

# THE ART OF BEING A JUDGE

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The title of this study—The Art of Being a Judge—posits the question: What is an art? I use the word in its primary meaning, *i.e.*, *skill* as the result of knowledge and practice, rather than in the sense of *perfection* in the *exercisè* of skill. The skill is human skill because it is exercised by judges who are human beings and use human tools.<sup>1</sup>

Students who differ radically as to the nature of the law and the judicial process agree that the personality of the judge is of utmost importance.<sup>2</sup> Indeed, someone has said that there is no guarantee of justice “except the personality of the Judge.”

## THE NATURE OF THE JUDICIAL PROCESS

Zechariah Chafee, Jr., has stated that while, in the art of judging, legal power “is much; it is not all,” but that the important residuum in the equipment of a judge is “the desire to understand human life as well as embalmed legal experience.”<sup>3</sup> For this reason, he insists that it is important that judges keep in “continuous fruitful contact with the changing social background out of which controversies arise.”<sup>4</sup>

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1. See FRANK, COURTS ON TRIAL c. 10, *Are Judges Human?* 146-56 (1949); WEBER, LAW IN ECONOMY AND SOCIETY 73-82 (1954).

2. EHRlich, FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW 190-95 (Moll transl. 1936); HALL, LIVING LAW OF DEMOCRATIC SOCIETY 50-54 (1949); Cohen, *The Process of Judicial Legislation*, in LAW AND THE SOCIAL ORDER 112-47 (1933); Pound, *Sociology and Law*, in THE SOCIAL SCIENCES AND THEIR INTERRELATIONS 319-27 (1927); see Rose, *Problems in the Sociology of Law and Law Enforcement*, 6 J. LEGAL ED. 191 (1953).

3. Chafee, *Economic Interpretation of Judges*, in THE INQUIRING MIND 265 (1928).

4. *Ibid.* The entire passage is worth quoting:

“There is, indeed, a non-legal element in his making of law, as with Marshall. Holmes interprets a statute or common-law principle in the light of its purpose, and understands that purpose because of his open-minded comprehension of the human activities which law serves only to regulate. So Lord Mansfield created modern business law because he understood business as well as law. Legal power is much; it is not all; but the important residuum in the equipment of a great judge is not, I believe, the possession of this or that political or economic or social view, but the desire to understand human life as well as embalmed legal experience.

“The problem of the judiciary is, therefore, not the selection and easy removal of judges on a political or class basis, but the question, what methods will make it easier to place men of this legal and ultra-legal power on the bench, and after they are there will enable them to keep in continuous fruitful contact with the changing social background out of which controversies arise.”

These attitudes see in law a form of social control expressing the real or ideal, arising out of relations which precede formal law. Pound's definition of law is: "social control through the orderly and systematic application of the force of politically organized society."<sup>5</sup> Even St. Thomas Aquinas' famous "*ordinatio ad bonum commune*" (ordinance for the common good) takes into consideration the societal element in law: "Law is nothing else than an ordinance of reason for the common good, promulgated by him who has the care of the community."<sup>6</sup> What gives strength to law is the fact that through it is expressed the desire of the community to regulate and control certain activities and relations. Even the earliest and most rudimentary legal systems owed their origin to the existence of certain human relations and institutions which sprung from the desire for mutual protection. From the development of these relationships and institutions emerged rules of conduct which came to be accepted as the right ones to govern them.

As society developed, it became necessary to formulate some of these customs, rules and regulations into a code of laws having behind it the sanction and force of the whole community. Thus arose law in its most formal state.

Judges administer justice judicially, *i.e.*, not according to some abstract ideas of right and justice, but according to the rules laid down by society in its Code of Laws to which it gives its sanctions. The function of the judge is primarily adjudication. This is not a mechanical craft, but the exercise of a creative art, whether we call it legislative or not, which requires great ability and objectivity:

"To practice the requisite detachment and to achieve sufficient objectivity no doubt demands of judges the habit of self-discipline and self-criticism, incertitude that one's own views are incontestable and alert tolerance toward views not shared. But these are precisely the pre-suppositions of our judicial process. They are precisely the qualities society has a right to expect from those entrusted with . . . judicial power."<sup>7</sup>

While Justice Frankfurter, in the quotation just given, was speaking of the function of the Justices of the Supreme Court of the United States in interpreting the due process clause of the Federal Constitution, what he says may be applied to *the act of judging* in general. For every judge of every court exercises great, although not *capricious*,

5. Pound, *More About the Nature of Law*, in LEGAL ESSAYS IN TRIBUTE TO ORRIN KIP McMURRAY 531 (1935).

6. AQUINAS, *SUMMA THEOLOGICA* pt. II, 1st pt., question 90, art. 4.

7. *Rochin v. California*, 342 U.S. 165, 171-72 (1951).

power when he applies inert general law to live, specific facts and when he exercises the power to stay administrative, legislative and executive arbitrariness by nullifying the acts of any of the three branches of the government which go counter to constitutional or statutory limitations.

