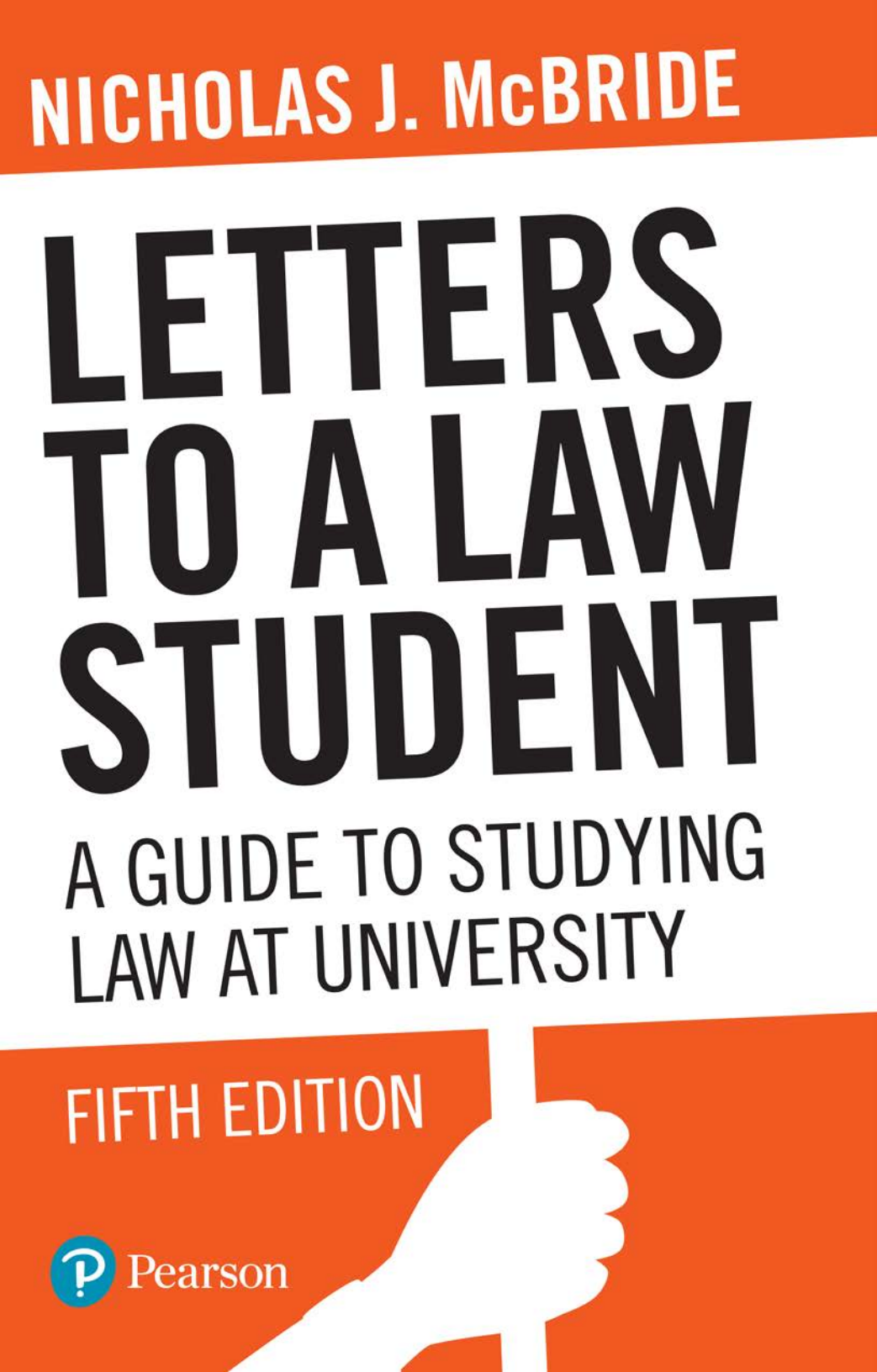
NICHOLAS J. McBRIDE

# LETTERS TO A LAW STUDENT

## A GUIDE TO STUDYING LAW AT UNIVERSITY

FIFTH EDITION



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# Letters to a Law Student

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# Letters to a Law Student

Fifth edition

Nicholas J McBride

Jason N.E. Varuhas

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To my favourite correspondents

Isabel, Ines and Luca

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# Preface

The fourth edition of *Letters to a Law Student* was written and published in 2017. Since then, in the words of WB Yeats' poem *Easter, 1916*, everything has 'changed, changed utterly'. One wishes one could observe with Yeats that with this change 'a terrible beauty is born'. It may be that one day we will be able to say this; in the meantime, the closing lines of a poem Yeats wrote three years later seem more appropriate: 'And what rough beast, its hour come round at last / Slouches towards Bethlehem to be born?' Whether that rough beast's progress is hindered or facilitated by our legal system will depend a lot on the quality of the students leaving our law schools; with the result that this edition of *Letters to a Law Student* has been written under the influence of a moral imperative that was missing from previous editions. Never has how we teach law students, and what they learn, at university seemed more vitally important.

Another moral imperative has been at work in this edition – one which springs out of what I tend to call (and have called in this edition) 'the problem of time'. The problem of time is that what students have to know in order to count themselves as culturally, politically, economically and philosophically literate expands over time, but the amount of time they have to become literate in these different ways remains fixed at about eight years (from the ages of 10 to 18). In the four years since the publication of the fourth edition of *Letters to a Law Student*, the problem of time has weighed on me more and more, and with it the thought that the failure of both schools and universities to tackle this problem head-on is resulting in students getting far less out of their time at university than they could and should. In preparing this edition, I have tried to make a start at addressing this problem, at least so far as law students are concerned.

The twin moral imperatives under which this edition was written are responsible for most of the new content in this edition, including seven completely new chapters, and also make this the best edition of *Letters to a Law Student* by a very long way; though this has been achieved without making this edition longer than the previous edition. Various other chapters have been completely rewritten, such as the chapters 'On doing the LNAT' and 'How to answer a problem question'. Other chapters have been updated to reflect

Covid-driven innovations in the way universities deliver both education and exams to their students (which innovations may well outlast Covid-19), as well as changes in the rules governing how one qualifies to be a practising solicitor in the UK.

