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LAW AND THE UNIVERSITIES*

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We have heard a good deal in recent years of the relation between law and the social sciences. No convention of law school teachers is complete without a program devoted to the contributions that can be made to the study of law by the disciplines of economics, psychology, anthropology, and kindred sciences. By no means do I deplore these exercises in self-depreciation. Humility, even among those humblest of citizens, university professors, is good for the soul; and we have seen too little actual infusion of outside learning in the study of law to create a risk that the process is really, as Alvin Johnson warned it might become, not cross-fertilization but cross-sterilization of the social sciences.

My theme is not, however, the contribution that general education can make to law. My theme is the less familiar one, the contribution that law can make to general education. Instead of concentrating on the content of pre-legal studies for lawyers, I suggest that some thought be given to the legal content of non-legal studies. The universities are experimenting successfully with courses on science for the citizen, aimed at an appreciation of scientific method or the tactics and strategy of science; courses have been introduced on economics for the citizen (known affectionately in some places as "economics for the idiot"); and similarly, in the name of general education, studies have been en-

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couraged in the history of the pervasive problems of political thought. Yet, so far as I am aware, almost no effort has been made to provide the general student with an introduction to an understanding of the legal order. The neglect is all the more striking when we remember that the institutions which are central to our civilization—security of the person, freedom of the mind, ownership, and the intercourse of trade—and which at the same time are the substance of our daily living, are all dependent on a structure of law. Should the student, whose preparation for mature living must include a study of Boyle's law of gases, be left unexposed to Pound's *Spirit of the Common Law* and Cardozo's *Nature of the Judicial Process*?

You will see that what I have in mind is no merely "practical" course in "law for the business man" or "law for the engineer." What is wanted is not instruction in how to endorse a check, any more than general education in science means training in the repair of an automobile engine, useful and money-saving as both these accomplishments may be. After all, there are specialists, lawyers and mechanics, to whom the citizen can turn for these services. But to understand something of the possibilities and limitations of science, or the methods and development of the law, as a basis for judging the serious issues of security and freedom that beset us—to understand these things is a responsibility that is nondelegable. In that sense the most "practical" study may be the most impractical. At long range we hit the target by aiming above it. The shortcomings of a "practical" course are suggested by the plight of the boy who was sent to a specialist to cure a bad case of stammering. After several weeks of intensive training the boy was discharged, and on being asked whether he was really cured he could only reply, "I can say 'Peter Piper picked a peck of pickled peppers,' b-b-but it r-r-rarely oc-c-curs in c-c-conversation."

At this point several questions have doubtless occurred to you. First, why address a plea for general education in law to an audience of lawyers and prospective lawyers? Second, is the subject matter sufficiently challenging to justify its inclusion in a program of liberal arts? Third, what themes might be pursued in a study such as I have proposed?

The first question is easily answered. The plea is addressed to lawyers because it is they who will have to assume the burden of

devising a course of study, and for the further reason that by examining our own discipline with this end in view we ourselves are likely to derive new insights into our own profession.

The second question—whether such a study is intrinsically worth while—may trouble the layman more than it troubles the lawyer. If so, that fact is additional evidence of the need for general education in law. Too many laymen think of lawyers simply as mouthpieces for interests over which they exercise no control. The popular attitude toward the lawyer is apt to be less good-natured than that suggested by Lord Erskine when he penned some verses commemorating the taking over of a lawyer's house by an ironmonger:

This house where once a lawyer lived
Is now a smith's, alas;
So rapidly the age of iron
Succeeds the age of brass.¹

Does the law display that record of original and creative thinking which makes science, for example, so rewarding a subject of study? As one who is as ignorant of science as the requirements of this University allowed, I may be inclined to exaggerate the excitement of transforming thought which is to be found in the records of science. I think of the professor of science as the biographer of Willard Gibbs, the Yale mathematician, described him as he stood before a blackboard exhibiting a beautiful mathematical formula. He stood there, his biographer tells us, with tears streaming down his face and a little group of students staring at him intently with the look of one who has just seen angels.² Very few law professors of my acquaintance could testify to such an experience. And yet I wonder whether a profession which can invent the trust and the corporate mortgage and can draft a Public Utility Holding Company Act need bow its head even before the achievements of the scientists. Our legal inventions may be slower to mature and less identifiable with individuals but they represent transforming thought none the less. Sometimes, indeed, the invention may be as dramatic as those of science. When the Supreme Court decided that California, on becoming a state, did not acquire, by implication, the off-

