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Essay

STATUTORY ANALOGY, PURPOSE, AND POLICY IN LEGAL REASONING: LIVE LOBSTERS AND A TIGER CUB IN THE PARK

ROBERT E. KEETON*

INTRODUCTION

Advance notice of this lecture** stated the title simply as “Statutory Analogies in Legal Reasoning.” I like short titles, and I empathize with those who deplore subtitles. But, while preparing this lecture, I became convinced, first, of a need for “purpose” and “policy” in the title and, second, of an exceptional need for a subtitle: “Live Lobsters and a Tiger Cub in the Park.” I defer explaining either conviction until I have introduced a theme underlying the issues I ask you to explore with me.

Before Oliver Wendell Holmes, Jr. had attained eminence as a Justice, and while speaking in a mode more provocative than precise, he commented, “The life of the law has not been logic: it has been experience.”¹ He spoke at a time when hyperbole was understood as a figure of speech, not the shrill assertion of a strident advocate.

In view of current mores of public discourse, exaggeration is more likely to be understood as overzealous advocacy than as a subtle figure of speech. Nevertheless, I will run the risk of proposing a scaled-down variation on the Holmes aphorism. I believe this statement to be almost literally true. I place it before you as the theme of this Essay: Analogy, more often than logic, is the principal method by which judges decide cases.²

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** The substance of this Essay was originally presented on March 3, 1993, as the Pearl and Lawrence I. Gerber Memorial Lecture. I gratefully acknowledge the courtesy of the Editors in allowing many informalities of style to be preserved in this published version. Some substance as well as flavor might have been lost in a more substantial transformation of style.

1. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (Boston, Little, Brown & Co. 1881).

2. See ROBERT E. KEETON, *JUDGING* 2 (1990).

Corollaries and implications of this theme could occupy us for hours, or weeks. Indeed, if my present effort to whet your appetite for thinking more seriously about analogical reasoning succeeds, I will urge you to do some reading. I recommend that early in the process you read Professor Cass Sunstein's recent article on analogical reasoning,³ on which I will comment further near the end of this Essay.⁴

Returning to my theme, I ask you to keep the place of analogy in mind as we think about the roles, the functions, and the conduct of the various lawmakers and decision-makers who are called upon to deal with some fundamental social and economic problems that are illustrated by a hypothetical case.

I. THE CASE OF LIVE LOBSTERS AND A TIGER CUB IN THE PARK

On a warm, sunny afternoon, live lobsters were being carried through a municipal park despite a very visible sign, "No animals in park, unless on leash." A diligent and dedicated park attendant was on duty. He believed in enforcing the rules. Also present were a score of outspoken members of a group in the community dedicated to the protection of animal rights.

A shopper had just bought the lobsters at a market and had cut across the park toward home, unaware that the animal rights demonstration was in progress. The demonstrators demanded that the park attendant arrest the shopper.

The park attendant, a stickler for the rules, knew he lacked authority to arrest without a warrant. Instead he issued a citation to the bewildered shopper and said, "I'll see you in court tomorrow." Then he escorted the shopper through the covey of demonstrators toward the nearest exit from the park.

Just before reaching the exit with the shopper, the park attendant encountered another citizen who had just entered, leading a tiger cub by a decorative ribbon. The park attendant blocked that citizen and her pet and ushered both out, over the citizen's strenuous protest that she had come to exercise her First Amendment right to speak her mind against the animal rights demonstration. The park attendant also issued her a citation.

What would you have done had you been the park attendant? What will you do tomorrow, if you are the judge?

3. Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741 (1993).

4. See *infra* text accompanying note 63.

The courtroom—*your* courtroom—is filled with angry spectators, including an even larger delegation of the animal rights group, as well as the tiger cub owner and her supporters. Also present in court, of course, is the shopper, now well-represented, less bewildered, and deeply aggrieved. All of these people will be at the polls when you run for re-election. How do you decide this case? Do you find the shopper guilty of the misdemeanor of violating the ordinance requiring compliance with the sign in the park? Do you find the owner of the tiger cub guilty?

Among the sets of lawmakers and decision-makers who must deal with problems associated with confrontations of this kind are the following six:

First, the drafters of statutes and ordinances; second, the drafters of contracts; third, the drafters of implementing rules, regulations, and directives—including park signs; fourth, the counselors who must interpret all of these drafts to advise citizens of the community about their rights, privileges, obligations, and remedies; fifth, the facilitators of alternative dispute resolution who try to help contending individuals and factions find an acceptable accommodation; and sixth, the decision-makers who, under the rule of law and in accordance with the facts as well as they can be determined, resolve the disputes that survive all other efforts at resolution.

This sixth set of decision-makers includes two subsets: one to find the facts—a judge in a bench trial or a jury—and the other to determine and apply, or tell the factfinders how to apply, the law—a judge. My remarks will focus primarily on the roles, functions, and performances of persons in the sixth category—the decision-makers who decide the hard cases⁵ that nobody else has succeeded in resolving.⁶

II. STATUTORY ANALOGY

Permit me, at the outset, a genuine hyperbole: “Everybody uses statutory analogy, purpose, and policy in legal reasoning. Few like to admit doing so.” I invite you to think also about whether this

5. There is an adage about hard cases making bad law. See, e.g., *Northern Securities Co. v. United States*, 193 U.S. 197, 400 (1903) (Holmes, J., dissenting) (“Great cases, like hard cases, make bad law.”); *Burnham v. Superior Court*, 495 U.S. 604, 640 n.* (1990) (Stevens, J., concurring) (“Perhaps the adage about hard cases making bad law should be revised to cover easy cases.”).

6. Judges are seldom asked to decide easy cases. Easy cases, absent bad lawyering or unreasonable clients, are usually disposed of by settlement and never reach a judge for decision. See KEETON, *supra* note 2, at 3.

next statement is hyperbole or just a fact of life: "Rarely can either an appellate judge or a trial judge decide a hard case without doing at least a little lawmaking. Moreover, every lawmaking decision is value-laden."⁷ Expressed another way, the observation is this: Judges cannot help thinking about policy questions and invoking analogies when they are making reasoned choices. Nevertheless, most judges prefer not to talk or write about it.

