THE MIND OF A LIBERAL LAW PROFESSOR: SELECTIONS FROM THE WRITINGS OF LOUIS B. SCHWARTZ

I. ON LAW REFORM

Why Penal Law Reform?[1]

The need for recurrent and systematic reconsideration of the penal law . . . is not so much because reform is likely to reduce the crime rate or flatten the current "crime wave", but so that we, the punishers, can believe that we are rendering justice as well as we can and that our system is worthy of our own respect.

Cycles of Reform: Existential Commitment Rather than Cynicism[2]

Anyone who has observed the cycle of penological reform may be forgiven a radical skepticism. Rehabilitation replaces retribution as the dominant goal of penal systems. Retribution makes a comeback. Sentencing discretion vested solely in judges gives way to vast discretion for parole boards. Flat sentences are abandoned in favor of indeterminate sentences, to be followed by a return to flat sentences subject to discounts for "good time" and to executive commutation of sentences. The philosophy of the juvenile court, based on assumptions of the benign purposes and omnicompetence of the state, gains sway over the neighboring territory of the "youthful offender," after which comes renewed faith in "adult" criminal procedure designed to protect against state tyranny. There is justification for skepticism about "expertise" and "science" in such matters, or at least for building into our theories the concept that modern economists call "bounded rationality," an overriding awareness that we know too little, and cannot know enough, to govern with confidence. Pessimism seems warranted as every reform seems to become the next generation's abuse. There are morals to be drawn from this perplexing history. The noble urge to improve must be tempered by a lively awareness that "progress" and "regress" are easily confused. Our movements must be tentative and heuristic, not dogmatic. This is not the counsel of despair. Immobility and stagnation are not

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[1] Schwartz, *Reform of the Criminal Law in the United States: Contemporary Issues,* in ENCYCLOPEDIA OF CRIME AND JUSTICE (1983).

[2] Schwartz, *Options in Constructing a Sentencing System,* 67 VA. L. REV. 637, 691-92 (1981) (footnote omitted).

acceptable alternatives. Reformers must reform. They had best do so, not because of any illusion that Satan can be finally laid by the heels, but because of an existential commitment to wrestle against him.

The perpetual process of reform should benefit if emphasis shifts somewhat away from the search for the "right" goal or combination of ultimate goals of a penal system. It is more fruitful to confront the problems of institutional structure, of administrative law, of allocation of power and checks on power, and of criteria for the exercise of discretion.

Purposes of the Penal Law[3]

On wire tapping, as on most problems of the penal law, where one comes out depends largely on the attitudes and assumptions which one brings to the controversy. At one extreme, one may believe that social order depends almost entirely on punishment of as many culprits as possible. At the other extreme is the view that all criminal law is simply crudely disguised vengeance, that jail and capital punishment are pointless cruelties deterring no one, embittering more criminals than they reform, and inflicting less pain on the guilty than on their innocent dependents. Between these two extremes is a third position that may commend itself to moderates. This position accepts the hypothesis of deterrence by example, but not the proposition that the best penal system is the one that produces convictions and sentences in 100% of the cases of crime. The paradoxical fact is that arrest, conviction, and punishment of every criminal would be a catastrophe. Hardly one of us would escape, for we have all at one time or another committed acts that the law regards as serious offenses. Kinsey has tabulated our extensive sexual misdeeds. The Bureau of Internal Revenue is the great archive of our false swearing and cheating. The highway death statistics inadequately record our predilection for manslaughter. One hundred percent law enforcement would not leave enough people at large to build and man the prisons in which the rest of us would reside. Somehow we manage to conduct a fairly orderly, stable society although arrests are made in a small percentage of the offenses committed, and convictions lag very far behind arrests.

A penal system gives us about all we can get out of it if apprehension and punishment are pursued and inflicted with sufficient determination that a would-be law violator must count them as substantial risks. The escape of an occasional or even many guilty individuals, be-

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[3] Schwartz, *On Current Proposals to Legalize Wire Tapping*, 103 U. PA. L. REV. 157, 157-58 (1954).

cause of the procedural safeguards that we accord to the accused, is therefore a tolerable price to pay for the preservation of an atmosphere of freedom and respect for individuality. Anglo-American societies have willingly paid this price for many centuries. Consider the number and variety of escape hatches for criminals built into our traditional and constitutional structure: the rule against searching a suspect or his house or his papers except on reasonable grounds previously exhibited to a judge; the requirement that prosecution witnesses tell their story in court, in the presence of the accused; the necessity that accomplice testimony be corroborated; the privilege against self-incrmination; the right to prevent one's spouse or lawyer from testifying to the crimes one has admitted in confidence; the constitutional necessity to produce two witnesses to an overt act of treason; the requirement of proof beyond a reasonable doubt; the right to trial by jury with the concomitant opportunity of the defendant to avoid punishment if a single juror, however obtuse, remains unpersuaded.

One stands amazed at these products of 1000 years of Anglo-American experience in restraining law enforcement. Make no mistake about it. These are not rules for the protection of the innocent alone. They are rules which operate and were intended to operate before anyone could decide whether the suspect was innocent or guilty. They are rules which are availed of in the vast majority of cases by persons more likely guilty than not. Their peculiar usefulness to the "guilty" is no accident, for many of these rules were written into the Constitution by real "criminals," fresh from experience as smugglers, tax evaders, seditionists and traitors to the regime of George III. Theirs was no mawkish sentimentality for miscreants. They understood, as we must understand, that the law enforcment net cannot be tightened for the guilty without enmeshing the innocent; that decent law enforcement is possible without impairing the bulwarks against injustice and tyranny; and that the worth of a society will eventually be reckoned not in proportion to the number of criminals it crucifies, burns, hangs or imprisons, but rather by the degree of liberty experienced by the great body of its citizenry. There have never been more determined law enforcers than Nazi Germany or the Soviet.

How Social Statistics Interact with Criminal Law[4]

The thesis is that the sex laws are absurd because they subject almost the entire population to corrective measures. Commentators

[4] Schwartz, Book Review, 96 U. PA. L. REV. 914, 914-17 (1948) (reviewing A. KINSEY, SEXUAL BEHAVIOR IN THE HUMAN MALE (1948)) (footnotes omitted).

have commended Professor Kinsey and his colleagues for showing "how unrealistic and even barbarous is the legalistic conception of sex relations." These laws, thus characterized as absurd in their total effect, are also challenged as class legislation, foisting the sex taboos of the upper social levels, *e.g.,* intolerance of premarital intercourse . . . , on the rest of the population.

In reading his data in favor of more understanding and less shock on the part of social workers, educators, military and legal authorities who encounter divergent sex practices, Kinsey is on firmer ground than when he suggests that the sex laws be repealed because so many men violate them. If the conduct proscribed by these laws is undesirable, evidence of promiscuous violation would, with greater logic, support an increase in penalties and more rigorous enforcement. The test of a criminal law is not its correlation with actual behavior, but its correspondence to behavior ideals and its efficiency in promoting those ideals. The report itself demonstrates that people who engage in forbidden practices nevertheless subscribe to the law and morality which condemn their conduct. This is not hyposcrisy, although hypocritical people may take such positions. This is only a recognition that there may be a better way of life than one is personally able to follow in every situation.

Do the sodomy laws, then, embody desirable standards of conduct? A very large proportion of our population will respond with an unhesitating affirmative, however irrational and superstitious this article of faith may seem to the anthropologist. Kinsey disclaims the desire or power to make moral evaluations and therefore must accept this popular hypothesis in evaluating the law. If we accept the hypothesis that sexual "perversion" is undesirable, the next question is whether the criminal law can effectively prevent it. The statistics seem to show that threat of imprisonment does not deter vast numbers of men from at least experimenting in heterodox sexuality. But it is important to bear in mind that the percentages stated in the quotation are *cumulative incidence* figures, *i.e.,* they denote the proportion of the male population which has *ever* had *any* of the named experiences. They do not represent proportions of the population currently engaged in forbidden sexual activity. A "cumulative incidence" of 95 per cent obviously includes a great majority whose sexual life exhibits fairly close conformity to the legal norm, despite occasional divagations. Overt homosexuality is an isolated or transitory experience in the lives of a very large proportion of the 37 per cent who have had it. Even in the age of greatest frequency of sexuality with animals—between adolescence and 20 years—only one per cent of total sexual outlet takes this form . . . .

If the effectiveness of criminal laws is to be tested by conformity and non-conformity, one would have to say there was more evidence here of success than of failure.

Even if it be assumed that the sex laws exert some influence in favor of desirable conduct, these laws could be justifiably criticized if they disserve other important objectives. If, for example, the effective deterrence of sexual non-conformity required the five per cent who are pure to support the rest of us in penal institutions, the pure would be the first to urge repeal. But that suggestion is nonsense. As well attack the criminal law in its entirety on the ground that the cumulative incidence of violations would put, not 95 per cent, but everyone of us in jail. At the technical level, the statute of limitations would save most; and premarital intercourse, the most frequent violation, is usually punishable only by a small fine. Beyond this is the reality of life, that the criminal law is never more than fractionally enforced, and should not be in view of the ridiculously inconvenient consequences of 100 per cent enforcement. The criminal law serves its purpose by threatening punishment rather than by actual incarceration, except in the relatively few cases where incapacitation is the dominant purpose of the sentence. The actuality of imprisonment is an unfortunate incident to the necessity of maintaining the threat. Considering the frequency of sex violations there are extraordinarily few persons in jail on this account.

There are of course evils that can flow from the existence of unenforced or whimsically enforced laws. Statutes which are generally honored in the breach lend themselves to blackmail and political persecution if someone unexpectedly chooses to take them seriously. A cynical attitude towards law enforcement in general may result from the presence of such laws. This danger, however, is gravest when violations are more or less public, as is often the case under liquor and gambling restraints. We are made uncomfortable by the glaring inconsistency between our ideals and our deeds. Sex crimes—especially those which are infrequently prosecuted—are for the most part secret. It is one of the paradoxes of social processes that Dr. Kinsey's *revelations* therefore may generate the very cynicism regarding law which might not have followed from the undocumented and unpublicized fact that our sex lives do not conform to our moral professions.

Now that Kinsey has let the cat out of the bag, shall we see major modifications of the sex laws comparable to the repeal of prohibition? I think not. Prohibition went out not merely because violation was frequent, but because of increasing doubts that the forbidden conduct was undesirable and much evidence that the cost and consequence of enforcement were intolerable. The situation of the sex laws is much more

comparable to the perjury problem. If cumulative incidence figures were compiled on conscious sworn fabrications in court proceedings, tax returns, etc., they would no doubt lend apparent support to the proposition that the perjury laws were "unrealistic" and "barbarous" contradictions of "normal" human behavior. But not a voice would be raised for repeal, because we would all go on believing that perjury was an evil and the threat of punishment plus the subtle influence of penal sanctions on the general moral climate of the community do tend to restrain it to some extent. Accordingly, Kinsey has not disproved the basic postulates of the sex laws: that the forbidden conduct is undesirable, that it can be deterred, and that the social cost of the deterrence program is not excessive.

It is on morals rather than on criminal law that *Sexual Behavior in the Human Male* must have its initial impact. Despite the authors' anxious attempt, as good scientists, to make amoral social interpretation, their strictures against the criminal law impugn the prevailing sexual morality. To reveal that certain behavior patterns are widespread, that they are a product of environment, opportunity, age and other factors over which the individual has little control, that they are not objectively harmful except as a result of society's efforts at repression . . . , to point out that similar behavior is encountered among other animals than man, to suggest that the law ought not to punish and that psychiatrists might better devote themselves to reassuring the sexual deviate rather than attempting to "redirect behavior". . .—all these add up to a denial that sexual "perversion" is an evil. When this doctrine presents itself for public acceptance, it faces formidable opposition based on Holy Writ and immemorial folk-belief, precisely as did the revision of religious beliefs implicit in Darwin's *Origin of Species.* Not until this new morality triumphs, or the more distant day when Americans cease to regard minority morals as a legitimate object of social coercion, will it be time to say that the law, which can only define and implement generally accepted social objectives, is unrealistic and barbarous. Meanwhile changes in practice will accrete, perhaps faster than changes in doctrine. District attorneys in selecting cases for prosecution will make practical distinctions between commercial pandering to bizarre sex desires and the non-conformity of one married couple to the methods of physical gratification satisfactory to others; between homosexual relations voluntarily established among adult partners and aggressions or seductions that turn the inexperienced into unhappy byways of social conflict. Eventually, such distinctions ease themselves into the written law, especially if it can be done in the course of a general revision of the penal code. This avoids the appearance of out-

right repudiation of conservative moral standards, by presenting the changes in a context of merely technical improvements.

Sin and the Criminal Law [5]

The argument for maintaining criminal sanctions against professional promoters of "vice" is essentially that drawing the line there retains some brake on economic exploitation of human weaknesses and some expression of the community's reservations about the activity itself, but minimizes the intolerable side-effects of attempting to make criminals out of millions of users of marijuana and patrons of gambling or prostitution. It is not "illogical . . . to forbid selling what it is permissible to give away free" because the cost-benefit calculation for law enforcement against sellers is quite different when buyers are also incriminated. Selling, in our commercial society implies promotion, advertising, bait for the unwary. A restraint on such activity does indeed somewhat restrict access to goods and services that some customers desire. It may also raise the price through the operation of the "crime tariff." But the customer remains free, in the sense that his personal security is not threatened by the State. The relatively few sellers are so threatened, but the constraint upon them is not an attempt to govern their life styles or sensual satisfactions; it is instead a relatively conventional regulation of economic activity. The ways in which one can make a living in our society are restricted by legislation ranging from licensing statutes to anti-begging ordinances. Even if one were prepared to recognize the "right to be sick" so far as to legalize possession, use, and non-commercial transfers of opiates, would it be arbitrary for Congress to ban importation and wholesale distribution of narcotics?

Abortion: Partial Decriminalization Recommended [6]

The criminal law in this area cannot undertake or pretend to draw the line where religion or morals would draw it. Moral demands on human behavior can be higher than those of the criminal law precisely because violations of those higher standards do not carry the grave consequence of penal offenses. Moreover, moral standards in this area are in a state of flux, with wide disagreement among honest and responsible people. The range of opinion among reasonable men runs from deep religious conviction that any destruction of incipient human life,

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[5] Schwartz, Book Review, 44 S. CAL. L. REV. 528, 531 (1971) (reviewing H. PARKER, THE LIMITS OF THE CRIMINAL SANCTION (1968)) (footnotes omitted).

