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LAW AND TECHNOLOGY: ON SHORING UP A VOID

*Arthur Allen Leff**

PREFACE

*Michel Picher***

In his book *Channeling Technology Through Law*¹ Professor Laurence H. Tribe sought to explore the relationship between law and technology. His search was premised on the widely-shared belief that technology has gained a momentum of its own and is fast becoming uncontrollable in ways that, in Tribe's own words, "threaten to reduce the meaning of man and to degrade the human spirit . . .".² In the book and in the articles that followed it Tribe has stressed the importance of the law's role in wisely controlling technology.

From the outset Tribe's concern has been with fundamentals; he has asked and has attempted to answer questions going to the root of the value systems on which our legal order is based. In an article entitled "Technology Assessment and the Fourth Discontinuity: The Limits of Instrumental Rationality"³ he raised the problem of the limits of contemporary processes of decision-making in the development and use of new technologies. Starting from the view that all human action is both "instrumental" (*i.e.*, maximizing personal interest) and "constitutive" (*i.e.*, self-educating or formative) he makes the critical observation that while man may shape technology for his own ends, that process of shaping will alter man himself and will force him to adopt new values.

Tribe stresses the obvious and frequently forgotten truth that man and his tools and values continually shape and reshape each other. He sounds the alarm against making critical decisions about the use and development of technologies on the basis of cost-benefit analysis, which is itself an exercise in instrumental rationality because it does not sufficiently take into account the constitutive impact (*i.e.* the effect on men's values) of a decision to develop or apply a particular technology. His conclusion is that man risks a form of bondage to technology if, in making decisions about technology and the kind of world he wants to live in, he cannot overcome the limitations of instrumental thought and achieve a mode of decision-making that reflects a constitutive rationality. Only when men are sensitive to the human con-

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¹ (1973).

² *Id.* at i-ii.

³ 46 S. CAL. L. REV. 617 (1973).

sequences of their decisions about technology and its use and that sensitivity or constitutive rationality enters into the decision-making process will they be the masters, rather than the slaves, of technology.

Tribe is aware that such a state of enlightenment is not easily achieved in a world where no two men agree on the definition of human nature and whether it should be preserved or whether technology should be allowed to reshape it, and, if the latter, just how it should be reshaped. Like Professor Roberto Unger,⁴ Tribe suggests that a community of universally shared values is needed if a new constitutive rationality is to be achieved. Pending the dawn of any such Utopia, he suggests that decisions about the development and use of technologies must be reached through an instrumental rationality that is, so far as possible, informed and sensitized by constitutive rationality. And in the striving for constitutive rationality, human intuition, he believes, may have an important role to play—certainly it should not be ignored or dismissed every time it “prints out” a view contrary to the computer print-out or cost-benefit analysis.

In a subsequent article entitled “Ways Not to Think About Plastic Trees: New Foundations for Environmental Law”⁵ Tribe applies his theoretical framework to the specific area of environmental protection. For Tribe, environmental policy decisions illustrate especially well the pre-determination that is inevitable when the decision-making process is, like ours, based on a homocentric world view. When the starting point is a view of all nature as being at the service of man (a view rooted in the transcendental conception of man as the chosen being made in the image of God) environmental planning decisions are reached on the basis of utility, usually expressed in objective economic terms. Non-economic values which do not lend themselves to objective quantification are largely left out of the equations that determine policy decisions. So long as we are locked into utilitarian modes of reasoning and the transcendent view of man that spawns those modes of reasoning we run the risk of reshaping human nature in ways we do not really intend or desire.

Tribe stresses the importance of a different view of nature—as being not in the service of man or meant strictly for his manipulation and benefit, but as embodying “values apart from its usefulness in serving man’s desires”. He does not, however, favour a world-view of immanence, seeing God and sanctity in all natural things, like ancient pantheism. While disclaiming any pretence to a simple solution, Professor Tribe, like Professor Unger, sees the need for an ideal that synthesizes the ideals of transcendence and immanence in a spiral of progress. When that occurs men may come to reject the inevitability of dominating other men and other beings.

For Tribe it is not enough to tinker with the existing machine, to overhaul and polish up the existing laws dealing with technology and the environment. To start there is to miss the point entirely. Tribe examines the

⁴R. UNGER, *KNOWLEDGE AND POLITICS* (1975).

