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LAW AS JUDGMENT

By ORVILL C. SNYDER

... you tithe mint, and anise, and cummin, and have left the weightier things of the law, judgment . . . . (Douay Version) . . . for ye pay tithe of mint and anise and cummin and have omitted the weightier matters of the law, judgment . . . . Matt. 23:23.

That "general propositions do not decide concrete cases" has become a commonplace. Since the days of this utterance, we have heard a great deal about this sort of thing. The "father complex" has been discovered and childish longing "to be fooled" with "myths" of legal certainty has been psycho-analyzed; "legal fundamentalism" has had its skeletons exposed and the stuffing has been thoroughly kicked out of "Bealism;" changes have been rung on rule versus discretion, stability versus change, or perhaps it is rule and discretion, stability and change; stare decises has been "viewed with alarm" as a roadblock to progress; and the "pretense" of legal reasoning has been repeatedly pilloried in the market place. In short, we are told that the judges do make law.

Little That Is New or News

There is not much that is new in all this. In our system, it was understood long ago, and adopted in practice and in theory too, that judgment is the "proof of the pudding" in law as much as "the eating" is in cookery. That is what due process and the case-law technique mean. Few have been ignorant of the "gap of ambiguity" in the "competing analogies" or unaware that filling that gap "reflects the power structure in the community." What else has the insistence on an "independent" judiciary and on the right "to put one's self on the country" ever meant?

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1 Most of the words quoted are from the "controlling book." See LEVI, AN INTRODUCTION TO LEGAL REASONING 111, 1 (Univ. of Chicago Press, 1949); FRANK, LAW AND THE MODERN MIND (Brentano's, 1930).
That judgment is of the essence was known a long time before that too, as the quotation above, from the Teacher of Teachers, shows.

Small Gains

Still, some gains have been made. The Olympian, "born with a silver spoon in his mouth," laughed while sticking pins in balloons. He also told us to wash our notions "in cynical acid." Less humorous, Judge Jerome Frank gets around, "at long last," to adding a mite with "I think we do not do the best we can."  

Grateful for these contributions, let us take a quick look at what, for more reasons than one, may be called the higher criticism.

The Higher Criticism

The Routine


Some Proposals

The chief pre-occupation of the higher criticism is the "myth" or "pretense" that the judges find the law. The constant refrain is that the judges make law, and it is intimated that what they actually do is to balance the interests. We are reminded that it is "most important to remember whenever a doubtful case arises, with certain analogies on the one side and other analogies on the other, that what really is before us is a conflict between two social desires . . . which cannot both . . . have their way. . . . Where there is doubt, the simple tool of logic does not suffice, and even if it is disguised and unconscious, the judges are called on to

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1 FRANK, COURTS ON TRIAL 265 n. 3.
exercise the sovereign prerogative of choice.” The big thought is for a conscious pursuit of desired social results and an end to “dwelling in the penumbra of intellectual laziness . . . of following habitual patterns of superstition and prejudice” and of “disguising the real issues involved.” The judges might well abandon “the persuasive symbols of judicial astrology” and “state their reasons and . . . adjudge the conflict, thus truly performing the function entrusted to them,” in “direct and outspoken discussion of the real issues involved.” What is needed, it seems, is a “jurisprudence of welfare.”

Some Assumptions (?)

The theme is persuasive, unless one gets to wondering whether anybody really means it. Take, for instance, an issue involving a restrictive covenant. Are we to understand that doing something like the following is actually proposed? All affected groups are to be identified and named and in just what way their feelings and pocketbooks are concerned delineated; the groups are to be lined up some on one side and some on the other; and then, in direct and outspoken discussion of the real issues involved, it is to be demonstrated in what the social desires of the prevailing groups are important and worthy to prevail, in what those of the disappointed groups are unimportant and unworthy, and in what manner the preference promotes what welfare of whom. It is a titulating thought.

