The Law of Change

Charles E. Wyzanski Jr.
The selection of my title is deliberately misleading. I think if you will reflect on it you will see that "The Law of Change" lends itself to a delightful ambiguity. I used to take as a title when I didn't know what I might want to say, "The Independent Man," which meant that I, the speaker, was independent as to what I would talk about, or sometimes "Trial and Error," because that certainly covered the whole field of experience. This time I thought "The Law of Change" covered my liberty to change the subject.

Of course I have in mind its other possible meaning, or one of its other possible meanings: that we live in a society which is engaged in certainly the most rapid rate of change known to man in his whole history. We are aware of the alteration in our lifetime. Transportation has come to move faster than the speed of sound, so that two weeks ago I was in Senegal and meantime I have been in Paris, and I have discovered that I can get from Africa to Boston about as quickly as I can get from Boston to New Mexico. The effect of this kind of one-world existence upon all of us, and particularly upon those of us who have any relationship to academic life, is extraordinary.

We have also come into a world in which communication moves with the speed of light, and the effect of this upon our policy at every stage is most remarkable. I think few could doubt that the Civil Rights Acts of the Johnson Administration would not have been possible without the television showings of the civil rights struggles in this country. Thus in a very dramatic way we see what technology has done to law.

What has gone on in the way of change is evident to every lawyer. Take the volumes 1 to 299 or 300 of the United States Supreme Court reports, which cover from the Court's beginning right through to October 10, 1936, and compare the volumes beginning with 301 United States which have in them the cases involving the National Labor Relations Act and the Social Security Act. And run through from 301 United States to almost 350 United States, where we are now—a period, note, of hardly more than three decades, one generation. I think
it would be fair to say that the law has changed more in those three decades than it did in the period from 1789, the date of the Constitution's effectiveness, to 1937.

I did not say that everybody would think the changes were beneficial; but that they have been drastic and dramatic, everyone, I think, would agree.

Consider the relationship between the United States and other countries in the area of the law. (I'm obviously remaining within the field of my competence in not trying to discuss political, military, and other matters in which I have no expertise of any kind.) Those of us whose college and law school education dates back four decades or more can truthfully say we were then still intellectually a colonial country. Despite Emerson's "American Scholar" and other pleas, American law, at any rate, was not in a dominant relation to Anglo-American law, and the judgments announced in the law courts on the Strand and elsewhere in England were at least a large fraction of the kind of law which we studied and were taught to admire.

But today, just as the red lines of the geographical and political empire of Britain have shrunk, so its legal dominance has shrunk. I saw the most extraordinary confrontations symbolically bearing this out last September: The most cultivated and distinguished of English jurists—I would go beyond that and say the most cultivated and distinguished of English-speaking jurists—(to use his technical title, he was a Lord of Appeal in Ordinary, nothing very ordinary except the title) was on the same program with Mr. Justice Brennan of the Supreme Court of the United States during the celebration of the 150th anniversary of the Harvard Law School. With eloquence that so far as I know no American lawyer or judge could match, Lord Radcliffe summarized the standards of fairness and justice that we owe to English law. But it was a James faced performance because he looked backward while Mr. Justice Brennan spoke of what the future holds. In the Plutarchian contrast between these two figures, each, eminent in his own country, spoke eloquently of what had happened in his homeland. From the two accounts it became clear that to the world at large, we, in this country, have become the torchbearers of what now is American-Anglo law.

