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## NATURAL LAW AND EVERYDAY LAW\*

*Joseph O'Meara*

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LIKE MOST TERMS "natural law" has had, and has, a variety of meanings. In most of its meanings it touches scarcely at all the professional concerns of the lawyer but moves, rather, on a plane widely separated from his daily cares and duties. Thus, for the most part, natural law stands aloof from the urgent here-and-now with which lawyer and judge necessarily are pre-occupied; it inhabits a world apart.

Relevant in this connection is a comment by Canon Leclercq, Professor of Moral and Social Philosophy at the Catholic University of Louvain:

. . . The term "natural law" is currently fashionable, especially among Catholics who seek a rallying point against relativism. There are, therefore, many people fond of using it, and they bring it up on any pretext, as other men use the term "sociology."<sup>1</sup>

I venture to think he is right — on both counts.

In these remarks I hope to suggest an approach to natural law which will make it useful on a day-to-day basis in the perplexities by which practitioners and judges constantly are confronted. I shall talk more about the judge than about the practitioner, though I have been the latter but never the former. I make no apology, however, since, after all, it is not necessary to be a concert artist to distinguish between a baritone and a basso.

Specifically, I suggest that natural law fruitfully may be regarded as the contribution which ethics can make to law.

But "law" itself is a word of many meanings; and one of the least profitable of scholarly enterprises is the seemingly endless endeavor to prove that it really means this or that and nothing else. In fact, language being conventional, law means all the things to which it properly is applied within the confines of accepted usage. In the customary language of lawyers, it refers chiefly to constitutions, judicial decisions and legislative enactments and, more particularly, to the rules of conduct they embody. In this sense, law is an accumulation of "rules which will be enforced by the government . . .

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\* Lecture delivered at the Yale Law School on February 29, 1960.

1. See Jacques Leclercq, *Suggestions for Clarifying Natural Law*, 2 NATURAL LAW FORUM 64, 74 (1957).

or to which it will at least provide forcible means to secure conformity.”<sup>2</sup>

If that is what law is and all that it is, it is hard to see how natural law in any of its meanings could make a significant contribution to it,<sup>3</sup> save insofar as natural law may guide legislators in their consideration of pending measures. But I am not here concerned with legislators. I am concerned with practicing lawyers and judges, especially the latter; and it may be that the widespread habit of regarding law as an accumulation of rules is in part responsible for the ineffectiveness of natural law so far as concerns the practical affairs of professional life. How could it be otherwise if law is simply an aggregation of already existing rules? In that situation, what part is there for natural law to play, except perhaps the negative role of calling in question the moral authority of a rule when it exceeds the limits of reason?

As appears from what I have just said, I do not envisage natural law as the arbiter of legal validity. “Law is law, whether it be good or bad.”<sup>4</sup> But this raises a problem: what is a judge to do when the relevant legal materials (constitutions, legislative enactments, decided cases and, on occasion, executive orders, administrative rulings and the like) necessitate a result which he cannot square with his conscience, for example, the Nazi confiscation laws? I answer: resign. “Tyranny is tyranny,” as Judge Learned Hand has said, “no matter what its form; the free man will resist it if his courage serves.”<sup>5</sup> In this Country, indeed, we cannot well deny the right of revolution without illegitimizing ourselves. But, I submit, only those in private life are free to resist: it seems to me obviously inadmissible for a public official to attack what he is sworn to uphold. And this is true, in my opinion, of all forms of resistance, from civil disobedience to subversion to armed rebellion. Yes, if a judge’s conscience gets in the way of performance of his official duties, the only course open to him is resignation.

Well, then, what role is there for natural law to play? What contribution can it make? Comparatively little, so far as I can see, if law be no more

2. Learned Hand, *How Far Is a Judge Free in Rendering a Decision?* in *THE SPIRIT OF LIBERTY* 104 (2nd ed., 1953). Elsewhere Hand has said that law is “an inherited accumulation, [which] imposes itself on each generation willy-nilly.” *Mr. Justice Holmes at Eighty-Five*, in *THE SPIRIT OF LIBERTY* 26 (2nd ed., 1953).

3. It is true, of course, that some legal rules invite the intervention of ethical principles, e.g., *FEDERAL RULES OF CIVIL PROCEDURE* 8(f): “Construction of Pleadings. All pleadings shall be so construed as to do substantial justice.” On the whole, however, it does not seem to me that the potential contribution of ethics is very great if law is conceived simply as a body of already existing rules.

4. FELIX COHEN, *ETHICAL SYSTEMS AND LEGAL IDEALS* 15 (1933). Cf. Jacques Leclercq, *Suggestions for Clarifying Natural Law*, 2 *NATURAL LAW FORUM* 64, 77 (1957): “. . . we are continually passing from law to morality, and vice versa. The two cannot be isolated from one another, for they have many questions in common. But their difference of perspective makes it extremely important not to confuse them.”

5. Hand, *Is There a Common Will?* in *THE SPIRIT OF LIBERTY* 55 (2nd ed., 1953).

than an aggregation of already existing rules. But law must be regarded as a good deal more than that. It seems to me convenient and useful to think of law as a living process for the just resolution of never-ending human controversies.<sup>6</sup> If law is regarded in this light, as a process of decision,<sup>7</sup> it comes alive, is responsive to changing human needs; and the way is cleared for a positive contribution by natural law, as I shall attempt to show.

This, of course, presupposes that the judge is not an automaton proceeding mechanically according to predetermined rules. I shall not dwell on this, for I assume it is now generally recognized that, in many if not most litigated cases, there is no logical necessity for deciding one way rather than another; that is to say, logical application of the relevant legal materials<sup>8</sup> does not require one and only one result.<sup>9</sup>

6. I recognize, of course, that the resolution of controversy is not the sole end of law. Just as law has many meanings, so it has more than one function. For example, it has an important teaching function. See LON L. FULLER, *THE LAW IN QUEST OF ITSELF* 137 (1940): "The judge in deciding cases is not merely laying down a system of minimum restraints designed to keep the bad man in check, but is in fact helping to create a body of common morality which will define the good man." See also Eugene V. Rostow, *The Supreme Court and the People's Will*, 33 *NOTRE DAME LAWYER* 573, 583 (1958):

... The great opinions of Chief Justice Hughes, of Justice Sutherland in the *Scottsboro* case, of Justices Brandeis, Holmes, Stone and Cardozo, are yielding now their intended fruit. In our common law approach to the problem of constitutional construction, one case leads to another as lawyers see new vistas opening, and develop new possibilities for their clients within the ambit of evolving doctrine. And the Court has thus been an educational force, along with many others, in helping to mold a state of opinion far more sensitive to civil liberties than that which prevailed in the United States thirty or fifty years ago.

Furthermore, for all its indispensable practicality, law is not merely matter-of-fact: it has a symbolic character through which, in part, its teaching function is performed. See Robert E. Rodes, *A Prospectus for a Symbolist Jurisprudence*, 2 *NATURAL LAW FORUM* 88 (1957).

I do not discuss the teaching and other functions of law because they are performed not apart from but in the process of resolving controversy — the function which is the immediate concern of lawyers, whether on the Bench or at the Bar.

7. Cf. Myres S. McDougal, *Law As a Process of Decision: a Policy-Oriented Approach to Legal Study*, 1 *NATURAL LAW FORUM* 53, 54-58 (1956).

8. Here and elsewhere in this paper "relevant legal materials" (as stated in the text at p. 84) comprise constitutions, legislative enactments, decided cases and, on occasion, executive orders, administrative rulings and the like.