"Using analogy," "thinking about the purpose underlying a statute or a judicial decision," and "thinking about policy questions" are three very closely related conceptions of legal reasoning. Perhaps, even, they are simply three different ways of describing the same thing. I believe, however, that there is even more discomfort among legal professionals (including lawyers and professors as well as judges) about explicitly using policy reasoning than about explicitly invoking statutory analogy, or statutory purpose.

A passage in a judicial opinion, referring to an inquiry about the meaning of one statute as analogous to an inquiry about the meaning of another statute, may not disturb the calm of professional readers. For example, in 1982, the Supreme Court of New Hampshire, in construing that state's Unfair and Deceptive Practices Act,⁸ looked to the "well developed" case law construing a Massachusetts "consumer protection statute"⁹ containing "exactly the same definition of trade and commerce as is contained in" the New Hampshire statute.¹⁰ In 1993, when construing the New Hampshire act with respect to whether an alleged practice can be determined to be "unfair" even though not among a statutory list of thirteen unfair or deceptive acts or practices expressly stated to be non-exhaustive, a federal court remarked: "Although the statute provides no further explication and New Hampshire caselaw is sparse, consultation with both federal and Massachusetts precedent is encouraged."¹¹ The supporting footnote explicitly uses the phrase: "analogous Massachusetts 'unfair and deceptive practices' act, Mass. Gen. Laws ch.93A."¹²

7. See KEETON, *supra* note 2, at 20.

8. N.H. REV. STAT. ANN. § 358-A (1984).

9. MASS. GEN. LAWS ANN. ch. 93A, § 1 (West 1980).

10. See *Chase v. Dorais*, 448 A.2d 390, 391-92 (N.H. 1982).

11. *Chroniak v. Golden Inv. Corp.*, 983 F.2d 1140, 1146 (1st Cir. 1993).

12. *Id.* at 1146 n.11. The court also called attention to the statutory directive in the New Hampshire act that "courts should 'be guided by the interpretation and construction given section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)), by the Federal Trade Commission and the federal courts.'" *Id.* (quoting N.H. REV. STAT. ANN. § 358-A:13 (1984)).

In contrast, some eyebrows are likely to be raised by an explicit suggestion that a court, in making the lawmaking decisions necessary to fill gaps in the law, should be guided not only by the policies underlying common-law precedents, but also by the policies underlying statutes. Yet, a venerable pretwentieth century tradition approved this method of legal reasoning. In an essay published in 1934, Dean James Landis convincingly documented this professional tradition of recognizing statutes as sources for further development of decisional law.¹³ He explained origins of the tradition¹⁴ and noted latter-day defections.¹⁵ He also advocated renewal of the tradition.¹⁶

Reasons for defections in the late nineteenth and early twentieth centuries are not entirely clear.¹⁷ In any event, with the encour-

13. James M. Landis, *Statutes and the Sources of Law*, in HARVARD LEGAL ESSAYS 213, 214-18 (1934).

14. The doctrine of "equity of the statute" was employed by early English courts to permit judges to recognize exceptions to loose statutory generalizations and, at the same time, bring situations that lay beyond a statute's express terms into its reach. See *id.* at 214-15. See also William L. Reynolds, JUDICIAL PROCESS IN A NUTSHELL 119-23 (2d ed. 1990) (discussing "the equity of the statute" under the heading, "Equity and Analogy").

15. In his essay on statutory analogy as a source of law, Dean Landis provided an excellent example of late nineteenth century reluctance of the judiciary to utilize statutory analogy:

When the highest tribunal of England in 1868 decided that the land-owner who artificially accumulates water upon his premises is absolutely liable for damage caused by its escape, that judgment had an enormous influence throughout Anglo-American law. True, the rule involved was supposed to possess a rational basis in the earlier common-law treatment accorded wild animals. But we are sufficiently mature to realize that the ultimate wisdom of such a judgment must rest upon the question of how well it distributes the unavoidable losses incident to the pursuit of a particular industrial occupation. Had Parliament in 1868 adopted a similar rule, no such permeating results to the general body of Anglo-American law would have ensued. And this would be true, though the act had been preceded by a thorough and patient inquiry by a Royal Commission into the business of storing large volumes of water and its concomitant risks, and even though the same Lords who approved Mr. Fletcher's claim had in voting 'aye' upon the measure given reasons identical with those contained in their judgments. Such a statute would have caused no ripple in the processes of adjudication either in England or on the other side of the Atlantic, and the judicial mind would have failed to discern the essential similarity between water stored in reservoirs, crude petroleum stored in tanks, and gas and electricity confined and maintained upon the premises—surely an easier leap than that from wild animals to reservoirs.

Landis, *supra* note 13, at 221 (citations omitted).

16. See *id.* at 233-34.

17. They might be attributable to the development of theories of jurisprudence that emphasized "the nature of the judicial process as limited to the mere finding of law." *Id.* at 217. Dean Landis suggested that, in this country, the dormancy of this tradition of

agement of Dean Landis and in the spirit of that most active period of the realist movements (in the Twenties, Thirties, and Forties), the professional tradition of judicial reasoning from statutory policy was revived. It has survived through the 1980s with moderate strength. From the sidelines, as a professional commentator, I have applauded the revived tradition. Also, in the 1980s, as a judge, I have thought it appropriate to contribute a little to the practice of the tradition. Now, in the 1990s, I am uneasy about the future of this tradition, for reasons to which I return near the end of these remarks.

Through the decades since I first read Dean Landis's seminal essay, I have continued to wonder why both the tradition and the Landis essay about it have not been more widely acknowledged by judges, lawyers, teachers, and scholars. Is concern about what has come to be called "judicial activism"¹⁸ the answer, or at least a large part of the answer? If so, I believe full exploration of the limits as well as the usefulness of reasoning from the manifested policy premises of statutes should allay that concern and encourage judges to pay at least as much respect to legislation as to judicial opinions as a guide to resolving policy questions that inescapably must be resolved in current judicial lawmaking. The current judicial lawmaking of which I speak is lawmaking that judges must do—not by choice but by necessity—in order to decide disputes within their jurisdiction that it is their duty to decide according to law.

For a time at least, I was encouraged by the accumulation, within the decades of the 1970s and 1980s, of a substantial body of

legal reasoning might also have been due to judicial hostility to the Jacksonian insistence upon wide popular participation in government. *Id.* at 218.

