The Many Faces of the Law

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(The talk which follows was the Lecture to Entering Students, presented by Justice Breitel at the opening of the academic year 1965-66.)

Thank you very much, Judge Schaefer, for a magnificent introduction. If I weren't the rude man that I am I wouldn't say what I'm going to say, namely, that it was too magnificent. An introduction, if it is not good, is a terrible thing. It leaves the speaker before the audience completely naked, with no foundation upon which he can proceed and without clothes to hide his obvious human imperfections. When the introduction is too good, there is no possibility that he can possibly attain the expectations that have been raised, so dear friend, Walter, you've done me too well tonight. I meant what I said: that was very nice and very touching and especially coming from Judge Schaefer. This I will tell you, and I know this is not compliment trading. . . . There are three great state judges in this country and they happen to live and work across the country. There is Traynor of California, there is Fuld of New York and there is Schaefer of Illinois.

I think it's a marvelous idea to have an entering law class addressed by someone who is an old man at the law. I think it's a magnificent idea to have it preceded by a dinner for all the reasons that Dean Neal told you.

The only trouble is what in heaven's name does the speaker now say to an entering class? I have a bad habit of accepting invitations to speak without having decided what I'm going to speak about. I find it somewhat rewarding sometimes, because in the necessity of deciding upon what I will speak about, I usually find it very educational for me, even if the effect on the audience is not equally rewarding.

So I have said to myself for a long time now, since I accepted the invitation to speak tonight, what does one say to an entering class? It's thirty-six years since I was a member of an entering class, and my memory is dim. It is a common rule of ordinary, commonplace psychology that painful experiences are not recalled easily, and so I did not know just what it was that an entering class would like to hear. Worse, I did not know what an entering class ought to hear, which might be quite different from what they wish to hear. So, with the legal training that I have had, which has not been too bad, I knew that I should do research. So I did. I started almost at home.

I have a daughter who has been out of law school less than two years, and as the idea of doing this research came to me on the spur of the moment, I used the telephone. And I said to her, "Eleanor, if you were a member of an entering class, it's a short time ago for you, and I was speaking to that class, what would you want me to say?" "Oh, my God," she said, "it's useless. Not at the beginning . . . maybe in February." She went on: "At the beginning they know all the answers. At the beginning they (the students) have achieved their successes in the liberal arts schools, and especially if they've been admitted to good law schools, they feel they've made it. They've both achieved at the college level and they have achieved by admission to their law schools." You heard what Dean Neal had to say today, this evening, which confirmed that. He told you this is the best of all classes the School has ever had, and therefore the most promising of all classes. You do not have to be told anything more on this point. She repeated, "Much better to talk in February." My daughter said also, "You know, by December confusion will reign. By December they will be in trouble, but it will still be too early to talk to them. You'll have to wait for it to settle a bit." I asked, "What's the confusion about?" She said, "The chaos in the law, the lack of any system, the peculiarities of the teaching system of law. It just doesn't make any sense. And for the first time these great achievers of great successes in the halls of Academe discover that there is this hopeless, waterless desert before them and the way out of it does not appear." When she had finished, I said, "You know, you have given me the beginning of my speech, and what else you have done is that you have given me some recall, because I now remember some things about when I entered law school."

I had been a major in philosophy during my liberal arts education with its highly disciplined, intellectual, logical system. I believed that I had the rules of logic by the tail, and I thought that I had heard that the law was logical, and that the law was a system. By the end of my first year in law school I said, "This is not for me." I hated it.

But I might be peculiar and it might be that my daughter inherited some peculiar genes from me, so I spoke to my law secretary. His recall, at first, was not very good either, and his answers were not very useful. Then I told him what my daughter had said. He's been out of law school about five or six years, therefore, it's eight or nine years since he was an entering student. And I said, "What was your condition when you entered?" He said, "By golly, it was like that." He said, "At the beginning I was at the top of the heap. I had done exceedingly well at my college, Cornell; I had been admitted to Columbia Law School; everything was open for me; it was marvelous; it was wonderful." He said, "After a few months the truth began to come through and I was distraught. It took me a long time to straighten out. I was on the Law Review before I finished, but
I had a terrible time before I was through.” I figured that I would carry my research just a little bit further.