In so doing, the judge cannot exercise the whim of an oriental *cadi*, but must move within the framework of the rule of law. Again quoting Justice Frankfurter, "The judicial judgment . . . must move within the limits of accepted notions of justice and is not to be based upon the idiosyncrasies of a merely personal judgment."<sup>8</sup>

### THE RULE OF LAW

Many ideas which today are accepted as the obvious imply great advances or, indeed, revolutions in their formulation. No great advance in the physical sciences was possible until the idea that the universe is governed by law was postulated. The late Albert Einstein re-asserted it in two sentences which have become famous: "I cannot believe that God would choose to play dice with the world. . . . *Raffiniert ist der Herr Gott, aber boshaft ist Er nicht.*" (God is clever, but he is not malicious).<sup>9</sup>

An equally important revolution occurred when the idea of *Justice by Grace* was replaced by the idea of *Justice by Right*, which finally became *Justice through Law*. Glimpses of the idea are found in some of the oldest records of civilization. A tablet dating back to Ashurbanapal read: "If he (the King) does not heed the law of his land, Ea, the King of destinies, will alter his destiny and cast him aside."<sup>10</sup> And we are all familiar with its expression in various places of the Old Testament, the best known of which is that in the Deuteronomic Code:

"And I charged your judges at the time, saying, Hear the causes between your brethren, and judge righteously between every man and his brother, and the stranger that is with him. Ye shall

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8. Justice Frankfurter in concurring opinion in *Malinski v. New York*, 324 U.S. 401, 417 (1944). The matter has been summed up recently in this manner: "In deciding between the alternatives open to them within the contours of pre-existing law, the judges try to make the just or the juster choice. Though 'it is more important that a rule of law should be settled than that it should be theoretically correct,' 'a trial is however not a mere exercise in logical perfection' and 'it should be unnecessary to remind ourselves that constitutions and laws are designed to establish justice'. 'If there were no rules, we would be governed by *men*, not *laws*. Order is not only Heaven's first law, but order is of the essence of jurisprudence. But rules are not the ultimate end, the main thing; that main thing is justice itself, the very right of the matter. The rules are only in aid of that main thing—the working tools whereby it is attained.'" SNYDER, PREFACE TO JURISPRUDENCE 601 (1954).

9. As quoted in Engel, *What Einstein Was Up To*, Harper's Magazine, Dec. 1955, p. 74.

10. JASTROW, THE CIVILISATION OF BABYLONIA AND ASSYRIA 366 (1915).

not respect persons in judgment; but ye shall hear the small as well as the great; ye shall not be afraid of the face of man.  
 . . . "11

Courts governed by the rule of law may not achieve spectacular results in particular cases, but they satisfy more effectively the need of modern society for peace in the relations between the individuals composing it and between them and the state. The courts, even in deciding ordinary disputes, allow "the peaceable end of wasteful conflict" and contribute "to men's ability to rely on certain expectations arising out of other people's conduct."<sup>12</sup> So the process of judging is also, to a certain extent, legislative.

### CREATIVE JUDGING

The exercise of the extensive powers of the judiciary, through the application of law and the test of constitutionality, has led some students to speak of ours as a "government by judges."<sup>13</sup> To counteract this charge others have denied altogether the importance of the personality of the judge in judicial decisions. But such attitude is unrealistic; law is formulated in the very process of application:

"For law ends by being what it is made to be by the body which applies it to concrete situations; it takes shape only at the moment when it is fitted to the facts of an actual case. Law is thus molded in the process of adjudication; and the body which adjudicates has final say as to what is and what is not law."<sup>14</sup>

As new conditions arise, judges apply and adapt to them old precepts and principles. New law thus arises. And law, instead of being fixed and static, becomes a living, changeable entity, aiming to satisfy the needs of human society—what Roscoe Pound has called "a continually more efficacious social engineering."<sup>15</sup> Progressive growth and adaptation thus become the chief characteristics of our legal system.<sup>16</sup> In this manner, it is an efficient, although limited, instrument for achieving social control, growth and development.