But maybe it is assumed that, on a welfare issue, there need be no decision against anybody; everything is in the interest of everybody; and, consequently, there is no conflict in the interests, that is, of course, in the interests of everybody who is not disreputable. Indeed, for a horrid moment, it seemed that we were expected to believe that a “jurisprudence of welfare” would abolish conflicts of interests. This suspicion—after our having

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5 Id. at 207, quoting Holmes.  
6 Id. at 38.  
7 FRANK, LAW AND THE MODERN MIND 217; PERELIS, LAW AND SOCIAL ACTION 88.  
8 Id. at 38.  
9 Id. at 30.  
10 Id. at 38.  
11 Id. at 32.  
12 Id. at 40.
had it pointed out to us so often that, in exercising the sovereign prerogative of choice, the judges do choose between conflicting interests whether they, or we, know it or not, and that all analyses, arguments, and expositions are, consciously or unconsciously, motivated by interest—occasioned some astonishment; but happily the misgiving has turned out to have been pre-mature.

Some Solid Ground

For it is recognized that there are sides and that the judges cannot decide for both sides; they can decide against both; they can decide for one or the other; they can disagree as to which to decide for and which against; but they cannot decide for both; they must decide against somebody, somebody must go down; even if they do not decide at all, they decide against the complainant, judgment delayed, etc.; and, if they could decide for both, either they are the universal Santa Claus or there would be no issue. There is, however, no universal Santa Claus and there are still going to be issues. No “issueless jurisprudence”\(^\text{13}\) is contemplated or expected.

Making Choices Here to Stay

Since issues are here to stay, the judges must choose. The eventuality is unavoidable in any jurisprudence of law-as-a-means-to-an-end; and equally so in a jurisprudence of rules. For the unvarying rules have varying application; the minor premises, the factual situations, change, even if the major premises, the law, remain unchanged.\(^\text{14}\) Our very doctrine of precedents, consisting as it does not only of \textit{stare decisis} but also of the “declaratory theory,” is itself what puts expansibility and flexibility as well as stability and responsibility in the common law,\(^\text{15}\) though some whose apparent delight is in the shortcomings of traditional ways seem unfamiliar with this simple fact.

\(^\text{13}\) \textit{Ibid.}

\(^\text{14}\) This truth runs everywhere through 	extit{Justice Cardozo's, The Nature of the Judicial Process}; it is drily dissected in the present writer's article, \textit{The Corporate Person and the Fourteenth Amendment}, 8 \textit{Brooklyn L. Rev.} 4, 17-21 (1938).

\(^\text{15}\) See the present writer's article, \textit{Retrospective Operation of Overruling Decisions}, 85 \textit{Ill. L. Rev.} 121, 128, 129 (1940).
Giving Reasons

In choosing, the judges, perhaps, have to give reasons. It has been said that "even a very wise . . . decision uttered without assignment of reasons may appear presumptuous and intellectually suspect." Why it is considered so may be one of the wonders of the ages, since judgment consists no more in a multitude of words than righteousness in long prayers. There is a homely adage that actions speak louder than words, which, in the form of Faire sans dire, The Honorable John Denzil Fox-Strangways has so recently recalled to our minds in so impulsive a fashion. Yet anyway, we need not puzzle ourselves; it is the practice to write opinions and the practice is not dying out. Consequently, the question, vis-a-vis the higher criticism, seems to be, What kind of plain talk are the judges to give the losers?

Here is the rub. Any old reason given in any old way impresses the winners. The losers, however, are more apt to be afflicted with that "stubborn obtuseness" without taking account of which "no analysis of human affairs can be quite complete." And "it always gives an appearance of stronger authority to a conclusion to deduce it dialectically from conceded premises than to confess that it involves the appraisal of conflicting interests which are necessarily incommensurable." The judges can hardly just tell the losers where to get off. Doing that might make subversives out of them. But again, we are not left without succor. In the "candor of Cardozo" and the judicial expressions of "the completely adult jurist," we are assured we can observe what good judicial practice is. For Justice Benjamin Nathan Cardozo was a judge of "adult emotional stature." His writings have been of inestimable value in making possible realistic thinking about law. There is perhaps but one judge who is his superior in this respect—Mr. Justice Holmes, who was "the completely adult jurist."