My family is studded with lawyers, I want you to know, although this isn’t a family story, I promise you. I spoke to my son-in-law, who is a lawyer. He’s been out of law school about four or five years, and I did not tell him about these other and earlier conversations. I said, “Bill, if you were in your first year at law school and I was there to speak to you, and have in mind who I am and what I’ve done or haven’t done, what would you want to hear from me?” He said, “I’d want to hear” . . .

now notice the parallel here, he came through with some other constructive suggestions, but notice the parallel . . . he said, “I’d want to be told that all the things I learned and achieved in liberal arts education were not necessarily relevant in the learning of the law. I’d want to be told that the law is different; that’s a different kind of discipline. I’m not quite sure why it’s different, but it is, and that every single one of us, when we entered law school, first came a cropper, in the first few months, and some never came out of it until the end of the first year, and some even later. I would have wanted to be warned of that so that I would be prepared for it, because at the beginning it was easy, and at the beginning I was in the flush of self-esteem and self-confidence.”

Last night I stopped off in Ann Arbor and I spoke to a young lady, a first year law student, and I wasn’t a good lawyer, because I didn’t first check something that I’ll mention to you in a moment. I said to her, “If I were addressing your class as an entering class, what would you like me to say?” “Oh,” she said, “I don’t know, I’m all confused.” And I thought, my gosh, my research hasn’t been complete. This case is different. And then I caught myself; (it shows you how careful you have to be in research,) classes had started at Michigan six weeks before. Then I asked her, “By the way, how was it at the beginning?” “Oh,” she said, “at the beginning it was wonderful. I’d been told how terrible law school was, how difficult, and it wasn’t at all.” But she said, “It didn’t stay that way.” So, the exception was no longer an exception.

Now to move just a little bit closer to what I want to tell you; there is something strange about the law. You know, almost every man thinks he is equipped to discuss the law with you, that he is equipped to decide whether a rule of law is good or a rule of law is bad. Unlike his treatment of professionals in other fields, as medicine or in the exact sciences, whether mathematics or nuclear physics, he assumes that this is within his ken. In the law he believes that he is entitled to have the same kind of judgment as those who have spent their lifetimes learning its peculiar vocabularies, its misleading ambiguities, the peculiar concepts, the misleading concepts, properly called fictions, with respect to the law, and so, if you as liberal arts graduates come to law school and feel that you have a right to think that you can understand it quite easily, you’re not out of the ordinary at all. You’re right in the proper lay tradition, and just to confuse you a little bit about that, we lawyers often say, and it’s considered even a principle in jurisprudence, that law is based on common sense and that if the law is not intelligible to the layman it is not good law.

All of these things, you see, obviously cannot be true at the same time. There is something that requires a synthesis here. So let’s try to see if I can analyze what the trouble is. I want to say, with no false effort at modesty or humility, for which I’m not noted, that I am not sure that my answers are right, but I do assure you that I believe that these are the answers and that they may provide data of some value to you.

First, we have the obvious premise that the law is a discipline like other disciplines, with its own vocabulary, its own techniques, its own categories, which is a matter more involved than that of vocabulary, and those of you who have studied logic or philosophy will know exactly what I mean, and also with its own traditions. Traditions suggest that the historical import will affect a discipline, and obviously, when we’re dealing with a social field—a humanity—history and tradition will be much more important than it is in the other so-called exact sciences. Although you do not have to know much about science to know that even there history influences our understanding and our so-called knowledge of what those sciences have to offer or discover for us. But when you deal with a social field, it is much more true that history will influence its content and method.

The second, and not such an obvious fact, is, and you’re going to be surprised that I claim it is not such an obvious fact, that the law is not a branch of a logical science, nor is it born of a logical methodology. The law is a social science and at the same time it is not merely a science, it is also an art and skill in the sense that it involves the doing of things. That does not give you the full import of what I want to say; my statement may be too obvious. After all, I did not have to come all the way to Chicago to tell you that the law is concerned with practical applications, but my point is that the law, unlike every other discipline, covers absolutely every aspect of human activity and inactivity in an organized society, so there is nothing that it does not touch—absolutely nothing that it does not touch. When one considers the other important orders in our society, whether of religion, or morals, if you distinguish between the two, or of politics, the sciences, the economic order, and, indeed, all of the institutions of society, from the family to the largest aggregates of social organization, there is just nothing that the law does not touch. Even when the law abstains from laying its hand on the conduct of human beings, it, in a sense, is functioning by
withholding its regulation. Now that, you see, is going to make the law a very complicated discipline.

You can begin to understand, too, from what has been said, that the law is very different from all the other things, even the most "social" of the social sciences that you studied in the liberal arts schools. Nothing was quite so embrace, nothing was quite so universal, but the end is not yet.