[6] MODEL PENAL CODE 150-51 (Tent. Draft No. 9, 1959) (Schwartz proposal).

even to save the life of the mother, is murder, to the equally fervent belief that the failure to limit procreation is itself unconscionable and immoral if offspring are destined to be idiots, or bastards, or undernourished, mal-educated rebels against society. For many people sexual intercourse divorced from the end of procreation is a sin; for multitudes of others it is one of the legitimate joys of living. Those who think in utilitarian terms on these matters can differ among themselves as widely as moralists. Voluntary limitation of population can be seen as national suicide in a world-wide competition for numerical superiority, while to others uncontrolled procreation appears equally suicidal as tending to aggravate the pressure of population on limited natural resources and so driving nations to mutually destructive wars. To use the criminal law against a substantial body of decent opinion, even if it be minority opinion, is contrary to our basic traditions. Accordingly, here as elsewhere, criminal punishment must be reserved for behavior that falls below standards generally agreed to by substantially the entire community.

An Agenda for Further Reforms of Penal Law[7]

One can dream of possibilities in legislation, criminal administration and political leadership that go well beyond the range of this article. How refreshing it would be if the new President [Carter], as he signed the criminal law reform bill, should declare:

> This is not a Safe Streets Act. Criminal laws are a secondary, although essential, protection against violent crime, and the states rather than the federal government are primarily responsible for physical security on the streets and in the homes. Of greater significance than criminal law, in the long run, is the confidence of all segments of the community that our system is fair and benevolent: fair in the distribution of income, fair in the assessment of taxes and other burdens, benevolent in its respect for individual freedom. This new federal criminal code promotes respect for law by its rationality, by its safeguards against discrimination and arbitrary punishment, and by eliminating obsolete and technical obstructions to effective law enforcement. Along with other reforms, it may make a contribution to a more tranquil life in city and countryside. We don't know that it will because,

[7] Schwartz, *Reform of the Federal Criminal Laws: Issues, Tactics, Prospects,* LAW & CONTEMP. PROBS., Winter 1977, at 1, 58-60 (footnotes omitted).

> despite prodigious efforts in universities and government, the causes of crime are very poorly understood and "cures" for crime virtually unknown. But if we cannot look to today's legislation to "solve the crime problem," we shall at least have cleared away ancient and ugly grievances against the system.

This modest, and therefore honest, declaration might well be accompanied by a few measures that would put future reforms on a solid footing. Among these, the highest priority might be given to establishing a credible system of criminal statistics. The existing system is a scandal. It depends almost exclusively on crimes reported to the police or on arrest statistics. The very categories used in reporting crimes—larceny, robbery, burglary, fraud—embrace such a broad range of behavior, from the trivial to the most dangerous, that reporting in such categories reflects the nature and gravity of crime only with intolerable margins of error. Since the overwhelming majority of crimes are not reported to police, since the number of arrests made is largely a function of fluctuating police policy, and since the numbers have frequently been manipulated by reporting police departments to make themselves look better, the country is operating in a state of basic ignorance. We cannot be sure, for example, how much of the huge reported increase in crime in recent years reflects changes in the reporting system, monetary inflation that converts formerly petty thefts into reportable felonies, or even such beneficent developments as a greater readiness of Blacks, emerging into the mainstream of American life, to report crimes to the police. It is time to establish a national crime census, based on scientific sampling of the general population, to ascertain the number of actual victimizations in a given period. Such data could be supplemented by reports from employers, insurance companies and other institutions, and from the armed forces, regarding those vast pools of unreported theft and aggression on the docks, in the warehouses, in the banks and in department stores. It is only by regarding the phenomenon of crime with unflinching concentration and acceptance of the full truth—as if we were epidemiologists bent on wiping out smallpox in India—that we can aspire to understanding and control.

Other promising paths of advance would include: (1) providing further guidance for the exercise of judicial discretion in sentencing by developing "presumptive sentences" for typical situations, along lines recently advocated by Senators Kennedy and Hart; (2) creating in the Department of Justice a permanent criminal justice research unit to follow the legislative, judicial and administrative developments throughout the nation and the world, and to act as a clearinghouse for informa-

tion and suggestions to the states; (3) experimenting with the correctional system by, for example, making disciplined labor on public works the central experience; (4) developing some alternative to the faltering juvenile delinquency laws for removing violent young aggressives from the environments which they terrorize; and (5) introducing into the law of justification and excuse the concept of a margin for noncriminal error.

As Mr. Justice Brandeis said long ago, "If we would guide by the light of reason, we must let our minds be bold."

On Intransigent Perfectionism as Obstacle to Pragmatic Law Reform[8]

Senator Kennedy's Criminal Code Reform Act of 1978 (S. 1437; H.R. 6869) recently passed the Senate by a vote of 72 to 15; but its future in the House, where hearings are being conducted in the Committee on the Judiciary, is problematical . . . .

Although the opposition in the Senate was overwhelmingly right wing (Senators Eastland, Dole, Griffin, Allen, Domenici, Bartlett, et al.), the big threat to the prospect for reform comes from certain elements of the civil liberties establishment. In this bizarre alliance of Left and Right to defeat reform, the self-destructive posture of the Left is "we oppose any bill that does not include *all* the reforms we favor." No effort is made to distinguish between objectionable features which the bill merely carries forward from existing law and objectionable features which can possibly be attributed to the Kennedy bill . . . .

The tone of the opposition is hysterical. [A published] ACLU memorandum includes charges that "dangers . . . are enlarged by . . . re-enactment of [certain existing provisions]." How re-enactment of existing law can enlarge dangers is not explained. Some other scary charges are based on farfetched interpretations which "*could conceivably*" render some provisions oppressive. Such an approach disregards prior experience with similar existing law, disregards normal rules of interpretation, disregards constitutional limitations which limit the application of all laws, and above all disregards the age-old lesson that abusive prosecutions are possible under any law (history records abusive prosecutions for treason, murder, rape, trespass, bribery, contempt of court, etc.). All criminal law has potential for abuse, and the price of liberty is eternal vigilance. But, as Alexander Hamilton wrote in *The Federalist* of opponents to the constitutional proposal for an indepen-

[8] 226 NATION 386, 386, 403 (1978) (letter to the editor from Louis B. Schwartz).

dent judiciary, the guardians of liberty should not give themselves up to "the rage for objection which disorders their imaginations and judgements."

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The issue which has fractured the liberal community in this instance is not what civil liberties are desirable—we are virtually unanimous as to that—but which are at present achievable. That is a political issue. On such an issue liberals would do well to align themselves with that master of politics who has already performed a political miracle for civil liberties in getting S. 1437 through the Senate largely unscathed, Senator Kennedy. ACLU and the National Committee Against Repressive Legislation have no power to bring about the enactment of an ideal bill. They have only the power to foster doubts among wavering or confused legislators, and thus to aid the forces of reaction and lethargy that are aligned against the Kennedy bill, i.e., against any reform whatever.

The Best As Enemy of the Good[9]

After 10 years of effort and controversy, the moment of truth has arrived for reform of the federal criminal code. Senator Edward Kennedy's version has been approved by the Senate Judiciary Committee with a single dissent because of its leniency toward marijuana. Representative Robert Drinan's version has just been favorably reported by a two-to-one vote of the House Judiciary Committee. The Drinan bill is somewhat more favorable to civil liberties than what Kennedy was able to achieve in the Senate, but both versions represent extraordinary advances over existing law. Inevitably, the reform project bypasses many hot issues, such as capital punishment, gun control, espionage, entrapment, and wiretapping. On these subjects existing law would remain in force, part of the never-exhausted agenda of law reform. But hundreds of improvements proposed by Kennedy and Drinan go a very long way toward promoting respect for law by making the law respectable.

What, then, stands in the way of this civil liberties reform? It is not the opposition of right wingers in both houses. Strangely enough, the principal obstacle is the American Civil Liberties Union. In the early 1970s, the ACLU and other liberal groups fought valiantly to defeat the notorious S.1, President Nixon's retrograde version of criminal law reform. But the ACLU became intoxicated by the thrill of opposition. In the years since, it has drifted into the paranoia of opposing

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[9] Schwartz, *Civil Liberties vs. the ACLU,* NEW REPUBLIC, July 26, 1980, at 20, 23.

any provision which "could be abused," as if there were ever a criminal law that could not be abused. It has attacked the proposed code for provisions found in existing law, as if the code had introduced them or as if defeat of the code would get rid of them. In general, the ACLU has fought progress on the indefensible line that no reform, however beneficent, is acceptable if it omits any desirable element. In a final act of political and intellectual bankruptcy, the ACLU, following favorable action by the House Judiciary Committee, announced its opposition to the Drinan bill. A notable case of "the best as enemy of the good."

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Those who are struggling to achieve a modern liberal federal criminal code would do well to ponder what Benjamin Franklin said at the end of the debates over the federal Constitution:

> [W]hen you assemble a number of men to have the advantage of their joint wisdom, you inevitably assemble with those men, all their prejudices, their passions, their errors of opinion, their local interests, and their selfish views. From such an Assembly can a perfect production be expected? It therefore astonishes me, Sir, to find this system approaching so near to perfection as it does. . . . Thus I consent, Sir, to this Constitution because I expect no better, and because I am not sure that it is not the best.

II. On Individual Rights

Defending the Exclusion of Evidence Obtained by Illegal Police Practices [10]

THE American rule forbidding use of illegally obtained evidence to secure criminal convictions has evoked reactions from British penalists ranging from outright rejection to perplexity or gentle tolerance. It has seemed anomalous that the criminal should go unpunished because the policeman erred. Far better to convict the manifestly guilty murderer or rapist and then turn one's attention to the proper measures of discipline to be applied to the policeman. "Two wrongs don't make a right" triumphantly declare the more naive of my fellow-countrymen who deplore the rule of exclusion. I have not heard that supposedly conclusive argument from Englishmen, but the general opinion here seems to be that it is surely enough to give judges discretionary power to exclude evidence when they are satisfied that it has been unfairly or oppres-

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[10] Schwartz, *Excluding Evidence Illegally Obtained: American Idiosyncracy and Rational Response to Social Conditions*, 29 MOD. L. REV. 635, 635-36 (1966) (footnotes omitted).

sively obtained. Perhaps that does go far enough in a country where it can be said that a word of disapproval from a judge would assure a change of practice by the police. American police are not so malleable; they not infrequently pass adverse public judgment on the judicial decisions which restrain them, with more than a hint occasionally of an intention to persist in methods which they regard as essential to their success. . . .

The essence of the matter is that American experience has shown the inefficacy of collateral disciplinary measures to secure police observance of lawful limits of their investigative procedures. . . . It is hardly to be wondered at that a policeman who is the hero in Monday's conviction of a dangerous criminal will not find himself in the prisoner's dock on Tuesday charged with criminal trespass or false imprisonment based on the tactics of his arrest of the convict. It would be his fellow-police and his collaborator, the public prosecutor (usually an elective office in our states), who would have to turn on him thus. Nor are civil remedies adequate against misguided police zeal. Damages to those most likely to be victimized by police excesses will be minimal, and the defendant policeman is unlikely to be able to pay a substantial judgment. The rationale of the exclusionary rule is not "punishment" of the police. Obviously reversal of a conviction does not penalize a policeman, whatever might be said as to its penalizing the victim or the public. The rationale is removal of any incentive for the police to violate the rules.

A most important point to appreciate regarding the exclusionary rule is that objections on the ground that it enables guilty people to escape condemnation impugn the substantive rules themselves rather than the evidentiary rule, because there is no doubt that many more guilty people escape as a result of the presumably normal compliance of the police with the laws that restrain their operations than escape as a result of discovered non-compliance. If the laws restrict the police too much, that issue should be faced directly rather than evasively by retaining the restriction and failing to implement it.

For Total Independence of the Public Defender of the Indigent [11]

[Professor Schwartz resigned from the Executive Committee of the Philadelphia's Defender Association and brought suit to prevent a restructuring of the Association that allotted fifty percent of the control-

[11] Petition for Certiorari at 10-11, Schwartz v. Defender Ass'n, *cert. denied,* 414 U.S. 1079 (1973) (Douglas, Brennan, & Marshall, JJ., dissenting from denial of certiorari to *In re* Defender Ass'n of Philadelphia, 453 Pa. 353, 307 A.2d 906 (1973)) (footnote omitted).

ling power to the Mayor and City Council in exchange for municipal financial support.]

The constitutional right to the assistance of counsel is violated by any system of providing defense to the indigent which is dominated by law enforcement authorities.

On its face, 50% of the power in the reorganized Board of Directors is in the hands of the Mayor of Philadelphia, who appoints the Commissioner of Police and the City Solicitor, a prosecuting officer. The Mayor is also, of course, responsible for the maintenance of order in the City, and for the execution of its laws. But the actuality of power is far greater than the nominal 50%. The increment of power above 50% derives from the expectable bloc voting of the Mayor's non-tenured appointees, particularly in the election of the "neutral" directors, on the budget of the Defender, and on any other issue that concerns the Mayor.

The existence of control and the inclination to use it are clear. The Mayor was able to make it a condition of the deal that the incumbent Chief Defender, a political opponent, be dismissed, and that future Chief Defenders should not enjoy a protected tenure but should be dismissable without cause. The bold proclivity of the Philadelphia executive and law enforcement authorities to put pressure on the Defender and even the judges is revealed in the dissenting opinion below . . . .

The unique structure of the reorganized Board of Directors is stamped on its face as an impermissible sharing of power with interests antagonistic to the defense. The tripartite arrangement, under which enforcement authorities designate 10 directors; defense interests designate 10 directors, and these 20 designate 10 more "neutral" directors, is plainly derived from commercial and labor arbitration. Whatever may be the merits of such a structure for an unofficial tribunal on which representatives of each party to a private controversy may, pursuant to prior agreement, sit alongside "neutral" members, it is unthinkable that defense of the indigent be so organized. Legal defense is not arbitration. It is not intended to work out practical compromises or alliances between commercial interests. It is not intended to be "neutral." It calls for unequivocal commitment to the interests of the accused. Even in the military service, where of necessity the ordinary liberties of a citizen are restricted, "command influence" in the structure of courts martial has been abjured.

Favoring Effective Federal Judicial Review of Local Police Abuse [12]

[In this article for *The Progressive,* Professor Schwartz criticized the five-to-four decision of the United States Supreme Court in *Rizzo v. Goode.*[13]]

The grounds on which Justice Rehnquist overruled the lower courts erect insuperable barriers to efforts by civil rights groups to force police departments to take complaints seriously. Rehnquist's judgment that "the evidence did not establish the existence of any [department] policy to disregard constitutional rights" apparently means that police departments are to be immune unless they declare openly that they oppose the Constitution. It is not enough to prove twenty individual complaints within a year "in a city of three million inhabitants" (Philadelphia's population is actually two million); Blackmun pointedly inquires whether 100 or 500 would be enough, and how long the trial would have to last. Mere "failure to act," a willful default in supervision and discipline in cases of police brutality, will not warrant Federal judicial "intrusion" into the "discretion" of police management.

