THE LIMITATIONS OF LAW AND JUDICATURE

(Observations on Law, Its Makers and Interpreters)

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Criticism of law and those who deal with it, judges and lawyers alike, is not new. We have Christ's familiar reproof of the lawyers:

> "Woe unto you also, ye lawyers! for ye lade men with burdens grievous to be borne, and ye yourselves touch not the burdens with one of your fingers." [1]

Professor Edward J. Goodspeed has put it in modern speech, which extends the adjuration to all experts in the law:

> "Yes, alas for you experts in the Law, too! For you load men with burdens they can hardly carry, and you will not touch them yourselves with a single finger." [2]

The patron Saint of lawyers is St. Ives of Brittany. At the annual celebration which is held in his native village every year, they chant this song:

> *"Advocatus sed no latro*
> *Res miranda populo."*
> (An advocate yet not a thief
> A thing well nigh beyond belief.)

An American poet has drawn a broad bill of indictment against the profession, accusing us of deficiency in those qualities which Western Christian civilization stresses:

> "The law the lawyers know about
> Is property and land;
> But why the leaves are on the trees
> And why the waves disturb the seas,
> Why honey is the food of bees,
> Why horses have such tender knees,
> Why winters come when rivers freeze,
> Why Faith is more than what one sees,
> And hope survives the worst disease,
> And charity is more than these,
> They do not understand." [3]

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1. Luke 11:46.
2. GOODSPEED, THE NEW TESTAMENT, Luke 11:46 (1923).
3. L. D. WALTERS IN PEPLER, ANTHOLOGY OF RECENT POETRY (1920).

All this just shows how much misunderstanding can arise about an ancient profession more or less honorable. So today, I stand as the devil's advocate and point to the humanness and humaneness of the law. Tragedy, comedy, sordidness, romance, human hopes and aspirations, human misery and degradation,—human beings not at peace, but at war with themselves and with their fellowmen—this is the picture which law in action, as it expresses itself in actual litigation, reflects,—a picture, at times, stranger than fiction.

Like a Greek tragedy, it seems ever new because it deals with human emotions, human beings in action. And one who has dealt with law for a long period of time might well say with Aeneas:

> *"quaeque ipse miserrima vidi et quorum pars magna fui."*
> (These most piteous scenes which I myself saw and of which I was no small part.)

Stranger Than Fiction

In the cold, dispassionate form in which law appears in the books, the humanity behind litigation is often lost to view. But it is there if you have imagination,—if you can visualize the recorded facts and the cross currents of motives which lay behind them. A case, after it is reported, or a decision, after it is made, may appear simple or clear enough. But to him who participates in clarifying the muddied waters which the lawsuit presents, in most instances, the problem is not so easy; and it is in the process of such clarification that the interest of the function of the judge and of all those who assist in the judicial process appears.

This is not always satisfactory; and, at times, it may be dubious. But, as we are human beings dealing with human elements, there is fascination in the material which we handle. Some of it,—to use a trite phrase,—is stranger than fiction. And was it not Boileau who said:

> *"Le vrai n'est pas toujours vraisemblable?"*
> (Truth does not always seem so.)

There is a famous short story of the mining camps,—*The Iliad of Sandy Bar,* by Bret Harte,—which involved two miners, Scott and York, who had started years before as partners in a mining venture known as "The Amity Claim." They quarrelled one night and separated at daybreak. For years, they feuded and litigated. The community feared that violence would ensue whenever they met, each being determined to kill the other on sight. When Scott lay on his deathbed, York, who had been very successful, and had gone abroad, returned to

Sandy Bar. Abandoning his Paris clothes, and dressing himself as a prosperous miner would on a holiday, he visited the shack where Scott lay, evidently very ill, delirious. He had him moved to his hotel, where he took care of him. Days passed. One day, as the sick man became conscious, he recognized his former partner. They talked of olden times, and Scott, slowly, and with difficulty, turned his face to York and said,

"I might have killed you once."

And York's answer was,

"I wish you had."

The remainder of the story we give in Bret Harte's own language:

> "They pressed each other's hands again, but Scott's grasp was evidently failing. He seemed to summon his energies for a special effort.
>
> " 'Old man!'
>
> " 'Old chap.'
>
> " 'Closer.'
>
> "York bent his head toward the slowly fading face.
>
> " 'Do ye mind that morning?'
>
> " 'Yes.'
>
> "A gleam of fun slid into the corner of Scott's blue eye, as he whispered:
>
> " 'Old man, thar *was* too much saleratus in that bread.' "

A good story, showing understanding of human nature, having all the elements of suspense and perfect denouement required in a story.

In my early career as a lawyer in Modesto, California, I actually defended and secured the acquittal of a Mexican boy who had killed his buddy in a quarrel which arose over the manner in which the deceased had cooked beans for the pair. They worked for the Santa Fe Railroad at Riverbank, California. They bunked together and shared their meals. One day a dispute arose over the preparation of the meal. In true Mexican fashion, they armed themselves with such sharp instruments as were handy. They walked out into the railroad yard, each having a handkerchief tied to his left wrist. A duel began. The deceased was the taller man and had armed himself with a razor. All that the defendant had was a pocket knife. They did not even take off their hats. The deceased took his razor and gave a slashing blow, which cut the defendant's hat and his face. The defendant "ducked", hit the deceased in a vital spot and killed him. I was able to convince the jury that the defendant had acted in self-defense. The handkerchief around the wrist might indicate a deliberate duel. But the members

of that jury, drawn chiefly from the farms surrounding the community, were not interested in the fine distinctions in our law between a situation in which a killing is provoked in the first instance or not. They thought that the homicide, under the circumstances, was justified.

It has been said that a good lawyer should not ask too many questions. In this case, I did not follow that policy. If there was concealment from me, I never learned it. Concealment is, at times, a source of injustice for which we are blamed unjustly. There is the quaint complaint of the colored woman:

> "Dere ain't no justice in dis world
> No mattah how yuh plan—
> For de cou't dat 'cided mah devorse
> Gave the chilun to mah ol' man!
> Ah niver heerd no sich thing
> Since de Lord Almight rizen
> Des spose dey knowed all I knowed——
> Not one ob dem is hisn!"

We laugh at the complaint. And yet, in one of the most interesting cases I ever tried as a judge of the Superior Court of California, I was confronted with that very proposition except that I *was informed* that the child wasn't "hisn." In brief, an apparently refined English woman, married to an American man, admitted an affair with a well-known industrialist and insisted in the divorce proceeding, brought by her husband, that the last child was not her husband's, but was her child by the lover. Through one of those strange situations which perhaps only a Freudian expert,—which I do not claim to be—could explain, the husband did not act like the proverbial offended party. He insisted and offered proof that the child was his. *And I so found.*[4]

Motivation is always difficult to find. There was the man who sought to take away the custody of his three children from their mother, whom he had never married. Although no impediments to marriage existed, the man could give no plausible explanation for his refusal to marry the woman with whom he had lived for many years, and who bore him three children. However, he felt that she had become impractical, was writing poetry and associating with a literary set, of which he disapproved. And he sought to give to his children a different environment. It was this case, which led me, in 1928, to make the statement:

> "There are no illegitimate children; only
> illegitimate parents."