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18 Cahn, The Sense of Injustice 100.
17 See Time, Feb. 5, 1951, p. 28.
19 Cahn, The Sense of Injustice 88.
18 Pekelis, Law and Social Action 33, quoting Judge Learned Hand.
20 Frank, Law and the Modern Mind, Part Two, Chapter VI.
21 Id. at Part Three, Chapter II.
22 Id. at 237.
23 Id. at 239.
The Candor of Cardozo and the Completely Adult Jurist

In the famous case of Allegheny College v. The National Chautauqua County Bank of Jamestown,24 Justice Cardozo, then Chief Judge of the New York Court of Appeals, demonstrated beyond cavil that, when a person makes a subscription to a charity for the purpose, among others, of establishing a memorial for himself, he gets in return a benefit which has as much legal significance as consideration as any commodity purchased with money in the market place, and that, consequently, he should keep his promise. Justice Cardozo did not put the matter thus coldly; in a flow of limpid rhetoric, he expressed his conclusion with almost poetic gentleness by stating that "the longing for posthumous remembrance is an emotion not so weak as to justify us in saying that its gratification is a negligible good."25 Alongside this circumlocution, we can lay Justice Holmes' witheringly short "Three generations of imbeciles are enough"26 in the case of the Virginia sterilization statute. Evidently, there are styles in stating reasons and the appropriateness thereof depends on the man and his taste and his sense of fitness in the particular case.

In Pennsylvania Coal Co. v. Mahon,27 we find Judge Holmes, for the majority, discussing principles in general language, much in contrast to the concern of Justice Brandeis, dissenting, for detailed consideration of the factual consequences. The latter's opinion reads a lot like the exploration of the facts by Justice Brewer in the case, Muller v. Oregon,28 on the constitutionality of the Oregon statute limiting hours of employment for women (the case of the famous Brandeis brief). The Holmes method here and the Brandeis method seem both to have their uses and to be equally good judicial practice at times and in appropriate cases.

In DeCicco v. Schweizer,29 Justice Cardozo, then a Judge of the New York Court of Appeals, gave another exemplification of judicial style. This case involved a marriage settlement. A prospective father-in-law had made a promise to pay an annuity to

25 57 A.L.R. at 984.
27 260 U.S. 393 (1922).
28 208 U.S. 412 (1908).
29 221 N.Y. 431, 117 N.E. 807 (1917).
his daughter for her life. The promise was made, in an elaborate
document, to the prospective son-in-law but payment was to be
made to the bride-to-be. After finding consideration for the
promise not in any promise by the prospective son-in-law not
to break nor in the fact of his not breaking the previously made
contract between himself and the promisor’s daughter to inter-
marry but in the young couple’s not having exercised their lawful
power to rescind by mutual consent, Judge Cardozo added: “The
conclusion to which we are thus led is reinforced by those con-
siderations of public policy which cluster about contracts that
touch the marriage relation. The law favors marriage settlements,
and seeks to uphold them. It has enforced them at times where
consideration, if present at all, has been dependent upon doubt-
ful inference. It strains, if need be, to the uttermost the inter-
pretation of equivocal words and conduct in the effort to hold
men to the honorable fulfillment of engagements designed to
influence in their deepest relations the lives of others.”

This final paragraph has always made it a little difficult for law teach-
 ers to tell their classes just what legal proposition the case actually
stands for; but we are left in no dubiety concerning whether
Justice Cardozo’s words were true. He was relating the facts of
legal life. Since this is so, we take note of another facet, namely,
that judicial candor involves judicial discrimination concerning
what to be candid about.

What Good Judicial Practice Involves

It appears, therefore, that, in good judicial practice, the judges
use their judgment not only in deciding between the parties but
also in deciding what results of social studies or other data are
available and trustworthy, how far these shall be utilized, and
what reasons they shall give and how they shall express those
reasons.

To What It Boils Down

The higher criticism cannot be called much ado about nothing;
it is more like much ado about what. Yet it has had its uses. It
has “aggravated” a lot of people into remembering that “the em-
phasis should be on the process.”

