THE LIMITS OF JUDICIAL OBJECTIVITY*

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It is a privilege to appear as lecturer on this platform honoring a noted American law professor, Edwin A. Mooers, particularly when it is in succession to the first lecturer of the series, the Dean of American legal scholars, Roscoe Pound. I recognize my temerity in venturing a new discussion of a topic which Pound and Cardozo have so definitively explored in modern times and which has stimulated lively thinking from at least the time of Aristotle. My excuse is not only the continuous fascination of the subject, but also the fact that after all these years of legal realism, frankly, even brutally, stripping the process of decision-making of all illusion, there appears to be rising a new wave of mysticism to bemuse the scholars, confuse the judges, and intrigue us all. Each generation, it seems, must work out anew its theories of the judicial process. Let me assure you that I have no new revelations to give you, only some unoriginal bromides, which seem in danger of being overlooked. My aim is to bring the discussion back to a pragmatic and practical level which will be of utility to those on the firing front. For a near quarter century of judging following two decades of teaching in the fields of law administration and legal procedure, if they have not given me final wisdom, have at least brought conviction that we should return the business of judging to the judges, unfettered by either abstract philosophy or mechanical rules of certainty and objectivity.

First I think I should give you a headnote or syllabus of my proposed address, thus allowing you release for other occupation this afternoon or

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from later perusal in your law review. What would we of the legal profession do without the headnote! It gives us surcease from the long prosy opinion, sometimes indeed improving it by suggesting the opposite from what the judge thinks he has written.\textsuperscript{3} The practice of headnoting is spreading to learned articles; that, in fact, is what the great \textit{Harvard Law Review} is doing to its scholarly product—an innovation to be viewed with both trepidation and delight.\textsuperscript{4} At any rate I shall now give you steps toward a headnote to emphasize my purpose that adjudication, unlike philosophizing, always and primarily concerns and affects specific persons actually before the court; only in a subordinate and secondary way does it deal with or proclaim abstract principles. Hence a court cannot avoid decision; an assumed refusal to decide is, in the most realistic of senses, a decision for the defendant. And if this seems obvious, even naive, let me add—what seems rather consistently overlooked—that every argument for so-called judicial restraint, for judicial "humilitarianism," as it is sometimes put,\textsuperscript{5} serves to bring a defendant's vote to the conference table. And it is inevitably a vote for the conservative reason, interpretation, or reaction to the matter in hand. That may be the proper attitude—I do not say it is necessarily wrong. But I do believe that the one-way nature of this approach and its consequence should be more fully noted and evaluated than I have yet seen it done.

Before I try to define my thesis more fully I should explain my terms. As a convenient tag to introduce my remarks I have chosen as my title, "The Limits of Judicial Objectivity." What I am suggesting here is a distinction often made by writers of adjudication along subjective or along objective lines, that is, of decision based on the \textit{ad hoc} equities or gut reaction of the judge as against decision based on general principles widely applicable. But this is not altogether apt. In fact it appears to suggest an obvious preference for objectivity, which is not my view or within the realities, as I shall endeavor to show. Actually a judge must have qualities of both types, and the suggested dichotomy is unsound in premising a clarity of distinction which does not exist. Every judge worth his salt will try his best to individualize each case before him so as to reach a just result to the individuals without regard to generalities. So his attitude toward each case is necessarily selective and subjective. On the other hand, he is moved by the tradition of his calling and his own

\textsuperscript{3} A classic example is what the headnote writer did to Judge Learned Hand's famous "fortress out of the dictionary" opinion. Cabell v. Markham, 148 F.2d 737, 739 (2d Cir. 1945), aff'd, Markham v. Cabell, 326 U.S. 404 (1945).
\textsuperscript{4} See, e.g., 75 Harv. L. Rev. 1263, 1319 (1962).
striving for impartiality in adjudication to try to assign the case to a
general mold, so that the individual personalities do not control or warp
the decision. To that extent he will aim to be objective. Thus he will
shift between the two poles and his decision will be an admixture of
them. In some cases the one element will seem the more important; it will
be my endeavor to examine the lines of demarcation recognizing that the
problem, like most in law which give us pause as being on the border
line of decision, is one of degree. But a denigration of emphasis does
not at all lessen the importance of the problem in the area of choice.

