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FORUM JURIDICUM

MISCELLANEOUS OBSERVATIONS IN RE THE LAW AND THE JUDGE FUNCTION*

*Robert C. Finley***

It is now more years ago than I like to admit since I was a student at the Duke Law School. At that time, I thought of the law and the judge function solely in an aura of positivistic dimensions. In fact, it seemed as if one could almost reach out, touch, and ascertain the material existence of a permanent, schematic arrangement of great legal principles and impressive precedential cases. At the time, it further appeared to me clearly that this closed system of certainties and absolutes operated quite automatically in the hands of lawyers and judges and that with little help from them the system generated its own implementation, providing answers and solutions to multitudinous questions and problems involving people and things, cabbages and kings, shoes, ships and sealing wax.

It seemed to me the law was just there. And it was enough that it existed. Further understanding through laboratory or scalpel-like dissection and analysis might be helpful, but it was not absolutely necessary.

I was not tempted or inclined to make any distinctions between abstract intellectual concepts and life's realities. Any reference to the "is" and the "ought to be," or to any so-called mind-matter dichotomy in the sense of philosophical values, jurisprudential thinking, and evaluations, disenchanted me and actually was beyond my "ken."

As a first-year law student, the process of becoming a lawyer did seem a long, difficult, and complex one, but relatively simple in terms of method. In the days and years ahead, my task was to become well acquainted with the law — and this largely through the then pedagogically touted Langdell case method. In other words, I must master the great principles and

*Address by Judge Robert C. Finley, Washington State Supreme Court, at the Law School, Louisiana State University, Baton Rouge, Louisiana, on November 25, 1963.

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rules of the law epitomized in the precedents of decided cases! Once having accomplished this fairly well, I would in fact have acquired standing and competence as a lawyer. With this status, legal solutions of legal problems in miscellaneous lawsuits would be within comparatively easy reach.

I suppose the judging function, if I had thought of it analytically, would have appeared simply as a process of finding or discovering the law. Application of the law then followed naturally and automatically in solving innumerable legal problems, some of them undoubtedly presenting some novel and different human, or other, considerations and orientations. In any event, with proper industry and appropriate intellectual effort, a likely, proper, and perhaps even kindly, revelation would occur in due course.

Such a state of mind is unquestionably a rather pleasant one, characterized by feelings of certainty, security, and an inner sense of well being. But this state of euphoria was not mine for very long. I encountered some curiously skeptical, probing "characters" with questioning minds among the Duke University Law Faculty. There was talk, actually, about the meaning of language — and, strangely enough, about the meaning of meaning. There was talk of the function of word symbols in identifying and communicating ideas, and in implementing intellectual concepts or legal conceptualizations. I was surprised to find that, according to Mr. Justice Holmes, words were nothing more than the skin of ideas.

Gradually, my youthful zeal in the quest of great learning in the law became freighted with uncertainties, complications, and difficulties. For example, in the first year class in torts, the legal principle or concept of negligence, with underlying, allegedly moral concepts respecting fault or blameworthiness, became something less than exact in application, particularly when confronted with the apparently countervailing legal principle or concept of contributory negligence, also an allegedly morally-based or inspired doctrine. Curiously enough, contributory negligence frequently lost luster and potency for resolving a legal controversy in a confrontation with the "last clear chance doctrine." In the evolving field of negligence law, I became acquainted (it seemed almost on a first-name basis) with Mr. Justice Cardozo in the *Palsgraff* case,[1] but it was indeed a strug-

1. Palsgraff v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928).

gle to cope with his and Justice Andrews' disagreement respecting the principle of proximate cause and its applicability in *Palsgraff*. As a principle, it almost eluded me in seeming either to amalgamate or neutralize antithetical considerations or values. But in the hands of jurors, *properly instructed* in specific cases, it provided a handy resolution of a lawsuit. Absent proximate causation, the defendant won; with it, the plaintiff carried the day. Shorn of a neophyte's frustrations, legal proliferation, and adornment or obfuscations, it was as simple as that. However, it did become apparent, even to me at that time, that the principle of proximate cause required facts to operate it. And facts, whatever they were — and that's another story[2] — seemed to be weighed and weighted differently, if not by "a reasonable man," then sometimes by jurors or trial judges, and frequently by appellate judges. The latter, somehow, seemed to have the last say most of the time anyhow.

At this point in my legal indoctrination, revelation and evolution, certainties and absolutes, intellectual security and serenity, were beginning to give way to a not inconsiderable degree of confusion and frustration in my thinking, and in my efforts to understand the law and the judge function.

In the class in Anglo-American legal history the conflict between Lord Coke and the Chancellors Ellesmere and Bacon was to me at first an interesting bit of historical news. Shortly, however, this posed the monumental intellectual or philosophical, and possibly a bureaucratic, conflict between the English common law courts and the courts of chancery or equity.[3] Apparently also involved was a struggle respecting royal prerogative and revenues; but the latter would be another story when time permits. Among other epithets, the erstwhile defenders of Lord Coke and the English common law courts asserted causatically that cases in equity were usually gauged and determined by the length of the Chancellor's foot. In essence, it was again the conflict between certainty, absolutes, and consistency (often for

2. Becker, *What are Historical Facts?* 8 W. POL. Q. 327, 336-37 (1935); Cahn, *Jerome Frank's Fact Skepticism and Our Future*, 66 YALE L.J. 824 (1957); Fuller, *Human Purpose and Natural Law*, 3 NATURAL L.F. 68 (1958); Isaacs, *The Law and the Facts*, 22 COLUM. L. REV. 1 (1922); Morris, *Law and Fact*, 55 HARV. L. REV. 1303 (1942); Nagel, *On the Fusion of Fact and Value: A Reply to Professor Fuller*, 3 NATURAL L.F. 77 (1958).