There is another quality that is peculiar to law. Some of the qualities I have already mentioned are shared to some limited extent with other social disciplines, but there is one that is peculiar to law, and that is... and although this is not an easy thing to understand, it is a very easy thing to phrase... that the law makes its own conditions. You see, in economics, for example, to take a real social science, a rule in economics may be valid or invalid, true or false. If it is false, it simply means we did not know enough. In law, that does not quite follow. The law, by making its rules the rules, makes them the law. It creates its own conditions. If the law says that using narcotics is a crime, by gosh, it's a crime. Now in economics, you know, if somebody adopts a rule... you'll notice that lawyer phrasing, "adopts a rule"... rather, finds a rule that such and such a factor will affect the demand under such and such circumstances, it is either true or false. The economists do not change the conditions by their pronouncements of rules, but the law does. For example, if the law says that a horse is a cow, the horse nevertheless remains a horse, but there is still a strange thing. The courts will treat the horse as if it were a cow, and when that happens, law students and almost all lawyers get apoplexy.

As a consequence of these few points that I have made for you, and take what follows not as an apology for law, but as a claim of pride on behalf of the law in its travail, that because these things are true, the law falters and stumbles. It moves ahead and then it slips backward. Sometimes it goes too fast, sometimes it moves too slowly. Sometimes it adjusts and sometimes it adapts and sometimes, too, it misadjusts and misadapts. Sometimes it follows what is happening in society and sometimes it even leads.

If we assume that the purpose of law is the fulfillment of society's ends, sometimes it is a failure and sometimes it is a success. But this is no reason for having less love and respect for it. This is what I did not know in my first year in law school. This stems from the fact that because the law is as universal as I told you, and because it covers all of society's problems, it must, by definition, suffer from every human failure, from every failing in society. If man does not know enough, then the law does not know enough. If man is greedy, the law will reflect that greediness. If man is beastly, the law will reflect beastliness, and I could carry the parallels indefinitely, but you can do that for yourself. Because the law, you see, is a reflection of the entire, both in extent and in depth, panorama of organized society.

To expect the law to be any better than the organized society in which it exists, is to expect the impossible. It is a very evil thing and a failure where it does not even rise to the level of its society. Then there is rejection of law and even revolution, as there should be. But to expect it to be much better, this is expecting what cannot be. So to find exactitude where there is no exactitude in society is impossible. To find perfect knowledge where there is no perfect knowledge in society is impossible. This may help explain to you when the days of confusion begin to come to you, how and why law has stumbled, how it has faltered, how it has moved ahead, how it has fallen back, how it tries to adjust, always in the hands of ordinary human beings who are, of course, finite.

Even as I speak to you tonight of this, I am not sure that this is the answer to explain the confusion. Many have tried to find the answers to problems of this kind and no man claims that he has them with any certainty, so that I am not picking myself out as the only modest man in the group.

Now there still can be a little further help that we can get out of this broad philosophical area and try to deal with the question of what it is that you are supposed to be learning in law school. In the first place, we have cases, and this method of teaching law by cases has its own devilment in it. Before Langdell developed the case method at Harvard Law School, law was studied out of texts, great texts written by great minds, texts that were also used by the courts in the way of citation of learned but not binding authority, something as they still do to a certain extent in continental countries under the so-called civil codes. Texts have a beauty to them. They have system. You start out with definitions; they give you principles; they give you rules. In short, they give you answers. It is not just an endless questionnaire. Yet we do not use texts in this way, with some very few exceptions. We have not used texts in the better law schools now for half a century, and more. We use cases, and I will try to tell you why.

The law operates by generalizations, by rules, but we have become skeptical about rules and generalizations. We have learned that it is easy to confuse a collection of words with a true generalization which describes an existing condition. But in cases we see how the rules and generalizations are actually applied. This is why we stress cases. Just to begin to introduce some of that confusion that perhaps you have not reached in only your second day: it is not true that the law is cases. The law is still rules and generalizations, and if you reach that distorted state of mind where you think there are only cases, you end up without any law. You just end up with decisions and judgments by individuals in cases,
and that is not law. There is something much more that implics both the lawyer and the judge to decide a case the way they do, and it is the need to apply principles of generalization. We work with the cases and yet out of the cases; instead of using the text as a crutch, you must find the rules and generalizations upon which the case rests; and to make the matter still more confusing, you cannot quite trust the judge who wrote the opinion when he gives you his generalizations. In the first place, he may not have been a good craftsman, although he may be a fairly good judge and reach the right result. So the reasons he gives may not be so good. Or he may be one of these crafty fellows—to use a word with the same etymon but with an entirely different meaning—he may be one of these crafty fellows who deliberately gives you a false reason for reaching a result for which he is afraid to give you the real reason.

