me, logically belongs in the law school if it belongs in the university at all. The reason for that is simple: Lawyers are the only "generalists" we have; their training, poor as it is, is in problem solving, with a problem by definition being social.

I should add that CPAs may well not belong in the university at all. That institution, with its encrustation of practices honored only by time but not by rationality, with its narrowminded, bureaucratic methods of operating, with its built-in resistance to change because vested interests in the status quo produce (as Arthur Koestler has said) an "inertia of the human mind" and a "resistance to innovation," may well not be able to adapt to the needs and challenges of the scientific age. It may be replaced — it is being replaced — by other institutions, such as the think-tanks and other groups of experts. Would you, for example, rather invest $1 million in a university or in Arthur D. Little Co., if you had a tough problem to solve (say, pollution)?

What this means is clear: It is by no means certain that the university will survive as anything other than a glorified place where the affluent can get the credentials to retain their status, those on the make can begin their hoped-for spiral of upward mobility, and females can (hopefully) enter into exogamous marriages. If that takes place, then the universities will merely be an extension of the high schools, purveying a little bit of knowledge but not much else. Maybe you will say that that is enough, that the university should not undertake to do more. If so, I can only say that I do not agree; and further, that I do not believe that the best minds will be attracted to university positions if their only task would be to become a modern Mr. Chips in an urbanized setting.

Universities, including law schools to some extent, have benefitted since the Second World War by being called upon by government and industry to do a host of jobs. But that was because they had a monopoly, or nearly so, during that time. That situation is now over. The prime success of the RAND Corporation, of Stanford Research Institute, of Arthur D. Little Co., of the Battelle Institute, and of the Hudson Institute, to name only a few, clearly points the way in which the trend is moving. Even in law, a similar situation is springing up. In Washington
alone, I know of at least five organizations which are concerned with
public-policy problems and which are by and large, although not
entirely, made up of lawyers. Ralph Nader's Center for the Study of
Responsive Law is one, as is Edgar Cahn's Citizen's Advocate Center.
Then there is the Center for Law and Social Action, which has just
gotten under way. To that trio may be added two policy-oriented
groups, the Institute for Policy Studies and the Institute for Politics
and Planning. The list is illustrative only; it does not include such
established organizations as the Brookings Institution, Resources for
the Future, and the National Planning Association. The point is that
the university is being seriously challenged by creation of other centers
of knowledge, which can bring experts from several disciplines together
without the impediments that seem to be epidemic on university cam-
puses. In universities themselves it seems that only by creating new
institutes or cross-disciplinary organizations can a decent job be done.
Certainly that seems to be true with respect to science and technology,
as witness the Jet Propulsion Laboratory at Cal. Tech., the Johns Hop-
kins Applied Physics Laboratory, and the Instrumentation Laboratory
at MIT.

The need is for the university to plan for and to create a center
which will be dedicated to the proposition that one of the inherent
rights protected by our constitutional polity is the right to be free from
adverse second-order consequences of science and technology and that
will be aimed at helping to produce viable solutions to the abrasive
problems of the human condition. Perhaps the ideal solution would
be to establish a new organization for that purpose, drawing when need
be on talents from within the university and also from outside the univer-
sity. To some extent, Harvard's Center for Technology and Society
seems to be doing precisely that. But Harvard is Harvard and most
other universities cannot hope to attract the money or the talent to do
the necessary task of superimposing CPAs on the university itself. If a
CPA is to be established, in most universities, at least, it will have to
come within the existing framework. And that is where the law schools
come into the picture. What will be required?

(1) There must be a recognition that the problems outlined by
Dr. Platt do exist and that the law schools have a responsibility to help
to alleviate them. This will not be easily accomplished. Most, perhaps
all, law schools are still stuck in a mold that resembles rather closely
— sometimes very closely indeed — the Harvard Law School of the
1920's. A major decision for the usual faculty meeting, it seems, is
to argue endlessly over such matters as whether torts or contracts should
be taught in four semester hours or five or six, whether a certain
number of semester hours can be graded on a pass-fail basis, and
whether or not to give tenure to Professor Zilch. (The latter decision
is particularly piquant, for it is made on the basis of no articulated
criteria at all by professors whose raison d'être is to deal with law in
the Aristotelian sense of "reason unaffected by desire".)

