

VALUES AND THE LAW: 2010 AALS ANNUAL MEETING LUNCHEON KEYNOTE ADDRESS¹

*The Honorable Guido Calabresi**

How can one say thank you? This is a great, great event for me. You are my colleagues, you are my friends, my mentors and my students. You have been my life. And though this is a lifetime achievement award, I hope that you will continue to be my life and that in time some may say that the award was premature.

It's particularly nice to have this happen on an occasion when so many people who are dear to me have also been honored: my student and law clerk, Risa; and my mentor in so many ways, Oscar Gray, whom the tort section honored. It's a wonderful sign of our continuity. When Fowler Harper died, Fleming James signed for me Harper's original copy of their great treatise, now in Oscar Gray's keep. And James put on it, "with that special affection that a teacher has for a student who has pushed the quest further." That's what we're all about, learning from someone and pushing the quest further. Transformative law is one of the ways we do it. As is the set of panels that will take place immediately after this lunch. I will mention just one, which my Dean, Bobby Post, will be moderating, and which will have among its participants two of my students, Catharine MacKinnon and Richie Epstein. Now, what could be more transformative than that? A marvelous combination of people thinking about what law is and what it ought to do.

Why is the transformative role of law so important? Why is it such

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The topics discussed in this address are further amplified in Judge Calabresi's Coase Medal Address, *Of Tastes and Values*, 16 AMERICAN L. & ECON. REV. 2 (Fall 2014), and in his recently published book, *THE FUTURE OF LAW AND ECONOMICS: ESSAYS IN REFORM AND RECOLLECTION*, Yale University Press (1st ed. 2016).

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an important part of what we do? Why is what law does so crucial, not just in changing rules of law, but in changing underlying values? Law changes values in ways that may be awful or may be glorious or may be prosaic. But everything we do in law does this. One of the reasons this is so is the blessing and curse of human beings . . . we are so adaptable. It is the secret, I think, of our survival, but it is also a secret of some of the most horrible things that have happened. If you had asked “good Germans” in 1933 whether the first laws, the first rules against Jews would lead to the gas ovens, they would have said you were crazy. And yet in less than ten years, that society and its values had changed enough so that it all became possible.

Conversely, I remember, as do some of you, the world before *Brown v. Board of Education*. That case didn’t come out of the blue. But when it came, it made a difference that has made us a different people, and made our legal system a different legal system. Of course, there is a tremendous amount still to do. And yet that decision, that ruling, because it changed our values, made possible all sorts of things that would have seemed impossible at the time.

Now, it would be nice to think that value changes were in one direction only, and only positive. In fact, it isn’t that way. Law changes and goes back and forth in any number of different ways. In 1958, when I was clerking, it was inconceivable to think of capital punishment as being unconstitutional. I don’t think there was a single member of the Warren court who would have been prepared to hold that at that time. Yet 20 years later, the Court came within an ace of such a holding. And if it had so held, it would have changed values in the same way that the abolition of capital punishment in parts of Europe—a movement led by political minorities—changed values enough so that now a country cannot join the European Union if it allows capital punishment. And yet it didn’t quite happen here, and so things turned back. And today, capital punishment seems to be broadly accepted. This too will change. I’m a firm believer in that and that values that I believe in will win out again. But remember: it does not move in just one direction. That means that we have to be able to say more about values.

And that isn’t limited to great issues. I’m a torts teacher. Torts looks as though it is immutable at any given point and then mutates enormously. Many things evolved from the 19th century to the 20th century and back again because of value modifications, and because of the changes that alterations in law made on values. And this is very important too: it is not only one thing affecting the other. Law affects values. Values affect law. Laws affect values again. It’s the same with

words. It isn't that because we speak some way, the law follows. And yet, it isn't just that because the law is one way, we speak that way. What we say changes in relation to law, and that, in turn, changes law again. And so it is with values.

That means that it is essential that we speak intelligently about values. Today's lunch is not the place to go into this question deeply; it's a tremendous topic. But I do want to say something about legal scholarship and values. The critical legal scholars were correct when they criticized so much of legal scholarship for not being concerned with values. In particular, some of them criticized *The Cost of Accidents*, my book, for talking about all sorts of wonderful things: Reduction of accidents? How boring! Reducing the sum of accident costs and the costs of their avoidance, safety costs? At best a little less boring! Even adding in all my talk of distributional, spreading, and administrative costs, I still was not talking about what they said really mattered, values. I hate to say it, but they were quite right.