At any rate, if you go to countries in Asia, in Africa, in the Middle East, as I fortunately have had the chance to do, you will find that the uncommitted countries, or those prepared to revise in some way their legal system, turn not to England but to the United States. In 1960,
for example, Lord Denning, Sir Kenneth Diplock, Sir Kenneth Bailey, Judge Jessup of the World Court, Mr. Justice Reed of the Supreme Court, Dean Griswold, and I were on a commission in connection with the Constitution of Nigeria—a Constitution which, unfortunately, as the revolution of last summer and the creation or attempted creation of the State of Biafra indicates, was not an entirely successful venture. But what struck me most was that the Nigerian lawyers, men who had been trained at the Inns of Court, men whose whole experience up to the time of their independence had been in connection with English law, looked to the Americans for their views with respect to constitutional law. They thought not only that our experience with technical problems, or the paramount character of federal law, or interstate commerce, or due process was important, but that the kind of techniques which are familiar to all who know anything about the Supreme Court of the United States were the techniques which would interest them: the doctrine of a growing and changing Constitution (a doctrine which finds its origin, at least verbally, in the statements of Chief Justice Marshall, more particularly in his opinion in McCulloch v. Maryland), the kind of presentation and technique illustrated in the arguments of the then Mr. Louis D. Brandeis in Muller v. Oregon (the appeal to economic and social facts and statistics and opinion, not so much as a basis for legal decision as a basis for finding that in the legislative judgment there is a rational corpus which warrants a conclusion that the enactment does possess the necessary due process of law).

We live, as I say, in an age of great and dramatic change that all of us are aware that it is an entirely new order. This penetrates into every community. I was interested this morning, when I happened to be eating breakfast in a coffee shop next to the hotel where I am staying, to overhear people at the next table who were officers of a corporation (which one I don’t know), talking of their relationship to the corporation and its policy, not in limited, personal, detailed terms, but in terms of the overall kinds of principle which perhaps are rarely discussed, but nonetheless do occasionally pop into men’s conversation. And I thought, here I am observing what I know very well to be true; that we have come into an age in which for many people the essential immediate loyalty is loyalty to the organization or association or corporation in which one has one’s business activity, and only secondarily, loyalty to the territorial community in which for the moment one happens to be dwelling. So many men in our age expect to be trans-
ferred from place to place in accordance with their business, corporate, or other associational contact, that their loyalty runs to their organization. I'm not saying this is true in comparison with loyalty to the nation, but to the city, town, and state.

I'm not sure that their children entirely agree; and in fact this may be one of the elements which lead children, at least in the more dramatic cases of disagreement, to support that saying attributed to, and undoubtedly correctly attributed to, Sam Goldwyn: "Include me out." There are many children for whom that newer form of loyalty is by no means easily comprehended; but it has raised the most serious kinds of legal, social, political, and philosophical questions.

People like Dean Mason, former Dean of the Littauer School of Public Administration at Harvard, now rechristened the Kennedy School of Government, and Professor Chayes of the Harvard Law School Faculty, among others, have devoted a great deal of time to the question of what might be called due process of law within the corporation. We have yet to work out in any detail what are the rights with respect to an individual's connection with the corporate organization of which he is a part. We do know, we don't have to read Fortune Magazine to get the facts, that the corporate officer's wife and family are scrutinized by the association or organization or corporation in a way in which, were a business conducted by the government to do it, people would unhesitatingly say that their privacy was being interfered with. We do know that there are problems of internal justice. And this is not to suggest for a moment that there is anything unconscionable or immoral about the corporation.

What I am trying to say is that we have moved into an era in which not only does the corporation regard itself as a citizen of the community (so that we have a problem of "corporate citizenship," as Mr. Gossett, once counsel of the Ford Motor Company, described it) but there is a problem of the individual's citizenship within the corporation. We do not know, any of us, in what direction this new due process problem is going to move, but we are well aware that it is one of the great challenges of our generation and of the next generation.

Now I shall move more directly into the area in which I might be thought to have had at least some experience, and I am going to talk about the trial court in some of its aspects.

In the volume Whereas some things that I have previously said have been published, including the Cardozo lecture which I gave more than a dozen years ago on "The Freedom and Responsibility of the Trial Judge." What I'm going to say now is neither intended as a
correction of what I said, nor designed to be a supplement in the ordinary sense. Like Santayana, I'm very sure, and with far more reason than he, that when one sits down to correct what one did before, there is no ground for believing that the correction will stand up any better after a period of time than did the original. But I echo the views expressed by Rousseau in a rather famous letter of 1754, that if one has the courage to avow one's own errors, one may at least hope to become the sort of person one would wish to be. It can't do any harm to confess. But I warn you of the celebrated remark of Mr. Justice Holmes to the greatest of Solicitors-General, William D. Mitchell. William D. Mitchell was beginning an argument in the Supreme Court of the United States and was stating the weaknesses of the government's case. Mr. Justice Holmes leaned forward and said, "Mr. Solicitor General, I see you have learned that candor is the best form of deception."

