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THE PROSPECT OF LIBERTY
or the View from Saint-Remy†

Ralph M. Carson*

I. THE UBIEITY OF LAWYERS

This celebration of the first century of the Michigan Law School recalls the vain endeavor of the Holy Roman Empire to keep the craft of the law out of the Americas. *Que no passasen abogados ni procuradores a las Indias* was a clause inserted by the Emperor Charles V into the capitulation of 1540 with Alvar Nunez which sanctioned the exploration of the River Plate. 1 Perhaps it was the futility of lawyers which prompted the Imperial veto. Twenty years before, when the Governor of Cuba sought to halt Cortez with decrees of outlawry from Spain, his cunning captain Sandoval evaded them by refusing audience to the notary, and all the notarial party were by Cortez's Indians "snatched up in net hammocks like sinful souls" and carried a four days' journey to Mexico. 2

Whatever his grounds for excluding lawyers from Spanish America, in the rest of the hemisphere the great Emperor has lost his case. The trickle of legal talent which followed the *Mayflower* to the Massachusetts Bay Colony has produced a flood. At the 1937 celebration of the University's first hundred years in Ann Arbor we were reminded that lawyers wrote the Declaration of Independence and fashioned the Constitution and Bill of Rights. 3 When Alexis de Tocqueville and his companion came to the United States in 1831 for a study of prison administration and stayed for a survey of democracy in action, lawyers were the dominating element of the country. 4

Thomas M. Cooley, later Chief Justice of Michigan, was then a farm boy of seven years entered in the district school at Attica, N. Y. Tocqueville, who went as far as Green Bay in Wisconsin,

† Address delivered at the program held in observance of the Centennial of the University of Michigan Law School, October 22, 23, 24, 1959.—Ed.
* Member of the New York bar. Grateful acknowledgment is made for the aid of Robert L. Bombaugh, J.D. 1960, research assistant in the Law School.
1 CUNNINGHAME-GRAHAM, CONQUEST OF THE RIVER PLATE 112 (1942).
3 MacDonald in A UNIVERSITY BETWEEN TWO CENTURIES 341 (1937).
4 TOCQUEVILLE, DEMOCRACY IN AMERICA, Bradley ed., i, 272-280 (1945).
felt the barbarism of the Western States. He found Detroit a settlement of two or three thousand where a bear pursued by dogs ran through the village streets, and there he talked with Father Gabriel Richard, his own compatriot who had helped in the founding of this University. He saw with amazement the vast flood of emigrants moving to our Atlantic shores and streaming across the wilderness toward the Pacific, a movement of population comparable in his mind only to those irruptions which caused the fall of the Roman Empire.

Now the event that we are here to celebrate, the founding of the Law School in 1859 pursuant to the Organic Act of 1837, occurred in the year of Tocqueville's death. My theme, after Judge Brown has dealt so ably with public law and our federal system, is liberty and private law in the development of the next hundred years. Tocqueville found the legal profession in America the best guarantee against the tyranny of the majority. At the end of a century from his death what is the prospect of liberty in the next few decades?

II. LIBERTY IN THE MOVEMENT OF HISTORY

Liberty, which was to be the theme of Lord Acton's unwritten masterpiece, he called "the delicate fruit of a mature civilization, . . . not a means to a higher political end [but] itself the highest political end." In his projected work on the history of freedom he planned to begin with one hundred definitions of the subject. Definition is needed. Edmund Burke was right in saying that "of all the loose terms in the world, liberty is the most indefinite." Its descriptions are many. The Duke of Orleans deemed it a supreme proof of English liberty that Louis XIV's grandson le grand prieur as a guest in England could take away the mistress of Charles II and display her at the opera opposite the royal box. At the election of Edmund Burke as member for Wendover in 1765, a toast to John Wilkes produced the effect—

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6 Pierson, Tocqueville and Beaumont in America 282, 284 (1938).
7 Id. at 291-293.
8 To Mary Gladstone, Feb. 10, 1881, Letters of Lord Acton to Mary Gladstone 7 (1904).
10 See 58 Mich. L. Rev. 999 (1960).—Ed.
"... all the Dishes were broken in the same Instant; in a few minutes the Room was cleared of Smoke and full of—Liberty. Wilkes and Liberty, Burke and Wilkes, Freedom and Wed­over; Empty Bottles, broken Glasses, Rivers of Wine, Brooks of Brandy, Chairs overturned, with the Men that sat upon them, while others in rising from their Knees fell under the Table..."  

Lincoln Steffens in 1918 regaled an audience in Ann Arbor with an account of the violent harangues of the Bolshevik orators in Petrograd; he thought them extreme to the point of license but, when he explained the difference between liberty and license, the impassioned speakers would reply: "What we want is license." Steffens seemed at the time to admire this view, for he it was who persuaded the British to release Trotsky from detention at Halifax. Trotsky and Lenin together condemned the Russian people to that long spell of imprisonment from which they have not yet emerged. As a final illustration of the various concepts of liberty, take Lord Acton himself: after a visit to the United States he accepted John Calhoun's contention on state sovereignty, which, if it had prevailed, would have riveted human slavery on the Southern states to this day.

In 1877, however, Lord Acton pointed to the United States as a country "whose institutions were so wisely framed to protect freedom even against the perils of democracy." Referring to the happy time of the Presidency of Monroe, he said: "... No other age or country had solved so successfully the problems that attend the growth of free societies, and time was to bring no further progress."  

This was the most learned historian of his time speaking in 1877 of the United States in 1822. Of his one hundred definitions of liberty I take as most relevant to the progress of the law two from a collection of Acton's essays:

"By liberty I mean the assurance that every man shall be protected in doing what he believes his duty against the influence of authority and majorities, custom and opinion."  

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13 Yet Steffens claimed to have foreseen the coming Bolshevik dictatorship in May 1917. AUTOBIOGRAPHY 762-763 (1931).
14 Herbert Paul, LETTERS OF LORD ACTON TO MARY GLADSTONE, xx (1904).
15 ACTON, THE HISTORY OF FREEDOM AND OTHER ESSAYS 56 (1907) (Address to the Bridgnorth Institution, May 1877).
16 ACTON, ESSAYS OF FREEDOM AND POWER 32 (1946).
And again:

"The most certain test by which we judge whether a country is really free is the amount of security enjoyed by minorities." 17

This is what Burke was saying in another way when he wrote to his friend in France after the fall of the Bastille that the liberty he loved "is social freedom. It is that state of things in which liberty is secured by the equality of restraint." 18

The institutions of the United States most congenial to the maintenance of liberty are the division of governmental powers and the Bill of Rights. In Lord Acton's view liberty depends on the division of power. Said he:

"Democracy tends to unity of power. To keep asunder the agents, one must divide the sources; that is, one must maintain, or create, separate administrative bodies. In the view of increasing democracy, a restricted federalism is the one possible check upon concentration and centralism." 19

The Bill of Rights was a condition attached by Jefferson and other libertarians of his time to ratification of the Federal Constitution. 20 With its guaranties of freedom of speech and assembly, of due process, and against a state religion, it is the fruit of the great Enlightenment of the eighteenth century. When the question is asked how the formation of the American Union was attended by such a galaxy of great men, from Franklin to Washington to Hamilton, a group whose like has not since been seen in this country, the answer is that their minds had been formed by the Enlightenment in which French philosophes and English political thinkers registered the emancipation of man from prejudice, superstition and feudal custom. The perfect formulation of the libertarian spirit to my mind is the famous oath of Jefferson (fitly inscribed within the rotunda of the memorial at Washington) of "eternal hostility against every form of tyranny over the mind of man." 21 This insistence upon the freedom of the mind entered into the foundation of the University of Michigan, since Judge

17 Id. at 33.
18 See note 10 supra.
19 To Mary Gladstone, Feb. 20, 1882, LETTERS OF LORD ACTON TO MARY GLADSTONE 124 (1904).
21 To Benjamin Rush, Sept. 23, 1800. MALONE, JEFFERSON AND HIS TIME, i, 101n. (1948).
Woodward in setting up his Catholepistemiad in 1817 proceeded upon the basis of discussions with Jefferson.²²

So equipped, the new American republic was, in the minds of many, at once the best hope for the advancement of liberty and the best vehicle for the idea of progress. That vehicle has now been in motion for 174 years. To measure or estimate the prospects of liberty in American law for the next century, it is well to take some bearings and note the speed and course which have been registered since that event in 1859 which we are commemorating.

