

Lecture IV. Adherence to Precedent.  
The Subconscious Element in the  
Judicial Process. Conclusion.

THE system of law-making by judicial decisions which supply the rule for transactions closed before the decision was announced would indeed be intolerable in its hardship and oppression if natural law, in the sense in which I have used the term, did not supply the main rule of judgment to the judge when precedent and custom fail or are displaced. Acquiescence in such a method has its basis in the belief that when the law has left the situation uncovered by any pre-existing rule, there is nothing to do except to have some impartial arbiter declare what fair and reasonable men, mindful of the habits of life of the community, and of the standards of justice and fair dealing prevalent among them, ought in such circumstances to do, with no rules except those of custom and con-

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science to regulate their conduct. The feeling is that nine times out of ten, if not oftener, the conduct of right-minded men would not have been different if the rule embodied in the decision had been announced by statute in advance. In the small minority of cases, where ignorance has counted, it is as likely to have affected one side as the other; and since a controversy has arisen and must be determined somehow, there is nothing to do, in default of a rule already made, but to constitute some authority which will make it after the event. Some one must be the loser; it is part of the game of life; we have to pay in countless ways for the absence of prophetic vision. No doubt the ideal system, if it were attainable, would be a code at once so flexible and so minute, as to supply in advance for every conceivable situation the just and fitting rule. But life is too complex to bring the attainment of this ideal within the compass of human powers. We must recognize the truth, says Gény,<sup>1</sup> that the will (*la volonté*) which inspires a statute

<sup>1</sup> *Op. cit.*, Preface, p. xvi.

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"extends only over a domain of concrete facts, very narrow and very limited. Almost always, a statute has only a single point in view. All history demonstrates that legislation intervenes only when a definite abuse has disclosed itself, through the excess of which public feeling has finally been aroused. When the legislator interposes, it is to put an end to such and such facts, very clearly determined, which have provoked his decision. And if, to reach his goal, he thinks it proper to proceed along the path of general ideas and abstract formulas, the principles that he announces have value, in his thought, only in the measure in which they are applicable to the evils which it was his effort to destroy, and to similar conditions which would tend to spring from them. As for other logical consequences to be deduced from these principles, the legislator has not suspected them; some, perhaps many, if he had foreseen, he would not have hesitated to repudiate. In consecrating them, no one can claim either to be following his will or to be bowing to his judgment. All that one does

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thereby is to develop a principle, henceforth isolated and independent of the will which created it, to transform it into a new entity, which in turn develops of itself, and to give it an independent life, regardless of the will of the legislator and most often in despite of it." These are the words of a French jurist, writing of a legal system founded on a code. The gaps inevitable in such a system must, at least in equal measure, be inevitable in a system of case law built up, haphazard, through the controversies of litigants.<sup>2</sup> In each system, hardship must at times result from postponement of the rule of action till a time when action is complete. It is one of the consequences of the limitations of the human intellect and of the denial to legislators and judges of infinite prevision. But the truth is, as I have said, that even when there is ignorance of the rule, the cases are few in which ignorance has determined conduct. Most often the controversy arises about something that would

<sup>2</sup> Pollack, "Essays in Jurisprudence and Ethics; The Science of Case Law," p. 241.

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have happened anyhow. An automobile is manufactured with defective wheels. The question is whether the manufacturer owes a duty of inspection to anyone except the buyer.<sup>3</sup> The occupant of the car, injured because of the defect, presses one view upon the court; the manufacturer, another. There is small chance, whichever party prevails, that conduct would have been different if the rule had been known in advance. The manufacturer did not say to himself, "I will not inspect these wheels, because that is not my duty." Admittedly, it was his duty, at least toward the immediate buyer. A wrong in any event has been done. The question is to what extent it shall entail unpleasant consequences on the wrongdoer.

I say, therefore, that in the vast majority of cases the retrospective effect of judge-made law is felt either to involve no hardship or only such hardship as is inevitable where no rule has been declared. I think it is significant that when the hardship is felt to be too great or to be un-

<sup>3</sup> MacPherson v. Buick Motor Co., 217 N. Y. 382.