The reader who is thinking about studying law should obviously read the entirety of Part One of this edition, and it would do them no harm to read Part Two as well. The reader who has made up their mind to apply to study law at university is in the reverse position. They should definitely read Part Two, and it would do them no harm to read Part One as well. Even if they will have no need to do the LNAT exam as part of the process of applying to study law, the section on dealing with the essay component of the LNAT exam may come in handy. Someone who has already obtained a place at university to study law may think that only Parts Three, Four and Five of the book are relevant to them – however, I would urge them also to read Parts One and Two (though they can skim Letters 4 and 14, ignoring anything that does not seem directly relevant to them).

The events of the past year and a half have emphasised the truth of Aristotle's observation that 'man is by nature a social animal' (*Politics*, 1253a). Anyone who gets anything out of this book owes a lot to those who have kept me going during the recent periods of enforced isolation: the three dedicatees of this book (to whom I owe everything), my brothers, Julius Grower, Jason Varuhas, the regulars at Penners Pub (sadly, a virtual rather than real institution), Shamima Dawood, Amelie Viljoen, Paul Davies, the staff and Fellows of Pembroke College, and of course my students. I also owe a substantial debt of gratitude to my physical therapists, Chris Campany and Agnes Osei, who have helped me overcome various Zoom-related ailments and once more given me a taste of what it is like to be a student, 30 years after I finished my last exam.

I am also extremely grateful to everyone at Pearson Education who has helped with production of this book, especially Victoria Tubb, Divya Sharma, Michelle Morgan, Sara Marchington, and Chithra Rajasekaran.

The process of writing a new edition of a book is always deeply confounding and shaming. When you write a book, it is like your baby – you can see no imperfections in it and fiercely defend its right to live against all comers. But when the time rolls round to write a new edition, all the ways in which the previous edition could have been better become glaringly obvious, and you begin to look on the old edition with the same cold eye that the newly crowned King Henry V turned on his old drinking companion Falstaff: 'I know thee not, old man' (*Henry IV, Part II* V.5). The lesson is that perfection is always beyond our grasp. But that does not mean we should not continue grasping at

it, and any students or teachers who have constructive suggestions as to how it might be changed for the better shouldn't hesitate to get in touch with me at njm33@cam.ac.uk. I would very much welcome hearing from you.

Nick McBride
Pembroke College, Cambridge
*July 2021*

# About the author

**Nick McBride** is a Fellow of Pembroke College, Cambridge. He was formerly a Fellow at All Souls College, Oxford, having studied Law at Brasenose College, Oxford both as an undergraduate and for the Oxford BCL exam. As well as *Letters to a Law Student*, he has written (with Roderick Bagshaw) a textbook on *Tort Law* (6th edition, 2018); (with Sandy Steel) an introductory book on studying jurisprudence called *Great Debates in Jurisprudence* (2nd edition, Palgrave Macmillan, 2018); an introductory book on contract law called *Key Ideas in Contract Law* (Hart Publishing, 2017) (part of a series of books on *Key Ideas* in law that he edits); and two books on the values underlying English private law, the nature of human flourishing, and the future of the West: *The Humanity of Private Law, Part I: Explanation* (Hart Publishing, 2019), and *The Humanity of Private Law, Part II: Evaluation* (Hart Publishing, 2020). In August 2020 he was appointed by the Lord Chancellor, Robert Buckland QC MP, to serve on an independent panel (chaired by Lord Faulks) that was asked to conduct an *Independent Review of Administrative Law*. He helped to co-author the panel's report, which was delivered to the government in March 2021, and underlay the Judicial Review and Courts Bill that the government subsequently sought to pass through Parliament.

# PART ONE

## THINKING ABOUT STUDYING LAW

# 1
# What is law?

## Dear Jess,

Thanks for your email. Your question – Why should I study law at university? – is a pretty big one, and deserves a letter rather than just a quick emailed response. For what it's worth, my quick answer would be: People should do a law degree because studying law is interesting, important, and educational. That doesn't necessarily mean that *you* should do a law degree. Law isn't for everyone. But as a subject for study, I think it's tough to find another subject that is as fascinating, and as significant, and as transformative as law is. So – that's the quick answer, but it's going to take me two letters to give you the long version. To understand what is so great about studying law, you first need to understand a bit about what law *is*. That's what I will talk about in this letter. I'll then send you a follow-up letter explaining why studying law at university is something you should give serious consideration.

## Law as a conversation

The question of 'What is law?' is one that continues to vex philosophers. But we might be able to make the concept of law more understandable through the following analogy. Suppose that you and I and a whole bunch of other people decide that we are going to go on holiday together. We all like each other, and we like spending time with each other, and a holiday is a great opportunity to do more of that. So – we're going on holiday, but we still have to decide where to go, when to go, where to stay, what to do, how we are going to get there, how much everyone is going to contribute to the cost of the holiday, who is going to be in charge of what. Loads of things. To work out the answers to these questions, *we need to talk to each other.* There are some issues that all of us

may have to talk about together, such as where we are going to go and when. There are other issues (such as transportation and accommodation) that we might be able to delegate to a few members of our party – and they will work those issues out together and report back to us. But however the various issues arising out of our plan to go on holiday are resolved, resolving them will require lots and lots of *conversations*.

What I want to suggest is that we can draw an analogy between the notion of law and the process of talking to each other in order to decide on the details of the holiday we are all going to go on. Instead of talking to each other to determine what sort of holiday we should go on, our law-makers talk to each other to determine *what sort of society we should live in*. So when we say 'What does the law say on such-and-such an issue?', we are really asking, 'Where are our law-makers at the moment in their conversation about what sort of society we should live in? Have they decided this issue already? If they have, what did they decide and is there any possibility of this issue being re-opened? If they haven't, then what does the state of conversation indicate at the moment about how our law-makers might resolve this issue?' The conversation is ongoing and intergenerational. The fact that a previous generation of law-makers may have taken a particular position on what sort of society we should live in does not mean that future generations cannot take a different position, thereby bringing about a change in the law. However, the views of previous generations of law-makers do not die with the law-makers; the record of those views lives on and has the potential to influence the views of the current generation. So great law-makers of the past, such as Sir Edward Coke (1552–1634), Lord Mansfield (1705–1793), Lord Shaftesbury (1801–1885), and Lord Denning (1899–1999), continue to have a voice in the conversations that go on today among our law-makers as to what sort of society we should live in.