1. HEARD, *ODDITIES OF THE LAW* 126 (1881).
2. RUKEYSER, *WILLARD GIBBS* 346 (1942).

shore oil deposits which had belonged to the United States, since California was admitted to the Union on an equal footing with the original states which enjoyed no such ownership,³ the Government's lawyers were able to maintain that the State of Texas, which as a Republic had in fact owned its offshore oil, nevertheless lost it to the United States by implication through coming in on an equal footing with other states.⁴ The lawyers who transformed the equal footing clause in this way must have experienced some of the excitement which we associate with Copernicus turning the Ptolemaic theory inside out or with Karl Marx when, as he professed, he stood Hegel on his head.

But more seriously, the lessons to be learned from the history of science are not very different from those which can be learned from the history of law. President Conant in his lectures *On Understanding Science* has spoken of two major impediments to scientific progress: a climate of opinion or set of preconceptions which must be overcome, and crudeness in tools of measurement. In the eighteenth century the concept of a wondrous substance called phlogiston long stood in the way of an understanding of combustion. In the nineteenth century the dominant conception of a mechanical universe described as matter in motion stood in the way of the electronic theory. In each case experimental evidence was at hand pointing to the newer concept, but the evidence was long rejected because it failed to square with the stubbornly held presuppositions of men of science. Something of the same sort can be found in the history of law. For phlogiston and matter in motion one need only substitute liberty of contract to make the point.

There are parallels too in the role of instruments of measurement and computation. Just as the art of long division could hardly flourish under the system of Roman numerals and the study of living cells could scarcely be fruitful without the microscope, so justice between man and man has sometimes had to wait upon refinements in the technique of measurement. In 1876 the Supreme Court of the United States was confronted with this problem: What were the rights of the parties where the insured, under a life insurance policy, had been prevented by the Civil War from continuing his premium payments from his home in

3. *United States v. California*, 332 U.S. 19 (1947).

4. *United States v. Texas*, 339 U.S. 707 (1950).

the South to a company in the North and after the lapse of the policy he had died?⁵ Two members of the Court maintained that impossibility caused by war excuses all obligations and therefore the beneficiaries of the policy could recover its face amount. Two members of the Court insisted that the company had promised to pay only on condition that the premiums were kept up and that for failure to meet this condition the company was excused from all liability on the policy. Five members of the Court, in an opinion by Mr. Justice Bradley, who was something of a mathematician himself and an unusually sagacious judge, found the solution to the problem in the realm of life insurance accounting. They analyzed the nature of level payment premiums in the light of actuarial tables and concluded that the company owed the beneficiaries something in the nature of the cash surrender value of the policy.

These comparisons, for which better examples could doubtless be chosen, suggest that the intellectual issues in the progress of science and in the progress of law are not so very different. It is not essential to decide whether developments in the law reflect as great a degree of originality and creativeness as in science itself, although the subject has its fascination. As Mr. Justice Holmes once observed, "What the world pays for is judgment, not the original mind."⁶ One need not be cynical to accept that estimate and to leave unresolved the meaning and significance of originality. It is enough if the history and system of the law present problems as challenging for the citizen as those of the natural and social sciences.

And so the second question merges into the third, namely what themes might be pursued in the experiment of general education in the law. The only difficulty here is an abundance of riches. I would simply suggest two main lines of thought: the method of law, and movement in the law.

The method of law is usually identified by the layman with the adversary system. In fact, of course, this is only one aspect of our profession. It is an aspect, nevertheless, of which there is need for greater appreciation. When we are asked whether the lawyer, like the scientist, is really a seeker after truth, the difficulty in answering is due to the impropriety of the form of the

5. *New York Life Ins. Co. v. Statham*, 93 U. S. 24 (1876).