Observe the position at the founding of this Law School. Economically this region was in the stage-coach era and lived on farming and lumber. Railroads were just coming in. In politics the air was electric with premonitions of civil conflict. The repeal of the Missouri Compromise (1854) and the Dred Scott case²³ had been followed by the long debate of Lincoln and Douglas for the senatorial election of 1858 in Illinois. Kansas was aflame over the slavery question. John Brown in October 1859 seized the federal arsenal at Harper's Ferry to provoke an insurrection of the slaves. Intellectually the scene in Michigan and the country as a whole was restricted indeed. The most authoritative account of the origin of all things was popularly considered to be in the Old Testament, and the sun of our solar system was deemed the center of a universe of which the most important item was the planet Earth with God's creation aboard.²⁴

What a contrast is presented by the hundred years following the event we celebrate! The struggle over slavery and secession blazed into a civil war of length and ferocity wholly unforeseen,²⁵ which speeded the industrialization of the North and concentrated federal power at the expense of the states. The effect upon the structure of government is well called the second American revolution. The year 1859 saw the publication in England of John Stuart Mill's great essay On Liberty, warning of the pressures of conformity and the tyranny of the State. In that year too came

²³ 19 How. (60 U.S.) 393 (1857).
²⁴ Until 1917 astronomers generally looked upon the sun as the center of the universe. Shapley, of Stars and Men 106 (1958).
²⁵ E.g., the Detroit Free Press in 1861 predicted that resistance to the threatened conflict would come in the North and that in Michigan alone 65,000 men would interpose between any Union army and the Southern people. Nevins, The War for the Union, i, 16 (1959).
out Darwin's epochal *Origin of Species*, sealing with proofs of
natural selection the theory of evolution. This revolutionary book
liberated the mind from the bondage of age-old fable and prej­
udice. A judgment of Lord Westbury for the Privy Council in
1863 sustained the right of a clergyman of the Church of England
to support evolution and to question eternal punishment, and so
gave rise to the following epitaph upon the Lord Chancellor:
“Towards the close of his earthly career he dismissed Hell with
costs and took away from Orthodox members of the Church of
England their last hope of everlasting damnation.”26

From 1859 the scientific revolution ran apace. Before Henry
Adams was six years old, he had seen (in 1844) “four impossibilities
made actual—the ocean steamer, the railway, the electric telegraph,
and the Daguerreotype. . . .”27 In seventy years he saw the coal­
output of the United States grow from nothing to 300 million tons
or more, but he failed to reckon with oil as a source of power. The
first commercial oil well was struck in Titusville, Pa. in 1859.28
Successive inventions changed the world, not once but many times.
The telephone (including the trans-oceanic and radio-telephone),
wireless telegraphy (including radio networks), the gas engine,
new road systems, long-distance power transmission, aviation, mo­
tion pictures, and television, in continuous development have
reorganized the conditions of life in America every thirty years,
presenting each new generation with weapons able not only to
control their environment but latterly to re-shape it also. Rocketry
and atomic science are now again to transform the world. The
increase in wealth and comfort for every class has been immense.
And so great has been the impact of the scientific revolution on
our physical life that, according to the grandson of Charles Darwin,
the London of 1750 more resembled the Rome of A.D. 100 than
it did either Rome or London in 1950.29 To the grandson of
President Adams, in search of a dynamic theory of history, the
acceleration of force threatened to escape control. Even as seen in
1905,

“An immense volume of force had detached itself from the
unknown universe of energy, while still vaster reservoirs,

26 BURY, A HISTORY OF FREEDOM OF THOUGHT 206 (1913). The case is Williams v.
Salisbury (Bishop of), II Moore (n.s.) 375 at 492-493, 15 Eng. Rep. 943 (1863), the two
archbishops of the realm concurring on this point.
27 THE EDUCATION OF HENRY ADAMS, c. XXXIV, p. 494 (1928).
supposed to be infinite, steadily revealed themselves, attracting mankind with more compulsive course than all the Pontic Seas or Gods or Gold that ever existed.

"Prolonged one generation longer, it [the movement from unity into multiplicity] would require a new social mind."^30

Now in 1959, I remind you, the new generation is here, with or without the new social mind.

As we stand thus Janus-like at the junction of the two centuries looking out upon an ocean of forces never yet presented to the view of man, can we at least stand firm on our feet? To the contrary. The seemingly stable earth, so complaisant a satellite of the sun that was formerly the center of the universe, is now lost in the metagalaxy deduced by the astronomers from the evidence of radio-spectroscopy. It cuts but a small figure in the hundred million planetary systems now estimated to be suitable for organic life.^31

Worst of all, our tiny planet is more solitary than ever in the wastes of interstellar space, for since 1859 as before, the universe has been expanding by an outward movement of the external galaxies at a minimum speed of thirty-five miles a second increasing by geometrical progression with the distance of their separation.^32

We see with Lucretius the *flammantia moenia mundi*.

Amid these Promethean bursts of power, two things stand out clearly. The first is that on our miniscule human theatre legal relationships are much the same as in the time when the jurists of Justinian toiled at assigning to each his own. The second is that, notwithstanding the brutal and ferocious tyrannies of recent date in Germany and Italy, the last hundred years have seen by and large a broadening of freedom. This has been marked not only by the liberating thought of Mill, Darwin, and the scientists in succession to the political liberalism of Jefferson and the other American heirs of the Enlightenment. It has not been limited to the emancipation of the American slaves in 1862 or the Russian serfs in 1861, or the extension of voting, smoking and general misbehavior to women on full parity with men. The increase of freedom in the United States, keeping pace with the extension of the suffrage in Great Britain and the decline of despotism in Western Europe, has been signalized by the gain of economic rights by the working classes, the slow reduction of racial prejudice,

^30 The Education of Henry Adams, c. XXXIV, pp. 495, 498 (1928).
^32 Id. at 110.
and the critical realism of judges like Holmes, Brandeis and Learned Hand. Such a decision as *Erie R. Co. v. Tompkins*\(^3\) has enhanced liberty because, in wiping out ninety years of federal law in the diversity jurisdiction, it restores the varying jurisprudence of the states to their proper place and improves the balance of that federal structure which Lord Acton thought the best check upon concentration of power.\(^3\)

III. **Liberty and American Law in the Next Century**

Against this background of multiplying force and accelerated movement unprecedented in history, let us now conjecture what will happen in a hundred years.

That is a period too short to employ laws of probability. If it were a million years instead, a scientist like C. G. Darwin could predict the general line of development upon the analogy of Boyle's law of gases and fashion a principle of probability on the fact that the total energy of colliding molecules in the pressure chamber is conserved; in short, individual deviations would cancel out.\(^3\)
And we cannot attempt definite predictions of new law; for, while the president of the West Virginia Bar Association might say in 1906 that any further concentration of power in Washington would come through the gateway of the commerce clause, no one could foresee either the re-definition of commerce in the 'thirties or the counter-balancing extension of state taxing power in 1959.\(^3\) We can only try to project into the next three generations the forces that we now see operative, upon the lines of recent history.