The trouble is that having said that, they didn't say anything about what can be said about values. That's why they're called critical. It's easier to criticize than to suggest something constructive. Nevertheless, theirs was a very important insight.

What can we say about values? Well, first, I think we have to start out with the statement that there are values that are good and there are values that are bad. That is as important for liberals to say as it is for conservatives. Often liberals say, well, we can't say that. That's nonsense. Arthur Leff, one of the most skeptical people in the world, wrote a little article in which he said: burning babies is wrong. There are things that are simply bad. And we should start out knowing and saying that. Second, it is also the case that we can analyze values and say something about what they do and what they don't do, and use our skills as legal scholars to show why some things are preferable to others. *De gustibus non est disputandum*: about taste there is no dispute. That sounds good, but it's nonsense. We must dispute about tastes and about values, we must say something about them. Indeed, it is so possible to say something about them that even lawyer-economists can contribute to that debate. And it's something I mean to do next.

Let me give you an example: economists say correctly that if we have no values at all, we can't say anything about which values are better than others. That's true enough. But allow me just two wants, two very simple wants: one, we like a larger pie rather than a smaller one (an assumption economists make all the time, that a bigger pie representing greater utility is better than a smaller one); and, two, some distributional

preference with respect to that pie. I don't care which one, but some distributional preference. For today I'm going to make the assumption that a given society wants a larger pie and a more equal distribution of that pie. Let me assume only these two values, and I can immediately tell you that those values that cause people to want things that are not scarce—things that are in common supply—will result in a greater joint maximization of these two values. When people want something that is rare, they either have to pay somebody to produce it or whip the person to produce it, both of which create greater inequality. If we want—if our values lead us to want—things that are common, we can have a larger and more equally distributed pie. To the extent that we prize good clean water over the finest of Burgundies; to the extent that we enjoy ordinary sex rather than wanting only sex as depicted in things that shape our values as if everybody looked like . . . oh, I don't know, what are their names—Brad Pitt? Jennifer Lopez? Give me a break. To the extent instead we have values that cause us to be happy with ordinary, common things, then we can have a larger pie than if we only value scarce things.

Now, let me add one other value: the desire for creativity. This is something that isn't very difficult to assume people want. To the extent that we say that we are made in the image of the Almighty, whether one takes that to be truth or myth, that suggests the desire for reason, love, and creativity, all of which seem fair to put in as values. But for now let me put in only one of these: the desire to be creative. So I will assume a society that wants a larger pie that is more equally distributed, and is also one in which people desire to be creative. If you allow me just these three values, "more," "more equal," and "creativity," I can immediately tell you all sorts of secondary values that lead to a greater joint maximization of the three basic values. Anything that allows people to be creative in a non-scarce way, that allows a whole lot of people to be creative, will result in a greater joint maximization of these three fundamental desires. So handicraft, popular art, singing in the shower, if they are valued, will contribute to achieving a higher level of our more basic values. Bringing up children, which is a highly creative (if also drudge-filled) activity is one that everyone can engage in. And I'm not talking about women as against men; or, rather, I'm talking about men and women both. To the extent that our society emits laws furthering these values, thereby prizing people who are creative in non-scarce ways, we will have a pie that is bigger and more equally distributed, by allowing more people to be creative.

I'm doing this not to propose any answers or solutions, but to say that even lawyer-economists can give insights into values. Among you

are philosophers, historians, thinkers from any number of disciplines. Each of you can and must analyze values through your own approach to law. You can explain why some are more desirable than others and suggest what legal rules will help us to further them. And each of you must do that from your own point of view, with your own background. In this respect, you all can be transformative.

