

IN DEDICATION TO DEAN DILLARD:
MAN OF DEPTH AND STYLE

FOREWORD

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IT is eminently fitting that an issue of the *Virginia Law Review* designed to make a serious contribution to legal education should be dedicated to Dean Hardy Dillard. For some forty years Dean Dillard has been a distinguished leader in the pioneering efforts in this country to create a more realistic and viable jurisprudence and to put that jurisprudence into effective application in improved legal education.

It would be as impossible as unnecessary even to attempt here to describe the many different roles in which Dean Dillard has asserted leadership. Throughout his career he has been a powerful teacher, both in the classroom and in other associations, greatly affecting the more fundamental perspectives of all his audiences. His scholarly publications upon subjects of the greatest variety—international law, jurisprudence, contracts, torts, general philosophy, legal education, and so on—have since the early thirties poured forth in steady and, happily, increasing volume. For these several decades, first as an influential member of the faculty and more recently as dean, he has had a major hand in shaping the destinies of a great national law school.¹ In a time of urgent national crisis he took the indispensable initiative in establishing an important, and enduring, center for training and inquiry in military law and government. He has represented and advised his government on matters of the highest importance both as a military officer and as a civilian. He has been active in the professional organizations of the bar, at both national and local levels, and has held high executive position in influential private associations, such as the American Society of Interna-

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¹ Despite his success as a dean, many of us still find it difficult to put Dean, rather than Professor, before Dillard. The public image of him as a teacher entirely corresponds to the emphasis in his formal title of James Monroe Professor of Law and Dean.

tional Law and the Association of American Law Schools. He has lectured in great universities abroad and served as consultant to large philanthropic foundations. Finally, as inimitable friend and mentor, he has stimulated many associates to enlarge their aspirations and capabilities and, hence, to make contributions which might otherwise have been beyond them. To the performance of all these different roles, it must be added, Dean Dillard has brought, in a manner quite distinctive to him, the deepest empathy for his fellowman, an abundance of wit and humor, and an extraordinary grace and felicity in style.²

The preeminent contribution of Dean Dillard has been perhaps in shaping the perspectives of lawyers and scholars about who they are and what their appropriate responsibilities and tasks are. In his conception, law is not something autonomous and apart, but an integral and important component of social process, directly affecting the quality of the public order a community can establish and maintain; correspondingly, it is the responsibility of the lawyer, as a skilled generalist in the management of processes of authoritative decision, to take an enlightened view of the aggregate consequences of the exercise of his skills and to employ such skills in promotion of both minimum and optimum order in all the communities which he serves. Thus, in insisting that the United Nations "is not simply a political tool expressing the interests of the component powers but is, in fact, a law-creating and law-enforcing body," he writes in generalization about all law:

The point seems to me to need stressing since it is so frequently misunderstood. It is misunderstood because of the over-emphasis, in legal and political thinking, of law as merely a body of norms which are somehow established by custom or created by a legislature and then applied by a court. Law does not exhaust its function merely by settling disputes. It has an "order-creating" or "constitutive" function as well; it performs this function by fashioning new patterns of relations.³

Similarly, "the lawyer's role," he affirms, "is that of a generalist among specialists" and "the theoretician's role is to create models in which norms and institutions are prudentially tailored to needs."⁴ In more detail he explains:

² These distinguishing characteristics are happily emphasized in Schachter, *Towards a Theory of International Obligations*, 8 VA. J. INT'L L. 300 (1968).

³ Dillard, *Conflict and Change: The Role of Law*, 1963 AM. SOC'Y INT'L L. PROC. 50, 62.

⁴ *Id.* at 67.

