JUDICIAL LEGITIMACY—FINDING THE LAW

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The following is the Judith and Marc Joseph lecture delivered by Chief Justice Robert N. Wilentz on November 29, 1984 at Drew University in Madison, New Jersey.

Introduction

Most people have some idea of how Congress and legislatures make law, and how presidents and governors often propose and, in effect, also make laws. And why. Less is generally known about judges, who are thought to decide cases on the basis of what the law is. Where and how they find that law is my subject. I suggest at the outset that no one really knows, including the judges.

Judge Cardozo, after being a judge for seven years, and eleven years before becoming a Justice of the United States Supreme Court, expressed his opinion.

> 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 ignominious retreat. It will hardly serve to still the pricks of curiosity and conscience. In moments of introspection, when there is no longer a necessity of putting off with a show of wisdom the uninitiated interlocutor, the troublesome problem will recur, and press for a solution. What is it that I do when I decide a case?[1]

What the judge does in deciding a case is more difficult to learn than where he looks before deciding. He looks at some of the hundreds of thousands of cases that went before, decided by other judges, some with similar facts and issues, together called the com-

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[1] B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 9-10 (1921).

mon law; he looks at legislation, both State and Federal, which may on occasion decide the case for him or her; and he looks at similar authorities, executive orders, administrative rules and regulations, and sometimes books written by those considered expert in that particular branch of the law[2] and books by those considered expert in the general subject of jurisprudence—the study of how judge-made law is made and how it should be.

Judges look at the facts of the case. Some believe that after *that* look, the judge decides the case, consciously or otherwise, and that all the other looking is to find a reason that will fit that result.[3] Some say that the judge looks into his heart and mind for something that comes out of all the prior searching, something called justice. Some say the judge looks at the election returns and others say that's what they meant when they said he looks into his heart and mind.

All I will try to do here is to describe, probably superficially, what others who have studied this say about the methods used by judges in deciding cases. None will tell you how all judges decide all cases or even how one judge decides one case. I won't either. The truth, I believe, is that judges use different methods for different cases, even combinations of methods for the same case, and that the "methods used" are sometimes less important than other factors, some conscious but unexpressed and sometimes subconscious.

While I would like to offer some explanation that unifies the subject, or at least one that provides a coherent answer for most cases to the inquiry of how judges decide them, I cannot. While the methods that I'll mention help to satisfy our need for comparing, differentiating and categorizing, I think the truth is somewhere between an explanation that relies on categories of methods and an explanation that says the process is too complex, too variable to be categorized—and closer to the latter.

Those who have studied this area have found five general methods of judicial law-finding or law-making that, when used individually or collectively, point to a certain result or decision. These five methods are: (1) the mechanical approach, (2) the logical or neutral principles theory, (3) the historical approach, (4) custom, and (5) public policy. These categories are primarily drawn from a book

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2 *E.g.*, W. PROSSER, THE LAW OF TORTS (4th ed. 1971).
3 *See* J. FRANK, LAW AND THE MODERN MIND (1936).

titled *The Judicial Process*[4] by Judge Ruggero J. Aldisert of the Federal Court of Appeals for the Third Circuit. Every case can, more or less, fit or be made to fit within these categories. While these methods do not explain every case fully and, as to some cases, not at all, they do provide a general analysis of the way in which a judge decides cases.

I. In General

The mechanistic or mechanical approach is the simplest form—or simplest analysis—of judicial decision-making. It assumes that there is a rule for every case— that there are no gaps to fill—and that all the judge has to do is to find the existing law.[5] It assumes further that there is no debate about where and how to find it.[6] The mechanistic approach differs from the logical/neutral principles approach in that it looks for a specific rule applicable to the case, rather than a principle that can logically be applied or extended to many cases including the one at hand. The logical approach uses principles to fill gaps when a case falls between two specific rules or calls for an extension of a rule because none seems applicable.[7] The mechanical approach does not admit that there are gaps and therefore finds no need to "extend" rules.

Almost all cases are decided using the mechanical approach. These are the cases in which the lawyers and the judge all agree there *is* a specific rule applicable to the facts of the case, and the lawsuit is really about the facts. Automobile cases, most contract cases, criminal prosecutions, landlord-tenant: practically all involve no dispute about the specific rule of law that governs. And, practically none are appealed, a factor that suggests there was no dispute about the law. Of the approximately 750,000 cases filed in New Jersey last year, about one percent were appealed.[8] The mechanical approach then, though it may be thought overly sim-

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4 RUGGERO J. ALDISERT, THE JUDICIAL PROCESS (1976).

5 *Id.* at 338.

6 *Id.*

7 R. POUND, JURISPRUDENCE 17 (1959); DEWEY, *Logical Method and Law*, 10 CORNELL L. Q. 17, 22 (1924).

8 According to the 1983 ANNUAL REPORT OF THE NEW JERSEY JUDICIARY, 731,000 cases were disposed of by the combined trial courts of this state. Of that number, only 6,393 cases were appealed.

ple, is apparently just and certainly practical—its application ends most lawsuits.

The logical principle or neutral principle approach involves an *analysis* of precedent—prior cases—so that new cases may be decided by a logical extension of the *general* principles learned from precedent.[9] This goes one step beyond the mechanistic approach since it allows for an extension of principles instead of believing that there is some rule already in existence that must be applied no matter how ill-fit to the case at bar. *Newmark v. Gimbel's, Inc.*[10] is an example of the logical or neutral principles theory. Mrs. Newmark developed dermatitis of the scalp after one of the defendant's beauty parlor operators applied a permanent wave solution. Her entire forehead was red and blistered and a large amount of hair fell out. Mrs. Newmark sued the beauty parlor claiming it warranted that the permanent wave solution was suitable for her—which it obviously was not. Based on prior case law,[11] the trial court decided in favor of the beauty parlor. The court said that the warranties applied only to the sale of goods; that what the beauty parlor provided was a service. It was not engaged in the sale of goods. While the New Jersey Supreme Court had previously recognized that implied warranties of fitness should not be restricted solely to the conventional sale of goods,[12] it had not extended implied warranties to impose liability in this kind of a case. Relying essentially on logic, the court decided that to dismiss this claim would set up an artificial distinction in the law:

> It does not accord with logic to deny a similar right to a patron against the beauty parlor operator or the manufacturer when the purchse and sale were made in anticipation of and for the purpose of use of the product on the patron who would be charged for its use. Common sense demands that such patron

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[9] *See* POUND, *supra* and DEWEY, *supra* note 7.

[10] 54 N.J. 585, 258 A.2d 697 (1969).

