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DO YOU AGREE WITH THIS CASE?

By H. E. NELSON*

“Do you agree with this case?” “Do you like this case?” “Do you approve of this case?” “Do you think this case is soundly decided?” No matter how the question is worded, I frequently find it embarrassing when asked of me. This may come as an odd confession from one who in theory, at least, should be expected to include the evaluation of the fruit of our judicial systems as part of his daily work, but my dilemma can possibly serve to guide an inquiry as to what should be done when law is studied under the very best and most inspired method of instruction.

There are various motivations behind the student questioners' resort to this question in class. A dull student may wish to bring his presence to the attention of the teacher, presumably without much risk of any commitment on the part of the student. The question can have about it a false cloak of rapt attention and deference to the unplumbed sagacity of the teacher, suggesting an insatiable absorption on the part of the student. When fairly certain the question has thus been blandly put, I am often tempted to hoist the interrogator by his own petard and ask him what *he* thinks about it. This often causes the student to assume a hurt and double-crossed look, crowns him a martyr, and creates the firm conviction in the minds of many other students that “Nelson doesn't know, so he's passing the buck to poor Fogwit.” The fact that this has sometimes been a correct appraisal of the verbal exchange is one of the reasons for preparing this paper and attempting to get to the very heart of the question.

I am also not too happy in my attempts to answer the question when I feel that even when my evaluations do attain a fair degree of adequacy, some of the students will condense all very perfunctorily in their notebooks—that is, those will

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who lend some comfort and aid to such allies and cherish them as treasures. The abridged versions will encompass such pithy comments as "Nelson approves," or "Nelson thinks case bad--too something."

This cheerless view of the situation tempts me to suggest that there may be a method that is better than the one so often followed in the way cases are evaluated—a method that might even inspire intelligent notes in the notebooks of dull students. Why shouldn't there be an approach which transcends a particular case and goes to the very heart and fundamentals of Law? It is for the purpose of exploring such possibilities that this paper finds another reason for coming into existence. What, if I had the time and the qualifications, could I tell my student who asks me the question which is the theme of this article?

I am not proud to admit that I have sometimes replied to the question, "I like the case," or "I don't think much of the case." And I have given little reasoning for my reactions, while to the joint shame of my students and myself, there has been little objection voiced. To say that you like or dislike a case, a necktie, or custard pie is twice as easy as missing a bus and even less susceptible of successful contradiction. What room for argument is there when a man has just said "I like *Plunkett Iron Works Ltd. v. Doodles*," or "I like Noel Coward," or "I don't like Frank Sinatra?"

Indeed, the only hope of ever arousing an argument with a man who has made one of these categorical asseverations is either to resort successfully to clairvoyance so as to demonstrate that his spoken words are not supported by his thoughts, or to attempt to refute what he has said by making reference to earlier words or to acts on his part which are incompatible with his most recent statement. Clairvoyance is not generally accepted today as a reliable method, while an attempt to disprove the words by the second method is open to the rejoinder that the speaker has changed his mind since the time of the earlier words or acts.

The arguments arise when one man tells another that he "ought to" like or dislike a certain case, vegetable, or doctrine. Then the controversy can wax warm. But to a mere "I like"

statement, the only logical reply by way of direct contradiction is to say, "Oh no, you don't like what you just said you like." Be this as it may, many a heated disagreement has originated in the endeavor to unsettle another's likes or dislikes, charging them with being ill-founded or silly. When reasons are sought and offered for likes and dislikes, some value may be found in a clash of preferences or rejections.

The nation now numbers its population at more than 144,000,000 human beings, and I am satisfied that not only an insignificant but a minute and unmilitant minority of these people care in the slightest about what I like or dislike. Furthermore, an indifference to my reactions by those who believe in rational processes may be well-deserved if I have come into the possession of my likes and dislikes through prejudice and scatter-brained thinking. For example I may "like" the decision of the Court in *Plunkett Iron Works Ltd. v. Doodles* because I have an antipathy towards one of the employees or stockholders of the Plunkett Company, or because Andrew Z. Doodles is an old school chum of mine. Or I may "like" the case, because it holds a big corporation liable to pay heavy damages to a poor man, regardless of fault, and I am always sympathetic towards underdogs, suspicious of big dogs. I may "like" all tax cases which hold against the Collector, because I dislike paying taxes and never devote any thought to the question of whether taxes are necessary and as to how they should be levied, if necessary I may "dislike" any case which holds in favor of a farmer or of a labor union, because I don't enjoy paying high prices for food and manufactured goods, and I have a closed mind upon the conviction that farmers and laborers are to blame for the high prices.