But candor is also open to some objection on the ground of vanity. There is no form of pride which is deeper than concern about one's alleged shortcomings. Most people who spend their time in confession—publicly at any rate—are not very humble people. But sometimes they are very interesting, like Montaigne, my really favorite author. Of course, today we know enough about Montaigne to know that some of the vices to which he confessed he didn't really possess to the degree he indicated; but it was fun to talk about them. And he has survived remarkably well. And at any rate, he, too, was a petty magistrate. So, using him as my excuse, I'm going to talk about the trial court.

We know very little about the trial court. All learned men study the Supreme Court of the United States. All law reviews have great and ponderous articles about Justices of the Supreme Court. Every word they write and some they say gets widely circulated. Gossip with respect to them is the very breath of lawyers' lives. But the trial judge is a very different fellow.

Of course, those who are truly perceptive might say that he who has the whole of power is a great deal more than he who has one ninth of power, particularly when all the others are committed in advance long before they have heard the argument. I don't mean that the trial judge can be counted upon to have an entirely open mind. There is no such thing. Nor do we want our judges to be without philosophy. One of the most acute remarks I ever heard about a very great judge (great in spite of this tale), was the remark that Dean Acheson made many years ago about Mr. Justice Roberts at the time when Mr.
Justice Roberts’ votes were fluctuating from left to right. Dean Acheson said, “Mr. Justice Roberts reminds me of the cannon on the deck in Victor Hugo’s Ninety Three: he strikes with full force, but since he has no philosophy we don’t know which side he will hit.”

It is a very dangerous business to have a judge in power who does not have a philosophy. One of the things with which we ought to be concerned in the appointment of judges is what their outlook is. I thoroughly commend the kind of inquiry which Theodore Roosevelt made before he appointed Oliver Wendell Holmes, Jr., even though I happen to think that that President was guided by an erroneous philosophy. He at any rate knew that it was important to consider the outlook, and the cultivation, and the political standards, and, in the deepest sense, the moral views of a man to be appointed to the Supreme Court of the United States. To pick a man because he is black, or because he is a Catholic or a Jew, or because he comes from Massachusetts or New Mexico is trivial. To pick him because he is a Republican or a Democrat or because he is believed to be liberal or conservative is equally absurd. What one needs to know about a judge is what one needs to know about a person to whom one is going to get married. And he who measures by the obvious will get what he richly deserves—the obvious.

One of the things which I now know that I certainly did not know when I delivered the Cardozo lecture and had never known before the Warren Court is the importance of that aspect of my function which is concerned with the criminal law. You may think it strange that it took so long for me to learn. When I went to the Harvard Law School, out of my fifteen or so courses I took one in criminal law, and that as a first-year law student. It was given by a man who deserves well for many reasons, but not because he knew anything about criminal law. When I entered Ropes and Gray—which then was and still is the largest law firm in New England—I do not believe that I ever saw a criminal case, either when I was a junior or when I was a partner.

When I was law clerk for Augustus N. Hand and Learned Hand, I worked on every case that each of those judges had (except that neither of them would let me work on a patent case, on the very proper ground that I didn’t know the first thing about it and it wasn’t worthwhile teaching me. Of course, they didn’t know I was going to become a federal judge or they might have thought the investment was worth something. I think I have a pretty good memory of what I learned from the two Judges Hand. At any rate, I know I treasure them more than I treasure anybody except people of my most imme
diate family. I cannot remember a single criminal case which came before those judges during the years I was their law clerk. Not one. The chief impression I have is what I once said of Judge Learned Hand—that he had no patience with a plainly guilty man. That was the kind of criminal law of that day in the best court in the United States, at least in my view.