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necessary, retrospective operation is withheld. Take the cases where a court of final appeal has declared a statute void, and afterward, reversing itself, declares the statute valid. Intervening transactions have been governed by the first decision. What shall be said of the validity of such transactions when the decision is overruled? Most courts in a spirit of realism have held that the operation of the statute has been suspended in the interval.<sup>4</sup> It may be hard to square such a ruling with abstract dogmas and definitions. When so much else that a court does is done with retroactive force, why draw the line here? The answer is, I think, that the line is drawn here, because the injustice and oppression of a refusal to draw it would be so great as to be intolerable. We will not help out the man who has

<sup>4</sup> Harris v. Jex, 55 N. Y. 421; Gelpcke v. Dubuque, 1 Wall. 125; Holmes, J., in Kuhn v. Fairmount Coal Co., 215 U. S. 349, 371; 29 Harvard L. R. 80, 103; Danchev Co. v. Farny, 105 Misc. 470; Freeman, "Retroactive Operation of Decisions," 18 Columbia L. R. p. 230; Gray, *supra*, secs. 547, 548; Carpenter, "Court Decisions and the Common Law," 17 Columbia L. R. 593.

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trusted to the judgment of some inferior court.<sup>5</sup> In his case, the chance of miscalculation is felt to be a fair risk of the game of life, not different in degree from the risk of any other misconception of right or duty. He knows that he has taken a chance, which caution often might have avoided. The judgment of a court of final appeal is felt to stand upon a different basis. I am not sure that any adequate distinction is to be drawn between a change of ruling in respect of the validity of a statute and a change of ruling in respect of the meaning or operation of a statute,<sup>6</sup> or even in respect of the meaning or operation of a rule of common law.<sup>7</sup> Where the line of division will some day be located, I will make no attempt to say. I feel assured, however, that its location, wherever it shall be, will be governed, not by metaphysical conceptions of the nature of judge-made law, nor by the fetich of some implacable tenet, such as that of the division of

<sup>5</sup> *Evans v. Supreme Council*, 223 N. Y. 497, 503.

<sup>6</sup> *Douglass v. County of Pike*, 101 U. S. 677.

<sup>7</sup> Cf. Wigmore, "The Judicial Function," Preface to 9 *Modern Legal Philosophy Series*, pp. xxxvii, xxxviii.

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governmental powers,<sup>8</sup> but by considerations of convenience, of utility, and of the deepest sentiments of justice.

In these days, there is a good deal of discussion whether the rule of adherence to precedent ought to be abandoned altogether.<sup>9</sup> I would not go so far myself. I think adherence to precedent should be the rule and not the exception. I have already had occasion to dwell upon some of the considerations that sustain it. To these I may add that the labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him. Perhaps the constitution of my own court has tended to accentuate this belief. We have had ten judges, of whom

<sup>8</sup> Laski, "Authority in the Modern State," pp. 70, 71; Green, "Separation of Governmental Powers," 29 *Yale L. J.* 371.

<sup>9</sup> "Rule and Discretion in the Administration of Justice," 33 *Harvard L. R.* 972; 29 *Yale L. J.* 909; 34 *Harvard L. R.* 74; 9 *Modern Legal Philosophy Series*, Preface, p. xxxvi.

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only seven sit at a time. It happens again and again, where the question is a close one, that a case which one week is decided one way might be decided another way the next if it were then heard for the first time. The situation would, however, be intolerable if the weekly changes in the composition of the court were accompanied by changes in its rulings. In such circumstances there is nothing to do except to stand by the errors of our brethren of the week before, whether we relish them or not. But I am ready to concede that the rule of adherence to precedent, though it ought not to be abandoned, ought to be in some degree relaxed. I think that when a rule, after it has been duly tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare, there should be less hesitation in frank avowal and full abandonment. We have had to do this sometimes in the field of constitutional law.<sup>10</sup> Perhaps we should do so oftener in fields of private law where considerations of social utility are not so

<sup>10</sup> *Klein v. Maravelas*, 219 N. Y. 383.