3. GOEBEL, CASES AND MATERIALS ON THE DEVELOPMENT OF LEGAL INSTITUTIONS 240 (1930); KINNANE, A FIRST BOOK ON ANGLO-AMERICAN LAW ch. XI (2d ed. 1952) (See particularly §§ 111-12); Adams, *The Origin of English Equity*, 16 COLUM. L. REV. 87 (1916).

consistency's sake) on the one hand, and flexibility, change and discretion, on the other hand, in judicial evaluation, decision, and disposition of lawsuits. My tribulation was compounded by the observations of Mr. Justice Holmes that the era of the black letter men of the law (literal-minded readers of the printed word) was on the wane;[4] that statistics, scientific and sociological data would progressively, but inevitably, influence the course of the law; that logical methodology was of limited utility in the law as in other fields; that any proposition could be given a logical form, and that actually a page of experience was worth a book of logic. Now, as I look back, the coup de grace to my student hopes and stumbling intellectual efforts to evolve a tidy legal system of certainties and absolutes was administered principally by assertions of Mr. Justice Holmes, such as the following:

> "The training of lawyers is a training in logic. The processes of analogy, discrimination, and deduction are those in which they are most at home. The language of judicial decision is mainly the language of logic. And the logical method and form flatter that longing for certainty and for repose which is in every human mind. But certainty generally is illusion, and repose is not the destiny of man. Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, . . . and yet the very root and nerve of the whole proceeding. You can give any conclusion a logical form."[5]

There was no letup by the teachers at Duke Law School in their often seemingly overzealous and always critical analytical scalpel-like dissection of the law. In constitutional law the classroom evaluation of the decision written in *Marbury v. Madison* by Chief Justice Marshall raised disturbing doubts about the validity of the reasoning of the Chief Justice in establishing a suspiciously pristine doctrine of judicial review.[6]

In the United States Supreme Court decision in *Muller v. Oregon*,[7] state police power legislation regulating the hours of

4. His exact words were: "For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics." Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

5. *Id.* at 465.

6. BOUDIN, GOVERNMENT BY JUDICIARY (1932).

7. 208 U.S. 412 (1908).

work for women and minors was validated against constitutional attack. Clearly the emphasis upon the Brandeis brief (which presented statistics, sociological and medical data) raised considerable doubts as to the certainty and the automatic operation of particular provisions of the United States Constitution.

In yet another field of law, critical classroom examination and evaluation of the rules of statutory interpretation left considerable doubt as to their certainty and automatic operation in the solution of lawsuits involving statutory problems. And this became particularly apparent with the knowledge that a particular rule of statutory interpretation usually had its counterpart or countervailing rule — and that opposite results were attainable depending upon judicious choice or selection of the rule or statutory maxim of interpretation to be emphasized.[8]

As a concept or rule of statutory interpretation, the phrase, *the intent of the legislature*, had resounding oracular persuasiveness. But, under the analytical focus of Karl Llewellyn, Max Radin, and other legal realists of the 1930's, the concept acquired some of the characteristics or earmarks of legal fictions.[9] The realist inquisitors probed deeply into the question whether it was rational to say that any given number of legislators had any specific intent about a particular choice of words employed by some legal draftsman in preparing a bill for legislative action. They questioned further how many members of a legislative committee, charged with primary responsibility for a bill, had the time to spare from other legislative duties, had studied the particular bill carefully, and could say what they intended as to specific language used.

Actually, my sojourn in law school was in the era of the writers of the American realist or sociological school of jurisprudence: Karl Llewellyn, Jerome Frank, Morris Cohen, Max Radin; and, with somewhat less agitation and fanfare and with more equanimity, Roscoe Pound, John Henry Wigmore, Lon Fuller, and others, were probing, questioning, putting off bal-

8. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 VAND. L. REV. 395 (1950); Loyd, *Equity of a Statute*, 58 U. PA. L. REV. 76 (1909); Radin, *Early Statutory Interpretation in England*, 38 ILL. L. REV. 16 (1943); Thorne, *Equity of a Statute and Heydon's Case*, 31 ILL. L. REV. 202 (1936).

9. Radin, *Realism in Statutory Interpretation and Elsewhere*, 23 CALIF. L. REV. 157 (1934).

ance, even toppling some orthodox and accepted views respecting the law and the judging function. As I see it now, there was a transition in my attitude of mind — or perhaps peace of mind — from feelings of certainty and absolutes in relation to the law toward an opposite extreme of almost complete flexibility and creativity. It was an exercise in frustration, and an upsetting experience. But, as I became better acquainted with Pound, and particularly with Holmes and Cardozo, a change occurred. Their observations and evaluations on the law and the nature of the judicial process provided a different kind of understanding, and, I think, a new dimension and appreciation of the law and the judging function evolved in my consciousness. I found real utility and some quiet solace and satisfaction in Holmes and Cardozo, particularly in that wonderful passage in *The Nature of the Judicial Process*,[10] where Cardozo says:

> "My analysis of the judicial process comes then to this, and to little more: logic, and history, and custom, and utility, and the accepted standards of right conduct, are the forces which singly or in combination shape the progress of the law. Which of these forces shall dominate in any case, must depend largely upon the comparative importance or value of the social interests that will be thereby promoted or impaired."

