ADVANCE SHEET– NOVEMBER 27, 2020

President's Letter

This issue contains three very disconnected documents.

The first is a famous and provocative essay, written in 1930 in the depths of the depression, in which the economist John Maynard Keynes predicted that a century later, the standard of living would be four to eight times higher, banishing serious economic cares. The first part of this prophecy has been generally realized, though Keynes under-rated the human propensity, once adverted to by Learned Hand, to convert luxuries into necessities.

The second is the Executive Summary of the famous or infamous report of the Kirwan Commission on Maryland education. Though styled an "interim report", it is in reality the final report since the further work of the Commission involved the drafting of bills, not production of a summary document. Though much 'hyped' in the press and by politicians, few are familiar with the actual recommendations. Broadly speaking, the Commission recommends enormous investments in pre-school education, an improved college preparatory curriculum using international standards, an improved vocational education track, added qualifications and pay for teachers, and a system of top-down accountability. Three reform measures, familiar in foreign countries, are conspicuous by their absence: there is no provision for building-level boards for each school which would eliminate the 'educationist' personnel monopoly; there is no provision for extra pay for teachers in scarce disciplines including the physical sciences, critical languages, and aspects of special education; and the new requirements for teachers are 'add-ons' which do not limit the present requirement of nearly a year of 'education' courses for all teachers which exclude 90% of college graduates from the teaching force. Little also is said about 'distance learning', which the virus crisis showed to be seriously inhibited by existing state legislation.

The third, our fortnightly judicial opinion, is the recent unanimous opinion of the Supreme Court of Great Britain holding that the British Prime Minister had improperly suspended the sitting of parliament. This was not an exercise of judicial activism to impugn legislative acts on the American model, but a vindication of parliamentary supremacy, a principle also embodied in the forgotten Article I, Section 1 of the Constitution of the United States.

In addition to Members of the Library, many recipients of this publication have had their names added to our mailing list at the suggestion of various directors. This time of year is the occasion for our annual fund-raising campaign, and readers wishing to contribute to our magazine, in-person and zoom events, and other activities are encouraged to send contributions to 'Library Company of the Baltimore Bar, 100 N. Calvert Street, Room 618, Baltimore, Maryland 21202.'

George W. Liebmann

Thanksgiving

As someone who attended Catholic schools for sixteen years, served as an altar boy and went to Mass not once in awhile, but each and every week (something that has been in abeyance since March), Thanksgiving Day was and is for me, a holy day. Giving of thanks meant directing that thanks to a greater power, someone who I owed thanks to, not just for what we define as good, but also that which most would consider "the bad." Although none of us covet it, it is in how we accept "the bad" that we are most clearly defined. Was there ever anyone who

embodied that more than our dearly departed friend, Judge James Schneider? Most of us remember him for the manner in which he faced all those seemingly unending challenges.

Not letting it get to us, can sometimes be too much for anyone. Mother Teresa, a woman who saw so much suffering, was not unaffected by it, writing "In my heart, there is no faith. I want God with all the powers of my soul, and yet between us there is terrible separation."

So here we are at Thanksgiving Day 2020. In a year that has seen so much suffering and death, so many economically devastated, we arrive at a day for giving thanks. I hope all of us can be like Judge Schneider and realize that no matter what, there is always much to be thankful for. It is not always easy to see, but in the end, for ourselves and the world in which we live, it is an effort well worth making.

Be well, take care and I hope to see you soon.

Joe Bennett

TIS THE SEASON – WOULD YOU BELIEVE

I cannot remember a time when hearing from someone meant as much as it does today. We reach out and almost without fail we conclude our remarks with be safe and stay well. If, in addition to calls and e-mails, you would like to send an old fashioned salutation to someone through the mail, I would recommend to you Bar Library note cards.

A number of years ago the Bar Library commissioned local artist Martha Dougherty to render works of the Bar Library and Mitchell Courthouse. They were so well received that additional images of the Museum of Baltimore Legal History, Ceremonial Courtroom 400 and the Supreme Bench Courtroom (Courtroom 600), were completed. In turn, these images were used to create Bar Library greeting cards. These marvelous representations evoke a dignity and sophistication that make them ideal for just about any occasion. The cards are blank inside (a brief description of what is portrayed is set forth on the back), allowing you to put whatever you might want, such as a particular holiday message or greeting. They sell for $1.50 each or $14.00 for a box of ten, which, as anyone who has recently purchased a card can tell you, is quite a bargain. In addition to the cards, prints of each of the scenes are available at a cost of $75.00 to $175.00 each, depending upon the size. They make a wonderful gift for anyone associated with the legal profession. This is especially so for that senior Baltimore lawyer who undoubtedly spent a large part of their early career doing research in the Bar Library or coming to the Mitchell Courthouse for trials and various ceremonies. To purchase, just stop by the Library, phone us at 410-727-0280 or send an e-mail to jwbennett@barlib.org. Curbside pick-up is available.

Joe Bennett

John Maynard Keynes, Economic Possibilities for our Grandchildren (1930)

I

We are suffering just now from a bad attack of economic pessimism. It is common to hear people say that the epoch of enormous economic progress which characterized the nineteenth century is over; that the rapid improvement in the standard of life is now going to slow down – at any rate in Great Britain; that a decline in prosperity is more likely than an improvement in the decade which lies ahead of us.

I believe that this is a wildly mistaken interpretation of what is happening to us. We are suffering, not from the rheumatics of old age, but from the growing-pains of over-rapid changes, from the painfulness of readjustment between one economic period and another. The increase of technical efficiency has taken place faster than we can deal with the problem of labour absorption; the improvement in the standard of life has been a little too quick; the banking and

monetary system of the world has been preventing the rate of interest from falling as fast as equilibrium requires. And even so, the waste and confusion which ensue relate to not more than 7 ½ per cent of the national income; we are muddling away one and sixpence in the £, and have only 18s. 6d., when we might, if we were more sensible, have £1; yet, nevertheless, the 18s. 6d. mounts up to as much as the £1 would have been five or six years ago. We forget that in 1929 the physical output of the industry of Great Britain was greater than ever before, and that the net surplus of our foreign balance available for new foreign investment, after paying for all our imports, was greater last year than that of any other country, being indeed 50 per cent greater than the corresponding surplus of the United States. Or again – if it is to be a matter of comparisons – suppose that we were to reduce our wages by a half, repudiate four fifths of the national debt, and hoard our surplus wealth in barren gold instead of lending it at 6 per cent or more, we should resemble the now much-envied France. But would it be an improvement?

The prevailing world depression, the enormous anomaly of unemployment in a world full of wants, the disastrous mistakes we have made, blind us to what is going on under the surface to the true interpretation of the trend of things. For I predict that both of the two opposed errors of pessimism which now make so much noise in the world will be proved wrong in our own time – the pessimism of the revolutionaries who think that things are so bad that nothing can save us but violent change, and the pessimism of the reactionaries who consider the balance of our economic and social life so precarious that we must risk no experiments.

My purpose in this essay, however, is not to examine the present or the near future, but to disembarrass myself of short views and take wings into the future. What can we reasonably expect the level of our economic life to be a hundred years hence? What are the economic possibilities for our grandchildren?

From the earliest times of which we have record – back, say, to two thousand years before Christ - down to the beginning of the eighteenth century, there was no very great change in the standard of life of the average man living in the civilised centres of the earth. Ups and downs certainly. Visitations of plague, famine, and war. Golden intervals. But no progressive, violent change. Some periods perhaps So per cent better than others at the utmost 100 per cent better-in the four thousand years which ended (say) in A. D. 1700.

This slow rate of progress, or lack of progress, was due to two reasons-to the remarkable absence of important technical improvements and to the failure of capital to accumulate.

The absence of important technical inventions between the prehistoric age and comparatively modern times is truly remarkable. Almost everything which really matters and which the world possessed at the commencement of the modern age was already known to man at the dawn of history. Language, fire, the same domestic animals which we have to-day, wheat, barley, the vine and the olive, the plough, the wheel, the oar, the sail, leather, linen and cloth, bricks and pots, gold and silver, copper, tin, and lead-and iron was added to the list before 1000 B.C.-banking, statecraft, mathematics, astronomy, and religion. There is no record of when we first possessed these things.

At some epoch before the dawn of history perhaps even in one of the comfortable intervals before the last ice age-there must have been an era of progress and invention comparable to that in which we live to-day. But through the greater part of recorded history there was nothing of the kind.

The modern age opened; I think, with the accumulation of capital which began in the sixteenth century. I believe-for reasons with which I must not encumber the present argument-that this was initially due to the rise of prices, and the profits to which that led, which resulted from the treasure of gold and silver which Spain brought from the New World into the Old. From that time until to-day the power of accumulation by compound interest, which seems to have been sleeping for many generations, was re-born and renewed its strength. And the power of compound interest over two hundred years is such as to stagger the imagination.

Let me give in illustration of this a sum which I have worked out. The value of Great Britain's foreign investments to-day is estimated at about £4,000,000,000. This yields us an income at the rate of about 6½ per cent. Half of this we bring home and enjoy; the other half, namely, 3¼ per cent, we leave to accumulate abroad at compound interest. Something of this sort has now been going on for about 250 years.

For I trace the beginnings of British foreign investment to the treasure which Drake stole from Spain in 1580. In that year he returned to England bringing with him the prodigious spoils of the *Golden Hind.* Queen Elizabeth was a considerable shareholder in the syndicate which had financed the expedition. Out of her share she paid off the whole of England's foreign debt, balanced her Budget, and found herself with about £40,000 in hand. This she invested in the Levant Company --which prospered. Out of the profits of the Levant Company, the East India Company was founded; and the profits of this great enterprise were the foundation of England's subsequent foreign investment. Now it happens that £40,ooo accumulating at 3f per cent compound interest approximately corresponds to the actual volume of England's foreign investments at various dates, and would actually amount to-day to the total of £4,000,000,000 which I have already quoted as being what our foreign investments now are. Thus, every £1 which Drake brought home in 1580 has now become £100,000. Such is the power of compound interest!

From the sixteenth century, with a cumulative crescendo after the eighteenth, the great age of science and technical inventions began, which since the beginning of the nineteenth century has been in full flood--coal, steam, electricity, petrol, steel, rubber, cotton, the chemical industries, automatic machinery and the methods of mass production, wireless, printing, Newton, Darwin, and Einstein, and thousands of other things and men too famous and familiar to catalogue.

What is the result? In spite of an enormous growth in the population of the world, which it has been necessary to equip with houses and machines, the average standard of life in Europe and the United States has been raised, I think, about fourfold. The growth of capital has been on a scale which is far beyond a hundredfold of what any previous age had known. And from now on we need not expect so great an increase of population.

If capital increases, say, 2 per cent per annum, the capital equipment of the world will have increased by a half in twenty years, and seven and a half times in a hundred years. Think of this in terms of material things--houses, transport, and the like.

At the same time technical improvements in manufacture and transport have been proceeding at a greater rate in the last ten years than ever before in history. In the United States factory output per head was 40 per cent greater in 1925 than in 1919. In Europe we are held back by temporary obstacles, but even so it is safe to say that technical efficiency is increasing by more than 1 per cent per annum compound. There is evidence that the revolutionary technical changes, which have so far chiefly affected industry, may soon be attacking agriculture. We may be on the eve of improvements in the efficiency of food production as great as those which have already taken place in mining, manufacture, and transport. In quite a few years-in our own lifetimes I mean-we may be able to perform all the operations of agriculture, mining, and manufacture with a quarter of the human effort to which we have been accustomed.

For the moment the very rapidity of these changes is hurting us and bringing difficult problems to solve. Those countries are suffering relatively which are not in the vanguard of progress. We are being afflicted with a new disease of which some readers may not yet have heard the name, but of which they will hear a great deal in the years to come--namely, *technological unemployment.* This means unemployment due to our discovery of means of economising the use of labour outrunning the pace at which we can find new uses for labour.

But this is only a temporary phase of maladjustment. All this means in the long run *that mankind is solving its economic problem. I* would predict that the standard of life in progressive countries one hundred years hence will be between four and eight times as high as it is to-day. There would be nothing surprising in this even in the light of our present knowledge. It would not be foolish to contemplate the possibility of a far greater progress still.

II

Let us, for the sake of argument, suppose that a hundred years hence we are all of us, on the average, eight times better off in the economic sense than we are to-day. Assuredly there need be nothing here to surprise us.

Now it is true that the needs of human beings may seem to be insatiable. But they fall into two classes --those needs which are absolute in the sense that we feel them whatever the situation of our fellow human beings may be, and those which are relative in the sense that we feel them only if their satisfaction lifts us above, makes us feel superior to, our fellows. Needs of the second class, those which satisfy the desire for superiority, may indeed be insatiable; for the higher the general level, the higher still are they. But this is not so true of the absolute needs-a point may soon be reached, much sooner perhaps than we are all of us aware of, when these needs are satisfied in the sense that we prefer to devote our further energies to non-economic purposes.

Now for my conclusion, which you will find, I think, to become more and more startling to the imagination the longer you think about it.

I draw the conclusion that, assuming no important wars and no important increase in population, the *economic problem* may be solved, or be at least within sight of solution, within a hundred years. This means that the economic problem is not-if we look into the *future-the permanent problem of the human race.*

Why, you may ask, is this so startling? It is startling because-if, instead of looking into the future, we look into the past-we find that the economic problem, the struggle for subsistence, always has been hitherto the primary, most pressing problem of the human race-not only of the human race, but of the whole of the biological kingdom from the beginnings of life in its most primitive forms.

Thus we have been expressly evolved by nature-with all our impulses and deepest instincts-for the purpose of solving the economic problem. If the economic problem is solved, mankind will be deprived of its traditional purpose.

Will this be a benefit? If one believes at all in the real values of life, the prospect at least opens up the possibility of benefit. Yet I think with dread of the readjustment of the habits and instincts of the ordinary man, bred into him for countless generations, which he may be asked to discard within a few decades.

To use the language of to-day-must we not expect a general "nervous breakdown"? We already have a little experience of what I mean -a nervous breakdown of the sort which is already common enough in England and the United States amongst the wives of the well-to-do classes, unfortunate women, many of them, who have been deprived by their wealth of their traditional tasks and occupations--who cannot find it sufficiently amusing, when deprived of the spur of economic necessity, to cook and clean and mend, yet are quite unable to find anything more amusing.

To those who sweat for their daily bread leisure is a longed--for sweet-until they get it.

There is the traditional epitaph written for herself by the old charwoman:--

> Don't mourn for me, friends, don't weep for me never,
> For I'm going to do nothing for ever and ever.