⁵83 *YALE L.J.* 1315 (1974).

values that underlie our legal order and he finds them wanting. He demonstrates that our continued adherence to those values and the legal frameworks they have produced will cause us to lose control over technology and, ultimately, over the vital question of what kind of beings we want to be.

His writings have provoked strong response⁶ and discussion as the law/technology interface has grown in legal literature.⁷ In March, 1975, a symposium entitled "Law and Technology: New Challenges for Jurisprudence" was convened at the Faculty of Law of the University of Ottawa. In reply to Professor Tribe's call for a new constitutive rationality in a world of shared values, Professor Arthur A. Leff delivered the following paper.

* * * * *

I. INTRODUCTION

I would like to make this talk as unpleasant an experience for everyone as I can manage, not by pushing anyone's face into something trivially nasty, but into something worse, a bare, black void, specifically the one which presently forms the hollow core of our society—the total absence of any defensible moral position on, under, or about anything. I do this not because I consider myself the discoverer of this critical nothingness; we all know it so deeply that it is that great rarity, a banal horror. I do it because, motivated by its terror, all of us are so impelled to ignore it, thereby turning much of our planning, technological or not, into empty mouthings of content-free prescription.

II. MODES

The world most likely does not arrange itself neatly into dichotomies, but writers like so to arrange the world. So let me present yet another: there are two basic modes of considering and criticizing technological planning. I shall call them, strictly for purposes of identification, the Heisenberg mode and the Gödel mode.

The first is by far the most commonly used, at least if one does not accept passing reference or bare lipservice as "use". This Heisenberg mode

⁶ See Sagoff, *On preserving the Natural Environment*, 84 YALE L.J. 205, at 212 (1974), and the response, Tribe, *From Environmental Foundations to Constitutional Structures: Learning from Nature's Future*, 84 YALE L.J. 545 (1975).

⁷ See, e.g., the following articles from the symposium on Law and Technology, 48 S. CAL. L. REV. 209-570 (1974): Findley & Plager, *State Regulation of Nontransportation Noise: Law and Technology*, *id.* at 209; Shapiro, *Who Merits Merit? Problems in Distributive Justice and Utility Posed by the New Biology*, *id.* at 318; Gelpe & Tarlock, *The Uses of Scientific Information in Environmental Decision-Making*, *id.* at 371; Allen, *Formalizing Hohfeldian Analysis to Clarify the Multiple Senses of "Legal Right": A Powerful Lens for the Electronic Age*, *id.* at 428; Brown, *Guilt by Physiology: The Constitutionality of Tests to Determine Predisposition to Violent Behaviour*, *id.* at 489.

of criticism tends to focus on those limitations, both necessary and contingent, on human empirical and rational powers which decree that no technological planning (or any other kind) will ever be perfectly trustworthy. They are all explications of the theme that between the "here" and the "there" falls the shadow of travelling between them with less than perfect knowledge and less than perfect means of processing what knowledge there is. In this mode lies a great deal of valuable work, lovely formulations like the general theory of the second best, much of the work of Ackerman, Calabresi and Tribe, and other important stuff like that. I certainly have no intention of being critical of a body of work which serves to illustrate so well that one cannot really know what "here" is, still less what "there" will be, and that even if one could know both those things, one still wouldn't know the path between them.

I shall, however, ignore the Heisenberg mode. It's interesting and it's important, but many things are, and one cannot talk about many things at once. I am far more interested here, if for no other reason than that it has not received the same attention, in what I have called the Gödel mode. This rarer species of technology assessment asks this question: assuming that there is a "here", a "there", and a path between them, on what ground can one defend a view of the "here" and the "there" which ought to impel anyone even to *search* for a path between them? Or, put more succinctly, on what ground does one base a decision that any one state of the world is better than any other state? Or (to put it just one way more) what is the moral basis of choice, technological or other?

III. THE EMPTINESS OF MORALITY

What I intend to do in this the largest portion of my paper is to describe the poverty, even unto total bankruptcy, of present-day ethical theory, its failure to generate *any* justification for the freely used terms "good" and "bad", "right" and "wrong" and their cognates, as criteria for belief and action. Though I have called this "The Gödel line" because it deals with *necessary* logical insufficiency rather than empirical impossibility, I would not pretend to anything as elegant as a "Gödel's Proof" of the arbitrariness of modern morality. But I think the job that can be done here—and briskly too—is quite enough at least to introduce the horror.