When I was first a United States District Judge (I was nominated on December 1, 1941, the week before Pearl Harbor, so it's quite a while ago), I had so little criminal business that I do not believe I tried a total of five criminal cases in the first three years I was a federal judge. Ninety percent were cases in which the defendant pleaded guilty, and the remaining cases have left no residue in my mind.

Now all this is changed. Of course, those of you who follow the Supreme Court of the United States will have no doubt that first and foremost among the causes of change is the most powerful and in some respects the most gifted man who has sat upon the Supreme Court of the United States since John Marshall. I mean Mr. Justice Hugo Black. I am not an unqualified admirer of Mr. Justice Black's character. I have not forgotten his silence at the time of his confirmation. I do not think that in every respect the form of his opinions reveals that kind of concern about absolute accuracy of statement, historical and factual, which does the highest honor to a judge. But in sheer power, in intellectual strength, in imaginative insight, Mr. Justice Black need bow to no man, living or dead. And what he has done with respect to the criminal law—directly, by habeas corpus cases, and indirectly, by reinterpretation of the United States Constitution—no one can match. And every one of us who is in every sense his subordinate, not merely in the hierarchy but in talent as well, knows what we owe to his influence.

Of course, there have been other factors in the change. When I was in law school, people were still talking about two studies which had been made of criminal law: the Cleveland Survey of Criminal Justice which Rosco Pound and Felix Frankfurter led, and the National Commission on Law Enforcement headed by Wickersham and ordinarily referred to as the Wickersham Commission. The Cleveland Survey had correctly pointed out the important and central role of the prosecutor in the criminal law. The Wickersham Commission, in addition to dealing with what was politically the most important problem of Prohibition, concerned itself to a large extent with arbitrary police methods, with third degree, and with other kinds of abuse. But
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I think I state fairly the fact when I say that the impact of both those commissions and the really anemic efforts of the Harvard Law School with respect to criminal law amounted to almost nothing in the thought of the bar, not to mention the lay public.

It is quite different today. Not only Miranda and a host of other Supreme Court cases, but the suggestions made by the recent commission for which Professor James Vorenberg served as head of the staff, the Crime Commission appointed by President Johnson, are on the lips of every reader as well as every writer of editorials. Today not merely crime on the streets but the handling of crime by the courts is a matter of grave concern. I do not mean just the kind of thing one hears over the radio in his community about criminal law, recent arrests, and recent trials. I'm talking about the basic problems of the criminal law.

Indeed, have we not moved from a law primarily concerned with property to a law increasingly concerned with poverty and with personality? Is not one of the total effects of the welfare state into which consciously or unconsciously we have moved that the reach of the law seems to all of us not merely to concern the problems of the capitalist and the small businessman, but to include matters of the health and education of every member of the community?

Once one begins to think broadly of problems of criminal law, one cannot help asking himself what he believes about responsibility. Of course, there are the agitated cases of mental unbalance, where we have in the last generation moved a long way. The Durham rule of the District of Columbia, which has in so many places supplanted the M'Naghten rules, and the American Law Institute's Model Penal Code have set forth different standards of measuring insanity and that kind of responsibility or lack of it. But that is only a fragment of the question of responsibility.

Do you in your heart believe that individual men are responsible? Or do you believe that nature and nurture in combination are the determinants, so that free will at any particular juncture is an illusion? Many of your children do believe that. I do not. But I am well aware that the children have on their side most respectable authority. Barbara Wootton, Baroness Wootton, who is by far the greatest criminologist known to me—herself a magistrate, herself a member of the House of Lords, herself a great academician, the author of important books—believes that the criminal law is really founded on a mistake; that people may be subjected to confinement or deprivation of rights for the benefit of their neighbors; that they may be subjected to train-
ing and education for their own benefit and the benefit of others; but that the notion of punishment is an absurd residue of early religious and pagan beliefs. I prefer the doctrine of the American Law Institute. I am persuaded that although men at point C often have no choice, this does not mean that at points B and A they had no choice. To punish them for what they do at C may deter them from wrong choices at points A and B earlier in the game.

