

THE JUDGE'S ART

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A judge on the bench is now and then in your whimsical situation between Tragedy and Comedy; inclination drawing one way and a long line of precedents the other.

—MANSFIELD

When men act on the principle of intelligence, they go out to find the facts and to make their wisdom. When they ignore it, they go inside themselves and find only what is there. They elaborate their prejudice, instead of increasing their knowledge.

—WALTER LIPPMANN

Plato's ancient question will not down. Is it "more advantageous to be subject to the best man or the best laws?"¹ We have long since settled on the Rule of Law, but that catch-phrase hardly meets the problem. As Plato observed, laws by definition are *general* rules; their generality is their essence and their weakness. For generality contemplates averages—the stuff of books. It falters before the complexities of life and must usually concern itself with form rather than substance. Accordingly, in Plato's ideal view, laws are a rough makeshift far inferior to the discretion of the philosopher king, whose pure wisdom would render real justice by giving each man *his* due, not the due of some nonexistent "average man."²

Aristotle anticipated our choice by rejecting the allwise ruler: "[T]o invest man with authority is to introduce a beast, as desire is something bestial, and even the best of men in authority are liable to be corrupted by anger." Law, in contrast, is "intelligence without passion." Yet Aristotle knew with Plato that:

All law is universal but about some things it is not possible to make a universal statement which shall be correct. In those cases then in which it is necessary to speak universally but not possible to do so correctly, the law takes the usual case, though it is not ignorant of the possibility of error. And it is none the less correct; for the error is not in the law nor in the legislator but in the nature of the thing, since the matter of practical affairs is of this kind from the start.³

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¹ Aristotle posed the problem in *Politics* after Plato had explored it in *Statesmen*. See 4 THE DIALOGUES OF PLATO 496-507 (Jowett ed. 1892).

² This and the next paragraph have drawn heavily from McILWAIN, *THE GROWTH OF POLITICAL THOUGHT IN THE WEST* (1932).

³ ARISTOTLE, *NICOMACHEAN ETHICS*, book V, ch. 10, at 1137, in 9 THE WORKS OF ARISTOTLE (Ross ed. 1925).

And so, having rejected the philosopher king in favor of the Rule of Law, we call him back to limited service and name him judge.⁴ In this capacity he fills the gap between the generalities of law and the specifics of life. Holmes put it in a thimble: "general propositions do not decide concrete cases."⁵ Thus judges must. We have synthesized the wisdom of Plato and the wisdom of Aristotle. An inclination one way rather than the other is the difference between our "activists" and our "humilitarians"—only the names are new. How much informed discretion, how much "law," is appropriate to the peculiarities of each concrete case? What are the proper proportions for each of the myriad contexts in which a court must resolve the discrepancy between the generic directives given it and the unanticipated or imperfectly foreseen controversies that demand adjudication? As Lord Wright put it, "notwithstanding all the apparatus of authority, the judge has nearly always some degree of choice."⁶

Such is the judge's burden. In its discharge he is plagued by all the frailties, not just the "bestiality" of desire, passion, and anger that Aristotle mentioned. He must clear his endless dockets and somehow maintain the stability and predictability of the Rule of Law without losing the flexibility implicit in the sound discretion of the philosopher king. He must mediate between the letter and the spirit; between the traditions of the past and the convenience of the present; between society's need for stability and its need for change; between liberty and authority; between the whole and its parts—all this in contexts that no lawmaking assembly could be expected to foresee. Plainly this entails high art. How may the job be done?

How, indeed, does one create a poem, or a symphony? If our literature on such matters is as sparse as it is on the judge's art, it is virtually nonexistent. Cardozo's famous effort—*The Nature of the Judicial Process*—stands almost alone and somewhat dated. Was it not, after all, a tract for the times directed to the last vestige of pretense that judges are mere mimics—that creativity is not for them? Thanks to Cardozo, supplemented by the innuendoes of "the great dissenters" after World War I and the Court crisis of the mid-1930's, we are more sophisticated now. Yet, while the legislative, executive, and administrative processes have been examined endlessly, few have proceeded further—and only modestly—in the thicket where Cardozo pioneered.⁷ What we have for the most part are scattered insights in

⁴ In another, more modern capacity, we call him "administrator."