What therefore I wish to examine is how far a judge can actually hold
himself above the contest before him and assume to be guided only by
abstract principles. As we shall see, in the new and close cases I believe
that he cannot maintain a wholly Jovian imperturbability and that he is
only fooling people, and himself most of all, if he does not face reality.
In one unguarded moment I suggested to the managers of this program
as a possible title, "Judicial Objectivity—An Illusion?" ending with a
question mark. The avidity with which this was seized upon, doubtless
for its obvious publicity appeal, warned me that it did have more ad-
vertising value than substance and that it was indeed unwise as con-
voying an emphasis I did not wish. But it has more than a kernel of
truth. I was intrigued to read in one of Holmes' famous speeches, "It
is a misfortune if a judge reads his conscious or unconscious sympathy
with one side or the other prematurely into the law." That one adverb
"prematurely," which he did not stress, seems to tell volumes as to the
famous justice's own thought processes. Here in this same speech he
uttered the famous aphorism: "Judges are apt to be naif, simple-minded
men, and they need something of Mephistopheles." I fear, indeed, that
they are often naif enough to believe what the scholars write about them.

In order to place my thesis in its correct setting it is necessary also
to delimit its field of proper operation. For actually the number of cases
where the problem rises to the surface (of course it may be lurking in
the background of any conceivable case) is quite small. There are vast
and important areas of the law where there is little debate as to the sub-
stantive principles, and the cases, if not foredoomed from the start,
deal only with the procedure or the settling of the facts for the ready
application of these principles. On the appellate level all observers
place the number of cases of a predestined outcome at a very high level;
Cardozo eventually went so far as to place it at "nine-tenths, perhaps

7. Ibid.
more,” of the total.\textsuperscript{8} At the trial level the ratio of cases turning upon certain substantive principles is obviously yet higher, though the then open contest as to the facts—the actual events—may well make the outcome less predictable. My point here is as to a solid and extensive law base where there is little occasion to worry whether the judge is an activist or a humilitarian.

In that brilliant, but extraordinary, book, \textit{The Common Law Tradition: Deciding Appeals}, Karl Llewellyn starts with the premise that there is now a crisis of lack of confidence in the courts and in the capacities and performances of the judges—a crisis not limited to the Supreme Court, but undermining confidence in courts generally. For this unusual statement he offers no proof of any kind. I am convinced that he is quite in error in his assumption. Outside of the special case of the Supreme Court, where, like the Presidency, crisis is normal, one can note only the most complete confidence (possibly too naive) in the substantive performance of the courts. The only question at all is one of procedural efficiency—whether they are adequate in numbers and in methods to meet the notable increase in litigation and the congestion of court calendars. The obvious desire is for more, rather than less, of the judicial product.\textsuperscript{9}

Nor is there reason why this conclusion should not follow. I submit that viewed as a whole the judicial accomplishment in this most litigious world is quite superb. Consider not merely the activities of the courts of general jurisdiction, but the specialized courts close to the people's needs—family, bankruptcy, probate, traffic, and all the manifold courts of criminal jurisdiction. It is perhaps a comforting thought that all the accumulated wealth of the entire country passes each generation under court supervision to the next generation with a minimum of controversial litigation, which appears to be constantly decreasing in number. It is also comforting to think of entire new businesses or ways of life which have been absorbed into the covering wing of our American legal system without difficulty. As one small example think of the millions collected by our cities from parking meters, a big business in itself, as well as means of traffic control, which depends for its existence on minor court enforcement of the traffic laws. Surely the thought of the courts as being in crisis is not realistic.