Consider, then, any proposition in the form "It is right to do X". The most obviously responsive response is simply "Why?". Now there are, it seems to me, a very limited number of possible replies to that question.

1. "*It is right to do X because if you don't do X, you will not get to Y.*"

This reply, a very common one, is quite clearly no response at all. For it will instantly be met by "O.K., but why is it right to get to or do Y?".

It is obviously not going to help matters by invoking a Z. At some point this particular series of ends is going to have an end, and with something other than still another undefended later member of the series. But how to ground that last term in the series is the very problem one started with. (And as we shall see, neither "the greatest good" nor "the survival of mankind" is going to do the trick.)

It should, of course, be noted that this X-to-get-Y formulation does carry with it additional *risks* for moral discourse. It makes it extremely easy to skimp on the moral attention given to X by focusing it all on Y, leading to end-justifies-means kinds of discourse (or, at least, insufficient consideration of X *qua* X). But that is just an additional source of *error*; it is hardly an extra guarantee of truth.

2. "*It is right to do X because it is right to do X.*"

I am personally very fond of this extremely common—perhaps most common—response, if for no other reason than that it makes it so easy to generate an infinity of propositions of identical form, all of which possess undeniable logical validity. It is therefore a very *powerful* formulation, if you like that sort of thing.

3. "*It is right to do X because God says so.*"

There is no counter to this particular argument. It is the only one among those available of which that can be said. Naturally, there are a large number of sub-issues involved in the practical this-world application of the principle. For instance, determining just what it is that God says has a few epistemological difficulties strewn in its path, of sufficient breadth and depth that whole peoples have been decimated as the question was debated in practice. But that is a side issue. If God is *defined* as a being whose commands are "right", then they are right, and this proposition 3 becomes merely a form of proposition 2. Then, for practical purposes, the only problem *in practice* (assuming the epistemological problems are solved) is one of the *existence* of God. But if that question is *assumed* to be a trans-empirical one, then it cannot be decided on the basis of any evidence; either God exists or He doesn't, but the question is *neither* logical *nor* empirical. Hence, there can be no debate. If God exists, and He has commands, and those commands are by definition righteous, and you know what those commands are, then you are "right" to do them.

Thus it is necessary to drop here what is, in this form, a non-question. But it is well, even here, to warn everyone that if this ground of "right" is *not* accepted, that is, if the basis for the validity of right choice is not located in trans-empirical definition and assertion, there are very serious consequences for all other forms of ethical imperative.

4. "*It is right to do X because P [P≠God] say(s) so.*"

There are, of course, various entities which can be introduced as referents of P in the above formulation, and I shall now proceed to test some of

them. I have stated the proposition as above only to show that, *whatever* fills in for P, it is still the same form of proposition. As we shall see, *regardless* of what P is made to stand for, the insufficiency of the total proposition is the same. Thus, I shall consider only two referents for P—"I" (that is, the speaker) and "everyone". Even these two are not really materially different for our purposes, but separating them helps more sharply to expose the source of their joint insufficiency.

4(a). "*It is right to do X because I say so.*"

Whether the "I" in that formulation is prescribing activity X for himself, or for someone other than himself, whoever the addressee of this proposition may be, he must still ask "Who the hell are *you*", and answering *that* is no picnic. Note that the answer cannot be "because I am God"; that is excluded here. Nor can it be either (a) "because I know that getting to Y depends on doing X", or (b) "because it is right to do X", for the reasons set forth above. The answer will have to be some variety of "I am in a position to know right from wrong because . . .". Now, what can follow that "because"? One thing that can follow is "I'm not alone in my belief that you would be right to do X", and we shall shortly consider answers in that form. But first let us consider the other thing that can follow: "I am uniquely able to perceive rightness from wrongness."

Now before I consider the weight and significance of that explanation, I should again point out that here it makes no difference whether the "I" is speaking to another or to himself, that is, whether he is specifying his own or another's right belief or action. For this is the "intuitionist move" (however denominated—the vocabulary varies today and has varied over the centuries): the "right" is directly knowable by some faculty for knowing-the-right. It is directly cognate to the aesthetic (and, recently, pornojuridical) "I don't know what it is, but I know it when I see it".

