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The Stream of Progress in the Law

Bernard L. Shientag

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The Stream of Progress in the Law

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The Hughes Memorial Lecture, delivered at the New York County Lawyers Association, October 31, 1951 (as revised). Associate Justice of the Appellate Division, Supreme Court of the State of New York, First Department.

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THE STREAM OF PROGRESS IN THE LAW*

BERNARD L. SHIENTAG†

“LECTURES are not much to my taste,” said Charles Lamb in a letter to Mrs. Wordsworth explaining why he had not heard either Coleridge who was lecturing on Shakespeare or Hazlitt on Poetry. “If read,” Lamb said, “they are dismal and flat and you can’t think why you are brought together to hear a man read his work which you could read so much better at leisure yourself; if delivered *ex tempore*, I am always in pain lest the gift of utterance should suddenly fail the orator in the middle. If I have to select one of these rather unhappy alternatives I should in all candor have to take the first although an audience gathered not by inclination but by necessity might well prefer the second.” I too have chosen the first method but not, I hope, with the same dismal prospect for my audience that Lamb apprehended.

The Hughes Lecture is delivered annually in this Association, primarily to honor one whose memory will ever be enshrined in our hearts as a fine gentleman, a leader of the American Bar, a distinguished statesman and a great jurist who successfully guided the destinies of the Supreme Court of our land, of which he was the head, during one of the most critical periods in its history. With an intellect of steely quality there was combined in him an uncompromising passion for truth. Once he became sensible that a moral issue was involved, from that moment, right or wrong became the supreme test for him. Charles Evans Hughes needs no praise from us here. Rather do we honor ourselves as we gather in this hall once in every year to draw inspiration and encouragement from the example of one who stood close to the top of the tree of judicial statemanship in our country. It is from his life and from his works that we derive a higher point of view, a firmer grasp, an elevation above the petty interests of life.

I need hardly remind this audience that I come here not as a legal philosopher, professional or otherwise. I deal with my subject as one who has been a worker in the vineyard of the law for over forty years

* The Hughes Memorial Lecture, delivered at the New York County Lawyers Association, October 31, 1951 (as revised).

† Associate Justice of the Appellate Division, Supreme Court of the State of New York, First Department.

of which over twenty-five years have been spent on the Bench in trial and in appellate work.

I have heard it observed that if our laws were deemed to register our progress there could be little disposition to boast; rather their study tends to create in the lover of democracy a humble and contrite spirit. Looking at the state of our law today, I venture to approach the consideration of my subject, certainly so far as our substantive civil law is concerned (and for the most part this lecture will have to be confined to that), in a spirit that is humble, to be sure, but by no means contrite. While we have not made the splendid and revolutionary advances of the natural sciences (sometimes with their accompanying destructive possibilities) we may view what has been accomplished in the law, not indeed with complacency, but with a certain degree of satisfaction and even of pride. That there are faults and abuses cannot and should not be denied, but on the whole there is much more to be thankful for than to condemn.

While our progress in the law has been slow and characterized generally by a gradualism, disappointing unless viewed in the cumulative retrospect, it has been for the most part a steady, substantial, progressive improvement. Indeed, it might well be said of the law: "This here progress; it keeps on." True, the current of the law did not always flow with equal speed. There were times when it "dawdled in backwaters"; at other times it rushed, with unrestrained impulse, "down the rapids of events."

Occasionally, although not too often, it is a good thing to look back over the road by which we have traveled and to survey the past and view it as a vital living force in the present. I come here not, in the main, as an apologist for our law, nor to boast of its achievements, but rather to take a somewhat objective view of its progress, with all its strength and its weaknesses. It is my creed that in the law, as in politics and the other social sciences, while ideals may not be fully realized, it is the pursuit of them that makes for improvement.

Without any attempt at formal philosophical discussion, let me say that, by temperament, by experience and by whatever power of reason the Divine Creator of the Universe endowed me, I am a firm believer in a natural, moral law, absolute with respect to certain fundamentals and variable in its applications in accordance with changes in mores, in social and economic environments and in the moral conventions of different epochs. There are, as Dr. Osler has pointed out to his own profession, certain great ideas which flow fresh through the ages and control us as effectively as they did our forebears thousands of years ago. In the law as in medicine we have to hold fast to basic principles. There

are occasions, of course, when adaptations are necessary, if old values, which we should retain, are to be preserved in a new environment. To me the ideal of natural justice is one of the most powerful and appealing concepts that has, through the centuries, motivated juristic thought.¹

The object of the law is to do as much good as possible and its ultimate justification is to be found in moral considerations. That law and morality cannot be identical is obvious. There are divine commands, there are moral precepts, which do not permit, in the very nature of things, of enforcement by any lay tribunal. Thus, "Honor thy Father and thy Mother," thou "shalt not hate thy neighbor in thy heart" are divine injunctions and ethical precepts of the highest order. Unaccompanied by any overt act, however, sanction for their compliance must be found in the conscience of man—in what Maeterlinck calls "the heroic, cloud-tipped, indefatigable energy of conscience." It should, however, occasion no surprise to find how much positive law, in the form of judicial decision or legislative enactment, has been built around those two high ethical commands. Law, for the most part, is concerned with external behavior, rather than with subjective states of mind unless they are accompanied by or constitute part of overt acts. More and more, however, the law is inquiring into the subjective quality of an act in order to determine its legal consequences. I do not of course speak of that kind of crime or offense coming under the classification of *malum prohibitum* where intent is immaterial in many instances. Public policy may require that, in the prohibition or punishment of particular acts, it may be provided that he who shall do them shall do so at his peril and will not be heard to plead as a defense good faith or ignorance.

Law and morals do not coincide but the close relationship between the two is striking and the gap between them is ever narrowing. The sense of justice and equity is constantly introducing life and flexibility into the law and adjusting it to the fulfillment of its appointed task.² No wonder that ancient thinkers, like Aristotle for example, included the discussion of the elements of law in their treatment of ethics and for Socrates and Plato the analysis of right was inseparable from the idea of justice. Nor is it mere chance that in all European languages except the English the terms for law and right coincide.³

The values inherent in the law may be said to be moral content, certainty and expediency, varying in the order of their importance in dif-

1. See *Wightman v. Wightman*, 4 Johns. Ch. 343 (1820) (per Chancellor Kent); *Pavesich v. New England Life Insurance Co. et al.*, 122 Ga. 190, 50 S. E. 68 (1905); *Evans v. Evans*, 1 Hagg. Consist. 35 (1790) (per Sir William Scott (Lord Stowell)).

2. See MORRIS RAPHAEL COHEN, *LAW AND THE SOCIAL ORDER* 261 (1933).

3. See VINOGRADOFF, *COMMON SENSE IN LAW* 23 (1914).

ferent branches of the law. Certainty and predictability have their urgent claims in branches of the law such as, for example, real property and commercial transactions. There are large areas in the law where it is necessary to establish rules, often ethically indifferent, to carry on the ordinary daily and business life of the community, so that people may know beforehand what they may do and may not do. Those who have acted in reliance on such rules are entitled to have their expectations fulfilled.⁴ But even in those branches of the law, certainty can often be had only at a price entirely out of line with its real worth. It is in the carefully studied and safeguarded transition in emphasis from the expediency, or even from the certainty of a rule of law, to its moral or ethical content that progress is made. Morals, it has truly been said, are potential law. As one of England's most distinguished jurists has put it: "Great judges have said that the function of the common law was the perpetual quest for justice. I should be sorry if quest for certitude were substituted for quest for justice."⁵

Before taking up a few specific branches of the law to illustrate their progressive development along lines of natural justice, it would be well to recall certain great basic principles which emerged during the early growth of the common law. It has been rightly observed that it is a spiritual tragedy not to see the way the ideals we cherish came, and to lose the memory of their past.

The Basic Struggles of the Common Law

All through the early growth of the common law we find struggles centering around a number of fundamental propositions. These, with their implications, singly and in combination, determined the path of Anglo-American law and gave it many of its unique characteristics. Following fundamental principles of natural justice, they gave recognition to those protections under the law, of life, liberty and property which today constitute our basic freedoms.

The first of these propositions was the overriding desire for security. From this desire came the transition from self help and private vengeance, by way of the ordeal and trial by battle, to the King's Peace—the recognition that crimes were the concern of the state and wrongs against the state. After a good deal of hesitation and uncertainty in the 13th Century, this led to the establishment of the right to trial by jury⁶ and later the denial of the power of the courts to punish jurors

4. Cf. *Great Northern Ry. v. Sunburst Oil & Refining Co.*, 287 U. S. 358 (1932), dealing with the so-called prospective change in judicial decision. See also Patterson, *Cardozo's Philosophy of Law*, 88 U. OF PA. L. REV. 71, 158 (1939).

5. Lord Wright, in 66 L. Q. REV. 454, 456 (1950).

6. RADCLIFFE AND CROSS, *THE ENGLISH LEGAL SYSTEM* 62-3 (1946).

for improper verdicts.⁷ There followed the savage criminal code emphasizing property at the expense of human life, the establishment of a police force to prevent, detect and assist in the prosecution of crime; and the ultimate humanization of the penal law.

The second basic struggle centered around the abhorrence of arbitrary action from whatever source. This found its expression in the development of the writ of habeas corpus, the most powerful writ known to the law, the most effective weapon ever contrived by the wit or ingenuity of man to guard the freedom of the individual against unlawful restraint—a writ, the preservation of which is safeguarded by the fundamental law of our nation and state.⁸ Lord Justice Denning in an interesting lecture on "Freedom Under the Law," tells us that "whenever one of the King's Justices takes his seat, there is one application which by long tradition has priority over others. Counsel has but to say 'My Lord, I have an application which concerns the liberty of the subject' and forthwith the Judge will put all matters aside and hear it. It may be an application for a writ of habeas corpus or an application for bail, but whatever form it takes it is heard first."⁹

We then encounter Magna Carta, originally a compact exacted from King John at Runnymede in 1215 by the barons of England—the most significant single document in the history of English Law. What matters is that its most famous clauses have lost the rather narrow, technical meaning and application they had for the men who wrote them. Some of the clauses have reverberated through the centuries and aroused in the hearts of men a love of freedom and of justice that glowed and enlarged until it formed the very cornerstone of the democratic way of life. There is the Fortieth Clause: "To none will we sell, to none will we deny or delay right and justice." The most famous clause of all, the Thirty-ninth Clause, provides that "No freeman shall be taken or imprisoned or disseised or outlawed or exiled or in any way destroyed, nor will we go upon him nor will we send upon him except by the lawful judgment of his peers or the law of the land." The happy phrasing, the

7. *Bushell's Case*, 6 How. St. Tr. 999 (1670).

8. See *Morhous v. N. Y. Supreme Court*, 293 N. Y. 131, 56 N. E. 2d 79 (1944); *Hogan v. N. Y. Supreme Court*, 295 N. Y. 92, 65 N. E. 2d 181 (1946), in which the Court of Appeals upheld prohibition restraining the Supreme Court from hearing and determining habeas corpus proceedings on the ground that *coram nobis* was the exclusive remedy; see also Anderson, *Prohibition vs. Habeas Corpus*, 17 BROOKLYN L. REV. 47 (1950). I agree wholeheartedly with the observation of Desmond, J., in his dissenting opinion concurred in by Loughran and Conway, J.J., in *People ex rel. Wachowicz v. Martin*, 293 N. Y. 361, 369, 57 N. E. 2d 53, 57 (1944), that "if 'the great writ of habeas corpus has been for centuries esteemed the best and only sufficient defense of personal freedom' then a restriction of its scope is a matter fraught with dangers most grave."

9. LORD JUSTICE DENNING, *FREEDOM UNDER THE LAW* 2 (1950).

great generalities of this clause had a content and a significance that varied from age to age. It was the precursor of the due process of law clauses in our federal and in our state constitutions. This was the clause which was mistakenly, but successfully used to support the right to trial by jury, a right still protected even in civil cases by our federal constitution and our state constitution, a right which in England in civil cases is now discretionary with the court. We turn the pages of history and come to the establishment of the doctrine of the supremacy of the law, a right inherent in the English Common Law, for that law sprang from the people and not from the will of the reigning Monarch—a doctrine implicit in Magna Carta—a doctrine completely vindicated by Lord Coke who courageously and successfully, on the memorable morning of November 10, 1607, took issue with the reigning King on that crucial proposition. We then have the act creating security of tenure for the judges, thereby insuring the independence of the judiciary—a necessary corollary to the supremacy of the law in a democratic form of government.