9. See John Dewey, *Logical Method and Law*, 10 *CORNELL LAW QUARTERLY* 17, 25 (1924):

... There is a wide gap separating the reasonable proposition that judicial decisions should possess the maximum possible regularity in order to enable persons in planning their conduct to foresee the legal import of their acts, and the absurd because impossible proposition that every decision should flow with formal logical necessity from antecedently known premises. To attain the former result there are required general principles of interpreting cases — rules of law — and procedures of pleading and trying cases which do not alter arbitrarily. But principles of interpretation do not signify rules so rigid that they can be stated once for all and then be literally and mechanically adhered to. For the situations to which they are to be applied do not literally repeat one another in all details, and questions of degree of this factor or that have the chief weight in determining which general rule will be employed to judge the situation in question. A large part of what has been asserted concerning the necessity of absolutely uniform and immutable antecedent rules of law is in effect an attempt to evade the

It may be useful, though, to consider briefly why this should be. According to Dr. Alexis Carrel, "Every man is a history unlike all others."<sup>10</sup> Similarly, every lawsuit is unique; each is a history unlike all others. It does not follow that law is a wilderness of single instances. Common-law judges reason from case to case by resemblance or analogy.<sup>11</sup> For the purpose in hand a

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really important issue of finding and employing rules of law, substantive and procedural, which will actually secure to the members of the community a reasonable measure of practical certainty of expectation in framing their courses of conduct.

10. ALEXIS CARREL, *MAN THE UNKNOWN* 242 (Harper & Brothers, 1935).

11. See EDWARD H. LEVI, *INTRODUCTION TO LEGAL REASONING* 1-3 (1958):

The basic pattern of legal reasoning is reasoning by example. It is reasoning from case to case. It is a three-step process described by the doctrine of precedent in which a proposition descriptive of the first case is made into a rule of law and then applied to a next similar situation. The steps are these: similarity is seen between cases; next the rule of law inherent in the first case is announced; then the rule of law is made applicable to the second case. This is a method of reasoning necessary for the law, but it has characteristics which under other circumstances might be considered imperfections.

These characteristics become evident if the legal process is approached as though it were a method of applying general rules of law to diverse facts—in short, as though the doctrine of precedent meant that general rules, once properly determined, remained unchanged, and then were applied, albeit imperfectly, in later cases. If this were the doctrine, it would be disturbing to find that the rules change from case to case and are remade with each case. Yet this change in the rules is the indispensable dynamic quality of law. It occurs because the scope of a rule of law, and therefore its meaning, depends upon a determination of what facts will be considered similar to those present when the rule was first announced. The finding of similarity or difference is the key step in the legal process.

The determination of similarity or difference is the function of each judge. Where case law is considered, and there is no statute, he is not bound by the statement of the rule of law made by the prior judge even in the controlling case. The statement is mere dictum, and this means that the judge in the present case may find irrelevant the existence or absence of the facts which prior judges thought important. It is not what the prior judge intended that is of any importance; rather it is what the present judge, attempting to see the law as a fairly consistent whole, thinks should be the determining classification. In arriving at his result he will ignore what the past thought important; he will emphasize facts which prior judges would have thought made no difference. It is not alone that he could not see the law through the eyes of another, for he could at least try to do so. It is rather that the doctrine of dictum forces him to make his own decision.

Thus it cannot be said that the legal process is the application of known rules to diverse facts. Yet it is a system of rules; the rules are discovered in the process of determining similarity or difference. But if attention is directed toward the finding of similarity or difference, other peculiarities appear. The problem for the law is: When will it be just to treat different cases as though they were the same? A working legal system must therefore be willing to pick out key similarities and to reason from them to the justice of applying a common classification. The existence of some facts in common brings into play the general rule. If this is really reasoning, then by common standards, thought of in terms of closed systems, it is imperfect unless some over-all rule has announced that this common and ascertainable similarity is to be decisive. But no such fixed prior rule exists. It could be suggested that reasoning is not involved at all; that is, that no new insight is arrived at through a comparison of cases. But reasoning appears to be involved; the conclusion is arrived at through a process and was not immediately apparent. It seems better to say there is reasoning, but it is imperfect.

Therefore it appears that the kind of reasoning involved in the legal process is one in which the classification changes as the classification is made. The rules change as the rules are applied. More important, the rules arise out of a process which, while com-

case may be regarded as analogous or comparable to other cases previously decided, that is, as duplicating their significant features and thus as presenting essentially the same question. To this recurring question common-law judges habitually give the same answer their predecessors gave. That, in short, is the Doctrine of Judicial Precedent. Save in rare instances, judges are bound by this doctrine to decide every case in a way which will make a consistent pattern with the decisions in comparable cases in the past.<sup>12</sup> But this involves problems of appraisal, evaluation and choice.<sup>13</sup> Is this case

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paring fact situations, creates the rules and then applies them. But this kind of reasoning is open to the charge that it is classifying things as equal when they are somewhat different, justifying the classification by rules made up as the reasoning or classification proceeds. In a sense all reasoning is of this type, but there is an additional requirement which compels the legal process to be this way. Not only do new situations arise, but in addition peoples' wants change. The categories used in the legal process must be left ambiguous in order to permit the infusion of new ideas. And this is true even where legislation or a constitution is involved. The words used by the legislature or the constitutional convention must come to have new meanings. Furthermore, agreement on any other basis would be impossible. In this manner the laws come to express the ideas of the community and even when written in general terms, in statute or constitution, are molded for the specific case.

I think Dean Levi overstates the case. His assertion that the "basic pattern of legal reasoning . . . is a three-step process . . . in which a proposition descriptive of the first case is made into a rule of law and then applied to a next similar situation" is true only in doubtful cases as, indeed, many if not most cases are which are pressed to final judgment in a court of last resort. But there are many other cases, cases which do not go that far or do not get into court at all. In most of these latter cases a well-established principle, expressive of the earlier decisions, is clearly dispositive of the controversy. See BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 128-129 (1922), *infra*, note 14. Dean Levi himself has spoken of the "normal result" in cases involving certain generalized fact patterns, such as that indicated by the term "consideration." See his *Natural Law, Precedent and Thurman Arnold*, 24 *VIRGINIA LAW REVIEW* 587, 602 (1938).

12. See CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 112 (1922): "One of the most fundamental social interests is that law shall be uniform and impartial. There must be nothing in its action that savors of prejudice or favor or even arbitrary whim or fitfulness. Therefore in the main there shall be adherence to precedent." See also *id.* at 33-34:

It will not do to decide the same question one way between one set of litigants and the opposite way between another. "If a group of cases involves the same point, the parties expect the same decision. It would be a gross injustice to decide alternate cases on opposite principles. If a case was decided against me yesterday when I was defendant, I shall look for the same judgment today if I am plaintiff. To decide differently would raise a feeling of resentment and wrong in my breast; it would be an infringement, material and moral, of my rights." Everyone feels the force of this sentiment when two cases are the same. Adherence to precedent must then be the rule rather than the exception if litigants are to have faith in the even-handed administration of justice in the courts.

13. See Erwin N. Griswold, *The Future of Legal Education*, 4 *HARVARD LAW SCHOOL BULLETIN* 2, 3-4 (1953):

It is a rare question today on which a good research man cannot find at least one case on both sides, and often in his own state. In such a situation the task of the lawyer or judge is not to find the controlling authority but to choose between competing lines of authorities. The law is to a considerable extent a logical structure; but we are coming more and more to see that the conclusion of a logical process turns not only on the accuracy of the logic but also on the premises to which the logic is applied. The common law has not always been a good instrument for the evaluation of premises. With clear lines of authority, premises may become rather thoroughly concealed or

really comparable to those urged upon him by this side or that? Does a certain circumstance present here, not present there, alter the picture essentially or only in an immaterial detail? Plaintiff's authorities present a persuasive analogy; defendant constructs a cogent argument on altogether different precedents. In short, there are two sides to every question. Thus many if not most cases that come before a court for decision present, in greater or less degree, a hitherto unsolved problem<sup>14</sup> — and one which cannot be postponed to another day. For it is the judge's duty as well as his prerogative to decide. This is the Anglo-American common-law system.