⁵ *Lochner v. New York*, 198 U.S. 45, 76 (1905) (dissenting opinion).

⁶ WRIGHT, *LEGAL ESSAYS AND ADDRESSES* xxv (1939).

⁷ See Chafee, *Do Judges Make Or Discover Law?*, 91 *PROCEEDINGS AM. PHIL. SOC'Y* 405 (1947); Frankfurter, *Some Observations on the Natures of the Judicial Process of Supreme Court Litigation*, 98 *PROCEEDINGS AM. PHIL. SOC'Y* 233 (1954).

writings directed to other ends. Some of these are gathered below in the hope that they may stimulate further thought on one of the pressing problems of our day: the role of judges in democratic government.

Of course, some "laws" are so clear that they preclude litigation, as, for example, the constitutional provision with respect to the number of senators from each state. Others are so vague, so lacking in standards, as to foreclose adjudication. Thus Holmes ventured to think that:

every time . . . a judge declines to rule whether certain conduct is negligent or not he avows his inability to state the law; and that the meaning of leaving nice questions to the jury is that while if a question of law is pretty clear we can decide it, as it is our duty to do, if it is difficult it can be decided better by twelve men at random from the street.⁸

Similarly, Judge Learned Hand observed that a jury verdict as to whether the accused had violated an obscenity statute "is not the conclusion of a syllogism of which they are to find only the minor premiss, but really a small bit of legislation ad hoc, like the standard of due care."⁹ Putting such issues to a jury is not unlike leaving inscrutable constitutional standards for application (read incarnation) by the political branches of government.¹⁰

Between these extremes where the law is neither so clear nor so obscure as to preclude adjudication, judges must find or make criteria for judgment. We have it on Mr. Justice Frankfurter's authority that:

The decisions in the cases that really give trouble rest on judgment, and judgment derives from the totality of a man's nature and experience. Such judgment will be exercised by two types of men, broadly speaking, but of course with varying emphasis—those who express their private views or revelations, deeming them, if not *vox dei*, at least *vox populi*; or those who feel strongly that they have no authority to promulgate law by their merely personal view and whose whole training and proved performance substantially insure that their conclusions reflect understanding of, and due regard for, law as the expression of the views and feelings that may fairly be deemed representative of the community as a continuing society.¹¹

It will be noted that here even a convinced humilitarian recognizes that the problem is not whether judges shall make or find the law, but whether internal or external data shall guide their creativity. Mr.

⁸ HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS 164, 233 (1920).

⁹ *United States v. Levine*, 83 F.2d 156, 157 (2d Cir. 1936).

¹⁰ See, e.g., *Coleman v. Miller*, 307 U.S. 433 (1939); *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849).

¹¹ Frankfurter, *supra* note 7, at 237.

Justice Stone's less challenging language may be more generally acceptable:

[T]he great constitutional guarantees and immunities of personal liberty and of property, which give rise to the most perplexing questions of constitutional law and government, are but statements of standards to be applied by courts according to the circumstances and conditions which call for their application. The chief and ultimate standard which they exact is reasonableness of official action They are not statements of specific commands. They do not prescribe formulas as to which governmental action must conform

Whether the constitutional standard of reasonableness of official action is subjective, that of the judge who must decide, or objective in terms of a considered judgment of what the community may regard as within the limits of the reasonable, are questions which the cases have not specifically decided. Often these standards do not differ. When they do not, it is a happy augury for the development of law which is socially adequate. But the judge whose decision may control government action, as well as in deciding questions of private law, must ever be alert to discover whether they do differ and, differing, whether his own or the objective standard will represent the sober second thought of the community, which is the firm base on which all law must ultimately rest.¹²

For humilitarians, of course, there can be no doubt—the judge's personal views have no proper place in his official life. "It comes down to this," Cardozo said:

There are certain forms of conduct which at any given place and epoch are commonly accepted under the combined influence of reason, practice and tradition, as moral or immoral. If we were asked to define the precise quality that leads them to be so characterized, we might find it troublesome to make answer, yet the same difficulty is found in defining other abstract qualities, even those the most familiar. The forms of conduct thus discriminated are not the same at all times or in all places. Law accepts as the pattern of its justice the morality of the community whose conduct it assumes to regulate. In saying this, we are not to blind ourselves to the truth that uncertainty is far from banished. Morality is not merely different in different communities. Its level is not the same for all the component groups within the same community. A choice must still be made between one group standard and another. We have still to face the problem, at which one of these levels does the social pressure become strong enough to convert the moral norm into a jural one? All that we can say is that the line will be higher than the lowest level of

¹² Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 23-25 (1936).

moral principle and practice, and lower than the highest. The law will not hold the crowd to the morality of saints and seers. It will follow, or strive to follow, the principle and practice of the men and women of the community whom the social mind would rank as intelligent and virtuous.¹³

This, of course, is an elaboration of the old common-law "reasonable man" standard which different judges may express in different terms. Thus Lord Haldane observed:

I think that there are many things of which judges are bound to take judicial notice which lie outside the law properly so called, and among those things are what is called public policy and the changes which take place in it. The law itself may become modified by this obligation of the judges. [Some law, like the Rule Against Perpetuities, has become] . . . a crystalized proposition forming part of the ordinary common law, so definite that it must be applied without reference to whether a particular case involves the real mischief to guard against which the rule was originally introduced. [But between such rules and those] . . . in which the principle of public policy has never crystalized into a definite or exhaustive set of propositions, there lies an intermediate class. Under this third category fall the instances in which public policy has partially precipitated itself into recognized rules which belong to law properly so called, but where these rules have remained subject to the moulding influence of the real reasons of public policy from which they proceeded.¹⁴

Chief Judge Learned Hand put it with a different emphasis:

There is a hierarchy of power in which the judge stands low; he has no right to divinations of public opinion which run counter to its last formal expressions. Nevertheless, the judge has, by custom, his own proper representative character as a complementary organ of the social will, and in so far as conservative sentiment, in the excess of caution that he shall be obedient, frustrates his free power by interpretation to manifest the half-framed purposes of his time, it misconceives the historical significance of his position and will in the end render him incompetent to perform the very duties upon which it lays so much emphasis. The profession of the law of which he is a part is charged with the articulation and final incidence of the successive efforts toward justice; it must feel the circulation of the communal blood or it will wither and drop off, a useless member.¹⁵

Finally, in Professor Swisher's words:

The Supreme Court is able to lead in constitutional development, then, only by virtue of the fact that its leadership is of such a

¹³ CARDOZO, *PARADOXES OF LEGAL SCIENCE* 36-37 (1928).

¹⁴ *Rodriguez v. Speyer Bros.*, 88 L.J.K.B. (n.s.) 147, 157-59 (1918) (Haldane, L.J.).

¹⁵ Hand, *The Speech of Justice*, 29 HARV. L. REV. 617-18 (1916).

character that the people and their representatives are willing to follow. To put the matter more simply, the Supreme Court succeeds in leading largely to the extent of its skill not merely as a leader but as a follower. Since the medium of its leadership is the law, or the decision of cases in terms of law, we can go further and say that the effectiveness of the Court's leadership is measured by its ability to articulate deep convictions of need and deep patterns of desire on the part of the people in such a way that the people, who might not have been able themselves to be similarly articulate, will recognize the judicial statement as essentially their own. The Court must sense the synthesis of desire for both continuity and change and make the desired synthesis the expressed pattern of each decision.¹⁶

In short, troublesome legal issues shall be settled in harmony with the sense of the community, whether in the judge's view the community be right or wrong. Accordingly, when doubtful matters cannot be avoided, they may be referred to a jury, to the political processes, or to the "reasonable man." But who is this creature? Like jury and legislature, he symbolizes all of us. He is a standard, an American Everyman, whereby a hard-pressed judge seeks to capture the "views and feelings that may fairly be deemed representative of the community as a continuing society" (Frankfurter); "the sober second thought" of the body politic (Stone); the "forms . . . which are commonly accepted under the combined influence of reason, practice and tradition" (Cardozo); "public policy" (Haldane); "half formed [community] purposes" (Hand); or the basic "convictions of need and deep patterns of desire on the part of the people" (Swisher). The underlying thought, of course, is plain:

[T]he 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. He is not to substitute even his juster will for theirs; otherwise it would not be the common will which prevails, and to that extent the people would not govern.¹⁷

The "reasonable man" approach is orthodox. A not entirely incompatible guide to decision—equally mundane, if less rational—is the informed "hunch" which Judge Ulman describes in action:

¹⁶ SWISHER, *THE SUPREME COURT IN MODERN ROLE 179-80* (1958).

¹⁷ HAND, *Is a Judge Free in Rendering a Decision?*, in *THE SPIRIT OF LIBERTY* 109 (1952).

On the morning of my third day of solitary work on this [rate] case the familiar hunch came to me. Quite suddenly, while reading an opinion of the Supreme Court, I discovered that I was going to have to decide in favor of the railway company. This discovery came to me with a shock; for not until then had I realized fully the strength of my bias the other way

Therefore I determined to test to the utmost the validity of my hunch. The way to do it was to write an opinion. If the half-thoughts and partial conclusions which were forming in my mind would go down on paper and stay there, then they were my deliberate judgement. Otherwise I might erase what I should first write and decide the case the way I wanted to decide it There had developed within me a clear-cut issue between the emotions and the intellect.¹⁸

But is the mundane never to be enlightened by frankly transcendental values? Must we, insofar as courts are concerned, live forever in a moral *status quo*? Is judicial law to be perpetually confined by the morals of the masses?

When a case comes before a court for decision, it may be that nothing can be drawn from the sources heretofore mentioned; there may be no statute, no judicial precedent, no professional opinion, no custom, bearing on the question involved, and yet the court must decide the case somehow The French Code Civil [art. 4] says: "Le juge qui refusera de juger sous prétexte du silence, de l'obscurité ou de l'insuffisance de la loi, pourra être poursuivi comme coupable de déni de justice." And I do not know of any system of law where a judge is held to be justified in refusing to pass upon a controversy because there is no person or book or custom to tell him how to decide it. He must find out for himself; he must determine what the Law ought to be; he must have recourse to the principles of morality.¹⁹

Or in the rather more sophisticated language of Lord MacMillan:

It is thus clear that the judiciary are constantly confronted with the necessity of making a choice between the doctrines of the law which they are to hold applicable to a particular case, and the choice which they make in the particular instance results inevitably in the expansion or restriction of the doctrine applied or rejected. It is at this point that what may, I think, quite properly be called ethical considerations operate and ought to operate. I hope I shall be acquitted of any suggestion that judges should allow themselves to be swayed by sentiment to wrest the law,

¹⁸ ULMAN, A JUDGE TAKES THE STAND 197-98 (1933). See also Hutcheson, *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decisions*, 14 CORNELL L.Q. 274 (1929).

¹⁹ GRAY, NATURE AND SOURCES OF THE LAW 302 (2d ed. 1921).

and I should deprecate as strongly as any the admission of the motives of the social reformer into the counsels of the Bench. I am no friend of that spurious kind of equity which Lord Bramwell robustly denounces as consisting in "A disregard of general principles and general rules in the endeavor to do justice more or less fanciful in particular cases." Other eminent judges in equally vigorous language, to which I am quite prepared to subscribe, have condemned the impropriety of allowing other than purely legal considerations to influence the decisions of the Courts. But when, as happens from time to time, the law itself presents a choice, and when it is a question whether one or other principle is to be applied, then it seems to me that it is impossible, as it is undesirable, that the decision should not have regard to the ethical motive of promoting justice.²⁰

Other judges may be inclined to go further as the following quotations from Chief Justice Waite, Chief Justice Reid of the Supreme Court of Georgia, and Judge Medina, respectively, suggest:

I have read with interest your brief . . . and am satisfied the case is by no means as desperate as I thought it was. Justice is on your side certainly and that is nine points in every law suit. I never realized this so much as since I have been on the bench.²¹

[I]f he [the lawyer] arrives at a sound solution, in his interminable quest for it, it will finally rest upon the eternal principles of what is right and wrong, and, if he finds that some judicial precedent is to the contrary, either he or those ministers of justice who are to follow him will come back again to those principles that lie eternally in what is right and wrong. Thus, pursuit of the law, glamorous as it is, is very little different on the bench from what it is in the practice.²²

I do not see why a judge should be ashamed to say that he prays for divine guidance and for strength to do his duty. Indeed, there came a time . . . when I did the most sincere and the most fervent praying that I ever did in my life.

I suddenly found myself in the midst of that trial of the Communists. It took me a long time to realize what they were trying to do to me. But as I got weaker and weaker and found the burden difficult to bear, I sought strength from the one source that never fails . . . my unguided will alone and such self-control as I possess were unequal to this test.²³

²⁰ MacMillan, *Law and Ethics*, 49 SCOT. L. REV. 61, 69 (1933).

²¹ Letter From Chief Justice Waite to H. Newbegin, June 16, 1877, quoted in TRIMBLE, CHIEF JUSTICE WAITE 266 (1938).

²² Reid, *What a Lawyer Discovers on Becoming a Judge*, 1940 ALA. BAR ASS'N PROCEEDINGS 316, 323-24.

²³ Medina, *The Judge and His God: "We Are Not the Masters,"* 38 A.B.A.J. 661, 662-63 (1952).

The virtues and dangers of extrarational intrusions upon the judicial process are suggested in the philosophies of Lon Fuller and John Dickinson:

The solution for the problem of rationalism *versus* irrationalism as it affects human conduct is, I think, to be found in a balance in which man's rational nature and the unrationalized side of his being reciprocally check and counterpoise one another. In such a state of balance, intuitive insight tempers reason and preserves it from excesses, while at the same time there is no relaxing of the effort to force intuition and instinct into the patterns of articulate thought. I believe it is not going too far to say that it was such a state of balance which sustained Western civilization during its progressive periods.²⁴

Under the name "law of nature," this ideal law, derived from currently active moral aspirations by philosophers, divines and judges, has supplied not merely a pattern and model, but a powerful stimulus for changes in and additions to the law of a given time and place. Of course, such ideal law can only influence the actual insofar as portions of it are from time to time adopted by judges and legislators. Naturally the ideal has varied, and not merely from period to period, but from individual thinker to individual thinker; yet in the large, the pursuit of it has usually represented an effort to discover and give effect to fundamental underlying human values, and the judge who has been influenced by the concept in his decisions has for the most part been doing what he could to build the law according to the better lights of his own age

[The hostility of the "realists"] to rules arises precisely from the element of stability which rules necessarily involve, and they, therefore, seek to eliminate the rule-element in law in favor of a conception of law as consisting essentially of intelligent discretion This view, stripped of its contemporary phraseology and modernistic trappings, is nothing but a return to the age-old idea that the best government is government by philosopher-kings. This idea long ago lost out in the competition of the market-place to the more pedestrian idea of government by law, because law, although at the expense of a certain amount of flexibility, can at least institutionalize the common sense wisdom of mankind, while the wisdom of the philosopher-king can often be proved to be wisdom only by the persuasive force of bullets and bombs. Whether the wisdom of modern philosopher-kings can be made to rest on any different kind of proof remains to be seen.²⁵

If doubt invites and often compels judicial "legislation," doubt is not a self-defining quality. One trait of the activists—old

²⁴ Fuller, *My Philosophy of Law*, in *MY PHILOSOPHY OF LAW* 113, 122 (1941).