The problem of what is a problem must be faced. It is no easy
matter even to determine that, as Mayo and Jones have demonstrated,
and as Felix Cohen said a generation ago (in his essay entitled "What
Is A Question?"). Put another way, the law schools must give hard
and rigorous thought to delineation of their mission(s). We must, in
other words, know what we want. Policy by drift within the university,
which is traditional, no longer is up to the mark—if, indeed, it ever
was. This will, to be sure, call for a new type of thinking. That poor
excuse for not having a philosophy—pragmatism—so vaunted as a
peculiarly American posture, no longer is adequate. Indeed, it never
was—as witness the multiplying problems around us, brought by
that very mode of "thought." We must know what we want; we must
have a philosophy, an ideology if you will, that we are willing to fight
and work for. The implication, of course, is clear: Laissez-faire has no
more validity in higher education than it does in economics. In other
words, a major need is for leadership—a matter deserving separate
treatment.

(2) The entire concept of academic freedom needs thorough re-
examination. If leadership is required, as I believe it is, then that means
that someone must actively be the boss. The result may well be loss
by the faculty of some of its "prerogatives." Some of these could well
be lost, and the sooner the better. Examples: "moonlighting"; course
content; teaching methods; tenure; the grading system.

I recognize that I am treading on sensitive ground, that I will be
accused of wanting to turn the law school into a fiefdom presided over
by a dean in the nature of a feudal lord. Not at all, for I would make
the dean's tenure as dean subject to a definite time limitation. Yale
does that now. Professors, however, have sat serene and aloof in their
ivory aeries for too long. If they want to practice law, then they should
resign from the faculty. And there should be the hardest type of thought
given to the other matters I mentioned, particularly tenure. The tenure
system locks in too many timeservers; all law schools have them. I do
not mean to suggest that a professor should be subject to being fired
on whim or caprice. Far from it. But I do say, with Peter Drucker, that
the tenure system has been abused. A decision to give tenure should
not be irrevocable. It should be reexamined, under established criteria,
every 3 to 5 years. A person at a law school should be entitled to "due
process of law," both procedurally and substantively, for the universi-
ties are private governments in fact and should be treated accordingly.
By according him due process, his rights will be protected, particularly
if university administrations make, as they should, full disclosure of their operations.

(3) Faculty members must have the capacity to do the jobs for which they are paid. That sounds odd when put that way. What I mean is this: At the present, I would gather that a majority of professors of law have expertise only in parsing appellate court opinions in the substantive areas in which they are most familiar. Those who “moonlight” by practicing law have, of course, the added expertise of the practitioner. There are exceptions in this rather dismal picture, of course, but I think it is generally accurate. (Saying such a thing will, I know, make me less popular than a whore in church. But others have said it— for example, Karl Llewellyn.)

One of the things faculty members should not be paid for is to do the nickel-and-dime administrative jobs that the deans do not want to do. They should not have to be on committees which meet often and seemingly endlessly, dealing with curricular and other matters. Again, I run against prevailing opinion in saying such a thing. Many faculties have fought long and hard to try to get some power from the administration; and it will not sit easy with them to have to give it up. But I put it to you that the only reason they wanted (and, admittedly, needed) power was to counteract some of the arbitrary nonsense emanating from topside. But what this suggests to me is that professors now spend too much valuable time with the trivia of administration; and that the need is for invention of techniques that will at once protect the faculty (when it should be protected) and permit them to devote their time to more important tasks. Professors, as a rule, make damned poor administrators. They ought to do what they can (or should be able to) do best: think. They are paid for thinking and communicating, in other words, with the communication coming both in teaching and in writing. And deans are paid for dean— not a passive role.

(4) A center for policy analysis need not begin on the grand scale. In all probability, it should start small, build firm foundations, and then expand. As for subject matter, there is literally nothing on the planet, or in outer space, that could not be brought within the ambit of consideration, if not full analysis. All of society, and society’s institutions, require analysis (perhaps psycho-analysis would be more apt). By starting small, by taking on, say, the question of air pollution in the city in which the law school is located (that is not so very small, by the way), there would in all probability be a synergistic effect produced, both by the cumulative activities of many CPAs and by the accumulated knowledge that would be derived from one problem situation. The net result may well be what Myrdal calls the Principle
of Cumulative Social Causation, one in which there might be an upward spiral toward a better world.

(5) There will be a need for a team effort with lawyers, professors and students, working with scientists, natural and social and behavioral. This will not be easy. Lawyers, particularly law professors, tend to be loners, to work best as individuals. But it is necessary. "Group think" and "group work" must supplement—I do not say entirely replace—"individual think and work." We have very little experience at this in the law schools, save in such organizations as the law reviews. (To be discussed separately, infra.) A little collaboration is evident between professors in writing articles or editing casebooks, but not much else.