6. HOLMES, *John Marshall*, SPEECHES 90 (1913).

question. The lawyer does not stand alone in his function as an advocate, but as part of a complex process, and the comparison must be between the scientist or the scientific process on the one hand and the adversary system of the law on the other. In this view the advocate plays his indispensable part in a truth-seeking enterprise. In fact, a distinguished European scientist has recently held up to science the example of the law as a means of avoiding unconscious choices of perception and interpretation in dealing with scientific data. The general relevance of the adversary method was thus described by Michael Polanyi in his volume *The Logic of Liberty*:

When you adopt one way of looking at things you destroy at the same moment some alternative way of seeing them. This is the reason why open controversy is deliberately used as a method of discovering the truth. In a courtroom, for example, counsels for the prosecution and for the defense are each required to take one side of the question at issue. It is supposed that only by committing themselves in opposite directions can they discover all that can be found in favour of each side. If, instead, the judge would enter into friendly consultation with counsel for both sides and seek to establish agreement between them, this would be considered a gross miscarriage of justice.⁷

But advocacy and the adversary system are only the most dramatic, not the most pervasive, aspects of the method of the law. There is the less spectacular method of adjustment, accommodation and agreement, along with the reduction of the result to a charter of conduct known as a legal document. The talent required to negotiate even so simple a transaction as the loan of an automobile for a week-end, and to produce the charter of conduct by means of a choice of words is really comparable, I suggest, to the imagination and verbal facility required in producing a sonnet or at any rate some stanzas of free verse. Indeed, as in modern poetry, there is in legal drafting the art of the deliberately unsaid, the art of leaving to others in the future the imaginative task of drawing inferences of meaning. When the framers of our Federal Constitution declined to include among the powers of Congress that of chartering corporations, they probably were determining to leave the inference one way or another to the wisdom of future needs and other minds. You may

7. POLANYI, *THE LOGIC OF LIBERTY* 20 (1951).

remember a somewhat similar example of the wise evasiveness of draftsmanship in the title of the British monarch as it stood from the time of Elizabeth I to the year 1800. The story is told by Maitland in one of his most engaging essays.⁸ Prior to Elizabeth's time the title of the monarch was "By the grace of God of England, France and Ireland Queen, Defender of the Faith, Supreme Head upon Earth of the Church of England and Ireland." In Elizabeth's time the magnificent final title "Supreme Head upon Earth of the Church of England and Ireland" was replaced by the colorless little phrase "and so forth." How much of the struggle between Protestants and Catholics, how much avoidance of clash and freedom of maneuver was meant to be achieved through the substitution we can only conjecture. Maitland concludes that when Elizabeth allowed herself to be "etceterated" she was really declaring herself to be ". . . (if future events shall so decide, but not further or otherwise) of the Church of England and also of Ireland upon Earth the Supreme Head."⁹ Could anything be more typically English, or more characteristic of the fine art of legal draftsmanship?

Besides the method of advocacy and of accommodation, there remains to be noticed what is perhaps the most important of legal methods, that of translating into institutions the ideals and purposes of a society. It is here that the lawyer ceases to be merely the advocate, negotiator or draftsman and becomes the statesman, not the statesman in office but the citizen as statesman.

I can think of no better example than the career at the bar of Mr. Justice Brandeis. The ideas of Brandeis were simple and "in the air." Indeed, they had been in the air from the beginning of Western thought down through the nineteenth-century populists and muckrakers and utopians. He believed that in order to conserve and develop our greatest natural resource, the talents of ordinary people, there must be diffusion of both political power (hence Federalism) and economic power, and a corresponding diffusion of responsibility. Preachers, publicists and politicians were spreading the gospel, but it was the lawyer's function to translate these aspirations into the structure of our

8. MAITLAND, *Elizabethan Gleanings* in 3 COLLECTED PAPERS 157 (Fisher ed. 1911).

9. 3 *id.* at 165.