At any rate, personal responsibility is a fundamental issue, and those of you who would like to explore it might best begin with the Durham lectures given by Sir Walter Moberly called “Responsibility,” a wonderful set of parallel inquiries as to what responsibility means to the lawyer, to the doctor, to the clergyman.

Another basic question raised by anybody who stops and thinks about criminal law is this: Is a vicarious good a suitable consideration in connection with punishment? May you justly, from a moral point of view, punish A in order to deter B? Immanuel Kant said, “No, that is un-Christian.” It ignores, in his view, the soul, the individual, the spiritual nature of man. Holmes, in The Common Law, said the opposite; and I plead for Holmes with an example he did not give but which certainly would have occurred to him. Suppose you are a front-line commanding officer. One of your men, in good mental condition so that that problem doesn’t arise, endeavors to betray the front line contiguous to the enemy. He is caught before he succeeds, and his repentance is genuine and complete. He needs no reform; he has reformed himself. Would you, as the commanding officer, the judge ad hoc in this case, have any doubt that it was your solemn duty to punish him to deter others from doing the like?

When the danger is sufficiently great, and the crime sufficiently serious, repentance and reform are not enough. The social order is too much at stake to take into account only the one man and his personal reform.

The problems which a District Judge faces require him to remember that crime is not all of a piece. Morris R. Cohen said (and I quoted him with approval in the Cardozo lecture, but now I’m going to modify my approval) that we know so little about individual men and their motives that judges do well to treat people according to classes of offense. In other words, Morris Cohen stood against the nineteenth-century effort to personalize criminal justice, and he did so on the ground of our ignorance with respect to individuals and their motives. There is much to be said for that position, in fact so much to be said that I accepted the view fifteen years ago. I confess my ignorance about.
individuals; I recognize the time-saving involved in a nice convenient rule; I know the virtue of precedent in the law in making people feel that they are being treated equally. But I have come to see some things which I did not observe earlier.

In the first place, I know that not only are there classes of offenses, but there are classes of offenders within the offense. I had a most dramatic experience a month ago which I am going to recite to you, because it illustrates my view that though we hear much about the "identity crisis" of the young, there is often in middle age an even more serious identity crisis through which many of us unexpectedly pass.

On the 23rd of December, 1967, I was sitting in the Marylebone Street Criminal Court in London, an experience I would like to recommend for all of you. I do not say this jocously. There is no theater in London, there is no museum in London, that is as rewarding as sitting in a criminal court. I do not mean a court of Appeals, or the High Court, or the Privy Council, or the House of Lords. I mean the criminal court: the Old Bailey, Bow Street, Marylebone Street, and so forth. Those of you who know London know where Regent Street is, know where Liberty's is, will have an idea where Selfridge's is. Marylebone Street Court is right in that neighborhood. I walked in there on the 23rd of December last and I took a seat and I listened to the magistrate disposing of cases. In each case, the defendant was scrupulously treated. His constitutional and other rights to an attorney, to a trial before a jury, and the like were observed. But, believe it or not, I was listening on the 23rd of December to cases involving offenses which occurred on the 22nd of December, the day before.

In one of the cases I listened to, and this is the one I'm concerned with at the moment, a man had pilfered two books, scholarly in nature, with a total value of £7, from Liberty's Department Store. The man looked my age but was in fact fifteen years younger. He pleaded guilty. The magistrate said to him, "Would you tell me how you happened to steal two scholarly books?" He replied, "I used to be the assistant curator of the Ashmolean Museum at Oxford, but I had a nervous breakdown. I lost my job, and I've been trying to get back into scholarly work. I haven't been able to tell my friends what's happened or to get any money. I just took the books heedlessly as a kind of gesture to reestablish my connection with scholarship."

The judge put the man on the equivalent of probation, but charged him with the costs of the case. I walked out of the courtroom at about
the time he did, and when he told me, in answer to my questions, that he still had no job and no money, I was impelled to give him enough to buy a decent lunch and dinner. I also made a telephone call later that I hope has resulted in his being given employment suited to his education and abilities.