This was her heaven. Like others who look forward to leisure, she conceived how nice it would be to spend her time listening-in-for there was another couplet which occurred in her poem:-

> With psalms and sweet music the heavens'll be ringing,
> But I shall have nothing to do with the singing.

Yet it will only be for those who have to do with the singing that life will be tolerable and how few of us can sing!

Thus for the first time since his creation man will be faced with his real, his permanent problem-how to use his freedom from pressing economic cares, how to occupy the leisure, which science and compound interest will have won for him, to live wisely and agreeably and well.

The strenuous purposeful money-makers may carry all of us along with them into the lap of economic abundance. But it will be those peoples, who can keep alive, and cultivate into a fuller perfection, the art of life itself and do not sell themselves for the means of life, who will be able to enjoy the abundance when it comes.

Yet there is no country and no people, I think, who can look forward to the age of leisure and of abundance without a dread. For we have been trained too long to strive and not to enjoy. It is a fearful problem for the ordinary person, with no special talents, to occupy himself, especially if he no longer has roots in the soil or in custom or in the beloved conventions of a traditional society. To judge from the behaviour and the achievements of the wealthy classes to-day in any quarter of the world, the outlook is very depressing! For these are, so to speak, our advance guard-those who are spying out the promised land for the rest of us and pitching their camp there. For they have most of them failed disastrously, so it seems to me-those who have an independent income but no associations or duties or ties-to solve the problem which has been set them.

I feel sure that with a little more experience we shall use the new-found bounty of nature quite differently from the way in which the rich use it to-day, and will map out for ourselves a plan of life quite otherwise than theirs.

For many ages to come the old Adam will be so strong in us that everybody will need to do some work if he is to be contented. We shall do more things for ourselves than is usual with the rich to-day, only too glad to have small duties and tasks and routines. But beyond this, we shall endeavour to spread the bread thin on the butter-to make what work there is still to be done to be as widely shared as possible. Three-hour shifts or a fifteen-hour week may put off the problem for a great while. For three hours a day is quite enough to satisfy the old Adam in most of us!

There are changes in other spheres too which we must expect to come. When the accumulation of wealth is no longer of high social importance, there will be great changes in the code of morals. We shall be able to rid ourselves of many of the pseudo-moral principles which have hag-ridden us for two hundred years, by which we have exalted some of the most distasteful of human qualities into the position of the highest virtues. We shall be able to afford to dare to assess the money-motive at its true value. The love of money as a possession -as distinguished from the love of money as a means to the enjoyments and realities of life -will be recognised for what it is, a somewhat disgusting morbidity, one of those semicriminal, semi-pathological propensities which one hands over with a shudder to the specialists in mental disease. All kinds of social customs and economic practices, affecting the distribution of wealth and of economic rewards and penalties, which we now maintain at all costs, however distasteful and unjust they may be in themselves, because they are tremendously useful in promoting the accumulation of capital, we shall then be free, at last, to discard.

Of course there will still be many people with intense, unsatisfied purposiveness who will blindly pursue wealth-unless they can find some plausible substitute. But the rest of us will no longer be under any obligation to applaud and encourage them. For we shall inquire more curiously than is safe to-day into the true character of this "purposiveness" with which in varying degrees Nature has endowed almost all of us. For purposiveness means that we are more concerned with the remote future results of our actions than with their own quality or their immediate effects on our own environment. The "purposive" man is always trying to secure a spurious and delusive immortality for his acts by pushing his interest in them forward into time. He does not love his cat, but his cat's kittens; nor, in truth, the kittens, but only the kittens' kittens, and so on forward forever to the end of cat-dom. For him jam is not jam unless it is a case of jam to-morrow and never jam to-day. Thus by pushing his jam always forward into the future, he strives to secure for his act of boiling it an immortality.

Let me remind you of the Professor in *Sylvie and Bruno:*

> "Only the tailor, sir, with your little bill," said a meek voce outside the door.
>
> "Ah, well, I can soon settle his business," the Professor said to the children, "if you'll just wait a minute. How much is it, this year, my man?" The tailor had come in while he was speaking.
>
> "Well, it's been a-doubling so many years, you see," the tailor replied, a little grufy, "and I think I'd like the money now. It's two thousand pound, it is!"
>
> "Oh, that's nothing!" the Professor carelessly remarked, feeling in his pocket, as if he always carried at least that amount about with him. "But wouldn't you like to wait just another year and make it four thousand? Just think how rich you'd be! Why, you might be a *king,* if you liked!"
>
> "I don't know as I'd care about being a king," the man said thoughtfully. "But it dew sound a powerful sight o' money! Well, I think I'll wait-"
>
> "Of course you will!" said the Professor. "There's good sense in you, I see. Good-day to you, my man!"
>
> "Will you ever have to pay him that four thousand pounds?" Sylvie asked as the door closed on the departing creditor.
>
> "Never, my child!" the Professor replied emphatically. "He'll go on doubling it till he dies. You see, it's always worth while waiting another year to get twice as much money!"

Perhaps it is not an accident that the race which did most to bring the promise of immortality into the heart and essence of our religions has also done most for the principle of compound interest and particularly loves this most purposive of human institutions.

I see us free, therefore, to return to some of the most sure and certain principles of religion and traditional virtue-that avarice is a vice, that the exaction of usury is a misdemeanour, and the love of money is detestable, that those walk most truly in the paths of virtue and sane wisdom who take least thought for the morrow. We shall once more value ends above means and prefer the good to the useful. We shall honour those who can teach us how to pluck the hour and the day virtuously and well, the delightful people who are capable of taking direct enjoyment in things, the lilies of the field who toil not, neither do they spin.

But beware! The time for all this is not yet. For at least another hundred years we must pretend to ourselves and to every one that fair is foul and foul is fair; for foul is useful and fair is not. Avarice and usury and precaution must be our gods for a little longer still. For only they can lead us out of the tunnel of economic necessity into daylight.

I look forward, therefore, in days not so very remote, to the greatest change which has ever occurred in the material environment of life for human beings in the aggregate. But, of course, it will all happen gradually, not as a catastrophe. Indeed, it has already begun. The course of affairs will simply be that there will be ever larger and larger classes and groups of people from whom problems of economic necessity have been practically removed. The critical difference will be realised when this condition has become so general that the nature of one's duty to one's neighbour is changed. For it will remain reasonable to be economically purposive for others after it has ceased to be reasonable for oneself.

The pace at which we can reach our destination of economic bliss will be governed by four things-our power to control population, our determination to avoid wars and civil dissensions, our willingness to entrust to science the direction of those matters which are properly the concern of science, and the rate of accumulation as fixed by the margin between our production and our consumption; of which the last will easily look after itself, given the first three.

Meanwhile there will be no harm in making mild preparations for our destiny, in encouraging, and experimenting in, the arts of life as well as the activities of purpose.

But, chiefly, do not let us overestimate the importance of the economic problem, or sacrifice to its supposed necessities other matters of greater and more permanent significance. It should be a matter for specialists-like dentistry. If economists could manage to get themselves thought of as humble, competent people, on a level with dentists, that would be splendid!

Books – The Perfect Present

As part of a literacy campaign, not sure whether it is still out there or not, we were all told, I suppose especially the young, that "Reading is **Fun**damental." We have found out that during a pandemic, it is not a bad way to spend time.

Many of the speakers who have appeared as part of the Bar Library Lecture series have done so in promotion of a book they had recently published. The Library obtained numerous copies for sale at the lectures and retained those that were not sold so that those who could not attend might have the chance to purchase them at a later time. Thus was born the Bar Library bookstore. The following are available for purchase. For yourself, for someone who is interested in the law or history, stop by and visit our store. If you already know what you would

like, just let us know and we will get it to you – including that favorite modern day favorite – curbside pick-up. Just call 410-727-0280 or e-mail us at jwbennett@barlib.org.

Abraham Lincoln & Treason In The Civil War (Hardcover) (Signed By Author)	$35.00
Abraham Lincoln & Treason In The Civil War (Softcover) (Signed By Author)	$20.00
American Constitutional History: A Brief Introduction	$30.00
Ancient Law	$75.00
Art Of Cross-Examination	$95.00
Baltimore & The Nineteenth Of April 1861	$15.00
Baltimore Lives	$30.00
Blackstone's Commentaries On The Laws Of England	$500.00
Brady v. Maryland: A Fiftieth Anniversary Commemoration	$20.00
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The Death Penalty As Torture	$20.00
Emancipation – The Union Army . . . (Signed By Author)	$35.00
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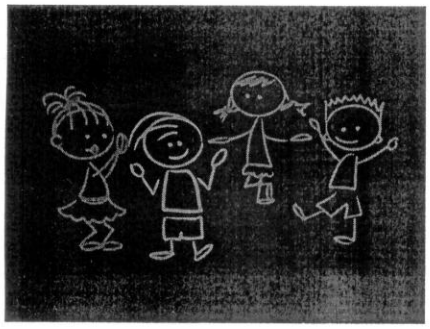
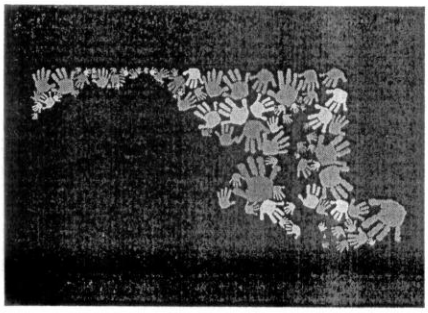
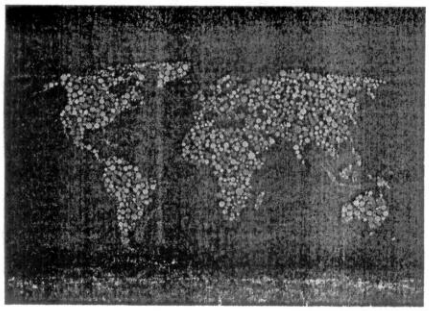
The Lost Indictment Of Robert E. Lee (Signed By Author)	$20.00
Louis D. Brandeis	$35.00
Louis D. Brandeis: American Prophet	$20.00
The Making Of Africa America	$25.00
Mencken: The Days Trilogy	$30.00
Mencken's Prejudices Debunked	$20.00
Military Law And Precedents	$75.00
Odessa: Architecture – Monuments	$35.00
The Order Of The Coif	$95.00
"Our Little Monitor": The Greatest Invention Of The Civil War (Signed By Author)	$25.00
Prohibition In Maryland: A Collection Of Documents	$15.00
The Promise And The Dream	$30.00
Reason And Imagination: The Selected Correspondence of Learned Hand	$35.00
The Secret Life Of Lady Liberty	$20.00
The Spirit Of The Common Law And Other Writings	$150.00
Telemachus	$20.00







MARYLAND COMMISSION ON INNOVATION & EXCELLENCE IN EDUCATION

Interim Report

January 2019

A Call to Action:

Building a World-class Education System in Maryland

When the Governor and General Assembly created the Commission on Innovation and Excellence in Education, they recognized that the fate of our State and the opportunities it creates for our children and grandchildren to enjoy successful careers and rewarding lives depends on the quality, equal access, and effectiveness of preK-12 education in every zip code across the State.

The Commission's charge also showed that State leaders understand that in today's interconnected, global economy, the benchmark for education quality is not just what is happening in the top-performing states in this country but also in countries around the world where students are greatly outdistancing ours, achieving at higher levels and with much more equity in outcomes. That is why State leaders asked the Commission to develop new policies, implementation strategies, and updated funding formulas with a strong accountability system that will enable *all* Maryland schools – and schoolchildren – to perform at the level of the world's top education systems.

Where are Maryland schools today? We were surprised to learn that in terms of student learning outcomes, we are neither where we thought we were nor where we need to be.

Given that charge, the Commission began its work by asking: Where are Maryland schools today? We were surprised to learn that in terms of student learning outcomes, we are neither where we thought we were nor where we need to be. To be sure, this State has many fine schools and outstanding teachers, as well as a deserved reputation for innovation, such as being among the first states to provide half-day pre-school for four-year-olds and broader access to Advanced Placement courses for high schoolers. Such smart moves were a major reason why some national rankings placed Maryland's education system at or near the top for several years. However, the real test for the quality of a school system is what its students are actually learning. On this measure, the picture for Maryland in 2019 is not nearly so bright.

The National Assessment of Educational Progress provides learning outcomes for fourth and eighth graders across the United States in reading and math every two years. In the most recent cycle, Maryland placed near or below the middle in both subjects and at both grade levels. Worse, Maryland was the only state to see scores drop – on all the tests – between 2013 and 2015. That would be bad enough if the United States was a world leader in preK-12 education, but it is not. On the latest round of Programme for International Student Assessment, a highly respected international exam measuring 15-year-old student learning in math, reading, and science, American student performance placed well down in the second quartile among students from 72 countries.

These data forced the Commission to face the inescapable truth: when it comes to actual student learning, Maryland schools perform at a mediocre level in a country that performs at a mediocre level internationally.

But that is not the only troubling fact that Commissioners learned. Like most other states, Maryland has glaring gaps in student achievement based on income, race, and other student subgroups. Less than half of kindergarteners are entering school ready to learn, and fewer than 40% of students are graduating from high school truly "college and

education leading to industry-recognized credentials and high-paying jobs;

4. Providing More Support to Students Who Need It the Most: Broad and sustained new support for schools serving high concentrations of students living in poverty, with before-and after-school and summer academic programs and student access to needed health and social services, and increased support for English learner and special education students; and

5. Ensuring Excellence for All: An accountability-oversight board that has the authority to ensure that the Commission's recommendations are successfully implemented and produce the desired results.

Changes of this magnitude will require much effort, take substantial time, and require a significant increase in funding. The Commission has developed a 10-year phase-in plan that, when fully implemented in 2030, will cost an additional $3.8 billion (combined State and local) annually. That amount averages out to less than 3% more per year or a 30% increase over current projected expenditures by 2030. While the increase is significant, the cost of not moving Maryland from its present status – "mediocre with bright spots" – to world class will ultimately prove far greater.

While the increase is significant, the cost of not moving Maryland from its present status – "mediocre with bright spots" – to world class will ultimately prove far greater.

Residents of this State – parents and taxpayers especially – have every reason to ask, what precisely are the benefits from such an investment? Research demonstrates that as a society's education level rises, crime and health care costs decline, the cycle of inter-generational poverty begins to break, civic engagement improves, and family structures are strengthened. A recent study in Pennsylvania showed that a high school dropout consumes $2,700 in public health insurance versus just $170 for a college graduate. Our prisons, too, are disproportionately populated with high school dropouts. The National Institute of Justice estimates that incarceration drains $450 billion from the U.S. economy annually.