institutions, and this was the distinctive contribution of a Brandeis. Called upon to settle a garment workers' strike, he seized the occasion to establish a plan of continuous collaboration between management and labor.¹⁰ Confronted by findings of waste and injustices in the field of industrial life insurance, he devised a system of savings bank life insurance, giving to workers more assured protection at lower cost and, just as important, demonstrating that the business could be carried on successfully by men with modest emoluments and without the prestige and ramifying power of the conventional financier of the era.¹¹ Impressed by the need of regulating competition and preventing monopoly, for to regulate monopoly seemed to him a fruitless task, he formulated the scheme of what became the Federal Trade Commission (for whose later checkered career he was of course not responsible).¹² Faced with the problem of controlling a public utility, he drew up for the regulation of the gas company in Boston a sliding scale whereby as rates to consumers were reduced dividends to stockholders could be increased, thus relying, for bodies corporate as well as for individuals, on the encouragement of inner impulses rather than external compulsion.¹³ This is not the place to appraise the merits or defects of each of these devices. It is only important to observe how a lawyer can make political and economic and even moral ideals of ancient lineage come alive in the institutions of twentieth century industrial civilization.

When we turn from methods to movement in the law we shall find, I think, that during the lifetime of this University the law has moved toward greater democratization, toward a wider shar-

10. LIEF, *BRANDEIS, THE PERSONAL HISTORY OF AN AMERICAN IDEAL* 183-191 (1936); MASON, *BRANDEIS: A FREE MAN'S LIFE* 291-315 (1946). [A recent conversation with Mr. Meyer Perlstein, International Vice-president of the I.L.G.W.U., who participated in these proceedings in 1910, reveals that the plan was known as the "Protocol of Peace." It was Mr. Filene, President of the famous Boston department store bearing his name, who called in Justice Brandeis. Other members of the tripartite panel were Hamilton Holt and Morris Hillquit. Among the specific proposals which were adopted was the "preferential union shop" as a compromise between the then much disputed "open" versus "closed" union shop. Mr. Perlstein whole-heartedly agrees that the credit is due Justice Brandeis. Ed.]

11. LIEF, *op. cit. supra* note 10, at 98-106; MASON, *THE BRANDEIS WAY* (1938).

12. LIEF, *op. cit. supra* note 10, at 287-292; MASON, *op. cit. supra* note 10, at 402-404.

13. LIEF, *op. cit. supra* note 10, at 76-84; MASON, *op. cit. supra* note 10, at 126-140.

ing of privileges and a wider distribution of the costs of life's disasters. I do not refer merely to legislative measures of social security, but to developments in judge-made law as well. The nineteenth century, with its emphasis on individualism, on unbridled competition, on a free field with no favor, all reinforced by a crude version of the Darwinian theory, tended to make the element of fault the central criterion of liability. This trend reached its peak in the creation of the fellow-servant rule as an escape from employer's liability, and then a counter-trend set in, with a nudge here and there from the legislatures, resulting in the abandonment of the fellow-servant rule and the amelioration of the defense of contributory negligence by the doctrine of last clear chance. And in the tangled web of proximate cause, the delight of the classroom and despair of the courtroom, has not the tendency been to seek the golden thread in the network of causation?

Likewise the attributes of property have undergone a democratizing change. The case of married women's property is a classic and non-controversial example. You will recall that at common law a wife's property became subject to her husband's use and enjoyment during marriage; that protection was eventually found in equity for the married woman through a settlement to her sole and separate use; that this expedient was largely confined in practice to the wealthier classes who employed family solicitors and made a practice of marriage settlements; and that finally the legislatures, in the nineteenth century, extended to married women generally, without the need of a family settlement, what had theretofore been a privilege of the aristocratic few.

