REACTIONS OF A LAWYER—NEWLY BECOME JUDGE

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JUDGE Cardozo brought to the Storrs lectures a deathless mind and spirit, eight extraordinarily fruitful years on an appellate bench, and a life that had been devoted to philosophy, jurisprudence and reflection. That slender volume has had the greatest impact on American legal thinking of any book since Holmes' Lowell lectures, delivered exactly forty years before; after four decades, every reading yields new aperçus and we are still under its spell. Against that contribution it is difficult to imagine what useful comments on judges and judging can be made by a most ordinary mortal who, when most of this article was written, had barely as many months on the bench as Cardozo then had years and whose life has been passed in the dust of the marketplace rather than on the high Alpine meadows where Cardozo dwelt.¹ However, such a flattering invitation from so distinguished a source could not be refused—although prudence would surely have dictated that the 1959 judicial vintage be kept longer in the cellar, with the more delectable growths of that year.

I.

What strikes a practicing lawyer on becoming a judge of an important appellate court? In the case of this one, primarily two things.

The first is the enormous change in the effect of the simple act of signing his name. He does something he has done thousands of times without any great consequences attaching to it; then, suddenly, at least if his signature is accompanied by colleagues', "the whole power of the state will be put forth, if necessary,"² to carry out his will.

This power of deciding between one's fellow men is, indeed, a responsibility that is awful in the etymological sense and must call forth a deep sense of humility. The awe, and the humility, ought to persist despite some considerations that might be urged as detracting from them. It is, of course, a commonplace that human experience has devised no better method of settling controversies than to submit them to men who, hopefully at least, are disinterested, experienced and wise, and then require that the decisions of those men be

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1. For a single sentence summary one can hardly improve on the remark of Judge Cuthbert W. Pound:

The judge should no doubt, like our own great Chief Judge, be both lawyer and philosopher of the highest grade, blessed with saving common sense and practical experience as well as sound and comprehensive learning, but such men are rare.

Pound, *Defective Law—Its Cause and Remedy*, 1 BULL. N.Y. STATE BAR ASS'N 279, 285 (1929).

2. HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS 167 (1920).

accepted, whether acceptable or not. Though this process assuredly is "one of the greatest triumphs mankind has won in its recorded history,"³ it is a triumph common to all mature legal systems. True also, our judges decide controversies, not like St. Louis under the oak tree,⁴ but by applying the rule of law. Still we should not cease to marvel at the process, and current happenings in our own land, best here left undescribed, show it may not have been altogether realized even yet.⁵

More enduringly impressive to the lawyer-turned-appellate-judge are the reverberations of his judgments beyond their immediate context. The decisions of our judges—and this is where they differ from the arbitrator, the jury, and, to a considerable extent, from their counterparts under other legal systems⁶—not only determine the case for the litigants, but help, in greater or less degree, to "make law" for thousands of others. "In the instance the suits are controlled by the rules; in the aggregate the rules are determined by the suits."⁷ The practitioner, whose legal views were of interest only to a few clients, and of little enough to them, dons a robe. Suddenly he becomes a legislator exercising power over generations yet unborn—a legislator dealing with many subjects as to which he has little familiarity, chosen without any real knowledge by the people that he will exert any such power, and fiercely resisting any effort by them to control him, although, in most areas, subject to reversal by the elected legislature if it should decide to intervene. This power is his, if he be sufficiently persuasive, even if a colleague thinks otherwise; "All agree that there may be dissent when the opinion is filed. Some would seem to hold that there must be none a moment thereafter. Plenary inspiration has then descended upon the work of the majority."⁸

II.

Surely the choice to have vast portions of our laws thus made by "a body who are specialists only in being unspecialized"⁹—if choice it can be said to have been¹⁰—was not inevitable, nor is it today. It is not that codification is any real alternative; one need not go beyond the framers of the first great

3. Oppenheimer, *First Judicial Impressions*, 46 A.B.A.J. 1188 (1960) (relating to the role of the trial judge).

4. See POUND, *AN INTRODUCTION TO THE PHILOSOPHY OF LAW* 63 (1925).

5. See McGill, *A View From a Tight Small Compartment*, Harv. Law School Bull., June 1961, p. 6; 1 DAVIS, *ADMINISTRATIVE LAW* 56 (1958).

6. See VON MEHREN, *THE CIVIL LAW SYSTEM* 827-28, 945-50 (1957); Pound, *The Theory of Judicial Decision*, 36 HARV. L. REV. 940 (1923). For a different view with respect to precedent under the civil law, see FRIEDMANN, *LEGAL THEORY* 295 (1944), and generally, the references cited by Judge Frank in *Usatorre v. The Victoria*, 172 F.2d 434, 439 nn.8, 9 & 11 (2d Cir. 1949).

7. Hamilton, *Judicial Process*, in 8 ENCYC. SOC. SCI. 450 (1932).

8. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 29 (1921).

9. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 263 (1960).

10. The development is conveniently summarized in PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 342-50 (5th ed. 1956).

modern code for recognition that "the needs of society are so varied, the intercourse among humans so active, their interests so multiple, and their relationships so extensive that it is impossible for the legislator to foresee everything" and that "a code, however complete it may appear, is no sooner promulgated than a thousand unexpected questions are presented to the judge."¹¹ But it is a fair question, at least on an academic basis, whether, with the immense broadening of the scope and intricacies of law, we would not do better to leave its development to those whose learning is a fact rather than a polite, or occasionally a sarcastic, phrase. I do not mean by this that law teachers are generically superior to lawyers-who-have-become-judges, although I should think few courts could sustain comparison, man to man, with the faculties of our best law schools and, in law that was made by professors rather than judges, only the best would count. My point is rather that whereas it was not unreasonable to expect a judge to be truly learned in a body of law that Blackstone compressed into 2400 pages, it is altogether absurd to expect any single judge to vie with an assemblage of law professors in the gamut of subjects, ranging from accounting, administrative law and admiralty to water rights, wills and world law, that may come before his court. Even the most experienced twentieth century judge, as he pirouettes among all these topics, must often feel himself a proper target for Dr. Johnson's shaft—"It is not done well; but you are surprised to find it done at all."¹² If our legal system permitted, would it not be wiser, in true Roman fashion, to leave the "law" to be made by the masters who know, with the judge relegated to decision of the particular case and that without precedential effect?

Cardozo himself told us, again at Yale, "More and more we are looking to the scholar in his study, to the jurist rather than to the judge or lawyer, for inspiration and for guidance."¹³ In the same lecture he paid tribute to the role played by professors, without whose "critical labors" in law reviews and treatises, in one notable instance "heresy, instead of dying out, would probably have persisted, and even spread."¹⁴ If the judge had to look for aid "to the scholar in his study" in 1924, when such staples of today's legal fare as income tax and labor law and security regulation could have been contained in very small bottles, aeronautical law was barely dreamed of¹⁵ and atomic

11. PORTALIS, TRONCHET, BIGOT-PREAMENEU & MALEVILLE, DISCOURS PRELIMINAIRE IN LOCRE, *LA LEGISLATION DE LA FRANCE* 257 (1827), quoted in VON MEHREN, *THE CIVIL LAW SYSTEM* 57-58 (1957). Compare FRANK, *LAW AND THE MODERN MIND* 186-95 (1930). For a much more ancient example, consider the intricate problems that arose with respect to the apparently simple prescription of the Fourth Commandment, as outlined in GUIGNEBERT, *LE MONDE JUIF VERS LE TEMPS DE JESUS* 106-07 (1935).