18. See, e.g., Lino A. Graglia, "Interpreting" the Constitution: *Posner on Bork*, 44 STAN. L. REV. 1019, 1028 (1992) ("[J]udicial activism . . . has usurped decisionmaking power over so many issues—abortion, capital punishment, criminal procedure, busing, prayer in the schools, government aid to church-run schools, pornography, libel, street demonstrations, vagrancy control, discrimination on the basis of sex, alienage and illegitimacy and so on."); William B. Reynolds, *Another View: Our Magnificent Constitution*, 40 VAND. L. REV. 1343, 1350 (1987) ("[J]udicial activism as an illegitimate substitute for the amendment process can only jeopardize our fundamental freedoms by denigrating the structural underpinnings vital to their survival."). The concern over judicial activism has been echoed in judicial opinions as well. See, e.g., *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986) ("The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution."); *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2884 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part) ("[I]f in reality our process of constitutional adjudication consists primarily of making *value judgments* . . . then a free and intelligent people's attitude towards us can be expected to be . . . quite different.").

precedent supporting this kind of judicial reasoning. Included are decisions of the Supreme Court of the United States and of state courts of last resort.¹⁹ For example, in *Boston Housing Authority v. Hemingway*,²⁰ the Supreme Judicial Court of Massachusetts found that the policies established in a statute permitting tenants to withhold rent for Sanitary Code violations supported judicial rejection of the former traditional common-law rule of independent covenants.²¹ Signs of further support for the tradition are appearing in the 1990s.²² In addition, a body of precedents has developed in insurance cases. In our text on *Insurance Law*, my co-author, Alan Widiss and I, collected reported judicial opinions resolving disputes about the terms of insurance coverage that reason from principles and policies underlying statutes. We concluded that this growing body of precedent was sufficiently significant to warrant recognition in a separate subsection of our text, published in 1988.²³

Insurance law reflects two compelling themes—contract and public policy. Consistently with the first theme, the terms of insurance coverage afforded by nongovernmental insurers are found primarily in the contracts they make with policyholders, and most of the terms of those contracts are legally enforceable.²⁴ In many instances and in many ways, however, insurance contracts and insur-

19. See, e.g., *Moragne v. States Marine Lines*, 398 U.S. 375, 392 (1970) (citing Landis, *supra* note 13); *Mailhot v. Travelers Ins. Co.*, 377 N.E.2d 681, 684 (Mass. 1978); *Boston Housing Auth. v. Hemingway*, 293 N.E.2d 831, 840 (Mass. 1973) (citing Landis, *supra* note 13, and *Moragne*).

20. 293 N.E.2d 831 (Mass. 1973).

21. *Id.* at 840-43.

22. See, e.g., *Liberty Mut. Ins. Co. v. Commercial Union Ins. Co.*, 978 F.2d 750, 755-56 n.7 (1st Cir. 1992) (reasoning that, on a case-by-case basis, subsequent legislative history can be used to choose which interpretation of a judicially created rule "fits more comfortably within the overall statutory framework"); *Mercado-Garcia v. Ponce Fed. Bank*, 979 F.2d 890, 892-93 (1st Cir. 1992) (using judicial interpretation of one statute, with nearly identical language and similar purpose, to interpret the statute under consideration).

23. See ROBERT E. KEETON & ALAN I. WIDISS, *INSURANCE LAW* § 6.4(a) (1988) (stating that "variance claims may be predicated on judicial views of either explicit or implicit declarations of public policy"). See also *Kates v. St. Paul Fire & Marine Ins. Co.*, 509 F. Supp. 477, 488-93 (D. Mass. 1981) (Keeton, D.J.) (using public policy in interpreting the Massachusetts disability insurance law).

24. Thus, in the area of insurance, as elsewhere, the law respects freedom of contract and in general enforces freely made bargains according to their terms. See, e.g., *Cheney v. Bell Nat'l Life Ins. Co.*, 315 Md. 761, 766-67, 556 A.2d 1135, 1138 (1989) (holding that the manifested intention of the parties to an insurance contract was to be ascertained, if possible, from the policy itself). It is good advice to the lawyer and the judge as well as the law student: "First, read the contract."

ance business are regulated by statute.²⁵ They are also subject to a mix of federal and state administrative regulations. Finally, insurance *contracts* are also subject to a very substantial body of law of judicial origin—"regulation" in a broad sense, even though we are not accustomed to applying that terminology to it. This phenomenon of judicial "regulation" is one of growing significance because of the increase, in recent decades, in the number and scope of enacted statutes that are responsive to public concerns about particular insurance problems. Examples include: insurance claims practices acts,²⁶ motor vehicle financial responsibility acts,²⁷ uninsured motorist coverage acts,²⁸ and insurer insolvency acts.²⁹

In insurance law, as in other fields of law generally, enacted laws leave unanswered numerous questions that must be answered, sooner or later, to resolve disputes in particular cases about the terms of insurance coverage. Every new statute or amendment enacted has, in addition to its explicit mandates, some more or less clearly manifested premises—underlying policies and principles. Sometimes these underlying premises are quite clearly manifested and quite relevant to unanswered questions that a court must answer to resolve a dispute before it. In such a case, judicial respect for the other branches of government and for their lawmaking actions is not shown by judicial disregard of the manifested policy premises of the legislation. Disregard is a form of disrespect.

To show respect for the lawmaking authority of the legislative and executive branches, judges must respect the expressions, explicit and implicit, of the other branches' *reasons* for acting, as well as the specific mandates they declare.

III. SUPREME COURT REASONING ABOUT JUDICIAL REASONING

An especially interesting and significant development bearing on explicit judicial discussion of forms of judicial reasoning has occurred in recent Supreme Court opinions. Beginning just three terms ago, justices of the Supreme Court have written opinions that

25. Thus, it is wise, after giving the advice in note 24, *supra*, to add: "Next, read the statutes." This is true because statutes often reflect the second theme: that other public interests are at stake in addition to freedom of contract.

26. *See, e.g.*, OKLA. STAT. tit. 36, §§ 1251-60 (1986) (Insurance Claims Resolution Act).

27. *See, e.g.*, OHIO REV. CODE ANN. §§ 4509.01-4509.99 (Anderson 1990) (Financial Responsibility Act).