An indication, however, of what might be done may be seen in the activities of G.A.S.P., Inc., a nonprofit corporation established by students at my law school. The acronym stands for "Greater-Washington Alliance to Stop Pollution." After being given a problem in Administrative Law in the spring of 1969 as the main course effort (I had eliminated the casebook as the main tool—rather, crutch—of instruction), the students on their own initiative formed G.A.S.P. and filed a complaint with the Washington Metropolitan Area Transit Commission seeking to halt air pollution by the D. C. Transit Company's buses. The problem, in brief, had been for them to research that area for a mythical client (a citizens' organization) and to state what administrative relief could be obtained; and if relief was denied administratively, what the federal courts would do. I am pleased to be able to report that the students did an outstanding job with that problem, so much so that, at this writing at least, they appear to have prevailed over the bus company at the administrative level.

I mention this for two purposes: (a) to indicate that the usual casebook approach to public-law courses is inadequate and (b) that, in part at least, we have a new breed of law student in our classes. They are simply not going to put up with much of the self-indulgence of case-parsing that Llewellyn says we do. And I mention it also to indicate one small bit of evidence that group effort by lawyers—in this case, law students—working with minimal faculty direction can produce highly professional results, and, what is vastly more important, can make small chips in that huge block of ice that is the deleterious effect of technology. (I should say here what should have been said before: No one wants to be a Luddite—at least, very few do; the need is the difficult one of retaining the benefits and eliminating the detriments—and of making hard choices between the two.)

To revert, however, to the main point of group effort: This must, of course, be multidisciplinary. Who is in charge is less important than cooperative effort designed to cure man's ills rather than exacerbate
them. There is work enough for all, more than enough, I should add. One of the tasks that Hercules took on was to clean the Augean stables. The world has become the modern day counterpart of those stables, laden with the effluvia of billions of human beings who appear to be intent on destroying or making unlivable their priceless and irreplaceable patrimony, the planet known as Earth. If the problem is ecological, and that it is, the response must be no less. We will work with each other, in the law schools and universities and with other knowledgeable people, or surely we will all perish. Wealthy as we are in this nation, we will end up, as John Gardner has said, as Croesus on top a garbage heap. We will be affluent in the midst of nauseous effluence.

(6) Where is the money coming from? Here, I could retreat into the oft used gambit of professors and say that I only ask the questions, I never answer them. There is a modicum of validity in such a view. Each must think these matters out for himself, aided and abetted by strong and affirmative, even charismatic, leadership that I have alluded to above. But that is not enough. Where, indeed, is the money coming from? The question is tough and may be insoluble.

With all of the present talk about environmental problems, there has been little or no effort to add up the check and present it to us. What we can perceive of the attitude of the taxpayer, he will be unwilling to foot the bill to stave off and remedy the defects of a runaway science and technology. Taxpayer's strikes are imminent. Already they are apparent in such places as Youngstown, Ohio, where the people balked about the cost of education. The rising cost of medical care is another area that is meeting resistance. But that is as nothing when compared to what will happen when the bill comes in for curbing science and technology.

What this means, at the very least, should be obvious. Certainly it has been stated often enough. We need a reordering of priorities in the nation. There is a finite limit to what we can do as a nation, and we are beyond the tipping point already. Confusion about priorities can, in substantial part, be traced to the failures of the political (that is, the constitutional) order; "interest-group liberalism" just is not working. But who is interested in setting, or even trying to set, priorities? Our political institutions are hopeless: Congress is imprisoned by interest-group politics, the administrative agencies tend to be surrogates for the ostensibly regulated, and the Chief Executive appeals to the great unwashed of the nation (rather than fiddling while Rome burns, he watches football on the boob-tube); the Supreme Court, acting as national conscience, has tried to act as a faculty of social ethics or political theory, but with notable lack of success. Government, in short,
seems to have lost the capacity to govern—not a very pretty picture, but valid nonetheless.

Our voluntary private associations are little better. The churches are little more than Sunday morning social clubs, handing out placebos to the smug and satisfied. The unions have become private power centers intent only on maximizing their private value positions, as are the farmers organizations and veterans legions. The corporations, which dominate the economy, pursue their own narrowly conceived goals with little regard to the over-all "public interest." I say that even though Henry Ford announced last December that his company would begin to worry about pollution. It does not take a cynic to be able to say that Ford's response may well be a public relations gimmick designed to help head off the rash of private antitrust actions that are being brought (some against the auto industry for collusion with respect to anti-pollution devices). (Speaking parenthetically, isn't it interesting to note the device that industry and government has worked out in antitrust actions—the consent decree? That is a system whereby a company says it has not done anything but promises to discontinue it in the future. That needs a Dickens or a Mencken to describe, not my poor talents. The consent decree is a classic example of the symbiotic relationship between government and industry that has been created and that is now bringing into being the corporate state, American style.)