12. BOSWELL, *LIFE OF JOHNSON* 287 (Everyman's ed. 1925).

13. CARDOZO, *THE GROWTH OF THE LAW* 11 (1924).

14. *Id.* at 13-16.

15. Cardozo noted, with some wonder, that "Already there is a body of legal literature that deals with the legal problems of the air." CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 62 (1921). The "body" in 1921 was slender and it was, indeed, more "literature" than law.

energy law was not, how much more tempting is such resort today? There is, indeed, a possibility that certain legal questions might receive different answers at New Haven than at "another place" a hundred miles northeast; but we scarcely require reminder that judges also disagree. Yet, with all his appreciation of the role of the law professors in containing or suppressing judicial heresy, Cardozo stopped far short of proposing that the making of law be entrusted to those who had discerned the true doctrine, rather than the judges who, but for their guidance, would have strayed from the road. I hope it is something other than an instinct for job security that makes me believe he would have taken the same view in the even more complex world of today—and this apart from political practicality and the unfeasibility, under our legal system, of divorcing the deciding from the law-making functions of the judge.¹⁶

Still, question must persist how, in this age of specialization, we can safely leave even the decision of cases, much less the making of law, to judges the most experienced of whom can scarcely be masters of more than a few of the subjects with which they deal. If political and other considerations preclude turning over the lawmaking function to the law professor, does not the answer lie in specialized courts? Quite clearly, it is such an understandable belief that the law has outstripped the appellate judge that lies behind Dean Griswold's advocacy of a special court for the final determination of all tax appeals save those few involving constitutional issues,¹⁷ as well as the proposals for an administrative court¹⁸ and a special court for patent litigation.¹⁹ Yet that

16. Pound, *The Theory of Judicial Decision*, 36 HARV. L. REV. 940, 957 (1923); FRIEDMANN, *LAW IN A CHANGING SOCIETY* 30 (1959).

17. Griswold, *The Need for a Court of Tax Appeals*, 57 HARV. L. REV. 1153 (1944). See the comments made by Mr. Justice Douglas on the oral delivery of his dissent in *Meyer v. United States*, 81 Sup. Ct. 210 (1960), N.Y. Times, Nov. 22, 1960, p. 29, col. 7. See also Lowndes, *Federal Taxation and the Supreme Court*, in *THE SUPREME COURT REVIEW* 222 (1960) ("It is time to rescue the Supreme Court from federal taxation; it is time to rescue federal taxation from the Supreme Court.").

18. See COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, *LEGAL SERVICES AND PROCEDURE* 84-88 (1955). See, favoring the proposal, Caldwell, *The Proposed Federal Administrative Court: The Arguments for its Adoption*, 36 A.B. A.J. 13 (1950); opposing it, SCHWARTZ, *FRENCH ADMINISTRATIVE LAW AND THE COMMON LAW WORLD* 317-20 (1954). The proposal has now assumed the more modest form of a Trade Court. S. 1275, 86th Cong., 1st Sess. A provocative remark is made in this connection by FRIEDMANN, *LAW IN A CHANGING SOCIETY* 412 (1959):

Unless there is a drastic change in the training and experience of lawyers from whom the judges are recruited, it is a matter of sheer accident if some of them, through wartime government service, or some other public mission, have acquired experience of the administrative process.

One wonders whether the process is truly so esoteric—or why practice before administrative agencies, as well as "wartime government service or some other public mission," cannot qualify.

19. See, opposing the proposal, Rifkind, *A Special Court for Patent Litigation? The Danger of a Specialized Judiciary*, 37 A.B.A.J. 425 (1951).

movement has not caught on; in the federal system only the Customs Court and the Court of Military Appeals²⁰ can be deemed specialized in the full sense that the subjects confided to them are largely withdrawn from the jurisdiction of the District Courts and the Courts of Appeals. Any further development of such exclusive specialized courts seems likely to be in areas where a separate language is required—tax law, as it appears to some, because of the intricacy of the legislation, or patents because of the increasingly technical nature of some of the raw material. How can we explain this seeming satisfaction with the system of general appellate courts,²¹ save perhaps in these few specialties, at a time when the law would appear to have outrun the judges?

We can find the beginning of a clue to this paradox in a passage of the Storrs lectures where Cardozo analyzes the grist of an appellate court. A majority of the cases that came before his court, he tells us, "could not, with semblance of reason, be decided in any way but one," since "the law and its application alike are plain"; "in another and considerable percentage, the rule of law is certain, and the application alone doubtful."²² In these two large areas, which Cardozo later estimated to comprise at least nine-tenths of the cases decided by appellate courts,²³ the process is more important than the subject matter; and the judge can lay claim to being a specialist in that. He will have acquired the power of analysis, of determining the issues—often quite other than what the parties think these to be. He will have learned to heed the imperative of going to the sources; experience will have taught him, if wisdom has not, never to rely on a characterization or on memory of what a witness has testified, a document stated, an opinion ruled, a statute commanded. He knows how to find these sources with speed and accuracy, and how to deal with them once they have been found. He understands how to pick evidence apart, to determine the inferences that may reasonably be drawn, to weigh one piece of testimony against another. He will have acquired some skill in the understanding of decisions and their precedential value; he will have learned something also about the reading of statutes. He will have trained himself to test his conclusions by essaying to put them in writing, and to express them fairly, clearly, and cogently. In the use of these tools, indispensable in all cases, sufficient in those where "the law and its application

20. 28 U.S.C. §§ 1340, 2631-42 (1958); 10 U.S.C. § 867 (1958).

21. "... it still seems to me that increasingly as technological complexity piles high, our ancient institution of ultimate review by those complete nonspecialists, the *general* Supreme Court, stands out as one of the wisest institutions man has thus far managed to develop."

LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 333-34 (1960).

22. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 164 (1921).

23. CARDOZO, *THE GROWTH OF THE LAW* 60 (1924). Indeed, Cardozo's nine-tenths estimate probably should be read as referring to the first category alone. Thus reading it, Professor Harry W. Jones finds it "surprising" on the high side. Jones, *Law and Morality in the Perspective of Legal Realism*, 61 COLUM. L. REV. 799, 803 n.16 (1961). So would I. If it includes both categories, I would not.

alike are plain" and in most where "the rule of law is certain, and the application alone is doubtful," he has acquired specialized competence, and he is none the worse—indeed, he is much the better—for sharpening his skills on a variety of grindstones.²⁴

What then of the residue of appellate cases, what Cardozo called the judge's "serious business,"²⁵ "where a decision one way or the other, will count for the future, will advance or retard, sometimes much, sometimes little, the development of the law"?²⁶ Here one saving factor for the necessarily unspecialized appellate judge is that the odds heavily favor the little against the much. Precedents will already have gone a great part of the way—the decision will be whether to press them further or refuse, whether to follow a line of authority emanating from one policy or a different line deriving from another. It is impossible to avoid quoting at this point Holmes' familiar phrase that judges legislate "only interstitially; they are confined from molar to molecular motions."²⁷ Even *MacPherson v. Buick Motor Co.*²⁸ had its predecessors and could hardly have been decided without them.²⁹ Cardozo extended liability without "privity," first to the automobile manufacturer in the *MacPherson* case and then to the public weigher in *Glanzer v. Shepard*,³⁰ but when it came to imposing the broad liability on accountants proposed in *Ultramares Corp. v. Touche, Niven & Co.*,³¹ he thought the time had come for judges to stop and elected lawmakers to begin—as within two years, in a measure, they did.³² Rare, indeed, is the complete turnabout such as *Erie R. R. v. Tompkins*³³—fortunately so since the courts are still endeavoring, twenty-three years later, to plumb all that was there decided,³⁴ and, I dare say, will be engaged in that same pursuit twenty-three years hence.