But you see, you want to know how the next case is going to be decided, so you've got to find out what the real rule is, what is the real generalization, that, in fact, moved the court to do as it did, consciously or unconsciously. Thus, you are going to find professors of yours, who are not natural-born sadists deliberately irritating you, who insist on asking what is the holding of the case, what the court said, what it had to say or reason in order to reach that holding, as distinguished from the dictum that it uttered, and whether, in fact, it really meant what it said. This does not mean that all lawyers, judges included, are completely untrustworthy speakers of the word. Think back of what I told you before. This is rough stuff. This is dealing with the facts of life. This is deciding cases about people who are involved in disputes.

The law deals with what are all trouble matters, and the need for reaching a just result is a very difficult one indeed, and judges are not selected in such numbers or in such ways as will produce uniformly a collection of the wisest men in the realm. And by the way, if you chose them that way, you probably would not have a good judiciary. There is a lot more to the problem of government of the people, of which the judiciary is a branch, than merely having intellectual and logical excellence, and perhaps scholarship to boot.

I would like to give you a bit of an illustration where some of these knotty problems get us into trouble. If we work with texts, we have a simple definition of fraud, for example. Fraud would be the misrepresentation of a fact to another with the intent that he should rely on it for the purpose of obtaining something of value from him. In courts they will sometimes refer to it as the five fingers of fraud; false statement of fact, the knowledge of its falsity by the utterer of it, the intention that the other should rely on it, the actual reliance by the victim, and the deprivation of the victim of his property or other thing of value by the actor, the evil actor. All right. So the friend lies to his friend who wishes to commit suicide, that if the friend will lend him his gun he will go a hunting with the gun and return it to him the next day. He hasn't the slightest intention of going hunting, he hasn't the slightest intention of returning the gun. Obviously, that's not fraud, but the facts literally, but only literally, fit the definition. No court would be so asinine as to apply that generalization to it. I have given you a very simple, very glaring, obvious example. You don't have to be a lawyer to see the trouble with that one. But this is the kind of stuff out of which the exceptions to the rules come. Then we have exceptions to the exceptions, because again, you see, we are not interested in constructing an ideal system of words; we are not writing a beautiful text; we are deciding real cases with real people; and we use generalizations in order to understand what rules we are supposed to apply and to discipline those who try the cases so that they will try them, not according to their own visceral or subjective reaction at the particular time, but in accordance with rules that have been laid down and learned by statute or precedent, as the case may be.

Let me give you another illustration, and this, again, is an ultra-simple one, but it can suggest the same kind of problems that you would have with the first. This is an illustration that appears in a case and materials book used at one of the Eastern law schools. There is a waiting room in a station. The sign on the waiting-room says, “No Dogs Allowed.” A man comes along with a trained bear on a chain. May he enter the waiting room with his bear? The words were so simple—No Dogs Allowed. But were they so simple? And what is the problem of the law with respect to enforcing the possible responsibilities and liabilities that would stem from such a sign? And it is no different from my fraud illustration, really it is not. Analytically it is not, and troubles with signs like that do occur, except that you don't see many trained bears around, but there will be people with cats, there will be people with parakeets in a box, there will be people with parrots and, by the way, the problem may arise in connection with a tariff schedule for shipment on a train or ship or plane and so on, endlessly, always these problems with words; and because we are dealing with the rules by which society is governed, these troubles are our business.

Now, both in the several principles I tried to give you before about what law was, as separated from other disciplines, and from the problems I gave you in connection with the handling of cases as opposed to the fact that law consists of rules and generalizations, you have something else super-imposed that introduces the real chaos, because chaos was the right word, and it is not found just in the contraries I put to you. It is found in something else, and this is straight jurisprudence.

There are three imperatives for any rule of law that distinguishes it from any other kind of rule that might
govern you and that might be imposed upon you by the state or other political authority. The first is neutrality of the rule. The second is justice and the third is equality. Now these three things are not the same, and the odd thing is they do not live together very well. That is where the chaos comes in; but first let's try to define them, remembering that definition in this field of ours is a very slippery eel.

