Tulsa Law Review

Volume 2 | Issue 2

1965

The Judge

James C. Thomas

TULSA LAW JOURNAL

VOLUME 2 JUNE, 1965 NUMBER 2

THE JUDGE

James C. Thomas*

Much has been written on the subject—The Judge. Even with all the time and effort represented by the voluminous-available material, do we really understand this creature? Instead of understanding, we have misunderstanding, for the explanation or description varies depending on the views of the writer. We find an array of articles and books on the subject, ranging from a general to a specific discussion. And in between, we find biographies which might be classed as both general and specific.

With this article, I add to this reservoir of material. But I hasten to say that I do not profess to be furnishing the needed understanding of the Judge. With both time and space budgeted (which is always the case in law review writing), it is impossible to do the subject justice. Especially is this true when a general approach is followed. What I do seek, through this article, is to spark, in the reader's mind, a deeper interest in the subject. By generating this interest, perhaps we will come to understand better the man called *The Judge.*

Before the subject can be comprehended, we must dispel certain aberrant thoughts and ideas. Included among these aberrations is the idea that named persons such as Marshall, Holmes, Shaw and others have individually reformed or made law. After identifying the judge, we must then examine his functions, powers, influence, and qualifications. In this paper, I discuss and attempt to show the relationship of these various factors. Finally, I discuss what can be considered the most serious aberration, that is, our idea of the responsibilities of the judge. There is a tendency to add to these responsibilities by requiring that the individual, holding the office of judge, set a good example in his daily life. Responsibilities imposed on a judge must be on the office and not the individual; otherwise we jeopardize judicial independence.

My primary purpose, being to generate new and original thought on the subject, is not lost even should the reader think some of my positions wrong. Being wrong is not disastrous as long as the writer is clearly wrong.

I. WHO IS THE JUDGE?

A cursory examination of the "Index to Legal Periodicals" and bibliographies on the subject will quickly impress upon one's mind the idea that many writers attempt to answer the question—Who is

*Mr. Thomas received his B.S. in 1952, and his LL.B. in 1957, from the University of Alabama. In 1964 he received his LL.M. from the New York University School of Law. He is a member of the Alabama Bar Associaiton, and is presently Associate Professor of Law at the University of Tulsa.

the Judge? — by focusing their discussion on a *named* Judge. Such an approach could well be rejected as being an inadequate answer. In fact, identification through works of outstanding individual jurists might be harmful to later judges. Such was suggested by Jerome Frank after his delivery of an eulogy to Judge Learned Hand. He stated:

> A great man, such as Learned Hand, we should prize. Yet — as I'm sure he would tell you — you should beware lest you do him an ill-service by so venerating him that he will stand in the way of those who come after him, paralyzing them through awe of his achievements.[1]

The Judge is a man of many faces; a man with no personal identity. He is the man who selects words of judicial opinions. He is the man who injects a moral fiber into decisions as his part in the moralization of American life.[2] He is the man who makes the law.[3] He is the man who finds the law which lay dormant in the sea of custom and the common law.[4] He is the man who acts the part of an umpire in the game called advocacy.[5] He is an instrument through which the legislative or Congressional policy is carried out.[6] He is a man who has been given an opportunity to perform a noble task and to contribute service to his country.[7] And finally he is a mortal; a human being — subject to all the errors of the imperfect soul.

With this divergent view of *the Judge,* why must we persist in making personal identifications? Chief Justice John Marshall has been called — "the expounder of our Constitution." *He* (personal identity) was said to favor a strong central government in order to develop a strong national economy and to obtain and preserve the respect of the world. "All of these desired results *he* achieved through decision after

[1] KRISTEIN, A MAN'S REACH, THE PHILOSOPHY OF JUDGE JEROME FRANK 70 (1965). — I don't suggest that we cease writing about individual judges; such writings provide a reservoir of interesting and valuable reading.

[2] I don't intend to get into the controversy concerning the moral decision, but assuming that there is an element of morality in judicial decisions, one is not finished. He must then inquire of the source of this morality — the judge's standard or the community's standard. For a review see: Shapiro, *Morals and the Courts: The Reluctant Crusaders,* 45 MINN. L. REV. 897 (1961).

[3] The role of the judge has been so described by some writers. See BRUCE, THE AMERICAN JUDGE (1924); GRAY, THE NATURE AND SOURCES OF THE LAW (1909); FRANK, LAW AND THE MODERN MIND (6th ed. 1949).

[4] Bl. Comm. *69 (Cooley's ed. 1884) — "(Judges) are the depositaries of the laws . . . ."

[5] In our adversary system the theory is that "truth" can best be determined as a result of two equal offensive forces. Jerome Frank, on the other hand, compares this system with the old physical fight. Under his "fight theory," it was argued that the adversary system did not insure that all pertinent facts would be made available to the tribunal. See FRANK, COURTS ON TRIAL, 80-85 (2nd ed. 1950). As for the judge acting as an umpire, Mr. Justice Frankfurter has said: "(J)udges are not referees at prize fights but functionaries of justice." *Johnson v. U.S.,* 333 U.S. 46, 54 (1948).

[6] This is identified as a separate role because I believe it has a special significance in the public law field. See: Cox, *Reflection Upon Labor Arbitration,* 72 HARV. L. REV. 1482, 1486 (1959). But then see: Sullivan, *FPC Jurisdiction Over Commingled Gas,* 30 GEO. WASH. L. REV. 638, 642 (1962).

[7] See remarks of Mr. Chief Justice Warren — JONES, CHIEF JUSTICE JOHN MARSHALL, IX (1956).

decision until they became imbedded in our law."[8] Why? Why did Chief Justice Warren write as if these things were personal achievements of John Marshall, the individual? He, the individual, accomplished nothing through the judicial decision he wrote. It was *The Judge* — the faceless human being — that deserves credit for these attainments. For sure, Chief Justice Marshall does deserve praise, but this laudation should be based on his carrying out the functions and obligations attached to his office.[9] It might well be said that Marshall was a product of the times. There are, today, an untold number of judges who look upon their office with the same responsibility and dedication that Marshall looked upon his. The difference is only time — from a formative period to a more stable period.

Other judges have been eulogized for, what writers inaccurately term, their personal accomplishments. For example, Professor Levy writes: "More than any other judicial figure, Massachusetts' Lemuel Shaw deserves credit for formulating the fundamentals of American railroad law."[10] Then we see Professor Reid referring to Judge Henry Brannon and Judge Marmaduke Dent as the shapers of West Virginia law.[11] Professor Reid also writes of Justice Charles Cogswell Doe of the New Hampshire Supreme Judicial Court. "Justice Doe," said Professor Reid, "is remembered as one of the great reformers of American law."[12] Each of these judges deserves the tribute given to them, but not for being reformers or shapers of the law. A more deserving and more accurate acclamation would be that they each efficiently and courageously performed their functions as a *judge.* Reforms, if there are any, are accomplished by the judicial office — given life by the judge; they are not accomplished by the named judge as an individual. As individuals, these named persons possess no power. The power is derived from the judicial office and exercised by the individual when and only when he is clothed with his judicial attire of authority. And once he adorns himself with this judicial attire, he loses his identity as an individual. He is converted into *The Judge.*

Another example of how writers focus on the named individual can be seen in writings about Judge Isaac Parker.[13] It has been said that

[8] JONES, *op. cit. supra* note 7 at XV, remarks of Mr. Chief Justice Warren.

[9] See JONES, *op. cit. supra* at 78 where Professor Fairman noted that the Supreme Court justices, prior to Marshall, badly needed direction, purpose, method and a sense of vocation. "When Marshall came to the Court it was a time — high time — for greatness."

[10] Levy, *Chief Justice Shaw, and the Formative Period of American Railroad Law,* 51 COLUM. L. REV. 327 (1951). See also: Levy, *Shaw — America's Greatest Magistrate,* 7 VILL. L. REV. 389 (1962).

