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SOME OBSERVATIONS ON THE LAW AND THE NATURE OF THE JUDICIAL PROCESS.

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May I strongly emphasize at the outset that I have approached the opportunity of preparing this paper in very much the same spirit expressed by Mr. Justice Holmes in 1897 in his speech, *The Path of the Law.*[1] There, in attempting a somewhat critical evaluation of law and the judicial process, Holmes said:

> I trust that no one will understand me to be speaking with disrespect of the law, because I criticize it so freely. I venerate the law, and especially our system of law, as one of the vastest products of the human mind. No one knows better than I do the countless number of great intellects that have spent themselves in making some addition or improvement, the greatest of which is trifling when compared with the mighty whole. It has the final title to respect that it exists, that it is not a Hegelian dream, but a part of the lives of men. But one may criticize even what one reveres. Law is the business to which my life is devoted, and I should show less than devotion if I did not do what in me lies to improve it, and, when I perceive what seems to me the ideal of its future, if I hesitated to point it out and to press toward it with all my heart.

I think it is safe to say that all of us, when we were law students, experienced something of the Holmes spirit of inquiry and skepticism. Definitely, we were interested in learning the rules of law, possibly by rote or memory. We drove hard to acquire a facility in legal tech-

* This article is derived from an address delivered by Judge Robert C. Finley at the Annual Meeting of the North Carolina Bar Association, on October 23, 1959.

[1] 10 HARV. L. REV. 457, 473-74 (1897).

niques. But, on the other hand we were curious and concerned as to the why and wherefore of the rules of law, the logical, historical, social, moral or other reasons therefor. Actually, I think that as law students most of us were quite impatient with superficial analysis, and with legal rationalization. Perhaps, at that time, we lacked understanding and maturity; but, with considerable youthful zest, the quest for knowledge and wisdom in the law, and for ultimate justice in the solution of human controversies, certainly was very strong, if not paramount, in our hearts and in our thinking. Since law school, however, most of us, as lawyers and judges, have been faced with the problem of too much work and too little time. So, pressed for time and busy with specific cases, I wonder if we may have become somewhat too accustomed to a rather pedestrian approach to the problems of the law and the function of the judicial process.

Perhaps, this came about naturally, (1) as a result of our law school training, which certainly over-emphasized the case method; or (2) as a matter of habit, if not expediency, in our practice of law through resort to the orthodox case method in attempting to solve legal problems. In other words, as legal technicians, we have a habit. We search earnestly, often a little desperately, for a plausible precedent—a "blue cow" case. However, in searching in this manner for solutions to legal problems, have we lost perspective and that spirit of inquiry which most of us had in law school?

The subtle implications may seem a bit critical—and, perhaps, they are.

To add fuel to the spark, I will mention Dean Roscoe Pound's fairly recent book, *The Lawyer from Antiquity to Modern Times*. The ubiquitous Pound depicts a somewhat critical, if not uncomplimentary, attitude of the public respecting our legal profession from Colonial times to the present day. I, of course, believe steadfastly with you, and will defend by documentation, quoting chapter and verse, the validity of our often-repeated assertion that ours is an ancient, honorable and learned profession. But, to borrow a phrase, the price of our professional status and rights is eternal vigilance through constant and earnest devotion to the public trust—the purpose being that the Bench and the Bar will continue, as truly in the past, to be a bulwark in the protection and maintenance of our American Way of Life.

In 1906 Dean Pound delivered an epochal address.[2] It was un-

[2] 29 A.B.A. Proceedings, 1906. As to the significance of Dean Pound's address, Dean Wigmore subsequently referred to the speech as "the spark that kindled the flame of progress." 20 J. AM. JUD. SOC. 176 (1937).

precedented in the annals of the American Bar Association in the severity of its criticism of lawyers, the courts, and the American administration of justice. As to the courts, Pound's criticism concerned incompetent, badly trained judges, and their political or happenstance selection. He denounced the then prevalent technicalities of legal procedure—trial from ambush, where ancient and outmoded ground rules made a lawsuit a game of chance instead of a quest for justice. He spoke of the legal profession's habit of slavish adherence to precedents, without having any real understanding of the historical reasons back of them, pointedly criticising the application of precedents after the supporting reasons had ceased to exist.