The third great struggle dealt with freedom of speech and of the press, "the matrix, the indispensable condition of nearly every other form of freedom." We encounter the unsuccessful attempt to limit the scope of the jury's verdict in prosecutions for seditious libel, leading to the enactment of Fox's Libel Act in England in 1792. In New York the struggle culminated in the great Libel Act of 1805 which, with its successors, by way of constitutional mandate and statutory enactments, established for all time the freedom of the press, in this state.

And finally the fourth basic proposition revolved around the struggle of the common law for survival—the unique pattern of case law which distinguished the common law from the civil law, over which the former, with its rather rigid system of writs, successfully prevailed. There followed the steady growth of the law by precedent after precedent, supplemented in the course of time by statute law, the doctrine of *stare decisis*, still controlling in England in all its ancient rigor,¹⁰ but relaxed, to some extent at least, particularly in the fields of constitutional and public law, in this country.¹¹ The craving for justice, unsatisfied by many of the

10. See *Birch Brother Ltd. v. Brown*, [1931] A. C. 605. "I would only add that, while the rule 'stare decisis' is binding on your Lordships, the decisions of this House in progressively construing a statute must often be stepping stones rather than halting places." *Id.* at 631 (per Lord Macmillan).

11. "The great generalities of the constitution have a content and a significance that vary from age to age. The method of free decision sees through the transitory particulars and reaches what is permanent behind them." CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 17 (1921). "In private law the process of judging is a never-ending movement and something more is exacted from them that play their part in it than the lifeless repe-

harsh and rigid rules of the common law, led to appeals to the conscience of the King, the establishment of the Court of Chancery with its jurisdiction in Equity and later to the consolidation of the common law and equity courts into one high court of original jurisdiction in this state in 1848 and in England in 1873-1875.

Restitution and Unjust Enrichment

One of the greatest advances in the common law along the lines of natural justice received its impetus from Lord Mansfield when he adapted the writ of *indebitatus assumpsit* to permit actions at law to recover for unjust enrichment. In 1760, in the celebrated case of *Moses v. Macferlan*,¹² he implied a contract for the return of monies resulting in unjust enrichment. He resorted to the fiction of a contract in order to bring the case within the framework of the writ. However his decisions in that field rested primarily on considerations of natural justice and equity. "If the defendant be under an obligation, from the ties of natural justice, to refund, the law implies a debt, and gives this action [*indebitatus assumpsit*] founded in the equity of the plaintiff's case as it were upon a contract ('*quasi ex contractu*', as the Roman Law expresses it.)"¹³ "It is a liberal action, founded upon large principles of equity, where the defendant cannot conscientiously hold the money."¹⁴

The extension of this doctrine at law, and in equity by way of subrogation, equitable lien and constructive trust, has done much to bring the law into harmony with moral and ethical ideals. In England, the theory of fictitious contract still seems to prevail, although sharply criticized there.¹⁵ In this country the minds of lawyers have turned away from the theory of fictitious contract. Instead, problems of unjust enrichment are dealt with on the basis of natural justice and *aequum et bonum*.

The Restatement of the American Law Institute calls it the Law of Restitution and sums it up as follows: "A person who has been unjustly enriched at the expense of another is required to make restitution to

tion of a mechanical routine." CARDOZO, *THE GROWTH OF THE LAW* 105 (1924). See also Mr. Justice Douglas, *Stare Decisis*, 4 RECORDS OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 152 (1949) (Cardozo Lecture).

12. 2 Burr. 1005, 97 Eng. Rep. 676 (1760).

13. *Id.* at 1009, 97 Eng. Rep. at 678.

14. *Sadler v. Evans*, 4 Burr. 1985, 1987, 98 Eng. Rep. 34, 35 (1766).

15. *Sinclair v. Brougham et al.*, [1914] A. C. 398; see WRIGHT, *LEGAL ESSAYS AND ADDRESSES* 1 *et seq.*, 15, 20, 33 (1939); WINFIELD, *PROVINCE OF THE LAW OF TORT* 131 (1931); ALLEN, *LAW IN THE MAKING* 229 (1930); see however Holdsworth, *Unjustifiable Enrichment*, 55 L. Q. REV. 37 (1939); 12 HOLDSWORTH, *HISTORY OF ENGLISH LAW* 545 (1938); JACKSON, *THE HISTORY OF QUASI CONTRACT IN ENGLISH LAW* 119-21 (1936).

that other." The boundaries of this great moral principle of justice, of this equitable doctrine of restitution for unjust enrichment, are constantly being expanded; its flexibility is one of its virtues and in its application narrow considerations of privity are for the most part ignored. We are still confronted however, in this field, with problems of recovery for unsolicited benefits and for the unsolicited discharge of obligations; but while there is the hostility of the law to intermeddlers, the emphasis is on the obligation of a defendant to restore what in equity and good conscience he should not be permitted to retain.¹⁶

Lord Mansfield's actual decision in *Moses v. Macferlan* has been criticized because he failed to distinguish between money paid under mistake of fact and payment made by mistake of law.¹⁷ However as the result of the recommendations of the New York Law Revision Commission, provision was made in 1942 for relief against mistake of law, another milestone in the progress of the law along ethical lines.¹⁸

Equity

The development of equity is one of the most fascinating chapters in the history of the law. It may be said to have originated in the plea to the King for justice in individual cases. The multiplicity of these appeals, addressed to the conscience of the King, caused their reference to the King's Council, of which the Lord Chancellor, in the early days a learned ecclesiastic, was the head. This led to the establishment of the Chancellor's Court, or as it later became, the Court of Chancery. Designed as a corrective of the common law with its rigid, inflexible writs and many of its harsh rules, it started to administer justice along individualized lines or, as it has been characterized, according to "the length of the Chancellor's foot."

In the course of time, equity became systematized and by successive precedents grew and expanded in scope. Not only did the jurisdiction of equity develop but it influenced changes for the better in the law administered in the common law courts. As Maitland put it: "Equity came not to destroy the law, but to fulfill it."

The rivalry between the two systems, operating side by side, led to frequent clashes which came to a head in the famous controversy between Lord Chief Justice Coke and Lord Chancellor Ellesmere in which

16. DAWSON, UNJUST ENRICHMENT 136 *et seq.* (1951).

17. See 12 HOLDSWORTH, HISTORY OF ENGLISH LAW 545 (1938); but see KEENER, LAW OF QUASI CONTRACT 412-16 (1893).

18. N. Y. CIV. PRAC. ACT § 112-f. For the scope of this amendment see REPORT OF THE NEW YORK STATE LAW REVISION COMMISSION, N. Y. LEG. DOC. NO. 65, 27-67 (1942), and Note, 11 FORD. L. REV. 327 (1942).

the Lord Chancellor, the embodiment of the conscience of the King, prevailed.¹⁹

To this day, equity, despite its more or less systematized principles, is the great reservoir of natural justice and morality in the law, acting not indeed arbitrarily or capriciously but in accordance with the dictates of reason guided by what is just and right.²⁰ To this day "the plastic remedies of the chancery are moulded to the needs of justice"²¹ and it is the constant concern of equity to temper the wind to the shorn lamb. It devised one of the greatest instruments of natural justice—the constructive trust, "the formula through which the conscience of equity finds expression."²² So we find equity developing the far-reaching system of trusts, the duties and obligations of fiduciaries, of injunctions restraining and mandatory, of specific performance, of reformation and rescission for fraud or mutual mistake, all in accordance with principles of natural justice, of fairness and decency reaching at times to the most scrupulous sense of honor.

The limitations of time oblige me to pass, with a bare reference, the rule of "undivided loyalty,"²³ the "doctrine of corporate opportunity,"²⁴ the high ethical obligations of fiduciaries and joint adventurers,²⁵ the principles of unfair competition and unlawful disparagement of product²⁶ (leaving much to be desired from an ethical standpoint, although the law is still quite plastic) all of which have grown up as the jurisdiction of equity developed and progressed. One of the oldest rules of equity was that it would not grant relief if there was an adequate remedy at law.

19. The Chancery Court had undertaken to forbid a litigant to enforce a common law judgment obtained by fraud. The reigning monarch, James I, being appealed to, consulted men learned in the law and decided in favor of his Chancellor.

20. As Justice Cardozo put in: "In the award of equitable remedies there is often an element of discretion, but never a discretion that is absolute or arbitrary. In equity as at law there are signposts for the traveler." *Evangelical Lutheran Church v. Sahlem*, 254 N. Y. 161, 167, 172 N. E. 455, 457 (1930).

21. *Foreman v. Foreman*, 251 N. Y. 237, 242, 167 N. E. 428, 429 (1929) (per Cardozo, J.).

22. *Beatty v. Guggenheim Exploration Co.*, 225 N. Y. 380, 386, 122 N. E. 374, 380 (1919) (per Cardozo, J.).

23. *Meinhard v. Salmon*, 249 N. Y. 458, 464, 164 N. E. 545, 546 (1929).

24. *Guth v. Loft Inc.*, 23 Del. Ch. 255, 5 A. 2d 503 (1939).

25. *In re Ryans' Will*, 291 N. Y. 376, 52 N. E. 2d 909 (1943); *City Bank Farmers Trust Co. v. Cannon*, 291 N. Y. 125, 51 N. E. 2d 674 (1943); *Albright et al. v. Jefferson County National Bank*, 292 N. Y. 31, 53 N. E. 2d 753 (1944). See also Note, *The Fairness Test of Corporate Contracts with Interested Directors*, 61 HARV. L. REV. 335 (1948); Note, 63 HARV. L. REV. 1446 (1950); Harlan F. Stone, *The Public Influence of the Bar*, 48 HARV. L. REV. 1, 8 (1934).

26. See Schechter, *The Rational Basis of Trademark Protection*, 40 HARV. L. REV. 813 (1927); Callmann, *False Advertising as a Competitive Tort*, 48 COL. L. REV. 876 (1948).

However modern ideas about the adequacy of a remedy at law are changing and expanding. This is notably true about specific performance—a remedy originally confined primarily to contracts involving interests in real property, but which is being extended more and more to cover all kinds of contracts which can be and which should justly be specifically enforced.²⁷ We are getting away from the doctrine referred to by Mr. Justice Holmes from which in the light of modern developments, Sir Frederick Pollock differed, that the “duty to keep a contract at common law means that you must pay damages if you do not keep it—and nothing else.”²⁸

I cannot refrain from a reference to an extraordinarily powerful dissent by Judge Cardozo in an equity case which, with respect but with deep conviction, I make bold to say, truly reflects the trend in the law. In *Graf v. Hope Building Corp.*,²⁹ the Court of Appeals by a vote of 4 to 3 held that, in the absence of fraud, bad faith or unconscionable conduct, a mortgagee is entitled to enforce a covenant in the mortgage that after default for twenty days in the payment of any instalment of interest the principal sum shall become due; that failure to pay the interest due because of errors and omissions of employees of the mortgagor constitutes no defense to an action brought to foreclose the mortgage at the expiration of twenty-one days after the default. In one of his few dissenting opinions, joined in by Judges Lehman and Kellogg, Chief Judge Cardozo took issue with the majority of the court. It was an opinion skillfully marshaling the authorities in support of the dissent and vibrant in its appeal to principles of natural justice. In the course of that opinion, Judge Cardozo said:

“There is no undeviating principle that equity shall enforce the covenants of a mortgage, unmoved by an appeal *ad misericordiam*, however urgent or affecting. The development of the jurisdiction of the chancery is lined with historic monuments that point another course. . . . Equity follows the law, but not slavishly nor always (*Hedges v. Dixon County*, 150 U. S. 182, 192). If it did, there could never be occasion for the enforcement of equitable doctrine (13 Halsbury, Laws of England, p. 68).

“ . . .
“Let the hardship be strong enough, and equity will find a way, though many a formula of inaction may seem to bar the path.”³⁰

There is a conflict as to whether there is a so-called “right of privacy”

27. See the modern rule concerning mutuality of remedy as announced in *Epstein v. Gluckin*, 233 N. Y. 490, 493, 135 N. E. 861, 862 (1922).

28. See HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS 175 (1921). See also 1 HOLMES-POLLOCK LETTERS 21, 80 (Howe ed. 1941); 2 *id.* 201, 233; HOLMES, *THE COMMON LAW* 301 (1881).

29. 254 N. Y. 1, 171 N. E. 884 (1930).

30. *Id.* at 13, 171 N. E. at 888.

at common law derived from principles of natural justice. In the well-known case of *Roberson v. Rochester Folding Box Co.*³¹ our Court of Appeals held not, but the decision by a divided court aroused such strong disapproval that at the next session of the Legislature a limited right of privacy was established by statute.³² In Georgia, on the other hand, the ruling in the *Roberson* case was rejected and a right of privacy there upheld largely on principles of natural right and justice.³³ The flood of litigation anticipated when our statute was enacted has not at all materialized. We have been able to deal effectively with unauthorized use of names or pictures for essentially commercial or advertising purposes but are still endeavoring case by case as they come up, to balance the individual's right "to be let alone," with our fundamental right of freedom of the press.

