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DOES TIME MAKE ANCIENT GOOD UNCOUTH?†

John W. Reed*

REFLECTIONS ON THE MILLENNIUM

The somewhat arch title of my remarks, which I'll explain later, came to me at the end of December, when all forms of the media were filled with references to the fast approaching turn of the calendar when we shall greet a twenty-first century and a third millennium. Whether it comes in with the year 2000, as popularly believed, or, more properly, the year 2001, it will be a time for reflection, for taking stock of ourselves and our world. Predictably, we already are inundated with pronouncements from pundits and politicians, from scientists and seers, from philosophers and fools. I predict that we shall be sick of it by that notable New Year's Day of the Third Millennium of the so-called Christian era.

At the same time, we should be grateful for any opportunity which stimulates reflection on the meaning and condition of our lives. In the familiar phrase, the unexamined life is not worth living; yet most of us are so caught up in the every-dayness of living that we fail to give thoughtful attention to what is really happening to us and to our lives. Happily, the approach of a milestone gives occasion to think about those things, especially a milestone as portentous as this one will be.

That kind of introspection comes to me rather easily at the moment because of several milestones in my professional life. The session of my evidence class on the day after Labor Day last September was, to the day, the fiftieth anniversary of my first class—at the University of Oklahoma in 1946. In June I expect to attend the fifty-fifth reunion of my law school class at Cornell. And this year one of my students who became a colleague on the Michigan faculty, and for a time its dean, will retire from the faculty. When your students retire, you become acutely aware of the passing of the years; and that awareness is a powerful impetus to think about what you have done and also what you have yet to do. The impending millennial celebration simply strengthens that urge.

By your leave then, I want to share with you some reflections on our lives in these last years of this century and this millennium.

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SCIENTIFIC PROGRESS IN THE PHYSICAL WORLD

The hallmark of this century has been scientific and technological progress. I used to marvel at the enormous scientific strides during the time of my mother and father, who began their lives with kerosene lamps and horse-drawn vehicles and lived to see color television and transoceanic air travel. Now I marvel at the even greater strides in my own lifetime: space stations, satellites, the Internet, heart transplants, in vitro fertilization, and now a cloned mammal: a manufactured sheep named Dolly. Christina Rossetti began one of her poems with the tender question, "Little lamb, who made thee?" Now we know. It was a Scottish geneticist.

I read someplace that with cloning there is no change in the genetic development; it just plateaus, and whatever evolution has been going on stops at the cloning time. That article brought to mind a favorite cartoon of perhaps twenty years ago. It shows a table in what I would describe as a quiche-and-hanging-fern café, and around the table are a half-dozen effete-looking young adults visiting over their wine glasses. One of them says plaintively, "Is evolution still going on, or is this about it?"

Communication is spectacularly easy and fast. We have friends in Dunedin, New Zealand, near the jumping off place for the South Pole. When I send them an e-mail message in mid-afternoon our time, their response arrives by supper time and is on the screen of my computer when I turn it on the next morning. We use cellular telephones and cordless telephones and take those miracles for granted. (I assume you read about the maternity ward that was so high-tech that the baby came out cordless.)

The extent of technological change is symbolized by the juxtaposition in this week's program of native Indian handcrafts on the one hand and the Hubble telescope and the hypertechnology of information warfare on the other.

In many ways life has been transformed in these years. We haven't banished illness and ignorance and want, but we've reduced them, and millions and millions are better off than their forebears. Diseases have been conquered. Smallpox is essentially gone from the face of the earth. Polio is rare. Health has been preserved in millions who, fifty years ago, would have died from causes not then understood. We have expanded physical and intellectual access so that one can go anywhere and learn anything with a speed that just a few years ago would have been found only in science fiction. This is a rich and amazing time, an exciting time to be alive. Despite very real concerns about degradation of the environment and overpopulation, we are physically better off than ever before. And if anything is certain about our condition, it is that these almost miraculous inventions and developments will continue.

And so we're getting better and better, with more and more "gee whiz" technology. If this is not quite yet Utopia, it will be in just a few years. Or will it?