The inevitable lack of expertise by judicial lawmakers does not seem to me unduly disturbing so long as the web is woven in small knots. What does

24. Compare the advice of Lord Acton in his Inaugural Lecture on the Study of History, reprinted in *LECTURES ON MODERN HISTORY* 30 (1961), and in *ESSAYS ON FREEDOM AND POWER* 39-40 (1955).

25. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 21 (1921).

26. *Id.* at 165.

27. *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 221 (1917).

28. 217 N.Y. 382, 111 N.E. 1050 (1916).

29. See LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 431-37 (1960).

30. 233 N.Y. 236, 135 N.E. 275 (1922).

31. 255 N.Y. 170, 174 N.E. 441 (1931). See LEVY, *CARDOZO AND FRONTIERS OF LEGAL THINKING* 43 (1938). In England the development stopped far short of *Ultramares Corp. v. Touche, Niven & Co.* See *Candler v. Crane, Christmas & Co.*, [1951] 2 K.B. 164.

32. Securities Act of 1933, § 11, 48 Stat. 82, 15 U.S.C. § 77k (1958).

33. 304 U.S. 64 (1938). True, there had been rumblings of discontent in dissenting opinions, notably of Mr. Justice Holmes, and perhaps the initiated would have found a premonition in Mr. Justice Cardozo's opinion in *Mutual Life Ins. Co. v. Johnson*, 293 U.S. 335 (1934), but the decision was surely a surprise to all but the most sophisticated, even including one of the concurring justices. See MASON, *HARLAN FYSKE STONE* 476-81 (1956).

34. For a recent example, see *Jaffex Corp. v. Randolph Mills, Inc.*, 282 F.2d 508 (2d Cir. 1960).

disturb me are the occasions when the judge is confronted with the necessity of leaping across the loom, particularly when he is confronted with a question for which accepted judicial techniques afford no satisfactory answer. Let me try to illustrate the distinction by two troublesome cases, both from Cardozo's third category, recently decided by our Court.

The first is *Carabellese v. Naviera Aznar, S.A.*³⁵ The question, as put to us, was whether the shipowner's liability for injury to seamen arising from unseaworthiness covers dangerous characteristics in cargo about to be stowed—"whether the owner warrants to longshoremen not simply a safe place to handle cargo but cargo which is safe to handle." Competing precedents and principles were at play. The wave of unseaworthiness had advanced from known defects in the vessel to unknown,³⁶ and from the vessel's own gear to gear brought aboard by others;³⁷ plainly it included improper stowage already effected.³⁸ On the other side was the principle of tort law that the owner of property is not usually liable for an accident caused solely by the negligence of an independent contractor carefully selected.³⁹ Even as the question has been stated, its decision either way would not have taken us far from the comfortable support of assured doctrine; but we did not decide even that. We found there was no substantial evidence that the particular cargo could not have been loaded by the taking of reasonable precautions by the stevedore and held that in such a case the owner was not to be cast for unseaworthiness merely because the loading required the stevedore to use somewhat more care than in the usual case. We reserved judgment on the situation where the injury resulted from a hidden danger in the cargo of which the stevedore was not aware. Time alone will tell whether we rightly decided even the limited issue that we did decide; at least the area of choice was small enough that we could see where we were going. Of course, I am not unaware that the case presented policy considerations beyond those articulated thus far. Presumably there would be no absolute liability of the ship or her owner if the cargo had injured the longshoreman on the pier;⁴⁰ why should the result be different because the injury was on the ship if there was no respect in which the ship

35. 285 F.2d 355 (2d Cir. 1960).

36. *Mitchell v. Trawler Racer*, 362 U.S. 539 (1960).

37. *Alaska S.S. Co. v. Petterson*, 347 U.S. 396 (1954); *Rogers v. United States Lines*, 347 U.S. 984 (1954).

38. *Palazzolo v. Pan-Atlantic S.S. Corp.*, 211 F.2d 277 (2d Cir. 1954), *aff'd on other grounds*, *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956); *Amador v. A/S J. Ludwig Mowinckels Rederi*, 224 F.2d 437 (2d Cir.), *cert. denied*, 350 U.S. 901 (1955); *Gindville v. American-Hawaiian S.S. Co.*, 224 F.2d 746 (3d Cir. 1955); *Reddick v. McAllister Lighterage Line, Inc.*, 258 F.2d 297 (2d Cir. 1958).

39. *RESTATEMENT, TORTS* § 409 (1934); 2 *HARPER & JAMES, TORTS* § 26.11 (1956).

40. I am assuming that 62 Stat. 496 (1948), 46 U.S.C. § 740 (1958), extending admiralty jurisdiction to include "all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land," would not cover such a case. *Cf. Fredericks v. American Export Lines*, 227 F.2d 450, 454 (2d Cir. 1955).

herself was unseaworthy? Even for an accident on the ship, ought not some scope be left to the Longshoremen's and Harbor Workers' Compensation Act?⁴¹ As against this, is there any real justification for distinguishing, as regards the ship's liability, between the fall of a crate being loaded and the fall of a crate that had already been? Or, to take a still broader view, has not the Supreme Court gone so far down the road to absolute liability for injuries aboard ship to seamen or persons performing seamen's work that lower courts ought assume the remaining distance will be soon traversed?⁴² I do not assert that the answer to these questions is easy; my point is that such considerations are within the grasp even of the generalist, whether or not they were here correctly weighed.

Another reason why we can tolerate law-making by nonspecialist judges in such a case is that if a decision is wrong, the harm done to the law, as distinguished from that to the parties, cannot be very great. An erroneous advance or retreat of an inch will do less damage than one of a foot and immeasurably less than one of a yard, even if it endures. In fact, it is unlikely to do so. Usually it will simply disappear—often quite quickly—under the erosion of distinction or oblivion; there will be no need for the traumatic process of overruling and establishing a principle altogether new. "The good" in a judge's work, Cardozo told us, "remains the foundation on which new structures will be built. The bad will be rejected and cast off in the laboratory of the years."⁴³ This is not only cheering news for the neophyte; it makes judicial law-making tolerable so long as that process is confined to "interstitial" legislation.

Let me cite in contrast a case where, it seems to me, the issue that had to be decided was not one adapted to the techniques of judicial law making—*McWeeney v. New York, New Haven & Hartford R. Co.*⁴⁴ The issue was whether, in a personal injury action under the Federal Employers' Liability Act, the jury should be instructed to make a deduction, from the portion of the award representing loss of earning power, for the income taxes the plaintiff would have had to pay on the lost earnings. The precedents in our own Court were conflicting, with two cases pointing in opposite directions but with the second not overruling the first.⁴⁵ In the second case the governing law was that of Oklahoma, and we reconciled the two by holding that was what the Court had there applied. The decisions in other jurisdictions were divided.⁴⁶ The legal principles invoked by the two sides—for the defendant that

41. 44 Stat. 1424 (1927), 33 U.S.C. §§ 901-50 (1958).