As to lawyers, his criticism emphasized lack of training, incompetence, poor professional ethics and standards, and the evils of irresponsible, unrestrained advocacy.

I hasten to point out that much has transpired and that there have been substantial improvements since the speech in 1906 by Dean Pound. Today there are more and better law schools. Numerous bar associations have been organized and are operating effectively. Much has been accomplished respecting admission, professional ethics, and discipline. Considerable improvement may be noted in the methods employed for the selection of judges. Furthermore, in the field of procedural law, pitfalls for the unwary, legal technicalities, and delay frustrative of justice have been minimized through clarification and simplification of the rules of practice and procedure. My purpose in mentioning some of these developments is to point out and to emphasize that the most constructive changes have occurred (1) in the field of procedural law, and (2) in judicial administration. The latter term of course largely refers to methods or mechanics for expediting and handling the business of the courts.

The one significant area wherein we have lagged the most is in the field of substantive law evaluation, revision, and improvement.

Over thirty years ago, Cardozo[3] wrote of the need for a national ministry of justice. Vanderbilt gave priority and emphasis to judicial administration, but also underlined the significant need for substantive law evaluation and revision.[4]

State commissions on substantive law revision have been established by legislative enactment in New York and California. Their work and accomplishments have been worthwhile, but somewhat limited.

[3] 35 HARV. L. REV. 112 (1921).
[4] VANDERBILT, THE CHALLENGE OF LAW REFORM 135 (1955).

My main purpose herein is to emphasize the need for substantive law evaluation and revision. I am not thinking so much in terms of the establishment of legislative commissions. It is, very simply, my belief that a better understanding of the nature of the judicial process by both Bench and Bar would produce far better and more acceptable results than could be expected from legislative commissions. I am convinced that better understanding by Bench and Bar of the nature and function of the judicial process would come about naturally through a broad program aimed at the development of modern law centers at existing law schools. I mean such modern law centers as that embodied in the broadscale program of continuing legal education and research, now in operation at the New York University Law School.

In thinking of the need and value of a better understanding of the judicial process through continuing legal education, legal research, debate and discussion respecting the judicial function, I want to take a somewhat round-about approach, making use of a conversation piece.

According to a discussion I overheard between my wife and some of her women friends, a conversation piece is an item of antique or unique furniture, glass, or pottery, or something of that nature. It performs an interesting social function. Apparently, when conversation lags with a guest or at a bridge party, the ladies bring out or point to a conversation piece. Immediately, new interest or curiosity is stimulated. The discussion and conversation are off to a new and vigorous start, *ad infinitum*.

So, I direct your attention and thought to my conversation piece. It is simply a stack of briefs, a yard high; namely, all of the briefs filed in the cases argued at one of the three terms of the Washington State Supreme Court a year ago. We handle approximately 350 appellate cases a year. If the number, height, weight, and amount of pages of a yard-high stack of briefs is multiplied by three, a rough idea can be ascertained as to the workload of our court at least in terms of the briefs and records submitted for our edification in the 350 cases decided each year.

Obviously, handling this annual appellate workload is time consuming. Each judge on the court is required to spend approximately 69 days of each year in the courtroom hearing argument on the cases involved. Assuming that one day is spent reading briefs for each day in court, about 138 days are consumed in hearing cases and reading briefs. If 138 days are subtracted from the 365 days in a year, about

227 days are left for each judge to write the decisions of the court assigned to him and to consider the opinions written by other members of the court. Last year I wrote 57 opinions. Of these, 36 were assignments for the court, and 21 were concurring opinions or dissents. Dividing the total number of days, 227, available for this work, by the number of opinions written, meant that I had an average of four days to write each opinion. Forgetting about the dissents and concurrences on the theory, perhaps, that I shouldn't have written them, 227 days divided by 36 assignments, which I actually had to write for the court, would have allowed me six and one-half days per opinion, or case. Though some cases may actually require less time, others obviously may require considerably more time. However, unless on the average less than six and one-half days are spent by each judge in writing his particular assignments, it is obvious that absolutely no time will be available for considering assignments or opinions written by other members of the court, or for conferences with the other judges respecting the cases to be decided.