Perhaps unsuspectingly, a

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30 221 N. Y. at 439.
31 LEVI, AN INTRODUCTION 73.
spotlight has been turned on the fact that the efficacy of any system of jurisprudence, whether of rules or of welfare, depends upon judgment in making the decisions. The rules and the theories are the bones and flesh but judgment is the heart’s blood. This is where we came in.

JUDGMENT

Judgment is more than making a choice; that can be done by flipping a coin; judgment involves good and poor judgment. Obviously, nobody can define judgment. Nobody can define blue either; but the sky can be pointed to and there it is. And judgment can be recognized, some of its elements can be noted, and examples are available.

Judgment is not “judicial whim or expediency,” and disclaimed is any “instinct by which to know the ‘reasonable’ from the ‘unreasonable.’” Justice Cardozo, in those renowned lectures, said: “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.” Justice Holmes once spoke of “an intuition of experience which outruns analyses and sums up many unnamed and tangled impressions; impressions which may lie beneath consciousness without losing their worth.” The accent is on experience and the question is, Experience of what?

While judicial esotericism and any notion that the judges merely afford “expression of the popular genius for unconscious achievement of justice and welfare,” are disdained, we notice, in the opinions, mention of “taste,” “notions of justice prevalent,” “mores.” When we wonder, Whose taste? What mores? Judge Clark comes along and mentions “Anglo-Saxon tradi-

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82 PEKELIS, LAW AND SOCIAL ACTION 21.
83 Id. at 11, quoting Justice Jackson.
84 The Nature of the Judicial Process 118 (Yale Univ. Press, 1928).
85 Quoted in FRANK, COURTS ON TRIAL 174.
86 PEKELIS, LAW AND SOCIAL ACTION 28, 32.
88 Ibid.
89 Sheer v. Rockne Motors Corporation, 68 F. 2d 942, 944 (2nd Cir. 1934), Judge Learned Hand.
tions.” 40 This brings to mind that beau systeme “first invented in the woods,” 41 Magna Carta, the Petition of Right, the common law, and the Constitution. “Words without knowledge” of these “darkeneth counsel.” It is experience which imbues with the principles and processes and values that these embody which qualifies for the giving of judgment in our legal system, by which alone our judges sit and sit to give judgment in its spirit.

Our system has three outstanding characteristics: (1) “Law is simply a method of protecting freedom.” 42 (2) The function of judicial proceedings is to learn the truth. 43 (3) The prototypical standard for testing truth is the “verdict of the countryside.” 44 For discussion of the first and second characteristics, no time will be taken here; 45 but as to the third, that the standard of judgment is common sense, or “horse sense” in the vernacular, a little ought, perhaps, to be said. Justice Holmes once stated his belief that even “constitutions are intended to preserve practical and substantial rights not to maintain theories.” 46 In the opinions, we are advised that decisions are not to be arrived at “simply by mechanical and quantitative” criteria; 47 that the “literal and precise” is “not attainable” and “not required;” 48 that a “simple and rational solution” is desirable; 49 that remedies are to be “reasonable and adequate . . . though they may not be technically and precisely the same” in all cases. 50

41 Montesquieu, The Spirit of the Laws 195 (Nugent Translation, New York, 1900); see discussion by the present writer, It’s Not Law, 38 Ky. L. J. 81, 82 (1949).
42 Kocourek, An Introduction to the Science of Law 251 (Little, Brown, 1930); Kocourek, Jural Relations 15 (Bobbs-Merrill, 1927).
44 2 Pollock and Maitland, History 660.
45 The reader is referred to Pollock and Maitland, Holdsworth, and Kocourek; and, modestly (?), to the present writer’s discussions in: It’s Not Law, supra, note 41; Liability for Negative Conduct, 85 Va. L. Rev. 446 (1949); Promissory Estoppel as Tort, 35 Iowa L. Rev. 28 (1949).
49 In re Amesley, Ch. 692, 709 (1926), Russell, J.
50 Canadian Northern Railway Co. v. Eggen, 252 U.S. 553 (1920), Justice Clarke.
Judgment in the Spirit of Free Men