4. Citing Warren v. Warren, 127 Cal. App. 231, 15 P.2d 556 (1932).

A statement which many, including the late O. O. McIntyre, have claimed as their own.[5]

It was not an easy case to decide. There was nothing in the conduct of the woman that would have warranted me in depriving her of the custody of the children to which she was entitled under the law of California.[6] However, there was one happy sequel to the proceeding. When we were through, the man had so specifically acknowledged the children as his own that, thereafter, the law of California would fasten upon him a liability which would not have been his had he not instituted the proceeding.

And then there was the man who objected to his wife's past and urged as a ground of annulment that his wife had concealed her unchastity from him. I held that the marriage could not be annulled on that ground. The decision created a good deal of discussion at the time. I was represented by the metropolitan press as drawing a curtain across a woman's past. Some newspapers criticized me very severely. The late C. K. McClatchy wrote in his "Private Thinks" in the Bee newspapers, with that dogmatism which is so characteristic of laymen who assert their knowledge in a field alien to them,—that the decision "is not the law, never has been the law and could never be the law." What he overlooked, was the fact, to which I promptly called his attention, that I had followed a decision of the Supreme Court of California, made in 1895.[7]

Some time after that, I was asked to decide whether misrepresentations as to wealth were ground of annulment. A middle-aged woman had married a man of her own age, believing him to be possessed of ample means, only to find that he had nothing and was being harassed by his creditors. Although the husband defaulted, I denied the decree. The case was appealed to the Supreme Court of California. As there had been no appearance in the case by the defendant, I requested two well-known members of the Los Angeles Bar to appear as friends of the court and present my views. I was interested in knowing if the decision in the old case, which I had followed, was still the law. The Supreme Court so held, summing up the law in these words:

> "'A promise to be a kind, dutiful and affectionate spouse cannot be made the basis of an annulment. The concealment of incontinence, temper, idleness, extravagance, coldness, *or fortune inadequate to representations, is not sufficiently material.*'"[8]

5. STEVENSON, THE HOME BOOK OF PROVERBS, 125 (1948); H. L. MENCKEN, A DICTIONARY OF QUOTATIONS, 571 (1942).
6. CAL. CIVIL CODE § 200 (1872).
7. Barnes v. Barnes, 110 Cal. 418, 42 Pac. 904 (1895).
8. Marshall v. Marshall, 212 Cal. 736, 740, 300 Pac. 816 (1931).

So, here, I was instrumental in having reaffirmed a principle declared thirty-five years before,—a principle which embodies sound social policy which, seeing in marriage the foundation of society, refuses to annul it, except for grounds that are vital.

This seeming illiberal policy is motivated also by the fact that, by annulment, we declare that the legal marriage *never* existed, although the children are legitimate, and provision may be made for their support and maintenance.[9]

Novelty is not always desirable. And, in dealing with an institution so ancient as that of marriage, which has stood the test of time, old principles may help us solve new problems. What we used to call in the old-fashioned law schools "domestic relations" tax heavily the judicial statesmenship of those who handle the problems arising from them. And, at least on one occasion, I brought to my aid,—when neither side could be of assistance,—a decision reported, not in the standard law reports, but in that mine of interesting trials,—Howell's State Trials,—and *five hundred years old,* which helped me compel a husband to perform an obligation which he had assumed. Briefly, there had been a divorce and property settlement approved by the court. In the agreement, the wife was given the home for herself and children. It was a very pretentious home, subject to the usual mortgage which, also pretentious, amounted to $30,000. The husband agreed to pay off the mortgage. He did not do so. The wife came to court and asked that I compel him to liquidate the incumbrance. There was no precedent in California or elsewhere. The husband insisted that I could make no mandaory order compelling him to pay,—that the wife had to wait until she was compelled to pay it, and then ask to be reimbursed. As the wife had no individual financial resources; the alternative meant to sacrifice the home. So I was happy to find that over five hundred years ago, the question arose before one of the English Chancelors. An English nobleman had agreed to endow the marriage of his son. He failed to do so. The dutiful son of a nobleman of the Middle Ages, would not sue his father. However, the wife,—with that independence which has always characterized women when it comes to protecting their rights,—had no such misgivings. She brought her father-in-law before the Chancelor. And he, as the Keeper of the King's Conscience, ordered my Lady's noble father-in-law to perform the obligation. And so that wise old Chancelor came to the aid of a young California judge and helped him do justice. And I do not say this facetiously. For, when-

9. CAL. CIVIL CODE §§ 84, 85 (1929) (1933).

ever the law compels anyone to keep his pledged word, justice triumphs; the very foundation of our legal system lies in upholding the binding force of contract. This observation may seem trite. But it is of utmost importance that it be made. For there are those who insist that the right of contract should be denied to persons whom they, for the moment, consider enemies of society. I was surprised to find, recently, when, following the verdict of a jury in a declaratory judgment action I held that a motion picture company had violated its contract with a writer, that many persons and commentators protested upon the ground that, because the writer was suspected of harboring subversive ideas, these employers should have been given *carte blanche* to suspend him. This, despite the fact that that was not the ground stated in the Notice of Termination. Yet, if we are not to embrace totalitarianism,—fascist, falangist, or communist,—which denies it, we must be true to the great fundamental of equality before the law, which is so integral a part of our society.

During the war, the Supreme Court held that even interned alien enemies could not be denied access to our courts of justice.[10] Yet some would have us deny it to Americans who stand convicted of no offense, but whose political or economic philosophy may be anathema to us.

I can conceive of no doctrine more subversive of that orderly judicial procedure which is our proud American heritage.

The Old and the New

Thus, even in our legal system,—in which our judgments ultimately fit into a legal pattern, which supplements and, at times, transcends the written law,—the old mingles with the new. The development of man's institutions, legal and other, lies along a rough road. A study of the past may help avert its mistakes and shape the future.

"The law," wrote Mr. Justice Oliver Wendell Holmes, in 1931, "tries to embody things that most men believe or want."

And, because, at times, human credulity is, and has been great, and human wants unreasonable, law has embodied beliefs which have seemed to subsequent generations to be incredible and wants which later generations have deemed outrageous. Many matters believed and wanted by these very generations may appear unjustifiable to those of a later day. And all that historical study and perspective may do for us is to teach us a little tolerance, and, perhaps, cause us to avoid some

10. *Ex parte* Kumezo Kawato, 317 U.S. 69 (1942). For limitations on an alien's right of access to our courts, see Johnson v. Eisentrager, 339 U.S. 762 (1950).

mistakes. Cynics do not even hope for that. For was it not Boileau who wrote *"le plus sot animal, c'est l'homme?"* (Man is the most stupid animal.)

To us today it is impossible to understand trials for witchcraft. Yet witchcraft was real to the people in the England of James I (in 1616) when among many others, one Mary Smith was prosecuted, convicted and hanged for witchcraft. The indictment charged her with many practices against various persons. At the trial, according to the report of the case, the following "wicked practices" were "proved" as having been practiced against John Orkton.