The professional role of the lawyer is, of course, multidimensional. Apart from serving clients and government in ways that are both traditional and familiar he is now confronted with a multitude of emerging problems challenging both his craftsmanship and imagination. The uses of atomic energy; space and outer space activities including meteorological investigations, satellites and communication problems; special trade and investment dilemmas raised by the European Common Market; and potential controls for limitations on armaments—to mention only a few of the more dramatic areas—are already taxing the resourcefulness of our profession. Nor is this all. Many traditional areas need the kind of re-examination which lawyers (working with men from other disciplines) should be equipped to provide. The impact of automation on labor-management relations; the gap in knowledge and understanding between economists and tax lawyers; the need for ancillary devices to ease racial tensions in a multitude of contexts—these challenges cut across a wide area of social life which is embraced within the lawyer's sphere of professional effort.⁵

Not unmindful of the “nuts and bolts” with which lawyers are sometimes obsessed, he would extend his concern beyond the reverent modification of traditional technicalities to considerations of grand strategy; he would, in paraphrase of a famous encomium, greatly learn and greatly teach.

It would do violence to fact, and possibly to Dean Dillard's sensibilities, to suggest that he has ever purported explicitly to project a comprehensive theory about law. He has many times expressed wariness about pretentious and over-elaborate systems, and he would probably regard any effort to impose a programmatic framework upon his expressed insights as an obnoxious form of intellectual hubris. It is believed, nonetheless, that even a modest sampling of his writings must reveal that he has contributed important clarifications to all the major features of a contextual, problem-solving, multi-method jurisprudence which could greatly facilitate the acquisition and communication of policy relevant knowledge about the reciprocal impacts of legal process and social process. Such clarifications can be traced through the observational standpoints he identifies, the comprehensiveness and realism of the major focus of inquiry he recommends, the range of relevant intellectual tasks he specifies, and the explicitness which he demands in the postulation of basic public order goals.⁶ It is conceivable that Dean Dillard has built

⁵ Dillard, *Law and Learning*, 49 VA. L. REV. 647, 655 (1963).

⁶ These criteria are developed in more detail in McDougal, Lasswell & Reisman,

more comprehensively than he has been willing deliberately to make explicit; it may not be without significance that one of his favorite stories, when turned against others, relates to "a little sign, a kind of bright thought for the day, outside a Unitarian church near London" which reads "between scepticism on the one hand and dogmatism on the other hand, there is a middle way, which is our way—open-minded certainty."⁷

In his identification of observational standpoints, Dean Dillard clearly distinguishes the perspectives of the authoritative decision-maker, primarily interested in making power choices in conformity with basic community policies, from those of the scholar, primarily interested in enlightenment about both the aggregate and particular interrelationships of authoritative decision and other aspects of community process. He often insists that the scholar must work *sub specie aeternitatis*, and he recognizes that the scholar must aspire to a theory more comprehensive than that of claimants and decision-makers if he is to establish criteria for appraising claims and decisions. Thus, he writes:

The power to generate new thought is quite different from the use of judgment involved in pure synthesizing research or the use of the critical faculties in analytical dissection. It not only implies a willingness to challenge old assumptions, it also involves a capacity to fashion new theories through which to view and select facts and even a capacity to shift categories, so that matters which were once classified as similar appear less so, and conclusions once thought compelled by logic appear no longer so compelled.⁸

The difficulty in maintaining this observational standpoint of the scholar does not escape him, but he insists upon the "utmost integrity of effort."⁹ Noting that "our knowledge is insecure," he invokes a challenge from Lord Richard Burdon Haldane:

But we can discriminate *quality* in what we find before us. . . . Of knowledge we can at best master only a fragment. But if that fragment has been reached by *endeavour* that is sufficiently passionate, the *struggle* towards it yields a sense of quality, of quality in the very

Theories About International Law: Prologue to a Configurative Jurisprudence, 8 VA. J. INT'L L. 188 (1968).

⁷ As recounted by Dean Dillard in *Commentary*, 21 U. MIAMI L. REV. 532 (1967).

⁸ Dillard, *A Tribute to Charles O. Gregory*, 53 VA. L. REV. 759, 760 (1967).