In such a system as ours then, good judgment involves the spirit of free men. This spirit is not interested in chiseling up words and ideas and putting the pieces together in clever little patterns; its “organic reactions”51 are repugnant to “seeing what one can get by with.” Justice Jackson has told us that “the very essence of constitutional freedom . . . is to allow more liberty than the good citizen will take,”62 and judges in exercising good judgment in making their decisions are good citizens. They do not go so far as they might possibly “get by with;” not because they fear any “reaction of outrage, horror, shock, resentment, and anger”53 but because they do not want to do so. They stop in no vainglorious feeling that “I do of my own accord what some are constrained to do by their fear of the law”64 but spontaneously because free men have no “taste” for “running things into the ground.” Judges in exercising good judgment are cautious too of their own “affections of the viscera and abnormal secretions of the adrenals”55 which would make a mere sense of injustice their index. This sort of thing is the “subject’s difficulty,”56 and, moreover, resentment as a sovereign virtue is susceptible of being overdone. “And when they say ‘I am just,’ it always soundeth like: ‘I am just—revenged.’”57 Too much of this on the bench could breed tyranny. The spirit of the free is not too much pre-occupied with having been “done wrong by” but always has within it a spark of “that celestial fire, called conscience” of which George Washington wrote in his schoolboy notebook.

Responsibility

Judgment is like unto the cook’s putting the right pinch of salt in the soup. The cook is not responsible for the provisions given him nor for what he has been told to make out of them;

51 Cahn, The Sense of Injustice 24.
52 Williamson v. U.S., 184 F. 2d 280, 283 (2nd Cir. 1950), sitting as a Circuit Judge.
54 Id. at 121, quoting Aristotle.
55 Id. at 24.
56 Id. at 161.
57 Thus Spake Zarathustra 107 (The Modern Library).
but it is his business to season each batch to taste. Similarly, judges are not responsible for the wisdom of legislation, nor for the wisdom of constitutions either, but they are responsible for the judgment with which they judge what is brought before them. The spirit of the free requires elbow room and as well that the elbows be moved within that room as a free man would.

And it must never be forgotten that judges are beset with peculiar and terrible temptations. Often they could make of where they sit a “coward’s castle” and no doubt they, ever and anon, refresh their recollection with those monitory words from “King Henry VII,” act 3, scene 2: “I conjure thee, fling away ambition: by that sin fell the angels.”

Mercy and Faith

If we read a little further in that passage from Saint Matthew with which we began, we find mercy and faith added. This must always be remembered. Moreover, the spirit of the free which leavens the beau systeme reflects the joinder of mercy and faith to judgment, which the Highest Authority made. What, however, is sometimes overlooked is that to mercy and faith is joined judgment. While “the morality of society is reflected in its attitude toward failure, the vertical descent”—and in every judgment there is a vertical descent, somebody is decided against—it is not reflected in this attitude alone. Strength is needed as much as flexibility.

Some Presentday Voices

It does seem these days that at times the limits of toleration are exceeded. In the notorious case of the communists, Judge Medina used good judgment, in fact it is safe to say very good judgment; but—why was it necessary for him to take so much? The suggestion has been made that he did not want a reversal for some trial slip. Justice Jackson, in an address at the dedication of The Stanford University Law School, July 15, 1950, said: “Every thoughtful observer must be depressed by the tendency of many of our criminal trials to degenerate into partisan wrangling and competitions in prejudicial, obstructive and contemptu-

59 Cahn, The Sense of Injustice 76.
ous tactics. . . . The trial judge has largely lost the control of
the influences that can be brought to bear upon the jury.” He
mentioned “external influences,” newspapers and radio commen-
tators in particular, and stated that “it will not do to put all the
blame for this on either defense lawyers or prosecutors or judges,
or even on the legal profession generally;” but he added, “we
must not allow these external influences to be invoked to exoner-
ate our own profession for the threatened disintegration of the
criminal trial process.” In a free society, with a “democratic
nature of the judicial process,” another voice can be listened to.
A prominent editor says: “In my opinion, the No. 1 reason for
the failure in enforcing the law of crime rests squarely on the
legal profession. . . . It is my understanding that there are
enough conflicting supreme court decisions to give any case
involving a hoodlum lively going.”

This brings us to the “milk of the coconut” in this article.

