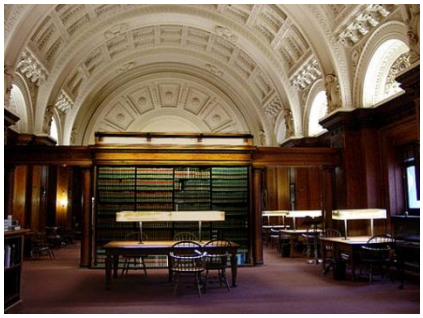

ADVANCE SHEET– DECEMBER 25, 2020

President's Letter

In this issue, we include two speeches about the limits of law that attracted a great deal of notice in Great Britain, but not in the United States. The first is a lecture by former Justice Jonathan Sumption of the new British Supreme Court delivered at Kuala Lumpur in Malaysia on November 20, 2013. The Bar Library owns a symposium volume discussing it, R. Ekins, et al, Lord Sumption and the Limits of Law (2016).

The second is a lecture by the late Jonathan Sacks, the former Grand Rabbi of Great Britain, who died last month, delivered at an ecumenical conference at the Vatican in 2014, which espoused a less extreme social conservatism than that heard in some quarters in the United States

The judicial opinion we reproduce is that of Mr. Justice Cardozo in *Palko v. Connecticut*, 302 U.S.319 (1937), an important case in the line of cases beginning with Justice Holmes' opinion in Moore v. Dempsey, enforcing the Bill of Rights against the States. The particular holding of *Palko* was overruled in *Benton v. Michigan*, 395 U.S.784 (1969) but its general approach remains; there are still provisions of the Bill of Rights relating to grand juries and amounts in controversy that are not enforced against the States. By comparison with later opinions, Justice Cardozo's prose is distinguished by its avoidance of long-windedness.

George W. Liebmann

A Holiday Gift:
Three Bar Library Lectures

I am most pleased to report that the Bar Library Lecture Series will continue in January with the first of three Zoom Winter Presentations. On Wednesday, January 13 at 5:00 p.m., the Honorable Richard D. Bennett of the United States District Court for the District of Maryland will present "The Electoral College – Its Historic Foundations and Considerations for the Future." On Wednesday, February 3 at 6:00 p.m., Gregg L. Bernstein, the former Baltimore City State's Attorney and presently a Partner with the firm of Zuckerman Spaeder LLP will be speaking on a topic yet to be determined. We will let you know in the next issue of the Advance

Sheet. Finally, on Tuesday, March 9 at 6:00 p.m., Freeman A. Hrabowski, III, the President of the University of Maryland, Baltimore County will speak on "Education In A Pandemic." I hope that you might be able to join us for three very captivating speakers. Having heard all of them speak, I can assure you that their presentations will be informational and entertaining. Besides, it would not be very nice not to accept our gift, would it? Take care and be well.

Joe Bennett

If You Can:
It Would Be Most Helpful & Appreciated

Perhaps it is bad form to tell you what we got you, then ask that you might give us something in return, but, here goes. In this most trying of years the Library has felt, like many others, a significant economic impact. With several of its primary sources of income down, the Library is asking that those that are in a position to do so, think about making a year end contribution to it. We are proud that during a time when all other libraries closed, the Library continued to operate with telephone reference and the transmission of material to firms near and far by way of e-mail. If we did not invent curbside pick-up, I am pretty sure we perfected it.

In addition to maintaining our daily operations, we made advancements in other regards, such as the expansion of our humble little newsletter to the present bi-weekly Advance Sheet featuring material from leading scholars, judges and an array of others. Our speaker series (see above), by utilization of Zoom, has also expanded with presentations in months we traditionally shied away from.

As the folks at P.B.S. say, "None of this would be possible without all of you." "If You Can: It Would Be Most Helpful & Appreciated."

Take care and be well. Happy Holidays and a Happy & Healthy New Year to one and all.

Joe Bennett

Lord Sumption gives the 27th Sultan Azlan Shah Lecture, Kuala Lumpur - The Limits of Law - 20 November 2013

Your Royal Highness, ladies and gentlemen, it is a great honour as well as a personal pleasure for me to be giving the Sultan Azlan Shah Law lecture. This is the twenty-seventh lecture in this distinguished series, and I am conscious that I am following in the footsteps of some of the outstanding jurists of the common law world. I am also conscious, as I suspect all of us are, that I am doing so in the absence of His Royal Highness Sultan Azlan Shah, for whom these lectures have been a source of justifiable pride. I am sure that I reflect the feeling of all of us in wishing him a swift return to good health.

The title of my lecture is not, I am afraid, calculated to tell you much about its contents. It is in part inspired by a well-known essay published in 1978 called "The Forms and Limits of Adjudication" by Lon Fuller, the distinguished legal philosopher who held the chair of law at Harvard for many years. Professor Fuller took as his starting point the fact the system of adjudication by courts of law was what he called "a form of social ordering". It was part of the complex mechanism by which the relations between people are governed and regulated. It operates side by side with other means of social control, such as legislation, administrative action, professional self-regulation, and more or less powerful social or cultural conventions. The question which he asked himself was this: what kinds of social tasks can properly be assigned to judges and courts, as opposed to these other agencies of social control. It is a much-debated

question, and there are two features of our legal culture that make it a particularly important and difficult one.

The first is that in the common law world there are unquestionably some areas in which judges necessarily make law. In a precedent-based system, they lay down general statements of principle 1 which then stand as authority in future cases. They do not merely discover legal principles concealed in the luxuriant undergrowth of ancient principle and scattered legal decisions, as the great eighteenth century jurist Blackstone supposed and generations of common lawyers pretended. They make law within broad limits determined by statute and legal policy. In recent years, appellate courts in the United Kingdom have been increasingly open about this. In 2005, in Re Spectrum Plus Ltd [2005] 2 AC 680, at [32], Lord Nicholls of Birkenhead put the point in this way: "Judges have a legitimate law-making function. It is a function they have long exercised. In common law countries much of the basic law is still the common law. The common law is judge-made law. For centuries, judges have been charged with the responsibility of keeping this law abreast of current social conditions and expectations." Just as common law judges make law, so also they unmake it. They overrule past decisions, even those of the highest appellate courts. The declaratory theory of law holds that in that case the earlier decisions must always have been wrong. It was just that the courts had taken a long time to realise it. As Lord Reid put it in West Midland Baptist Association Inc. v Birmingham Corporation [1970] AC 874, 898-9, "We cannot say that the law was one thing yesterday but is to be something different tomorrow. If we decide that [the existing rule] is wrong, we must decide that it always has been wrong." But this is now overtly recognised as the fiction it always has been. The courts of the United States, India, Ireland and the European Union have all asserted the right in certain categories of case to overrule a decision only with prospective effect, a function previously regarded as the special domain of the legislature. In the Spectrum Plus case, the House of Lords held that in a suitable case it would do so too. So judges can now not only say that the law was one thing yesterday and another tomorrow. They can actually admit that they are doing it. It is a very significant power. It is not a power that would be recognised in all legal cultures. Article 5 of the French Civil Code, which has been part of the Code from its inception at the beginning of the nineteenth century, provides that "judges are not permitted to adjudicate on cases before them by way of statement of general principle or statutory construction." This means that judges may only formulate principles applicable to the particular facts before them. They may not purport to lay down general rules which would apply in any other case. That would be classified as an essentially legislative function. In keeping with that principle, there is with limited exceptions no doctrine of precedent in French law. This is one reason why the social and political implications of judicial decisions are usually more limited in civil law jurisdictions than they are in the world of the common law.

There is a second reason why we need to think seriously about the proper role of judges in the ordering of society. We live in an age of unbounded confidence in the value and efficacy of law as an engine of social and moral improvement. The spread of Parliamentary democracy across most of the world, has invariably been followed by rising public expectations of the state, of which the courts are a part. The state has become the provider of basic standards of public amenity, the guarantor of minimum levels of security and, increasingly, the regulator of economic activity and the protector against misfortune of every kind. The public expects nothing less. Yet protection at this level calls for a general scheme of rights and a more intrusive role for

law. In Europe, we regulate almost every aspect of employment practice and commercial life, at any rate so far as it impinges upon consumers. We design codes of safety regulation designed to eliminate risk in all of the infinite variety of human activities. New criminal offences appear like mushrooms after every rainstorm. It has been estimated that in the decade from 1997 to 2007, more than 3,000 new criminal or regulatory offences were added to the statute-book of the United Kingdom. Turning from statute to common law, a wide range of acts which a century ago would have been regarded as casual misfortunes or as governed only by principles of courtesy, are now actionable torts. This expansion of the empire of law has not been gratuitous. It is a response to a real problem. At its most fundamental level, the problem is that the technical and intellectual capacities of mankind have grown faster than its moral sensibilities or its co-operative instincts. At the same time other restraints on the autonomy and self-interest of men, such as religion and social convention, have lost much of their former force, at any rate in the west. The role of social and religious sentiment, which was once so critical in the life of our societies, has been largely taken over by law. So when Lord Nicholls spoke, in Spectrum Plus, of the judiciary's duty to keep the law abreast of current social conditions and expectations, he was making a wider claim for the policy-making role of judges than he realised. Popular expectations of law are by historical standards exceptionally high.