The total problem of classes of offenders and awareness of what their problem is, is of the first importance. It's relatively easy for those of us in middle age or beyond to understand middle-aged people. It's much more difficult for us to understand the young. I was in London last year in June when a very good friend of mine (I say this because I am going to be extremely critical of him), Lord Parker, the Lord Chief Justice of England, had before him on a charge of possession of marijuana Mick Jagger, one of the Rolling Stones. The magistrate below had imposed the incredible sentence of three years on this fellow, who had in fact got in France not marijuana but relatively harmless drugs and brought them in without having an English doctor's prescription. And Lord Justice Parker, although he cut the sentence and in effect placed the man on probation, gave him a lecture which the English press printed in full about his and his associates' criminal nature.

There is nothing more dangerous than what I am now going to do. A judge is not supposed to comment on legislative policy, I am going to. Indeed, those of you who read the New Republic know that this isn't the first occasion on which I have done it recently with respect to the drug laws. There is no rational basis whatsoever for the mandatory minimum five-year sentence imposed by Act of Congress upon a person who has possession of marijuana which the jury finds had been imported and which the jury finds the defendant knew had been imported. All mandatory minimum sentences deserve scrutiny and this one deserves outright condemnation. There is a conspiracy of silence between the young and the old as to what marijuana is about. The New York Times has just printed a series of most revealing and in my opinion accurate articles. Limited use of marijuana—I am not talking about excessive use—has not been proved to be any more dangerous than alcohol or cigarettes. Its use by the young is directly connected with sexual pleasure, more than is admitted. And this is the real nub of the conflict, though it is not discussed. The elderly, aware of waning powers, have always looked with envy upon the young.

With respect to all kinds of offenses, a very careful discrimination is required. Some years ago, the Institute of Criminology at Cambridge, England, made a careful distinction between armed robbery of banks
not involving defendants' use of weapons and robbery of banks involving such use. Some of you may have seen in the British weekly, The Economist, a good summary of that analysis. The statutes do distinguish, but not enough judges have become aware of the degree to which a precise discrimination with respect to types of robbery is appropriate before people are sentenced.

If one moves from robbery into other kinds of misdealing with property, the study which is requisite has been entirely lacking. One of the largest classes of federal offenders involves the juveniles who violate the federal Dyer Act by interstate transportation of stolen motor vehicles. How many federal judges know that in Scandinavia and in certain other European countries such theft by juveniles of motor vehicles is a tort and not a crime? Some thoughtful persons abroad have come to the conclusion that this kind of misleading is in many cases not so much basically wicked as part of the intemperance and want of discipline in the young at a particular stage in their development.

Consider another class of offense involving property—embezzlement. By definition embezzlement is abuse of trust. Nobody is an embezzler unless somebody first trusted him. He must have had that kind of character and personality which seemed to warrant confidence, and generally it did warrant it despite the subsequent breach. The embezzler who is detected in and indicted for his first offense is among the most contrite people who ever walked into a federal court. His wife, his children, his friends could not believe he would have done such a thing. He has been tortured long before the federal judge sees him. The publicity has made him shamefaced at his family table. In twenty-six years I have never sent to jail a first offender who had committed embezzlement. I have always placed him on probation, and since I have had—before me in that period of time approaching one thousand such persons, you may be interested to know that so far as I am aware, and I am quite aware because I have had diligent inquiry made, only one, literally one, has ever either violated his probation or become a recidivist, a repeater.

What about the tax evader? For a long time I subscribed to the doctrine which emanates from Washington that tax evaders must uniformly be sent to jail, because if they are not sent to jail the deterrent effect upon the rest of the community will be far less than it should be. I was at Lewisburg prison as a visitor with thirty other judges about two and a half years ago, and we heard a lecture by somebody in the
Internal Revenue Service on the importance of all judges sending tax evaders to jail.