That is not all. As education and skill levels rise, so do personal income and the quality of life. Businesses are more prosperous because they are able to more easily recruit a workforce with the necessary talent and skills in the ever increasing sophistication of the modern workplace.

The Commission's recommendations are carefully constructed to produce exactly these benefits. Investing in full-day pre-K will greatly increase the proportion of students who come to school ready to learn. A top-notch curriculum, coupled with greater resources and timely interventions and support for students who need them most, including schools serving concentrations of students living in poverty, plus a highly qualified professional teaching corps, will ensure the vast majority of students are on track to be college and career ready by the end of tenth grade. The exciting pathways that follow during the eleventh and twelfth grades will enable most students to leave high school with significant college credit – even an associate's degree – or a skill that is immediately valued in the workplace. And, importantly, the recommendations include an independent

career ready." These troubling realities are not restricted to specific jurisdictions. There are underperforming schools and underserved students in each of Maryland's 24 school districts. This is unacceptable in a state like ours with substantial means; and it is short-sighted, since the State's future depends on the quality of education all of our students receive.

We also learned of the State's big teacher shortages, especially in science and mathematics, and that schools must recruit over half of their new teachers each year from outside the State. Finally, much to our surprise, we learned that several national studies show Maryland to be "regressive" in its school funding, which means, in effect, that our school finance system is unfair to poor communities and the children who live in them.

Surely we can and must do better on all these dimensions. But to do better, Maryland needs a roadmap for creating an education system that learns from the world's best but can work in Maryland based on our context and needs. That is precisely what the Commission has done.

Toward that end, Commission members, staff, and consultants have labored long and hard with the benefit of marvelous input and feedback from across the State. We benefited, too, from the expertise of the National Center on Education and the Economy (NCEE), which has spent the past two decades doing careful research on the distinguishing features of the world's best school systems. Through this research, NCEE has identified what it calls the "building blocks" of high-performing systems. These top performers can be found in different regions of the world; they operate under different forms of government; they have different cultures and traditions; and many are as demographically diverse as Maryland. But when it comes to their school systems, they exhibit remarkable consistency in using the building blocks that NCEE identified and the results speak for themselves.

With NCEE's support, the Commission did an extensive and rigorous "gap analysis," comparing Maryland's present policies and practices with four high-performing international systems and with the states of New Jersey, New Hampshire, and Massachusetts. Based on that analysis, the Commission developed recommendations in five key policy areas:

1. Investing in High-quality Early Childhood Education and Care: Significant expansion of full-day pre-school, to be free for all low-income three- and four-year-olds, so that all children have the opportunity to begin kindergarten ready to learn;

2. Elevating Teachers and School Leaders: Raising the standards and status of the teaching profession, including a performance-based career ladder and salaries comparable to other fields with similar education requirements;

3. Creating a World-class Instructional System: An internationally benchmarked curriculum that enables most students to achieve "college- and career-ready" status by the end of tenth grade and then pursue pathways that include early college, Advanced Placement courses, and/or a rigorous technical

accountability process with the authority to ensure the desired results are achieved for all our students.

That is the future Maryland can have if it embraces the Commission's recommendations. But they must be embraced in their entirety. They are an interdependent and synergistic package of recommendations that will not produce the desired benefits if they are broken apart and selectively implemented.

One piece of work remains for the Commission and that is to recommend a fair distribution of the costs of the Commission's recommendations between the State and its 24 local jurisdictions. Leaders of the General Assembly have said the Legislature cannot address both the scope of the policy changes recommended by the Commission and the distribution of costs within a single 90-day session. So they have asked the Commission to continue its work and make funding recommendations in fall 2019, which it will do. In the meantime, much can be accomplished during the present legislative session. The State has wisely set aside up to $325 million that could be allocated to "jump start" the Commission's recommendations and the Commission is making recommendations on how these resources should be allocated for fiscal 2020. The legislature can also endorse the Commission's policy recommendations and set aside funding this session for fiscal 2021, the first year of the Commission's 10-year plan.

The Commission's recommendations create for Maryland a once-in-a-generation opportunity to set a bold course and create a bright future for the State and its citizens. The question that remains is, does the State have the will, discipline, and persistence required to make it happen? We believe it must. Nothing less than the future well-being of our State and its citizens is at stake.

Chapter 3:

Summary of Final Recommendations and Costs

The full Commission adopted final policy recommendations based on recommendations from each of the four working groups covering Policy Areas 1 through 4. The full Commission discussed and developed recommendations for Policy Area 5. These recommendations are summarized below by policy area. The Commission intends that these policy recommendations will be implemented in all public schools across the State, including charter and contract schools. Exhibit 3.1 shows a potential timeline to phase in implementation of the policy recommendations over 10 years. The phase-in schedule refers to year 1 (fiscal 2021) through year 10 (fiscal 2030), with fiscal 2020 representing "year 0" as a planning and start-up year before full implementation begins. To fully implement the recommendations from all five policy areas, total annual expenditures would increase by $3.8 billion (State and local funds) by year 10 (fiscal 2030). For a more detailed explanation of the Commission's final recommendations and costs by policy area, see Chapter 4. Total costs to implement the Commission's recommendations as a system, accounting for adjustments for cost overlaps and savings, are detailed in Chapter 5.

Policy Area 1: Early Childhood Education

High-quality, full-day prekindergarten will be expanded through a voluntary, mixed-delivery system (public school- and community-based programs) at no cost for four-year-olds and three-year-olds from families with incomes up to 300% of the federal poverty level (FPL) (approximately $75,000 for a family of four in 2018). For four-year-olds from families with incomes between 300-600% FPL (approximately $75,000 to $150,000 for a family of four in 2018), some public funding will be provided to families to assist with the cost of prekindergarten based on a sliding scale. Families with incomes above 600% FPL (approximately $150,000 for a family of four in 2018) will pay the full cost to attend a public prekindergarten program.

Further, increased incentives and technical assistance will be provided to improve the capacity and quality of existing prekindergarten programs, and tuition assistance will be provided to assist staff and teachers in attaining early childhood education credentials at the pace needed to meet workforce demands. All entering kindergarteners will be assessed for school readiness, and the results will be used for lesson planning and identifying students with learning challenges who may need additional assistance. The State will also significantly expand the number of Judy Centers and Family Support Centers, and increase funding for the Maryland Infants and Toddlers Program, to ensure families with young children have access to support services.

Policy Area 2: High-quality and Diverse Teachers and Leaders

In addition to making teacher preparation programs more rigorous, raising licensing standards for new teachers, and rebranding the teaching profession as a more attractive career, Maryland will raise teacher pay to make it equitable with other highly trained professions with comparable education requirements. While teacher wages and salaries will continue to be collectively negotiated at the local level, the State will conduct periodic benchmarking of teacher salaries with other professions. Ultimately, most

increases in teacher salaries will be tied to movement up a teacher career ladder. The career ladder will be based on performance and experience, including certification from the National Board for Teaching and Professional Standards, and there will be two tracks: a Teacher Leadership Track and an Administrative Track. The State will provide uniform design parameters for the career ladder, including titles and criteria for moving up the ladder, and while local school districts will have flexibility to develop ladder pay scales and roles for teachers within the school, districts must remain within these parameters. The school day must also be reorganized to allow teachers to spend less of the working day teaching classes and have more time to improve instruction and plan lessons, tutor students who are falling behind, and participate in collaborative professional learning. Cultural competency and restorative practices training will be required for all teachers, and the State will expand scholarships and loan forgiveness programs for highly skilled and diverse teachers who teach, or agree to teach, in high-need schools.

Policy Area 3: College and Career Readiness Pathways

The prekindergarten to twelfth grade instructional system (curriculum frameworks, course syllabi, and assessments) as a whole must be fully aligned. A college and career readiness (CCR) standard will be established that certifies that the student has, by the end of tenth grade, the requisite literacy in English and mathematics needed to succeed in first-year, credit-bearing courses in open enrollment postsecondary institutions in the State. Students who meet the CCR standard will be able to pursue (1) the International Baccalaureate Diploma program, the Cambridge International Diploma program, or a sequence of Advanced Placement (AP) courses leading to an AP Diploma; (2) a dual-enrollment program to earn college credits while in high school, with the possibility of earning an associate's degree along with or subsequent to high school graduation; (3) redesigned Career and Technical Education (CTE) pathways that include workplace training and lead to industry-recognized credentials, including postsecondary certificates earned through dual enrollment; and (4) a combination of these options. These pathways will be aligned with high school graduation requirements, and the electives, extra-curricular activities, and full range of courses that are typically offered by a high school will still remain available to students regardless of the pathway that the student chooses. For students who do not meet the CCR standard by the end of tenth grade, the State and local school districts will develop eleventh and twelfth grade programs to meet the CCR standard by twelfth grade, including programs with more project- and program-based courses, summer instruction following tenth grade, assignment of a teacher as the student's case manager, and priority access to an enhanced career counseling system.

To keep students on the pathway of CCR, transitional supplemental instruction such as tutoring will be provided to all students in kindergarten through third grade that are identified as struggling learners. This early warning system will serve as a transitional program to provide students with additional academic support while the new system proposed by the Commission is being fully implemented. The State will establish a CTE Committee within the Governor's Workforce Development Board to

build and steer the CTE system, which will be fully aligned with the State's economic and workforce priorities and combine classroom education with workplace training. As part of the redesigned CTE system, every middle and high school student will have access to career counseling to advise them on CTE pathway options.

Policy Area 4: More Resources to Ensure All Students are Successful

To ensure all students have both the academic supports and wraparound services to address their social, physical health, mental health, and family needs, the funding formula weights for special education students and English learner students will be revised, and a new concentrated poverty formula will be added to support intensive, coordinated services for students in schools that have a high concentration of student poverty. For these high-poverty schools, funding in addition to the compensatory education formula will be available to provide a community schools coordinator and a health services practitioner at that school and services such as extended learning time, vision and dental services, behavioral health services, and family and community engagement. For the compensatory education formula and new concentration of poverty formula, direct certification including Medicaid eligibility should be used as the proxy for poverty in the future instead of eligibility for free and reduced-price meals.

For special education students, a placeholder weight will be in place until a special education study required by Chapter 361 of 2018 to evaluate national and international special education funding methodologies is completed and incorporated in statute. For English learner students, in addition to providing language acquisition services, funding will be included to provide supports for English learner students who are also low income, including instructional and intervention support, social and emotional support from counselors and social workers, and extended learning time through before- and after-school programming as well as summer school. Further, as part of the effort to increase school safety and wraparound services for students, school staff should be trained to recognize mental health issues and coordinate access to those services for students and the school-based health center program should be expanded.

Policy Area 5: Governance and Accountability

In order to transform Maryland's education system into a world-class system, the recommendations of the Commission must be implemented with fidelity, through a strong system of accountability where the vast majority of money follows the student to the school, and new funds must be spent effectively to improve student outcomes. An independent oversight board of education policy experts will be established, and will ultimately sunset after the implementation period, to oversee and coordinate implementation of the Commission's recommendations across numerous State and local entities (*e.g.*, Maryland State Department of Education (MSDE); Department of Labor, Licensing, and Regulation; Maryland Higher Education Commission; Department of Commerce; local boards of education; and State Board of Education) over the 10-year phase-in period. With input from State and local agencies charged

with implementing the Commission's recommendations, the oversight body will develop a comprehensive implementation plan with key milestones for year-by-year implementation. The oversight board will also develop guidelines and criteria on which MSDE will review and recommend approval of local school system implementation plans, monitor implementation efforts against the comprehensive plan schedule, and gather and analyze data on the effect of the plans on student performance. The oversight board will have authority to withhold up to 25% of new funds if it finds that the local school system or school is not doing what it should to improve student performance, consistent with the comprehensive implementation plan.

MSDE will oversee and coordinate a system of expert review teams (consisting of expert teachers, principals, and MSDE staff) to help schools with students who are not making adequate progress towards CCR endorsement by the end of tenth grade. The teams will conduct on-site evaluations and interviews and recommend measures to improve the school's performance. The CTE Committee will follow a similar process and organize expert review teams (consisting of representatives of employers and trade unions and CTE educators) to help schools with students who are not making adequate progress toward completion of the CTE pathway. Teacher preparation programs at institutions of higher education and alternative programs will be held accountable for ensuring that the teachers they train are better prepared to meet the higher standards and greater responsibilities called for by the Commission's recommendations. MSDE and the Maryland Higher Education Commission will report to the oversight board on the effectiveness of teacher preparation programs in implementing the Commission's recommendations.

[2019] UKSC 41
On appeals from: [2019] EWHC 2381 (QB)
and [2019] CSIH 49

JUDGMENT

R (on the application of Miller) (Appellant) *v* The Prime Minister (Respondent)
Cherry and others (Respondents) *v* Advocate General for Scotland (Appellant)
(Scotland)

before

Lady Hale, President
Lord Reed, Deputy President
Lord Kerr
Lord Wilson
Lord Carnwath
Lord Hodge
Lady Black
Lord Lloyd-Jones
Lady Arden
Lord Kitchin
Lord Sales

JUDGMENT GIVEN ON

24 September 2019

Heard on 17, 18 and 19 September 2019

Appellant	Respondent
(Gina Miller)	(The Prime Minister)
Lord Pannick QC	Sir James Eadie QC

Tom Hickman QC
Warren Fitt

(Instructed by Mishcon de Reya LLP (London))

Appellant
(The Advocate General)
Lord Keen of Elie QC
Andrew Webster QC

(Instructed by Office of The Advocate General for Scotland)

David Blundell
Christopher Knight
Richard Howell

(Instructed by The Government Legal Department)

Respondents
(Joanna Cherry MP and others)
Aidan O'Neill QC
David Welsh
Sam Fowles

(Instructed by Balfour and Manson LLP (Edinburgh))

1st Intervener
James Wolffe QC, Lord Advocate
James Mure QC
Christine O'Neill
(Instructed by the Legal Department of the Scottish Government)

2nd Intervener
Ronan Lavery QC
Conan Fegan BL
Richard Smyth
(Instructed by McIvor Farrell Solicitors)

3rd Intervener
Michael Fordham QC
Celia Rooney
Hollie Higgins
(Instructed by Welsh Government Legal Services Department)

4th Intervener
Lord Garnier QC
Tom Cleaver

Anna Hoffmann
(Instructed by Herbert
Smith Freehills LLP
(London))

5th Intervener
Deok Joo Rhee QC
Catherine Dobson
(Instructed by Howe and Co)

6th Intervener
Thomas de la Mare QC
Daniel Cashman
Alison Pickup
(Instructed by Public Law Project)

Interveners:

(1) The Lord Advocate
(2) Raymond McCord
(3) Counsel General for Wales
(4) Sir John Major KG CH
(5) Baroness Chakrabarti CBE, PC (written submissions only)
(6) Public Law Project (written submissions only)

LADY HALE AND LORD REED GIVING THE JUDGMENT OF THE COURT:

1. It is important to emphasise that the issue in these appeals is not when and on what terms the United Kingdom is to leave the European Union. The issue is whether the advice given by the Prime Minister to Her Majesty the Queen on 27th or 28th August 2019 that Parliament should be prorogued from a date between 9th and 12th September until 14th October was lawful. It arises in circumstances which have never arisen before and are unlikely ever to arise again. It is a "one off". But our law is used to rising to such challenges and supplies us with the legal tools to enable us to reason to a solution.