The inquiry is, in the priceless phrase of a current radio commentator: "What will our future forefathers say?"\(^3\)

1. **Population Problems.** First, we are threatened with a network of legal regulations required by increasing population concentrated in cities. We have no longer the guarantee of virtue which Jefferson found in the predominance of agriculture. The situation is now the unhappy one he foresaw in writing from Paris to Madison in 1787: "When we get piled upon one another in large cities, as in Europe, we shall become corrupt as in Europe, and go to eating one another as they do here."\(^3\)

\(^3\) 304 U.S. 64 (1938).
\(^3\) Letters of Lord Acton to Mary Gladstone 124 (1904).
\(^3\) Darwin, *The Next Million Years* 16-20, 22 (1952).
\(^3\) Barry Gray quoted by John Lardner in 35 The New Yorker 159 (1959).
As compared with the 31,639 population found by Tocqueville in the District of Michigan in 1832, this state is expected to have 9,000,000 in 1970, and 240,000,000 inhabitants are seen for North America by 1975. An English scientist predicts mass neurosis in the United States (and Western Europe) unless this process is arrested. Regional plan studies in the East have indicated by 1970 a continuous string of urban settlements on the Atlantic Coast from Bangor, Maine to Miami, Florida. Judge Learned Hand has suggested that in such a concentration of urban settlement personal liberty is bound to be stifled by the maze of regulations and administrative services.

Take for example the pressure upon the courts of the automobile accident cases alone, something unknown before 1900. As against the 43,000,000 cars registered in the United States only ten years ago, there are now almost 70,000,000; but by 1975 more than 125,000,000 cars are expected to be shooting about the country, when not penned up in the huge urban agglomerations. In New York City last February Mrs. Meyer Fish, who sells cash registers at 149 Bowery, had been accustomed to make a left turn from Grand Street to get to her place of business. On February 12, the traffic officer signalled to her not to turn but to go straight ahead. She did so, circled the block several times, and then pulled up alongside the patrolman. She inquired whether she might ask a question. The answer was No. Nevertheless she asked the question, "How do I get into the block to get to my business?" The officer waved her to the curb and wrote out a summons "for failing to comply." On a plea of not guilty she was fined $7.00 with an alternative of two days in jail.

These harassments are inseparable from the administration of large aggregates of people. Yet, so long as the increase of population is accompanied by technological advances which permit increases of production, the result is bound to be a reduction in

41 United Nations, Population Studies No. 28, New York 1958. The Preface says: "With the present rate of increase, it can be calculated that in 600 years the number of human beings on earth will be such that there will only one square metre for each to live on . . . ."
42 Dr. L. H. Matthews at the 121st meeting of the British Association for the Advancement of Science. N. Y. TIMES, Sept. 4, 1959, p. 23:8.
44 N. Y. TIMES, June 2, 1959, p. 1:1. The appeal has so far cost the defendant $18 for minutes, $35 for loss of time.
work time and a growth of leisure time. Since 1900 the working week has been cut from 56 hours to 40 hours, and with provision for retirement and paid holidays an ordinary laborer now works a 1900-hour year for 45 years instead of a 3000-hour year all his life. A Harvard economist pronounces us well on the way to eliminating toil as a required economic institution and devotes a book to the need of readjusting society from an organization based on poverty to one based on wealth.\textsuperscript{46}

These are the offsetting facts of urban concentration so long as technological progress holds up. And it seems that automation, whereby machines are utilized to run machines, has only begun. A computing-machine maker has just announced a mechanism that plays winning checkers by improving its game through so-called "generalization learning."\textsuperscript{46} The automatic elevators now being installed in city skyscrapers excel those operated by men, in timing their movements to the needs of traffic under the direction of an overriding mechanical brain. Machines for translating languages are under serious scientific investigation,\textsuperscript{47} while data-processing machines are now an old story.

The total effect of these forces upon liberty may be illustrated by the case of the great travelling carriage which Andrew Jackson kept at his estate The Hermitage in Tennessee. In this vehicle the President was wont to travel from Nashville to the White House over narrow, rutted, miry, or corduroy roads. No traffic lights, no speed limits, no congested urban centers, few or no turnpike tolls. This was freedom of a kind. But the trip took thirty days! How much more liberation of the person flows from the instant mobility of modern travel! Whatever the inconvenience of highway controls it is more than compensated by 60-mile motor speeds over smooth stone surfaces. The network of civil air regulation is a minor restraint upon the person as compared with the flash and ease of jet flight which it makes possible.

We may conclude then that the increase of population in the next hundred years is consistent with the maintenance of liberty. Restriction of the individual by administrative regulation of various kinds is much less than the new fields of energy opened

\textsuperscript{46} N. Y. Times, July 20, 1959, p. 27, quoting July IBM Technical Journal. But the secretary to a federal judge, who thought to employ his summer in constructing an automatic brief-writer from an electric beam and an electric typewriter keyed to the West Digest with a page-turning device, retired with a nervous break-down before autumn.
\textsuperscript{47} Oettinger in On Translation 240 (1959).
by modern science. Science by conferring new powers enhances the human personality to a degree far greater than legislation and rule have confined it.

2. **Remediable Handicaps of Social Organization.** Second, it is fashionable in these times to call attention to the cramping effect of the bureaucracy that administers the welfare state, to the fiscal mismanagement resulting, to the economic shackles imposed by grasping labor unions badly led. Each doubtless incorporates a threat to liberty; each is worthy a separate paper. But I only mention them here because not one gives a definite line on which to project the next century in this country. My reason is that each is easily controllable by effective government, and that the immense increase of political expertness and sophistication, which we are bound to have if the country survives at all, will bring the remedy in each case. No doubt, as centralization goes on, we shall come to something like the parliamentary system of government; but why that should be, and how it might happen, is outside our province here.

3. **Multiplication of Precedents.** Third, as a consequence of the population increase, the next decades will certainly produce such an inundation of law reports as we have not yet seen. The proliferation of authority is even now appalling. In 1916 John W. Davis as Solicitor-General remonstrated on this subject with the Judicial Section of the American Bar Association. In his paper "The Case for the Case Lawyer" he pointed to the multiplication of precedents in that day. Citing the early complaints of Coke, Bacon and Montaigne, he quoted Mr. Justice Buller in 1786 on the "Herculean labour" of wading through the cases in Comyns' Digest; and then came to 1886 and a report for the American Bar Association signed by David Dudley Field and others which described the condition at that time as "chaos." Taking a census as of 1916 Mr. Davis found things infinitely worse. He counted 6,836 volumes of British reports (including the Empire); 9,621 volumes of American reports, official and semi-official, both state and federal; together with 1,015 volumes of the Reporter system and 914 books of selected cases—a total of 11,650 volumes of American reports alone in the year 1916. But the fact of largest import, said he, was that of the total American volumes over 6,000,

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49 Birch v. Wright, 1 Durn. & East 378 at 383 (1786).
or more than one-half, came from the presses in the thirty years since Field's report in 1885. 60

Since Mr. Davis spoke, the accumulation of precedents has continued with that increasing velocity so familiar in every aspect of American life. There have been added in the West National Reporter System 3,075 volumes, and the rate of annual increase is 100 volumes comprising 108,000 pages of both state and federal reports. The aggregate of official and semi-official reports, state and federal, since 1916 is 7,333 volumes. To this huge mass must be added 663 volumes of reports of special courts, commissions or boards such as the Tax Court, Board of Tax Appeals, National Labor Relations Board, Interstate Commerce Commission, and Court of Claims. In 1955, according to Chief Justice Vanderbilt, reported American decisions numbered 2,100,000, compared to the 5,000 cases with which Coke and Bacon had to deal in 1600 and the 10,000 cases in the books used by Mansfield and Blackstone. 61

The work of analysis and digesting has grown commensurately. The Sixth Decennial of the West Digest System covering 1947-56 only contains 32 large tomes of Digest topics, printed in 6-point solid type, three columns to the page. These ten years have produced 54,000 pages of digest material comprising 1,250,000 digest propositions. The complete American General Digest System, beginning with the Century in 1896, runs to 235 big books totalling 502,700 pages and 7,705,000 digest paragraphs. And we are told that the complexity of modern decisions and the fine distinctions drawn by the courts have aggravated the problems of classification within any digest system, and multiplied the labor of research. 62

In Plowden's Reports, the apprentice at the bar says to the court: "May it please your lordship to shew us, for our learning, the causes of your judgment." 63 That was well enough in 1565, but now we are in the plight of Dukas' Apprenti Sorcier, who could not arrest the innumerable pails of water being delivered by the broomstick because he had forgotten the terminal spell.

