Towards Legal Understanding: II

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TOWARDS LEGAL UNDERSTANDING: II

"Men make their own history," including their legal history. But they make it "not under conditions chosen by themselves, but under conditions found at hand, given and handed down." Though they never leave conditions as they find them, they adapt old ways and beliefs to new desires and interests, to persist, in spite of changes, in conditions handed down.

An outline, necessarily attenuated, of salient changes in legal conditions in successive periods of Anglo-American history has been carried to the middle of the nineteenth century. It will be briefly interrupted for a closer view of an ancient illusion whose moral products, handed down through centuries, are factors in the confused legal conditions of to-day.

IV

LEGAL ILLUSION AND JUDICIAL MORES

Since law began, illusion about it has commonly been considered of its essence. All the book theories of the nature of law which Dean Pound analyzed in 1921 pictured law as

"not merely an ordering of human conduct and adjustment of human relations, which we have actually given, but something more which we should like to have, namely, a doing of these things in a fixed, absolutely predetermined way, excluding all merely individual feelings or desires of those by whom the ordering and adjustment are carried out."

There may always have been persons who knew better. But until lately not many would have thought it absurd for a judge to buttress a controversial decision with assertion that "courts are the mere instruments of the law, and can will nothing." Condemnation of wilful decisions was sometimes widespread and intense. But condemners usually denounced judicial legislation as "not law" in preference to conceding that law is made by human wills and powers.

3 Continued from the May issue, 34 Columbia Law Rev. 862. Citations to the first part will be without title.
2 Marx, The 18th Brumaire of Louis Bonaparte (1869) 1. The phrase "not at their own free will" is omitted for the reason that it begs an unanswerable question. The hypothesis that men determine their wills in their conditions is as tenable as the hypothesis that their wills are determined by their conditions. And it comports better with the assumption which we have to make to save our lives from inanity—the assumption that we have some power to affect our own destinies through our choices.
1 Introduction to the Philosophy of Law (1922) 71.
1. The Genesis of Legal Illusion

The view that law is independent of personal wills and powers had originally a factual basis. Early law emerged imperceptibly from primitive folkways. In primitive conditions social order rests upon moral enforcement, without law, of a complex body of rights of property and status and obligations of reciprocity in gifts and services. A Melanesian shore dweller, for instance, has a right and duty to function in a fishing canoe. After getting his share of a catch of fish (a proportion according to his function), he makes a gift of part of it to an inlander. The inlander is expected to reciprocate, when he harvests his crop, with a gift of yams—lavish if his crop is large, meagre if it is lean. His obligation is measured by his own feelings of fairness, checked by those of neighbors who, standing themselves in similar gift relations, applaud him if he is generous and shun him if he is mean. The power of their concurring wills and interests institutes and maintains the right and duty.

Such customary rights and duties seem, to primitive persons, to inhere in the nature of things. There was never a time when anything but might could establish or maintain rights, whether moral or legal. But when the might was that of the harmonious desires, beliefs, and feelings of a whole community or folk, it seemed unpersonal.

Early law seemed so to those who lived under it. In the middle ages rapacious powers worked their wills by armed force, without legislative awareness or intent. Changes by conquest of statuses and their incidents were accomplished facts before they got recognized and lawful. Folk courts and kings’ councils, when they looked for law, found and followed norms of right and ways of dealing with disputes which had already become customary. No one perceived that power of persons had made those norms and ways. It was unthinkable that power of persons should change them and make new ones. Once in the tenth century on the Continent there was doubt whether a deceased son’s children should inherit from their grandfather along with their uncles. No sovereign power or mere majority of an assembly dared presume to pass on the matter. The question, not just the case, was referred to God, through battle between champions; and God revealed to men the pre-existing law of which they had been unsure.

By Bracton’s time this method of discovering law was no longer trusted. But law thitherto discovered was still a body of norms and ways whose rightness was unquestioned by its users. It consisted of

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*See Jenks, Law and Politics in the Middle Ages (2d ed. 1913) 9.
customs, different in different places, with whatever changes and substitutions (the option of inquest for trial by battle, for instance) just and prudent magnates had been correct in deeming suited to obtain "the common warrant of the body politic." That willful persons could make law was as unthinkable as earlier. Society was incessantly disturbed by willful aggressions and oppressions. But nearly everyone has some desire for peace and justice, even though his inconsistent desires for aggrandizement are stronger. There were deep and powerful longings to escape conditions in which "the will and not the law has dominion." Will and law were conceptual opposites.

A dependence of law upon the will and power of magnates (i.e., such government as there was) had to be conceded. Unless arms maintained them, laws would fail of force, and justice be exterminated. But not even the sovereign's commands were law ipso facto; nothing could be law unless it found "common warrant." The king's will could not, indeed, be disputed. For every person is under the king, "and he is under no person, but only under God." But "he ought to be under the law." In Bracton's mind, the law could not be affected by his will or any other. And the law which Bracton saw manifest in use—a corpus juris of usages which were certain and definite, even though many of them were unwritten—was not in fact affected by what he saw

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8 Bracton, De Legibus Angliae (c. 1250) (Twiss ed. 1878) vol. i; fol. 1, p. 2: "There are also in England several and divers customs according to the diversity of places: For the English have many things by custom which they have not by written law, as in divers counties, cities, boroughs and vills, where it will always have to be inquired, what is the custom of the place, and in what manner, they who allege the custom, observe the custom."

9 Ibid. "But it will not be absurd to call the English laws, although they are unwritten, by the name of laws, for everything has the force of law, whatever has been rightly defined and approved by the counsel and consent of magnates and common warrant of the body politic, the authority of the king or prince preceding." Ibid. Cf. fol. 2, 12: "Law is the common precept of prudent men in council [or consulted]—virorum prudentium consultum], the coercion of offences which are committed either voluntarily or through ignorance [and] common warrant of the body politic."

Italics indicate differences of my translation from Twiss's. Bracton's definition is taken verbatim from the Digest; see Maitland, Bracton and Azó (1895) 29. But what it meant to him, looking at the English scene, was not the same as what it meant to Romans. He had seen the King and Council do some legislating, normally (even when the King's emolument through fees and amercements was a motive) with an eye primarily to what already had, or would surely find "common warrant," for the profits of the King's courts depended upon their giving better satisfaction to their customers than other courts. Bracton clearly does not conceive the unwritten laws as dependent upon "prudent men" or "magnates" for anything except enforcement. They are law in and by common warrant of approving feelings throughout the community. No formal action by any definite body of justices, members of the Council, or other prudent men or magnates, was prerequisite to legal validity; nor could it give legal validity to anything which failed of common warrant.

10 Ibid. fol. 5b, 38.
11 Ibid. fol. 1, 2
12 Ibid. fol. 5b, 38.
as will. Oppression in the main was naked, not legislating or seeking cloak from law. It seemed outside of law even when it used courts as instruments. For corrupt judges wrote no opinions, and had no maze of flexible or alternative doctrines to hide in. Their false judgments were force, not law. Law still seemed in truth to be found existing, and beyond the reach of legislative wills.

Bracton's desire that law consist of norms and ways which have "common warrant of the body politic" seems to be the same that we should now express as a desire that law be *reasonable*—or, less vaguely, conduce as much as possible and in the best ways possible (subject to whatever may be the limits of practicality under the conditions of the time and place) to justice and "general convenience." To Bracton, however, "common warrant" was not a moral standard of what law *ought to be*, to be used for guidance of judicial and other legislative choices. It was a touchstone by which to recognize the law that *is*.

Being a practical man, he knew that there were, and always would be, self-willed and stupid judges, insensitive to this touchstone. Therefore, if novel cases arise, "let them be judged after a similar case, if there have been any." But rarely except in novel cases would there be need of new revelations from the touchstone. For when laws and customs "have been approved by the consent of those who use them, and confirmed by the oath of kings, they cannot be changed or abolished without the common consent and counsel of all those by whose common consent and counsel they were instituted (*promulgatae).* They cannot be changed, that is, unless the touchstone certifies improvements; but "Even without common consent, they may be converted into something better; for that which is commuted into something better is not abolished." If general convenience conflicts with legal usals, general convenience wins; for law is that which serves it best.

In the middle ages there was not, at least till later, much obvious conflict between general convenience and legal usals to contradict the assumption that an ideal law and law in fact are one and the same thing. John's cattle, ranging at large as was right and usual, break Robert's hedge and destroy his corn. Robert impounds and keeps the cattle till John ransoms them. Since no one wants his own enclosures

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14 *Cf.* Bracton's complaint, *ibid.*, fol. 1, 4 to the effect that foolish judges who ascend the judgment seat without having learned the laws are often led astray by magnates (*majoribus*) who decide causes "rather by their own will than by authority of the laws (*potius proprio arbitrio quam legum authoritate).*" Such acts of *will* are not law and make no law.