What is prorogation?

2. Parliamentary sittings are normally divided into sessions, usually lasting for about a year, but sometimes less and sometimes, as with the current session, much longer. Prorogation of Parliament brings the current session to an end. The next session begins, usually a short time later, with the Queen's Speech. While Parliament is prorogued, neither House can meet, debate and pass legislation. Neither House can debate Government policy. Nor may members of either House ask written or oral questions of Ministers. They may not meet and take evidence in

committees. In general, Bills which have not yet completed all their stages are lost and will have to start again from scratch in the next session of Parliament. In certain circumstances, individual Bills may be "carried over" into the next session and pick up where they left off. The Government remains in office and can exercise its powers to make delegated legislation and bring it into force. It may also exercise all the other powers which the law permits. It cannot procure the passing of Acts of Parliament or obtain Parliamentary approval for further spending.

3. Parliament does not decide when it should be prorogued. This is a prerogative power exercised by the Crown on the advice of the Privy Council. In practice, as noted in the House of Commons Library Briefing Paper (No 8589, 11th June 2019), "this process has been a formality in the UK for more than a century: the Government of the day advises the Crown to prorogue and that request is acquiesced to". In theory the monarch could attend Parliament and make the proclamation proroguing it in person, but the last monarch to do this was Queen Victoria in 1854. Under current practice, a proclamation is made by Order in Council a few days before the actual prorogation, specifying a range of days within which Parliament may be prorogued and the date on which the prorogation would end. The Lord Chancellor prepares a commission under the great seal instructing the Commissioners accordingly. On the day chosen for the prorogation, the Commissioners enter the House of Lords; the House of Commons is summoned; the command of the monarch appointing the Commission is read; and Parliament is formally prorogued.

4. Prorogation must be distinguished from the dissolution of Parliament. The dissolution of Parliament brings the current Parliament to an end. Members of the House of Commons cease to be Members of Parliament. A general election is then held to elect a new House of Commons. The Government remains in office but there are conventional constraints on what it can do during that period. These days, dissolution is usually preceded by a short period of prorogation.

5. Dissolution used also to be a prerogative power of the Crown but is now governed by the Fixed-term Parliaments Act 2011. This provides for general elections to be held every five years and for an earlier election to be held in only two circumstances: either the House of Commons votes, by a majority of at least two-thirds of the number of seats (including vacant seats) in the House, to hold an early election; or the House of Commons votes that it has no confidence in Her Majesty's Government and no-one is able to form a Government in which the House does have confidence within 14 days. Parliament is dissolved 25 days before polling day and cannot otherwise be dissolved. The Act expressly provides that it does not affect Her Majesty's power to prorogue Parliament (section 6(1)).

6. Prorogation must also be distinguished from the House adjourning or going into recess. This is decided, not by the Crown acting on the advice of the Prime Minister, but by each House passing a motion to that effect. The Houses might go into recess at different times from one another. In the House of Commons, the motion is moved by the Prime Minister. In the House of Lords, it is moved by the Lord Speaker. During a recess, the House does not sit but Parliamentary business can otherwise continue as usual. Committees may meet, written Parliamentary questions can be asked and must be answered.

The run-up to this prorogation

7. As everyone knows, a referendum was held (pursuant to the European Union Referendum Act 2015) on 23rd June 2016. The majority of those voting voted to leave the European Union. Technically, the result was not legally binding. But the Government had pledged to honour the result and it has since been treated as politically and democratically binding. Successive Governments and Parliament have acted on that basis. Immediately after the referendum, Mr David Cameron resigned as Prime Minister. Mrs Theresa May was chosen as leader of the Conservative party and took his place.

8. The machinery for leaving the European Union is contained in article 50 of the Treaty on European Union. This provides that any member state may decide to withdraw from the Union "in accordance with its own constitutional requirements". That member state is to notify the European Council of its intention. The Union must then negotiate and conclude an agreement with that member state, "setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union". The European Union treaties will cease to apply to that state when the withdrawal agreement comes into force or, failing that, two years after the notification unless the European Council, in agreement with the member state, unanimously decides to extend this period.

9. On 2nd October 2016, Mrs May announced her intention to give notice under article 50 before the end of March 2017. Mrs Gina Miller and others challenged her power to do so without the authority of an Act of Parliament. That challenge succeeded: *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2018] AC 61. Parliament responded by passing the European Union (Notification of Withdrawal) Act 2017, which received royal assent on 16th March 2017 and authorised the Prime Minister to give the notification. Mrs May did so on 29th March 2017.

10. That Parliament was dissolved on 3rd May 2017 and a general election was held on 8th June 2017. The result was that Mrs May no longer had an overall majority in the House of Commons, but she was able to form a Government because of a "confidence and supply" agreement with the Democratic Unionist Party of Northern Ireland. Negotiations for a withdrawal agreement with the European Council proceeded.

11. Meanwhile, Parliament proceeded with some of the legislative steps needed to prepare United Kingdom law for leaving the Union. The European Union (Withdrawal) Act 2018 came into force on 26th June 2018. In brief, it defined "exit day" as 29th March 2019, but this could be extended by statutory instrument (section 20). From that day, it repealed the European Communities Act 1972, the Act which had provided for our entry into what became the European Union, but it preserved much of the existing EU law as the law of the United Kingdom, with provision for exceptions and modifications to be made by delegated legislation. Crucially, section 13 requires Parliamentary approval of any withdrawal agreement reached by the Government. In summary it provides that a withdrawal agreement may only be ratified if (a) a Minister of the Crown has laid before Parliament a statement that political agreement has been reached, a copy of the negotiated withdrawal agreement and a copy of the framework for the future relationship; (b) the House of Commons has approved the withdrawal agreement and future framework; (c) the House of Lords has, in effect, taken note of them both; and (d) an Act

of Parliament has been passed which contains provision for the implementation of the withdrawal agreement.

12. A withdrawal agreement, setting out terms for a "smooth and orderly exit from the European Union" and a political declaration, setting out a framework for the future relationship, to be negotiated by the end of 2020, were concluded on 25th November 2018. However, the agreement was rejected three times by the House of Commons, on 15th January 2019 (by 432 to 202 votes), on 12th March 2019 (by 391 to 242 votes) and on 29th March 2019 (by 344 to 286 votes).

13. On 20th March 2019, the Prime Minister had asked the European Council to extend the notification period. This was granted only until 12th April 2019. However, on 8th April 2019, the European Union (Withdrawal) Act 2019 was passed. This required a Minister of the Crown to move a motion, that day or the next, that the House of Commons agrees to the Prime Minister seeking an extension to a specified date and, if the motion was passed, required the Prime Minister to seek that extension. Pursuant to that Act, the Prime Minister sought an extension, which on 10th April 2019 was granted until 31st October 2019. The regulation changing the "exit day" was made the next day (European Union (Withdrawal) Act 2018 (Exit Day) (Amendment No 2) Regulations 2019 (SI 2019/859)). Thus the current position, under both article 50 of the Treaty on European Union and the European Union (Withdrawal) Act 2018 is that the United Kingdom will leave the Union on 31st October 2019 whether or not there is a withdrawal agreement (but this is now subject to the European Union (Withdrawal) (No 2) Act 2019: see para 22 below).

14. Mrs May resigned as leader of the Conservative party on 7th June 2019 and stood down as Prime Minister on 24th July, after the Conservative party had chosen Mr Boris Johnson as its leader. Mr Johnson has on many occasions made it clear that he believes that the European Council will only agree to changes in the withdrawal agreement if they think that there is a genuine risk that the United Kingdom will leave without any such agreement. He appointed Mr Michael Gove Cabinet Office Minister with a view to preparing for a "no deal" exit. Yet it was also clear that a majority of the House of Commons would not support withdrawal without an agreement.

This prorogation

15. On 28th August 2019, Mr Jacob Rees-Mogg, Lord President of the (Privy)Council and Leader of the House of Commons, Baroness Evans of Bowes Park, Leader of the House of Lords, and Mr Mark Spencer, Chief Whip, attended a meeting of the Privy Council held by the Queen at Balmoral Castle. An Order in Council was made ordering that "the Parliament be prorogued on a day no earlier than Monday the 9th day of September and no later than Thursday the 12th day of September 2019 to Monday the 14th day of October 2019" and that the Lord Chancellor "do cause a Commission to be prepared and issued in the usual manner for proroguing the Parliament accordingly". We know that in approving the prorogation, Her Majesty was acting on the advice of the Prime Minister. We do not know what conversation passed between them when he gave her that advice. We do not know what conversation, if any,

passed between the assembled Privy Counsellors before or after the meeting. We do not know what the Queen was told and cannot draw any conclusions about it.

16. We do know the contents of three documents leading up to that advice, annexed to a witness statement from Jonathan Jones, Treasury Solicitor and Head of the Government Legal Department. His evidence is that his department had made clear to all relevant departments, including the Prime Minister's Office, the requirement to make thorough searches for and to produce all information relevant to Mrs Miller's claim.

17. The first document is a Memorandum dated 15th August 2019 from Nikki da Costa, Director of Legislative Affairs in the Prime Minister's Office, to the Prime Minister and copied to seven other people, including Sir Mark Sedwill, Cabinet Secretary, and Dominic Cummings, Special Adviser. The key points made in the Memorandum are:

• This had the longest session since records began. Because of this, they were at the very end of the legislative programme of the previous administration. Commons and Lords business managers were asking for new Bills to ensure that Parliament was using its time gainfully. But if new Bills were introduced, the session would have to continue for another four to six months, or the Bills would fall at the end of the session.

• Choosing when to end the session - ie prorogue - was a balance between "wash up" - completing the Bills which were close to Royal Assent - and "not wasting time that could be used for new measures in a fresh session". There were very few Bills suitable for "wash-up", so this pointed to bringing the session to a close in September. Asking for prorogation to commence within the period 9th to 12th September was recommended.

• To start the new session with a Queen's Speech would be achievable in the week beginning 14th October but any earlier "is extremely pressured".

• Politically, it was essential that Parliament was sitting before and after the EU Council meeting (which is scheduled for 17th - 18th October). If the Queen's Speech were on 14th October, the usual six-day debate would culminate in key votes on 21st and 22nd October. Parliament would have the opportunity to debate the Government's overall approach to Brexit in the run up to the EU Council and then vote on it once the outcome of the Council was known.

• It must be recognised that "prorogation, on its own and separate of a Queen's Speech, has been portrayed as a potential tool to prevent MPs intervening prior to the UK's departure from the EU on 31st October". The dates proposed sought to provide reassurance by ensuring that Parliament would sit for three weeks before exit and that a maximum of seven days were lost apart from the time usually set aside for the conference recess.

• The usual length of a prorogation was under ten days, though there had been longer ones. The present proposal would mean that Parliament stood prorogued for up to 34 calendar days but, given the conference recess, the number of sitting days lost would be far less than that.

• The Prime Minister ticked "Yes" to the recommendation that his PPS approach the Palace with a request for prorogation to begin within the period Monday 9th September to Thursday 12th September and for a Queen's Speech on Monday 14th October.

18. The second document is the Prime Minister's handwritten comments on the Memorandum, dated 16th August. They read:

"(1) The whole September session is a rigmarole introduced [words redacted] t [sic] show the public that MPs were earning their crust.

(2) So I don't see anything especially shocking about this prorogation.
(3) As Nikki nots [sic], it is OVER THE CONFERENCE SEASON so that the sitting days lost are actually very few."

19. The third document is another Memorandum from Nikki da Costa, dated 23rd August, again to the Prime Minister and copied to five people, including Sir Mark Sedwill and Dominic Cummings. This sets out the proposed arrangements, including a telephone call between the Prime Minister and Her Majesty at 6.00 pm on Tuesday 27th August, formally to advise prorogation, the Privy Council meeting the next day, a cabinet meeting by conference call after that, and a press notice after that. Draft remarks for the Cabinet meeting and a draft letter to MPs (approved by the Chief Whip) were annexed.

20. We also have the Minutes of the Cabinet meeting held by conference call at 10.05 am on Wednesday 28th August, after the advice had been given. The Prime Minister explained that it was important that they were "brought up to speed" on the decisions which had been taken. It was also "important to emphasise that this decision to prorogue Parliament for a Queen's Speech was not driven by Brexit considerations: it was about pursuing an exciting and dynamic legislative programme to take forward the Government's agenda". He also explained that the timetable did not conflict with the statutory responsibilities under the Northern Ireland (Executive Formation etc) Act 2019 (as it happens, the timetable for Parliamentary sittings laid down in section 3 of that Act requires that Parliament sit on 9th September and, on one interpretation, no later than 14th October). He acknowledged that the new timetable would impact on the sitting days available to pass the Northern Ireland Budget Bill and "potentially put at risk the ability to pass the necessary legislation relating to decision-making powers in a no deal scenario". In discussion at the Cabinet meeting, among the points made was that "any messaging should emphasise that the plan for a Queen's Speech was not intended to reduce parliamentary scrutiny or minimise Parliament's opportunity to make clear its views on Brexit. … Any suggestion that the Government was using this as a tactic to frustrate Parliament should be rebutted." In conclusion, the Prime Minister said that "there were no plans for an early General Election. This would not be right for the British people: they had faced an awful lot of electoral events in recent years".

21. That same day, the Prime Minister sent a letter to all MPs updating them on the Government's plans for its business in Parliament, stressing his intention to "bring forward a new bold and ambitious domestic legislative agenda for the renewal of our country after Brexit".

22. On 3rd September Parliament returned from its summer recess. The House of Commons passed a motion that MPs should take control of the order paper - in other words decide for themselves what business they would transact. On 4th September what became the European Union (Withdrawal) (No 2) Act 2019 passed all its stages in the House of Commons. On 6th September the House of Lords suspended its usual rules so that the Bill could be passed. It received Royal Assent on Monday 9th September. The import of the Act is to require the Prime Minister on 19th October to seek, by a letter in the form scheduled to the Act, an extension of three months from the European Council, unless by then Parliament has either approved a withdrawal agreement or approved leaving without one.

