4/28/69

Memorandum 69-65

Subject: The Law Revision Commission as "A Ministry of Justice"

This memorandum presents the question whether the Law Revision Commission is fulfilling its function as a "Ministry of Justice." The staff suggests no significant change in our function as we have interpreted it in the past. Nevertheless, it appears desirable for the Commission to discuss this matter at this time: We have five relatively new Commission members; Chief Justice Traynor at the last State Bar Convention gave a talk giving his view that the Commission could do more to fulfill its function as a ministry of justice. A little more than a year ago this matter was briefly discussed and it was then decided that the matter should again be discussed in approximately a year.

The New York Law Revision Commission was created as a response to the article by Justice Cardozo in the Harvard Law Review written in 1921. This article is reproduced on the attached pink pages and is worth reading. Although the California Law Revision Commission is not authorized to study any topic without prior legislative approval in the form of a concurrent resolution, the California Commission also appears to have been intended to serve as a ministry of justice and to report to the Legislature areas of the law in need of study and reform.

The talk of Chief Justice Traynor at the 1967 Bar Convention was printed about a year ago in the State Bar Journal. A copy is attached (yellow). This, too, is well worth reading. Justice Traynor suggests that there is a need for greater communication between the courts and legal scholars and the Legislature. He believes that a law revision commission is a natural agency to receive and transmit such communications.

The Law Revision Commission now does much to serve the function of a

ministry of justice as envisioned by Justice Cardozo. However, we have long recognized that the Commission cannot undertake to propose legislation designed to correct all defects in the law. We have necessarily limited our efforts to a relatively few topics. To a considerable extent, the Legislature itself has indicated the priorities to be given to various topics. The topics that have occupied most of the Commission time during recent years are topics that the Legislature itself has directed the Commission to study.

In considering the function of the Commission, it also should be recognized that other law reform agencies operate in California. The role of the State Bar is well known. The Judicial Council is active in certain areas. The well staffed legislative committees also engage in substantial law reform efforts. Special Joint Legislative Committees or commissions have been created in particular areas, such as constitutional revision and revision of penal law and procedure. Special Governor's Commissions, such as the Commission on Juvenile Justice, have made significant contributions to law reform in California. Accordingly, it does not appear necessary or desirable for the Commission to assume responsibility for all areas of the law.

In some areas of the law, the Commission now performs the function suggested by Justice Cardozo and Chief Justice Traynor. For example, the Commission has reviewed all cases, recently published texts, law review articles, and a number of communications from judges and lawyers concerning the new Evidence Code. A few changes have been proposed by the Commission as a result of this review. Others will be considered in the future. Because

of the expert knowledge of the individual members of the Commission in this field, this task has not occupied a substantial portion of the Commission's time. To some extent, the Commission has performed the same function with respect to governmental liability and in some other areas of the law that the Commission has studied, such as arbitration.

We suspect that Justice Cardozo and Chief Justice Traynor would have us do far more than we are now doing. As an example of what could be done, we refer you to Exhibit III (attached green pages)--an extract from the report of Alaska Legislative Council relating to Legislative Oversight of the Administration of Statutes. The Alaska Legislative Council undertakes to review all court and agency expressions of dissatisfaction with state statutes and to report these to the Alaska Legislature. Although this is no doubt a valuable service, the staff doubts that it would be a desirable allocation of Commission resources to undertake this task. We now undertake to report all statutes held unconstitutional or impliedly repealed and have long considered this service to be of doubtful value and would recommend that it be discontinued were it not for the fact that it requires only a minimal amount of Commission and staff time and was included by the Legislature in our enabling statute.

At the same time, an examination of the list of topics that the Commission is authorized to study will reveal that there are few remaining topics that are small in scope and justify Commission study. The Commission needs additional relatively small topics so that we can continue to make a few recommendations to each session of the Legislature during the time we are working on inverse condemnation, condemnation law and procedure, and sovereign immunity. We could obtain such topics and, at the same time, do something in response to Chief Justice Traynor's suggestion if we improved

our communications with the courts. Specifically, we might request that the Judicial Council serve as a clearing house to receive and screen suggestions from judges for relatively narrow areas of the law in need of revision. Upon receipt of the suggestions forwarded to us by the Judicial Council, we could select those topics that we wish to request the Legislature to authorize us to study. Obviously, we could undertake to study only a few additional topics.

The Commission, some time ago, directed the Executive Secretary to write to each appellate court judge asking for suggested topics. We received only one response--a suggestion concerning workmen's compensation which will be presented for your consideration in due course. What suggestions do the Commissioners have concerning means of obtaining new topics.

Respectfully submitted,

John H. DeMoully
Executive Secretary

Memorandum 69-65

EXHIBIT I

HARVARD LAW REVIEW

VOL. XXXV DECEMBER, 1921 NO. 2

A MINISTRY OF JUSTICE

THE courts are not helped as they could and ought to be in the adaptation of law to justice. The reason they are not helped is because there is no one whose business it is to give warning that help is needed. Time was when the remedial agencies, though inadequate, were at least in our own hands. Fiction and equity were tools which we could apply and fashion for ourselves. The artifice was clumsy, but the clumsiness was in some measure atoned for by the skill of the artificer. Legislation, supplanting fiction and equity, has multiplied a thousand fold the power and capacity of the tool, but has taken the use out of our own hands and put it in the hands of others. The means of rescue are near for the worker in the mine. Little will the means avail unless lines of communication are established between the miner and his rescuer. We must have a courier who will carry the tidings of distress to those who are there to save when signals reach their ears. To-day courts and legislature work in separation and aloofness. The penalty is paid both in the wasted effort of production and in the lowered quality of the product. On the one side, the judges, left to fight against anachronism and injustice by the methods of judge-made law, are distracted by the conflicting promptings of justice and logic, of consistency and mercy, and the output of their labors bears the tokens of the strain. On the other side, the legislature, informed only casually and intermittently of the needs and problems of the courts, without expert or responsible or disinterested or systematic

advice as to the workings of one rule or another, patches the fabric here and there, and mars often when it would mend. Legislature and courts move on in proud and silent isolation. Some agency must be found to mediate between them.

This task of mediation is that of a ministry of justice. The duty must be cast on some man or group of men to watch the law in action, observe the manner of its functioning, and report the changes needed when function is deranged. The thought is not a new one. Among our own scholars, it has been developed by Dean Pound with fertility and power.[1] Others before him, as he reminds us, had seen the need, and urged it. Bentham made provision for such a ministry in his draft of a Constitutional Code.[2] Lord Westbury renewed the plea.[3] Only recently, Lord Haldane has brought it to the fore again.[4] "There is no functionary at present who can properly be called a minister responsible for the subject of Justice."[5] "We are impressed by the representations made by men of great experience, such as the President of the Incorporated Law Society, as to the difficulty of getting the attention of the government to legal reform, and as to the want of contact between those who are responsible for the administration of the work of the Commercial Courts and the mercantile community, and by the evidence adduced that the latter are, in consequence and progressively, withdrawing their disputes from the jurisdiction of the Courts."[6] In countries of continental Europe, the project has passed into the realm of settled practice. Apart from these precedents and without thought of them, the need of such a ministry, of some one to observe and classify and criticize and report, has been driven home to me with steadily growing force through my own work in an appellate court. I have seen a body of judges applying a system of case law, with powers of innovation cabined and confined. The main lines are fixed by precedents. New lines may, indeed, be run, new courses followed, when precedents are lacking. Even then, distance and direction are guided by mingled considerations of

[1] Pound, "Juristic Problems of National Progress," 22 AM. J. OF SOCIOLOGY, 721, 729, 731 (May, 1917); Pound, "Anachronisms in Law," 3 J. AM. JUDICATURE SOC., 142, 146 (February, 1920).

[2] WORKS, IX, 597–612.

[3] 1 NASH, LIFE OF LORD WESTBURY, 291, quoted by Pound, *supra*.