I have been talking about cases which turn on prior judicial decisions, precedents; but what I have said is equally true of constitutions and statutes. One cannot simply look at a constitution — or at a statute — and find there the answers to all of the questions arising under it which a court must decide. There are persuasive reasons for deciding many of these questions one way as well as another.<sup>15</sup> In large part, indeed, constitution and statute do no more than provide alternatives or set limits on decision.

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ignored. When authority multiplies and becomes widely divergent, the lawyer and the judge will more and more often have to search for, and to evaluate, premises; and it may be more clearly seen that these may appropriately change with the times, and with different social patterns.

See also Walter W. Cook, *Scientific Method and The Law*, 13 AMERICAN BAR ASSOCIATION JOURNAL 303, 308 (1927): "... An intelligent choice can be made only by estimating as far as that is possible the consequences of a decision one way or the other. To do this, however, the judge will need to know two things: (1) what social consequences or results are to be aimed at; and (2) how a decision one way or other will affect the attainment of those results."

14. I have no wish to exaggerate the law's uncertainties. No doubt it is true, as Cardozo has observed, that:

... Most of us live our lives in conscious submission to rules of law, yet without necessity of resort to the courts to ascertain our rights and duties. Lawsuits are rare and catastrophic experiences for the vast majority of men, and even when the catastrophe ensues, the controversy relates most often not to the law, but to the facts. In countless litigations, the law is so clear that judges have no discretion. They have the right to legislate within gaps, but often there are no gaps. We shall have a false view of the landscape if we look at the waste spaces only, and refuse to see the acres already sown and fruitful. *THE NATURE OF THE JUDICIAL PROCESS*, 128-129 (1922).

But the controversies which get into court and are pressed to final judgment are those in which each of two or more lawyers thinks the law is or may be (or *should* be and, if he is true to his calling and plays well his part, *will* be) on his side. Allowing for a certain number of cases which are pursued to a conclusion for little reason other than incompetence or blind partisanship, the conclusion is — and it is borne out, I suggest, by each succeeding volume of the reports of every court of last resort — that many if not most cases in courts of ultimate jurisdiction do, in fact, press arguable alternatives: in short, each is a hitherto unsolved problem.

15. See Dewey, *Logical Method and Law*, 10 CORNELL LAW QUARTERLY 17, 26 (1924):

... In part legislation endeavors to reshape old rules of law to make them applicable to new conditions. But statutes have never kept up with the variety and subtlety of social change. They cannot at the very best avoid some ambiguity, which is due not only to carelessness but also to the intrinsic impossibility of foreseeing all possible circumstances, since without such foresight definitions must be vague and classifications indeterminate. Hence to claim that old forms are ready at hand that cover every case

So the judge has choice thrust upon him, as Judge Hand has recognized: "Like every public functionary, in the end [judges] are charged with the responsibility of choosing but of choosing well."<sup>16</sup> Creative, therefore, the judge's function inescapably is,<sup>17</sup> and this involves the exercise of discretion though not, of course, unlimited discretion. The judge exercises discretion because there is no escape from doing so; but decision is never at large, discretion being limited to choosing between alternatives within the framework of our traditional approach to legal problems.<sup>18</sup>

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and that may be applied by formal syllogizing is to pretend to a certainty and regularity which cannot exist in fact.

See also CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS*, 14-15 (1922):

... codes and statutes do not render the judge superfluous, nor his work perfunctory and mechanical. There are gaps to be filled. There are doubts and ambiguities to be cleared. There are hardships and wrongs to be mitigated if not avoided. Interpretation is often spoken of as if it were nothing but the search and the discovery of a meaning which, however obscure and latent, had none the less a real and ascertainable pre-existence in the legislator's mind. The process is, indeed, that at times, but it is often something more. The ascertainment of intention may be the least of a judge's troubles in ascribing meaning to a statute. "The fact is," says Gray in his lectures on the "Nature and Sources of the Law," "that the difficulties of so-called interpretation arise when the legislature has had no meaning at all; when the question which is raised on the statute never occurred to it; when what the judges have to do is, not to determine what the legislature did mean on a point which was present to its mind, but to guess what it would have intended on a point not present to its mind, if the point had been present."

16. Hand, *The Speech of Justice*, in *THE SPIRIT OF LIBERTY* 19 (2nd ed., 1953).

17. See CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 166-167 (1922):

... I was much troubled in spirit, in my first years upon the bench, to find how trackless was the ocean on which I had embarked. I sought for certainty. I was oppressed and disheartened when I found that the quest for it was futile. I was trying to reach land, the solid land of fixed and settled rules, the paradise of a justice that would declare itself by tokens plainer and more commanding than its pale and glimmering reflections in my own vacillating mind and conscience. I found "with the voyagers in Browning's 'Paracelsus' that the real heaven was always beyond." As the years have gone by, and as I have reflected more and more upon the nature of the judicial process, I have become reconciled to the uncertainty, because I have grown to see it as inevitable. I have grown to see that the process in its highest reaches is not discovery, but creation; and that the doubts and misgivings, the hopes and fears, are part of the travail of mind, the pangs of death and the pangs of birth, in which principles that have served their day expire, and new principles are born.

Cf. FULLER, *THE LAW IN QUEST OF ITSELF* 137-138 (1940):

The judge in deciding cases is not merely laying down a system of minimum restraints designed to keep the bad man in check, but is in fact helping to create a body of common morality which will define the good man. When he sees his office in this light, the judge will realize, I think, how significantly creative his work is, and how sinister is the temptation to evade his responsibilities to the future by adopting a passive and positivistic attitude toward "the existing law."

18. Holmes expressed the limitation on the judge's discretion in a much-quoted passage as follows: "... I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions. A common-law judge could not say I think the doctrine of consideration a bit of historical nonsense and shall not enforce it in my court." *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 221 (1917) (dissenting opinion). Cardozo put it this way:

... The range of free activity is relatively small. We may easily seem to exaggerate it through excess of emphasis. None the less, those are the fields where the judicial



Thus the sharp distinction, commonly drawn, between the law-that-is and the law-that-ought-to-be is unrealistic, for the simple reason that the so-called law-that-is<sup>19</sup> in important part is a myth:<sup>20</sup> it is fictitious—and inhibiting and mischievous as well—so far as concerns those numerous questions I have alluded to, namely, doubtful questions.

But if this be so, if precedent and constitution and statute, instead of supplying clear-cut answers, so often point simultaneously in more than one direction, to what is a judge to turn?

Now, of course, there is no problem if the relevant legal materials<sup>21</sup> speak plainly to the question at issue; there is a problem only if the relevant legal materials do not speak to the question or speak ambiguously,<sup>22</sup> or with more than one voice.<sup>23</sup> In that event, obviously, if the question is to be answered, the answer must be sought elsewhere, beyond the relevant legal materials — in short, outside the law. Thus in very truth legal problems are solved by recourse to nonlegal considerations.

function gains its largest opportunity and power. Those are the fields, too, where the process is of the largest interest. Given freedom of choice, how shall the choice be guided? Complete freedom—unfettered and undirected—there never is. A thousand limitations—the product some of statute, some of precedent, some of vague tradition or of an immemorial technique,—encompass and hedge us even when we think of ourselves as ranging freely and at large. The inscrutable force of professional opinion presses upon us like the atmosphere, though we are heedless of its weight. Narrow at best is any freedom that is allotted to us. How shall we make the most of it in service to mankind? *THE GROWTH OF THE LAW* 60-61 (1924).

19. Judge Hand calls it "the law as it is." Hand, *Is There a Common Will?* in *THE SPIRIT OF LIBERTY* 55 (2nd ed., 1953).