Most frightening of all is the Court's response to the finding by the lower courts of a *pattern* of constitutional violations: "There was no showing that the behavior of the Philadelphia police was different in kind or degree from that which exists elsewhere . . . the problems disclosed . . . are fairly typical of . . . police departments in major urban areas." This means that until plaintiffs can prove that the situation is worse in Philadelphia than in New York or Chicago, there can be no judicial relief. Wherever a suit is brought, the plaintiff will have to show that the defendant department is worse than most. The scope of the trial is impossibly broadened. The purpose and effect are clear: to slam the door of the Federal court in the face of citizen groups seeking to bring police department procedures into line with the Federal Constitution.

Against Authorizing Police to Detain for Investigation[14]

The [American Law Institute Model Pre-Arraignment Code] proposal improperly transfers traditional judicial power to police. The Institute is presented with the choice between two basic conceptions of the relation between the police and the judiciary:

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[12] Schwartz, *A Blow Against Liberty,* PROGRESSIVE, Mar. 1976, at 9.

[13] 423 U.S. 362 (1976).

[14] Memorandum from Louis B. Schwartz to the American Law Institute, May 1966 (opposing Tentative Draft No. 1 of the ALI Model Pre-Arraignment Code).

> (i) The traditional and presently legal relationship has the police making inquiries and conducting surveillance *without interference with anybody's freedom of movement.* When objective cause to believe in X's guilt arises, the policeman is authorized to take X into custody or preferably summon him to appear. Custody by the policeman is converted into custody by judicial authority as soon as practicable, i.e. by preliminary hearing before a magistrate. *The crucial point is that the police are never authorized to make judgments about the need to prolong custody.* It is left to *judges* to make all determinations about prolonging custody.
>
> (ii) Tentative Draft No. 1, on the other hand, leaves it to the police themselves to judge the need, not merely to take custody by arrest, but *to prolong custody for the convenience of investigators and prosecutors, and to obtain admissions of criminality.*

The latter is a transfer of traditional judicial power to the executive. It may be surrounded, as it is in the draft, with many safeguards. Time limits may be imposed. But once we approve the principle of investigation while a man is held in police custody, this mountain of safeguards will begin to melt. In my opinion it *must melt* because, encumbered with all these restraints, the change will not yield what the police say they need. And we will already have conceded that they are entitled to get the confessions they want. Legislatures considering our Model Code will not feel bound by our precautionary measures, e.g. the recording of interrogations provided by § 4.09, the hour limits set by § 4.05. Why should they? There is nothing to support these precise limits except the honorable impulses of the draftsmen, and I dare say that the state legislators will trust their own instincts at least as much as that of the "professors."

Institutional Racism[15]

[Professor Schwartz and Professor Edward V. Sparer exchanged a series of memoranda on this subject that were later printed in the University of Pennsylvania's *Gazette.* The following is an excerpt from one of Professor Schwartz's memoranda.]

You quite legitimately put back to me the question that I have repeatedly urged on you: "What is institutional racism?" My answer is

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[15] Memorandum from Louis B. Schwartz to Edward V. Sparer, *reprinted in* PA. GAZETTE, March 1982, at 23, 26.

that it is a rhetorical phrase employed as a substitute for thought, a pejorative flexible enough to give the user psychic satisfaction without compelling him or her to identify a particular evil or a particular remedy.

You and I have agreed (i) that an ethnic disproportion in desirable posts does not necessarily betoken anything that can properly be designated as racism; and (ii) that the presence of ethnic disproportions would raise questions in the mind of persons of goodwill as to whether institutional obstacles needlessly (even though unintentionally) obstructed access to goodies by disadvantaged groups. It seems to me therefore that useful discourse in this realm would take the form of assertions (and correlative contradictions) that, for example, the requirement of creditable published scholarly work is an improper standard for professional tenure, if a Black is excluded on this ground, even though the requirement has jeopardized 100 Whites for every Black affected by it, and was established in societies where there was no race issue. Whenever tests for competence have been established, whether in medicine, engineering, music, mathematics, nuclear physics, or bar examinations, one is entitled to ask that the tests be examined for relevance to the tasks to be done, if they tend unnecessarily to ethnic disproportion. If the standards survive such reexamination, one is not entitled to fire at random the blunderbuss, divisive charge of "racism."

Relieving the Horrors of the World War II Internment of Japanese Americans [16]

[After the Japanese attacked Pearl Harbor in 1941, the United States interned its Japanese citizens in the Western Command.[17] Thousands of young lawyers in many departments of the federal government in Washington, D.C. were then coopted into a corps of reviewing officers to pass upon individual applications for release from detention. Professor Schwartz, then in the Justice Department, was a member of this corps. He wrote the following memorandum recommending release.]

EVIDENCE: Subject is a Japanese fisherman, a member of the Terminal Island Fleet. He is 54 years old, received eight years grammar school education in Japan and came to the United States in 1906 at the age of 18. He returned to Japan in 1917, married and reentered the United States with his wife in 1918. Since that time he has resided

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[16] Memorandum from Louis B. Schwartz to Chief of Review Section, United States Dep't of Justice (July 17, 1942).

[17] *See* Korematsu v. United States, 323 U.S. 214 (1944).

continuously in the United States and has been a fisherman for 28 years. He can pilot a boat and use a compass and his fishing operations ranged from San Francisco down to the Mexican coast and out as far as the San Clemente Islands. The hearing board found, rather mysteriously, that his boats were "equipped with radio" but "not equipped with wireless." Subject has five children of whom the four oldest were born in the United States and the youngest, a boy 13 years old, born in Japan on a visit by his wife to her mother. On this same visit his wife left their third child, a girl now 18, in Japan with her grandmother. This girl is registered for dual citizenship in Japan. Subject explained that his daughter in Japan registered for dual citizenship in order to get a diploma from school. The youngest boy, born in Japan, came back to the United States at the age of nine months and has lived here ever since. One of subject's sons operates a chicken ranch in Alabama. Another son is in the army. Two of them were in junior high school at San Pedro, California. All children living in the United States attended a Japanese language school at Terminal Island for four or five years.

Subject has had no military service; registered for deferment in accordance with Japanese law. He belonged to no Japanese associations except the Fishermans' Association and was never an officer of this group. He subscribes to Rafu Shimpo, a Japanese newspaper, and denies making any contributions to Japanese war relief saying that he was too poor and had too many children. Subject is a Buddhist and believes in the divinity of the Emperor, explaining that he was so taught from childhood. When asked if he would obey any command of the Japanese Emperor he said he would hardly do so because three of his children were United States citizens "but of course I am of Japanese citizenship." He said he wanted neither Japan nor the United States to win the war but wanted peace. He wanted America to win for the sake of his children but on the other hand as an individual and subject of Japan his conscience forced him to say that he wanted Japan to win. When asked if he thought he would be better off if Japan won the war he said perhaps it would be better for him but not for his children. The board commented that subject's demeanor was courteous and serious and recommended his internment as "potentially dangerous" on account of his loyalty to Japan, the fact that one of his daughters was there and that one son was born in Japan and also "on account of his unsatisfactory answers to some of our questions." CONCLUSION: I recommend parole for this subject. I believe that he represents a case of honestly divided sympathies and I think the hearing board's findings show that they were not altogether clear that he was dangerous. In the absence of any indication of subversive associa-

tions or sentiments it seems to me unnecessarily harsh to separate such a man from his family by internment.

Lenience to Nazi Refugees on the Question of "Moral Turpitude" in Lying to Immigration Authorities [18]

[During the Holocaust, the lucky thousands who escaped death sought refuge in foreign countries, including the United States. The Immigration and Naturalization Service of the United States Department of Justice often found these refugees to have committed "crimes" in their own countries, making them subject to deportation if those crimes were interpreted to have involved "moral turpitude." As an attorney in the Department of Justice, Professor Schwartz wrote the following interpretation exonerating many refugees of "moral turpitude" in offenses committed under the duress of persecution.]

The conclusion of the immigration authorities that the alien committed a crime is insufficient if based on anything less than unequivocal admissions with respect to every material element of the offenses. The file does not show that any such admission has been made by Krawiecki. He did admit to swearing to the false statement regarding his birth, etc., but all his statements regarding the mental element of the crime seem to be exculpatory. There is no indication that he concedes his guilt of violating any criminal law. Even if he had made such an admission one might have questions regarding it in view of the unlikelihood that he is familiar with our law, and the ambiguities of the situation with respect to intent and motive, and in respect of the materiality of the misstatements.

I am definitely of the opinion that under the peculiar circumstances of this case no moral turpitude is involved. The elements of coercion are much the same as those presented in the Attorney General's opinion authorizing the admission of a German-Jew convicted of falsifying financial statements in Germany in connection with his emigration. Lisbon, in 1940, when France had collapsed and it seemed probable that Germany would prevail, and when frantic émigrés envisioned Spain as well as Portugal overrun by the Nazis, was no place for the exercise of unbiased moral judgment. Moreover State Department communications in this file twice refer to the fact that Krawiecki would have obtained his transit visa to the Dominican Republic even if he had told the truth about his Polish rather than Lithuanian origin. A

[18] Memorandum from Louis B. Schwartz to Assistant Attorney General Wendell Berge (Aug. 14, 1943).

false statement regarding what appears to have been therefore an immaterial matter hardly rises (or should I say falls) to the level of moral turpitude.

Freedom of Speech: Recommending Against Prosecution of Columnist Drew Pearson for Criminally Libelling Secretary of State Cordell Hull [19]

In essence, Pearson makes two charges against the Secretary: (1) That he is incompetent as shown by his official actions toward Latin America, the Free French and the Soviet Union, and by his choice of subordinates; and (2) that he is biased against the Soviet Union and acts officially on the basis of this bias. As you know, the Secretary has publicly characterized these charges as "monstrous and diabolical falsehoods" and suggested that they give aid and comfort to the enemy, and the President is reported to have called Pearson a chronic liar.

. . . .

In considering the applicability of the criminal libel statute, I assume that Pearson's statements were false and defamatory and there is of course no question as to publication. The principal, and to my mind insuperable, obstacle to prosecution would be the protection afforded the defendant by the privilege of fair comment upon public officers. This privilege, a product of the bitter English political struggles of the 17th and 18th centuries, gives immunity to criticism of a public official's conduct of or capacity for office, provided there be no actual malice. The privilege is based upon the paramount interest in free discussion of the conduct of the public affairs, and criticism of the official acts of cabinet officers has been cited as a typical case for the operation of the principle.

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Prosecution, in the circumstances of this case, would be generally and rightly regarded as an attack upon freedom of discussion. It would discredit the Administration and prejudice the State Department far more than Pearson's columns.

III. On Antitrust, Economics, And Law

Goals of Antitrust: Freedom and Political Responsibility [20]

The purpose of the antitrust laws is to preserve liberty, *i.e.*, free-

[19] Memorandum from Louis B. Schwartz to Attorney General Francis Biddle (Sept. 3, 1943).

[20] ATTORNEY GENERAL'S NAT'L COMM. TO STUDY THE ANTITRUST LAWS, DEP'T OF JUS-

dom of choice and action, first in the economic sphere but ultimately in the political sphere as well. Businessmen are to be free from direction or coercion of other businessmen. Buyers are to be free from concerted exploitation by sellers and vice-versa. No one is to build, alone or in combination with others, an industrial empire of such scope that others must perforce deal with him or on his terms. Entry into all trades and businesses shall be as free as physical limitations permit.

This maximization of freedom is desired because of the favorable economic consequences of competition, as is fully shown in the Majority Report; but that is not all. It is also desirable on principle and for its own sake, like political liberty and because political liberty is jeopardized if economic power drifts into relatively few hands. The centers of great wealth will own and influence newspapers, magazines and broadcasters, direct the development of universities, retain the ablest lawyers, economists and public relations specialists, finance political parties, infiltrate or wear down the executive agencies by which they are supposed to be regulated, and operate powerful lobbies so that the popular will itself is shaped to their needs. In addition, individual dignity and responsibility are magnified in a free economy. Success will not depend solely on the favor of superiors in a great pyramid of power, but may be achieved also by striking out on one's own, winning fortune from the patronage of fellowmen. Freedom on the economic frontier is today's only substitute for the open Western lands which in other generations nourished American individualism.

Antitrust as a Quasi-Constitutional Principle[21]

American antitrust laws are a product of American democratic traditions and aspirations, suspicion of concentrated power combined with self-interest, and skepticism about bureaucratic "expertise" whether in government or in the management of giant firms and associations. The goals of the antitrust system are broader than economic efficiency, a quality which "antitrusters" believe difficult to appraise by any standard other than success in a competitive market. The goals, in short, are political and social as well as economic. It is believed that concentrated economic power tends to dominate government and hence leads to authoritarian societies. It was on this theory, as well as upon

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TICE (1955), *reprinted in Hearings Before the Senate Select Comm. on Small Business,* 84th Cong., 1st Sess. (Part 1) 244, 259-60 (1955) *and in* 1 ANTITRUST BULL. 37, 38-39 (1955) (Louis B. Schwartz dissenting from Majority Report) (footnote omitted) [hereinafter cited as Antitrust Committee Dissent].

[21] Schwartz, *American Antitrust Laws and Free Enterprise,* SWISS REV. INT'L ANTITRUST LAW, Jan. 1978, at 3-5.

the belief that a competitive society is the strongest and most dynamic, that the United States, after World War II, pressed for antitrust regimes in Germany, Japan, and other countries receiving Marshall Plan aid.

On the domestic front, the Americans view cartels and monopolies as usurping governmental power when they "regulate" commerce by controlling prices, terms of trade, production, marketing territories, or the free decisions of other entrepreneurs. The United States Supreme Court has noted that our Constitution designates *Congress*—i.e. a politically responsive body—as the agency to regulate interstate and foreign commerce. The power of a cartel or monopoly to raise prices is seen as "taxation without representation," a slogan which animated the American Revolution against England. The antitrust laws do not, however, express a preference for political control of economic decision. On the contrary, "antitrusters" are inclined to oppose or minimize government intervention unless free enterprise solutions demonstrably fail to achieve social goals. It is for this reason that antitrust enjoys the support in principle of the whole spectrum of American business, although in practice each industry may be constantly seeking to insulate itself from antitrust controls. Paradoxically, the antitrust program, although aimed at minimizing government regulation, may actually entail considerable government intervention, e.g., by complex judicial injunctions designed to maintain workably competitive markets. A major reason why antitrusters seek to limit the replacement of competition by government regulation is that regulating agencies tend to become dominated by the industry's viewpoint.

Finally, antitrust goals include certain beneficial effects on the quality of life. Free enterprise is more likely than government controls to give us a variety of products and services, a variety of points of view in books, newspapers, movies, and sports, wider choice of employment, more responsiveness of firms to local exigencies, etc. . . .