Changes like this in the property rights of married women give point to the remark that England (and the same can be said of America) is the most revolutionary country on earth, but the revolutions take place without being noticed. Consider the movement which has taken place in the last century in the attributes of property in general. One need only mention such qualifications on the rights of ownership as zoning laws, building codes, conservation measures, and limitations on restrictive covenants, to say nothing of rent control, to perceive how far we have moved in the direction of democratization—some would say socialization—of the law of real property. We are moving slowly in the

same direction in the legal control of intangible property, notably the rights of members of corporations or labor unions to secure responsible management of their interests. Our conception of property has come a long way from that of John Locke, to whom we owe the constitutional trinity life, liberty and property, and to whom property appeared as one's household goods and the fruits of one's labors, an extension of one's personality. Property has been largely dehumanized since the rise of large-scale enterprise, and consists in the value of relationships within groups to which the individual belongs, whether groups of investors or workers. The value of "property" has been all along in "belongings," but how different the connotations of the words have become! In the law, at least, de Tocqueville was right when he said that the human mind more easily invents new things than new words.¹⁴ Now the law is attempting to reconcile the facts of industrial life with the theory of ownership, to restore something of the old intimacy between an owner and his belongings.

Along with the theme of the democratizing movement in the law must be placed the theme of an individualizing movement. Sometimes the two currents are in collision. The principle of insurance, for example, as in the case of workmen's compensation or unemployment insurance, is one of the major democratizing forces in modern life. And yet it threatens the principle of individual accountability based on personal responsibility. In the field of unemployment insurance, one simple accommodation has been made to the principle of individual responsibility through the use of a merit rating system for employers.

In this conflict between the cushioning of victims through the spreading of costs and the imposing of rewards and penalties according to merit, Mr. Justice Brandeis thought that we had gone too far with the insurance principle.¹⁵ For this reason, he favored the separate plant reserve system of unemployment compensation; and he felt that fidelity insurance, whereby the managers of a business were shielded from their failure to discover a faithless employee, was an abomination. Many will disagree with his judgment. But at least he recognized the problem with which

14. 1 DE TOCQUEVILLE, DEMOCRACY IN THE UNITED STATES 200 (7th ed. 1882).

15. LIEF, *op. cit. supra* note 10, at 473.

the law must cope in many forms—the problem of the general security as against the unique moral claims and responsibilities of the individual. The same contest runs through the criminal law and through administrative law. Each has burgeoned as a protector of the general security through the recognition of new social duties, and each is an instrument of the democratization of law. At the same time each has had to devise ways of individualizing its sanctions, whether through the probation and parole procedures of the criminal law or through the dispensing power of administrative agencies.

One of the perpetual problems of the law is when to choose a rigid rule for the general security and when to rest on a more individualized view of blameworthiness. Was not this really the issue that lurked beneath the recent controversy over the appointment of a cabinet member who balked at disposing of his stock? He seemed to regard the barrier of the conflict-of-interest statutes as a reflection on his own integrity, for if he could not be trusted to place the public interest first he did not deserve to be appointed, and if he could be trusted there was no reason for divesting himself of his stock. Those who echoed this view, including some who saw in the statute only a bias of politicians against business men, missed the central issue, which was whether the problem of conflict of interest could best be dealt with on an individualized or on a generalized basis. Anyone familiar with the history of law, and of the idea of fiduciary duties which pervades so much of law, would recognize these statutes as typical prophylactic measures. They are premised on the ground that it is unsatisfactory and unseemly to examine into the motives or good faith of a public trustee in his official transactions, and that so far as possible it is best to avoid such inquiries by removing the conditions that might deflect the judgment either toward favoring one's private interests or, what would be almost as bad, toward disfavoring them, in carrying on the public business. The Government is thereby freed from the embarrassment of special scrutiny of the officer, and the officer is emancipated from the distractions of self-interest. That a sizeable number of citizens and commentators failed to see the issue in terms other than the personalities involved seems to me to reflect the lack of a general education in law.

I have been speaking of methods and movements in the law, of the adversary system, of negotiation and accommodation, of translation of social ideals into legal institutions, and of the currents of democratization and individualization which may appear in the aspect of general security and personal uniqueness and which may come into conflict and have to be resolved. In all of this our law strives to adjust conflicting ideals by methods which are pragmatic. As William James would have said, we define by consequences rather than by essences. If you want to appreciate the difference, simply review the struggle of the Supreme Court to adjust the power of the states over local health and safety to the power of Congress over interstate commerce, or try to distinguish a trust from a mortgage. I honestly believe that a better understanding of utilitarianism and pragmatism can be had from a study of torts or contracts than from a reading of Bentham or William James, though there is no reason why a university student should not do both. I say this not to assert that a Cardozo is a greater philosopher than a James or a Dewey. I only mean that the accommodating of ideals through the testing process of the law is an exhibition of pragmatic thinking and not simply a discussion of it. It was a philosopher, Alexander Meiklejohn, who best expressed the educational role of the Supreme Court, a role which I believe is played by our legal institutions as a whole, and who stressed the closeness of the work of the Court to the proving-ground of experience:

