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An Approach to Law

Edward Hirsch Levi

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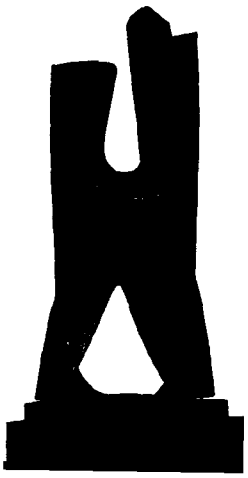

An Approach to Law

By EDWARD H. LEVI

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By Edward H. Levi*

I cherish this opportunity of greeting the members of the Law School's entering class, and of adding to the welcome already extended by Dean Neal and other members of the Law faculty in the course of class sessions of the last few days. My colleagues and I wish for the members of this class the provocative intellectual experience the study of law can bring – and which I anticipate you will have – and then, beyond that, the gaining of that knowledge, understanding and service a life in the law makes possible. Classes have begun. The punditry of faculty – an extraordinary group – is on display. The brightness of classmates shines. The swift transition from layman to professional is on its way. But it is not too late for the members of the class to remember how it was before they became lawyers. You still know how it was to look at the law from the outside; you are still in the throes, despite what special experiences you might have had, of realizing that first perception of how law looks on the inside. This is a favorable position, but one of disequilibrium. In future years, and in but a brief period, your problem will be how to regain these insights, and how to use them to illuminate the special knowledge and craftsmanship which law requires.

Law does not exist for or by itself. It operates for and with people, and in a society which, perhaps particularly in the United States, is not homogenous. It uses the tools of the intellect, and the insight and craftsmanship required for an art. Even as you are fully absorbed, as you must be, in the acquisition and perfection of skills, and as you gain for yourself, as you should, an organizing

*This paper was presented by Edward H. Levi, President of The University and Professor of Law, to the entering Class of 1976 on October 2, 1974.

view of the sovereign control of the ends of the law, it is important to remember that law is not everything. In more or less degree this is the advice which should be given for all specialized study. Each major intellectual discipline seeks for itself a major dominating monopoly view of the world. But economics is not everything, nor are psychiatry, psychology or sociology. And not even public relations. Even in the natural sciences it is the preclusive boundaries which must be pierced, not only to give renewed vitality to the disciplines, so that questions and inquiry may find their own way, but also as a reminder that enclosed structures give an imperfect view, and that while knowledge is interrelated, the kinds of knowledge appropriate for different tasks and perception vary with what must be done.

There are special reasons for emphasizing this with respect to law. Law builds upon and, I should like to claim, is one of the liberal arts. It uses words of persuasion and changing definition for practical ends. It has absorbed within itself a view of the nature of human beings, and of how their acts and the incidents which overtake them may be classified for favor or penalty, or for rights, permission or negation. Law, itself, is a mediating discipline, not only among the passions and needs of human beings, sometimes viewed severally and sometimes in groups or associations, but with respect to the craftsmanship which is useful, and to the relevance of what is perceived as current knowledge or opinion. As an instrument for practical action, law is responsive to the wisdom of its time, which may be wrong, but it carries forward, sometimes in opposition to this wisdom or passion, a memory of received values.

Thus, I should like to emphasize, you bring much to the study of law, and difficult as it may be, you should try to preserve this larger view. And you should remember there is no such thing as having had a liberal education. To have worked in the liberal arts gains meaning only as the work is continued. I hope you will continue that work here and beyond. For a thoughtful

lawyer – for a thoughtful citizen – education is always lost if it is not renewed.

A part, but only a part of what I am trying to say, is exemplified in the advice which a young American future statesman gave to his friend, William Bradford, to urge him to study law. The year was 1773. The young American wrote: "If I am to speak my sentiments of Merchandise, Physics and Law I must say they are all honorable and useful professions and think you ought to have more regard to their suitableness to your genius than to their comparative Excellence. As far as I know your endowments I should pronounce Law the most eligible . . . It alone can bring into use many parts of your knowledge you have acquired and will still have a taste for, and pay you for cultivating the Arts of Eloquence. It is a sort of General Lover that woos all the Muses and Graces."