42. See *Halecki v. United New York & New Jersey Sandy Hook Pilots Ass'n*, 358 U.S. 613 (1959); *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959).

43. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 178 (1921).

44. 282 F.2d 34 (2d Cir. 1960), *cert. denied*, 364 U.S. 870 (1961).

45. *Stokes v. United States*, 144 F.2d 82, 87 (2d Cir. 1944); *O'Connor v. United States*, 269 F.2d 578, 584-85 (2d Cir. 1959).

46. The cases are collected in Morris & Nordstrom, *Personal Injury Recoveries and the Federal Income Tax Law*, 46 A.B.A.J. 274, 276 n.19 (1960). The leading case for the

damages are intended to make a plaintiff whole but no more,⁴⁷ for the plaintiff that a recovery is not to be reduced for benefits from "collateral sources"⁴⁸—were so far away that resort to them would have been rationalization rather than reasoning—the lines of force were too remote to exert any real pull.

Here was a case where, of Cardozo's various methods of decision, only "the method of sociology"⁴⁹ was available; the problem was of the broad sort normally dealt with by elected legislators and the Court had in effect to act as such. Since logic and philosophy afforded no aid, it is not surprising that the result was lacking in them. Looking at the great mass of personal injury cases, of which this one was typical, we held that the administrative problems of income tax determination by juries or even by judges, plus the tendency to under-compensation arising from inflation and from the inability of plaintiffs to recover their attorneys' fees,⁵⁰ rendered the proposed instruction improper. If we had stopped there, we would have been on ground that could not be attacked as illogical, whether or not one thought it wise. However, the case of the very large earner was pressed upon us. How absurd to present a plaintiff with an award based on annual earnings of \$100,000 when his effective income would have been less than half! We said therefore that at some point in the income scale the balance of interests between plaintiff and defendant would shift; later decisions will have to determine that point's location more precisely and also how the deduction in the case of the large earner shall be determined. I would hope, although I confess without much real expectation, that before the courts have to do this, the legislature will step in.

The reason why I think *McWeeney's* case was inappropriate for judicial solution is not so much that the precedents afforded no guidance—judges in a tradition that decided *Slade's* case⁵¹ and introduced the action for money had and received into the common law would hardly cavil at that. The more important reasons are that we lacked the factual data needed for a right answer and, still worse, there was no right answer we could give even if the data had been available. Let me explain.

A judge desiring to make a truly intelligent answer to the question posed in *McWeeney's* case would need to know much more of what takes place in the jury room than courts have yet learned—although some light from the Middle West, in the shape of the University of Chicago jury study, may not

deduction is *British Transp. Comm'n v. Gourley*, 3 All E.R. 796 (1955)—where the tax would have amounted to nearly three-quarters of the earnings. For an interesting discussion of the refusal of the Supreme Court of Israel, which had adopted the contrary rule earlier laid down by the Court of Appeal, to follow the overruling by the House of Lords, see *International Lawyers' Convention in Israel* 46, 297, 314-15 (1959).

47. 2 HARPER & JAMES, TORTS § 25.1 (1956); MCCORMICK, DAMAGES § 20 (1935).

48. 2 HARPER & JAMES, TORTS § 25.8, at 1316, § 25.10, at 1320-21, § 25.19, at 1337-41 (1956).

49. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 98-102 (1921).

50. See Goodhart, *Costs*, 38 YALE L.J. 849, 872-78 (1929).

51. 4 Coke 92b (1602).

be far away. Also, I should think, he would have to know much else. He would wish to know how much of the verdicts go for attorneys' fees and other expenses of litigation, what plaintiffs do with the sums awarded, and whether the lump sum recovery, determined in advance of the fact on the basis of averages, is still suitable, especially in an age of new cures that may make it too high, and of increased longevity and inflation which may make it too low.⁵² But when all this information was at hand, judges still would not be able to give a good answer to the question presented. A court has only three choices—to deduct the tax in all cases, to deduct it in none, or to deduct it in the big income cases but not in the medium or small. The last course, which we adopted, was satisfactory only in the limited sense of seeming better than either of the others, but it leaves future problems of drawing the line, and of determining the tax in cases beyond the line, which courts are ill equipped to handle.

Contrast the resources available to the legislature. The legislature might establish a small—or no—percentage deduction on awards up to a certain annual figure, and a higher percentage on those above. In fixing these percentages, it could determine whether they should reflect the under-compensation from probable future inflation or from the lack of recovery of attorney's fees and, if so, to what degree. Percentage deductions thus determined could apply regardless of idiosyncracies of the particular plaintiff in the way of exemptions, deductions or outside income, and hence would free the courts from the burden of inquiry about these in every case. Alternatively, the legislature might decide to require the portion of the award representing loss of earnings, or so much of it as was left after deducting expenses of litigation, to be paid into court and disbursed over a period of years, then being subject to income

52. The lack of such information illustrates one difficulty I find in the "Two-Level Procedure of Justification," recently proposed in the interesting little book: WASSERSTROM, *THE JUDICIAL DECISION—TOWARD A THEORY OF LEGAL JUSTIFICATION* (1961). The two levels are, *first*, selection of what would be generally regarded as the governing legal rule, and, *second*, determination whether that rule produces as sociologically good a result as a possible variant. (Presumably the "second-level" procedure would be used alone when, as in *McWeeney*, there was fair room for doubt whether any precedentially created rule existed). Taking as an example the marital evidentiary privilege and particularly its application in the rather extraordinary case of *Hawkins v. United States*, 358 U.S. 74 (1958) (*cf.* *Wyatt v. United States*, 362 U.S. 525 (1960)) the author suggests at page 155, that a court might approach the "second-level" problem by examining data as to the relative frequency of divorces in "reasonably comparable" jurisdictions granting and not granting the marital privilege. Apart from the fact that many critics of *Hawkins v. United States* do not propose complete abolition of the privilege, and the questionable major premise that marriage is always good and divorce bad, whence is such information to come—let alone the far more complex data needed for a case like *McWeeney's*? See FRANKFURTER, *SOME OBSERVATIONS ON SUPREME COURT LITIGATION AND LEGAL EDUCATION* 17 (1954); Karst, *Legislative Facts in Constitutional Litigation*, in *THE SUPREME COURT REVIEW* 75 (1960). I fear that, at least so long as decision is left to the courts rather than to bodies that can command special studies, we shall have to be satisfied with much less "scientific" solution at the "second-level," along lines indicated in section III of this article.

tax, and thereby end the whole problem. Almost any of these solutions would be better than the best a court can achieve.

The moral is pointed out by the English experience with the related question of the effect, in personal injury cases, of benefits receivable under the national insurance scheme. After much investigation, Parliament enacted the Law Reform (Personal Injuries) act, 1948, section 2(1) of which provides that in an action for damages for personal injuries there shall be taken into account against any loss of earnings or profits half the value of any rights in respect of national security benefits for five years from the time when the cause of action accrued. No judge could have arrived at a solution so Solomonic.⁵³ Yet who is to say that it is not wiser than a court's universal yea or nay?