In the American schools and colleges, thousands of men and women are devoting their lives to the attempt to lead their pupils into active and intelligent sharing in the activities of self-government. And to us who labor at that task of educating Americans it becomes, year by year, more evident that the Supreme Court has a large part to play in our national teaching. That court is commissioned to interpret to us our own purposes, our own meanings. To a self-governing community it must make clear what, in actual practice, self-governing is. And its teaching has peculiar importance because it interprets principles of fact and of value, not merely in the abstract, but also in their bearing upon the concrete, immediate problems which are, at any given moment, puzzling and dividing us. But it is just those problems with which any vital system of education is concerned.¹⁶

16. MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 32 (1948).

One has only to deal with visitors from abroad to see how much of Anglo-American philosophy is reflected in our law. Where they proceed with ruthless logic from large propositions of principle, we are embarrassed when we try to frame tentative and modest generalizations from particular instances. Our earth-bound caution is not surprising in a legal system under which rights grew out of procedural writs. Recently a group of German lawyers visited my class in conflict of laws, and I learned later that one of them had asked a student, "What is this professor's theory of the subject?" Needless to say the student was at a loss to answer. I recall a conversation with an eminent European scholar who maintained that a statute held unconstitutional by a court was as if it had never been, and could be given no effect whatever, for otherwise the court would be making law and thus violating the principle of separation of powers. When I showed him an opinion of Chief Justice Hughes on the subject in which the upshot of the discussion was that everything depended on the precise effect to be given to interim events under the statute,¹⁷ he was struck with the point of view but remained unconvinced. Not long ago a class was discussing the question whether the courts of one state should be required to enforce the revenue claims of another state, and we canvassed arguments pro and con. Afterwards a European student came up and said, "Isn't the objection to such enforcement the fact that a revenue claim is a public law?" To him the category, not the consequences, was all-important and solved the problem. The dangers of thinking in slogans—whether they be "separation of powers" or "state police power" or "public law" or "sovereignty" or "guilt by association" or "un-Americanism"—can be attacked in many ways in university education, and I do not presume to argue that only an injection of legal thought can produce an antibody. What I am suggesting is that a university overlooks a rich educational experience when it fails to offer instruction in legal thinking as a part of general education.

I do not mean to suggest that common law lawyers and judges always succeed in freeing themselves from the tyranny of absolutes. But in time the absolutes generally yield to some workable adjustment. Take for example the problem of picketing. At one

17. *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 374-378 (1940).

time it was regarded as simply a form of economic duress which could be dealt with like lockouts or agreements in restraint of trade. Then for a time picketing seemed to be regarded as simply a form of freedom of expression, the workingman's way of exercising his freedom of speech. Now, however, it is recognized that picketing is a hybrid, or a legal mermaid, if you will, and that the role of the law is to deal with it on the specific facts, taking account of the means used and the purposes which it seeks to achieve. Take the problem of sound trucks. By some they are regarded as the twentieth century equivalent of the eighteenth century coffee house or pamphleteering. To others sound trucks appear to be an assault upon the senses of an involuntary audience, to be classified with other forms of nuisance. But we are working out an adjustment which recognizes that the truth lies somewhere in between, and that the problem is really one of regulating time and place and volume while keeping the content or the sponsorship safe from the censorship of public officials. Or take the case of group libel laws, making it a criminal offense to defame racial or religious groups. To some this form of insult or invective is the exercise of liberty of speech, to be met by counter-argument but not by suppression or punishment. To others, group libel is one form of ordinary defamation, and surely slander and libel have traditionally been outside the pale of the guarantee of freedom of expression. Here too, I suggest, we do not make a noise like a lawyer when we simply toot one horn of the dilemma. The real problem for legislatures and courts is to recognize that group libel has some of the elements of political expression and some of the elements of private defamation, and to devise appropriate safeguards both for the speaker and for the group. Those safeguards might include such elements of a criminal statute as the clear and present danger test, the recognition of truth as a defense, and the burden on the prosecution of showing an intention to incite to unlawful acts. But whether these or some other requisites are the most suitable, the important point is that the wisest solution of the problems comes from yielding our polar positions.