Probably more time than is warranted has been given to establishing the proposition that the weakest and most unjustifiable response to our theme question is a dogmatic "I like it" or "I dislike it" although essentially these responses are made more often than we realize.

Next to be considered is the reliance-upon-precedent style of reply. Under this head may be found such solemn and impressive judicious responses as "Most authorities have so held," or

“The great majority of courts here and in England have held *contra*.” This sort of response is what too many of our students naively believe it is the prime function of the teacher to deliver, and when their impatient ears catch these honey-sentences the students make double-haste to inscribe in their notebooks the substance of the invaluable information. The students under the present system are too much apt to think that the sole function of a legal mind is to assemble precedents in overwhelming columns, to memorize the rules which they are supposed to support, and then to use them in winning lawsuits or in writing law examinations. I sometimes refer to this misguided theory as the nickel-in-a-slot kind of classroom technique. The student puts a nickel in the slot by asking the teacher “What is the majority rule on this point?” or “What does our state hold on this question?” Then the instructor, if he is informed but fatuous enough to respond, plays his little record of what the majority rule is, or what the local jurisdiction holds. Far better would it be if he were to tell his students that the library is fully equipped with digests, treatises, and texts which will answer their questions of this sort for them—and afford them good practice in elementary research. The classroom work should not be a bandying of precedents, but a descent below the superficial level of precedents.

Indeed, it requires no brilliantly constructive thinking and but an average amount of mental ability and legal training to dig out, analyze, classify, and statisticalize the precedents. The advantages and the disadvantages of the doctrine of *Stare Decisis* have been the subject of so much controversy and writing that there is no need here to repeat the arguments. Suffice it to say that the doctrine is not appreciably near excision. And undoubtedly when the study of Law is thought of in its practical case-winning and examination-writing roles, close familiarity with the precedents on all pertinent questions is necessary, however much it may fail fully to provoke penetrating or original thinking.

But Law finds a most important and permanent significance in the policy-making function, which, it is submitted, requires more than mere reliance upon precedents or obeisance to likes and dislikes for proper development. Before taking up

this policy-making function and what should lie behind it, let me express my gratitude and pleasure that so long as there is some necessary resorting to precedents, I am delighted that many of my fellows enjoy unearthing and collating precedents and in giving to the world the products of their labors. And I look with approval upon the training which is given many law students who devote energy and time to the preparation of law reviews and who must undertake a rather intensive discipline in the assembling and evaluating of precedents. Such a training is of true worth in providing the student with some of the practical training he should have in the field of research.

On the other hand, it may be questionable whether faculty members are employing their time as profitably and maturely as they could when they turn out manuscripts of concentrated precedents wherein may be found a minimum of constructive or original thought. Almost any plodding, conscientious, run-of-the-mill lawyer can assemble precedents systematically and helpfully. Doubtless such labor is satisfying to those who find their chief curiosity to consist of finding out what judges said and did about a problem during the course of the centuries, albeit a mind with this predilection may seem in some respects pathetically cobwebby and definitely limited. Nor do I mean to suggest that there are not instances when nice distinctions and deep analyses are required, as shown in the writings of our truly great writers of legal literature.

Legal literature that is great must often be so on its own feet, because of the felicitous and persuasive wording of the author. Yet many of our pieces of legal literature reflect the minds of those who glory in the abundance of footnotes, heedless of the fact that these may stand as eloquent evidence of how little that is printed is the author's own, and of how slavishly he has read, selected, and prepared the words of others. In this kind of writing, words *per se* apparently are not thought to have the power to convince, and their great distinction comes from the prestige of their original user.