Cardozo told us what we must do if we are to maintain our system of judge-made law amid the growing complexities of twentieth century life. I refer to his "A Ministry of Justice."⁵⁴ "Fiction and equity" were not always enough, even in hands as skillful as his; the "thousandfold" multiplication of power supplied by legislation was required. If that was needed when Cardozo wrote, it is needed *a multo fortiori* in the super-sonic age. It is needed not merely "to extirpate, root and branch, a rule which is today an incumbrance and a snare";⁵⁵ it is demanded, perhaps even more, to guide the courts in areas where the legislature has furnished too uncertain a trumpet⁵⁶ and to deal with problems where the range of choice has become too great for judges to decide with wisdom and there may be need for a solution framed in something other than what the traditional judicial approach can attain. The *McWeeney* problem would not have been serious if the rate of income taxation were a uniform 5 per cent; it is quite another matter with a 20 per cent withholding and rates ranging up to 91 per cent. Again, one need not altogether accept Gray's thesis that "the law with regard to a natural force cannot exist before the discovery of the force,"⁵⁷ in order to agree that the law of common callings, which has been traced back to the reign of Edward III,⁵⁸ may have

53. FRIEDMANN, *LAW IN A CHANGING SOCIETY* 155 (1959).

54. 35 HARV. L. REV. 113 (1921), reprinted in CARDOZO, *LAW AND LITERATURE* 41 (1931). As to the superior resources available to the legislature, see also Mr. Justice Harlan, dissenting in *Mitchell v. Trawler Racer*, 362 U.S. 539, 572-73 (1960).

55. *Id.* at 51-52.

56. See, e.g., GILMORE & BLACK, *ADMIRALTY* § 10-13, at 677 (1957):

The Limitation Act has been due for a general overhaul for the past seventy-five years; seventy-five years from now that statement will be still true, except that the overhaul will then be one hundred and fifty years overdue.

Another example is what would seem the relatively passionless subject of enforcement of orders of the Interstate Commerce Commission. See *United States v. ICC*, 337 U.S. 426 (1949); *United States v. New York, N.H. & H.R.R.*, 276 F.2d 525, 538-43 (2d Cir. 1960). Cf. *United States v. St. Regis Paper Co.*, 285 F.2d 607 (2d Cir. 1960), *cert. granted*, 365 U.S. 857 (1961). Sometimes the legislative ambiguity is deliberate, see Cox, *Reflections upon Labor Arbitration*, 72 HARV. L. REV. 1482, 1491 n.26 (1959).

57. GRAY, *THE NATURE AND SOURCES OF THE LAW* 99 (2d ed. 1921).

58. PLUCKNETT, *op. cit. supra* note 10, at 481-82.

needed some modification for the iron horse and certainly for the flying one. Aviation similarly requires legislation to deal with the basic problem of air space; concepts developed when the sky was deemed to be "scraped" at five hundred feet do not supply adequate answers when the air has become a highway both above and below that level. So likewise is legislation demanded for the problems created by atomic energy, by heightened urbanization, by the intensification of our personal and business contacts with other nations, and by many others. "We must have a courier who will carry the tidings of distress to those who are there to save when signals reach their ears"⁵⁹—and not only will carry the message to the legislators but remain a gadfly until something is done. Perhaps the best tribute that could be paid Cardozo on the anniversary of his lectures would be to put that idea truly to work.^{59a}

III.

The question how judges go about the business of judging continues to hold interest—although apparently more for lawyers and law professors than for judges. Llewellyn has told of promises by seven professors-made-judges "to further their old, still fresh-scented job of helping prospective lawyers understand how and why appellate judges decided as they did"—and of their distressing lack of performance.⁶⁰ He gives one clue to the failure of the experiment by reference to William James' shrewd observation that "the completed decision wipes off memory's slate most of the process of its attainment";⁶¹ psychiatrists would doubtless proffer another less flattering explanation. A further reason is that the new judge soon learns that each judge judges differently from every other judge and that any one judge judges differently in each case. The subject is far too large and deep for treatment here. Still there may be some value in setting down a few initial and provisional thoughts.

Today, particularly after Llewellyn's provocative study, we are a long way from some of the more excessive realist outbursts, such as the characterization of decision as "an emotive experience in which principles and logic play a secondary part."⁶² Few would now accept even the testimony, given many years ago by a most distinguished judge, that cases are decided by a "hunch," if that means only "an intuitive sense of what is right or wrong for that

59. CARDOZO, *LAW AND LITERATURE* 42 (1931).

59a. Since this was written, Dean Griswold has pertinently said,

Forty years ago this fall Judge Benjamin N. Cardozo made his cry for a Ministry of Justice. The opening sentence was: "The courts are not helped as they could and ought to be in the adaptation of law to justice." And he closed by saying: "The time is ripe for betterment." Everyone commented most favorably on this essay. Yet it is, I am afraid, quite fair to say that absolutely nothing was done about it.

Harvard Law School, Dean's Report for 1960-61, p. 12.

60. LLEWELLYN, *op. cit. supra* note 29, at 264-65.

61. *Id.* at 104, citing 1 JAMES, *PRINCIPLES OF PSYCHOLOGY* 260 (1890).

62. Yntema, *The Hornbook Method and the Conflict of Laws*, 37 *YALE L.J.* 468, 480 (1928).

cause"⁶³ or by a flash of romantic imagination "in which the meagre stale forbidding ways of custom, law and statute . . ." are happily cast aside. This is not to assert that all judges or any one judge will inevitably follow the identical or, indeed, any describable logical process,⁶⁴ or to deny that on occasions a night's sleep or a morning's walk will suddenly produce what seems clarity where all was confusion before. Ultimately some conclusion must emerge, for it is "a judge's duty to decide, not to debate."⁶⁵ The point is that the conclusion which flashes before the shaving-mirror in the morning does not differ in intellectual quality from that matured from study in chambers the night before; each represents a synthesis of the ways "of custom, law and statute"—not "stale" and "forbidding" but fresh and inviting—with the judge's years of experience and days of reflection. An important ingredient omitted from what Judge Hutcheson wrote, although doubtless included in what he meant, is that what he called intuition is not free but trained; Dean Pound put it more accurately when he said: "The trained intuition of the judge continually leads him to right results for which he is puzzled to give unimpeachable legal reasons."⁶⁶

Today's major debate seems to lie in a somewhat different area. How far are appellate decisions "result-oriented"? How far may they permissibly be? A passage from a recent comment by Dean Griswold furnishes a useful springboard for discussion:

Intellectual disinterestedness in a judge is a pearl of very great price, achieved only by continual care and striving. Even the greatest sometimes succumb. For example, *Willing v. Chicago Auditorium Ass'n*, and *Erie R.R. v. Tompkins*, both opinions by Justice Brandeis, have always seemed to me to be strongly result-oriented decisions. But to say that shaping the opinion to the result is hard to avoid, and that it has been done by the best, is only to emphasize the difficulties involved and the importance of constant effort to see that decisions are really reached, as far as humanly possible, on intellectually valid and disinterested grounds.⁶⁷

63. Hutcheson, *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decisions*, 14 CORNELL L.Q. 274, 285 (1929). This article received strong endorsement in FRANK, *LAW AND THE MODERN MIND* 103-04 (1930).