These proceedings

23. Meanwhile, on 30th July 2019, prompted by the suggestion made in academic writings in April and also by some backbench MPs, and not denied by members of the Government, that Parliament might be prorogued so as to avoid further debate in the run-up to exit day, a cross party group of 75 MPs and members of the House of Lords, together with one QC, had launched a petition in the Court of Session in Scotland claiming that such a prorogation would be unlawful and seeking a declaration to that effect and an interdict to prevent it. This was met by averments that the petition was hypothetical and premature and that there was no reasonable or even hypothetical apprehension that the UK Government intended to advise the Queen to prorogue the Westminster Parliament with the intention of denying before Exit Day any further Parliamentary consideration of withdrawal from the Union. This denial was repeated in revised Answers dated 23rd and 27th August. On 27th August the Petition was amended to claim that it would be unlawful to prorogue Parliament with the intention to deny "sufficient time for proper consideration" of withdrawal. On 2nd September, the Answers were amended to deny that there was any reasonable apprehension of that.

24. On 30th August, the Lord Ordinary, Lord Doherty, refused an application for an interim interdict to prevent the now very far from hypothetical prorogation and set the date of 3rd September for the substantive hearing: [2019] CSOH 68. On 4th September, he refused the petition, on the ground that the issue was not justiciable in a court of law: [2019] CSOH 70. The Inner House (Lord Carloway, Lord President, Lord Brodie and Lord Drummond Young) heard the appeal later that week, delivered their decision with a summary of their reasons on 11th September, and their full judgments were published on Friday, 13th September: [2019] CSIH 49. They allowed the appeal, holding that the advice given to Her Majesty was justiciable, that it was motivated by the improper purpose of stymying Parliamentary scrutiny of the executive, and that it and the prorogation which followed it were unlawful and thus null and of no effect. They gave permission to appeal to this court.

25. Meanwhile, as soon as the prorogation was announced, Mrs Gina Miller launched proceedings in the High Court in England and Wales, seeking a declaration that the Prime Minister's advice to her Majesty was unlawful. Those proceedings were heard by a Divisional Court (Lord Burnett of Maldon, Lord Chief Justice of England and Wales, Sir Terence Etherton, Master of the Rolls, and Dame Victoria Sharp, President of the Queen's Bench Division) on 5th September and their judgment was delivered on 11th September: [2019] EWHC 2381 (QB).

They dismissed the claim on the ground that the issue was not justiciable. They granted a "leap-frog" certificate so that the case could come directly to this court.

26. This Court heard the appeals in *Cherry* and in *Miller* over 17th to 19th September. In addition to the written and oral submissions of the principal parties, we had written and oral submissions from the Lord Advocate, for the Scottish Government; from the Counsel General for Wales, for the Welsh Government; from Mr Raymond McCord, who has brought proceedings in Northern Ireland raising various issues relating to Brexit, but has not been permitted to proceed to challenge the lawfulness of the prorogation given that the Scottish and English challenges were already well-advanced; and from Sir John Major, a former Prime Minister with first-hand experience of prorogation. We have also received written submissions from Baroness Chakrabarti, shadow Attorney General, for Her Majesty's Opposition, and from the Public Law Project. We are grateful to everyone for the speed with which they have produced their submissions and all the other documents in the case. In view of the grave constitutional importance of the matter, and the disagreement between the courts in England and Wales and Scotland, we convened a panel of 11 Justices, the maximum number of serving Justices who are permitted to sit.

27. Both cases raise the same four issues, although there is some overlap between the issues:

(1) Is the question of whether the Prime Minister's advice to the Queen was lawful justiciable in a court of law?

(2) If it is, by what standard is its lawfulness to be judged?

(3) By that standard, was it lawful?

(4) If it was not, what remedy should the court grant?

Is the question of whether the Prime Minister's advice to the Queen was lawful justiciable in a court of law?

28. Counsel for the Prime Minister in the *Miller* proceedings, and the Advocate General as representing the United Kingdom Government in the *Cherry* proceedings, have argued that the court should decline to consider the challenges with which these appeals are concerned, on the basis that they do not raise any legal question on which the courts can properly adjudicate: that is to say, that the matters raised are not justiciable. Instead of the Prime Minister's advice to Her Majesty being reviewable by the courts, they argue that he is accountable only to Parliament. They conclude that the courts should not enter the political arena but should respect the separation of powers.

29. As we have explained, that argument was rejected by the Inner House in the *Cherry* proceedings, but was accepted by the Divisional Court in the *Miller* proceedings. In the view of the Divisional Court, the Prime Minister's decision that Parliament should be prorogued at the

time and for the duration chosen, and his advice to Her Majesty to that effect, were inherently political in nature, and there were no legal standards against which to judge their legitimacy.

30. Before considering the question of justiciability, there are four points that we should make clear at the outset. First, the power to order the prorogation of Parliament is a prerogative power: that is to say, a power recognised by the common law and exercised by the Crown, in this instance by the sovereign in person, acting on advice, in accordance with modern constitutional practice. It is not suggested in these appeals that Her Majesty was other than obliged by constitutional convention to accept that advice. In the circumstances, we express no view on that matter. That situation does, however, place on the Prime Minister a constitutional responsibility, as the only person with power to do so, to have regard to all relevant interests, including the interests of Parliament.

31. Secondly, although the courts cannot decide political questions, the fact that a legal dispute concerns the conduct of politicians, or arises from a matter of political controversy, has never been sufficient reason for the courts to refuse to consider it. As the Divisional Court observed in para 47 of its judgment, almost all important decisions made by the executive have a political hue to them. Nevertheless, the courts have exercised a supervisory jurisdiction over the decisions of the executive for centuries. Many if not most of the constitutional cases in our legal history have been concerned with politics in that sense.

32. Two examples will suffice to illustrate the point. The 17th century was a period of turmoil over the relationship between the Stuart kings and Parliament, which culminated in civil war. That political controversy did not deter the courts from holding, in the *Case of Proclamations* (1611) 12 Co Rep 74, that an attempt to alter the law of the land by the use of the Crown's prerogative powers was unlawful. The court concluded at p 76 that "the King hath no prerogative, but that which the law of the land allows him", indicating that the limits of prerogative powers were set by law and were determined by the courts. The later 18th century was another troubled period in our political history, when the Government was greatly concerned about seditious publications. That did not deter the courts from holding, in *Entick v Carrington* (1765) 19 State Tr 1029; 2 Wils KB 275, that the Secretary of State could not order searches of private property without authority conferred by an Act of Parliament or the common law.

33. Thirdly, the Prime Minister's accountability to Parliament does not in itself justify the conclusion that the courts have no legitimate role to play. That is so for two reasons. The first is that the effect of prorogation is to prevent the operation of ministerial accountability to Parliament during the period when Parliament stands prorogued. Indeed, if Parliament were to be prorogued with immediate effect, there would be no possibility of the Prime Minister's being held accountable by Parliament until after a new session of Parliament had commenced, by which time the Government's purpose in having Parliament prorogued might have been accomplished. In such circumstances, the most that Parliament could do would amount to closing the stable door after the horse had bolted. The second reason is that the courts have a duty to give effect to the law, irrespective of the minister's political accountability to Parliament. The fact that the minister is politically accountable to Parliament does not mean that he is therefore immune from legal accountability to the courts. As Lord Lloyd of Berwick stated in the *Fire*

Brigades Union case (*R v Secretary of State for the Home Department, Ex p Fire Brigades Union* [1995] 2 AC 513, 572-573):

> "No court would ever depreciate or call in question ministerial responsibility to Parliament. But as Professor Sir William Wade points out in *Wade and Forsyth, Administrative Law,* 7th ed (1994), p 34, ministerial responsibility is no substitute for judicial review. In *R v Inland Revenue Comrs, Ex p National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617, 644 Lord Diplock said:
>
> > 'It is not, in my view, a sufficient answer to say that judicial review of the actions of officers or departments of central government is unnecessary because they are accountable to Parliament for the way in which they carry out their functions. They are accountable to Parliament for what they do so far as regards efficiency and policy, and of that Parliament is the only judge; they are responsible to a court of justice for the lawfulness of what they do, and of that the court is the only judge.'"

34. Fourthly, if the issue before the court is justiciable, deciding it will not offend against the separation of powers. As we have just indicated, the court will be performing its proper function under our constitution. Indeed, by ensuring that the Government does not use the power of prorogation unlawfully with the effect of preventing Parliament from carrying out its proper functions, the court will be giving effect to the separation of powers.

35. Having made those introductory points, we turn to the question whether the issue raised by these appeals is justiciable. How is that question to be answered? In the case of prerogative powers, it is necessary to distinguish between two different issues. The first is whether a prerogative power exists, and if it does exist, its extent. The second is whether, granted that a prerogative power exists, and that it has been exercised within its limits, the exercise of the power is open to legal challenge on some other basis. The first of these issues undoubtedly lies within the jurisdiction of the courts and is justiciable, as all the parties to these proceedings accept. If authority is required, it can be found in the decision of the House of Lords in the case of *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374. The second of these issues, on the other hand, may raise questions of justiciability. The question then is not whether the power exists, or whether a purported exercise of the power was beyond its legal limits, but whether its exercise within its legal limits is challengeable in the courts on the basis of one or more of the recognised grounds of judicial review. In the *Council of Civil Service Unions* case, the House of Lords concluded that the answer to that question would depend on the nature and subject matter of the particular prerogative power being exercised. In that regard, Lord Roskill mentioned at p 418 the dissolution of Parliament as one of a number of powers whose exercise was in his view non-justiciable.

36. Counsel for the Prime Minister rely on that dictum in the present case, since the dissolution of Parliament under the prerogative, as was possible until the enactment of the Fixed-term Parliaments Act 2011, is in their submission analogous to prorogation. They submit that prorogation is in any event another example of what Lord Roskill described as "excluded categories", and refer to later authority which treated questions of "high policy" as forming

another such category (*R v Secretary of State for Foreign and Commonwealth Affairs, Ex p Everett* [1989] QB 811, 820). The court has heard careful and detailed submissions on this area of the law, and has been referred to many authorities. It is, however, important to understand that this argument only arises if the issue in these proceedings is properly characterised as one concerning the lawfulness of the exercise of a prerogative power within its lawful limits, rather than as one concerning the lawful limits of the power and whether they have been exceeded. As we have explained, no question of justiciability, whether by reason of subject matter or otherwise, can arise in relation to whether the law recognises the existence of a prerogative power, or in relation to its legal limits. Those are by definition questions of law. Under the separation of powers, it is the function of the courts to determine them.

37. Before reaching a conclusion as to justiciability, the court therefore has to determine whether the present case requires it to determine where a legal limit lies in relation to the power to prorogue Parliament, and whether the Prime Minister's advice trespassed beyond that limit, or whether the present case concerns the lawfulness of a particular exercise of the power within its legal limits. That question is closely related to the identification of the standard by reference to which the lawfulness of the Prime Minister's advice is to be judged. It is to that matter that we turn next.

By what standard is the lawfulness of the advice to be judged?

38. In principle, if not always in practice, it is relatively straightforward to determine the limits of a statutory power, since the power is defined by the text of the statute. Since a prerogative power is not constituted by any document, determining its limits is less straightforward. Nevertheless, every prerogative power has its limits, and it is the function of the court to determine, when necessary, where they lie. Since the power is recognised by the common law, and has to be compatible with common law principles, those principles may illuminate where its boundaries lie. In particular, the boundaries of a prerogative power relating to the operation of Parliament are likely to be illuminated, and indeed determined, by the fundamental principles of our constitutional law.

39. Although the United Kingdom does not have a single document entitled "The Constitution", it nevertheless possesses a Constitution, established over the course of our history by common law, statutes, conventions and practice. Since it has not been codified, it has developed pragmatically, and remains sufficiently flexible to be capable of further development. Nevertheless, it includes numerous principles of law, which are enforceable by the courts in the same way as other legal principles. In giving them effect, the courts have the responsibility of upholding the values and principles of our constitution and making them effective. It is their particular responsibility to determine the legal limits of the powers conferred on each branch of government, and to decide whether any exercise of power has transgressed those limits. The courts cannot shirk that responsibility merely on the ground that the question raised is political in tone or context.

40. The legal principles of the constitution are not confined to statutory rules, but include constitutional principles developed by the common law. We have already given two examples of such principles, namely that the law of the land cannot be altered except by or in accordance with

an Act of Parliament, and that the Government cannot search private premises without lawful authority. Many more examples could be given. Such principles are not confined to the protection of individual rights, but include principles concerning the conduct of public bodies and the relationships between them. For example, they include the principle that justice must be administered in public (*Scott v Scott* [1913] AC 417), and the principle of the separation of powers between the executive, Parliament and the courts (*Ex p Fire Brigades Union*, pp 567-568). In their application to the exercise of governmental powers, constitutional principles do not apply only to powers conferred by statute, but also extend to prerogative powers. For example, they include the principle that the executive cannot exercise prerogative powers so as to deprive people of their property without the payment of compensation (*Burmah Oil Co Ltd v Lord Advocate* [1965] AC 75).

41. Two fundamental principles of our constitutional law are relevant to the present case. The first is the principle of Parliamentary sovereignty: that laws enacted by the Crown in Parliament are the supreme form of law in our legal system, with which everyone, including the Government, must comply. However, the effect which the courts have given to Parliamentary sovereignty is not confined to recognising the status of the legislation enacted by the Crown in Parliament as our highest form of law. Time and again, in a series of cases since the 17th century, the courts have protected Parliamentary sovereignty from threats posed to it by the use of prerogative powers, and in doing so have demonstrated that prerogative powers are limited by the principle of Parliamentary sovereignty. To give only a few examples, in the *Case of Proclamations* the court protected Parliamentary sovereignty directly, by holding that prerogative powers could not be used to alter the law of the land. Three centuries later, in the case of *Attorney General v De Keyser's Royal Hotel Ltd* [1920] AC 508, the court prevented the Government of the day from seeking by indirect means to bypass Parliament, in circumventing a statute through the use of the prerogative. More recently, in the *Fire Brigades Union* case, the court again prevented the Government from rendering a statute nugatory through recourse to the prerogative, and was not deflected by the fact that the Government had failed to bring the statute into effect. As Lord Browne-Wilkinson observed in that case at p 552, "the constitutional history of this country is the history of the prerogative powers of the Crown being made subject to the overriding powers of the democratically elected legislature as the sovereign body".