28. MD. ANN. CODE art. 48a, § 243H (1957) (Unsatisfied Claim and Judgment Fund Law).

29. R.I. GEN. LAWS §§ 27-34-1 to -19 (1989) (Insurers' Insolvency Fund Act).

are much more explicit about the Court's lawmaking role, and constraints upon its lawmaking role, than had been common for at least a decade or two.³⁰

What has come to be called "new rule" jurisprudence³¹ has been at least partly responsible for this set of explicit expressions of sometimes clashing views. A problem has been simmering mostly on a back burner ever since the Warren Court introduced new rules that revolutionized criminal procedure.³² A visitor from Mars who popped in to observe a criminal trial and preparations for it in the 1950s might think he had come to a different planet if she, he, or it stopped in again, for a next visit, in the 1980s or 1990s. Incorporating the new rules of criminal practice and procedure into the legal system has required some answers to questions about whether to apply the "new rule" retroactively, for example, to previous conduct (that is, conduct that occurred before the new rule was declared), to previous indictments not yet tried, to previous convictions on which rights of appeal have terminated, and to previous convictions on which rights of appeal have *not* yet terminated.

A similar set of problems in civil cases was receiving less attention until limitations defenses began to attract special notice a few terms back.³³ At that point the justices of the Supreme Court began to write opinions explicitly challenging each other's views about making new rules, and about declaring that they do or do not have

30. Compare, e.g., *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2806 (1992) ("The inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise the same capacity which by tradition courts always have exercised: reasoned judgment. Its boundaries are not susceptible of expression as a simple rule) *with id.* at 2884 (Scalia, J., concurring in the judgment in part and dissenting in part) ("How upsetting it is, that so many of our citizens . . . think that we Justices should properly take into account their views, as though we are engaged not in ascertaining an objective law but in determining some kind of social consensus."). See also the several opinions in *James B. Beam Distilling Co. v. Georgia*, 498 U.S. 803 (1990).

31. See, e.g., *Teague v. Lane*, 489 U.S. 288, 310 (1989) ("Unless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced."); *Butler v. McKellar*, 494 U.S. 407, 414 (1990) ("The 'new rule' principle therefore validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions.").

32. See, e.g., *Miranda v. Arizona*, 384 U.S. 436 (1966) (denying use at trial of a statement made after arrest and before the defendant was advised of his constitutional rights); *Massiah v. United States*, 377 U.S. 201 (1964) (holding that the right to counsel attaches when a criminal suspect is indicted).

33. See, e.g., *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 157 (1987) (Scalia, J., concurring in the judgment) (criticizing the majority for "borrowing" a statute of limitations period from the Clayton Act and applying it to the RICO statute).

retroactive application.³⁴ I do not, however, undertake to explore these very significant developments today.

IV. STATUTORY PURPOSE IN SUPREME COURT DECISIONS

In the new mode of free and open exchange of views about law-making, opinions of justices of the Supreme Court currently speak more often and more explicitly about a closely related problem that I will call "judging statutes."

One of the most recent and most interesting sets of opinions on this subject was handed down in January 1993, in *Rowland v. California Men's Colony*.³⁵ The precise issue of statutory interpretation before the Court was whether the word "person," as used in the *in forma pauperis* statute,³⁶ included a corporation or association or was limited to natural persons. That is, did the statute confer on entities such as an association of prisoners in the California Men's Colony, as well as each prisoner individually as a natural person, the right to proceed *in forma pauperis* when satisfying other conditions prescribed in the statute? The Court's answer, by a five-to-four majority, was No. "Person" in this statute meant a natural person only. A legal entity such as the California Men's Colony was not a "person" and was therefore not authorized by the statute to proceed *in forma pauperis*.³⁷

In reaching this conclusion, the Court interpreted not only 28 U.S.C. § 1915 but also another statute, the Dictionary Act.³⁸ That statute declares that "person," as used in any act of Congress includes "associations" and other artificial entities such as corporations and societies, "unless the context indicates otherwise."³⁹ In *Rowland*, the majority held that "'[c]ontext' here means the text of the Act of Congress surrounding the word at issue, or the texts of other related congressional Acts,"⁴⁰ and not "context" in its "secondary meaning of '[a]ssociated surroundings, whether material or

34. See *id.* at 166-70 (finding no basis in precedent or policy for creation of "new" statute of limitations rule).

35. 113 S. Ct. 716 (1993).

36. 28 U.S.C. § 1915(a) (1988).

37. *Rowland*, 113 S. Ct. at 718.

38. 1 U.S.C. § 1 (1988).

39. *Id.*

40. *Rowland*, 113 S. Ct. at 720. Perhaps the "text of the Act of Congress surrounding the word at issue" would also include at least the "structure of the statutory scheme" and perhaps "its objectives"—as these phrases were used in *Block v. Community Nutrition Inst.*, 467 U.S. 340, 345 (1984). If not, has *Rowland* limited *Block*?

mental. . . .'⁴¹ Even though differing on outcome and reasoning in other respects, all three opinions filed in *Rowland* support the proposition that courts are bound not only by unambiguous legislative mandates but also, when the statutory text is ambiguous, by something more—variously described in the different opinions as “statutory purpose”⁴² or “congressional policy judgments”⁴³ that are implicit in words of the statutory text. Writing for the majority, Justice Souter noted:

The dissent suggests that our reference to statutory purpose here [in construing 28 U.S.C. § 1915(a)] is inconsistent with our interpretation of “context” in 1 U.S.C. § 1. . . . A focus on statutory text, however, does not preclude reasoning from statutory purpose. To the contrary, since “[s]tatutes . . . are not inert exercises in literary composition [, but] instruments of government,” . . . a statute’s meaning is inextricably intertwined with its purpose, and we will look to statutory text to determine purpose because “the purpose of an enactment is embedded in its words even though it is not always pedantically expressed in words.”⁴⁴

Justice Kennedy, explaining his reason for joining the dissent, wrote:

[I]t seems to me permissible to ask whether the broad Dictionary Act definition is compatible with a workable construction of the statute. To the extent the Court attempts to uncover practical barriers to including artificial entities within 28 U.S.C. § 1915, its analysis is quite appropriate and ought not to be condemned as policymaking. The problem, in my view, is that the Court does not succeed in this attempt.⁴⁵

Justice Thomas, with whom Justices Blackmun, Stevens, and Kennedy joined, dissenting, declared:

Any reading of the phrase [in 1 U.S.C. § 1] ‘unless the context indicates otherwise’ that permits courts to override congressional policy judgments is in my view too broad. Congress has spoken, and we should give effect to its

41. *Rowland*, 113 S. Ct. at 720 (citing WEBSTER’S NEW INTERNATIONAL DICTIONARY 576 (2d ed. 1942)).