[11] Reid, *Henry Brannon and Marmaduke Dent: The Shapers of W. Va. Law,* 65 W. VA. L. REV. 19, 99 (1963).

[12] Reid, *The Reformer and the Precision: A Study in Judicial Attitudes,* 12 JO. L. ED. 157 (1959) — In this article, Prof. Reid compares the attitudes of two judicial colleagues — Charles Doe and Alonzo Carpenter. Explaining the basic differences between these jurists, we see the statement: "Judge Carpenter undertook to do no more than to interpret the law; Judge Doe, if he thought the occasion justified it, did not scruple to alter it, abrogate it, or add to it." p. 157.

[13] HARRINGTON, HANGING JUDGE (1951); SHIRLEY, LAW WEST OF FORT SMITH (1957).

Judge Parker sentenced 160 persons to be hanged, of which 79 were actually hanged.[14] From this he gained the reputation — the hanging judge. Those individuals who were convicted of murder generally heard these words:

> "I sentence you, _____, to be hanged by the neck until dead. And may God, whose laws you have broken . . . have mercy on your souls."[15]

Reading this pronouncement, one must inquire as to the referent of the word "I". Which is more accurate: "I, Isaac Parker," or "I, the judge?" Surely no one would say that Parker, the individual, sentenced anyone to be hanged. This would be a great disservice to the man. Then, if we don't charge the judge, as an individual, for the hangings, why should we pay tribute to a judge, as an individual, for reforms accomplished through the powers of the judicial office? We must learn to praise or criticize the proper act. And this act always remains the same. Is the individual properly exercising the powers and recognizing the obligations of the judicial office? One would never say that a corporation's president made a certain profit for the company. Instead, one would say that the corporation, under the leadership of the president, made a certain profit. It's the same thing with a judge.

Speaking again of Judge Parker, he would never have said that he, the individual, ordered the hangings. He recognized that his power was only that derived from the instrument of a court of law. Without any personal identification of the Judge, Parker said:

> The Court is but the humble instrument to aid in the execution of that divine justice which has ever decided that he who takes what he cannot return — human life — shall lose his own.[16]

To Parker, the obligation of sentencing belonged to the court. Likewise, any deserving tribute or praise belonged to the court. "We are proud of the record of *the court* at Ft. Smith," said Parker, simply, "we believe we have checked the flood of crime."[17]

Disposing of the question of personal identity, we again ask: Who is the judge? "A judge," answers Piero Calamandrei, "is a lawyer mellowed and purified by age, a man from whom the years have taken the illusions, exaggerations, prejudices, and perhaps even the impulsive generosity of youth. The judge is what remains after there have been removed from the lawyer all those exterior virtues which the crowd admires."[18] Even this well phrased statement does not adequately answer the question. Conclude then that there is no precise identification to be found. In order for one to intelligently understand *the judge,* he must examine many factors including — the functions and powers of the judge; the influence of the judge; the characteristics and qualifications of the

[14] HARRINGTON, *op. cit. supra,* note 13 at 58.

[15] HARRINGTON, *op. cit. supra,* note 13 at 30 — the reason why the word "souls" is plural is because, on occasions, there were multiple sentencings. It was reported that on Sept. 3, 1875, six men were hanged together. p. 30.

[16] HARRINGTON, *op. cit. supra,* note 13 at 38.

[17] HARRINGTON, *op. cit. supra,* note 13 at 59.

[18] CALAMANDREI, EULOGY OF JUDGES, 17 (2nd. ed. 1956, tr. by Adams and Phillips) — This book, which is only 88 pages long, deserves to be read by everyone interested in the law.

judge; and the responsibilities and obligations of the judge.

II. WHAT ARE THE FUNCTIONS AND POWERS OF THE JUDGE?

As I thought about this section, it became apparent that it would be most difficult, if not impossible, to separate the functions of a judge from the powers of a judge. Powers of a judge can only be activated when the judicial functions are performed. Actually, this says nothing more than what was previously emphasized. The powers of a judge are derived from his office.[19] When the judge walks out of his official station — the court — he walks out stripped of his judicial power. He again becomes an individual. True, that while in this individual capacity, he may carry wtth his a certain degree of prestige and influence, yet he carries no power.

Since these factors cannot be separated, we obviously must examine the functions of the judge. Through such an examination we shall come to appreciate the scope and limits of his power. With this design, should a discussion of the functions of the trial judge be disjoined from those of the appellate judge? Are their functions so far apart? Where necessary, a separation will be made; however, I suggest that they each are reaching for a common goal.

As a common goal, both the trial judge and the appellate judge seek to serve the cause of justice. But what is justice?[20] The answer to this question must come from the way it is used.[21] And in this article, the term "justice" is used to indicate an equal application of the law. We can then say that a common function of the trial judge and the appellate judge is to insure parties an equal application of the law. This is not to say that such equality is accomplished in all cases;[22] it is only to identify

There are differences, however, between functions of the trial judge

[19] U. S. CONST. ART. III, sec. 1 — "The judicial power of the United States shall be vested in one Supreme Court . . ." Under this provision, it is clear that power is vested in the Court and not the judge as an individual. The Judge merely symbolizes the judiciary. He acts as a conduit through which the powers of the Court are channeled.

[20] This question opens up a vast sea of exploration. As stated by Hans Kelsen: "No other question has been discussed so passionately; no other question has caused so much precious blood and so many bitter tears to be shed; no other question has been the object of so much extensive thinking by the most illustrious thinkers from Plato to Kant; and yet, this question is today as unanswered as it ever was." KELSEN, WHAT IS JUSTICE 1 (1957).

[21] KELSEN, *op. cit. supra* note 20 at 24.

[22] See LASKI, THE STATE IN THEORY AND PRACTICE (1935) as cited in AUERBACH, GARRISON, HURST & MERMEN, THE LEGAL PROCESS 73 (1961) — "Nor must we forget the fact that wealth is a decisive factor in the power to take advantage of the opportunities the law affords its citizens to protect their rights." This statement brings to mind the remark we have all heard — "Capital punishment is reserved to the poor." But see: BRUCE, THE AMERICAN JUDGE, 28 (1924). Professor Bruce offers an example where an equal application of the law by a judge results in inequality. For this, he blames the legislature. A rich man and a poor man are fined the same amount for a traffic violation. This equal application was described by Judge Parker as follows: "None are so high in station as to be above it (law), and none so low as to be beyond it . . . As does the light of Heaven, it blesses rich and poor alike, and if enforced without fear, favor or affection . . . every man can feel that there is none to molest him, or make him afraid." HARRINGTON, HANGING JUDGE, 63 (1951).

a function. A failure here should not bring criticism to *the judge*, the faceless — unidentifiable person described above. It should be directed to the individual for failing to carry out the functions of his office.

and functions of the appellate judge. Trial judges are not dealing with facts sterilized by reduction to affidavit and memorandum form. They hear and observe a re-enactment of chunks of life from the lips of witnesses. On the other hand, the appellate judge works in the calm of a library — free from the strife and emotions of the trial.[23] His hearing the live testimony of witnesses; his feeling the emotions of the parties; and his observations are all sources of power held by a trial judge. Because of his closeness to the trial, the trial judge's finding of facts is rarely challenged by appellate courts.[24] If we conclude that this is power, we then must inquire — what kind of power? How much power? This power can be the power of life or death; the difference between wealth or bankruptcy; or a change from scorn and ridicule to a position of equality.