42. The sovereignty of Parliament would, however, be undermined as the foundational principle of our constitution if the executive could, through the use of the prerogative, prevent Parliament from exercising its legislative authority for as long as it pleased. That, however, would be the position if there was no legal limit upon the power to prorogue Parliament (subject to a few exceptional circumstances in which, under statute, Parliament can meet while it stands prorogued). An unlimited power of prorogation would therefore be incompatible with the legal principle of Parliamentary sovereignty.

43. In our view, it is no answer to these points to say, as counsel for the Prime Minister argued, that the court should decline to consider extreme hypothetical examples. The court has to address the argument of counsel for the Prime Minister that there are no circumstances whatsoever in which it would be entitled to review a decision that Parliament should be prorogued (or ministerial advice to that effect). In addressing that argument, it is perfectly appropriate, and necessary, to consider its implications. Nor is it any answer to say that there are practical

constraints on the length of time for which Parliament might stand prorogued, since the Government would eventually need to raise money in order to fund public services, and would for that purpose require Parliamentary authority, and would also require annual legislation to maintain a standing army. Those practical constraints offer scant reassurance.

44. It must therefore follow, as a concomitant of Parliamentary sovereignty, that the power to prorogue cannot be unlimited. Statutory requirements as to sittings of Parliament have indeed been enacted from time to time, for example by the Statute of 1362 (36 Edward III c 10), the Triennial Acts of 1640 and 1664, the Bill of Rights 1688, the Scottish Claim of Right 1689, the Meeting of Parliament Act 1694, and most recently the Northern Ireland (Executive Formation etc) Act 2019, section 3. Their existence confirms the necessity of a legal limit on the power to prorogue, but they do not address the situation with which the present appeals are concerned.

45. On the other hand, Parliament does not remain permanently in session, and itis undoubtedly lawful to prorogue Parliament notwithstanding the fact that, so long as it stands prorogued, Parliament cannot enact laws. In modern practice, Parliament is normally prorogued for only a short time. There can be no question of such a prorogation being incompatible with Parliamentary sovereignty: its effect on Parliament's ability to exercise its legislative powers is relatively minor and uncontroversial. How, then, is the limit upon the power to prorogue to be defined, so as to make it compatible with the principle of Parliamentary sovereignty?

46. The same question arises in relation to a second constitutional principle, that of Parliamentary accountability, described by Lord Carnwath in his judgment in the first *Miller* case as no less fundamental to our constitution than Parliamentary sovereignty (*R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2018] AC 61, para 249). As Lord Bingham of Cornhill said in the case of *Bobb v Manning* [2006] UKPC 22, para 13, "the conduct of government by a Prime Minister and Cabinet collectively responsible and accountable to Parliament lies at the heart of Westminster democracy". Ministers are accountable to Parliament through such mechanisms as their duty to answer Parliamentary questions and to appear before Parliamentary committees, and through Parliamentary scrutiny of the delegated legislation which ministers make. By these means, the policies of the executive are subjected to consideration by the representatives of the electorate, the executive is required to report, explain and defend its actions, and citizens are protected from the arbitrary exercise of executive power.

47. The principle of Parliamentary accountability has been invoked time and again throughout the development of our constitutional and administrative law, as a justification for judicial restraint as part of a constitutional separation of powers (see, for example, *R v Secretary of State for the Environment, Ex p Nottinghamshire County Council* [1986] AC 240, 250), and as an explanation for non-justiciability (*Mohammed (Serdar) v Ministry of Defence* [2017] UKSC 1; [2017] AC 649, para 57). It was also an animating principle of some of the statutes mentioned in para 44, as appears from their references to the redress of grievances. As we have mentioned, its importance as a fundamental constitutional principle has also been recognised by the courts.

48. That principle is not placed in jeopardy if Parliament stands prorogued forthe short period which is customary, and as we have explained, Parliament does not in any event expect to be in permanent session. But the longer that Parliament stands prorogued, the greater the risk that

responsible government may be replaced by unaccountable government: the antithesis of the democratic model. So the same question arises as in relation to Parliamentary sovereignty: what is the legal limit upon the power to prorogue which makes it compatible with the ability of Parliament to carry out its constitutional functions?

49. In answering that question, it is of some assistance to consider how the courts have dealt with situations where the exercise of a power conferred by statute, rather than one arising under the prerogative, was liable to affect the operation of a constitutional principle. The approach which they have adopted has concentrated on the effect of the exercise of the power upon the operation of the relevant constitutional principle. Unless the terms of the statute indicate a contrary intention, the courts have set a limit to the lawful exercise of the power by holding that the extent to which the measure impedes or frustrates the operation of the relevant principle must have a reasonable justification. That approach can be seen, for example, in *R (UNISON) v Lord Chancellor* [2017] UKSC 51; [2017] 3 WLR 409, paras 80-82 and 88-89, where earlier authorities were discussed. A prerogative power is, of course, different from a statutory power: since it is not derived from statute, its limitations cannot be derived from a process of statutory interpretation. However, a prerogative power is only effective to the extent that it is recognised by the common law: as was said in the *Case of Proclamations*, "the King hath no prerogative, but that which the law of the land allows him". A prerogative power is therefore limited by statute and the common law, including, in the present context, the constitutional principles with which it would otherwise conflict.

50. For the purposes of the present case, therefore, the relevant limit upon the power to prorogue can be expressed in this way: that a decision to prorogue Parliament (or to advise the monarch to prorogue Parliament) will be unlawful if the prorogation has the effect of frustrating or preventing, without reasonable justification, the ability of Parliament to carry out its constitutional functions as a legislature and as the body responsible for the supervision of the executive. In such a situation, the court will intervene if the effect is sufficiently serious to justify such an exceptional course.

51. That standard is one that can be applied in practice. The extent to which prorogation frustrates or prevents Parliament's ability to perform its legislative functions and its supervision of the executive is a question of fact which presents no greater difficulty than many other questions of fact which are routinely decided by the courts. The court then has to decide whether the Prime Minister's explanation for advising that Parliament should be prorogued is a reasonable justification for a prorogation having those effects. The Prime Minister's wish to end one session of Parliament and to begin another will normally be enough in itself to justify the short period of prorogation which has been normal in modern practice. It could only be in unusual circumstances that any further justification might be necessary. Even in such a case, when considering the justification put forward, the court would have to bear in mind that the decision whether to advise the monarch to prorogue Parliament falls within the area of responsibility of the Prime Minister, and that it may in some circumstances involve a range of considerations, including matters of political judgment. The court would therefore have to consider any justification that might be advanced with sensitivity to the responsibilities and experience of the Prime Minister, and with a corresponding degree of caution. Nevertheless, it is the court's responsibility to determine whether the Prime Minster has remained within the legal

limits of the power. If not, the final question will be whether the consequences are sufficiently serious to call for the court's intervention.

Conclusions on justiciability

52. Returning, then, to the justiciability of the question of whether the Prime Minister's advice to the Queen was lawful, we are firmly of the opinion that it is justiciable. As we have explained, it is well established, and is accepted by counsel for the Prime Minister, that the courts can rule on the extent of prerogative powers. That is what the court will be doing in this case by applying the legal standard which we have described. That standard is not concerned with the mode of exercise of the prerogative power within its lawful limits. On the contrary, it is a standard which determines the limits of the power, marking the boundary between the prerogative on the one hand and the operation of the constitutional principles of the sovereignty of Parliament and responsible government on the other hand. An issue which can be resolved by the application of that standard is by definition one which concerns the extent of the power to prorogue, and is therefore justiciable.

The alternative ground of challenge

53. In addition to challenging the Prime Minister's advice on the basis of the effect of the prorogation which he requested, Mrs Miller and Ms Cherry also seek to challenge it on the basis of the Prime Minister's motive in requesting it. As we have explained, the Prime Minister had made clear his view that it was advantageous, in his negotiations with the EU, for there to be a credible risk that the United Kingdom might withdraw without an agreement unless acceptable terms were offered. Since there was a majority in Parliament opposed to withdrawal without an agreement, there was every possibility that Parliament might legislate to prevent such an outcome. In those circumstances, it is alleged, his purpose in seeking a prorogation of such length at that juncture was to prevent Parliament from exercising its legislative functions, so far as was possible, until the negotiations had been completed.

54. That ground of challenge raises some different questions, in relation to justiciability, from the ground based on the effects of prorogation on Parliament's ability to legislate and to scrutinise governmental action. But it is appropriate first to decide whether the Prime Minister's advice was lawful, considering the effects of the prorogation requested and applying the standard which we have set out. It is only if it was, that the justiciability of the alternative ground of challenge will need to be considered.

Was the advice lawful?

55. Let us remind ourselves of the foundations of our constitution. We live in a representative democracy. The House of Commons exists because the people have elected its members. The Government is not directly elected by the people (unlike the position in some other democracies). The Government exists because it has the confidence of the House of Commons. It has no democratic legitimacy other than that. This means that it is accountable to the House of Commons - and indeed to the House of Lords - for its actions, remembering always that the actual task of governing is for the executive and not for Parliament or the courts. The first

question, therefore, is whether the Prime Minister's action had the effect of frustrating or preventing the constitutional role of Parliament in holding the Government to account.

56. The answer is that of course it did. This was not a normal prorogation in the run-up to a Queen's Speech. It prevented Parliament from carrying out its constitutional role for five out of a possible eight weeks between the end of the summer recess and exit day on the 31st October. Parliament might have decided to go into recess for the party conferences during some of that period but, given the extraordinary situation in which the United Kingdom finds itself, its members might have thought that parliamentary scrutiny of government activity in the run-up to exit day was more important and declined to do so, or at least they might have curtailed the normal conference season recess because of that. Even if they had agreed to go into recess for the usual three-week period, they would still have been able to perform their function of holding the government to account. Prorogation means that they cannot do that.

57. Such an interruption in the process of responsible government might not matter in some circumstances. But the circumstances here were, as already explained, quite exceptional. A fundamental change was due to take place in the Constitution of the United Kingdom on 31st October 2019. Whether or not this is a good thing is not for this or any other court to judge. The people have decided that. But that Parliament, and in particular the House of Commons as the democratically elected representatives of the people, has a right to have a voice in how that change comes about is indisputable. And the House of Commons has already demonstrated, by its motions against leaving without an agreement and by the European Union (Withdrawal) (No 2) Act 2019, that it does not support the Prime Minister on the critical issue for his Government at this time and that it is especially important that he be ready to face the House of Commons.

58. The next question is whether there is a reasonable justification for taking action which had such an extreme effect upon the fundamentals of our democracy. Of course, the Government must be accorded a great deal of latitude in making decisions of this nature. We are not concerned with the Prime Minister's *motive* in doing what he did. We are concerned with whether there was a reason for him to do it. It will be apparent from the documents quoted earlier that no reason was given for closing down Parliament for five weeks. Everything was focussed on the need for a new Queen's Speech and the reasons for holding that in the week beginning the 14th October rather than the previous week. But why did that need a prorogation of five weeks?

59. The unchallenged evidence of Sir John Major is clear. The work on the Queen's Speech varies according to the size of the programme. But a typical time is four to six days. Departments bid for the Bills they would like to have in the next session. Government business managers meet to select the Bills to be included, usually after discussion with the Prime Minister, and Cabinet is asked to endorse the decisions. Drafting the speech itself does not take much time once the substance is clear. Sir John's evidence is that he has never known a Government to need as much as five weeks to put together its legislative agenda.

60. Nor does the Memorandum from Nikki da Costa outlined in para 17 above suggest that the Government needed five weeks to put together its legislative agenda. The memorandum has much to say about a new session and Queen's Speech but nothing about why so long was needed to prepare for it. The only reason given for starting so soon was that "wash up" could be

concluded within a few days. But that was totally to ignore whatever else Parliament might have wanted to do during the four weeks it might normally have had before a prorogation. The proposal was careful to ensure that there would be some Parliamentary time both before and after the European Council meeting on 17th - 18th October. But it does not explain why it was necessary to curtail what time there would otherwise have been for Brexit related business. It does not discuss what Parliamentary time would be needed to approve any new withdrawal agreement under section 13 of the European Union (Withdrawal) Act 2018 and enact the necessary primary and delegated legislation. It does not discuss the impact of prorogation on the special procedures for scrutinising the delegated legislation necessary to make UK law ready for exit day and achieve an orderly withdrawal with or without a withdrawal agreement, which are laid down in the European Union (Withdrawal) Act 2018. Scrutiny committees in both the House of Commons and the House of Lords play a vital role in this. There is also consultation with the Scottish Parliament and the Welsh Assembly. Perhaps most tellingly of all, the memorandum does not address the competing merits of going into recess and prorogation. It wrongly gives the impression that they are much the same. The Prime Minister's reaction was to describe the September sitting as a "rigmarole". Nowhere is there a hint that the Prime Minister, in giving advice to Her Majesty, is more than simply the leader of the Government seeking to promote its own policies; he has a constitutional responsibility, as we have explained in para 30 above.

61. It is impossible for us to conclude, on the evidence which has been put before us, that there was any reason - let alone a good reason - to advise Her Majesty to prorogue Parliament for five weeks, from 9th or 12th September until 14th October. We cannot speculate, in the absence of further evidence, upon what such reasons might have been. It follows that the decision was unlawful.

Remedy

62. Mrs Miller asks us to make a declaration that the advice given to Her Majesty was unlawful and we can certainly do that. The question is whether we should do more than that, in order to make it crystal clear what the legal consequences of that holding are. The Inner House did go further and declared, not only that the advice was unlawful, but that "any prorogation which followed thereon, is unlawful and thus null and of no effect". The essential question is: is Parliament prorogued or is it not?

63. The Government argues that we cannot answer that question, or declare the prorogation null and of no effect, because to do so would be contrary to article 9 of the Bill of Rights of 1688, an Act of the Parliament of England and Wales, or the wider privileges of Parliament, relating to matters within its "exclusive cognisance". The prorogation itself, it is said, was "a proceeding in Parliament" which cannot be impugned or questioned in any court. And reasoning back from that, neither can the Order in Council which led to it.

64. Article 9 provides:

> "That the Freedome of Speech and Debates or Proceedings in Parlyament ought not to be impeached or questioned in any Court or Place out of Parlyament."

The equivalent provision in the Claim of Right of 1689, an Act of the Parliament of Scotland, is this:

> "That for redress of all greivances and for the amending strenthneing and preserveing of the lawes Parliaments ought to be frequently called and allowed to sit and the freedom of speech and debate secured to the members."