42. *Id.* at 726 n.12.

43. *Id.* at 731 (Thomas, J., dissenting).

44. *Id.* at 726 n.12 (citation omitted).

45. *Id.* at 726 (Kennedy, J., dissenting).

words.⁴⁶

Other opinions of justices of the Supreme Court have supported what may be understood as a somewhat broader obligation of judicial deference to legislation, under which a court may appropriately examine statutes as sources of expression of underlying purposes and policy judgments that may guide a court not only in statutory interpretation but also in resolving other issues of decisional law.⁴⁷ In *Moragne v. States Marine Lines, Inc.*,⁴⁸ for example, the Court recognized a wrongful death cause of action in admiralty beyond the scope prescribed by congressional acts. The Court stated, "The [legislative] policy . . . has become itself a part of our law, to be given its appropriate weight not only in matters of statutory construction but also in those of decisional law."⁴⁹

Has the precedential weight of the opinion in *Moragne* been limited by more recent Supreme Court opinions? That is another interesting question that I must today defer for exploration on some other occasion. For the present, I observe merely that even if *Rowland* is interpreted as limiting *Moragne*, the fact remains that all justices of the current Court have, in *Rowland*, endorsed the view that courts are bound to respect not only unambiguous statutory mandates but as well something more. The uncertainty is about how to describe that something more. Is it statutory purpose? Is it the structure of the statutory scheme and its objectives? Is it statutory policy? Is the use by judges of any or all of these kinds of sources of guidance well described as statutory analogy in legal reasoning?

V. LIVE LOBSTERS AND A TIGER CUB ONCE MORE

With the statement of theme and several deferred concerns in mind, I ask you now to think more about the case of Live Lobsters and a Tiger Cub in the Park. This hypothetical case was inspired by

46. *Id.* at 731 (Thomas, J., dissenting).

47. See, e.g., *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970) (recognizing a cause of action based on policy enunciated by Congress). See also *Boston Housing Auth. v. Hemingway*, 293 N.E.2d 831, 840 (Mass. 1973) (citing *Moragne*, 398 U.S. at 380); *Liberty Mut. Ins. Co. v. Commercial Union Ins. Co.*, 978 F.2d 750, 755-56 n.7 (1st Cir. 1992) ("Common sense tells us that legislative history, whether contemporaneous or subsequent, can be used [to construe a judicially created rule]."); *Fischer v. Bar Harbor Banking & Trust Co.*, 857 F.2d 4, 7 (1st Cir. 1988) (noting that in determining an undecided issue of state law, "a federal court may consider 'analogous decisions, considered dicta, scholarly works, and any other reliable data tending convincingly to show how the highest court in the state would decide the issue at hand'" (quoting *Michelin Tires v. First Nat'l Bank of Boston*, 666 F.2d 673, 682 (1st Cir. 1981))).

48. 398 U.S. 375 (1970).

49. *Id.* at 390-91 (citing *Landis*, *supra* note 13).

the opinions of Chief Judge Stephen Breyer in two recent cases before the First Circuit Court of Appeals. The first was *Martin v. Coventry Fire District*.⁵⁰ In a clear and thorough opinion interpreting a federal statute contrary to the meaning contended by the Secretary of Labor, Judge Breyer declared:

The Secretary quite properly understands, however, that statutory language, like all language, derives its meaning from context. A sign that says "no animals in the park" does not mean "no picnic oysters," nor does it mean "no children," nor is it "ambiguous" in this respect.⁵¹

The hypothetical sign, "No animals in the park," appears again in Chief Judge Breyer's opinion in *United States v. Data Translation, Inc.*⁵²

As I was reading the second of these opinions at home one evening, I chuckled. My wife inquired why. I read to her the passage about the hypothetical sign, "No animals in the park," and remarked that I might use that example for this lecture. She responded, "If you do, make it live lobsters a shopper just bought before taking a short cut through the park on the way home." I have adopted her suggestion, and I acknowledge my indebtedness both to her and to Chief Judge Breyer for providing me this apt example to drive home the point that statutory interpretation ought to be realistic, pragmatic, free of contrary-to-real-world presumptions, and fundamentally consistent with common sense.

The park attendant deserves commendation for his diligence and dedication, for his sensitivity to the limits of his powers of arrest without a warrant, and for his capable handling of an explosive situation when he escorted the bewildered shopper through the angry group of demonstrators to the nearest park exit. He did not do as well, however, in interpreting the park sign. He needed more guidance and experience in interpreting ordinances and statutes.

Even if live lobsters on their way through the park in the shopper's bag are literally "animals in the park," no reasonable person, with a good understanding of the legal system, could conclude that the posted sign had a manifested meaning that was violated either by the lobsters themselves (in which case the remedy might have to be an *in rem* proceeding) or by the shopper who was carrying them. Statutory (or ordinance) interpretation is not a game of words and

50. 981 F.2d 1358 (1st Cir. 1992).

51. *Id.* at 1361.

52. 984 F.2d 1256 (1st Cir. 1992).

moves and umpires who enforce technical rules to trap the unwary and make hapless players look foolish, all for the amusement of spectators. Statutory interpretation is a vital part of a system of administering justice. The system is aimed at producing just and, as far as is humanly possible, predictable outcomes.

What do live lobsters and a tiger cub in the park have to do with my stated subject matter—"Statutory Analogy, Purpose, and Policy in Legal Reasoning"? It is time for me to be more explicit.

Would you rule that a violation occurred when the owner led the tiger cub through the park on a ribbon? The sign said, "No animals in park, unless on leash." The ribbon, incidentally, was borrowed and adapted from one of Professor Warren Seavey's fabled hypotheticals in which the actor led a tiger through Harvard Square on a string (or, when Professor Seavey was in an especially jovial mood, on a thread).