Turning now to the small area requiring creative effort in the treatment of the new cases, its importance of course far transcends its numbers. For these cases are what give tone and color to the entire judicial process. From the upper court decisions all the courts get their cue; and the practice, to which all try to conform, is there set. Examples abound; one of the most pertinent is that of criminal law enforcement, where the Supreme Court, speaking in a comparatively few cases, has immeasurably raised the police standards everywhere.10

Now it is precisely in this area, and because it involves the new trends, that discussion and debate develop over the judge's role. And it is here that there may be growth and expansion of the living law or it may be held back and stunted and deformed. I should like to discuss a bit the latest trends of thought in the scholarly world as to the role of the judge in these cases. This involves a number of new concepts of differing content, but all seemingly aimed in one direction, namely, restricting judicial action. I believe that is an interesting aspect of the newer jurisprudence—one that has not been enough stressed. Whether we call it abstention, or desuetude, or judges too overworked to exercise their full jurisdiction, or "toward neutral principles," the upshot inevitably seems to be a negative decision or, in plain language, a defendant's judgment. Let me recount some of these trends to illustrate the point. I shall not strive for details or completeness here, since all this has been much discussed of late, as I myself have attempted elsewhere.11

The abstention doctrine calls for the federal courts to abstain from decision of issues which may involve state law until the state courts have stated and defined that law. A striking example is that of a suit on an insurance policy, properly in the federal court because of the diverse citizenship of the parties, but decision postponed until in state proceedings the validity of certain policy provisions can be determined.12 The result obviously is many years of litigation before the merits can be reached, while preliminary decision is being had on matters which to the dissenting justices did not seem in doubt. A corollary doctrine flows from the Erie-Tompkins principle that the federal courts must follow state law in the diversity cases—a doctrine impeccable in itself and only troublesome when it forces the federal courts into subservience in areas such as procedural reform where those courts have been outstanding.13 The

11. See Clark, supra note 10; Clark & Trubek, supra note 8.
"desuetude" doctrine, newly named, has been applied in the famous Birth Control Cases, where a majority of the Supreme Court declined to consider the validity of a Connecticut criminal statute, in proceedings properly before it procedurallywise, because the statute was not being enforced by the state prosecutors.14 The outcome of that has been that a distinguished Yale doctor has had to provoke prosecution and conviction in order to produce a situation where, in the words of the local paper, it is believed the Court can no longer "evade" decision. The suggestion as to overworked judges, made in the Harvard Law Review, since denied by some of the justices involved,15 led to the conclusion that certiorari should be denied in more cases than is now usual. But this resolves itself into an admonition against Supreme Court review of the action of intermediate reviewing courts in overturning verdicts for injured workmen in cases under the Federal Employers' Liability Act.16

There are other signposts along the same way which I shall not stop here to note.17 I shall conclude my summary with reference to a truly brilliant analysis by a careful scholar which has done so much to revivify the whole issue as to the judge's area of authority. This is, of course, Professor Herbert Wechsler's already famous lecture, "Toward Neutral Principles."18 Even to those of us who must remain not fully persuaded by the argument, the lecture has provided a goad to more careful thinking about these great issues; indeed, no higher tribute can be paid a scholar than the veritable tempest of discussion it has called forth.19 But its central thesis that judges should refrain from adjudicating except

where the issues adapt themselves to settlement by neutral—or apparently impartial—principles does highlight the questions I am trying to raise as to circumscription of appellate review. Since others have experienced a like difficulty,\textsuperscript{20} perhaps I may be pardoned for failing to discover a practically operable base for the classification of cases thus urged. Quite obviously it has much to do with the importance of the issue and its susceptibility to general or, shall I say, "objective" determination. But I find these characteristics in essentially all cases at the appellate level which are not foredoomed by precedent or convincing lack of merit, i.e., all cases in this area of new and original activity. Thus especially surprising to me is the apparently quite widely held view, shared at least by some of the Supreme Court justices, that appellate restriction on jury trial, actually demonstrated in the FELA and Jones Act cases, does not furnish a prime occasion for review under any of the principles set before us.\textsuperscript{21}

With deference I suggest that we are allowing abstract principles to run away with the results, so that the primary purpose of litigation is lost sight of. That, of course, is to settle disputes and adjudicate rights as to certain persons who come before the court. Commentators on the American scene from De Tocqueville on have noted our inveterate tendency to make all issues legal, to turn any political question sooner or later into a judicial question.\textsuperscript{22} Perhaps this is overdone, and results may tend at times to the bizarre. But there is much saving grace in having to note that, however great the principle which the court may announce, its only validity is as it determines rights between plaintiff A and defendant B or between a plaintiff or a defendant as against his government, whether state or national. This also serves to admonish us that a decision cast in terms of refusal to act is under our system a decision for one party, with all the elements of success for that particular litigant thus indicated, and no abstraction can lessen or conceal that fact.