64. Pound pointed this out many years ago in *The Theory of Judicial Decision*, 36 HARV. L. REV. 940, 951 (1923).

65. HAND, *THE SPIRIT OF LIBERTY* 100 (1952).

66. Pound, *The Theory of Judicial Decision*, 36 HARV. L. REV. 940, 951 (1923). Even Pound's statement is criticized, as over-emphasizing the role of "intuition," in WASSERSTROM, *op. cit. supra* note 52, at 103. Very likely this whole dispute over "intuition" is largely semantic. I am more troubled by Judge Hutcheson's reference to "what is right or wrong in the particular case" rather than in the general situation of which the case is an instance. See Wasserstrom's criticism, *id.* at 91-98, and many of the comments in LLEWELLYN, *op. cit. supra* note 29.

67. Griswold, *Of Time and Attitudes—Professor Hart and Judge Arnold*, 74 HARV. L. REV. 81, 91 (1960).

I assume that when Dean Griswold used the phrase "result-orientation" in this pejorative sense, he did not mean merely some consideration of the relative desirability of the result of one decision or another. That is Cardozo's "method of sociology,"⁶⁸ and no one to my knowledge, and surely not Dean Griswold, has ever questioned Cardozo's disinterestedness. "Result-orientation" in the sense condemned must thus refer to a judge's personal belief in what is desirable, formed before study of the case at hand and resistant to contrary argument.

Bad as all this may sound, to condemn it *semper et ubique* is to put the criticism on the wrong ground. The way to handle this kind of "result-orientation" is to require that a judge keep his personal beliefs as to desirability in their appropriate subordinate place in the judicial process—not to insist on his pretending to an intellectual equilibrium on great policy matters that cannot be expected or, in many instances, desired. No one recognized the impracticability of the latter more clearly than Cardozo. Although the judge ought to "disengage himself, so far as possible, of every influence that comes from the particular situation which is presented to him, and base his judicial decision on elements of an objective nature,"⁶⁹ nevertheless the judges "do not stand aloof on . . . chill and distant heights; and we shall not help the cause of truth by acting and speaking as if they do."⁷⁰ Centuries earlier, Hobbes required that the judge "divest himself of all feare, anger, hatred, love and compassion"⁷¹ but not of all conviction. To this limited extent I agree with some of the thoughts Judge Arnold has so strongly expressed;⁷² his error is in making it appear that the judge will probably, and may permissibly, hold the same deep-seated personal faith about the reorganization sections of the Internal Revenue Code as about the First Amendment. Even as to questions of the latter sort the judge should try to make sure he is interpreting the long term convictions of the community rather than his own evanescent ones; but we may as well recognize this goal will not always be realized even "by the best." Sometimes the judge will fail of this because the community has no true convictions—the people of the United States scarcely entertained any common will as to *Swift v. Tyson*—on other occasions because it is asking too much that a judge suppress the basic beliefs by which he lives. What seems to me important is not to insist on a degree of detachment that often is unattainable and sometimes is undesirable,⁷³ but to limit severely the cases

68. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 98-141 (1921).

69. *Id.* at 121.

70. *Id.* at 168.

71. LEVIATHAN, ch. xxvi, in MORRIS, *THE GREAT LEGAL PHILOSOPHERS* 130 (1959).

72. Arnold, *Professor Hart's Theology*, 73 HARV. L. REV. 1298, 1312-13 (1960).

73. See Miller & Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 66 (1960). As Professor Jaffe has well said,

Our tradition rightly interpreted is that the judge should be neutral toward the question of whether the specific defendant is guilty. It is a perversion of that tradition to demand that the judge be neutral toward the purpose of the law.

Jaffe, *The Reform of Federal Administrative Procedure*, 2 PUB. ADMIN. REV. 149 (1942).

in which a judge may consult his views on such matters, to define the stage in the judicial process when such considerations may enter and to what degree. Again Cardozo can be our mentor, if we have the grace to listen.

Let us go back to Cardozo's three-fold division of the cases coming before an appellate court.⁷⁴ "Result-orientation" in the sense condemned is scarcely likely to enter into his first category, where "the law and its application alike are plain"; all will agree it would be wholly intolerable if it did. In the second, where the "rule of law is certain, and the application alone doubtful," there will scarcely be a hazard save when the whole bench shares the same prejudices, and then more to the parties than to the law; but here again strictures on "result-orientation" are amply deserved. The problem under discussion is really encountered only when we reach Cardozo's third category—those cases where the judge has some freedom to make a rule of law. Here and here alone may a judge occasionally take his personal belief of the desirable into account; when and how much will vary greatly according to the nature of the case. Some illustrations may place the problem in focus.

Take first a problem of statutory interpretation. Each side asserts, with some degree of plausibility, that the words, taken simply as words, have a meaning favorable to it. Such a problem is excruciating in its demand for judicial objectivity. No one, to my knowledge, has described it so well as Judge Learned Hand—the judge "must try as best he can to put into concrete form what . . . [the common] will is, not by slavishly following the words, but by trying honestly to say what was the underlying purpose expressed."⁷⁵ Only after all the processes incident to interpretation—intensive study of the words, not only in themselves but in their relation to other parts of the statute and in comparison with earlier and later statutes, of the problem the act was intended to meet, of legislative history, and of practical construction—have been tried and found in precise balance, as they rarely will be, may there be consideration of the relative desirability of the two results. Even as to that, "the judge must always remember that he should go no further than he is sure the government would have gone, had it been faced with the case before him. If he is in doubt, he must stop, for he cannot tell that the conflicting interests in the society for which he speaks would have come to a just result, even though he is sure that he knows what the just result should be,"⁷⁶ and he must endeavor to puzzle out what the legislature would have deemed desirable, not what he would have thought. Attempt this he must; yet we cannot reasonably expect that fallible humans will always be capable of selflessness so sublime.

Let us take next a situation where there are no statutes but a line of precedents that have almost but not quite reached the case in hand, with perhaps some conflicting ones emerging on the other side. Since the judge is here mak-

74. See notes 22-26 *supra* and accompanying text.

75. HAND, *THE SPIRIT OF LIBERTY* 84 (1952).

76. *Ibid.*

ing law, there is more reason for his considering the relative desirability of the two results than when he is dealing with a statute. Yet here, too, the entry of the desirability theme should be postponed. As Cardozo taught, the rule of analogy or the method of philosophy, as he calls it, has "a certain presumption in its favor It has the primacy that comes from natural and orderly succession. Homage is due to it over every competing principle that is unable by appeal to history or tradition or policy or justice to make out a better right."⁷⁷ In such a case, the judge will do exceedingly well to keep judgment in suspense and maintain his mind fully open to the view of colleagues, as Professor Henry Hart and Dean Griswold have urged,⁷⁸ before he turns to considerations of "policy or justice," and when he does that, he should attempt to apprehend the community's views, not his own, but we may as well recognize that, in fact, the views embodied in decision will be more likely to have emerged from the judge's previous experience and reflection than from new research painstakingly conducted in an aseptic social laboratory.⁷⁹

Let us turn finally to the two opinions where Dean Griswold thinks Mr. Justice Brandeis "succumbed." I do not disagree with the Dean's condemnation of *Willing v. Chicago Auditorium Ass'n*,⁸⁰ although I am not sure our condemnation rests on precisely the same ground. I do not think it was wrong that Brandeis, having formed the strong view that courts ought to decide actual and not hypothetical controversies,⁸¹ and believing that "the most important thing we do is not doing,"⁸² should not consider this view open to re-examination in every case; what was wrong about *Willing* was that Brandeis' zeal for this position prevented him from looking fairly at what was actual and what hypothetical as he later did,⁸³ and also led him to violate his own maxim by deciding something not remotely presented for decision. *Erie R.R. v. Tompkins*⁸⁴ was an altogether different matter. I do not question Dean Griswold's assumption as to the facts. Having served as the Justice's law clerk the year *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*⁸⁵ came before the Court, I have little doubt he was waiting for an opportunity to give *Swift v. Tyson*⁸⁶ the happy despatch he thought

77. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 31-32 (1921).