A sort of General Lover that woos all the Muses and Graces! Karl Llewellyn did not shrink from calling lawyering – in school and in practice – "trade, culture and profession all in one." Speaking of the materials of the law, he said, "I say in these things there is poetry, in these things there is life, in these things there is beauty. If this be not culture, I do not know where to find it." He did not say these things would come easily. He remarked, "Within a hair we have lost the art of reading." And he was right. There was a reason Llewellyn called his lecture, which you should read, *The Bramble Bush.*

Candor compels me to add to the account of the relationship between Bradford and his advising young friend. Bradford followed the advice and commenced the study of law. Several months later the young friend began, through a course of reading, to study law himself. This particular kind of exposure – and I do not give this as a warning – seems to have produced a different reaction within him. He wrote Bradford: "I was afraid you would not easily have loosened your affections from the Belles Lettres. A delicate taste and warm imagination like yours must find it hard to give up such refined and exquisite en-

joyments for the coarse and dry study of the Law. It is like leaving a pleasant flourishing field for a barren desert; perhaps I should not say barren either because the Law does bear fruit but it is sour fruit that must be gathered and pressed and distilled before it can bring pleasure or profit."

To this Bradford responded, "Some parts of the law are indeed dry and disagreeable enough, but you should not call it a barren study. Far from it. It bears *golden* fruit, my friend. Rather say the Belles Lettres are unprofitable." And then he repeated, slightly incorrectly, a couplet from Samuel Butler:

"For what's the worth of
anything
But as much money as
'twill bring."

And he commented that, "It is this that attracts so many to engage in the profession and that makes them pore over the dry pages of Littleton and Coke with more pleasure than those of Homer or Cicero."

You will be glad to know that ten years later we find the young adviser renewing his reading in law. While not a practicing lawyer, he was a powerful influence in the shaping of the law of our country and in the codification and revision of the law of his state. His name was James Madison. William Bradford, I believe, became Attorney General of the United States.

Let me return from this glimpse of gold, which sometimes, but not always accompanies social justice, to mention briefly three aspects of the relationship of law to other disciplines and institutions of society, and to behavioral patterns. To do this, I will pass quickly over an ancient, but changing and sporadically active, controversy concerning the nature and sources of law, and I will move to what is perhaps a slight variation of a present predominant view.

At the heart of legal systems, as we know them, are rules normally accepted as obligatory, and the availability of sanctions or authenticating steps which may be imposed. A variety of organizations as well as active social customs have

these characteristics. When Mr. Kimpton was Chancellor of the University, he was invited to dinner at Burton-Judson. The Master of Burton-Judson requested that the male students wear suit coats for the occasion. They did so, but left off their trousers. I assume there are some institutions in which trousers could be required.

We might add as even more important attributes for the formal legal system (possibly assumed or inchoate in the two I have already stated), institutions or accepted ways for rule creation, interpretation and enforcement. Again, many social institutions have these attributes. Thus, life within the family, social, economic and religious enterprises might be included. To these requirements we might further join an insistence that definite procedures be followed, arising out of the conceptions created by the system itself, to enforce minimum standards of participation or representation and fairness. There is a temptation to think of the adversary system as merely a civilized adaptation of self-help or the feud, but obviously it is a great deal more.

It may be said that this recital of attributes, which at one time might have invited a belief that they marked the evolution of a legal system to maturity (I do not believe it is that simple), is flawed because it does not include the state as the moving power or authenticating force. I have left the state out to emphasize that if the state or government or sovereignty is decisive in our recognition of what is a system of law, we should realize that government action may be direct or quite remote, and only tangentially related. It may be implied or demanded, and thus bestowed after the fact, because the other attributes of law, or some of them, are present. The government, indeed, may insist, or others will insist, that if important rules are normally accepted as obligatory, these must be under the jurisdiction of the formal legal system. And yet if it is important to put the government in, it is also a mistake, as I suppose we have reason to know, to assume that everything the government does is equivalent to law or the legal system.

The first aspect of this relationship of law to other institutions of society or behavioral patterns, then, is to press upon you again that law is not everything, but it is a great deal, and sometimes it is too much. There is no evading this problem. It is a problem many generations of lawyers will have to meet. There, undoubtedly, are a variety of answers. But we must recognize that law is a powerful and frequently, perforce, crude instrument with which to regulate all human conduct. In modern western society, law brings with it an increasing paraphernalia of structure, a public aspect, a determination – not always realized – to seek finality, an assumption that what has been done in one area should be done in another, a harshness, and an inevitable influence toward conformity. The quaint – to our eyes – older writing as to the sources of the law reminds us that the increased communication and centralization of our time have changed the quality of the law, and this must be taken into account.