Those conversations are conducted among and between two classes of law-maker: *judges* and *legislators*. Judges decide concrete *cases*, telling the parties to that case what the law says in that particular case. Legislators lay down general rules in the form of *statutory provisions*, both for people's guidance as to how they should behave and in order to empower people to act in socially productive ways. Both are engaged in determining what sort of society we should live in, and in performing their functions each give effect to visions of what sort of society we should live in. Law that emerges from the way judges decide concrete cases is known as *common law*. Law that is laid down by legislators is known as *statute law*.

The ultimate power to decide what sort of society we should live in rests with the legislators: in deciding cases, the judges must give effect to any relevant

legislative provisions that have been validly laid down by the legislators. Judges are subject to a further constraint that legislators are not. In deciding a case, a judge is required to give effect, not to his or her own *personal* vision of what sort of society we should live in, but to the vision that seems to be supported by the way the conversation among law-makers on this issue has evolved so far. For example, in *R (on the application of Nicklinson)* v *Ministry of Justice* (2012), a man who was completely paralysed and wished no longer to live sought a declaration from the courts that it would be lawful for a doctor to kill him. The judges who decided the case may have *personally* thought that we should live in a society where this sort of thing is allowed to be done. However, there was absolutely no support for the idea that we should live in a society that practises euthanasia either in statutory provisions created by legislators or cases previously decided by the judges. So the idea that euthanasia is acceptable is not one that had so far found any support in the evolving conversation between law-makers as to what sort of society we should live in. Given this, the court in *Nicklinson* had no option but to turn down the application, ruling that it could not hold that euthanasia was lawful until legislation had been passed making it lawful.

The requirement that judges not give effect to their own personal views as to what sort of society we should live in, but rather the emerging consensus among law-makers on this issue is a salutary one – however frustrating a particular judge (for example, one who believes strongly in the acceptability of euthanasia) might find it. The question of what sort of society we should live in is a very large and difficult one, and no one judge (or, indeed, any human being) can claim a monopoly of wisdom on this subject. Given this, a wise judge will listen with respect to the views of other law-makers – both past and present – on the issue of what sort of society we should live in, and will give greater weight to those views than his own, possibly mistaken, convictions on this issue. Of course, there are some judges (I could name a few . . .) who are determined to give effect to their own convictions, come what may – but there exist procedures for marginalising them: their judgments can be overturned on appeal, and they tend not to get promoted to the higher courts where they can have more influence on the direction of the conversation among law-makers as to what sort of society we should live in.

## A concrete example

Let me now give you an example to make clearer the idea I am advancing here of seeing law as an ongoing conversation that is aimed at determining what sort of society we should live in. In the *Belmarsh* case, *A* v *Secretary of State for*

*Home Department* (2004), the issue was whether the government was entitled to detain indefinitely non-nationals whom it suspected of being involved in terrorism. (The non-nationals were detained in Belmarsh Prison; so that's why the case is referred to as the *Belmarsh* case, for short.) Part of what makes the *Belmarsh* case fascinating is that so many different (though not necessarily incompatible) views as to what sort of society we should live in were relevant to deciding the case. All of these views have found their place in the ongoing conversation among our law-makers as to what sort of society we should live in. In deciding the *Belmarsh* case, the House of Lords had to determine which view should take precedence.

## (1) The rule of law

There is, first, the view that we should live in a society that places strict controls on how government power is exercised, so as to ensure that it is not exercised tyrannically or arbitrarily. This view – expressed by the ideal that we should be governed 'by law, and not by men'; in other words, that we should live under the *rule of law*, and not be ruled by arbitrary government fiat – is wonderfully expressed in both the arguments and judgment in the case of *Entick* v *Carrington*, which was decided way back in 1765. In that case, Entick sued Carrington and three others for trespassing on his land: they had gone into his house and searched it for papers, in pursuance of a warrant issued by a Secretary of State that purported to authorise them to make searches to find out who was publishing 'very seditious papers intitled *The Monitor*, or *British Freeholder*'. Entick's barrister argued:

> A power to issue such a warrant as this, is contrary to the genius of the law of England, and even if they had found what they searched for, they could not have justified under it . . . the verdict says such warrants have been granted by Secretaries of State ever since the Revolution; if they have, it is high time to put an end to them, for if they are held to be legal the liberty of this country is at an end; it is the publishing of a libel which is the crime, and not the having it locked up in a private drawer in a man's study; but if having it in one's custody was the crime, no power can lawfully break into a man's house and study to search for evidence against him; this would be worse than the Spanish Inquisition;

> for ransacking a man's secret drawers and boxes to come at evidence against him, is like racking his body to come at his secret thoughts. The warrant is to seize all the plaintiff's books and papers without exception, and carry them before Lord Halifax; what? has a Secretary of State a right to see all a man's private letters of correspondence, family concerns, trade and business? this would be monstrous indeed; and if it were lawful, no man could endure to live in this country.

The Lord Chief Justice, Lord Camden, found in favour of Entick:

> The great end, for which men entered into society, was to secure their property. That right is preserved sacred and incommunicable in all instances, where it has not been taken away or abridged by some public law for the good of the whole . . . By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my license, but he is liable to an action . . . If he admits the fact, he is bound to show by way of justification, that some positive law has empowered or excused him. The justification is submitted to the judges, who are to look into the books; and if such a justification can be maintained by the text of the statute law, or by the principles of common law. If no excuse can be found or produced, the silence of the books is an authority against the defendant, and the plaintiff must have judgment. According to this reasoning, it is now incumbent upon the defendants to show the law by which this seizure is warranted. If that cannot be done, it is a trespass. Papers are the owner's goods and chattels: they are his dearest property; and are so far from enduring a seizure, that they will hardly bear an inspection . . . Where is the written law that gives any magistrate such a power? I can safely answer, there is none; and therefore it is too much for us without such authority to pronounce a practice legal, which would be subversive of all the comforts of society.

On this view, any government power to detain people indefinitely on suspicion of being involved in terrorist plots is legally suspect as it places too much power in the hands of the government to act oppressively and arbitrarily.