Some of the difficulty is due to the double function performed by our judges. They must decide the case before them for the sake of the litigants and at the same time they must write for posterity to guide the affairs of those who come after. Judges

are both arbiters and oracles. Some of our greatest judges have excelled as one or the other, differently gifted as they were by temperament and power of expression. Both are needed in the movement of the law. The layman quite naturally reserves his highest appreciation for the oracular judge, but the closer student of the law can see the wisdom and virtue in a judge like Augustus Hand who, when he wrote his opinion ruling that James Joyce's *Ulysses* could not be excluded from the country,¹⁸ remarked that he was careful to say nothing that would be quotable. One of the wisest of Mr. Dooley's stories described the scene when the decision in the *Insular Cases* was handed down, involving the power of Congress to levy a duty on products imported from Puerto Rico.¹⁹ I paraphrase the story for want of both a text and a brogue. Mr. Justice Brown announced that the Constitution follows the flag but not quite everywhere. Mr. Justice White dissented in part and concurred in part, and Mr. Justice Gray concurred in part and dissented in part. And when this kaleidoscope of color had ceased to revolve, a little old man in the rear of the courtroom rose and said, "Your Honors, can I ask a question?" The Chief Justice viewed him sternly and said, "What is it that you want to know?" To which the little old man replied, "Please, sir, do I get me lemons back?" Whatever the public and the press may think, the law is at its soundest when it does not forget the lemons.

Having made much of the fact that law is a pragmatic discipline, I may fairly be asked to consider a test case: how could general education in law contribute to a judgment on a problem that concerns the universities in their very being—the legislative investigations into certain affiliations of teachers. In part the legal aspects are technical, and I would not expect laymen, however well-rounded their general education has been, to know the precise significance of a claim of the privilege against self-incrimination. But I would expect them to distrust the easy generalizations we have heard on both sides, and to demand from commentators and critics some reasoned explanation of the privilege.

On the one hand we have heard that since the privilege is a

18. *United States v. One Book Entitled Ulysses by James Joyce*, 72 F. 2d 705 (2d Cir. 1934).

19. *Downes v. Bidwell*, 182 U.S. 244 (1901).

constitutional one its assertion is as colorless as the assertion by a Congressman of his constitutional immunity for statements made on the floor of Congress. What then of the evidently reasonable practice in a number of places of suspending or discharging policemen who assert the privilege? Is the duty of frankness less on the part of a teacher than on the part of a policeman? On the other hand, we are told that the claim of the privilege to a question regarding membership in the Communist Party carries a logical inference of guilt, a confession of membership, which is, so it is said, a crime; else how could the privilege be honestly claimed? This is, of course, a specious chain of reasoning. Membership in the Communist Party is not in and of itself a federal crime; the Internal Security Act expressly so states.²⁰ What is a crime is conspiracy under the Smith Act to advocate the violent overthrow of the government, or establishing an organization which so advocates, or being a member of such an organization knowing its purposes.²¹ The privilege with respect to the question of membership rests not on the notion that an affirmative answer would confess to a crime but, at most, that it would furnish a link in a prosecution under the Smith Act, though the witness may deem himself innocent of crime and indeed may be innocent because of his personal view of the purposes of the organization. Indeed, a refusal to answer may not even be an admission of membership. A truthful denial of past membership might lead a prosecutor to focus on questions regarding other forms of affiliation, and a truthful denial of present membership, in a series of questions, might furnish evidence useful to a prosecutor regarding the dates of prior membership.