My personal equation, *i.e.*, what happened to my thinking and state of mind as a young devotee of the law, seems epitomized reasonably well in the little jingle on the flyleaf of Llewellyn's *The Bramble Bush*.[11] It reads:

> "There was a man in our town and he was wondrous wise:
> "He jumped into a BRAMBLE BUSH and scratched out both his eyes —
> "and when he saw that he was blind,
> "with all his might and main
> "he jumped into another one
> "and scratched them in again."

The conceptualizations of Holmes, Cardozo, and Pound concerning the law and the judging function have been very helpful to me in thirteen years of work as a member of the multi-judge court of my state. Comparable conceptualizations by

10. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 112 (1928).
11. LLEWELLYN, THE BRAMBLE BUSH (1951).

other analytical legal writers and their contributions to the modern Anglo-American literature on legal philosophy and jurisprudence provide a working basis for a forthright realistic analysis of the law and the judicial process. But there is need to evaluate the contributions of these outstanding people and to proceed further with a careful study of the judicial process broken down insofar as possible into its more minuscular facets and parts. Someone has aptly pointed out that the law and the judge function are multi-dimensioned realities. The goal should be to define or to understand law, not in the abstract or in terms of broad generalizations, but by close-up, careful analysis of the practical workings of the process in actually litigated, decided cases. Such an approach or project might well be lacking in utility or merit, or even might be categorized as supererogation, and accordingly dismissed. I might make such a concession regarding religion, love, and politics. But I am not content, nor am I yet ready, to concede that the law and the judge function are realities that naturally or inevitably resist analysis, and that this is as it should be. So again I say that there has been too much generalization and not enough particularization as to the nature of the law and the judging function. In this vein Cardozo noted that law in its higher reaches is creative.[12] Arthur L. Corbin, of the Yale Law Faculty, commenting on Cardozo,[13] recently observed:

> "It is my conviction that the judicial process is 'creative' throughout, and not merely in what Cardozo described as its 'highest reaches.'
>
> ". . .
>
> ". . . The words of Learned Hand are worth quoting and worth pondering. He has listed thus the judicial qualities that lead toward truth and justice: 'skepticism, tolerance, discrimination, urbanity, some — but not too much — reserve toward change, and, above all, humility before the vast unknown.' His words apply equally to a teacher and a writer of the law."

In a further personal observation, Corbin said:

> "Now, as an old man, there is neither pain nor disappointment in the realization that I have not reached the

12. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 166 (1928).
13. Corbin, *A Creative Process*, 6 YALE L. REP. 2 (1959).

> paradise of a Justice that is absolute, universal and eternal. I rejoice in the conviction that Justice is a function of humanity, that decisions need not be arbitrary, that even if we cannot reach the perfect and the best, we can at least strive for the better and do the best we can. . . ."

But again, these are generalizations. And the trouble with such statements is that they attempt too much. And again, the law and the judge function are all-encompassing, varied, and complex in implication. Efforts to effect a simple, short definition, though well meaning, are in reality an imprecise exercise in dilettante semantics, rather fantastic in conception, and impossible of realization. A more useful method of analysis respecting the law and the judge function (reasonably and practicably possible, and a manageable one in terms of language and intellectual concepts) must be much less than all inclusive; in fact, almost on a case-by-case analysis and synthesis.

To elaborate briefly and in one particular respect: When Pound says the law (and by inference the judicial process) must be stable yet it cannot stand still, he has stated a large, generalized truth or principle, yet one that is utterly inconsistent and paradoxical in its two facets. We know that in some instances, and in certain areas, the law is stable, and the judicial function is nothing more than a reference to so-called absolutes, or at least tentative ones, in terms of decision making in the particular instances and areas concerned. For example, consider certain areas of the law of negotiable instruments and certain areas of real property law in our Anglo-American legal system. As to these areas the judging function or operation tends to be be rulistic — the law, its implementation through the courts, tends strongly in the direction of absolutes and certainties. This of course is itself a generalization, and I fall prey to my criticism of the glittering generalizations of others who have attempted definition, description, and explanation of the law and the judge function. However, my generalization or observation respecting the law of negotiable instruments and real property indicates one end or one extreme of a possibly useful hypothetical measuring device or spectrum respecting the scope of the law and the judge function.

In other instances and areas the law and the judge function are flexible. Here, reference in terms of the judicial function is

to values and considerations which, to say the least, are somewhat less than absolute, and just might be somewhat nonlegal in nature. In this area the decisional function tends toward the other pole or extreme of the spectrum and is in nature creative and, perhaps, as Cardozo said, may provide only tentative solutions for insoluble problems. Having in mind the concept of absolutes at one end of the spectrum and the concept of flexibility and creativity at the other end, perhaps it would be interesting and worth the effort to attempt a finer focused analysis of several specific appellate decisions. The effort, hopefully at least, may serve to identify, pinpoint, or describe some aspects of appellate reasoning, techniques, or methods employed and the particular factors emphasized in the decision of specific cases. We might note, if possible, whether the particular decision is oriented toward the absolute or toward the creative extreme of the hypothetical juristic spectrum.