⁹ *Honor: Concept and Reality*, Address by Professor Dillard to Entering Students of the University of Virginia, Sept. 20, 1954 at 3.

effort made, which stands for us as being what we care for beyond everything else, as being for us truth, whatever else may not be truth. . . .¹⁰

The focus of inquiry recommended by Dean Dillard is as comprehensive and realistic as even the most perfectionistic might demand. Law is, he finds, "pervasively concerned" with the whole "human condition," including all "the manifold pressures and reactions of human beings."¹¹ The location of law in "its environment" and the "asking how it works," he suggests, "brings into the picture the relation of law to politics, sociology, economics, anthropology, ethics, and a host of other disciplines" and must require "empirical studies of all kinds designed to nibble away at areas darkened by ignorance, superstition, and prejudice."¹² The conception of law which infuses these suggestions extends beyond that of "a mere body of autonomous rules abstracted from the institutional apparatus" giving them "authority" and "meaning" to the whole process of decision in which such rules are employed in shaping and affecting community values.¹³ In rejecting the position that law should be defined as "norms formulated in words which decision-makers feel, or should feel, impelled to obey," he offers, explicitly on behalf of the "advocates of a policy-oriented approach," an eloquent and insightful statement:

To ask, however tentatively, "What *are* rules?" is unwittingly to endow them with a kind of reality or existence, even a metaphysical existence, which is illusory. Rules of law do not "exist" in the sense in which a tree or a stone or the planet Mars might be said to exist. True, they may be articulated and put on paper and in that form they exist, but, whatever their form, they are expressed in words which are merely signs mediating human subjectivities. They represent and arouse expectations which are capable of being explored scientifically. The "law" is thus not a "something" impelling obedience; it is a constantly evolving process of decision making and the way it evolves will depend on the knowledge and insights of the decision makers. So viewed, norms of law should be considered less as compulsive com-

¹⁰ *Id.* at 8.

¹¹ Dillard, *Supplementary Comment on the Humanities and the Law*, 17 J. LEGAL ED. 68, 69 (1964).

¹² Dillard, Book Review, 38 VA. L. REV. 703, 704-05 (1952).

¹³ Dillard, *Law and Conflict: Some Current Dilemmas*, 24 WASH. & LEE L. REV. 177, 188 (1967). Cf. the general emphasis of *Some Aspects of Law and Diplomacy*, 91 RECUEIL DES COURS 447 (1957).

mands than as tools of thought or instruments of analysis. Their impelling quality will vary greatly depending on the context of application, and, since the need for stability is recognized, the norms may frequently provide a high order of predictability. But this is referable back to the expectations entertained and is not attributable to some existential quality attaching to the norms themselves. In other words, our concept of "law" needs to be liberated from the cramping assumption that it "exists" as a kind of "entity" imposing restraints on the decision maker.¹⁴

The largest community in which Dean Dillard would locate, and make inquiry about, law is, as suggested in the quotation above, the community of the whole of mankind. The broad reach of his aspiration is excellently indicated in his presidential address to the American Society of International Law:

I would suppose that if we were to identify the syndromes of accelerated change in the twentieth century, in contrast to those of the nineteenth, we would signal out for special emphasis: (1) the changing nature of international conflict owing to the pervasively felt impact of Soviet ideology wedded to organized power, *i.e.*, the fact that Karl Marx is wedded to Peter the Great; (2) the rising expectations of the masses of the world symbolized by the emergence of so many new nations in so short a time; (3) the quickening of the conscience of the world with respect to racial discrimination; and finally (4) the splitting of the atom with its attendant consequences in weapon systems. Each of these has created its own distinctive set of problems and has challenged anew law's capacity to help mediate conflicting pressures.¹⁵

The intellectual tasks recommended by Dean Dillard would, similarly, appear to include all those indispensable to effective policy invention and evaluation. The necessity for goal clarification is inherent in his insistence that law is "value oriented" and has the function of so ordering human relationships "as to maximize values that are worthwhile."¹⁶ He observes that "every decision incorporates a value judgment which is no less intrusive for being hidden" and finds this "true even when custom has

¹⁴ Dillard, *The Policy-Oriented Approach to Law*, 40 VA. Q. REV. 626, 629 (1964).

¹⁵ Dillard, *Conflict and Change: The Role of Law*, 1963 AM. SOC'Y INT'L L. PROC. 50, 66.