These changes bring into sharper focus the question which I posed at the outset of this lecture: what sort of social reordering can properly be assigned to judges and courts, as opposed to other agencies of social control such as administrators or legislators. In theory, English law has a coherent answer to this question. It was given by Lord Diplock in his speech in the House of Lords in R v. Inland Revenue Commissioners ex p. National Federation of Self-Employed and Small Businesses [1982] AC 617, 619. Parliament is sovereign and has the sole prerogative of legislating. Ministers are answerable to the courts for the lawfulness of their acts. But they are accountable exclusively to Parliament for their policies and for the efficiency with which they carried them out, and of these things Parliament was the sole judge. This is neat. It is elegant. And it is perfectly useless, because it begs all the difficult questions. What is a question of law? What is a question of policy? The Diplock test will yield a different answer depending on how you define the issue.

Let me illustrate this point with an example, not particularly important in itself, but revealing nonetheless. In England, the administration and jurisdiction of the higher courts is governed the Senior Courts Act 1981. Section 130 of that Act, which remained in force until 2003, is not normally regarded as a great engine of social policy. It empowered the Lord Chancellor to fix the level of court fees. In 1997, the Lord Chancellor introduced new regulations. Their effect was to increase the court fees, while at the same time omitting provisions in the previous regulations which had exempted people on income support. They now had to pay the court fee just like any one else. The object was to reduce the net cost to the state of funding the court system, but the effect was necessarily to make access to the courts more expensive for the poorest section of society. Mr. Witham was a man on income support who wanted to bring an action for libel but could not afford the court fee. So he applied for judicial review of the new regulations: R v Lord Chancellor ex parte Witham [1998] QB 575. Now there are at least three different approaches that one might take to a problem like this one. The first is to say that a service such as the administration of justice should be viewed in the same way as any other service provided by the state. It is simply one of a number of competing claims on a

limited pot of money. All public services have an opportunity cost. The money that is spent on one service is not available to spend on another which might be equally beneficial. Who is to say whether it is more important that the poor should have affordable access to the courts or that they should have affordable access to hospitals, schools, or any of the other publicly provided services of the state. This is precisely the kind of policy decision which on any orthodox view of English public law is not for judges. It is an inescapably political question.

But there is a second approach. One could say that affordable access to justice was so fundamental a right that the state was under an absolute legal duty to provide it. From this it would follow that access to justice trumped all other calls on the state's budget. Put like that, the question ceases to be a political issue and becomes a legal one. A third approach is to recognise the absolute character of the duty to provide affordable access to the courts to the poor, while doing it in some other way. For example, one might make legal aid available on a more generous basis or increase income support payments so that the higher court fees became affordable. That approach raises yet further questions. The practical effect of providing legal aid is to increase the resources available to citizens provided that they spend it on litigation. Yet is litigation such a valuable part of our social culture that we should privilege it in this way? If Mr. Witham's income support payments had been increased by enough to pay the court fee, he might have preferred to spend the money on a holiday than on suing his detractor. Is this a choice that should be denied to him? These are not straightforward questions. But more important than their inherent difficulty is that they are not legal questions. We are back in the realms of politics. Mr. Witham's case came before a Divisional Court of the Queen's Bench division, which quashed the regulations. Laws J., one of the most thoughtful constitutional lawyers to have sat on the English bench in recent times, delivered the leading judgment. He considered that access to justice at an affordable price was not just another government service. It was a constitutional right, which could only be restricted with specific statutory authority. Since Britain does not have a written constitution, Laws J was exercising a purely judicial authority when he declared this constitutional right to exist. What he did not do was consider the implications of the question for the distribution of the government's resources or the appropriate method of helping the poor. Indeed, he seems to have thought that the question did not arise. This was because in his view reduced court fees were not a state subsidy supported by taxpayers' money: see p. 586D-E. He thought that in this respect they were different from legal aid, which the executive would be at liberty to regulate at its discretion.

Now, I am not saying that the result of this case was necessarily wrong, and in any event it was subsequently given statutory force. But it cannot possibly be justified on these grounds. Since the cost of running the courts greatly exceeds the revenue derived from court fees, reducing court fees inevitably involves a large measure of public subsidy, just as legal aid does. The real question was not about the importance of keeping down court fees, but about the relative importance of doing so, relative, that is, to other possible uses of the money or other possible ways of helping the poor. What the Divisional Court did was reduce the question before it to a binary question. Was it fundamental to the legal order that the poor should be able to afford court fees, Yes or No. By classifying the question in that narrow way, the court turned it into a question of law. Had it confronted the real issue, it might have concluded that it wasn't a justiciable issue at all. I cite this minor corner of English public law, because it perfectly illustrates the problems associated with the judicial resolution of questions with wider policy

implications. But this is not a problem peculiar to English law. There has been a notable tendency in other common law jurisdictions to characterise as questions of law issues which do not really lend themselves to a legal solution. The tendency has been particularly marked in the United States, where it was first noticed by the great French political scientist Alexis de Tocqueville as early as the 1830s. "Scarcely any political question arises in the United States," De Tocqueville wrote, "that is not resolved sooner or later into a judicial question." In Europe, much the most notable monument of this tendency to convert political questions into legal ones is the European Convention for the Protection of Human Rights and Fundamental Freedoms. This is such an important feature of the current British and European legal scene that it is worth dwelling on it for a while. The Convention is a treaty initially made between the non-communist countries of Europe in 1950, in the aftermath of the Second World War. It reflected the concern of European nations to ensure that the extremes and despotism and persecution characteristic of the German Third Reich were never repeated, as well as a growing fear of the new totalitarianism then coming into being in the Soviet-dominated communist block. In all countries of the Council of Europe, the Convention now has the force of law: that is to say that it is not just an international obligation of the signatory states, but is part of their domestic legal order. In the United Kingdom, effect has been given to it since 2000 by the Human Rights Act 1998. Alone of the many national and international declarations of human rights, the European Convention provides for its enforcement by an international court, the European Court of Human Rights at Strasbourg, with the right to hear individual petitions and to make decisions which the contracting states bind themselves to put into effect. In the United Kingdom, this is achieved by conferring on all public authorities, including the courts, a statutory duty to give effect to the Convention so far as statute permits. Where statute does not permit, the courts may make a declaration of incompatibility. The understanding is that Parliament will then amend the law so as to remove the inconsistency. The Act provides that in applying the Convention, the Courts are bound to have regard to the decisions of the Strasbourg court.

The text of the Convention is wholly admirable. It secures rights which would almost universally be regarded as the foundation of any functioning civil society: a right to life and limb and liberty, access to justice administered by an independent judiciary, freedom of thought and expression, security of property, absence of arbitrary discrimination, and so on. Nothing that I have to say this evening is intended to belittle any of these truly fundamental rights. But the European Court of Human Rights in Strasbourg stands for more than these. It has become the international flagbearer for judge-made fundamental law extending well beyond the text which it is charged with applying. It has over many years declared itself entitled to treat the Convention as what it calls a "living instrument". The way that the Strasbourg court expresses this is that it interprets the Convention in the light of the evolving social conceptions common to the democracies of Europe, so as to keep it up to date. Put like that, it sounds innocuous, indeed desirable. But what it means in practice is that the Strasbourg court develops the Convention by a process of extrapolation or analogy, so as to reflect its own view of what rights are required in a modern democracy. This approach has transformed the Convention from the safeguard against despotism which was intended by its draftsmen, into a template for many aspects of the domestic legal order. It has involved the recognition of a large number of new rights which are not expressly to be found in the language of the treaty. A good example is the steady expansion of the scope of Article 8. The text of Article 8 protects private and family life, the privacy of the home and of personal correspondence. This perfectly straightforward provision was originally

devised as a protection against the surveillance state by totalitarian governments. But in the hands of the Strasbourg court it has been extended to cover the legal status of illegitimate children, immigration and deportation, extradition, aspects of criminal sentencing, abortion, homosexuality, assisted suicide, child abduction, the law of landlord and tenant, and a great deal else besides. None of these extensions are warranted by the express language of the Convention, nor in most cases are they necessary implications. They are commonly extensions of the text which rest on the sole authority of the judges of the court. The effect of this kind of judicial lawmaking is in constitutional terms rather remarkable. It is to take many contentious issues which would previously have been regarded as questions for political debate, administrative discretion or social convention and transform them into questions of law to be resolved by an international judicial tribunal. There appear to me to be a number of potential issues about this way of making law. In the first place, it is not consistent with the ordinary principles on which written law is traditionally elucidated by judges. A system of customary law like the common law may within broad limits be updated and reformulated by the courts which made it in the first place. But very different considerations apply to a written instrument like the Convention, which records not just an agreement between states but the limits of that agreement. The function of a court dealing with such an instrument is essentially interpretative and not creative. The Vienna Convention of 1969 on the Law of Treaties requires every treaty to be interpreted in accordance with the ordinary meaning to be given to its terms, having regard to its object and purpose. While every one will have his own take on particular decisions, there are undoubtedly some cases in which the approach of the Strasbourg court to the Human Rights Convention goes well beyond interpretation, and well beyond the language, object or purpose of the instrument. In practice, it seeks to give effect to the kind of Convention that the Court conceives that the parties might have agreed today. This process necessarily involves the recognition by the Court of some rights which the signatories do not appear to have granted, and some which we know from the negotiation documents that they positively intended not to grant.