²⁵ Dickinson, *My Philosophy of Law*, in *MY PHILOSOPHY OF LAW* 91, 101-02, 106 (1941).

and new—is their relative freedom from uncertainty. They do not question the judicial duty of deference to the community when the law is foggy, but they have a marked ingenuity for scattering the clouds of doubt. Often, where colleagues are troubled, the activist finds (or, as it seems to some, legislates) certitude. His characteristic gambit is to discover or revive the “true purpose” of the Fathers—for he dare not openly repudiate the orthodox view that judgment should spring from some objective, external standard. Thus, as Jerome Frank put it,

All judges exercise discretion, individualize abstract rules, make law The fact is, and every lawyer knows it, that *those judges who are most lawless, or most swayed by the “perverting influences of their emotional natures,” or most dishonest, are often the very judges who use most meticulously the language of compelling mechanical logic, who elaborately wrap about themselves the pretense of merely discovering and carrying out existing rules, who sedulously avoid any indication that they individualize cases.*²⁶

Thomas Reed Powell expressed it differently: “I think that what I most object to in many Justices is something that springs from a feeling of judicial duty to try to make out that their conclusions come from the Constitution.”²⁷

Even Plato recognized that a philosopher king would be unacceptable unless he could hide his naked power by a “noble fiction.” It follows, of course, that platonists on the bench do not avow, but only practice, activism. When Mr. Justice Field needed a broad constitutional tool to restrain state regulation of business he “discovered” that the natural rights listed in the Declaration of Independence had been embedded in the fourteenth amendment:

Among these inalienable rights, as proclaimed in that great document [the Declaration], is the right of men to pursue their happiness, by which is meant the right to pursue any lawful business or vocation, in any manner not inconsistent with the equal rights of others, which may increase their prosperity or develop their faculties so as to give them their highest enjoyment.²⁸

Modern activists find that Field was quite wrong; that the Fathers intended to “incorporate” the Bill of Rights (rather than the Declaration) into the fourteenth amendment.²⁹ The effective difference, of

²⁶ FRANK, *LAW AND THE MODERN MIND* 137-38 (1949).

²⁷ POWELL, *VAGARIES AND VARIETIES IN CONSTITUTIONAL INTERPRETATION* 179 (1956).

²⁸ *Butchers' Union Co. v. Crescent City Co.*, 111 U.S. 746, 754, 757 (1884) (concurring opinion).

²⁹ See *Adamson v. California*, 332 U.S. 46, 68 (1947) (Black, J., dissenting).

course, is that the one view gave business interests a "preferred place," while the other would give it—rather selectively—to libertarian interests.

Of course, one can be as creative in gauging the sense of the community as in discovering the true meaning of the Fathers. But there is this great difference: the community can talk back. Few, and modern activists least of all, would be willing to accept as generally binding the dead hand of past "intentions."³⁰ To do so would be, in Mr. Justice Mathews words, "to deny every quality of the law but its age."³¹ Moreover, in view of the changing and contradictory purposes that have been attributed to the Fathers, it would appear that their meaning is at least as uncertain in the face of modern problems as is our thinking. Given the present activist's progressive bent, one suspects that when he pleads past purposes—always selectively—to justify his conception of present needs, he does so because he is reasonably sure his views would not be presently acceptable on their own merits.

Must it be either a "psychoanalysis" of the present with the humilitarians, or of the past with the activists? Max Radin proposed a more direct approach:

[I]n that great mass of transactions which do not fit readily or quickly into established types, or will fit into one just as easily as another, the judge ought to be a free agent. We need not fear arbitrariness. Our Cokes and Mansfields and Eldons derive their physical and spiritual nourishment from the same sources that we do. They will find good what we find good, if we will let them. And if they had not prescribed to themselves the curious necessity of putting the transactions to be regulated into one type-form rather than another—assuming that it could go into either and will not without pushing go into any—they would have no need of their relations and imputations, their presumptions and suppositions, their gyrations and concatenations, and could cut straight to the desirable result which they in common with ourselves as members of the community prefer

It is an undoubted fact that the chief purpose courts fulfill in giving us not merely a judgment but a classification of the judgment by types and standards, is to make it easy for us to find out how they think. The technique which has become traditional in Europe and America seems to me to make it hard.³²

³⁰ With modern activist views on freedom of expression and right to counsel, contrast the "intentions" of the Fathers as set out in LEVY, *LEGACY OF SUPPRESSION* (1960), and BEANEY, *THE RIGHT TO COUNSEL IN AMERICAN COURTS* ch. 3 (1955).