I remember that truism stated years ago by the brilliant Walter Wheeler Cook, in criticism of no less a jurist than Justice Brandeis in the latter's famous dissent in the \textit{Associated Press} case. The justice had

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\textsuperscript{21} Compare Arnold, \textit{supra} note 16.

urged against an injunction prohibiting the International News Service from pirating news matter from the Associated Press, stating considerations why the Court should "decline to establish a new rule of law in the effort to redress a newly-disclosed wrong, although the propriety of some remedy appears to be clear." In a Note in the Yale Law Journal, Professor Cook said: "It is usually overlooked—indeed at times it is denied—that in settling that under a given state of facts the person involved is privileged to act in a certain way, a court determines the jural relations of that person to other human beings. . . . So Mr. Justice Brandeis, in holding that the defendant was privileged to pirate the plaintiff's news, was laying down 'a new rule of law' just as clearly as was the majority when they held that the defendant was not privileged."24

So there is no easy way to judicial salvation by declining to adjudicate. For that declination is itself a judicial decision. Now there may be sound reasons justifying such negative action. I would not advocate jettisoning all the time-honored reasons for judicial caution, such as accepting a limited view of a new statute in order to avoid a grave constitutional issue—even though I may think that at times these aphorisms are stretched to their limits.25 But I do believe we should take heed lest the press to a negative decision does cause us to overlook its immediate effect in the actual litigation and in other like cases. So the admonitions I listed earlier seem to me to lead directly to decisions steadily for one side of litigation, and that the conforming or conservative side. It is the decision of yesterday, rather than of today or tomorrow.

I incline to go somewhat farther and say that, even if we could define cases adapted to neutral principles of adjudication with any precision, I doubt that sound social policy would sustain the limitation. Little cases are important to the litigants; in addition, they have a way of turning into big ones. Yick Wo and Dred Scott, Brown and Baker, Lochner and Abrams, even Marbury and Dartmouth College—I wonder how many of these litigants looked like big people when their cases first started. Even more to the point, what difference should it make? A court is devoted to the idea of affording "equal justice for all"; it is not to pick and choose among litigants. Surely this must and should be the case for all tribunals below the Supreme Court; and that Court is restricted only by the sheer exigencies of human limitation that it cannot hear all cases.

Its choice within its permissive jurisdiction should well be where it can do the most good in settling judicial sores or resolving troublesome doubts; I question if it can express a safe or a satisfying choice in terms of the supposed importance of the case. For such a test is so delusive as to the human problems thereby covered up. Certainly the Supreme Court has not taken that course in its ever expanding concern for the indigent prisoners. Were Herndon and Powell or Rogers and Coulombe, or more lately Coppedge, covered by the sheltering wing of neutral principles? Was it not something more expansive and, indeed, quite unrestricted, namely, a concern for the rights of an individual, however lowly?

The truth is that we have all served to create, or at least to share, an image of American justice and American courts which contains no place for such limitations. As a matter of theory our governmental institutions might well have developed differently, might perhaps have followed the English model restricting courts as policy makers; but actually they took quite another course and we are unreal and unwise now to fight it. Some time back I looked rather longingly at the English system in an article I called The Dilemma of American Judges. When I complained to a lawyer friend that only judges seemed to approve, he said: “Of course. They don’t like hard cases.” The easy cynicism which thus took for granted judicial reluctance to plough deep waters while it assumed the satisfaction of everyone else is, I believe, typical. It is too late now to change the judicial image. I believe we are in honor bound to carry it out. We have a striking example in the current judicial scene. The problem of inequitably apportioned legislative districts seemed one definitely placed beyond judicial reach. Even though strong arguments to the contrary had been made—perhaps most extensively by a distinguished news correspondent turned law student and Nieman Fellow at Harvard—it seemed that no judicial help for an increasingly intolerable subversion of democratic principles could be looked for. But when the Court two months ago decided Baker v. Carr with obviously much natural travail, the resulting near universal reaction of relief and approval, I dare say, may have surprised many. But it need not have done so. Just as in Brown v. Board of Education and numerous other examples, the