Fact finding, and that is what we are speaking of, is a tremendous source of power.[25] But only through an examination of the importance of facts can this scope of power be appreciated. First of all, the rights and obligations of the party litigants will be determined, not necessarily by the true facts of the case but rather by the facts as seen by the trial judge.[26] Facts can send an innocent man to his death. Facts can release a guilty man from jail. Facts can impose an enormous money judgment on one guilty of no wrong. And facts can cause scorn by erroneously showing truth in a libel action. This then illustrates the magnitude of the fact-finding power — held by the trial judge.[27]

To a certain extent the trial court's power is limited through the review procedure. But this review procedure, a function of the appellate court, is also a source of power. Assuming (for purposes of this paper only) that none of the findings of fact are challenged by the appellate court, we then ask: What is the review power? An answer to this question can come only through an examination of the functions. So what are the functions? One of the primary appellate functions is to see if the trial court decision is in accordance with the law. In making this determination, the judge will construe a statute if one is involved and he will examine the decision in light of legal precedent or *stare decisis*. It is through

[23] BOTEIN, TRIAL JUDGE 129 (1952); FRANK, COURTS ON TRIAL 152 (2nd ed. 1950).

[24] FRANK, COURTS ON TRIAL 48 (2nd ed. 1950).

[25] Judge Jerome Frank says that facts as found by a trial court or a jury are subjective. They are subjective because a witnesses statement becomes a pertinent fact only if believed.
FRANK, COURTS ON TRIAL 22, 150 (2nd ed. 1950).

[26] FRANK, *op. cit. supra* note 24 at 167. — I might add that the responsibility of developing facts to best insure "truth" rests with lawyers and not the judge.

[27] I have purposely omitted any discussion of the fact-finding role of the jury. For a critical comment about the jury see: FRANK, *op. cit. supra* note 24 at 110, 120, 132. Frank offers an alternative to the abolishment of juries — the special verdict — see p. 141. Also see: Goodhart, *The Judge, the Jury and the Lawyer* 12 (1964) John F. Murry Endowment Lecture, College of Law, The University of Iowa).

this doctrine that we truly see the appellate powers in operation.

There is nothing mystifying about the powers of the appellate judge under the doctrine of *stare decisis.* It is a power of manipulation,[28] but a rational or logical manipulation. In order to be rational or logical, the manipulation must occur within the framework of legal precedent. This is necessary if we are to remain consistent with the definition of "justice" — equal application of the law. One will no doubt ask: How can you have manipulation and at the same time have any equal application? The solution is simple but it is only simple if one understands the doctrine of *stare decisis.*

Reference to *stare decisis* stands for the theory that courts will stand by decisions and not disturb settled matters. Under this doctrine a legal rule handed down in one case will be applied in all future cases that are similar in nature or that have the same factual pattern.[29] But one must explore further. What is a legal rule under this doctrine? What facts must be examined to determine if two cases are similar? Before attempting to answer these questions, certain observations should be made. First, as will be seen in the discussion, these two questions somewhat overlap. Second, and more important, we are not speaking of a mechanical operation. There is much more to the doctrine of *stare decisis* than finding a legal rule and mechanically applying it to a factual problem.[30]

When we say that a legal rule of one case will be applied to all future cases with the same or similar factual patterns, we mean that the holding of a case that carries with it the *weight of precedent* will be so applied. It is this holding, having the weight of precedent, that is our legal rule under the doctrine of *stare decisis.* Thus, the next logical question is: When does a holding have the weight of precedent? For a holding to have the weight of precedent it must be the decision of a court in the same jurisdiction. Under this theory then a decision handed down by the Supreme Court of Oklahoma would be binding only on the lower courts of Oklahoma. In other jurisdictions such a decision, at the most, would only be persuasive.[31]

[28] I urge the reader not to take this word "manipulation" to mean that law is arbitrary. Nor would I prescribe to any idea that a judicial decision has no rational basis. But according to Judge Hutcheson a trial judge decides a case on the basis of a feeling or hunch. Hutcheson, *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decisions,* 14 CORN. L. Q. 274 (1929). For a discussion of this point see: FRANK, *op. cit. supra* note 24 at 170.

[29] From this, one again sees the importance of facts.

[30] A criticism of the school of analytical jurisprudence is that it seeks to mechanically apply legal rules. Courts, suggests Prof. Hart, are guilty of formalism or literalism when they make an excessive use of analytical methods. Such formalism or mechanicalism casts the law into a sea of uncertainty. And as Professor Hart states: "Decisions made in a fashion as blind as this . . . scarcely deserve the name of decisions; we might as well toss a penny in applying a rule of law." Hart, *Positivism and the Separation of Law and Morals,* 71 HARV. L. REV. 593, 610-611 (1958).

[31] This sheds light on the power of a judge. We might say that the power of a judge in Oklahoma is limited by territorial boundaries. To avoid a discussion of cases where a judicial decision in one state can affect the rights and obligations of persons in other states, I restrict this limitation of power to the doctrine of *stare decisis.*

Actually, this discussion falls short of a complete explanation of *stare decisis* and how it relates to the power of the judge. I explained only the circumstances under which a judicial decision would carry the weight of precedent. The more important question is: How do we determine the holding of a case? When this question is answered, one will see how the appellate judge's manipulation power works.

How do you determine the rule of a case? Many legal scholars have attempted to come up with the answer;[32] however, in my opinion, Professor Goodhart offers the most workable solution.[33] According to Professor Goodhart, the first step in determining the *ratio decidendi* or holding of a case is to determine if the opinion was rendered by the judge and then to determine *if the opinion was necessary for the decision of a particular case.* Now stated in the most simple terms, this *ratio decidendi* of the case is determined by taking the material facts of the case and then applying the naked decision to these facts. If we stop here, the solution is too simple. We must inquire of the material facts. How do we determine what facts are material? A lawyer's value judgment as to what facts are material is of no concern. It is the judge who decides the case. And "(t)he judge... reaches a conclusion upon the facts *as he sees them.*"[34] Our task in analyzing a case is to state those material facts upon which the judge's conclusion is based. An aid for determining these material facts was discussed by Professor Goodhart. Briefly summarized, he sugests that if a judge specifically states or impliedly treats a fact as material or immaterial then we must accept them as such.[35] And, declares Professor Goodhart, all facts of person, time, place, kind and amount are immaterial unless stated to be material.

Through the use of the theory offered by Professor Goodhart, the judge can follow prior decisions, distinguish prior decisions, or reject prior decisions. When the judge applies or distinguishes prior decisions, he is manipulating. Perhaps an example would clarify this. In our example the plaintiff files suit against the defendant in an attempt to recover damages for injuries received as a result of negligence on the part of defendant's agent. The facts showed that the plaintiff was also an employee of defendant. On the day of the accident, the plaintiff and the negligent servant had loaded a wagon and were making deliveries. The employee drove the wagon negligently, injurying his co-worker, the plaintiff.[36] As lawyer for the plaintiff, we find that there are no cases

[32] For a good survey of the writings on this question see: AUERBACH, *op. cit. supra* note 22 at 43-65.

[33] Professor Goodhart's theory on how to determine the rule, holding on *ratio decidendi* of a case can be found in: GOODHART, ESSAYS IN JURISPRUDENCE AND THE COMMON LAW, 1-26 (1931), and VANDERBILT, STUDYING LAW, 493-525 (1945).

[34] VANDERBILT, *op. cit. supra,* note 33 at 505. (Emphasis belongs to the author).

[35] VANDERBILT, *op. cit. supra,* at 523-525. On these pages, Professor Goodhart enumerates the rules of analysis. He makes one thing clear and that is — the rule of a case is not found in the reasons given in the opinion and it is not the rule of law set forth in the opinion. Judge Frank's theory of fact finding (note 25 *supra*) becomes quite pertinent.

[36] This factual pattern was taken from the case, *Priestley v. Fowler,* 3 Mees & Wels. 1 (Exchequer 1837), as reported in AUERBACH, *op. cit. supra,* note 22 at 15.

directly on point, but we do find many cases dealing with the liability of a principal for the acts of his agent. One of these principal-agent cases might be reduced to Professor Goodhart's theory as follows:[37]

Facts.