Secondly, the power to extrapolate or extend by analogy the scope of a written instrument so as to enlarge its subject-matter is not always easy to reconcile with the rule of law. It is a power which no national judge could claim to exercise in relation to a domestic statute, even in a common law system. It is potentially subjective, unpredictable and unclear. Beyond a very limited point, the reformulation of a written instrument so as to satisfy changed values since it was made is not necessarily an appropriate judicial function. Let me suggest an analogy drawn from recent English case-law. In Norris v United States of America [2008] 1 AC 920, a bold attempt was made by a Divisional Court in England to rewrite the elements of the common law offence of conspiracy to defraud, so as to cover economic cartels which, although unlawful, had never hitherto been regarded as criminal. The Divisional Court's decision would have been perfectly acceptable by Strasbourg standards. It was a response to changing attitudes to economic manipulation. Cartels are less acceptable today than they were a hundred years ago when the law in this area was made. But in the view of the House of Lords, which unanimously overturned the Divisional Court's decision, this was not an acceptable way for judges to change the law. Once a principle of law is established, Lord Bingham observed at [21], "the requirement of certainty is not met by asserting that at some undefined later time a different view would have been taken." There are of course particular reasons for insisting on the requirement of certainty in the criminal law. But, albeit within broader limits, the same principle must surely apply to all law. Third, the Strasbourg court's approach to judicial lawmaking gives rise, as it seems to me, to a significant

democratic deficit in some important areas of social policy. This is a particular problem given the inherently political character of many of the issues which it decides. Most of the human rights recognised by the Convention are qualified by express exceptions for cases where the national law or action complained of was "necessary in a democratic society" (or some equivalent phrase). The case-law of the Strasbourg court provides a good deal of guidance about how these qualifications are to be applied. The court must ask itself a number of questions. Is the measure being challenged necessary? Does it have a legitimate purpose? Does it conform to current practice among other signatories to the Convention? Does it pursue its purpose in a satisfactory way? What alternative and possibly less intrusive measures would have been enough? These questions have only to be stated for it to be obvious that they are questions of policy. Most people would regard them as inherently political questions. But their inclusion in the Convention to a considerable extent removes them from the arena of legitimate political debate, by transforming them into questions of law for judges. Lack of democratic legitimacy is a potential problem about all judge-made law. In a common law system it has to be accepted within limits. But it is a potentially a rather serious problem in the case of judicial decisions about supposedly fundamental rights. It is important to bear in mind that in a Parliamentary democracy the legislature can selectively enact into law whatever parts of the Convention or the case-law of the European Court of Human Rights it pleases. We do not need the Convention in order to introduce changes for which there is a democratic mandate. The Convention, and its judicial apparatus of enforcement, are only necessary in order to impose changes for which there is no democratic mandate. It is a constraint on the democratic process.

I think that most people would recognise that there must be some constraints on the democratic process in the interests of protecting politically vulnerable minorities from oppression and entrenching a limited number of rights that the consensus of our societies recognises as truly fundamental. Almost all written constitutions do this. But the moment that one moves beyond cases of real oppression and beyond the truly fundamental, one leaves the realm of consensus behind and enters that of legitimate political debate where issues ought to be resolved politically. An interesting illustration has recently been provided by a highly charged issue about the right of convicted prisoners in the United Kingdom to vote in elections. This rule has been part of the statute law of the United Kingdom since the inception of our democracy in the nineteenth century and has been regularly reviewed and re-enacted since. It has considerable public support. It may or may not be a good rule, but it has nothing to do with the oppression of vulnerable minorities. Yet in two cases, Hirst v United Kingdom and Scoppola v Italy, the European Court of Human Rights has held that the automatic disenfranchisement of convicted prisoners is contrary to the Convention. In both cases, the Court's reasoning revealed its limited interest in the democratic credentials of such policies. In the first, they declined to accept the argument based on democratic legitimacy on the ground that Parliament cannot have devoted enough thought to the penal policy involved. In the second, they disregarded it even more summarily on the ground that the issue was a matter of law for the court, and implicitly, therefore, not a matter for democratic determination at all. But of course to say that it is a question of law is simply to point out the problem. The Strasbourg Court directed the United Kingdom to bring forward legislative proposals intended to amend the relevant statute. The government has brought forward legislative proposals, but the United Kingdom Parliament has declined to approve them. The resultant collision between an irresistible force and an immoveable object was considered a month ago by the Supreme Court in R (on the application

of Chester) v Secretary of State for Justice [2013] UKSC 63, in which we held that we were bound to follow the law repeatedly declared by the Strasbourg Court, although we declined to grant a remedy as a matter of discretion.

The case-law of the European Court of Human Rights, which is largely based on the Court's view of what is appropriate to a democratic society, is an interesting example of the ambiguity of political vocabulary. Properly speaking, democracy is a constitutional mechanism for arriving at decisions for which there is a popular mandate. But the Convention and the Strasbourg court use the word in a completely different sense, as a generalised term of approval for a set of legal values which may or may not correspond to those which a democracy would in fact choose for itself. In his famous essay, "Politics and the English language", written in 1946, George Orwell observed that "if thought corrupts language, language can also corrupt thought." "Democracy" was prominent in the catalogue of words that he singled out as having become largely meaningless in consequence. To give the force of law to values for which there is no popular mandate is democratic only in the sense that the old German Democratic Republic was democratic. Personally, if I may be allowed to speak as a citizen, I think that most of the values which underlie judicial decisions on human rights, both at Strasbourg and in the domestic courts of the United Kingdom, are wholly admirable. But it does not follow that I am at liberty to impose them on a majority of my fellow-citizens without any democratic process. The answer which is normally put forward to defend of the democratic credentials of this kind of judge-made law is that Parliament has implicitly authorised it, by not reversing the decisions which it disapproved, or in the case of decisions under the Human Rights Convention, by passing the Human Rights Act 1998. I would suggest that the reality, however, is somewhat more complicated. The treatment of the Convention by the European Court of Human Rights as a "living instrument" allows it to make new law in respects which are not foreshadowed by the language of the Convention and which Parliament would not necessarily have anticipated when it passed the Act. It is in practice incapable of being reversed by legislation, short of withdrawing from the Convention altogether. In reality, therefore, the Human Rights Act involves the transfer of part of an essentially legislative power to another body. The suggestion that this is democratic simply confuses popular sovereignty with democracy. Of course, a sovereign Parliament may transfer part of its legislative power to other bodies which are not answerable even indirectly to the people of the United Kingdom. But it would be odd to deny that this undermines the democratic process, simply because Parliament has done it. A democratic Parliament may abolish elections or exclude the opposition or appoint a dictator. But that would not make it democratic.