Examples of Judgment

Before looking at some examples, we must pause to ask our-
selves: “How can any lesson be gleaned? Anything now is mere
hindsight. Everybody is good at that. If we had been there,
we should have been unable to do as well. How could anybody
have done better? How can anybody know how to do better in
the future?” Such is not the approach. To paraphrase Edmund
Burke, the question is not whether something or somebody is
to be praised or blamed but what, in the name of God, can you
make of it? Nor is the question one of the “stubborn obtuseness”
of mankind, judges included. “'Mit der Dummheit kampfen
Götter selbst vergebens.” We can do no better, though as
“Sophocles knew . . . life is as pitiless to ignorance as it is to
wickedness.” But we are taken off that hook by Judge Jerome
Frank; he says, “I think we do not do the best we can.” Thus
rescued, we are enabled to go on.

52 Speech on Conciliation.
56 CARLYLE, THE FRENCH REVOLUTION 575 (The Modern Library), anent
the Girondins. Many people today are making noises which sound like the Gir-
ondins.
4 Four Famous Greek Plays (The Modern Library), Introduction by Pro-
fessor Paul Landis, at p. xv.
Chief Justice Marshall used good judgment in the case of the mandamus, though, if he had not held the thirteenth section of the Judiciary Act of 1789 unconstitutional and had issued the writ, he would have been confronted with the predicament of having Jefferson laugh at him. He had the judicial acumen to preserve nevertheless the judiciary as an equal branch of the government.

The next time the doctrine of *Marbury v. Madison* was invoked to hold an Act of Congress unconstitutional, the results were not merely unhappy but catastrophic. History has verified Lincoln’s surmise that, in the ill-starred Dred Scott case, the justices did not do so well as they knew how. The case “fired the blood” and they reached out and dragged in by the ears a question beyond the competency of the ermine to resolve.

In a later period, they became enamoured of the corporate person and freedom of contract. This doctrine, bravely reaffirmed on June 1, 1936, was, under the impact of the Rooseveltian court-packing onslaught, beggared and left an orphan on March 29, 1937, with the discovery that “the Constitution does not speak of freedom of contract.” It is difficult to believe wholeheartedly that the judges had no inkling, while they were doing it, that they were metamorphozing a doctrine into a hobby-horse which they were riding somewhat harder than good judgment warranted.

In *Cassell v. Texas*, a conviction “of murder by crushing the skull of a sleeping watchman with a piece of iron pipe to carry out a burglary” was reversed, because of discrimination against

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62 Marbury v. Madison, 1 Cranch 137 (U.S. 1803).
64 Scott v. Sandford, 19 How. 393 (U.S. 1857).
65 Lincoln’s speeches, the House-divided speech at Springfield, June 16, 1858.
66 2 BEVERIDGE, ABRAHAM LINCOLN 469 (Houghton Mifflin, 1928); 3 WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 17, 21, 52 (Little, Brown, 1924).
67 See the present writer’s discussion in: The Corporate Person and the Fourteenth Amendment, supra, note 14; Freedom of the Press—Personal Liberty or Property Liberty? 20 B.U.L. Rev. 1 (1940).
68 Morehead v. N.Y. exR Tipaldo, 298 U.S. 587.
69 West Coast Hotel Co. v. Parrish, 300 U.S. 379.
70 70 S. Ct. 629 (1950).
the defendant's race in selecting the grand jury. There was no question of the defendant's guilt. He had had a fair trial; a "fairly chosen trial jury," "a jury admittedly chosen without racial discrimination," had "heard the prosecutions' and defendant's evidence and . . . held that guilt beyond a reasonable doubt . . . (was) proved."71