1. Plaintiff was injured by employee of defendant.
2. Employee was acting within the line and scope of his authority.
3. Employee was negligent.

Conclusion.

Defendant is liable to plaintiff.

By analyzing one of the early agency cases in this fashion, we come up with the rule that: A principal is liable for the negligence of his agent who is acting within the line and scope of his authority. As you can see, all that has been done in formulating this legal rule is to restate the material facts and the conclusion. Everything else in the opinion is either reasoning or *dicta* and carries no weight of precedent. At the most, this reasoning and *dicta* is persuasive and not binding.

Going back to our example, we will attempt to show that the agency case is binding precedent. The example case could be summarized to show its similarity with the agency case.

Facts.

1. Plaintiff was injured by employee of defendant.
2. Employee was acting within the line and scope of his authority.
3. Employee was negligent.

If we stop here, it is obvious that the material facts in the example are identical with the facts in the agency case. Thus, under *stare decisis,* the plaintiff must recover; however, the judge, using his manipulation power, adds another material fact:

4. Plaintiff was also an employee of defendant.

Conclusion.

Defendant is not liable to plaintiff.

By adding one fact, the judge has developed a new rule. While so doing, he has remained consistent with the doctrine of *stare decisis.* Instead of the well established principal-agent rule, we see the development of the fellow-servant rule. An employer is not liable to an employee injured through the negligence of a fellow-employee. Again, you can see how the rule is established by restating the conclusion of the case and the material facts. Now, under the doctrine of *stare decisis,* we must apply this rule, in all future cases with the same factual pattern. But through the power of the judge, these rules can be expanded, contracted, or ignored merely by manipulating the facts. The more material facts found, the narrower the rule. The fewer material facts, the broader the rule. For instance: If a later judge examined the example case above, he might say that the wagon was a material fact. By so doing our fellow-servant rule would have been: An employer is not liable to an employee injured through

[37] For similar examples see Professor Goodhart's theory — VANDERBILT, *op. cit. supra,* note 33 at 513-514.

the negligent driving of a wagon by a fellow servant. Now this case, under the doctrine of *stare decisis,* would be applied only in future cases that involved a wagon. This would, of course, be ridiculous, but it makes the point. The judge has extreme power — manipulation power.

With the limitations imposed on me by time and space, it is impossible to examine all the functions of the judge. And this would not be too important here. What is important is that it be recognized that all powers come from functions. In criminal cases, the judge, imposing a sentence on a convicted murderer, is exercising a function and at the same time exerting his power. Illustrative of this is the reported argument between Judge Parker and the Bishop:

> The Bishop asserted that his power was greater because, while the Judge could merely say, "you be hanged," the Bishop could say, "you be damned." The Judge retorted, "yes, but when I say 'you be hanged,' you are hanged."[38]

As a final illustration of the power of the judge, one might consider contempt proceedings. Many lawyers at one time or another have heard the words of a judge: "If you say one more word...I will hold you in contempt." Contempt power is held and used by the judge to preserve the dignity of his office. It is also used to insure a calm and fair trial, free from outside pressures and influences.[39] This power, however, is not to be used as a shield to the individual. As the Court stated in *Craig v. Harney:*[40]

> (T)he law of contempt is not made for the protection of judges who may be sensitive to the winds of public opinion. Judges are supposed to be men of fortitude, able to thrive in a hardy climate.

When contempt power is used to preserve the office it is immense. Speaking of this power, one writer, who was also a trial judge, observed:

> In his courtroom he has greater power than the President. A bystander may with impunity hurl an epithet at the President. Should anyone so address a judge in the courtroom, he has the power to fine or imprison him for contempt of court.[41]

The power of the judge is pervasive and thus, it cannot be neatly isolated in a single section of a paper written on *The Judge.* As you will see in the next sections of this paper, one is forced to appreciate the power in any discussion of the influence, characteristics and responsi-

[38] SHIRLEY, LAW WEST OF FORT SMITH, 139 (1957).

[39] Craig v. Harney, 331 U.S. 367, 394 (1947) (J. Jackson dissenting).

[40] *Id.* at 376 — The case involved a contempt action against a newspaper man who had written critical articles about a judge. In reversing the contempt, the Court found that the articles were no direct threat to the judiciary. This case will be discussed in more detail later in the paper.

[41] BOTEIN, TRIAL JUDGE, 129 (1952). One might take issue with Judge Botein when he says that the power of a judge is greater than the power of the president. Especially is this true in light of what President Andrew Jackson was reported to have said. In the case, *Worcester v. State of Ga.,* 31 U.S. 515 (6 Pet. 1832), the Court in an opinion written by Marshall held that the Federal government had exclusive jurisdiction over Indian lands and that the State of Georgia had no authority to prosecute a missionary who was living on this Indian land. The State refused to obey the Court and this refusal was supported by President Jackson. He declared: "John Marshall has made his decision, now let him enforce it." JAMES, ANDREW JACKSON — PORTRAIT OF A PRESIDENT, 304 (1937).

bilities of the judge.

III. THE JUDGE'S INFLUENCE

From the start, let me make it clear that, in this section of the paper, we are not to be concerned with what influences the judge; we are concerned only with the influence of the judge. Judges do represent an influencing factor in our way of life, our custom, our economy, our governmental structure, and even our morals. And the scope of this influence depends on the boldness of the judge and his acceptance of the responsibilities and obligations of the office. If we recognize the power of the judge, we are forced to appreciate his influence. In fact, it is reasonable to say that power is influence. The power of force, the power of friendship, the power of fairness will all have influence on the recipient of the power.

Most writers would agree that judges do influence the development of our society. Their explanation of this might be that judges legislate. The problem, in attempting to understand these writers, is to determine how the word "legislate" is being used. John Austin recognized this legislative function. He stated: "I cannot understand how any person who has considered the subject can suppose that society could possibly have gone on if judges had not legislated..."[42] What did he mean by the word "legislate?" In his discussion of the topic, Austin said that "one cannot assume that the judge is to enforce morality; otherwise, he could enforce just whatever he pleases."[43] Other writers have used this word "legislate" in another sense. According to Professor Bruce: "Law always has been and always will be judge made rather than legislature made."[44] Declaring that no public official is more influential than the American judge,[45] Professor Bruce goes on to paint a glowing picture of the court's position.

> Each new invention, each new departure in industry, involves new rights and obligations and new law. The old law must ever be adapted to the new situation, and the legislatures never have kept and never will keep pace with the need.[46]

Some jurisprudential writers such as Professor Bruce exaggerate the power of a judge which has the natural tendency of exaggerating the influence.[47] While one must guard against over-exaggeration, he must be

[42] AUSTIN, THE PROVENCE OF JURISPRUDENCE DETERMINED, 191 (Hart ed. 1954). Austin continued by saying "(I)nstead of blaming judges for having legislated, he (Bentham) should blame them for the timid, narrow, and piecemeal manner in which they have legislated . . . ." To understand Austin's views one must keep in mind that he was basically drawing from English law where there is an absence of a separation of powers concept which is present under our Constitution.

[43] AUSTIN, *op. cit. supra* note 42 at 32, 191. In his discussion, Austin was attacking a point of view held by Lord Mansfield who had ruled that a moral consideration was sufficient consideration for a contract.

[44] BRUCE, THE AMERICAN JUDGE 14 (1924).

[45] BRUCE, *op. cit. supra* note 44 at 1.

[46] BRUCE, *op. cit. supra* note 44 at 16.