Mr. Davis in 1916 attributed the flood of reports to many causes—the requirement of legislatures that all cases be published with their reasons, the prolixity of some opinions, the excessive

60 41 A. B. A. Proc. 761 (1916).
62 Statistics after 1916 have been kindly furnished by Geoffroy Billo, President, and George S. Gulick, Editor-in-Chief of the Lawyers Co-operative Publishing Company, Rochester, N. Y.
citations of many lawyers induced by the appetite of some judges for authority.\textsuperscript{54} None of these causes has ceased to operate. The statutes requiring written opinions have been repealed in but three states since 1916.\textsuperscript{55} The increasing number of antitrust decisions necessarily consume much space. Judges are still to be found who can belabor a simple factual issue like the common-law marriage of a theatrical producer to such exhausting effect as to cause an appalled legislature to abolish that doctrine entirely.\textsuperscript{56}

The wilderness of citations now available and endued with authority under our system of precedents has aggravated the condition which an alarmed French lawyer described as early as 1830:

"The French codes are often difficult to comprehend, but they can be read by everyone; nothing, on the other hand, can be more obscure and strange to the uninitiated than a legislation founded upon precedents. . . . The French lawyer is simply a man extensively acquainted with the statutes of his country; but the English or American lawyer resembles the hierophants of Egypt, for like them he is the sole interpreter of an occult science."\textsuperscript{57}

How much more will this seem the case with the multiplication of precedents in the next hundred years! How many precedent-hunters will disappear in

"A gulf profound as that Serbonian bog Betwixt Damiata and Mount Casius old, Where armies whole have sunk!"

4. \textit{The Decisional Process}. Fourth, as an escape from this condition, we may expect increasing sophistication in the use of legal materials in the decisional process. Where a mass of diverse precedents are urged upon the court as controlling a given controversy, the spirit of critical choice and balance of social advantage will select the winner. Gone are the iron technicalities of Baron Parke, who non-suited a plaintiff in an undefended cause, with the remark that "those who drew loose declarations brought scandal

\textsuperscript{54} Mr. Davis mentioned an opinion of 65 pages containing 351 citations and another of 50 pages with 325 "in a court of very high authority which shall in this presence be nameless" (Horace Gray, J.). 41 A. B. A. Proc. 766 (1916).


\textsuperscript{56} The performance of O'Brien, S., in Matter of Erlanger, 145 N. Y. Misc. 1-267 (1932), led to the abolition of common-law marriage in N. Y. Laws (1933) c. 606. The fact that an estate of $65,000,000 was at stake fails to justify a minute summary of 149 witnesses and 834 exhibits.

on the law." The future is with what Holmes called the most
important aspect of the law—"the establishment of its postulates
from within upon accurately measured social desires instead of
tradition."  

(a) The proliferation of precedents, offering alternative solu-
tions of every problem, will in the future even more than in the
past promote solutions *ex aequo et bono* according to standards
of general fairness. Our ramifying technology compels such a
development. When Michigan was still a district of the Northwest
Territory, the precedents governing in the Court of Common
Pleas of Wayne County reflected the old English common law
rather than the spirit of the frontier. In a complicated modern
society studded with new devices, new approaches must be taken
by the courts. *MacPherson v. Buick Motor Co.* established a
new principle of liability of automobile manufacturers outside
of contract. *Bing v. Thunig* established a new principle of li-
ability of charitable hospitals for negligence in performance of
medical as well as administrative functions. Neither problem
could have found a solution in existing precedents, for both the
automobile and the community-supported modern hospital are
recent products of the scientific revolution.

In all this there is no reason why the principle of stare decisis
should not continue to be observed if the thing decided and the
ratio decidendi are properly understood. The judgments of the
law will still have importance, as Cardozo pointed out, to the
extent only that "they permit a reasonable prediction that like
judgments will be rendered if like situations are repeated" so as
to show "principles of order revealing themselves in uniformities
of antecedents and consequents."  

68 Lord Chief Justice Coleridge in 37 CONTEMPORARY REVIEW 799-801 (1890), quoted in
69 Holmes, "Law in Science and Science in Law" (1899), in HOLMES, COLLECTED LEGAL
PAPERS 210 at 225-226 (1920).
70 Blume, "Criminal Procedure on the American Frontier," 57 MICH. L. REV. 195 at
61 217 N. Y. 382, 111 N. E. 1050 (1916).
62 2 N. Y. (2d) 656, 143 N. E. (2d) 3 (1957).
63 In Baum v. N. Y. Central R. Co., 175 N. Y. S. (2d) 628 (1958), involving an accident
in a television scene, Special Term in New York County applied what seems a standard of
the reasonable horse, the classical analogy. But as to the true ratio decidendi, its many
difficulties are pointed out by ALLEN, LAW IN THE MAKING, 6th ed., 247-248, 275-279 (1958);
and Goodhart, "Determining the Ratio Decidendi of a Case," reprinted in JURISPRUDENCE
IN ACTION 193 (1953).
(b) Only in the future these principles are more and more likely to be aggregated into digests, summaries, and restatements. Judge Goodrich, who has been for the past quarter-century so vital a force in the preparation of the Restatements of the American Law Institute, says that the object of the Restatement was to do for the American common law generally what Cardozo and his court did for the question presented in *MacPherson v. Buick*: "Out of the welter of decisions the principle was to be found and that principle stated as clearly and as accurately as possible." Second editions of the Restatement on various topics are now being prepared, and the commercial publishers will continue to find a market in their efforts to generalize, simplify and harmonize the flood of precedent. Indeed, it is vital that this be done. Continuing confusion and uncertainty in important areas of life or property could even warp the political development of the country. A historian of Russia has pointed out that the peasants were prepared for communism through the communal ownership of family land imposed by the conflicting decisions of the Ruling Senate; the law on the ownership of the farmhouse descending by inheritance was so confused as to resist any rational formulation. It is too early to say whether the anarchy deliberately fostered in antitrust policy by contradictory acts of Congress will have a similar effect; but one cannot read without despair the Byzantine logomachy required for a careful statement of the price discrimination clauses of the Robinson-Patman Act.

Hence summarization and restatement of the law will run apace. Each new formulation will lead to new departures; for, as Cardozo pointed out from the lecture notes of Aristotle, "As in other sciences, so in politics, it is impossible that all things should be precisely set down in writing; for enactments must be universal, but actions are concerned with particulars."

(c) We cannot attempt, as did the Roman State after a thousand years of legal history and the fall of the Western Empire, to collect everything into one conclusive codification and forbid citation of the sources or commentary upon the result. We are

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65 Goodrich, Yielding Place to New: Rest Versus Motion in the Conflict of Laws, Ninth Cardozo Lecture, Association of the Bar of the City of New York 8 (1950).
66 Florinsky, The End of the Russian Empire 192-193 (1931). The confusion was not set at rest until the Ukase of 1906.
69 Moyle, Imperatoris Justiniani Institutiones 75, 81 (1912).
not in Brobdingnag where, Dean Swift reports, the writing of a comment upon any law is a capital Crime. Nor can we rely upon well-considered legislation to reduce to order the chaos of instances. In this country legislative drafting is still in a crude stage. While the British, with a higher standard of written language and the centering of public opinion in the House of Commons through the parliamentary system of government, have been able to produce legislation that is clear and exact although complicated, our diffuse and divided congressional system has not been so successful.  