15 *Ibid.* fol. 1b, 8. "Instituted" is obviously not a literal translation of *promulgatae*. But I think it is fairer than "promulgated." Bracton's thinking was about English unwritten laws. But for Latin vocabulary he depended on his Roman authors. At this point he had before him Azo's prefacc, which speaks of imperial laws as *promulgatis*; MAITLAND, *op. cit. supra* note 9, at 10.
broken, Robert's course is approved by unanimous feelings of justice, unconfused by ratiocination about the dependence of liability upon fault.\textsuperscript{15} Law found Robert's right to impound cattle damage feasant and John's to redeem. It did not make those rights. And the judge who first discovered that it would find common warrant to permit Robert to recover damages without impounding was not conspicuously legislating. Judicial as well as royal legislation sometimes took wider jumps from prior legal usals. But legislation was usually informed by an accurate sense of what would find common warrant in the approving feelings of nearly all whom it affected. Therefore it gave no deep shocks to the faith, handed down from primitive conditions, that law is untouchable by human wills.

Even in the middle ages, however, hard-headedness might occasionally deny that faith. In a case called Langbridge's\textsuperscript{16} in the fourteenth century the question was whether a donee by deed of a remainder in fee could protect his future interest by intervening in an action between a demandant, claiming title in fee, against a tenant in possession for term of life who had "made default after default." There was precedent for intervention where the intervenor's title was "by fine," and so of judicial record. But here the would-be intervenor's deed in pais had no such solemn status. And this distinction had been said, and very likely held, to be material.\textsuperscript{17} Nevertheless, said Sharshulle, J., the mere difference in solemnity between recorded fine and deed in pais should not bar the intervention.\textsuperscript{18} The ensuing colloquy is famous:

\begin{quote}

In the origin of customary liabilities, or rather, remedial procedures, there is no "principle" either of liability for fault or that "a man acts his peril." Basic is the resentment of the sufferer at his own loss. He and neighbors may or may not impute fault to the causer. Commonly enough they do. But whether a remedial procedure develops does not depend on that. It depends on the neighbors' interested sympathies. If it seems to them that they are themselves more likely to suffer than to inflict a similar loss in the ordinary course of their affairs, their sympathies are with the sufferer, and there develops, through their "common warrant," a right way of going after relief. The right of sufferers to resort to that right way is felt as just; and recognition of it conduces to general convenience.

\textsuperscript{15}\textsuperscript{16}\textsuperscript{17}\textsuperscript{18} Y. B. 18-19, Ed. III, Pike ed. Rolls Ser.; (1344-5) 374.

\textsuperscript{15}\textsuperscript{16}\textsuperscript{17}\textsuperscript{18} Probably claimants under deeds in pais had often and consistently been excluded from intervening. Feeling of the peculiar sanctity of court records doubtless contributed to maintain the distinction between claimants by record and claimants by deed. But there was sense in it. A recorded fine was good proof of title. The authentication of a deed was by the donor's seal. And forgery of seals was common. There were monasteries which systematically counterfeited every seal of which the monks could get an impression.

\textsuperscript{15}\textsuperscript{16}\textsuperscript{17}\textsuperscript{18} He added this: "No precedent is of such force as that which is right (or reasonable?—\textit{nulle ensample est si fort come resoun})."
“Thorpe [objecting counsel]. I think you will do as others have done in the same case, or else we do not know what the law is. HILLARY. J. It is the will of the Justices. STONE, J. No; law is right reason (Nay; ley est resoun).”

Hillary apparently submitted to be silenced. What had he to gain by insisting on his heresy? It does not appear that his will differed from those of the other justices. The wills which prevailed were to follow the precedent for permitting intervention when to do so seemed conducive to justice and general convenience. The earlier limitation of intervention to cases where the intervenor’s title was incontestably proved by record had accorded with views of justice and general convenience prevailing formerly, but no longer. Had the concept of changing conditions been developed, orthodoxy might, as to-day, have explained the overruling of the limitation by saying that conditions had changed, not law. So long as law was kept accordant with the desires and feelings of those it served, it was idle to debate whether the accord was due to human wills or transcendental powers of Law’s own. Nothing important could be gained by effort to dislodge illusion.


Mores: “Ways of doing things which are current in a society to satisfy human needs and desires, together with the faiths, notions, codes, and standards of well living which inhere in those ways, having a genetic connection with them.” Any way or standard is moral, as the word will be used here, if resort to it is compatible with good repute in a society, class, or group.

Mores of subgroups: “Each class or group in a society has its own mores. This is true of ranks, professions, industrial classes, religious and philosophical sects, and all other subdivisions of society. Individuals are in two or more of these groups at the same time, so that there is compromise and neutralization. Other mores are common to the whole society. Mores are also transmitted from one class to another.”

Variability and diversity of mores: “No less remarkable than the persistency of . . . mores is their changeableness and variation.” Consistency is not to be assumed for the mores of any society or group. There are moral ways of deviating from moral ways.

19 Sumner, Folkways (1906) 59. This seems the least unsatisfactory of Sumner’s definitions of mores, which are easy to perceive but hard to describe comprehensively. The other definitions make prevalence of a supposition that they are conducive to societal welfare the test of whether ways, etc., are moral; ibid., at 30; 1 Sumner and Keller, Science of Society (1927) 34. Ways which are believed conducive to personal or class welfare usually are claimed, and often considerably felt to be conducive to societal welfare. But the real test of the morality (as that word is here used) of a way seems to be whether, in the group which most matters to him, a man incurs no diminution of reputation by following it. Ruthlessness and brutality are clearly moral among gangsters.
20 Ibid. 39.
21 Ibid. 84.
22 In Melanesia, inheritance is matrilineal. On a man’s death the moral right way for his property to go is to his maternal uncle, brother or nephew. But he
Though illusion about the nature of law is metaphysical, its practical effects have been moral.

For centuries the prevalence of illusion strengthened moral pressures upon judges to resist partisan desires. *Cannot* has more rhetorical and emotional force than *ought not; no power* than *no right.* De facto human powers are in fact restrained by belief that they are non-existent. Saying that judges *cannot* legislate means only that they *ought not,* and does not prevent every decision from being in fact a legislative choice. But widespread conviction that judges *cannot* legislate, especially when they shared it, made them choose in general to give effect to what would be taken to be compulsion of Impersonal Law.

The surest and easiest way for a judge to seem, even to himself, to intrude no will of his own was by doing “what others have done in the same case,” or, if the case was novel, to judge “after a similar case if there have been any”—in other words, to decide as if mechanically controlled by legal usuals. To do so was normal from the beginning, when legal usuals were in close accord with harmonious popular feelings of right and justice. The *rightness* of doing so was always in the judicial mores. For a while in the early history of the so-called “common” law of the king’s courts, a near duty of converting legal usuals into “something better” was also in those mores; and changes well calculated to win common warrant were fairly frequent. But when a professional lawyer class arose, trained like Thorpe to “know what the law is” by study of precedents, its pressure was for undeviating consistency with “settled” ways. Judges chosen from that class rarely used Bracton’s touchstone. They have felt for the most part that their professional respectability would be endangered if they did so.

In the common law before Lord Mansfield, *Langbridge’s Case* is almost unique in its open resort to “natural reason,” as distinguished naturally wants it to go to his own son. It is morally permissible for an influential father to put property in his son for the father’s life; and often, probably without more, the son may succeed in keeping it after his father’s death. But the *right way* to clinch the son’s retention of the property is to marry him (the incest taboos extend only to cousins on the mother’s side) to his father’s brother’s daughter—technically, “cross-cousin marriage.” Malinowski, op. cit. supra note 6, 100-111.

The moral permission to violate taboos on incest with remote maternal cousins has become considerable. The *right way* to make sure of the propriety of the incest is by making magic. *Ibid.* 79-80.

28 *Locke, Second Treatise of Civil Government* (1690), uses *power* throughout where it is plain that all he can sensibly mean is *right.* Locke is the authority for use of the same trick in American constitutions.

29 The king’s courts had little concern with other litigants than land-holding gentry. Borough and other popular courts remained vital at least until the sixteenth century.