¹⁶ Dillard, *Law and Conflict: Some Current Dilemmas*, 24 WASH. & LEE L. REV. 177, 179-80 (1967).

crystallized to a point of conditioning the expectations of actors since adherence to custom is itself a value to be weighed.”¹⁷ He answers the pragmatist who demands to know how a rule “works” by suggesting “that it is impossible to tell how a rule works without some notion of what it is working toward, i.e., without some notion of end or purpose.”¹⁸ Though he notes “how stultifying a sense of tradition can be when uninformed by certain attributes,”¹⁹ a sense of the importance of the “insights gained from grappling with past decisions and legislative enactments and the study of the conditions which gave them birth” is endemic throughout his work.²⁰ The need, he says, is “for what might be called historic perspective leading to a deepened understanding of purposes and methods,” attended by a sifting out of “the demands which are ephemeral while recognizing those that are likely not only to emerge but endure.”²¹ He emphasizes the importance of scientific study of the conditions affecting decision, in decrying the “assumption that the significance of behavior can somehow be revealed by a process of analysis which avoids the tough job of probing beneath the surface manifestations of behavior to see what kinds of motives inspired it. . . .”²² In similar vein, he writes:

We cannot expect to clarify a stuttering dialogue unless we dig beneath the surface manifestations of disputes in search of the underlying criteria which form the basis for our legal as well as our ethical and historical judgments. By airing these criteria and putting them in the public domain, we may not only narrow the area of disagreement but expose the kind of dogmatism that confuses fact with fancy and substitutes “stereotypes for sense and rage for reason.”²³

The need for conscious and deliberate contemplanation of probable future developments Dean Dillard variously notes. “It is,” he asserts, “of course, disingenuous to speak of the ‘lessons’ of the past if by doing so we assume that an elusive future will conveniently accommodate itself to

¹⁷ Dillard, *Tribute to Philip C. Jessup and Some Comments on International Adjudication*, 62 COLUM. L. REV. 1138, 1145 (1962).

¹⁸ Dillard, Book Review, 5 J. LEGAL ED. 387, 389 (1953).

¹⁹ Dillard, *Law and Conflict: Some Current Dilemmas*, 24 WASH. & LEE L. REV. 177 (1967).

²⁰ Dillard, *Minds and Moods*, 44 VA. Q. REV. 51, 58 (1968).

²¹ Dillard, *Law and Learning*, 49 VA. L. REV. 647, 657 (1963).

²² Dillard, Book Review, 52 AM. J. INT'L L. 558, 559 (1958).

²³ Dillard, *Law and Conflict: Some Current Dilemmas*, 24 WASH. & L. REV. 177, 202 (1967).

our expectations.”²⁴ Similarly, he cautions that the “smell of future trouble” be “not stifled by over-familiarity with past dangers.”²⁵ His prescription for management of the “difficult art” of knowing “how to separate the signals of the future from the noise of the present” is “a feeling for history, including the history of ideas,” which “is not numbed by an obsession with the present.”²⁶ The case for deliberate invention and assessment of new alternatives he makes most eloquently:

It is here submitted that the lawyer today must draw upon a kind of intellectual resource that puts a higher premium on “imagination” than was true a half a century ago. “Imagination,” as its etymology suggests, may be characterized as a capacity to recognize new sets of relations. The dictionaries are fairly uniform in defining it as an intellectual power which forms images of objects not present to the senses. Some add that it is the power to perceive in their entirety elements previously perceived only separately, while others accent the ability to create new ideas or to combine old ones in new forms.²⁷