11. DEUTERONOMY c. I, vs. 16-17.

12. HURST, *THE GROWTH OF AMERICAN LAW* 194 (1950).

13. LAMBERT, *LE GOUVERNEMENT DES JUGES* (1921). For foreign defenses of the American system, see 3 DUGUIT, *TRAITÉ DE DROIT CONSTITUTIONNEL* 709-90 (3d ed. 1930); HAURIQU, *PRECIS DE DROIT CONSTITUTIONNEL* 266-78 (2d ed. 1929).

14. DICKINSON, *ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF THE LAW* 122 (1927); cf. HAINES, *A GOVERNMENT OF LAWS OR A GOVERNMENT OF MEN* 19 (1929). See also HAINES, *THE REVIVAL OF NATURAL LAW CONCEPTS* 309-49 (1930).

15. POUND, *THE PHILOSOPHY OF LAW* 99 (1922); cf. POUND, *INTERPRETATIONS OF LEGAL HISTORY* 141-65 (1923).

16. "The life of the law has not been logic; it has been experience." HOLMES, *COMMON LAW* 1 (1881); cf. STONE, *THE PROVINCE AND FUNCTION OF LAW* 754-85 (1950); Cohen, *Law and the Scientific Method*, in *LAW AND SOCIAL ORDER* 184 (1933).

In the formulation of new law, and in the process of actual adjudication of controversies, three elements enter, according to Pound. They are: (1) certain legal precepts "more or less defined"; (2) a "body of traditional ideas" as to the method of application of these legal precepts and "a traditional technique of developing or applying them"; and (3) a "body of philosophical, political and ethical ideas as to the end of law," held consciously and subconsciously, "with reference to which legal precepts and the traditional ideas of application and decision and the traditional technique . . ." are shaped and applied.<sup>17</sup> Among these elements the philosophical and social outlook of the Judge is of the utmost importance in a society in flux. Consciously or unconsciously, judges represent the philosophy of the times in which they live and their decisions reflect their view as to social needs sought to be reached by law.

Justice Cardozo's statement on the subject is well known:

"There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them—inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs, a sense of James' phrase of 'the total push and pressure of the cosmos,' which, when reasons are nicely balanced, must determine where choice shall fall. In this mental background every problem finds its setting. We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own. To that test they are all brought—a form of pleading or an act of parliament, the wrongs of paupers or the rights of princes, a village ordinance or a nation's charter."<sup>18</sup>

17. Pound, *The Theory of Judicial Decision*, 36 HARV. L. REV. 641, 645 (1923); see LEVI, AN INTRODUCTION TO LEGAL REASONING 1-7, 70-74 (1949).

18. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 12 (1921). Pound has written: "Law, then, is not the simple thing that we sought to make it in our legal theory in the last century. It is not something established definitely and absolutely by the will of the sovereign. It is not something given absolutely by logic on a basis of authority, nor revealed absolutely and definitely by history, nor deducible infallibly from an absolute, fundamental metaphysically-given *datum*. It is a highly complex aggregate, arising socially from the attempt of men in politically organized society to satisfy the claims involved in civilized social life so far as they may be satisfied by a systematic ordering of conduct and adjustment of relations. Looking at law in this way we perceive at once how change takes place continually without our being aware of it. 'No', says Mr. Dooley, speaking of the decadence of Greece, 'on account iv th' fluctuations in rint an' throuble with th' landlord it isn't safe to presoom that th' same fam'y always lives in th' wan house.' Because names and forms remain the same it does not follow that the content of the law is constant. Modification of the current ideal picture of the social order by which judges are governed in choosing analogies, in developing principles, and in applying rules, may change the law in action profoundly within a generation while the outward forms remain the same." Pound, *The Theory of Judicial Decision*, 36 HARV. L. REV. 641, 660 (1923).

So the art of judging is not simple but complex. It involves not only the exercise of these elements of knowledge and personal and intellectual integrity which have at all times been stressed as the required qualifications of a judge, but also a full awareness and understanding of the facts out of which controversies arise. As a modern legal scholar has put it:

“[N]ot only does legal method include the technical rules of procedure, logical analysis of authoritative materials, the interpretation of legal language under guidance of precedent, the drawing of factual conclusions from the evidence, and the other components, noted above. It also includes the ‘pressure of the norms’, the psychology of the forum, the prevailing philosophies, and the perspectives of the officials. Legal method, it follows, cannot be scientifically rigorous. It is only the more or less rational instrument of particular societies.”<sup>19</sup>

#### JUDICIAL COURAGE

In these days of storm and stress when many persons preoccupied with the problem of security express resentment at the attitude of the judges towards some of the problems that trouble the nation, I would urge courage on the part of judges as *the greatest need of the day if justice by law is to survive*.