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The foregoing explains the remarkable assimilation of antitrust to a *constitutional* principle in American jurisprudence. The United States Supreme Court has said:

> Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.

Expressing, therefore, a quasi-constitutional principle, the antitrust law

is not inhibited by any perceived conflict with "freedom of contract." Not only contract law, but also the law of property, of freedom of association, of agency, and of patent must yield to the principle that legal rights may not be so massed and exercised as to trammel the equally respected freedoms of others.

The Non-Economic Component of Antitrust Policy [22]

The non-economic component of American antitrust policy stands . . . out strikingly if one broadens the perspective beyond congressional legislation to consider that major historic event, American imposition of antitrust measures upon conquered Germany and Japan after World War II. No one then suggested that our zeal for industrial deconcentration there was an attempt to impose diseconomies on the defeated. Some believed that the rapid reconstruction of those devastated economies called for decartelization and decentralization. But clearly the dominant motivation was political: a desire to create alternative centers of power that could not readily be marshalled behind authoritarian regimes. I have elsewhere explored "Authoritarian Aspects of Bigness" as a political theme in the antitrust symphony. Finally, it is well known that one goal of the antitrust laws is to avert the need for massive and ongoing government regulation or nationalization—precisely the political goal that has brought even sophisticated businessmen to join in the American consensus supporting the antitrust principle, however avidly each businessman may seek exemption for his own business.

The dogma that "antitrust laws protect competition not competitors" overstates the case and ignores considerations of justice. One must amend that declaration by adding at least the following qualification: "unless individual competitors must be protected in the interests of preserving competition." A conspiracy to put a single small competitor out of business violates the Sherman Act even if there is no showing of significant impact on competition generally. In the Robinson-Patman Act, Congress explicitly extended the anti-discrimination ban to attempts to eliminate "a competitor" as well as to cases of impairment of competition. These may be regarded as instances of Congress' concern with "incipient" impairment of competition or desire to prevent transactions, trivial in themselves, which might "trigger" a series of similar transactions. But they also may be seen as a congressional concern for a non-economic goal: "justice," in the sense of fair and equal treatment of persons in like situations.

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[22] Schwartz, *"Justice" and Other Non-Economic Goals of Antitrust*, 127 U. PA. L. REV. 1076, 1076-78 (1979) (footnotes omitted).

Economics, "Populism" and Antitrust [23]

The key to Areeda's and Turner's approach to antitrust issues, intellectually, is an obsession with "populism." Juxtaposing it to "economics," "efficiency," and optimum allocation of resources, they present populism as a crude, confused yearning for income equalization, dispersion of economic and political power, and "atomization" of industry, and an aspiration for the virtues of yeomanry. According to Areeda and Turner, "populist goals should be given little or no independent weight in formulating antitrust rules and presumptions." The errors of populism are attacked with theological fervor that is at times self-caricaturing, as when "populists" are chastised for the "peculiar and perverse" rejection of

> the right to develop and practice new and more efficient methods of doing business or to provide consumers with better products and services. Those who have espoused the primacy of [populist] goals have either indulged in euphemism, mistakenly assumed that one man's entrepreneurial initiative would rarely if ever limit the options of others, or simply failed to think their concepts through.

One would be hard put to find protagonists of the perverse "primacy" that the authors so mercilessly expose, or indeed any critics of Areeda's and Turner's policy stance who march under the banner of populism. "Populism" becomes, therefore, merely an epithet, a stick to beat people and ideas, useful against "fellow travelers" as well as against heterodox sectaries. It is sad that "populism" can be so used, but this reviewer sees hope and portent in the history of populism's tenets which have become today's orthodoxies: antitrust laws, railroad regulation, regulation of stock and commodities markets, wage-hour legislation, protection of collective bargaining, child labor laws, and taxation of income at progressive rates.

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I attribute the affinity of some fine legal minds for the imponderables of economics to the fact that economists talk the language of numbers and depict their models, however remote from the real world, in graphs whose alluring curves intersect with gratifying precision. The aversion to the incommensurable reaches its peak in Areeda's and Turner's proposition, astounding for lawyers, that "[a]s a goal of antitrust policy, 'fairness' is a vagrant claim applied to any value that one hap-

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[23] Schwartz, *On the Uses of Economics: A Review of the Antitrust Treatises,* 128 U. PA. L. REV. 244, 246, 250 (1979) (footnotes omitted).

pens to favor." They are, of course, perfectly right in pointing out that interest groups have different views of what is fair and have sometimes successfully lobbied, in the name of fairness, for special protections and subsidies inconsistent with competition and the interests of consumers. But if imprecision and the possibility of perversion were fatal defects, the due process clause would long ago have been repealed, and the constitutional attack upon the Sherman act for vagueness would not have failed in *Nash v. United States.* It would have been better for Areeda and Turner to accept fairness as an ingredient of antitrust calculations than to proscribe it as a goal of the antitrust laws. Indeed, fairness is so deeply ingrained in the antitrust tradition, from the common law background through the protests against Rockefeller predation in the oil industry, that "choosing the economic goals" to the exclusion of fairness assumes the proportions of radical historical revisionism.

Institutional Size and Individual Liberty: Authoritarian Aspects of Bigness[24]

The theme of this essay is that the main significance of large size in units of social organization lies in their tendency to substitute compulsion in place of persuasion, to emphasize discipline rather than liberty. I speak of the giant business corporation, the industry-wide union, the massive political party or church, the huge charitable foundation, entities like the Army, the Navy, or the Atomic Energy Commission, and of the great nation-states themselves. For present purposes, I see these overpowering units as more alike in their bigness than differing on account of the diversity of their products, techniques, goals. The characteristic feature which distinguishes the big unit from an aggregation of smaller units loosely linked together by contracts, common membership in trade associations, federations of unions, or leagues of nations, is that the big unit typically conducts its operations by mandatory orders directed from higher to lower echelons, whereas persuasion and negotiation are the techniques of collaboration in a confederacy.

It must not be assumed from the title of this essay or from the contrast which has just been drawn that Bigness is inevitably bad. Neither is authoritarianism or dictatorship always and in all places to be condemned. Some degree of coercion is necessary to maintain individual security and freedom. Without such coercion more individual freedom would be lost by the encroachment of undisciplined individuals than is lost in the process of government. No one supposes that an

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[24] Schwartz, *Institutional Size and Individual Liberty: Authoritarian Aspects of Bigness,* 55 NW. U.L. REV. 4, 4-5 (1960).

army should be run by caucus or majority vote. The centralized political despotism of absolute monarchy may be a necessary intermediate stage of political evolution from oppression by regional tyrants to constitutional democracy. Two massive political parties may be preferable, in some ways, to multi-party strife and government by unstable coalitions. Finally, all must recognize that in the sphere of industrial organization, units of very large size are required to achieve some technological goals.

If large social units are, therefore, inevitable or desirable for some purposes at some times, it is nevertheless important to bear in mind the disadvantages as well as the advantages of bigness, to disentangle the real advantages from the mythical ones with which all important institutions surround themselves, and to ask constantly whether on balance the units are not bigger than they need be.

The Contagious Quality of Bigness [25]

Size, then, can make itself appear indispensable: one has only to monopolize enough of an important technology and the courts will fear to lay hands on the structure. And size begets size: the hugeness of the leaders of one industry will save the monopolist in another industry from dismemberment. This contagious quality of bigness manifests itself in many ways in today's economy. Banks merge because only giant banks can handle the financing of giant industry. But a very large bank must make large loans and therefore courts big industry with special favor. Suppliers and customers are driven to integrate, if only to achieve the "countervailing power" upon which some economists have now been driven to rely in place of competition. Only big newspapers and broadcasting chains can provide the advertising coverage required by the great selling combines, and only the latter can pay the rates. The upshot is clear: integrate or disappear. Moreover, there has appeared an irrational psychology of competition among managements to be "Number One," "the Biggest," even if this is accomplished by buying out unprofitable firms. The same psychology is reflected in a stock market phenomenon: the invariably bullish character of any merger announcement, without regard to underlying business factors.

Only intervention by the legislature can roll back the tide of monopoly. The nature of the intervention has already been indicated. There must be a legislative investigation of the justification for our very

[25] Antitrust Committee Dissent, *supra* note 20, *reprinted in Hearings Before the Senate Select Comm. on Small Business*, 84th Cong., 1st Sess. (Part 1) at 262-63, *and in* 1 ANTITRUST BULL. at 45.

largest aggregations of financial and industrial control, probably followed by a statute authorizing an appropriate agency to bring these enterprises into some reasonable relationship with technological requirements.

The Need for Judicial Review of Consent Decrees[26]

The Report [of the National Committee to Study the Antitrust Laws] recommends that the Department of Justice enter into negotiations with prospective defendants for consent decrees. Such a practice will certainly have the advantage claimed for it in the Majority Report, namely, "increased cooperation between business and Government," saving time and money. What it will also do is whittle away the last remnants of judicial control and public scrutiny in this area, and involve the Government in bargaining with a law violator not only as to the relief but also as to the nature of the accusation to be made against him. The proposal opens the possibility that the Government's complaint will be modified so as to be consistent with the relief that defendant is prepared to consent to. But the settlement of an antitrust case ought not to be a simple matter of bargain between the Department and the defendant. It results in a court order, enforceable by contempt proceedings. No judge should abdicate his own responsibility in this field, although admittedly he must rely to a considerable extent on the prosecutor's willingness to accept the relief embodied in the tendered decree. This judicial function is undermined if the Government does not state its case independently and in advance of the settlement. Furthermore, not only the court but also Congress and the public are excluded from any basis for exercising a critical judgment regarding the compromise embodied in the decree.

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Instead of urging the Department to broaden its use of the consent decree, the Committee ought to have considered certain proposals made to it, but not reflected in the Report, for greater safeguards on the present consent decree procedure. One of these proposals would have required the Department to publish an opinion accompanying each consent decree, stating the Department's case, the defendant's position, and the reasons for the Department's acceptance of the particular compromise. It is well known that the necessity to give reasons for disposition

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[26] *Id., Hearings Before the Senate Select Comm. on Small Business,* at 266-67, 1 ANTITRUST BULL. at 52-54. Most of the views Professor Schwartz expressed in this excerpt were later enacted into law in the Antitrust Procedures and Penalties (Tunney) Act of 1974, 15 U.S.C. § 16(b)-(h) (1976).

help to assure that they will be reasonable. The other proposal would have made it a matter for the judge's discretion whether or not a consent judgment should constitute prima facie evidence in subsequent private antitrust suits. Present law provides that in no case shall a consent decree, entered before testimony is taken, be available to help the private victims recover antitrust damages from the defendant. Few victims are financially able to assemble the evidence required to prove an antitrust violation against a great combine. One would think it a proper part of the Government's responsibility to see that private victims are made whole. But in practice in the majority of antitrust cases which are settled by consent decree the Government is, in effect, bargaining away all real possibility of recovery by private victims.

Rebutting a Liberal's Attack on the Antitrust Laws[27]

Foremost among the obsolete myths and rituals [that, according to Professor Galbraith, obscure society's picture of itself] are the notions that competition is a significant restrainer of economic decision and that the antitrust laws serve the purpose of maintaining the competitive market. It is an old point with Galbraith. He made it in *American Capitalism: The Concept of Countervailing Power,* in 1952, and it had been made before that by Thurman Arnold, among others, in *The Folklore of Capitalism,* in 1937. According to these "realists," antitrust activity is a facade of superficial government intervention that, without actually restraining private power, aims to reassure simpletons that their lives are not being managed. . . .

I never took Galbraith's *American Capitalism* seriously on antitrust, and I don't think he is to be taken seriously now. In *American Capitalism,* Galbraith discounted competition as a goad to progress or restraint on greed. He identified the real governor of modern economies as the balance of power between the giant producer and giant distributor, giant employer and giant unions, and so forth. Not many people noticed the admission near the end of the book that this system of mutual restraint would not work in a period of inflation, when all the giants would make common cause against the unorganized consumers, mostly poor. In other words, the Galbraithean proposition that the antitrust laws are superfluous and obsolete would concededly be invalid for any time since the depression of the thirties and for any time in the foreseeable future, for we live in an era of perpetual, moderate, planned inflation. The author who emerged in *American Capitalism* as

[27] Schwartz, Book Review, 81 HARV. L. REV. 915, 919, 922 (1968) (reviewing J. GALBRAITH, THE NEW INDUSTRIAL STATE (1967)) (footnote omitted).

our most delightful tongue-in-cheek pundit maintains that distinction in *The New Industrial State.*

. . . .

Until someone proffers more practical devices for asserting the value of individualism, of the pluralistic society, of the separation of political and economic power, of the kind of planning that starts from unmanipulated human wants, pragmatic meliorists may prefer to stick with the antitrust laws. They are imperfect. They are only partially enforced. They constantly confront us with paradoxes, as when they are invoked against minor mergers but seem impotent against the greatest consolidations. But ultimately they stand for accountability of private economic power. From the powerhouse Messrs. Sherman and Clayton built flows an energy that is felt not only in prosecutions, injunctions, and cease-and-desist orders, but also in continuing congressional committee inquiries into oppressive business practices, in significant modifications of regulatory legislation and administration to maximize freedom, and, as any antitrust lawyer knows, in a stream of influential advice to the technostructure deflecting the planners from at least the excesses of autocracy.

Planning and the Designed Planlessness of Antitrust [28]

The United States is an underdeveloped country which must increasingly resort to national planning to achieve its goals. The antitrust laws are essentially an affirmation of the desirability of what might be called "planlessness," that is, free development of private business subject to the discipline of competition but without centralized direction either by the government or by monopolies and cartels. What is the future of antitrust in an age of planning? To answer this question we must reflect upon the necessity for certain kinds of national planning, and upon the continuing validity of the principle of designed planlessness in some sectors of the economy.

The United States is an underdeveloped country. That is, its legitimate aspirations and national commitments vastly exceed available resources. The ratio of American aspirations to resources—and this is the meaningful index of underdevelopment in the political and psychological sense—may be higher in the United States than in any other country in the world. We would conquer space. We would ring the earth with artificial satellites. We would provide our physicists with billion-dollar instruments to hunt subatomic particles. We would build super-

[28] Schwartz, *Antitrust in the Age of Planning,* in CROSSROADS PAPERS 242 (1965).

sonic planes. We would conquer poverty in our time, and ignorance, and disease, mental as well as physical. Decent American homes will stand where wretched tenements now blot the landscape and twist the lives of millions. Bright schools and teachers are to open the minds of myriads now condemned to subliteracy, perpetually banished from the world of today's skills and culture. We require vast expansion of medical research and care, of hospital facilities, of day nurseries and recreation facilities. Marginal farmers and redundant coal miners are to be relocated, retrained. The very face of the land is to be remade with dams, tunnels, roads, airports, open spaces, new forests. Total or even merely sensible military defense demands its incalculable billions of us. And of all these good things we visualize for ourselves, we mean to provide a share also to the needier nations through generous foreign-aid programs.