[4] Report of Lord Haldane's Committee on the Machinery of Government (1918).

[5] *Ibid.*, p. 63.

[6] *Ibid.*, p. 64.

logic and analogy and history and tradition which moderate and temper the promptings of policy and justice. I say this, not to criticize, but merely to describe. I have seen another body, a legislature, free from these restraints, its powers of innovation adequate to any need, preoccupied, however, with many issues more clamorous than those of courts, viewing with hasty and partial glimpses the things that should be viewed both steadily and whole. I have contrasted the quick response whenever the interest affected by a ruling untoward in results had some accredited representative, especially some public officer, through whom its needs were rendered vocal. A case involving, let us say, the construction of the Workmen's Compensation Law, exhibits a defect in the statutory scheme. We find the Attorney General at once before the legislature with the request for an amendment. We cannot make a decision construing the tax law or otherwise affecting the finances of the state without inviting like results. That is because in these departments of the law, there is a public officer whose duty prompts him to criticism and action. Seeing these things, I have marveled and lamented that the great fields of private law, where justice is distributed between man and man, should be left without a caretaker. A word would bring relief. There is nobody to speak it.

For there are times when deliverance, if we are to have it — at least, if we are to have it with reasonable speed — must come to us, not from within, but from without. Those who know best the nature of the judicial process, know best how easy it is to arrive at an impasse. Some judge, a century or more ago, struck out upon a path. The course seemed to be directed by logic and analogy. No milestone of public policy or justice gave warning at the moment that the course was wrong, or that danger lay ahead. Logic and analogy beckoned another judge still farther. Even yet there was no hint of opposing or deflecting forces. Perhaps the forces were not in being. At all events, they were not felt. The path went deeper and deeper into the forest. Gradually there were rumblings and stirrings of hesitation and distrust, anxious glances were directed to the right and to the left, but the starting point was far behind, and there was no other path in sight.

Thus, again and again, the processes of judge-made law bring judges to a stand that they would be glad to abandon if an outlet could be gained. It is too late to retrace their steps. At all events,

whether really too late or not, so many judges think it is that the result is the same as if it were. Distinctions may, indeed, supply for a brief distance an avenue of escape. The point is at length reached when their power is exhausted. All the usual devices of competitive analogies have finally been employed without avail. The ugly or antiquated or unjust rule is there. It will not budge unless uprooted. Execration is abundant, but execration, if followed by submission, is devoid of motive power. There is need of a fresh start; and nothing short of a statute, unless it be the erosive work of years, will supply the missing energy. But the evil of injustice and anachronism is not limited to cases where the judicial process, unaided, is incompetent to gain the mastery. Mastery, even when attained, is the outcome of a constant struggle in which logic and symmetry are sacrificed at times to equity and justice. The gain may justify the sacrifice; yet it is not gain without deduction. There is an attendant loss of that certainty which is itself a social asset. There is a loss too of simplicity and directness, an increasing aspect of unreality, of something artificial and fictitious, when judges mask a change of substance, or gloss over its importance, by the suggestion of a consistency that is merely verbal and scholastic. Even when these evils are surmounted, a struggle, of which the outcome is long doubtful, is still the price of triumph. The result is to subject the courts and the judicial process to a strain as needless as it is wearing. The machinery is driven to the breaking point; yet we permit ourselves to be surprised that at times there is a break. Is it not an extraordinary omission that no one is charged with the duty to watch machinery or output, and to notify the master of the works when there is need of replacement or repair?

In all this, I have no thought to paint the failings of our law in lurid colors of detraction. I have little doubt that its body is for the most part sound and pure. Not even its most zealous advocate, however, will assert that it is perfect. I do not seek to paralyze the inward forces, the "indwelling and creative" energies,[7] that make for its development and growth. My wish is rather to release them, to give them room and outlet for healthy and unhampered action. The statute that will do this, first in one field and then in others, is something different from a code, though, as statute follows statute, the material may be given from which in time, a

[7] 2 BRYCE, STUDIES IN HISTORY AND JURISPRUDENCE, 609.

code will come. Codification is, in the main, restatement. What we need, when we have gone astray, is change. Codification is a slow and toilsome process, which, if hurried, is destructive. What we need is some relief that will not wait upon the lagging years. Indeed, a code, if completed, would not dispense with mediation between legislature and judges, for code is followed by commentary and commentary by revision, and thus the task is never done. "As in other sciences, so in politics, it is impossible that all things should be precisely set down in writing; for enactments must be universal, but actions are concerned with particulars."[8] Something less ambitious, in any event, is the requirement of the hour. Legislation is needed, not to repress the forces through which judge-made law develops, but to stimulate and free them. Often a dozen lines or less will be enough for our deliverance. The rule that is to emancipate is not to imprison in particulars. It is to speak the language of general principles, which, once declared, will be developed and expanded as analogy and custom and utility and justice, when weighed by judges in the balance, may prescribe the mode of application and the limits of extension. The judicial process is to be set in motion again, but with a new point of departure, a new impetus and direction. In breaking one set of shackles, we are not to substitute another. We are to set the judges free.

I have spoken in generalities, but instances will leap to view. There are fields, known to us all, where the workers in the law are hampered by rules that are outworn and unjust. How many judges, if they felt free to change the ancient rule, would be ready to hold to-day that a contract under seal may not be modified or discharged by another and later agreement resting in parol?[9] How many would hold that a deed, if it is to be the subject of escrow, must be delivered to a third person, and not to the grantee?[10] How many would hold that a surety is released, irrespective of resulting damage, if by agreement between principal and creditor the time of payment of the debt is extended for a single day?[11] How many would hold that a release of one joint tortfeasor is a release also of the others? How many would not prefer, instead

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[8] Aristotle, Politics, Bk. II (Jowett's translation).

[9] 3 Williston, Contracts, §§ 1834–1837; Harris v. Shorall, 230 N. Y. 343 (1921).

[10] Blewitt v. Boorum, 142 N. Y. 357, 37 N. E. 119 (1894).

[11] N. Y. Life Ins. Co. v. Casey, 178 N. Y. 381, 70 N. E. 916 (1904).

of drawing some unreal distinction between releases under seal and covenants not to sue,[12] to extirpate, root and branch, a rule which is to-day an incumbrance and a snare? How long would Pinnel's case[13] survive if its antiquity were not supposed to command the tribute of respect? How long would Dumpor's case[14] maintain a ghostly and disquieting existence in the ancient byways of the law?

I have chosen extreme illustrations as most likely to command assent. I do not say that judges are without competence to effect some changes of that kind themselves. The inquiry, if pursued, would bring us into a field of controversy which it is unnecessary to enter. Whatever the limit of power, the fact stares us in the face that changes are not made. But short of these extreme illustrations are others, less glaring and insistent, where speedy change is hopeless unless effected from without. Sometimes the inroads upon justice are subtle and insidious. A spirit or a tendency, revealing itself in a multitude of little things, is the evil to be remedied. No one of its manifestations is enough, when viewed alone, to spur the conscience to revolt. The mischief is the work of a long series of encroachments. Examples are many in the law of practice and procedure.[15] At other times, the rule, though wrong, has become the cornerstone of past transactions. Men have accepted it as law, and have acted on the faith of it. At least, the possibility that some have done so, makes change unjust, if it were practicable, without saving vested rights. Illustrations again may be found in many fields. A rule for the construction of wills established a presumption that a gift to issue is to be divided, not *per stirpes*, but *per capita*.[16] The courts denounced and distinguished, but were unwilling to abandon.[17] In New York, a statute has at last

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[12] Gilbert *v.* Finch, 173 N. Y. 455, 66 N. E. 133 (1903); Walsh *v.* N. Y. Central R. R. Co., 204 N. Y. 58, 97 N. E. 408 (1912); *cf.* 21 COLUMBIA L. REV. 491.