After Orkton had struck her son (Mary Smith's son) she cursed him. "Whereupon presently he grew weake, distempered in stomacke, and could digest no meate, nor other nourishment received, and this discrasie or feebleness continued for the space of three quarters of a yeare; which time expired, the forementioned griefe fel downe from the stomacke into his hands and feete, so that his fingers did corrupt, and were cut off; as also his toes putrified and consumed in a very strange and admirable manner."

From these ills he never recovered.

Other practices against three other persons were attributed to her. The Reporter adds:

> "And it is not improbable that she had dealt no better with others than these above mentioned."

In all cases, her curses came true.

She was found guilty and executed. Not only to the judges of the day, but to the reporter of the case and to Mary Smith herself, the acts with which she was charged were within the realm of the real.

Superstition, you say?

The Reporter was not alone in his belief in witchcraft. The judges, the educated public opinion of the day, shared the belief. The King himself was so convinced of the reality of witchcraft that, not satisfied with the existing law, he caused it to be changed so as to make the use of evil spirits a capital offense.[11]

Although he called it a "dubious crime," the great Sir William Blackstone, so revered by the lawyers of two continents, in his Commentaries, written in the middle of the 18th Century, took witchcraft as a reality. He wrote:

> "To deny the possibility, nay the actual existence of witchcraft and sorcery is at once flatly to contradict the revealed word of God, in various passages both of the Old and New Testament

11. LOWIE, ARE WE CIVILIZED? 237 *et seq.* (1929). The report of the case is taken from 2 HOWELL STATE TRIALS 1050-9.

> . . . The civil law punishes with death not only sorcerers themselves, but also those who consult them, imitating in the former the express law of God: 'Thou shalt not suffer a witch to live.' And our own laws, both before and since the Conquest, have been equally penal; ranking this crime in the same class with heresy in condemning both to the flame." [12]

But why multiply the instances? Books on history are full of them. Yet one thing is certain. Man has ever punished more severely those who interfered with his belief or rationalizations of it, than those who interefered with the world of his material being or possessions. Conformance to a fetish has been more ruthlessly enforced than any other conformance.[13]

A recent historian of the Massachusetts witchcraft trials, during the same century, concludes her analysis of the phenomenon with these sound observations:

> "Moral seasons come and go. Late in the nineteenth century when it was much the fashion to memorialize the witchcraft delusion, honest men discussed it with wondering pity as something wholly gone from the world and no longer quite comprehensible. But such condescension is not for the twentieth century. Heaven forgive us, 'demoniac possession' is with us still, even if the label is different, and mass mania, and bloodshed on a scale that the judges of old Salem would find incredible. Our age too is beset by ideological 'heresies' in almost the medieval sense, and our scientists have taken over the office of Michael Wigglesworth in forcing on us the contemplation of Doomsday. What one feels now for deluded Salem Village is less pity than admiration and hope—admiration for men whose sanity in the end proved stronger than madness, hope that 'enlightenment' too is a phenomenon that may recur." [14]

This is a sobering thought. Each generation feels progressive in outlook. And yet, even in our lifetime, we can see how unintelligent some of our recent approaches are. After the First World War, we saw the emergence all over the United States of laws to which, in more recent years, we have not pointed with pride. Criminal problems caused by the impact of war on the personalities of a large number of persons were sought to be handled by rigorous recidivist laws like the Baume laws of New York, which allowed a person to be committed as an habitual criminal on the third offense. Under such law,—in the State

12. 4 Bl. Comm. 60.

13. The witchcraft trials in Massachusetts in the latter part of the sixteenth Century followed the same pattern. See Wigmore, Kaleidoscope of Justice 551-5 (1941); Starkey, The Devil in Massachusetts (1949).

14. *Id.* at 282.

of Michigan, which had a very severe state prohibition law, a person could have been locked up for the remainder of his natural life as an habitual criminal, if convicted the third time for possessing a pint of whiskey. Laws aimed at thought control became the order of the day. Under the Lusk laws of New York, passed after the first World War, a teacher in that State could be deprived of his right to teach if he had advocated adoption, by the most peaceful means, of any governmental form not contained in the Constitution of New York, such as, for instance, the initiative, referendum or recall. Five assemblymen duly elected by the citizens of certain assembly districts of the State of New York to the Lower House of the State were denied their seats because they were professed Socialists. If we look back now, we may be quite willing to concede the error *of those ways*. But similar laws aiming at thought control have been put into effect in many states since the second World War, such as the Ober statute in Maryland and the Feinberg law in New York. At all times, courageous men and men at the Bar spoke out against these laws. And some do now. But, on the whole, apathy reigned. Dean Orren Kipp McMurray was among the men who spoke out against the unintelligent spirit which prevailed at the end of the first World War. He pointed to the fact that under some of the statutes enacted in various states, Jefferson and Lincoln could have been jailed. And I was proud to be of the audience which applauded him, in the early twenties, when he uttered these warning words:

> "The danger is that crude thinking based upon false assumptions, may be enacted into legislation, and may impair the guarantees of orderly legal procedure that are at the basis of our liberty. The duty devolves upon the bar of upholding in the face of criticism and against the temporary majority the fundamental principles on which our legal system is founded and for which organized society exists."

There is always danger when we yield to spasmodic movements which aim to undo, under one pretense or another, the orderly process of legal administration. But man has ever been violently resentful of those who interfered with his beliefs. And the criminal laws of various societies reflect the ideas which they sought to protect. Man has particularly been eager to protect his "momentarily great" personages. In England, as far back as 1275, because the Norman conquerors evidently felt insecure at the hands of the commonalty, there developed the law *De Scandalis Magnatum*—the libeling of the great. This grew out of three separate statutes.[15] The first of these dated back to 1275, and read:

15. Statute of Westminster, 1275, 3 EDW. 1 c. 34; 12 RICH. 2, c. 11 (1388).

> "That none be so hardy to invent, to say, or to tell or publish any false news or tales, whereby discord, or occasion of discord, or slander, may grow between the king and his people, or the great men of the realm; and he that doth so, shall be taken and kept in prison, until he hath brought into the court him which was the first author of the tale."

The other two read:

> "None shall devise or speak false news, lies, or such other false things, of the Prelates, Dukes, Earls, Barons, and other Nobles and Great Men of the Realm, and of the Chancellor, Treasurer, Clerk of the Privy Seal, the steward of the King's House, the Justices of the one Bench or the other, and other great Officers of the Realm, and he that doth so shall be taken and imprisoned. . . ."
>
> "When any such" (person as is described in the foregoing statutes) "is taken and imprisoned, and cannot find him by whom the speech be moved, he may be punished by the advice of the council, notwithstanding the statutes of Westm. 1, c. 34; and 12 Ric. 2, c. 5."

Those who are now advocating the broadening of our criminal laws in dealing with opposition to government or governmental policy are not preaching a new evangel. They are merely reverting to those long repudiated and futile authoritarian attempts to stifle non-conformity and opposition. This movement is also in line with Fascist and Communist totalitarian political theories which have evolved many crimes against the government, unkown to free countries.[16] Back of these is the old fear of heresy.

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16. Yankwich, *Changing Concepts of Crime and Punishment,* 32 GEO. L.J. 1 (1943).

