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Law Day Address--Law and the Education of the Citizen

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LAW DAY ADDRESS

LAW AND THE EDUCATION OF THE CITIZEN

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A celebration of Law Day under academic auspices suggests the subject of this talk. If I were asked to define the ABC's of liberal education I would offer these three characteristics: apprenticeship, breadth, and a critical spirit. Each of them, I am persuaded, can be pursued in an especially fostering way through an exposure to, or better an immersion in, the experience of the law.

To speak of apprenticeship in the context of a liberal education may seem to be a curious and contradictory conjunction. So it would be if the meaning were the learning of a trade. But what I have in mind is something deeper, a development of intellectual and moral standards through absorption in the mind and spirit of a master. The relationship may be an actual, personal one, or it may be vicarious, through study of another's life.

I speak with special feeling on this subject, because I had the inestimable good fortune to serve for a year as law clerk to Mr. Justice Brandeis, an experience that left a stronger impression on my own thinking than any other before or since. I learned then how a life can be lived in the law with whole-souled devotion to reason, persuasion, and the effective pursuit of an ideal. When I came to work for the Justice he was seventy-six years old, and his working day began at some pre-dawn hour that the law clerk could identify only circumstantially, from the amount of research and writing accomplished before the clerk's arrival at a gentlemanly morning hour. I learned the morality of craftsmanship from the dozens, even scores, of revisions through which he put the drafts of his opinions. He used to say that the Court owed its prestige to the fact that, almost alone among the officialdom of the capital, the Justices did their own work. He strongly opposed the elaborate new building for the Court, on the ground that it would tend to make the authority of the Court turn on external symbols and trappings instead of on the intrinsic reason of its opinions.

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I learned, too, how a simple basic philosophy can give unity and strength to manifold endeavors to translate ideals into reality through law. Brandeis believed that the function of government is to promote the development of men, that responsibility is the great developer, and, at the same time, that the limits of capacity in even the best of men are soon reached. From these premises, grounded in experience, there followed the need for diffusion of responsibility through the federal system and for the sharing of responsibility in our industrial life. And I learned how the commonplace controversies into which lawyers are plunged can be made to serve as germinal points for imaginative and constructive measures of a broader sort—how a resourceful mind can move from the particular to the general, giving the general the solid underpinning of the concrete. Thus Brandeis moved from the representation of insurance policyholders to the creation of a system of low-cost savings bank life insurance, from the counselling of a subordinate officer in the Interior Department who made accusations of corruption and waste to a program for conservation of resources, from participation in labor disputes in the garment industry to a plan for ongoing cooperation of management and labor. I learned, in short, the meaning of Justice Holmes' reminder that a man may live greatly in the law as well as elsewhere, that indeed at its best the law provides a rare fusion of immediacy and perspective for one who can master both microscope and telescope.

This leads me to the second of my ABC's—breadth. How can a technical vocational subject like law furnish anything to broaden the mind while sharpening it? It all depends on how you take the subject. Archibald MacLeish has said that the study of law (in which he excelled) was a better preparation for the craft of poetry than his undergraduate liberal education. The latter dealt too much in abstractions, while the law, like art itself, must be saturated in human experience, and yet impose a measure of order on the disorder of experience without disrespect for the underlying diversity, spontaneity, and disarray.

On the spaciousness of law the finest statement I know is, not surprisingly, a passage in an address by Holmes to an audience of undergraduates:

> All that life offers any man from which to start his thinking or his striving is a fact. And if this universe is one

> universe, if it is so far thinkable that you can pass in reason from one part of it to another, it does not matter very much what that fact is. For every fact leads to every other by the path of the air. Only men do not yet see how, always. And your business as thinkers is to make plainer the way from some thing to the whole of things; to show the rational connection between your fact and the frame of the universe. If your subject is law, the roads are plain to anthropology, the science of man, to political economy, the theory of legislation, ethics, and thus by several paths to your final view of life. It would be equally true of any subject. The only difference is in the ease of seeing the way. To be master of any branch of knowledge, you must master those which lie next to it; and thus to know anything you must know all.

The third of the ABC's of a liberal education is the critical spirit, the quality of mind that looks on what is in the light of what was and what might be, that sees in the present a tension between continuity and change, that strives to understand this tension as the spring that keeps the watchworks of knowledge and of society itself from running down. The joinder of tradition and revision, of heritage and heresy, is nowhere better described than by Alfred North Whitehead in his book on symbolism:

> It is the first step in sociological wisdom to recognize that the major advances in civilization are processes which all but wreck the societies in which they occur—like unto an arrow in the hand of a child. The art of free society consists first in the maintenance of the symbolic code; and secondly in fearlessness of revision, to secure that the code serves those purposes which satisfy an enlightened reason. Those societies which cannot combine reverence to their symbols with freedom of revision, must ultimately decay either from anarchy, or from the slow atrophy of a life stifled by useless shadows.

Law itself is preeminently dialectical, seeking accommodations between conflicting rights, a resolution of competing truths. May a state tax the receipts derived from interstate commerce? For an answer we recite not one truth, but two: interstate com-

merce shall not be trammeled, and interstate commerce must pay its way. If a thing is misappropriated and finds its way into the hands of an innocent person, who has the better claim to it, the original owner or the transferee? Again we invoke values in pairs: we must safeguard the rights of property, and we should encourage the security of transactions. In each of these problems, the solutions are, of course, remarkably complex and refined, but they derive their solidity from the dialectic that produces them. An ethical philosopher ignorant of law would be astonished at the richness of the subject for his purposes.