That leaves the universities, the think-tanks, and the foundations. And that is not much. But it is all we have, so we had better make do with them, improve them where we can, and get on with the job. The foundations can—indeed, they have been—sources of financial aid. Noteworthy in this category is the Russell Sage Foundation. Less noteworthy are Ford and Rockefeller and Carnegie. For what doubtless are multiple reasons, these large foundations have not devoted sufficient resources to getting qualified people to do some of the most difficult jobs. Of course, I do not mean to denigrate much of the very fine work that has been done, but I must confess that I simply do not know what motivates the foundation executive—although I suppose that the laws of bureaucratic behavior apply to foundations as well as elsewhere.

And of course even the Ford Foundation does not have unlimited resources. An ideal solution, one that no doubt reveals the naivete of an academic, would be for the federal government to "tithe" itself, by spending, say, 10 percent of what it spends on R&D (research and development) for the establishment of centers for policy analysis throughout the nation. Think what an annual $2 billion could do.

A further suggestion would be for the legal profession to "tithe" itself. Why should law schools continue to operate mainly as service
stations for the law firms, with little by way of a *quid pro quo*? Why should not the firms allocate a percentage of their net income each year to some fund, established, say, by the Association of American Law Schools and then disbursed to law schools and individual professors? As Dean Bayless Manning has recently pointed out, the law firms (and their clients, of course) have relied on the universities as manpower pools. They have benefitted but they have not reciprocated. That is a bad bargain, by any light, from the perspective of the law school. When to that is added the melancholy fact that we have permitted, and continue to permit, the practicing bar to act as a closed-shop guild (and thus as a private government), regulating the manner in which neophytes can enter the profession, we in the law schools are paying double. Our curricula are tailored to the bar examinations, even though it is widely recognized that those examinations have little or no relationship to an ability to practice law. (I would suggest, by the way, that any student of a caliber that makes him eligible for admission to almost any of our law schools could, in the course of one year’s study, learn enough to get him by almost every bar examination in this country. If that be so, what does it mean for the 3-year curriculum? Or for our failure to confront the bar with the manifest and manifold inadequacies of their examining strategies?)

The doctors do it better, although I hold no brief for that legalized cartel, the American Medical Association. They know how important the medical schools are to the profession; and although they have been derelict in keeping the number of doctors at too low a level (it is probably accurate that the medical care in this country would collapse were it not for foreign-trained doctors), they have come up with financial assistance. That aid has come both from themselves and from their influence in government — which makes large sums available to the medical schools. Is it not odd that, with at least 50 percent of our Congressmen being lawyers, there is not something comparable for the law schools? Perhaps governmental aid might come if the law schools ever became more than service stations for the corporate bar. (I know of the recent movement of a few students into noncorporate practice; but I think the jury is still out on the question of how long that will last. We can hope, however.)

The money question is tough, and there is no quick answer to it.

(7) A center for policy analysis would be useless unless there were some way for its recommendations to get truly serious attention from the nation’s policymakers, both public and private. This is to be seen in the many advisory commissions established in Washington, which exist for a brief period of time, which get a brief flurry in the media, and whose reports then are usually shelved and gather dust amidst the tons of paper that float around official Washington. Once
in awhile one of these commissions gets attention and action; this is usually in direct proportion to the pressure being brought on government by some interest group. We now have, for example, an Administrative Conference of the United States, which grew out of a temporary conference that operated in 1961-62. (That the Administrative Conference is noteworthy for trivia should not be taken as a slight; it was meant to operate that way. Let no one delude himself that it is more than a facade, or, perhaps better, a charade.)

How, then, can there be a way by which the politicians will give serious attention to the CPAs? Only if some political muscle or clout can be brought to bear, it seems to me. In my limited, admittedly impressionistic view of the Washington scene, issues without muscle or clout behind them quickly become forgotten. Politicians do not lead; they follow; their main interest is in being re-elected. The reason why so many have recently begun to beat the drum for improvement of the quality of life is obvious: Enough Americans are now outraged at the outrages that have been committed on their environment to ask some tough questions of the politicos. But who will they listen to when the crunch comes? Will it be the Sierra Club or the timber and grazing interests? Will it be a center for policy analysis or the tycoons from the supercorporations?