I should accord a subordinate although not dispensable place to these writers who have served at best as verbal conduits for a number of genuine and original minds, and who have

manifested a tireless capacity for drawing sentences together which are almost inevitably reinforced by numerous columns of footnotes. And when they offer imposing lines of precedents, they are as the miners of Law who dig the ore and do some screening of it, while the true architects are grateful, for from this ore they may mould and erect the great mansions of Law in accord with their own keen and original concepts of legal architecture.

If I look with disfavor upon the "I like" or "I dislike" answer to our question, and if I believe that the answer which limits itself to precedents is inadequate, what other possibility remains for consideration?

The remaining possibility should require reasons which do not depend upon either the finality of precedent or the subjective bias of simple like or dislike. But this third method involves the application invariably of one's personal philosophy, in its broadest sense, without uninterrupted resort to the objective realm. It requires that the one answering must first assemble all pertinent premises, carefully select those which he believes have sufficient validity to justify his reliance, and finally apply these last premises to the case which is to be evaluated.

If this process is faithfully carried through, it will be seen how Law in its policy-making function can well be said to comprise the whole of human experience and thought. It will be understood how impossible it is to separate Law from the fields of philosophy, art, science, and literature, and it will be realized that Law, on its sublimer level of policy-making, cannot possibly dispense with the background of a broad and enlightening liberal arts and sciences education.

What I am advocating is probably beyond the capacities of most of our law schools of today, which treat largely not of the policy-making function of Law, although this incidentally and at times unescapably appears, but of the practical side of precedent and legislative enactments. Too many of the teachers are not so well equipped and educated themselves as to be able to offer satisfactory answers and reasons which trace back through a maze of interlocking premises, drawn from all fields of human learning, experience, and thought. Some of them don't

even have the vision or the interest of this kind. The law teacher is likely to be a specialist, and that in a single field of Law, and he rarely gets far back of even his specialization in Law. Yet fundamentally one gets back to the same inevitable premises when a question of seemingly narrow import about Contracts is asked as when the obviously more broad and philosophical question characteristic of Constitutional Law is posed.

The author certainly feels his own disqualifications with respect to assembling, evaluating, and applying of the pertinent premises needed to implement an intelligently reasoned reply to the question, "Do you agree with this case?" But he nevertheless ventures to suggest what he thinks would be best, could it be done. The approach he advocates and outlines would make Law the special and focused application of all human experience and thought, the funnel through which is channeled for impact upon the conduct of human beings the most acceptable of the pertinent premises drawn from science, art, literature, and philosophy

Inasmuch as the acceptability of these premises and the validity accorded them varies in the judgment of individuals, the reply to our topical question must depend upon the individual, and, essentially, upon the individual's philosophy. The judgment of evaluation of a case may well be no better or no worse, no more valid or invalid, than is the philosophy of the individual.

Most people escape from feeling great concern over the judgments they pass upon causes, politics, economics, and the like, although the process of judging or evaluating is basically the same whatever is to be judged. We, all of us, rely upon premises, of course, but we often fail to take properly into account the controlling premises, and we vaguely rest upon premises which have never been sufficiently validated. People differ widely in their conduct with respect to the relative degree they rely upon unproven premises and fail to weed out the least tenable. Many of us escape from worry, because we lack the interest or the capacity to do the gruelling mental work of screening our premises.

Emotions play a large part in our reactions, as we all

know. Men and women are gregarious, they like to belong, to be affiliated with others in a lodge, a club, a political campaign, a war, and their joy is in the victory their side effects rather than in the validity of the goal sought. The glory comes from "my side wins," with often an additional personal conceit and expansion being added on the notion that we have personally contributed largely to the victory. Occasionally we meet the lonely and reserved intellectual, who elevates the rational over the emotional and fails to be normal and to lose himself in a will to win for "my side," and who thereby suffers the distrust of his normal fellow creatures in their failure to understand a quirk of personality which places so high a premium upon validation of the goal and end that it cannot experience complete satisfaction in the emotional joy of being a part of the victorious group. The man of action, it is true, may rarely do much conscious worrying about premises, and if he happens to choose wisely he is fortunate in the time and worry saved. But we are not secure in relying upon our men of action in emergencies as being such fortunate choosers.

The happier way for us may be to brush aside any concern over the validity of our premises, even to be oblivious to their existence, or to decide arbitrarily that we will accept certain premises, because it is too much trouble to investigate them, and we can never really at our best absolutely validate them, anyway. If we pursue this route, we are free to enjoy the emotional life, to be active in group endeavors, to confine our legal thinking to the search for appropriate precedents.