[13] 5 Coke, 117; *cf.* Jaffray *v.* Davis, 124 N. Y. 164, 167, 26 N. E. 351 (1891); Frye *v.* Hubbell, 74 N. H. 358, 68 Atl. 325 (1907); 1 WILLISTON, CONTRACTS, § 121; ANSON, CONTRACTS, Corbin's ed., p. 137; Ferson, "The Rule in Foakes *v.* Beer," 31 YALE L. J. 15.

[14] 2 Coke, 119.

[15] In jurisdictions where procedure is governed by rules of court, recommendations of the ministry affecting the subject-matter of the rules may be submitted to the judges.

[16] I state the law in New York and in many other jurisdictions. There are jurisdictions where the rule is different.

[17] Petry *v.* Petry, 186 App. Div. 738, 175 N. Y. Supp. 30 (1919), 227 N. Y. 621, 125 N. E. 924 (1919); Matter of Durant, 231 N. Y. 41, 131 N. E. 562 (1921).

released us from our bonds,[18] and we face the future unashamed. Still more common are the cases where the evil is less obvious, where there is room for difference of opinion, where some of the judges believe that the existing rules are right, at all events where there is no such shock to conscience that precedents will be abandoned, and what was right declared as wrong. At such times there is need of the detached observer, the skilful and impartial critic, who will view the field in its entirety, and not, as judges view it, in isolated sections, who will watch the rule in its working, and not, as judges watch it, in its making, and who, viewing and watching and classifying and comparing, will be ready, under the responsibility of office, with warning and suggestion.

I note at random, as they occur to me, some of the fields of law where the seeds of change, if sown, may be fruitful of results. Doubtless better instances can be chosen. My purpose is, not advocacy of one change or another, but the emphasis of illustration that is concrete and specific.

It is a rule in some jurisdictions that if A sends to B an order for goods, which C, as the successor to B's business, takes it on himself to fill, no action at the suit of C will lie either for the price or for the value, if A in accepting the goods and keeping them believed that they had been furnished to him by B, and this though C has acted without fraudulent intent.[19] I do not say that this is the rule everywhere. There are jurisdictions where the question is still an open one. Let me assume, however, a jurisdiction where the rule, as I have stated it, prevails, or even one where, because the question is unsettled, there is a chance that it may prevail. A field would seem to be open for the declaration by the lawmakers of a rule less in accord, perhaps, with the demands of a "jurisprudence of conceptions,"[20] but more in accord with those of morality and justice. Many will prefer to turn to the principle laid down in the French Code Civil:

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[18] Decedent's Estate Law, § 472; L. 1921, c. 379.

[19] Boulton *v.* Jones, 2 H. & N. 564 (1857); 1 Williston, Contracts, § 80; *cf.* Boston Ice Co. *v.* Potter, 123 Mass. 28 (1877); Kelly Asphalt Co. *v.* Barber Asphalt Paving Co., 211 N. Y. 68, 71, 105 N. E. 88 (1914).

[20] Pound, "Mechanical Jurisprudence," 8 Columbia L. Rev. 605, 608, 610; Hynes *v.* N. Y. Central R. R. Co., 231 N. Y. 229, 235, 131 N. E. 898 (1921).

"L'erreur n'est une cause de nullité de la convention que lorsqu'elle tombe sur la substance même de la chose qui en est l'objet. Elle n'est point une cause de nullité, lorsqu'elle ne tombe que sur la personne avec laquelle on a intention de contracter, à moins que la considération de cette personne ne soit la cause principale de la convention." [21]

Much may be said for the view that in the absence of bad faith, there should be a remedy in quasi contract.[22]

It is a rule which has grown up in many jurisdictions and has become "a common ritual" [23] that municipal corporations are liable for the torts of employees if incidental to the performance or non-performance of corporate or proprietary duties, but not if incidental to the performance or non-performance of duties public or governmental. The dividing line is hard to draw.

"Building a drawbridge, maintaining a health department, or a charitable institution, confining and punishing criminals, assaults by policemen, operating an elevator in a city hall, driving an ambulance, sweeping and cleaning streets, have been held governmental acts. Sweeping and cleaning streets, street lighting, operating electric light plants, or water works, maintaining prisons, have been held private functions." [24]

The line of demarcation, though it were plainer, has at best a dubious correspondence with any dividing line of justice. The distinction has been questioned by the Supreme Court of the United States.[25] It has been rejected recently in Ohio.[26] In many jurisdictions, however, as, for example in New York, it is supported by precedent so inveterate that the chance of abandonment is small. I do not know how it would fare at the hands of a ministry of justice. Perhaps such a ministry would go farther, and would wipe out, not merely the exemption of municipalities, but the broader exemption of the state.[27] At least there is a field for inquiry, if not for action.

It is a rule of law that the driver of an automobile or other vehicle who fails to look or listen for trains when about to cross a railroad, is guilty of contributory negligence, in default, at least,

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[21] Code Civil, Art. 1110.

[22] ANSON, CONTRACTS (Corbin's edition), 31; KEENER, QUASI CONTRACTS, 358-360.

[23] 34 HARV. L. REV. 66.

[24] *Ibid.*, 67.

[25] Workman *v.* The Mayor, 179 U. S. 552, 574 (1900).

[26] Fowler *v.* City of Cleveland, 100 Ohio St. 158, 126 N. E. 72 (1919).

[27] Smith *v.* State, 227 N. Y. 405, 125 N. E. 841 (1920).

of special circumstances excusing the omission. I find no fault with that rule. It is reasonable and just. But the courts have in some jurisdictions gone farther. They have held that the same duty that rests upon the driver, rests also upon the passenger.[28] The friend whom I invite to ride with me in my car, and who occupies the rear seat beside me, while the car is in the care of my chauffeur, is charged with active vigilance to watch for tracks and trains, and is without a remedy if in the exuberance of jest or anecdote or reminiscence, he relies upon the vigilance of the driver to carry him in safety. I find it hard to imagine a rule more completely unrelated to the realities of life. Men situated as the guest in the case I have supposed, do not act in the way that this rule expects and requires them to act. In the first place, they would in almost every case make the situation worse if they did; they would add bewilderment and confusion by contributing multitude of counsel. In the second place, they rightly feel that, except in rare emergencies of danger known to them, but unknown to the driver, it is not their business to do anything. The law in charging them with such a duty has shaped its rules in disregard of the common standards of conduct, the every-day beliefs and practices, of the average man and woman whose behavior it assumes to regulate. We must take a fresh start. We must erect a standard of conduct that realists can accept as just. Other fields of the law of negligence may be resurveyed with equal profit. The law that defines or seeks to define the distinction between general and special employers is beset with distinctions so delicate that chaos is the consequence. No lawyer can say with assurance in any given situation when one employment ends and the other begins. The wrong choice of defendants is often made, with instances, all too many, in which justice has miscarried.