The courts are full of statutory construction cases. 

Take the simple question of a defendant’s right in a criminal case to obtain, for impeachment purposes, statements made to government agents by government witnesses, as required by Jencks v. United States. The day after that decision the first of eleven bills was introduced in the House of Representatives, and the final product of conference between the houses was accomplished “at high speed under the pressures of the end of a session.” The statute resulting, 18 U.S. Code §3500, was ambiguous in failing to specify whether the procedure for disclosure laid down was to govern only statements reproducing the witness’s own words or statements of every description connected with the witness; that is, whether the legislation was meant to be all-inclusive or merely a check upon extravagant interpretations of the Jencks case. This question heedless draftsmen left to the Supreme Court, which divided thereon five to four in the first case under the act. The decision invalidating the Pennsylvania Sedition Act, Pennsylvania v. Nelson, was based on the congressional plan to occupy the whole field, but was none the less vociferously criticized by some members of Congress more interested in publicity than in better draftsmanship.

As another instance of bad drafting, we may note the Natural Gas Act of 1938, whose supposedly intended application to gas producers was not realized by the supervising commission until Phillips v. Wisconsin and whose provisions for rate review were

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70 See Dickerson, “Legislative Drafting: American and British Practices Compared,” 44 A.B.A.J. 865 (1958), pointing out the relative expertness and concentration of the drafting work at Westminster.
74 350 U. S. 497 (1956).
75 347 U. S. 672 (1954).
held by three justices in 1958 to have been violated by the practice of many years.\textsuperscript{76}

The difficulty of effective codifying legislation was recognized by the New York Law Revision Commission in 1939 in treating the liability of a principal for negligent injuries inflicted by independent contractors. After completing a detailed study, the commission made no recommendation for legislation, partly in reliance upon action by the courts to avert injustice in particular cases and partly in the belief that legislation on the subject, "while obviating some objections would give rise to others, equally, if not more, serious."\textsuperscript{77} Reviewing the matter twenty years later, counsel for the commission emphasizes the difficulty of codifying "affirmatively a large segment of the law of torts, and furthermore . . . in a pattern of statute law in which there is no place for it."\textsuperscript{78}

Even so, the states with legislative drafting agencies are fortunate beyond others. Most of our jurisdictions are probably in the situation of the state which appointed a commissioner to codify the agricultural laws with the following directive:

"Section 2. Such Commissioner shall not simply transcribe such statutes as enacted by the Legislature, but shall, without changing the intent of the law-maker, so alter the phraseology as to eliminate and exclude all redundancy, prolixity and obscurity of expression; and when there shall be several acts relating to the same matter or subject, they shall be condensed into one concise statement of the whole; when it is apparent that there are legislature omissions or mistakes, or that additional provisions are necessary to make the law of practical application or legal, said commissioner shall supply and rectify the same so as to correct, perfect or make legal such statute or statutes, and render its meaning clear and its operation complete. . . ."\textsuperscript{79}

In the absence of really effective legislation, the best we can expect is sophistication in the handling of judicial decisions and the increasing use of informal codification to control and master the outpouring of cases. In this process the philosophy of the law

\textsuperscript{76} United Gas Pipe Line Co. v. Memphis Light, Gas and Water Div., 358 U. S. 103 at 116-120 (1958).
\textsuperscript{78} MacDonald, "The Effect of an Unsuccessful Attempt To Amend a Statute," 44 CORN. L. Q. 336 at 350 (1959).
will become more and more prominent, and to that the leading law schools will make an increasing contribution. Other expedients will present themselves. The New York reports, for example, carry more and more pages which recite merely the titles of actions and the outcome, without opinions. Really selective reporting, as in England, is hardly to be expected under our conditions.

(d) Again, with the pressure of business we may expect growing effective pressure for better judges, above all in the state courts which have been cursed since about 1846 with the elective system. Elective judges so-called are, under modern conditions, judges appointed by the party leaders in private instead of being appointed in public by a chief executive himself popularly elected. "Elective" judges are thus in reality appointed clandestinely, for reasons of party service, patronage, or anything else but learning or mental power. Where the party nomination does not itself carry the appointment, the choice between judicial nominees by the electorate cannot be intelligently divorced from the general political considerations which affect the whole ticket. A tragic illustration in Michigan is the defeat of Chief Justice Cooley in April 1885 for return to the Supreme Court Bench which he had honored for twenty years. This was the work of a Detroit newspaper resentful of Cooley's upright application of the law in a libel suit against its publisher. For the federal judiciary even now the American Bar Association is pressing a campaign for non-partisan appointments, and a Republican attorney-general will promise no more than a "balanced" judiciary. The late Lord Jowitt, when Lord Chancellor in the Labour Government, was regularly selecting for the English High Court the leading practitioners at the bar, regardless of their being Conservatives.

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80 Cf. Pound, "Do We Need a Philosophy of Law?" reprinted in Jurisprudence in Action 393 (1953).
82 MacLean v. Scripps, 52 Mich. 214 (1883), rehearing den., id. at 251, mandamus and prohibition granted, id. at 257. The concise and unexceptionable opinions of Cooley, C.J., earned him the epithet of "cunning sophist" in the Evening News editorial of March 16, 1885. A barrage of 15 editorials was laid down from Feb. 9, 1885 around the principal themes of contributory negligence and the fellow-servant rule, as to which Cooley and the court as a whole merely applied the law then existing. Cooley had the Republican nomination. His party was demoralized by the Cleveland victory of 1884, and the nomination was impaired by the endorsement of the Prohibition party. Yet on the tariff question Cooley was a Democrat, and he voted for Cleveland in 1884. See Vander Velde, Michigan and the Cleveland Era 91-92 (1948).
All trial lawyers know the immense importance of a judge distinguished not only for probity and learning, but also for industry and intellectual power. Such a judge is the best protection of the weaker litigant. Such a judge alone is capable of cutting through procedural obstacles and handling the burden of interrogatories and depositions permitted by the federal rules. A federal judge now deceased told counsel in his first case that, if he had known how hard the work was, he would not have taken the job. Another who presided for weeks over the trial of a most important and complicated case (not any case of mine, I hasten to say) so discouraged counsel by his failure to grasp the mass of testimony that both sides abandoned the contest and made a settlement repugnant to each. It will, I hope, be found increasingly intolerable that places so vital in the administration of justice be utilized to pension off party workers at the expense of litigants.\\n
5. **Language.** Fifth, we must take into account the essential tool with which the legal profession will handle the increased burdens of litigation and adjudication posed by a growing population, the multiplication of precedents, the constant re-casting of principle, the velocity of business and technological change. This essential tool is the English language, or that variety employed in our fifty-two jurisdictions. What are the chances of that tool meeting the requirements in the next hundred years?

At the moment we must admit that the chances are not good, for two reasons. One is that the educational psychologists have succeeded (largely through effective work with the state legislatures) in taking the content out of public education. The other is that the mass distribution of goods through advertising works for systematic debasement of the language. The consequences in boneless and imprecise writing are evident in many court opinions and are bound to spread as these forces extend their influence.