I said to this lecturer, when he finished, "I happen to live in a state in a district in which on the whole we have been following exactly your practice and your recommendation. I am well aware that there are other states in which that has not been done, that there are districts in the United States where tax evaders are generally not sent to jail. May I ask whether the Department of Justice in cooperation with the Department of the Treasury has undertaken to find out whether there is any difference in the degree of tax compliance in the districts where the judges send tax evaders to jail and those where they don't?" No answer. The government isn't interested in finding out whether their theory is accurate, and we supine judges have so far too often accepted the view presented to us.

How much experience do we have with fines? There is something about the present generation which makes people assume that fines are not a very good method of dealing with offenders. We live in a welfare state where so many costs are publicly borne and people so easily get aid that we wonder whether money is much of a sanction. But I suggest that the carrot and the stick have not lost their total force and their total appeal. We ought to utilize to a larger extent fines deliberately made payable over an extended period, so that the offender is constantly before our eyes and our watch over him is constantly brought to his attention.

So much for the criminal side of my business. Let me now talk for a while about some of the miscellaneous problems of a trial judge about which he is often asked.

"Do you believe in the jury system?" I am sure that I believe in a plurality of persons making a decision. That is to say, I know I have a bias which I cannot fully discount, try as I will. And I know that it is advantageous in difficult cases, and particularly, of course, in criminal cases, to have a person's fate determined by men of different backgrounds and degrees of cultivation. But do I believe that they must be laymen, or will it do to have a tribunal of several judges? This is not easy to answer, but truthfully I fear the bureaucrats, and the judge is a bureaucrat. No matter how sensitive a man is, he does become hardened. He could not do his job if every case were a fresh anguish. And yet men are entitled to have emotional as well as rational responses to their causes, within limits of course. So I do favor laymen.

I favor them for another reason. As Daniel Webster said, "Justice is
man's highest interest on earth." For any layman to share in the process of justice is to be a participant in a noble and worthy undertaking and to gain a great insight into the total meaning of life.

What do I think about the capacity of a tried and experienced judge to pass on the credibility of people? I have plenty of vanity, but I do not think I know when every person is telling the truth. What I think I know is the truth of statements made by a man of my background, of roughly my social and economic and educational position. I think I have a fair idea of whether such a man is telling the truth. But when I, to take the extreme at the other end, listen to two persons born in China trying to inform me (one on one side and one on the other) whether a person born abroad in China is the son of an American citizen of Chinese ancestry or is the son of a Chinaman who never was outside of China, I haven't the slightest idea as I watch their impassive Oriental countenances which of them is telling the truth. My mind is an absolute blank. And I view with despair the statement of one of my predecessors (an otherwise distinguished judge) who said he never believed Italians because Italians don't tell the truth. We're not all quite that prejudiced, but we all are somewhat prejudiced. And I know that credibility is not anything like such a simple question as is sometimes supposed.

Also I have learned something else—that a story may be true though every detail is false. The fellow who tells you about how fast he was driving or how slow, who tells you what he saw or didn't see, who tells you the circumstances of the whole automobile accident, is probably as inaccurate as a child. Yet he may tell what is, overall, correct enough. Some of you have read the splendid article on the Warren Commission and its critics which appeared in the *Times Literary Supplement*. Written by the Warden of All Souls, John Sparrow, once a junior of Lord Radcliffe, it devastatingly demolished the critics while at the same time pointing out how false was a lot of the testimony which the Warren Commission believed. Of course, I am not praising the way the Warren Commission went about its work. I said contemporaneously to the Chief Justice and to my colleague, John J. McCloy, that it was inexcusable to hold those hearings in private. It was inexcusable to rely upon other people to do the work. But I think the Commissioners reached the right result.