Lord James Mansfield, in reversing the outlawry sentence imposed on John Wilkes, a member of Parliament, because of certain writings against the Crown, complained of what he called the *mendax infamia* of the press and gave an answer worthy of his greatness:

“The constitution does not allow reasons of State to influence our judgments: God forbid it should! We must not regard political consequences; how formidable soever they might be; if rebellion was the certain consequence, we are bound to say ‘fiat justitia, ruat caelum.’ . . . I will do my duty, unawed.”<sup>20</sup>

Declarations like these have an historical significance for us. For it was one of the complaints of the American colonists against the English King that he stood in the way of an independent judiciary.

19. HALL, *op. cit. supra* note 2, at 51.

20. *Rex v. Wilkes*, 4 Burr. 2527, 2562, 98 Eng. Rep. 327, 347 (K.B. 1770). The Supreme Court of the United States has stressed this quality: “And we agree that this court must do without reference to an accused’s political or religious beliefs, however such beliefs may be received by a predominant segment of our population. Ideological status is not an appropriate gauge of the high standard of justice toward which our courts may not be content only to strive.” *Dennis v. United States*, 339 U.S. 162, 168 (1949). And Justice Jackson, in his concurring opinion becomes more specific: “Courts should give to a Communist every right and advantage that they give to any defendant.” *Id.* at 174.

In the Declaration of Independence they charged that: "He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries." And the Federal Constitution sought to assure the independence of the federal judiciary by providing for service "during good behavior" and against diminution of compensation "during their continuance in office" for both constitutional judges and for such judgeships as might be created by the Congress.<sup>21</sup>

No one disputes the need for such independence. Senator Alexander Wiley of Wisconsin, when he was Chairman of the Senate Judiciary Committee, stated the meaning of this independence in this manner:

"An independent Judiciary is a strong Judiciary, a fearless Judiciary, having respect for its coequal branches of government, but respecting even more its paramount obligation to the American people in interpreting the supreme law of the land."<sup>22</sup>

By contrast, in totalitarian countries such as Soviet Russia, the judiciary is considered "an organ of state power."<sup>23</sup>

The division of powers embodied in the Constitution also expresses the deal of the independence of the judiciary without the power of the executive and legislative branches to encroach on its prerogatives. These are truisms which no one disputes. Yet, at times, in the conduct of lawyers towards the judiciary, the desire to achieve an immediate result becomes more important than encouragement of judicial courage.

As I look about me and see lawyers interested more in winning a particular case than achieving justice, lawyers who—while declaiming on festive occasions on the importance of the independence of the judiciary—are attempting to remove from their own cases judges who, by their rulings, have in the past been little impressed by the justness of the lawyer's cause, as I see even the great Government of the United States seeking to disqualify a courageous judge by an affidavit both legally insufficient and scandalous<sup>24</sup> and the Senate Judiciary Committee approving a bill that would disqualify the courts of an entire district upon an allegation of bias "based on information and belief." I realize the compelling need of stressing the importance of judicial courage if the rule of law is to survive.

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21. U.S. CONST. art. III, § 1.

22. Wiley, *The Meaning of an Independent Judiciary*, 7 F.R.D. 553, 556 (1948).

23. TOWSTER, *POLITICAL POWER IN THE U.S.S.R., 1917-1947*, at 304 (1948). Another student of the Soviet system states that Judges "are expected to apply Soviet Law in accordance with the current policy of the government and the Party." KULSKI, *THE SOVIET REGIME* 291 (1954).

24. *United States v. Lattimore*, 125 F. Supp. 295, 296 (D.D.C. 1954).

## THE IMPONDERABLES IN JUDGING

Ever since the establishment of judicial systems man has tried to achieve, through them, substantial justice—that form of justice which Ulpian defined as the “constant and perpetual wish to render to each one his rights.”<sup>25</sup> If he has not achieved it, it has been due primarily to the imperfection of the law itself—reflecting the deficiencies of the community which produced it and the frailties of judges who, after all, are only human beings, with specific problems before them, endeavoring to achieve justice through law. At times, the very rule of law stands in the way of the application of an ideal of abstract justice. This is necessarily so. For *abstract justice is a divine not a human attribute*. Yet it should be the aim of all to achieve justice in human relations. In the federal system the trial judge is “not a mere moderator, but is the governor of the trial. . . .”<sup>26</sup>

If questions for decision presented themselves as abstractions or like mathematical problems to which a specific formula or theorem could be applied, the art of judging would be easy. But lawsuits, dispassionate as they may appear in the printed records, are very personal things. In them, as they unfold in open court, are tragedy . . . comedy . . . sordidness . . . romance . . . human hopes and aspirations . . . human misery and degradations. . . . The judge has before him human beings, not at peace but at war with themselves, with their fellowmen and, at times, with God. It is a picture often stranger than fiction. Like the Greek tragedies, they seem ever new because they deal with human emotions. In them we see human beings *in conflict*.