³¹ Quoted in Bickel, Book Review, *New Republic*, May 12, 1958, pp. 16, 19.

³² Radin, *The Theory of Judicial Decision: Or How Judges Think*, 11 A.B.A.J. 357, 362 (1925).

John Dewey propounded a similar thought in more pragmatic terms:

On the view here presented, the standard is found in consequences, in the *function* of what goes on socially. If this view were generally held, there would be assurance of introduction on a large scale of the rational factor into concrete evaluations of legal arrangements. For it demands that intelligence, employing the best scientific methods and materials available, be used, to investigate, in terms of the context of actual situations, the consequences of legal rules and of proposed legal decisions and acts of legislation. The present tendency [1941], hardly more as yet than in a state of inception, to discuss legal matters in their concrete social setting, and not in the comparative vacuum of their relations to one another, would get the reinforcement of a consistent legal theory. Moreover, when it is systematically acknowledged in practice that social facts are going concerns and that all legal matters have their place *within* these ongoing concerns, there will be a much stronger likelihood than at present that new knowledge will be acquired of a kind which can be brought to bear upon the never-ending process of improving standards of judgment.³³

Some will insist that whatever the proclaimed standard a judge cannot long escape his own sense of values—his own bias. Perhaps detachment is an illusion. Maybe it belongs only to the gods. “Be that as it may,” Learned Hand admonishes,

we know that men do differ widely in this capacity; and the incredulity which seeks to discredit that knowledge is a part of the crusade against reason from which we have already so bitterly suffered. We may deny—and, if we are competent observers, we will deny—that no one can be aware of the danger [of his bias] and in large measure provide against it.³⁴

Cardozo's attitude was not entirely different:

If reasoning is vitiated at times by adhering to abstractions, it is vitiated also by starting with a prepossession and finding arguments to sustain it. The weakness is inherent in the judicial process. The important thing, however, is to rid our prepossessions, so far as may be, of what is merely individual or personal, to detach them in a measure from ourselves, to build them, not upon instinctive or intuitive likes and dislikes, but upon an informed and liberal culture, a knowledge (as Arnold would have said) of the best that has been thought and said in the world, so far as that best has relation to the social problem to be solved. Of course, when our utmost effort has been put forth, we shall be far from freeing ourselves from the empire of inarticulate

³³ Dewey, *My Philosophy of Law*, in *MY PHILOSOPHY OF LAW* 73, 84-85 (1941).

³⁴ HAND, *Thomas Walter Swan*, in *THE SPIRIT OF LIBERTY* 209, 218 (3d ed. 1960).

emotion, of beliefs so ingrained and inveterate as to be a portion of our very nature The best that we can hope for is that from the knowledge of our weakness there will come the exercise of strength.³⁵

Judge Frank may have been a bit more pessimistic:

In the many cases where the testimony is in conflict, can there ever be much "objectivity" in judicial decisions, or . . . much of uniformity in the translation of community ideals into those decisions? I confess that I do not know the answer. To some extent, the difficulty can be surmounted by self-knowledge on the part of the judge, by a self-scrutiny revealing to him his personal biases, followed by an effort on his part to bring them into line with acceptable moral ideals. But that is no complete solution. Perhaps there is none; perhaps there is.³⁶

In the end we must recognize that law is not a bucket of ready-made answers, but a process, or technique, for easing an endless flux of changing social tensions. It "is always approaching, and never reaching, consistency. It is forever adopting new principles from life at one end, and it always retains old ones from history at the other, which have not yet been absorbed or sloughed off. It will become entirely consistent only when it ceases to grow."³⁷ Legal reasoning then involves more than logic. Judge Bok described it at its best as "the play of an enlightened personality within the boundaries of a system."³⁸ Under a facade of formal symmetry it must synthesize established rules, pragmatic needs, and moral yearnings. It must honor reasonable expectations born of the past and yet allow adequate *Lebensraum* for the present and the future. It must have daring moments and moments politic, moments of hope, moments of fear, and moments of doubt. Plainly the stolid satisfaction of the hedgehog, bristling upon a single postulate, is not for judges. They must pursue the fox—the reason that is many reasons, the truth that cannot be caught without destroying its vitality. In short, as Dean Levi insists,