However, before considering specific cases, the problems involved, their evaluation, and final resolution by court decision, it might be well to take a look at a few aspects of the judicial process sometimes taken for granted or overlooked almost entirely. First of all, appellate courts are multi-judge tribunals as distinguished — and it is an important distinction — from single-judge tribunals. The basic reason for this should be obvious. Several heads are (or should be) better than one. This is true in terms of a potentially larger, broader group knowledge in relation either to an assumption that the law is absolute or an assumption that the law is creative. Group evaluation, group reasoning, and group responsibility seem convincingly preferable to that of one individual. Curiously, the very fact of the existence of multi-judge courts suggests, I think, the Cardozo formula. This, of course, suggests an on-going process of reasoning and evaluation, the weighing of facts, and the weighting of factors, individually and in combination, in the decision-making process, by different minds, different backgrounds of experience and training.

At this point another special facet of the judging function deserves mention and emphasis. Annually, hundreds of cases are presented to appellate courts in this country. These cases have been analyzed and evaluated with considerable care by reasonably competent attorneys who are representing each side of the controversy involved. I believe a very high percentage of ap-

pellate advocates are reasonably competent, ethical practitioners. If certainty, positivism, and absolutes are the all-pervading qualities, characteristics or dynamics of the law, it seems incredible that competent, honest, and professionally ethical lawyers throughout the country, day in and day out, arrive at diametrically opposing evaluations in so many appellate cases, and that they can contend that right and justice require disposition in favor of their particular side. The only rational, satisfactory explanation which occurs to me is that in most cases appealed there is room for doubt, and that the law is not certain and absolute. Contrariwise, I shall add a caveat which may indicate a reverse swing as to appropriate description or characterization of the law and the judging function — in the direction of absolutes and certainties. A recent study of 1,000 appeals to the Washington State Supreme Court shows that we affirmed 63.8%; in 36.2%, we reversed or modified substantially. (Query: Is the law 63.8% absolute? is it 36.2% creative?)

But now let us get down to viewing and attempting to analyze some specific cases. As guinea pigs for the experiment, I have selected several decisions of the Washington State Supreme Court in which I participated.

In *Kehus v. Eutenier*,[14] decided by the Washington State Supreme Court in 1961, an Oregon court had granted a divorce to the husband, but awarded custody of two minor daughters under the age of three to the mother. Shortly, pursuant to a stipulation by the divorced parents, the older child (then age three) was transferred to the custody of the father. Six years later, the mother sought to regain custody of the older girl (then nine years of age). The request was denied by a Washington trial court, and affirmed on appeal by the Washington State Supreme Court.

Now some comment is appropriate respecting certain facets of the evidentiary pattern and other dynamics of this case. The trial court found that the mother had remarried twice after her divorce in 1953. The third marriage was a relatively stable one. The mother was gainfully employed as a school teacher and provided reasonably good care for the younger daughter in her custody. The husband was a good worker and a stable person, and had agreed to assume custody of both of the girls.

14. 59 Wash.2d 188, 367 P.2d 27 (1961).

The nine-year-old girl and her father (who had been awarded legal custody) lived in very cramped quarters — a small, one-room apartment. There was nothing against the father morally, and he was a reasonably good worker. But he was unemployed much of the time because his occupation was seasonal in nature. His earnings were limited to approximately $2,200 a year. When employed, he worked either day or night shifts, and frequently the child was left in the care of older women acting as baby sitters. The mother, seeking to regain custody of the nine-year-old daughter, was earning approximately $6,000 a year as a teacher, and her husband was earning approximately $4,000 a year. When questioned by the trial judge in his chambers, the nine-year-old girl stated that she wanted to stay with her father. Apparently she and the father had a good parent and child relationship and were genuinely fond of each other. There had been little contact between the opposing parties themselves, or between the children, each parent having custody of only one daughter during most of the six years intervening since the divorce. The nine-year-old girl was very intelligent and presented no disciplinary problems. In the decision on appeal, the majority of our court forthrightly conceded that they might have reached a different conclusion if they had heard the case in the first instance in the trial court, but they accepted the judgment and decision of the trial judge, and refused to change the custody of the child. The underlying and decisive factors in the trial court and on appeal seemed to be (a) that the child's more obvious physical needs had been reasonably well cared for, (b) that she had been living with the father for more than six years at the time of the hearing, and (c) that he was a good man and had done the best he could as a father, and for the child.

But a dissent was written, stating that the principle or rule of law placing strong reliance upon the discretion and wisdom of the trial court in custody matters does not mean or require absolute reliance. The dissent emphasized the fact that the female child was approaching puberty and adolescence, that living with the father in a cramped one-room apartment was not especially conducive to her then changing and expanding social needs, and furthermore, that lack of adult female companionship and counsel was an important factor. The dissent pointed out that the father was only seasonably employed, and that when he was employed it was necessary for him to leave the child

with someone else; that the school principal testified the nine-year-old girl seemed to have a particular affinity and an above average need for the affection of women teachers. The dissent further emphasized the contrast in available family income as an important factor relating to the development, care, and custody of the child; that the younger sister was in the custody of the mother, and that reunion and a closer association of the sisters had significant value; that the mother and her then husband were willing and able to provide a good home for both girls, at a considerably better standard of living than the one girl had with her father.