So the process of judging involves many imponderables. And, at times, the question arises whether we reach the real source of the difficulties. Do we perceive the real motives behind many of the lawsuits other than personal gain or compensation for actual loss or injury? Are facts placed before us which enable us always to determine the truth? There are many instances in which intervention on the part of the judge, of the type which some lawyers resent, and even the judge's “hunch” have been the only means of discovering the truth.<sup>27</sup>

Do we know the real motivation for the crimes with which we deal? Jury waivers are very common in criminal cases in our state in both state and federal courts. I have tried many cases without a

25. “Justitia est constans et perpetua voluntas jus suum cuique tribuendi.” *INSTRUMENTS* 1.1.1.

26. *Quercia v. United States*, 289 U.S. 466, 469 (1933). A similar statement by Chief Justice Hughes is contained in an earlier case. *Herron v. Southern Pac. Co.*, 283 U.S. 91, 95 (1931).

27. Yankwich, *Address to New Lawyers*, 28 L.A. BAR BULL. 319 (1953).

jury from murder down. In retrospect, I would not change any of the verdicts rendered. But as I think back, it would have been just as easy to accept the explanation of the defendants in the light of which their acts were not criminal, as the one on which the verdict of "guilty" was based.

There were the directors of a large corporation who, when the depression came, used several hundred thousand dollars of the company's money in an attempt to support their own stock holdings. Their explanation, that their act would help the entire stock structure of the corporation and that practices of that character were prevalent in many corporations, was rejected. The Supreme Court of California, however, in sustaining the verdict intimated that *there was* evidence in the record from which an inference could have been drawn that there was *no fraudulent intent*, which was a necessary element of the crime of embezzlement of which I found them guilty:

"Certain evidence tended to show that defendants were not conscious that their acts amounted to embezzlement even if they did constitute bad business practice. . . .

"These and other facts were before the trial court, and that court was permitted to draw the inference of fraudulent intent from the admitted fact that the funds were appropriated and used for the personal purposes of the defendants."<sup>28</sup>

And there was the homicide case on an Indian Reservation in which an Indian stepfather had killed his young stepson because he had threatened his mother. I refused to accept a plea but tried the case without a jury. I might have found the case one of justifiable homicide, but the drunkenness of both the stepfather and the son prevented me from finding the elements which warranted the taking of a human life in defense of another.

Constantly we are asked to interpret law and especially criminal law in the light of a "higher" law. In dealing with human life courts have evolved the principle that one *may be* justified in taking human life to save one's own. Over a hundred years ago a district judge in Massachusetts, upholding a jury's verdict that found a seaman without justification in sacrificing the lives of some of his passengers by pushing them overboard in order to save his own life, observed:

"The law of nature forms part of the municipal law; and, in a proper case (as of self-defense), homicide is justifiable. . . . Varying however, or however modified, the laws of all civilized nations, and, indeed, the very nature of the social constitution,

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28. *People v. Talbot*, 220 Cal. 3, 7-8, 28 P.2d 1057, 1058-59 (1934).

place sailors and passengers in different relations. And, without stopping to speculate upon over-nice questions not before us, or to involve ourselves in the labyrinth of ethical subtleties, we may safely say that the sailor's duty is the protection of the persons intrusted to his care, not their sacrifice,—a duty we must again declare our opinion, that rests on him in every emergency of his calling, and from which it would be senseless, indeed, to absolve him exactly at those times when the obligation is most needed."<sup>29</sup>

Almost fifty years later, an English court, called upon to determine whether murder and consequent cannibalism practiced by seamen were justified to save the lives of two seamen adrift with two others in an open boat, held that they were not, saying:

"To preserve one's life is generally speaking a duty, but it may be the plainest and the highest duty to sacrifice it. . . . It is not correct, therefore, to say that there is any absolute or unqualified necessity to preserve one's life. . . . It is not needful to point out the awful danger of admitting the principle which has been contended for. Who is to be the judge of this sort of necessity? By what measure is the comparative value of lives to be measured? Is it to be strength, or intellect, or what? It is plain that the principle leaves to him who is to profit by it to determine the necessity which will justify him in deliberately taking another's life to save his own. In this case the weakest, the youngest, the most unresisting, was chosen. Was it more necessary to kill him than one of the grown men? The answer must be 'No'—

'So spake the Fiend, and with necessity, The tyrant's plea, excused his devilish deeds.'"<sup>30</sup>

29. *United States v. Holmes*, 26 Fed. Cas. No. 15383, at 368-69 (E.D. Pa. 1842).