(a) The story of pretentious and empty educational methods, leading to academic degrees without knowledge, has been a familiar one since Abraham Flexner’s book. Dean Barzun has now made another trenchant demonstration of the vacuous end-product of college teaching. He cites Dean Warren’s finding that few entrants into the Columbia Law School, however carefully selected,
have skill in reading and writing adequate for the study of law; and the complaint of Dean Griswold that even capable applicants to the Harvard Law School presented college records limited to Principles of Advertising Media, Office Management, Principles of Retailing, Stage and Costume Design, and Methods in Minor Sports. In his own experience Dean Barzun found that 170 first-year graduate students in history failed in a test of the twenty most common abbreviations used in books (e.g., *viz.*, *ibid.*, and the like); only one out of the 170 understood all twenty, and half of these scholars could not decipher more than four. So great has been the decline in American intellectual standards in the last hundred years that the minds and attention of graduate students of today would be taxed by the reasoning of the Lincoln-Douglas debates which held the attention of farmers standing for hours in the court-house squares of Illinois. A recent magazine article by a professor of American literature describes his experience in giving an extension course to twenty-eight teachers of literature from the high schools and junior colleges of Kansas: the course broke down because none of the pupils, all teachers themselves, could articulate a paragraph, construct an English sentence, or even spell correctly. These twenty-eight teachers, the author concluded, could not communicate in the English language.

(b) In addition to the weakness in primary education we have a constant corrosion of the language from the psychologists and semanticists who administer the twelve billion dollars spent annually in advertising. Advertising is now a primary means for distributing the vast output of machine production in the greatest market ever created, and an economic force not to be turned aside. The masters of this technique have learned that the canting use of words, the combination of opposites, and the adoption of vulgar error pay off. A phrase such as "the new active leisure" does no particular harm; it is only nonsense; but the reiterated promise that a cigarette which shall be nameless "tastes good like a cigarette should" is a willful corruption of language, lucrative to the advertiser not only because it exploits the common confusion between "like" and "as" but for the more subtle reason that the double

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88 Id. at 99.
89 Id. at 57.
90 Koerner, "Can Our Teachers Read and Write?" 209 Harper's Magazine 79 at 81 (1954). The author "passed" all his students; they were trying to earn teaching credits and he didn't know what else to do.
meaning of “like” insinuates the idea of enjoyment. Thus hedonism enlarges profit at the cost of the distinction between two useful words. The distinction will soon be lost, just as that between “precipitous” and “precipitate” is vanishing and that between “oral” and “verbal” is almost gone.

The word “like” gets similar treatment from a newspaper of massive circulation which shall also be nameless, and which drags into the act the little referent “it.” The phrase is “Nobody says it like” this newspaper. The trick of filling a mere referent with an appearance of meaning which does not exist is an ancient abuse that lawyers do not benefit from learning. Yet the advertising people, who understand very well the clefts and faults of the consumer’s mind, are not to be deterred from their rewarding practices simply because they spread error in popular usage.

When taxed by Miss Marya Mannes on a television panel the other day with the systematic abuse of words in advertising, the vice-president of a leading agency responded that this practice merely recognizes colloquial speech in like manner with the short stories of Hemingway! In this way the idols of the market-place debase the word which “is the skin of a living thought.” The very question which I above repeated from a radio broadcast “What will our future forefathers say?” smells of the advertising double-entendre, for the speaker intends to double his prophecy with the echo of ancestral voices.

In our economy advertising is now a prime adjunct of production, and my purpose here is not to criticize this uncontrollable natural force, which has its own function, but only to indicate that euphoric mist, which it is the duty of all good advertising to disseminate, is the very opposite of the lapidary statement needed in the law. What we have in advertising goes beyond the device admired by Talleyrand of using language to conceal thought; the beau idéal of all motivational selling is the use of language to conceal the absence of thought. There is a connection between education and advertising since, as a competent observer has pointed out, “Unlike any other the American university is organized on the model of the factory.”

91 Bacon, "Novum Organum," (trans. Curtis & Greenslet) The Practical Cogitator 15 (1945): “... and words are imposed according to the apprehension of the vulgar. And therefore the ill and unfit choice of words wonderfully obsesses the understanding.”


94 Cohen, American Thought 34 (1954). Compare the direct control of their business which scholars have in the English system, as illustrated in C. P. Snow’s novel, The Masters (1952).
Of course faults of grammar, taste, and syntax are nothing new. Lucian ridiculed them in his dialogues. They appear in other fields besides the law, as Fowler's *Modern English Usage* and Dr. McCartney's delightful book attest. The point here is that the progress of the law is specially dependent upon language. The multiplied tasks of the next century demand a prose style that is accurate, exact, flexible, and pointed. The novelist Stendhal, as Cardozo reminds us, considered that "there was only one example of the perfect style, and that was the Code Napoléon; for there alone everything was subordinated to the exact and complete expression of what was to be said."

Dean Barzun has well put the problem in describing law and diplomacy as two of the most remarkable uses of language in our society today:

"... The law is a model of intellectual work, and it is a work of words. It is a profession easy to ridicule by its externals and it is criticizable, like other institutions, for its anachronisms. But as an attempt of the esprit de finesse to mold coherent conceptions of the true and the just on the restless multiplicity of human life, it is a triumph of articulateness and exactitude.... A deeper cause [of the troubles of the law] is the lowered standard of the linguistic power, which accounts also for the fact that only a few judges no longer living—Holmes, Brandeis, Cardozo—furnish us again and again with the verbal concretions of ideas we should be lost without."

Of course, the weakness and danger I speak of are not without remedy. What would happen if the leading law schools required as a condition of entry not only a college degree, but the proved ability to write clear, correct, idiomatic English particularly in exposition and argument? One can imagine the anguished pleas that would arise of double jeopardy and cruel and unusual punishment.

6. *The Bill of Rights.* Sixth, and last, we have ground to hope in the next hundred years—bating the calamity of a world war more catastrophic than the last two—for the maintenance in this country of that personal liberty which is the business of the

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95 *Lexiphanes,* Fowler trans., ii, 263 (1905).
98 *Barzun*, *The House of Intellect* 247-248 (1959). The author, being a scholar in other fields, overlooks Goodrich, Cit. J., Wyzanski, D. J., and other living judges who might be named, but are not numerous enough.
courts and the main interest of civilization. I refer especially to
the freedom of the mind protected by the constitutional guarantees
relating to speech, assembly, religion, due process. This prediction
I rest on the course of decision of the Supreme Court in the last
twenty-five years, which composes in my view one of the most
glorious pages in its history. Even Jefferson for all his later com­
plaints of judicial usurpation, valued the Bill of Rights for “the
legal check which it puts into the hands of the judiciary.”

In this time we have seen made good in majority opinions much
of the promise of Holmes’ dissent in the Abrams case:

“... But when men have realized that time has upset many
fighting faiths, they may come to believe even more than they
believe the very foundations of their own conduct that the
ultimate good desired is better reached by free trade in ideas—
that the best test of truth is the power of the thought to get
itself accepted in the competition of the market, and that
truth is the only ground upon which their wishes safely can be
carried out. That at any rate is the theory of our Constitu­
tion. It is an experiment, as all life is an experiment. . . .
While that experiment is part of our system I think that we
should be eternally vigilant against attempts to check the
expression of opinions that we loathe and believe to be
fraught with death, unless they so imminently threaten im­
mediate interference with the lawful and pressing purposes of
the law that an immediate check is required to save the
country.”

Since 1933 we have had from the Supreme Court trenchant
reinforcement of liberty in terms of the Bill of Rights. We have
had five cases more or less dealing with the right to retain citizen­
ship in divers situations of desertion, Communist party mem­
bership, etc.; twelve cases adjudicating the rights of aliens, usually in
departation proceedings; twenty-five cases affecting freedom of
religious belief, including the relations of state and church; forty­
three cases involving freedom of the press (including motion pic­
tures and radio) against censorship or other interference, or free­
dom of assembly and political belief; nine cases arising from
loyalty oaths; thirty cases of asserted unreasonable search and sei­
zure; twenty-five cases in which the defendant pleaded double
jeopardy; thirty cases of confessions claimed to have been coerced
or unfairly induced; forty-one cases involving fundamental fair-

100 Abrams v. United States, 250 U.S. 616 at 630 (1919).
ness in criminal proceedings; twenty-five cases reviewing jury trials in criminal matters; thirty-one passing on the right to assistance of counsel; nine on the right to a civil jury; twenty-seven cases dealing with equal protection of the laws and various forms of discrimination; nineteen cases on due process in civil matters including prejudice in the jury from newspaper stories; and nine on the right to vote.