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aggressive and insistent. There should be greater readiness to abandon an untenable position when the rule to be discarded may not reasonably be supposed to have determined the conduct of the litigants, and particularly when in its origin it was the product of institutions or conditions which have gained a new significance or development with the progress of the years. In such circumstances, the words of Wheeler, J., in *Dwy v. Connecticut Co.*, 89 Conn. 74, 99, express the tone and temper in which problems should be met: "That court best serves the law which recognizes that the rules of law which grew up in a remote generation may, in the fullness of experience, be found to serve another generation badly, and which discards the old rule when it finds that another rule of law represents what should be according to the established and settled judgment of society, and no considerable property rights have become vested in reliance upon the old rule. It is thus great writers upon the common law have discovered the source and method of its growth, and in its growth found its health and

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life. It is not and it should not be stationary. Change of this character should not be left to the legislature." If judges have woefully misinterpreted the *mores* of their day, or if the *mores* of their day are no longer those of ours, they ought not to tie, in helpless submission, the hands of their successors.

Let me offer one or two examples to make my meaning plainer. I offer them tentatively and without assurance that they are apt. They will be helpful none the less. The instance may be rejected, but the principle abides.

It is a rule of the common law that a surety is discharged from liability if the time of payment is extended by contract between the principal debtor and the creditor without the surety's consent. Even an extension for a single day will be sufficient to bring about that result.<sup>11</sup> Without such an extension, the surety would have the privilege upon the maturity of the debt of making payment to the creditor, and demanding immediate subrogation to the latter's remedies

<sup>11</sup> N. Y. Life Ins. Co. v. Casey, 178 N. Y. 381.

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against the principal. He must, therefore, it is said, be deemed to have suffered prejudice if, by extension of the due date, the right has been postponed. I have no doubt that this rule may justly be applied whenever the surety can show that the extension has resulted in actual damage, as where the principal in the interval has become insolvent, or the value of the security has been impaired, though even in such circumstances the measure of exoneration ought in justice to be determined by the extent of the damage suffered. Perhaps there might be justice in permitting exoneration whenever the surety had tendered payment of the debt, and demanded subrogation to the remedies against the debtor. Perhaps the burden of disproving prejudice ought to be cast upon the creditor. No such limitations have been recognized. The rule applies to cases where neither tender nor actual damage is established or pretended. The law has shaped its judgments upon the fictitious assumption that a surety, who has probably lain awake at nights for fear that payment may some day be demanded, has

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in truth been smarting under the repressed desire to force an unwelcome payment on a reluctant or capricious creditor. The extended period has gone by; the surety has made no move, has not even troubled himself to inquire; yet he is held to be released on the theory that were it not for the extension, of which he knew nothing, and by which his conduct could not have been controlled, he would have come forward voluntarily with a tender of the debt. Such rules are survivals of the days when commercial dealings were simpler, when surety companies were unknown, when sureties were commonly generous friends whose confidence had been abused, and when the main effort of the courts seems to have been to find some plausible excuse for letting them out of their engagements. Already I see some signs of a change of spirit in decisions of recent dates.<sup>12</sup> I think we may well ask ourselves whether courts are not under a duty to go

<sup>12</sup> *Wilkinson v. McKemie*, 229 U. S. 590, 593; *U. S. v. McMullen*, 222 U. S. 460, 468; *Richardson v. County of Steuben*, 226 N. Y. 13; *Assets Realization Co. v. Roth*, 226 N. Y. 370.

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farther, and place this branch of the law upon a basis more consistent with the realities of business experience and the moralities of life.