But all these splendid aspirations cannot be achieved now or in a generation. We must make choices. We must decide whether homes are more important than roads, a hundred thousand schools more important than moon travel, whether to build first an additional medical school, a 100 BEV accelerator, or an intercontinental missile. The choices to be made are of course much more subtle than "either-or." It is a question of timing in the deployment of resources. Large immediate investments in Project A may be necessary now to supply the requirements of Project B later. Project B may be the most pressing ultimate goal; yet for the present it would be pointless to do more than make a small initial allocation of resources. This is why an underdeveloped country must plan.

Planning must extend to major categories of private expenditure as well as to items normally covered in governmental budgets. The investment projections of AT&T or General Motors are as significant for national development as those of the Tennessee Valley Authority, and make comparable demands on resources. Levels of production of wheat or housing are critical elements in the shaping of our future, regardless of the fact that production is and will remain largely in private hands.

It is astonishing how little planning of national economic goals this country has had. No one has come forward with a rational ordering of goals including estimates of cost matched to specific resources from income and borrowing: not the government, not the major political parties, not the intellectual liberal groups, not the economists. Instead, thought and discussion have focused on abstractions like "growth rates" expressed as a percentage of increase of Gross National Product—as if it were of little importance what kinds of goods and services composed the increase or, for that matter, the base figure. Or there has been what

might be called fragmental planning, the uncoordinated announcement by interested groups of their particular demands: for defense, for housing, for education, for medicare, or new prisons and probation services, etc., each estimate made utterly without reference to competing demands. In the aggregate these demands are so unrealistic as to be completely irresponsible and amount to no plan at all. Sometimes we are bemused by what appears to be comprehensive planning but turns out to be mere forecasting of the results of unplanning or of private planning by interested enterprises. I speak here of input-output analysis, which takes as its starting point projected investment and marketing plans of the private sector of the economy, anticipated consumer demands (themselves largely directed by producer decisions and advertising), and government spending. The analysis then derives from these projections a series of quantities of designated types of goods which must be produced if the projections are to be realized. This sort of thing, if it can be called planning at all, has little to do with the selection and ordering of rational objectives; it merely facilitates the logistics of campaigns planned by someone else.

Reflections on the Breakdown of Rate Regulation under Inflationary Pressures[29]

If any conclusions can be drawn from the foregoing survey, they might be stated as follows: Inflation sets up powerful forces directed at modifying classic regulatory rules, including the rule that limits regulated utility returns by reference to an historic cost rate base. A rule so widely evaded seems to demand fundamental reexamination; yet, no principled and politically acceptable alternative has been found. Certainly, a general return to replacement costs seems out of the question for all the reasons advanced against it long ago by Brandeis and others. However, although those reasons remain valid against enshrining replacement costs as a constitutionally required standard of remunerating investors, they may not preclude consideration of replacement costs as a matter of legislative or administrative policy.

But what policy? Should regulation promote for unfortunate utility investors, a "bailout" policy like the federal government's debt guarantees and capital grants to railroads, Chrysler, savings and loan associations, and other private enterprises that would otherwise be squeezed out in bankruptcy? If some larger national goal, such as preserving the stability of banks and insurance companies or maintaining

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[29] Schwartz, *Inflation and Utility Rate Regulation*, 1982 UTAH L. REV. 89, 122-23 (footnote omitted).

the incomes of widows and orphans dependent on old utility investments, calls for such a policy, should the fiscal burden be put on consumers or on the taxpayer? In pursuing that goal, how much weight should be given to the social desirability of holding down residential rates as compared to commercial and industrial rates?

Inflation is, after all, a vast transfer of income, from creditors to debtors, from fixed income pensioners to organized workers. Accordingly, the seismic tremors of inflation, breaking up old patterns of regulation, stir new demands for redistribution of income. Can such a large political issue as income redistribution be rationally dealt with in quasi-judicial administrative proceedings? If we cannot regulate in old ways, if we see no credible new principle of regulation, if vast private enterprises totter, if new social demands must be met, does nationalization become a more attractive alternative than it has seemed in the past?

The OPEC Example: Capitalism, Competition and Cartels [30]

Take note—consumers, believers in the "science" of economics, adherents of a naive capitalism—of the dismay with which the financial community and government circles confront the prospect that oil prices might fall because of the disintegration of OPEC.

One senior administrative official in Washington says the administration is "worried sick" about the possibility of a "real break" in oil prices. The United States had hoped that the oil-producing countries would set production quotas that might have limited any price decline to about $2 a barrel.

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The real and immense blessing that a drastic decline in oil prices promises has not received adequate public attention. If the price dropped from $34 a barrel to $10 a barrel (a generous estimate of cost of production including reasonable profit), that would be the equivalent of a tax cut of almost $150 billion dollars. At the gas pump the equivalent price drop would be approximately 48 cents a gallon.

If the administration had the courage to levy a tax on oil equivalent to the price drop, thus keeping consumer prices level, the overwhelming problem of budget deficits would be solved at one stroke, interest rates would fall, houses would be built, employment would rise, and the long-promised economic recovery might begin.

A substantial drop in oil prices would, of course, cut the inflation

[30] Schwartz, The OPEC Example: Capitalism, Competition and Cartels, Philadelphia Inquirer, Feb. 6, 1983, at G7, col. 1.

rate, rescue the ailing airlines, help the truckers, and cut the fuel and fertilizer costs of farmers. The adverse balance of our foreign trade would be wiped out. The desperate plight of Third World countries, drained of resources by the savagely inflated oil price, would be ameliorated.

The public should understand that the alliance between our own government and the oil cartel is not new, but of long standing. The Gerald Ford-Henry Kissinger policy when confronted with the formation of OPEC was collaboration, not resistance. Opposition would have meant centralizing oil imports in a federal agency that would therefore have the power to offset the cartel with centralized buying power that could play one OPEC member off against another.

Opposition would have meant a crash program of government-subsidized and government-owned exploration, on the continental shelf and elsewhere. Instead, the wily Kissinger chose, like the Romans of old, to pay off the peripheral tribes in arms and cash.

Long before Kissinger, national oil policy supported a cartel of our own oil-producing states so that they could limit production and maintain high oil prices at the expense of the rest of the country—our domestic version of OPEC. When foreign oil was cheap, our own government imposed import quotas, with the effect of causing us to use up our domestic oil reserve faster, as well as holding up domestic prices.

The full force of this paradox can be seen when we note the present policy of buying high-price foreign oil to be stored underground as a reserve against the possibility of renewed Arab boycott. First we take out our own so we become dependent on them; then, as rapidly as they permit, we replace it at high cost as a reserve against the possibility of renewed boycott. Meanwhile our foreign policy in the Middle East is hostage to oil sheiks.

Establishment economists have contributed to our national acquiescence in submitting to extortion, providing such rationales as the beneficent effect of the price increases in promoting conservation through redesign of our automobiles and conversion of oil-burning utilities to other fuels. They have even suggested that quadrupling the price by cartel agreement merely achieved an approximation of a "free market" price, oil having in their view been previously underpriced.

Notably wanting has been any denunciation by economists of the massive misallocation of resources when the price of energy is raised to 10 times its cost, with a consequent transfer of wealth on the order of hundreds of billions of dollars to people who did not incur the costs of finding and producing the oil. Instead the theologians of economics display a jesuitical facility in vindicating the status quo, as now in joining

the chorus of warnings against "disaster" if the international banks can't collect their bad loans.

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The very language in which the mass media discuss consumer issues has been corrupted. 1984 is very close, but Orwell's "newspeak" has long been anticipated. On our financial pages, good crops are reported as disasters, because prices drop. Nobody celebrates this rate dispensation for the poor at home and abroad. If an outbreak of competition among gas distributors temporarily reduces the price at the pump, we hear about it in the deploring concepts of the merchant, not the customer. The event is reported as a "price war," with all the pejorative implications of armed and bloody international conflict: Wars are something to put an end to.

When "peace" has been declared (*i.e.* prices go up again), we are all supposed to be happier. We see here the same distortions of capitalism that lead some to face real war and gross distention or arms production with equanimity because they "help to end" unemployment and economic depression.

Capitalism has immense potentials for freedom and progress. But capitalism implies competition, not cartels. Capitalism implies the loss of imprudent investments, not a tax on the public to rescue improvident international bankers or overextended speculators on escalating oil prices. Capitalism is too important to be entrusted to capitalists.

On the Relation of Economics to Law I[31]

What are the proper uses of economics? First, it seems clear that lawyers, judges, and legislatures should not delegate decisionmaking to economists. Their dogmas are no better than ours. Their counsel is divided, and even their consensus, shifting from time to time, cannot provide a firm basis for policy decisions. The insights of their dissidents may be as valid as those of their professional establishment. There is too little empirical basis for economic doctrine, too little correspondence between its models and real life, and virtually no possibility of confirmation by experiment. Its record on predictions is abysmal. The unworldliness of this discipline is manifested in its avowed disinclination, or inability, to make or take account of moral, psychological, political, or other "value" judgments; it is essentially a matter of indifference for most of the profession what proportions of the "gross national product" consist of cigarettes, bread, pornography, advertising, low-cost housing,

[31] Schwartz, *supra* note 23, at 266-68 (footnotes omitted).

or weaponry.

But the radical skepticism expressed in the preceding paragraph is appropriate only as a preachment to those who have been oversold. That sort of destructive barrage could be levelled at any who espouse so dogmatically the theories of philosophy, history, political science, anthropology, sociology, psychiatry, religion, or other branches of learning with which we do and must seek to illuminate the human condition. All these disciplines help, or seem to help, us comprehend or order the infinite chaos that would otherwise confront us. . . .

Thus our ideal legislator, judge, or lawyer must look at the world through all available lenses, including those of the economist.

Surely these "lenses" ought not be limited to those provided by a single school of economists. One of the dangers of attempting to educate lawyers and judges in economics (or psychiatry, for that matter) is that the exposure will be to a single teacher or school, with understatement of conflicting views. Another danger is that limited training in an esoteric art will induce, in some of the trainees, illusions of being an artist. Moreover, gratified to be admitted to the society of the cognoscenti, judges will become too receptive to the notion that the laity, the jury, is an obstruction to decisionmaking in "complex cases." A third danger is that a person who has taken a course or even several courses in economics as an undergraduate or in law school will, twenty years later, be spouting or relying on obsolete, but firmly entrenched, economic dogmas. There is still much to be said for using expert testimony or counsel's extraction from and interpretation of current economic literature to "educate" judges and juries in adversary proceedings. Counsel will need advice from economists to perform this role well, just as they need expert psychiatrists, engineers, accountants, chemists, statisticians, or art critics in litigation involving these other mysteries.

On the Relation of Economics to Law II[32]

The disciplines are obviously complementary. Economics—even at its most speculative and abstract—is perpetually exposing old errors and new considerations relevant to decisionmaking in government. Law is perpetually reformulating the equations by which governmental decisions are reached. Those equations contain many variables that are non-economic: notions of fairness and national priority, administrative feasibility, political feasibility, the desirability of disposing of complex questions under rubrics simple enough to be appraised by legislature

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[32] Schwartz, Book Review, 120 U. PA. L. REV. 584, 594-96 (1972) (reviewing A. KAHN, THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS (1970-71)) (footnote omitted).

and public. If the equation occasionally seems to deprecate the economic variable, that is more likely accounted for by the counterweight of other factors than by legal resistance to economic enlightenment. If the equation seems at times stubbornly resistant to change, it is because stability is itself a value in the equation. Economists too "temper principle with practicality" by accepting, for the sake of stability in utility rates, long range marginal costs rather than theoretically superior short range costs as the standard.

In relation to the legal order, other social sciences are in much the same position as economics. The psychiatrist makes an essential contribution to criminal proceedings when he throws light on the emotional organization of the accused, the extent of his power to choose between desirable and undesirable courses of conduct. But the personality of the accused is only one of many variables in the legal equation; and a psychiatrist who fails to perceive this is likely to feel acute frustration when a man whom he regards as "ill" is nevertheless held "responsible." He may even see such a judgment in terms of lawyers or jurors presuming to negate professional diagnosis. He will regard the statutory formula separating the punishable from the exculpatingly ill, whether McNaughten's rules, *Durham,* or American Law Institute, contemptuously as a "legal" definition of a medical concept. Any such formulation is, on the contrary, only an administrable rule-of-thumb that takes account—well or poorly—of such non-medical considerations as: the pervasiveness and incalculable diversity of human "abnormality"; the inherence of social and philosophic elements in the concept of mental illness; the dearth of techniques and physical resources for the "cure" of many forms of psychic deviation; and certainly the need (at the guilt-determining stage of trial, although not perhaps at the sentencing stage) to have *rules* disposing of *categories* of cases, so that the law will at least appear to operate with a degree of consistency in similar cases.

An historian too, applying the criteria of his speciality to the criminal trial, would be likely to come away with scorn for this perverted way of "searching for the truth." Who ever heard of rejecting a conclusion merely because it is not "established beyond a reasonable doubt"? What even-handed searcher for truth would categorically exclude from consideration hearsay, testimony of a spouse against his mate, a confession obtained by pressure, incriminating evidence illegally obtained by the police? What historian would withhold an adverse judgment on a figure of the past until he could provide a lawyer for the defense? Shall journalists and good citizens—amateur historians, all—really doubt the guilt of Oswald, "alleged" assassin of President Kennedy, because the

"presumption of innocence" has never been accorded to him in a legal proceeding? The answer to these rhetorical questions lies, of course, in the fact that a criminal trial is not an abstract search for historic verity. The trial lies primarily in the realm of action, not cognition. A man's fate is to be disposed of, and in a procedure that calls into question the tactics of government as much as the behavior of the accused. We are committed to the proposition that it is better for ten guilty to go free rather than one innocent be condemned. We know and intend that a verdict of "not guilty" means only "not sufficiently proved" or even "proved but the law is silly." Painfully aware of the frailties of the trial process even at its best, and perhaps in anxious dubiety about the utility of the entire system of prosecution and punishment, we erect "arbitrary" barriers against conviction like the statute of limitations and the rule against double jeopardy. In sum, the range of consideration is enormously broader and different for lawyers than for historians.

The X-ray chooses not to see skin, fat, any tissue extraneous to the target of its probe. Intellectual specialists must similarly blind themselves to much that is ultimately relevant, in order to see more deeply. The economist necessarily excludes from the range of his inquiry much that the lawyer cannot ignore. The mathematical economist excludes much that the institutional economist regards as vital. Agricultural engineers, social psychologists, demographers, philosophers, and public relations wizards, whose sciences feed into economics, presumably reproach economists for a certain imperviousness to their respective illuminations.

