Reflections on the Law

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A speech on an occasion like this is, I suppose, in the nature of a commencement address: inspirational advice from one who has already traveled part of the road, designed to impress those who are about to set out with the awesomeness of what lies ahead. The more arduous the journey can be made to appear — hostile Indians here, frightful mountains there, burning deserts without water or shelter — the more credit is reflected on the speaker who has, after all, grappled with these horrors and lived to tell the tale. I have listened to a good many of these speeches: the only one I can remember is one which Learned Hand gave at a law review banquet a few months after Pearl Harbor. There is nothing, said Judge Hand, which an old man can, in all decency, say to young men who are about to go to war. Since there is not, in the spring of 1961, the immediate prospect of destruction which concentrated our thought in the spring of 1942, I would not bet very heavily on the chance of effective communication between my generation of depression and war and your generation of prosperity and doom.

It is, of course, possible to give useful advice. On the occasion when, along with several hundred others, I was admitted to the bar of New York, my colleagues and I were addressed by a justice of the Appellate Division. I know, said the learned jurist, why most of you took up the study of law: you had heard about the large trust funds which lawyers have frequent opportunity to administer. What I would like to say to you (he went on, fiercely) is this: when you get your hands on those trust funds, never forget that the court which has the power to admit you to the bar also has the power to disbar you.

Ask not, we may say in the current grand style, what the law can do for us.

There is a sense in which it is true that, while all study tends to corrupt, the study of law corrupts absolutely. The discipline which we have undergone leaves none of us unmarked. We have a compulsion to see too many sides of things which are easier to live with when they are one-sided. We never go the whole hog: radical lawyers are less radical than other radicals; conservative lawyers are less conservative than other conservatives. We are the negotiators, the compromisers, the fixers, the go-betweens; discretion is all our valor; we do not ride forth white-plumed to battle; we know that a bad peace is better than a good war. In a world where passion commands the hearts of men, we uphold the unglorious standard of reason.

The untrained mind requires easy answers to hard questions, definite solutions to problems of indefinite dimensions. The popular man is the one who can count the infinite, weigh the imponderable and measure the incommensurable. I do not suppose that charlatanism and quackery are inventions of our own age: the magician who can transmute base metals into gold has always been with us and always will be. A few hundred years ago he wore a pointed hat and had the signs of the zodiac inscribed on his flowing robes — which made identification easy. Today his costume is less distinctive: the brief case is his symbol, the electronic computer is his God, the Ford Foundation is his prophet. You may know him by this: whoever he is, wherever he is, whatever the discipline or mystery he professes, he knows the truth. In human affairs, truth is a commodity in short supply: anyone who claims to have cornered the market is necessarily suspect.

For thirty years or so we have heard a great deal about law and the social sciences and the fruitfulness of what are called interdisciplinary studies: a sure way to success in the law school world is to set up a course — which, with a little luck, will burgeon into a Grant and may even flower into an Institute — in Law and Something Else. It makes no particular difference what the Something Else is. I proposed a little while ago that my own school set up an Institute of Intra-

Disciplinary Studies, but nothing seems to have come of it.

My own observation has been that lawyers and economists are apt to get on quite well together and even to have profitable interchanges. I attribute this to the fact that the economists have been at work for a hundred and fifty years or so: since the days of Adam Smith and Ricardo each generation of economists has seen the predictions of the preceding generation proved wrong. With each generation the predictions become a little less confident, the conclusions a little more tentative, the premises more narrowly and sharply defined. The economists have long since lost their hold on Truth.

Economists apart, collaboration with social scientists can be frustrating: the fault lies, I think, not in the social scientists, who are typically men of great intelligence and charm, but in the social sciences. While these scientists lay claim to nineteenth century ancestors, their sciences suffered a rebirth around 1930 with the discovery of techniques, thought to be accurate, for finding out what people really think, indeed, what people really are. The first generation of anything — a revolution, a new science, a new school of art — is marked by a terrible enthusiasm. Truth, which has so long eluded our grasp, is now within our reach. The new sciences are perhaps nearing the end of this first period: the early results, concededly, were inaccurate, but, then, the early techniques were crude; if the techniques can be refined just a little more, if the computers can be made to compute just a little faster, then, all at once, we shall know everything about everything and the land will flow with milk and honey.

It does not follow that when we know everything about everything we shall really know anything about anything — although, with wisdom, we may in time learn something about something. Lawyers have long been accustomed to deal with facts — suspiciously and warily, like the animal trainer venturing into the lion's cage. No lawyer will be surprised by the substance of the late Felix Cohen's wonderful epigram: Prejudice is the term we use to describe our opponent's facts; fact is the term we use to describe our own prejudices. If, as lawyers, we are specialists in anything, we are specialists in the imperfecton of human knowledge, in the fallibility of human thought. In fifty or a hundred years, it may be, we and the social scientists will have something useful to say to each other. At the moment we are much too humble for them.