But to return to our subject what would be required were one to give the most thoroughgoing and unemotional response to our troublesome question? What premises are needed? How does it come about that the simplest case in Law, when comprehensively and broadly evaluated, can precipitate a probe into the very depths of human experience and wisdom?

If the law teacher has in mind all the pertinent and most valid premises to be applied, he can reply immediately. But the best that most of us can do, and we should be able to do this, is to outline the network of interlocking premises, and to point out that elimination of one as invalid may well entail the destruction

of a link in the chain which causes the whole to fall. That is, the teacher should be able to suggest pretty clearly to the questioner just what he must consider and select from in the background of premises, before the relatively soundest answer can be given to the question. And the students should understand that evaluating a case in Law is the work of each individual in applying his own philosophy, i. e.—his own store of irreducible and indispensable premises. And if this is so, probably no two persons among fifty would be in complete agreement about the reply to be made.

In the most general sense, our premises rest upon our experience. We may have experienced directly, or we may have experienced indirectly through others, by their reporting and interpreting what they have directly experienced. In this empirical process, we find that we use certain primary premises over and over again as a means of formulating a vast number of secondary premises. Law, in its fact-finding function, relies heavily upon these primary premises, and because the policy-making function of Law is largely dependent upon fact-finding, Law in all its aspects is tied to these primary premises.

I have termed these primary premises the Credibility Premises, because they relate to the means we employ to test and to establish belief. They may fairly well be stated in a way which almost all men will accept, and they may be given in three propositions. (1) We do not accept as worthy of belief those items in our experience which we regard as not having been accurately observed. (2) We do not accept as worthy of belief those items in our experience which we regard as not having been accurately reproduced in the present from the past, whether by memory, writing, instrument, or otherwise. (3) We do not lend our credence to any proposition or conclusion which we do not believe to be the result of accurate interpretation of what has been accurately observed and accurately reproduced.

Credibility for each one of us hangs upon our satisfaction that there have been accurate observation, accurate reproduction of observed data, and accurate interpretation of what has thus been observed and reproduced. The most materialistically minded scientists and the most pious religious mystics might

well agree upon these statements, their differences arising from the application of the Credibility Premises, especially the interpretive proposition.

Our first hurdle in replying to our question, "Do you agree with this case?", is a correct application of the Credibility Premises to all involved as relevant facts, including as relevant the broad facts as to human conduct and society in general, and not just the narrow facts of the particular case. And right at the start, the careful thinker must know how badly the cards are stacked against him.

A corollary of the Credibility Premises is the premise that credibility should not be extended to observation, reproduction, or interpretation which has been distorted and rendered inaccurate by subjective elements such as bias and prejudice. But how often do we find these subjective elements absent from the processes?

The fallibility of human observation and memory is so well known as to need little elaboration. People do not observe accurately in the first place, the senses are unreliable, and human beings are notoriously weak in the capacity for accurate memory. In the event that we use scientific instruments to observe and record, we still must employ human senses to observe test tubes, pointers or dials, and the like, as well as depend upon human reasoning for making the interpretations. Thus when we consider how open to error are the observations, reproductions, and interpretations which determine our beliefs, we should feel cautious and humble, because our assumptions rest upon such frail supports. I make this statement as one having particular force in its context here.

One cannot supply an easy and meritorious answer to our question, because so much of the primary data and so many of the controlling presumptions rest upon what at best can be but a relatively accurate application of the Credibility Premises. I concede that happily for the peace of mind of the majority of us, we get along most of the time without undue worrying about our application of these premises. We are willing to accept the conclusions of those whom we trust as experts or authorities, thus saving ourselves the trouble of establishing

validity, or we frankly follow a course of going on our way with a pseudo-sophisticated shrug of the shoulders, declaring, "Oh well, you can't be *sure* about anything, and I'll believe what most suits my temperament, and let the philosophers waste their days arguing about the good, the true, and the beautiful." But in the context which concerns us we are demanding exactness and reasons for our answers.