These 340 decisions of the high Court in the past quarter-century, although an incomplete list, demonstrate its earnest preoccupation with basic personal rights. Impressive as the total record are the thoroughness of consideration and the earnestness with which differing views on the more and the less are put forward in majority and minority opinions. The differences are inevitable, for, as Justice Frankfurter observed,

"Every Term we have to examine the particular circumstances of a particular case in order to apply generalities which no one disputes. . . . It is the nature of the concept of due process and, I venture to believe, its high serviceability in our constitutional system, that the judicial enforcement of the Due Process Clause is the very antithesis of a Procrustean rule."\(^{101}\)

Putting aside the divisions in the Court on given states of fact and the closely-argued differences which give such fascination to the jurisprudence of the present Court, one does find in the total product good omen for the future of liberty. Justice Holmes has largely won his fight in the Abrams case. Oppression by the state is fended off by rulings such as that in a recent opinion of the Chief Justice:

". . . that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves."\(^{102}\)

On the vital issue of freedom of the mind, the liberty of the press (as represented by motion pictures) has been strikingly upheld against censorship masquerading under a charge of obscenity in the recent cases involving La Ronde\(^ {103}\) and the film version of

\(^{101}\) Kingsley International Pictures Corp v. Regents of the University of the State of New York, 360 U.S. 684 at 696-697 (1959).

\(^{102}\) Spano v. New York, 360 U.S. 315 at 320-321 (1959) (massive official interrogation of a prisoner over an eight-hour period, with his request for counsel refused).

Lady Chatterley’s Lover. The latter case is an encouraging blow for freedom of thought upon a discouraging state of facts. D. H. Lawrence’s book is in some ways an exhibition of bad taste and is judged by many an artistic failure. But the question before the Court was simply whether the public could see and judge the film for themselves, or should be excluded from judgment by the intervention of censors. The Court came out against censorship but by four different routes. Justice Douglas, speaking for two justices, held all censorship of movies unconstitutional, and with reference to British practice invoked by Justice Frankfurter, quoted Bridges v. California:

“No purpose in ratifying the Bill of Rights was clearer than that of securing for the people of the United States much greater freedom of religion, expression, assembly, and petition than the people of Great Britain had ever enjoyed.”

Justice Stewart, for four justices, held the relevant parts of the New York Education Law unconstitutional on their face for the further striking reason:

“What New York has done . . . is to prevent the exhibition of a motion picture because that picture advocates an idea—that adultery under certain circumstances may be proper behavior. Yet the First Amendment’s basic guarantee is of freedom to advocate ideas. The State, quite simply, has thus struck at the very heart of constitutionally protected liberty.”

This is a high point for the libertarian rule if we remember that one of the Ten Commandments was in question and the Puritan tradition is strong. Consistently with the nature of censorship, the film itself, when allowed to be seen, was perceived to be harmless. The New York Times critic found the charge of the censors to be “absurd,” and two members of the Court said the same thing in effect. Next came an attack upon the book itself, through a Post Office ban upon mailing and the subsequent

105 Id. at 697-698.
106 Id. at 688.
107 Bosley Crowther in N. Y. Times, Aug. 11, 1959; Harlan, J., 360 U.S. 684 at 708; Frankfurter, J., id. at 691-692: “To assume that this motion picture would have offended Victorian moral sensibilities is to rely only on the stiffest of Victorian conventions.”
judicial review. Judge Bryan's opinion setting aside the Post Office order, while fully in the tradition of Judge Woolsey's judgment in the *Ulysses* case, is at odds with the published views of a leading Protestant churchman, and presumably all professional religious opinion.

I do not imply, of course, that it is only in the domain of speech and the press that the high Court is giving vitality to the Bill of Rights. The foregoing rough classification of recent cases shows its alertness to the claims of the human personality on every side. When a college teacher was held in contempt for failing to tell a congressional committee his political associations, the majority first satisfied itself that academic freedom was not at stake. In holding an administrative agency to the task of careful fact-finding, the Court pointed out that, without such standards, "... expertise, the strength of modern government, can become a monster which rules with no practical limits on its discretion. Absolute discretion, like corruption, marks the beginning of the end of liberty."

For comparison, it is interesting to note that, whereas in England encroachments of the executive and so-called administrative tyranny have for the past thirty years been criticized by Lord Hewart, C. J., and others as menacing the liberty of the individual, a recent English scholar gives individual liberty a better chance in the United States because of our written Constitution and the authority of the Supreme Court.

Nevertheless, we cannot put the maintenance of liberty in the next century stronger than a well-documented hope, for the reason that the true love of liberty is a minority view. When people claim to favor freedom they mean as a rule freedom for themselves only. Aristotle stated the general view for our time as well as his own: "The weaker are always asking for equality and justice, but the stronger care for none of these things." Edmund Burke told his electors at Bristol in 1780:

"It is but too true that the love, and even the very idea, of genuine liberty is extremely rare. It is but too true that there are many whose whole scheme of freedom is made up

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109 (S.D. N.Y. 1933) 5 F. Supp. 182, aff'd. (2d Cir. 1934) 72 F. (2d) 705.
114 Politics, Jowett trans., VI.3.8.
of pride, perverseness, and insolence. They feel themselves in a state of thraldom . . . unless they have some man or some body of men dependent on their mercy . . . . This disposition is the true source of the passion which many men in very humble life, have taken to the American war."\[115\]

Who shall say that, despite the palliating phrase about men in humble life, Burke did not have in mind his magisterial friend and fellow-member of The Club, Dr. Samuel Johnson, who in conversations with Boswell "breathed out threatenings and slaughter" against the Americans "calling them 'rascals—robbers—pirates' "\[116\] In the anthologies of the free press some of the most glowing pages are culled from Milton's plea for "the liberty of unlicensed printing"; but Dr. Johnson asserts for the Tory side that Milton felt not so much the love of liberty as repugnance to authority.\[117\]

In our own time and country the Chief Justice calls attention to the refusal by a group of state employees to permit the posting of the Bill of Rights on their bulletin board, in connection with its 163rd anniversary, on the ground that it was "controversial." He adds with good reason: "It is straws in the wind like this which cause some thoughtful people to ask the question whether ratification of the Bill of Rights could be obtained today if we were faced squarely with the issue."\[118\]

The dispute about the posting of the Bill of Rights came at the end of the extraordinary career of Senator McCarthy of Wisconsin, who had been condemned by his colleagues on December 1954 for unparliamentary language to senators after conducting a four years' reign of terror through the flagrant misuse of the congressional power of investigation. On the day of the Senate vote a petition signed by 1,000,816 McCarthy sympathizers was delivered to the Capitol, and on McCarthy's death two and one-half years later one of his newspaper friends wrote: "Joe McCarthy was slowly tortured to death by the pimps of the Kremlin."\[119\]

The McCarthy mania has now died down, but where else may we not expect the wildfire of mad unreason to flare up again under

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115 Speech at Bristol Previous to the Election, 1780. WORKS ii, 163-164 (1888).
116 BOSWELL, LIFE OF JOHNSON ii, 463 (1912). This conversation occurred in 1778.
the hand of another demagogue? Even the American Bar Association on February 24, 1959 adopted resolutions for legislative change on the basis of a report of its special anti-Communist committee which criticized Supreme Court decisions upholding civil liberties, with the remarkable statement:

"Many cases have been decided in such a manner as to encourage an increase in Communist activity in the United States . . . although these cases might readily have been disposed of without so broadly limiting National and State security efforts."