I have spoken mainly of these questions in a British context because that it where my own experience lies. But the frame of mind underlying the case-law of the European Court of Human Rights is symptomatic of a much wider phenomenon, namely the resort to fundamental rights, declared by judges, as a prime instrument of social control and entitlement. The main casualty of that approach is the political process, which is no longer decisive over a wide spectrum of social policy. In many countries, including the United Kingdom, there is widespread disdain for the political process and some articulate support for an approach to lawmaking that takes the politics out of it. This reflects the contempt felt by many intelligent commentators for what they regard as the illogicality, intellectual dishonesty and the irrational prejudice characteristic of party politics. The American philosophers John Rawls and Ronald Dworkin

have been perhaps the most articulate modern spokesmen for this point of view. I think that their attitude, which is shared by some judges, overlooks some fundamental features of the political process. Democracy requires a minimum degree of social cohesion and tolerance of internal differences in order to function properly. But provided that these conditions exist, I would like to suggest to you that politics is quite simply a better way of resolving questions of social policy than judge-made law. The public law questions which come before the courts are commonly presented as issues between the state and the individual. But most of them are in reality issues between different groups of citizens. This applies particularly to major social or moral issues, and more generally to issues on which people hold strong and divergent positions. The essential function of politics in a democracy, is to reconcile inconsistent interests and opinions, by producing a result which it may be that few people would have chosen as their preferred option, but which the majority can live with. Political parties are rarely monolithic. Although generally sharing a common outlook, they are unruly coalitions between shifting factions, united only by a common desire to win elections. They therefore mutate in response to changes in public sentiment, in the interest of winning or retaining power. In this way, they can often be a highly effective means of mediating between those in power and the public from which they derive their legitimacy. They are instruments of compromise between a sufficiently wide range of opinions to enable a programme to be laid before the electorate with some prospect of being accepted. The larger a democracy is, and the more remote its political class from the population at large, the more vital this process of mediation is. It is true that the political process is often characterised by opacity, fudge, or irrationality, and who is going to defend those? Well, at the risk of sounding paradoxical, I am going to defend them. They are tools of compromise, enabling divergent views and interests to be accommodated. The result may be intellectually impure, but it is frequently in the public interest. Unfortunately, few people recognise this. They expect their politicians to be not just useful but attractive. They demand principle, transparency and consistency from them. And when they do not get these things, they are inclined to turn to courts of law instead.

The attraction of judge-made law is that it appears to have many of the virtues which the political process inevitably lacks. It is transparent. It is public. Above all, it is animated by a combination of abstract reasoning and moral valuejudgment, which at first sight appears to embody a higher model of decision-making than the messy compromises required to build a political consensus in a Parliamentary system. There is, however, a price to be paid for these virtues. The judicial resolution of major policy issues undermines our ability to live together in harmony by depriving us of a method of mediating compromises among ourselves. Politics is a method of mediating compromises in which we can all participate, albeit indirectly, and which we are therefore more likely to recognise as legitimate. During the 1960s, the United Kingdom Parliament enacted a number of measures designed to liberalise long-standing features of our law. Two notable monuments of this period were the decriminalisation of homosexuality and the authorisation in certain circumstances of abortion. These measures were highly controversial, and were strongly opposed by significant sections of the public. In both cases, the Parliamentary debates squarely addressed the moral issues, and represented the whole spectrum of contemporary opinion. The legislation which emerged contained carefully framed limitations and exceptions meeting some, although by no means all of the objections. By and large the results of these enactments have been accepted, and the principles underlying them have become largely uncontroversial. This is the paradigm case of how the political process ought to work. It also

suggests that it is perfectly capable of successfully addressing major moral issues which would today be characterised as engaging human rights. I venture to suggest that if similar reforms had been imposed judicially, they would not have been so readily accepted. The continuing controversy in the United States about the decision of the US Supreme Court in Roe v Wade 410 U.S. 113 (1973) to recognize judicially the almost unrestricted constitutional right of a woman to an abortion certainly suggests that that is so. Like other ancient nations, the United Kingdom has shown a remarkable ability to adapt peaceably to changing realities. Some of these changes have radically disturbed existing expectations and vested interests. Yet the law has adapted itself to them in a way which has generally been accepted by a broad consensus among its citizens. This process of compromise and adaptation in the face of disruptive social change owes almost everything to politics. Courts of law could not have done it. It is not their job.

I have already mentioned Professor Ronald Dworkin, whose death last year deprived us of one of the most formidable defenders of rights-based law defined by judges. He defended it against those who would leave this to the legislature, by arguing that judges were at more likely to get the answer right. "I cannot imagine", he wrote, "what argument might be thought to show that legislative decisions about rights are inherently more likely to be right than judicial decisions." The problem is that this assumes a definition of "rightness" which is hard to justify in a political community. How do we decide what is the "right" answer to a question about which people strongly disagree, without resorting to a political process to mediate that disagreement? Rights are claims against the claimant's own community. In a democracy, they depend for their legitimacy on a measure of recognition by that community. To be effective, they require a large measure of public acceptance through an active civil society. This is something which no purely judicial decision-making process can deliver. But I would go further than this. Unlike Professor Dworkin, I can imagine why legislative decisions about rights are more likely to be correct than judicial ones, even if what one is looking for is the intellectually or morally ideal outcome. The reason, as it seems to me, is that rights can never be wholly unqualified. Their existence and extent must be constrained to a greater or lesser extent by the rights of others, as well as by some legitimate collective interests. In deciding where the balance lies between individual rights and collective interests, the relevant considerations will often be far wider than anything that a court can comprehend simply on the basis of argument between the parties before it. Litigants are only concerned with their own position. Single interest pressure groups, who stand behind a great deal of public law litigation in the United Kingdom and the United States, have no interest in policy areas other than their own. The court, being dependent in the generality of cases on the material and arguments put before it by the parties, is likely to have no special understanding of other areas. Lon Fuller famously described these as "polycentric" problems. What he meant was that any decision about them was likely to have multiple consequences, each with its own complex repercussions for many other people. "We may visualise this kind of situation by thinking of a spider's web," he wrote; "a pull on one strand will distribute tensions after a complicated pattern throughout the web as a whole." In such a case, he suggested, it was simply impossible to afford a hearing to every interest affected. One of three consequences follows, and sometimes all three at once. First, the judge may produce a result which because of its unexpected repercussions is unworkable or ineffective or obstructive of other legitimate activities. Secondly, the judge may end up by acting unjudicially. He may consult third parties, or make guesses about facts of which he has no sufficient knowledge and cannot properly take judicial notice. Third, he may reformulate the issue so as to make it a one-dimensional question of law in which the only

relevant interests appear to be those of the parties before the court, which is what the Divisional Court did in Mr. Witham's case. Decisions made in this way are necessarily made on an excessively simplified and highly inefficient basis.

Now, I would be the first to acknowledge that some degree of judicial lawmaking is unavoidable, especially in an uncodified common law system. It is a question of degree how far this can go consistently with the separation of powers. Even in a case where the limits have been exceeded, I am not going to suggest that the fabric of society will break down because judges, whether sitting in London, Strasbourg, Washington or anywhere else, make law for which there is no democratic mandate. The process by which democracies decline is more subtle than that. They are rarely destroyed by a sudden external shock or unpopular decisions. The process is usually more mundane and insidious. What happens is that they are slowly drained of what makes them democratic, by a gradual process of internal decay and mounting indifference, until one suddenly notices that they have become something different, like the republican constitutions of Athens or Rome or the Italian city-states of the Renaissance.

Rabbi Jonathan Sacks, Colloquium on Marriage
The Vatican, November 18, 2014

I want this morning to begin our conversation by one way of telling the story of the most beautiful idea in the history of civilization: the idea of the love that brings new life into the world. There are of course many ways of telling the story, and this is just one. But to me it is a story of seven key moments, each of them surprising and unexpected. The first, according to a report in the press on 20th October of this year, took place in a lake in Scotland 385 million years ago. It was then, according to this new discovery, that two fish came together to perform the first instance of sexual reproduction known to science. Until then all life had propagated itself asexually, by cell division, budding, fragmentation or parthenogenesis, all of which are far simpler and more economical than the division of life into male and female, each with a different role in creating and sustaining life.

When we consider, even in the animal kingdom, how much effort and energy the coming together of male and female takes, in terms of displays, courtship rituals, rivalries and violence, it is astonishing that sexual reproduction ever happened at all. Biologists are still not quite sure why it did. Some say to offer protection against parasites, or immunities against disease. Others say it's simply that the meeting of opposites generates diversity. But one way or another, the fish in Scotland discovered something new and beautiful that's been copied ever since by virtually all advanced forms of life. Life begins when male and female meet and embrace.

The second unexpected development was the unique challenge posed to Homo sapiens by two factors: we stood upright, which constricted the female pelvis, and we had bigger brains – a 300 per cent increase – which meant larger heads. The result was that human babies had to be born more prematurely than any other species, and so needed parental protection for much longer. This made parenting more demanding among humans than any other species, the work of two people rather than one. Hence the very rare phenomenon among mammals, of pair bonding, unlike other species where the male contribution tends to end with the act of impregnation. Among most primates, fathers don't even recognise their children let alone care for them. Elsewhere in the animal kingdom motherhood is almost universal but fatherhood is rare.

So what emerged along with the human person was the union of the biological mother and father to care for their child. Thus far nature, but then came culture, and the third surprise.