A study and evaluation of judicially decided cases almost invariably leads us to a consideration of freedom and of limitations upon freedom. Liberty and limitations upon liberty are the stuff of Law. While on the one hand Law may in a particular instance be preserving or enlarging the limited freedom of one man, on the other hand and at the same time it is artificially limiting the freedom of another man. The plaintiff, when he prevails, secures his liberty against unjustified encroachments, while the defendant finds that the Law has imposed artificial limitations upon his power to do as he pleases with the person or property of another, and so has restricted his freedom.

Law imposes artificial limitations upon human liberty, but in so doing it accepts a host of premises dealing with natural limitations. When we try to evaluate a case, "agree" with it, we must necessarily accept or reject a great many of these premises of natural limitations. These premises include a great many assumptions which common sense says are true, which are practically axiomatic to many people, so that the fact that philosophers, scientists, and theologians may question them strikes these people as absurd. Among these quasi-axiomatic premises, we find the premise that man is limited by nature in his physical strength. Then there is the premise of the limitations imposed by time, and there is the related premise pertaining to the limitations imposed by space. Man cannot do a great many things at once or be in several places at the same time. The passing of time brings decrepitude and decay, all limiting man so that he cannot enjoy an optimum of liberty and life forever.

These quasi-axiomatic premises of natural limitation also embrace property. There are assumptions that there is not enough of the world's goods to go around and to satisfy the de-

sires of all men, so that this assumption of natural limitations upon the amount of goods available necessitates a multitude of artificial limitations upon man's freedom, imposed by Law in its efforts to control the distribution and enjoyment of the limited quantities of goods available. Law often stands in the way of those who by preponderant physical power or by cunning would ride roughshod over their fellows in the struggle for goods.

Then there are the premises pertaining to natural and artificial limitations upon intangibles—limitations upon mental ability and capacity, and as to how much freedom men are to be permitted in the exercise of ideas. The proponents of freedom of speech and of conscience base their arguments upon the premises that the fewer restrictions there are placed upon the mind and the transmission of ideas, the better off man will be. There is the assumption that free exercise of mind and conscience and ideas will bring betterment, betterment often thought of in terms of happiness, of less pain, of more pleasure. Associated with this assumption is the premise that among the attainable are happiness, less pain, more pleasure, truth, reality, salvation. Why pursue intellectual liberty if you do not believe it will gain you something which you believe will be an improvement? We believe in this liberty, despite the fact that we cannot absolutely prove the premise that freedom of the mind will result pleasingly for us, and we do not carry too far the glib saying that ignorance is bliss.

I have listed some of the more commonly followed premises, but we must not forget how far they are from being satisfactorily proved, no matter how "obvious" and true they may appear to us to be. One slightly familiar with modern Science, with Religion, and with Philosophy must realize how little is finally and conclusively established as to the nature of reality, the correctness of our assumptions as to time and as to space, and as to the ultimate nature of the universe. How absolute are our premises when a number of leading scientists of our day tell us that it is a mental world, that space, time, energy, force, and all of the old familiar concepts of physics are but "mental constructs"? That they are creations of our own minds in the attempt to understand reality, but that they are not necessarily

reality? When they say that the old controversy of matter versus mind is today the controversy of particles versus waves, with the latter accorded preference, and the wave theory of physics definitely more a mental concept than the particle theory?¹

¹It is only fair to state that some modern scientists discredit the religious and philosophical speculations which color the writings of a number of our most popular and most outstanding scientists. This dissent is based in part upon the view that laymen readers will unjustifiably conclude that Science and Religion have merged, whereas Science is really able to give no final explanations of any sort as yet; offering, as it does, only reports of what it has observed uniformly follows in a certain sequence when similar conditions are present. Probably temperament has much to do with how far each scientist will go when he speculates about reality. Some scientists suspect all religions, others have a perceptible religious bent. Within the past months such works as *HUMAN DESTINY*, by Lecomte du Nouy, and *MAN DOES NOT STAND ALONE*, by A. Cressy Morrison, have received popular acclaim, largely because of the religious and moral flavor in the writings of these scientists.

For some rather typical words by the scientists who are not averse to find religious and philosophical implications in Science, the following quotations are submitted.