29. Perhaps typical is the surprisingly favorable editorial, “The Court Steps In,” in the usually conservative Saturday Evening Post, May 5, 1962, p. 92, which incidentally gives major credit to the Lewis article, note 27 supra, as a stimulus to the Court’s change of view.
period of abstention had masked a growing public need to which ultimately and properly the judges responded. If they were to fill the place which history and public need and demand had given them, they could not do otherwise.

What is the upshot of all this? To me it seems clear that judicial objectivity—taken to mean adherence to principles already established—can carry us only so far, and in fact not a great way in the new and undetermined area, which is my present concern, where principles are in the process of creation. Very soon the judge finds himself where he cannot avoid the hard decision, where there is no one and nothing to tell him how or where to go, but where he owes it to his judicial office to yield the best answer he can. In my view it is a mistake, with consequences often extreme, to sugar this over and to make it appear that various devices can yield a ready solution, and particularly that non-action furnishes a way out. The more he faces the inevitable of the difficult decision which is his to make, the better for him and for the results.

Is there then no possibility of obtaining assistance anywhere, or are all attempts at aiding judicial wisdom and understanding futile or worse? While I do think the possibilities of ready first aid have been exaggerated—perhaps particularly of late—I would not support a wholly hopeless and nonintellectual fatalism. In the stimulating book to which I have already alluded, The Common Law Tradition: Deciding Appeals, the late Karl Llewellyn, one of the most original legal thinkers of our time, has attempted such a synthesis, in form an explanation to lawyers of the ways of decision, in substance a demonstration to the judges of how it is to be done. Though I have doubts whether the judge’s actual freedom of decision has not been undervalued, I stand in awe of the magnificence of the attempt and the richness of the detail he has adduced in its support.31 I freely admit that I may not have thoroughly caught the import of the author’s purple prose,32 and he is perhaps building more permanently than I have appreciated. It will not do to try to compress his leaping thoughts in brief compass. But for present purposes I may point out that he expects the modern judge, working in the “Grand Style,” to develop “the type-situation,” which appears to be not so much the equities of a case as the broader, more generalized, aspects of whatever human, commercial, or institutional relationships are at stake. Then once a court has developed the “type situation” it can then apply “situation-sense” to choose among the myriad possible paths

32. As suggested in Corbin, A Tribute to Karl Llewellyn, 71 Yale L.J. 805, 808-812 (1962).
always left open in this type of case by the precedents. And for Llewellyn this "situation-sense" seems to be an instinctive insight for The Right Rule in a given situation.33

It is one mark of a great book that it stimulates thinking even beyond the area where it commands assent. So of the Llewellyn book. Making allowance for the poetic imagery of the expression and adding some assumptions of our own for ideas not made precise or not fully understood, we may perhaps here find a suggestion toward improving the art of judicial decision. Here is certainly no device for automatic adjudication; rather it is steps for making our approach to the problem more sophisticated and knowledgeable of all the elements involved. What is necessary for a subconscious sensing of the type situation, the first step in Llewellyn's deciding appeals in the Grand Style? Obviously important are things which are only God-given, such as brains and human understanding. But there are certainly other characteristics which can be developed and in which a judge can grow. That is, a judge, by taking note and by industrious application of the mental equipment with which he is endowed, can add measurably to his judicial stature. I trust it will not be thought presumptuous in this connection to refer to the steps by which a great American justice made himself the admired judge he now is. Mr. Justice Black's biographers tell us of the rigorous and extensive course of reading he prescribed for himself from 1926 to 1937—and presumably thereafter on the Court.34 I could not ask for a better demonstration of my thesis than that.