Now I will confess some personal concern about an off the record, extra-legal fact or consideration. The trial judge who heard this matter was one of our most experienced, and unquestionably had been one of the most competent and distinguished, members of the trial bench. But at the time this child custody matter was before him, he had apparently aged considerably and was not well. This was generally known among the local bar, had come to my attention, and perhaps was known to other members of the appellate court. As a matter of fact, the trial judge suffered a stroke and passed away before the disposition of this case on appeal. It was my strong feeling that the indicated extra-legal circumstances were not only pertinent to appellate disposition, but rendered the trial judge's evaluation and disposition of the custody matter somewhat dubious. Furthermore, it was my feeling that the legal rule or presumption usually followed in custody matters that the trial judge had properly exercised judicial discretion was inappropriate and should not be applied to sustain his denial of a change in custody. The basis for this rule or presumption and its application by the appellate court is a practical and, normally, a reasonably valid one: namely, the trial judge has the only opportunity to view and hear the parties and their witnesses, and consequently he is in a better position than the appellate court to pass on the vital matter of credibility. However, objective evaluation by the trial judge is a *sine qua non.*

The record was replete with conflicting testimony supporting the claims of each parent; but, unfortunately, the record before the appellate court was sadly lacking in information and data pertinent to the actual welfare of the child, in terms of the relative stability and emotional aura of the two households. I

will say further that during the conference with my associates on the Supreme Court I became somewhat concerned, perhaps a bit emotionally, about the determination of custody in this appeal. In effect, I may have tended to assume the role of an advocate in support of my personal evaluation of the matter. In oral argument at the hearing on the case and as emphasized in the subsequent dissent in the case, it was apparent that more than two years had elapsed from the date of the decision by the trial judge. Therefore, it seemed to me that as a very practical matter the case should be remanded and reheard by a different trial judge, if for no other reason than that of the possibility that conditions and circumstances might well have changed, and that at least an up-to-date custody determination based on current and expanded social data should be made by a different trial judge.

Now again, I raise these questions: What objective or subjective criteria or standards were applied in this case? What influenced and determined the decision? The pertinent principle of law is that custody determinations must be made by the courts to serve the best interests of the child. Obviously, this rule of law, as such, discounts the conflicting claims, desires, and interests of the parents, making these subservient to the interests of the child. In this respect the limiting or exclusionary effect of the rule seems quite positivistic. In the majority and the dissenting opinions, each recognized, re-enunciated, and ostensibly applied the same principle or rule of law relating to the best interests of the child. But the end results and the custody awards, as favored by the majority and by the dissent, were diametrically conflicting. Why? What accounted for this? It was not the facts, as such, for all of these were available, known to, and considered by the majority and also the dissenting judges. The answer lies in evaluation, interpretation, and emphasis accorded to the various facts. But, did the facts supply their own evaluation, interpretation and emphasis, or the standards for ascertaining such? If not, then the missing and decisive component could have been supplied by the experience and backgrounds, the personalities and reaction, the mental processes of the appellate judges. But these facets of the problem are variables and are predictable, if at all, only in relation to the individual judge, his memory recall respecting past experiences, the creative bent of his mind, his emotional, in fact,

his total mental or intellectual orientation, reactions, and processes.

Query again: Toward which end of the spectrum did the law operate in this instance, and what about the judging function? Should description and characterization be in terms of absolutes and certainties, or in terms of flexibility or creativity? Were the determinations as made by the judges closely related operationally to Cardozo's generalized formula? Could the applicable rule of law possibly operate and decide the case without facts or empirical data? Could this happen in a mechanical sense with fact-data available but without interpretations or personal judicial value judgments as to these data?

A recent case[15] decided by our Washington Court involved the meaning and effect of the language of a state statute which provided for the creation and operation of water districts. In our state these are legal entities or municipal corporations authorized to supply water to home owners or others. Two water districts were created by inhabitants of particular geographical areas, as permitted by statute. One boundary of the two districts was an adjoining one. The promoter of a real estate development, located physically within one district, could effect substantial savings in his costs respecting water mains and connecting lines by arranging for water services to be provided by the adjoining district, and water connections for his promotional houses were made accordingly. The other district applied to the courts for an injunction to prohibit the business arrangement made by the real estate promoter with the rival water district. The pertinent portion of the basic state statute authorizing activities and functions of water districts simply provided: "Water districts may supply water services to persons outside of the district." The problem of course was whether this statutory language permitted a water district in effect to *invade or raid* another district for customers. Stated another way (using words or language symbols differently in a less dramatic perhaps not so slanted more objective manner), the question was whether the statute simply authorized water services to be supplied by a district to persons outside the district but not residing in another district. The official journals of proceedings in the House and the Senate of the State Legis-

15. Alderwood Water Dist. v. Pope & Talbot, 62 Wash.2d 319, 382 P.2d 639 (1963).

lature provided no help; *i.e.*, no clues were available as to the meaning of the pertinent statutory language. There were no committee reports available or other material indicative of either legislative intent or the meaning of the language of the statute. In the face of little or no help in terms of legislative documents or other published material relative to the meaning of the statute, and practically with no other pertinent information or facts, our court nevertheless had to make a decision and determine the outcome of the case. This, of course, the necessity that a decision be made, is one of the special characteristics of the judicial function, perhaps the vital one. It was my assignment to write the opinion for the court, deciding this legal controversy. The decision restricted water districts to customers within their own district and to persons outside of the district, but not residing in any other water districts. Obviously, one of the considerations in resolving this case was to prevent one district from jeopardizing the operations and the orderly development of the facilities of another district.