Let's step backwards. In thinking of the law's power to transform and further values, we should also have some respect for a group of people with whom I don't agree, the formalists, who don't want the law to be transformative. One of the things I noticed coming as a refugee from fascist Italy was that the law in Italy during the time of fascism was completely formalistic—unchangeable—and even scholars were not permitted to suggest changing the law, if they were to be scholars. *De juris condendum*—the study of the law as it ought to be—was not considered scholarship. Now, why was that? In a fascist state, formalism retained in place 19th-century law and 19th-century values. Those values were flawed in any number of ways, but they were relatively liberal or libertarian, in contrast with what the Italian legal sociologists (as the fascist legal scholars were sometimes pejoratively called) wanted to put in. Formalism is mighty conservative, not in a right/left sense, but in that it tends to conserve some values that are in place. It is precisely what you want, if you're scared of where transformative law may take you. And judges and scholars in fascist Italy managed to preserve all sorts of decent things because they were formalists and not transformative. Then, when World War II ended, Calamandrei and Ascarelli, who had been two great formalists in the '20s, wrote: now we can be functionalists. Now that Italy is a democracy, we can talk about transforming law. And that was wonderful. There was, however, an elderly scholar, a very distinguished antifascist named Furno, who asked, what about the next dictatorship? Isn't it better to stay tied to this rock and not have to worry about the next dictatorship? In a sense, formalists are people who are sufficiently scared of human reason that they would rather stay tied to a past that is bad, but that, if transformed, could be worse. So viewed, I think one can understand the appeal of formalism. That is not me. That isn't this year's theme. But be aware that the people who are formalists, who are taking that view, are not just fools. They may be worrying about the direction in which law can be transformed for plausible, but mistaken, reasons.

Now, who is going to lead this transformation? Don't count on judges too much. Learned Hand once said something about how little judges can do, with the exception of a few notable ones. He obviously

meant himself. I don't include myself among those few. But that's because I can wear a scholar's cap and can cause trouble—transform—as a scholar rather than as a judge. Judges tend to be conservative (again, not in a right/left sense). And we may want them to be conservative. It is you who have to lay the groundwork that allows judges to take a part in transformation. Don't expect the judges to take the lead. You know that old maxim of judges, "do justice though the heavens fall"? If a judge ever caused the heavens to fall, that judge wouldn't last five minutes. That judge would be out. It's the job of people of the world—including judges—to see to it that the heavens don't fall.

You scholars, instead, can write what you believe is in the interest of justice, though the heavens fall. Why can you do it? Because the heavens don't fall. Because as scholars, you are in the first instance ignored. And that is the source of your, of our authority. We are treated well. We're given tenure. We're paid reasonably well, much better than judges (and correctly so). We have all sorts of perks. And the reason for these perks is that we can look into dark places, we can say what we think is right though the heavens fall . . . and then we can be ignored by people of the world who react to our troubling ideas by saying, "oh, he never held a job," "oh, she never met payroll," and use that as an explanation for not following our transformative suggestions. That, in fact, is the source of our freedom.

So you should never be worried or upset when people pay no attention to what you have written. They will pay attention all too soon. Paul Bator, a dear friend, wrote an article about habeas, and when the Supreme Court rejected it the next year he didn't write anything else for 20 years. I think he was wrong in his article, but in time the Supreme Court bought it. He transformed the law, eventually, by writing what he thought was the truth. So what you must do is write what you believe to be true, and you must analyze values in the way you think is right. And all too soon—though in the first instance you may be ignored—your writing will be picked up by people of the world, including judges.

My own worry as a scholar was that my work in torts might have gotten picked up too quickly by people of the world. It was right. I still think it's right, and I still think it's good. But I was writing neither as a mathematician producing pure theory nor as a policymaker saying we must do this tomorrow. I was writing to change the way we look at law, the way we think about things, with the hope that people who were in a position to do something about it might, in time, take it up. And that's what we must be about.

In the end, our job is still best described, I think, by John Stuart

Mill who, when asked who were the two most transformative minds of the century from 1750 to 1850, named Coleridge, the poet (and how interesting that he thought that!), and, of course, Bentham, in any number of ways the great transformer of law. Mill said that Bentham approached all ideas as a stranger, that he looked at everything completely *de novo*. And if the ideas did not meet his test of utility, he dismissed them as vague generalities. But, Mill said, what Bentham did not realize was that in those vague generalities lay the whole unanalyzed wisdom and experience of the human race. That is, in those things that a *tabula rasa* approach doesn't consider is an awful lot of learning, an awful lot of things that people are not ready to give up simply because, say, someone has written *The Costs of Accidents*. But then Mill went on and said that some of that unanalyzed experience of the human race consists of centuries of exploitation, values that are wrong, things that must be overcome and things that we can, and must, improve on. When we analyze, when we do our job as scholars and show that some values should be favored, that some rules of law are better than others, our work may not be accepted immediately because our analysis may be incomplete, because what we may be missing is the whole unanalyzed wisdom and experience of the human race. But in time, that part will be sorted out along with the past exploitation and other useless values, and we will have shown the people of the world what needs to be changed.

What a job. What a wonderful task that you have, that we have. For I like to think that I still have that task, as a scholar: to look into dark places, to analyze values, and to favor justice though the heavens fall—which they won't. Thank you.