20. See LEVI, *INTRODUCTION TO LEGAL REASONING* 1-3 (1958).

21. See note 8, *supra*.

22. See CARDOZO, *THE GROWTH OF THE LAW* 105-106 (1924):

... We held a little while ago in *Oppenheim v. Kriedel*, 236 N.Y. 156, that a woman, as well as a man, may maintain an action for criminal conversation. The court of intermediate appeal had ruled that the action would not lie. To make out the woman's disability, precedents were cited from the time of Lord Coke. Stress was laid upon pronouncements in those days that a man had a property right in the body of his wife. A wife, it was said, had none in the body of her husband. Stress was laid also upon rulings made in days when the wife was unable, unless the husband joined with her as plaintiff, to sue for any wrong. We did not ignore these precedents, but we held them inconclusive. Social, political, and legal reforms had changed the relations between the sexes, and put woman and man upon a plane of equality. Decisions founded upon the assumption of a bygone inequality were unrelated to present-day realities, and ought not to be permitted to prescribe a rule of life.

23. See CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 40-41 (1922):

... One principle or precedent, pushed to the limit of its logic, may point to one conclusion; another principle or precedent, followed with like logic, may point with equal certainty to another. In this conflict, we must choose between the two paths, selecting one or other, or perhaps striking out upon a third, which will be the resultant of the two forces in combination, or will represent the mean between extremes. Let me take as an illustration of such conflict the famous case of *Riggs v. Palmer*, 115 N.Y. 506. That case decided that a legatee who had murdered his testator would not be permitted by a court of equity to enjoy the benefits of the will. Conflicting principles were there in competition for the mastery. One of them prevailed, and vanquished all the others. There was the principle of the binding force of a will disposing of the

To be sure, the naive idea appears to be entertained by some British scholars that solving legal problems is a simple matter, requiring little more than precise delimitation of terms.<sup>24</sup> But, as Hohfeld saw clearly, describing words by metes and bounds can do no more than sharpen issues;<sup>25</sup> it cannot solve the problems on which, in the end, decision turns in doubtful cases — problems of appraisal, evaluation and choice.<sup>26</sup> Solution of such problems involves a great deal more than semantics; it necessitates recourse to substantive considerations;<sup>27</sup> and, since legal problems seldom if ever arise unless

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estate of a testator in conformity with law. That principle, pushed to the limit of its logic, seemed to uphold the title of the murderer. There was the principle that civil courts may not add to the pains and penalties of crimes. That, pushed to the limit of its logic, seemed again to uphold his title. But over against these was another principle, of greater generality, its roots deeply fastened in universal sentiments of justice, the principle that no man should profit from his own inequity or take advantage of his own wrong. The logic of this principle prevailed over the logic of the others. I say its logic prevailed. The thing which really interests us, however, is why and how the choice was made between one logic and another. In this instance, the reason is not obscure. One path was followed, another closed, because of the conviction in the judicial mind that the one selected led to justice.

24. See, for example, H. L. A. Hart, *Definition and Theory in Jurisprudence*, 70 *LAW QUARTERLY REVIEW* 37, 42-43 (1954):

... If we take "A has a right to be paid £10 by B" as an example, we can see what the distinctive function of this form of statement is. For it is clear that as well as presupposing the existence of a legal system, the use of this statement has also a special connection with a particular rule of the system. This would be made explicit if we asked, "Why has A this right?" For the appropriate answer could only consist of two things: first, the statement of some rule or rules of law (say those of Contract) under which given certain facts certain legal consequences follow; and secondly, a statement that these facts were here the case. But again it is important to see that one who says that "A has a right" does not *state* the relevant rule of law; and that though, given certain facts, it is correct to say "A has a right," one who says this does not state or describe those facts. He has done something different from either of these two things: he has drawn a conclusion from the relevant but unstated rule, and from the relevant but unstated facts of the case. "A has a right" like "He is out" is therefore the tail-end of a *simple legal calculation*: it records a result and may be well called a conclusion of law. (Emphasis in last sentence added.)

Cf. Nakhnikian, *Contemporary Ethical Theories and Jurisprudence*, 2 *NATURAL LAW FORUM* 4, 29 (1957): "[Hart and the other 'Oxford philosophers' aim] to elucidate language, and the way to elucidate is to see, in typical contexts, how whatever you are trying to elucidate is typically employed."

25. See Cook's Introduction to HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS* 3-4 (1923):

... It was Hohfeld's great merit that he saw that, interesting as analytical jurisprudence is when pursued for its own sake, its chief value lies in the fact that by its aid the correct solution of legal problems becomes not only easier but more certain. In this respect it does not differ from any other branch of pure science. We must hasten to add, lest we do an injustice to Hohfeld's memory by thus emphasizing his work along the line of analytical jurisprudence, that no one saw more clearly than he that while the analytical matter is an indispensable tool, it is not an all-sufficient one for the lawyer. On the contrary, he emphasized over and over again — especially in his notable address before the Association of American Law Schools upon *A Vital School of Jurisprudence* — that analytical work merely paves the way for other branches of jurisprudence, and that without the aid of the latter satisfactory solutions of legal problems cannot be reached.

26. See Griswold, *The Future of Legal Education*, 4 *HARVARD LAW SCHOOL BULLETIN* 2, 3-4 (1953) and Cook, *Scientific Method and the Law*, 13 *AMERICAN BAR ASSOCIATION JOURNAL* 303, 308 (1927), both quoted from in note 13, *supra*.

27. See O. W. HOLMES, *THE COMMON LAW* 35-36 (1923):

... in substance the growth of the law is legislative. And this in a deeper sense than

legal materials leave the answer in doubt, these substantive considerations must be nonlegal considerations.

But what nonlegal considerations? If decision is not to be capricious there must be some criteria of choice among possible solutions.<sup>28</sup> What are the nonlegal criteria for solution of legal problems?

Mr. Justice Cardozo has suggested that the judge's duty is to conform to the "standards of the community, the *mores* of the times."<sup>29</sup> But there are conflicting standards and mores at any given date. How is the judge to know which standards to follow? Should he make a Gallup-poll approach and thus seek guidance from the multitude? Even if he should, can he? Has he the facilities necessary to do this? Of course he has not. To attempt to conduct a poll, in the words of Judge Hand, "would be fantastically absurd."<sup>30</sup>

What, then, should the judge do? Should he guess what a poll would show and let that determine choice? Yes, says Judge Hand. The judge, he says, is "confined to the best guess [he] can make of how such a poll would result."<sup>31</sup> He says that in respect of cases turning on a moral issue.<sup>32</sup> No reason appears, however, why the judge should not be similarly confined in any case in which public attitudes, impulses and aspirations are thought of as decisive. But if that is all he has to go by, his conjecture of how a poll would turn out, the judge is at sea without a compass on a starless night.

Nevertheless, if Hand is right, he must take what might be called a "constructive" poll; for Hand insists that the judge is an "organ of the social will" and must be free "by interpretation to manifest the half-framed purposes

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that what the courts declare to have always been the law is in fact new. It is legislative in its grounds. The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned. Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practice and traditions, the unconscious result of instinctive preferences and inarticulate convictions, but none the less traceable to views of public policy in the last analysis.

See also CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 103 (1922): ". . . within the range over which choice moves, the final principle of selection for judges, as for legislators, is one of fitness to an end."

28. See Griswold, *The Future of Legal Education*, 4 *HARVARD LAW SCHOOL BULLETIN* 2, 4 (1953): "Unless the selection of premises is to be merely arbitrary, the lawyer and judge must have some basis for making the choice." See also CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 21 (1922): "The sentence of today will make the right and wrong of tomorrow. If the judge is to pronounce it wisely, some principles of selection there must be to guide him among all the potential judgments that compete for recognition."

29. See CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 108 (1922).

30. *Johnson v. United States*, 186 F.2d 588, 590 (1951).