This comes near to a charge that the high Court deliberately endangered the country. Yet a review of the twenty-four decisions which set this tocsin clanging, shows that all except possibly the Jencks case "employ well-established principles of general applicability and follow precedent." 120

I hope it is permissible in this presence to cite the pressures exerted upon this University by the National Security League and some zealous faculty members to force the dismissal from the faculty of E. A. Boucke and five other supposed pro-Germans in 1917-18.121 The record compares unfavorably with the refusal by Harvard in the same period to dismiss Professor Muensterberg for a series of utterances which caused the pro-German faction in the East to revive Luther's hymn—Ein Muensterberg ist unser Gott. Latterly, in the defense of academic freedom, Harvard during the reign of Senator McCarthy incurred the extreme peril of being branded a pro-communist institution, and survived that peril.

The fact is that the concept of truth as mutable and elusive is uncongenial to most people, and that persecution for differences of opinion is only logical. 122 The Soviets, in defending their iron censorship, argue that the only news broadcasts entitled to go out are "accurate" ones. Too few accept the profound saying of Judge Learned Hand that "The spirit of liberty is the spirit which is not too sure that it is right . . . " 123 Not many believe with Bacon that not only the knowledge and belief of Truth but the inquiry of Truth "is the Soveraigne Good of humane Nature." 124

121 The dismissals are described, with evident approval, in SMITH, HARRY BURNS HUTCHINS AND THE UNIVERSITY OF MICHIGAN 198-199 (1951).
124 "Of Truth," ESSAYS (1625).
Yet an open field for thought and expression, against the prejudice or even the firm conviction of the majority, is vital for the development of a good life in this country. Liberty is still as in Milton's time the chief nurse of great wits. Tocqueville on his visit 128 years ago noted the absence of freedom of opinion here. The result has been a kind of anemia in American thought. Santayana remarks in the New England writers their "expurgated and barren conception of life"; he saw in the student life of Harvard before 1910 "a flutter of intelligence in a void, flying into trivial play." But, important as is freedom for the internal development of the next century, it is at least as important to our foreign relations, perhaps to our very survival. Recall that it was vague, impalpable imputations of disloyalty that were used in 1954 to deprive this country of the services of a leading nuclear physicist, Dr. J. Robert Oppenheimer. How can our leaders refute the Marxian dialectic in the forensics of international discourse if it is dangerous to know what the Marxian dialectic is?

IV. THE VIEW FROM SAINT-REMY

Most of the recent attacks upon personal liberty are related to the fear of Soviet Russia. The direct conflict of the Soviet ideology with ours and the development of long-range ballistic missiles together mean that the United States stands, for the first time in its history, in the front line of the defense of civilization as we conceive it. This is a momentous fact productive of deep anxiety to our people.

Now our relationship with Russia has been long in developing. To illustrate, let me once more cite the young French lawyer who in 1831 was struck with wonder by democracy in America. At the end of the first part of his book, Tocqueville predicted that the time would come when North America would have a population of 150,000,000 representing the same density of settlement as in Europe. He then named Russia as the other great nation in the world which would in that day stand opposite the United States. In a striking passage he contrasted the two countries, America as fighting the wilderness, Russia as fighting civilization. "The Anglo-American," said Tocqueville, "relies upon personal interest to accomplish his ends and gives free scope
to the unguided strength and common sense of the people; the Russian centers all the authority of society in a single arm. The principal instrument of the former is freedom; of the latter, servitude. Their starting-point is different and their courses are not the same; yet each of them seems marked out by the will of Heaven to sway the destinies of half the globe. 128

The Russian State in another form still stands for servitude, and the Soviet Premier in his attack upon American democracy complains that more than half the members of Congress are lawyers. 129 The President of this University, returning last summer from the Soviet Union, reminds us that the Russians expect to prove to Asia and Africa the superiority of their system. Dr. Hatcher adds: "The sheer physical presence of the USSR in the world and the rapid movement going on in that society are two of the basic and inescapable facts of the world today." 130

Such a society, waging all over the world a war for servitude, cannot avoid a clash with the dynamics of freedom, infinitely stronger, which Western civilization directs even at the minds and hearts of the Soviet people. The fatal ease of modern communication makes unavoidable some kind of confrontation between the systems. The Berlin crisis is but a step in a long struggle. For this struggle our society will need all the weapons of its science, all the freedom of minds using the illimitable resources that science now opens in the universe.

In our effort to extend the rule of law we are again at the point where the Roman Empire stood in the principate of Augustus Caesar. The early Empire was the grandest organization for the maintenance of civil rights that the world has ever known. In it was realized something we have not yet seen in the modern world—a uniform structure of government overlying the varying customs of the provinces, a system of roads which permitted Roman citizens to travel without passport from the confines of Persia to the northern wall of Britain—ultimosque horribilesque Britannos—a universal language for the known world, a system of law which under Papinian, Ulpian and their school became a model for all Europe, and the reign of world peace for two hundred years.

Now this grand organization of law and government broke

128 Ibid.
down in the long run, we may fairly say, from its failure to solve the Berlin question. The ultimate inroads of the Northern barbarians came from the failure of Rome to pacify Germany east of the Rhine and to cover that country, as it covered Gaul, with the monuments, manners, and institutions of civilization. At Saint-Rémy in Provence is a singular memorial of this contest. As you motor from Avignon to Arles in that harsh sunny country you come to a grand Roman arch near which in a clump of olives is the old priory church and cloister of St. Paul-de-Mausole, latterly a hospital for the insane that received the painter Van Gogh in 1888. The site, surrounded by a ring of sun-baked desolate hills, is one of austere beauty. Near the arch is a quadrangular stone base crowned with a pillared canopy, and beyond the French archeologists have uncovered a Roman way leading to the forum and market-place of a buried town. This town is Glanum, founded by Greek merchants who came up from Marseilles and converted by the Romans into a place of importance on the high-road from Spain to Italy.

The monument is a lofty one, the encircling columns at the top close-set, and it is only by some scrutiny that one sees in the space within the columns two tall figures. They seem to be young men wrapped in the toga, and their gaze from the lofty crown is fixed on the horizon, north by northeast. If we ask who these youths can be that for nineteen centuries have been looking from the top of their tower toward the Rhine and the Elbe, we are told they are Gaius and Lucius Caesar, the sons of Agrippa, the grandsons and adoptive heirs of Augustus, who died in their youth during the campaigns to fix the German frontier of the Empire. The cenotaph at Saint-Rémy was building in the years when the Roman legions were fighting beyond the Rhine and the Danube. A series of campaigns were marked by dangerous revolts of the tribes in Pannonia and Illyria, and on the Rhine Varus and his three legions were surprised and destroyed by the Germans in the Teutoburg Forest (A.D. 9). Augustus took the warning, withdrew the frontiers to the Rhine and the Danube, gave up the effort to spread Latin civilization to Germany. The figures of his adoptive heirs have continued to stand on their monument in that

131 Eydoux, Monuments et Trésors de la Gaule 151-158 (1958); Buchan, Augustus 251-252 (1937). This identification is questioned by Chamoux, Les Antiques de St. Rémy de Provence, Phoibos, vi, 97, 104 (1951-1952); but the size and sumptuousness of the monument indicates a public not private character.

132 Buchan, Augustus 919-936 (1937).
theatre of grand and desolate beauty, with their faces turned to the Rhine frontier from which Augustus apprehended the greatest danger to Roman civilization.

And it was indeed from that region beyond the Rhine that the masses of barbarians came who finally overwhelmed an Empire weakened from within. It is in that region today that the Western powers are locked in a duel with Russian communism. Short of war, the struggle will be a long one. If in the next century the contest pending these nineteen hundred years is won by Western civilization, the triumph will belong to the expansive powers of liberty channeled into their victorious courses by the rule of law.