It seems that among hunter gatherers, pair bonding was the norm. Then came agriculture, and economic surplus, and cities and civilisation, and for the first time sharp inequalities began to emerge between rich and poor, powerful and powerless. The great ziggurats of Mesopotamia and pyramids of ancient Egypt, with their broad base and narrow top, were monumental statements in stone of a hierarchical society in which the few had power over the many. And the most obvious expression of power among alpha males whether human or primate, is to dominate access to fertile women and thus maximise the handing on of your genes to the next generation. Hence polygamy, which exists in 95 per cent of mammal species and 75 per cent of cultures known to anthropology. Polygamy is the ultimate expression of inequality because it means that many males never get the chance to have a wife and child. And sexual envy has been, throughout history, among animals as well as humans, a prime driver of violence.

That is what makes the first chapter of Genesis so revolutionary with its statement that every human being, regardless of class, colour, culture or creed, is in the image and likeness of God himself. We know that in the ancient world it was rulers, kings, emperors and pharaohs who were held to be in the image of God. So what Genesis was saying was that we are all royalty. We each have equal dignity in the kingdom of faith under the sovereignty of God.

From this it follows that we each have an equal right to form a marriage and have children, which is why, regardless of how we read the story of Adam and Eve – and there are differences between Jewish and Christian readings – the norm presupposed by that story is: one woman, one man. Or as the Bible itself says: "That is why a man leaves his father and mother and is united to his wife, and they become one flesh."

Monogamy did not immediately become the norm, even within the world of the Bible. But many of its most famous stories, about the tension between Sarah and Hagar, or Leah and Rachel and their children, or David and Bathsheba, or Solomon's many wives, are all critiques that point the way to monogamy.

And there is a deep connection between monotheism and monogamy, just as there is, in the opposite direction, between idolatry and adultery. Monotheism and monogamy are about the all-embracing relationship between I and Thou, myself and one other, be it a human, or the divine, Other.

What makes the emergence of monogamy unusual is that it is normally the case that the values of a society are those imposed on it by the ruling class. And the ruling class in any hierarchical society stands to gain from promiscuity and polygamy, both of which multiply the chances of my genes being handed on to the next generation. From monogamy the rich and powerful lose and the poor and powerless gain. So the return of monogamy goes against the normal grain of social change and was a real triumph for the equal dignity of all. Every bride and every groom are royalty; every home a palace when furnished with love.

The fourth remarkable development was the way this transformed the moral life. We've all become familiar with the work of evolutionary biologists using computer simulations and the iterated prisoners' dilemma to explain why reciprocal altruism exists among all social animals. We behave to others as we would wish them to behave to us, and we respond to them as they respond to us. As C S Lewis pointed out in his book The Abolition of Man, reciprocity is the Golden Rule shared by all the great civilizations.

What was new and remarkable in the Hebrew Bible was the idea that love, not just fairness, is the driving principle of the moral life. Three loves. "Love the Lord your God with all your heart, all your soul and all your might." "Love your neighbour as yourself." And, repeated no less than 36 times in the Mosaic books, "Love the stranger because you know what it feels like to be a stranger." Or to put it another way: just as God created the natural world in love and forgiveness, so we are charged with creating the social world in love and forgiveness. And that love is a flame lit in marriage and the family. Morality is the love between husband and wife, parent and child, extended outward to the world.

The fifth development shaped the entire structure of Jewish experience. In ancient Israel an originally secular form of agreement, called a covenant, was taken and transformed into a new way of thinking about the relationship between God and humanity, in the case of Noah, and between God and a people in the case of Abraham and later the Israelites at Mount Sinai. A covenant is like a marriage. It is a mutual pledge of loyalty and trust between two or more people, each respecting the dignity and integrity of the other, to work together to achieve together what neither can achieve alone. And there is one thing even God cannot achieve alone, which is to live within the human heart. That needs us.

So the Hebrew word emunah, wrongly translated as faith, really means faithfulness, fidelity, loyalty, steadfastness, not walking away even when the going gets tough, trusting the other and honouring the other's trust in us. What covenant did, and we see this in almost all the prophets, was to understand the relationship between us and God in terms of the relationship between bride and groom, wife and husband. Love thus became not only the basis of morality but also of theology. In Judaism faith is a marriage. Rarely was this more beautifully stated than by Hosea when he said in the name of God:

I will betroth you to me forever;
I will betroth you in righteousness and justice, love and compassion.
I will betroth you in faithfulness, and you will know the Lord.

Jewish men say those words every weekday morning as we wind the strap of our tefillin around our finger like a wedding ring. Each morning we renew our marriage with God.

This led to a sixth and quite subtle idea that truth, beauty, goodness, and life itself, do not exist in any one person or entity but in the "between," what Martin Buber called Das Zwischenmenschliche, the interpersonal, the counterpoint of speaking and listening, giving and receiving. Throughout the Hebrew Bible and the rabbinic literature, the vehicle of truth is conversation. In revelation God speaks and asks us to listen. In prayer we speak and ask God to listen. There is never only one voice. In the Bible the prophets argue with God. In the Talmud rabbis argue with one another. In fact I sometimes think the reason God chose the Jewish people was because He loves a good argument. Judaism is a conversation scored for many voices, never more passionately than in the Song of Songs, a duet between a woman and a man, the beloved and her lover, that Rabbi Akiva called the holy of holies of religious literature.

The prophet Malachi calls the male priest the guardian of the law of truth. The book of Proverbs says of the woman of worth that "the law of loving kindness is on her tongue." It is that conversation between male and female voices, between truth and love, justice and mercy, law and forgiveness, that frames the spiritual life. In biblical times each Jew had to give a half shekel to the Temple to remind us that we are only half. There are some cultures that teach that we are nothing. There are others that teach that we are everything. The Jewish view is that we are half and we need to open ourselves to another if we are to become whole.

All this led to the seventh outcome, that in Judaism the home and the family became the central setting of the life of faith. In the only verse in the Hebrew Bible to explain why God

chose Abraham, He says: "I have known him so that he will instruct his children and his household after him to keep the way of the Lord by doing what is right and just." Abraham was chosen not to rule an empire, command an army, perform miracles or deliver prophecies, but simply to be a parent. In one of the most famous lines in Judaism, which we say every day and night, Moses commands, "You shall teach these things repeatedly to your children, speaking of them when you sit in your house or when you walk on the way, when you lie down and when you rise up." Parents are to be educators, education is the conversation between the generations, and the first school is the home.

So Jews became an intensely family oriented people, and it was this that saved us from tragedy. After the destruction of the Second Temple in the year 70, Jews were scattered throughout the world, everywhere a minority, everywhere without rights, suffering some of the worst persecutions ever known by a people and yet Jews survived because they never lost three things: their sense of family, their sense of community and their faith.

And they were renewed every week especially on Shabbat, the day of rest when we give our marriages and families what they most need and are most starved of in the contemporary world, namely time. I once produced a television documentary for the BBC on the state of family life in Britain, and I took the person who was then Britain's leading expert on child care, Penelope Leach, to a Jewish primary school on a Friday morning.

There she saw the children enacting in advance what they would see that evening around the family table. There were the five year old mother and father blessing the five year old children with the five year old grandparents looking on. She was fascinated by this whole institution, and she asked the children what they most enjoyed about the Sabbath. One five year old boy turned to her and said, "It's the only night of the week when daddy doesn't have to rush off." As we walked away from the school when the filming was over she turned to me and said, "Chief Rabbi, that Sabbath of yours is saving their parents' marriages."

So that is one way of telling the story, a Jewish way, beginning with the birth of sexual reproduction, then the unique demands of human parenting, then the eventual triumph of monogamy as a fundamental statement of human equality, followed by the way marriage shaped our vision of the moral and religious life as based on love and covenant and faithfulness, even to the point of thinking of truth as a conversation between lover and beloved. Marriage and the family are where faith finds its home and where the Divine Presence lives in the love between husband and wife, parent and child. What then has changed? Here's one way of putting it. I wrote a book a few years ago about religion and science and I summarised the difference between them in two sentences. "Science takes things apart to see how they work. Religion puts things together to see what they mean." And that's a way of thinking about culture also. Does it put things together or does it take things apart?

What made the traditional family remarkable, a work of high religious art, is what it brought together: sexual drive, physical desire, friendship, companionship, emotional kinship and love, the begetting of children and their protection and care, their early education and induction into an identity and a history. Seldom has any institution woven together so many

different drives and desires, roles and responsibilities. It made sense of the world and gave it a human face, the face of love.

For a whole variety of reasons, some to do with medical developments like birth control, in vitro fertilisation and other genetic interventions, some to do with moral change like the idea that we are free to do whatever we like so long as it does not harm others, some to do with a transfer of responsibilities from the individual to the state, and other and more profound changes in the culture of the West, almost everything that marriage once brought together has now been split apart. Sex has been divorced from love, love from commitment, marriage from having children, and having children from responsibility for their care.