31. *Ibid.*

32. See also *Schmidt v. United States*, 177 F.2d 450 (1949).

of his time";<sup>33</sup> his mission is by "divination" to discover "the deeper moods of [his] time";<sup>34</sup> he must be "an articulate organ of the half-understood aspirations of living men, constantly recasting and adapting existing forms, bringing to the high light of expression the dumb impulses of the present."<sup>35</sup> Only so, says Hand, "can [judges] continue in the course of the ancestors whom they revere."<sup>36</sup> Then judges must be seers; and, if that be so, who is to man the bench?

But suppose judges were seers. Would that help, for example, on intricate questions of commercial law, involving sales, negotiable instruments and complicated security arrangements? Whatever dumb impulses judges might be able to divine would help not at all, I suggest, in such complexities nor, it seems plain, in any other technical dilemma. So, even the gift of divination would avail little in the run of cases.

But suppose a populace sophisticated enough to have opinions on technical problems. What then? Having ascertained these opinions, would the judge be bound to follow them? And every time they change must his judgment change? "Assuming it to exist at all," Judge Hand points out, "there is noth-

33. Hand, *The Speech of Justice*, in *THE SPIRIT OF LIBERTY* 14-15 (2nd ed., 1953):

... There is a hierarchy of power in which the judge stands low; he has no right to divinations of public opinion which run counter to its last formal expressions. Nevertheless, the judge has, by custom, his own proper representative character as a complementary organ of the social will, and in so far as conservative sentiment, in the excess of caution that he shall be obedient, frustrates his free power by interpretation to manifest the half-framed purposes of his time, it misconceives the historical significance of his position and will in the end render him incompetent to perform the very duties upon which it lays so much emphasis. The profession of the law of which he is a part is charged with the articulation and final incidence of the successive efforts toward justice; it must feel the circulation of the communal blood or it will wither and drop off, a useless member.

Justice? Elsewhere Judge Hand speaks of it as "that tolerable compromise that we call justice, without which the rule of the tooth and claw must prevail." *To Yale Law Graduates*, in *THE SPIRIT OF LIBERTY* 87 (2nd ed., 1953).

34. Hand, *Mr. Justice Holmes at Eighty-Five*, in *THE SPIRIT OF LIBERTY* 25 (2nd ed., 1953):

And so perhaps a sceptical disposition is a hazardous equipment for a judge; the interpreter need not analyze, his mission primarily is to discover to the faithful such congenial dogmas as will come to them with warmth and intimacy as all along their own. Many a judge, not a few great judges, have succeeded largely through such divination of the deeper moods of their time; they justly live in fame, not because their intellects have been penetrating, but because by nature they are gregarious.

35. Hand, *The Speech of Justice*, in *THE SPIRIT OF LIBERTY* 16 (2nd ed., 1953):

... It is not as the priest of a completed revelation that the living successors of past lawmakers can most truly show their reverence or continue the traditions which they affect to regard. If they forget their pragmatic origin, they omit the most pregnant element of the faith they profess and of which they would henceforth become only the spurious and egregious descendants. Only as an articulate organ of the half-understood aspirations of living men, constantly recasting and adapting existing forms, bringing to the high light of expression the dumb impulses of the present, can they continue in the course of the ancestors whom they revere.

36. *Ibid.*

ing more impalpable, nebulous and fugitive than common will, as any political doctor will agree.”<sup>37</sup>

Other problems must be faced if the judge is bound to follow the popular will. Must he follow the popular will of the Nation as a whole, or as it is reflected on a regional basis, or on a State or local basis? If he be an elected judge, must he think first of his constituents? Or is he bound to take a wider view? And, if so, how wide?

Assuming these questions settled, and that the opinions of the multitude on legal problems could somehow be ascertained, are we prepared to say the judge is duty bound to abide by them? Would we accept the consequences of an affirmative reply? What would happen to the Fifth Amendment? — for that matter, to the whole of the Bill of Rights, to the Constitution itself?

Enough of this. The very idea of the judge as a political barometer is obnoxious; in our Western tradition nothing could be more out of character.

Is there help from some other quarter? Yes, says Hand: the judge can appeal to his predecessors on the bench whose decisions, when he seeks to apply them in more or less altered circumstances, turn out to be equivocal. That actually is what he does, according to Judge Hand:

... Although at times he says and believes that he is not doing so, *what* [the judge] *really does is to take the language before him, whether it be from a statute or from the decision of a former judge, and try to find out what the government, or his predecessor, would have done, if the case before him had been before them.*<sup>38</sup> (Emphasis supplied.)

The judge cannot possibly find out how another judge, very likely a stranger to him and very likely long since dead, would have decided a case which, for that other judge, never existed. If you were somebody else, who would you be? Indeed, Judge Hand himself recognizes that “it is impossible to know” how another would have decided.<sup>39</sup> Are we to believe, then, that an adult, twentieth-century judge actually spends his energies trying to solve conundrums? I find it hard to accept the notion that judges occupy their time trying to find out what “it is impossible to know,” namely, how some other judge in the past would have decided a case which only now has arisen.

If, nevertheless, that really is what the judge does, as Hand says it is, how can he be the interpreter of “the half-framed purposes”<sup>40</sup> and “the deeper moods of [his] time”?<sup>41</sup> How can he be “an articulate organ of the half-

37. Hand, *Is There a Common Will?* in *THE SPIRIT OF LIBERTY* 54 (2nd ed., 1953).

38. Hand, *How Far Is a Judge Free in Rendering a Decision?* in *THE SPIRIT OF LIBERTY* 106 (2nd ed., 1953).

39. *Ibid.*

40. See *supra*, note 33.

41. See *supra*, note 34.

understood aspirations of living men"?<sup>42</sup> And if he be "an articulate organ of the half-understood aspirations of living men," how can he obey Judge Hand's admonition on other occasions to respect and follow "the law as it is" instead of "a factitious common will"?<sup>43</sup>

With all respect, I can find in Judge Hand's counsel only confusion and contradiction — confusion and contradiction embroidered with the allure of style.

The question remains: where is the judge to turn for help in answering unanswered problems? He cannot shift responsibility to his judicial predecessors nor to the men and women of his time. Is there nowhere he can turn?

Dean Pound has advanced a variation of Cardozo's suggestion that judgment should conform to the "standards of the community, the *mores* of the times."<sup>44</sup> Modern jurists, says Pound, "are content to search for the ideals of the age and to set them up as a guide."<sup>45</sup> But the ideals of the age are always in flux. At any given time and place there are conflicting and competing ideals; and now this, now that is ascendant. How, then, are the ideals of the age to be identified? It cannot be simply a matter of "count[ing] heads, without any appraisal of the voters."<sup>46</sup> If no more than that were involved, we would be back to a Gallup poll, confronting all of the difficulties I have pointed out; confronting them, moreover, in the most exaggerated form, with the inquiry broadened from the here-and-now to embrace the age.

But if the weight of numbers does not determine choice among competing

42. See *supra*, note 35.

43. See Hand, *Is There a Common Will?* in *THE SPIRIT OF LIBERTY* 55-56 (2nd ed., 1953):

... Of the contrivances which mankind has devised to lift itself from savagery there are few to compare with the habit of assent, not to a factitious common will, but to the law as it is. We need not go so far as Hobbes, though we should do well to remember the bitter experience which made him so docile. Yet we can say with him that the state of nature is "short, brutish and nasty," and that it chiefly differs from civilized society in that the will of each is by habit and training turned to accept some public, fixed and ascertainable standard of reference by which conduct can be judged and to which in the main it will conform.

44. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 108 (1922).