Neutrality requires that the arbiter of cases, the maker of law, be ideally absolutely impartial with regard to the consequences to whom the rule is applied. He just doesn't care—he just doesn't. He'll treat his own mother the same way he would treat the stranger. He's totally neutral. The rule is supposed to be neutral. If the rule is you must pay your debt, everybody must pay his debt; the neutral doesn't distinguish. The second thing is that the rule is supposed to achieve a just result. Now without getting into all of the subtleties of what a just result is—that you will have trouble with even in your third year, let alone now—let's assume that the just result is what we expect the law to achieve in deciding cases so that when you get the result, you say this is the way it ought to be—this is the right decision. The umpire has done the right thing—he called that ball as it was. That's oversimplification, but for our purposes, take it as that. The third thing is there must be equality of treatment. That is a little different from neutrality. The neutrality relates to the motivation with which you start. Now you've done it—you were very neutral and you did it. Now the same case comes up again, but now either because you know more, have learned more, or have changed your mind, or whatever it may be, you would like to decide this case differently. Then you violate the principle of equality. You don't have a stable rule anymore. And the reason we need these two things, the equality and the neutrality, because justice, you see, is the big diamond in the tiara, that's the main one, the reason you need the other two is because dealing with finite people we assume that if they will be both neutral in their treatment of everyone, and equal in their treatment of cases, the chances of just results being achieved is very, very high, recognizing that a man doesn't just look at a situation and say, "Ah, this is the just answer." It isn't that easy. Think of the No Dog Allowed sign again. So we need these other two for that purpose. But you see, they don't sit well together because every time you get a new case it's just a little bit different because all human events are slightly different, even just because the events happened a little later, and as you get to know more about things, and the changing external conditions, your attitudes may change, and so will your sense of rightness. So there is a strong tendency to have what's called a free judgment. Just decide every case the way it comes along. But you see, most of us believe—there is dispute about it—most of us believe that that is not a true system of law. So this means we have to reconcile ourselves to some unjust results in order to obtain neutrality and equality, but our tolerance is not unlimited. When we find the number of unjust cases precipitated by these other imperatives of neutrality and equality, we rebel and we create an exception, or we create a fiction of law, or we just stand on our heads and say, "I hope nobody sees us doing this." And this, as we make an exception without saying so, makes for confusion and chaos in the rules and the cases and in the work you do, because human beings working in the mines have decided these matters, and they have been affected by the danger of an unjust result. They have struggled with the rule or the generalization and did not like it, as applied in that case, and they did not quite know how to get out of the quandary.

It is often said that a very skillful craftsman can avoid these unjust situations without doing violence to the rules, but that most people are not very skilled craftsmen. This applies to the practice of the law as well as to the business of judging. You know, if you're a very smart lawyer you'll be surprised at what you can do for your client without cutting any corners, but when you're not very smart, and you try to do the same thing for your client by cutting a corner you might be disbarred, and the client could even go to jail.

I do not want you to get any idea that law is a highly relativistic business and anything that happens goes. If you actually look to the incidence of cases you will find that tested by almost any standard that you would use, if you only agree on the standard, you will approve of the results, whatever the reasons that may have been given. But there is a generalization, a proper generalization, lurking somewhere that would explain why you like all of these results, even though they are justified verbally by conflicting or contrary supporting explanations. It is much like explaining jury verdicts. If you talk to trial lawyer after trial lawyer they will tell you, and judges, too, that the juries are very stupid. You ask jurors after they have rendered a verdict how they decided the case, you may get the sheerest nonsense in the world, the worst fallacies, the worst recollections of the evidence, complete misunderstanding of the judge's charge, introduction of utterly irrelevant and prejudicial factors in deciding the case, but if you ask the lawyer, "Did they decide it the right way?" he is likely to answer, "Yes, they did." The laymen on the jury are the least trained in analysis and yet we know as a fact, and most of us agree, that they do reach the right results. This may go back to that paradox I mentioned to you earlier, that law is based on common sense, and if it is not intelligible to the layman, it is not good law. That is why a jury can actually function in a court system without doing violence to the system of the law, and you will see that most arguments about eliminating the jury are
based upon the argument that the judges would decide the cases the same way anyway, which simply means the juries haven’t been deciding it so badly if that argument is valid.