Where does this case fit, in terms of our evaluative, juristic spectrum? What were the determining factors involved in the appellate process? Was it enough that the appellate court *of necessity* had to make a decision, simply to settle the controversy?

Several years ago, a case[16] in our appellate court involved a state statute which imposed a prison penalty if a convicted and incarcerated criminal offender escaped "from an institution of the State of Washington." Such a person was in temporary custody in a county jail. He escaped, was rearrested, indicted, and convicted under the indicated provision of the escape statute. Custody of state prisoners in county jails had existed for years and was authorized by certain legislation in terms of financial reimbursement by the state to the counties for the cost of services rendered. The crucial question of course was whether, under the statute and in the particular context, the county jail was an institution of the State of Washington and escape therefrom by a convicted state prisoner was punishable under the escape statute enacted by the legislature. Once again, no legislative records were available to shed any light as to the nature of the legislative intent or as to how the statute should be interpreted. We did have the language of the statute,

16. State v. Rinkes, 49 Wash.2d 664, 306 P.2d 205 (1957).

which obviously did not help. We did have the above-indicated information about the existing practice (a) that state prisoners were kept for varying periods of time in county jails, and (b) that the state paid for these services, but this provided less than a conclusive answer to the judicial problem involved. Our court held that the escape of a state prisoner from the county jail violated the statute. Once again, what were the determining factors? What considerations of public policy, if any, would justify the decision in view of the orthodox canon of strict statutory interpretation respecting criminal statutes? Did the court construe the statute simply by "looking at its four corners"? Was it simply given a "common sense interpretation"? Is the latter justification sufficient? Where does this case and its disposition fall in terms of our spectrum, measure, or standard for analyzing and evaluating the law and judicial disposition of cases?

There are other court decisions I would like to discuss and bring to your attention for some critical analysis; however, time is limited and I must move along. But I will take the time to comment on two decisions in the field of constitutional law. They do not involve any highly controversial issues respecting federal versus state constitutional authority and relationships. And they involve none of the usual supercharged emotional potential of such matters. But in a milder or more limited way, serious controversy and some emotional content or overtones were factors not entirely absent in determining the law and performing the judge function in these cases involving only state constitutional issues.

In *Hoague v. Port of Seattle*,[17] a state statute was designed to permit the development of industrial sites for manufacturing and other industrial plants. This was to be accomplished by creating industrial development districts, as provided by the statute. The statute authorized municipal corporations to create industrial development districts to acquire real estate through the exercise of the power of eminent domain; and, subsequently, to improve, plat and to lease or to sell such real estate for the establishment and use of industrial plants in the so-called industrial districts. The basic question, a constitutional one, was whether or not the statute involved the taking of private property for a *private* or for a *public* use. The former was pro-

17. 54 Wash.2d 799, 341 P.2d 171 (1959).

hibited, the latter was permitted by the state constitution. Our court, by a five-to-three vote, with one judge disqualifying for personal reasons, held that the use contemplated by the statute was a private rather than a public one, and, consequently, was prohibited by the provisions of the state constitution. A strong dissent was filed by three members of the court.

Two years later, in *Miller v. City of Tacoma,*[18] a somewhat different state statute was involved. It was designed more directly for the purpose of urban land renewal and development rather than for the purpose, as in the *Hoague* case, of developing industrial sites or industrial districts. In the *Miller* case the thesis of the dissent in the *Hoague* case seemingly became the law of the State of Washington. The urban renewal legislation involved in the *Miller* case was upheld by a five-to-four vote. Interestingly and perhaps somewhat curiously, the *Miller* case was argued three times before our court. The first rehearing occurred because of a resignation from the court; subsequently, in a period of several months, another rehearing was necessary because of the untimely death of one of our judges. Thus, before the decision could be agreed upon one way or the other, our court — its qualified and functioning members — twice reached an impasse, four favoring and four disfavoring constitutionality of the statute. Although the court is normally composed of nine members, a total of eleven judges heard the case during the three times it was argued before the court. There is no public record as to how two of these voted. Possibly six of them could have favored invalidating the statute on the ground of unconstitutionality. In any event, five of the nine judges finally functioning on the case voted to validate the statute. The problem in the *Miller* case, of course, required the court to find appropriate or at least persuasive definitions in the legal literature or elsewhere, or to create ad hoc an appropriate definition of the terms *public use* and *private use.* The constitution obviously used the terms but did not define or spell out their meaning. The basic problem was, I think, one of approach or method, whether the court should look backward, to the present, or to the future, or to all three of these dimensions or factors, in considering the provisions, the purpose and import of the statute, and applying, construing, or interpreting the language of the pertinent provisions of the state constitution.

18. 61 Wash.2d 374, 378 P.2d 464 (1963).

Literally, as mentioned above, the language of the constitution was not self-definitive as to what did or should constitute a "public use." The problem of the majority as well as the dissent was to brew a judicial recipe which would exude the most persuasive justification that privately owned real property was or was not being taken for a *public use.*

Perhaps it would be repetitive and elaborating the obvious, and even a bit fatuous, to raise the following questions, but I will do so: Did the appellate court find or discover the law? Did the majority opinion of the court operate largely at the creative end of the spectrum of the law in deciding this case? Was the operation different, or was it also creative, in formulating and articulating the dissent? What about Cardozo's formula or generalized definition of the judging function? Does the formula generally fit the judicial operations in the *Hoague* and *Miller* cases?