30. *Regina v. Dudley*, 14 Q.B.D. 273, 287-88 (1884). In modern times, we have had very few authenticated instances of cannibalism. There was the Donner party, a group of emigrants to California in 1846, who were caught by early snow in the High Sierras, at the place now known as the Donner Pass area, which resulted in the death of many of them. Cannibalism was practiced by the survivors on the bodies of the dead. A vivid description of it is found in *DE VOTO, THE YEAR OF DECISION: 1846*, at 400 (1943). And then, there is the murder and consequent cannibalism practiced by one of a group of gold hunters from Provo, Utah, in Colorado in 1873, which Gene Fowler has described in *TIMBER LINE* (1933). The survivor, Frank Packer, was found guilty of murder on April 13, 1883, and Judge M. B. Gerry sentenced Packer to be hanged on May 19, following. Fowler writes that:

"Although Judge Gerry delivered what was considered the most eloquent hanging speech in Western court history, an apocryphal sentence is the one that persists, and by which this scholarly gentleman's name still lives. . . . Larry Dolan, who had a grudge against Packer, attended every session of the trial. Between times, Larry filled himself to the larynx with "Taos Lightning". . . . Just as the fluent Judge Gerry began a classical pronouncement of doom, Larry let out a cheer and fell from a bench. Then he rose, bowed and ran drunkenly to his favorite saloon, bellowing like ten Apis bulls of Egypt:

"'Well, boys, ut's all over; Packer's to hang. The Judge, God bless him . . . . p'intin' his temblin' finger at Packer, so ragin' mad as he was, he said: 'They was siven Dimmycrats in Hinsdale County, but you, yah voracious, man-eatin' son of a bitch, yah eat five of thim! I sintince ye t' be hanged by th' neck ontill y're dead, dead,

Here are two extreme cases in which the courts refused to recognize the doctrine of necessity to justify killing in order to save one's own life. It is significant, however, that despite the decisions reached the penalties ultimately suffered in both cases were minimal. So humaneness prevailed. And we are back to Isabella's warning:

"No ceremony that to great ones 'longs,  
Not the king's crown, nor the deputed sword  
The marshal's truncheon, nor the judge's robe,  
Become them with one-half so good a grace  
As mercy does."<sup>31</sup>

Which brings up the age-old problem of punishment. Do we know sufficiently the background of the individuals who have come in conflict with the law to impose punishment? The jury's or our own verdict of "guilty" does not answer the matter.<sup>32</sup> It merely posits the question: What, if any, punishment shall be imposed and what will the punishment achieve? Put yourself in my place in imagining the following persons up before you for imposition of sentence, after verdict or plea of guilty:

(a) Clergyman charged with cashing a forged check while under the influence of liquor.

(b) Prominent Industrialist charged with deliberately falsifying his income tax return by charging up as goods bought for sale such unrelated items as gifts of diamonds to his wife in order to avoid war excess profit taxes.

(c) Young Boy parading in a military uniform *not* for personal gain but as an expression of the exhibitionism of youth.

(d) Former Navy Yeoman charged in peace time with attempting to sell to a foreign power secret navy gunnery information.

What would you do if you were the Judge? Your answers would be conditioned by your approach to the problem of crime. And so were mine. So I state it briefly.

Crime, in my view, should be treated in terms of purely social harm and a line drawn between crimes committed for gain and those

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dead; as a warnin' ag'in reducin' the Dimmycratic popalashun of th' State.'" *Id.* at 37. Although the sentence was reversed, Packer was again convicted on a second trial and was given a life sentence. He was pardoned after serving eighteen years—following a campaign for his pardon started by the Denver Post. *Id.* at 38.

31. SHAKESPEARE, *MEASURE FOR MEASURE* act II, scene 2.

32. It is not ordinarily very difficult, on a trial, to "hold the balance nice, clear and true between the state and the accused. . . ." *Tumey v. Ohio*, 273 U.S. 510, 532 (1927). However, punishment presents perplexing problems. See Rose & Prell, *Does the Punishment Fit the Crime?*, 61 A.J. Soc. 247 (1955); Yankwich, *Narcotics and the Federal Law*, 43 GEO. L.J. 1, 8-16 (1954); Yankwich, *The Federal Penal System*, 10 F.R.D. 539, 542-55 (1950).

otherwise motivated. Vengeance has no place in punishment. The aim of punishment should be to disarm an enemy of society, with the object of protecting society. Punishment should, therefore, be individualized to "fit the offender" and not the offense. Having indicated my approach, you should not be surprised at the punishments imposed in the specified cases:

- (a) The Clergyman—probation.
- (b) The Industrialist—one year and a day, plus a fine of \$5,000.
- (c) The young man wearing the uniform illegally—probation.
- (d) The Navy Yeoman—fifteen years.