But let me move on a bit. The three factors that I have mentioned give rise to these conflicts and this chaos. The chaos and the lack of system and the troubles are all the worse because the discords will vary in degree, and here you will begin to see where your roles as lawyers come into it, if there are failures of advocacy. If the lawyers do not do a good job, the chances of these failures occurring are all the greater; there is greater difficulty in achieving the just result consistent with the principles of neutrality and equality of treatment. You will find that there may be failures of proof—that are nobody’s fault, that are inevitable. In other words, you have two cases that seem to be alike, but in one case they prove the X factor and in the other case they do not prove the X factor. By way of hunch you believe that the X factor was present in both cases, but it is not proven. What do you do? And then, of course, we have the weakness of our own generalizations and definitions, like the definition of fraud. Time-honored and ancient as it is, it does not describe, in the strict definitional sense what is fraud. You will recall that for a definition to be perfect there must be classification by family and differentiation, including everything that is to be covered and excluding everything that is not to be covered. I venture to say that you will never find a definition of law that does that, because we are not defining words for a dictionary; we are defining working propositions that are to be applied to cases in real society and that makes the difference. Real society just does not fit into neat little—you cannot include the bear in the definition of a dog, and it is a tamed, chained bear, at that. If an unleashed bear is involved you have no trouble with the case; it’s easy. Why is it easy? There is another principle lurking there somewhere. But this is a trained bear and it is on a chain. Why would you have less trouble with a parakeet in a little box as compared with an American bald eagle in a wicker basket? The sign only said No Dogs Allowed. Then, of course, obviously, a changing society engenders an evolution of new insights. Hence, we often find ourselves rebelling against principles that we used before and considered established. This trouble arises with statutory law just as much as with decisional law. Not many decades ago there were many crimes for which people could receive capital punishment, certainly an extreme sanction. Today there are very few crimes that people think merit the sanction and many people would abolish it for all. I take this kind of illustration deliberately because implicit in the sanction is a generalization that it serves certain social purposes. Why did they kill people for committing larceny in England in 1810? They did it because they believed it would serve certain essential social purposes. Obviously, they have decided that it never did, or, at least, that it does not at present. Now one takes a simple thing like that, and it if gives you trouble, think of the troubles that are given us by these marked advances in the techniques of economic enterprise, the development of administrative law, and the development of government regulation and involvement with economic enterprise today.

Moreover, one may not neglect the great public issues involving civil rights and the status of minorities, and anybody who thinks that the transition legally from Plessy v. Ferguson to Brown v. the Board of Education can be accomplished by any kind of logical process merely, just does not understand anything at all about the law. This is disturbing in the first year, because you are looking for some kind of certain technique, some kind of neat logic that one can use and it is not there. This is a different kind of discipline.

Now when one reaches technical and procedural problems the confusion is even greater and the principles even harder to extract. When one starts dealing with the problem of hearsay evidence, for example, one is likely to get quite a few fixed notions, like so many Anglo-American lawyers have done before, after being exposed to the hearsay rule, that the doctrine was divinely ordained. In fact, it is hard to believe that history and tradition are the real explanations. On the continent of Europe, hearsay evidence is used almost without limitation. Professor Morgan wrote a model code of evidence for the American Law Institute which contains very serious and sharp inroads into the so-called hearsay evidence rule. The hearsay evidence rule itself is shot through with exceptions and exceptions on the exceptions. The fact of the matter is all hearsay is not unreliable. If a hundred witnesses who ran from the scene because they did not want to be involved eventually told ten honest policemen what happened, that’s pretty good evidence if it is probability of truth you are after, but we won’t admit a single bit of it.

The reason all those exceptions to the hearsay rule developed are the problems I discussed with you before. Courts faced with real situations, real problems, recognize that even though, under the literal generalizations of the hearsay rule, evidence is not admissible, there may be very reliable proof and it ought to be admissible; as, for example, when we are talking about the so-called dying declaration of a victim of a murder, which, in some ways, is the most extreme kind of hearsay. Because the man has just been shot, the policeman has arrived at the scene, the victim is gasping, he knows he’s about to die, and he says, “Johnny Brown did it,” then the policeman can testify to what was said. It was not said under oath, it was not said in court, but you see, they feel he’s about to face his Maker, or worse, and so he’ll tell the truth.