Occasionally we encounter a decision that shakes our faith in the progress of the law along lines of natural justice. In the face of a particularly strong dissent the Supreme Court of one of our sister states has held that the fact that one party to a contract creating a joint and survivorship account murdered the other party did not divest the murderer of his vested interest in the account in the absence of a statute to that effect. The court said:

"Counsel insist that Tego's right should be denied him because to allow it would be in contravention of sound public policy and place a premium on murder. We are not subscribing to the righteousness of Tego's legal status; but this is a court of law and not a theological institution. We have no power to attain Tego in any way, shape, or form. Property cannot be taken from an individual who is legally entitled to it because he violates a public policy. Property rights are too sacred to be subjected to a danger of that character. We experience no satisfaction in holding that Tego is entitled to this account; but that is the law, and we must so find."³⁴

What a pity: to feel compelled to reach such a decision "when one is searching for justice as one must." As the learned dissenting Justice said: "It is always hard to be forced to sacrifice the right for the sake

31. 171 N. Y. 538, 64 N. E. 442 (1902).

32. Cf. N. Y. CIV. RIGHTS LAW §§ 50, 51. See also Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890); and *Sidis v. F. R. Publishing Corp.*, 113 F. 2d 806 (2d Cir. 1940); see also Feinberg, *Recent Developments in the Law of Privacy*, 48 COL. L. REV. 713 (1948).

33. *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S. E. 68 (1905).

34. *Oleff et al. v. Hodapp et al.*, 129 Ohio St. 432, 438, 195 N. E. 838, 841 (1935). *Accord*, *Welsh v. James*, 408 Ill. 18, 95 N. E. 2d 872 (1950). *Contra*, *Sherman et al. v. Weber et al.*, 113 N. J. Eq. 451, 167 Atl. 517 (1933) *semble*; *Bryant v. Bryant*, 193 N. C. 372, 137 S. E. 188 (1930); *Barnett v. Couey*, 224 Mo. App. 913, 27 S. W. 2d 757 (1930); *Bierbauer v. Moran*, 244 App. Div. 87, 279 N. Y. Supp. 176 (4th Dep't 1935); 30 HARV. L. REV. 622 (1917); *Riggs v. Palmer*, 115 N. Y. 506, 22 N. E. 188 (1889); cf. *Jones v. Maynard*, 1 T. L. R. 700, 702 (1951).

of a syllogism. We are not required to do so in the instant case. Reason and authority sustain the conclusion that the murderer cannot recover the amount of the deposit."³⁵

Contracts and Commercial Morality

In the field of contract we find the same progressive development, although, in this branch of law, many of the reforms have been accomplished by statute. Here, while certainty and stability have been primary concerns, they have often been made to yield, by the creative judicial process and by appropriate legislation, to the more imperative demands of fair and just dealing.³⁶ The doctrine of consideration has received many a dent through judicial decision and, by means of promissory estoppel, has been stripped of much of its ancient rigidity. "The law has outgrown the primitive stage of formalism when the precise word was the sovereign talisman and every slip was fatal. It takes a broader view today. A promise may be lacking and yet the whole writing may be instinct with an obligation imperfectly expressed."³⁷ We encounter many instances in the law of contract where the precise legal formula is made subservient to the demands of fair dealing. There is for example the rule that "an omission both trivial and innocent . . . will not always be the breach of a condition to be followed by a forfeiture. . . . Something doubtless may be said on the score of consistency and certainty in favor of a stricter standard. The courts have balanced such considerations against those of equity and fairness and found the latter to be the weightier. . . . The willful transgressor must accept the penalty of his transgression. For him there is no occasion to mitigate the rigor of implied conditions. The transgressor whose default is unintentional and trivial may hope for mercy if he will offer atonement for his wrong."³⁸

Charitable subscriptions have been enforced by the application of the doctrine of consideration as qualified by the ethical principle of promissory estoppel. To give a third party beneficiary, a stranger to the contract, a right to recover thereunder was "anathema in its beginnings to those who were inclined to put symmetry in the first place and fairness and common sense in the second."³⁹ By judicial decision in this

35. *Oleff et al. v. Hodapp et al.*, 129 Ohio St. 432, 447, 195 N. E. 838, 844 (1939).

36. "We are told at times that change must be the work of statute, and that the function of the judicial process is one of conservation merely. But this is historically untrue, and were it true, would be unfortunate. Violent breaks with the past must come, indeed, from legislation, but manifold are the occasions when advance or retrogression is within the competence of judges as their competence has been determined by practice and tradition." CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* 7 (1928).

37. *Wood v. Lucy, Lady Duff Gordon*, 222 N. Y. 88, 91, 118 N. E. 214 (1917).

38. *Jacobs and Young v. Kent*, 230 N. Y. 239, 242, 244, 129 N. E. 889, 890, 891 (1921).

39. *Bristol v. Woodward*, 251 N. Y. 275, 288, 167 N. E. 441, 446 (1929).

state in *Lawrence v. Fox*,⁴⁰ the right of a third party beneficiary to recover on the contract was firmly established and that principle has been extended in the later cases.

By legislation, for the most part recommended by the Law Revision Commission of this State, the presence or absence of a seal upon a written instrument is now without legal effect. One of the great accomplishments of Lord Mansfield was the creation of a body of Commercial Law resulting from the absorption into the common law of many of the customs of the Law Merchant. In 1765 in *Pillans v. Van Mierop*,⁴¹ he laid down the rule that a promise in writing made in or as part of a business transaction was binding without any consideration. There was no authority for this holding in the common law but Lord Mansfield said, "In commercial cases amongst merchants the want of consideration is not an objection." His view was that "the ancient notion about the want of consideration was for the sake of evidence only."⁴² This holding, however, was overruled in the later English cases. Our Law Revision Commission has not gone to the extent of Lord Mansfield's holding but it has eliminated the necessity for consideration in many situations and it is to be hoped that the day is not far distant, when as Holdsworth pointed out in his History of English Law: "All lawful agreements should be valid contracts, if the parties intended by their agreement to affect their legal relations, and *either* consideration was present, *or* the agreement was put into writing and signed by all the parties thereto."⁴³ The time would seem to be opportune, moreover, for a reexamination and revision of the provisions of the Statute of Frauds relating to the sale of goods which have so often operated to accomplish, rather than to prevent, commercial fraud and perjury and have resulted in endless litigation.⁴⁴

The marked change in the attitude of the law towards commercial morality fully establishes the main thesis of this lecture. The old individualistic, laissez faire concept which was the basis of *caveat emptor* has been discarded in favor of rules emphasizing fairness in business dealings, and recognizing new and higher standards of business ethics and of the morals of the market place. *Caveat venditor* has, to a large extent, replaced *caveat emptor*.⁴⁵ The recognition of deceit as a distinct

40. 20 N. Y. 268 (1859).

41. 3 Burr. 1663, 97 Eng. Rep. 1035 (1765).

42. *Id.* at 1669, 97 Eng. Rep. at 1038.

43. 8 HOLDSWORTH, HISTORY OF ENGLISH LAW 48 (1926). For some changes in the New York law, see Shientag, *Lord Mansfield Revisited—A Modern Assessment*, 10 FORD. L. REV. 345, 367 (1941), reprinted in MOULDERS OF LEGAL THOUGHT 99, 131, 132 (1943).

44. See the criticism of the Statute of Frauds as relating to the sale of goods in 51 L. Q. REV. 95 (1935).

45. Walton Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L. J. 1133 (1931).

legal wrong, the broadening of its application so that silence itself may constitute fraud and deception under certain circumstances,⁴⁶ relief from mutual mistake of fact and later for unilateral mistake under appropriate conditions, the granting of relief for mistake of law, protection of the *fool* from the *knave* in connection with misrepresentation, the broadening of the rule of justifiable reliance, the extension of the doctrine of express and implied warranties,⁴⁷ the action for inducing breach of contract,⁴⁸ are some of the steps taken by the law to promote commercial morality. By the Securities and Exchange Act and the law creating the Federal Trade Commission Act, and the Pure Food and Drug Act, unfair and misleading business practices are regulated to an extent undreamed of at common law. Instead of granting monopolies as was done in early English legal history, monopolies and combinations in restraint of trade are sternly repressed by law; perhaps some keen minds may, in the future, be able to formulate more definite rules in this field for the guidance of businessmen who really wish to comply with the law.

Torts

Much progress has been made in the law of torts along the lines of natural justice. There is no branch of the law in which the creative judicial process has a wider range. It is here that the moral sense should bring about a harmony between present rules and present needs.

In the course of time absolute liability gave way to liability for fault, to return in part to absolute liability on an insurance basis, as under our Workmen's Compensation statutes. Apart from statute, the trend in the law of torts today is that the ethical quality of the defendant's act is the measure of liability not just the final act done. The early common law gave remedies for infringement of the safety or liberty of an individual and for injury to his property. Gradually under the decisions, remedies for slander and libel, deceit and malicious prosecution arose. The independent tort of negligence sprang from the needs of the industrial age. Unfortunately the prevailing economic viewpoint engrafted upon the doctrines of negligence and contributory negligence the harsh judge-made rules of fellow servant and assumption of risk—of which by now the law has, for the most part, rid itself.

The conception of tort, from an early date, has been a fluid one.⁴⁹

46. Cf. *Donovan v. Aeolian Co.*, 270 N. Y. 267, 271, 200 N. E. 815, 816 (1936).

47. See *Warranties of Kind and Quality under the Uniform Revised Sales Act*, 57 *YALE L. J.* 1389 (1948).

48. *Lumley v. Gye*, 2 E. & B. 216, 118 Eng. Rep. 749 (1853).

49. The categories of negligence, for example, are never closed. In *Paris v. Stepney Metropolitan Borough Council*, 65 T. L. R. 723 (1949), the Court of Appeal held that as

In 1762 Pratt, C. J., said: "This action is for a tort; torts are infinitely various, not limited or confined, for there is nothing in nature but may be an instrument of mischief."⁵⁰ The law of tort is constantly expanding and "the idea of its being cribbed, cabined and confined in a set of pigeon holes is untenable. Sometimes old torts are expanded and new torts are developed so slowly and cautiously that they tend to mask the fact that they have been created for they have often come into existence only by a series of analogical extensions spread over a long period of time."⁵¹

In 1893, Lord Bowen expressed the view that "At common law there was a cause of action whenever one person did damage to another wilfully and intentionally, and without just cause or excuse."⁵² A similar rule was announced by the Supreme Court of the United States speaking through Mr. Justice Holmes.⁵³ In 1946, in the case of *Advance Music Corp. v. American Tobacco Co.*,⁵⁴ Chief Judge Loughran speaking for a unanimous Court of Appeals, in a holding which is a landmark in our law, applied the principle approved by Lord Bowen and Mr. Justice Holmes, to a specific pending action saying that it was unnecessary to "decide anything in respect of the nature of the judgment to which plaintiff may be entitled." It is enough that there is stated "a case for relief either at law or in equity."⁵⁵

For every unjustifiable wrong there is a remedy—whether or not you can tag the wrong with a specific label. Is not this of the essence of natural justice, particularly in view of the trend towards extension of what is "unjustifiable" as applied for example to spite fences, the use and diversion of surface and underground waters on one's own property, and the inducing of breach of contract or expectation cases. *Damnum absque injuria* is heard less and less in the law as the years go by.

Many important reforms have been effected in the law of torts by statute where the unjust, outworn rules were considered too firmly entrenched to be dealt with by the creative judicial process. Under the

it was not the duty of the defendants to provide goggles for workmen who had two good eyes so as to guard them against metal chips, there could be no duty to supply them to plaintiff merely because having only one eye the consequences to him would be more serious than they would be to an ordinary man. The House of Lords reversed. "I cannot accept the view neatly summarized by Asquith, L. J., that the greater risk of injury is, but the risk of greater injury is not, a relevant circumstance." [1951] A. C. 367, 375. See also 67 L. Q. REV. 281 (1951).

50. *Chapman v. Pickersgill*, 2 Wils. 145, 146, 95 Eng. Rep. 734 (1762).

51. WINFIELD, *TEXTBOOK OF THE LAW OF TORTS* 15 (3d ed. 1946).

52. *Skinner & Co. v. Shew & Co.*, [1893] 1 Ch. 413, 422.

53. *Aikins v. Wisconsin*, 195 U. S. 194, 204 (1904).

54. 296 N. Y. 79, 70 N. E. 2d 401 (1946).