[47] Professor Bruce does not stand alone. He has the company of such men as Jerome Frank and John Chipman Gray. See: FRANK, LAW AND THE MODERN MIND (6th ed. 1949); FRANK, COURTS ON TRIAL (2nd ed. 1950); KRISTEIN, A MAN'S REACH: THE SELECTED WRITINGS OF JUDGE JEROME FRANK (1965); GRAY, THE NATURE AND SOURCES OF THE LAW (2nd ed. 1927).

careful not to under-emphasize this influencing force. The power to sentence a man to be hanged carries with it a certain influencing force. One observer of Judge Parker declared that the fate of the 79[48] served as an effective warning to the Southwest frontier. "No court has ever wielded a more salutary influence over a semi-civilized country filled with the worst of criminals."[49] This is one way of showing the force of judicial decisions, but how does a judge influence our economy? This question was touched upon in the discussion dealing with the identity of the judge. But the subject will perhaps justify more details.

As observed earlier, John Marshall was said to have achieved his desired goals through judicial decision.[50] He desired a strong central government, a strong national economy, and the respect of the world for America.[51] How could a judge project this influence? The first step would be to establish a strong independent judiciary. And this was done.[52] The Court, in *Marbury v. Madison,* ruled that: "It is emphatically the province and duty of the judicial department to say what the law is."[53] How could a judge develop a strong central government through judicial decisions? A sideline question to this is: Why was there a desire for a strong central government?

Background to the questions posed would, by necessity, deal with the Jeffersonian-Hamiltonian controversy. If Alexander Hamilton could be projected to our modern age, he would, no doubt, come as an ultra conservative. He held a strong belief that the rights of property must be protected. If a state should grant a corporate charter or an exclusive franchise, then that state should not be allowed, at a later date or with a change in the legislature, to take these rights away. Hamilton was not necessarily a strong supporter of democracy. At least, he did not believe that the people, through their elected representatives, should be allowed to regulate or take away property. Thomas Jefferson, on the other hand, believed strongly in democracy. He believed that the power of the people, through their elected representatives, was absolute. He opposed a strong central government because it was not close enough to the people. Individual rights were best protected by the states. Hamilton supported a strong central government because he believed that this gave the greatest protection to property. One can see the irony of this by comparing the modern day conservative and liberal to these men. Today, this strong central government established to foster the aims of the conservatives (Federalist) is being attacked by the modern day conservative. Con-

[48] This is the number of convicted criminals hanged as a result of the judge's power to sentence.

[49] HARRINGTON, HANGING JUDGE 59 (1951). We are forced to accept the fact that our criminal laws have a certain deterrent influence; otherwise, we would become an avenging society. I do not mean for this to be taken as an approval of capital punishment.

[50] When reference is made to an individual judge, it is not intended that this detract from my position that this is an erroneous reference. Such, however, is made necessary for identity purposes — identity of the writer.

[51] JONES, CHIEF JUSTICE JOHN MARSHALL XV (1956) — these were observations made by Chief Justice Warren.

[52] Marbury v. Madison, 1 Cranch 137 (1 U.S. 1803).

[53] *Id.* at 177.

versely, the modern day liberal does not look to the state to carry out his aims; he looks to the strong central government.[54]

Development of our strong federal system can be demonstrated through an examination of early court decisions. In 1810, the case of *Fletcher v. Peck*[55] was decided in which the court held a state Act to be unconstitutional. Then in 1818, the *Dartmouth College*[56] case was decided. It was in this case that the court held unconstitutional an Act passed by the State to amend the charter of a corporation. These decisions had the effect of centralizing power in the Supreme Court to review state action. They also provide a platform from which voices were raised in support of the rights of property. It could even be argued that these cases established a firm foundation for the development of our commerce in the form of free enterprise. But any absolute freedom, if there were ever such a thing, was short lived. In *Charles River Bridge v. Warren Bridge*,[57] the court held that a franchise (alleged to be exclusive) to build a bridge was not impaired when a subsequent legislature granted a second franchise. By this decision, the court opened the door to future commercialization. From this discussion, one can see the influencing force of the judge in the area of economics and politics.[58]

The influence of a judge is not limited to economics. As stated before, judicial decisions influence our custom and morals. A good example of this force is found in the 1954 segregation case.[59] In its unanimous opinion, the Court was changing a long established custom—segregation of schools. Can anyone question the influencing force emitted from this decision? It has been said that with the *Brown v. Board of Education*[60] case, the Court entered the field of social engineering. It assumed, through this decision, that morality can be legislated.[61] One can here accept the influencing force on custom and morals even though it is

[54] For further discussion of this subject see: JONES, CHIEF JUSTICE JOHN MARSHALL (1956) — see particularly the article contributed by Joseph Dorfman, pp. 124-144.

[55] 6 Cranch 87 (10 U.S. 1810).

[56] Dartmouth College v. Woodward, 4 Wheat 518 (17 U.S. 1818). In reviewing this evolution, one should also examine *McCulloch v. Maryland*, 4 Wheat 316 (17 U.S. 1819); *Gibbons v. Ogden*, 9 Wheat 1 (22 U.S. 1827); and *Bank of Augusta v. Earle*, 13 Pet. 519 (U.S. 1839). For a discussion of the influence that this last decision had on corporate developments see: Warren, II Harvard Law School 150 (1908).

[57] 11 Pet. 496 (36 U.S. 1837).

[58] For further consideration of the economic influence of the judge see the articles cited at notes 10, 11 *supra*. One might also see *Priestley v. Fowler*, 3 Mees & Wells 1 (Exchequer 1837); *Murray v. South Carolina Railroad Co.*, 1 McM. 385 (S. C. 1841); and *Farwell v. The Boston and Worcester Railroad Corporation*, 4 Metc. 49 (Mass. 1842). All of these cases are discussed in AUERBACH, GARRISON, HURST, MERMIN, THE LEGAL PROCESS 15-32 (1961). They concern the development of the fellow-servant rule.

[59] Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).

[60] *Ibid.*

[61] Roche & Gordon, *Can Morality Be Legislated*, NEW YORK TIMES MAGAZINE, May 22, 1955, p. 10, as cited by AUERBACH *op. cit. supra* note 57 at 311.

questionable that the Court was legislating morality.[62]

Another significant area of influence is legislation. Do judicial decisions affect legislation? The answer is obviously "yes," but then we must ask: "How?" I do not suggest that there is a judicial decision behind every statute. What I do suggest is that the influencing force of the decision can affect certain enactments. It can affect the actual introduction of a bill, the drafting of a bill, and even the passage of the bill into law. Statutory laws must not be in opposition to the Constitution, and whether it is or not in any particular case is a question for the courts. "This is of the very essence of judicial duty."[63]

This judicial influencing power goes much further than a constitutional review. The courts on occasion make certain suggestions which might be followed by the legislature. At other times, the legislature might disagree with a judicial interpretation and might amend the statute to make the purpose and intent clearer. In either case, there has been judicial influence. An illustration of this is found in cases leading to the creation of the Interstate Commerce Commission.[64] Prior to the creation of this agency, state legislatures — influenced by the Granger movement — enacted railroad regulatory statutes. And under the blessing of the Supreme Court, these states were allowed to regulate even though it affected interstate commerce.[65] Then in 1886, the Court ruled that if interstate commerce is to be regulated "it should be done by the Congress of the United States...."[66] Shortly thereafter, Congress created the Interstate Commerce Commission.[67] Congress was influenced by a judicial decision.

When the Court created the "rule of reason" as the rule of construction for the Sherman Antitrust Act, it created, according to some Congressman, uncertainty in the law against trust and monopolies. This rule was handed down in the case, *Standard Oil Co. of N. J. v. U. S.*,[68] in 1911. Congress did not receive the decision with universal approval, but

[62] Before one could say that the Court, in *Brown v. Board of Education*, was legislating, it would be necessary to focus on the effects of the decision. It would also be necessary to identify the morals involved. You must decide if segregation was a standard of morality. If you conclude that it was, then you must inquire of the support for the standard. In such search, one would find that the standard was supported by state statute — a statute that required segregated schools. It seems reasonable then to say that the morality was legislated, but it was legislated by the states. When the Court decided the *Brown* case, it was in effect saying that the states could not pass statutes to preserve this particular standard of morality. Professor Cahn seemed to feel this when he suggested that the *Brown* case could have been decided on a purely constitutional law basis. It was not necessary to resort to sociological and psychological studies as was done by the parties. Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150, 157 (1955).