Then, for another illustration, there’s an old one that
drove me wild when I was in my first year of law school. I had a very distinguished professor of criminal law, his name is renowned in the field, and I was an old philosophy student, have that in mind, and he was explaining how the criminal law no longer is based on vengeance; once it was, but it is no longer. Now the purpose was to deter wrongful acts and every crime must have a wrongful intent, a mens rea, and also a wrongful act, and both must concur, if there is to be a crime. He gave as an illustration what I suppose has been given a thousand times in hundreds of law schools. My teacher said that there is a student's watch on his desk. The student who owns it, but does not recognize it as his watch, thinks it is the teacher's. The student stealthily removes it. Is there a crime? And students raised their hands and said, "Of course not, there was no wrongful act, it was the man's own watch." So, stupid me, I raised my hand too and I said, 'I don't follow that. If the purpose was merely deterrence, I can see why you need an objective manifestation. We should not attempt to read a man's mind, that's unreliable. But here it is perfectly obvious that the man was out to steal, and you want to catch thieves and stop them from doing it again. We are not trying to revenge him for taking somebody's watch, we are trying to prevent stealing. Why shouldn't he be punished?" The answer to me was, "You think you're smart, don't you?" I did. It was my first year.

I think that I have given you enough to spell out some of the seeming confusions. I do not have to take you by the hand and show you further. It should be clear, almost clear, why we go to the cases, and yet why the law is not cases, and why the techniques of the law and the lawyer are going to be so different from those in economics, to take a difficult field, or sociology, to take another difficult field, or even from nuclear physics, which is a field we think of as capable of exactness, if only we know enough. In this sense the natural sciences are easy because one is dealing with something that pursues to be an exact science, the rules of which can be tested in various ways with reasonably controlled experiments. We cannot control most of our experiments.

There is still another difficulty. Everytime we do something we create our own conditions as I told you before. At the same time we have to work with angels and we have to work with devils. We have to make laws and rules for good men and we have to make laws and rules for bad men, and it isn't that we're even engaged in a trial and error method. Serious things have to go on ahead while we fuddle around, and as we fuddle we may be creating the conditions that never should have come to pass. We may be aggravating evil conditions. Let me again give a simple illustration from the field of criminal law. I refer to a current problem, and it is also a legal problem. Should the sale of narcotics be made a crime? Should the obtaining of narcotics be prevented by making the sale to the narcotics addict a crime or are we sowing dragons' teeth so that we produce more crime, both of the narcotics variety itself and associated crime committed to raise the money to buy the narcotics at the high prices dictated by the illegality of the market by reason of that kind of rule? Some of you must be quite familiar with the discussion and the debate at that level. It is a matter of the highest controversy at the present time. You know the problem
is no different when you try to decide what should be
the liabilities of a seller of merchandise who ships the
merchandise across the land under a bill of lading and
the bank at the other end has some responsibilities with
regard to picking up the cash for the bill of lading against
a sight draft. Surely it's not as important as narcotics
addiction, or is it not as important? After all, the pro-
ductive side of our society is what makes the rest of it
possible, and one cannot pick any essential part of this
society of ours and say we can dispense with it, or that
it is not important legally, because it does not affect us
emotionally as much as something else. Then, too, we
are governed by certain other corollary principles. Dis-
putes we must decide, otherwise people will decide
them by force, and one of the chilling things you will
learn is that it is more important that we decide the dis-
pute than that we decide it correctly. So, for example,
legal system that would take three years to decide a case
correctly may be worse than a legal system that does not
do too badly, but does not decide them correctly, but
at least decides them within a matter of weeks. I
saw an interesting discussion just the other day in the
New York Law Journal, saying that the Supreme Court
rule in Sullivan v. The New York Times, making a
showing of actual malice a condition before there may
be recovery for defamation against public officials by
depriving injured persons of a libel remedy may bring
us back to the days when the libeled person would
resort to self help. In other words, when you withhold
a legal sanction you have to think twice as to the con-
sequences. If one says that something will not be covered
by legal regulation you may be suggesting to these
people that since nothing is going to be done by the
state you will have to take care of this matter yourself,
and they will. For example, in criminal law one of the
things we believe is that in imposing sentence we must
pay some attention to the anger and demand for retri-
bution of the community, not too much, just enough to
quiet them so they won't go out and Lynch. But you
can't just ignore community reaction. Take, particularly,
the kinds of crime that arouse great emotional reaction;
for example, rapes, vicious assaults against old people,
against children. So it is true, obviously, that the man
who did it was a very sick man or he never had any
advantages, or he was very underprivileged. Will the
community permit that man to escape any retribution?
If you think so, then we can handle the case on a
purely individual and sociological basis. But if it is law
and order we have to maintain, we have to look to
something else. I said before the law created its own
conditions. It does as law, but it does not, except rarely
and in very slight degrees, change society. Remember,
the horse remained a horse, it did not become a cow.
If, for example, we pass a law that you should not have
evil thoughts, that will be the law, but it won't be very
meaningful law, and you won't be able to prosecute
anybody for it because you won't be able to prove it.
Now if you have been analytical enough, and I think
you probably have been, you will realize that I've been
pulling, not deceitfully, something like the philosopher's
jokes, "all generalizations are false except this one," or
"all men are liars except me"; because here, although I
have been questioning the rational and logical pattern
of the law, I have also been urging the need to find uni-
fying principles. I have also warned that one will not ne-
cessarily find the principles easily in the cases and we know
that the texts will also be fallible. Here we are touching
upon the primary technique of the lawyer and why it is so
difficult to be a good lawyer. From one point of view
one must work with the worst materials possible, and
yet by strokes of genius one must elicit rules and gen-
eralizations on the basis of which one can advise the
client, argue to a court, or, if one is a judge, decide the
case.