But it would not be right to end without a post-history. Before the probation period was over, the Clergyman had rehabilitated himself personally and with his church, was restored to his sacerdotal duties and, on being so informed by his Bishop, probation was terminated. The young man who loved uniforms finally *forced* himself into one and became a commando. He proudly came back to show himself to us in a sergeant's uniform, the right to wear which he had earned.

Along with these successes, there have been failures. On the whole, society benefited, but the process of making the determination was not easy. Neither is the exercise of any other art. A ballet dancer may achieve a superb performance at the cost of excruciating pain and bleeding toes. And so the act of judging involves great travail.

#### THE PERSONAL QUALITIES OF A JUDGE

Socrates has defined the qualities of a judge in a manner which has become famous: "Four things belong to a Judge; to hear courteously; to answer wisely; to consider soberly and to decide impartially."<sup>33</sup> And it cannot be denied that if a judge has ability to do all these things, he can perform his function effectively. In Mosaic legislation the admonition is:

"Ye shall do no unrighteousness in judgment; thou shalt not respect the person of the poor nor honor the person of the mighty: but in righteousness shalt thou judge thy neighbor."<sup>34</sup>

33. As given in F.P.A., BOOK OF QUOTATIONS 466 (1952).

34. LEVITICUS c. XIX, v. 15. In a very recent case, *Griffin v. Illinois*, 351 U.S. 12 (1956), Justice Black, rendering the judgment of the Court, referred to this biblical admonition with the comment: "Providing equal justice for poor and rich, weak and powerful alike is an age-old problem. People have never ceased to hope and strive to move closer to that goal." *Id.* at 16.

Here the emphasis is on the doctrine of equality before the law and conformance to ethical standards. Elsewhere in the Old Testament, judges are enjoined: "Ye shall not be afraid of the face of man."<sup>35</sup>

As justice *by right* takes the place of justice *by grace*, the function of the judge is to administer and interpret the law according to definite norms. To do so effectively, the judge must understand life about him and the societal conflicts from which litigation stems. As law grows out of the needs of the community, its content must change and adapt itself as the community's transformation. Adaptability thus becomes one of the main merits of the common-law system. Like a sturdy tree its roots are in the past, its trunk in the present and its topmost branches reach skyward. And the judge who, in the process of applying and interpreting the law, bears this constantly in mind is most likely to achieve such perfection as may come to his craft.<sup>36</sup>

#### THE FUNCTION OF THE FEDERAL JUDICIARY

What has just been said applies to all judges. But because of the dual nature of our government, the federal judiciary is given the function of dealing with controversies which arise under the Constitution and laws of the United States. So the federal courts stand guard over the Constitution and laws of the United States.

The complex industrial and social development in the last few decades, and the periods of war and international crises, have resulted in the widening of the area of federal control and regulation. These have brought on a corresponding expansion of the jurisdiction of federal courts. The power to invalidate legislation, state or federal, which contravenes the Federal Constitution has given to the federal judiciary an authority not possessed by the judiciary of any other country governed by constitutional principles.

For these reasons, the federal judiciary may affect fundamentally the life of every citizen. In the realm of the personal rights guaranteed by the Constitution and the Bill of Rights, the federal courts become their chief and ultimate guardians. This guardianship is, perhaps, the most important function of the federal courts. Our rights may be personified in the person of those who come into conflict with the

35. DEUTERONOMY c. I, v. 17.

36. Justice Cardozo has summed up the function of the Judge in our society in these classic words: "The judge . . . is not to innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to 'the primordial necessity of order in the social life.'" CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 141 (1921).

law. Under democratic political philosophy they may assert such rights against the community itself. And the courts must not only allow, but *must insure* such assertion.

The federal courts are shields against arbitrary power in the federal domain, no matter who exercises it. So when a President of the United States sought to gain control of a large private industry threatened by strikes, the courts, finding no justification in law for such action, undid it.<sup>37</sup>

The United States district court is the most important federal trial court. Excepting some specialized courts and excluding petty criminal cases which may be tried by commissioners, the United States district court is the court in which most of the litigation, civil and criminal, within the jurisdiction of the federal courts originates. As a great majority of the cases never go beyond the judgment of the district court, for most citizens the quality of justice administered in the federal district courts determines *their idea* of federal justice *in general*.