For me, the moral of all this is the necessity for professional modesty. The X-ray must not suffer the illusion that it sees all. The general practitioner must not imagine that he has X-ray eyes, but must be ever ready to examine those shadowy transparencies submitted to him by the radiologist, and to listen comprehendingly to the specialist's interpretation. The boundaries between the professions must remain permeable, and we must honor the border-raiders.

IV. On Being a Lawyer

A Self-Image for Lawyers [33]

Law students frequently have a poor professional self-image. There is an age-old, vulgar (but not entirely baseless!) view of lawyers as unprincipled, contentious, pettifogging, and mercenary. Much of this

[33] L. Schwartz, Studying Law for Fun and Profit 22-23 (1980) (published by University of Pennsylvania Law School).

villainous caricature derives from the inescapably adversary quality of much of a lawyer's work—he or she seems ready to offer services to either side, and by the law of averages half of the clients will end up disappointed. How much better off our medical colleagues are! Their clearly identified opponents, illness and death, always wear black hats. Their young patients almost always recover, whether because of or despite treatment. When their old patients die, nature, God, or the devil gets the blame. How easy it is for a farmer to be a "moral" man; he deals principally with soil, weather, machines, weeds, pests and other non-human adversaries. Thus he is largely immune to the interpersonal pressure and temptations which are the lawyers' entire milieu. Nevertheless, the following characterizations of lawyers are descriptively true for many of them and certainly a valid professional ideal.

> The lawyer is a planner, a negotiator, a peace-maker. Despite the popular stereotype of the lawyer as contentious adversary, the peaceful ordering of human relations overwhelmingly predominates in his activities. In the drafting of commercial and labor contracts, treaties, wills, constitutions, he or she is concerned with achieving orderly arrangements and with avoiding or settling controversy. This requires imaginative anticipation of contingencies, changes of fortune, tragedies, betrayals, and social change.
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> The lawyer is a counselor, advising individuals in their varied and complex relationships with one another and the state. Similarly the lawyer advises groups, corporations, unions, ethnic communities, cities, states, federal departments and agencies, international organizations. In giving advice he or she brings into play the lawyer's specialized understanding of the formal structure of society and of law as an instrument of social control and betterment.
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> The lawyer is an advocate, representing the views, needs and aspirations of others more effectively than they, uncounseled, could do by themselves.
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> The lawyer is a defender of the rights of the individual against the conformist pressures of society.
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> The lawyer is an architect of social structure, responding creatively to the needs of a rapidly changing society.
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> The lawyer is a social scientist, drawing upon economics, history, sociology, psychology, political science, and anthropology to deal with the problems of individuals, organizations and communities.
>
> The lawyer is an educator, especially a self-educator.

The process of educating a lawyer never ends. In every controversy he or she must refresh expertise or acquire expertise in a new factual domain.

The lawyer is a humanist. To study law is to look through the greatest window of life. Here one sees the passions, the frailities, the aspirations, the baseness and the nobility of the human condition.

The lawyer is a leader. All other qualifications converge in thrusting upon the lawyer leadership and responsibility in community life.

Lawyers Must Be Broadly Cultivated: To Be Only a Lawyer Is To Be Half of a Lawyer[34]

The three years of law school are not mere "preparation" for life but rather a significant segment of actual living. That living will be enriched if you enter broadly into the life of the university, the city, and its hinterland. That hinterland includes not only the remarkable counties of Eastern Pennsylvania, nearby Delaware and Maryland, the beaches and Babylons of the Jersey Coast, but also two well-known suburbs of Philadelphia, New York City and Washington. Immediately at hand, because you are on the campus of a great university, are innumerable opportunities for stretching your intellectual horizons and cultivating your sensibilities: concerts, plays, films, lectures by outstanding men (both visitors and members of the faculty in their regular courses), a world-renowned archaeological museum, the venturesome Institute of Contemporary Art, etc. To be only a lawyer is to be half a lawyer.

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A good legal education is worthwhile not only to those who plan to practice law but also to prospective businessmen, political leaders, novelists, philosophers and chess players. Consider the following sample of literary and artistic careers which followed law training: *poets*: John Donne, Wallace Stevens, Archibald MacLeish (see his Apologia, relating law study to poetry, 85 Harv. L. Rev. 1505 (1972)), Edgar Lee Masters, Robert Louis Stevenson, Garcia Lorca; *novelists*: James, Galsworthy, Meredith, Fielding, Scott, Kafka, Flaubert, Balzac, Perez Galdos, Benavente; *other literary figures*: Boswell, A.P. Herbert, Gilbert (of Gilbert & Sullivan), Corneille, Moliere; *philosophers*: Hume, Bentham, Bacon, More. Consider also the sociologist David Riesman; the painter and chess player, Camille Duchamps.

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[34] *Id.* at 8.

Lawyering and Ideology [35]

One's notion of justice will be strongly influenced by political ideology. If you are acutely sensitive to the wretchedness of poverty or to dehumanizing effects of racial discrimination, you are likely to disfavor all outcomes adverse to a disadvantaged person. If you believe that officials do most things badly, that political "solutions" are often worse than the disease, you will be inclined to minimize the role of government, to let "free market" forces operate, to be skeptical of legal innovations. Your attitude towards law and justice will be affected by your belief or disbelief in God, progress, original sin, dialectic materialism, Darwinian natural selection, quietism, existentialism, etc. Everyone has a mind-set; but the key to comprehending and practicing a democratic, pluralistic legality is that the law exists to enable persons and groups of radically different mind-sets to live together peaceably. The basic technique is to convert ideological conflict into pragmatic or procedural conflicts to be resolved by tribunals operating in accordance with rules generally recognized as fair. To argue about whether abortion is sin or murder, on the one hand, or social necessity and inviolable individual right, on the other, is to prepare for civil war. To assemble evidence as to the effectiveness of repression, the inequality of access to abortion by rich and poor, the death rates in normal birth, legal abortion, and illegal abortion, to analyze precedents under the Due Process Clause—all this is to resort, in the manner of lawyers, to a process that does not directly challenge the deeply opposed convictions.

The foregoing remarks are prelude to advice that good lawyers and good law students do not wear their ideologies on their sleeves, do not trumpet their deepest moral, philosophic, religious, political, and economic convictions in the course of legal controversy as if the very sound would cause the walls of Jericho to crumble. Putting these passionately-held convictions at the forefront of legal controversy does not win over opponents or neutrals, it merely advertises your ideology, solidifies resistance, subjects your "rational" arguments to deprecation as simply the expectable mouthings of an ideologue. You're in the wrong profession: try preaching or political organizing or writing revolutionary tracts. Meanwhile, astute lawyers—who may be just as deeply committed to your ideology—will be arguing your case with professional grace and plausibility, pitching the arguments on the firm ground of commonly respected procedures and constitutional principles.

All this is not to suggest that you put aside passion and politics,

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[35] *Id.* at 25-26.

but that you express them, on the professional side, in such a way that other professionals, lawyers and judges, may decide in your favor without accepting or even seeming to accept your ideology. To develop this facility, it is a good idea occasionally to put yourself in the frame of mind of one of your ideological opponents, articulating in class discussion the "neutral principles" on the basis of which he might expect to prevail. Such tactical identification with an opponent is an excellent way to anticipate and effectively repel his thrusts, whether in legal brief or war.

Role of the Defense Lawyer[36]

The job of the defense attorney is to help the accused in every lawful way before trial as well as during trial and on appeal. A person charged with crime is in very serious trouble. He's got a lot going against him. There's a big, professional detective force looking for evidence against him. The judge and the jury are inclined to believe, as anybody would, that the accused is most likely guilty or else the police wouldn't have arrested him, the magistrate wouldn't have held him, the grand jury wouldn't have indicted, and the prosecuting attorney wouldn't be pushing for conviction. Finally, the law is complicated. Most people are scared by it and afraid they'll be tripped up.

The way we Americans look at it, a fellow caught in this situation is entitled to one person who's on his side and knows the law—a defense lawyer. To begin with, the defense lawyer is supposed to investigate the case from the point of view of the client's innocence or mitigating circumstances. From experience, the lawyer knows what kind of witnesses and testimony will be helpful to the defendant, and what kind of checks should be made to expose weaknesses in the evidence of probable prosecution witnesses. This kind of investigation is often more important than the showy business in court, because it's the facts, more than speeches, that influence judge and jury.

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The defense attorney must be loyal to the client. The ethical rules of the bar association, as well as the nature of the defense lawyer's job, require that just about anything the client says to his lawyer is confidential, even confession of crimes. This is much like the protection given to confessions made to priests. And the reason is the same: if the sinner knew that his words would go abroad, many would not tell the truth, and the purpose of confession would be defeated. So, if a client

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[36] L. SCHWARTZ & S. GOLDSTEIN, LAW ENFORCEMENT HANDBOOK: THE POLICE AND CRIMINAL JUSTICE SYSTEM 13-17 (2d ed. 1980).

could not trust his lawyer completely, clients would often fail to tell their lawyers important things which the lawyer should know, for example, in advising the client whether to plead guilty or not guilty. Neither the lawyer nor the priest becomes involved in the guilts which he hears confessed. Each has a job to do for the sinner or accused.

Because of loyalty to the client, the defense lawyer must often act in a way that frustrates or irritates the police. For example, he or she will usually tell the client not to answer police questions if there is any possibility that the answers could be used against the client. The defense attorney will generally cross-examine police witnesses at the trial. . . .

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It is not the defense attorney's job to get the client off regardless of how he does it. The defense attorney, like the prosecuting attorney, is an "officer of the court[.]" Neither may knowingly deceive the court. If either one got a witness to lie under oath, it would be contempt of court and also the crime of suborning perjury. If a lawyer gets into the position of working as a partner in crime, for example, by advising criminals how they can commit offenses without being caught, the lawyer would be guilty of criminal conspiracy. It's not a part of a defense lawyer's job to help criminals commit crimes, and if you as a policeman run into a lawyer who seems to be involved in that way, don't take it that all defense lawyers act the same way. That's as untrue and unfair to the great majority of honest defense lawyers as when unthinking members of the public distrust all policemen because some go wrong.

It is often asked how a lawyer can defend somebody he or she knows is guilty. The answer is easy when you understand the lawyer's job in the administration of justice—a job assigned to the lawyer by society, not just the client. It's not the lawyer's job to judge whether the client is guilty or innocent; that's the job of judge and jury. Furthermore, the fact that the client says he's guilty doesn't necessarily mean that it's so. Experienced lawyers and policemen are familiar with false confessions of guilt. Sometimes such a confession is made to protect someone else. Sometimes it is made by a person of low intelligence or who is actually insane. . . . Sometimes uneducated defendants are ready to admit guilt because they don't understand simple things about the law. An uneducated man may think he is a murderer because he killed someone even though it was a case of self-defense. A youth who has had illicit intercourse with a woman may feel guilty, and may be stupid enough not to know that it was rape only if he forced her.

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Another reason for taking on the defense of a man who is believed

to be guilty, is that "defending" doesn't necessarily mean trying to get him off. It may mean advising him to plead guilty. If he pleads guilty, or is found guilty after trial, one of the most important jobs of the defense lawyer still remains to be done, namely, to show the court everything good that can possibly be said of the defendant so as to lighten the sentence.

For these reasons, an experienced lawyer, retained or assigned to defend a man on a criminal charge, would no more think of starting off by asking if his client was guilty than would a surgeon operating on a captured and wounded bank robber. In each case the professional is put there to help the fellow. They need to have information bearing on the defense or the medical situation. It's up to other people later to decide whether the man is guilty and what to do about it if he is. The situation is something like that of the policeman making an arrest, who often must say to himself, "Buddy, I'm not saying you did it or you didn't do it. It looks as if you did it, and so my job is to take you in. Other people will decide whether you're guilty."

An important part of the defense attorney's job is to keep the government on its toes and behaving according to the law. For example, when the defense attorney objects to evidence obtained by illegal search, he is of course seeking in the first place to save his client. But if he keeps the evidence out of the case and so gets his man off, the police will presumably be more careful after that to observe the rules regulating search.

A similar effect follows from every maneuver by defense counsel that involves criticism of the government's case. Thus the defense lawyer may bring out that the law under which his client is accused is unconstitutional, or that the grand jury was improperly constituted, or that the indictment is defective, or that workingmen or Blacks or women were discriminated against in jury selection. In a way, every criminal trial thus becomes a trial also of the way the government conducts itself. Defense lawyers perform a valuable function here.

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The defense lawyer has a job to do. It's a job as important to the community as it is to the defendant. If persons accused of rape or treason were tried without defense lawyers, the newspapers and the public would suspect that the trial was loaded against the defendant. There would be less confidence in the verdict, in courts, and ultimately in government. The defense lawyer's job is so important that our forefathers wrote it into the Constitution that the accused "shall enjoy the right [to have the Assistance of Counsel for his defence]."

The Moral Dilemmas of Lawyers[37]

Stern, Lawyers on Trial, is an excellent book of its genre, which is muckraking. I regard muckraking as socially useful as well as profitable to writers and publishers, and entertaining to readers. Stern is accurate in detail, perceptive, comprehensive, even stylish; and he certainly succeeds in his goal of troubling lawyers about their profession. So much so that I plan to make substantial use of the book in my Spring course on the Legal Profession.

Where he fails is in diagnosing the social pathology and proffering a remedy. He seems to think that matters would improve if only lawyers were more moral and refused to represent clients engaged in antisocial activities. But the problem is not immorality of lawyers. It lies rather in the very texture of our competitive individualistic culture, a culture riddled with defects and defensible only by comparison with the visible alternatives. Moreover, the issue of social utility is rarely as clear cut as Stern assumes.

If Stern's moral lawyer rejects a case or a client, there will be ten other lawyers waiting in line to do the work. Stern is horrified by influential lawyers' *private* contacts with government decisionmakers. I deplore that as much as he does and government agencies have revised their procedures to restrain the practice. But Stern ignores the other branch of the problem: that in administrative agencies the "prosecutors" are colleagues of the decisionmakers in constant informal contact with each other. Stern, like me, deplores the "revolving door" practice by which lawyers recently resigned from an agency exploit their agency contacts for the benefit of private clients; but he conveys no adequate sense of the dilemma in trying to prevent that, as the law does, by disqualifying recent employees from practice in the precise fields in which they are expert. Stern notes but dismisses the lawyers' contention that dilatory tactics are attributable primarily to the incompetence and laxness of judges. The "unilateral disarmament" of one "moral" lawyer cannot cure that problem. Observing that most of the culprits in the Watergate scandal were lawyers, without stressing that the conspiracy was brought down by other lawyers, is a misleading half-truth that only serves to distract attention from the real problem of corruption.