The beauty of this position is that it brooks no opposition. It is merely the "It is right because it's right" move with the addition of a hypothetical human faculty added as an explanatory mechanism. In one sense it is impregnable because unchangeable; no argument can be adduced to change it because it depends on no argument. If indeed one holds a position as to the rightness of X *on such a ground* then nothing anyone can say ought to have any effect. If one's position *does* change, it can only be because (a) it is not really based on this moral "faculty" at all but on something to which the argument changing the belief was directed (for instance, the nasty effect on society of not doing X), or (b) the faculty is there but not wholly certain—one can be wrong about one's intuitions of the right.

But if it is the latter, and one *can* be wrong, how can one tell when one is and when one isn't. By getting further empirical data? *What* further data counts? That just begs the question of *how* one can tell. So the real answer to how one can tell is: "Well, I don't know. I just can, that's all." And indeed, that *is* all. There is no doubt that one can assert one's belief

about rightness, and that one can believe in one's belief, but when one does *that* all one is doing is describing a fact: I believe that doing X is right. No one need challenge anyone's sincerity to find that of no importance. For the issue is not whether one *believes* that doing X is right, but whether doing X *is* right. And *that* is not a question of fact at all. If "the right" is *defined* as "that which I believe is right", then so be it.

This can be illustrated much more clearly if one discusses another proposition, where for P is substituted not "I", but "everyone". It is in this context that one can see most clearly that the insufficiency of the moral proof lies neither in epistemological problems, nor in problems of sincerity or intersubjectivity, but at a far more basic level.

4(b). "*It is right to do X because everyone believes so.*"

In jumping to this form of proposition I have leapfrogged at least two intermediate positions with a good solid historical following: (1) ". . . because most people say so"; and (2) ". . . because all [or most] *good* people say so". These are not trivial, since the first is the ethical basis of democracy, and the latter of aristocracy (in whatever form). But what I am going to say about the "stronger" proposition (*i.e.* 4(b), above) will cover such lesser positions *a fortiori*.

Now proposition 4(b) is indeed a very strong one; it is that X is right because *everyone* says so. By that I mean literally everyone; there is no person on earth who disagrees. And I will further stipulate that there is no problem of self-knowledge or insincerity or anything of that sort. Whatever right-determining faculty exists, it has indeed gone "bong" for every person on earth with respect to the rightness of matter X, and this is not just abstract concurrence but a deep concern upon which everyone would and does act.

What can one say to that? This is what one can say: so what? What is the linkage between the propositions "everyone believes it is right to do X" and "it is right to do X"? What is the source of validity of the proposition which necessarily follows (as it does) "it is right to do that which everyone believes it is right to do"?

Note that I am not disputing the proposition on the ground that it is somehow logically flawed. (As we shall soon see, I would be the last to make any such move as that.) Rather, I am in a way disputing its significance because it is logically impregnable. And it is logically impregnable because it too is just a *definition* of right, and there is *never* any *logical* ground for disputing *any* definition. If that's how you want to stipulate a definition, go to it. I may be entitled to criticize on *intellectual* grounds someone's *use* of a definition within a logical system (*e.g.*, between move 73 and move 74 you *changed* the definition), but I sure as anything can't tell him that his system has to use a different set of definitions. It is not, after all, a *logical* error for a Frenchman to call momma *ma mère*.

Let's put it another way. Let us say that there are indeed some propositions about right and wrong with which every person on earth would

agree—intellectually and in his own practice. (I would, however, point out in passing that if that were the case then no problem could ever arise; only if a person did something not in accord with the universal proposition would one have something with which to cope, but that very fact would establish the proposition as *not* universal. But let it pass.) Indeed, let us put it more strongly than that: mankind is so constructed that with respect to certain X's all persons will believe that it is right to do X. (Note: this needs to be buttressed by an implied "You can't change human nature.") So what? What is the *ethical* significance of a factual proposition even so universalized? So far as I can tell, there is none. Indeed, this mode of empirical proof incorporates an exceedingly well-known philosophical error, that what *is* is somehow "greater" or "better" or something of that sort than what is not. Indeed, it is precisely in the form of the ontological proof; only this time the fallacy is being used, not to establish the existence of God, but, with considerably less justification, the existence of the right and the good. So let it be quite clear, on earth as it is in Heaven: existence, stipulated or empirically determined (which, by the way, is also a form of stipulation), establishes existence. And that is all it establishes.