[63] Marbury v. Madison, 1 Cranch 137, 178 (1 U.S. 1803).

[64] For more details, see: SCHWARTZ, AMERICAN ADMINISTRATIVE LAW 9-14 (2nd ed. 1962); THOMAS, AN ANSWER TO REGULATION CRITICS 114-117 (1964).

[65] Peik v. Chicago & N. W. Ry. Co., 94 U.S. 164, 178 (1877).

[66] Wabash, St. L. & P. Ry. v. Ill., 118 U.S. 557, 577 (1886).

[67] As a result of this judicial decision, Congress was left with the choice of regulating or leaving the railroad unregulated. It could not escape the issue by leaving the problem to the states. And, by the aid of political pressure from the Grangers, Congress decided to regulate.

[68] 221 U.S. 1 (1911).

came to recognize the need for laws to supplement the Sherman Act.[69] I don't imply that the "rule of reason" decision was the only influencing factor, but in any event the Federal Trade Commission Act[70] and the Clayton Act[71] were passed by Congress in 1914.

Many other examples of this influencing force of judicial decisions could be cited; however, the point has been established. And there is nothing unusual about this; it is the natural workings of our legal system —the separation of powers and the "checks and balance" concept.

IV. CHARACTERISTICS AND QUALIFICATIONS OF THE JUDGE

One will immediately recognize that the characteristics and qualifications of the judge are controlled by the functions of a judge. As we saw before, these functions also dictate the scope of the judge's power and influence. It must be recognized here that characteristics and qualifications cannot be clearly separated. One fades into and merges with the other. For example: One might point to the element of fairness as one of the qualifications of a judge, but how could this be separated from the term "impartial," which might be classed as a characteristic? There is a difference between the two terms. Through reference to the characteristics of a judge we attempt to understand the faceless creature that holds the office. "Qualifications," the more important of the two, relates to the fitness of the judge to carry out the functions of his office.

As Professor Calamandrei described the characteristics of the judge: "A judge is a lawyer mellowed and purified by age...."[72] He then makes an interesting comparison of the lawyer and the judge.[73] The lawyer, asserted Calamandrei, is the eager, generous youth of judge; the judge is the mellowed ascetic old age of the lawyer. The lawyer is partisan; the judge is impartial. The lawyer is dynamic; the judge is static. The lawyer stands; the judge is seated. The lawyer waves his tentacular arms, aggressive and unrequited; the judge holds his head in his hands, collected and immobile. And the lawyer must find good arguments; the judge must only select the better of those presented.[74] To conclude his comparison of the judge and lawyer, Calamandrei stated:

> A judge does not need superior intelligence. It is enough that he be possessed of an average intellect so that he can understand *quod omnes intellegunt.*[75]

Writers who have ecstasied individual judges, such as Chief Justice Marshall, Justice Holmes, Justice Brandeis, Justice Frankfurter, Judge

[69] For early Congressional debates on this subject, see: House debates: 51 CONG. REC. 1866, 8840, 8973; Senate debates: 51 CONG. REC. 11081, 11237 (1914).

[70] 38 Stat. 717 (1914).

[71] 38 Stat. 730 (1914).

[72] CALAMANDREI, EULOGY OF JUDGES 17 (2nd ed. 1956, rr. by Adams and Phillips).

[73] CALAMANDREI, *op. cit. supra* at 17-22.

[74] Concerning this last comparison, Calamandrei noted: "But what a moral responsibility lies in that choice! When a lawyer has accepted a case his road is clear; he is like the soldier before a target. But the judge needs a force of character which the lawyer may lack . . ." CALAMANDREI, *op. cit. supra* note 71 at 18.

[75] CALAMANDREI, *op. cit. supra* note 71 at 22.

Frank, Judge Learned Hand, Judge Shaw, and many others, have created a false or erroneous image of the judge. And the sad thing is that lawyers are guilty of holding this image. We imagine that judges are superhuman in that they can intelligently decide a case merely because it is presented. Lawyers, losing sight of their own responsibility of preparing a case, may vow to avoid that judge in future cases.[76]

"The lawyer who complains that the judge has misunderstood him, discredits himself."[77] After making this statement, Professor Calamandrei declared:

> It is not the judge's duty to understand, but it is the lawyer's duty to make himself understood. The judge remains seated awaiting a communication; the lawyer is on his feet; he should be the aggressor and approach the judge in both the physical and intellectual sense.[78]

Under our adversary system it is the opposing lawyers who are charged with the duty of developing the case. They call their own witnesses and ask those questions they think necessary to convince the impartial judge. When Calamandrei suggests that a judge does not need superior intelligence, he is not suggesting that this is not a favorable characteristic. He means only that there are other characteristics of more importance.

A good example of what I have been discussing can be made through a comparison of court opinions and lawyer briefs. In 1818, Daniel Webster argued the famous *Dartmouth College*[79] case. One writer, after comparing Webster's argument with the Court's opinion, observed that Chief Justice Marshall *"followed Mr. Webster's argument very closely."*[80] Another case argued by Webster was *McCulloch v. Maryland*[81] in which he sought to show that a state could not tax the operation of a U. S. bank. He stated:

> If the states may tax the bank, to what extent shall they tax it, and where will they stop? An unlimited power to tax involves, necessarily, *a power to destroy....*[82]

In writing the judicial opinion, Chief Justice Marshall used these words:

> That the *power to tax* involves the *power to destroy;* that the power to destroy may defeat and render useless the power to create ....[83]

To say that Chief Justice Marshall drew heavily upon lawyers for his opinions is not to speak in a detrimental tone. He was not merely reducing his own labor through the talents of gifted lawyers; he was completing a partnership in American destiny.[84] One of the characteristics of the judge should not necessarily be originality. His personal intelligence and his own original thoughts should not overshadow careful

[76] Jerome Frank spoke of the lawyers jockeying for particular judges. FRANK, LAW AND THE MODERN MIND 112-113 (6th ed. 1949).
[77] CALAMANDREI, *op. cit. supra* note 71 at 22.
[78] CALAMANDREI, *op. cit. supra* note 71 at 22.
[79] *Supra* note 56.
[80] LEWIS, GREAT AMERICAN LAWYERS Vol. III p. 298.
[81] 4 Wheat 316 (17 U.S. 1819).
[82] *Id.* at 326 (emphasis added).
[83] *Id.* at 429 (emphasis added). For comments, see: Lewis, *op. cit. supra* Vol. III p. 301.

developments by lawyers lest he ceases to remain impartial.

A final note on the characteristics of the judge: "This isn't a job, it's a new way of life."[85] The drama of the judge is loneliness. He must be free from human bonds and cannot seek support or assistance from affectionate friendship. "The drama of the judge is the daily contemplation of human sorrow and human weakness which fill the world."[86] Happy faces do not come into a court of law for the very nature of the proceeding is based on conflict.

Qualifications: From this last paragraph, one can see the merging of the characteristics with the qualifications; there is no clear line of division. Qualifications, however, cast on the judge a positive duty which must, by necessity, be dictated by his functions and responsibilities. The judge must not be weak.[87] He must not be timid.[88] He must not persist in error.[89] He must not be a tyrant.[90] He should not be prejudiced.[91] He must not become too influenced by technical rules.[92] And above all other qualifications, he must be independent. In fact most of the above listed qualifications are needed in order to preserve judicial independence.

Judges, before taking office, take an oath to "defend the Constitution:"

> I, _____, do solemnly swear (or affirm) that I will support, obey, and defend the Constitution....[93]

This is not intended to be an empty statement for formality purposes. It charges the judge with certain sacred duties and to carry out his oath, he must remain independent.