From *PHYSICS AND PHILOSOPHY* (1943) by Sir James Jeans, at the pages indicated: "But the physical theory of relativity has now shown that electric and magnetic forces are not real at all; they are mere mental constructs of our own, resulting from our rather misguided efforts to understand the motions of the particles. It is the same with the Newtonian forces of gravity and with energy, momentum, and other concepts which were introduced to help us understand the activities of the world—all prove to be mere mental constructs and do not even pass the test of objectivity. If the materialists are pressed to say how much of the world they now claim as material, their only possible answer would be matter itself. Thus their whole philosophy is reduced to a tautology for obviously matter must be material. But the fact that so much of what used to be thought to possess an objective physical existence now proves to consist only of subjective mental constructs must surely be counted a pronounced step in the direction of mentalism." (P.200.) "It has recently become clear that the ultimate processes of nature neither occur in, nor admit of representation in, space and time." (P.175.) "We know matter only through the energy or particles it emits; but this provides no warrant for assuming that matter itself consists of atoms either of substance or of energy." (P.179.) "When we view ourselves in space and time, our consciousnesses are obviously the separate individuals of a particle-picture, but when we pass beyond space and time, they may perhaps form ingredients of a single continuous stream of life. As it is with light and electricity, so it may be with life; the phenomena may be individuals carrying on separate existence in space and time, while in the deeper reality beyond space and time, we may all be members of one body." (P.204.) "But as we pass from the phenomenal world of space and time to this substratum, we seem in some way we do not understand to be passing from materialism to mentalism, and so possibly also from matter to mind. It may be then that the springs of events in this substratum include

There is no necessity for us here to delve deeply into physics and into metaphysics, however fundamental must be their use in testing the validity of so many of the premises regarded as obviously true. There is less justification for examining the premise of free will and the premise of the existence of an objective, external world, because whether or not we have free

our own mental activities, so that the future course of events may depend in part on the mental activities." (P.215.)

From *THE NATURE OF THE PHYSICAL WORLD* (1927) by Arthur S. Eddington, at the pages indicated, we find: "We all know that there are regions of the human spirit untrammelled by the world of physics." (P.327.) "I repudiate the idea of proving the distinctive beliefs of religion either from the data of physical science or by the methods of physical science." (P.333.) "The idea of a universal Mind or Logos would be, I think, a fairly plausible inference from the present state of scientific theory at least it is in harmony with it." (P.338.) "Science cannot tell whether the world-spirit is good or evil." (P.338.) "Starting from ether, electrons and other physical machinery we cannot reach conscious man and render count of what is apprehended in his consciousness." (P.343.)

Nobel Prize Winner in Medicine, Sir Charles Sherrington, has written in his book called *MAN ON HIS NATURE* (1941), as follows, at the pages indicated: "If you say that thoughts are an outcome of the brain we as students using the energy concept know nothing of any relation between thoughts and the brain, except as a gross correlation in time and space." (P.290.) "The mind which we experience, if we try to extend our experience into the process of its making, seems to become almost at once unable to be experienced. It eludes us by becoming subconscious. It is as though our mind were a pool of which the movements on the surface only are what we experience." (P.307.) "No attributes of energy seem findable in the processes of mind. The two remain refractorily apart. They seem to be disparate; not mutually convertible; untranslatable the one into the other. (P.312.) "our world is in any case an act of mind." (P.324.) "Science does not, I think, regard electrons, protons, neutrons, etc. otherwise than as mental figments, symbols. It has not supposed them 'ultimate reality.'" (P.344.) "Mind refuses to be energy just as it has always refused to be matter." (P.348.) "Mind, for anything perception can compass, goes therefore in our spatial world more ghostly than a ghost. Invisible, intangible, it is a thing not even of outline; it is not a 'thing. It remains without sensual confirmation and remains without it forever. Stripped to nakedness there remains to it but itself. What then does that amount to? All that counts in life. Desire, zest, truth, love, knowledge, 'values, and seeking metaphor to eke out expression, hell's depth and heaven's utmost height.'" (P.357.)