55. *Id.* at 84, 70 N. E. 2d at 403.

common law there was no liability for tort resulting in death and actions for personal injury died with the wrongdoer. The first unjust rule was abolished in England by Lord Campbell's Act. Our state constitution preserves the right of recovery in death cases.⁵⁶ The rule that actions for injury to person or property die with the wrongdoer was abolished in this state, but not until 1935, on the recommendation of our Law Revision Commission.⁵⁷ Similarly, on the recommendation of that Commission, there was abolished the unjust rule that the negligence of a parent or other custodian might be imputed to the infant.⁵⁸ It is expected that, at the next session of the Legislature, the Law Revision Commission will again recommend a bill providing generally for contribution among joint tortfeasors.

A recent case, decided by a divided Court of Appeal in England, dealing with liability to third persons for the negligent preparation of accounts is reminiscent of Judge Cardozo's well-known opinion on that subject in *Ultramares Corp. v. Touche*.⁵⁹ The scholarly note about the case prepared for the Law Quarterly Review by its learned editor Professor Arthur L. Goodhart reads as follows:

"There can be little doubt that *Candler v. Crane, Christmas & Co.* (1951) 1 T.L.R. 371 will give rise to more debate than any other case in recent years. It is fortunate therefore that the facts are not in dispute, leaving a pure question of law for decision. The plaintiff was prepared to invest £2,000 in the X Company, but before doing so he wished to be satisfied concerning its financial position. The managing director of the company thereupon showed him the accounts which had been prepared by the defendants, a firm of accountants. The accounts were produced to the plaintiff by the defendants' employee who knew for what purpose they were required. Unfortunately the accounts had been carelessly prepared, and were grossly defective. Relying on the accounts the plaintiff invested £2,000 in the company, and lost the whole amount when the company had to be wound up without any assets. The plaintiff brought the present action against the defendants claiming damages for negligence. Lloyd-Jacob, J., dismissed the action, holding that the accountants were under no duty of care to the plaintiff. The Court of Appeal (Cohen and Asquith, L.J.J., Denning, L.J. dissenting) dismissed the plaintiff's appeal."⁶⁰

I commend to your consideration the note and the three opinions of the Lord Justices, the dissent being an unusually spirited one for an English high court. Apparently the case stands for the proposition that in the absence of fraud,⁶¹ an obligation to take care in making statements

56. N. Y. CONST. Art. I, § 16.

57. N. Y. DEC. EST. LAW §§ 118, 119.

58. N. Y. DOM. REL. LAW § 73.

59. 255 N. Y. 170, 174 N. E. 441 (1931). See PROSSER, TORTS § 87 (1941).

60. 67 L. Q. REV. 173 (1951).

61. The English definition of what constitutes fraud at common law may not be as

could arise only out of a contractual duty owed by the defendant to the plaintiff or a fiduciary relationship between the parties and that in any event a duty to third persons to take care arose only where the result of a failure would cause physical damage to person or property. Judge Cardozo's opinion was quoted from at length in one of the prevailing opinions. The dissenting Lord Justice argued that, in the instant case, the defective accounts, prepared by the defendants, were presented by them to the plaintiffs with the knowledge that they would rely on them, whereas in the *Ultramares* case the negligent representations were to an indeterminate class. The prevailing Lord Justices apparently saw no difference in principle. It will be interesting to see what the House of Lords will make of it.⁶²

The classic pronouncement of Lord Atkin in the form the "You must not injure your neighbor" rule bears directly on the main thesis of this lecture. It was made in the great case of *Donoghue v. Stevenson*⁶³ (the snail-in-the-bottle case) as follows:

"The liability for negligence, whether you style it such or treat it as in other systems as a species of 'culpa,' is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour, becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbor. Who, then, in law is my neighbour? The answer seems to be—persons who are so directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."⁶⁴

What Judge Cardozo characterized as "the assault upon the citadel of privity" is continuing to exert its influence upon the development of the law along ethical lines. His opinions in this field may be found in such cases as *MacPherson v. Buick Motor Co.*,⁶⁵ *Glanzer v. Shepard*⁶⁶ and *Ultramares Corp. v. Touche*.⁶⁷

broad as that adopted in New York cases. Compare Holdsworth, *Equity*, 51 L. Q. REV. 146, 147 (1935), with *Ultramares Corp. v. Touche*, 255 N. Y. 170, 174 N. E. 441 (1931).

62. See the scholarly analysis of this case and the relevant authorities in Seavey, *Candler v. Crane, Christmas & Co.—Negligent Misrepresentation by Accountants*, 67 L. Q. REV. 466 (1951); see also Morison, *Liability in Negligence for False Statement*, 67 L. Q. REV. 212 (1951).

63. [1932] A. C. 562.

64. *Id.* at 580.

65. 217 N. Y. 382, 111 N. E. 1050 (1916).

66. 233 N. Y. 236, 135 N. E. 275 (1922).

67. 255 N. Y. 170, 174 N. E. 441 (1931).

It is appropriate at this time to call attention to a number of recent cases, challenged in other jurisdictions, in which recoveries have been allowed despite the novelty of the action.⁶⁸ Without expressing any opinion as to their correctness I refer to them as indicating the marked trend in the law along the lines of natural justice and right. These cases have allowed recovery to minor children against a woman for alienating the affections of their father and inducing him to leave home and live with her.⁶⁹ The same rule has been applied to the enticement of a mother in a particularly appealing and well-reasoned opinion by the Supreme Court of Minnesota:

"The Common Law does not consist of absolute, fixed and inflexible rules, but rather of broad and comprehensive principles based on justice, reason and common sense. . . . These principles are susceptible of adaptation to new conditions, interests, relations and usages as the progress of society may require."⁷⁰

Other Branches of the Law; Practice and Procedure

We have considered the progress, along lines of natural justice and morality, in the three main fields of the civil law. Many and important have been advances in other branches of the substantive law which of necessity cannot here be discussed. Great reforms in Pleading and Practice have been accomplished. It is a far cry, for example, from the rigid,

68. "This argument about the novelty of the action does not appeal to me. It has been put forward in all the great cases which have been milestones of progress in our law and it has nearly always been rejected. If one reads *Ashby v. White*, *Pasley v. Freeman* and *Donoghue v. Stevenson* one finds that in each of them the judges were divided in opinion. On the one side there were the timorous souls who were fearful of allowing a new cause of action. On the other side there were the bold spirits who were ready to allow it if justice so required. It was fortunate for the common law that the progressive view prevailed." Denning, L. J., dissenting, in *Candler v. Crane, Christmas and Co.*, 1 T. L. R. 371, 378 (1951). See also Pollock, *Judicial Caution and Valour*, 45 L. Q. REV. 293 (1929). The cases referred to in the foregoing quotation from Lord Justice Denning are as follows: *Ashby v. White*, 2 Ld. Raym. 938 (1703), *rev'd*, 1 Eng. Rep. 417 (1704) (an action on the case lies by a burgess against the returning officer of the borough for refusing his vote at an election of members to serve in Parliament); *Pasley v. Freeman*, 3 T. R. 51, 100 Eng. Rep. 450 (1789) (deceit as an independent tort); and *Donoghue v. Stevenson*, [1392] A. C. 562 (liability to third person for injury through finding snail negligently allowed to get into a bottle of ginger-beer).

69. *Daily v. Parker*, 152 F. 2d 174 (7th Cir. 1945); *Johnson v. Lugman*, 330 Ill. App. 598, 71 N. E. 2d 810 (1947).

70. *Miller, et al. v. Monsen*, 228 Minn. 400, 406, 37 N. W. 2d 543, 547 (1949). See also *Heck v. Schupp*, 394 Ill. 296, 68 N. E. 2d 464 (1946); 20 CORNELL L. Q. 255 (1935). *Contra*: *Morrow v. Yannantuono*, 152 Misc. 134, 273 N. Y. Supp. 912 (Sup. Ct. 1934); *Taylor v. Keefe*, 134 Conn. 156, 56 A. 2d 768 (1947); 83 U. OF PA. L. REV. 276 (1934). It should be noted that in New York, in 1935, the causes of action for alienation of affections, criminal conversation, seduction and breach of promise to marry were abolished. N. Y. CIV. PRAC. ACT Art. 2-A.

technical common law writs and procedure to the successful "revolt against formalism" in this field of the law. This reached its high point in New York in the enactment of the Field Code of 1848, with abolition of the different common law forms of action and the union of legal and equitable remedies in a single form of action: "the civil action of the Code." How different from the common law rule was the pronouncement, for instance, of the Court of Appeals (per Desmond, J.) that "the question for us is whether the requisite allegations of any valid cause of action cognizable by the state courts 'can be fairly gathered from all the averments.'"⁷¹

Many indeed have been the improvements in our system of civil practice—improvements too numerous even for mention. Outstanding among them is the remedy of summary judgment, a powerful weapon to defeat expeditiously the assertion of claims and defenses which raise no triable issue—a remedy which should be broadened in New York along the lines of the Federal Rules of Civil Practice to cover every kind of action or defense. There is the remedy of declaratory judgment far reaching in its social and economic implications, the bounds of which should be more clearly defined by appropriate rule. We have the system of pre-trial practice patterned on the old English summons for directions; in actual practice however, in the New York State courts, this important procedural device is used primarily, if not entirely, to attempt to effectuate settlements; it by no means follows the English procedure under which all interlocutory applications are made and disposed of, and the issues defined, at one time.

By the development of methods of free and non-technical discovery, inspection, examination before trial, and demand for admission of the genuineness of a paper or of any specific fact or facts (not resorted to here anywhere like it is in England) our civil procedure has adopted as its policy the principle that a litigant should reveal rather than conceal his case before trial. The trial tends to become an earnest search for truth rather than a battle of wits.

Interpleader practice has been simplified and broadened. Amendments to pleadings, substantial in character, are today freely allowed and there is considerable latitude permitted for the joinder of causes of action and the interposition of counterclaims. Statutes of Limitations have been changed to the end that stale claims may be more effectively barred. Broad provisions for arbitration have furnished the commercial community and others with a prompt, informal remedy. The relief af-

71. *Condon v. Associated Hospital Service*, 287 N. Y. 411, 414, 40 N. E. 2d 230, 231 (1942).

72. *Cf. N. Y. CIV. PRAC. ACT* § 449a.

forded by arbitration can only be approximated by the establishment of a commercial court with informal, expeditious procedure presided over by judges experienced in commercial problems. The abbreviated record on appeal, while of acknowledged desirability, is still largely, with us in this state, the expression of a hope rather than a reality; much more should be done to make it effective.

At this point it may be appropriate to refer to right of trial by jury in civil actions. The historical reasons for trial by jury, which made it one of the outstanding features in the development of the common law, have today largely disappeared. Yet the right to trial by jury in civil actions is frozen into the Constitution of our State. That provision, it is submitted, should be defrosted and made flexible and discretionary with the legislature. In certain types of actions such as divorce, libel and slander, false arrest and imprisonment, malicious prosecution, and violation of the civil rights law, the right to trial by jury should continue to be preserved by constitutional mandate. But as to all other civil causes trial by jury should be left to the discretion of the legislature and the courts. In England today there is no right to trial by jury in any civil action except pursuant to direction of the court, or of the master. The right to trial by jury in all forms of commercial litigation is an anachronism. To have one judge try the most important and complicated equity case and a judge together with a jury of twelve try the simplest kind of commercial litigation no longer makes sense. There is to be sure, greater room for a jury in negligence cases because of possible variations in assessing damages but that presents a problem the solution of which should be left to the legislature and the courts rather than embodied in the fundamental law of the state.

An improvement was made when the requirement for a unanimous verdict in a civil action was removed by legislation and a verdict of not less than five-sixths of the jurors substituted. So too the provision for alternate jurors in a case likely to be a protracted one has prevented many a mistrial because of the disability of a juror.⁷² Largely because of the constitutional protection of trial by jury we are still struggling with the difference between the right to direct the verdict in a jury case and the right to set it aside as against the overwhelming weight of the credible evidence and to order a new trial. We had thought that this problem was well on its way to solution as the result of the enactment of Section 457-A of the Civil Practice Act which provides that the "judge may direct the verdict when he would have set aside a trial verdict as against the weight of the evidence." Notwithstanding the specific language used our courts have decided that Section 457-A added nothing

to the pre-existing law on the subject; that it was simply declaratory of the common law.⁷³

The Judicial Council, established in 1934, is engaged in a continuous study of civil practice and procedure and has made numerous recommendations to the legislature for improvements which have been enacted into law. Fundamentally, it is my firm conviction that we are dealing with civil practice and procedure in entirely the wrong way. The legislature should delegate to the courts the power to make and revise the rules of civil practice and procedure along the same lines, and subject to the same safeguards as were provided when the Congress delegated to the Supreme Court of the United States the power to make and revise Federal Rules of Civil Practice. With the aid of an advisory committee named by the Supreme Court the Federal Rules of Civil Practice were adopted; they are a model of their kind and furnish adequate machinery for needed, periodical revision.