While it is not necessary for my present purposes, I would at this time point out some practical difficulties with the ontological proof.

First of all, in practice it will be rare that one will actually attempt to locate the right and the good in *everyone's* belief. Some subset of everyone will be chosen to embody the requisite belief, with non-believers relegated to the usual residuary categories: ignorance, insanity and evil.

But more important than that, if the right and the good is that which people believe, then there is no ground upon which to stand while criticizing such "universal" belief. If indeed it were to turn out that "mankind" universally believed that him to whom evil is done should do evil in return, it would be a "right" proposition. One could bring to bear no argument against such a belief, because its existence establishes its rightness. That is, to put it briefly, if right is rooted in what people are, no one has any warrant to try to change them into what they presently are not. And if some believe X is "right"; and others believe \bar{X} is, there is, *on this ground*, no way to choose between the groups.

Perhaps that should not concern anyone much. But, at least for people who are willing to gather to consider jurisprudential aspects of law and human technology, such a position on the necessary rightness of the moral perceptions of a particular species—albeit assumed to be shared by all members of that species—has interesting results in a universe which gives strong evidences of containing more than one species. As we shall see.

In any event, there still remain two common approaches to ethics which demand comment at this time. Both are really no different from others already discussed, but they come up in a particular form *so* frequently that each is entitled to a few words of its own.

5. *"It is right to do X because the survival of the human species depends upon doing X."*

It should immediately be noted that this proposition is in the "do-X-for-the-sake-of-Y" form. Hence, we have to consider the compellingness of Y. Once we do that we see that this proposition is merely another ontological proof of the existence of (a particular) "right" and "good". *Why* is it that the survival of the race is good? Because we are the race whose survival is in question? Are we in some kind of longevity contest with, say, dinosaurs, which it is our *ethical* duty to win? Who is keeping score? Who indeed is watching? What if we get wiped out, or indeed the whole world does? One might say, as a matter of definition, that being is "better" than non-being for the entity most directly involved in the question, but it still remains a matter of definition. One might in fact be willing to go along with the idea that non-existence is the ultimate "bad", but one should be clear about what one is going along with—a definitional proposition like any other.

6. *"It is right to do X because not doing X would be inconsistent with doing Y, which it is right to do."*

This too is a variant form of the "X-for-the-sake-of-Y" type of proposition, but it is special enough, and widespread enough, to deserve special treatment. It is, after all, at the hidden heart of much modern ethical philosophy, from Kantian-imperative spin-offs to deontological ethics. Indeed, one is tempted to call it the deontological proof of the existence of right and good.

Now the issue here does not quite allow one to respond by saying "What's so great about Y?" For the proposition is not that one ought to do X to achieve a particular Y, but rather that if one has on some ground determined that Y is good, then one would not be acting *consistently* if one failed to do X. That is, the "good" to be achieved is *intellectual coherence*: if one is to behave *rationally*, then one must do X (given that one is committed to doing Y).

That position is considerably more subtle than the causative version of the X-for-the-sake-of-Y approach. It is, unfortunately, no more sufficient. For there is no way to establish that intellectual coherence is itself a good—except, of course, in the usual fashion, by asserting such to be the case. As I have had occasion recently to remark, the proposition $A > B$, $B > C$, $C > A$ is logically bizarre, but that does *not* make it immoral. Nor is it "immoral" to say "All people are identical, so treat all of them identically except Morris Fleischfarb"—even though that one is pretty ugly as "rational" propositions go. Briefly, logical coherence is logical coherence; it becomes something else—right, or good—only if so stipulated.

But there is, locked in the heart of this intellectual-coherence approach, itself rather a subtle move, one that is even more subtle. I mention it, not because it is more "sufficient" than any other, but because it has activated

the work of very smart people like Lon Fuller. It goes something like this: "Human society is *society*. Without some communications system, there can be no society. If the human communications system does not contain even the minimal requisites for bare coherence, there can be no communication and hence no society. So intellectual coherence is *necessary* to human society."