From *HUMAN DESTINY* (1947) by Lecomte du Nouy, at the pages indicated: "It is clear, therefore, that expressions such as 'scientific truth' should only be taken in a very limited sense, and not literally, as the public so often does. There is no scientific truth in the absolute sense." (P.15.) "An explanation of the evolution of life by chance alone is untenable today." (P.43.) "Once more we repeat that there is not a single fact or a single hypothesis, today, which gives an explanation of the birth of life or of natural evolution." (P.134.)

will (we may function in a world of "unconscious determinism," as Jeans suggests), little difference is made in our Law. That is, everything may exclusively be in my own mind, and the whole panorama of events be as pre-determined and pre-arranged as the running of a talking picture film, yet I could still believe that I was exercising a free choice and that persons and things outside of my own mind were affected by me, and could affect me, in turn. There would still be prisoners, judges, jurors, witnesses, attorneys, sheriffs, and Law in my experience, deceptively placed in an objective, external frame and seemingly exercising free will.

The task of Law and of ourselves in attempting to evaluate cases is to find acceptable premises which can guide us in determining when limitations of an artificial kind should be placed upon human liberty and of what they should consist. We are in the position of asking what a man "ought" to be required to do and what he "ought" to be prohibited from doing. Should the judge have decided that the defendant "ought" to have kept his oral promise? That he "ought not" to have written as he did? That he "ought not" to have hit another man over the head with a baseball bat, and that he must now pay damages, or, if it is a criminal case, pay a fine, or go to jail, or both? Or that members of a religiously moved group "ought" to obey this statute, although obedience to it clearly prevents their carrying out a sincerely held tenet of their religion? Or that Congress "ought not" to impose a certain control upon prices, as it has attempted to do? Or that specified officers in order to qualify for office "ought" to certify non-affiliation with the Communist Party?

Palpable conflicts occur when we seek the pertinent premises which bear upon the solution of our problem in any specific case which concerns artificial limitations upon human liberty. Although many people may suppose that this is the age of Science, and that the premises of Science should give us the answers we seek with respect to the policies we should follow, we find that actually Science offers us little, if any, final help here in our "ought" and "ought not" field of policy-making. Law, just as Science does not profess to lend us any final premises as to the nature of reality "Ought" and "ought not,"

categorical imperative, doing unto others as you would be done by—all are derived from Religion, or from Philosophy, or from both, not from Science. Virtue and vice, good and evil, right and wrong, as moral terms, are not from Science. Their use in Science must be only in the efficient sense of proper or improper, efficient or inefficient means of attaining a desired end. Science tells us nothing of whether in the first place we should strive towards one end or another. Science consists of means, not of ends.

Even the brasher sciences, Psychology and Sociology, reduce basically to organized attempts to tell us from careful observations how it is believed men consistently act under specified stimuli and conditions, not *how* they *should* act. The ends we seek are not found in test tubes or in psychological laboratories. When a sociologist presumes to tell us how society should manage or conduct itself and its members, i. e.—what should be its goals and ends and policies, the Sociologist surely is drawing not from his science but from aesthetic prejudice, personal preference, Philosophy, or perhaps (to the scandal of many sociologists) from Religion itself.

Science assists time and time again by suggesting means towards ends, and by giving us pretty fair predictions of what reactions can be expected. Law finds Science indispensable in this respect. But when we come to the ends, to policy making, we find no direct premises of Science in point. Science is amoral. To Science, killing of another human being in the course of armed robbery is neither good nor bad, right nor wrong, nor is the extermination of a whole race by concentration camp methods, or by explosion of an atomic bomb. Science may find these killings very interesting as phenomena and data, and it may pass upon the efficiency of the methods used to bring death, or even find interest in tracing the mental states of perpetrators of such slaughter and of the victims. But it lies beyond Science to tell us whether in the first place we "ought" or "ought not" to adopt a policy of encouraging or of discouraging such killings. Test tubes and pointers on dials give us no moral mandates.

Contracts might be supposed to rest pretty heavily upon Economics, and the premises of the two be regarded as indepen-

dent in large part of the premises in other fields. But if you are making an exact and comprehensive attempt to state why you agree or disagree with the decision of a case in Contracts, you must follow through the whole chain of premises upon which directly and ultimately your judgment depends. Thus we accept repeatedly the premise that death is an enemy and that sending one out of this life confers no benefit upon the one who dies. A life in hand on this earth is considered as worth two in the cosmic bush of tomorrow.