Illustrations yet more obvious are at hand in the law of evidence. Some of its rules are so unwieldy that many of the simplest things

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[28] Read v. N. Y. C. & H. R. R. R. Co., 123 App. Div. 228, 107 N. Y. Supp. 1068 (1908); s. c., 165 App. Div. 910, 150 N. Y. Supp. 1108 (1914), aff'd., 219 N. Y. 660, 114 N. E. 1081 (1916); Noakes v. N. Y. C. & H. R. R. R. Co., 121 App. Div. 716, 106 N. Y. Supp. 522 (1907), 195 N. Y. 543, 88 N. E. 1126 (1909). For the true rule see Weidlich v. N. Y., N. H., & H. R. R., 93 Conn. 438, 106 Atl. 323 (1919); 31 YALE L. J. 101.

of life, transactions so common as the sale and delivery of merchandise, are often the most difficult to prove. Witnesses speaking of their own knowledge must follow the subject-matter of the sale from its dispatch to its arrival. I have been told by members of the bar that claims of undoubted validity are often abandoned, if contested, because the withdrawal of the necessary witnesses from the activities of business involves an expense and disarrangement out of proportion to the gain. The difficulty would be lessened if entries in books of account were admissible as *prima facie* evidence upon proof that they were made in the usual course of business. Such a presumption would harmonize in the main with the teachings of experience. Certainly it would in certain lines of business, as, *e. g.*, that of banking, where irregularity of accounts is unquestionably the rare exception. Even the books of a bank are not admissible at present without wearisome preliminaries.[29] In England, the subject has for many years been regulated by statute.[30] Something should be done in our own country to mitigate the hardship. "The dead hand of the common-law rule . . . should no longer be applied to such cases as we have here."[31]

We are sometimes slow, I fear, while absorbed in the practice of our profession, to find inequity and hardship in rules that laymen view with indignation and surprise. One can understand why this is so. We learned the rules in youth when we were students in the law schools. We have seen them reiterated and applied as truths that are fundamental and almost axiomatic. We have sometimes even won our cases by invoking them. We end by accepting them without question as part of the existing order. They no longer have the vividness and shock of revelation and discovery. There is need of conscious effort, of introspective moods and moments, before their moral quality addresses itself to us with the same force as it does to others. This is at least one reason why the bar has at times been backward in the task of furthering reform. A recent study of the Carnegie Foundation for the Advancement of Teaching deals with the subject of training for the public profession of the law.[32] Dr. Pritchett says in his preface:[33]

[29] Ocean Bank *v.* Carll, 55 N. Y. 440 (1874); Bates *v.* Preble, 151 U. S. 149 (1894).

[30] 42 & 43 VICT. c. 11; STEPHEN, DIGEST OF THE LAW OF EVIDENCE, Art. 36.

[31] Rosen *v.* United States, 245 U. S. 467 (1918).

[32] Bulletin No. 15, Carnegie Foundation.

[33] *Ibid.*, p. xvii.

"There is a widespread impression in the public mind that the members of the legal profession have not, through their organizations, contributed either to the betterment of legal education or to the improvement of justice to that extent which society has the right to expect."

The Centennial Memorial Volume of Indiana University contains a paper by the Dean of the Harvard Law School on the Future of Legal Education.[34]

"So long as the leaders of the bar," he says,[35] "do nothing to make the materials of our legal tradition available for the needs of the twentieth century, and our legislative lawmakers, more zealous than well instructed in the work they have to do, continue to justify the words of the chronicler — 'the more they spake of law the more they did unlaw' — so long the public will seek refuge in specious projects of reforming the outward machinery of our legal order in the vain hope of curing its inward spirit."

Such reproaches are not uncommon. We do not need to consider either their justification or their causes. Enough for us that they exist. Our duty is to devise the agencies and stimulate the forces that will make them impossible hereafter.

What, then, is the remedy? Surely not to leave to fitful chance the things that method and system and science should order and adjust. Responsibility must be centered somewhere. The only doubt, it seems to me, is where. The attorneys-general, the law officers of the states, are overwhelmed with other duties. They hold their places by a tenure that has little continuity, or permanence. Many are able lawyers, but a task so delicate exacts the scholar and philosopher, and scholarship and philosophy find precarious and doubtful nurture in the contentions of the bar. Even those qualities, however, are inadequate unless reinforced by others. There must go with them experience of life and knowledge of affairs. No one man is likely to combine in himself attainments so diverse. We shall reach the best results if we lodge power in a group, where there may be interchange of views, and where different types of thought and training will have a chance to have their say. I do not forget, of course, the work that is done by Bar Associations, state and national, as well as local, and other voluntary bodies. The work has not risen to the needs of the occasion. Much of it has been

[34] Pound, "The Future of Legal Education," 259.

[35] *Ibid.*, 268.

critical rather than constructive. Even when constructive, it has been desultory and sporadic. No attempt has been made to cover with systematic and comprehensive vision the entire field of law. Discharge of such a task requires an expenditure of time and energy, a single-hearted consecration, not reasonably to be expected of men in active practice. It exacts, too, a scholarship and a habit of research not often to be found in those immersed in varied duties. Even if these objections were inadequate, the task ought not to be left to a number of voluntary committees, working at cross purposes. Recommendations would come with much greater authority, would command more general acquiescence on the part of legislative bodies, if those who made them were charged with the responsibilities of office. A single committee should be organized as a ministry of justice. Certain at least it is that we must come to some official agency unless the agencies that are voluntary give proof of their capacity and will to watch and warn and purge — unless the bar awakes to its opportunity and power.

How the committee should be constituted, is, of course, not of the essence of the project. My own notion is that the ministers should be not less than five in number. There should be representatives, not less than two, perhaps even as many as three, of the faculties of law or political science in institutes of learning. Hardly elsewhere shall we find the scholarship on which the ministry must be able to draw if its work is to stand the test. There should be, if possible, a representative of the bench; and there should be a representative or representatives of the bar.

Such a board would not only observe for itself the workings of the law as administered day by day. It would enlighten itself constantly through all available sources of guidance and instruction; through consultation with scholars; through study of the law reviews, the journals of social science, the publications of the learned generally; and through investigation of remedies and methods in other jurisdictions, foreign and domestic. A project was sketched not long ago by Professor John Bassett Moore, now judge of the International Court, for an Institute of Jurisprudence.[36] It was to do for law what the Rockefeller Institute is doing for medicine. Such an institute, if founded, would be at the service of the min-

[36] Report of Dean of Columbia University Law School for 1916.

isters. The Commonwealth Fund has established a Committee for Legal Research which is initiating studies in branches of jurisprudence where reform may be desirable. The results of its labors will be available for guidance. Professors in the universities are pointing the way daily to changes that will help. Professor Borchard of Yale by a series of articles on the Declaratory Judgment [37] gave the impetus to a movement which has brought us in many states a reform long waited for by the law.[38] Dean Stone of Columbia has disclosed inconsistencies and weaknesses in decisions that deal with the requirement of mutuality of remedy in cases of specific performance.[39] Professor Chafee in a recent article [40] has emphasized the need of reform in the remedy of interpleader. In the field of conflict of laws, Professor Lorenzen has shown disorder to the point of chaos in the rules that are supposed to regulate the validity and effect of contracts.[41] The archaic law of arbitration, amended not long ago in New York through the efforts of the Chamber of Commerce,[42] remains in its archaic state in many other jurisdictions, despite requests for change. A ministry of justice will be in a position to gather these and like recommendations together, and report where change is needed. Reforms that now get themselves made by chance or after long and vexatious agitation, will have the assurance of considerate and speedy hearing. Scattered and uncoördinated forces will have a rallying point and focus. System and method will be substituted for favor and caprice. Doubtless, there will be need to guard against the twin dangers of overzeal on the one hand and of inertia on the other — of the attempt to do too much and of the willingness to do too little. In the end, of course, the recommendations of the ministry will be recommendations and nothing more. The public will be informed of them. The bar and others interested will debate them. The legislature may reject them. But at least the lines of communication will be open. The long silence will be broken. The spaces between the planets will at last be bridged.

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[37] 28 YALE L. J. 1.

[38] 34 HARV. L. REV. 697.

[39] The "Mutuality" Rule in New York, 16 COLUMBIA L. REV. 443.

[40] "Modernizing Interpleader," 30 YALE L. J. 814.

[41] 30 YALE L. J. 565, 655; 31 *id.*, 53.

[42] Matter of Berkovitz, 230 N. Y. 261, 130 N. E. 288 (1921).

The time is ripe for betterment. "Le droit a ses époques," says Pascal in words which Professor Hazeltine has recently recalled to us. The law has "its epochs of ebb and flow."[49] One of the flood seasons is upon us. Men are insisting, as perhaps never before, that law shall be made true to its ideal of justice. Let us gather up the driftwood, and leave the waters pure.

Benjamin N. Cardozo.

NEW YORK CITY.

[49] H. D. Hazeltine, 1 CAMBRIDGE L. J. 1.