78. Hart, *The Time Chart of the Justices*, 73 HARV. L. REV. 84, 100 (1959); Griswold, *supra* note 67, at 85.

79. See note 52 *supra*.

80. 277 U.S. 274 (1928).

81. See his unpublished opinion in the *Atherton Mills* case in BICKEL, *THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS* 5-14 (1957).

82. *Id.* at 17.

83. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227 (1937), in which Brandeis concurred.

84. 304 U.S. 64 (1938).

85. 276 U.S. 518 (1928). Those who read footnotes will doubtless have seen that this was also the term of *Willing v. Chicago Auditorium Ass'n*, 277 U.S. 274 (1928).

86. 41 U.S. (16 Pet.) 1 (1842).

it deserved. I am willing to assume also that even though new research on the history of section 34 of the Judiciary Act⁸⁷ provided ample ground for reversal and the Constitution itself was ultimately invoked,⁸⁸ the true motive for decision was the Justice's belief that the doctrine of *Swift v. Tyson* contained "defects, political and social" and produced "mischievous results"—and that no amount of argument could have led him to think otherwise.⁸⁹ I part company with the Dean only in the conclusion that this showed a lack of "intellectual disinterestedness." The question at issue was of the most fundamental character, going to the very nature of the Federal union; Brandeis had been pondering it for at least a decade and probably much longer; and I see nothing wrong in his adhering to a conclusion so formed rather than making a pretense of reexamination either in the discussion leading to the opinion or by granting a reargument in which counsel could not have added anything to what the various Justices themselves had urged. I would say the same with respect to another "result-oriented" decision of Mr. Justice Brandeis of which I have some personal knowledge, his dissent in the wire-tapping case, *Olmstead v. United States*.⁹⁰ Here his thinking went back not ten years, but nearly forty—to the article on "The Right to Privacy" written in 1890 for the Harvard Law Review with his partner Warren;⁹¹ it is altogether idle to suppose that, on such an issue, any quantity of argument would—or should—have altered a position so long and so deeply held.

Let not my defense of Brandeis' handling of these two cases obscure or weaken what I have said before. The cases where an appellate judge may properly be affected by consideration of the desirability of the result are a fraction of the category, itself a relatively small fraction of the decisions he will have to make, where a new rule of law must be forged. The rule must be the desirable one for the situation, not for the idiosyncracies of the particular parties. Even after all this he should do his level best to eliminate purely personal views of the desirable. But in some cases the best of judges will not succeed in that and in a few, a very few, it is wrong to expect them to try. I would not altogether ban this medicine of personal belief—indeed, we could not effectively ban it if we would, so long as the bench is occupied by human beings rather than Univacs—but it must be prescribed rarely and then with restraint. In those few cases where the prescription is appropriate, it betrays no lack of disinterestedness that the judge does not go through the form of reexamining the efficacy of every element in the pharmacopoeia.

87. Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 51-52, 81-88, 108 (1923).

88. See MASON, HARLAN FISKE STONE 478-80 (1956).

89. 304 U.S. 64, 74 (1938).

90. 277 U.S. 438, 483 (1928).

91. Warren & Brandeis, *The Right To Privacy*, 4 HARV. L. REV. 195, 205 (1890). See Freund in MR. JUSTICE 116-17 (Dunham & Kurland ed. 1956).

IV.

"Le droit à ses époques," said Pascal, as Cardozo recalled for us.⁹² Indubitably Cardozo's epoch was one of greatness, which he helped make all the greater—as Dean Pound has said, "a time of transition, quite comparable to the formative era of American law, a time when judges are called upon to shape the legal materials which took form for nineteenth-century America to the exigencies of the economically unified, urban, industrial America of the twentieth century."⁹³ It is not hard to locate the seed-time of this greatness—the young Eliot's call of Langdell to the deanship of the Harvard Law School in 1870, followed by the appointments of Thayer and Ames in 1873 and Holmes' lectures on "The Common Law" in 1881. Did Cardozo's death in 1938 coincide with the beginning of a downward slope?

A good case can be made that it did. It seems not altogether a hankering for the snows of yesteryear that makes a graduate of the late '20s think the counters show a somewhat lower champagne content in today's legal air than in those days when bliss it was to be alive. Nor is objective confirmation wanting. Of the three other great judges who, along with Cardozo, dominated the era, Holmes retired in 1932 and Brandeis early in 1939, although Judge Learned Hand, to our great good fortune, remained with us, active and productive to the very end, until this past summer. It is in no way denigrating their many able successors to say that none has had quite the stature of these four mighty men.⁹⁴ Bohlen wrote in 1930 that "during the last five years American Courts have made great strides in the development and analysis of the law of Torts";⁹⁵ would anyone say as much today? For contracts, *Wood v. Duff-Gordon*⁹⁶ was decided in 1917; for the law of fiduciaries, *Meinhard v. Salmon*⁹⁷ in 1928. In constitutional law, Mr. Justice Holmes' *Lochner* dissent⁹⁸ goes back to 1905, the "Brandeis brief" to 1908.⁹⁹ We are likely to think the use of federal habeas corpus for the protection of those convicted of crime through abuse of constitutional guarantees to be a major development of our day; but *Johnson v. Zerbst*¹⁰⁰ was decided the year Cardozo died, and had been prefigured, as regards state convictions, by *Moore v.*

92. CARDOZO, LAW AND LITERATURE 68-69 (1931).

93. Pound, *Foreword* to POLLARD, MR. JUSTICE CARDOZO: A LIBERAL MIND IN ACTION 4 (1935). See also Pound, *The Theory of Judicial Decision*, 36 HARV. L. REV. 641 (1923).

94. Note Professor Jones' recent reference to "Cardozo, Holmes' only equal as an American common law judge." Jones, *Law and Morality in the Perspective of Legal Realism*, 61 COLUM. L. REV. 799, 803 (1961), and the Manchester Guardian's recent obituary:

There are many who will feel that with the death of Learned Hand the golden age of the American judiciary has come to an end.

95. BOHLEN, CASES ON TORTS iii (3d ed. 1930).

96. 222 N.Y. 88, 118 N.E. 214 (1917).

97. 249 N.Y. 458, 164 N.E. 545 (1928).

98. *Lochner v. New York*, 198 U.S. 45, 74 (1905).

99. See *Muller v. Oregon*, 208 U.S. 412, 419 (1908).

100. 304 U.S. 458 (1938).

*Dempsey*¹⁰¹ and *Mooney v. Holohan*¹⁰² some years before. *Erie R.R. v. Tompkins*¹⁰³ was likewise decided in 1938 and the only really major development of the doctrine, Mr. Justice Frankfurter's opinion in *Guaranty Trust Co. v. York*,¹⁰⁴ came but seven years later. Against the galaxy of these and many other decisions, what of like importance have recent years of Supreme Court decision offered, with the solitary exception of *Brown v. Board of Education*?¹⁰⁵ Then add the Federal Rules of Civil Procedure which became effective in 1938, the greatest of the many contributions to our law by the then Dean of the Yale Law School, Judge Charles E. Clark.