65. The first point to note is that these are Acts of Parliament. It is one of the principal roles of the courts to interpret Acts of Parliament. A recent example of this Court interpreting article 9 is *R v Chaytor* [2010] UKSC 52; [2011] 1 AC 684. The case concerned the prosecution of several Members of Parliament for allegedly making false expenses claims. They resisted this on the ground that those claims were "proceedings in Parliament" which ought not to be "impeached or questioned" in any court outside Parliament. An enlarged panel of nine Justices held unanimously that MPs' expenses claims were not "proceedings in Parliament" nor were they in the exclusive cognisance of Parliament. There is a very full discussion of the authorities in the judgments of Lord Phillips of Worth Matravers and Lord Rodger of Earlsferry which need not be repeated here.

66. That case clearly establishes: (1) that it is for the court and not for Parliament to determine the scope of Parliamentary privilege, whether under article 9 of the Bill of Rights or matters within the "exclusive cognisance of Parliament"; (2) that the principal matter to which article 9 is directed is "freedom of speech and debate in the Houses of Parliament and in parliamentary committees. This is where the core or essential business of Parliament takes place" (para 47). In considering whether actions outside the Houses and committees are also covered, it is necessary to consider the nature of their connection to those and whether denying the actions privilege is likely to impact adversely on the core or essential business of Parliament; (3) that "exclusive cognisance refers not simply to Parliament, but to the exclusive right of each House to manage its own affairs without interference from the other or from outside Parliament" (para 63); it was enjoyed by Parliament itself and not by individual members and could be waived or relinquished; and extensive inroads had been made into areas previously within exclusive cognisance.

67. Erskine May, *Parliamentary Practice* (25th ed 2019, para 13.12) is to similar effect:

> "The primary meaning of proceedings, as a technical parliamentary term, which it had at least as early as the 17th century, is some formal action, usually a decision, taken by the House in its collective capacity. While business which involves actions and decisions of the House are clearly proceedings, debate is an intrinsic part of that process which is recognised by its inclusion in the formulation of article IX. An individual member takes part in a proceeding usually by speech, but also by various recognised forms of formal action, such as voting, giving notice of a motion, or presenting a petition or report from a committee, most of such actions being time-saving substitutes for speaking."

68. The prorogation itself takes place in the House of Lords and in the presence of Members of both Houses. But it cannot sensibly be described as a "proceeding in Parliament". It is not a decision of either House of Parliament. Quite the contrary: it is something which is imposed upon them from outside. It is not something upon which the Members of Parliament can speak or

vote. The Commissioners are not acting in their capacity as members of the House of Lords but in their capacity as Royal Commissioners carrying out the Queen's bidding. They have no freedom of speech. This is not the core or essential business of Parliament. Quite the contrary: it brings that core or essential business of Parliament to an end.

69. This court is not, therefore, precluded by article 9 or by any wider Parliamentary privilege from considering the validity of the prorogation itself. The logical approach to that question is to start at the beginning, with the advice that led to it. That advice was unlawful. It was outside the powers of the Prime Minister to give it. This means that it was null and of no effect: see, if authority were needed, *R (UNISON) v Lord Chancellor* [2017] UKSC 51, para 119. It led to the Order in Council which, being founded on unlawful advice, was likewise unlawful, null and of no effect and should be quashed. This led to the actual prorogation, which was as if the Commissioners had walked into Parliament with a blank piece of paper. It too was unlawful, null and of no effect.

70. It follows that Parliament has not been prorogued and that this court should make declarations to that effect. We have been told by counsel for the Prime Minister that he will "take all necessary steps to comply with the terms of any declaration made by the court" and we expect him to do so. However, it appears to us that, as Parliament is not prorogued, it is for Parliament to decide what to do next. There is no need for Parliament to be recalled under the Meeting of Parliament Act 1797. Nor has Parliament voted to adjourn or go into recess. Unless there is some Parliamentary rule to the contrary of which we are unaware, the Speaker of the House of Commons and the Lord Speaker can take immediate steps to enable each House to meet as soon as possible to decide upon a way forward. That would, of course, be a proceeding in Parliament which could not be called in question in this or any other court.

71. Thus the Advocate General's appeal in the case of *Cherry* is dismissed and Mrs Miller's appeal is allowed. The same declarations and orders should be made in each case.

All Aboard

Arthur Cheney Train was born in Boston in 1875. He was a lawyer and writer of legal thrillers, perhaps best known for his creation of the fictional lawyer Mr. Ephain Tutt. Tutt was featured in a dozen or so novels and roughly twice that many articles in the "Saturday Evening Post."

Train wrote both fiction and non-fiction. *The Prisoner At The Bar* (1907), from which the following is excerpted, was written while Train was an Assistant District Attorney in New York City. It is a chapter entitled "What Is Crime?" We thought that you might find it interesting to hear the musings on the subject of the original John Grisham of his times. We hope you enjoy. Please let us know what you think about this or any other material in the *Advance Sheet*.

The Prisoner at the Bar

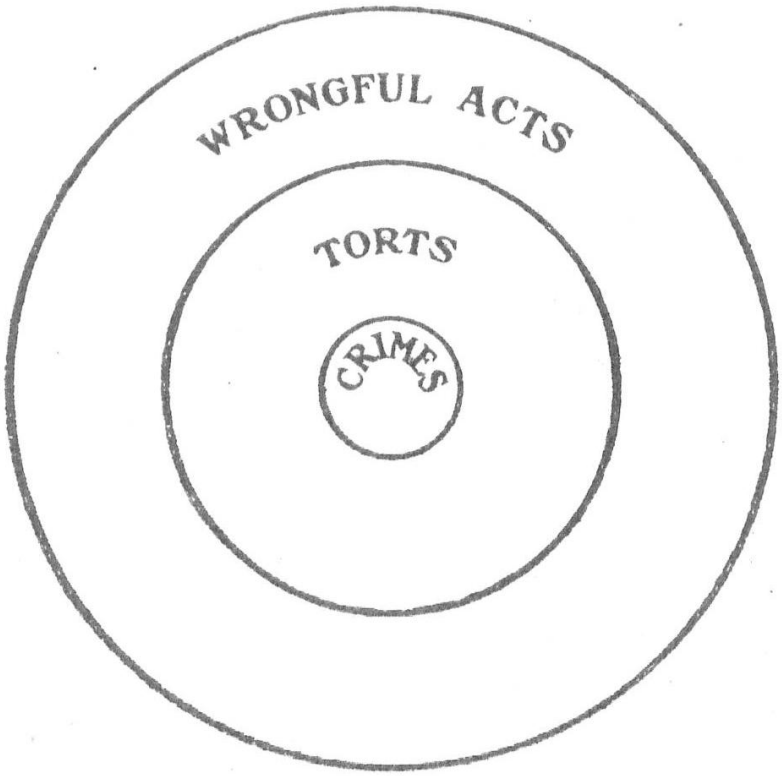
CHAPTER I

WHAT IS CRIME?

A CRIME is any act or omission to act punishable as such by law. It is difficult, if not impossible, to devise any closer definition. Speaking broadly, crimes are certain acts usually wrongful, which are regarded as sufficiently dangerous or harmful to society to be forbidden under pain of punishment. The general relation of crimes to wrongs as a whole is sometimes illustrated by a circle having two much smaller circles within it. The outer circle represents wrongful acts in the aggregate; the second, wrongful acts held by law to be *torts*, that is to say, infractions of private rights for which redress may be sought in the civil courts, and the smallest or inner circle, acts held to be so injurious to the public as to be punishable as crimes.

This does well enough for the purpose of illustrating the relative proportion of crimes to torts or wrongful acts in general, and, if a tiny dot be placed in the centre of the bull's-eye to represent those crimes which are actually punished, one gets an excellent idea of how infinitely small a number of these serve to keep the whole social fabric in order and sustain the majesty of the law. But the inference might naturally be drawn that whatever

was a crime must also be a tort or at least a wrong, which, while true in the majority of instances, is not necessarily the case in all. In a certain sense crimes are always wrongs or, at least, wrong, but



only in the sense of being infractions of law are they *always* wrongs or wrong.

The word wrong being the antithesis of the word right, and carrying with it generally some ethical or moral significance, will vary in its meaning according to the ideas of the individual who makes use of it. Indeed, it is conceivable that the only really right thing to do under certain circumstances would be to commit an act designated by law as a crime. So, conversely, while a wrong viewed as an infraction of the laws of God is a sin, that which is uni-

versally held sinful is by no means always a crime. Speaking less broadly, a wrong is an infraction of a right belonging to another, which he derives from the law governing the society of which he is a member. Many wrongs are such that he may sue and obtain redress therefor in the courts. But it by no means follows that every crime involves the infraction of a private right or the commission of a tort. Thus "perjury" and most crimes against the State are not torts at all. It will thus be seen that no accurate definition of a crime can be given save that it is an act or omission which the State punishes as such, and that technically the word carries with it no imputation or implication of sin, vice, iniquity, or in a broad sense even of wrong. The act may or may not be repugnant to our ideas of right. Numerically considered, only a minority of crimes have any ethical significance whatever, the majority being designated by the law itself as *mala prohibita*, rather than *mala in se*.

It is the duty of a prosecutor to see that infractions of the criminal law are punished and to represent the public in all proceedings had for that purpose, but, in view of what has just been said, it will be observed that his duties do not necessarily involve familiarity with vice, violence or even sin. The crimes he is called upon to prosecute may be disgusting, depraved and wicked, or they may be, and frequently are, interesting, ingenious, amusing or, possibly (though not probably), commendable. For example, a man who chastises the foul slanderer of a young woman's character may have technically committed an assault of high degree, yet if he does so in the proper spirit, in a suitable place, and

makes the offender smart sufficiently, he deserves the thanks and congratulations of all decent men and honest women. Yet, indubitably, he has committed a crime, although, thanks to our still lingering spirit of chivalry, he would never be stamped by any jury as a criminal.

A prosecutor is frequently asked if he does not find that his experience has a "hardening" effect.

"Why should it?" he might fairly reply. "I have to do with criminals, it is true, but the criminals as a rule are little or no worse than the classes of people outside from which they have been drawn. Their arrest and conviction are largely due to accidental causes, such as weak heads, warm hearts, quick temper, ignorance, foolishness or drunkenness. We see all of these characteristics in our immediate associates. A great many convicted persons have done acts which are not wrong at all, but are merely forbidden. Even where their acts are really wrong it is generally the stupid, the unfortunate, or the less skilful who are caught. For every rogue in jail there are at least ten thousand at large. The ones who escape are wiser and very likely meaner. Last, but not least, a very great number of the most despicable, wicked, and harmful deeds that can be committed are not crimes at all. The fact that a man is a criminal argues nothing at all against his general decency, and when I meet a convict I assume, and generally assume correctly, that to most intents and purposes he is a gentleman. The code which puts one man in stripes and allows another to ride in an automobile is purely artificial, and strictly speaking proves not a whit which is the better man."

Now while such an answer might seem frivolous enough to the lay reader, it would nevertheless be substantially true. Your criminal, that is to say, strictly, the law-breaker who is brought to book for his offence, is very likely a pretty good sort of fellow as fellows go. If he has been guilty merely of an act which is prohibited, not because of its inherent wrong, but simply on grounds of public policy—*malum prohibitum*—he is probably as good as anybody. His offence may be due to ignorance or accident. Assuming that his crime be one which would seem to involve moral turpitude—*malum in se*—there are very likely mitigating circumstances which render his offence, if not excusable, at least less reprehensible than would appear at first glance.

Crimes bear no absolute relation to one another. A murderer may or may not be worse than a thief,—and either may be better than his accuser. The actual danger of any particular offender to the community lies not so much in the kind or degree of crime which he may have committed as in the state of his mind. Even the criminals who are really criminal, in the sense that they have a systematic intention of defying the law and preying upon society, are generally not criminal in all directions, but usually only in one, so that taken upon their unprofessional side they present the same characteristics as ordinary and, roughly speaking, law-abiding citizens. The bank robber usually is a bank robber and nothing more. He specializes in that one pursuit. It is his vocation and his joy. He prides himself on the artistic manner in which he does his work. He would scorn to steal your watch and is a man of

honor outside of bank-breaking hours,—"Honor among thieves." Often enough he is a model husband and father. So, too, may be your forger, gambler, swindler, burglar, highwayman, or thief,—any in fact except the real moral pervert; and of course murder is entirely compatible on occasion with a noble, dignified and generous character. "There is nothing essentially incongruous between crime and culture." The prosecutor who begins by loathing and despising the man sitting at the bar may end by having a sincere admiration for his intellect, character or capabilities. This by way of defence to crime in general.

Our forefathers contented themselves with a rough distinction between crimes as *mala prohibita* and *mala in se*. When they sought to classify criminal acts under this arrangement they divided them accordingly as the offence carried or did not carry with it a suggestion of moral turpitude. Broadly speaking, all felonies were and are regarded as *mala in se*. Murder, arson, burglary, theft, etc., in general indubitably imply a depraved mind, while infractions of Sunday observance laws or of statutes governing the trade in liquor do not. Yet it must be perfectly clear that any such distinction is inconclusive.

There can be no general rule based merely on the name or kind of crime committed which is going to tell us which offender is really the worst. A misdemeanor may be very much more heinous than a felony. The adulterator of drugs or the employer of illegal child labor may well be regarded as vastly more reprehensible than the tramp who steals part of the family wash. So far as that goes there are an

alarming multitude of acts and omissions not forbidden by statute or classed as crimes which are to all intents and purposes fully as criminal as those designated as such by law. This is the inevitable result of the fact that crimes are not crimes merely because they are wrong, but because the State has enjoined them. For example, to push a blind man over the edge of a cliff so that he is killed upon the rocks below is murder, but to permit him to walk over it, although by stretching out your hand you might prevent him, is no crime at all. It is a crime to defame a woman's character if you write your accusation upon a slip of paper and pass it to another, but it is no crime in New York State to arise in a crowded lecture hall and ruin her forever by word of mouth. It is a crime to steal a banana off a fruit-stand, but it is no crime to borrow ten thousand dollars from a man whose entire fortune it is, although you have no expectation of returning it. You can be a swindler all your life—the meanest sort of a mean swindler, but there is no crime of being a swindler or of being a mean man. It is a crime to ruin a girl of seventeen years and eleven months, but not to ruin a girl of eighteen. The "age of consent" varies in the different States. It is a crime to obtain a dollar by means of a false statement as to a past or existing fact, but it is no crime to obtain as much money as you can by any other sort of a lie. Lying is not a crime, but lying under oath is a crime,—provided it be done in a legal proceeding and relates to a *material* matter. The most learned jurists habitually disagree as to what is material and what is not.