HUMAN NATURE—IS IT BETTER?

The problem—you already know it—is not the physical world in which we live. The problem is those of us who live in it. In Pogo's words, "We have met the enemy and he is us." We see a transformed physical world, with the most marvelous inventions and cures and devices and gadgets, getting better and better. But what is harder to foresee is a day when human nature will have been commensurately transformed. Science can perfect objects and processes in the physical world, but there is no way we can perfect ourselves. Indeed, science typically makes its discoveries first—in such life and death areas as cloning and cryogenics—and asks the ethical questions later.

Are men and women better than a millennium ago? Or more decent, more humane? I would like to think so, and there is some evidence of that in the acts of kindness and generosity and heroism that we see around us. But just when I am about to conclude that modern man is getting better at making moral choices, I see *Schindler's List*. I hear Special Agent Hagmaier describe unspeakable crimes against children. I see terrorist killings of the innocent. I see ethnic hatreds in the Balkans and the Middle East and Central Africa and Ireland—and in our own inner cities. And, most dangerous of all, I see the widening immoral gulf between the world's haves and have nots. These are big and obvious human failings.

But let me also remind you of some developments that are less global and less dramatic, and less important than war and genocide and famine, but which stand in similarly stark contrast with the spectacular advances in science and technology.

Coarsening of Culture

The arts, for example: Public support for the arts has diminished markedly in the last few decades. Music appreciation programs and music performance have all but disappeared from the public schools; the National Endowment for the Arts is on life support; and we are raising a generation of persons whose primary exposure to the graphic arts is *Beavis and Butthead*. Whereas in simpler, less democratic and presumably less enlightened times, artists and composers were publicly supported and nurtured, we now leave them to their own devices; and the market, driven to the lowest common denominator, produces little of lasting quality. We have a brilliant young friend at the University of Michigan, in music, who argues persuasively that culturally we are entering upon a new Dark Ages.

On every hand there is a coarsening of culture, a world that is going to MTV in a hand basket. In January Dot and I acquired one of those technological marvels, an 18-inch satellite dish and a high definition television set. The quality of the pictures and sound is simply astounding; but the majority of the programming is, to put it charitably, junk. One of the first things we saw on the new equipment was a highly touted Bette Midler special, which was dreadful: ugly, noisy, boring, and crude. In the same week we saw the inaugural gala—the variety show presented to honor the President the night before the inauguration. Though not crude, it too was noisy, boring, and cheap—surely not the best we can do to honor the leader of the most powerful nation in the world.

We delight in exposing the faults and foibles of our leaders, our entertainers and athletes, and other public figures. No embarrassing personal detail is off limits. By demystifying our heroes, both past and present, we lose the all-important power of myth and symbol to inspire; and without inspiration, we are little more than clods. The culture clearly is more coarse.

Focus on the Near View

And then there is our compulsive focus on the near term. Although we are prosperous, everything is short term. Directors and managers of enterprises place supreme importance on the current quarter. There is no support for long-range research and development. Delayed payoffs down the road will do the current management no good since those managers will be long gone because they didn't run up the stock price quickly.

For the same instant-result, bottom-line reasons, employees are expendable, and hundreds and thousands of workers live with the daily specter of workforce reductions in the name of profitability. Employees have become so expendable that the Massachusetts textile mill owner whose plant burned became the executive of the year and the darling of the press simply by keeping his workers on the payroll until things got straightened out.

For many who are laid off, of course, self-employment becomes the only option, and working for oneself is not without its problems. In a recent newspaper cartoon captioned "The Trouble with Being Your Own Boss," the self-employed worker said, "I had to fire myself today; I called in sick but I knew I was lying."