Our appellate courts traditionally are designed to function as multi rather than single judge institutions. The reasons for multi judge appellate courts are fairly obvious: First, the number of cases appealed simply means a workload too great for one judge; second, there is the generally sound idea that the individual mind is still slightly less than infallible, and that the composite evaluation and disposition of legal problems by courts composed of several judges produces better results in terms of justice, law and order.

As indicated heretofore, the Washington State Supreme Court handles approximately 350 appellate cases annually. Available statistics show that the workloads of appellate courts of other states are comparable. In view of the staggering workloads faced by our appellate courts today, how can they possibly find the time to function collectively? How can they work out and arrive at composite judgments, representing the studied wisdom, training and experience of the entire court?

The point of diminishing returns actually has been reached. Instead of functioning as a group whose collective training, experience, wisdom, and judgment can be utilized in evaluating and disposing of cases on appeal, there is a dangerous tendency, almost a necessity, to parcel out the cases proportionately to the individual judges, and to accept and approve their judgment and recommended disposition of such cases. This is well known in judicial circles. It has been the subject of

study by Bar Association committees and Judicial Councils, and even by legislative committees. In the State of Washington, for example, this problem and its significance was called to the attention of the legislature in a scholarly report, with recommended solutions, in 1929.[5] However, no serious effort was made to do anything further about the problem in our state until quite recently. Unfortunately, efforts in the last several legislative sessions to find some practicable solution to the problem were abortive.[6] It bears repeating that this problem is not restricted to merely one or two states, but is chronic in most of them. I suggest it is a matter of great public importance that demands serious study and effective corrective action. Basically, the point I wish to make is simply this: The size of the workload of an appellate court determines whether cases on appeal will be evaluated and disposed of through an informed, composite judgment of the group, or by delegating responsibility and accepting the recommendation of individual members of the group.

Once again, I shall refer to our conversation piece, a yard-high stack of appellate briefs. They represent a wide variety of both criminal and civil actions. Largely, the cases fall into three categories involving (a) common law questions; that is, problems of judge-made law; (b) statutory questions, involving principles of statutory construction, interpretation and application; (c)constitutional questions, obviously involving the principles or problems of constitutional interpretations and application.

First, let us look at this composite of cases from the standpoint of the lawyers or the firms representing the litigants in these cases. The lawyer or firm on each side of each controversy analyzed and evaluated the client's case in terms of the facts and legal principles involved. Assuming, as we should, a fair and careful analysis of previous court decisions and other authorities respecting each case that was appealed, the opposing attorneys concluded that there was much to be said in support of their particular side of the controversy. In other words, the

[5] State of Washington: Second Report of the Judicial Council (1929), pp. 10-11.

[6] H.J.R. 7 (a proposed constitutional amendment), introduced at the 1959 legislative session, was passed by the House of Representatives, survived first and second readings in the Senate, but died in the Senate Rules Committee in the closing hours of the session. As amended by the Senate Judiciary Committee, the resolution provided:

> The superior court judges and retired supreme court judges shall at all times be subject to call to the supreme court by that court to act, for not more than ninety consecutive days, in a department thereof as associate judges in place of any absent, disqualified or disabled judge or for assignment to a department of said court, but no department shall include more than one such judge.