Memorandum 69-65

EXHIBIT II

Interweavers in the Reformation of Law

The Courts

By Roger J. Traynor, Chief Justice of California*

We are all going to miss Senator Tydings this morning and no one wishes more than I that he could have been here and that I could have been in the audience with all of you. I think I would have been in the audience too had I merely been summoned to pinch-hit for "God, for Country and for Yale"; but of course there was nothing else to do but to heed the summons from the President of the State Bar of California, for if there is one thing I am proud of it is the bench and bar of California and the splendid cooperation between them.

It is the current vogue to endorse law reform as our forerunners once endorsed the status quo. The very term law reform now conveys assurance, like a miracle fabric, that all will be well as soon as it is pressed or unpressed into service. If one fabric fails, the facile remedy is to fabricate another and another via the legislative process.

Receptive though we may be to an abundance of new riches in the law, we cannot let them accumulate in such haphazard heaps that they confuse the law at the expense of rational reform. Hence, as legislatures increase their already formidable output of statutes, courts must correspondingly enlarge their responsibility for keeping the law a coherent whole.

Ordinarily a legislature makes much more law in a session via statutes than a court does over a long period of time via the painstaking application or adaptation of common law rules and the occasional innovation of a new one. By definition legislators are the experimental lawmakers, free to draft laws on a massive scale or *ad hoc* in response to what they understand to be the needs of the community or the community of interests they represent. The legislators themselves are experiments of a sort; they are on trial until the next election and must prove in the interim that they can make laws acceptable to their time and place, even though many of them may not be lawyers.

What a legislature does, however, it can undo without much ado. If some of its purported miracle fabrics fail to prove

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* Roger J. Traynor at the 40th Annual Convention of The State Bar of California, Monterey, September 27, 1967.

miraculous, they need no longer remain on the shelves. We can lament that they sometimes do, but we need not despair; they rarely survive indefinitely. Bumbling though the legislative process may be, it is more readily self-correcting than the judicial process. Given its flexibility, we can accept amiably that when a legislature is good, it can be very, very good, but that when it is bad, it is horrid. We can also in some measure resign ourselves to how ingeniously it sometimes abstains from any action, how mysteriously it sometimes moves its wonders not to perform. We can reconcile ourselves to its swings of quality so long as the people exercise responsibly their power to keep it a do-gooder, a reformer of the law.

It could not be otherwise in the modern world that for better or worse the legislatures have displaced courts as our major lawmakers. We have come a long way from the time when courts were on guard to keep statutes in their place in the shadow of precedent. In most of their affairs people who seek out new rules of law now look to the next legislative session, not to the day of judgment. In street wisdom, it is easier to legislate than to litigate. A legislature can run up a law on short notice, and when it has finished all the seams it can run up another and another. It is engaged in mass production; it produces piecework of its own volition or on order. The great tapestry of Holmes's princess, the seamless web of the law, becomes ever more legendary.

Whatever our admiration for ancient arts, few of us would turn the clock back to live out what museums preserve. The law of contracts was once well served by delightful causeries of learned judges that clarified the meaning of obligation. Such causeries, however, proved inadequate to provide an expansion and diversification of words to correspond with that of business enterprise. Thus it fell to the legislators to spell out whole statutes such as insurance codes and the uniform laws dealing with negotiable instruments, sales, bills of lading, warehouse receipts, stock transfers, conditional sales, trust receipts, written obligations, fiduciaries, partnerships, and limited partnerships.

There followed in the United States another development, a state-by-state adoption of the Uniform Commercial Code, the culmination of years of scholarly work sponsored by the American Law Institute and the Commissioners on Uniform State Laws. Such statutes can take a bird's-eye view of the total problem, instead of that of an owl on a segment. They can encompass wide generalizations from experience

that a judge is precluded from making in his decision on a particular case. Legislatures can break sharply with the past, if need be, as judges ordinarily cannot. They avoid the wasteful cost in time and money of piecemeal litigation that all too frequently culminates in a crazy quilt of rules defying intelligent restatement or coherent application. They can take the initiative in timely solution of urgent problems, in contrast with the inertia incumbent upon judges until random litigation brings a problem in incomplete form to them, often too soon or too late for over-all solution.

As the legislators tend their factories replete with machinery for the massive fabrication of law, judges work away much as before at the fine interweaving that gives law the grace of coherent pattern as it evolves. Paradoxically, the more legislators extend their range of lawmaking, of statutory innovation and reform at a hare's speed, the more significant becomes the judges' own role of lawmaking, of reformation at the pace of the tortoise. Even at a distance from the onrushing legislators they can make their presence felt. It has been known since the days of Aesop that the tortoise can overtake the zealous hare; La Fontaine has noted that it does so while carrying a burden. The frailty of the hare is that for all its zeal it tends to become distracted. The strength of the tortoise is its very burden; it is always in its house of the law.

Unlike the legislator, whose lawmaking knows no bounds, the judge stays close to his house of the law in the bounds of stare decisis. He invariably takes precedent as his starting-point; he is constrained to arrive at a decision in the context of ancestral judicial experience: the given decisions, or lacking these, the given dicta, or lacking these, the given clues. Even if his search of the past yields nothing, so that he confronts a truly unprecedented case, he still arrives at a decision in the context of judicial reasoning with recognizable ties to the past; by its kinship thereto it not only establishes the unprecedented case as a precedent for the future, but integrates it in the often rewoven but always unbroken line with the past.

Moreover, the judge is confined by the record in the case, which in turn is confined to legally relevant material, limited by evidentiary rules. So it happens that even a decision of far-reaching importance concludes with the words: "We hold today only that . . . . We do not reach the question whether . . ." Circumspectly the weaver stops, so as not to confuse

the pattern of transition from yesterday to today. Tomorrow is time enough for new weaving, as the facts of tomorrow come due.

A decision that has not suffered untimely birth has a reduced risk of untimely death. Insofar as a court remains uncommitted to unduly wide implications of a decision, it gains time to inform itself further through succeeding cases. It is then better situated to retreat or advance with a minimum of shock to the evolutionary course of the law, and hence with a minimum of shock to those who act in reliance upon judicial decisions. The greatest judges of the common law have proceeded in this way, moving not by fits and starts, but at the pace of the tortoise that steadily makes advances though it carries the past on its back.

The very caution of the judicial process offers the best of reasons for confidence in its recurring reformation. A reasoning judge's painstaking exploration of place and his sense of pace, give reassurance that when he takes an occasion dramatic leap forward he is impelled to do so in the very interest of orderly progression. There are times when he encounters so much chaos on his long march that the most cautious thing he can do is to take the initiative in throwing chaos to the winds. The great judge Mansfield did so when he broke the chaos of stalemated contractual relations with the concept of concurrent conditions. Holmes and Brandeis did so when they cleared the way for a liquidation of ancient interpretations of freedom of contract that had served to perpetuate child labor. Cardozo did so when he moved the rusting wheels of *Winterbottom v. Wright* to one side to make way for *Buick v. McPherson*. Chief Justice Stone did so, in the chaotic field of conflict of laws, when he noted the leeway in the United States Constitution between the mandate of the full faith and credit clause and the prohibition of the due process clause.

To a reasoning judge, each case is a new piece of an ever-expanding pattern, to be woven in if possible by reference to precedent. If precedent proves inadequate or inept, he is still likely to do justice to it in the breach, setting forth clearly the disparity between the square facts before him and the usually benign precedents that now fail to encompass them. He has also the responsibility of justifying the new precedent he has evolved, not merely as the dispossessor of the old, but as the best of all possible replacements. His sense of justice is bound to infuse his logic. A wise judge can strengthen his overruling against captious objections, first by an exposition of the injustice engendered by

the discarded precedent, and then by an articulation of how the injustice resulted from the precedent's failure to mesh with accepted legal principles. When he thus speaks out his words may serve to quicken public respect for the law as an instrument of justice.