Independence of the judiciary is itself sacred, being gained only through a difficult struggle between the sovereign and men who recognized the necessity for judicial independence. This struggle, traced back to the days of Bracton, coincides with the baronial revolt of 1258.[94] One

[84] JONES, CHIEF JUSTICE JOHN MARSHALL 60 (1956). Article contributed by Irving Bront.

[85] BOTEIN, TRIAL JUDGE 4 (1952).

[86] CALAMANDREI, *op. cit. supra* note 71 at 72.

[87] Pennekamp v. Florida, 328 U.S. 331, 357 (1946). (Concurring opinion by J. Frankfurter) — "Weak characters ought not to be judges . . . ."

[88] Wilkerson v. McCarthy, 336 U.S. 53, 65 (1949) (concurring opinion by J. Frankfurter) — "A timid judge, like a biased judge, is intrinsically a lawless judge."

[89] Craig v. Harney, 331 U.S. 367, 392 (1947) (dissent — J. Frankfurter) — "It has not been unknown that judges persist in error to avoid giving the appearance of weakness and vacillation."

[90] Paulos v. N. H., 345 U.S. 395, 426 (1953) (dissent — J. Douglas) — "(H)istory proved that judges too were sometimes tyrants."

[91] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (dissenting, J. Brandeis) — "(W)e must be ever on our guard, lest we erect our prejudices into legal principles."

[92] Sparf and Hansen v. U.S., 165 U.S. 51, 174 (1895) (J. Gray dissenting) — "(I)t is a matter of common observation, that judges and lawyers, even the most upright, able and learned, are sometimes too much influenced by technical rules . . . ."

[93] OKLA. CONST. ART. 15 sec. 1. In Oklahoma, the judge also swears to discharge the duties of his office with fidelity, and swears that he did not pay any money, etc., to procure the nomination or election.

[94] PLUCKETT, A Concise History of the Common Law (5th ed. 1956).

of Bracton's great contributions was his idea that "the King was subject to God and the law."[95] Then in 1328 we witness the enactment of the Statute of Northampton which declared that no royal command shall disturb the course of the common law, and that if such a command is issued the *judges shall ignore it.*[96] Bracton's philosophy nor the Statute stopped the attacks; the King continued to exercise prerogatives. But then came the time of Sir Edward Coke. Born in 1552, Coke became Chief Justice of England in 1606 during the reign of James I. During his term of office he put into practice Bracton's famous words — "the King was subject to God and the law." "Coke's position as the champion of the supremacy of the common law was extremely strong, for it certainly represented public feeling based upon centuries of medieval thought which had always looked to the law rather than to the state."[97] This supremacy of the law did become firmly established and when our Constitution was written, the drafters sought to preserve it through judicial independence.[93]

According to the Constitution, judges shall, at stated times, receive for their services, a compensation which shall not be diminished during their continuance in office.[99] This language was placed in the Constitution to preserve the independence of judges. The power of the purse, which might sway the judge's judgment or action, was removed. Such was the construction placed on this Constitutional language by the Court in *O'Donoghue v. U. S.*[100] Citing Alexander Hamilton, the Court said:

> Next to permanancy in office, nothing can contribute more to the independence of the judges than a fixed provision for their support... In the general course of human nature, *a power over a man's subsistence amounts to a power over his will.*[101]

If we value and wish to preserve our Constitution, we must never surrender the independence of judges. As Chief Justice Marshall once said: "I have always thought, from my earliest youth till now, that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and a sinning people, was an ignorant, a corrupt, or a dependent judiciary."[102] For justice[103] to prevail there must be an impartial trial, and there can be an impartial trial only if the judge is independent. He cannot be made dependent through a threat of personal liability for he makes judicial decisions behind an absolute immunity shield. He cannot be made de-

[95] PLUCKNETT, *op. cit. supra* at 263.
[96] PLUCKNETT, *op. cit. supra* at 158.
[97] PLUCKNETT, *op. cit. supra* at 243-244. See also: BRUCE, *op. cit. supra* note 44 at 45.
[98] In articles I, II, and III of the U. S. Constitution the powers of Congress, the President, and the Courts are set out respectively. And as the Court stated in *Marbury v. Madison, supra* note 62 at 177: "It is emphatically the province and duty of the judicial department to say what the law is."
[99] U. S. CONST. ART. III sec. 1.
[100] 289 U.S. 516, 531 (1933). This case involved a legislative attempt to reduce the salary paid to judges of the D.C. courts. It was argued these were not constitutional courts.
[101] *Ibid.* Court cited Federalist, No. 79.
[102] As cited in *Id.* at 532.
[103] Justice meaning equality.

pendent through the efforts of a calculated press.[104] But neither is he free from an unfavorable press. He cannot hold in contempt one who ventures to publish anything that tends to make him unpopular.[105] The sensitive judge receives no protection to guard him from public opinion. Such comment and public opinion is necessary to preserve judicial independence. Comment guards against the individual usurping the powers of his office.[106]

If the judge has independence, what other qualifications does he need? As stated earlier, the judge must not be timid.[107] "Judges," declared Justice Douglas, "are supposed to be men of fortitude, able to thrive in a hardy climate."[108] While this statement as used here is out of context, it has some relevance. A judge with fortitude is not likely to be timid. He will not allow himself to become too influenced by technical rules.[109] Nor will he accept blindly prior decisions.[110] Instead, the judge will adapt his decision to meet the growing needs of society.[111] But in speaking of this, what are we referring to? Actually, it is only another way of saying that the judge must be independent. A timid judge is a dependent judge. He is made dependent by his own fear of change. And a timid judge might even be made dependent by his fear of adverse comment. To finally answer the question first posed: An independent judge needs no other qualifications; he has them.[112]

To close this section on the qualifications of a judge, it is appropriate to quote a statement made by the chairman of a committee charged with the duty of approving the person to fill a vacancy on the bench. Judge Bernard Botein tells the story.[113] After he was named by the governor, he was called before the committee to determine if he had the qualifiactions. As Botein entered the committee room, he was introduced as the new judge. The chairman adivsed him that the approval had been unanimous. Then we read the very pertinent words of the chairman:

> "Of course," the chairman went on, "we expect and demand professional competence, independence, and integrity, and we hope

[104] See: *Craig v. Harney,* 331 U.S. 367 (1947). In this case a newspaper man had been held in contempt of court on account of his comments on the way the judge handled a particular case. While the Court reversed the contempt proceedings, it did say that there had been no direct threat to the judiciary. Justice Frankfurter and Justice Jackson dissented — the difference being the directness of the threat.

[105] *Id.* at 376.

[106] See note 89 *supra.* Judges on occasion may tend to become tyrants.

[107] See note 87 *supra.*

[108] Craig v. Harney, *supra* note 103 at 376.

[109] As Archibald Cox once said: "The tendency to be literal is often enhanced by lack of familiarity with the subject matter." Cox, *Reflecting Upon Labor Arbitration,* 72 HARV. L. REV. 1482, 1488 (1959). See also note 12 *supra.*

[110] See note 88 *supra.* A timid judge might accept an erroneous decision as precedent under a blind acceptance of the doctrine of *stare decisis.*

[111] See: Hart, *Positivism and The Separation of Law and Morals,* 71 HARV. L. REV. 593, 612 (1958).

[112] Statutes providing for the disqualification of judges serve here as a good example. 22 OKLA. STAT. sec. 571 (1961). "No judge of any court of record shall sit in any cause . . . in which he may be interested . . . ." The key is independence.

[113] BOTEIN, TRIAL JUDGE (1952).

for that rare commodity, moral courage. We also expect a judge to have a decent regard for the rights and feelings of others. Nobody, not even the losing litigant or his lawyer, should ever leave the courthouse bruised in personal dignity or spirit, or feeling that his day in court has been pile-driven into minutes or seconds by an impatient judge. He goes home at night to a wife, to children, to parents, friends. He should leave the courthouse with his self-respect unimpaired." He smiled. "We don't expect miracles, but I'm confident you'll justify our faith."[114]

And as the chairman commented, these qualifications are more important than the type technician you are.