26 *Supra* note 16.
from "the artificial reason of the law,"27 for justification of innovation. Though the professional mores have tenaciously retained the illusion that law is found, not made, the general run of judges and lawyers—the carriers of the judicial mores—have always assumed that the one right way to find it is in precedents, narrowly construed. Some of the few judges who have conceived Impersonal Law as seated in reasonableness for justice and general convenience have gained great prestige by looking there for it with results that won common warrant. But for all their eminence and influence, they have been impotent to lodge their conception in the mores. For it would imply duty to look always beyond precedents to reasonableness in finding law. The mores have easily resisted acceptance of so difficult a duty. The most they have conceded is a limited privilege or permission of occasional resort to reasonableness. The paramount duty in mores is to behave as if bound by settled usuals. The privilege of occasional deviation is a moral inconsistency.

A tendency of conscientious performance of this duty may be illustrated by an early Year Book case:29

"A brought a writ of nuisance against B. B. What nuisance? A. Sir, we tell you that whereas there was a foss and a hedge around my corn, so that cattle might not eat it, there he has abated the foss, so that cattle enter there, etc. Howard. Let his admission be entered on the roll; and thereby he is foreclosed forever from the soil of this foss; for he supposes by his plaint that the soil is ours. Spigorne. We tell you that we enclosed our corn with a foss; and he came and abated it; ready, etc. Howard. And we pray judgment of his admission that the foss which was abated is his own foss. Judgment if such a writ lie in this case.

"It was adjudged that it did not; and therefore it was quashed."

Since the foss was on his own land, not B's, A should have used a writ of curia claudenda instead of nuisance. The "admission" inferred from his error may, as Howard claimed, have shifted title to the soil of the foss to B. Such a result would have shocked no common lawyer. Considerations of justice or general convenience had become normally irrelevant to "what the law is."

28 Cf. Sumner, op. cit. supra note 19, at 46. "The masses are the real bearers of the mores. They carry tradition. The folkways are their ways. They accept influence or leadership, and they imitate, but they . . . [remain] controlled by their notions and tastes previously acquired. . . . What the classes adopt, be it good or ill, may be found pervading the mass after generations, but it will appear as a resultant of all the vicissitudes of the folkways in the interval . . . It is the classes who produce variation; it is the masses who carry forward the traditional mores."
29 Y. B. 21 Ed. I (1292) 224.
Langbridge's Case, in which reason prevailed, was an instance of deviation from legal moral obligation. The judicial mores have retained always a permission of such deviation, within changing limits never precisely definable in words, but capable of fairly accurate perception by judges sensitive to states of popular and judicial moral feeling and of social pressures. "The Nature of the Judicial Process" is given largely to effort to make words describe as accurately as words can the present limits of permissible deviation from present legal usals, as Cardozo, not without idealization, senses those limits.

In the later middle ages deviation (legal innovation) was morally permissible when it was sensed that it would be welcome generally (Assumpsit, Trover) or to important interests whose approval would outweigh objections (Uses, Fines and Recoveries), provided it would increase the business of the courts. But the pace of change was slow, and many usals persisted long after they had lost common warrant if they had ever had it. In the swiftly changing conditions of the sixteenth and seventeenth centuries dissatisfactions with such persisting usals became intense and widespread. And there were powerful pressures for supplementing, if not superseding, the common lawyers' moral standards with those of a Natural Justice unbound by rule or precedent. But the class of judges and lawyers which had throughout maintained the medieval professional mores was re-established in undisputed control of law by the seventeenth century settlement. General acceptance of the fiction of "common consent" to law and government made it henceforth easy to baffle legal criticism by representing legal usals as established by and existing with "common warrant of the body politic," and

32 Ibid. 95-101, 115-118.
33 34 Columbia Law Rev. 872-3. Doctor and Student (1523) came early in this movement; Hobbes, Leviathan (1651) came at its end. Hobbes Pt. ii. c. 26, is to this effect: Law is what the sovereign commands. His blanket command, subject to such exceptions as he makes by statute, is that subjects be governed by the "law of nature," which is that men deal equitably, with mutual consideration for one another. The commands of that law are clear to all who, without partiality and passion, make use of natural reason; "yet considering there be very few, perhaps none, that in some cases are not blinded by self-love or some other passion, it is now become of all laws the most obscure." Therefore, since "there is no judge subordinate nor sovereign but may err in a judgment of equity, if afterward in another like case he find it more consonant to equity to give a contrary sentence, he is obliged to do it. No man's error becomes his own law; nor obliges him to persist in it." Nor does it become a law to other judges. "All the sentences of precedent judges that have ever been cannot altogether make a law contrary to natural equity: nor any examples of former judges can warrant an unreasonable sentence, or discharge the present judge of studying what is equity, in the case he is to judge, from the principles of his own natural reason." The eighteenth century revolutions so clinched this fiction in general mores that Bentham's exhibition of its absurdity--Fragment on Government (1776) Pt. iv--made little practical impression.
changeable only by statute, as provided in the Social Contract. Moreover, changes in legal usuals concurred with eighteenth century tranquility in making legal criticism rare and lenient. But the singleness of judicial moral obligation continued—obligation to decide as if bound by rules and precedents regardless of their repugnance in many instances to the interests and moral feelings of most non-lawyers. Though Lord Mansfield, by breaking them, stretched for a time the limits within which innovation was professionally respectable, in the period of reaction which followed those limits shrank again.

Permission of departure from paramount legal-moral obligation is forced into the judicial mores, and its limits widened or narrowed, by pressures for interests moralized by other classes in conditions in which their power approaches dominance in society. Lord Mansfield was backed and approved by such tremendous power, especially in the commercial middle class, that legal-moral condemnation seemed idle cackling. He did not have to take the trouble to simulate consistency with legal usuals.

But not even a Mansfield risks any moral censure lightly. And ordinarily, judicial legislative freedom is morally permissible only when its inconsistency with legal-moral right and duty is inconspicuous. Piece-meal legislation, as when assumpsit was developed, easily escapes attention. Moral permission of more drastic legislation is usually subject to the condition that its character be veiled. Formerly the veiling might be by flagrant fiction. The preference latterly has been for more subtle verbal magic. The veils have often been thin. But until the twentieth century, since few bothered to look through them, they sufficed to prevent very much perception of the existence of legal moral inconsistency.

V

The Confusion of American Judicial Ways

1. Permissible Judicial Freedom before the Civil War

"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 law." 80

Marshall's enormous statement at least states truly an ideal which was rarely challenged after Kent and others had taught homespun

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80 See Dicey, Law and Opinion (1905), chapter on "Old Toryism."
82 Cf. note 22 supra.
judges to consult Blackstone, if nothing else, before deciding cases. The administration of rough and ready justice and injustice without regard for law in books became professionally disreputable, even if it continued fairly frequent. It was generally felt that Marshall's statement ought to be true—that the "will of the law," as revealed by authorities in law books, ought always to control judicial power. It commonly did control, except when some stronger motive than feeling that the law was unjust or harsh led courts to enforce some will of their own or of impressive litigant or counsel. But of course, whatever will controlled the making of a precedent by a court to which respect was due, after the precedent was made the will expressed in it was thenceforth, while it stood, the law's.

Docility to authority was both morally obligatory and common—probably usual. From the beginning, however, it was morally permissible to "adapt" the common law to American conditions. And judicial legislation for other objects was often conspicuous, especially in constitutional cases. To Jeffersonians its object seemed sometimes to be the substitution of British for American conditions. For the consciences of conscientious judges were not less sensitive to the mores of their social class than to those of their profession, and the most influential of them, whatever they called themselves politically, were members of the class whose mores had accepted Hamiltonian ideals and standards. Being practical men not prey to introspection, and sure that what they did was somehow righteous, they could usually give legal effect to a debatable view of social interest without qualms of inconsistency with their legal-moral duty.

Qualms were sometimes experienced, however. For Shaw, one of the most hard-headed and practical judges of the lot, resorted to the magic of transcendental metaphysics to allay them. Impersonal Law, as he conceived it, only seems to be contained in a palpable corpus juris of authorities. In its true reality it exists somewhere else—in a few broad principles of reason, natural justice, and "that general convenience which is public policy," of which more definite legal norms and usages are but ephemeral manifestations, necessary for practical purposes, but not really law at all. Marshall, dealing with the Constitution instead of the common law, had similarly found true reality brooding above or behind "particular provisions" in "general principles common to free institutions."
Uterance of such doctrines from high places contributed to moralize judicial legislation. But transcendental conceptions are chiefly useful for spiritual solace. Shaw himself felt that law in its incorporeal essence "would be too vague and uncertain for practical purposes, in the various and complicated cases, of daily occurrence, in the business of an active community." To rest decisions nakedly upon higher principles would, moreover, have been legal-morally shocking. Judicial legislation was more stimulated by its practice than by rationalizing theory. And judges looked rather to precedents than to higher principles for information about the limits within which they could legislate without impropriety provided they cloaked their legislation with decent semblance of compulsion by precepts of the palpable corpus juris of precedents and constitutional and statutory provisions.