[11] 102 N.J. Super. 279, 284-85, 246 A.2d 11 (App. Div. 1968).

[12] 54 N.J. at 594, wherein the court cites Cintrone v. Hertz Truck Leasing, 45 N.J. 434, 212 A.2d 769 (1965) (involving an action by an employee of the lessee of a truck against the lessor for an alleged breach of warranty and negligence in maintaining a truck in which the plaintiff was injured due to brake failure); and Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965) (concerning an action against builder vendor of a mass-produced house in a project where a child of the purchaser's lessee was injured due to excessively hot water drawn from the bathroom faucet).

be deemed a consumer as to both manufacturer and beauty parlor operator.[13]

The historical approach to decision-making relies on an examination of history, both legal and general, to tell courts what a rule means or how it was intended to be used.[14] This approach focuses on the intent of those who formed—or found—the rule in the first place and examines subsequent events that may have helped clarify it or have altered its scope or meaning.[15] The historical approach, like the logical approach, tries to fill in the gaps left by the mechanistic approach. However, instead of following the path that logic alone would direct, a court employing the historical approach would examine past events in an attempt to glean from them the probable intended meaning and implications of the rule or principle.

The next category is finding the law by finding custom. Custom may be said to be any uniform practice, long established and engaged in by general consent, which is not contrary to statute and is reasonable under all the circumstances.[16] It is history that searches for the custom. Once discovered, however, it is the practice itself, the custom, that influences the law, not its history, although its history obviously may help to explain its existence and purpose. Custom is sometimes a source for new principles in areas never before addressed by the law, for example, air and space law,[17] though more often it's used in settled areas of the law, for example, contract law.[18]

The case of *Ghen v. Rich*[19] is an example in which custom established new law. The issue was who owned a whale. The common

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[13] 54 N.J. at 593, 258 A.2d at 701.

[14] POUND, *supra* note 7, at 18; CHARLES A. MILLER, THE SUPREME COURT AND THE USES OF HISTORY 26 (1967).

[15] MILLER, *supra* note 14, at 26.

[16] RUPERT CROSS, PRECEDENT IN ENGLISH LAW (1961).

[17] *See* POUND, *The Theory of Judicial Decision*, 36 HARV. L. REV. 940, 948 (1923). *See generally* COSTELLO, *Spacedwelling Families: The Projected Application of Family Law in Artificial Space Living Environments*, 15 SETON HALL L. REV. 11 (1984).

[18] *See, e.g.*, Frigalment Importing Co. v. B.N.S. International Sales Corp., 190 F. Supp. 116 (S.D.N.Y. 1960). In this case the issue was "what is chicken?" *Id.* at 117. The court discussed the definition of chicken in terms of common trade usage after the plaintiff said that "chicken" meant "a young chicken, suitable for broiling and frying" and the defendant contended that "chicken" meant "any bird of that genus that meets contract specifications on weight and quality, including what it calls stewing chicken and what [the] plaintiff pejoratively terms 'fowl.'" *Id.*

[19] 8 F. 159 (D. Mass. 1881).

law directed that the person to first take effective possession of a wild animal (presumably including whales) is to be considered its owner.[20] This principle did not answer the question before the court, however, because of the conceptual difficulty of figuring out how to determine when and how a person took effective possession of a whale. To decide the case, the court gave effect to the undisputed custom in the whaling industry that the first to harpoon the whale is its owner.[21] No mechanical application of a rule, no logical extension of a principle, no history: simply a custom given the force of law.

Whitesell v. Collison[22] also shows the use of custom in a settled area of the law. The dispute concerned a farm lease and whether the tenant could remove the manure on the farm at the termination of the lease. Vice Chancellor Leaming wrote:

> The evidence in this case fully justifies the conclusion that a

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20 *Id.* at 161. In Ghen, District Court Judge Nelson cited Bartlett v. Budd, 1 Low. 323 for the proposition:

> A whale, being *ferae naturae*, does not become property until a firm possession has been established by the taker. But when such possession has become firm and complete, the right of property is clear, and has all the characteristics of property.

21 Gehn, *supra* at 159-60, wherein the court discussed the business of whaling:

> In the early spring months the easterly part of Massachusetts bay is frequented by the species of whale known as the fin-back whale. Fishermen from Provincetown pursue them in open boats from the shore, and shoot them with bomb-lances fired from guns made expressly for the purpose. When killed they sink at once to the bottom, but in the course of from one to three days they rise and float on the surface. Some of them are picked up by vessels and towed into Provincetown. Some float ashore at high water and are left stranded on the beach as the tide recedes. Others float out to sea and are never recovered. The person who happens to find them on the beach usually sends word to Provincetown, and the owner comes to the spot and removes the blubber. The finder usually receives a small salvage for his services. Try-works are established in Provincetown for trying out the oil. The business is of considerable extent, but, since it requires skill and experience, as well as some outlay of capital, and is attended with great exposure and hardship, few persons engage in it. The average yield of oil is about 20 barrels to a whale. It swims with great swiftness, and for that reason cannot be taken by the harpoon and line. Each boat's crew engaged in the business has its peculiar mark or device on its lances, and in this way it is known by whom the whale is killed.
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> The usage on Cape Cod, for many years, has been that the person who kills a whale in the manner and under the circumstances described, owns it, and this right has never been disputed until this case.

22 94 N.J. Eq. 44, 118 A. 277 (1922).

> custom of that nature [*i.e.*, at the termination of the lease, the tenant leaves all manure on the farm] exists in the locality of the farm here in question. In this case the letting was by parol, and no specific stipulation touching the manure to be left on the farm is disclosed to have been made. . . . The testimony also indicated that it is the custom in that locality for a tenant to leave the manure on the farm when no agreement touching the manure has been specifically made.
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> My conclusion in this case is that the manure, which is the subject of the dispute herein, is the property of the owner of the farm, although it appears to somewhat exceed in amount that amount which the tenant received the benefits of when he went into possession.[23]

The last of the five categories, the public policy approach, is thought to be applied in cases where a court has little else to guide it, where the guiding rules are in conflict, or in some areas where, as a result of legislation phrased in most general terms, courts have, in effect, been left the responsibility of setting policy.[24] The public policy approach involves a court looking to the underlying policies of a statute, regulation, or body of common law, or to most any source.[25] This approach differs from the logical neutral principles approach in that public policy, because of the nature of its sources, may not represent a logical extension of well-settled principles. Indeed, it may clearly conflict with them. It often provides courts with several options because of the variety of the sources that contain or suggest public policy.