The result is that in Britain in 2012, 47.5 per cent of children were born outside marriage, expected to become a majority in 2016. Fewer people are marrying, those who are, are marrying later, and 42 per cent of marriages end in divorce. Nor is cohabitation a substitute for marriage. The average length of cohabitation in Britain and the United States is less than two years. The result is a sharp increase among young people of eating disorders, drug and alcohol abuse, stress related syndromes, depression and actual and attempted suicides. The collapse of marriage has created a new form of poverty concentrated among single parent families, and of these, the main burden is born by women, who in 2011 headed 92 per cent of single parent households. In Britain today more than a million children will grow up with no contact whatsoever with their fathers.

This is creating a divide within societies the like of which has not been seen since Disraeli spoke of "two nations" a century and a half ago. Those who are privileged to grow up in stable loving association with the two people who brought them into being will, on average, be healthier physically and emotionally. They will do better at school and at work. They will have more successful relationships, be happier and live longer.

And yes, there are many exceptions. But the injustice of it all cries out to heaven. It will go down in history as one of the tragic instances of what Friedrich Hayek called "the fatal conceit" that somehow we know better than the wisdom of the ages, and can defy the lessons of biology and history. No one surely wants to go back to the narrow prejudices of the past.

This week, in Britain, a new film opens, telling the story of one of the great minds of the twentieth century, Alan Turing, the Cambridge mathematician who laid the philosophical foundations of computing and artificial intelligence, and helped win the war by breaking the German naval code Enigma. After the war, Turing was arrested and tried for homosexual behaviour, underwent chemically induced castration, and died at the age of 41 by cyanide poisoning, thought by many to have committed suicide. That is a world to which we should never return.

But our compassion for those who choose to live differently should not inhibit us from being advocates for the single most humanising institution in history. The family, man, woman, and child, is not one lifestyle choice among many. It is the best means we have yet discovered for nurturing future generations and enabling children to grow in a matrix of stability and love. It is where we learn the delicate choreography of relationship and how to handle the inevitable

conflicts within any human group. It is where we first take the risk of giving and receiving love. It is where one generation passes on its values to the next, ensuring the continuity of a civilization. For any society, the family is the crucible of its future, and for the sake of our children's future, we must be its defenders.

Since this is a religious gathering, let me, if I may, end with a piece of biblical exegesis. The story of the first family, the first man and woman in the garden of Eden, is not generally regarded as a success. Whether or not we believe in original sin, it did not end happily. After many years of studying the text I want to suggest a different reading.

The story ends with three verses that seem to have no connection with one another. No sequence. No logic. In Genesis 3: 19 God says to the man: "By the sweat of your brow you will eat your food until you return to the ground, since from it you were taken; for dust you are and to dust you will return." Then in the next verse we read: "The man named his wife Eve, because she was the mother of all life." And in the next, "The Lord God made garments of skin for Adam and his wife and clothed them."

What is the connection here? Why did God telling the man that he was mortal lead him to give his wife a new name? And why did that act seem to change God's attitude to both of them, so that He performed an act of tenderness, by making them clothes, almost as if He had partially forgiven them? Let me also add that the Hebrew word for "skin" is almost indistinguishable from the Hebrew word for "light," so that Rabbi Meir, the great sage of the early second century, read the text as saying that God made for them "garments of light." What did he mean?

If we read the text carefully, we see that until now the first man had given his wife a purely generic name. He called her ishah, woman. Recall what he said when he first saw her: "This is now bone of my bones and flesh of my flesh; she shall be called woman for she was taken from man." For him she was a type, not a person. He gave her a noun, not a name. What is more he defines her as a derivative of himself: something taken from man. She is not yet for him someone other, a person in her own right. She is merely a kind of reflection of himself.

As long as the man thought he was immortal, he ultimately needed no one else. But now he knew he was mortal. He would one day die and return to dust. There was only one way in which something of him would live on after his death. That would be if he had a child. But he could not have a child on his own. For that he needed his wife. She alone could give birth. She alone could mitigate his mortality. And not because she was like him but precisely because she was unlike him. At that moment she ceased to be, for him, a type, and became a person in her own right. And a person has a proper name. That is what he gave her: the name Chavah, "Eve," meaning, "giver of life."

At that moment, as they were about to leave Eden and face the world as we know it, a place of darkness, Adam gave his wife the first gift of love, a personal name. And at that moment, God responded to them both in love, and made them garments to clothe their nakedness, or as Rabbi Meir put it, "garments of light."

And so it has been ever since, that when a man and woman turn to one another in a bond of faithfulness, God robes them in garments of light, and we come as close as we will ever get to God himself, bringing new life into being, turning the prose of biology into the poetry of the human spirit, redeeming the darkness of the world by the radiance of love.

PALKO *v.* CONNECTICUT.

APPEAL FROM THE SUPREME COURT OF ERRORS OF CONNECTICUT.

No. 135. Argued November 12, 1937.—Decided December 6, 1937.

1. Under a state statute allowing appeal by the State in criminal cases, when permitted by the trial judge, for correction of errors of law, a sentence of life imprisonment, on a conviction of murder in the second degree, was reversed. Upon retrial, the accused was convicted of murder in the first degree and sentenced to death. *Held* consistent with due process of law under the Fourteenth Amendment. P. 322.
2. Assuming that the prohibition of double jeopardy in the Fifth Amendment applies to jeopardy in the same case if the new trial be at the instance of the Government and not upon defendant's motion, it does not follow that a like prohibition is applicable against state action by force of the Fourteenth Amendment. Pp. 322 *et seq.*

3. The Fourteenth Amendment does not guarantee against state action all that would be a violation of the original bill of rights (Amendments I to VIII) if done by the Federal Government. P. 323.
4. The process of absorption whereby some of the privileges and immunities guaranteed by the federal bill of rights have been brought within the Fourteenth Amendment, has had its source in the belief that neither liberty nor justice would exist if they were sacrificed. P. 326.
5. It is not necessary to the decision in this case to consider what the answer would have to be if the State were permitted after a trial free from error to try the accused over again or to bring another case against him. P. 328.
6. The conviction of the defendant upon the retrial ordered upon the appeal by the State in this case was not in derogation of any privileges or immunities that belonged to him as a citizen of the United States. *Maxwell* v. *Dow,* 176 U. S. 581. P. 329.

122 Conn. 529; 191 Atl. 320, affirmed.

APPEAL from a judgment sustaining a sentence of death upon a verdict of guilty of murder in the first degree. The defendant had previously been convicted upon the same indictment of murder in the second degree, whereupon the State appealed and a new trial was ordered.

Messrs. David Goldstein and *George A. Saden* for appellant.

Mr. Wm. H. Comley, with whom *Mr. Lorin W. Willis,* State's Attorney, was on the brief, for Connecticut.

MR. JUSTICE CARDOZO delivered the opinion of the Court.

A statute of Connecticut permitting appeals in criminal cases to be taken by the state is challenged by appellant as an infringement of the Fourteenth Amendment of the Constitution of the United States. Whether the challenge should be upheld is now to be determined.

Appellant was indicted in Fairfield County, Connecticut, for the crime of murder in the first degree. A jury

found him guilty of murder in the second degree, and he was sentenced to confinement in the state prison for life. Thereafter the State of Connecticut, with the permission of the judge presiding at the trial, gave notice of appeal to the Supreme Court of Errors. This it did pursuant to an act adopted in 1886 which is printed in the margin.[1] Public Acts, 1886, p. 560; now § 6494 of the General Statutes. Upon such appeal, the Supreme Court of Errors reversed the judgment and ordered a new trial. *State* v. *Palko,* 121 Conn. 669; 186 Atl. 657. It found that there had been error of law to the prejudice of the state (1) in excluding testimony as to a confession by defendant; (2) in excluding testimony upon cross-examination of defendant to impeach his credibility, and (3) in the instructions to the jury as to the difference between first and second degree murder.

Pursuant to the mandate of the Supreme Court of Errors, defendant was brought to trial again. Before a jury was impaneled and also at later stages of the case he made the objection that the effect of the new trial was to place him twice in jeopardy for the same offense, and in so doing to violate the Fourteenth Amendment of the Constitution of the United States. Upon the overruling of the objection the trial proceeded. The jury returned a verdict of murder in the first degree, and the court sentenced the defendant to the punishment of

---

[1] "Sec. 6494. *Appeals by the state in criminal cases.* Appeals from the rulings and decisions of the superior court or of any criminal court of common pleas, upon all questions of law arising on the trial of criminal cases, may be taken by the state, with the permission of the presiding judge, to the supreme court of errors, in the same manner and to the same effect as if made by the accused."