Changes in the Academy

These bottom-line influences have penetrated the academy. No longer ivory towers, universities are not immune from pressures for cost-cutting and, especially, for quick results, even though quick results are the antithesis of the traditional scholarly life, where thoughtful contemplation is generally under-

stood to be the path to discovery and to revelation. Certainly since the time of World War II there has been a partnership between the government and the research universities premised on the need for technological superiority in national defense. Now with the Cold War gone and China not yet at the level of an immediate threat, the partnership between the government and the universities, which was characterized by trust, has been replaced by an arm's length, contentious, contractual relationship, and the research universities are overrun by government auditors and lawyers. Meanwhile, economic pressures are leading to the creation of virtual universities, that is, classes and library resources made available off-campus by Internet and satellite feeds (those wonderful technologies again). Students already can put together, with elements from among several universities, a tailor-made degree program of courses, and graduate without ever having been on campus or having sat in a traditional classroom. In the academy as in life we seem to be moving away from community ideals. As we retreat from each other we not only know less about one another, we also care less for one another. With higher education increasingly justified as training for employment, rather than training for life, there is high risk of what John Cobb calls "the moral collapse of the university."

As an aside, while thinking about universities, you may be interested to know that this year there is another substantial decline in law school applications, even though the number of 22-25 year-olds is flat and the number of college graduates is slightly up. Since 1990 the number of persons taking the LSAT has declined dramatically, by almost a third. This steady decline is good news for the layman who thinks there are too many lawyers and for the lawyer who thinks there is too much competition. But it highlights two troubling phenomena: the public's diminished esteem for the profession and the loss of recruits from among the brightest and best of our young people.

By the way, you may wonder what we really teach in law school. We're fond of saying that we teach the student to think like a lawyer, to develop what's called "the legal mind." Harvard's Thomas Reed Powell defined the legal mind this way: "If you can think about something that is inextricably connected with something else without thinking about the something else, then you have the Legal Mind."

The Legal Profession

All this leads me, as you might expect, to brief comments about what is happening in our profession and our professional lives. The adversary system, for example—what's happening to the adversary system, the continuation of which is one of the stated objectives of the International Society of Barristers? Criticism of the adversary system of resolving disputes continues to mount. Litigation is a popular whipping boy blamed for many of our nation's ills. And

no one can deny the excesses, at times egregious, in discovery warfare, unmanageable class actions, foolish lawsuits, and the like. Mediation and arbitration and other forms of dispute resolution are touted as more economical and less abusive. I don't argue with the usefulness—indeed, the virtual necessity—of alternative modes of dispute resolution in some settings where truth and accuracy of result are of secondary concern; but much of its use is the result of imposing an economic model on everything, and I remain unpersuaded that the adversary system should recede further. Sidney Harris recently wrote: “It is impossible to learn anything important about anyone until we get him or her to disagree with us; it is only in contradiction that character is disclosed.” In similar vein, it is often in contradiction that *truth* is most likely disclosed. In the analogous political sphere, Christopher Buckley argues that what we need is not bipartisanship and healing but principled advocacy.

You may remember the classic motion picture, *The Third Man*. If so, you will recall Orson Welles's statement to Joseph Cotton in the scene on the Ferris wheel. “In Italy,” said Welles's character, “for thirty years under the Borgias, they had warfare, terror, murder, and bloodshed, but they produced Michaelangelo, Leonardo da Vinci, and the Renaissance. In Switzerland, they had brotherly love. They had five hundred years of democracy and peace—and what did that produce? The cuckoo clock.”

Obviously I don't argue for “warfare, terror, murder, and bloodshed,” nor do I think Welles's statement is necessarily an argument for the adversary system, but I do believe there are losses in our pell-mell rush toward softer ways of resolving disputes.

And what about our professional lives? As we near the end of this millennium as a profession made more efficient and productive by specialization and advertising and marketing and computerization and technology, what is happening to the profession, to the lawyers themselves? The bottom-line mentality increasingly infects the practice of law. The economic model controls us. Rainmaking is what counts. Billable hours is what counts. Nobody makes partner for an especially good piece of pro bono work. Advertising and marketing, the effects of automation and high-tech equipment, the inexorable tension between income and expense, all managed by efficiency experts—these reek more of the cash register than of the library lamp. This insistent business orientation of the law profession has led to emaciation of the essential trust between attorney and client, between attorney and associate, and even—perhaps especially—among partners themselves.