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All this is not a counsel of despair. I do my bit to raise the consciousness of my students with regard to the moral dilemmas of the profession. Here and there a rule can be tightened, a new procedure

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[37] Letter from Louis B. Schwartz to Dori Lewis, Consultant for Editorial Development, Times Books, New York, N.Y. (Oct. 6, 1980) (discussing P. STERN, LAWYERS ON TRIAL (1980)).

invented to expedite justice. Maybe a book that harps on the moral shortcomings of lawyers and their equivocal responses will help to remold the conscience of society — provided someone is around to say "Wait, fellows, the problem is not lawyers' morality." On reflection, I think it unjustified to criticize Hazard's book, Ethics in the Practice of Law, as "Non-Answers to Hard Questions," 89 Yale Law Journal 1438 (1980). Some questions too important to be ignored have no "answers."

Ironic Advice to Law Students on How To Pass Examinations[38]

It is well known that law students almost unanimously desire to pass examinations. Indeed, it may safely be assumed that many would rather pass the examination than learn anything about the subject. Some students have, in fact, passed without knowing anything about the subject. No objective analysis of the examination process can overlook this fact. Yet, it would be a mistake to assume that ignorance is helpful. To be sure, one ought not, in taking an examination, reveal deeper insight or wider knowledge than the instructor, since natural human jealousy is likely to warp his response. Barring such neurotic reactions, however, one should assume that a little learning is a useful thing. The following principles are offered for the guidance of those who would like to pass, and who do not object seriously to a little learning.

1. . . . Never mind suggestions that you read assignments in advance of class, discuss problems with your fellows, avoid hornbooks, etc. All this reflects the professorial point of view—he has not been a student for years, and was probably atypical even in his undergraduate days. Develop your own individuality.

2. Pace yourself. If you crowd all your studying in early in the term, time will hang heavy later in the year just before the examination, dulling your perceptions. On the other hand, if you save your strength at the beginning, and finish up with a burst of power, cramming twenty hours a day during the final weeks, your head will be full of fresh, disorganized recollections as you enter the examination room, giving you a maximum of material to draw from.

. . . .

4. Plan to avoid all diversion or exercise during the last week before exams. These are likely to promote relaxation and sound sleep. Nobody ever passed an examination sleeping.

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[38] Schwartz, *How to Pass Law School Examinations,* 11 J. LEGAL EDUC. 223, 223-25 (1958).

. . . .

7. An elegant, inscrutable handwriting enlivens the professor's day. Many a gay hour is spent in consultation with wife, child, or colleagues, or with cryptographic aides; and you may be sure that gratitude for this variation from the humdrum will be reflected in his grading. Fanciful and personal abbreviations can be combined with unusual chirography to achieve sensational effects.

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9. Avoid preoccupation with the precise words of the problem. Start writing as soon as you get the general idea. This will allow you time to exceed the page limit selfishly suggested by the professor. It will also enable you to avoid any conscious guilt as you transcribe information you have memorized, having little bearing on the question asked.

10. The first of a series of problems is always the most important. It should, therefore, be given at least twice as much time as the problems that follow, regardless of suggested time allocations. If observance of this rule results in inadequate time for the final problem, this can always be remedied by writing "TIME!" at the end of the paper.

. . . .

12. If the problem calls for discussion from a particular point of view, e.g., defense counsel, legislator, junior legal assistant, disregard such limitations. The professor has probably forgotten about it, or changed his mind. Besides, you will probably never be defense counsel or legislator anyway.

13. The ability to supply missing facts necessary to your conclusion is highly regarded, and the more inventive you are, the higher the regard. Some students manage to change the entire complexion of the problem this way, and even to answer their own problem wrong.

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15. Never forget that law is the expression of policy. So why not go right to the heart of the matter at once. Give him policy. Show him that your heart is in the right place. Intellect is not everything.

16. Overconcentration on the exact problem posed, in all its uniqueness of fact, may lead to answers undesirably tainted with practicality and common sense.

V. REFLECTIONS

"Roman Baths" for City Slums[39]

Did I ever discuss with you a certain pipe-dream of mine involv-

[39] Letter from Louis B. Schwartz to David A. Wallace, city planner (dated from Provence,

ing architecture and city planning: the placing of a "Roman-bath-cultural-center" in the middle of three or four of Philadelphia's depressed ethnic (and I don't mean just black) ghettos? I first got the idea admiring the magnificent swimming-pool-physical-culture facilities I have seen in Cambridge England, Salzburg Austria, and here in Aix-en-Provence. Visiting the remains of old Roman baths in Provence, and reading about them in the Michelin guides, stimulated my imagination. What I have in mind at the moment is the possibility that the idea might be further developed using academic resources, e.g. a seminar or graduate student research project. A philanthropic foundation might be persuaded to subsidize this phase of study and elaboration. Eventually, if the project developed favorably, such private financing might be found for a full-scale pilot project. Let me record a few speculations on features and problems of such an enterprise.

One starts with the physical: a splendid pool with a moving roof that slides back in summer and is in any event transparent. One facade is all glass, presenting the pool and its activities to the community. There are separate ponds for learners, and a basking yard. Associated with the pool, showers of course but also, perhaps, bathing facilities designed not only as an alternative to inadequate hygiene in poor homes, but avowedly as a physical luxury, an attractive place to relax in groups. A gymnasium. Lo! a library, a game room, an exhibition room for arts and crafts. Facilities for meetings of neighborhood organizations? Quarters for neighborhood medical and social services? The goal is to create a genuine neighborhood centered on a cultural institution rather than a row of stores. The cultural institution bases itself on the existing physical pre-occupations of the population to be served, while exposing them to other influences.

The Riddle of the Germans[40]

[Arthur R.G.] Solmssen [author of *A Princess in Berlin*] gives us the feverish post-World-War I Berlin of artists, writers, and idealistic politicians; unemployed generals, grim ex-corporals, and mangled war veterans; gay, desperate whores, and psychotic anti-semites. Here are elegant fifth-generation converted Jews running investment banking houses, newspaper chains and steamship lines, haunted by a secret dread. Here is a Berlin of the pleasant suburban schloss, the liberated upper class actress, and the nubile heiress whom one can teach sailing

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Dec. 27, 1971).

[40] Schwartz, Book Review, U. PA. L. ALUMNI J., Winter 1981, at 17 (reviewing A. SOLMSSEN, A PRINCESS IN BERLIN (1980)).

and other things.

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Who can solve the riddle of the Germans? A people of extraordinary talent in science, industry, music, painting, literature, a people of war, sentimentality, jingoism and genocide. Is it possible that the admired Germany of today could, like the Germany of Weimar, the pleasant lands of pre-Bismark Germany, or the model of freedom, culture and politico-economic reforms that was the Germany of the late 19th Century, revert to the apocalyptic Beast? Our writers, and German writers as well, have lately been exploring the soul of this portentous nation. Fritz Stern gave us a frightening reading in *Gold and Iron,* a history of the tensions in Bismarckian Germany. Barbara Tuchman has looked into this maelstrom in *Proud Tower, The Guns of August,* and *A Distant Mirror.* Gunther Grass lifts the lid off this same cauldron in *The Tin Drum* and *The Flounder.* There are, of course, no answers to the riddle, but reflective people will be satisfied, in reading *The Princess,* that they understand the question better.

On Ineradicable Doubt, Martyrdom, and Myth[41]

On August 22, 1927, Nicola Sacco and Bartolomeo Vanzetti were executed by the Commonwealth of Massachusetts. They had been convicted in 1921 of murdering one Berardelli in the course of an armed robbery of a shoe company paymaster at South Braintree. The defendants were Italian immigrant anarchists. The era was that of Babbitry, xenophobia, Harding-Coolidge "normalcy" and Attorney General Palmer's raids against radicals. In the six year interval between trial and execution, there gathered about Sacco and Vanzetti an extraordinary assembly of vindicators, including Felix Frankfurter, Walter Lippmann, Dorothy Parker, Edna St. Vincent Millay, Arthur Schlesinger and John Dewey. Those of us who were arriving at the age of political awareness in the summer of 1927 will not forget the tensions of that frenzied final week of efforts to save two lives. Vibrations emanating from world-wide massive protest demonstrations electrified the political atmosphere. I can still see the protesting poster in the shop window of an Italian cobbler on the main street of our town.

Were they in fact guilty? The question seems almost irrelevant four decades after their death. The continuingly relevant questions are: Does our system of justice work as well as is humanly possible? Should capital punishment be abolished in a regime of justice so long as there

[41] Schwartz, Book Review, 114 U. PA. L. REV. 1260, 1260, 1264-65 (1966) (reviewing D. FELIX, PROTEST: SACCO-VANZETTI AND THE INTELLECTUALS (1965)).

is an irreducible margin of human error?

The theses of David Felix' book include the following propositions: The evidence was convincing of Sacco's guilt and persuasive of Vanzetti's. They had a fair trial despite the fact that the trial judge, Webster Thayer, was a political reactionary. The liberals of the Twenties came (belatedly) to the support of these alien defendants because the liberals themselves felt alienated in the Harding-Coolidge society, and found identity in the role of protestants. The innocence of Sacco and Vanzetti was elevated to the status of an article of faith, and Vanzetti to the role of saint in a secular hagiography created by American writers of the Thirties.

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Whether or not the "martyrdom" of Sacco and Vanzetti be "myth," Felix' account of the reflection in art of these real, earth-shaking deaths is an absorbing and illuminating exercise on the borderlands of politics, law, sociology and literary criticism. He takes up one by one the novels and plays that wove themselves about the case and helped build the myth. In the end, he acclaims the myth, regardless of its verity . . . .

. . . .

Felix is a civilized man trying to understand. He takes us on a difficult path between the thought-numbing certainties of the right and left, but does not fall into action-numbing vacillation of the middle. He sees the tragic necessity for decision despite dubiety, but action to which he summons us would not be cruel, irrevocable or neurotically fixed upon a single goal when humanity knows only plural goals.

Capital Punishment [42]

Hegel's observation that history teaches nothing except that its lessons are ignored will not deter historians or reduce their audiences. History, like philosophy, will be written and read regardless of any crass utility, to satisfy man's inborn compulsion to find patterns in a manifold universe. It thus serves as a branch of aesthetics, like music or painting, distinguished from the novel or the play principally by the requirement of verity in the detailed assertions employed to create the total dramatic effect. To be sure, a history of criminal law will be turned to practical account by life's brokers, in textbook and brief, classroom and legislature—paintings are articles of commerce too—but

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[42] Schwartz, Book Review, 98 U. PA. L. REV. 132, 132-34 (1949) (reviewing L. RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION, 1750-1833 (1948)) (footnotes omitted).

the essential virtue of Professor Radzinowicz' book is its power to arrest us with his brilliant evocation of an era in the moral development of the western world.

. . . .

For those who seek lessons in history many are here provided. Mr. Justice Frankfurter has already cited Radzinowicz for the proposition that brutal methods of law enforcement are essentially self-defeating. Another might conclude from this history only that the excessively severe penalties of the substantive criminal law led to an *overly liberal* criminal procedure. Perhaps the lesson is that criminal laws must eventually conform to the moral sense of the community. Or is it more significant that Professor Radzinowicz documents a century of notable divergence between law and public opinion? Some may find in Radzinowicz the thesis that nations can be converted and uplifted by the heroic efforts of a few leaders, while others will adhere to Tolstoy's view that heroes and leaders are mere instruments of their times, voicing rather than moulding the mass experience. There is material for the reflection that each generation's reforms become the shackles of the next generation. Long term imprisonment was introduced as a mitigation of capital punishment; solitary confinement was conceived as an opportunity for moral regeneration through undisturbed meditation on one's sins. The principle that punishment should be proportionate to the crime was first used to persuade men to discriminate in penalty between murder and malicious mischief; it then becomes an argument against adapting treatment to the personality of the offender. We lack the science of social cause and effect to tell us whether the amelioration of eighteenth century English criminal law was cause, consequence, or merely evidence of a more general softening or "civilization" which was under way.

Criminal Law and Social Science: Tribute to a Great Coursebook[43]

Michael and Wechsler did not, of course, invent the "functional approach," but they brought it to bear on a field of law that was—and is—often assumed to be virtually an irrational response to vengeful impulses and unarguable premises. Their book [*Criminal Law and Its Administration*] pervasively asks what our purposes are and whether our means are well adapted to achieving those purposes. Since the purposes, premises, and norms of a society are complex and contradictory, reflecting conflicting group interests, religious influences, perceptions

[43] Schwartz, *The Wechslerian Revolution in Criminal Law and Administration*, 78 COLUM. L. REV. 1159, 1160-61 (1978) (footnotes omitted).

and misperceptions of sociology, psychology, philosophy, and medicine, the book constantly confronts us with the premises of law, drawn from these other disciplines, in a way that no other book had done. Ultimately the very image of the lawyer is transformed. Under Michael and Wechsler's discipline, the lawyer can no longer remain a mere logician, grammarian, and instrument of a tyrannical sovereign will; he becomes a humanist critic of the institutions that punish people whose behavior departs egregiously from generally accepted norms.

The range over which this stunning synthesis extended required, of course, radical innovation in expository method and style. The ponderous techique of reproducing numerous judicial opinions upon which an inductive and "Socratic" pedagogy can be practiced had to be modified. Much information was conveyed in forthright summary, either in the authors' own words or in quotations from commentators or legislative revisers. Typical statutes were reproduced, as deserving the same intense examination and comparison as the utterances of judges. The texts of Italian, Russian, and British legislation liberated us from parochialism. Problems of discretion were strikingly illustrated by sample probation reports and by accounts by the Governor of New York and the British Home Office regarding the exercise of executive clemency in capital cases.

The book's tremendous intellectual demand was leavened by the extraordinary dramatic flair evidenced in the selection of the case material. It is not hard to be interested in criminal law. Greed, lust, violence, treachery, political fanaticism, and madness are its raw materials. But this book is particularly enthralling because the cases, like classical tragedies, so frequently involve more than personal crises. With uncanny prescience of the great social and moral issues of the decades ahead, the authors presented scenarios on racial conflict and unequal justice, on youthful criminality, on middle-class reaction to aggression from the ghetto, on organized crime, on white-collar crime, on euthanasia, on commercial arson with fatal consequences, on repression of political dissent, on culture conflict under imperialism, on bloody family fights, and on lawlessness of law enforcement officers.