Merely to state this argument is simultaneously to admire and dismiss it. It is lovely because it does focus on process as the "good", rather than on a more arbitrary laundry list of substantive goods. But alas, once again, there is nothing in the existence of a thing, even if its existence is deemed to be *necessary* to another thing, which establishes the rightness or goodness of either the thing or its dependant, and that is true even if both are processes rather than ends, and the dependent process is our present state of existence. It is the same old story: that a thing exists, even if it *has* to exist, does not tell us that it is good. Even unavoidability (assuming that could be established) is not a warrant of rightness *unless we say it is*. It is perhaps true that human society is *impossible* without at least minimal symbolic coherence. But even granting that, we can once again, when the question is not existence but evaluation, apply the ethically universal solvent: so what?

* * * * *

I am thoroughly aware of the icy unpleasantness of almost everything that I have thus far said. This piece is one of those arid intellectual products which (I am sure many here will be willing to tell me) makes no allowance for, nor even seems to feel, the true emotional temperature of these issues. The passionate intensity of conscience, the admirable actions of honorable men, the beauty of moral force expressed in an evil world—all those things are left out of the picture as if they do not exist or, though existing, do not move us.

Well, that is largely correct. I do believe that the *style* of a belief or action, its burning, corruscating power in someone's life, *is* irrelevant to its validity—at least as that term is used here. In other words, authenticity has no bearing on logical sufficiency. A deeply felt conviction is a different matter of fact from a flip and casual one, but both are still just matters of fact. And it will not do to say that the "right" is that which one considers the right *with one's whole heart and soul*, for the last clause amounts to nothing other than a new definitional variation, no more "valid" (though no less) than any other.

That does not mean I deny the existence of deep and passionate beliefs, facts that stir people to their depths. All I deny (and it may not be much) is that these deep beliefs about the nature of the right and the good are logically any different from shallow ones.

All right. All I have done thus far is apply the Gödel insight (alas, without the Gödel elegance) to that human life system known as ethics and come up with a predictable result: it is no more possible here than in any

other system to validate all the terms in the system by references to terms within it. At least one term will have to come from "outside", and thus, in terms of the inside—the system itself—will be, strictly speaking, arbitrary. As soon as God was dropped as the ground of ethical systems, there was *nothing* outside to which to anchor any first premises. Once one detached natural law from any unnatural lawgiver it became clear that one had but two choices, treating mere existence (especially if it seemed to be *necessary* existence) as rightness itself, or smuggling into the universe a natural law which, though not trans-empirical, was somehow supervalid over other existing things—that is, creating a new "God" on the sly, keeping up the self-deception by keeping the referent linguistically shadowy.

The question immediately occurring to anyone at this point is whether all this makes any difference. Let us say that indeed there *is* no way to defend any ultimate ethical proposition. Does it follow that any human action—including technological planning and assessment—is in any way affected by that fact? In the next very brief portion of this paper, I hope to at least suggest that it *does* follow and that, at least insofar as there is an intellectual component to planning, failing to face the void helps one to fail to face many other things with more direct kinds of practical importance.

IV. SOME PRACTICAL IMPLICATIONS OF THE VOID

Let us assume, therefore, that there are no "natural" trumps in our deck, that is, that one can establish an ultimate ethical premise in only two ways; either one just defines it (and asserts it in a louder and louder voice), or one points to the existence (or necessary existence) of something (including a state of opinion), and then deems that existence itself to be or to establish goodness.

If that is the case, and thus all normative systems are in a strong sense "arbitrary", it still makes a difference to the operation of any system which *form* of grounding it is given.

For instance, *if* one considers a lack of self-deception important (and this, like everything, *need* not be), then it is important not to externalize the process of choice and pretend that it is directed from outside ourselves. I am speaking here not just of the minor *mauvaise foi* of "limited resources", "the complexity of it all" and so on, but of considerably more subtle moves.

Consider, for instance, a recent law and technology piece with which I am sure everyone here is familiar, Professor Tribe's *Technology Assessment and the Fourth Discontinuity: The Limits of Instrumental Rationality*.¹ It should go without saying (though I am not going to chance not saying it) that I have chosen this piece because I consider it qualitatively at the very top of the Law and Technology genre.