V. RESPONSIBILITIES AND OBLIGATIONS OF THE JUDGE

With power go responsibilities; and so with the judge. These responsibilities and obligations have, in the prior sections of this paper, been indirectly discussed. For this final section, my purpose is to bring these responsibilities into focus and then to comment on the judge's duty in connection with judicial opinions. I single out opinions only because the subject has not been touched upon.

My first attempt will be to bring the judge's responsibilities into focus. We have seen that the judge is charged with the duty of supporting, obeying and defending the Constitution. We have examined the functions of the judge. And we have reviewed the qualifications of the judge. In all of these cases we were referring to the office of the judge. In fact, in the first section of this paper, it was suggested that reference to the judge had to be to his official capacity. As an individual, the judge has no power. Conversely, the judge, as an individual, has no greater responsibility than any ordinary citizen. This is what I mean when I state that the judge's responsibilities must be brought into focus.

To set an example for our individual standard of morality is not one of the functions of the judge. An individual who is described as a nasty, narrow-minded, greedy, cruel, arrogant, insensitive man, a time-serving politician and a liar, may also be a great judge.[115] Yet we have a tendency to demand more from the individual who happens to also be a judge. Just pick up a newspaper and read the editorials about the shocking fact that Judge _____ was seen drunk at a party; or that Judge_____ was driving while intoxicated. Listen to the comments of members of the Bar as to the adverse effects that these facts will have on the general public's faith in our courts. Persons adhering to this type criticism are guilty of the erroneous position of identifying the functions of the judge with the individual rather than with the office. They must feel that the powers of the judge follow the individual, a position that is not only absurd but also dangerous. It is dangerous in the sense that you elevate the individual to an unwarranted position.

[114] BOTEIN, *op. cit. supra* at 14.

[115] This was a description of Lord Coke by Jerome Frank. KRISTEIN, A MAN'S REACH: THE PHILOSOPHY OF JUDGE JEROME FRANK, 48 (1965). Frank then recognized Coke's greatness as a judge. Can anyone question the greatness of Lord Coke as a judge? See note 96 *supra.*

But, some will say, even as an individual, the judge must maintain a high degree of morality — whatever that word means. If the qualification of an individual who may act as judge must be measured by some standard of morality, there is another question that must be asked. By what standard shall he be measured? Must he be a family man — a Protestant — a Democrat — and a non-drinker? Must he be a segregationist? These could all be classed as standards of morality, but do any of them add anything of value to the qualifications of the judge? To answer this question, I would need much more knowledge and understanding of jurisprudence than I now possess. I would also have to be a psychologist and a sociologist which I am not.

All I can do is to raise the questions and suggest the possible consequences. First, take the family man. If we say that our judges must be devout family men, what is the possible sacrifice? Do we possibly sacrifice his independence? Can he impartially decide a case where one of the litigants is a devout family man and the other is a drifter? If we require a judge, as an individual, to hold himself as a non-drinker, do we sacrifice his independence as a judge? Will he impartially decide a driving-while-intoxicated case? And what about the judge who must, by public demand, be a segregationist? Does he impartially decide cases dealing with the rights of Negroes? When asked in this fashion, the answer to these questions seems clear. To impose our standard of morality on the judge, we do sacrifice his independence. We must remember that every person, whether or not they agree with our standard, has a deep-rooted right to an impartial trial.

Good morals as bad morals can make the judge dependent — if his decisions are controlled by such. Law and morality must be separated.[116] This separation is weakened when we place too much importance on the daily private life of the judge, as an individual. Especially is this true if the judge holds his office through the election process. Litigants do not come before a court to be tried under the electorate's standard of morality; they come before the court to be tried in accordance with the law.

If one is to be tried in accordance with the law, the next question is: What law? Courts, under the doctrine of *stare decisis,* will to some extent be bound by prior judicial decisions. This, then, raises the question of legal opinions. The judge, when writing an opinion, has a responsibility of writing a clear and understandable opinion. After Professor Bruce had pedestaled the judge's position, he examined the obligations attached to that position. As to the written opinion, he stated:

> The well considered written opinion is absolutely necessary to a democratic government of laws as opposed to an autocratic government of men. *It is the greatest safeguard against judicial tyranny.*[117]

[116] I don't propose to discuss this deep jurisprudential question. The separation of law and morality or the separation of the "is" and the "ought" is a position taken by the school of analytical jurisprudence. Hans Kelsen of this school indicated that a pure theory of law is a theory of positive law. Kelsen, *The Pure Theory of Law & Analytical Jurisprudence,* 55 HARV. L. REV. 44 (1941). See also: KELSEN, GENERAL THEORY OF LAW AND STATE (1945). For a more sophisticated view on the subject see: Hart, The Concept of Law 181-207 (1961).

[117] BRUCE, THE AMERICAN JUDGE 78 (1924) (emphasis added).

While writing an opinion, the judge must remain conscious of its purpose. This purpose is to explain the basis of the judicial decision; it is not intended to be a literary masterpiece. On this point Professor Calamandrei observed:

> In the hope of seeing their "brilliant" opinions published in the law reports or having them create favorable impressions when promotion is being considered, there is a danger that some judges will treat the decision as the point of departure for a brilliant essay rather than a bridge of passage to the just conclusion — the true function of the judicial process.[118]

To make the point even stronger, Professor Calamendrei states that: "The judge who is intent only upon presenting casual readers with the delight of a literary masterpiece, instead of offering a just solution to the sufferings of the parties, fails to comprehend the holy function of justice."[119] Of course, literary skill, if it promotes clarity, is a blessing in a judge.[120] But to say of a judge that his decisions are fine in a literary sense is not a compliment to him as a judge.[121] In order to have an opinion identified by logic and clarity, the case must be adequately prepared. Lawyers then must be charged with a certain amount of responsibility in connection with opinions. This does not mean, however, that the judge can delegate his function or responsibility to the lawyer. It is the judge who is the impartial person; and it is the judge who must prepare the findings upon which his decision is based.[122]

To command respect, the judge must make his position clear. By clearly defining his position, the judge avoids the appearance of weakness and vacillation. If there is nothing absolute or sacred about the doctrine of *stare decisis,* then it is ridiculous for a court to distinguish conflicting cases through the use of fiction.[123] If a judge is wrong in his decision, then let him be clearly wrong. By so making his position clear — whether right or wrong — he will gain the respect of his brethren and the general public.

[118] CALAMANDREI, *op. cit. supra* note 71 at 61-62.

[119] CALAMANDREI, *op. cit. supra* note 71 at 62.

[120] KRISTEIN, A MAN'S REACH: THE PHILOSOPHY OF JUDGE JEROME FRANK 45 (1965).

[121] CALAMANDREI, *op. cit. supra* note 71 at 58.

[122] For a critical comment toward a judge who allowed the winning attorney to prepare findings, the conclusion and the judgement of a case, see: *U.S. v. El Paso Natural Gas Co.,* 376 U.S. 651, 656 f.n. (1964). This was a very significant antitrust case; yet the trial court decided not to write an opinion. While this was not too bad, the court went further and directed counsel to prepare findings upon which the decision would be based. A long footnote was devoted to explain the responsibility of trial judges and it would bear your attention. I can't say that this affected the Sup. Cts. decision; however, an unusual thing was done. The Court, after reversing the trial court (on substantive grounds) refused to remand the case. It directly ordered the divestiture of the merged companies. *Id.* at 662. See also the comments of Justice Harlan in his dissent. *Id.* at 662-663.

[123] BRUCE, *op. cit. supra* note 116 at 68-74.