The most conspicuous precedents for judicial legislation were aimed to promote business convenience or the increase or security of private wealth. Old impediments to dealings by or with corporations, for instance, broke down rather easily, in spite of even Marshall's opposition and the considerableness of surviving feeling that corporations were too dangerous to be suffered to deal freely. A judicial relaxation of a harsh old rule of evidence would, however, have been unthinkable. It came to be felt as not improper for judges to legislate, if not too nakedly, for wealth or business. This limit was not inflexible. Shaw,

43 See his dissent in Bank v. Dandridge, 12 Wheat. (U. S.) 64 (1827).

44 In the view which came down from the past, a corporation was an imperium in imperio; a government indiscriminately profuse in grants of the special privilege of incorporation would endanger itself and destroy the freedom of its people. Corporations were recognized as proper for some public objects—government of municipalities or colonies, religious, educational or eleemosynary purposes, development of foreign trade; later for a few sorts of enterprises of "great and general utility," requiring more capital than partners could assemble—banking, insurance, turnpikes, canals, water supply. But it was reasonable to charter such a business corporation only when "all the operations are capable of being reduced to what is called a Routine, or to such uniformity of method as admits of little or no variation." For "negligence and profusion must always prevail, more or less," in corporate management. Charters should be granted sparingly, and always contain strict limitations of powers. For when business corporations "have been allowed to act according to their natural genius, they have always, in order to confine the competition to as small a number of persons as possible, endeavored to subject the trade to many burdensome restrictions." Adam Smith, Wealth of Nations (1776) Bk. v. c. I, Pt. iii, art. i. Cf. Baldwin, Amer. Business Corporations before 1789, Two Centuries Growth of American Law (1901) 261; Henderson, Position of Foreign Corporations (1918) c. 2.

Until the middle of the nineteenth century this view was orthodox in general mores, and was usually treated with respect on paper; note Marshall's deference to it in the Dartmouth College Case, 4 Wheat. (U. S.) 518 (1819). But owing to the facility with which charters could be had by bribing legislators, fact got pretty far from theory. This was said in 1832: "There is scarcely an individual of respectable character in our community [Boston], who is not a member of, at least, one private company which is incorporated." Angell and Ames, Corporation's (1st ed. 1832) 35.

for example, sometimes went beyond it, with genuine devotion to the ethical ideal implicit in his metaphysical fantasia. But few other early judges were so daring, or had such accurate perceptions of what would come nearest to finding common warrant in a society whose members were coming more and more to differ in feelings of right and justice and judgments of general convenience.

2. The Moral Rebellion of the Supreme Court

In the judicial mores which came down into the restless social conditions after the Civil War, obligation to submit unquestioningly to authority was still paramount. And faith in the impersonalness of law was strong in popular mores. It seemed imperative that judges should always at least seem to be bound by law. Feeling of a limited permissibility of reasonable legal “adaptation” or innovation was confined to the judicial class. The public recognized no such permission. Conspicuous instances of judicial legislation, unless general approval blinded the public to their legislative character, in fact endangered the prestige and respectability of the courts. Judges felt that conspicuous frequency of inconspicuous judicial legislation would do likewise. Of course, in cases where the voices of authority were silent or conflicting, the necessity of judicial legislation was inescapable. And in a society in which acquisitive appetites had become dominant, judicious adaptations of law to business convenience or prosperity, even if contrary to authority, were sometimes safe because approved by nearly all who mattered. But even for this object judicial legislation must not be conspicuously frequent. It must not conspicuously occur at all for other objects, except on very rare occasions when extremely powerful pressures of interest and opinion seemed to justify the risk. In general, authority, if clear, ought to be followed mechanically, regardless of its consistency with feelings of justice or views of general convenience.

In the period of Reconstruction and accelerated industrial expansion, the Supreme Court found it impossible to keep its practice in accord with the requirement of this complex of standards. It was incessantly confronted with cases in which its members’ human sympathies and social interests and convictions were at war both inter sese and with their feelings of judicial expediency or propriety.

On the Legal Tender question, the interests and Hamiltonian convictions of the successful acquisitive class, with which judges have commonly been sympathetic, conflicted bitterly with popular interests and convictions. The decision adverse to the Legal Tender Acts was virtually on “general principles”—conspicuously legislative, and scandal-

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46 Hepburn v. Griswold, 8 Wall. (U. S.) 603 (1870).
ous in popular opinion. The decision which came on its heels seemed as flagrantly legislative, since it overruled the other; and even more scandalous, since it was thought that new justices had been appointed to the Court with the deliberate purpose of procuring it.47

As to Reconstruction, the personal sympathies of the judges were with the southern whites, and the social inexpediency of perpetuating carpet-bag and negro domination appalled them. Yet such would have been the tendency of giving effect to the intention of the Fourteenth Amendment and Congressional Reconstruction Acts. However wise the statesmanship of the Court in refusing to construe the Amendment48 and the statutes49 as intended, it outraged a vast deal of northern sentiment. And it was obvious even to those who approved the statesmanship that the Court was legislating.

These conspicuous controversial decisions shook both the Court's prestige and popular faith that judicial power is never exercised except to give effect to Impersonal Law. Awareness of this doubtless contributed to keep the Court generally reluctant, when southern questions were not involved, to hold statutes unconstitutional or make drastic legal innovations. But the pull of other feelings against those which inclined the justices to submit to authority was sometimes too strong for them.

They had to deal, for instance, with a vast number of cases involving the validity of municipal bonds.50 The bonds had usually been issued to promoters in exchange for stock in projected railways. This was a corrupt racket, and not the least demoralizing of the acquisitive shamelessnesses of the Gilded Age.51 The avidity of towns and counties

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47 Legal Tender Cases, 12 Wall. (U. S.) 457 (1872). See 2 Warren, SUPREME COURT IN UNITED STATES HISTORY (2d ed. 1926) c. 31.
48 In the Slaughterhouse Cases, 16 Wall. (U. S.) 36 (1873), the justices were racked by a variety of pulls. Sympathy for southern whites under carpet-bag domination (of whose evils the subjection of the butchers of New Orleans to the slaughterhouse monopoly was an instance) contributed to induce the dissenters to insist that the monopoly was unconstitutional, and the majority to give narrow construction to the "privileges and immunities of citizens of the United States"; a broad construction would have tended to commit them to sustaining Reconstruction statutes. They were swayed also by feelings for and against the policy of extending judicial censorship of state legislation by adopting so vague a standard of constitutionality as the "rights of man" or "common right and reason"; cf. Field's restatement of his position in Butchers' Union Co. v. Crescent City Co., 111 U. S. 746 (1883). The conventional judicial moral obligation to give effect to the "original and intended meaning" of the Fourteenth Amendment scarcely counted at all.
49 E.g., United States v. Cruikshank, 92 U. S. 542 (1875); United States v. Reese, 92 U. S. 214 (1875); United States v. Harris, 106 U. S. 629 (1883); Civil Rights Cases, 109 U. S. 3 (1883).
50 For an impression of the number of bonds-for-stock cases with which the Supreme Court dealt, see the volume indices, under the title "Municipal Bonds," from 1864 (1 Wall.) to 1890.
51 For the mores of the aggressively acquisitive class at the period, see CHARLES FRANCIS ADAMS, A CHAPTER OF ERIE (1869); MARK TWAIN & C. D. WARNER,
for railway service and the venality of their officials made it easy to work. Often enough the railways were never built. Whether they were or not, insiders got much or most of the proceeds of the bonds, and the stock was worthless.

Judges often disliked enforcing the obligations of such bonds against swindled municipalities, and occasionally resorted to rather sharp lawyering to avoid it. But statutes authorizing cities and counties to issue their bonds for the "public purpose" of capitalizing projected railways had nearly everywhere, at the beginning, been held valid by state courts. The authority of Fletcher v. Peck forbade invalidation of the bonds for fraud or failure of consideration. Ordinarily the only chance to avoid their obligation was to find some irregularity in statutory prerequisites (usually including approval by vote) to their issuance. Numerous cases which went to the Supreme Court from inferior federal courts turned on questions of due compliance with statutory prerequisites. Though probabilities of legally unprovable irregularities and frauds are strongly suggested by the reported facts, the technical case for the municipality, in view of settled rules, was usually weak. The bonds were almost invariably sustained, with not infrequent dissents by single sympathetic justices.