45. ROSCOE POUND, *THE SPIRIT OF THE COMMON LAW* 82 (1921).

46. See *Schmidt v. United States*, 177 F.2d 450, 451 (1949) (Hand, J.). And see Edmund Cahn, *Private Interviews and Community Views*, 11 *JOURNAL OF LEGAL EDUCATION* 513, 514 (1959):

... community judgment is something more than the aggregate of private judgments. The something more — as Aristotle made clear in his *Politics* 1281b-1282a and as I believe all students of society would agree — consists in the public's "coming together" physically or metaphorically, and discussing the facts, circumstances, and competing values before reaching a judgment. Of course, this is one of the reasons why we do not poll a jury at the end of the testimony, but only after they have retired to the jury room and discussed it.

ideals, the selection must be based on worth.<sup>47</sup> That, however, involves a value judgment, requiring the judge to decide according to his own intellect, experience and conscience.

There is no escape. Let the judge extract all the instruction which can be got from judicial precedent.<sup>48</sup> Still, the case now pending never arose before; to some extent it differs from all earlier cases. Someone must settle whether the differences are essential and, accordingly, whether the same or a different pattern of decision should be followed.<sup>49</sup> Or perhaps the case can be fitted nicely into either of two competing lines of authority.<sup>50</sup> Which shall it be? The judge does not usurp authority when he decides; he would default in his duty if he did not decide. *This* case must be decided *now*, and in our Anglo-American common-law system the judge is the official authorized — and required — to perform that office. Thus the judge's role necessarily is a creative one<sup>51</sup>—he must legislate;<sup>52</sup> there is no help for it. And, I submit,

47. This is illustrated by Cardozo's statement that "It is the customary morality of right-minded men and women which he [the judge] is to enforce by his decree." *THE NATURE OF THE JUDICIAL PROCESS* 106 (1922). Who are the *right-minded* men and women? The judge can answer that question only by making a value judgment.

48. Considerations analogous to those which follow apply in the case of constitutions, statutes, etc.

49. Cf. COHEN, *ETHICAL SYSTEMS AND LEGAL IDEALS* 36-37 (1933): "The question before the judge is: 'Granted that there are differences between the cited precedent and the case at bar, and assuming that the decision in the earlier case was a desirable one, is it desirable to attach legal weight to any of the factual differences between the instant case and the earlier case?'"

50. In addition to *Riggs v. Palmer*, 115 N.Y. 506, 22 N.E. 188 (1889) note 23, *supra*, see *Hynes v. New York Central Ry.*, 231 N.Y. 229, 131 N.E. 898 (1921). We have from the author of the opinion of the latter case the following explanation of it:

... A boy was bathing in a river. He climbed upon a springboard which projected from a bank. As he stood there, at the end of the board, poised for his dive into the stream, electric wires fell upon him, and swept him to his death below. In the suit for damages that followed, competitive analogies were invoked by counsel for the administratrix and counsel for the railroad company, the owner of the upland. The administratrix found the analogy that suited her in the position of travelers on a highway. The boy was a bather in navigable waters; his rights were not lessened because his feet were on the board. The owner found the analogy to its liking in the position of a trespasser on land. The springboard, though it projected into the water, was, none the less, a fixture, and as a fixture it was constructively a part of the land to which it was annexed. The boy was thus a trespasser upon land in private ownership; the only duty of the owner was to refrain from wanton and malicious injury; if these elements were lacking, the death must go without requital. Now, the truth is that, as a mere bit of dialectics, these analogies would bring a judge to an impasse. No process of merely logical deduction could determine the choice between them. Neither analogy is precise, though each is apposite. There had arisen a new situation which could not force itself without mutilation into any of the existing moulds. *CARDOZO, THE GROWTH OF THE LAW* 99-101 (1924).

51. See *CARDOZO, THE NATURE OF THE JUDICIAL PROCESS* 166-167 (1922), and *FULLER, THE LAW IN QUEST OF ITSELF* 137 (1940), both of which are quoted from in note 17, *supra*.

52. See *CARDOZO, THE NATURE OF THE JUDICIAL PROCESS* 19-21 (1922):

... in a system so highly developed as our own, precedents have so covered the ground that they fix the point of departure from which the labor of the judge begins. Almost invariably, his first step is to examine and compare them. If they are plain and to the

when the critical moment comes and he must say yea or nay, he is on his own; he has nothing to rely on but his own intellect, experience and conscience.<sup>53</sup>

Hence, if decision is not to be capricious, it seems obvious there must be some criteria of choice among the alternatives which virtually every case presents.<sup>54</sup> But what criteria of choice?

I do not now undertake to answer fully.<sup>55</sup> I suggest merely that the

point, there may be need of nothing more. *Stare decisis* is at least the everyday working rule of our law. I shall have something to say later about the propriety of relaxing the rule in exceptional conditions. But unless those conditions are present, the work of deciding cases in accordance with precedents that plainly fit them is a process similar in its nature to that of deciding cases in accordance with a statute. It is a process of search, comparison, and little more. Some judges seldom get beyond that process 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 the 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, 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.

53. Cf. J. C. GRAY, *THE NATURE AND SOURCES OF THE LAW* 287-288 (2nd ed., 1924):

... We all agree that many cases should be decided by the courts on notions of right and wrong, and of course every one will agree that a judge is likely to share the notions of right and wrong prevalent in the community in which he lives; but suppose in a case where there is nothing to guide him but notions of right and wrong, that his notions of right and wrong differ from those of the community, — which ought he to follow—his own notions, or the notions of the community? Mr. Carter's theory requires him to say that the judge must follow the notions of the community. I believe that he should follow his own notions.

54. See Griswold, *The Future of Legal Education*, 4 *HARVARD LAW SCHOOL BULLETIN* 2 (1953), and Cook, *Scientific Method and the Law*, 13 *AMERICAN BAR ASSOCIATION JOURNAL* 303, 308 (1927), both of which are quoted from in note 13, *supra*.

55. My views are set out in somewhat more detail in my article on *The Notre Dame Program: Training Skilled Craftsmen and Leaders*, 43 *AMERICAN BAR ASSOCIATION JOURNAL* 614, 670 (1957):

Thus, as our Bulletin puts it, the Notre Dame Law School "systematically endeavors to illuminate the great jurisprudential issues which, especially in this fateful age, insistently press for answer; and to make clear the ethical principles and inculcate the ideals which should actuate a lawyer. The School believes that a lawyer is best served, and the community as well, if he possesses not only legal knowledge and legal skills but also a profound sense of the ethics of his profession — and something else which the curriculum is likewise designed to cultivate: pride in the legal profession and a fierce partisanship for justice."

How is all this brought down to the level of the practical, workaday world? By inculcating the approach to legal problems which I shall try to describe in the next paragraphs.

The complex phenomenon which lawyers know as law is an always unfinished product. It may be compared to a tapestry the weaving of which is never done, which repeats many of the patterns of the past but is constantly adding new patterns and variations on old patterns. Every lawyer, whether on or off the bench, has a part in the weaving of this tapestry and in the process is confronted by an endless succession of questions for which there is no simple, ready-made answer. In every case there are problems of appraisal, evaluation and choice, which — whether practitioner or judge — a man must somehow solve for himself. Is this case really comparable to that? Does a certain cir-



criteria should include the principles of natural law; in other words, when the nature of the case warrants, the judge should turn for guidance to relevant ethical principles — those principles of conduct, that is, “which [are] in keeping with man’s nature as it would be if it were able to resolve its disharmonies and to surmount its imperfections.”<sup>56</sup>

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cumstance present here, not present there, alter the picture essentially or only in an immaterial detail? These authorities present a persuasive analogy; those point just the other way. Always, in short, there is more than one possible outcome pressing for acceptance. A choice must be made.

How? On what basis? To begin with, the alternatives must be tested in the light of all available facts, including the data of comparative law, the social sciences and any other fields of learning that may be relevant in a given case. I am not suggesting that law schools should attempt to teach non-law subjects. Law is what law schools should teach; but it cannot be taught as we think it needs to be taught without cultivating on the part of the student an awareness of law’s dependence on all the other disciplines.