An example of the public policy approach is *Reynolds v. Sims*[26] where the United States Supreme Court invalidated the Alabama legislative apportionment scheme because it gave white voters much more power in the state legislature than black voters by making the districts in which whites were a majority much smaller in population than those in which blacks were a majority. The Court did not have to look far for public policy to guide it.[27] The fourteenth amend-

[23] *Id.* at 46-47, 118 A. at 278.

[24] CARDOZO, *supra* note 1, at 16, 65-67; POUND, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 608-10 (1908); FRIENDLY, *The Gap in Lawmaking—Judges Who Can't and Legislatures Who Won't*, 63 COLUM. L. REV. 787, 791-2 (1963). *See generally* DAYNARD, *The Use of Social Policy in Judicial Decision-Making*, 56 CORNELL L. REV. 919 (1971).

[25] *See* CARDOZO, *supra* note 1, at 19.

[26] 377 U.S. 533 (1964).

[27] Chief Justice Warren writing for the majority noted:

ment[28] had imbedded in it clear principles of political equality. It is more than possible that the Court was influenced as well by the history of that amendment and its concern for the problems of southern blacks.

II. The Mechanistic Approach to Judicial Decision-Making

This technique is the jurisprudential approach most frequently applied by judges, most easily criticized by writers, and most often championed by those who seek to limit the power of the judiciary. The approach posits that all a judge need do is apply predetermined rules to the facts of a case.[29] He finds the facts, finds the rule (either statuatory or judge-made), and decides the case accordingly. The outcome when this technique is used is supposedly predictable (assuming that everyone's copy of the rule book is the same) and stable.[30] Blackstone stated the rule that the duty of the court was not to "pronounce a new law,

To the extent that a citizen's right to vote is debased, he is that much less a citizen. The fact that an individual lives here or there is not a legitimate reason for overweighing or diluting the efficacy of his vote. The complexions of societies and civilizations change, often with amazing rapidity. A nation once primarily rural in character becomes predominantly urban. Representation schemes once fair and equitable become archaic and outdated. But the basic principle of representative government remains, and must remain, unchanged—the weight of a citizen's vote cannot be made to depend on where he lives. Population is, of necessity, the starting point for consideration and the controlling criterion for judgment in legislative apportionment controversies. A citizen, a qualified voter, is no more nor no less so because he lives in the city or on the farm. This is the clear and strong command of our Constitution's Equal Protection Clause. This is an essential part of the concept of a government of laws and not men. This is at the heart of Lincoln's vision of "government of the people, by the people, [and] for the people." The Equal Protection Clause demands no less than substantially equal state legislative representation for all citizens, of all places as well as of all races. (footnotes omitted).

28 U.S. CONST. amend. XIV, § 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

29 ALDISERT, *supra* note 4, at 338.

30 POUND, *supra* note 24, at 605.

but to maintain and expound the old one."[31] "The judge rather than being the creator of the law was but its discoverer."[32] Despite this, I suggest that many who have tried to discover the law have found it easier to create it.

The argument *for* the mechanistic approach is that it removes all idiosyncratic or personal considerations.[33] A judge's personal background would not affect his decisions. Nor would his intellect except to aid his search for the facts and the rules. As Pound said, the mechanistic approach places a significant limit on "magisterial ignorance,"[34] meaning, presumably, that society would suffer less from an ignorant judge's mistakes in trying to find the law than it would from his mistakes in trying to create the law. He also pointed out that the mechanical approach would "preclude corruption" ,[35] the thought being that in using the mechanical approach, the law is so certain that any deviation would be not only immediately detected but also presumptively corrupt. Despite those advantages, which I suspect Pound did not really believe to exist, he did not advocate mechanistic decision-making.

The attractiveness of the mechanical approach diminishes considerably in a supreme court, which must consider the continued validity of rules, some of which were formulated long ago to fit the needs—and the bias—of a very different society. An example of the unfortunate results that might occur if a supreme court simply mechanically continued to "find" and apply existing specific rules is seen in the women lawyer cases, which refused to admit women to the practice of law.

In *In the Matter of Goodell*[36] the Supreme Court of Wisconsin dealt with a woman's application to be admitted to the Bar of that state:

> We cannot but think the common law wise in excluding women from the profession of the law. The profession enters largely into the well being of society; and, to be honorably filled and safely to society, exacts the devotion of life. The law

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[31] 1 BLACKSTONE, COMMENTARIES (15th ed. 1809), at 69.

[32] JOHN C. GRAY, THE NATURE AND SOURCES OF THE LAW (1st ed. 1909), at 222.

[33] POUND, *supra* note 24, at 605.

[34] *Id.*

[35] *Id.*

[36] 39 Wis. 232 (1875), *reprinted in* ALDISERT, *supra* note 4, at 353.

> of nature destines and qualifies the female sex for the bearing and nurture of the children of our race and for the custody of the homes of the world and their maintenance in love and honor. And all life-long callings of women, inconsistent with these radical and sacred duties of their sex, as is the profession of the law, are departures from the order of nature; and when voluntary, treason against it. . . . [I]t is public policy to provide for the sex, not for its superfluous members; and not to tempt women from the proper duties peculiar to ours. There are many employments in life not unfit for female character. The profession of the law is surely not one of these. The peculiar qualities of womanhood, its gentle graces, its quick sensibility, its tender susceptibility, its purity, its delicacy, its emotional impulses, its subordination of hard reason to sympathetic feeling, are surely not qualifications for forensic strife. Nature has tempered woman as little for the juridical conflicts of the courtroom, as for the physical conflicts of the battlefield. Womanhood is moulded for gentler and better things. . . . Discussions are habitually necessary in courts of justice, which are unfit for female ears.[37]

In another case, the United States Supreme Court affirmed Illinois' disqualification of women as lawyers.[38] Referring to the possibility of such admission, one Justice said:

> Being contrary to the rules of the common law and the usages of Westminster Hall from time immemorial, it could not be supposed that the legislature had intended to adopt any different rule.[39]

Under the mechanical approach, those cases might have remained good law until the Civil Rights Act of 1964.[40]

Another example is *Gluck v. Baltimore*,[41] an eminent domain case. The plaintiff was a landlord. He was suing the city claiming hardship because under the contemporary law of Maryland a tenant was entitled to the condemnation award. The landlord was supposedly compensated for the loss of his land because the award did not relieve the tenant of the obligation to pay rent. The problem was

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[37] *Id.* at 244-5, *reprinted in* ALDISERT, *supra* note 4, at 353-4.

[38] Bradwell v. Illinois, 83 U.S. (16 Wall) 130 (1873).

[39] *Id.* at 140 (BRADLEY, J., concurring).