There have been and are societies, China, for example, which are of ancient lineage and have developed so that vast areas of human conduct are controlled by social pressures outside of what we would call the formal legal system. To such a lesser degree as, of course, to mark a difference in kind, this is also true in the United States, although those areas where law is not intricately involved are diminishing. The example of China is appropriate because it reminds us that non-law systems can be authoritarian, and we like to believe, and there is truth in this, that the thrust of our legal system is for the protection of the individual. Yet it is a peculiar but natural arrogance, and I beg of you to think hard on this point, to believe that it is the system of law – one institution among many – which is always the best protector of human freedom. If we are to woo all the Muses and Graces, let Humility be among them. We still carry with us the thought that liberty is aided or protected if there are areas "which are not the law's business." This phrase was the focus of an important debate be-

tween Lord Devlin and Professor H. L. A. Hart of Oxford, beginning about fifteen years ago. One of the notable addresses in that debate was given by Lord Devlin as the Ernst Freund Lecture ten years ago in this hall. The debate concerned the use of the criminal law to enforce morality, but the implications of that debate are broader. Of course the removal of matters of personal morality from the grasp of law is probably the easiest area in which to win approval from those who favor the extension of law for social action – and the reverse is probably sometimes true also. But I suggest the effects of intervention in a variety of areas need to be appraised and not taken for granted. Moreover, as our law develops, this is not necessarily a matter for public debate, but flows from accretions of constitutional interpretations, and further rides on the point that law is already present in the area and must be clothed with all its attributes.

Because I do not wish to be misunderstood, let me say explicitly that I think it is an urgent matter for governance and law to make effective a new or renewed charter of freedom for all citizens. But the challenge to statecraft is to achieve this with a minimum, not a maximum, of the structure of formal law.

The second aspect of the relationship between law and other institutions of society and to behavioral patterns is based on the unique characteristics and responsibilities which law carries. Thus, while it is important – and particularly for a lawyer – to observe the similarities in group behavior in the many areas of life where there are collective causes, there is a point in insisting that law is or ought to be different. There is a paradox in this, I realize. It is because law is seen as everywhere that the distinction between it and other activities is blurred. One can, of course, analyze society naively as though nothing more were involved than a series of pressure groups and devices. Roscoe Pound, who began his important work in the jurisprudence of interests at this University, powerfully influenced at that time by the work in sociology, saw the task of law

as social engineering, mediating and responding to the various claims of society. But it is a far different conception which treats law as only another device for social pressure and leverage. The special responsibility for law is that its end is the common good. The values which it exemplifies in its treatment of individuals and groups must be conditioned to that end. Law does invoke sanctions which penetrate deeply and can be terrifying in their impact. The misuse of law as but another device for leverage is profoundly corrupting. Unfortunately we have many examples of this in our time. One would hope that the emergence of the lawyer as more than a scrivener or a clerk, and his acceptance as an officer of the court, would mean more than the duty to protect orderly procedures in that forum. Indeed, it has meant more. But to accomplish this, the profession carries an accountability to the system of justice it protects, and a duty to improve that system. If so, there really is a great deal for you to do.

I come now to the third aspect which deals more particularly with the relationship of law to other disciplines. You note I reject a view of law as being solely what a judge, as a judge, says it is. Such a view makes a valuable point, but it is seriously wrong. The judge may have the last word, even though sometimes for only a brief period. But one might as well say that for many matters and substantial periods, the law is what the practicing lawyer or commentator says or, in other areas, what the policeman does. Moreover, there is legislation; there are executive orders, administrative rules. There is obviously much more to law than the report of cases. And even if we tried to limit law to what the cases say, the social theories of the particular time will find their expression there. Witness the attention which has been paid to the so-called sociological footnote in Brown v. Board of Education, and before that to the reference to the Brandeis brief in Muller v. Oregon, considered enlightened for its time, and eloquent on the point that it is appropriate to restrict or qualify the conditions under which

women should be permitted to work.

Law is part of both the humanities and the social sciences. I suppose it could be argued that it should be studied as they are studied. The idiosyncrasy of law study, doubtedly, is in part an accident of history.