In periods of stress, there is a tendency to look for short cuts and avoid what would momentarily seem to be the slow process of solving economic problems by ordinary means. There is always the temptation to subvert certain process of our law to aims alien to them. Confronted, after the First World War, with serious economic problems which resulted from its rapid change from a predominately rural to an urban state, California, not content with rigid enforcement of its criminal syndicalism statute (CALIF. STATS. 281 (1919). CALIF. PENAL CODE APP. 773 (1949)) resorted to the process of injunction to enforce the statute. A blanket injunction was issued out of one of the Superior Courts against some named and a larger number of unnamed persons forbidding them to commit the acts designated by the statute. Persons were charged with violation of the Act and without the benefit of a jury, in effect, found guilty of violating the Criminal Syndicalism Act. A unanimous Supreme Court of California sustained this procedure. (*In re* Wood, 194 Cal. 49, 227 Pac. 908 (1924).) But a writer in the California Law Review, giving his initials H. W. B., presumably Professor Henry W. Ballantine, had this comment on the procedure thus sanctioned:

> "It is not in accordance with the intent and spirit of the constitution that persons should be punished for violating general laws by a court acting without a jury under a sweeping edict or injunction issued against all persons who may violate the terms of a criminal statute. Such injunctions are merely cumulative prohibitions against what the criminal law already has forbidden under penalty.

Blackstone placed heresy in the same class as witchcraft. Tolerance in the realm of ideas is a very modern innovation. Dissidence is unpleasant. The dissenter disturbs our equanimity; and most societies, including modern ones, are ready to see the dissenter as one fit for "treason, stratagems and spoils." Tolerance in matters of religion was unknown to the medieval mind. Church and state, being one, and the community believing in a unity based on one religion and being intolerant of all dissent, the Middle Ages dealt ruthlessly with any new thinking which they thought affected that unity, and punished it as an offense against the State as much as a sin against the church. Hence the Inquisition was as much the product of a political as of a religious idea. Tolerance for a variety of political ideals in the State is the product of free institutions. Some of the greatest of modern minds, while preaching tolerance, would grant it to certain groups only. John Locke, who influenced so much English and American constitutionalism, while preaching "toleration,"—as he called it,—saw no inconsistency in urging its denial to Catholics. In his famous first letter on Toleration, first published in Latin in Holland early in 1685, and in English later in the same year, he wrote:

> "These therefore (Catholics) and the like, who attribute unto the faithful, religion and orthodox, that is, in plain terms, unto themselves, any peculiar privilege or power above other mortals, in civil concernments, or who, upon pretense of religion, do challenge any manner of authority over such, as are not associated with them in their ecclesiastical communion, I say these have no right to be tolerated by the magistrate; as neither those that will not own and teach the duty of tolerating all men in matters of mere religion. For what do all these and the like doctrine signify but that they may, and are ready upon any occasion, to seize the government, and possess themselves of the estates and fortunes of their fellow subjects, and that they only ask leave to be tolerated by the magistrate so long, until they find themselves strong enough to effect it?" [17]

As to Mohammedans, he wrote:

> "It is ridiculous for anyone to profess himself to be a Mahumetan only in his Religion, but in everything else a faithful

It would seem to be a great mistake, even if not unconstitutional, to allow prosecuting officials to employ courts of equity as mere criminal courts. As has been well said 'courts of equity cannot with propriety or safety extend their jurisdiction, under the guise of protecting property, by issuing decrees imposing merely cumulative prohibitions against that which the criminal law already forbids, in order summarily to try and punish offenders for acts in violation of those prohibitions'." [13 CALIF. L. REV. 63, 66 (1924).]

17. 2 JOHN LOCKE'S WORKS 251 (2d ed. 1722).

> subject to a Christian Magistrate, whilst at the same time he acknowledges himself bound to yield blind obedience to the Mufti of Constantinople, who, himself is entirely obedient to the Ottoman Emperor and frames the feigned oracles of that Religion according to his pleasure. But this Mahumetan living amongst Christians would yet more apparently renounce their government if he acknowledged the same person to be the head of his church, who is the Supreme Magistrate of the State." [18]

So the idea of denying freedom to those who, we believe, would deny it to us if they came into power is not new. It is merely used against different kinds of disobedience.

". . . freedom for the thought that we hate," which Mr. Justice Oliver Wendell Holmes considered the test of our devotion to free speech,[19] has never been a very easy or popular doctrine. Rather would we *enforce* conformity on all, forgetting that voluntaryism is the essence of democratic living, and that, just as Roger Williams thought that "enforced worship stinks in God's nostrils," so do *enforced* confessions of faith of any kind. And, in the end, they will prove as illusory in achieving unity as did the act of the Puritans in exiling Roger Williams into the bleak New England wilderness, from which his "heathen" Indian friends rescued him.

So, if law is not wiser than it is, it is because human beings who create it, and the institutions which they seek to protect through the social control known as law, are not perfect.

A French Jurist has expressed the thought in one sentence:

> *"Le droit ne domine la société, il l'exprime."* [20]
>
> (Law does not control society, it expresses it.)

And our understanding of the law is enhanced, if we see in its expressions at a particular time, including our own, not the embodiment of eternal principles of supreme wisdom, but a mere device for social control attempted at a particular time in order to achieve a particular social end.

A brilliant student of the modern state has written:

> "The trouble about eternal principles is that they become antiquated and obstructive."

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18. *Ibid.*

19. United States v. Schwimmer, 279 U.S. 644, 655 (1929).

20. JEAN CRUET, LA VIE DU DROIT 336 (1908). Compare: "Law is nothing else than an ordinance of reason for the common good, promulgated by him who has the care of the community." (The Summa Theologica, Question 90, Article 4, p. 747, Volume 2, in The Basic Works of St. Thomas Aquinas.)

And he saw the weakness of our system in the fact that

> "The law faced with new situations, applies ancient formulas." [21]

So there is wisdom in the warning of the great Sir Frederick Pollock:

> "Thou shalt not make unto thyself any graven image—of maxims or formulas to wit." [22]

Prejudice in the Form of Law

Those who deal with the end product,—the law—and seek to apply it to particular situations, may, if they have special genius, rise above the *mores* of the community from which a particular piece of legislation springs. When they do this, we have the creative judicial spirit at its best. If they fail, the *mores* of the community at the particular time, as expressed in the legislation, hold full sway; and if they are the result of those prejudices which communities, at various times, enshrine into principles which they consider sacred, the spectacle, especially in retrospect, is not very enlightening.

California, at various times, in its history, has been noted for the force with which it asserted its convictions as a community; and the real pioneer vigor with which it embodied it in legislation. And, because so many of its early inhabitants came from the South, that its first most important constitutional battle was fought over the issue whether it would be slave or free,—what we have come to call "racism," was dominant in its early history. Very revealing in this respect is the composition of the California Constitutional Convention of 1849. There were in it twenty-two delegates who were natives of Northern States and fifteen delegates who were natives of slave States. Seventeen were natives of California and four were foreign born.