[40] Civil Rights Act of 1964, 28 U.S.C. § 1447, 42 U.S.C. §§ 1971, 1975a-d, 2000a-2000b-6 (1964).

[41] 81 Md. 315, 32 A. 515 (1895), *reprinted in* ALDISERT, *supra* note 4, at 306.

that the lease still had forty years to run and the landlord suggested the tenant might not pay rent for forty years on non-existent land. The court recognized that the landlord had a point, but found its hands tied.

> [T]his court decline[s] to permit considerations of great hardship to influence the rigid enforcement of established legal principles. Obviously a principle, if sound, ought to be applied wherever it logically leads, without reference to ulterior results. That it may, in consequence, operate in some instances with apparent or even real harshness and severity does not indicate that it is inherently erroneous. Its consequence in special cases can never impeach its accuracy.[42]

One of the strongest arguments made for rigid adherence to previously settled specific rules is predictability. Since people have already ordered their affairs based on what they believed the law to be, it would be unfair and unwise to change that law. Circuit Court Judge Jerome Frank found that argument to be valid only when one of the litigants had in fact relied on a precedent. In a deportation case where the defendant was admittedly deportable because he had entered the United States with a false passport, Judge Frank decided to allow him to present evidence to the District Court that his life would be in danger if he returned to China.[43]

Judge Frank took judicial notice of the possibility that, because of political conditions there, upon his return to China, the defendant might be killed. He concluded that entering the United States with a false passport did not warrant a sentence of death. The same court, in another case, had previously refused to listen to *any* reason why deportation should be denied when it was based on the fact that the immigrant used a false passport.[44] In declining to follow mechanically that specific rule, Judge Frank wrote that when a human life was involved, he was much more willing to rule according to the idiosyncrasies of the case.[45]

In the statutory area, courts sometimes apply rules in a manner quite similar to the mechanistic approach. One example is the "plain meaning" rule. This rule is that if the words of the statute

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42 *Id.* at 325, 32 A. 517, 522, *reprinted in* ALDISERT, *supra* note 4, at 307.

43 United States v. Shaughnessy, 234 F.2d 715 (2d Cir. 1955).

44 United States v. Shaughnessy, 218 F.2d 316 (2d Cir. 1954).

45 234 F.2d at 718, wherein Circuit Court Judge Frank held that "stare decisis should not govern in a case like this where a man's life is involved."

clearly lead to a result it will be followed no matter how apparently unintended that result might be.

An example is found in the case of *Church of the Holy Trinity v. United States*.[46] There the Circuit Court for the Southern District of New York construed a statute which made it criminal to pay for the immigration of foreigners. The objective was to stop the importation of cheap southern European labor. The words of the statute, however, if literally applied, clearly prohibited a church from paying for a person to immigrate, in order to become that church's minister, although it was equally clear that it was not the type of action that Congress intended to forbid.

The Circuit Court found that the church had violated the statute. It explained that it was bound by the "plain, unambiguous, and explicit" meaning of the statute even though it believed that the law was not intended to suppress contracts like the one in question.

> Whenever the will of Congress is declared in ample and unequivocal language, that will must be absolutely followed, and it is not admissible to resort to speculations of policy, nor even to the views of members of Congress in debate, to find reasons to control or modify the statute.[47]

The United States Supreme Court reversed, rejecting the mechanistic approach in favor of a construction of the statute based on its purposes as revealed by its history.[48]

The mechanistic approach does not allow so-called "judicial activism" when it would clearly be desirable. In a California case, *State v. Rubbish Collectors Ass'n v. Siliznoff*,[49] defendants were thugs and mobsters who were trying to coerce plaintiff to pay a fee to them if plaintiff pursued his trash collecting business in a certain area. He refused to pay and they threatened to beat him up. He became, understandably, extremely frightened and thereafter sued defendants for damages on account of that intentionally inflicted fright. A mechanical approach would have denied damages since the settled specific rule in California was that defendants were not liable for damages for plaintiff's emotional distress unless he was actually hit

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46 143 U.S. 457 (1892).

47 36 F. 303, 304 (S.D.N.Y. 1888) (citing U.S. v. Railroad Co., 91 U.S. 72 (1875)).

48 36 F. 303 (S.D.N.Y. 1888), *rev'd*, 143 U.S. 457 (1892).

49 38 Cal.3d 330, 24 P.2d 282 (1952).

or attacked by defendants or unless he became physically ill.[50] The California court discarded that rule and awarded damages. They rejected the mechanical approach and used public policy as their guide.[51]

As Cardozo wrote in *The Nature of the Judicial Process*:

> Some judges seldom get beyond that process (finding precedent) in any case. Their notion of their duty is to match the colors of the case at hand against the colors of many sample cases spread out upon their desk. The sample nearest in shade supplies the applicable rule. But, of course, no system of living law can be evolved by such a process, and no judge of a high court, worthy of his office, views the function of his place so narrowly. If that were all there was to our calling, there would be little of intellectual interest about it. The man who had the best card index of cases would also be the wisest judge. It is when the colors do not match, when the references in the index fail, when there is no decisive precedent [there is a "gap" to fill] that the serious business of the judge begins. He must then fashion law for the litigants before him. In fashioning it for them, he will be fashioning it for others. . . . The sentence of today will make the right and wrong of tomorrow.[52]

The strength of the mechanical approach is that it promotes stability and predictability. In most cases those are the most important values involved. But, those values are not so important that they must override justice, and prevent improvements in the law. The mechanical approach is too limiting to be employed by judges of a supreme court whose duty, I believe, includes reshaping ancient rules to fit modern society; reshaping and sometimes rejecting them.

This approach, however, has great staying power even in the highest appellate courts. It was not until 1966 that the House of Lords—the highest court in England—finally ruled that it had the

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50 *See, e.g.*, Newman v. Smith, 77 Cal. 22, 18 P. 791 (1888); and Easton v. United Trade School Contracting Co., 173 Cal. 199, 159 P. 597 (1916).

51 38 Cal.2d 330, 335, 240 P.2d 282, 285 (1952).