The several cases brought to your attention were selected deliberately from several areas or basic classifications of the law. They are representative of the judge function in these several areas: (a) child custody matters, (b) statutory problems and interpretation — civil and criminal, (c) constitutional problems and interpretation. Admittedly, they fall on our juristic spectrum some distance away from the absolute extreme and nearer to the opposite pole, or the extreme bearing the labels flexibility, creativity, and exercise of judicial discretion.

Now, I come to the point where I wish to suggest a review of what I have said and a regrouping of suggestions or thoughts I may have been able to present for your consideration.

Why talk about the nature of the law and the nature of the judging function in terms of careful and realistic analysis and evaluation, on the basis of some kind of a formula or conceptualistic scale or spectrum with extremes and mid-points, and possibly points in between such? I have done so largely for several reasons, which I shall now indicate.

First, although you are divided into first, second, and third-year law students, you are soon becoming lawyers, and advocates in relation to the problems and the causes of clients. The breadth and depth of your approach and understanding respecting the many facets of the law and the judging function will

determine how much assistance you will be to your clients as an advocate, and will determine whether you meet your responsibilities and how much assistance you will be to the courts. Perhaps my emphasis upon the absolutes at one extreme, and creativity at the other end of our evaluative juristic spectrum, and upon the Cardozo formula, will be helpful. At the risk of further elaboration of the obvious, I will suggest that most rules of law are implemented on the basis of the pertinent facts, or perhaps I could say empirical data, presented and made available for consideration by the courts. More often than not, interpretation or evaluation of these data is likely to be controlling in terms of decision making in contrast to the positivistic implications or some kind of mystical compulsion supposedly inherent in abstract legal rules and principles. Forthright flexibility and creativity in approach should be a hoped-for characteristic of the young-in-heart law student, because, may I say, it identifies or predicts professional competence and responsibility and a constructive and successful career in the legal profession.

As to my second reason for the content of my talk with you, I turn again to Cardozo where, in *The Nature of the Judicial Process,* he says:[19]

> "The work of deciding cases goes on every day in hundreds of courts throughout the land. Any judge, one might suppose, would find it easy to describe the process which he had followed a thousand times and more. Nothing could be farther from the truth. Let some intelligent layman ask him to explain: he will not go very far before taking refuge in the excuse that the language of craftsmen is unintelligible to those untutored in the crafts. Such an excuse may cover with a semblance of respectability an otherwise ignominious retreat. It will hardly serve to still the pricks of curiosity and conscience. In moments of introspection, when there is no longer a necessity of putting off with a show of wisdom the uninitiated interlocutor, the troublesome problem will recur, and press for a solution. What is it that I do when I decide a case? To what sources of information do I appeal for guidance? In what proportions do I permit them to contribute to the result? In what proportions ought they to

19. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 9 (1928).

> contribute? If a precedent is applicable, when do I refuse to follow it? If no precedent is applicable, how do I reach the rule that will make a precedent for the future? If I am seeking logical consistency, the symmetry of the legal structure, how far shall I seek it? At what point shall the quest be halted by some discrepant custom, by some consideration of the social welfare, by my own or the common standards of justice and morals? Into that strange compound which is brewed daily in the caldron of the courts, all these ingredients enter in varying proportions. I am not concerned to inquire whether judges ought to be allowed to brew such a compound at all. I take judge-made law as one of the existing realities of life. There, before us, is the brew. Not a judge on the bench but has had a hand in the making. The elements have not come together by chance. *Some* principle, however unavowed and inarticulate and subconscious, has regulated the infusion. It may not have been the same principle for all judges at any time, nor the same principle for any judge at all times. But a choice there has been, not a submission to the decree of Fate; and the considerations and motives determining the choice, even if often obscure, do not utterly resist analysis."

Cardozo's observations are applicable today, particularly as to the understanding of judges relative to their decisional function, and whether they can explain it rationally, intelligibly, either among themselves or to others. If, as seems to happen more often than not, a judge is oriented in his thinking too closely in the direction of absolutes and certainties, his function is thereby depreciated and limited substantially.

I certainly cannot and would not deny that there are absolutes in the law which prompt the judicial process to operate and the judge function to be performed, as by an automaton with relatively mechanical precision. But I feel the emphasis or modus operandi is substantially in the other direction on our hypothetical juristic spectrum or measuring stick, indicating that the process is an on-going, evaluative, and in many respects a creative one. Related to this there is an important facet worth mentioning and with some emphasis.

If the law is regarded and over-emphasized in terms of absolutes, and automatic implementation of principles and applica-

tion of rules, the judge function logically is automatic and absolute in nature. It follows that personal and official responsibility is extremely limited or nil. On the other hand, the Cardozo formula — in the direction of creativity in evaluating the law and the judicial function — implies or poses significantly the matter of individual responsibility on the part of the judge. If judgment, discretion, or choice there is, then it follows there is responsibility for decision making. I firmly believe that in our legal system — in terms of the American concept of government under law — a more realistic evaluation of the law and the judging function is not only desirable, but vital and necessary. Other branches of government in our American system, formula or ideal of representative democracy are held responsible for decision making. Rationally, logically, it should be the same insofar as the judicial branch is concerned whether it be at the state or national level. Some may think it is dangerous, even heretical, to concede that wide areas of judicial discretion or creativity exist, amounting in some instances to the exercise of almost plenary judicial power. However, a more realistic conception and evaluation of the judge function, if coupled with a binding concept of personal and official judicial responsibility, and public awareness and insistence thereupon, is much less dangerous than the obverse. In fact, to deny the existence of broad discretionary power and authority, coupled with the co-existence of considerable individual responsibility on the part of the members of the judicial branch, is inimical to our concepts of government by the consent of the governed; *i.e.*, responsibility of the governors to the governed for action and decision making.