What I am trying to say, I fear imperfectly, is that a judge should possess knowledge; and so far as he lacks that, he should go out to see that he obtains it. Knowledge, as I use it, is made intentionally an all-inclusive word. It will necessarily mean many things: complete understanding of the actual case and its growth and development and the parties before the court; familiarity with the background elements, including for so many of our cases the history of our government and the economic and political background of the debated issues; and an understanding of other wisdoms and disciplines, even—spare the word for the vehemence it has aroused—psychology.35 In short, the judge needs to be an educated man, educated not merely in the particular case, but in all that concerns the governmental institution which gives meaning and

33. Clark & Trubek, supra note 8, at 261, 262.
35. Brown v. Board of Education, 347 U.S. 483, 494 (1954), the famous reference to "psychological knowledge" as supported by "modern authority."
authority to his acts. Of course in one sense I am giving you very little beyond what all of us conceive for the ideal judge. In another, however, I am urging what I think can give a judge the wisdom and insight to exercise the situation-sense that the hard, but vital, case demands. And I am also warning against easy substitutes, however abstractly labeled, for the intellectual labor of acquiring knowledge and using it. There is no automaton or IBM to provide answers, and the judge must know that and act on his own and all alone.

In short the limits of judicial objectivity are set when the time comes for hard thinking. It is indeed a lonely, at times a thankless, task;\(^{36}\) but it is a necessary one of delicate adjustment if freedom is to be perfectly balanced against an operable democracy or popular government. And I fully believe we can trust it and have more confidence in its consequence if we look at it head on than if we try to conceal the process under resounding abstractions.

To round out my discussion I should advert to what should be the public or popular reaction to the judge's necessarily subjective response in this small, but vastly important, segment of decision. I have been urging that the judge owes it to the responsibilities of his job to make himself as knowledgeable and sophisticated in the premises as he can. But when he has done all this by way of preparation he is on his own for the ultimate result which must reflect his background, his personality, and his inner convictions. Thus would not Marshall be a lesser judge, as well as a lesser man, had not his great opinions reflected his profound belief in the destiny of a national government? So, too, of Holmes and Brandeis in their concern for the sanctity of the individual person? And though I would not have been ready so to concede some years ago, I think we must respect the four horsemen of the '30s—McReynolds, Van Devanter, Sutherland, Butler—for being true men of conviction and courage, even though events have shown they were facing toward a past which could not be recaptured. Incidentally my references, I believe, point up those whom history has held to be the great judges—men of deep conviction and activists all!

Now what we should do about it to me seems rather clear. We should recognize the facts of judicial life and not be upset by them or fight them unwisely. Both the great Learned Hand and the eminent Dean of the Harvard Law School have expressed distaste for being ruled by a bevy of Plato's wise men, and the Dean even concedes that the idea "makes

\(^{36}\) Compare Feltason, *Fifty-Eight Lonely Men* (1961), an account of the federal judges located in the South.
me shiver a little bit.”37 I think this is unfortunate. It seems to me that for years we have been governed—judged—by a bevy of good men, though not all reaching the Platonic level, and that, always reserving the right to protest in particular cases and against particular persons, we as a people are so substantially satisfied that constitutional change is actually unthinkable. Lawyers and judges are all too prone to cover up their thought processes by the fiction that it is the law which commands, and it seems to me that these remarks, indeed the great, if inconclusive, debate on neutral principles, tend to befog and bemuse the problem. Better it is, in my judgment, to face the hard reality of the importance of human judgment. For then we can more clearly do the things which we as citizens should do. The first is constant and intelligent criticism of judicial activity, criticism such as we are getting in the best law reviews—although the barbs could perhaps be more direct and less abstract. And the second is a constant and active concern for the selection of judges with a sophisticated knowledge of their attributes as human beings. This is too vast a subject to cover here, and I have adverted to it elsewhere.38 Suffice it to say that the stress presently on legal learning and moral character—important as they are—has perhaps tended to subordinate unduly study of the judge’s outlook on life which may well be important and controlling in the area of present consideration. For the hoary apothegm of a “government of laws, and not of men,”39 needs to be supplemented by a fuller expression; what we must seek is a government of laws as maintained, fortified, and enriched by the good decisions of intelligent men.

38. See Clark & Trubek, supra note 8, at 271-276.