A comparable proposal (H.J.R. 5) was introduced at the 1957 session.

net effect was that competent, ethical lawyers wrote briefs and urged that the cases be decided in two conflicting ways. Now I do not think that lawyers take cases to a state supreme court just to earn legal fees, or because they enjoy the experience of arguing an appeal. Their actions, furthermore, should not be rationalized purely on the theory of advocacy, for all lawyers are officers of the courts wherein they practice and they share with the courts a grave responsibility for the administration of justice in our country. The only reasonable explanation or inference is that appellate cases are in the main close and doubtful ones from the standpoint of facts or law, or both. Certainly, all of us would agree quite readily that the lawyers acted ethically and properly in practically all of the 350 appellate cases which I have called to your attention.

There is another factor that bears upon our conversation piece: an informal study of 1,000 cases of the Washington State Supreme Court shows that we reversed in 36.8% of these appeals. This percentage may be too high. It may or may not mean something is wrong with our particular system. I don't know. I mention the percentage of reversals because it does indicate appellate cases are close ones, and that predictability as to outcome is hazardous.

At this point, we have thought about what the lawyers did and their function in the approximately 350 cases appealed to the Washington State Supreme Court in an average year. Three bound volumes of printed opinions show what the court did and the function of the judges in the same 350 cases. You will note that perhaps we did not have quite so much to say about the cases as the lawyers did. But what about the decisions by the court disposing of these cases? Well, first of all, there were some dissents; and, yes, perhaps shockingly enough, there were some very close five-to-four decisions deciding and disposing of the appeals. A recent editorial in one of our local papers criticized appellate courts for dissenting opinions, and for five-to-four decisions.[7] As a practicing lawyer I seem to recall that I also criticized dissents and five-to-four decisions. Perhaps I even indulged in this criticism almost as a hobby.

Now it certainly is not my intention to be unduly critical. The point is this: What the lawyers did in these cases generally seems quite acceptable and understandable. It should be the same as to the court —what is sauce for the goose is sauce for the gander. There simply is

[7] The Daily Olympian, September 21, 1959, p. 4, col. 1.

a great need for a better understanding and evaluation of the nature of the judicial function in appellate cases.

I will add briefly that it seems to me that the filing of a dissent is more indicative and a more truthful and accurate reporting practice as to what a court decided; hence, more useful to lawyers when the members of a court cannot agree unanimously. The filing of an opinion as though a decision is unanimous, when in fact it is not, is to my mind actually a questionable practice. I shall add quickly that I hold no brief for intemperate dissent or for dissent merely for dissent's sake.

Now suppose we take a somewhat different approach in thinking about the nature of the judicial process. When I was in law school, there was great esteem for Judge Cardozo's work while on the New York Court of Appeals, and later while on the United States Supreme Court. In his stimulating little book, *The Nature of the Judicial Process,* published first in December 1921, this gentle scholar, intellectual giant, and remarkable jurist, observed:

> 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 craft. Such an excuse may cover with a semblance of respectability an otherwise ignominous 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 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 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. . . .[8]

Lord Coke, commenting on the law and the judicial process, reportedly once observed, "Reason is the life of the law."[9] Obviously, this statement emphasizes precedent—that is, logic, or the process of deduction, as the most significant factor in the judicial process.

In contrast to this, there are a number of statements by Holmes. Among other things, he stated that the history of world morality is the history of the law. In his book, *The Path of the Law,* he criticizes the habit of judicial reliance upon precedent, pointing out that the use of precedent simply involves an application of the science of logic, or logical methods in the legal field. Specifically, Holmes said:

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 langaguge of judicial decisions 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.[10]

Holmes immediately prefaced this statement with the following:

So in the broadest sense it is true that the law is a logical development, like everything else. The danger of which I speak is not the admission that the principles governing other phenomena also govern the law, but the notion that a given system, ours, for instance, can be worked out like mathematics from some general axioms of conduct. This is the natural error of the schools, but it is not confined to them. I once heard a very eminent judge say that he never let a decision go until he was absolutely sure that it was right. So judicial dissent is often blamed, as if it meant simply that one side or the other were not doing their sums right, and, if they would take more trouble, agreement inevitably would come.[11]

In *The Common Law,* Holmes stated:

[8] CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 9-11 (1921).
[9] CATREZAS & EDWARDS, THE NEW DICTIONARY OF THOUGHTS 328 (rev. ed. 1955).
[10] 10 HARV. L. REV. 457, 465 (1897).
[11] *Ibid.,* 465.