Even when the acts to be contrasted are all crimes

there is no way of actually discriminating between them except by carefully scrutinizing the circumstances of each. The so-called "degrees" mean little or nothing. If you steal four hundred and ninety-nine dollars out of a man's safe in the daytime it is grand larceny in the second degree. If you pick the same man's pocket of a subway ticket after sunset it is grand larceny in the first degree. You may get five years in the first instance and ten in the second. If you steal twenty-five dollars out of a bureau drawer you commit petty larceny and may be sent to prison for only one year.

If the degree of any particular crime of which a defendant is found guilty is no index to his real criminality or of his danger to society, still less is the name of the crime he has committed an index to his moral character, save in the case of certain offences which it is not necessary to enumerate. Most men charged with homicide are indicted for murder in the first degree. This may be a wise course for the grand jury to pursue in view of the additional evidence which often comes to light during a trial. But it frequently is discovered before the case goes to the jury that in point of fact the killing was in hot blood and under circumstances which evince no great moral turpitude in the slayer. For example, two drunken men become involved in an altercation and one strikes the other, who loses his equilibrium and falls, hitting his head against a curbstone and fracturing his skull. The striker is indicted and tried for murder. Now he is doubtless guilty of manslaughter, but he is less dangerous to the community than a professional thief who preys upon the public by impersonating a gasman or telephone repairer and by thus gaining access to private

dwellings steals the owner's property. One is an accidental, the other an intentional criminal. One is hostile to society as a whole and the other is probably not really hostile to anybody. Yet the less guilty is denominated a murderer, and the other is rarely held guilty of more than petty larceny. A fellow who bumps into you on the street, if he be accompanied by another, and grabs your cane, is guilty of robbery in the first degree,—"highway" robbery,—and may get twenty years for it, but the same man may publish a malicious libel about you, and by accusing you of the foulest practices rob you of your good name and be only guilty of a misdemeanor. Yet the reader should not infer that definitions and grades of crime capable of corresponding punishments are not proper, desirable, and necessary. Of course they are. The practical use of such statutes is to fix a maximum sentence of punishment. As a rule the minimum is anything the judge sees fit. Hence you may deduce a general principle to the effect that the charge against the prisoner, even assuming his guilt, indicates nothing definite as to his moral turpitude, danger to the community, or general undesirability.

But we may honestly go much further. Not only are the names and degrees of the crimes which a defendant may have committed of very little assistance in determining his real criminality, but the fact that he has committed them by no means signifies that he is morally any worse than some man who has committed no so-called crime at all. Many criminals, even those guilty of homicide, are as white as snow compared with others who have never transgressed the literal wording of a penal statute.

"We used to have So and So for our lawyer,"

remarked the president of a large street railway corporation. "He was always telling us what we *couldn't* do. Now we have Blank, and pay him one hundred thousand dollars a year to tell us how we *can* do the same things." The thief who can have the advice of able counsel "how to do it" need never go to jail.

Many of the things most abhorrent to our sense of right do not come within the scope of the criminal law. *Omissions,* no matter how reprehensible, are usually not regarded as criminal, because in most cases there is no technical legal duty to perform the act omitted. Thus, not to remove your neighbor's baby from the railroad track in front of an onrushing train, although it would cause you very little trouble to do so, is no crime, even if the child's life be lost as a result of your neglect. You can let your mother-in-law choke to death without sending for a doctor, or permit a ruffian half your size to kill an old and helpless man, or allow your neighbor's house to burn down, he and his family peacefully sleeping inside it, while you play on the pianola and refuse to ring up the fire department, and never have to suffer for it,—in this world.

Passing from felonies—*mala in se*—to misdemeanors—generally only *mala prohibita*—almost anything becomes a crime, depending upon the arbitrary act of the legislature.

It is a crime in New York State to run a horse race within a mile of where a court is sitting; to advertise as a divorce lawyer; to go fishing or "play" on the first day of the week; to set off fireworks or make a "disbursing noise"* at a military funeral in a city on Sunday; to arrest or attach a

* New York Penal Code, Section 276.

corpse for payment of debt; to keep a "slot machine"; to do business under any name not actually your own full name without filing a certificate with the county clerk (as, for example, if, being a tailor, you call your shop "The P. D. Q. Tailoring Establishment"); to ride in a long-distance bicycle race more than twelve hours out of twenty-four; to shoe horses without complying with certain articles of the Labor Law; to fail to supply seats for female employés in a mercantile establishment; to steal a ride in a freight car, or to board such a car or train while in motion; to set fire negligently to one's own woods, by means of which the property of another is endangered; to run a ferry without authority; or, having contracted to run one, to fail to do so; to neglect to post ferry rates (under certain conditions) in English; to induce the employé of a railroad company to leave its service because it requires him to wear a uniform; to wear a railroad uniform without authority; to fish with a net in any part of the Hudson River (except where permitted by statute); to secretly loiter about a building with intent to overhear discourse therein, and to repeat the same to vex others (eavesdropping); to sell skimmed milk without a label; to plant oysters (if you are a non-resident) inside the State without the consent of the owner of the water; to maintain an insane asylum without a license; to enter an agricultural fair without paying the entrance fee; to assemble with two or more other persons "disguised by having their faces painted, discolored, colored or concealed," save at a fancy-dress ball for which permission has been duly obtained from the police; or to wear the badge of the "Pa-

trons of Husbandry,'' or of certain other orders without authority. These illustrations are selected at random from the New York Penal Code.

Where every business, profession, and sport is hedged around by such *chevaux-de-frise* of criminal statutes, he must be an extraordinarily careful as well as an exceptionally well-informed citizen who avoids sooner or later crossing the dead-line. It is to be deprecated that our law-makers can devise no other way of regulating our existences save by threatening us with the shaved head and striped shirt.

The actual effect of such a multitude of statutes making anything and everything crimes, punishable by imprisonment, instead of increasing our respect for law, decreases it unless they are intended to be and actually are enforced. Acts *mala in se* are lost in the shuffle among the acts *mala prohibita,* and we have to become students to avoid becoming criminals.

Year by year the legislature goes calmly on *creating* all sorts of new crimes, while failing to amplify or give effect to the various statutes governing existing offences which to a far greater degree are a menace to the community. For example, it is not a crime in New York State to procure money by false pretences provided the person defrauded parts with his money for an illegal purpose.

In the McCord* case, in which the Court of Appeals established this extraordinary doctrine, the defendant had falsely pretended to the complainant, a man named Miller, that he was a police officer and held a warrant for his arrest. By these means he

* 46 New York 470.

had induced Miller to give him a gold watch and a diamond ring as the price of his liberty. The conviction in this case was reversed on the ground that Miller parted with his property for an unlawful purpose; but there was a very strong dissenting opinion from Mr. Justice Peckham, now a member of the bench of the Supreme Court of the United States.

In a second case, that of Livingston,* the complainant had been defrauded out of five hundred dollars by means of the "green-goods" game; but this conviction was reversed by the Appellate Division of the Second Department on the authority of the McCord case. The opinion was written by Mr. Justice Cullen, now Chief Judge of the New York Court of Appeals, who says in conclusion:

"We very much regret being compelled to reverse this conviction. Even if the prosecutor intended to deal in counterfeit money, it is no reason why the appellant should go unwhipped of justice. *We venture to suggest that it might be well for the legislature to alter the rule laid down in McCord vs. People.*"

Well might the judges regret being compelled to set a rogue at liberty simply because he had been ingenious enough to invent a fraud which involved the additional turpitude of seducing another into a criminal conspiracy. Livingston was turned loose upon the community, in spite of the fact that he had swindled a man out of five hundred dollars, because he had incidentally led the latter to believe that in return he was to receive counterfeit money or "green goods" which might be put into circulation.

* 47 App. Div. 283.

Yet, because, some years before, the judges of the Court of Appeals had, in the McCord matter, adopted the rule followed in civil cases, to wit, that as the complaining witness was himself in fault and did not come into court with clean hands he could have no standing before them, the Appellate Division in the next case felt obliged to follow them and to rule tantamount to saying that two wrongs could make a right and two knaves one honest man. It may seem a trifle unfair to put it in just this way, but when one realizes the iniquity of such a rule as applied to criminal cases, it is hard to speak softly. Thus the broad and general doctrine seemed to be established that so long as a thief could induce his victim to believe that it was to his advantage to enter into a dishonest transaction, he might defraud him to any extent in his power. Immediately there sprang into being hordes of swindlers, who, aided by adroit shyster lawyers, invented all sorts of schemes which involved some sort of dishonesty upon the part of the person to be defrauded. The "wire-tappers," of whom "Larry" Summerfield was the Napoleon, the "gold-brick" and "green-goods" men, and the "sick engineers" flocked to New York, which, under the unwitting protection of the Court of Appeals, became a veritable Mecca for persons of their ilk.

The "wire-tapping" game consisted in inducing the victim to put up money for the purpose of betting upon a "sure thing," knowledge of which the thief pretended to have secured by "tapping" a Western Union wire of advance news of the races. He usually had a "lay out" which included telegraph instruments connected with a dry battery in an adjoining closet, and would merrily steal the sup-

posed news off an imaginary wire and then send his dupe to play his money upon the "winner" in a pretended pool-room which in reality was nothing but a den of thieves, who instantly absconded with the money.

In this way one John Felix was defrauded out of fifty thousand dollars on a single occasion.* Now the simplest legislation could instantly remedy this evil and run all the "wire-tappers" and similar swindlers out of business, yet a bill framed and introduced in accordance with the suggestion of the highest court in the State was defeated. Instead the legislature passes scores of entirely innocuous and respectable acts like the following, which became a law in 1890:

AN ACT FOR THE PREVENTION OF BLINDNESS.

Section 1. Should any . . . *nurse having charge of an infant* . . . *notice* that one or both eyes of such

* The operations of these swindlers recently became so notorious that the District Attorney of New York County determined to prosecute the perpetrators of the Felix swindle, in spite of the fact that the offence appeared to come within the language of the Court of Appeals in the McCord and Livingston cases. Accordingly Christopher Tracy, alias Charles Tompkins, alias Topping, etc., etc., was indicted (on the theory of "trick and device") for the "common-law" larceny of Felix's fifty thousand dollars.

The trial came on before Judge Warren W. Foster in Part III of the General Sessions on February 27, 1906. A special panel quickly supplied a jury, which, after hearing the evidence, returned a verdict of guilty in short order.

It now remains for the judges of the Court of Appeals to decide whether they will extend the doctrine of the McCord and Livingston cases to a fraud of this character, whether they will limit the doctrine strictly to cases of precisely similar facts, or whether they will frankly refuse to be bound by any such absurd and iniquitous theory and consign the McCord case to the dust-heap of discarded and mistaken doctrines, where it rightfully belongs. Their action will determine whether the perpetrators of the most ingenious, elaborate and successful bunco game in the history of New York County shall be punished for their offence or instead be turned loose to prey at will upon the community at large. (See "The Last of the Wire-Tappers" in the *American Magazine* for June, 1906.)

> infant are inflamed or reddened at any time within two weeks after its birth it shall be the duty of such nurse . . . to report the fact in writing within six hours to the health officer or some legally qualified practitioner of medicine . . .
>
> Section 2. Any failure to comply with the provisions of this act shall be punished by a fine not to exceed one hundred dollars, *or imprisonment not to exceed six months, or both.*

The criminal law which had its origin when violence was rife is admirably adapted to the prevention, prosecuting and punishment of crude crimes, such as arson, rape, robbery, burglary, mayhem, assault, homicide, and "common-law" larceny,—theft accompanied by a trespass. In old times everything was against the man charged with crime—at least that was the attitude of the court and jury. "Aha!" exclaims the judge as the evidence goes in. "You thought you were stealing only a horse! But you stole a *halter as well!*" And the spectators are convulsed with merriment.

We take honest pride in the protection which our law affords to the indicted prisoner. It is the natural expression of our disapproval of a system which at the time of our severance from England ignored the rights of the individual for those of the community. We touched the lips of the defendant and gave him the right to speak in his own behalf. We gave him an unlimited right of appeal on any imaginable technicality. But while we have been making it harder and harder to convict our common criminals, we have to a very great extent failed to recognize the fact that all sorts of new and ingenious crimes have come into existence with which the law in its present state is utterly unable to cope. The evolution of the modern corporation

has made possible larcenies to the punishment of which the law is entirely inadequate. "Acts for the prevention of blindness" are perhaps desirable, but how about a few statutes to prevent the officers of insurance companies from arbitrarily diverting the funds of that vague host commonly alluded to as "widows and orphans"? The careless nurse is a criminal and may be confined in a penitentiary; while perhaps a man who may be guilty of a great iniquity and known to be so drives nonchalantly off in his coach and four.

What is crime? We may well ask the question, only eventually to be confronted by that illuminating definition with which begins the Penal Code—"A crime is an act or omission forbidden by law and punishable upon conviction by . . . penal discipline." Let us put on our glasses and find out what these acts or omissions are. When we have done that we may begin to look around for the criminals. But it will be of comparatively little assistance in finding the *sinners*.

So-called criminologists delight in measuring the width of the skulls between the eyes, the height of the foreheads, the length of the ears, and the angle of the noses of persons convicted of certain kinds of crimes, and prepare for the edification of the simple-minded public tables demonstrating that the burglar has this kind of a head, the pickpocket that sort of an ear, and the swindler such and such a variety of visage. Exhaustive treatises upon crime and criminals lay down general principles supposed to assist in determining the kind of crime for which any particular unfortunate may have a predilection. One variety of criminal looks this way

and another looks that way. One has blue eyes, the other brown eyes.* Some look up, others look down. My friend, if you examine into the question, you will probably discover that the clerk who sells you your glass of soda water at the corner drug store will qualify for some one of these classes, so will your host at dinner this evening, so, very likely, will the family doctor or the pastor of your church.

The writer is informed that there has recently been produced an elaborate work on political criminals in which an attempt is made to set forth the telltale characteristics of such. It is explained that the tendency to commit such crimes may be inherited. You are about as likely to inherit an inclination to commit a political crime as you are to derive from a maiden aunt a tendency to violate a speed ordinance or make a "disbursing" noise.

Let some one codify all the sins and meannesses of mankind, let the legislatures make them crimes and affix appropriate penalties, then those of us who still remain outside the bars may with more propriety indulge ourselves in reflections at the expense of those who are not.

* The following appeared in the New York *Globe* for April 25, 1905: "Criminal eyes.—It is well known," says Dr. Beddoe, F.R.S., "that brown eyes and dark hair are particularly common among the criminal classes. An American observer calls the brown the criminal eye, etc., etc."