## (2) Necessity

On the other hand, there is a view that we should live in a society where the government is empowered to do what is necessary to ensure the safety and security of the populace. This view – expressed by the Latin tag *salus populi suprema lex est* ('the safety of the people is the supreme law') – actually finds some support at the end of Lord Camden's judgment in *Entick* v *Carrington*:

> One word more for ourselves; we are no advocates for libels, all Governments must set their faces against them, and whenever they come before us and a jury we shall set our faces against them; and if juries do not prevent them they may prove fatal to liberty, destroy Government and introduce anarchy; but tyranny is better than anarchy, and the worst Government better than none at all.

The view that in an emergency, the government should be empowered to act in ways that would ordinarily be regarded as oppressive and tyrannical in order to secure public safety underlies the Civil Contingencies Act 2004, which purports to allow the government in an 'emergency' (defined as an event or situation 'which threatens serious damage' either to 'human welfare in', or to 'the environment of', 'a place in the United Kingdom') to make emergency regulations 'to make provision for the purpose of preventing, controlling or mitigating an aspect or effect of the emergency' when there is an urgent need to do so. This view also underlay the decision of the House of Lords in *Liversidge* v *Anderson* (1944), holding that where someone was detained under war-time regulations allowing the Home Secretary to order the internment of someone whom he had 'reasonable cause to believe [was] of hostile origin or associations', the courts would not inquire into whether there *was* reasonable cause to believe the detainee was 'hostile'; it would be enough that the Home Secretary *said* there was reasonable cause to believe this:

> The appellant's counsel truly say that the liberty of the subject is involved. They refer in emphatic terms to Magna Carta and the Bill of Rights, and they contend that legislation dealing with the liberty of the subject must be construed, if possible, in favour of the subject and against the Crown . . . I hold that the suggested rule has no relevance in dealing with an executive measure by way of preventing a public danger.

So, on this view, the ordinary requirements of the rule of law – which suggest that the exercise of government powers should be strictly controlled – should be relaxed where the public safety is at stake. On this view, then, giving the government power to detain people indefinitely when they are suspected of involvement in terrorism might not be so objectionable.

## (3) Democracy

A third view that was of crucial importance to the outcome of the *Belmarsh* case was the view that in our society difficult questions of how to balance the need for security against the need to respect people's liberties should be decided through democratic institutions that can fairly reflect the desires of the majority as to where that balance should be struck. This view underlies the doctrine of *Parliamentary sovereignty*, according to which the courts are not allowed to set aside or refuse to give effect to an Act of Parliament. (Note that – consistently with the theme of this letter – 'Parliament' literally means 'talking shop'.) The doctrine of Parliamentary sovereignty is felt to be so important that when Parliament passed the Human Rights Act 1998 and committed the UK to being a society in which the State observes people's human rights, as set out in the European Convention on Human Rights – even then, Parliament took care to provide in section 4 of the Act that the courts would still have to give effect to an Act of Parliament which the courts thought was inconsistent with the European Convention on Human Rights; all they could do in such a case was issue a 'declaration of incompatibility' and leave it up to Parliament to decide whether or not to amend the offending legislation and, if so, how.

The relevance of this third view to the outcome of the *Belmarsh* case is that Parliament had legislated to authorise the detention of the non-nationals whose detention had given rise to the litigation in *Belmarsh*. Under the Immigration Act 1971, the Home Secretary had a power to detain a non-national in custody while he was awaiting deportation. So a non-national who was suspected of being involved in terrorism could be deported from the UK and detained in custody under the 1971 Act while awaiting deportation. But many non-nationals who were suspected of being involved in terrorism could not be deported from the UK as there was a real fear that they would be tortured in the countries to which they would be deported. Such non-nationals could not be detained while awaiting deportation under the 1971 Act because deportation was not a prospect for them. Section 23 of the Anti-terrorism, Crime and Security Act 2001 dealt with this problem by providing that a non-deportable, non-national who was a 'suspected international terrorist' could

still be detained in custody 'while awaiting deportation' under the Immigration Act 1971 even though in practice he or she could never be deported.

The effective result of this provision was to allow the government to detain indefinitely in custody a non-national who was a 'suspected international terrorist' but who could not be deported from the UK. In creating this power, Parliament made it clear that it thought the need to ensure the security of the British people by detaining in custody non-nationals who were suspected of being involved in terrorism outweighed any concerns about depriving such non-nationals of their liberty. Given this, how could the courts justify taking a different view?

## (4) Discrimination

But there is, fourthly, a view that we should live in a society where the government and other important institutions are not allowed to discriminate against people for morally arbitrary reasons. This view has only comparatively recently found its way into the conversation among our law-makers about what sort of society we should live in. It finds expression in Lord Denning MR's great judgment in *Nagle* v *Feilden* (1966), where the Court of Appeal held that a horse owner could sue the Jockey Club for denying her a licence to act as a trainer merely because she was a woman:

> The common law of England has for centuries recognised that a man has a right to work at his trade or profession without being unjustly excluded from it. He is not to be shut out from it at the whim of those having the governance of it. If they make a rule which enables them to reject his application arbitrarily or capriciously, not reasonably, that rule is bad. It is against public policy. The courts will not give effect to it. Such was held in the seventeenth century in the celebrated case of the *Tailors of Ipswich* [1614] where they had a rule that no person was to be allowed to exercise the trade of a tailor in Ipswich unless he was admitted by them to be a sufficient workman. Lord Coke CJ held that the rule was bad, because it was 'against the liberty and freedom of the subject' . . . I have said before, and I repeat it now, that a man's right to work at his trade or profession is just as important to him as, perhaps more important than, his rights of property. Just as the courts will intervene to protect his rights of property, they will also intervene to protect his right to work . . . When an association, who have the governance of a trade, take

> it upon themselves to license persons to take part in it, then it is at least arguable that they are not at liberty to withdraw a man's licence – and thus put him out of business – without hearing him. Nor can they refuse a man a licence – and thus prevent him from carrying on his business – in their uncontrolled discretion. If they reject him arbitrarily or capriciously, there is ground for thinking that the courts can intervene.