We ourselves are not always as careful, as humble, as we should be. It seems to me that over the past few years a great deal of nonsense has gone forth about something called the rule of law — the rule of law, the phrase sometimes runs, in a free society. One of my colleagues and I have projected a collaborative piece to be called: The Rule of Law in a Slave Society. We decided to write alternate sentences: he lost the toss of the coin but has not yet, I am sorry to say, produced the first sentence.

If by "the rule of law" we mean that a society has set up a system of courts for the adjudication of disputes between individuals and other individuals, or between individuals and the state, or between competing agencies of the state, then we are merely describing a society in which barbarism or anarchy has been replaced by a measure of civilization. We are saying nothing about the quality or moral worth of the society, except that it has achieved a mechanism for the orderly settlement of disputes. The society itself may be good or bad, free or slave: that depends on the substantive rules which the society has adopted, not on the existence of a procedural mechanism for giving effect to them.

"Rule of law" sometimes seems to mean the *ex post facto* principle: that no man shall be punished for doing acts which the state had not declared to be crimes when he did them. This is a valuable principle of jurisprudence: to the extent that any society is able to live up to it, that society is on the way toward becoming a good society. We should remind ourselves that no society, including our own, has ever been able to live up to the principle fully, and that only a relatively stable society can apply it at all. It is, I believe, true that England and the United States are the two countries in the world which have, for a century and a half, most scrupulously adhered to the *ex post facto* principle. The European and Asiatic countries which have more recently — and in some cases more than once — passed through the turmoil of revolution have not been as scrupulous as we, nor could they have been so. *Ex post facto* is the treasured heritage of a way of life in which for generations the fabric of society has not been ripped apart by violent hands.

Since World War II the idea has been put forward that it is a good thing to execute leaders of the states which lose a war, for war crimes, crimes against humanity and so on. Clearly these men are being punished for acts which were not crimes, by the positive law of their own countries, or indeed by international

law, at the time when they were committed. It is said, however, that their acts offended the moral law, the natural law, the universal sense of justice and that, therefore, they are not being punished *ex post facto*. This is a paltry juggling with words. The *ex post facto* principle, if it is to have any meaning at all, must refer to positive and not to natural law. As a matter of public relations or politics or even morals, it was, arguably, a good thing for the Allied Powers to put the Nazi leaders to death at Nuremberg and is a good thing for Israel to put Eichmann to death now. My own opinion is that the Nuremberg trials were bad things and that the Eichmann trial is another bad thing. There are, however, various levels of discourse at which these trials can be defended: what is not permissible is for the defender to salve his conscience by pretending — to himself or to others — that the *ex post facto* principle has not been violated, that the rule of law has not been weakened.

We are often invited to believe that the establishment of the rule of law on a world-wide scale will somehow end the world's troubles. Law, we are told, it's wonderful! If we have law, we shall have peace; if we do not have law, we shall have war. People who say this are getting the chicken and egg sequence wrong. If we have peace, law — that is to say, the peaceful settlement of disputes — will no doubt follow. But all we are really saying is that if we have peace things will be peaceful. Law is not a way of getting peace. Law — in the sense of not fighting things out — presupposes the existence of a central power which is visible, acknowledged, undisputed and indisputable. Law — a legal order — has always followed, and never preceded, the creation of such a power. Instead of talking nonsense about the rule of law and world peace we will do better to reflect on less pleasant propositions: for example, that a small country, whether it is a landlocked mass in central Europe or an island in the Caribbean, is ill advised to pursue a policy which is offensive to a near-by great Power.

Underlying much of the rule of law discussion is an idea which is never clearly articulated: that if people can be thoroughly enough indoctrinated in the rule of law, they will become obedient. Juveniles will cease to be delinquent, criminals will abandon crime, slaves will no longer revolt against their masters and so on. We should think a long time before we accept the idea that obedience, docility, passivity are the great social virtues or that the prime function of law is to preserve the status quo. If we want to teach people to respect "the law," as in general they should, we must not forget to tell them that there is always a limiting point at which disobedience to law becomes the ultimate virtue: we must stop short of counselling Jews in Nazi Germany or Negroes in Mississippi that they ought to obey the duly enacted ordinances and regulations of the state.

Lord Acton once remarked that: "Liberty, next to religion, has been the motive of good deeds and the common pretext of crime ever since its seeds were sown at Athens more than two thousand years ago." The greater the potential of an idea for good, the greater is its matching potential for evil. There is a need for absolutes. Man must have some ideas that he believes in with all his mind and heart and soul. But there should be as few of these as it is possible to live by. In most human activity we should reserve judgment and not rush in to conclusions; we should patiently assemble evidence; we should insist on the many-sidedness of things. We should proclaim, on a broad scale, the necessity for disbelief. It is often necessary to act decisively in a doubtful situation; it should not be necessary to pretend that all doubt has been resolved before the action can be taken.

Whatever we do, let us keep in mind that we are the guardians not of truth, which escapes us, but of reason, a useful although not a pleasant traveling companion.

These remarks, delivered at the third annual publications banquet of the Law School in 1961, are relevant today. We are pleased to publish them.

The Editors