For a variation on the hypothetical, change the sign slightly. Suppose it read: "No dogs or cats in park, unless on leash." We might argue about whether the sign, literally interpreted, applies to a tiger cub as a kind of cat and whether a string or a ribbon—even a nylon ribbon—is a leash. But even if both those questions are answered in the negative, one might reasonably argue that the text of the sign manifests quite clearly to any person who reads it with his common sense wits at work (and even without resort to any history about how the creators of the sign came to post it), that there was an underlying policy on which the rule of conduct stated in the sign was premised, and that the underlying policy is violated by a person who leads through the park a tiger cub on a ribbon—even a nylon ribbon. If this statement raises your eyebrows, note that I have said only, "one might reasonably argue. . . ."

We might differ in the way we describe the process by which the municipal court would reach its conclusion in order to rule on the misdemeanor charge before it. Is it just a plain common-sense "interpretation" of the sign and the rule of conduct it prescribes? Or is the municipal court filling in the interstices of an imperfectly drafted directive that leaves unanswered some questions the adjudicating court must answer to decide the case before it? If the latter, do we describe what the court does as using the directive (the ordinance and the park sign generated by legislative and executive officials of the municipality) as a source of guidance for judicial policy reasoning, or reasoning by analogy, or reasoning from purpose? That is, how do we describe what the municipal court does when the directive literally does not answer an important question that must be

decided as a legal premise in order for the court to determine whether a misdemeanor has been committed.

Is the court being more respectful or less respectful of the legislative and executive authorities of the municipality if the court candidly and openly reasons to the decision it reaches on the basis of a manifested underlying policy premise, rather than saying, in purported respect by the third branch for the authority of the legislative and executive branches of our government, that its hands are tied and it must rule that the municipal authorities so poorly drafted their directive that their manifested purpose fails?

VI. STATUTORY ANALOGY IN LEGAL REASONING

We have examined a background of precedent regarding judicial reasoning by "statutory analogy," judicial use of statutory purpose, and judicial use of statutory manifestations of underlying policies in reasoning to a lawmaking choice to fill some gap in the law that needs to be filled in order to decide a pending case. We have also considered a hypothetical test case. Now I invite you to think about the fundamental nature of legal reasoning. My theme is, first, that *some* use of statutory analogy, statutory purpose, and statutory policy is imperative. Telling an appellate judge or a trial judge to think about a statutory mandate that was fashioned by legislators who were thinking about purpose and policy, but not to think about what purpose or policy they were thinking about, is rather like—if I may use analogy—telling a child to stand in the corner and think about pink elephants but not about pink and not about elephants.

Statutes, their purposes, and the policies underlying them, even if separately identifiable to some extent, are also to some extent inextricably intertwined. In considering when and how far courts should use statutory analogy, statutory purpose, and statutory policy, we professionals should be communicating with each other candidly and openly about this subject, and about how human limitations and other realities of drafting documents, statutes, and even judicial opinions affect our professional work. I include law students among the professionals who should be communicating. They justify our hope and expectation that the legal *profession* will be even more worthy of the term "profession" in the future.

Also, of course, I include professors. I confess that, as a professor who often talked about this subject in classes and sometimes wrote articles about it, I probably conceived my role as that of a sidelines observer, rather than a participant. Having become a trial judge and thus inevitably a participant, I now see more clearly that

we need professionals other than judges to be participants in the exploration of the professional roles of trial and appellate judges.

We professionals—all of us—need to be more explicit and more candid about the purposes, principles, and policies underlying our existing practices with respect to “interpreting,” applying, and using statutes in judicial decision making—the process of “judging” statutes in the broadest sense.

Returning to the theme of this Essay, I now propose to you a second and third statement of underlying theme, supplementing the first theme I suggested at the outset of these remarks. I repeat the preliminary theme first. Analogy, more often than logic, is the principal method by which judges decide cases. The second statement, which I now propose to you, is an expansion of the first, providing more context:

Judging is choice. . . .

Judicial choice, at its best, is reasoned choice, candidly explained.

[One method of reasoning to a choice is logic.] Another . . . is what we call analogy. Logic draws sharp, bright lines. In contrast, analogy deals with ranges and shadings. . . . Analogy, more often than logic, is the principal method by which we compare and contrast different experiences, and assimilate and differentiate them.

[Analogy is the principal method we use to decide that] small percentage of cases left for decision, after settlements have disposed of the great majority, [leaving] selectively the more difficult.⁵³

The third statement focuses on “judging statutes”: we should always judge statutes candidly, practically, in a common-sense way, with respect not only for legislative mandates but also for statutory purpose and for manifestations of policy, and without resort to contrary-to-fact presumptions that disregard difficulties of drafting and realities of the legislative process.⁵⁴

Three more hypothetical cases that explain and test the theme are based on the “tort reform” statutes enacted in more than half of the fifty states during the 1980s.⁵⁵ Among those statutes were many that cut back in varied ways and degrees on the scope of common-

53. KEETON, *supra* note 2, at 1-3.

54. *See id.* at 139-43, 146-76.

55. *See generally* Robert A. Prentice & Mark E. Roszkowski, “Tort Reform” and the Liability “Revolution”: *Defending Strict Liability in Tort for Defective Products*, 27 GONZ. L. REV. 251 (1992) (outlining and criticizing tort reform legislation of the 1980s); Symposium,

law rules of joint and several liability.⁵⁶ This, incidentally, is the subject on which I stated some views in the presence of Professor Oscar Gray—an incident I believe to have been a “proximate cause” of my being invited to give this lecture.

I used one of those statutes—enacted in Louisiana—as the basis for three hypothetical cases discussed in chapter 6 of *Judging*.⁵⁷ Here are the first two of those hypothetical cases, referred to as Cases 6.1 and 6.2:

CASE 6.1

RICH, CABBIE, AND LUCE

Rich is in town for a big event. Having lingered in a bar a bit too long, he hails a cab and says “Step on it! I’ll pay the fine if [you are] stopped!” Cabbie, spurred by visions of a big tip, speeds through a traffic light just after it has turned red and crashes into Luce, driving along without having his seat belt and shoulder harness fastened. Luce is thrown out of his car and is severely injured. Cabbie is less severely injured. Rich is relaxed and is uninjured.