52 CARDOZO, *supra* note 1, at 20-21.

power to overrule its own prior decisions.[53]

III. The Logical/Neutral Principles Theory of Jurisprudence

The neutral principles theory attempts to fill the gaps that the mechanistic theory fails to fill. It recognizes that specific rules sometimes simply do not apply to a situation. A judge of the logical school of jurisprudence would analyze the subject matter and precepts of the legal system to discover the principles upon which it is based, and then "logically" extend them to fashion a new rule applicable to that situation.[54]

This theory has its weaknesses. It does not give judges guidance on how to determine the applicable principles or whether and how a principle should be extended. The neutral principles theory also pushes for formal consistency irrespective of the consequences of its application to concrete facts.[55] Furthermore, like mechanistic jurisprudence, this theory can perpetuate societal status. Dewey wrote in *Logical Method and Law* that logic "reinforces those inert factors in human nature which make men hug as long as possible any idea which has once gained lodgment in the mind."[56]

The fellow-servant cases demonstrate the use of logic to extend a pre-existing rule despite the unfortunate results reached. In *Albro v. The Agawam Canal Co.*[57] a worker at a cotton manufacturing establishment sued her employer for injuries she sustained during the course of employment. The superintendent of the plant was grossly negligent in instructing the employee in charge of the gas lighting. As a result, gas filled the room in which the plaintiff was working so as to "throw her into spasmodic fits, and occasion her a very serious and lasting injury."[58] The applicable rule exempted an employer from liability to one employee for the negligence of its other employees since the injured employee was said to have "assumed the risk."[59] The Supreme Judicial Court

[53] *See* JONES, KERNOCHAN AND MURPHY, LEGAL METHOD—CASES AND TEXT MATERIALS (1980), at 125.

[54] *See, supra* note 4; *see also* CARDOZO, *supra* note 1, at 31-34.

[55] DEWEY, *supra* note 7, at 20-21.

[56] *Id.* at 22.

[57] 60 Mass. 75 (1850).

[58] *Id.* at 76.

[59] *Id.*

of Massachusetts logically extended the rule to include that superintendent as a fellow servant, just another employee whose negligence in injuring a different employee would not render the employer liable. The injured employee presumably assumed the risk that even the superintendent might be grossly negligent.

The neutral logical approach, however, can result in vast changes in the law. One of the most dramatic changes it effected is in the law governing the liability of the seller of goods. That person used to be liable only to the buyer and then only if the goods were not as warranted. Today manufacturers of defective goods, middlemen, and retailers may be liable to anyone whose use of the product or whose injury by the product was foreseeable, regardless of negligence or lack of it, and regardless of warranties or their lack.[60]

So, while proponents of this neutral logical principles theory believe it prevents "liberal" judges from doing what they would otherwise do on a subjective basis because it forces judges to use intellectual constraints to restrain emotional reactions, it has not prevented, rather, it has caused, this unparalleled explosion of litigation and damage recovery for injuries caused by defective goods.

IV. The Historical Theory of Jurisprudence

In the historical approach to deciding cases, the judge looks for the applicable legal principle, tries to determine through historical analysis what was intended by those who framed the legal principle (or drafted the statute) and what step would be in keeping with that intent.[61] Many judges go a step further by looking at not only the intent at the time of the rule's adoption, but also at ongoing history.[62] These judges view history not only as an event but as a continuing influential process.

History, of course, can be misused. Alfred Kelly in his 1965 *Supreme Court Review*[63] concludes that inept and perverted history had aided the Warren Court in announcing pathbreaking decisions, and that "law office history" has been concocted to give

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60 *See* RESTATEMENT (SECOND) OF TORTS § 402A (1965).

61 *See supra* note 14.

62 MILLER, *supra* note 14, at 26.

63 KELLY, SUPREME COURT REVIEW (1965), 119-58.

the opinions the trappings of scholarship and seeming roots in the past while serving the ends of modern "libertarian idealism."[64]

Like other approaches, the historical is sometimes not suited for the case at hand—or for the desired result. The historical theory certainly could not have supported the decisions in the 1954 desegregation cases. *Brown v. Board of Education of Topeka*,[65] which banned legally compelled segregation in public schools, never would have been decided that way if the decision had been based on the mechanical, logical, or historical approaches to jurisprudence. *Brown* required a complete change in the past legal treatment of blacks. Instead of relying on the history and purpose of the fourteenth amendment to justify the decision, the Court employed the sociological method; it used its notion of public policy.[66]

In 1838, a New Jersey appellate court was faced with the following question: Is adultery committed when a man has intercourse with an unmarried woman?[67] Unwilling to be controlled by the meaning given to adultery by the Ecclesiastical courts in cases of divorce, the court held that the New Jersey statute was intended to punish only the offense forbidden by the Seventh Commandment;[68] it was not intended to cover "a mere breach of the marriage vow."[69] The court, starting with Moses, examined the law on this subject, and concluded that Lash was not guilty since adultery can only be committed by relations with a married woman.

In his book, *The Supreme Court and the Uses of History*, Charles Miller, in his chapter on "Constitutional Law and the Past," wrote:

> "The past," Holmes said, "gives us our vocabulary and fixes the limits of our imagination." The value of a thorough knowledge of history, he believed, was that it "sets us free and enables us to make up our own minds dispassionately" whether to enforce an old law that no longer serves a legiti-

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64 MILLER, *supra* note 14, at 5-6.
65 347 U.S. 483 (1954).
66 *Id.* at 493-495.
67 State v. Lash, 16 N.J.L. 380 (Sup. Ct. 1838).
68 *Exodus* 20:14, "Thou shalt not commit adultery."
69 16 N.J.L. at 383.

mate social purpose; "its chief good is to burst inflated expectations." There is another side to the use of history, however, one emphasized by Holmes' followers after the apparent success of the earlier campaign to free the present from the past. This is the use of history to free the present from itself. History, as Jerome Frank wrote, "liberates from the fetters of the present for it suggests that there were other ways of doing things than those we now employ." We may benefit from the thoughts and experience of others who faced similar problems, regardless of when they lived.[70]

V. Custom

A fourth approach used in deciding cases is custom. When custom becomes relevant in a case before a judge, two preliminary questions present themselves: what is custom and is it in fact a custom? The former is usually answered by the litigants; at least one of them will allege custom in support of his/her case or as authority contrary to the position of the opponent. The second question, whether the practice alleged is in fact a custom, must generally be answered by the court. This necessarily involves a definition of custom. The courts are receptive to anything as custom, such as the use and meaning of a word or phrase or an activity in a social or commercial setting, so long as the circumstances may be said to lend the custom the force of law.[71] The English courts still accept any practice as custom and give it the force of law as long as the practice is reasonable, does not contradict a statute, is not forced upon the participants, and has existed "since time immemorial".[72] "Since time immemorial" is said to be since 1189 A.D.[73] The English courts had established that the end of the reign of Henry II, the father of the common law, marked the beginning of the time of memory of man.[74] In

[70] MILLER, *supra* note 14, at 199-200 (footnotes omitted).