Our task is great. Its performance brings into play those qualities of knowledge, social idealism, courage and integrity which have always been considered the attributes of a good judge. At times, the community about us, or at least the portion that makes itself heard, champs legal restraint. There is demand for "swifter" or justice more consonant with "popular" wishes, the type of summary justice of the oriental *cadi* or the one which in western pioneer days was known as the justice "West of the Pecos." Suited as these may have been for other civilizations and to times past, they cannot be the justice of our day.

Some would have us destroy the constitutional guarantees which are the basis of our liberty. Others would have us deny the benefit of these protections to those who come in conflict with the law. Indeed, some would brand as criminals or deprive of valued privileges those who invoke constitutional guarantees. But if we deny constitutional protection to anyone who is entitled to it, or brand anyone as criminal or unworthy of trust for invoking it, it ceases to exist for us all. So it becomes more important than ever for the federal judiciary to stand fast in the guardianship of the rule of the law against mob or majority, popular clamor or public opinion, and stand *unafraid*. For it is of the essence of the principle of supremacy of law that the judiciary be not, as it is in totalitarian countries, *a mere instrument*

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37. *Youngstown Steel & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); see Yankwich, *Separation of Powers*, 7 VA. L. WEEKLY DIGEST COMP. NO. 17 (1955).

of governmental policy.<sup>38</sup> For a democratic society there are no worthy alternatives to justice under law.

But this principle can achieve full fruition only if there be an earnest desire on the part of the entire community to achieve justice through its institutions. For law reaches only a few. The majority do not need the fear of the sanctions or penalties of the law to fulfill their private or public obligations. So in the last analysis, the administration of justice is a social problem, which the community as a whole must meet. Such it has been for every generation from the dawn of recorded history. It is for us to meet it, in a spirit ripened by the experience of the past—enlightened by the highest social idealism of the age—with eyes fastened on the future, and the aim to achieve a better ordered life. There is still validity in the ideal expressed in the old maxim:

“Justice ought to be free, because nothing is more iniquitous than venal justice; full, because justice ought not to halt; and speedy because delay is a kind of denial.”<sup>39</sup>

This can be achieved by judges who consider a lawsuit not a game, the object of which is to award a prize to the more skillful of two contestants, but as society's method of achieving social peace and justice under law.<sup>40</sup> Because the materials with which litigation deals are human, and the instrumentalities through which justice is accomplished are also “all too human,” the end product, at times, leaves much to be desired. But so long as the aim is, in the words of the *Book of Common Prayer*, to “truly and indifferently minister justice,” the federal courts and those who preside over them will fulfill truly their

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38. See citations at note 23 *supra*. A modern student of Western society has warned: “The rational course of justice and administration is interfered with not only by every form of ‘popular justice’, which is little concerned with rational norms and reasons, but also by every type of intensive influencing of the course of administration by ‘public opinion’, that is, in a mass democracy, that communal activity which is born of irrational ‘feelings’ and which is normally instigated or guided by party leaders or the press. As a matter of fact, these interferences can be as disturbing as, or, under circumstances, even more disturbing than, those of the star chamber practices of an ‘absolute’ monarch.” WEBER, *LAW IN ECONOMY AND SOCIETY* 356 (1954).

39. “Justitia debet esse libera, quia nihil iniquius venali justitia; plena, quia justitia non debet claudicare; et celeris, quia delatio est quaedam negation.” 2 COKE, *INSTITUTES* \*55.

40. In a recent book Justice Douglas has summed up very briefly the importance of an independent judiciary in our society:

“Respect and prestige do not grow suddenly; they are the products of time and experience. But they flourish when judges are independent and courageous. The court that raises its hand against the mob may be temporarily unpopular; but it soon wins the confidence of the nation. The court that fails to stand before the mob is not worthy of the great tradition.

“The judiciary is in a high sense the guardian of the conscience of the people as well as of the law of the land.” DOUGLAS, *WE THE JUDGES* 445 (1956).

great art of judging in our free society. And I would have us all who exercise the function, remember, with humility, Isabella's admonition:

“O it is excellent  
To have a giant's strength;  
But it is tyrannous  
To use it like a giant.”<sup>41</sup>

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41. SHAKESPEARE, *MEASURE FOR MEASURE* act II, scene 2. Fortunately we are not “the law.” At best, the law speaks through us. There is greater safety for democratic institutions if we, as judges, help maintain the feeling that ours is a country ruled by law. Our satisfaction must come from observance of the traditions of the judicial art.