Law is a powerful antidote to the most pernicious virus in current education—the cult of glibness, of one-dimensional thinking, and of thinking words, not things.

One contemporary issue that invites the use of the antidote is the effect of recent Supreme Court decisions on the integrity of our federal system. Unless we were to exalt verbalism and formalism over substance, any appraisal of this issue must commence with an inquiry into the values that a federal system is meant to serve. Those values, I believe, can be subsumed under two principal heads: the diffusion of political authority and participation, and the fostering of innovation and experimentation. Viewed in this light, the role of the Court has been superficially restrictive of federalism but on a deeper level protective of the essential federal values. Decisions limiting state authority over speech and press and assembly, and putting limits on qualifications required for voting, are in fact a vindication of that diffusion of authority and breadth of participation that federalism seeks to promote. So perceived, the concern of the Court over inequitable apportionment in voting districts, and over a state law of libel that would penalize honest but mistaken political defamation, is a concern not hostile to, but supportive of, the political ideals of federalism.

The only fair question is whether the Court has drawn its lines and made its accommodations in the most sagacious way, or whether it has emulated the little boy who said he knew how to spell banana but didn't know when to stop. I happen to think that the rule of numerical equality has been given too exclusive a place in determining equal protection of the laws in reapportionment, but I can understand that a court might for practical reasons fix on that one criterion for both houses of a legislature in the interest of avoiding all the uncertainties that a more com-

plex set of standards would draw in its train. Similarly I happen to think that the rule of privilege in the case of the defamation of a public official—that the publisher is not liable unless he acted with knowledge of, or reckless disregard for, the falsity of the libel, ought not to be extended to the case where the victim is not a public official but only a figure in the public eye. The interest in unfettered public debate may be ill served by a rule that makes private citizens vulnerable to defamation if they dare to venture into the arena of debate on public issues. Yet I can understand that a court might regard the distinction between public officials and public figures as too shadowy for application in the grey areas.

On the score of innovation and experiment, the Court has actually liberated the states in their search for the necessary wherewithal. Limitations on state taxation that abounded in the 1920's have been removed by more recent decisions: taxes on income from federal sources are now legitimate, as are various forms of taxes on receipts from interstate commerce. The basic problems of state finances are now political, not justiciable—above all, how state revenues can be geared more closely to an expanding gross national product, perhaps through a linkage with the federal income tax by way of federal grants or federal taxpayers' credit. The most diverse methods of cooperation have been validated, whether they take the form of interstate compacts, conditional grants, tax credits, or regulatory federal laws under the commerce clause, tailored to fit the divergencies of local policy. Juridically our federalism, it has been aptly said, resembles a layer cake less than it does a marble cake.

It is in the field of criminal law that the controversy over the role of the Court now chiefly centers. The two principal targets are the *Mapp* and *Miranda* decisions, the one requiring that evidence obtained through an unconstitutional search and seizure be excluded, the other requiring that incriminating statements elicited in a pre-trial interrogation be excluded unless there was an opportunity to obtain counsel and the privilege to do so was waived. Both decisions, it should be noted, were responses to problems of judicial administration; they provide new instruments for the assurance of constitutional rights rather than creating new rights themselves. In *Mapp*, the right to be free of illegal searches and seizures was protected in the only way readily available to the Court, through a mandate concerning

the use of evidence. But it by no means follows that the rule of exclusion is constitutionally immutable. As a means, an instrument, to a constitutional end, not required for the integrity of the trial process itself, it could be supplanted, in my judgment, by a different prophylactic rule that promised at least equal deterrence of unlawful official conduct. Thus if a state were to provide that such evidence could be admitted in the discretion of the trial judge (the English common law rule), while also providing a sound and not an illusory civil remedy—as by an action for liquidated and punitive damages against the state or subdivision, with an allowance of counsel fees—I see no reason to think that the experiment would be held invalid. Likewise in the *Miranda* problem, it is noteworthy that the Court did not place the decision on the sixth amendment right to counsel, but on the fifth amendment right to be free of compulsion to incriminate oneself. The provision of counsel here, like the rule of exclusion in *Mapp*, is instrumental to a constitutional end. In the *Miranda* opinion, indeed, the Court more than once observed that the new standards were obligatory in the absence of other equally effective assurances of the free exercise of the privilege to remain silent. It would be interesting to see what would be thought, for example, of a state practice under which interrogation was conducted not in the presence of counsel but before a magistrate. My purpose is not to consider the wisdom of the solutions reached in these cases of criminal procedure, but to suggest that even here the opportunities for diversity and innovation are not entirely foreclosed.

The thrust of my remarks has been that the qualities of the legal mind are needed outside the law as fully as inside, and that within the law those qualities should not be looked for solely in the judicial realm. In a democracy, Justice Frankfurter used to say, the most important office is that of citizen. And in the legal system, I would add, the most important office is that of lawyer. Are the judges in truth the conscience of the country? They cannot be if a participatory democracy is to function as it should. We will be truly civilized, I like to think, when the Supreme Court is no longer front-page news, when the judges need occupy no more exalted a place than John Maynard Keynes hopefully foresaw for economists: when they would come to serve like dentists, doing a bit of patchwork here and there, but not responsible for the basic health of the society.