[71] *See, e.g.*, Whitesell v. Collison, 94 N.J. Eq. 44, 118 A. 277 (Ch. 1922); Frigalment Importing Co. v. B.N.S. International Sales Corp., 190 F. Supp. 116 (S.D.N.Y. 1960).

[72] CROSS, *supra* note 16, at 157.

[73] *Id.*

[74] Ackerman v. Shelp, 8 N.J.L. 125, 130 (Sup. Ct. 1825), wherein the court found that "[t]ime of memory hath been long ago ascertained by law to commence from the beginning of the reign of Richard the First, and any custom may be *destroyed* by evidence of its non-existence in any part of the long period from that time to the present."

other words, you must prove your custom existed at least as long ago as 1189. To avoid absurdity, however, the rule is that the party alleging custom need prove only its practice, leaving it to the opponent to show that the custom did not exist until after 1189.[75]

The United States has borrowed much from the English law and the doctrine of custom is no exception. The problem is, however, how to define "time immemorial". Is it from 1492, 1607, 1776, the date of settlement of the territory or the date of incorporation of the state? This issue has been answered differently by different courts of the United States. A few examples are illustrative: in Iowa, "time immemorial" dates from the territorial stage of the state;[76] in New Hampshire the period is twenty years;[77] and in Massachusetts the custom must have been practiced for "many years."[78] In New Jersey, it seems that custom will be recognized based not on its antiquity, but if it is established, known, uniform, reasonable and not contrary to law.[79]

The English use of custom can be seen in the case of *Mercer v. Denne*.[80] There an owner of a length of beach sued a fisherman for trespass on the beach. The fisherman was in the habit of laying out his nets on the beach to dry. The court found that it was the custom of the fishermen in this locality to do this. The court noted that anywhere else the owner would have had a valid claim for trespass. That custom in this locale led the court to rule in favor of the fisherman. An almost identical rule was one of the supporting authorities in Justice Schreiber's recent *Bay Head* decision holding that in some circumstances even the dry portion of a private beach may be subject to some public use.[81]

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75 CROSS, *supra* note 16, at 157.

76 Kimple v. Schafer, 161 Iowa 659, 143 N.W. 505 (1913).

77 Knowles v. Dow, 22 N.H. 387 (1851).

78 Ghen v. Rich, 8 F. 159 (D. Mass. 1881).

79 Barton v. McKelway, 22 N.J.L. 165, 175 (1849); Hudson County Nat. Bank v. Provident Inst. for Sav. in Jersey City, 80 N.J. Super. 339, 347, 193 A.2d 697, 701 (Ch. 1963), *aff'd*, 44 N.J. 282, 208 A.2d 409 (1965).

80 [1905] 2 Ch. 538.

81 Matthews v. Bay Head Imp. Ass'n., 95 N.J. 306, 316-7, 471 A.2d 355, 360 (1984), wherein the court cited Borough of Neptune City v. Borough of Avon-by-the-Sea, 61 N.J. 296, 303, 294 A.2d 47, 51 (1972) for:

> the ancient principle that land covered by tidal waters belongs to the sovereign, but for the common use of all the people. The genesis of this principle is found in Roman jurisprudence, which held that [b]y the law

Custom is not always followed by the court. A custom over time may have become unreasonable. In *The T.J. Hooper*,[82] owners of cargo being moved by sea on barges pushed by tug boats sued the tug boat companies because the tug boats were allegedly unseaworthy. The tugs, barges and cargo were all lost when the tugs and barges had foundered in a gale. In deciding whether the tugs were unseaworthy, the court noted that none of the boats were equipped with radios that might have avoided the disaster. While it was claimed that the custom was to not have radios on tug boats, the court found that, given the radios' utility for safety purposes, and their affordability, that custom had become unreasonable.[83] The court refused to apply it to the case.

Oliver Wendell Holmes delivered the opinion of the United States Supreme Court in the case of *Texas & P.R. Co. v. Behymer*,[84] in which a railroad employee sued the railroad company for injuries he suffered in a fall off a railroad car. The employee had climbed atop the car to release the brake and allow the car to be pulled by an engine onto the main line. There was ice on top of the car and this fact was known to all parties. When the train stopped it did so in a sudden, jerky fashion. The employee slipped on the ice and fell between the train cars. In defense, the railroad company alleged that it was customary to stop trains suddenly and this caused the cars to jerk. In affirming a decision of the lower court in favor of the employee, Holmes wrote:

> What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of rea-

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of nature the air, running water, the sea, and consequently the shores of the sea were common to mankind. Justinian, Institutes 2.1.1 (T. Sandars trans. 1st Am. ed. 1876). No one was forbidden access to the sea, and everyone could use the seashore to dry his nets there, and haul them from the sea. . . . Id., 2.1.5. The seashore was not private property, but subject to the same law as the sea itself, and the sand or ground beneath it.

82 60 F.2d 737 (2d Cir. 1932).

83 *Id.* at 740, where Learned Hand declared that:

> [c]ourts must in the end say what is required, there are precautions so imperative that even their universal disregard will not excuse their omission. . . . But here there was no custom at all at to receiving sets; some had them, some did not; the most than can be urged is that they had not yet become general. Certainly in such a case we need not pause; when some have thought a device necessary, at least we may say that they were right, and the others too slack. (Citations omitted).

84 189 U.S. 468 (1903).

> sonable prudence, whether it usually is complied with or not. No doubt a certain amount of bumping and jerking is to be expected on freight trains, and, under ordinary circumstances, cannot be complained of. Yet, it can be avoided, if necessary, and when the particular and known condition of the train makes a sudden bump, obviously dangerous to those known to be on top of the cars, we are not prepared to say that a jury would not be warranted in finding that an easy stop is a duty.[85]

Additional usage of custom is evidenced in another New Jersey case, *Mandelbaum v. Weiss*,[86] where the court was faced with a man and a woman who had recently broken off their engagement to be married. The woman had returned the engagement ring to the man but had then sued the man for possession of certain engagement gifts which had been given to both by family and friends. She alleged that social custom in the United States dictated that the disappointed bride retain the engagement gifts should the couple not be wed. The court said it was unaware of any such custom and divided the gifts evenly between both.[87]

Custom, like other jurisprudential approaches, may or may not lead to beneficial results. Those who have studied the law of "modern" jurisdictions find that custom is likely to be disregarded if it has become unreasonable or if its use in a particular case would lead to undesirable results.[88]

VI. The Public Policy Approach of Judicial Decision-Making

The public policy approach is the only one that "involve[s] the explicit insertion of new principles" into the body of preexisting law.[89] In that respect it appears to accord the judiciary the greatest amount of discretion. The public policy approach invokes the creative use of source materials to further the apparent

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85 *Id.* at 470.