(Note how Lord Coke can be seen here as talking to Lord Denning across a 300-year interval to shape Lord Denning's vision of what sort of society we should live in.) Lord Denning's theme was taken up by Parliament in passing the Equal Pay Act 1970 (requiring employers to pay their employees the same amount for work of equal value, regardless of their sex), the Sex Discrimination Act 1975 (requiring employers, education providers, shops and landlords not to discriminate unjustifiably between people on grounds of their sex), and the Race Relations Act 1976 (banning discrimination on grounds of race by employers, education providers, shops and landlords). The view that we should live in a society where the government and other important social institutions do not discriminate against people on morally arbitrary reasons has most recently been given expression in the Equality Act 2010, which brings together many earlier anti-discrimination provisions. It also underlies Article 14 of the European Convention on Human Rights, which provides that:

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

The relevance of this view to the *Belmarsh* case was that the power to detain suspected international terrorists that was under scrutiny in *Belmarsh* only applied to non-nationals: that is, people who were not UK citizens. So a UK citizen could not be detained indefinitely under s. 23 of the Anti-terrorism, Crime and Security Act 2001 even if he was also a 'suspected international terrorist'. One can understand why Parliament ended up in this position. On one view, Parliament may have thought that it was simply plugging a loophole in the original Immigration Act 1971, under which the government could only detain suspected terrorists who it wanted to deport if deportation was a practical

option. As the power to deport only applied to non-nationals, Parliament's 'fix' of the Immigration Act 1971 also only applied to non-nationals. On another – more cynical – view, it may be that Parliament intended that s. 23 of the 2003 Act should operate in a discriminatory fashion. Parliament may have thought that the people in the UK would not put up with the indefinite detention of a UK citizen on mere suspicion of being a terrorist, but might be relatively indifferent to someone who was not a UK citizen suffering a similar fate. Either way, the effect of s. 23 was that the power to detain suspected terrorists indefinitely in custody applied in an unacceptably discriminatory fashion – it worked against non-nationals but not against UK citizens when there might have been no morally significant difference between them.

## The outcome of the case

The doctrine of Parliamentary sovereignty made it inevitable that the House of Lords would have to rule that the indefinite detention of non-nationals who were suspected international terrorists was lawful under s. 23 of the 2001 Act. However, the House of Lords also made it very clear that the existence of such a power was repugnant to *their* vision of what sort of society we should live in, and declared that the power to detain indefinitely non-nationals who were suspected of involvement in terrorism was incompatible with the European Convention on Human Rights. Lord Hoffmann gave the most outspoken judgment:

> This is one of the most important cases which the House has had to decide in recent years. It calls into question the very existence of an ancient liberty of which this country has until now been very proud: freedom from arbitrary arrest and detention. The power which the Home Secretary seeks to uphold is a power to detain people indefinitely without charge or trial. Nothing could be more antithetical to the instincts and traditions of the people of the United Kingdom . . .
>
> Freedom from arbitrary arrest and detention is a quintessentially British liberty, enjoyed by inhabitants of this country when most of the population of Europe could be thrown into prison at the whim of their rulers. It was incorporated into the European Convention in order to entrench the same liberty in countries which had recently been under Nazi occupation. The United Kingdom subscribed to the Convention because it set out rights which British subjects enjoyed under the common

> law . . . This country, more than any other in the world, has an unbroken history of living for centuries under institutions and in accordance with values which show a recognisable continuity . . .
>
> [A] power [to detain on suspicion of being involved in terrorism] is not compatible with our constitution. The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these.

Though it was under no obligation to do so, Parliament listened to the House of Lords' views and repealed s. 23 of the 2001 Act, replacing it with a power under the Prevention of Terrorism Act 2005 to impose 'control orders' on an individual in order to prevent or restrict 'involvement by that individual in terrorism-related activity'.

## Where we are now

The *Belmarsh* case was just one episode in the great, centuries-long conversation between our law-makers about what sort of society we should live in. Stepping back a bit, it might be worth giving you an overview of where we are at the moment in this conversation (or at least where we would have been before Covid-19 triggered another twist in the conversation). Our law-makers seem to agree at the moment that we should live in a society where . . .

***Persons***

**(1)** . . . people are required to observe certain minimum standards of decent conduct in the way they treat other people, and will be able to obtain effective remedies from the courts when those minimum standards are not observed. These requirements and remedies are set out in the *law of tort*.

**(2)** . . . people who deliberately fail to observe these minimum standards may be punished by the State. The conditions under which such a person may be so punished are laid out in the *criminal law*.

**(3)** . . . people have the power to make binding promises, and enter into binding agreements, with other people, and effective remedies will be available from the courts when such binding promises or agreements are broken. These powers and remedies exist under the *law of contract*.

(4) . . . people are able to recover the value of money or other benefits that they have conferred on other people by mistake or under unacceptable pressure or in the confident expectation of getting something in return which never came. This power to recover a benefit one has conferred on someone else exists under the *law of restitution* or the *law of unjust enrichment* (different people prefer different titles for this area of law).

(5) . . . the sort of education people get, or where they work, or where they live, or what goods and services they can buy, or the way they are treated by the government will not be affected by their gender, or their race, or their sexual orientation, or any other morally irrelevant characteristic. Provisions ensuring that this is the case make up *anti-discrimination law*.

***Property***

(6) . . . people are able to acquire and dispose of property, and will have effective powers to control, retain and recover such property after they have acquired it and before they have disposed of it. The powers to acquire and dispose of property, and to control, retain and recover it are the subject matter of the *law of property* (which area of law is usually split up into *land law*, *the law of personal property* (or *commercial law*), and *intellectual property law*).

***Markets***

(7) . . . people are able to trade goods and services with each other, and are left free to determine for themselves the terms of trade – at least where they are of equal bargaining power. These powers to trade with each other and determine the terms of trade (and the limits on these powers) are also dealt with by the *law of contract*.

(8) . . . people are free to combine together to form companies, through which they can trade goods and services, sharing in the profits made by the company, while limiting their liabilities if the company is unsuccessful. These powers are dealt with by *company law*.

(9) . . . traders in the marketplace are required not to conspire together to rig their prices, or to abuse a dominant position that they have acquired in the marketplace to drive out any remaining competitors. These limits are dealt with by *competition law*.

*Families*

**(10)** . . . people are empowered to enter into life-long commitments of care and support to each other by marrying each other; on dissolution of the marriage, the courts will enforce those commitments by fairly redistributing the assets and future incomes of the parties to the marriage. The power to marry and the conditions for, and consequences of, a dissolution of a marriage are dealt with by *family law*.

**(11)** . . . parents have special responsibilities to look after their children, and powers to control what happens to their children; and non-parents are empowered to take on parental responsibilities towards children who are no longer cared for by their natural parents. Again, these aspects of social life are dealt with by *family law*.