The Cultural Deficit in Broadcasting[44]

American television has defaulted on its legal obligation to maintain the national cultural heritage, to diversify offerings from the point of view of levels of taste, and to satisfy the demand of an important

[44] Schwartz, *The Cultural Deficit in Broadcasting*, 26 J. COM. 58, 63 (1976).

segment of the audience that wants an effective alternative to lowest-common-denominator programming to mass tastes by mass advertisers. One may speak of a cultural deficit in this connection without, for the time being, undertaking to define it. The concept of high culture does not lend itself to comprehensive and precise definition. Like many unavoidably vague legal standards—due process of law, obscenity, reasonable grounds for arrest—it is only a rough guide by which judgments can be made and remade from time to time.

The ingredients for judgment are not hard to name. The material may be music, drama, painting, dance, architecture, history, biology, astronomy, politics, religion, or philosophy—in short, anything in the realm of the arts, the humanities, or science. It may be classical, but not hackneyed, or innovative with some promise of entering into the great flow of the history of thought and feeling. The material must be such as cannot be appreciated without attention and even some educational preparation. In that respect it would differ not only from the superficially distracting, easily accessible fare that presently dominates the commercial TV screen, but also from most offerings on "educational" television, which quite properly has a large commitment to the education of children, to current events, to cookery, to consumerism, and to civic affairs.

The important thing is not legalistic definition of what constitutes high culture, but providing credible appraisals of the broadcast system's performance from the standpoint of culture . . . . To put it another way, when a market is not—perhaps cannot be—effectively competitive, public regulation must be invoked to assure the flow and quality of service that public interest requires.

Skepticism as to Administrative "Expertise": Prescience of the Liberal Turnabout on Judicial Review[45]

Expertness has been oversold in this country. The obvious and enormous success of specialization in industry and the physical sciences has led to the notion that specialization holds the answer to all questions in politics, education, philosophy, and the social sciences generally. Also we live in the shadow of an indistinctly remembered era prior to 1936 when the prestige of the judiciary had been undermined by a series of decisions invalidating popular social legislation on dubious constitutional grounds. The great successes of the Roosevelt era came to be associated in the minds of many with the rise of administra-

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[45] Schwartz, *Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility,* 67 HARV. L. REV. 436, 471-73 (1954) (footnotes omitted).

tive agencies. Only recently, while conservatives have been aligning themselves with the regulatory bodies, has the liberal tune begun to change. Now it is being recalled again that "war is much too serious a matter to be entrusted to generals"—a jibe at expertness that finds serious expression in the American political principle of the dominance of civilian over military power. A critic of the CAB has raised the question whether "five men can be found who are experts in political science, military science, the business of transportation, corporate finance, and experts in legislation and the law." Speaking in another context, Judge Wyzanski expresses the new skepticism of expertise with his usual felicity: "one of the dangers of extraordinary experience is that those who have it may fall into the grooves created by their own expertness. They refuse to believe that hurdles which they have learned from experience are insurmountable can in fact be overcome by fresh, independent minds."

We have only to look about at the social science experts and the real role they play in community life to see that expertness is not wisdom and that the relative ordering of values in a society—the ultimate problem of choosing between alternative courses of action—is something we do after the expert has completed his task of collecting data, describing, and, to a limited extent, predicting. This should be sufficiently clear from the field of economics . . . . The most contradictory policies are constantly buttressed by economic experts of unquestionable authority. . . .

Administrative expertise is a slogan which served well in a period of struggle to establish some degree of authority for the emerging new tribunals. Perhaps the time has come for a reexamination of the content of this slogan.

The Need for a Credible Left[46]

In view of the harsh things to be said about the scholarship, rhetoric, and politics of the Critical Legal Studies movement, I must affirm at the outset the importance of addressing, not suppressing, the issues that agonize these young radicals. The country and the world *are* fraught with evil and injustice. Income and power are viciously maldistributed. Hypocrisy and hysteria taint foreign and domestic policies. In this "age of communication," communications rot in substance as the technology advances. The law does indeed embody, in part, the will of the dominant to dominate. There is indeed a pervasive unjusti-

[46] Schwartz, *With Gun and Camera Through Darkest CLS-Land*, 36 STAN. L. REV. (forthcoming 1984).

fied complacency. Radical measures may be required to turn us towards genuine human and social progress. There is then a continuing need for a clamorous left to challenge establishment cliches. This need has been, to an extent, filled by CLS, and the prospect of filling it accounts for the attraction the movement holds over so many very able people.

Even misdirected protest may sensitize those who will more soberly pursue reform, and will sharpen their perceptions. The danger, however, is always that the status quo will only be solidified if the attack upon it is manifestly vulnerable in logic and fact, or is perceived as a game of jurisprudential polemics divorced from the real world and devoid of practical proposals for progress. The need is for a credible left, a left of impeccable scholarship and style. No doubt, many CLS members, emerging from the nightmare of discovering evil, will turn to the constructive tasks of reform.

Legal Aid Thirty Years Before Community Legal Services[47]

[Professor Schwartz, temporarily assigned by the Securities and Exchange Commission to the Seattle region in 1938, became active in the local branch of the National Lawyer's Guild. He proposed that the organization make legal aid its central activity.]

It seems to me necessary that the local chapter get something accomplished if it is to survive or be worth surviving. The Guild must be more than a social club for people who think somewhat alike. The problem of doing something precedes the problem of expanding membership and, in part, will solve the latter problem by making it possible to point to achievement. An important step in the progression from resoluting to action is confining attention to one or a few specific objectives. Such objectives may be akin to, but ought not to be identical with, those of other "liberal" groups. Preferably, they should be within the peculiar province of lawyers. If there are no such projects, the Guild should dissolve to prevent dissipation of energies which might more effectively be employed by organizations which were in existence before the Guild: The American Civil Liberties Union, The League for Peace and Democracy, the Democratic Party, and the Friends of Spanish Democracy. In my opinion, however, there are aims which a lawyers' guild is specially qualified to pursue. I suggest for immediate action the following program which will enable the Seattle Chapter to do a public service and at the same time help the profession of the law and lawyers.

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[47] Memorandum from Louis B. Schwartz to Chairman, Seattle Chapter, National Lawyer's Guild (Aug. 20, 1938).

[The memorandum here details a program for establishing a legal aid operation, and continues with a discussion of related "institutional advertising."]

What I have in mind here is a logical complement to the legal aid program—an organized effort to advertise the need for and availability of lawyers' services among those who can afford a moderate fee. Traditionally, lawyers have been barred from personal advertising, and partially, as a result of this attitude, lay institutions, particularly banks, trust companies, insurance companies and title companies, have taken over many of the lawyers' most profitable lines of activity. In addition, there exists a large group of middle class people able to pay moderate fees for legal counsel, but believing that a lawyer is to be consulted in time of calamity and fearful, with or without basis, that preventive legal counsel is a luxury available only to racketeers and the rich.

One plan of attack on this problem might be that of the Junior Bar Association of Buffalo, New York, which has given a series of radio skits, written and acted by members, dramatizing the need for lawyers' services. Usually the plays have been based on actual recent court decisions. An alternative might be weekly broadcast or newspaper column discussing the effect of recent decisions in terms of real meaning to the middle and lower classes. It is my impression that free time would be available on some local station if the advertising element of the program were judiciously subtle. A permanent publicity committee would seem to be the vehicle for studying and carrying out some such program.

Civilizing the Law Review [48]

What's wrong with the law reviews is an old topic. Reading the old complaints and reflecting on new grievances lead me to the conclusion that the fundamental source of difficulty is loss of concern about readers. The reviews are edited and published primarily to serve the ends of the writers, not the readers. They afford students practice in "legal" writing, professors an outlet for the "production" which is a professional necessity, polemicists a platform however lowly. It is not surprising that frequently the style is pedantic, the documentation grossly excessive, the choice of subject matter idiosyncratic, the selection of comments virtually dictated by the accident of which student's write-up is superior and available at deadline time.

This is not to say that law reviews serve no function. In the aggre-

[48] Schwartz, *Civilizing the Law Review*, 20 J. LEGAL EDUC. 63, 63-64 (1967).

gate, the reviews constitute a valuable (if vastly expensive) mine or bank of information, ready-made research, and rhetoric. But no one would buy or read *one* law review for this purpose. Rather, we have libraries to stock them all, and the *Index To Legal Periodicals* to help us search the whole canon when we want help with a specific problem. The rise of the specialist legal journal has further diluted the significance of any one university law review. The tax practitioner, the antitrust specialist, the criminal lawyer, the lawyer who concentrates on municipal government, patents, banking, or insurance, certainly doesn't read a university law review to keep up professionally.

Is the university law review then a moribund institution? Is it to be bought only out of old-school-tie loyalty (or compulsion, where the law student has its cost billed to him with the tuition fee)? Does it and will it survive (8 issues a year? 6? quarterly?) only because law schools must subsidize it as a teaching aid or for "prestige" purposes?

The answer to these questions may be yes. But there is another possibility waiting to be realized by daring ventures in new editorial policy. The crux of that new policy would be a more explicit catering to reader interest, with definite classes of readers and potential readers in mind. The readers I envision are cultivated, literate lawyers with broad interests, and also educated laymen who can follow a discourse on legal matters with a minimum of incidental explanation. Law students fall into the latter category. A review so edited would not have to be forced upon students by mandatory subscriptions, or by threats that examination questions will be answerable only from that source, or by desperate appeal for "support." Such a review would instead constitute an introduction to the heady, witty, vital, precise, and far-ranging intercourse of good lawyers when they foregather to talk of justice and society. The new Law Review would have the same relationship to law that the *Scientific American* has to current science. It would be literature as well a law.

Coerced Confessions: A Twelve-Year-Old Murder Conviction Annulled

In habeas corpus proceedings in the *Sheeler* case,[49] Professor Schwartz and Raymond J. Bradley unraveled a fantastic story of miscarriage of justice. Sheeler spent twelve years in prison under a life sentence imposed for murder of a policeman. The judgment was en-

[49] Commonwealth *ex rel.* Sheeler v. Burke, 367 Pa. 152, 79 A.2d 654 (1951) (findings of Levinthal, J., reported at 74 Pa. D. & C. 241 (1951)). For a discussion of this case, see J. FRANK & B. FRANK, NOT GUILTY 168-80 (1957).

tered following his plea of guilty in open court, on the advice of two lawyers who had been appointed by the court to defend him in this capital case. Sheeler had been brutalized and terrorized by Philadelphia police during a week of illegal detention until he signed a long, police-fabricated confession. So convinced had he become that the police would send him to the electric chair if he recanted the confession and that they could save his life if he "cooperated," that he publicly embraced the prosecutor in open court when the "lenient" life sentence was pronounced.

Over the years various lawyers had been enlisted on Sheeler's behalf, but they lost on a motion for a new trial on the ground of after discovered evidence (for example, an employer's record showing that Sheeler was working in New York City at the time of the shooting). Professor Schwartz was brought into the case by Philadelphia's famous Judge Curtis Bok, who had befriended Sheeler in the course of prison visits. A year's investigation followed, after which application was made directly to the Supreme Court of Pennsylvania to exercise its extraordinary original jurisdiction in habeas corpus. The writ issued, designating a widely-respected trial judge to hear the case as referee. The sensational trial before Judge Levinthal lasted almost a week, was front page news throughout, and was regularly attended by Professor Schwartz' students in criminal law.

In the course of the trial, the "confession" was torn to shreds. It was shown, for example, that Sheeler, pressed by the police to designate a meetingplace where he was supposed to have rendezvoused with accomplices, gave an address with which he was familiar, and that was incorporated in the confession. The house at that address had been torn down two years earlier. Similarly, to tie in with the story of a police stool-pigeon that Sheeler had fled from Philadelphia to "West New York" on the night of the murder, Sheeler incorporated in his confession an address on the west side of Manhattan. Neither he nor his interrogators were aware that "West New York" is a town in New Jersey.

It was also proved that Sheeler had originally denied his guilt, had employed his own defense lawyer, who had been summarily edged out of the case to be replaced by compliant court-appointed "defense" lawyers, and had confessed only after prolonged detention, beatings, midnight interrogation, and confrontation with bogus eye-witnesses.

The Supreme Court granted habeas corpus, and in a swift retrial (the Philadelphia District Attorney's office still resisting), Sheeler was acquitted.

The Law Review asked Professor Schwartz to record his reflec-

tions on this extraordinary case. They follow:

Four things stay with me as a result of this experience: (1) an appreciation of the common humanity shared by us on the outside with those in prison; (2) a still-amazed awareness of the depth of corruption that can penetrate a community in the name of law enforcement; (3) the subversive effect of such occasional gross injustices upon respect for "the system," notwithstanding that the overwhelming majority of the incarcerated are in fact guilty; and (4) the psychic rewards available to young lawyers willing to immerse themselves in the battle against injustice.

As to our common humanity with the jailed, there was Sheeler, who had had a very seamy childhood after emerging from an orphanage at the age of sixteen in the depths of the Great Depression. A kind fellow-prisoner had guided his reading in prison to the point where he was a remarkably sophisticated young man when he emerged from prison. I met his prisonmates, men who had been convicted of terrible crimes but who were like the rest of us: capable of loyalty and consideration but also of treachery and cruelty; some very intelligent, more stupid; many likable, some dour and repulsive; crazy and sane and all degrees between: people we have to punish but must not hate.

As to corruption (I speak now of the Philadelphia before the great post-World War II reform of the Clark-Dilworth era), what is one to think of a community where a notorious squad of policemen hunted down "gangsters," especially supposed police-killers, disposing of them by shooting "in self-defense" in the course of arrest. What is one to think of a leading newspaper which honored such heroes of law enforcement? How regard as anything but a nightmare the course of events leading to the framing of Sheeler? Someone else, in all probability the real killer, had been convicted, likewise on a confession, and had been in prison a year before the police took after Sheeler. He was released upon Sheeler's conviction! What were the police motives? I never learned reliably, but the most plausible explanation was a schism in the police department: one faction had "solved" the policeman's murder with the earlier conviction. Another faction sought to discredit the first faction and its solution.

Criminal justice is an essential but vulnerable institution, perhaps dirty business at best. It does not deserve the mortal blows of the great unjust convictions. I feel an urge to remind people how atypical the *Sheeler* case is. Sheeler himself came out of prison vowing to secure the release of all those fellow-prisoners who were also unjustly convicted. He declined most of my proposals to reintegrate him into ordinary civilian life, and spent a year running down evidence for his former cell-

mates. Then he gave me a stunned report: "You know what? They were all lying!"

The supply of injustice, large and small, has not run low. They may not all be *Sheeler* cases, or even criminal cases—or cases of any kind, but rather statutes and institutions that conduce to heart-breaking family crises; to demoralizing discrimination; to oppression in mine, factory, hospital, or army; to vast unpunishable economic exploitation. To lawyers bogged down in narrow client-serving, I'd like to say, "Pick a cause and run with it. It's almost indecently enjoyable."