86 11 N.J. Super. 27, 77 A.2d 493 (App. Div. 1950).

87 *Id.* at 30 where the court wrote: "It is true that much of our law finds its origin in custom. However, this court is aware of no social custom which compels the award of engagement gifts to the disappointed bride. Consequently, judicial notice cannot be accorded thereto."

88 *See* Note, *Custom and Trade Usage: Its Application to Commercial Dealings and the Common Law*, 55 COLUM. L. REV. 1192, 1204 (1955) ("when custom is rejected there appears to be a supervening public policy reason").

89 DAYNARD, *supra* note 24, at 922.

will of the political entity—here the State of New Jersey.[90] It looks to the underlying policies of statutes, regulations, contracts, constitutional provisions or the common law. It consults as many materials as possible to determine that policy. An example is *Zupo v. CNA Insurance Co.*.[91] There a woman was injured in an automobile accident and received personal injury protection benefits from her no-fault insurance carrier. Five years later, she suffered from a recurrence of her injury—an infection which caused the softening of her bones. She sought additional benefits from her carrier, but the carrier denied coverage based on a statute of limitations contained in New Jersey No-Fault Law,[92] which barred claims for additional benefits made more than two years after the last payment of benefits. The woman sued the carrier for the benefits. The Appellate Division found that:

> [a] fundamental component [*i.e.*, public policy] of the no-fault scheme is the right of an insured to receive payment from his PIP carrier for all medical expenses incurred by him in connection with a compensable injury irrespective of the amount of the expenses or the length of time during which they are incurred.[93]

Based on this policy behind no-fault insurance, the Appellate Division believed it:

> would contravene logic, common sense and the basic purpose of reparation underlying the No-Fault Law if we were to assume a legislative intention to condition an insured's right to future medical benefits on the fortuity of the timing of the recurrence of a compensable illness, which from its onset and certainly at the time the carrier made its last payment, was known to it to be of a recurrent nature. We are convinced that it was not the legislative intent to confer upon a carrier immunity from its payment obligations simply by reason of that fortuity.[94]

The Supreme Court affirmed the lower court's reasoning. The decision was fair in that it furthered the intent of the No-Fault Law and still protected the carrier, since it would be liable for benefits be-

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90 CARDOZO, *supra* note 1, at 71-73.

91 98 N.J. 30, 438 A.2d 811 (1984).

92 N.J. STAT. ANN. § 39:6A-13.1 (West 1972).

93 Zupo v. CNA Insurance Co., 193 N.J. Super. 374, 380, 474 A.2d 259, 263 (App. Div. 1984).

94 *Id.* at 381-2, 474 A.2d at 263-4.

yond the two-year period only when the insured has an illness "whose insidious nature is such that [its] recurrence after an extended period of apparent cure is probable" at the time the carrier makes its last payment.[95] Moreover, the Court noted that its decision did not contravene the purposes of a statute of limitations; namely, to provide for a fair defense by barring litigation of stale claims, to penalize dilatoriness and to serve as a measure of repose.[96] Zupo brought her claim within fifteen months of her injury's recurrence; the facts were fresh and she was not dilatory.

When a court cannot find evidence of public policy from conventional sources, it will look elsewhere, at statements of officials, government spending programs, socio-economic writings, indeed anything that suggests some basis other than the judge's own wishes for asserting the existence of a particular public policy.[97] Unfortunately, sometimes the policy is simply asserted and thereafter used to decide a case without mention of any evidence supporting its existence.

There are several bodies of scholarship upon which judges often draw when they are making policy on their own. The two most prominent are economics and philosophy.

When a court employs economic reasoning it looks either to cost-benefit analysis or to an examination of the incentives and disincentives created by a possible rule of law, and decides whether those costs and benefits or incentives and disincentives are worthwhile.[98] For example, economic analysis is frequently used in products liability cases where a court considers the desirability of requiring a manufacturer to absorb a particular cost.[99]

Another significant body of scholarship upon which judges draw, although not always explicitly, is political philosophy which

95 98 N.J. at 33, 483 A.2d at 813.

96 Ochs v. Federal Ins. Co., 90 N.J. 108, 112, 447 A.2d 163, 165-6 (1984).

97 *See generally*, DAYNARD, *supra* note 24.

98 *See, e.g.*, Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922); Chesapeake and Ohio Railway Co. v. United States, 704 F.2d 373 (7th Cir. 1983); Robinson v. Diamond Housing Corp., 463 F.2d 853 (D.C. Cir. 1972); Boomer v. Atlantic Cement Company, 26 N.Y.2d 219, 309 N.Y.S.2d 312, 257 N.E.2d 870 (1970).

99 *See, e.g.*, Greenman v. Yuba Power Products, Inc., 59 Cal.2d 57, 61, 27 Cal. Rptr. 697, 701, 377 P.2d 897, 901 (1963), wherein the court stated that "[t]he purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves."

can range anywhere from the "rights" analysis of John Rawls and Ronald Dworkin to the "laissez-faire" analysis of Robert Nozick and Milton Friedman.

Examples of use of political philosophy abound in decisions of the United States Supreme Court based upon protection of minorities or the political processes. The Court looks to the political philosophy of democracy.

> Logically, in a society ostensibly grounded on representative government, it would seem reasonable that a majority of the people of a State could elect a majority of that State's legislators. To conclude differently, and to sanction minority control of state legislative bodies, would appear to deny majority rights in a way that far surpasses any possible denial of minority rights that might otherwise be thought to result. Since legislatures are responsible for enacting laws by which all citizens are to be governed, they should be bodies which are collectively responsible to the popular will. . . . [T]he democratic ideals of equality and majority rule, which have served this Nation so well in the past, are hardly of any less significance for the present and the future. . . . To the extent that a citizen's right to vote is debased, he is that much less a citizen. The fact that an individual lives here or there is not a legitimate reason for overweighting or diluting the efficacy of his vote.[100]

In a footnote, Chief Justice Warren quoted the dissent of Justice Douglas in *MacDougall v. Green*:[101]

> [A] regulation . . . [which] discriminates against the residents of the populous counties of the state in favor of rural sections . . . lacks the equality to which the exercise of political rights is entitled under the fourteenth amendment.
>
> Free and honest elections are the very foundation of our republican form of government. . . . Discrimination against any group or class of citizens in the exercise of these constitutionally protected rights of citizenship deprives the electoral process of integrity. . . .
>
> None would deny that a state law giving some citizens

100 Reynolds v. Sims, 377 U.S. 533, 565-67 (1964) (Warren, C.J., writing for the majority). This suit was brought by voters in several Alabama counties against officials having state election duties. The Court held that malapportionment of the Alabama legislature deprived them and others similarly situated of rights under the equal protection clause of the fourteenth amendment and the Alabama constitution.