A statute of Vermont (G. L. 2598) was given the same effect and upheld as constitutional in *State* v. *Felch,* 92 Vt. 477; 105 Atl. 23.

Other statutes, conferring a right of appeal more or less limited in scope, are collected in the American Law Institute Code of Criminal Procedure, June 15, 1930, p. 1203.

death. The Supreme Court of Errors affirmed the judgment of conviction, 122 Conn. 529; 191 Atl. 320, adhering to a decision announced in 1894, *State* v. *Lee,* 65 Conn. 265; 30 Atl. 1110, which upheld the challenged statute. Cf. *State* v. *Muolo,* 118 Conn. 373; 172 Atl. 875. The case is here upon appeal. 28 U. S. C., § 344.

1. The execution of the sentence will not deprive appellant of his life without the process of law assured to him by the Fourteenth Amendment of the Federal Constitution.

The argument for appellant is that whatever is forbidden by the Fifth Amendment is forbidden by the Fourteenth also. The Fifth Amendment, which is not directed to the states, but solely to the federal government, creates immunity from double jeopardy. No person shall be "subject for the same offense to be twice put in jeopardy of life or limb." The Fourteenth Amendment ordains, "nor shall any State deprive any person of life, liberty, or property, without due process of law." To retry a defendant, though under one indictment and only one, subjects him, it is said, to double jeopardy in violation of the Fifth Amendment, if the prosecution is one on behalf of the United States. From this the consequence is said to follow that there is a denial of life or liberty without due process of law, if the prosecution is one on behalf of the People of a State. Thirty-five years ago a like argument was made to this court in *Dreyer* v. *Illinois,* 187 U. S. 71, 85, and was passed without consideration of its merits as unnecessary to a decision. The question is now here.

We do not find it profitable to mark the precise limits of the prohibition of double jeopardy in federal prosecutions. The subject was much considered in *Kepner* v. *United States,* 195 U. S. 100, decided in 1904 by a closely divided court. The view was there expressed for a majority of the court that the prohibition was not confined

to jeopardy in a new and independent case. It forbade jeopardy in the same case if the new trial was at the instance of the government and not upon defendant's motion. Cf. *Trono* v. *United States,* 199 U. S. 521. All this may be assumed for the purpose of the case at hand, though the dissenting opinions (195 U. S. 100, 134, 137) show how much was to be said in favor of a different ruling. Right-minded men, as we learn from those opinions, could reasonably, even if mistakenly, believe that a second trial was lawful in prosecutions subject to the Fifth Amendment, if it was all in the same case. Even more plainly, right-minded men could reasonably believe that in espousing that conclusion they were not favoring a practice repugnant to the conscience of mankind. Is double jeopardy in such circumstances, if double jeopardy it must be called, a denial of due process forbidden to the states? The tyranny of labels, *Snyder* v. *Massachusetts,* 291 U. S. 97, 114, must not lead us to leap to a conclusion that a word which in one set of facts may stand for oppression or enormity is of like effect in every other.

We have said that in appellant's view the Fourteenth Amendment is to be taken as embodying the prohibitions of the Fifth. His thesis is even broader. Whatever would be a violation of the original bill of rights (Amendments I to VIII) if done by the federal government is now equally unlawful by force of the Fourteenth Amendment if done by a state. There is no such general rule.

The Fifth Amendment provides, among other things, that no person shall be held to answer for a capital or otherwise infamous crime unless on presentment or indictment of a grand jury. This court has held that, in prosecutions by a state, presentment or indictment by a grand jury may give way to informations at the instance of a public officer. *Hurtado* v. *California,* 110 U. S. 516; *Gaines* v. *Washington,* 277 U. S. 81, 86. The Fifth Amendment provides also that no person shall be

compelled in any criminal case to be a witness against himself. This court has said that, in prosecutions by a state, the exemption will fail if the state elects to end it. *Twining* v. *New Jersey,* 211 U. S. 78, 106, 111, 112. Cf. *Snyder* v. *Massachusetts, supra,* p. 105; *Brown* v. *Mississippi,* 297 U. S. 278, 285. The Sixth Amendment calls for a jury trial in criminal cases and the Seventh for a jury trial in civil cases at common law where the value in controversy shall exceed twenty dollars. This court has ruled that consistently with those amendments trial by jury may be modified by a state or abolished altogether. *Walker* v. *Sauvinet,* 92 U. S. 90; *Maxwell* v. *Dow,* 176 U. S. 581; *New York Central R. Co.* v. *White,* 243 U. S. 188, 208; *Wagner Electric Mfg. Co.* v. *Lyndon,* 262 U. S. 226, 232. As to the Fourth Amendment, one should refer to *Weeks* v. *United States,* 232 U. S. 383, 398, and as to other provisions of the Sixth, to *West* v. *Louisiana,* 194 U. S. 258.

On the other hand, the due process clause of the Fourteenth Amendment may make it unlawful for a state to abridge by its statutes the freedom of speech which the First Amendment safeguards against encroachment by the Congress, *De Jonge* v. *Oregon,* 299 U. S. 353, 364; *Herndon* v. *Lowry,* 301 U. S. 242, 259; or the like freedom of the press, *Grosjean* v. *American Press Co.,* 297 U. S. 233; *Near* v. *Minnesota ex rel. Olson,* 283 U. S. 697, 707; or the free exercise of religion, *Hamilton* v. *Regents,* 293 U. S. 245, 262; cf. *Grosjean* v. *American Press Co., supra; Pierce* v. *Society of Sisters,* 268 U. S. 510; or the right of peaceable assembly, without which speech would be unduly trammeled, *De Jonge* v. *Oregon, supra; Herndon* v. *Lowry, supra;* or the right of one accused of crime to the benefit of counsel, *Powell* v. *Alabama,* 287 U. S. 45. In these and other situations immunities that are valid as against the federal government by force of the specific

pledges of particular amendments[2] have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states.

The line of division may seem to be wavering and broken if there is a hasty catalogue of the cases on the one side and the other. Reflection and analysis will induce a different view. There emerges the perception of a rationalizing principle which gives to discrete instances a proper order and coherence. The right to trial by jury and the immunity from prosecution except as the result of an indictment may have value and importance. Even so, they are not of the very essence of a scheme of ordered liberty. To abolish them is not to violate a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder* v. *Massachusetts, supra,* p. 105; *Brown* v. *Mississippi, supra,* p. 285; *Hebert* v. *Louisiana,* 272 U. S. 312, 316. Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without them. What is true of jury trials and indictments is true also, as the cases show, of the immunity from compulsory self-incrimination. *Twining* v. *New Jersey, supra.* This too might be lost, and justice still be done. Indeed, today as in the past there are students of our penal system who look upon the immunity as a mischief rather than a benefit, and who

---

[2] First Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Sixth Amendment: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence."

would limit its scope, or destroy it altogether.[3] No doubt there would remain the need to give protection against torture, physical or mental. *Brown* v. *Mississippi, supra.* Justice, however, would not perish if the accused were subject to a duty to respond to orderly inquiry. The exclusion of these immunities and privileges from the privileges and immunities protected against the action of the states has not been arbitrary or casual. It has been dictated by a study and appreciation of the meaning, the essential implications, of liberty itself.

We reach a different plane of social and moral values when we pass to the privileges and immunities that have been taken over from the earlier articles of the federal bill of rights and brought within the Fourteenth Amendment by a process of absorption. These in their origin were effective against the federal government alone. If the Fourteenth Amendment has absorbed them, the process of absorption has had its source in the belief that neither liberty nor justice would exist if they were sacrificed. *Twining* v. *New Jersey, supra,* p. 99.[4] This is true, for illustration, of freedom of thought, and speech.

[3] See, e. g. Bentham, Rationale of Judicial Evidence, Book IX, Pt. 4, c. III; Glueck, Crime and Justice, p. 94; cf. Wigmore, Evidence, vol. 4, § 2251.

Compulsory self-incrimination is part of the established procedure in the law of Continental Europe. Wigmore, *supra,* p. 824; Garner, Criminal Procedure in France, 25 Yale L. J. 255, 260; Sherman, Roman Law in the Modern World, vol. 2, pp. 493, 494; Stumberg, Guide to the Law and Legal Literature of France, p. 184. Double jeopardy too is not everywhere forbidden. Radin, Anglo American Legal History, p. 228.

[4] ". . . it is possible that some of the personal rights safeguarded by the first eight Amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law. *Chicago, Burlington & Quincy Railroad* v. *Chicago,* 166 U. S. 226. If this is so, it is not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law."