*The State*

**(12)** . . . the State is empowered to define certain forms of anti-social conduct as punishable, and to punish those who engage in such forms of conduct. These forms of conduct and the punishments applicable to those who engage in them are laid out in the *criminal law*.

**(13)** . . . the State operates under the rule of law, which means that exercises of government power (other than the power to pass Acts of Parliament) are subject to strict controls to ensure that such powers are exercised rationally and in a way that is consistent: (i) with the reasons why those powers were created in the first place; (ii) with people's legitimate expectations as to how those powers will be exercised; (iii) with certain fundamentally important values such as the need to respect people's liberties and the importance of observing due process before making decisions that have a major impact on an individual's life. These limits on the exercise of government power are dealt with by *administrative law* or *public law* (different people use different titles for this area of law).

**(14)** . . . foreigners who have a well-founded fear of persecution in their own countries will be able to seek asylum here. The power to seek asylum in the UK is dealt with by *immigration law*.

**(15)** . . . Parliament is free to change any aspect of (1) – (14) above. As we have seen, this is known as the *doctrine of Parliamentary sovereignty*, and forms part of what is known as *constitutional law*.

Two points need to be made about this overview.

First, being an overview, it is necessarily extremely superficial. The study of law involves getting a much more detailed understanding of all of these different areas of law, finding out for example, *what* we are required to do for each other under the law of tort, *what* sort of things are capable of amounting to property and what are not, *what* will happen when a marriage is dissolved, and so on. Studying law also involves getting an understanding of how tensions between these different areas of law are resolved. For example, what happens when you and I enter into a contract under which you agree that I can treat you in a way that would normally be forbidden by the law of tort? And what happens when Parliament legislates to relax the controls that the courts would normally place on the exercise of government power?

Secondly, if this overview seems very familiar – and, dare I say it, a little bit boring (don't worry, the law gets a lot more interesting the more you know about it) – that is because it's basically describing the society you live in. Our law-makers made it that way, making a reality of their visions of what sort of society we should live in. Things could have been different. There were plenty of alternative visions of what sort of society we should live in available to our law-makers which they might have gone for, with the result that we would live today in a very different kind of society. And it may be that things will be very different in future: the conversation between our law-makers as to what sort of society we should live in may evolve in surprising directions in the next 50 years or so – and may be evolving in such directions as I write to you in 2021 – with the result that our society will become unrecognisably different from the sort of society we live in at the moment.

## To be continued . . .

That's enough from me for the time being. I hope you've got a good idea from this letter of what we are talking about when we talk about 'law' and obtained a few insights into the current state of the law in this country. If you have, you'll be in a much better position to understand my next letter – in which I'll explain why law is such a great subject to study at university. Until then,

All best wishes,

Nick

# 2
# Five reasons for studying law

## Dear Jess,

As promised, here's my follow-up letter setting out the various reasons why I think people should be interested in studying law at university. I've got five of them. Let's get straight into them.

## Brain training

The first reason for studying law at university is that doing a law degree is great at helping you learn how to think *carefully*, *imaginatively* and *sensibly*. I am not sure how much schools do nowadays in helping their students to *think* – students I meet say that much more emphasis is placed on rote learning and regurgitating information. Certainly, when I ask them to discuss a situation raising some issue of law, their responses seem to be much more guided by their instincts and emotions, rather than their carefully and imaginatively reasoning their way to a sensible conclusion. I find this really sad. In these benighted times, we need more than ever people who can think properly – and if you haven't acquired that ability at school, then doing a law degree is a great way to catch up.

So how does studying law help you to think properly? Well, consider the following situation which I sometimes ask students I meet to consider. You are told that:

> Someone commits murder if his or her actions cause another to die and he or she performed those actions intending to kill someone or to cause someone to suffer serious bodily harm and he or she had no lawful justification or excuse for acting as he or she did.

In light of this information, consider whether D has committed murder in the following situation:

> T, a notorious terrorist, kidnaps D's wife and two children and threatens to kill them unless D delivers a package containing a bomb to V, the ambassador at an embassy to which D has access. D delivers the package. When V opens the package, it explodes and V dies.

So – what do you *think*? If you are thinking carefully, you will note that the definition of murder with which you have been supplied has three elements – and *all* of them need to be present for murder to be committed. So we need to establish that: (1) D's actions caused V to die; and (2) D acted as he did with an intent to kill or an intent to cause serious bodily harm; and (3) D had no lawful justification or excuse for acting as he did.

Taking each element in turn, it is clear that D's actions did cause V to die – had he not done what he did, V would not have been killed. But did D have an intent to kill when he acted as he did? This is where a lot of students trip up – they say that if D knew that the package contained a bomb, then he intended to kill V when he delivered the bomb. In that situation, D will certainly have *foreseen* that V would very probably die if he delivered the package – but if we are thinking *carefully* we will wonder whether we can always be said to intend what we foresee will happen as a result of our actions. After all, why would we have two different words for what we intend and what we foresee if they were the same thing? In order to test out whether we can always be said to intend something that we foresee will happen as a result of our actions, we have to use our *imagination* to come up with a *hypothetical example* to test this out. For example, I foresee that writing this letter to you will result in my getting quite tired. (Thinking *is* hard work!) But does that mean that I intend to get tired when I write to you? That sounds pretty implausible. Intending something to happen seems to be different from foreseeing that something will happen. If you intend something to happen, you *try* to make it happen – and when D delivers the package, he isn't trying to kill V. He is just trying to deliver the package. So if we are careful in the way we think about the situation presented above, we will conclude that D is not guilty of murder.

But what about this situation?

> T, a notorious terrorist, kidnaps D's wife and two children and threatens to kill them unless D kills his best friend, V, who is an important politician. D kills V.

Here D's actions have caused V to die, and D acted as he did with an intention to kill – he was trying to kill V when he killed V. So D will have committed murder in this situation *unless* he had a lawful justification or excuse for acting as he did. At this point instincts or emotions will lead a lot of students to say that he did have a justification or excuse for acting as he did. After all, if he hadn't done what he did, three people would have died, and surely three people surviving and one person dying is better than three people dying and one person surviving?