And it is at the top, for me at least, because, while importantly devoted

¹ 46 S. CAL. L. REV. 617 (1973).

to doing a superb job in the "Heisenberg mode", it does not at all duck, or treat as simple, the ethical issues involved in technology. Indeed, it is central to Professor Tribe's piece that he recognizes thoroughly that how we are does *not* determine how we ought to be. And he explicitly adds: "so long as we feel bound by Hume's dictum that no 'ought' can ever follow from an 'is,' it will remain difficult to perceive how the proposed extension beyond instrumental rationality should proceed."² Indeed, he hints that this might be a "fifth discontinuity".³

But then, having said that, he makes a move which screams for scrutiny. "We are not, after all, wholly without *intuitions*; if an individual *senses* a particular technological prospect as somehow offensive to the *essence of humanity*, the inchoate apprehension thus expressed ought to be treated . . . as a potential source of wisdom to be explored."⁴

But what is this "intuition", and, more pressingly, what is this "essence of humanity"? Well, says Professor Tribe, we can't really tell right now. But perhaps we will in time. For "[t]he belief that there might exist *a mode of thought not yet developed* which will eventually enable us to 'reason' toward ultimate ends . . . should make it easier to treat such intuitive fragments seriously . . .".⁵ In brief, denied God as an out-of-system validator, what we must do is await *the second coming of man*. Meanwhile, "like sailors who must rebuild their ship on the open sea . . .",⁶ we just have to do the best we can, apparently on the basis of our intuitionist fragments.

Now that just won't do. The reason it won't do is that intuitions are facts too, and if they are their own validation, then every intuition is as good as every other. And if there is any "essence of humanity", it too has no validation other than existence. So far as I know, nature knows no "essences". I do not doubt for a moment that it is *necessary* to listen to both reason *and intuition*, but inasmuch as they are both determinative of choice only if we make them so, the prescription is hardly an answer to how we ought to live. One might say that we ought just to live by living, but then one cannot appeal to a magical later validation by some hypothetical *übermensch* to buttress such a statement.

In practical terms, you see, it even makes a difference what *kind* of intuitionist one is. If one is, for instance, a pure subjective intuitionist ("It is right to do X because I believe it is right to do X"), one suits oneself. If, however, one is an "everyone believes" man, one might try to determine (empirically?) what it is that, as anthropological fact, everyone *does* believe. That is very different from the life plan of a "majority believes" man who would in turn sharply differ (with the most radical political effects) from a "good people believe" man. In other words, I do not deny that we have

² *Id.* at 658.

³ *Id.* at n. 137.

⁴ *Id.* at 659 (emphasis added).

⁵ *Id.* (emphasis added).

⁶ *Id.* at 660.

to muddle. I just believe that not all muddles are identical in shape, and that the actual problems of process can not be fluffed off under a loose rubric which puts intuition into potential touch with some indescribable transcendent human mutation. After all, *la raison aussi a ses raisons que le coeur ne connait pas*.

Of course Professor Tribe's move is rather a subtle and intelligent one. Just because his despair has triggered a sudden thrust toward pious if empty hope, one should not overstate the case. Even though Professor Tribe astonishingly seems to think we *have* successfully traversed the three discontinuities of Copernicus, Darwin, and Freud, and are no longer seriously troubled at having learned that we are inconsequential in the universe, unexceptional among animals, and non-autonomous as rational beings, he still *does* recognize the void when he allows himself a glance at it. And perorations are, after all, infinitely forgivable.

Similarly, Professor Fuller's enshrinement of the conditions for intelligible communication as a natural good is, as noted earlier, also a position of some power. After all, if society without communciation is unimaginable, it is hard to fault someone very much for finding that which must necessarily be imagined to be a "natural" good. But think of all the more vulgar examples. Consider Professor Sagoff, for instance, who in a recent essay⁷ seems to have been *assuming* that the existence of forests and eagles was a *necessary and sufficient* ground for their continued existence, even unto coercive legal protection. Or consider *all* the people who just assume that it is *necessary and sufficient* to point to the *fact* of a majority opinion (expressed either politically or economically) as the justification for an act. No, most of it just won't do.

As you might have guessed in the light of the early portions of this essay, it is not in me to try to tell anyone else what *will* do. All I can say is this: It may once have been awful to contemplate the possibility that the hand which held you suspended over the fiery pit despised you. It may be worse to contemplate the probability that there is nothing in that awful notion. But if it is indeed the case that there is no idiosyncratic and inhuman validator, that is, no God, then everything *is* permitted—save only those things *we* decide are not. Neither the universe, nor our intuitions, nor "the requisites for species survival", nor anything else can defensibly make *those* decisions for us.

⁷ Sagoff, *On Preserving the Natural Environment*, 84 YALE L.J. 205 (1974).