Of that freedom one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom. With rare aberrations a pervasive recognition of that truth can be traced in our history, political and legal. So it has come about that the domain of liberty, withdrawn by the Fourteenth Amendment from encroachment by the states, has been enlarged by latter-day judgments to include liberty of the mind as well as liberty of action.[5] The extension became, indeed, a logical imperative when once it was recognized, as long ago it was, that liberty is something more than exemption from physical restraint, and that even in the field of substantive rights and duties the legislative judgment, if oppressive and arbitrary, may be overridden by the courts. Cf. *Near* v. *Minnesota ex rel. Olson, supra; De Jonge* v. *Oregon, supra.* Fundamental too in the concept of due process, and so in that of liberty, is the thought that condemnation shall be rendered only after trial. *Scott* v. *McNeal,* 154 U. S. 34; *Blackmer* v. *United States,* 284 U. S. 421. The hearing, moreover, must be a real one, not a sham or a pretense. *Moore* v. *Dempsey,* 261 U. S. 86; *Mooney* v. *Holohan,* 294 U. S. 103. For that reason, ignorant defendants in a capital case were held to have been condemned unlawfully when in truth, though not in form, they were refused the aid of counsel. *Powell* v. *Alabama, supra,* pp. 67, 68. The decision did not turn upon the fact that the benefit of counsel would have been guaranteed to the defendants by the provisions of the Sixth Amendment if they had been prosecuted in a federal court. The decision turned upon the fact that in the particular situation laid before us in the evidence the benefit of counsel was essential to the substance of a hearing.

[5] The cases are brought together in Warren, The New Liberty under the 14th Amendment, 39 Harv. L. Rev. 431.

Our survey of the cases serves, we think, to justify the statement that the dividing line between them, if not unfaltering throughout its course, has been true for the most part to a unifying principle. On which side of the line the case made out by the appellant has appropriate location must be the next inquiry and the final one. Is that kind of double jeopardy to which the statute has subjected him a hardship so acute and shocking that our polity will not endure it? Does it violate those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions"? *Hebert* v. *Louisiana, supra.* The answer surely must be "no." What the answer would have to be if the state were permitted after a trial free from error to try the accused over again or to bring another case against him, we have no occasion to consider. We deal with the statute before us and no other. The state is not attempting to wear the accused out by a multitude of cases with accumulated trials. It asks no more than this, that the case against him shall go on until there shall be a trial free from the corrosion of substantial legal error. *State* v. *Felch,* 92 Vt. 477; 105 Atl. 23; *State* v. *Lee, supra.* This is not cruelty at all, nor even vexation in any immoderate degree. If the trial had been infected with error adverse to the accused, there might have been review at his instance, and as often as necessary to purge the vicious taint. A reciprocal privilege, subject at all times to the discretion of the presiding judge, *State* v. *Carabetta,* 106 Conn. 114; 127 Atl. 394, has now been granted to the state. There is here no seismic innovation. The edifice of justice stands, its symmetry, to many, greater than before.

2. The conviction of appellant is not in derogation of any privileges or immunities that belong to him as a citizen of the United States.

There is argument in his behalf that the privileges and immunities clause of the Fourteenth Amendment as well as the due process clause has been flouted by the judgment.

Maxwell v. *Dow, supra,* p. 584, gives all the answer that is necessary.

The judgment is

Affirmed.

MR. JUSTICE BUTLER dissents.

LEGAL SPECTATOR & MORE

Jacob A. Stein

COLD CASH UP FRONT

When I ask law students what they would like to do when they graduate, most say that at some time in their career they would like to try a case in federal court. They will be disappointed. They are more likely to appear in federal court as a defendant rather than as a lawyer.

There is yet another disappointment in store for them. They will never get a cash fee up front. The client who pays cold cash up front demonstrates the sincerest form of flattery known to the legal profession.

These days, an associate in a law firm who brought in cash up front would be met with a series of pointed questions: Are you involving us in money-laundering statutes? Where did the client get the money? Why didn't he pay by certified check? Don't you know that the Criminal Code has 10 different reporting statutes concerning cash? The associate would be brought before a committee and grilled for three hours and then told to return the

money and get a receipt and make a memorandum of the event and have the memorandum reviewed by a senior partner.

That was not always the case. Twenty-five years ago the criminal bar dearly loved to get cash in hand. The lawyer who got a good cash fee before noon walked with a spring to his step. He was open, friendly, optimistic, and generous. He lent money to his peers as needed. He invited those in his circle to lunch uptown. It may have been to Hammel's on 10th Street or to Harvey's on Connecticut Avenue, next to the Mayflower. Harvey's was special. The seafood was excellent. In addition, J. Edgar Hoover was on display at his own table, with his back to the wall.

Cash up front is entirely different from payment by check. The promised check may not be in the mail. Even if sent, it may bounce or be returned marked "Payment Stopped."

Robert I. Miller was a colorful member of the Fifth Street criminal bar in the good old days. He had a quick turnover, cash-up-front criminal practice. He carried around a big bankroll and did all his business in big bills.

In a proceeding before Judge David A. Pine in the United States District Court (I place the time in the 1950's), Mr. Miller cited a case during argument. The judge had reason to believe Mr. Miller never read the case.

Judge Pine: "Mr. Miller, do you have the case handy? If so, please hand the book up."

Miller, with a Toscanini-like gesture, handed the book up. He identified the page by placing a 100-dollar bill in the book as a marker. Judge Pine announced he was taking the matter under advisement. Judge Pine kept the book and the money for several months. He then had the clerk send the book back with a note

attached to the 100-dollar bill. The note said, "Motion denied—order to follow."

Mr. Miller's career was interrupted when he was indicted and tried for first-degree murder. He shot and killed a leading psychiatrist who was having a love affair with Mr. Miller's wife. The jury acquitted Miller. He immediately returned to his all-cash practice with more clients than he could handle. There were giants in the land in those days.

The up-front cash fee that I recall most vividly involved an impressive-looking gentleman who wished me to do a few things that at the time struck me as clerical. In looking back I see that what he involved me in was not that at all.

The cash part went like this. I was asked what my fee would be. I gave a number, and then I was apprehensive that I had asked too much. The gentleman said that he would not only pay me the $300 fee, but he would add another $200 to demonstrate his faith in my competence. He put his hand in his pocket and drew out the wad. He removed the wide rubber band and counted out in 50-dollar bills the $500. I got more than I thought I should have received, plus a bonus. And all up front.

I asked if he wanted a receipt. He said, "Receipt? What for?" I should have known better. Big butter-and-egg men who deal in cash don't want to be bothered with receipts.

When he left the office, I put the money on my desk and counted it again. I pocketed the money and took a walk to calm down.

I walked from my office at Seventh and F streets to Pennsylvania Avenue and turned right. Within a few blocks I was in the Benjamin Franklin bookstore (long since gone), asking the price of the 1929 *Merriam Webster Unabridged, India Paper, New International*

Dictionary of the English Language With a Reference History of the World. I had seen it in the window, and I hoped some day to buy it. Now was the day. Cash is not to be thrown away on necessities.

The proprietor said it was in mint condition and rare. I needed no sales talk. I knew all about it. I was there to buy—and to pay cash. The price was announced, $35. I extracted a 50-dollar bill from the roll. The book was taken from the window and placed on the counter. It was mine. Although the book weighed 10 pounds, I walked out and resumed my stroll, with the *Unabridged* under my arm.

I still have the dictionary. It defines "cash" as "ready money, paid immediately." This won't do. The full flavor comes in the slang definitions: cold cash, hard cash, spot cash, big bucks, bread, do-re-mi, gravy, moolah, folding lettuce, mazuma, green bucks, and the beautiful green.

If you had happened to walk past me as I strolled the avenue, you would have heard me singing to myself:

As I walk along the Bois Boolong
With an independent air,
You can hear the girls declare
"He must be a millionaire."
You can hear them sigh and wish to die,
You can see them wink the other eye
At the man who broke the bank at Monte Carlo.

Jacob Stein took part in the Bar Library Lecture Series on January 21, 2009 with a presentation on "Perjury, False Statements & Obstruction of Justice." Generous with his time, Mr. Stein was generous in other ways as well as indicated by the language in the preface to the third volume of *Legal Spectator* from which the following was taken. Mr. Stein wrote "This book is not copyrighted. Its contents may be reproduced without the express permission of, but with acknowledgement to, the author. Take what you want and as much as you want." The works featured in the *Legal Spectator*, originally appeared in the *Washington Lawyer*, the *American Scholar*, the *Times Literary Supplement*, the *Wilson Quarterly*, and the ABA Litigation Section's publication. I want to thank Bar Library Board of Director Henry R. Lord for his time and efforts in reviewing the writings of Mr. Stein for inclusion in the *Advance Sheet*.