> The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.[12]

Professor Julius Stone, in his treatise, *The Province and Function of the Law*,[13] criticizes the doctrine of *stare decisis* or the rule of precedent, I think, almost too severely and unnecessarily.

Judge Roger Traynor of the California Supreme Court, commenting on the law and the judicial process at the dedication of the new Law School Building at the University of Illinois, recently stated:

> More than ever social problems find their solution in legislation. Endless problems remain, however, which the courts must resolve without benefit of legislation. The great mass of cases are decided within the confines of stare decisis. Yet there is a steady evolution, for it is not quite true that there is nothing new under the sun; rarely is a case identical with the ones that went before. Courts have a creative job to do when they find that a rule has lost its touch with reality and should be abandoned or reformulated to meet new conditions and new moral values. And in those cases where there is no stare decisis to cast its light or shadow, the courts must hammer out new rules that will respect whatever values of the past have survived the tests of reason and experience and anticipate what contemporary values will best meet those tests. The task is not easy—human relations are infinitely complex, and subtlety and depth of spirit must enter into their regulation. Often legal problems elude any final solution, and courts then can do no more than find what Cardozo called the *least erroneous answers to insoluble problems.* But a searching error is a useful worm, burrowing deep to leaven the hard ground of tradition that it may nourish new growth as dogma dies.[14]

Sir Frederick Pollack once observed:

> No tolerably prepared candidate in an English or American law school will hesitate to define an estate in fee simple; on the other hand, the greater a lawyer's opportunities for knowledge have been, and the more time he has given to the study of legal principles, the greater will be his hesitation in face of the apparently simple question, What is Law?[15]

In a recent closed circuit address before the Chapter of the Order

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[12] HOLMES, THE COMMON LAW 1 (1881).
[13] STONE, PROVINCE AND FUNCTION OF THE LAW (1st ed. 1950).
[14] 2 U. ILL. L. F. 232 (1956).
[15] See CARTER, LAW: ITS ORIGIN, GROWTH AND FUNCTION 9 (1907).

of the Coif at the University of Washington, an associate on the Washington State Supreme Court, Judge Foster, stated that our profession has been too prone to praise the role of the common law in our system of justice without critically evaluating some of its shortcomings. He said:

> For centuries, succeeding generations of lawyers have been told that the common law was perfection in itself. Each generation has struggled valiantly to exceed preceding ones in extravagant and intemperate praise of the common law. But is this justified? Will the common law of a simple, agrarian society solve the problems of a highly industrialized and scientific one? Unless the common law attributes of real property ownership had been promptly discarded, what would have happened to the modern necessity respecting navigation of air space? Of course, the question answers itself, but this illustration is not an isolated one.

Lifted out of context, the statement may seem somewhat shocking. However, when put in proper focus, there is considerable truth in it. For example, I know that in making the statement my associate, Judge Foster, was thinking of *Ackerman v. Port of Seattle*.[16] This case is now in our Court on a petition for rehearing.[17] I cannot say very much about it other than to state the problem. The owners of unoccupied land adjacent to the airport and beneath the glide path of airplanes (landing and taking off) brought a suit to recover for alleged diminution in the market value of their unoccupied property. They urged as the basis of legal liability (1) trespass, (2) nuisance, and (3) a constitutional damaging or taking of their property, without compensation having first been paid into court. The airport argued that there had been no trespassing in the orthodox, physical sense of that common law concept; that the property was zoned for an airport, and that the operation of the airport was not ultra vires, but authorized by ordinance and state legislation; hence, immunity with respect to any unlawful trespass. The same argument was advanced as to the common law nuisance concept. Our court initially filed an opinion indicating doubt as to any common law basis of liability, but held that the complaint was good against a demurrer, since it alleged a constitutional cause of action; namely, damaging or taking of property without compensation.