It is another rule of the common law that a parol agreement, though subsequently made, is ineffective to vary or discharge a contract under seal.<sup>13</sup> In days when seals counted for a good deal, there may have been some reason in this recognition of a mystical solemnity. In our day, when the perfunctory initials "L. S." have replaced the heraldic devices, the law is conscious of its own absurdity when it preserves the rubrics of a vanished era.<sup>14</sup> Judges have made worthy, if shamefaced, efforts, while giving lip service to the rule, to riddle it with exceptions and by distinctions reduce it to a shadow.<sup>15</sup> A recent case suggests that timidity, and not reverence, has postponed the hour of dissolution.<sup>16</sup> The law

<sup>13</sup> *McCreery v. Day*, 119 N. Y. 1; 3 *Williston on Contracts*, secs. 1835, 1836.

<sup>14</sup> *Harris v. Shorall*, 230 N. Y. 343.

<sup>15</sup> *McCreery v. Day*, *supra*; *Thomson v. Poor*, 147 N. Y. 402.

<sup>16</sup> *Harris v. Shorall*, *supra*.

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will have cause for gratitude to the deliverer who will strike the fatal blow.

I have drawn illustrations from the field of substantive law. The law of evidence and generally the whole subject of procedure supply fields where change may properly be made with a freedom even greater. The considerations of policy that dictate adherence to existing rules where substantive rights are involved, apply with diminished force when it is a question of the law of remedies. Let me take an illustration from the law of evidence. A man is prosecuted for rape. His defense is that the woman consented. He may show that her *reputation* for chastity is bad. He may not show specific, even though repeated, acts of unchastity with another man or other men.<sup>17</sup> The one thing that any sensible trier of the facts would wish to know above all others in estimating the truth of his defense is held by an inflexible rule to be something that must be excluded from the consideration of the jury. Even though the woman takes

<sup>17</sup> *People v. Carey*, 223 N. Y. 519.

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the stand herself, the defendant is not greatly helped, for though he may then cross-examine her about other acts, he is concluded by her answer. Undoubtedly a judge should exercise a certain discretion in the admission of such evidence, should exclude it if too remote, and should be prompt by granting a continuance or otherwise to obviate any hardship resulting from surprise. That is not the effect of the present rule. The evidence is excluded altogether and always. Some courts, indeed, have taken a different view, but their number unfortunately is small. Here, as in many other branches of the law of evidence, we see an exaggerated reliance upon general reputation as a test for the ascertainment of the character of litigants or witnesses. Such a faith is a survival of more simple times. It was justified in days when men lived in small communities. Perhaps it has some justification even now in rural districts. In the life of great cities, it has made evidence of character a farce. Here, as in many other branches of adjective law, a spirit of realism should bring about a

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harmony between present rules and present needs.

None the less, the rule of adherence to precedent is applied with less rigidity in the United States than in England, and, I think, with a rigidity that is diminishing even here. The House of Lords holds itself absolutely bound by its own prior decisions.<sup>18</sup> The United States Supreme Court and the highest courts of the several states overrule their own prior decisions when manifestly erroneous.<sup>19</sup> Pollock, in a paper entitled "The Science of Case Law," written more than forty years ago, spoke of the freedom with which this was done, as suggesting that the law was nothing more than a matter of individual opinion.<sup>20</sup> Since then the tendency has, if anything, increased. An extreme illustration may be

<sup>18</sup> Gray, *supra*, sec. 462; Salmond, "Jurisprudence," p. 164, sec. 64; Pound, "Juristic Science and the Law," 31 Harvard L. R. 1053; London Street Tramways Co. v. London County Council, 1898, A. C. 375, 379.

<sup>19</sup> Pollock, "First Book of Jurisprudence," pp. 319, 320; Gray, "Judicial Precedents," 9 Harvard L. R. 27, 40.

<sup>20</sup> "Essays in Jurisprudence and Ethics," p. 245.