In an earlier incarnation Dean Dillard was modestly distressed by an alleged dilemma of having to weigh “conflicting interests” in the absence of a “common denominator to reduce them to” or “scales to weigh them with.”²⁸ In more recent writings, however, he unhesitatingly proclaims the need for the postulation, as contrasted with the derivation, of a comprehensive set of goal values, and he explicitly joins with the present writers in recommending postulation of the basic goal values of human dignity. In a democracy, he insists, order alone “is not an exclusive value.”²⁹ “What we seek in a democracy,” he adds, “is not merely order but good order, that is, order directed to a purpose.” This purpose he finds in “the promotion of the dignity and the worth of the individual,” and he defines “a democracy” as “a commonwealth of mutual deference where there is a full opportunity to mature talent into socially creative skill free from artificially imposed and non-rational discrimination.” It is not of course Dean Dillard’s expectation, any more than that of present writers, that the basic goal values of human dignity can be

²⁴ Dillard, *Power and Persuasion: The Role of Military Government*, 42 YALE REV. 212, 225 (1953).

²⁵ Dillard, *Minds and Moods*, 44 VA. Q. REV. 51, 57 (1968).

²⁶ *Id.* at 59.

²⁷ Dillard, *Law and Learning*, 49 VA. L. REV. 647, 656 (1953).

²⁸ Dillard, Book Review, 27 VA. L. REV. 568, 570 (1941).

²⁹ Dillard, *Law and Conflict: Some Current Dilemmas*, 24 WASH. & LEE L. REV. 177, 180-81 (1967). The several quotations which follow are from this same source.

clarified and applied in specific instances by simple definitional exercises; the detailed specification of such values for rational application in specific instances must require, insofar as economy permits, the disciplined and systematic performance of all the various intellectual tasks indicated above. The principal function for which our contemporary community maintains the structures and processes of law, Dean Dillard rightly asserts, is to secure this clarification and implementation of basic values.³⁰ In "the public domain," as contrasted with the domain of private choice, "the State must rationally justify its choices by reference to some conception of democracy." He adds:

In its ultimate reach, this requirement is the citizen's protection against dictatorial tyranny. A choice is nonrational, i.e., it is arbitrary, if it is not "reasonably" related to an end which society thinks good. Society "thinks" through its representatives in accordance with constitutional procedures which, under our system, lodge the ultimate decision in the electorate through the amending power and place the more immediate and practical decision in the legislative branch as to most matters and in the courts through the power of judicial review as to constitutionally protected civil rights.³¹

In presenting these samplings from Dean Dillard's writings about jurisprudence it has not been our purpose to attempt to constrain his thought into a formal systematization that his genius might find alien. It has been our purpose only to document that he has already, without any pretense toward system, made most substantial contributions toward clarifying the major features of the kind of configurative, policy-oriented jurisprudence urgently needed for transforming legal education into "conscious, efficient, and systematic training for policy making" in a "free and productive commonwealth of mutual deference." One happy fact attending his retirement from the duties of the deanship, ceremonialized in this issue of the *Law Review*, is that new leisure may afford him opportunity to crystallize his pervasive insights into more comprehensive expression. Like the editors of the *Virginia Law Review*, we yield to none in our dedication to Dean Dillard, and certainly would be among the last to dare, or wish, to say a requiem over his abounding creativity.

Legal education in coming years can be expected to move in harmony

³⁰ See Dillard, *Freedom of Choice and Democratic Values*, 38 VA. Q. REV. 410 (1962).

³¹ *Id.* at 421.

with the theory of law made so persuasively articulate in Dean Dillard's essays and so impressively manifest in his career. The curriculum will provide occasion to acquire competence in recognizing the interplay of legal process with social process, and in perceiving how knowledge of the past and estimates of the future are linked to the goals and strategies of public policy. As value outcomes are specified through the years, students and practitioners alike will improve their judgment and skill in timing both the occasion and the degree of appropriate change. In such a perspective it will be evident when the situation is unripe for innovation, or by contrast when innovations of moderate or even radical scale are indicated. Criteria will be apparent for determining when the opposite strategy is gradualist (sometimes called incremental), and when the moment is auspicious for sweeping termination of old abuses or for taking advantage of great new opportunities. Aware of the delicate balance between formal authority and effective control, the several phases of decision will be appraised in ways that conserve or adapt the structures of public and civic order to the postulate of life with dignity. Happily the initiatives of Dean Dillard are more likely to mark the beginning than the end of an era.