When the legal profession developed in England in the thirteenth century, the universities of Europe (as, for example, at Bologna), which regarded law as a major intellectual discipline, were preoccupied with Roman and canon law. The materials for the study of the common law were mainly customary practices and writs. We know, of course, that Bracton collected a large number of case results, but the reporting of cases was sparse. So the education of the new profession was mainly, as Pollock and Maitland described it, "purely empirical" – a phrase which would have a somewhat different meaning today. If one jumps to the eighteenth and a good part of the nineteenth century in the United States, the apprenticeship system still predominates. The printing press has made reading law an actuality. You will recall Bradford's reference to Coke and Littleton. A few notable professorships are established. Lectures are widely distributed. So the American edition of Sir William Blackstone's Commentaries on the Laws of England becomes a legal bible for many American lawyers and students. The writings of Chitty, James Wilson, Chancellor Kent and Justice Story supplemented the work in law offices, in a few proprietary schools, and in the beginning university programs.

When Holmes went to the Harvard Law School in 1864, this was just six years before the transition to the case method. There were three professors. The two-year curriculum was composed of lectures, moot court and a reading list of treatises. Holmes left the program in the middle of the second year and finished in a law office. While he often said pleasant things about his legal education, he did describe it as presenting law as a "ragbag of details." He commented that "the best training is found in our moot courts and in the offices of older lawyers;" a journal of

which he was co-editor a few years later complained "the condition of the Harvard Law School has been almost a disgrace to the Commonwealth of Massachusetts." Holmes was hard to please. When a few years later Langdell introduced the case method to Harvard, Holmes, in an unsigned review of Langdell's casebook, commented, "Decisions are reconciled which those who gave them meant to be opposed, and drawn together by subtle lines which never were dreamed of before Mr. Langdell wrote." He labeled Langdell as "the greatest legal theologian" not intended, I think, to be a compliment. Years later, Jerome Frank, a product of this Law School, spearheaded the realist attack on the training of law students solely through the reading of cases, dismissing Langdell as a bookish man. But the case method continued to win out, even though now it is much changed and supplemented, not because law is to be studied as analytical chemistry was then viewed, as Eliot and Langdell seemed to think, but because law is humanistic, seeks to apply continuity to values and determinations, and requires the testing of Socratic discussions.

There has been an extraordinary growth in the social sciences, and surely law can be studied as a social phenomenon. Special aspects or problems can be looked at: the operations of the court system, itself; the importance of guilty pleas or particular rules of evidence on some quantitative basis; the effect of evidentiary rules on police conduct; alternatives to ways of improving the penitentiary system. The list is long. But beyond these matters directly related to the legal system, itself, much modern social science research cannot help but have implications which may question the assumed results following from legal rules or the given reasons for the rules. Law is pervasive throughout most of human life. In his most famous speech on legal education, Holmes said, "The rational study of law is still to a large extent the study of history. History must be part of the study because without it we cannot know the precise rules which it is our business to know.

it is part of the rational study, because it is the first step toward an enlightened scepticism." And then he went on to say, "the man of the future is the man of statistics and the master of economics." I assume he meant these specific subjects, but he also meant them to signify the growing substance and techniques of the social sciences. And I also suppose he meant you.

If law is a mediating discipline with respect to the craftsmanship which is useful and to the relevance of what is perceived as current knowledge or opinion, then it is important that the higher learning in law search out those techniques and theories of knowledge most relevant to the correction or direction of law. This Law School has been one of the leaders in this research, not only in the relationship of law to other disciplines, but, as I think is necessary when such research is done, in the other disciplines directly. The point of this is that one cannot simply take the stated conclusions of another science and apply them. At some stage of the interrelationship, the question of law has to be reformulated, but the assumed impact and meaning of the external theory must also be reexamined. This is when the research really begins. This is the beginning of understanding.

Law is its own discipline, not to be captured by any other. It must keep fresh its relationships to other fields of knowledge, and to the enlightened as well as the common thought of its time. But there is an integrity and a cohesiveness of its own which must be maintained. Law has its own history which is part of its working process, the values it protects, the procedures which have been developed for change. It is a discipline to be studied. But it is much more. The problem for the lawyer, and for the legal scholar, is not just to know the law, but how to create within it. It is a world of artistry and craftsmanship and change.

I do not know that the law will bring you gold, but in its own terms – and the terms are important – it will be rewarding.

Editor: Frank L. Ellsworth

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