He is hardly eager to take on such tasks if he can do otherwise. He knows that a new rule must be supported by full disclosure in his opinion of all aspects of the problem and of the data pertinent to its solution. Thereafter the opinion must persuade his colleagues, make sense to the bar, pass muster with scholars, and if possible allay the suspicion of any man in the street who regards knowledge of the law as no excuse for making it. There is usually someone among them alert to note any misunderstanding of the problem, any error in reasoning, any irrelevance in data, any oversight of relevant data, any premature cartography beyond he problem at hand. Every opinion is thus subject to approval. It is understandable when a judge faced with running such a gamut marks time instead on the line of least resistance and lets bad enough alone.

Moreover, he may still be deterred from displacing an inherently bad or moribund precedent by another restraint of judicial office, the tradition that courts do not ordinarily innovate change but only keep the law responsive to significant changes in the customs of the community, once they are firmly established.

The tenet of lag, strengthening the already great restraints on the judge, is deservedly respected. It bears noting, however, that it is recurringly invoked by astute litigants who receive aid and comfort from law that is safely behind the times with the peccadillos of yesteryear and has not caught up with their own. At the slightest sign that judge-made law may move forward, these bogus defenders of stare decisis conjure up mythical dangers to alarm the citizenry. They do sly injury to the law when the public takes them seriously and timid judges retreat from painstaking analysis within their already great constraints to safe and unsound repetitions of magic words from the legal lore of the year before much too long ago.

Too often the real danger to law is not that judges might take off onward and upward, but that all too many of them have long since stopped dead in the tracks of their predecessors. They would command little attention were it not that they speak the appealing language of stability in justification of specious formulas. The trouble is that the formulas may encase notions that have never been cleaned and

pressed and might disintegrate if they were. We might not accept the formulas so readily were we to realize what a cover they can be for the sin the Bible calls sloth and associates with ignorance. Whatever the judicial inertia evinced by a decision enveloped in words that have lost their magic, it is matched by the profession's indifference or uncritical acceptance. Thus formula survives by default.

Stare decisis, to stand by decided cases, conjures up another phrase dear to Latin lovers—*stare super antiquas vias*, to stand on the old paths. One might feel easier about that word *stare* if itself it stood by one fixed-star of meaning. In modern Italian *stare* means to stay, to stand, to lie, or to sit, to remain, to keep, to stop, or to wait. With delightful flexibility it also means to depend, to fit or to suit, to live, and, of course, to be.

Legal minds at work on this word might well conjecture that to stare or not to stare depends on whether *decisis* is dead or alive. We might inquire into the life of what we are asked to stand by. In the language of *stare decisers: Primo*, should it ever have been born? *Secundo*, is it still alive? *Tertio*, does it now deserve to live?

Who among us has not known a precedent that should never have been born? What counsel does not know a precedent worn so thin and pale with distinctions that the court has never troubled to overrule it? How many a counsel, accordingly misled, has heard the court then pronounce that the precedent must be deemed to have revealed itself as overruled *sub silentio* and ruminated in bewilderment that the precedent on which he relied was never expressly overruled because it so patently needed to be?

The notion yet persists that the overruling of ill-conceived, or moribund, or obsolete precedents somehow menaces the stability of the law. It is as if we would not remove barriers on a highway because everyone had become accustomed to circumventing them, and hence traffic moved, however awkwardly. The implication is that one cannot render traffic conditions efficient without courting dangers from the disturbance of established habit patterns. We have reached such a pass, we are wont to say, that it is for the legislature and not the court to set matters aright. No one says it more than the courts themselves.

Why? One speculation is that the popular image of the legislature as the lawmaking body, in conjunction with a popular notion of contemporary judges as primarily the maintenance men of the law, has engendered an auxiliary notion that whatever incidental law courts create they are

bound to maintain unless the legislature undertakes to unmake it.

One can speculate further that the occupational caution of judges makes them reluctant to take the initiative in overruling a precedent whose unworthiness is concealed in the aura of stare decisis. It takes boldness to turn a flashlight upon an aura and call out what one has seen, at the risk of violating quiet for the benefit of those who have retired from active thought. It is easier for a court to rationalize that less shock will result if it bides its time, and bides it and bides it, the while it awaits legislative action to transfer an unfortunate precedent unceremoniously to the dump from the fading glory in which it has been basking.

Thus courts have maintained their own theater of the absurd. For generations since the 1787 rule of ***Jee v. Audley,*** for example, they earnestly pretended that ancient crones could have babies. Again, even after the advent of conclusive blood tests to the contrary, they could still pretend that anyone might be a father. Flattering though it may have been to a crone to be viewed as a possible mother of the year though she would never have a child to show for it, it can only have been disquieting to a man to be named as an actual father of someone who was no child of his.

Fortunately all is not saved. In retrospect we come to see how well courts now and again do clear a trail for those who come after them. They have significantly expanded the concept of obligation. They are recognizing a much needed right to privacy. They are recognizing a right to recovery for prenatal injuries and intentionally inflicted mental suffering. They are also recognizing liability once precluded by charitable or governmental immunities. Their now general acceptance of the manufacturer's liability to third persons for negligence has stimulated inquiry into appropriate bases for possible strict liability for injuries resulting from defective products. There is more and more open preoccupation with compensation for personal injuries, which is bound in turn to augment the scope of insurance.

Courts are also recognizing new responsibilities within the family as well as new freedoms. They are recognizing the right of one member of the family to recover against another. They are recognizing women as people with lives of their own, transcending their status as somebody else's spouse or somebody else's mother, transcending somebody else's vision of what nonentities they should be.

In conflicts of law wooden rules are giving way as surely as wooden boundary lines. Comparable changes are on the

horizon in property law that will reflect new ways of holding and transferring property, and evolving concepts of land use, zoning, and condemnation. Criminal law is beginning to reflect new insights into human behavior. Landmark cases in constitutional law evince major changes in the relation of the federal government to the states.

A judge participates significantly in lawmaking whether he makes repairs and renewals in the common law via the adaptation of an old precedent or advances its reformation with a new one. He does so on a variety of fronts, in the interpretation of statutory or constitutional language as well as in the analysis of traditional common law problems.

Rare are the statutes that rest in peace beyond the range of controversy. Large problems of interpretation inevitably arise. Plain words, like plain people, are not always so plain as they seem. Certainly a judge is not at liberty to seek hidden meanings not suggested by the statute or the available extrinsic aids. Speculation cuts brush with the question: what purpose did the legislature express as it strung its word into a statute? An insistence upon judicial regard for the words of a statute does not imply that they are like words in a dictionary, to be read with no ranging of the mind. They are no longer at rest in their alphabetical bins. Released, combined in phrases that imperfectly communicate the thoughts of one man to another, they challenge men to give them more than passive reading, to consider well their context, to ponder what may be their consequences. Such a task is not for the phlegmatic. It calls for judicial temperament, for impassive reflection quickened with an awareness of the waywardness of words.

There are times when statutory words prove themselves so at odds with a clear legislative purpose as to pose a dilemma for the judge. He knows that there is an irreducible minimum of error in statutes because they deal with multifarious and frequently complicated problems. He hesitates to undertake correction of even the most obvious legislative oversight, knowing that theoretically the legislature has within its power the correction of its own lapses. Yet he also knows how cumbersome the legislative process is, how massive the machinery that must be set in motion for even the smallest correction, how problematic that it will be set in motion at all, how confusion then may be worse confounded.

With deceptively plain words, as with ambiguous ones, what a court does is determined in the main by the nature of the statute. It may be so general in scope as to invite

judicial elaboration. It may evince such careful draftsmanship in the main as to render its errors egregious enough to be judicially recognized as such, inconsistent with the legislative purpose.

The experienced draftsmen of tax laws, among others, find it impossible to foresee all the problems that will test the endurance of their words. They did not foresee the intriguing question whether the United States is a resident of the United States, which arose under a revenue act taxing interest received by foreign corporations from such residents. What to do when a foreign corporation received interest from the United States? Mr. Justice Sutherland decided that this country resided in itself. He found a spirit willing to take up residence though the flesh was weak, if indeed not entirely missing. The ingenuity of the solution compels admiration, whatever misgivings it may engender as to our self-containment.