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found in a recent decision of a federal court.<sup>21</sup> The plaintiff sued a manufacturer of automobiles to recover damages for personal injuries resulting from a defective car. On the first trial he had a verdict, which the Circuit Court of Appeals for the second circuit reversed on the ground that the manufacturer owed no duty to the plaintiff, the occupant of the car, since the latter was not the original purchaser, but had bought from some one else.<sup>22</sup> On a second trial, the judge, in obedience to this ruling, dismissed the complaint, and a writ of error brought the case before the same appellate court again. In the meantime, the New York Court of Appeals had held, in an action against another manufacturer, that there was a duty in such circumstances, irrespective of privity of contract.<sup>23</sup> The federal court followed that decision, overruled its prior ruling, and reversed the judgment of dismissal which had been entered in compliance with its mandate. The defendant in that case who first reversed the

<sup>21</sup> Johnson v. Cadillac Motor Co., 261 Fed. Rep. 878.

<sup>22</sup> 221 Fed. Rep. 80r.

<sup>23</sup> MacPherson v. Buick Motor Co., 217 N. Y. 382.

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judgment because the complaint had *not* been dismissed, and then suffered a reversal because on the same evidence the complaint *had* been dismissed, probably has some views of his own about the nature of the judicial process. I do not attempt to say whether departure from the rule of adherence to precedent was justified in such conditions. One judge dissenting held the view that the earlier decision should have been applied as the law of the case irrespective of its correctness, like the rules of *res adjudicata*. The conclusion of the majority of the court, whether right or wrong, is interesting as evidence of a spirit and a tendency to subordinate precedent to justice. How to reconcile that tendency, which is a growing and in the main a wholesome one, with the need of uniformity and certainty, is one of the great problems confronting the lawyers and judges of our day. We shall have to feel our way here as elsewhere in the law. Somewhere between worship of the past and exaltation of the present the path of safety will be found.

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Our survey of judicial methods teaches us, I think, the lesson that the whole subject matter of jurisprudence is more plastic, more malleable, the moulds less definitively cast, the bounds of right and wrong less preordained and constant, than most of us, without the aid of some such analysis, have been accustomed to believe. We like to picture to ourselves the field of the law as accurately mapped and plotted. We draw our little lines, and they are hardly down before we blur them. As in time and space, so here. Divisions are working hypotheses, adopted for convenience. We are tending more and more toward an appreciation of the truth that, after all, there are few rules; there are chiefly standards and degrees. It is a question of degree whether I have been negligent. It is a question of degree whether in the use of my own land, I have created a nuisance which may be abated by my neighbor. It is a question of degree whether the law which takes my property and limits my conduct impairs my liberty unduly. So also the duty of a judge becomes itself a question of degree, and

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he is a useful judge or a poor one as he estimates the measure accurately or loosely. He must balance all his ingredients, his philosophy, his logic, his analogies, his history, his customs, his sense of right, and all the rest, and adding a little here and taking out a little there, must determine, as wisely as he can, which weight shall tip the scales. If this seems a weak and inconclusive summary, I am not sure that the fault is mine. I know he is a wise pharmacist who from a recipe so general can compound a fitting remedy. But the like criticism may be made of most attempts to formulate the principles which regulate the practice of an art. W. Jethro Brown reminds us in a recent paper on "Law and Evolution"<sup>24</sup> that "Sir Joshua Reynolds' book on painting, offers little or no guidance to those who wish to become famous painters. Books on literary styles are notoriously lacking, speaking as a rule, in practical utility." After the wearisome process of analysis has been finished, there must be for every judge a new synthesis which

<sup>24</sup> 29 Yale L. J. 394, 397.

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he will have to make for himself. The most that he can hope for is that with long thought and study, with years of practice at the bar or on the bench, and with the aid of that inward grace which comes now and again to the elect of any calling, the analysis may help a little to make the synthesis a true one.