When they have been illuminated by all available factual information, how are the various alternatives to be evaluated? The criteria are workability and justice. What is workable is not necessarily just, but that can hardly be just which is unworkable. Initially, therefore, the inquiry concerns practicability, viability. From there it moves to the greater question of justice. In the words of Chief Justice Warren, “it is in the nature of man to seek justice, and the basic purpose of any good legal system is to provide it.”

But what is just in the context of a concrete situation? No definition can determine that question. Its answer can come only from a conscience informed by the traditions and ideals of the legal profession, by the values and aspirations of our constitutional democracy and by the principles of natural law. At Notre Dame, it goes without saying, these principles, aspirations, values and ideals are illumined by the Christian tradition of which we are a part.

We conceive it our duty to habituate students to seeing in this perspective and approaching in this way the problems of choice they will never cease to encounter as long as they follow the law.

56. See Fuller, *American Legal Philosophy at Mid-Century*, 6 JOURNAL OF LEGAL EDUCATION 457, 472-473 (1954): “. . . That is good which advances man’s nature; that is bad which keeps him from realizing it. . . . I cannot see what standard there can be for passing ethical judgments if it is not that which is in keeping with man’s nature as it would be if it were able to resolve its disharmonies and to surmount its imperfections.” Cf. *Brown v. United States*, 256 U. S. 335, 343 (1921): “The law has grown, and . . . its growth . . . has tended in the direction of rules consistent with human nature.”

Of course, the mere fact, alone and without more, that given conduct is either good or bad, as regards the individual, does not necessarily determine whether the law should require or forbid it. Many other factors must be taken into account; and, with reference to ethics, what is pertinent is not so much the requirements of human nature as the requirements of human nature in its social aspect. Hence the judge should look primarily to that division of ethics which is concerned with the social needs of human nature. Cf. Leclercq, *Suggestions for Clarifying Natural Law*, 2 NATURAL LAW FORUM 64, 76 (1957):

The distinction between the question of what social rule to establish and the problem of the obligation or licitness of a given action is what makes morality and law two different disciplines, even though the objects of the two are related. We cannot determine juridical good without first ascertaining what man’s good is; and since man cannot develop except in society, we cannot know his good without taking into account the social needs of his nature. . . . The jurist is above all interested in social good, in rules to be observed in view of that good; the moralist is preoccupied with the good of the individual.

The prevailing notion in contemporary ethical theory is about as far removed as possible from these views. Its adherents preach a counterpart of the linguistic jurisprudence of Professor Hart. See footnote 24, *supra*. They have no time for the central reality — and the specific concern — of ethics, that is, human conduct. They are exclusively preoccupied

These principles are, to be sure, nonspecific, and we all remember the dictum of Mr. Justice Holmes that "general propositions do not decide concrete cases."<sup>57</sup> But they do, indeed they do.<sup>58</sup> In Whitehead's words, "the ideals cherished in the souls of men enter into the character of their actions."<sup>59</sup> For example, as he has pointed out,

. . . Millions of men have marched to battle fiercely nerved by intense faith in Law imposed by the will of inflexible Allah, Law sharing out to each human his inevitable fate, Law sharing out to each faithful Mahometan either victory, or death and Paradise. Millions of Buddhists have shunned the intrinsic evils of such fierce Mahometan emotion re-

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with the *language* of ethics, ignoring the substance behind the symbols. Cf. Fuller, *A Rejoinder to Professor Nagel*, 3 NATURAL LAW FORUM 83, 99-100 (1958):

. . . At the present time the prevailing philosophy of ethics seems to me to have descended to a level of triviality that is truly appalling. . . .

Perhaps I can best convey my view of the present state of ethical theory by saying it calls to mind a picture something like this. A human being, *A*, is engaged in doing some act, such as giving money to a beggar, or paying a gambling debt, or dragging the unconscious victim of an automobile accident to the side of the road. An observer, *O*, points to *A*'s action and is heard to say, "This is good." At this signal ethical theoreticians begin swarming in from all sides. Their first act is to relieve the scene of the encumbrance of *A*, who is ousted without ceremony. This done, all gather round *O* and embark on a lively disputation in which everyone talks at once. How shall we characterize that sentence *O* just uttered, "This is good"? What is its "semiotic status"? Is it a mere ejaculation equally meaningful and equally meaningless, whether emitted in private or in public? Is it, in other words, like the "um-um" of a man enjoying a pot roast? Or is it perhaps a kind of news report to others about *O*'s inner state? Is it such a report coupled with an invitation to others that they join in this inner state? Or instead of being viewed as a mere invitation, shall *O*'s remark be interpreted as demanding or claiming that others should or must share his approving glow? Is *O* announcing an invitation or a directive that others do what *A* was just observed to do? At this point someone is heard to shout, "You are wrong, *O*. What *A* did was bad, not good." *O* starts to defend himself, but before he can complete a sentence the theorists swarm round him again and begin debating the kinds of demonstrations or assertions that *O* may properly employ in supporting his position. Can he only say, "Well, I feel that way"? Or can he adduce something that can be called "proof," "validation," "justification," or "explanation" for his position? What is the quintessential difference between proving a fact and demonstrating that a value judgment is right?

57. *Lochner v. New York*, 198 U. S. 45, 76 (1905).

58. There was a time when I did not fully understand this. See my article on *Freedom of Inquiry Versus Authority: Some Legal Aspects*, 31 NOTRE DAME LAWYER 3, 8 (1955). I did not then realize how greatly, as a matter of fact, the shaping of the minor premise is influenced by the major.

59. ALFRED NORTH WHITEHEAD, *ADVENTURES OF IDEAS* 49 (Mentor ed., 1955). See also F. S. C. Northrop, *Philosophical Issues in Contemporary Law*, 2 NATURAL LAW FORUM 41, 48 (1957):

. . . a shift in the basic philosophy of law . . . results in an epoch-making difference in the way a concrete case is decided. Clearly, cases alone, or even cases, the Bill of Rights, and the legislative statutes together, are not enough; the philosophy of law which the judge or the legal scientist brings to the cases, the Constitution, the Bill of Rights, and the legislative statutes is equally important. In fact, it is all-important since it determines the interpretation that is put upon the Bill of Rights, the legislative statute, and the case.

lying on the impersonal immanence of Law, made clear to them by the doctrines of the Buddha.<sup>60</sup>

For present purposes the principles of ethics may be compared, fruitfully it seems to me, to the polestar of the mariner — if I may talk in such terms in this day of radar. Now, the polestar is of no use if a fire breaks out aboard, and in a hundred other ways it will avail nothing whatsoever; but it helps to keep the ship on course. That, I suggest, is what these principles can do for the judge; they can help to keep the legal ship on course.<sup>61</sup>

Are they absolutes? Someone is sure to ask: are these principles absolutes? That, if I may say so, is the language of debate, not of inquiry. I think it likely that many of those who argue fiercely pro and con about absolutes have not bothered to look very closely at what they are talking about. Generally they seem not to appreciate, for one thing, “the difficulty of making language express anything beyond the familiarities of daily life.”<sup>62</sup> So, exaggerated claims are met by sweeping denials, both sides acting as if words were as precise as mathematical symbols.

If, instead of being queried about absolutes, I am asked whether there are enduring values, I answer categorically. The position of the ethical relativist is untenable. Times and attitudes change and there is no doubt about it. But it does not follow that everything changes and all is flux. On the contrary, “under the turbulence of change there is a bedrock of unchanging values.”<sup>63</sup> Could Hitler’s concentration camps be anything but evil — anywhere, ever? Could the compassion of the Good Samaritan be anything but good — anywhere, ever? There are some things, then, which are evil in their very nature and therefore evil at all times and in all places; similarly, there are some things which are good in their nature and therefore good at all times and in all places. It may be that the list of things essentially evil — or good — is not very extensive; and no doubt there would be dispute as to what the list should include. I venture to suggest, though, that, in his innermost being, every man acknowledges there are some things which cannot be right and some which cannot be wrong. Indeed, I suspect the area of disagreement is much smaller than the alarms of partisans would lead one to suppose.