The first Civil Practice Act of 1850 provided:

> No Indian or Negro shall be allowed to testify as a witness in any action in which a White person is a party.[23]

The corresponding provision in Section 14 of the Criminal Act of the same year was:

> "No Black, or Mulatto person, or Indian shall be permitted to give evidence in favor of, or against a White man." [24]

A white Californian was convicted of murder upon the testimony of a Chinese. On appeal, the defendant raised the question whether that

21. R. M. MacIver, The Modern State 270 (1926).
22. Pollock, *A Plea for Historical Interpretation*, 39 L.Q. Rev. 162, 169 (1923).
23. Cal. Civil Practice Act of 1851 § 394, Calif. Stats. 114 (1851).
24. Cal. Crim. Practice Act of 1850 § 14, Calif. Stats. 230 (1851).

evidence was properly received. The word "Chinese" was not mentioned in either the civil or criminal acts. Indeed, the Criminal Act, limited its prohibitions to black, mulatto, or Indian persons. However, the Court found no difficulty in solving the problem. It reached the conclusion that the words were generic and that it was the clear intention to deny to every "person of color" the right to testify against a white person. After referring with dogmatic certainty to the high point of perfection which "the science of ethnology" had attained, the Chief Justice disposed of the matter in these words:

> "In using the words, 'No Black, or Mulatto person, or Indian shall be allowed to give evidence for or against a White person', the Legislature, if any intention can be ascribed to it, adopted the most comprehensive terms to embrace every known class or shade of color, as the apparent design was to protect the White person from the influence of all testimony other than that of persons of the same caste. The use of these terms must, by every sound rule of construction, exclude every one who is not of white blood." [25]

And so, confronted with a criminal statute in a community, the judicial system of which stemmed from the common law, one of the cardinal principles of which was equality before the law, an American court stretched the language of a statute and turned a Chinese into a black or mulatto or Indian or "what-have-you," in order to free a white citizen who had been found guilty of murder on the testimony of a Chinese witness.

Human life was cheap in those pioneer days and Chinese human life was cheapest. And there is the story of the constable who found a Chinese who had been killed on the streets of a mining town, and, being determined that some one should be punished for some infraction of the law connected with the killing, was happy to find that the deceased had been armed. So all the amenities and the constable's conscience were satisfied by charging the corpse with carrying a concealed weapon. But, to come to our muttons,—the old anti-alien witness law. When, in order to solve a particular situation, courts establish dubious principles, these have a way of gathering strength as they go along,—*Viresque adquirit eundo,*—as Virgil put it.

A few years later, in 1859, the Court found no difficulty in applying the principle to a civil case in which Chinese had been excluded as witnesses when offered by the plaintiff.[26] The complexion of the Court had changed, in the meantime. Terry and Field, who loom so large

25. People v. Hall, 4 Cal. 399, 403 (1854).
26. Speer v. See Yup Co., 13 Cal. 73 (1859).

in our California history, were now on the bench, Terry being the Chief Justice. The lone dissenter in the prior case, who, unfortunately, expressed his dissent in one pithy sentence:

> "From the opinion of the Chief Justice I must most respectfully dissent,"

had gone. The third member of the court did not participate. The same year, with all the justices concurring, W. W. Cope having replaced Terry, who resigned on September 12, 1859, the court diluted somewhat its stark racism. This, too, was a murder case in which a verdict of murder in the first degree had been returned. The court allowed as a witness one Martin, who was dark,—a native of Turkey, born of Turkish parents. While conceding that the previous ruling did not settle the matter, the Court said:

> "* * * We cannot presume that all persons having tawny skins and dark complexions are within the principles of that decision." [27]

So it resolved the doubt in favor of the verdict with the additional observation that

> ". . . although the population of Turkey is made up, in some degree, of several distinct types of the human race, the Caucasian largely predominates, and constitutes the controlling element."

But the generous spirit that may have motivated this decision did not last. And there came before the Court in 1860, the question whether the statute excluding witnesses applied to the injured person—in this case, a person of "half negro blood," as the opinion calls him, from whom the defendant had stolen a watch. The trial court had received his testimony, under the provision of Section 13 of the Criminal Act,[28] which distinctly provided that

> "the party or parties injured shall, in all cases, be competent witnesses."

But the Supreme Court held that the language of this section was modified by the following section,[29] which

> ". . . creates an exception to the general rule declared in the preceding section."

Mr. Chief Justice Field, himself, delivered the opinion in which Baldwin concurred. Cope would not go along and wrote a simple, yet forceful,

27. People v. Elyea, 14 Cal. 144, 146 (1859).
28. Cal. Crim. Practice Act of 1850 § 13, CALIF. STATS. 230 (1851).
29. *Id.*, § 14.

opinion in which he applied the familiar rule that an exception to a general rule must be

> ". . . confined within the narrowest limits which can be assigned to it upon any reasonable hypothesis of the intention of the Legislature." [30]

He insisted that any other construction would

> "in many cases, result in entire failure of public justice." [31]

And that is just what the result of the majority opinion was. It is inconceivable that even a racist-minded court should have aided in making it so easy to escape punishment by ruling that the person from whom property is stolen or the person who is injured by an assault should not be a competent witness against the thief or the assailant.

The Legislature of 1863 amended the section to read:

> "No Indian, or person having one half or more of Indian blood, or Mongolian or Chinese, shall be permitted to give evidence in favor of, or against, any white person." [32]

The Civil War ended. The Negroes were emancipated and the first Civil Rights Bill, which preceded the adoption of the 14th Amendment, was adopted.[33]

In 1869, the Supreme Court of California was again confronted with this statute. A native American Negro was indicted for robbing a Chinese, who was the sole witness to the offense. Upon a stipulation that no other testimony was available at the trial, the trial court set aside the indictment and discharged the defendant.[34] The Court sustained the order upon the ground that the Civil Rights Bill had modified the state statute so as to place the native negro, as regards his civil rights, on the same footing with white persons. The defendant was, therefore, given the immunity which the statute had given to white persons.

So, to all intents and purposes, *a negro became a white person.*

In 1870, the Court repudiated this case, but only to hold that even the 14th Amendment did not affect the validity of the anti-Chinese witness exclusion statute.[35] The statute was finally given its *coup de grace* by the promulgation of the Codes in 1872, but not without the Supreme Court freeing another white man who had been convicted of an assault

30. People v. Howard, 17 Cal. 64 (1860).
31. *Id.*, at 66.
32. CALIF. STATS. 1863, c. 70, § 14.
33. 14 STAT. 27 (1866), as amended, 8 U.S.C. § 47 (1946).
34. People v. Washington, 36 Cal. 658 (1869).
35. People v. Brady, 40 Cal. 198 (1870).

to commit murder on a Chinese. The court held that the prior rulings were binding upon the trial courts, which

> "are not at liberty to set aside or disregard the decisions of this Court because it may seem to them that the decisions are unsound." [36]

The fact that the new Codes had abolished the rule, the Court did not consider a ground for deviation. Indeed, they pointed to that fact as making the whole question of the correctness of its prior decisions of no practical importance.

Thus, consistency came to the aid of entrenched prejudice.