In what I have said, I have thrown, perhaps too much, into the background and the shadow the cases where the controversy turns not upon the rule of law, but upon its application to the facts. Those cases, after all, make up the bulk of the business of the courts. They are important for the litigants concerned in them. They call for intelligence and patience and reasonable discernment on the part of the judges who must decide them. But they leave jurisprudence where it stood before. As applied to such cases, the judicial process, as was said at the outset of these lectures, is a process of search and comparison, and little else. We have to distinguish between the precedents which are merely static, and those

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which are dynamic.<sup>25</sup> Because the former outnumber the latter many times, a sketch of the judicial process which concerns itself almost exclusively with the creative or dynamic element, is likely to give a false impression, an overcolored picture, of uncertainty in the law and of free discretion in the judge. Of the cases that come before the court in which I sit, a majority, I think, could not, with semblance of reason, be decided in any way but one. The law and its application alike are plain. Such cases are predestined, so to speak, to affirmance without opinion. In another and considerable percentage, the rule of law is certain, and the application alone doubtful. A complicated record must be dissected, the narratives of witnesses, more or less incoherent and unintelligible, must be analyzed, to determine whether a given situation comes within one district or another upon the chart of rights and wrongs. The traveler who knows that a railroad crosses his path must look for approaching trains. That is at least the gen-

<sup>25</sup> Cf. Salmond, "Jurisprudence," p. 160.

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eral rule. In numberless litigations the description of the landscape must be studied to see whether vision has been obstructed, whether something has been done or omitted to put the traveler off his guard. Often these cases and others like them provoke difference of opinion among judges. Jurisprudence remains untouched, however, regardless of the outcome. Finally there remains a percentage, not large indeed, and yet not so small as to be negligible, where a decision one way or the other, will count for the future, will advance or retard, sometimes much, sometimes little, the development of the law. These are the cases where the creative element in the judicial process finds its opportunity and power. It is with these cases that I have chiefly concerned myself in all that I have said to you. In a sense it is true of many of them that they might be decided either way. By that I mean that reasons plausible and fairly persuasive might be found for one conclusion as for another. Here come into play that balancing of judgment, that testing and sorting of considerations of analogy

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candor in much of the discussion of the theme, or rather perhaps in the refusal to discuss it, as if judges must lose respect and confidence by the reminder that they are subject to human limitations. I do not doubt the grandeur of the conception which lifts them into the realm of pure reason, above and beyond the sweep of perturbing and deflecting forces. None the less, if there is anything of reality in my analysis of the judicial process, they do not stand aloof on these chill and distant heights; and we shall not help the cause of truth by acting and speaking as if they do. The great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by. We like to figure to ourselves the processes of justice as coldly objective and impersonal. The law, conceived of as a real existence, dwelling apart and alone, speaks, through the voices of priests and ministers, the words which they have no choice except to utter. That is an ideal of objective truth toward which

"The Foundations of Social Science," by James Mickel Williams, p. 209 *et seq.*

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every system of jurisprudence tends. It is an ideal of which great publicists and judges have spoken as of something possible to attain. "The judges of the nation," says Montesquieu, "are only the mouths that pronounce the words of the law, inanimate beings, who can moderate neither its force nor its rigor."<sup>28</sup> So Marshall, in *Osborne v. Bank of the United States*, 9 Wheat. 738, 866: The judicial department "has no will in any case. . . . Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislature; or in other words, to the will of the law." It has a lofty sound; it is well and finely said; but it can never be more than partly true. Marshall's own career is a conspicuous illustration of the fact that the ideal is beyond the reach of human faculties to attain. He gave to the constitution of the United States the impress of his own mind; and the form of

<sup>28</sup> Montesquieu, "Esprit des Lois," LIV, XI, chap. VI, quoted by Ehrlich, "Die juristische Logik," p. 101; Gény, *op. cit.*, p. 76; cf. Flavius, *supra*, p. 40.

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our constitutional law is what it is, because he moulded it while it was still plastic and malleable in the fire of his own intense convictions. At the opposite extreme are the words of the French jurist, Saleilles, in his treatise "De la Personnalité Juridique":<sup>29</sup> "One wills at the beginning the result; one finds the principle afterwards; such is the genesis of all juridical construction. Once accepted, the construction presents itself, doubtless, in the ensemble of legal doctrine, under the opposite aspect. The factors are inverted. The principle appears as an initial cause, from which one has drawn the result which is found deduced from it." I would not put the case thus broadly. So sweeping a statement exaggerates the element of free volition. It ignores the factors of determinism which cabin and confine within narrow bounds the range of unfettered choice. None the less, by its very excess of emphasis, it supplies the needed corrective of an ideal of impossible objectivity. Nearer to the truth, and midway between these

<sup>29</sup> Pp. 45, 46.