In matters of evidence and trial practice much progress has been made in the law. The disqualifications because of interest have been virtually eliminated. Among the more recent improvements in the law of evidence are amendments permitting the broad use of records kept in the regular course of business;⁷⁴ allowing contradiction of a witness by proof of a prior inconsistent statement made by him in writing or under oath, "irrespective of the fact that the party has called the witness or made the witness his own";⁷⁵ and the abolition of the requirement that an exception must be taken to an adverse ruling with respect to the admissibility of evidence.⁷⁶

There is still a difference of opinion as to whether judges in our state courts have the right to comment on the evidence in charging a jury. This doubt should be removed and our state judges given the same powers in that regard as are exercised by judges in our federal courts and in England.

Delay in Tort Actions

The greatest dissatisfaction with the civil law in this community today is the delay, the unconscionable delay, in the trial of tort jury cases—most of them arising from motor vehicle accidents on our highways.⁷⁷

73. *Bank of United States v. Manheim*, 264 N. Y. 45, 189 N. E. 776 (1934); *Blum v. Fresh Grown Preserve Corp.*, 292 N. Y. 241, 54 N. E. 2d 809 (1944); *Ruthizer v. Bass Dress Corp.*, 264 App. Div. 372, 35 N. Y. S. 2d 473 (1st Dep't 1942); *Matter of Whipple*, 294 N. Y. 292, 62 N. E. 2d 76 (1944).

74. *Cf.* N. Y. CIV. PRAC. ACT § 374-a.

75. N. Y. CIV. PRAC. ACT § 343-a.

76. N. Y. CIV. PRAC. ACT § 445.

77. Another justifiable cause for dissatisfaction is the multiplicity of appeals and the failure to provide for counsel fees as part of the costs where a litigant, ultimately successful, has had one or more appeals forced upon him.

The calendar in these cases, in the Supreme Court of New York County is almost four years behind. The delay in Bronx County and in the City Court while not so great is quite substantial. What shall we do about it? Steps have been taken piecemeal, to be sure, but important and helpful, to reduce this congestion. For example, the jurisdiction of the Municipal Court has been increased from \$1,000 to \$3,000. The jurisdiction of the City Court will, by constitutional amendment be increased from \$3,000 to \$6,000.⁷⁸ The Appellate Division, it is to be hoped, may also be given the right to utilize our judicial manpower by transferring judges as needed from one court to another.⁷⁹ A system of preferences has been adopted designed indirectly to have cases tried in the court in which, because of the nature and extent of the injuries received, such cases properly belong. It would seem that by constitutional amendment, the courts should be enabled, under appropriate safeguards, to transfer cases directly.

But those calendars are continuing to fall behind and small wonder! The report of the State Motor Vehicle Bureau gives the following significant figures concerning reported motor vehicle accidents for Greater New York for the year 1950. Population, 7,454,995; Vehicle Registration, 1,350,526; Accidents, 54,395; Deaths, 554; Injuries (more than one in the same accident), 72,244. There is nothing fanciful about this. These accidents take place and injured persons and the kin of those killed (despite conflicting claims of fault and liability) want redress. Taking account also of the large number of other accidents from various causes and of other torts you can readily understand why it is that these actions are beginning to cause parts of our judicial structure to burst at the seams.

It is essential therefore that a Legislative Commission be created to look into this entire problem. This Commission should consider among other things, the organization, jurisdiction and business of our courts of civil jurisdiction (limited if you will to the City of New York); what consolidations, if any, of those courts should be effected; the advisability of modifying the constitutional provisions for trial by jury in civil cases, and giving the Legislature at least a limited power to deal therewith particularly in connection with commercial and negligence actions; the adoption of a rule of court giving a preference on the jury calendar in certain classes of negligence actions where a plaintiff waives but a defendant demands a jury trial; the power, under appropriate safeguards, to transfer negligence actions, to the courts of appropriate

78. The Amendment became effective January 1, 1952.

79. Such a proposed constitutional amendment passed one Legislature in 1951. See N. Y. CONST. Art. XIX, § 1.

jurisdiction, in which they properly belong; judicial supervision over contingent fees in negligence actions; provisions for adequate supervision by the Appellate Divisions of the work of the courts within their respective jurisdictions; the methods to be adopted to reduce motor vehicle accidents and in what manner the accident cases can be most effectively dealt with in our courts. This mass of motor vehicle cases, clogging our court calendars, adversely affects the efficiency of the administration of justice generally. The accidents are real. Those of the injured, who are entitled to recover, should not be subjected to unreasonable delay, often resulting in a complete denial of justice to them. If the courts are unable to deal with these motor vehicle injury actions, justly and expeditiously, some system along the lines of the Workmen's Compensation Law may have to be adopted.⁸⁰

Criminal Law

In no branch of law has there been manifested a greater change than in our attitude to the criminal offender. The whole history of the criminal law is the transition from brutality and stupidity to humanity and enlightenment. The hideous story of man's inhumanity to man in the enforcement of the criminal law has often been recounted. We are shocked when we realize how those living in the eighteenth century tolerated, "with fearful composure," the horrors of the jails, the brutality of the criminal code and the savagery of the press-gang. Changes for the better have come in the course of time, immense changes, but they have been so slow and gradual that we are hardly conscious of them. From the brutal, savage and severe punishment for crime we have progressed steadily along the lines of crime prevention and detection and have placed the emphasis upon speedy, certain punishment and upon the rehabilitation of the criminal offender. The trend has been to put the solely punitive aspect of our criminal law in the background and to limit, within the strictest necessary bounds, the suffering inflicted by law.

Advances in medicine, particularly in physiology, psychiatry and psychology have thrown much light on what were previously considered imponderables and have contributed effectively to the more scientific sentencing and treatment of criminal offenders. Children and youth offenders' courts, family courts, our systems of probation and parole and the attempted individualization of sentences imposed, are all steps in the right direction. There are many who feel that we have reached the point where the prevention of crime, within certain limitations, is a purchaseable commodity—purchaseable in terms of adequate police forces, modern prisons, and enlightened procedures in trials and sen-

80. See Shientag, *Motor Vehicle Accidents and the Law*, 1 BULLETIN OF THE NEW YORK STATE BAR ASS'N 134 (1929).

tences. The prevention of crime is purchaseable in increased emphasis on the social, economic, physical and mental conditions which tend to breed crime and disrespect for law and order. Judges are becoming more receptive to training in criminology and are acquainting themselves with what goes on in the different penal institutions.

The rights of the person charged with crime should always be respected but we should not lose sight of the fact that the community also is entitled to protection. Abuses led the judges in 1785 to lay down the law that a "confession forced from the mind by the flattery of hope, or the torture of fear comes in so questionable a shape that no credit ought to be given to it and therefore it is rejected."⁸¹ We have laws requiring the prompt arraignment of prisoners charged with crime. The courts should not consider themselves powerless, within reasonable limits, to enforce this legal mandate. There is a serious question whether there shall be continued the rule in this state which allows evidence obtained by unlawful means to be used on a criminal trial. The Federal rule is to the contrary and is more in accord with reason.

The revelations of the Kefauver Committee and of the New York State Crime Commission have stirred the conscience of the American people. Few were prepared for the unsavory disclosures of widespread organized crime on the part of racketeers, police and public officials generally. No penalty is too severe for traffickers in narcotics who undermine the moral fibre of our youth and who destroy those unable to resist the pernicious drugs transported and offered for sale. Punishment—severe punishment of the offenders, prevention of the illicit traffic and the treatment and cure of the victims are problems pressing for solution. How to deal effectively with them calls for all the wisdom, the skill, and the courage of our lawmakers aided and supported by the bar of the country. Although stressing the humane treatment and rehabilitation of the criminal offender, it should be recognized that the primary purpose of the criminal law is the protection of society.

What a difference between denial, under the old common law, of a defendant's right to counsel, and our present insistence upon it, as a fundamental right of an accused, to be protected at all times by the liberal extension of the great moral writ of *coram nobis*.⁸² How different the old practice of executing a convicted defendant, without right of appeal, from our requirement that every conviction in a case where the

81. *Rex v. Warwickshall*, 1 Leach 263, 168 Eng. Rep. 234 (1783); see the quaint observation in *Rex v. Thompson*, 1 Leach 291, 168 Eng. Rep. 248 (1783). "Too great a chastity cannot be preserved on this subject." *Id.* at 293, 168 Eng. Rep. 249. See also *People v. Malinski*, 292 N. Y. 360, 55 N. E. 2d 353, *rev'd*, 324 U. S. 401 (1944).

82. *Matter of Bojinoff v. People*, 299 N. Y. 145, 85 N. E. 2d 909 (1949); *People v. Guariglia*, 303 N. Y. 338, — N. E. 2d — (1951).

death sentence is imposed must, at the instance of a defendant, go directly to the highest court of the state for review.

One of the greatest opinions written by Justice Hughes was in the case of *Brown v. Mississippi*,⁸³ holding that a trial in a state court, fair in its fundamentals, is guaranteed by the Federal Constitution. Speaking for a unanimous court he quoted with approval from *Fisher v. State*,⁸⁴ a Mississippi case where it was held: "The duty of maintaining the constitutional rights of a person on trial for his life rises above mere rules of procedure and whenever the court is clearly satisfied that such violations exist, it will refuse to sanction such violations and will apply the corrective."⁸⁵ It is a case which should be read and re-read by all those who love freedom and justice.

In our own state the Court of Appeals, speaking through Fuld, J., recently held: "Vicious though the crime was, convincing though the evidence of guilt may seem to be, we could affirm only if we were to announce a doctrine that the fundamentals of a fair trial need not be respected if there is proof in the record to persuade us of defendants' guilt. We are not prepared to announce such a doctrine."⁸⁶

An outstanding need in this branch of our law is a thorough, scientific study and revision of our Penal Law, our Code of Criminal Procedure and related statutes. Neither the Law Revision Commission nor the Judicial Council is equipped for this purpose. What is required is a temporary legislative commission, with adequate facilities and appropriations for making the necessary studies. There are many matters requiring consideration by such a proposed legislative commission. I have to limit myself to a few: the right of comment on the failure of a defendant to take the stand;⁸⁷ the adaptation of the privilege against self-incrimination to meet the modern needs of society in waging war against crime;⁸⁸ a more scientific definition of legal insanity; a revision of the distinctions between felonies and misdemeanors and offenses; and a new, humane method of dealing with paternity proceedings.

At this point also it is important to emphasize, as Mr. Justice Hughes did, that there is no more serious menace than the discontent which is fostered by a belief that, because of poverty, the most humble indi-

83. 297 U. S. 278 (1936).

84. 145 Miss. 116, 110 So. 361 (1926).

85. *Id.* at 134, 110 So. at 365.

86. *People v. Mieczko*, 298 N. Y. 153, 163, 81 N. E. 2d 65, 69 (1948).

87. See *Adamson v. California*, 332 U. S. 46 (1946); N. Y. CONST. ART. I, § 6; N. Y. CODE CRIM. PROC. §§ 10, 393.

88. *Twining v. New Jersey*, 211 U. S. 78 (1908); *Snyder v. Massachusetts*, 291 U. S. 97 (1933); *Brown v. Mississippi*, 297 U. S. 278 (1935); *Palko v. Connecticut*, 302 U. S. 319, 322, 324 (1937); see note 87 *supra*.

vidual cannot enforce his legal rights or adequately defend himself when charged with crime. The Legal Aid Society is doing excellent work in this field; undoubtedly more will have to be done in the future.

*What the Law is and What it Ought to be
What is Desirable and What is Possible*

Our law has reached a point in its development where we are in a position to examine and appraise it from two angles: what the law is and what it ought to be; to put it in a different way—what is desirable and what is possible. The more we narrow the gap, whether by the creative judicial process or by legislation between what is desirable and what is possible and between what the law is and what it ought to be, the better our law will become and the nearer it will be to the realization of its purpose.

That there are rules of law contrary to moral conceptions is due, not so much to our mistaken notion of what is right or wrong, as to our notions of what is possible—that is, what is expedient or practicable. Certainty and expediency are distinct values and have their place in the law. It is, however, our task, not to accept blindly the pleas of certainty and expediency, so temptingly put before us, but to see whether or not they would really be sacrificed by the adoption of the rule having an ethical basis—in other words whether the desirable certainty and expediency cannot fairly be reconciled with the moral considerations involved.