101 335 U.S. 281, 288-290 (1948) (Douglas, J., dissenting).

> twice the vote of other citizens in either the primary or general election would lack that equality which the fourteenth amendment guarantees. . . . The theme of the Constitution is equality among citizens in the exercise of their political rights. The notion that one group can be granted greater voting strength than another is hostile to our standards for popular representative government.[102]

Similarly, in the poll tax cases the Court found it abhorrent to republican government to require citizens to pay a fee in order to vote.[103] They wrote that citizens' ability to vote should not vary according to their wealth.

In *Ortiz v. Hernandez Colon*,[104] the United States District Court for Puerto Rico overturned an inequitable voting scheme with a direct reference to John Rawls and his political theory.[105]

The economic and philosophical forms of analyses are not mutually exclusive nor are they used exclusive of all others; they are merely the most prominent. A court may draw upon other bodies of scholarship, as well as its own experience and reasoning.

The public policy approach is thought to have several advantages. It allows judges explicitly to locate the will of the majority and enforce it, as well as to counteract it when the political system calls for it.

> The final cause of law is the welfare of society. The rule that misses its aim cannot permanently justify its existence. . . . The end which the law serves will dominate [all other methods]. . . . I do not mean, of course, that judges are commissioned to set aside existing rules at pleasure in favor of any other set of rules which they may hold to be expedient or wise. I mean that when they are called upon to say how far existing rules are to be extended or restricted, they must let the wel-

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102 377 U.S. at 564 n.41.

103 *See, e.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663, 666. The Court concluded that "a state violates the equal protection clause of the fourteenth amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard."

104 385 F. Supp. 111 (D.P.R. 1974).

105 *Id.* at 117. (" '[T]he effect of self-government where equal political rights have their fair value is to enhance [sic] the self-esteem and the sense of political competence of the average citizen. His awareness of his own worth, developed in the smaller associations of his community, is confirmed in the constitution of the whole society.' " J. Rawls, A THEORY OF JUSTICE 234 (1972)).

fare of society fix the path, its direction and its distance.[106]

The public policy approach is not without its dangers. Some think it is the most likely to be abused. Incorrectly employed it may become the naked use and abuse of power.[107] That degree of discretion is not accorded to the judiciary. Justice Holmes said, a judge's job is not to "do justice," but to "play the game according to the rules."[108] The public policy approach incurs the distinct risk that courts, believing they are promoting society's welfare, may not be, and that, to add insult to injury, their decisions may be unacceptable to a substantial majority. Cardozo wrote:

> You may say that there is no assurance that judges will interpret the *mores* of their day more wisely and truly than other men. I am not disposed to deny this, but in my view it is quite beside the point. The point is rather that this power of interpretation must be lodged somewhere, and the custom of the constitution has lodged it in the judges.[109]

It is also quite difficult for a court to formulate policy. The talent and resources for that exercise often lie more readily with the Legislature.

> The expanded role thus thrust upon the courts has involved them deeply in matters of social policy traditionally left to other branches of government— matters with which, as presently constituted, the courts are ill-equiped to deal. . . . In short, courts speak more as the legislature should than as courts traditionally do. Diverse, if not diametrically opposed results—as, for example, concerning when and how busing should be used to remedy educational imbalance—are produced in such cases by courts proceedings not only from differing judicial philosophies, but also upon different and generally incomplete and conflicting factual assumptions.[110]

Another alleged weakness of the public policy approach is its unpredictability. It is a weakness, however, only to the extent other approaches are any more predictable.

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106 CARDOZO, *supra* note 1, at 66-67.

107 *See, e.g.*, Rolf Santorius, *The Justification of the Judicial Decision*, 78 ETHICS 171 (1968); POUND, *supra* note 24.

108 Continuing Legal Education for Professional Competence and Responsibility, The Report on the Arden House Conference (December 16-19, 1958), at 123.

109 CARDOZO, *supra* note 1, at 135.

110 Meyer, *Justice, Bureaucracy, Structure, and Simplicifcation*, 42 MD. L. REV. 659, 665 (1983).

I will not give examples of cases using the public policy approach. You can find them in your daily newspaper's articles about most of the nation's courts and many of their cases, including some from New Jersey.

VII. Conclusion

How then *should* a judge decide cases? What approach should he use? Justice Cardozo wrote:

> We go forward with our logic, with our analogies, with our philosophies, till we reach a certain point. At first, we have no trouble with the paths; they follow the same lines. Then they begin to diverge, and we must make a choice between them. History or custom or social utility or some compelling sentiment of justice or sometimes perhaps a semi-intuitive apprehension of the pervading spirit of our law must come to the rescue of the anxious judge, and tell him where to go. . . . If you ask how he is to know when one interest outweighs another, I can only answer that he must get his knowledge just as the legislator gets it, from experience and study and reflection; in brief, from life itself.[111]

In other words, there seems to be no steadfast rule as to what method to apply to a case nor how a case should be decided. It is as complex as life itself.

VIII. Epilogue: Judicial Legitimacy—Finding the Law

By legitimacy I mean the need for a court, especially one that is appointed and that can achieve tenure, to clearly base its decisions on some well-defined approach, whatever it may be. Without that, it may appear, and it may be true, that a judge is simply expressing his or her completely subjective notion of what the result should be. That is the worst kind of arbitrariness for unlike the decrees of a dictator, judicial decisions pretend to be objective and reasonable, and unlike the whims of legislators, governors and presidents, the judicial whim may not be correctible at the next election.

Without that kind of perceived legitimacy, the public will not trust the courts and lacking that confidence over any long period, the judicial system will disintegrate. Sometimes, however, even

[111] CARDOZO, *supra* note 1, at 43, 113.

legitimacy in judicial decision-making causes a substantial loss of public confidence and sometimes over a fairly long period. At that point the problem for judges becomes acute. They want to regain that confidence, but there is nothing—at least in America—more illegitimate than judicial decisions whose sole aim is to please the public.

Goodwill is often the only remedy for such situations. It produces patience; it gives all a chance to reflect, both the public and the courts. In a decent, considerate society with a strong judicial tradition of legitimacy, neither the courts nor the public need fear the kind of consequences that may result from a public that may mistakenly perceive judicial illegitimacy or from a court that may mistakenly abandon legitimacy. Given such a society, given such a judicial tradition, the mistakes of either are likely to be temporary. Or, as the editors would say, we certainly hope so.