Justice Jackson, dissenting, said: "In setting aside this conviction, the Court is moved by a desire to enforce equality in that realm where, above all, it must be enforced—in our judicial system. But this conviction is reversed for errors that have nothing to do with the defendant's guilt or innocence, or with a fair trial of that issue. This conflicts with another principle of our law, viz., that no conviction should be set aside for errors not affecting substantial rights of the accused. This Court has never weighed these competing considerations in cases of this kind. The use of objections to the composition of juries is lately so much resorted to for purpose of delay, however, and the spectacle of a defendant putting the grand jury on trial before he can be tried for crime is so discreditable to the administration of justice, that it is time to examine the basis of the practice. . . . This Court never has explained how discrimination in the selection of a grand jury, illegal though it be, has prejudiced a defendant whom a trial jury, chosen with no discrimination has convicted. The reason this question was not considered is that, in the earlier cases where convictions were set aside, the discrimination condemned was present in selecting both grand and trial jury and, while the argument was chiefly based on the latter, the language of the opinions made no differentiation, nor for their purpose did they need to. (Citations omitted.) Only within the last few years have convictions been set aside for discrimination in composition of the grand jury alone, and in these the question now under consideration was not discussed. (Citations omitted.) It is obvious that discriminatory exclusion of Negroes from a trial jury does, or at least may, prejudice a Negro's right to a fair trial, and that a conviction so obtained should not stand. . . . The grand jury is a very different institution. . . . Its power is only to accuse. . . . Its duty is to indict if the prosecution's evidence,

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71 These facts are gleaned from Justice Jackson's dissent. The majority and concurring opinions are silent on these matters.
unexplained, uncontradicted and unsupplemented, would warrant conviction. If so, its indictment merely puts the accused on trial. . . . Under such circumstances (those of the instant case), it is frivolous to contend that any grand jury, however constituted, could have done its duty in any way other than to indict. . . . I do not see how this Court can escape the conclusion that any discrimination in the selection of the grand jury in this case, however great the wrong toward qualified Negroes in the community, was harmless to this defendant. To conclude otherwise is to assume that Negroes qualified to sit on a grand jury would refuse even to put to trial a man whom a lawfully chosen trial jury found guilty beyond a reasonable doubt. . . .

I doubt if any good purpose will be served in the long run by identifying the right of the most worthy Negroes to serve on grand juries with the efforts of the least worthy to defer or escape punishment for crime.”

Justice Jackson further said that “Congress has provided means other than the release of convicted defendants to enforce the right of the Negro community to participate in the grand jury service; and they are, if used, direct and effective remedies to accomplish this purpose.” He mentioned criminal prosecution of the public officers doing the discriminating (it is true that one of the opinions concurring with the majority indicates there was not much to go on here), mandamus, and suit in equity. He would have affirmed the conviction of the guilty man and sent a copy of the record to the Attorney General for investigation and prosecution of the discriminators, if any. His words are like a little candle shining like a good deed in a naughty world.

This decision, in the reaching out, is reminiscent of the Dred Scott case and, in the riding hard, of freedom of contract. Since the Court not only decides the cases it hears but also what cases it will hear, maybe a case less dubious might have been awaited for an opportunity to say whatever needed saying.

In United States v. Sacher, Judge Medina’s orders, at the end of the communists’ trial, adjudging attorneys guilty of contempt and sentencing them to imprisonment were affirmed except the specification that the contemnors acted in concert, which

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182 F. 2d 416 (2nd Cir. 1950).
was reversed. The reason for the reversal was that Judge Medina should have granted a hearing instead of proceeding summarily as to this specification.

Since, according to "Anglo-Saxon traditions," the purpose of judicial proceedings is to learn the truth and not to maintain theories, figuring out how anybody in another hearing could ever be so well informed about what these contemnors were up to, as Judge Medina was at the moment he called them to the bar after having seen and heard them in action for months before him, is a trifle on the transcendental side.

In *United States v. Coplon*, a conviction for conspiring to defraud the United States and for attempting to pass defense information to a Russian was reversed because the arrest had been made without a warrant, when it appeared that the arresting officers might have obtained one, and because the trial judge refused to permit the defense to examine records of wire-taps, though "the guilt is plain."

This reversal has precipitated a great amount of speculation about "guilt proven without conviction," and the case is going up to the Supreme Court of the United States. The puzzling thing is, Why was it thought necessary to put the expression "for the guilt is plain" in the opinion?