The history of the law demonstrates that every important legislative reform was accompanied by well-intentioned but dire predictions that it would be destructive of the law, and would open the flood-gates to litigation based on fraud and perjury or would permit the use of the law for improper, reprehensible purposes. The problem centers largely around what has been called "the difficulties and dangers of proof" and the harm resulting therefrom. I can only refer briefly to a few concrete examples by way of illustration relating to rules of law, some of which can be changed or corrected, if at all, by legislation. Have we not reached a point in the progress of the law and of medical and psychiatric science where it would be entirely desirable and safe to abandon the unjust rule that there can be no recovery in negligence for shock or mental disturbance, without impact? Many states have abandoned this rule; it does not seem to be the law in England.⁸⁹ Lord Macmillan put it thus: "The crude view that the law should take cognizance only of

89. BOHLEN, *STUDIES IN THE LAW OF TORTS* 252 *et seq.* (1926); *cf.* Goodrich, *Emotional Disturbance as Legal Damage*, 20 MICH. L. REV. 497 (1922); 49 HARV. L. REV. 1033 (1936).

physical injury resulting from actual impact has been discarded and it is now well recognized that an action will lie for injury by shock sustained through the medium of the eye or the ear without direct contact."⁹⁰

Have we not reached a point in medical science where we should allow a recovery for negligent injuries to an infant *en ventre sa mere*? The Court of Appeals said no, by a divided court in *Drobner v. Peters*,⁹¹ Cardozo, J., dissenting without opinion. Since that decision a number of states have rejected its holding. Another case involving the same question may soon be reviewed by the Court of Appeals.⁹²

There is the doctrine of contributory negligence. It was engrafted on the concept of negligence, that is, liability for fault only, early in the industrial age. As applied under modern conditions it has become an anachronism. The conception that even though a defendant was negligent, an injured plaintiff cannot recover at all, if any careless act on his part contributed in any way to the occurrence of the accident certainly is not in accordance with principles of natural justice. As far back as 1916 Judge Jeremiah Smith, a teacher and authority on the subject said: "The doctrine of contributory negligence is a decadent doctrine which will ultimately disappear from the law." Why do we continue it? England has dealt with it effectively.

On the recommendation of the Lord Chancellor's Law Revision Committee, made in 1939, Parliament, in 1945, enacted the Law Reform Contributory Negligence Act. It provides, along the lines of the rule under the maritime law, that "Where any person suffers damage as a result partly of his own fault and partly of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage but the damages recoverable in respect thereof shall be reduced to such extent as the Court thinks just and equitable having regard to the claimant's share in the responsi-

90. Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033 (1936); *Bourhill v. Young*, [1943] A. C. 92, 103; 59 L. Q. REV. 150 (1943); 8 CAMB. L. J. 265 (1944).

91. 232 N. Y. 220, 133 N. E. 567 (1921). *Contra: Damasiewicz v. Gorsuch*, 79 A. 2d 550 (Md. 1951); see POUND, INTERPRETATIONS OF LEGAL HISTORY 121 (1923); 10 A. L. R. 2d 1059 (1950).

92. See *Woods v. Lancet*, 278 App. Div. 913, 105 N. Y. S. 2d 417 (1st Dep't 1951), *rev'd*, 303 N. Y. 349, 102 N. E. 2d 691 (1951) (since this lecture was delivered), holding that *Drobner v. Peters*, 232 N. Y. 220, 133 N. E. 567 (1921), would no longer be followed and allowing recovery for pre-natal injuries caused by negligence. "The precise question for us on this appeal," said Desmond, J., speaking for the majority, "is: shall we follow *Drobner v. Peters*, or shall we bring the common law of this State, on this question, into accord with justice? I think, as New York State's court of last resort, we should make the law conform to right."

bility for the damage." This would include injuries to property. The Act "does not alter the existing law as to determining whether or not there has been contributory negligence; all that it does is to alter the law as to the damages recoverable where contributory negligence is established. . . . As to procedure the court must find and record the total damages which would have been recoverable if the claimant had not been at fault; if the case is tried with a jury they assess the amount of the total damages and also the extent to which they are to be reduced."⁹³

There has been criticism likewise of the "last clear chance" rule as it has been laid down by judicial decision in this state. Until, at least, a very recent Court of Appeals decision which points in a more liberal direction,⁹⁴ for the last clear chance doctrine to operate at all, the injured person had to be virtually unconscious or at least in an immobile position. Even then the doctrine was strictly limited. It "is never wakened into action unless and until there is brought home to the defendant to be charged with liability a knowledge that another is in a state of present peril, in which event there must be reasonable effort to counteract the peril and avert its consequences. . . . Knowledge there must be or negligence so reckless as to betoken indifference to knowledge."⁹⁵

The Court of Appeals, in a recent decision without opinion, has applied the same exemption from liability for negligence to hospitals organized for profit, as had theretofore been allowed, in the decisions, to non-profit, charitable hospitals. This entire subject should receive careful study at the hands of the Law Revision Commission.⁹⁶

That Commission likewise should study the advisability of amending the law with respect to signing at the end of the will, and of also amending Section 347 of the Civil Practice Act prohibiting the testimony of an interested witness concerning transactions with a decedent. These

93. WINFIELD, *TEXTBOOK OF THE LAW OF TORT* 404, 405, 415-16 (3d ed. 1946).

94. *Chadwick v. City of New York*, 301 N. Y. 176, 93 N. E. 2d 625 (1950).

95. *Woloszynowski v. N. Y. Central R. R.*, 254 N. Y. 206, 208, 172 N. E. 471, 472 (1930). See also *Panarese v. Union Ry.*, 261 N. Y. 233, 185 N. E. 89 (1933); *Hernandez v. Brooklyn & Queens Transit Corp.*, 259 App. Div. 853, 19 N. Y. S. 2d 511 (2d Dep't), *rev'd*, 284 N. Y. 535, 32 N. E. 2d 542 (1940).

96. *Bakal v. University Heights Sanitarium, Inc.*, 277 App. Div. 572, 101 N. Y. S. 2d 385 (1st Dep't 1950), *aff'd*, 302 N. Y. 870, 100 N. E. 2d 51 (1951). See 29 *IOWA L. REV.* 624 (1944); 9 *U. OF PITT. L. REV.* 253 (1948). See also *Schoendorff v. Society of the New York Hospital*, 211 N. Y. 125, 105 N. E. 92 (1914); *Bernstein v. Beth Israel Hospital*, 236 N. Y. 268, 140 N. E. 694 (1923); *Butterworth v. Keeler*, 219 N. Y. 446, 114 N. E. 803 (1916); *Hamburger v. Cornell University*, 240 N. Y. 328, 148 N. E. 539 (1925); *Sutherland v. N. Y. Polyclinic Medical School & Hosp.*, 273 App. Div. 29, 75 N. Y. S. 2d 135 (1st Dep't 1947), *aff'd*, 298 N. Y. 682, 82 N. E. 2d 583 (1949).

rules designed to prevent fraud tend at times to operate most unjustly. Surely a better way can be found to deal with them.⁹⁷

There has been much adverse comment about the old rule in this state that equity will not restrain the publication of a libel, even if the wrongdoer is financially irresponsible. This rule goes back to the case of *Brandreth v. Lance*⁹⁸ decided in 1839. It has been criticized as unjust, archaic and outmoded. It should be noted, however, that the Appellate Division, First Department, in a recent case, specifically left this question open. In affirming an order denying a temporary injunction to restrain the publication of an unauthorized biography, the court said: "Our affirmance of the order should not be construed as a determination by this Court that injunctive relief may not be had to restrain the publication of defamatory statements in a proper case. Suffice it to say that the record before us does not furnish any proper basis for the granting of a temporary injunction."⁹⁹

The problem here posed differs from that presented in *Near v. Minnesota*¹⁰⁰ where, in one of his most famous opinions, Mr. Chief Justice Hughes, speaking for the majority of the court, held that a newspaper or periodical could not be restrained from publishing a libel, however, outrageous, on a public official. Such a prior restraint would be an invasion of the constitutional guaranty of freedom of speech and of the press. After discussing the limitations on this rule, the Chief Justice specifically said, "Nor are we now concerned with questions as to the extent of authority to prevent publications in order to protect private rights according to the principles governing the exercise of the jurisdiction of courts of equity."¹⁰¹

97. *Matter of Winters*, 277 App. Div. 24, 98 N. Y. S. 2d 312 (1st Dep't 1950), *aff'd*, 302 N. Y. 666, 98 N. E. 2d 477 (1951). See MORGAN, THE LAW OF EVIDENCE: SOME PROPOSALS FOR ITS REFORM 23 (1927). An interesting suggestion has been made by an English writer which might well be explored here. He says: "The formal requirements for a will are supposed to prevent fraud but it is probable they facilitate far more fraud upon the wishes of testators than they prevent. Courts should be given discretion when satisfied that a particular document was intended by the deceased to be his will to admit such document to probate. This would not encourage slackness in drawing wills for a person who drew a defective will would still be subject to the risk that the court might refuse probate. Leave the formal requirements as they are now; in the vast majority they would be complied with." WILLIAMS, THE REFORM OF THE LAW 103 (1950).

98. 8 Paige 24 (N. Y. 1839).

99. *Koussevitzky v. Allen, Towne & Heath, Inc.*, 272 App. Div. 759, 69 N. Y. S. 2d 432, 433 (1st Dep't 1947), *aff'g*, 188 Misc. 479, 68 N. Y. S. 2d 779 (Sup. Ct.). See *Advance Music Corp. v. American Tobacco Co.*, 268 App. Div. 707, 711, 53 N. Y. S. 2d 337, 341 (1st Dep't 1945), *rev'd*, 296 N. Y. 79, 70 N. E. 2d 401 (1946).

100. 283 U. S. 697 (1931).

101. *Id.* at 716, citing, 29 HARV. L. REV. 640 (1916). *Cf. Singer et al. v. Romerrick Realty Corp.*, 255 App. Div. 715, 5 N. Y. S. 2d 607 (2d Dep't 1938); *Marlin Fire Arms*

And now to a highly debatable subject but one which cannot be ignored in a lecture dealing with the influence of natural justice on the development of the law. "A man stands idly by, and watches a baby drown in two feet of water, when he could save it with no further inconvenience to himself than of wetting his hands, gravely offends the code of morals, but not that of law."¹⁰² That is, I am ashamed to say, Anglo-American law today and I fear that it can only be changed by statute. Moreover many good people will oppose such a statute. It is shocking that in our present state of civilization the common law countries have not put their stamp of disapproval on this most revolting rule, at least by making it a criminal offense, punishable by a short term of imprisonment. Difficult to draft a statute! Not at all; it has been done in several of the code countries.¹⁰³ It will tend to encourage officious intermeddling—how far fetched! Suppose instead of one man watching this baby drown, half a dozen stand by idly. It is easy to make the statute applicable where there is only one person present in a position to save the child. But let us at least have some declaration of legal policy by the state setting its countenance against a violation of a fundamental obligation of a man living in a civilized society. Condemned by religion,¹⁰⁴ condemned by every moral instinct, it should be condemned by law.¹⁰⁵

True the courts have sought to find some way within the old framework of the common law to impose a legal sanction in the case we are considering and leading legal scholars have advocated the imposition of liability, at least some criminal liability by statute.¹⁰⁶ Liability has been

Co. v. Shields, 171 N. Y. 384, 64 N. E. 163 (1902), and note on *Injunctions Against the Disparagement of Business Methods and—the Quality of Manufactured Products*, 126 N. Y. L. J. 1624, col. 1 (Dec. 13, 14, 17, 1951).

102. HANBURY, ENGLISH COURTS OF LAW 8 (1944).

103. See e.g., DUTCH PENAL CODE, Art. 450: "He who, seeing another person suddenly threatened with the danger of death, omits to give or furnish him with assistance, which he can give or procure without any reasonable fear of danger to himself or others, is punished, if the death of the person in distress has resulted, with three months imprisonment and fine."

104. "Neither shalt thou stand idly by the blood of thy neighbor." LEVITICUS XIX, 16. This has been construed to mean when his life is in danger. "Do not stand idly by, watching with indifference thy fellow man in mortal danger through drowning, or attacked by wild animals, or robbers without hastening to his rescue." TALMUD. There is a further application of this verse by the sages: "if thy fellow man is accused of a crime and evidence that could clear him of it is in thy possession, thou art not at liberty to keep silent."