If we are inclined to be critical, it is well to bear in mind that the Supreme Court of the United States, more than half a century later, disregarding known anthropological and ethnological data, held that a high caste Hindu was not a white person, under the Naturalization statute.[37] In so doing, they interpreted the words "white person" as that term would be used in common parlance, saying:

> "What we now hold is that the words 'free white persons' are words of common speech, to be interpreted in accordance with the understanding of the common man, synonymous with the word "Caucasian' only as that word is popularly understood. As so understood and used, whatever may be the speculations of the ethnologist, it does not include the body of people to whom the appellee belongs. It is a matter of familiar observation and knowledge that the physical group characteristics of the Hindus render them readily distinguishable from the various groups of persons in this country commonly recognized as white. The children of English, French, German, Italian, Scandinavian, and other European parentage, quickly merge into the mass of our population and lose the distinctive hallmarks of their European origin. On the other hand, it cannot be doubted that the children born in this country of Hindu parents would retain indefinitely the clear evidence of their ancestry. It is very far from our thought to suggest the slightest question of racial superiority or inferiority. What we suggest is merely racial difference, and it is of such character and extent that the great body of our people instinctively recognize it and reject the thought of assimilation." [38]

Thus unassimilibility—ever the racist's appeal—is adopted as a rule of statutory interpretation. And as late as 1934, the Court, speaking through Mr. Justice Cardozo, reaffirmed the popular conception of race by stating emphatically that

36. People v. McGuire, 45 Cal. 56, 57 (1872).
37. 16 STAT. 256 (1870), as amended, 8 U.S.C. § 359 (1946).
38. United States v. Thind, 261 U.S. 204, 214 (1923).

". . . men are not white if the strain of colored blood in them is a half or a quarter, or, not improbably, even less, the governing test always . . . being that of common understanding." [39]

Add to all this, the fact that the Legislature of California, on February 13, 1880, endeavored to carry into effect the anti-alien mandate of the new Constitution [40] by prohibiting the employment of Chinese or Mongolians,—*even native,* by any corporation, public or private, and the picture is wretched indeed.

The reverse of it, however, shows that the federal courts declared the particular non-employment Act unconstitutional.[41] And we have the noble words of the Supreme Court of California in more recent years, repudiating racism and invalidating the 80-year-old California miscegenation statute,[42] and those of the Supreme Court of the United States in condemning restrictive covenants.[43]

This is the other side of the shield.

THE LAW IS DEAD, ITS INTERPRETER IS ALIVE

It is evident, therefore, that the interpretation of the law is not the mechanical process which some see in it. Behind it stands the interpreter who brings to his task not only the legal technique of interpretation and application, but also social considerations stemming from his

39. Morrison v. California, 291 U.S. 82, 86 (1934).

40. CAL. CONST. ART. XIX, 2.

41. *In re* Tiburcio Parrott, 1 Fed. 481 (C.C.D. Cal. 1880).

42. Perez v. Lippold, 32 Cal.2d 711, 198 P.2d 17 (1948) (invalidating the Miscegenation Statute, CAL. CIV. CODE § 69).

43. Hurd v. Hodge, 334 U.S. 24 (1948); Shelly v. Kraemer, 334 U.S. 1 (1948); Acheson v. Murakami, 176 F.2d 953 (9th Cir. 1949) (condemning the racist theories which led to the segregation of the native Japanese); Suweatt v. Painter, 339 U.S. 629 (1950) and McLaurin v. Oklahoma Regents, 339 U.S. 637 (1950) (invalidating segregation of Negroes in southern State-supported schools and their exclusion from certain schools, under the so-called "separate but equal" doctrine). And see Yankwich, *On Rereading Gobineau,* 19 MOD. LANG. FORUM 176 (1934); Yankwich, *Racialism as Dogma,* 18 SOCIOLOGY AND SOCIAL RESEARCH 365 (1934).

I advert to the fact that many years ago (in 1928), I declined, as a state judge, to recognize private agreements not to sell to designated racial groups as covenants running with the land, and denied injunctive relief to enforce them, only to be overruled by the higher courts of California. See Littlejohns v. Henderson, 111 Cal. App. 115, 295 Pac. 95 (1931).

Restrictive race covenants are a part of what a brilliant foreign student of American institutionss has called "The American Dilemma." See MYRDALL, THE AMERICAN DILEMMA (1944). On the historical phase of the whole problem, see FRAENKEL, OUR CIVIL LIBERTIES 189-97 (1944); WHIPPLE, THE HISTORY OF CIVIL LIBERTIES IN THE UNITED STATES 169-200 (1928); Tussman and Ten Broek, *The Equal Protection of the Law,* 37 CALIF. L. REV. 341 (1949). On the subject of race, see BRESSOLES, RACISME ET CHRISTIANISME; KLUCKHOHN, MIRROR FOR MAN 102-44 (1949); McWILLIAMS, BROTHERS UNDER THE SKIN 78-114 (1943); SELIGMAN, RACE AGAINST MAN (1939).

social philosophy which enter into the process of judging.[44] In bringing social consideration to bear upon their judgment, judges, of necessity, reflect the dominant philosophy of the society in which they live. The process of judging, therefore, implies application of ethical, political and economic considerations in assaying concrete situations by the general language of a statute. And those who participate in the legal establishment or institution, as Karl N. Llewellyn would call it, whether they be legislators, lawyers, administrators, or judges, need a keen insight into the social and economic processes to which they seek to apply the inert mass of law. Thus, certain situations may call for knowledge of economic factors.

When I was on the Superior Court, in the early days of voluntary oil production curtailment under the Hoover Administration, I had to determine whether voluntary curtailment on the part of an oil operator conflicted with his contractual obligation to the lessee "to drill diligently for oil." There was no precedent. After considering the depressed market, that conservation was a governmentally encouraged policy, that difficulties of transportation for marketing had, at times, been considered sufficient to postpone performance of drilling, I held that the economic condition in the American oil market warranted curtailment without forfeiture of rights under the lease. Economic factors were

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44. Llewellyn, *Law and Social Science,* 62 HARV. L. REV. 1286 (1949). See TAFT, THE ANTI-TRUST ACT AND THE SUPREME COURT 33. *Cf.* TAFT, POPULAR GOVERNMENT 174 (1913). Mr. Justice Cardozo's statement of the problem is well known:

> "There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives forces which they do not recognize and cannot name, have been tugging at them—inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs, a sense of James' phrase of the 'total push and pressure of the cosmos', which, when reasons are nicely balanced, must determine where choice shall fall. In this mental background, every problem finds its setting. We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own. To that test, they are all brought—a form of pleading or an act of parliament, the wrongs of paupers or the rights of princes, a village ordinance or a nation's charter." (THE NATURE OF THE JUDICIAL PROCESS 12 (1921).)

Kohler sees in the judge a carrier of the culture (or civilization) of the time. He writes:

> "The lawmaker is the man of his time, thoroughly saturated with the thoughts of his time, thoroughly filled with the culture that surrounds him, that he works with the views and conceptions which are drawn from his sphere of culture, that he speaks with words that have a century of history behind them and whose meanings were fixed by the sociological process of a thousand years of linguistic development, and not through the personality of the individual." (LEHRBUCH DES BURGERLICHEN RECHTS, 1, 38 (1906).) See also KOHLER, PHILOSOPHY OF LAW, 4-5 (1914).