Assuming some accuracy for this position, it leads me to a third reason or basis for my remarks. Not only should we reexamine the nature of the law and the judicial function in terms of substantive law, but examination, evaluation, and improvement in procedural law, and in the administration of our legal system, the functioning, day to day, of our courts, should be high on the agenda of public notice and attention. The objective, an elusive one but reasonably attainable if we persevere, should be the disposition of lawsuits on the basis of reasonably acceptable standards of fairness with a minimum of technicality and delay, and at reasonable expense to the litigants. In the area of judicial administration, furthermore, I must say that,

if the law and the judge function are creative to a high degree in our dynamic democracy, the standards and the methods or mechanics for the selection, retention, removal, and the voluntary or mandatory retirement of judges certainly become significant to a very high degree. Actually, what are the standards and the mechanics of our system? What should they be? Among other things, what standards are uniformly recognized, and are legally operable respecting education, training, competence, tenure, compensation, removal, and retirement?[20] Does the existing system secure the best talent in the legal profession for the judicial branch of government?

And now, lastly, there is another and larger frame of reference for my observations and comments. What I am about to say was characterized by my law clerk as "a leap in the direction of the cosmos." Perhaps it is just this, to think and talk about world peace and order through rule of law. In any event, I shall risk the leap. That we are living in the atomic space age requires little documentation. One atomic-nuclear submarine, fully armed, packs more destructive force than all of the bombs dropped by all of the belligerents in World War II. Our physical facilities of communication and transportation have today resulted in an approximation of Wendell Wilkie's "One World" concept of several years ago. In the dramatic words of Adlai Stevenson, "We and other peoples of the world now live side by side in the same stuffy tenement."

In a half century we have not only experienced two major world wars of tremendous destructive consequences, but the forces of destruction in modern warfare have evolved almost to the point of infinity or totality. Armed conflict and war as a means for settling international tensions and disputes has become so staggering and utterly fantastic as to be almost beyond human imagination. A hopeful alternative is world peace and order through rule of law. I will admit it is a nebulous hopeful ideal at the present time. But awareness of this possible peaceful alternative by the legal fraternity throughout the world is a most hopeful beginning. The considerations I have emphasized herein are, I think, a most important step in such a beginning. I mean by this the careful analytical investigation

20. KLEIN, JUDICIAL ADMINISTRATION AND THE LEGAL PROFESSION, A BIBLIOGRAPHY (1963); VANDERBILT, MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION (1949); *The Model Judicial Article*, 47 J. AM. JUD. SOC'Y 1-34 (1963).

and evaluation of law and the judging process, and this in terms of its assets and liabilities as a potential for the settlement of international tensions and conflicts.

The American Bar Association is engaged in a hopeful and encouraging program. Four regional meetings of the world's lawyers and one world-wide meeting have been held. Perhaps the discussions have not proceeded in the greatest depth and breadth; undoubtedly, obstacles and problems and frustrations have been and will be encountered. But the beginning, to my way of thinking, is an auspicious and hopeful one. Some "doubting Thomases" will say, among other things, (a) there are no bases, conceptually or otherwise, for world rule of law, (b) no legal system can or will operate or work without enforcement authority, enforcement techniques, machinery, and wherewithal, and these are now nonexistent, imponderable, and impossible of attainment at the international level, (c) we know very little about and doubt if the international court of justice or any other international entity would be competent and could be trusted. But may I point out that the same things have been said in a more localized dimension respecting the courts and Anglo-American law almost since the time of the Norman Conquest. There have been frustrations; there have been advances and regressions. But progress has been made. We, in America, live today and enjoy the blessings of democracy under a reasonably successful and on-going system of government under rule of law.

I would freely admit that transplantation or any effort at immediate adaptation and application of our Anglo-American legal system to international problems would be highly unsatisfactory, indeed an impossibility. Neither ours nor any other legal system in existence today or at any time in history could adequately cope with the tasks involved. But the point is this. The elimination of the age-old mystery that shrouds the law and the judge function, with the resultant realization that the application of the judicial function varies from the area of absolute rules to vistas of concomitant creativity and responsibility, will produce a sounder foundation for a larger use of law experience and legal knowledge. This foundation or understanding, widely known and accepted, could not only vastly improve the effectiveness of our own legal system, but, hopefully,

further practice and experimentation could produce legal procedures and even a legal system that could be acceptable, understandable, and reasonably operable at international levels. This is the hopeful and I believe not impossible alternative to war as the means of settling international tensions and conflicts. But once again, I stress that the utility of such an ideal is largely dependent upon a responsible awareness of the judge function in the rule of law.

Now, in conclusion, the law and the judge function, their evaluation, their significance in terms of both domestic tranquility and world order, are matters presently in the hands of those of us oldsters actively engaged in the work of the bar and the bench and the law schools. But an inevitable finger points and writes in a moving context. You and your associates in the law schools around the world hold the key to the future. Today's challenge is, I believe, in breadth, depth, and total scope, the greatest for the legal profession of any period in the memory of man. I hope and I believe in the future, and that it is in good hands.