So the courts now and again prevent erratic omissions or errant words from defeating legislative purpose, even though they thereby disregard conventional canons of construction. We come upon an intriguing but quite different problem when we consider what should be the fair import of legislative silence in the wake of statutory interpretation embodied in the occasional precedent that proves increasingly unsound in the solution of subsequent cases. Barring those exceptional situations where the entrenched precedent has engendered so much reliance that its liquidation would do more harm than good, the court should be free to overrule such a precedent despite legislative inaction.

It is unrealistic to suppose that the legislature can note, much less deliberate, the effect of each judicial interpretation of a statute, absorbed as it is with forging legislation for an endless number and variety of problems, under the constant pressure of considerations of urgency and expediency. The fiction that the failure of the legislature to repudiate an erroneous judicial interpretation amounts to an incorporation of that interpretation into the statute not only assumes that the legislature has embraced something that it may not even be aware of, but bars the court from reexamining its own errors, consequences as unnecessary as they are serious.

It is ironic that an unsound interpretation of a statute should gain strength merely because it has stood unnoticed by the legislature. It is a mighty assumption that legislative silence means applause. It is much more likely to mean ignorance or indifference. Thus time after time a judicial

opinion calls out loud and clear that there is an unresolved problem or patent injustice that can be remedied only by the legislature. The message may be heard round the world of legal commentators who listen intently for such reports. Rarely, however, does it reach the ears of legislators across the clamor and the static of legislative halls. It would be high comedy, were it not for the sometimes sad repercussions, that we are wont solemnly to attribute significance to the silence of legislators. There can be idle silence as well as idle talk.

In spelling out rules that form a Morse code common to statutes and judicial decisions, and in the United States common even to the constitution of the country and the constitutions of the states, courts keep the law straight on its course. That high responsibility should not be reduced to a mean task of keeping the law straight and narrow. It calls for literate, not literal judges.

The very independence of judges, fostered by judic office even when not guaranteed by tenure, and their continuous adjustment of sight to varied problems tend to develop in the least of them some skill in the evaluation of massive data. They learn to detect latent quackery in medicine, to question doddered scientific findings, to edit the swarm spore of the social scientists, to add grains of salt to the fortune-telling statistics of the economists. Moreover, as with cases or legal theories not covered by the briefs, they are bound in fairness to direct the attention of counsel to such materials, if it appears that they may affect the outcome of the case, and to give them the opportunity to submit additional briefs. So the miter square of legal analysis, the marking blades for fitting and joining, reduce any host of materials to the gist of a legal construction.

Regardless of whether it is attended by abundant or meager materials, a case may present competing considerations of such closely matched strength as to create a dilemma. How can a judge then arrive at a decision one way or the other and yet avoid being arbitrary? If he has a high sense of judicial responsibility, he is loath to make an arbitrary choice even of acceptably rational alternatives, for he would thus abdicate the responsibility of judgment when it proved most difficult. He rejects coin-tossing, though it would make a great show of neutrality. Then what?

He is painfully aware that a decision will not be saved from being arbitrary merely because he is disinterested. He knows well enough that one entrusted with decision, traditionally above base prejudices, must also rise above the

vanity of stubborn preconceptions, sometimes euphemistically called the courage of one's convictions. He knows well enough that he must severely discount his own predilections, of however high grade he regards them, which is to say he must bring to his intellectual labors a cleansing doubt of his omniscience, indeed even of his perception. Disinterest, however, even disinterest envisaged on a higher plane than the emotional, is only the minimum qualification of a judge for his job. Then what more?

He comes to realize how essential it is also that he be intellectually interested in a rational outcome. He cannot remain disoriented forever, his mind suspended between alternative passable solutions. Rather than to take the easy way out via one or the other, he can strive to deepen his inquiry and his reflection enough to arrive at last at a value judgment as to what the law ought to be and to spell ut why. In the course of doing so he channels his interest .n a rational outcome into an interest in a particular result. In that limited sense he becomes result-oriented, an honest term to describe the stubbornly rational search for the optimum decision. Would we have it otherwise? Would we give up the value judgment for an abdication of judicial responsibility, for the toss of the two-faced coin?

In sum, judicial responsibility connotes far more than a mechanical application of given rules to new sets of facts. It connotes the recurring formulation of new rules to supplement or displace the old. It connotes the recurring choice of one policy over another in that formulation, and an articulation of the reasons therefor.

Even so much, however, constituting the judicial contribution to lawmaking, adds up to no more than interweaving in the reformation of law. If judges must be much more than passive mechanics, they must certainly remain much less than zealous reformers. They would serve justice ill by weaving samplers of law with ambitious designs for reform. Judges are not equipped for such work, confined as they are to the close work of imposing design on fragments of litigation. Dealing as they do with the bits and pieces that blow into their shop on a random wind, they cannot guess at all that lies outside their line of vision nor foresee what may still appear.

As one who has declared himself against the perpetuation of ancient fabrics that no longer shield us from storms, if they ever did, I should like now to voice a cautionary postscript against judges rushing in where well-meaning angels of mercy tread, hawking their new methods of fabrication.

The zealots of law reform too often are as indifferent to exacting standards of quality control as the mechanics of the status quo. Moreover, we cannot be so tolerant of heedless ventures in new directions in courts as in legislatures, given the constant risk that judicial error will become frozen as stare decisis.

We could wish that modern legislatures, often abundantly equipped to carry the main responsibility for lawmaking, would be weaving grand designs of law as informed and inspired reformers. Instead we must rue with Judge Friendly *The Gap in Lawmaking—Judges Who Can't and Legislators Who Won't*. He laments that "the legislator has diminished the role of the judge by occupying vast fields and then has failed to keep them ploughed."

Certainly courts are helpless to stay the maddening sequences of triumphal entry and sit-in. What is frustration to them, however, could be challenge to the scholars. Steepe in special knowledge of one field or another, they can wel place their knowledge at the service of legislatures for the plowing of the fields, for their sowing and their care. Who but the scholars have the freedom as well as the nurturing intellectual environment to differentiate the good growth from the rubbish and to mark for rejection the diseased anachronism, the toadstool formula, the scrub of pompous phrases?

There is a tragic waste in the failure to correlate all our machinery for vigil to maximum advantage. Is it not time to break the force of habit that militates against steady communication between legislators in unplowed fields and scholarly watchbirds in bleachers? It is for no more sinister reason than lethargy that we have failed in large measure to correlate the natural resources of legislators who have an ear to the ground for the preemption of new fields and of scholars who have an eye on their long-range development.

Perhaps we can make a beginning by calling upon legislators to take the initiative in establishing permanent lines of communication. The scholars can hardly take that initiative, for they are not lobbyists. Why not invite their ideas through the good offices of a legislative committee that can insure their careful consideration? Why not, particularly when some legislatures are now equipped with permanent legislative aids, and here and there law schools have now set up legal centers, and there remains only to set up permanent lines of communication between them? The natural agency for such communication is a law revision commission such as those long since established in New York and California

or the ones established for England and Scotland by the 1965 Law Commissions Act.

A law school offers an ideal environment for such a commission. It could there devote itself wholeheartedly to the formulation and drafting of statutes as well as to continuing re-examination of their fitness for survival. It could withstand the prevailing winds of pressure groups as it made timely use of the abundant wasting assets of scholarly studies. One can hardly imagine more valuable interchange for the law than that between those entrusted to review it critically and those entrusted to draft proposals for its revision. On a wide front they could collaborate in long-range studies of legal needs that would richly complement the applied research that legislatures recurringly ask of their legislative aids. In turn the work of the commissions would offer hearty sustenance not only to the law reviews but to all the other projects of a law school, not the least of which is the classroom. Such permanent relationships between law schools and law revision commissions, going far beyond today's occasional associations, would strengthen their beneficent influence on legislation.