See Sorokin, *The Organized Group (Institution) and Law Norms,* in INTERPRETATIONS OF LEGAL HISTORY (ESSAYS IN HONOR OF ROSCOE POUND), 668 (1947). And for an interesting recent study of the judicial process, see LEVI, AN INTRODUCTION TO LEGAL REASONING (1949). For a critique of the pragmatic system, see STONE, THE PROVINCE AND FUNCTION OF LAW (1949).

given recognition, in order to excuse what would, otherwise, have been an economically unsound performance.

With the broadening scope of federal regulation, the federal courts, especially, must call to their aid the data of social and economic sciences, if they are to appraise situations and apply social controls correctly and intelligently.

THE LIMITATIONS OF JUDICATURE

Try as we might, we cannot always, as interpreters of the law, rise above the level of the legislation itself. Mr. Justice Cardozo warned us, years ago:

> "The Judge is not to innovate at pleasure. He is not a knight errant, roaming at will in pursuit of his own ideal of beauty or of goodness." [45]

Indeed, it is one of the great disappointments of the work of the trial judge that, repeatedly, he is thwarted and that often, when his own conception of concrete justice would call for one judgment, he must make a different one, either because the particular facts of the case do not fit into the narrow pattern of the law, or the situation which has arisen was not envisaged by the legislators. For it is humanly impossible for legislation, no matter how complex, to cover the entire field of human conflicts, which may need control or adjustment by law in our complex society. Law, by its very nature, must cover only situations which are usual. The unusual, the unexpected, when it appears, requires the creative thought and imagination of the judge.[46] The old definition of a court as a place where justice is judicially administered is both a description and a limitation. We do not administer justice in the abstract or absolute justice, but justice under the limitations of the law and of the technique of its application and interpretation. It was the boast of Hammurabi of Babylon, in his great Code, that he had established "law and justice." But neither he, in his time, nor anyone else since, has attained it. Ideal justice is a divine, not a human attribute. And it is doubtful if man will ever attain it. But there is hope so long as he strives for it. If his efforts are defeated, it is because,—as I have said before,—the instrumentality with which he is dealing,—law,—is human, as are also the materials to which he applies it.

45. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 141 (1921). "There can be no abstract, absolute, final or eternal justice. The notion of justice is in that condition of adaptive change which is usual with the products of evolution. KELLER, MAN'S ROUGH ROAD 177 (1932).

46. Yankwich, *The Judge in Modern American Society,* 40 COM. L.J. 171 (1935); Yankwich, *The Judge in a Progressive Society,* 14 L.A.B. BULL. 297 (1939).

In 1948, I was confronted with a troublesome question. A group of my colleagues in the American Legion,—although not my own Post,—in acting under that anarchic impulse which, in periods of stress, comes to many who consider themselves the guardians of the conscience of the nation, broke into a meeting of a regularly organized Democratic Party Club, held at a private residence, and ordered the audience to disband, after manhandling some of the guests. The excuse was that the group was to listen to a lecture critical of the Marshall Plan. Mark well. This was on November 14, 1947, when the Marshall Plan had not been accepted as a definite policy and was still the subject of discussion among the people. It was fortunate for the community that force was not resisted by force. Otherwise, tragic consequences might have resulted. For no one, not even Legionnaires, can, with impunity, invade a private home. The result was that not only was there an illegal invasion by members of an unruly mob,—small though it was,—but a group of Americans was deprived of the right to assemble and discuss national affairs, and, if need be, petition the Government. All the rights, all the rules of decent behavior were on the side of these citizens, who were impeded in their exercise of their constitutional rights. Yet, when action was brought under the Civil Rights statutes,[47] I was compelled, very reluctantly, to deny relief, because the statutes, as interpreted by the courts, do not cover deprivation of rights, except by persons who are repositories of state power and act in such capacity.

In my opinion, I expressed the limitations of the judicial function:

> "But, in applying a specific statutory enactment of the type under discussion here, we are not free to disregard the line of demarcation laid down by the courts between governmental action and actions by individuals, and adopt a construction which might turn every base manifestation of local prejudice, bigotry or discrimination, into a federal lawsuit.
>
> "We grant that the acts complained of, the occurrence of which is admitted by the motion to dismiss, inflicted a grievous wrong on the plaintiffs. Such acts are manifestations of that ignoble mob spirit which is so abhorrent to a free, decent and democratic society. They undermine due process and play into the hands of those who would destroy constitutional freedom. For they would substitute for freedom and order in society the momentary whim of an aroused and unruly group. They would substitute for a nation united, a nation divided into Spartans and helots. They would enthrone the mob as arbiter of freedom.

47. REV. STAT. § 1980 (1878), 8 U.S.C. § 47 (1940); 36 STAT. § 1092 (1911), 28 U.S.C. § 41 (1946).

> And I know of no more unsafe and unworthy repository of the rights of the individual. 'Mob law does not become due process of law,' by parading under the cloak of *fidei defensor.*" [48]

It can be seen readily that the judge of a trial court, especially, cannot cast himself in the role of a Don Quixote. His own idea of right of justice *may not* coincide with the pattern laid down by legislators or by the higher courts. And he is not free to disregard either in the hope that they may change, even when change may seem imminent. I found myself in such situation when the second Municipal Bankruptcy Act of 1937 was before me.[49] I agreed with the minority in the prior decision,[50] and felt that, if the reasoning of the majority held, that there were more grounds for invalidating the second statute than there had been for the first. But, due to the change in the complexion of the court, this reasoning did not hold, and I found that only two members of the court,—Justices McReynolds and Butler, adhered to the decision which I had felt bound to follow.[51]

To Conclude

And so: *Multis verbis habitis,—*

We come to the end. What does it all add up to?

Whitman wrote:

> The law of the past cannot be eluded,
> The law of the present cannot be eluded,
> The law of the living cannot be eluded—
> It is eternal.[52]

In law, as in life, the old mixes with the new. Even when it apparently seems to replace it, there is no sharp division. The old is absorbed by, and amalgamated into, the new and transformed by it. Ours is the

48. Hardyman v. Collins, 80 F. Supp. 501, 513 (S.D. Cal. 1948). An English Judge, Lord Justice McKinnon, expressed a similar disappointment in a noted case:

> "As far as I am concerned, freely avow that * * * in common sense and decency (the plaintiff) ought to be able to recover against somebody * * * * if the law allows it; my only concern is to see whether, upon the cases, the law does allow him so to recover." (Quoted in Stone, *Fallacies of the Logical Form in English Law,* in Interpretations of Modern Legal Philosophies (Essays in Honor of Roscoe Pound), 696, 722 (1947).)

49. 50 Stat. 654 (1937), 11 U.S.C. § 401 (1946).

50. *In re* Lindsay-Strathmore Irrigation District, 21 F. Supp. 129 (D.C. Cal. 1937). And see my observations in United States v. Standard Oil Co., 78 F. Supp. 850 (D.C. Cal. 1948).

51. Lindsay-Strathmore Irrigation District v. Bekins, 304 U.S. 27 (1938). The prior decision, dealing with the Act of 1934, was Ashton v. Cameron County, 298 U.S. 513 (1936).