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extremes, are the words of a man who was not a jurist, but whose intuitions and perceptions were deep and brilliant—the words of President Roosevelt in his message of December 8, 1908, to the Congress of the United States:<sup>30</sup> "The chief lawmakers in our country may be, and often are, the judges, because they are the final seat of authority. Every time they interpret contract, property, vested rights, due process of law, liberty, they necessarily enact into law parts of a system of social philosophy; and as such interpretation is fundamental, they give direction to all law-making. The decisions of the courts on economic and social questions depend upon their economic and social philosophy; and for the peaceful progress of our people during the twentieth century we shall owe most to those judges who hold to a twentieth century economic and social philosophy and not to a long outgrown philosophy, which was itself the product of primitive economic conditions."

I remember that this statement when made

<sup>30</sup> 43 Congressional Record, part 1, p. 21.

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aroused a storm of criticism. It betrayed ignorance, they said, of the nature of the judicial process. The business of the judge, they told us, was to discover objective truth. His own little individuality, his tiny stock of scattered and unco-ordinated philosophies, these, with all his weaknesses and unconscious prejudices, were to be laid aside and forgotten. What did men care for *his* reading of the eternal verities? It was not worth recording. What the world was seeking was the eternal verities themselves. Far am I from denying that this is, indeed, the goal toward which all of us must strive. Something of Pascal's spirit of self-search and self-reproach must come at moments to the man who finds himself summoned to the duty of shaping the progress of the law. The very breadth and scope of the opportunity to give expression to his finer self seem to point the accusing finger of disparagement and scorn. What am I that in these great movements onward, this rush and sweep of forces, my petty personality should deflect them by a hairbreadth? Why should the

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pure light of truth be broken up and impregnated and colored with any element of my being? Such doubts and hesitations besiege one now and again. The truth is, however, that all these inward questionings are born of the hope and desire to transcend the limitations which hedge our human nature. Roosevelt, who knew men, had no illusions on this score. He was not positing an ideal. He was not fixing a goal. He was measuring the powers and the endurance of those by whom the race was to be run. My duty as judge may be to objectify in law, not my own aspirations and convictions and philosophies, but the aspirations and convictions and philosophies of the men and women of my time. Hardly shall I do this well if my own sympathies and beliefs and passionate devotions are with a time that is past. "We shall never be able to flatter ourselves, in any system of judicial interpretation, that we have eliminated altogether the personal measure of the interpreter. In the moral sciences, there is no method or procedure which entirely sup-

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plants subjective reason."<sup>31</sup> We may figure the task of the judge, if we please, as the task of a translator, the reading of signs and symbols given from without. None the less, we will not set men to such a task, unless they have absorbed the spirit, and have filled themselves with a love, of the language they must read.

I have no quarrel, therefore, with the doctrine that judges ought to be in sympathy with the spirit of their times. Alas! assent to such a generality does not carry us far upon the road to truth. In every court there are likely to be as many estimates of the "Zeitgeist" as there are judges on its bench. Of the power of favor or prejudice in any sordid or vulgar or evil sense, I have found no trace, not even the faintest, among the judges whom I have known. But every day there is borne in on me a new conviction of the inescapable relation between the truth without us and the truth within. The spirit of the age, as it is revealed to each of us, is too often only

<sup>31</sup> Gény, *op. cit.*, vol. II, p. 93, sec. 159; vol. II, p. 142, sec. 168; also Flavius, p. 43.