105. JEROME HALL, PRINCIPLES OF CRIMINAL LAW 247-78 (1947).

106. BENTHAM, PRINCIPLES OF MORALS AND LEGISLATION 322, 323 (1830); Ames, *Law and Morals*, 22 HARV. L. REV. 97 (1908); Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability*, 56 U. OF PA. L. REV. 217 (1908); PROSSER, TORTS § 32 (1941); POUND, LAW AND MORALS 67 *et seq.* (1924) (and the authorities cited at 69); Kirchheimer, *Criminal Omissions*, 55 HARV. L. REV. 615 (1942); Moreland, *Criminal Negligence and*

imposed where there was a contractual relationship, a relationship involving an element of traditional dependency, although temporary in character, a relationship of mutual reliance (mountain climbing) and where one has undertaken and then abandoned the rescue. Some cases have gone quite far in the absence of statute to reach the desired result. But at the critical point, practically all of them have drawn back.¹⁰⁷

It may not be inapposite here to mention that the common law has never recognized any unmoral rule such as "necessity knows no law." There are several famous criminal cases on record in which seamen, forced to sacrifice some lives to save themselves and others, were convicted but received light sentences.¹⁰⁸

Regulatory Legislation

A changing world brought in its train a change in the commonly accepted functions of government, and has led to a great mass of social, labor and business legislation. It is not too far back when a woman or even a child, under the guise of an illusory freedom of contract, could work any number of hours, for starvation wages, in any kind of unsanitary or unsafe surrounding. It was no concern of the government—laissez faire—let man look after himself; the government had nothing to do with his relationships. All that has changed since the end of the 19th century. Regulatory statutes have been enacted that would have been considered revolutionary, fifty and even twenty-five years ago. They are now regarded as so essential that what we read about the opposition they encountered seems almost incredible. They are now rightly considered as the duty of the government and as vital to the preservation of the individual rights and liberties which go to make up our American way of life. Such measures promote rather than diminish freedom and are for the most part based upon natural justice and morality. Today liberty is "viewed not negatively or selfishly as a mere absence of restraint but positively and socially as an adjustment of restraints" to fulfill the ideals of freedom rather than to destroy them.

Perhaps the most significant change is that which has taken place in

Crimes by Omission, 32 KY. L. J. 221 (1944); Perkins, *Negative Acts in Criminal Law*, 22 IOWA L. REV. 659, 668 (1937). Compare Orvill Snyder, *Liability for Negative Conduct*, 35 VA. L. REV. 446 (1949).

107. Compare *Rex v. Russell*, [1933] Vict. L. R. 59 (1932) (failure of husband to prevent wife from drowning their children), with *People v. Beardsley*, 150 Mich. 206, 113 N. W. 1128 (1907), and *Parrish v. Atlantic Coast Line R. R.*, 221 N. C. 292, 20 S. E. 2d 299 (1942), and *Depue v. Flatau*, 100 Minn. 299, 111 N. W. 1 (1907).

108. *United States v. Holmes*, 26 Fed. Cas. 349, No. 15,382 (D. Me. 1858); *United States v. Holmes*, 26 Fed. Cas. 360, No. 15,383 (E. D. Pa. 1842); *Regina v. Dudley and Stephens*, 14 Q. B. D. 273 (1884).

judicial decisions and in statutes in the field of labor relations. I invite you to read again the famous dissenting opinion of Mr. Justice Brandeis in *Truax v. Corrigan*¹⁰⁹ and consider the history of the law governing relations between employers and employed. In England until 1813, even the employee's individual freedom to contract was restricted; he was confronted with laws limiting the amount of wages he might demand. Until 1824, he was "punishable as a criminal if he combined with his fellow workmen to raise wages or shorten hours or to affect the business in any way even if there was no resort to a strike." In the United States the right to combine and to strike received early recognition, but this right was regulated largely by judicial decisions. "Judges, being thus called upon to exercise a quasi-legislative function and weigh relative social values, naturally differed in their conclusions on such questions."¹¹⁰ But a reading of the opinion gives the whole story. Suffice it to say that it is a far cry from the conditions thus portrayed to the enactment of the Norris-LaGuardia Anti-Injunction statutes, the National Labor Relations Act, and their state counterparts. The right to regulate working conditions and business practices, and to deal with social security had somewhat analogous histories.¹¹¹ As far back as 1910, Mr. Justice Hughes said: "Freedom of contract is a qualified and not an absolute right. There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community."¹¹²

In 1937, Cardozo, J., writing for the majority said, in the Social Security cases:

"Nor is the concept of the general welfare static. Needs that were narrow or parochial a century ago may be interwoven in our day with the well-being of the Nation. What is critical or urgent changes with the times. . . . The hope behind

109. 257 U. S. 312 (1921).

110. *Id.* at 354, 365.

111. Compare *People v. Charles Schweinler Press*, 214 N. Y. 395, 108 N. E. 639 (1915), with *People v. Williams*, 189 N. Y. 131, 81 N. E. 778 (1907); *People v. Balofsky*, 167 App. Div. 913, 151 N. Y. Supp. 1135 (2d Dep't 1915); *In re Jacobs*, 98 N. Y. 98 (1885); *Lochner v. New York*, 198 U. S. 45 (1905), and *Muller v. Oregon*, 208 U. S. 412 (1908); *Riley v. Massachusetts*, 232 U. S. 671 (1914); *United States v. Butler et al.*, 297 U. S. 1 (1936), and *Steward Machine Co. v. Davis*, 301 U. S. 548 (1937); *Stettler v. O'Hara*, 69 Ore. 519, 139 Pac. 743 (1914), *aff'd*, 243 U. S. 629 (1917); *Adkins v. Children's Hospital*, 261 U. S. 525 (1923); *People ex rel. Tivaldo v. Morehead*, 270 N. Y. 233, *aff'd*, 298 U. S. 587 (1936), and *West Coast Hotel Co. v. Parrish*, 300 U. S. 379 (1937).

112. *Chicago B. & Q. R. R. v. McGuire*, 219 U. S. 549, 567 (1911).

this státute is to save men and women from the rigors of the poor house as well as from the haunting fear that such a lot awaits them when journey's end is near."¹¹³

That reaches close to the point of moral exaltation in a judicial opinion.

The past few decades have witnessed the broadening interpretation by the Supreme Court of the United States of the "commerce" clause in such a manner as to permit the exercise of federal power in the fields of labor, social and economic legislation which theretofore had been considered to be the function of the respective states. It was recognized that many of these problems crossed state lines, had become essentially national in scope, and could be dealt with effectively only on a national basis. Of course there is such a thing as going too far. The problem for the future is to maintain the balances between individual freedom and social duty. That involves the judicious balancing of the forces of individual initiative and public regulation.

"The pressing problem," said Justice Hughes in 1920, and we certainly should hearken to his words today, "is how we are to adapt government to imperative needs and yet remain free. . . . Adaptation according to democratic principles, the growth and development in which democratic progress consists, must ever be the concern of those who know how to distinguish between what is vital and what is merely incidental and temporary."¹¹⁴

Administrative Agencies

The growth of regulatory legislation inevitably led to the establishment of administrative agencies to carry that legislation into effect. As Mr. Chief Justice Stone pointed out, of the changes in the law "destined to have the most far reaching consequences, one is the rise of administrative agencies, with the accompanying increase of their function and powers."¹¹⁵ Along with unreasonable delay in the courts and the expense and multiplicity of appeals the greatest dissatisfaction with the law comes from the way these agencies function and their methods of procedure.

I have not the fear expressed by Lord Hewart some years ago in his book *The New Despotism*, and reflected by many in this country, that the growth of administrative agencies will destroy the freedoms which Anglo-American law fought, through the centuries, to secure and to maintain. Administrative agencies have their appropriate place in our democratic form of government. Our task is to make sure that they

113. *Helvering v. Davis*, 301 U. S. 619, 641 (1937).

114. ADDRESS TO HARVARD LAW SCHOOL ALUMNI ASSOCIATION 31, 34 (June 21, 1920).

115. Stone, *Remarks*, 1 RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 144, 148 (1946).

function properly and the tests to be applied towards that end are the requirements of natural justice.

Much of the regulatory legislation that was enacted, of necessity, had to be more or less general or skeletal in nature. This resulted in the creation and growth of administrative agencies to carry into effect, by detailed rules and regulations, which could readily be changed or varied, the general requirements laid down by the legislature. However, one of the great difficulties was that some of these agencies were given not only quasi-legislative powers and powers of investigation and of prosecution but were also given powers of quasi-judicial determination. In a sense this violates what has been called in England, the "first and most fundamental principle of natural justice, namely, that a man may not be a judge in his own cause. . . . The litigant often feels that in the combination of functions within a single tribunal or agency, he has lost all opportunity to argue his case to an unbiased official and that he has been deprived of safeguards that he has been taught to revere."¹¹⁶

The Administrative Procedure Act of 1946, enacted on the recommendation of the Attorney General's Committee on Administrative Procedure, recognized this weakness and by the method of "internal separation" required that there be set up within each agency a group of semi-independent hearing officers called examiners, with security of tenure, to whom alone were to be assigned the initial adjudicating functions of the agency. This is an important step in the right direction and perhaps in the future a more radical change may have to be made.

Mr. Justice Hughes, himself, when Governor of New York, had taken the lead in the creation of a commission to regulate utilities and their rates, with authority to act free from hampering restrictions. In 1931, addressing the Federal Bar Association he said: "Experience, expertness and continuity of supervision, which could only be had by administrative agencies in a particular field, have come to be imperatively needed. But these new methods put us to new tests, and the serious question of the future is whether we have enough of the old spirit which gave us our institutions to save them from being overwhelmed."¹¹⁷

In the second *Morgan* case Mr. Chief Justice Hughes said:

"The vast expansion of this field of administrative regulation in response to the pressure of social needs is made possible under our system by adherence to the basic principle that the legislature shall appropriately determine the standards of administrative action and that in administrative proceedings of a quasi-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. These demand 'a fair and open hearing,'—essential alike

116. 63 L. Q. REV. 58 (1947).

117. N. Y. Times, Feb. 13, 1931; p. 18, col. 1. See HENDEL, CHARLES EVANS HUGHES AND THE SUPREME COURT 98 (1951).

to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process. Such a hearing has been described as an 'inexorable safeguard.'

“ . . .
 “The maintenance of proper standards on the part of administrative agencies in the performance of their quasi-judicial functions is of the highest importance and in no way cripples or embarrasses the exercise of their appropriate authority. On the contrary, it is in their manifest interest . . . if these multiplying agencies deemed to be necessary in our complex society are to serve the purpose for which they are created and endowed with vast powers, they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play.”¹¹⁸

What are these basic concepts of “fair play” as we call them or of the “principles of natural justice” as they are characterized in England. Concededly they may be summarized as notice of what the charge or complaint is, an opportunity to be heard, a fair, objective hearing, and a decision which as to questions of fact is supported by substantial evidence.¹¹⁹ I would include as an added requirement a statement of findings, however informally expressed, giving the reasons for the conclusion reached. It is the duty of the courts on review to see that these requirements of fair play or natural justice are complied with.

Notice and an opportunity to be heard: as far back as 1722 notice of a quasi-judicial proceeding was held to be indispensable. Sir John Fortescue said, “The laws of God and man both give the party an opportunity to make his defence. Even God himself did not pass sentence upon Adam before he was called upon to make his defence.”¹²⁰ A fair objective hearing: one who assumes to act in a judicial or quasi-judicial capacity “must act in good faith and fairly listen to both sides for that is a duty lying upon every one who decides anything.”¹²¹

Findings and conclusions supported as to the facts by substantial evidence: a multitude of decisions and a host of legal articles have been written on this subject. On questions of law, on questions of jurisdiction and of power, there should be full judicial review by the courts. It is with respect to judicial review on question of fact that the main problem arises. Concededly the courts should not substitute their judgment or opinion for that of the administrative agency. On the other hand, it is equally true that courts should have the power to override an arbitrary, capricious, unconscionable determination on the facts by any administrative agency. “Law and arbitrary power,” maintained

118. *Morgan v. United States*, 304 U. S. 1, 14-15, 22 (1938).

119. *Cf. Matter of 67 Liquor Shop Inc. v. O'Connell*, 273 App. Div. 68, 75 N. Y. S. 2d 411 (1st Dep't 1947).

120. *King v. Chancellor, et al.*, 1 Str. 557 (1723).

121. *Board of Education v. Rice*, [1911] A. C. 179, 182.

Edmund Burke, "are in eternal enmity." The entire history of Anglo-American law is the unceasing struggle against arbitrary power, from whatever source it came. The very essence of liberty is the subjection of all arbitrary methods to the rule of law.