In criticizing the common law, I know that Judge Foster was also thinking of its shortcomings, in terms of its failure to provide a socially

[16] 152 Wash. Dec. 663, 329 P.2d 210 (1958).

[17] Editor's Note: The decision of the Washington State Supreme Court upon the petition for re-hearing referred to by the author was filed on January 14, 1960.

acceptable, overall solution to the problem of workmen injured in industrial employment. The final result, of course, was legislation in all the states. This, essentially, circumvented fault as the basis of liability or recovery by negativing the common law concepts of contributory negligence, and assumption of risk, and providing industrial insurance for workmen injured in industrial employment. Substantially, this problem has been taken out of the hands of the courts and removed from the field of common law litigation.

Finally, I know that, in underlining the shortcoming of the common law, my associate, Judge Foster, was thinking of the doctrine of charitable immunity; and furthermore, of the common law doctrine of privity of contract in the products-liability field. It is obviously a far cry from the case of *Winterbottom v. Wright*[18] to *MacPherson v. Buick Motor Co.*,[19] and to *Freeman v. Navarre*.[20] Incidentally, we all know that there has been discussion from time to time of the possibility of a legislative-administrative solution relative to the problem of automobile personal injury litigation. Insurance benefits would be paid to injured motorists, without regard to fault, contributory negligance, or negligence. It may, however, be that some system of comparative negligence will become the law in more and more states, and will provide, at least a tentatively acceptable solution.

In my allusions to the observations of Holmes and others as to the doctrine of stare decisis, it is not my purpose to be unduly critical of the rule of precedent, but to suggest inquiry and a better evaluation and understanding of its purpose and use as a significant factor in the operation of the judicial process. I do not infer that stare decisis serves no useful purpose. Furthermore, I am certainly not suggesting that the judicial process should become in effect an easily adjustable sieve, through which an amorphous mass of personal notions, scientific or other values of hypotheses should emerge as arbitrary rules of law merely at the behest of judges and with barely a tentative semblance of certainty, form and symmetry. Stare decisis unquestionably serves one useful, although perhaps sometimes tentative or technical, purpose. It permits the courts to evaluate and to compare contemporary values with other values established or accepted in the past. It sharply emphasizes the fact that for a given period of time past values and legal concepts, or rules, based thereon have survived the tests of reasonableness

[18] 10 M & W 109, 152 Eng. Rep. 402 (1842).
[19] 217 N.Y. 382, 111 N.E. 1050 (1916).
[20] 47 Wn.2d 760, 289 P.2d 1015 (1955).

and experience. The significant question actually is whether the judges of our courts will so regard or analyze the doctrine of stare decisis as a useful and significant factor in the judicial process.

Now to summarize: (1) We have taken a look at the function of lawyers and have attempted some evaluation of their work as a part of the judicial process. We have compared this evaluation and understanding of the work of the lawyer with the evaluation and, may I say, lack of understanding of the function and work of the judges. (2) I have cited and quoted a number of statements respecting the judicial process and the law by outstanding judges and legal scholars.

All of this indicates the existence of several significantly different viewpoints, theories, or so-called schools of legal philosophy regarding the nature of law and the nature and function of the judicial process.[21] But these viewpoints or schools of thought seem to me to group themselves around or in the direction of two divergent ideas, ideals, or perhaps one could say, extremes: First, the extreme that legal principles are eternal verities, or are absolute in nature, and that they are or should be automatic in application; that the judicial process is nothing more or less than the action of judges in seeking or attempting to discover and apply the proper legal rule or postulate, one inference being that these are inherently divine and revealed to the well-trained, conscientious, good judge.