Luce sues Cabbie and Rich. Cabbie claims against Luce and Rich. At trial the factfindings are as follows:

Damages sustained by Luce.....	\$1 million
Damages sustained by Cabbie	\$90 thousand
Allocated percentages of responsibility:	
Rich	20%
Cabbie	70%
Luce	10% (only for not fastening belts)

The state in which these events occur has no statute as to wearing seat belts, has a comparative negligence statute enacted in the 1970s, and has a statute on joint and divisible liability enacted in the 1980s, which reads in part as follows:

A. He who conspires with another person to commit an intentional or willful act is answerable, jointly, with that person, for the damage caused by such act.

B. If liability is not joint pursuant to paragraph A, . . . [1] then liability caused by two or more persons shall be joint only to the extent necessary for the person suffering injury, death, or loss to recover fifty percent of his recover-

Tort Reform, 64 DEN. U.L. REV. 613 (1988) (covering the insurance crisis of the 1980s, joint and several liability, and the constitutionality of tort reform).

56. See, e.g., LA. CIV. CODE ANN. § 2324 (West 1989 & Supp. 1993).

57. KEETON, *supra* note 2, at 146-48.

able damages; [2] however when the amount of the injured person's recovery has been reduced in accordance with the comparative fault statute of the state, a judgment debtor shall not be liable for more than the degree of the judgment debtor's fault to a judgment creditor to whom a greater degree of fault has been attributed. [3] All parties shall enjoy their respective rights of indemnity and contribution. [4] Except as described in paragraph A of this Article, or as otherwise provided by law, and hereinabove, the liability shall be several only and a joint tortfeasor shall not be jointly liable with any other person for damages attributable to the fault of such other person, including the person suffering injury, death, or loss, regardless of such other person's insolvency, ability to pay, degree of fault, or immunity by statute or otherwise.

...

CASE 6.2

AFTER LUCE'S SETTLEMENT

Assume all facts to be the same as in Case 6.1, plus the following:

During trial, Luce settled with Cabbie for the full payment of the \$25,000 limit of Cabbie's liability insurance policy.⁵⁸

What is the meaning of the statutory phrase, "intentional or willful act"? What is the meaning of the longer phrase, "conspires with another to commit an intentional or willful act"? If you are a federal trial judge confronted with the need to answer questions like these about the meaning of a statute in order to decide a case on your docket, how do you decide? How do you discharge your judicial obligation of reasoned decision making, candidly explained?

My answer is longer than is appropriate for this occasion, but I do suggest to you, briefly, some of the answer's key parts. First, regardless of how fervently we might wish that everyone would use words in a way that conforms with the most common usage in the legal system—as an aid to clarity of communication and understanding—that will never happen. A judge, committed to determining the meaning of a passage in a statute or in a precedent as faithfully as possible to the meaning manifested in that passage, taken in its context, is not free to take the circumstances of ambiguity as an opportunity to fill the gap in communication the way the judge person-

58. *Id.* This hypothetical statute, though borrowed mostly from La. Civ. Code Art. 2324, changes the distinctive Louisiana terminology of "solidary" liability to the terminology common in other states—"joint" liability.

ally would prefer it to be filled, rather than the way most likely to be compatible with the entire communication in which the gap appears. This hypothetical statute is a classic illustration of a statute as to which there is a clear mandate for a change in the law from what it had been before, but a gap in the specification of just how far that change goes—a gap in the specification needed to decide the case before the court.⁵⁹

My second key point relies on the context of the enactment of this hypothetical statute. Let us assume that the context of the statute's enactment—even in the narrow sense of the text of other statutes of the state using phrases like “conspire” and “intentional or willful act”—included workers compensation statutes. The state's court of last resort had interpreted those statutes as to the meaning of “intentional act” before the legislature used this phrase again in the joint and several liability statute. Are we using statutory analogy, statutory purpose, and statutory policy when we study these opinions about another statute in order to reach a reasoned decision about the meaning of this phrase in this statute?

Are we acting properly if we also look to the larger body of common-law precedents about the meaning of these phrases in other contexts of tort law, hoping to find some help there in determining the meaning of this statute? The statute, after all, was enacted by a legislature after that body of common-law precedent, and precedent interpreting the statutes of other states, was in the books. Is it a reasonable inference that legislative drafters had access to and made some use of parts at least of that large body of available resources?

Similarities and differences among the joint and several liability statutes enacted in a majority of states in the 1980s suggest a lot of borrowing among the states, but also a lot of additional refinement and modification, state by state.⁶⁰ Is it appropriate then, when we

59. *Id.* at 163.

60. For example, many states, although limiting or abolishing joint and several liability, still retain the doctrine in actions involving environmental hazards. *See, e.g.*, IDAHO CODE § 6-803 (1992) (limiting joint and several liability but providing exceptions for causes of action relating to hazardous or toxic waste); HAW. REV. STAT. § 663-10.9 (1992) (abolishing joint and several liability except for certain actions, including “[t]orts relating to environmental solution”); ARIZ. REV. STAT. ANN. § 12-2506(D)(2) (1992) (“Nothing in this section prohibits imposition of joint and several liability in a cause of action relating to hazardous wastes or substances or solid waste disposal sites.”). Many states also limit the joint liability of defendants who are apportioned less than 50% of the total fault assigned to all the parties. *See, e.g.*, IOWA CODE ANN. § 668.4 (West 1992) (providing that joint and several liability does not apply to defendants who bear less than 50% of total fault); MO. ANN. STAT. § 538.230(2) (Vernon 1992) (providing for

are interpreting the joint and several liability statute of one state, to extend broadly our use of statutory analogy? Is it appropriate to examine the meaning of similar phrases not only in the workers compensation statute of the same state but also in the joint and several liability and workers compensation statutes of other states?

Before [the Louisiana] statute was enacted, the law imposed "joint and several" liability in some rather different kinds of circumstances, including, among others, the following distinct categories.

(1) Concerted action (e.g., two assailants beating and robbing the plaintiff).

(2) Concurring causes, each of which alone would have been sufficient to cause the entire harm of which a plaintiff complains (e.g., two fires that come together before burning plaintiff's house).