The notion of a law firm as a place where one spends his or her entire professional life is by and large almost gone. In its place we find lawyers more mobile and transitory than ever before in our history. The glue that held the firms together, large and small, was the overriding fiduciary obligation we felt

to each other and that we felt in common to our clients. Today lawyers are hopping and skipping and jumping from one firm to another. And they are moving in groups and sections: Real estate departments, bankruptcy groups, merger and acquisition units, whole litigation teams are moving en masse as lawyers chase the almighty dollar.

In this milieu clients, not surprisingly, are learning to protect themselves. You undoubtedly know the story of the lawyer trying to impress his prospective client. “Yes,” he said, “you’ve got the best case I’ve ever heard.” “Thanks,” said the man, grabbing his hat and heading for the door. “Where are you going?” asked the lawyer. “I’m going to settle out of court.” “But I told you, it’s the best case I’ve ever seen.” “Yeah, well, what I just told you was the other side’s version.”

Not very long ago, in any of the professions, such as law, medicine, and education, professional status was defined as much by a sense of ethical and professional responsibility as by specialized knowledge. Today professionals increasingly define themselves strictly in terms of their command of technical matters, by their marketable skills and knowledge. I saw a recent televised interview with Desmond Howard, the former Michigan football player who was named Most Valuable Player during this year’s Superbowl (and who, just yesterday, bolted the Green Bay Packers, the team that helped him win the MVP award, and signed on with the Oakland Raiders—just like lawyers jumping from firm to firm after big verdicts). Howard repeatedly spoke of his “profession,” which, of course, it is if profession means only a high degree of marketable knowledge and skills. There is a real loss in this shift of what it means to be a professional. The older notion of professional may have been susceptible to arrogance, but it also represented important nonmarket values that gave moral balance to whatever commercial elements were inevitably present. By contrast, both in economic matters and social matters the new professionals have largely replaced public-spiritedness with private-mindedness. As a pessimist put it, the legal profession is rotting away into an occupation.

Lester Thurow, in his recent book, *The Future of Capitalism*, observed that capitalism is about making money. That is all it is—a system for making money. It has no built-in morality. Indeed, one role of government is to ameliorate the excesses of capitalism through such devices as consumer protection, securities regulation, antitrust, and some redistribution of wealth by way of taxes. Lawyering is similar to capitalism. That is to say, legal skills have no built-in morality. The role of professionalism is to provide moral balance to our enterprise.

All of this leads me, a little belatedly, to the main point and to the obscure title of my remarks. The title “Does Time Make Ancient Good Uncouth?” is derived from an abolitionist poem by the nineteenth century American poet, James Russell Lowell. With obvious reference to slavery, he began his poem:

Once to every man and nation
 Comes the moment to decide
 In the strife of truth with falsehood
 For the good or evil side.

And then in a later stanza he wrote:

New occasions teach new duties,
Time makes ancient good uncouth;
 They must upward still and onward
 Who would keep abreast of truth.

As that poem came to mind, I found myself wondering how far one can legitimately take Lowell's point, which is that what is right, or at least what is thought to be right, changes with the passage of time. As for the point at issue in the poem, none of us would argue that slavery was good; and to the extent that there had been intellectually respectable arguments in favor of it, Lowell was right to say that changing understandings over time had made that good uncouth, that is to say, outlandish and no longer acceptable. (There were better words than "uncouth" but he had to rhyme with "truth.") There is no question that some of our perceptions of what is good and what is true will always be imperfect. They will mutate over time. But the flow of dilemmas never abates and, I submit, the fundamental values are immutable.

I have reminded you of a number of technological changes and social and economic changes, a mere sampling of the vast, irreversible changes happening all around us—and to us. Inevitably we worry. We worry, for example, about the law of unintended consequences, the bad things that can happen from well-intentioned measures, when a blessing is accompanied by a curse—the pesticide or medicine or energy source that cures or saves but also simultaneously sickens or kills. With these and countless other worries we have a mood of anxiety-ridden satisfaction.