The answer to which I am driven is this: American life is highly politicized. If anyone wants to get something done, he had better pursue the "political," not the "legal," path. (That acting politically can also be legal shows merely the imprecise state of our taxonomy about law and the legal process.) The inability of courts to effect any meaningful changes, save when there is a high degree of cooperation from the avowedly political branches of government, means that judicial action, in and of itself, will not get the job done. Social norms must be set in other ways. The courts can help but cannot control. Theodore Lowi, in *The End of Liberalism*, has, as has been said, set out an accurate description of the failures of what he calls "interest-group liberalism," but his prescription of "juridical democracy" is fuzzy at best, incredibly naive at worst.

(8) A word must be said about the law reviews, published as you know in an increasing number throughout the profession. There is scarcely a law school without at least one; some have two or more. What this means is simple; the best minds (taken by grades) among the students devote substantial time to editing periodicals that I suspect do not get read. Why? The sheer bulk of the literature makes it impossible. We are being buried in a sea of words. No one can hope to keep up with the literature. I have two suggestions to make:

(a) That students, rather than writing case analyses, make it a practice to grapple with true problem situations. Some of this is now
being done, sporadically, in some of the periodicals. I suggest that it should be the norm. Who, other than the author and the editorial staff and maybe the lawyers and judges involved, reads case notes? Does anyone know? I doubt it. I venture to guess that few get read.

The law review, as it began, was an instrument that did serve a fairly useful purpose. It helped students learn to chop logic with judges and to parse cases. But it did it within the intellectual climate of Blackstone's declaratory theory of law. That theory is now dead, even buried, but it still rules the law reviews from its grave. That is "19th-century-ism" — and we are only 30 years away from the 21st century (less than 15 away from 1984). The time has come for the institution of the student-edited periodical to be reexamined. More, student time should be devoted to stretching the frontiers of the law and legal process, to truly multidisciplinary studies of problem situations, to integrating law (when need be) with science and technology as well as with the social and behavioral sciences. A few years ago, in a fit of unique bravery (for them) the editors of the *Harvard Law Review* commissioned several articles on law and behavioralism. I mention that only to say that if Harvard can do it, any law school can; that that particular symposium considerably set back the cause of integrating law with other disciplines should not be taken as meaning that the idea has no validity. The best law journal (by far) in this country, and perhaps in the world, is *Law & Contemporary Problems*, although even it could be considerably improved.

What I am saying can be summed up briefly: The faculty should reassert control over the law reviews and they should be vehicles for publishing the results of the research of the CPAs.

(b) Given the plethora of periodicals, a major service could be performed by some law school if it published, not an "original" law review, but abstracts of the important papers in other reviews. The *Index to Legal Periodicals* is not enough to give us knowledge about whether a given article is useful. A set of abstracts would be. There is precedent for this (which should allay the fears of those who do not want to strike out alone) in the economics profession, which has a system of abstracts of economics articles published and available.

Some way, in some form, must be found to make the sheer bulk of the literature manageable. If this were to be done by (say) the College of Law at the University of Denver, a beginning might be in the area of science and technology. I would hope that the progressive leaders of this progressive institution would seriously consider this. If they do, then I would further suggest that not only legal periodicals but also such nonlegal magazines as *Science*, the *Bulletin of the Atomic Scientists*, *Scientific American*, and *Environment*, among others, should be abstracted.
I end this peremid with a plea. There are a host of problems and issues emanating from science and technology that universities and law schools in universities should meet head-on. They may be summed up in four words: pollution, population, poverty, and peace. All are immensely important. But I suggest to you that the most important of all is that of population: Unless and until human breeding can be controlled and populations stabilized, the other problems cannot be met. A law school can take on no higher task than to delve into the controversial and abrasive problems dealing with population control. That is my plea. I do not expect it to be answered or even acknowledged. That is a dolorous note to end this statement, I know, but I cannot see how anyone can believe otherwise. Whether, per T. S. Eliot, the world ends with a "bang" or a "whimper" is not the point; for end it will from the sheer weight of hydraulic pressures coming from too many human beings. (I ignore, as we must, the second law of thermo-dynamics.) Man must truly become, to use Emerson's term, "Man Thinking." This means, finally, that he must adjure the Christian notion of special creation and the inherent superiority of homo sapiens. Man must again come together with nature, as he was millenia ago. In no other way can the required ecological balances be struck, without which man cannot survive. This means, then, that law and lawyers cannot be morally or ethically neutral nor can scientists and technologists. (The pretense is that they are, I realize; but that idea rests on such flimsy foundations that it needs no argument to dispute it.) All must avowedly pursue an ideology, one made of attainable goals that will enhance the human spirit amidst a "oneness" with nature. In saying that I do not advocate a return to a state of "nature red in tooth and claw," a Hobbesian world in which life is "cold, nasty, brutish, and short." We do not have any transcendental duty to attain that state of "oneness"; it is merely a necessity.