(3) Single indivisible result (e.g., two cars colliding, and one veering off to strike the pedestrian plaintiff).

(4) Arguably divisible results (e.g., traffic victim is taken to hospital, where malpractice occurs during treatment).

Perhaps we would all agree that the statute of Case 6.1 means to reduce (to the extent required to assure collection of no more than 50% of the total damages) one tortfeasor's "joint" liability for the allocable share of an insolvent second tortfeasor, at least in relation to most cases like those in categories (3) and (4). We may have more unease, and difference of opinion, about whether the statute means that a reckless tortfeasor is to receive this protection when the case is of the type in categories (3) and (4), however. Also, we may have differences among us about what the statute means for cases in category (2), and about whether some cases, even in category (1), are governed by paragraph B and not by paragraph A of the statute.

To which of these categories of cases—and to the differences within a category, such as the difference between merely negligent and reckless acts—does the argument that apparently appealed to the legislature have most com-

joint liability only with defendants "whose apportioned percentage of fault is equal to or less than such defendant"). Despite such similarities, many states have individualized these statutes. *See, e.g.*, MO. ANN. STAT. § 538.230(1) (Vernon 1992) (applying the limitation only to actions against health care providers); IDAHO CODE § 6-803 (1992) (denying the limitation to intentional or mass torts); HAW. REV. STAT. § 663-10.9(A)-(F) (1992) (same).

elling force—the argument of unfairness of imposing the entire risk of financial irresponsibility of a third-party contributor upon the defendant rather than the plaintiff?⁶¹

In thinking about the questions this way, we are, of course, considering our perception of the statute's underlying policy, as we perceive it to be manifested in the statute's words, taken in the larger context of the background of common-law rules into which the legislature introduced a mandate for a particular change—not the substitution of a whole new body of law.

Consider another case.

CASE 6.5 TOXIC WASTE DISPOSAL

Tortfeasor T1 (who continues to have large assets) hires Tortfeasor T2 (who has virtually no assets) to dispose of toxic waste at a location where it seeps onto plaintiff's adjacent property, making the property virtually worthless as well as creating difficult-to-appraise risks of bodily harm to plaintiff and plaintiff's family.

How does the statute, quoted in Case 6.1, affect this case?

Here the plaintiff is the classic innocent victim, and we may doubt that the statute means that the rule of joint liability is to be different for this case from what it has been. The words "willful act" in the statute provide a stronger base for this result than the words "intentional . . . act," but an argument may be advanced that a factfinder might find that at least harm to property, if not harm to person, was also within the scope of intended consequences on the ground that both defendants, acting in concert, knew that it was substantially certain that the toxic waste would seep onto adjacent property.

The argument for inclusion within the statutory objective underlying paragraph A certainly has more force in relation to conduct like that of T1 and T2 in Case 6.5 than to conduct like that of Rich and Cabbie in Case 6.2. Where is the line to be drawn? The statute does not provide a clear answer. It has a gap in this respect. Courts must supply the answer.⁶²

61. KEETON, *supra* note 2, at 164-65 (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 266-67, 309, 322-24, 347-53 (5th ed. 1984) for the categories of circumstances in which the common law would have imposed joint and several liability).

62. *Id.* at 165-66.

I reiterate, to emphasize, that a judge is not free to fill every gap as he or she might wish, on an independent policy analysis. Instead, in filling the gaps of a statute, to be fully respectful of legislation, the judge must use statutory analogy, statutory purpose, and statutory policy that is explicit or implicit in the statutory mandates.

CONCLUSION

Professor Sunstein observed, in his recent article to which I referred earlier, that “analogical reasoning has fallen into ill repute.”⁶³ I believe he means in the community of law teachers. He may be right about how analogical reasoning is viewed in legal academia today. If so, that is indeed a serious problem—not so much for the present and future of analogical reasoning as for the present and future of the legal profession if its academic, judicial, and practitioner components continue to distance themselves from each other.

Analogical reasoning is in good repute among judges and lawyers. They are using it daily, and with no thought of apology even among those who are the most self-conscious and thoughtful about their professional obligations and the quality of their performance. From the perspective of a trial judge, I believe Professor Sunstein—supportive as he is of analogical reasoning—still understates its capability of capitalizing on insights from economics, empirical social science, interdisciplinary inquiry, and philosophy—and from every source of understanding of the human condition and human relationships.

Today, law review articles are mostly written by academics for academics. Given this fact of life, I theorize—and, of course, risk overstatement in so doing—that Professor Sunstein, in writing his article, was torn between his own sound instinct and his quite-perceptive sense of the current mood of the academic community in the United States. On the one hand, his instinct for deeper understanding presses him to resist the current academic appetite for grand theory, unconnected with any thought about what would happen if some lawyer tried to use it in thinking about how to advise a client or draft an agreement or a proposed statute, or some judge tried to use it in deciding a case. On the other hand, like most other law teachers, Professor Sunstein lives both professionally and personally in a nationwide academic community that has grown more ab-

63. Sunstein, *supra* note 3, at 791.

strictly theoretical and more isolated from the rest of the profession.

I enthusiastically applaud Professor Sunstein's exploration of analogical reasoning and hope it may come to be a turning point—a beginning for bridging gaps that now exist between professors, lawyers, and judges. One benefit of bridging these gaps is that judges would get more help from lawyers and professors in learning how to make better decisions, and how to explain them more candidly and lucidly.

As a commentator, I wonder if we are entering another period, like that immediately preceding the appearance of the realists, in which judicial use of statutes for guidance on policy issues that a court must address is at least constrained. Perhaps, even, the tradition is formally denied, or rejected. As a judge, I am even more troubled because I believe deeply that the tradition is a wise one, but I also believe deeply that as a trial judge I must be faithful to judicial precedents as well as statutory directives. If the current judicial precedents deny or reject the tradition of judicial reasoning from the public policies explicitly or implicitly underlying statutes, I must do my best to apply the precedents in my own decision making. So, when I ask you—and through you, other thoughtful and interested members of the legal profession—to consider with me these important questions about the roles of appellate and trial judges, I am genuinely asking for help from other branches of the profession. Judges need that help, lest the circumstances of their professional role that tend to isolate them to some extent from participation in the public affairs of the community leave them distant even from open communication with other branches of the profession about their role, their function, and their performance.