Well, let's *think* about it. If we were thinking carefully, we would note that the definition of murder refers to someone having no lawful *justification* or *excuse* for acting as they did. The fact that two different words are used here might indicate that they are referring to two different things. When we say that X's actions are justified, we seem to be saying that X did the *right thing*, in the circumstances. But when we say that X's actions are excused, we seem to be saying something different. Doing the right thing needs no excuse. It's only when you do the wrong thing, that you might seek to be excused for what you did. And when people ask to be excused, they almost always do so on the basis that their conduct, while wrong and regrettable, was so *understandable* that it would be *wrong to blame them* for acting as they did.

So this indicates that D has two ways of arguing that the final element in the definition of murder was not present in his case. He could argue that: (1) he did the right thing in acting as he did; or (2) he did the wrong thing in acting as he did, but his actions were so understandable that it would be wrong to blame him for acting as he did. So let's think about whether he can make either of these claims.

First of all, did D do the right thing in doing what he did? As we have just seen, a lot of students instinctively think that he did – three people living and one person dying is better than three people dying and one person surviving. But let's *think* about that for a second, with the help of another hypothetical example. Suppose that you suffer from some medical condition which means that you only have one year to live. But you are told that your condition can be completely cured by a full body blood transfusion, which would involve

replacing your entire blood supply with blood extracted from X's body. The transfusion would have the effect of killing X – who would, as a result, have to be forced into donating his blood – but will save your life. Would you want to go ahead with the blood transfusion? I think most people would say 'no'. They would not want their continued existence to be paid for with the killing of an innocent person like X. If this is right, then D's wife and two children might each prefer that D not preserve their lives by killing V. And if that is right, then it becomes much harder to argue that D did the right thing in killing V – if the very people for whose sake he was killing V would have preferred him not to do so, then it's hard to find a basis for arguing that he did the right thing in killing V.

D might find it easier to argue that he should be excused for doing what he did. He would claim that while he might have done the wrong thing in killing V, it was understandable that he found it difficult, if not impossible, to stand up to T's threats and allow T to kill his wife and children. Different people might have different views on this. This is what Lord Hailsham thought, in rejecting the idea that an ordinary person could not be expected to stand up to T's threats and that it would have required D to exhibit an extraordinary degree of heroism to do so:

> I must say that I do not at all accept in relation to the defence of murder it is either good morals, good policy or good law to suggest . . . that the ordinary man of reasonable fortitude is not to be supposed to be capable of heroism if he is asked to take an innocent life rather than sacrifice his own. Doubtless in actual practice many will succumb to temptation . . . But many will not, and I do not believe that as a 'concession to human frailty' the former should be exempt from liability to criminal sanctions if they do. I have known in my own lifetime of too many acts of heroism by ordinary human beings of no more than ordinary fortitude to regard a law as either 'just or humane' which withdraws the protection of the criminal law from the innocent victim and casts the cloak of its protection upon the coward and the poltroon in the name of a 'concession to human frailty'.

What do *you* think? Note that Lord Hailsham is only talking there of a situation where someone kills an innocent person in order to save his *own* life. Might things be different where you kill in order to save the lives of other people whom you love?

# Rhetoric

So the first reason for studying law at university is that it helps sharpen your mind. The second reason for studying law is that it helps sharpen your tongue and pen as well. Studying Law is the closest you can come to getting a course in what the ancient Greeks and Romans would have called *rhetoric*: the art of persuading someone to adopt a particular point of view by speaking and writing effectively.

Rhetoric is not something that is taught any more in schools, and it shows when my students come to university. As a general rule, they don't know how to write effective essays: essays that argue effectively for a particular point of view. Their essays are full of: 'On the one hand . . . on the other hand'; 'It is necessary to bear the following points in mind . . .'; 'It might be argued that . . .' They are very painful to read, and must be pretty boring to write. There is no sense of any spark of life or inspiration behind them; no sense that the essay is animated by a positive desire to change the way the reader thinks about things. It is all just lifeless, going through the motions.

Studying law at university helps change all that. Because law is, at base, all about a conversation about what sort of society we should live in, the one immutable rule for lawyers is: *Express yourself clearly or die*. Let's call this the *iron rule of lawyering*: If you cannot express yourself clearly, there is no room for you in the law. So, for example, if you are a law-maker, obscurity will doom all your efforts at making law to failure. Lon Fuller makes this point vividly in a parable about a would-be law-maker, Rex:

> Rex . . . announced to his subjects that henceforth he would act as a judge in any disputes that might arise among them. In this way . . . he hoped that [by] proceeding case by case, he would gradually work out a system of rules that could be incorporated in a code.

> Unfortunately . . . [t]he venture failed completely. After he had handed down literally hundreds of decisions neither he nor his subjects could detect in those decisions any pattern whatsoever. Such tentative toward generalization as were to be found in his opinions only compounded the confusion, for they gave false leads to his subjects and threw his own meagre powers of judgment off balance in the decision of later cases . . .

> Rex now realized that there was no escape from a published code declaring the rules to be applied in future disputes. . . . Rex worked diligently on a revised code, and finally announced that it would shortly be published. This announcement was received with universal gratification. The dismay of Rex's subjects was all the more intense, therefore, when his code became available and it was discovered that it was truly a masterpiece of obscurity. Legal experts who studied it declared that there was not a single sentence in it that could be understood either by an ordinary citizen or by a trained lawyer. Indignation became general and soon a picket appeared before the royal palace carrying a sign that read, 'How can anybody follow a rule that nobody can understand?'

I don't know of any judge whose voice is still listened to in the ongoing conversation among law-makers about what sort of society we should live in who was not a master at expressing himself (or herself) clearly. (Have a look at any of the judgments quoted in my last letter to see some examples of judges expressing themselves extremely clearly.) Obscure and unclear judgments have a very short shelf-life. The same is true of statutory provisions. Any statutory provision that is not expressed clearly enough to be understood is soon withdrawn or revised, or attracts such a wealth of caselaw trying to make it clear what the statutory provision says that you might as well just retain the caselaw and throw away the underlying provision.