Perhaps the story of law reform would get better as it went along if scholars steadily established quality controls for the weaving of law, spurring legislators to legislate when necessary and to legislate well, and untangling the problems that advance upon courts, to smooth the task of judicial decision. There comes to mind a story of pioneering times called The Weaver's Children, which begins:

"Many years ago a little woolen mill stood in a ravine . . . The little mill filled the space between a rushing stream and a narrow road."

The mill might symbolize the world of scholars, in law schools or on law revision commissions, in legislatures or courts, as well as in public or private practice. The weavers in the mill would keep a weather eye out for the volume and course of the rushing stream, of life itself, to calculate the tempo for the weaving of statutes. They would also keep a weather eye out for traffic conditions on the narrow road, estimating therefrom the tempo at which motley caravans could unload their variegated sacks of litigation. The mill would be a model of rational methods of weaving.

One might envisage such a development less as a happy ending to the story of law reform than as an ideal way for it to be continued. So I have thought, in saying now and again, that the law will never be built in a day, and with luck it will never be finished.

Memorandum 69-65

EXHIBIT III

ALASKA LEGISLATIVE COUNCIL

LEGISLATIVE AFFAIRS AGENCY

LEGISLATIVE OVERSIGHT OF THE

ADMINISTRATION OF STATUTES

Regulations of the Department of Public Safety
Department of Public Works

Review of Supreme Court Opinions
Review of Attorney General Opinions

Suggested Legislation

JANUARY 1967

FOREWORD

AS 24.20.065(a) provides that the Legislative Council shall annually examine administrative regulations, published opinions of state and federal courts and of the Department of Law that rely on state statutes, and final decisions adopted under the Administrative Procedure Act (AS 44.62) to determine whether or not

(1) the courts and agencies are properly implementing legislative purposes;

(2) there are court or agency expressions of dissatisfaction with state statutes;

(3) the opinions or regulations indicate unclear or ambiguous statutes.

Under AS 24.20.065(b) the council is to make a comprehensive report of its findings and recommendations to the members of the legislature at the start of each regular session. This is that report.

The oversight of the administration of statutes is one of the most vital functions performed by the Legislature. When enacting statute law the legislature in many cases delegates what amounts to legislative power to administrative agencies to promulgate regulations or administrative law to implement the statute law in detail. The body of administrative law found in the Alaska Administrative Code almost equals the statute law in size and may be expected to surpass it in a few years. The annual review along with the power to annul administrative regulations is the only way the Legislature can retain the necessary control over the powers it delegates and insure that the legislative intent is being followed.

John C. Doyle
Executive Director

January 16, 1967

PART 2

REVIEW OF 1966 STATE SUPREME COURT DECISIONS

1. City of Anchorage v. Lot 1 in Block 68 of the Original Townsite of Anchorage, Alaska, et al, Supreme Ct. Op. No. 316 (File No. 666) Jan. 10, 1966.

It should be noted that this case has been superseded by ch. 122, SLA 1966. The sole substantive question presented in the case was whether a first class city is authorized to use a declaration of taking in eminent domain proceedings commenced with the object of obtaining off-street parking facilities. The court held that AS 29.55.030, when read alone or in conjunction with AS 09.55.420, does not authorize such a taking.

The 1966 legislature passed chapter 122 amending AS 29.55.-030 and AS 09.55.420 to authorize such a taking, thereby nullifying the opinion.

2. City of Seward et al v. Alva Wisdom et al, Supreme Court Op. No. 342 (File No. 627) May 5, 1966.

The appeal in this case raises the question of whether, at the time of his death, Alva Wisdom was an employee of the City of Seward. After the March 27, 1964, Alaska earthquake, Mr. Wisdom asked if he could be of assistance and the Seward chief of police sent him to help clear an access road. He was doing this when the tidal wave hit Seward and he was drowned. The Alaska Workmen's Compensation Board determined that Alva Wisdom was an employee of the City of Seward at the time he drowned.

The board concluded that Mrs. Wisdom was entitled to death benefits of $28.35 weekly from March 27, 1964, until death or remarriage, with 104 weeks' benefits in a lump sum upon remarriage, and funeral expenses not exceeding $1,000 and statutory attorney fees based on compensation awarded by the board. The board's decision was upheld on appeal to the Superior Court.

The Supreme Court held that Alva Wisdom was not an employee of the City of Seward at the time of his death and therefore his widow was not entitled to receive death benefits under the Alaska Workmen's Compensation Act. The court said "The relationship of employer-employee can only be created by a contract, which may be express or implied." The court held that since Mr. Wisdom volunteered to help and made no request for remuneration and compensation was not discussed, no contract of employment either express or implied existed at the time of his death.

The court concludes:

> "We are of the opinion that in an emergency of this magnitude, which in turn involved large numbers of Seward's citizens, it was not the intent of the legislature that all volunteers were to be considered employees for purposes of the act. Whether or not our compensation act is to have such an expansive reach is, in our opinion, a judgment which appropriately rests with the legislature. Not only is this broad question deserving of consideration by the legislature but the instant case warrants the legislature's consideration of affording special relief to Alva Wisdom's widow." (emphasis supplied)

The legislature may wish to consider this Supreme Court recommendation.

3. James A. Watts et al v. Seward School Board et al, Supreme Ct. Op. No. 380 (File No. 427) December 7, 1966.

In 1964, the Supreme Court upheld the action of the Seward School Board in refusing to renew Watts' and Blue's teaching contracts in the Seward Public Schools on the ground that the teachers had engaged in "immoral" conduct under the definition in AS 14.20.170. /1 AS 14.20.170 lists the causes for nonretention of a teacher, one of which is immorality which is defined as conduct of the person tending to bring the individual concerned or the teaching profession into public disgrace or disrespect. The "immoral" action of Mr. Watts and Mr. Blue was the solicitation of labor union and fellow teachers to support the removal from office of the superintendent of schools and members of the school board.

/1 395 P 2d 372, Opinion No. 251 of September 21, 1964.

In 1965 the legislature enacted chapter 14 which states that

> "Sec. 14.20.095. RIGHT TO COMMENT AND CRITICIZE NOT TO BE RESTRICTED. No rule or regulation of the commissioner of education, a local school board, or local school administrator may restrict or modify the right of a teacher to engage in comment and criticism outside school hours, relative to school administrators, members of the governing body of any school or school district, any other public official, or any school employee, to the same extent that any private individual may exercise the right."

Also in 1965 the legislature amended AS 14.20.090 to define immorality as the commission of an act which constitutes a crime involving moral turpitude. /2 AS 14.20.090 lists the causes for revocation of a teaching certificate. Undoubtedly the legislature erred in not also amending the definition of immorality in AS 14.20.170 in the same manner. This error was corrected in the 1966 legislative session. /3 In order that there is no doubt of the legislative intent in passing the 1966 amendment, the House Judiciary Committee prepared the following committee report which was printed in the House Journal:

REPORT OF HOUSE JUDICIARY COMMITTEE

ON HOUSE COMMITTEE SUBSTITUTE FOR SENATE BILL NO. 6

In Watts and Blue v. Seward School Board, Alaska Supreme Court No. 427, Sept. 1964, the court construed AS 14.20.170-(2) which is amended by HOUSE COMMITTEE SUBSTITUTE FOR SENATE BILL NO. 6. In that case the court held that two teachers, Mr. Watts and Mr. Blue, could be discharged because their action in soliciting labor union and fellow teachers for support in removing the school superintendent and members of the school board from office was an immoral act under Alaska law.

The case was taken to the United States Supreme Court (Watts v. Seward School Board Per Curiam No. 923) which said: 'We need not consider petitioners' contentions at this time, for since their petition for certiorari was filed, Alaska

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/2 sec. 1, ch. 41, SLA 1965.
/3 ch. 104, SLA 1966.