There are also involved necessarily the premises which treat of the likelihood of and nature of an after-life. How completely validated do many of us feel these premises to be? Yet what a difference it might make if our assumption were that death means a speedy translation into paradise, for in that case whatever hastened one's translation into the ecstatic realm would be approved, beneficial, and doubtlessly legal. The atomic bomb, destroying the earth in one fell swoop, would be a magnificent savior. And; returning to Contracts and Economics, that which tended to further the making of a living here on earth and to secure the necessaries of life, would be open to objection that the effect would be to delay translation into paradise and to cause men to linger longer here in an imperfect existence. Yet curiously the most religiously minded men, the ones most militantly in accord with the old-fashioned Biblical concept of Heaven, do not encourage the coming of death as a great desideratum.

Most of the decisive factors which determine whether you agree with a case come not from Science, but from Religion and from Philosophy because these last two make the ends of life and of society their principal concern. Your Religion and Philosophy in the last analysis govern your reply. The premises of Philosophy are most frequently founded upon rationalization and intellectual juggling, whereas the premises of Religion are less often the products of rationalization and are rather the assumptions or doctrines adopted fully fledged and at times dogmatically from those who have experienced what are termed visions, revelations, theophanes, supernatural visitations, and the like.

The premises derived from Religion as to the ends to be furthered in human conduct, many of which have been taken over wholesale by our Law from the Christian Religion, generally stress the concepts of virtue for virtue's own sake, of an inexorable duty, with a certain measure of final rewarding offered as an inducement. The dogmatic rules which religious sects propound frequently come from the pronouncements of a leader or founder who may rely more upon the validity of alleged divine revelation than upon logic or philosophy for confirmation. There are extant premises to the effect that card playing and dancing are evils, to cite two of the commoner ones. And there are special premises of different sects pertaining to tabus with respect to certain kinds of food, clothing, words, and so on.

The acceptability of such premises, as usual, is dependent upon how the Credibility Premises are employed. A man experiences mysterious voices or strange sights, telling him to do or not to do certain things. He believes they have come from God and accepts them unquestioningly. He thinks that he has accurately observed, accurately remembered, and accurately interpreted them. But the unbeliever might say that the original observation came from within the man and was the product of hallucination or hypnosis and that therefore to interpret them as of divine origin and persuasiveness is erroneous. But to the devout believer, the whole process is credible, and he believes that he experienced the word of God. Upon what do you rely for your acceptance or rejection of the Biblical statement that the Kingdom of Heaven is within us?

The ends of Law—the policies which it pursues and which appear in cases offered for our evaluation—invariably, then, are judged by us in our religious and philosophical capacities and not in our scientific natures, because Science tells us nothing as to the final ends of human conduct which should be sought. We need to see the whole problem, to grasp the vast anatomy of Law with its connecting rib-like premises which invariably take one back through the various fields of human experience and thought. Many of the basic premises are used time and time again for every case, and once sufficiently formulated and validated need only appropriate mention. But our task is

to formulate and validate the premises which we know, or should know, are indispensable for our judgments.

I have not presented this outline with the serious notion that what I have suggested could very practicably be followed today. We lack the time and the qualified teachers to carry out such an approach to Law, but surely once or twice in the course of a law student's training, he could be given a fair realization of what should be done were a person to answer adequately, honestly, and comprehensively that unassuming little question, "Do you agree with this case?" And then he might conceive in a humble spirit what really should and could be the scope of a study of Law.

Meantime, for practical reasons, and because we stress what the precedents and statutes "make" our laws to be, we shall probably forego the premises approach to Law—the bridges which connect its parts with the best interpretation of human experience and thought. But for the student who is fascinated by the policy-making function of Law and who is desirous of learning about this, there is really no other procedure than the diligent and persistent examination of premises in broad and open-minded criticism.

If you don't care *why* the Law is what it is but only *what* its rules are, you are cold to the premises involved. If you are interested in *how* Law got this way, or *why* it should be changed, you will probably be unable to avoid complying with much that I have sketched in this outline relevant to procedure. And it is the author's conviction that all law students, whatever their future application of Law is to be, should have a definite realization of what is required when we do our best to evaluate and criticize the policies of the Law.