Other data yield a similar conclusion. The years ending with Cardozo's death were the years of the great treatises. Williston on Contracts was pub-

101. 261 U.S. 86 (1923).

102. 294 U.S. 103, 112-13 (1935).

103. 304 U.S. 64 (1938).

104. 326 U.S. 99 (1945).

105. 349 U.S. 294 (1955). The editors have suggested that I ought to add *Mapp v. Ohio*, 367 U.S. 643 (1961). If that decision has the effect of imposing on the states the precise Federal implementation of the Bill of Rights, thereby overruling or impairing *sub silentio* such cases as *Hurtado v. California*, 110 U.S. 516 (1884), *Twining v. New Jersey*, 211 U.S. 78 (1908), *Palko v. Connecticut*, 302 U.S. 319 (1937), and *Adamson v. California*, 332 U.S. 46 (1947), I should agree. But Mr. Justice Clark's prevailing opinion, for four Justices, does not say that, and, especially in view of the limited nature of Mr. Justice Black's concurrence and of the recent reiteration of *Twining v. New Jersey* in *Cohen v. Hurley*, 366 U.S. 117, 127-29 (1961), I would think it quite premature to suppose the decision goes anything like that far; only time will tell how far it does. For an interesting discussion, antedating *Mapp*, see the Madison lecture by Mr. Justice Brennan, *The Bill of Rights and the States*, 36 N.Y.U.L. Rev. 761 (1961).

It may be worth recording that, in what was fated to be my last talk with Judge Learned Hand, I expressed concern over the size of the problem *Mapp* had created, initially for state courts and ultimately for Federal courts under 28 U.S.C. § 2254 (1958), in the form of applications by prisoners who would now "discover" they had been convicted, many years back, by evidence obtained through illegal search and seizure. It seemed to me altogether likely that most of these applications would be unmeritorious as to the fact of illegal search and seizure, and that, in many of the small fraction that might have merit on that score, the prisoner would have been convicted in any event; yet the hearing of these myriad complaints would further disable the courts, already overburdened, from performing pressing duties to more worthy litigants. Hence I suggested that if the majority was intent on overruling *Wolf v. Colorado*, 338 U.S. 25 (1949); it should have done so on a prospective basis, applying the new rule only to trials occurring thereafter or, at the most, to *Mapp* and all other cases where the process of direct appeal had not yet been concluded, as distinguished from convictions that had become final, the course proposed by Mr. Justice Frankfurter in a not dissimilar context, *Griffin v. Illinois*, 351 U.S. 12, 25-26 (1956). Compare Mr. Justice Black dissenting in *Mosser v. Darrow*, 341 U.S. 267, 275-76 (1951), and see generally Levy, *Realist Jurisprudence and Prospective Overruling*, 109 U. Pa. L. Rev. 1 (1960). Judge Hand vehemently dissented, but with the kind of gay ferocity that always left one uncertain how far his professed disagreement represented true conviction and how far the love of the lively legal argument—even at 89. Perhaps my concern was ill-founded; a lower New York court has just held that *Mapp* was intended to apply only prospectively, *People v. Figueroa*, N.Y. County Court, Kings County, 30 U.S.L. WEEK 2158.

lished in 1920-24; the first edition of Williston on Sales goes back to 1909. The three editions of Wigmore on Evidence are dated 1904, 1923, and 1939; Scott on Trusts also came in 1939. Nor were the first four decades wanting in books more fundamental in character—in addition to Cardozo's own. Gray's Nature and Sources of the Law was published in 1909, Pound's Introduction to the Philosophy of Law and The Spirit of the Common Law appeared in 1921, and his Interpretations of Legal History and Hohfeld's Fundamental Legal Conceptions in 1923—its principal chapter having appeared a decade before.¹⁰⁶ These also were the years of the Restatements, in which Cardozo took so deep an interest.¹⁰⁷ The first of these, on Contracts, appeared in 1932; others followed at brief intervals thereafter; and the last, the final volumes of Property, were published in 1945. All the while the law reviews were pouring forth a stream of pioneering articles by such men as Stone, Frankfurter, T. R. Powell, Morgan, Cook, Lorenzen, Bohlen, Seavey and Chafee, to name only a few. Great new treatises we have today, indeed, such as Corbin on Contracts, Mertens on Federal Income and Federal Gift and Estate Taxation, Moore on Federal Practice, Davis' Administrative Law Treatise, and Loss on Securities Regulation;¹⁰⁸ but, although written in the grand manner, all but the first lie for the most part in fields largely occupied by statute or rule and can hardly organize a subject as Williston did for contracts or Wigmore for evidence. And the Restatements, valuable though they assuredly will be, can scarcely create the same interest, or make the same contribution, as their predecessors.

Assuming that the fifth and sixth decades of the century have seen somewhat less dramatic development of law by judges and others than the first four, what are the causes and the portents? Great creative eras cannot be expected to last forever. "Periods of judicial boldness in the adaptation of the law to new social problems have usually been followed by periods of consolidation and reaction."¹⁰⁹ If the work has been well done, there must be an interval before new creation is needed—or possible. No tears are shed because the sons of J. S. Bach, great composers though they were, did not equal the father; some years had to pass and new thoughts to be developed, in part by them, before there was need for a Mozart to give these definitive expression. The increase in the role of legislation has doubtless played a large part in the detente. Interpretation of the Fair Labor Standards Act does not provide the same intellectual excitement as the Long Island Railroad's liability to Mrs. Palsgraf for the dislodgement of the package of firecrackers from the arms of the unnamed prospective passenger,¹¹⁰ although it is immensely more impor-

106. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913).

107. See, e.g., CARDOZO, LAW AND LITERATURE 121-41 (1931).

108. How one would like to be able to add treatises of similar excellence on labor and antitrust law!

109. FRIEDMANN, LAW IN A CHANGING SOCIETY 28 (1959).

110. *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 162 N.E. 99 (1928).

tant in day-to-day life. If it is thus hard today to recapture all the stimulation of the golden age, there is surely no need for the judge, or the law student, to believe we have passed into not merely a silver but a copper one. Problems still press for solution, ranging from the very old ones of reformulating personal injury and criminal law, through such great new fields as labor law, to the altogether novel problem of developing the law of space.¹¹¹ Solution for most of these will call for action by elected legislators rather than judges; indeed, many will require handling on supra-national lines. Meanwhile the appellate judge will do well to remember another lesson from Cardozo's life. As Llewellyn has reminded us, ". . . the beauty of Cardozo's judging did not consist primarily in production of three dozen transcendent landmarks of *MacPherson* stature. . . . As he grew more experienced, the drive grew in him to leave the older authorities *tidied up behind*, to make each little opinion, in its own little way, a *clean* fresh start."¹¹² Even though "the cabin of doctrine may seem for the moment complete, with only chinks and leaks left to attend to,"¹¹³ there is still much worthy work of this sort to be done—and there always will be.

111. See, e.g., Cooper, *Fundamental Questions of Outer Space Law*, a lecture presented at Leiden University, Oct. 10, 1960; American Bar Foundation, *Report to the National Aeronautics and Space Administration on the Law of Outer Space* (1960).

112. LLEWELLYN, *op. cit. supra* note 29, at 297-98.

113. *Id.* at 37.