The state of legal-moral feeling was not unlike that during the sixteenth century disputation between strict common lawyers and advocates of flexible equity. In a then famous moot case an obligor had paid his obligation on the day, but taken no formal acquittance. The obligee sued at law for a second payment. The idea that equity should protect the obligor from his own "folly and negligence" was horrifying to sixteenth century common lawyers. The idea of changing settled legal rules to prevent injustice to the millions of victims of the railway

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**The Gilded Age (1873); H. D. Lloyd, Wealth Against Commonwealth (1894); Ida M. Tarbell, History of the Standard Oil Company (1904); The Education of Henry Adams (1918) c. 14-20; 3 Parrington, Main Currents in American Thought (1930) 3-47.**

82 See Oelrich v. Pittsburgh, Fed. Cas. No. 10,442 (W. D. Pa. 1859), where Justice Grier seized the opportunity to delay if not defeat a bondholder who had not got his bonds transferred on the books of the issuing city. The opinion contains an interesting résumé of the prior history of the bonds-for-stock practice. At first the states had issued such bonds lavishly. The corruption and fraud were notorious. But "the expenditure of such immense sums made flush times, and all were delighted with the system"—until there was a panic and some of the states went bankrupt. When the railroad mania returned with prosperity—"when it was anticipated that every railroad from any place to another place, or no place, would produce large profits on the investment, would convert villages into cities, and every city a London, . . . the state being unwilling to involve herself in further debt, and risk a second insolvency, the scheme of city, county and borough subscriptions was invented and put into practice."

83 6 Cranch (U. S.) 87 (1810), cited supra note 42.

84 Replication of a Serjeant (c. 1525), published with Doctor and Student, supra note 33 (ed. Cincinnati, 1874) 343-7.
promoters was as repugnant to most nineteenth century judges.\footnote{Those victims included thousands who had subscribed individually for worthless railway stock as well as the taxpayers of municipalities which had done so. A farmer who, falling for the wiles of a stock salesman, had mortgaged his farm to secure payment of a subscription, had not a chance to save his farm in a court of equity unless he could prove that the salesman’s lies were such as would have fooled much wiser men than he. Sawyer v. Prickett, 19 Wall. (U.S.) 146 (1873). In such a case the justices of the Supreme Court would no more have dreamed of changing settled rules than would the sixteenth century Serjeant.} Occasionally, however, a court responded to pressure for equity. The Supreme Court of Iowa, overruling its own prior decisions, held that municipalities had no constitutional power to issue bonds in exchange for railway stock. But the Supreme Court of the United States forbade the federal courts in Iowa to accept the state court’s holding as state law, using language which might, *mutatis mutandis*, have been written by the sixteenth century Serjeant. “We shall never,” it said, “immolate truth, justice, and the law, because a state tribunal has erected the altar and decreed the sacrifice.”\footnote{Gelpcke v. Dubuque, 1 Wall. (U.S.) 175 (1864).}

Nevertheless, a few years later, the Supreme Court itself found a way to protect the people of a city from paying taxes to meet the obligation of bonds regularly issued as authorized by statute. The case, *Loan Association v. Topeka*,\footnote{20 Wall. (U.S.) 655 (1875). The opinion was by Justice Miller, who had dissented in Gelpcke v. Dubuque.} is distinguishable only in that the bonds attacked were issued to subsidize a bridge factory instead of a railway. The opinion went on the ground that “to lay with one hand the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation.” The statute authorizing the bond issue was therefore violative of implied constitutional limitations “which grow out of the essential nature of all free governments”; and the bonds invalid.

The justice and reasonableness of the decision were scarcely disputable. But since the meaning of “due process of law” had not yet been changed, there could be no pretense that it was authorized by any constitutional provision. By Marshall’s standards the decision itself was an impairment of the obligation of contract. Justice Clifford’s eloquent dissent was scarcely needed to make most of the other justices uneasy at their flagrant breach of conventional propriety. There were shreds of prior authority for holding statutes unconstitutional on “general principles”—but not enough to make it seem quite legal to do so. The possibility of expanding the Due Process clause beyond its literal

\footnote{See 34 Columbia Law Rev. 882; and Corwin, *The “Higher Law” Background of American Constitutional Law* (1928-29) 42 Harv. L. Rev. 149, 365.}
meaning was already in the air. After Loan Association v. Topeka all the justices probably found seductive the notion of adding to the Constitution what would amount to an express authorization to nullify statutes on the ground of extreme obnoxiousness. Such authority as there was for such a reading of the Due Process clause was not, to be sure, in good repute. On no occasion did the Court discuss the propriety of that reading. But never again, after the Slaughter House Cases, did any justice hint denial that that reading was correct. Not for twenty years, however, did the court take the drastic step of resting a decision of unconstitutionality upon it.

Commencing with Munn v. Illinois, the powerful pressure of economic class interest was for doing so. From the depression of the ’70’s onward “the inequalities in the condition of men” were increasingly “marked and disturbing”; there was widespread uneasiness lest “enormous aggregations of wealth . . . encroach upon the rights and crush out the business of individuals of small means.” From these premises Justice Field in 1890 drew this conclusion: as unrest increases “it becomes more and more the imperative duty of the court” unhestitatingly to enforce what he called, consistently with his dissenting opinions, “constitutional” guaranties of private rights—meaning conceptually absolute and abstractly equal imprescriptible “natural rights” of concretely unequal persons, for practical purposes substantially the same as rights theretofore enjoyed at common law or recognized in the mores of generations of economic pygmies. The first holding of unconstitu-

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59 Corwin, The Doctrine of Due Process of Law before the Civil War (1911) 24 Harv. L. Rev. 366, 460. The only opinion in the Supreme Court in which the doctrine of “substantive” due process had been used before the Civil War was Taney’s in the Dred Scott case, 19 How. (U.S.) 393, 450 (1856); the only later use was Chase’s in Hepburn v. Griswold, supra note 46, 8 Wall. (U.S.) 603, 622-6 (1870). In both, “substantive” due process was a mere make-weight.

60 16 Wall. 36, 80-81 (1873).


62 94 U.S. 113 (1876). For illustration of the heat with which the decisions in the Granger cases were assailed in the “conservative” press, see 2 Warren, op. cit. supra note 47, at 581 ff. It seems never to have been strongly argued that there was then no provision of the Federal Constitution (unless the Contract Clause as construed by Marshall) under which the validity of the Granger legislation was open to question. If there is any reality at all in the theory that constitutional construction is of the “original intent and meaning” of provisions, the argument would have been unanswerable. See Corwin, op. cit. supra note 59. Cf. Llewellyn, The Constitution as an Institution (1934) 34 Columbia L. Rev. 1. It was already assumed, however, that legislation adverse to powerful economic interests presents a constitutional question ipso facto.

63 Address to the N. Y. State Bar Association, Feb. 4, 1890, pamphlet, bound as No. 28 in vol. ii of Justice Field’s personal collection of his Opinions and Papers, now the property of Professor Frederick C. Hicks.

64 See Nelles, review of Swisher, Stephen J. Field (1930), Book Review (1931) 40 Yale L. J. 998.
tionality under the expanded Due Process clause established those rights, for a while, as constitutional. But reasonableness had theretofore been the standard of constitutionality under the expanded Due Process clause during the twenty years in which statutes attacked under it had consistently been sustained. It presently re-appeared as the standard. And though undue unreasonableness and invasion of natural rights have since alternated as criteria of unconstitutionality, the former seems finally to have prevailed.

3. Reasonableness v. Stare Decisis and the Constitution as Written

In the conditions of the last third of the nineteenth century the members of the Supreme Court were by no means the only judges who often felt oppressed by the narrowness of inherited bounds of judicial propriety. And the example of the Supreme Court was moral precedent for greatly increased freedom in dealing with cases as seemed to judges right or reasonable.

Two cases in the Taney period are typical of ways which conscientious judges then felt morally obliged to follow—ways which still, in spite of eighty years' attrition, stand as right in many minds. A public highway, not in use, ran between two farmers' wheat fields. To save fencing, they ran a single fence along its middle, each erecting half. The first to harvest his crop at once took down his half of the fence, and his cattle crossed over and destroyed the other's standing wheat. There was no possible doubt about the law. To erect the fence in the highway was an unlawful act. To take it down was a lawful act. Therefore the destruction of wheat ensuing was damnum absque injuria. "Mischievous motives make a bad act worse, but they cannot make that wrong which in its own essence is lawful." Similarly, when a bank systematically accumulated bank-notes issued by a rival bank, and plunged the rival into difficulties by presenting them for redemption all at once, of course no action lay in 1854. In such cases rules were definite and rights were absolute. To bend them to justice would have outraged professional propriety. It would have been clearly outside the unclear limits of permissible judicial freedom.