52. Whitman, To Think of Time (1855).

entire field of human experience. The most important task of those who deal with its content through law is to understand thoroughly the living community out of which it arises. Because we, its interpreters, are human, the result of our efforts may not always be satisfying. As we look at the acts of those who preceded us, we think we might have done better. But the perspective of distance distorts our vision. We are quite certain now that, had we lived in the past, we might not have been guilty of the errors committed by them. But this kind of thinking is what the French call *"Esprit d'escalier,"* the wisdom of the departing guest, who thinks, *too late,* of the wise and clever things he might have said in the course of the evening. We do not always see any similarity between some of our own acts and those in the past which we stand ready to condemn. In truth, however, the difference is only of degree. But to a democratic civilized society there are no worthy alternatives to justice under law. The concept of individual justice of the Oriental Cadi, or of the pioneer justice "West of the Pecos," does not commend itself to us today. That was justice by whim or by caprice. It stemmed from the authoritarian past of justice *by grace,* which, in all Western civilization, was replaced by justice *by right.* At times, we yearn for the unregulated discretion of the past,[53] which has the vagaries of the judge as its touchstone. At times, we champ the limitations of the judicial prerogative. But untrammelled judicial power, as exemplified in the Nazi and Soviet concepts of the State, lands us in the arms of absolutism; and absolutism is a corruptive canker, whether exercised by a judge or any other human functionary. For implicit in our Anglo-American concept of law is the idea of the court as the protector of individual rights, which can be asserted against the sovereignty of the community itself. Totalitarian concepts deny to the individual the rights which he might assert against

53. We, in California, had this type of justice in pioneer days. There were no delays. And the results achieved were swift and final. On August 21, 1851, there came before Major R. C. Barry, Justice of the Peace, of Tuolumne, the case of Jesus Ramirez, indicted for stealing a black jennet belonging to Sheriff George Work. The rugged justice found Ramirez guilty, sentenced him to pay the costs of court in the sum of ten dollars and a fine, the amount of which does not appear in the record. Ramirez, not being able to pay either, the Justice, as his own record of the case shows, ruled that Sheriff George Work should pay the costs of court and the fine,—failing which, the mule should be sold by the Constable and the proceeds applied to the payment. The aftermath of the case may be put down, without comment, in the justice's quaint language, including his free-lance spelling:

> "H. P. Barber, the lawyer for George Woork insolently told me there were no law fur me to rool so I told him that I didn't care a damn for his book law, that I was the law myself. He jawed back so I told him to shet up but he wouldn't so I fined him 50 dolars, and comited him to gaol for 5 days for contempt of Coort in bringing my roolings and dississions into disreputableness and as a warning to unrooly citizens not to contradict this Coort." (Quoted in BUCKBEE, THE SAGA OF OLD TUOLUMNE, 39 (1935).)

the community.[54] The Soviet Constitution of 1918 denies to individuals or groups rights which might be asserted against "the socialist revolution." [55] And, while the Soviet Constitution of 1936 recognized certain individual rights, the fundamental concept is still there. One Soviet authority has summed it up in the sentence:

> *"Man should have no rights that place him in opposition to the community."* [56]

Soviet State theory assumes the essential unity, and the impossibility of contradiction, between the rights of the individual and the rights of the State. Andrey Vishinsky's famous book, *The Law of the Soviet State,* expresses the fusion in this manner:

> "Safeguarding the interests of the socialist state, the court thereby safeguards also the interests of citizens for whom the might of the state is the primary condition essential for their individual well-being." [57]

For us, bred in the traditions of the Anglo-American system, this concept of justice means a reversion to the authoritarism which was abandoned after centuries of struggle with unlimited power.[58]

Unless we should undergo a catastrophic change in our thinking, the present system with all its deficiencies, presents a better opportunity for achieving the great aim of distributive justice which Ulpian defined as

> *"Constans et perpetua voluntas suum cuique tribuendi."*
> (The everlasting desire to give to everyone his due.)

We can help mold it into a more ideal instument to that end, if, in this never-ending quest for law, we, in the profession, are both spectators and actors. If, in the end, the judgment of history upon our effort be not very favorable, we must bear in mind that our capacity for doing good *or evil,* is limited. For, as Holdsworth has warned us:

> "The law may hinder or it may guide the political and social development of the state. It cannot altogether stop it." [59]

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54. Yankwich, *Increasing Judicial Discretion,* 1 F.R.D. 746 (1941).

55. U.S.S.R. CONST. TIT. I, ART. 1, § 18.

56. QUOTED in DOUGLAS, BEING AN AMERICAN, 95 (1948). And see, Yankwich: Book Review, 22 So. CALIF. LAW REV. 336 (1949).

57. VYSHINSKY, THE LAW OF THE SOVIET STATE 497 (Babb's transl. 1948).

58. Yankwich, *The Background of the American Bill of Rights* 37 GEO. L.J. 1, 19 (1948).

59. 2 HISTORY OF ENGLISH LAW 589 (3d ed. 1926). This has been the experience in the United States. The courts merely delayed, they did not stop social legislation. *Cf.,* SCHLESINGER: POLITICAL AND SOCIAL HISTORY OF THE UNITED STATES (1829-

The struggle is never over. Each new generation must renew it in its own way by its own means. Mephistopheles was not far from the truth when he said:

> *"Grau . . . is alle Theorie,*
> *Und grün des Lebens Goldner Baum."*
> (All theory is dull. Life's golden tree is green.)

So like Voltaire's Candide, we must cultivate our garden.[60]

1925), 442-46 (1925); BEARD, THE RISE OF AMERICAN CIVILIZATION 581-593 (1929). Schlesinger says:

> "The yielding of the Laissez Faire attitude to the new doctrine of social responsibility was perhaps the most valuable advance made by the new generation."

60. On the hopes for the future, see ADAMS, THE EPIC OF AMERICA 400-417 (1931); 2 BEARD, *op. cit. supra* note 59, at 797-800. Compare the beautiful ending of HENRI BERGSON'S LES DEUX SOURCES DE LA MORALE ET DE LA RELIGION 343 (1932).

> *"L'humanité gémit, à demi ecrasée sous le poids des progres qu'elle a faits. Elle ne sait pas assez que son avenir dépend d'elle. A elle de voir d'abord si elle veut continuer à vivre. A elle de se demander ensuite si elle veut vivre seulement, ou fournir en outre l'effort necessaire pour que s'accomplisse, jusque sur notre planète refractorie, fonction essentielle de l'univers, qui est une machine a faire des dieux."*
>
> (Mankind is groaning, half crushed under the weight of the progress it has made. It does not seem to understand that the future depends upon itself. It is for it to decide, first, if it desires to continue to live. Then it must ask itself if it desires simply to live, or whether, in addition, it will furnish the necessary effort, in order to achieve, even upon our refractory planet, the essential function of the universe, which is an instrument to bring forth God-like creatures.)

There is great beauty in the French phrase which ends the quotation:

> *"Une machine a faire des dieux!"*

See, Del Vecchio, *Truth and Untruth in Morals and Law*, in INTERPRETATIONS OF MODERN LEGAL PHILOSOPHIES (ESSAYS IN HONOR OF ROSCOE POUND) 143, 159-160 (1947).