Yet, this a grand system; it is just a most difficult one.
It is not a chaos, it does have order, but it is an order
imposed upon a society, the order of which itself is not
all neat and buttoned up. I suppose we could devise a
perfect legal system for a society uncovered by a group
of excavating archaeologists because then we could
study it at our leisure, we could make rules and the
conditions that wouldn't change and we would give
them a perfect legal system, and it would be a lovely
museum piece to put alongside the skeletons and the
artifacts and the fabrics of clothing that they wore and
all the rest of it along with the chards. But you cannot
do that with a living society.

Now I said I would not make this a family story, but
I've got to bring in another lawyer member of my fam-
ily. My wife is also a lawyer but she doesn't practice law,
hasn't practiced it since my first daughter was born,
and I told her about my research into the subject matter
for my talk tonight, and she said (a very cynical person
she is, too, with no respect for her husband, based upon
long experience; indeed, I have been married to her
even longer than I have been a lawyer) and she said,
"It is all useless. They will not remember in December
what you said in October." Now that does not daunt
me, because I do not expect you to remember everything.
You will not remember everything you study in law
school, either, and if human knowledge and skills de-
pend on remembering all the things we learn we may
as well give up and go back to the wigwams. The
fact of the matter is there is something else we acquire
in the process of learning, and maybe there are some
drops of my mental perspiration that will descend on
you and add some clarity to something. We will know
if there has been a benefit out of it, if at the end of
three years, and I challenge you to it, you will be able
to tell me what should have been said to a first year class.
Professor Jo Desha Lucas holding forth at an alumni gathering in Salt Lake City.

Professor Lucas, now shown in Denver, has not lost his audience.

The speaker’s table at the Annual Meeting of the Law Alumni Association of New York, left to right: George B. Pidot, JD'30; Waleed M. Sadi, JD'58, Jordanian Delegate to the United Nations; Donald L. Janis, '61, retiring president of the Association; Sheldon Teft, James Parker Hall Professor of Law, the principal speaker; Frank H. Detweller, JD'31, incoming president of the Association, and Assistant Dean James M. Ratcliffe, JD'50.

F. Max Schuette, JD'50, Kenneth S. Tollett, JD'55, Assistant Dean James M. Ratcliffe, JD'50, James P. Markham, JD'22, and John H. Freeman, '12, at the Houston alumni luncheon at whichDean Ratcliffe was the speaker.

Summer Work for NCLC

The National Council of Legal Clinics has continued into a second year its program encouraging the placement of law students for summer work in areas of the Council’s interest. In the summer just passed, fifteen University of Chicago Law School students worked in such positions, the variety of which may be of interest:

JAMES L. BAIIIE, Office of the Public Defender, Miami, Florida.
GEORGE A. BRAUN, Legal Aid Society of Nassau County, New York.
RICHARD H. CHUSED, Neighborhood Legal Advice Clinic Program, Chicago.
DANIEL H. FRIEDMAN, Legal Service Unit of Mobilization for Youth, New York.
JEFFREY H. HAAS, Neighborhood Legal Services Project, Washington, D.C.
CHRISTOPHER JACOBS, Community Renewal Foundation, Chicago.
MICHAEL KAUFMAN, Office of Fifth Ward Alderman, Chicago.
WAYNE A. KERSTETTER, National Labor Relations Board, Chicago.
ELINOR B. LEVINSON, Legal Aid Office, Portland, Maine.
WILLIAM A. LONDON, Legal Aid Bureau of Chicago.
ROBERTA C. RAMO, American Civil Liberties Union, Chicago.
BARRY ROBERTS, Neighborhood Legal Services Project, Washington, D.C.
JOEL S. SEIDENSTEIN, Civil Liberties Union, New York.
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