Within fifty years, however, judges were beginning to say that even "lawful acts" are unlawful if they cause loss, unless they were

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65 Allgeyer v. Louisiana, 165 U.S. 578 (1897).
done with "just cause and excuse." The landmarks are Lord Bowen's opinion in Mogul Steamship Co. v. McGregor, Dow & Co., 23 Q. B. D. 598 (1889); Judge Taft's in Moores v. Bricklayers' Union, 23 Oh. Wkly. Law Bull. 48; 10 Oh. Dec. 665 (Superior Ct. of Cincinnati, 1890); and Holmes's Privilege, Malice and Intent (1894), 8 Harv. L. Rev. 1.
impropriety in deciding reasonableness by hunch or prepossession without close analysis and weighing of all relevant considerations, or in using supposed absolutes of right as tests, or loose assumption that the interests of the acquisitive strongest coincide, in some "last analysis" that never has been made, with those of other persons generally. The modern judges for whom respect is deepest do not do such things. But the many instances in which they have been done in constitutional cases at some periods have often been followed as moral precedents by the judicial rank and file who carry the mores. When the question is of enjoining factory smoke or noise as nuisance, or of breaking a restrictive covenant, the losses and discomforts of householders may be slighted. "Reasonable" construction of old strict standards of the responsibility of corporate directors, and of stockholders who have got money as dividends which should have been saved for paying bills, has done not a little to facilitate the practice of "milking" corporations. When risk of loss pending transfer of title is not taken as concluded by authority, manufacturers are likely to be preferred to their customers. "Reasonable" expansion of the concept of "security title" has been largely for the benefit of bankers as against creditors of the buyer or the seller. Expansion of the concept of "property" has brought labor disputes within rules and principles whose application to them has no near approach to common warrant.

Even where reasonableness stands in the open as the apparent standard, traditional usals get in the way of reasonable judges and excuse unreasonableness in others. Since issues, traditionally, are between the parties only, weighty consumers' interests, not represented by counsel, may be ignored in unfair competition cases. In labor cases the conventional issues are as to the reasonableness of particular acts and courses; a strike may be broken because persons unknown threw stink-bombs, without investigation or adjustment (for which, indeed, courts are ill-equipped) of the substantial differences between employers and employed. In personal injury cases the traditional presumption that criteria of reasonableness can be embalmed as rules and kept sound throughout time, has been taken as justification for rules which tend to exclude consideration of reasonableness.

The types of cases for which authority definitely prescribes reasonableness as standard are still not very numerous. But the mores permit occasional semi-covert resorts to reasonableness in a wide and increasing variety of cases. A court decides a question as it believes it should reasonably be decided; but, deferring to tradition, represents its judgment as resting upon some less indefinite-seeming rule or test, which it prescribes to its successors. For a while thereafter *stare de-
cis is taken to require that the way prescribed be followed. Whether the results of following it are reasonable does not become open to inquiry until some judge or lawyer somehow makes it so.

Such a confusion and alternation of ways is illustrated in a line of decisions as to negligence and proximate cause. An early, and therefore daring, instance of open resort to considerations of reasonableness was in Ryan v. New York Central. A fire started by sparks from a wood-burning locomotive spread and consumed several houses in Syracuse. The court held that the railway company, though negligent, could not be made to pay the damage. Suppose the whole city had burned? To sustain a house-owner’s claim “would subject to a liability against which no prudence could guard, and to meet which no private fortune would be adequate.” House-owners, moreover, would naturally have insurance. The railway would not. Such reasons, however, seemed insufficiently legal. The notion that rights could depend on reasonableness had not commenced to be respectable. So the court said also that only the first fire started by the sparks, in a shed belonging to the railway, was proximate; and concluded thus: “The remoteness of the damage ... forms the true rule ... which prohibits a recovery.”

Thereafter for several years in several states physical propinquity was the test of liability for fires due to locomotive sparks. If a man’s negligence caused a fire which destroyed his own house, the destruction of his next-door neighbor’s house was “too remote”—unless the neighbor’s house was physically connected by a party wall. The destruction of woodland, unlikely to have been insured, was “too remote” from the cause of a fire which crossed two miles of dry stubble field to reach it.

When such cases were overruled, it was usually on the theory that when a loss must be borne somewhere, the “guilty” rather than the “innocent” should bear it—provided it were a “foreseeable,” or at least a “natural” consequence of the “guilty” act. In New York the test of physical propinquity has probably been demoted without explicit overruling. The Court of Appeals still purports to maintain it. But it has not lately been applied in a case where the distant sufferer of loss would not naturally have been insured. And it was very lately held that, though there can be no recovery where the fire has burned across intervening land to reach the plaintiff’s distant property, if it jumps across

35 N.Y. 210 (1866).

36 See cases cited in notes, BOHLEN, CASES ON TORTS (3d ed. 1930) 244-5.


the intervening land without burning anything there, the plaintiff can recover. For "the intervening land, no part of which has been touched by fire, provides no element of causation."78

In the case in which this reason was stated as controlling, the plaintiff's property was insured, and it might have been unnatural for the defendant to carry insurance against liability for damage to it. This may have been considered, and deemed outweighed by the fact that the fire originated from an explosion of gasoline which the defendant had in storage for commercial distribution. No one can tell whether these facts counted, perhaps not even the judges. For in spite of the commonness of covert free decisions controlled by convictions of justice or reasonableness, it is still commonly regarded as essential to represent them as controlled by, or at least as consistent with, some rule or doctrine of law-in-books. And it is not considered professionally proper to disclose what actually induced them.

The much discussed Palsgraf case79 is a less doubtful illustration of irrelevance of stated grounds to actual. A railway guard, as such guards do many times a day, had pushed a passenger aboard a crowded suburban train. A paper bag the passenger was carrying fell. The bag contained fireworks, which exploded, knocking over a penny scale at a point physically remote on the station platform. The scale struck the plaintiff, injuring her. The jury found that the guard was negligent. The Court of Appeals, divided four to three, reversed the judgment against the railway company. The opposing views of reasonableness must have been about as follows:

Majority: Such an accident could happen in any jostling crowd. The fact that it happened in a railway station, with a railway servant an active jostler, is fortuitous. Suppose it had happened on Fifth Avenue; as well charge any jostling office boy and his perhaps struggling employer in that case as the railway here. Since jostling in public places is normal in urban life, and risk of explosion is not normally incident to it, it should be classed as a risk against which no one not responsible for the presence of explosives should be required to insure another.

Minority: All sorts of risks are incident to the jostlings inescapable in cities. Attempts to distinguish degrees of normality or naturalness can lead only to legal artificiality and confusion. Risks must often lie where they fall, whatever the hardships. But general convenience requires that active contributors to such risks, if their pecuniary resources are sufficient, should insure their less active and usually less pecuniouss fellows against them wherever the imposition of such an insurer's burden seems practicable and not undue. Here the railway company, for private profit, assembles jostling crowds and jams

people into trains. Its charges are, or can be made (this was before the depression), sufficient to cover insurance against the ensuing risks. To make the railway an insurer, especially or at least when its own servants, even if careful, are active agents, is no more undue than making newspapers insurers against non-negligent unintended libels. 18

Between these opposing views of the mandate of reason for the Palsgraf case, there seems, as often, to be no better determinant of choice than the toss of a coin. It can scarcely be doubted that some such views determined the opposing conclusions of the judges—who could not, however, consistently with usual form-of-words-ways in such actions, have said so. The guard’s fault, if any, was completely immaterial in either view of reasonableness. Both opinions, nevertheless, bowed to convention by representing culpable negligence as material.

In the dissenting opinion, however, Judge Andrews made a notable contribution towards the downfall of mechanical ways of deciding questions of “proximate cause.” The negligence, he said, was proximate enough to the injury. “What we mean by the word ‘proximate’ is, that because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics. . . . It is all a question of expediency.”

In the majority opinion Judge Cardozo treated the question of proximate causation as immaterial. It must be taken that the guard was negligent. But if the jury found him negligent with respect to the distant plaintiff, they went beyond the evidence. The verdict cannot stand—for the negligence, if any, was with respect to the passenger carrying the bag of fireworks.