The Administrative Procedure Act of 1946 lays down fundamental requirements of fair play in practice and procedure by administrative agencies. It was an important step in the right direction and should have its counterpart in the states. The act is by no means the last word on the subject and it should be supplemented by continuous, expert study of how the agencies proceed under it.¹²² One of its provisions is that the reviewing court shall set aside agency action "unsupported by substantial evidence" and that the court "shall review the whole record or such portions thereof as may be cited by any party. . . ."¹²³ Acts dealing with specific administrative agencies contain substantially similar provisions and certainly that should be the minimum standard for judicial review. I should have supposed that meant an examination by the reviewing court of the entire record (or such portions as the parties submitted to it) in order to determine whether there is room for a reasonable, legitimate difference of opinion concerning the findings of the agency; if there is, the judicial function comes to an end; if there is not, it is the right and the duty of the courts to set them aside. Chief Justice Hughes held that "substantial evidence" meant ". . . such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."¹²⁴

Two recent decisions of the Supreme Court of the United States are said to have opened "a new chapter in the long controversy concerning judicial control over administrative determinations."¹²⁵ If, as those decisions indicate, the scope of judicial review has been broadened by the Administrative Procedure Act and similar provisions in other statutes, that certainly is a step in the right direction. I had thought that the process of judicial review had always been what those two cases now say it is.¹²⁶ In any event the entire problem of practice and procedure

122. See Parker, *The Administrative Procedure Act: A Study in Overestimation*, 60 YALE L. J. 581 (1951); Rhyne, *The Erosion of the Administrative Procedure Act*, 37 A. B. A. J. 641 (1951).

123. 60 STAT. 243 (1946), 5 U. S. C. § 1009 (e) (Cum. Supp. 1950).

124. *Consolidated Edison Co. v. N. L. R. B.*, 305 U. S. 197, 229 (1938).

125. Jaffe, *Judicial Review: "Substantial Evidence on the Whole Record,"* 64 HARV. L. REV. 1233 (1951); *Universal Camera Corp. v. N. L. R. B.*, 340 U. S. 474 (1951); *N. L. R. B. v. Pittsburgh S. S. Co.*, 340 U. S. 498 (1951).

126. See *Matter of Stork Restaurant Inc. v. Boland*, 282 N. Y. 256, 26 N. E. 2d 247 (1940); Benjamin, *Judicial Review of Administrative Adjudication: Some Recent Decisions of the New York Court of Appeals*, 48 COL. L. REV. 1 (1948); Shientag, *The Human Element in Judicial and in Administrative Procedure*, in FIELD CENTENARY ESSAYS, 215-25

before administrative agencies and the judicial review of their determinations should be the subject of future study and consideration. We have by no means attained what is desirable or even essential in these matters. Perhaps an Administrative Court of Appeal should be set up. Why, for example, should the Legislature deprive the courts of power to deal with arbitrary or unconscionable penalties imposed by administrative agencies?¹²⁷ No man can possibly familiarize himself with the rules and regulations of an agency (and their interpretation), affecting his business. Do not the requirements of fair play and of natural justice require that, generally speaking a notice of violation or a desist order be given before a substantial penalty is imposed?¹²⁸

Finally, on this point, it should be emphasized that the personality of the administrative head plays a much greater part than does the personality of the judge in arriving at a conclusion, for the former has not had ingrained in him the judicial respect for fairness and above all of objectivity. The process of judging, to be sure, is not confined to courts, but whoever does the judging is subject to the fundamental requirements of natural justice.

As Mr. Justice Hughes said in an address to the American Law Institute:

"The controversies within the range of administrative action may be different and extremely important, and they may call for a particular type of experience and special methods of inquiry, but the spirit which should animate that action, if the administrative authority is to be properly exercised, must be the spirit of the just judge."¹²⁹

Writing not only as a judge, but as one who was the head of an important state administrative agency, I maintain that the fundamental doctrine of Anglo-American law—of the supremacy of the law—admits of no exception, not even for administrative agencies.

Preventive Law

Much is being said today about preventive law. In a measure most law is designed to be preventive in character—preventive in the sense

(1949); *cf.* *Matter of 54 Cafe & Restaurant v. O'Connell, et al.*, 274 App. Div. 428, 84 N. Y. S. 2d 729 (1st Dep't), *aff'd*, 298 N. Y. 883, 84 N. E. 2d 802 (1948); *Matter of Gonzalez v. O'Connell*, 278 App. Div. 463, 105 N. Y. S. 2d 808 (1st Dep't), *aff'd*, 303 N. Y. 632, 101 N. E. 2d 705 (1951).

127. *Matter of Sagos v. O'Connell, et al.*, 276 App. Div. 157, 93 N. Y. S. 2d 104 (1st Dep't 1949), *rev'd*, 301 N. Y. 212, 93 N. E. 2d 644 (1950).

128. *Cf.* *Matter of Katz's Delicatessen v. O'Connell, et al.*, 277 App. Div. 363, 100 N. Y. S. 2d 385 (1st Dep't 1950), *rev'd*, 302 N. Y. 286, 97 N. E. 2d 905 (1951).

129. N. Y. Times, May 13, 1938, p. 8, col. 1. See HENDEL, CHARLES EVANS HUGHES AND THE SUPREME COURT 113 (1951).

that it serves notice of what society requires of the individual in his various relationships with others and with the government. It is a field which will be more fully explored in the future for it has great possibilities. I can deal with it only rather sketchily.

Preventive law may be stimulated in a number of ways. The first is by education—to endeavor to make the basic principles of law understood by laymen so that primarily they may either avoid trouble or know enough to obtain legal advice before they actually get into trouble. This may be done, for example, by elementary instruction in law in the high schools and colleges, and by lectures, under the auspices of the bar associations, on law for laymen as the medical societies do in their field. In the second place the bar associations may help by encouraging and enabling a person to obtain preventive legal advice on terms he can afford. The Lawyers Referral Service is doing excellent work along these lines. The Legal Aid Society, in extending help to those who are unable to pay at all, is discharging an important function.

In the third place there are specific preventive provisions in the law itself, such as the remedy of declaratory judgment, the use of the injunction, the requirements for licenses of various kinds, the requirements of the Securities and Exchange Commission before the issuance of securities, and the rules of the Federal Trade Commission.

The courts themselves can do much more than they are now doing in this field. We have pre-trial calendars in the civil courts, and much work of a preventive nature is done in the Domestic Relations Court, the Home Term branch of the Magistrate's Court, under the Youthful Offenders Procedure and by means of the probation and parole system generally. There should be something in the nature of pre-trial conference in matrimonial cases in the Supreme Court; the custody of children should be dealt with not as a legal problem but as one of the most sensitive problems in human relations. Because man is created in the image of God he can never be reduced to the level of a thing or chattel. A child is not a commodity or an article of commerce. It requires no amendment to the law to authorize social investigations or psychiatric examinations in custody cases in the Supreme Court. The power is there; the facilities are lacking, unless the parties have enough funds to pay for the necessary studies. The Supreme Court, if it is to retain jurisdiction in matrimonial cases and I believe it should, ought to be given such facilities. Until that is done the court is always free to call on other governmental agencies and social welfare organizations for assistance and I have never found lack of cooperation from those quarters.

Forces Contributing to the Progressive Development of the Law

Among the agencies which are contributing much to the steady, scientific development of the law and enabling it to meet social and economic needs are the university law schools, with their increasing emphasis on the social implications of the law and its kinship with the other sciences, physical and social. The mighty river of the law must be fed by many tributary streams. There is the work of the legal scholars, the students of jurisprudence whose research, textbooks, and articles in legal periodicals, have made a marked beneficial impact on the law. As Justice Hughes pointed out, no judge will finish work on an important or novel question of law without consulting the pertinent articles and notes in the law reviews, some of which have made legal history.¹³⁰

The last few decades have witnessed the growth of legal research and to some extent, although not nearly what it should be, of clinical research and surveys in the law—that is, the study of the law and its procedure in action; new techniques to accomplish this will have to be developed. The educational foundations in this country have commenced to take an interest in legal research and to manifest, by increasingly substantial contributions, an appreciation of its value and importance. The establishment of law centers and of institutes of comparative law will do much for the healthy expansion and growth of our law.¹³¹ Mention should also be made of the accomplishments of the American Law Institute in the Restatement of the Law, of the work of the Commissioners on Uniform State Laws,¹³² the creation of Legislative Bill Drafting Bureaus,

130. “. . . there has been a growing regard for these ‘notes,’ as helpful analyses of decisions, while the articles contributed to the reviews by eminent legal experts have given lawyers and judges the benefit of wide research and exploration, not infrequently blazing new trails in preference to old but less desirable paths. It is not too much to say that, in confronting any serious problem, a wide-awake and careful judge will at once look to see if the subject has been discussed, or the authorities collated and analyzed, in a good law periodical.” Charles Evans Hughes in the Foreword to 50 *YALE L. J.* 737 (1941). “Where shall we turn for the statement of the law, for the patient research of the specialist, for the condensation of material, the philosophical analysis, the detection of departures and trends? With rare exceptions, we must look to the faculties of our law schools, to the little groups of experts, each having a definite field. I am far from suggesting the infallibility of law professors. Their feet, I think both judges and practicing lawyers sometimes feel, are not always on the earth and their voices are not a harmonious chorus. If we formed a high court from among the best of them they would equally need their critics, and doubtless we should read with unregenerate glee the dissenting opinions which would then flourish in a new freedom.” CHARLES EVANS HUGHES, ADDRESS TO HARVARD LAW SCHOOL ALUMNI ASSOCIATION 30 (June 21, 1920).

131. “The time has gone by when it was fashionable to treat foreign systems as Mr. Pecksniff stigmatized sirens,—‘fabulous animals (pagan, I regret to say).’” Winfield, *The Law of Tort*, 51 *L. Q. REV.* 249, 262 (1935).

132. Mention should be made, for example, of the Uniform Commercial Code, the final

the educational activities of the various Bar Associations and the excellent pioneer work of the Practising Law Institute in the field of Post-Admission Legal Education.

Finally, and perhaps most important, is the step taken in this state in 1934 by the creation of the Law Revision Commission and of the Judicial Council. The Judicial Council has succeeded in securing many helpful changes in practice and procedure. The work of the Law Revision Commission has been especially valuable. Despite its meager appropriation, which should be substantially increased, its recommendations, supported by thorough, expert research studies, have brought about important reforms in the law, too numerous even for mention here.¹³³ In the neighborhood of one hundred and fifty laws of varying degrees of importance have been enacted as the result of its recommendations. These two permanent state agencies set up to make a continuing, expert study of the law and its procedure have fully justified their existence. They have counteracted the tendency to lethargy and lack of initiative; they have served as a corrective to ill-informed and misdirected attempts at reform. One weakness perhaps is that, unlike other departments of the state government, they are not in a position to fight for the adoption of their recommendations. They present them to the Legislature and make out the best case they can for them. They have however, with the cooperation of committees of the various bar associations, been on the whole quite successful; we look to increased effort on the part of those committees in the future. All of these forces, working together, will do much to mould the law of the future along the proper lines and make it a living organism, sensitive to the ideals, the aspirations and the social values of the times.

Conclusion

The pulse of life beats strongly in the law. The stream of progress has, for the most part, continued to flow steadily. A deep-rooted sense of tradition has been successfully combined with a flexibility and a capacity for growth that have enabled the law to absorb fresh ideas into its bloodstream.

Justice in the courts, administered without favor by men and women conspicuous for patience, probity, ability and independence—that is

draft of which was approved by the Commissioners on Uniform State Laws and the American Law Institute on September 15, 1951. This Code, it is expected, will be introduced in a number of state legislatures (including New York) early in 1952.

133. See Shientag, *A Ministry of Justice in Action, The Work of the New York State Law Revision Commission*, 22 CORNELL L. Q. 183 (1937); MacDonald, *The New York State Law Revision Commission*, MCKINNEY'S SESSION LAWS OF NEW YORK No. 6, XXXIX (1949); *The New York State Law Revision Commission: A Legislative Aid*, 35 A. B. A. J. 512 (1949).

the best assurance of respect for and confidence in our free democratic institutions. Primarily it is the obligation of the Bar to educate public opinion concerning the problems confronting the law and its administration.

It is a satisfaction to look back on the long history of the law and to find in it, in such a marked degree, both stability and moral fulfillment. But as Mr. Justice Hughes pointed out: "Gratifying as is the record of achievement, it would be extreme folly to engage in mere laudation or to surrender to the enticing delusion of a thoughtless optimism." De Tocqueville said, "I should have loved freedom, I believe, at all times, but in the times in which we live, I am ready to worship it." What shall we say and do to maintain that freedom in our democracy, in these days of tension, insecurity and peril!

The test of any good system of human law is not finality; it is progress. A disposition to preserve, a determination and an ability to improve, taken together, will make for continued progress in the law along the lines of natural justice and of social and economic needs. Yes, the stream of progress in the law continues to flow steadily. It is for you my brethren of the Bar to keep that stream fresh and clear and undefiled.