What I have suggested offends an admonition by Judge Hand, contained in his eulogy of those who taught him in the Harvard Law School:

. . . You cannot raise the standard against oppression, or leap into

60. WHITEHEAD, *ADVENTURES OF IDEAS* 139 (Mentor ed., 1955).

61. Cf. Levi, *Natural Law, Precedent and Thurman Arnold*, 24 *VIRGINIA LAW REVIEW* 587, 589 (1938): “. . . it is because the natural law is general that it is useful.”

62. See WHITEHEAD, *ADVENTURES OF IDEAS* 124 (Mentor ed., 1955).

63. David Sarnoff, quoted in the *New York Times* for November 11, 1959, p. 28, 1st col.

the breach to relieve injustice, and still keep an open mind to every disconcerting fact, or an open ear to the cold voice of doubt. . . .

Many years ago in this place I sat under men who resisted all such allurements; men who believed that the pursuit of knowledge was enough to absorb all their powers and more. They taught me, not by precept, but by example, that nothing is more commendable, and more fair, than that a man should lay aside all else, and seek truth; not to preach what he might find; and surely not to try to make his views prevail; but, like Lessing, to find his satisfaction in the search itself. These men did not seek to rebuild the world nearer to the heart's desire; they were content to be themselves, confident that, if they were faithful in that, their light would shine, steady and far.<sup>64</sup>

While these words describe primarily Hand's ideal for the scholar, my reading of the address in which they appear indicates that it is likewise his ideal for the judge.<sup>65</sup>

But pure knowledge, with which alone the judge no less than the scholar should be concerned, if Hand is right, is a mirage, as Whitehead has made clear:

. . . You cannot consider wisdom or folly, progress or decadence, except in relation to some standard of judgment, some end in view. . . .

. . . the notion of "mere knowledge" is a high abstraction which we should dismiss from our minds. Knowledge is always accompanied with accessories of emotion and purpose.<sup>66</sup>

The weight of history, I suggest, is likewise against Hand. The great majority of common-law judges have been active men, trained in the school of practical affairs, who believed they had a mission and took it seriously — a mission that cannot rightly be described in terms of the acquisition of knowledge. And so they had. The judge is not a eunuch on the bench any more than he is a ventriloquist's dummy. I cannot imagine a worthy judge who is not the personification of a fierce partisanship for justice. Nor am I troubled by my inability to capture and confine within a definition the animating principle of justice. Justice is an aspiration lifting men to the heights, no less potent because its spirit eludes expression in a verbal formula.

But will not all this lead to personal justice? The best answer, I submit, is that it hasn't. There has been plenty of opportunity, for common-law judges have been deciding cases for a long time. And, I submit, they have been de-

64. Hand, *On Receiving an Honorary Degree*, in *THE SPIRIT OF LIBERTY* 138 (2nd ed., 1953).

65. Else why would he say: "Like others I have not been true to what they taught me"? *Id.* at 138. He had been a judge for 30 years when he spoke those words; and, before that, in the interim between his graduation from law school and his appointment to the bench in 1909, he had practiced law.

66. WHITEHEAD, *ADVENTURES OF IDEAS* 12 (Mentor ed., 1955).

cluding doubtful questions according to their own intellect, experience and conscience — the only course, I suggest, open to a conscientious judge.

The judicial office in common-law countries is hedged about with built-in safeguards. The humility and respect for the opinions of others which characterize a worthy judge will protect him from riding his hobbies. As a great judge has pointed out, "Something of Pascal's spirit of self-search and self-reproach must come at moments to the man who finds himself summoned to the duty of shaping the progress of the law."<sup>67</sup> In fact, as we all know, for whatever reason, judges tend to be conservative and

... are curiously timid about innovations. A judge who will hector the bar and browbeat the witnesses and who can find a warrant in the Fourteenth Amendment for stifling a patently reasonable legislative experiment, will tremble at the thought of introducing a new exception into the hearsay rule.<sup>68</sup>

And there are other, external safeguards. We are all fenced in by the age in which we live,<sup>69</sup> and by the conditions, traditions and circumstances of our calling. Lawyers and judges, with few exceptions, share a common outlook; and this provides an automatic and unnoticed check on discretion, except in times of revolutionary upheaval. There are, moreover, in Cardozo's words,

... restrictions not easy to define, but felt, however impalpable they may be, by every judge and lawyer [which] hedge and circumscribe his action. They are established by the traditions of the centuries, by the example of other judges, his predecessors and his colleagues, by the collective judgment of the profession, and by the duty of adherence to the pervading spirit of the law.<sup>70</sup>

Congress could cut off appropriations for the other branches of government. The President could declare martial law, arrest the members of Congress and send them to a concentration camp. What restrains the President and Congress? In the final analysis, nothing but our common commitment to liberty ordered by reason under the guidance of our democratic heritage and aspirations. That, too, must be our reliance against abuse of judicial power — along with the safeguards already mentioned, the traditions and ideals of the legal profession and the watchfulness of the Bar.

This, of course, underlines the Bar's duty to subject the work of courts

67. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 172 (1922).

68. Hand, *The Contribution of an Independent Judiciary to Civilization*, in *THE SPIRIT OF LIBERTY* 158-59 (2nd ed., 1953).

69. See KARL ADAM, *THE SPIRIT OF CATHOLICISM* 246 (rev. ed., 1943): "Every period of time has its special character, its 'spirit,' i.e., a characteristic way, conditioned by its special circumstances, of seeing, feeling, judging and acting."

70. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 114 (1922).

to constant, searching criticism — but informed criticism, not hysterical or partisan clamor.<sup>71</sup>

To sum up, natural law in its usual meanings is not very helpful in the day-to-day problems of professional life. This could be remedied, I suggest, and natural law made much more fruitful if it were thought of as the contribution to law which can be made by ethics. At the same time, of course, it would be necessary to think of law as a process of decision<sup>72</sup> rather than as an agglomeration of rules, a process in which the judge performs not a mechanical but a creative function. In so doing, he must of necessity rely, in the end, on his own intellect, experience and conscience. Thus he has urgent need for guides to which he can turn in his recurrent perplexities. My suggestion is that natural law, in the sense in which I am using that term, is one such guide.

Seen in this perspective, though always old, law is never old, like the Poor Old Woman in the play. "Did you see an old woman going down the path?" asked Bridget. "I did not," replied Patrick, who had come into the house just after the old woman left it, "but I saw a young girl and she had the walk of a queen."<sup>73</sup>

71. See my *Foreword to the Symposium on the Role of the Supreme Court in the American Constitutional System*, 33 NOTRE DAME LAWYER 521 (1958).

72. As is apparent throughout the text, I am dealing with lawyer's law, the law that practitioners and judges are professionally concerned with; and my approach, in Professor Fuller's phrase, is "litigation-oriented." See *American Legal Philosophy at Mid-Century*, 6 JOURNAL OF LEGAL EDUCATION 457, 477 (1954). Given the purpose in view (see text, p. 83), this seems to me appropriate and, indeed, necessary; for litigation is central to the legal process as it affects and is affected by lawyers in their professional concerns. I do not by any means, however, suppose that law exists only within the confines of litigation. On the contrary, as I have suggested in the text (p. 83), law means many things, and I am aware that a wider view of law will encounter problems that a litigation-oriented approach does not reach — for example, the sources of governmental authority, and the necessary conditions of its exercise, referred to by Professor Fuller as the "external and internal moralities of law." See Fuller, *Positivism and Fidelity to Law — a Reply to Professor Hart*, 71 HARVARD LAW REVIEW 630, 644-648 (1958).

73. William Butler Yeats, *Cathleen Ni Hoolihan*, in *THE HOUR-GLASS AND OTHER PLAYS* 80 (Macmillan Co., 1912).