Thus a decision which seems almost surely to have been based upon “considerations of policy and social advantage” is again, as in the Ryan case, so dressed as to leave for future cases a standard inviting to Mechanical Judicature. “Negligence to whom?” will often be the question. Answers to it will often be real as well as formal grounds of decision, even where consideration of reasonable allocation of risk would lead to contrary decisions which nearly everyone would regard as just.

A situation which the New York courts have not yet finally dealt with illustrates the confusing tendency of compliance with the usage of employing conventional legal concepts as if as grounds or explanations of reasonable “free” decisions which were in fact reached on grounds left unstated. When the New York elevated railways were built, their

noise and vibration impaired the value of abutting land. The Railway
Company was required to pay abutting owners the difference between
the value of their land before and after. The actual inducing reason, of
course, was as when cattle break a fence and destroy crops—feeling that
as between the more active agent or maintainer of the injurious agency
and the passive sufferer, the former should bear the loss. But so to ex-
plain the award of compensation to the abutting owners would have been
even more legal-morally shocking in 1880 than it would to-day. The
compensation was described as for \textit{property taken}—the “property”
being in immunity from impairment of value by noise and vibration.
Since the Railway Company \textit{took} property, it must \textit{have} the property
taken. So it was thenceforth taxed on its “value.” On East 42nd
Street (where the “spur” was from Third Avenue to the Grand Central
Station) the abutting owners got for their “property taken” about
$200,000 some fifty years ago. Lately the elevated structure in East
42nd Street, having become obsolete, was removed, pursuant to a statute
providing that the abutting owners be assessed the “costs, compen-
sation,” \textit{etc.}, incident to the removal. The Railway Company demanded as
compensation for this “taking” of its “property” (its right, that is, to
infect noise and vibration) its “value”—to be measured, of course, by
present cost of reproduction, which then, just before the depression,
would have been about six million dollars. It seems clear, from the
lower courts’ opinions, that it will not get anything like that sum—but
clear also that it will get something, and that the something will be
called “value of property taken.”

Here, as in the \textit{Palsgraf} case, it would still be legal-morally im-
proper to present the inevitably “free” decision nakedly upon the
grounds which actually induce it. Cardozo says truly that “the judge,

\footnote{81 Since operation of the Elevated “Spur” had long been at a loss, the Railway
Company has been awarded no compensation for the taking of its franchise and
right to occupy the street. But the lower courts hold that it is entitled to the
“value” of its “so-called rights to impair easements of light, air and access”—includ-
ing those acquired by prescription (against owners who omitted to go after
compensation for the impairment of their light, air and access by noise and vibra-
tion fifty years ago) as well as those which it acquired by purchase in condemna-
tion of constructively equivalent proceedings. See Notes: \textit{A Constructive \textit{Property
Right} and its \textit{Value}}” (1931) \textit{40 Yale L.J.} 1074; \textit{Valuation of Easements
in Condemnation of Elevated Railroads}, \textit{ibid.} 779; \textit{The Elevated Railway Con-
demnation Case—Another Analysis of the Property Interests Involved}, \textit{ibid.} 1309.
Leading cases as to the abutting owners’ right to compensation were \textit{Story v.
N.Y. Elevated R. Co.}, \textit{90 N.Y.} 122 (1882); \textit{American Bank Note Co. v. N.Y.
Elevated R. Co.}, \textit{129 N.Y.} 252, 29 N.E. 302 (1891). As to the Railway Company’s
compensation, see \textit{In re Elevated Railroad Structure in East 42nd Street, 126
Misc. 879, 216 N.Y. Supp. 2} (Sup. Ct. 1926), modified \textit{229 App. Div. 617, 243
N.Y. Supp. 663} (1st Dept. 1930); \textit{141 Misc. 565, 253 N.Y. Supp. 743 and 143
Misc. 129, 257 N.Y. Supp. 37} (Sup. Ct. 1932), \textit{aff’d,} 238 \textit{App. Div. 832, 262
N.Y. Supp. 973} (1st Dept. 1933), and leave granted to appeal to the Court of
even when he is free, is still not wholly free.”82 Within a wide vague area, free decision has become reputable. But in most of that area it is still not reputable for the judge to rest his free decisions openly upon the considerations which lead him to them. As a practical matter, therefore, the power of a socially benevolent judge to give legal effect, in instances, to his mastery and use of an artificial technique.

The multiplication of instances of free decision is augmenting facilities for representing future instances as sufficiently consistent with stare decisis to satisfy the mores. Such decisions are commonly precedents either for newly discovered principles or standards or for extended applications of old ones. Stare decisis comes more and more to mean that decided standards should stand ahead of rules. Though narrow rules are still often blindly followed, “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.”83 Standards and judgments of degree are flexible. Even if the catch-pool standard—justice or reasonableness under whatever may be the circumstances—cannot respectably appear naked, probably almost any decision that most people would deem just or reasonable can be made to look consistent enough with stare decisis to seem respectable. What, indeed, might not be presented acceptably through the technique of the Funk case84—i.e., stare decisis requires that the decided principle that “the common law by its own principles adapts itself to changed conditions” prevail over stare decisis?

But though stare decisis may thus on occasion seem to commit suicide, it springs to life again from its own corpse. According to Cardozo,85

“We have to distinguish between the precedents which are merely static, and those which are dynamic. 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,86 a majority, I think, could not with semblance of reason, be decided in any way but one. . . . In countless litigations, the law is so clear that judges have no discretion.”

Of course there are not a few judges who decide as they like whenever for any reason (sometimes a sinister one) it seems to them importantly

82 The Nature of the Judicial Process (1921) 141.
83 Ibid. 161.
84 290 U. S. 371 (1933), discussed in 34 Columbia Law Rev. 864 ff.
86 Then of course the New York Court of Appeals.
desirable to do so,\textsuperscript{87} claiming compulsion of authority or reason, as the case may be, merely to cloak their bias. Conscientious judges, however, still feel for the most part bound, not free. A great many of the cases in which they feel bound are such that most sensible persons would agree that justice and general convenience require them, in those cases, to adhere to legal usals. No one would want to feel uncertain about the rule of the road, or as to the enforcibleness, under ordinary conditions, of contracts that have the quality of mutual beneficence which characterizes primitive reciprocities.\textsuperscript{88}

But the cases in which “the law is so clear that judges have no discretion” include also a large number in which their submission to conventional legal-moral duty has results which few would call just or reasonable. Even Cardozo feels that a court cannot properly make it unsafe for speculators to do business through irresponsible dummies.\textsuperscript{89} And he could not persuade his court that a fair written contract could change rights vested by a prior contract under seal.\textsuperscript{90} Though reasonableness has considerably relaxed old rigidities of contracts under cover of “implied conditions,” courts still feel bound to enforce contract provisions which manifestly would not be as they are if the parties had stood “in the equality of position . . . in which freedom of contract begins.”\textsuperscript{91} It is matter of course that the death of the owner of a building in which an elevator accident had occurred should relieve the company which insured him against liability for such accidents from compensating the victim.\textsuperscript{92} In a case reminding of the fosse case in the Year Book,\textsuperscript{93} “correct procedure,” as subsequently determined (few if any competent lawyers would have known what it was before the decision), was lately deemed more important than that a surety should have to pay a twenty thousand dollar judgment after its reversal.\textsuperscript{94} The Funk case\textsuperscript{95} belatedly

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\item \textit{Cf. Gray, Nature and Sources of the Law} (2d ed. 1921) 290: “Of course, the motive of a judge's opinion may be almost anything—a bribe, a woman's blandishments, the desire to favor the administration or his political party, or to gain popular favor or influence.” If these, in Gray's language, are not sources of the law “which Jurisprudence can recognize as legitimate,” a truthful jurisprudence must notwithstanding recognize that they are actual.
\item See ante, text above note 6 supra.
\item Crowly v. Lewis, 239 N. Y. 264, 146 N. E. 374 (1925), discussed by Cardozo, \textit{Paradoxes of Legal Science} (1928) 70-72.
\item Holmes, J., dissenting in Coppage v. Kansas, 236 U. S. 1, 27 (1915).
\item Ormsby v. Chase, 290 U. S. 387 (1933). It does not appear in the opinion either that the case was defended by an insurance company or that the usualness of covering elevator accident liability by insurance would be deemed material.
\item Supra note 29.
\item Anderson, an employee of the Singer Sewing Machine Company, inflicted personal injuries upon Mrs. Baldwin by negligent driving. A judgment for just under $20,000 against both Anderson and the Singer Company was affirmed as to Anderson; but reversed as to the Singer Company on the ground that there was no evidence to support a finding that Anderson had been “in the course of his
\end{itemize}

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The two defendants had appealed jointly. The appeal bond ran thus: WHEREAS the Singer Company [there was no mention of Anderson] has appealed and desires to stay execution; Now therefore the American Surety Company acknowledges itself bound "that if the said judgment appealed from, or any part thereof, be affirmed," the appellant will pay the amount "as to which said judgment shall be affirmed"; and "if the said appellant does not make such payment within thirty days from the filing of the remittitur," judgment may be entered on motion against the surety. On the expiration of the thirty days from the affirmation as to Anderson, Mrs. Baldwin, on ex parte motion, entered judgment against the Surety Company. This judgment was promptly vacated on motion of the Surety Company. On Mrs. Baldwin's appeal, the vacating order was reversed, on the ground that the Surety Company ought to have appealed instead of moving to vacate. Baldwin v. Anderson, 50 Idaho 606, 299 Pac. 341 (1931).