What about the use of other people? When I first went to Washington, Mr. Justice Brandeis said to me, "The reason they think so much of the Justices of the Supreme Court in Washington is that we
are the only people who do our own work." Which of the nine today could say that? I, as a matter of policy, with one or two exceptions, have not had a law clerk. I did have one very important law clerk, Carl Kaysen, then an economist at Harvard and now director of the Institute of Advanced Studies in succession to Robert Oppenheimer. Carl Kaysen's name is an anagram on Keynes. He is the most gifted man of his generation known to me, and I unhesitatingly say that he wrote under the name of Wyzanski in the Unified Shoe case. I do not mean that the words were his; the music was. Bethuel Webster, a colleague of mine on the board of the Ford Foundation, wrote or spoke a piece in opposition to my use of Carl Kaysen; and Webster was right and I was wrong. No, judge ought to have at his elbow a man who is not subject to examination and cross-examination by counsel and who has intellectual mastery sufficient to control the judge. Bracton long ago said, "He who has companions has a master." It is true.

I can testify that in all the opinions of Judge Augustus N. Hand while I was his law clerk there is only one paragraph that I wrote, and I don't remember which one that is. When I worked for Judge Learned Hand, he would never read anything I wrote. He kept me only for the purpose of listening to his ideas and criticizing them as he expressed them. That use of a law clerk is all right and is a wonderful education for him. It's better than being at the other end of the log from Mark Hopkins.

What you can do when you are a judge is, in obvious external ways, to use experts. I had a patent case, for which, as I told you, I was not appropriately trained by Judge Augustus N. Hand or Judge Learned Hand, which involved the most recondite learning with respect to radar and like matters. I am no mathematician, no physicist, and no competent scholar in those or related areas. How was I to deal with the case?

I got hold of my friend, Dr. Stratton, who was the president of M.I.T. at the moment, and I said, "Jay, I have a problem involving radar. Who are the greatest experts in the field?" He gave me a list of names, including a fellow named Chew, who was on the M.I.T. faculty, a man of Chinese origin, who has 200 American patents to his credit. Then I said to the parties, "Would you each suggest to me, please, five possible masters in this case." The name Chew was on each list. I said, "I am going to name Mr. Chew as the master, and I am going to give him a rather unusual authority. I'm going to tell him to talk with each of you in the presence of the other; I'm going to have
you show him absolutely everything you want to show him in the presence of the other; I'm going to have you talk to him at length always in the presence of the other; I'm going to ask him to write a report of what his view is; I'm going to have him submit the report to each of you; and then I'm going to put him on the stand, and I am going to have each of you cross-examine him." The procedure worked even better than I could have expected. He wrote the report and they settled on that basis. But the technique was fundamentally sound.

I have appointed as clerk of our Court Russell Peck, who was until recently secretary of the faculty of the Harvard Law School. I have appointed as the draftsman of the rules of our District Court Professor Lloyd Weinreb, once law clerk to Mr. Justice Harlan and currently a professor at the Harvard Law School. I have authorized work on the historical records of the Court to be done by Professor Zobel, who is known to some of you as the co-author of a very great work on the status of legal business in the time of John Adams.

This kind of assistance a judge can use; and should use. But when it comes to the business of judgment, there he had better walk a careful line. He ought to learn, but how? He ought to learn by reading. And I do not mean reading the cases in the Supreme Court of the United States and in other tribunals which Mr. Justice Holmes correctly characterizes as the "small change" of the law. Nor do I mean to limit the list to those books that Learned Hand talked about—Thucydides and Dante and Acton and the other names which would qualify for the hundred greatest books. They are very useful, and more than that, enlarging. What judges need is that kind of discernment which I think comes best from the most gifted, imaginative writers. People like the French novelist Flaubert, or the Russian novelist Dostoevski—men who make us see, as a psychologist would want to make us see, what really motivates people and what kinds of problems all of us must deal with. The law is incorrectly depicted when the only form in which it appears are two tablets of stone.

The poet Archibald MacLeish spoke of law (and he knew whereof he spoke because he was the first scholar in his class at Harvard Law School before he became a poet) as a "loose-fitting garment, worn by the living society." And we who are judges are engaged in part in the study of men—of what Sophocles described when he wrote in the Song of Man, "What is more wonderful than man, who has mastered the art of speech, of wind-swift thought, and of living together in neighborliness?"