The emphasis should be on the process. The contrast between logic and the actual legal method is a disservice to both. Legal reasoning has a logic of its own. Its structure fits it to give meaning to ambiguity and to test constantly whether society has come to see new differences or similarities. Social theories and other changes in society will be relevant when the ambiguity has to be

³⁵ CARDOZO, *op. cit. supra* note 13, at 126-27.

³⁶ Frank, Book Review, 59 HARV. L. REV. 1004, 1011 (1946).

³⁷ HOLMES, THE COMMON LAW 36 (1881).

³⁸ BOK, BACKBONE OF THE HERRING 9 (1941).

resolved for a particular case. Nor can it be said that the result of such a method is too uncertain to compel. The compulsion of the law is clear; the explanation is that the area of doubt is constantly set forth. The probable area of expansion or contraction is foreshadowed as the system works. This is the only kind of system which will work when people do not agree completely. The loyalty of the community is directed toward the institution in which it participates. The words change to receive the content which the community gives to them. The effort to find complete agreement before the institution goes to work is meaningless. It is to forget the very purpose for which the institution of legal reasoning has been fashioned. This should be remembered as a world community suffers in the absence of law.³⁹

Holmes tells us he once heard an eminent judge say that he never let a decision go until he was sure it was right:

This mode of thinking is entirely natural. The training of lawyers is training in logic . . . and the logical method and form flatter that longing for certainty and for repose which is in every human mind. But certainty generally is illusion, and repose is not the destiny of man. Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding. You can give any conclusion a logical form. You always can imply a condition in a contract. But why do you do it? It is because of some belief as to the practice of the community or of a class, or because of some opinion as to policy, or, in short, because of some attitude of yours upon a matter not capable of exact quantitative measurement, and therefore not capable of founding exact logical conclusions.⁴⁰

From this it is an easy step to Cardozo's view that "a judge must think of himself as an artist . . . who, although he must know the handbooks, should never try to use them for his guidance; in the end he must rely upon his almost instinctive sense of where the line [lies] between the word and the purpose . . . behind it; he must somehow manage to be true to both."⁴¹

Great artistry on the bench as elsewhere means creative response to the evolving processes of social life. It entails respect for existing forms and values, but immunity from their strangulating grasp. Above all, it demands a sense of paradox. For in the words of Mr. Justice Frankfurter:

³⁹ LEVY, AN INTRODUCTION TO LEGAL REASONING 73-74 (1949).

⁴⁰ HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS 167, 180-81 (1920).

⁴¹ Hand, *Mr. Justice Cardozo*, 52 HARV. L. REV. 361-62 (1939).

The core of the difficulty is that there is hardly a question of any real difficulty before the Court that does not entail more than one so-called principle. Anybody can decide a question if only a single principle is in controversy. Partisans and advocates often cast a question in that form, but the form is deceptive. In a famous passage Mr. Justice Holmes has exposed this misconception:

All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached The boundary at which the conflicting interests balance cannot be determined by any general formula in advance, but points in the line, or helping to establish it, are fixed by decisions that this or that concrete case falls on the nearer or farther side.

This contest between conflicting principles is not limited to law. In a recent discussion of two books on the conflict between the claims of literary individualism and dogma, I came across this profound observation: ". . . But when, in any field of human observation, two truths appear in conflict it is wiser to assume that neither is exclusive, and that their contradiction, though it may be hard to bear, is part of the mystery of things." But judges cannot leave such contradiction between . . . conflicting "truths" as "part of the mystery of things." They have to adjudicate. If the conflict cannot be resolved, the task of the Court is to arrive at an accommodation of the contending claims. This is the core of the difficulties and misunderstandings about the judicial process. This, for any conscientious judge, is the agony of his duty.⁴²

⁴² Frankfurter, *supra* note 7, at 238.