The *iron rule of lawyering* also applies to legal academics writing about the law. A legal academic who cannot make him or herself understood by his or her peers will have no future as an academic. I can count on the fingers of one hand the number of legal academics who have achieved some kind of world renown without being able to write really clearly – but as soon as they retire, their renown will quickly fade as people become less and less willing to make the effort to try to understand what they were trying to say. Law has seemed immune from the modern fad for identifying obscurity with profundity that has invaded other disciplines such as English, or Theology, or Philosophy or any of the social sciences other than law. Students in those disciplines have to weary their minds trying to make sense of rubbish like this:

> Both Pound's 'Portrait [d'une Femme]' and Eliot's ['Portrait of a Lady'] constitute a kind of *epyllion* which, as we shall see, is a pattern they used a great deal – the parallel actions function as a plot and counterplot which

enrich each other by their interplay. Poe's 'Descent into the Maelstrom' has structurally much in common with the vortices of the Cantos. Similarly, the 'Sargasso Sea' is a vortex that attracts multitudinous objects but which also tosses things up again in recognizable patterns which serve for survival.

Law students, in contrast, get to feast on gems like this:

A search warrant has to be specifically justified or it gives no authority to enter premises or take away goods. So held Lord Camden. A Good Thing. The policeman may, however, seize any suspicious goods he finds. So holds our Court of Appeal. A Bad Thing. Lord Denning MR explains that there are more wicked people about now; more innocent people, consequently, must suffer without redress. Diplock LJ refuses to follow the liberal reasoning of *Entick* v *Carrington* on the ground that our police forces are better today; might they not become better still if they had to pay for their mistakes? Salmon LJ said that the warrant could have been drawn so as to protect the police; his decision means that they needn't bother: *Chic Fashions (West Wales) Ltd* v *Jones* [1968] 2 WLR 201.

Can it be said on occasion . . . judges give effect in court to political views which might fairly be described as right-of-centre-upper-middle-class? I think it is possible to argue that they do, and that, on occasion, when free to do otherwise they either go out of their way to protect the well-to-do, or make decisions within the framework of tolerated debate which is congenial to that group only. Some litigation is conducted with little overt sensitivity to the political context in which it takes place. It is not that two views are debated and one rejected but rather, as in a one-party state, only two variants of one view. Some judges like to say that the most important person in court is the party who is going to lose. Every effort must be made to persuade him that his views have been listened to. They are also often aware that there are parties not before the court for whom the matter is at least as important. What has to be said is that there are sometimes political non-party losers whose views are wholly unrepresented in the debate. We are all of us in favour of protecting the

rights of the individual, but it is possible to disagree as to what those rights are when they meet with the novel demands of a welfare state. Collectivism will not hold the same terror for the down-and-out as it holds for the up-and-in.

Practising lawyers such as solicitors (who represent clients in legal matters outside court) and barristers (who represent clients in legal matters inside court) are also bound by the *iron rule*. Solicitors who cannot advise their clients clearly as to their legal rights will lose those clients very quickly. A barrister who cannot argue a case effectively in court will soon find him or herself running short of briefs.

Finally, law students are not exempt from the *iron rule*. Law students are expected to write essays that make effective arguments in favour of a particular view of what the law says, or what it should say. In exams, these essays tend to have to be written in as little as 40 minutes to an hour. So law students who want to be successful as law students need to learn how to say a lot, and to say it clearly, in two or three pages. This is very difficult: brevity is always much harder to achieve than loquaciousness. (Blaise Pascal, the French mathematician and philosopher, once joked: 'I have made this letter longer than usual, because I lack the time to make it short.') But you cannot do well as a law student without learning how to get to the point quickly and make every word count.

It is no accident, I think, that so many of the greatest orators of all time – such as Demosthenes, Cicero, Daniel Webster, Henry Clay, Abraham Lincoln, and William Jennings Bryan – were all lawyers before going on to achieve fame as great speech-makers. It's no accident either that the speech for which Abraham Lincoln is most famous – the Gettysburg Address – is only 272 words long. (In contrast, the Professor of Greek Literature who spoke before Lincoln at the Dedication Ceremony at Gettysburg spoke for two hours.)

## Politics

The third reason for studying law is that it helps you to form your own views as to what sort of society we should live in, and puts you in a good position to provide an informed contribution to the future shaping of our society – whether simply by voting in elections, or by working within politics yourself. Of course, it might be argued that studying philosophy at university would serve just as

well to prepare you for a career in politics. However, there is a crucial difference. When you study philosophy, you are looking at a set of thinkers' *abstract* ideas as to how society should be ordered. But law exists at the cutting edge of shaping society. As a result, law-makers have a special responsibility that philosophers are not subject to – the ideas for arranging society that law-makers give effect to *have to work in practice*. They have to do more good than harm. If they don't, then the law-makers' efforts will eventually be overturned. Once the law-maker is off the scene (either fired or retired), his or her contributions to the law will be reversed and the law will be put on a more beneficent path. In a sermon preached in 1853, Theodore Parker said: 'I do not pretend to understand the moral universe . . . [But] I am sure it bends towards justice.' Whether that is true or not of the 'moral universe', it is certainly true of legal systems. In Lord Mansfield's striking phrase, the law eventually 'works itself pure' of its past failures. So when you study law, you develop a practical sense of what works and what doesn't work in ordering society. That, I think, is a very important thing to know if you are going to get involved in politics – and that is not something that studying abstract political theories on a philosophy course can give you. Indeed, it is striking how many philosophical ideas, once put into practice, have proven to have terrible consequences.

Moreover, studying law – and, in particular, English law – introduces you to a particular *method* of effecting social change. This is perhaps English law's greatest contribution to the world – the *common law method* of making law. All law-makers are faced with the problem of their lack of omniscience – the fact that they cannot anticipate all the consequences of their law-making activity, and can end up doing much more harm than good through that activity. The common law method of making law was the English lawyers' solution to this problem. Until the twentieth century, the English law was primarily *common law*; that is, law that had been developed as a result of the decisions of the courts in concrete cases. And in developing the law, the courts would decide on a *case by case basis* what the law said. This method of making law – the *common law method* – allowed the English courts a lot of leeway to experiment with the law.

In a particular case, one judge might suggest that the law said *x*. In later cases, other judges would have a look at this suggestion and ignore it, modify it, apply it, or expand on it. And then other judges in further cases would see what they made of that development, and adjust it accordingly. In this way, the common law – the law as developed in the courts – emerged out of a process of trial and error, where only rules and doctrines that generally satisfied the judges as being reasonable would survive to become part of the established common law. In this way the law-maker's problem of lack of omniscience was