The legal mind can at least make it clear that the situation is clouded with ambiguities. If the academic colleagues of the witness who claims the privilege then seek to dispel these ambiguities in the particular case by pressing for his motives, as seems proper, the legal mind can furnish some perspective. We can recall that the privilege was established in revolt against the practice of searching out religious heresy of a witness from his own lips, without the formality of a charge or confrontation with accusing witnesses. The privilege has grown wider; but its origin may have some bearing in judging those academic wit-

20. 64 STAT. 987, 992 (1950), 50 U.S.C. § 783 (f) (Supp. 1952).

21. 62 STAT. 808 (1948), 18 U.S.C. § 2385 (Supp. 1952).

nesses who may have been Communists, but who regard Communist affiliation as no more than a kind of political or economic heresy, having nothing to do with violent overthrow or thought control or subservience to a foreign power, and who, moreover, are unwilling to implicate their associates whom they believe to have been of like mind. Such individuals may, in your and my judgment, be greatly deceived, foolish and naive; their disillusionment may be slow in coming; the question is whether for these sins they merit dismissal.

These considerations have led us directly to the case of the admitted Communist, and I will only suggest some questions that the legal mind may put, leaving the answers to those who have to give them. Are we facing here still another form of that basic dilemma of the general security and the individual conscience, the principle of insurance, if you will, matched against the uniqueness of personal responsibility? Can we afford the latter, entailing scrutiny of the individual's claims, or must we forego it, as we do in the case of a cabinet officer with conflicting financial ties? The alternatives confronting teachers are incomparably harsher—loss of position and virtual blacklisting or divestment of beliefs and membership (the one divestment impossible, the other perhaps too late). Is the danger in the case of teachers correspondingly greater, and is the conflict of loyalties as clearly established to warrant a general rule? We have indeed adopted a general rule for officers of labor unions, a field where there was evidence that Communist leadership used its position for political ends, not the ends safeguarded by the Labor Relations Act. Are the universities, which are in the best position to judge, prepared to say that, as a matter of their experience, Communists have as a group shown lack of integrity in their teaching and professional writing, or been insufficiently devoted to their academic tasks, or counselled students in ways of breaking the laws of the land?

These are meant as honest and open questions, which seem to have been crowded out of the public mind by the black-letter headlines and the radio waves carrying reports of this or that encounter of a professor with a committee. The central issue which has to be faced is this: Shall the universities judge Communists, like other nonconformists, in the light of national security and academic integrity, on a case by case basis, as com-

plete and complex human beings, or is this a useless and costly luxury, and shall the universities instead lay down a blanket characterization and a universal rule of outlawry? Shall the universities follow, or depart from, the rule of the criminal law that attaches importance not merely to our own understanding of a member's commitments but to his understanding of them as well?

Like a typical law teacher, I am more confident in asking questions than in answering them. Also like a good teacher, I ought to acknowledge my predilections. Where choice is fairly possible, as between judgments in the mass and judgments of the individual, it is the latter current that needs reinforcing. The issue far transcends the plight of a few professors. In an age of mass politics, mass information, mass entertainment, mass communication, mass judgments, factories with so many "hands," armies with so many "bodies," humanity is in danger of becoming a set of statistics and stereotypes. How these movements, if sufficiently exploited, can lead to the corruption and caricature of democracy is best revealed in the Communist world itself. We should remember, too, that our great apostles of the free spirit are cherished for their affirmations and not for the blanket impersonal dooms they laid down owing to expediency or the prevailing climate of opinion. John Milton is not remembered for his exclusion of "popery and open superstition" from the bounds of toleration; nor John Locke for his exclusion of atheists; nor John Stuart Mill for his exclusion of backward peoples from the right of free expression.

What the world pays for is judgment, as Justice Holmes insisted. In another and tragic sense what the world pays for is mistakes of judgment. It is the business of a lawyer to seek for evidence and to ask questions, the questions that go to the heart of the matter. If the temper and outlook of the lawyer could be more widely shared, perhaps we might save ourselves a little oftener from the tragedy of mistakes of judgment. And so I urge you to give those "lesser breeds without the law" a taste of our austere and civilizing discipline.