Diametrically opposed to this extreme, there is another view, sometimes referred to as the functional, or the sociological, or the realistic school of legal philosophy. Here, the emphasis is upon social change, social needs, and consequently, upon flexibility and evolution in the law as an institution of social control. There is, of course, some truth—yet I feel considerable error—in both these extreme viewpoints.

Personally, I lean toward an explanation of the judicial processes and the law, somewhere in between the two extreme views. It is a viewpoint expressed quite well by Cardozo. I do not think I could improve upon his statement. He said:

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[21] Eminent scholars seem to experience some difficulty in isolating or defining accurately the several viewpoints or so-called schools of legal philosophy. They disagree not only as to the labels, words, or language symbols to be used to identify particular viewpoints, but also as to the content or substance involved. KELSEN, GENERAL THEORY of LAW AND STATE, Appendix: Natural Law Doctrine and Legal Positivism at 397; Pound, *Natural Law and Positive Natural Law,* 68 LAW QUART. REV. 330 (1952). Beutel, *Relationship of Natural Law to Experimental Jurisprudence,* 13 OHIO ST. L. J. 167 (1952); Fuller, *Positivism and Fidelity to Law,* 91 HARV. L. REV. 630 (1958); Parker, *Natural Law and Kelsenism,* 13 OHIO ST. L. J. 160 (1952); Llewellyn, *Some Realism about Realism,* 44 HARV. L. REV. 1222 (1931); Chroust, *Natural Law and Legal Positivism,* 13 OHIO ST. L. J. 178 (1952).

> 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.[22]

Cardozo, in his writings, denies the assertion of the extreme realists that judges, in rendering judicial decisions, are free-wheeling, independent, and uncontrolled. It was his view that judges as a whole are bound, or at least strongly influenced, by legal history, precedent, by moral and ethical standards of right and wrong conduct, by the social needs of the time, by the evaluation placed upon their decisions by members of the Bar, other judges, and the public at large. In other words, though it may appear to be somewhat paradoxical, it seems to me that Cardozo suggested a flexibility, within limitations; knowledgeable, conscious flexibility, within knowledgeable and conscious limitations.

In view of this divergence of views respecting the nature of the judicial process, it would seem that the subject still deserves considerable research and study.

Keeping in mind only the questions and problems I have referred to herein, it is my sincere belief that the Bench and Bar of our country could perform a notable public service by encouraging and supporting a movement for the establishment and maintenance of modern law centers in each of our states. This of course would take some money and some doing, but could be accomplished fairly simply by enlarging the scope of operations of existing law schools along the lines of the operation of the New York University Law Center. Such a program, among other things, would emphasize and provide for continuing legal study of the seminar or other variety for lawyers, judges and law teachers. At times, it might include interested and competent representatives of other professions and of other areas of skill and learning. I am pleased to be able to report that we have made a start in this direction in the state of Washington. This summer two interesting and worthwhile seminars were held. Participating, were practically all of the members of the State Supreme Court, most of the superior court trial judges, the Dean and several members of the faculty of our state law school, and several outstanding leaders of the Bar.

Our Washington state judges are planning another seminar for next

[22] CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 112 (1921).

summer. A number of substantive law problems have been suggested for consideration and study, such as (1) the privity of contract problem in the products liability cases; (2) involuntary confessions in criminal cases; (3) the McNaughton rule, or the right and wrong test when insanity is a defense in a criminal case; (4) comparative negligence; (5) the model code of evidence. The New York University Law Center has conducted a two to three week seminar for approximately twenty state appellate court judges every summer for the past four years.

I am convinced that the nature and function of the judicial process would be a fertile field of study for any modern law center. One result should be a better understanding of the Judicial Function, which, I am sure, would be worthwhile and should be most constructive in the correction of imperfections in the law, and in improving the administration of justice in our country.

In the words of an author unknown to me: "The important thing is to have faith, but not illusions, and to risk action on this faith."