All these changes make us wonder about the possible need for a corresponding change in ourselves. Do these remarkable physical world developments imply corresponding changes in human values, in what is right and wrong? The great Czech leader, Václav Havel, has observed that experts can explain anything in the objective world to us, yet we understand our own lives less and less; and that we live in a post-modern world, where everything is possible and almost nothing is certain.

The uses to which fallible people put scientific marvels will be the issue. As Einstein said about the dangers of physics after Hiroshima, "The world is more apt to be destroyed by bad politics than by bad physics." As lawyers and opinion makers we necessarily will participate in resolving conflicts over the

uses to which the new technologies will be put—conflicts that cannot be resolved by science but only by the exercise of moral choice. In medicine, illustratively, who will get the benefit of a life-saving treatment that is extraordinarily expensive or rare? Who determines triage priorities and on what basis? Who makes the decision to spend a million dollars per patient for a high-tech treatment for just a few instead of millions for food and public health that perhaps on another continent would save thousands of lives?

As we face these choices and countless other choices posed by scientific advances, guess what? It's the same old us with the same old weaknesses. The plot may be different but the characters are the same. The choices are new but we are not. And we will apply age-old values of justice and compassion and charity and love—and as much wisdom, however limited, as we can muster.

Although the changes in the practice of law and in the trials of lawsuits are not of the same dramatic order as changes in the supersciences, the issues are analogous. Have the changes we know so well in law and lawyering changed what is right and wrong? Alas, for many it would seem so, hence the declines in civility, in trust, in generosity of spirit that are apparent on every hand. Indeed, the steepness of those declines makes us less and less a profession, and it challenges us to resist that decay and to preserve the ancient “goods” that we know: honor, honesty, diligence, dignity, courage, skill, and the like—ancient goods that time has *not* made uncouth.

In that endeavor, surrounded as we are by a culture that places a dollar sign in front of every choice, we need all the help we can get to maintain a moral compass. Each of us has his own conscience, his own pole star; and the values that we espouse are in the abstract high-minded and ethical. The problems come in our diurnal decisions, in our responses to the day-by-day issues that we face. And I speak not of the big, obvious ethical dilemmas, but of the moment-by-moment choices we make that constitute the fabric of our lives.

You will derive your guidelines and your strength from whatever source you have chosen—your religious faith, your system of ethical values, your humanity—but each of us needs the support of like-minded persons to stand for the high values, to preserve the ancient good. And that is one of the main reasons for the International Society of Barristers. The Society's founders, and particularly Craig Spangenberg, saw the Barristers as a haven (Joel Boyden this morning used the metaphor, “an oasis”), a place where those bloodied by their service in the law might come together for a restorative fellowship, reminding each other what it means to spend oneself in the service of others—the hallmark of a professional. We come together to reassure each other that time has not made ancient good uncouth.

We are not a “cause” organization, lobbying or mounting projects. But neither are we alone. One among us lamented this week that the battle for profes-

sionalism seems to be lost. I think not. I certainly hope not. But I am sure that the Barristers can make a difference. The Torah says that God promised Abraham to save Sodom if even ten righteous people could be found. Though not alone, we Barristers may well be part of the saving remnant of our profession.

If that sounds pretentious, if that task seems too great, remember the folk wisdom, "Life by the yard is hard, life by the inch is a cinch." As Harold Leventhal used to say to his law clerks "Seize the inch!" The improbability of total success is not reason to sit still. To paraphrase Leon Higginbotham, you should aim for the top of the mountain; you may not get to the top, but you won't be left in the valley of despair.

There is reason to be dismayed about our beloved profession in the near term, but lawyers like you give high promise for our future. I commend to you an optimistic word from that great Minnesota philosopher, Garrison Keillor:

To know and to serve God of course is why we're here, a clear truth that, like the nose on your face, is near at hand and easily discernible but can make you dizzy if you try to focus on it hard. But a little faith will see you through. What else will do except faith in such a cynical and corrupt time? When the country goes temporarily to the dogs, cats must learn to be circumspect, walk on fences, sleep in trees, and have faith that all this woofing is not the last word.