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the spirit of the group in which the accidents of birth or education or occupation or fellowship have given us a place. No effort or revolution of the mind will overthrow utterly and at all times the empire of these subconscious loyalties. "Our beliefs and opinions," says James Harvey Robinson,<sup>32</sup> "like our standards of conduct come to us insensibly as products of our companionship with our fellow men, not as results of our personal experience and the inferences we individually make from our own observations. We are constantly misled by our extraordinary faculty of 'rationalizing'—that is, of devising plausible arguments for accepting what is imposed upon us by the traditions of the group to which we belong. We are abjectly credulous by nature, and instinctively accept the verdicts of the group. We are suggestible not merely when under the spell of an excited mob or a fervent revival, but we are ever and always listening to the still small voice of the herd, and are ever ready to defend and

<sup>32</sup> "The Still Small Voice of the Herd," *32 Political Science Quarterly* 315.

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justify its instructions and warnings, and accept them as the mature results of our own reasoning." This was written, not of judges specially, but of men and women of all classes. The training of the judge, if coupled with what is styled the judicial temperament, will help in some degree to emancipate him from the suggestive power of individual dislikes and prepossessions. It will help to broaden the group to which his subconscious loyalties are due. Never will these loyalties be utterly extinguished while human nature is what it is. We may wonder sometimes how from the play of all these forces of individualism, there can come anything coherent, anything but chaos and the void. Those are the moments in which we exaggerate the elements of difference. In the end there emerges something which has a composite shape and truth and order. It has been said that "History, like mathematics, is obliged to assume that eccentricities more or less balance each other, so that something remains constant at last."<sup>38</sup> The like is true of the

<sup>38</sup> Henry Adams, "The Degradation of the Democratic Dogma," pp. 291, 292.

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work of courts. The eccentricities of judges balance one another. One judge looks at problems from the point of view of history, another from that of philosophy, another from that of social utility, one is a formalist, another a latitudinarian, one is timorous of change, another dissatisfied with the present; out of the attrition of diverse minds there is beaten something which has a constancy and uniformity and average value greater than its component elements. The same thing is true of the work of juries. I do not mean to suggest that the product in either case does not betray the flaws inherent in its origin. The flaws are there as in every human institution. Because they are not only there but visible, we have faith that they will be corrected. There is no assurance that the rule of the majority will be the expression of perfect reason when embodied in constitution or in statute. We ought not to expect more of it when embodied in the judgments of the courts. The tide rises and falls, but the sands of error crumble.

## CONCLUSION

The work of a judge is in one sense enduring and in another sense ephemeral. What is good in it endures. What is erroneous is pretty sure to perish. The good remains the foundation on which new structures will be built. The bad will be rejected and cast off in the laboratory of the years. Little by little the old doctrine is undermined. Often the encroachments are so gradual that their significance is at first obscured. Finally we discover that the contour of the landscape has been changed, that the old maps must be cast aside, and the ground charted anew. The process, with all its silent yet inevitable power, has been described by Mr. Henderson with singular felicity:<sup>34</sup> "When an adherent of a systematic faith is brought continuously in touch with influences and exposed to desires inconsistent with that faith, a process of unconscious cerebration may take place, by which a growing store of hostile mental inclinations may accumulate,

<sup>34</sup> "Foreign Corporations in American Constitutional Law," p. 164; cf. Powell, "The Changing Law of Foreign Corporations," 33 Pol. Science Quarterly, p. 569.

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strongly motivating action and decision, but seldom emerging clearly into consciousness. In the meantime the formulas of the old faith are retained and repeated by force of habit, until one day the realization comes that conduct and sympathies and fundamental desires have become so inconsistent with the logical framework that it must be discarded. Then begins the task of building up and rationalizing a new faith."

Ever in the making, as law develops through the centuries, is this new faith which silently and steadily effaces our mistakes and eccentricities. I sometimes think that we worry ourselves overmuch about the enduring consequences of our errors. They may work a little confusion for a time. In the end, they will be modified or corrected or their teachings ignored. The future takes care of such things. In the endless process of testing and retesting, there is a constant rejection of the dross, and a constant retention of whatever is pure and sound and fine.

The future, gentlemen, is yours. We have been called to do our parts in an ageless process. Long

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after I am dead and gone, and my little part in it is forgotten, you will be here to do your share, and to carry the torch forward. I know that the flame will burn bright while the torch is in your keeping.