In *People v. Feldman*, the defendant was convicted, spent several months in the death-house, and then had the conviction reversed. He was again convicted, spent several months again in the death-house, and again had the conviction reversed. On the third trial, he was acquitted. The second reversal was for things which happened at the second trial which were the same as what had happened at the first trial and which had been presented and argued as reversible error on the first appeal and then apparently held to be innocuous since they were not mentioned in the majority opinion on the first reversal.

Decisions like these four raise questions: (1) What relation have such reversals of trial judges to their losing control of their courtrooms and to the "threatened disintegration of the criminal

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78 185 F. 2d 629 (2nd Cir. 1950).
80 Judge Desmond's dissent, Judges Lewis and Fuld concurring, 299 N.Y. 171, 172.
trial process" which Justice Jackson was talking about at Stanford? (2) That it is better the guilty escape than the innocent hang is certainly true in that, when there is any reasonable doubt of guilt, better not convict. Is it also true that the way to protect the innocent is to protect defendants whose guilt is plain? Newspaper men and radio commentators disregarded as uninformed and incapable of informing themselves in the premises, what innocents, in the minds of these cognoscenti, are protected and in what respects and how by such reversals?

More Examples

But, with us at least, all is not "darkness at noon." Going back to the times of Dred Scott, we find the knightly figure of Chief Justice Joseph R. Swan, who acted as a judge and was content to be just that. In the famous "rescuers' case,"76 he, in 1859, a scant two years before the guns began to shoot, under the greatest pressures and against the pull of his own sympathies, simply decided the case before him as he had in his judicial oath sworn to do. Then too, in 1936, we hear the cool judicial tones of Chief Justice, then Justice, Harlan Fiske Stone's dissent in United States v. Butler:77 "... the only check upon our own power is our own sense of self-restraint." Nor is it possible to omit mentioning Justice, then Judge, Cardozo and Imperator Realty Co. v. Tull. Zealous Don Quixotes have squandered acclaim on other of Justice Cardozo's opinions of less consummate judicial craftsmanship; but, in Imperator Realty Co. v. Tull,78 he was simply the judge, though the judge par excellence. The beautiful analysis of a problem full of confounded confusion and the simple, sane solution of it vie for admiration with the shimmering rhetoric in which a stodgy question of contract is portrayed and disposed of.

Legal Education

The law schools have been busy presenting the law as a congeries of dessicated intellectualisms—rules and principles and precedents and analyses and arguments and the court says, the

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76 Ex Parte Bushnell, 9 Oh. St. 77 (1859).
77 297 U.S. 1 (1936).
78 228 N.Y. 447, 127 N.E. 263 (1920).
court says, and the court says. Maybe we have omitted the weightier matters of the law. We all know, who in a case-law system could be unaware, that it is the application that is the life of the law. And after all it is the judges not the conceptual courts who say. But, when we remember judges, we remember those whom we identify and extoll as crusaders and statesmen and, latterly sometimes, as adepts of the legal hypothesis. Yet the books are replete with examples of judges who were, and are, only judges, just that and nothing more but most surely that. Perhaps, some material concerning their performances could be used here and there in the “cases and materials,” with profit. With this thought, a few sentences from Justice Jackson’s dedication address at Stanford will bring us to a close.

“In training lawyers the law schools are also training these future judges, for we do not think it compatible with democracy that the judiciary, as in some Continental countries, be a separate profession specially trained for the task of judging. Either to preside over a courtroom or helpfully and successfully to conduct cases at its bar is, perhaps, less a science than an art. Some of the best trial judges I have known were not distinguished for learning so much as for wisdom and common sense and a personality that enabled them unostentatiously to dominate the courtroom and be master of its proceeding. I do not know that it would be possible to teach that kind of art . . .”

As to the last sentence, the answer is a resounding no. But exposing the students to a few examples of good judgment in judging as judges will not hurt.

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79 Sometimes opinions remind one of the troubles of Lord Kylsant, who was convicted of signing a false prospectus every word of which was true. See: Rex v. Kylsant, 1 K.B. 442 (1932); notes, 45 Harv. L. Rev. 1078, 75 Sol. J. 594. See discussion in the present writer’s article, The Influence of Equity Principles in Embezzlement Prosecutions, 30 Ill. L. Rev. 995 (1936).