The Surety Company then appealed from the ex parte judgment; but as its time to appeal from that judgment had expired during the period between the vacation and the reversal of the order of vacation, the appeal was dismissed. Baldwin v. Anderson, 51 Idaho 614, 8 P.(2d) 461 (1932).

The lower court's denial of a second motion by the Surety Company to "correct and then vacate" the judgment was affirmed. Baldwin v. Anderson, 52 Idaho 243, 13 P.(2d) 650 (1932). The State Supreme Court declined throughout to consider the correctness of the judgment, its position being that the judgment, however erroneous, was not void, and therefore not subject to attack on motion. The lower court had jurisdiction to enter it. Only on a timely appeal from the judgment could the question whether the lower court ought to have entered it be considered by the Supreme Court. It was immaterial that the judgment had been vacated on motion and was not in effect (unless a judgment can somehow be in effect notwithstanding the fact that the records of the court whose judgment it was say that it has been vacated) when the Surety Company's time to appeal from it ran and expired.

Meanwhile the Surety Company had gone to the federal courts. The District Judge held that comity precluded his court from touching a matter of which the state courts had first acquired jurisdiction; the federal courts, moreover are concluded by the state court's construction of state procedural statutes. Amer. Surety Co. v. Baldwin, 51 F.(2d) 596 (D. Idaho, 1931). This was reversed by the Circuit Court of Appeals: the Surety Company's consent that judgment be entered against it on ex parte motion was only in case the Singer Company failed to pay a judgment against itself; it had not undertaken that the Singer Company would pay a judgment against Anderson; therefore the ex parte judgment was without due process of law, and void. 55 F.(2d) 555 (C. C. A., 9th, 1932).

In the Supreme Court of the United States, certiorari to the State Supreme Court was dismissed, and the decision of the Circuit Court of Appeals was reversed. In the state courts the Surety Company's claim of deprivation without due process of law contrary to the Fourteenth Amendment was made for the first time on motion for rehearing. This was too late. There was no denial of due process by the state, moreover, for the state law gave the Surety Company a due procedure—by appeal—for relief from the judgment entered without notice and without its consent. The Company's mistake of remedy gives it no ground to claim deprivation without due process. The state court's decisions made the validity of the ex parte judgment res judicata. There must be an end to litigation. A party who has been beaten in a state court of competent jurisdiction cannot try the same issues over again in a federal court. American Surety Co. v. Baldwin, 287 U. S. 156 (1932).

On the grounds stated in this opinion, the Federal District Court has enjoined the Surety Company from proceeding in the state courts with a suit in equity to restrain Baldwin from enforcing the ex parte judgment. Am. Surety Co. v. Baldwin, 2 F. Supp. 679 (D. Idaho, 1933).

"290 U. S. 371 (1933), supra note 84."
become more striking than their convenience to the administration of justice.96

But though many old clarities of rigid rule and absolute right still seem unblurred, moral assurance that they will remain so tends constantly to weaken. It is still unlikely that "a mortgagee would be prevented from foreclosing because he acted from disinterested malevolence and not from a desire to get his money."97 But it is no longer unthinkable. Even if there were no depression a court might restrain a malevolent foreclosure without deep shock to the profession. The limits of moral permission of judicial resort to reasonableness are always widening.

In the constitutional field from the beginning, judicial convictions respecting the commands of right and reason contended for constitutional sovereignty with the original intent and meaning of the written instrument. The conquest of the Due Process clauses was their decisive victory. That won, resistance dwindled. The provisions of the nuclear instrument became useful mainly for mnemonic convenience. Without them as pegs on and between which to drape the living Constitution, constitutional lawyers would not have known how to keep what they knew of it in any sort of serviceable order.

With growth, however, the living Constitution is tending back towards intelligible simplicity. Understanding of the acquired meaning of the Due Process clause makes all the rest easy to understand. Constitutional questions differ only superficially. Each is described as involving one or more particular provisions of the instrument, or some doctrine said to be derived therefrom—for instance that of the immunity of federal instrumentalities from state control. Most questions, however, whatever their verbal forms, are in substance Due Process questions of reasonableness under the circumstances.98 Though drivers of federal mail trucks cannot be required to have driving licenses,99 right and reason require that states be free to interrupt their discharge of federal duties by arrest if they are charged with murder.100 It is unreasonable, even though in no wise inconsistent with any Congressional regulation of commerce, that every state through which it passes should be free to levy tonnage taxes on freight in transit between Boston and San Francisco.101 It is reasonable that Congress should regulate local transactions

96 See CLARK, CODE PLEADING (1928) 83. See also Foster, Place of Trial in Civil Actions (1930) 43 HARV. L. REV. 1217; Place of Trial—Interstate Application of Intrastate Methods of Adjustment (1930) 44 ID. 41.
97 Holmes, J., in the Federal Reserve Bank case, supra note 71.
98 See CORWIN, STORRS LECTURES AT YALE (1934)—title for publication not yet determined.
100 United States v. Kirby, 7 Wall. (U. S.) 482 (1868).
101 Case of the State Freight Tax, 15 Wall. (U. S.) 232 (1873).
and businesses when its policies with respect to interstate commerce would otherwise be thwarted.\textsuperscript{102} It is reasonable also that federal authorities should deal with instances of vice and crime which the swiftness of travel makes it hard for states to reach.\textsuperscript{103} When circumstances make it reasonable, both Congress and the states may abridge freedom of speech and press,\textsuperscript{104} or impair the obligation of contract.\textsuperscript{105} That a question in form involves some other than the Due Process clause often makes no difference except in the names of cases chosen for citation as authoritative. Right and reason, as judicially construed, so normally determine decisions that study of the personnel of the Supreme Court outweighs knowledge of precedents under particular rubrics in usefulness for constitutional prediction.

The living Constitution is therefore simpler than it used to be. But it is still complicated by hang-overs of old ways at common law. Judges have not given up the practice of presenting decisions as consistent both with original intent or meaning and with precedents. And since they attempt this seriously and sincerely, their constructions of right and reason are often warped, and sometimes even kept from counting, by supposed obligations of fidelity to the past.

Actual fidelity to both original intent and precedents is usually impossible. For most of the important precedents—those in line with most of those cited two paragraphs back, for instance, and all those applying the expanded meaning of due process of law—are manifestly inconsistent both with the meaning of constitutional language as understood when adopted and with any intent which could then safely have been expressed in public. Two ways of escape from the impossible task of duplex fidelity compete in usage. One, available because few people really know much about original intent, is to take for granted that it is expressed by such of the precedents in point as accord with the deciders’ views of right and reason. Thus, at a time when butter is selling for not much more than fifteen cents a pound, a decision sustaining a tax of fifteen cents a pound on wholesome butter substitutes may be compelled by the precedent doctrine that the collateral purposes of legislatures in levying taxes are beyond the scope of judicial inquiry;\textsuperscript{106} or a contrary decision, if deemed more reasonable, might be as authoritatively compelled by the doctrine that an arbitrary tax is not really a tax at all, but

\textsuperscript{102} Tagg Bros. & Moorhead v. United States, 280 U. S. 420 (1930); Stafford v. Wallace, 258 U. S. 495 (1922).
\textsuperscript{105} Home Bldg. & Loan Assn. v. Blaisdell, 290 U. S. 398 (1934).
\textsuperscript{106} A. Magnano Co. v. Hamilton, 54 Sup. Ct. 599 (1934).
a confiscation of property.\textsuperscript{107} "Constitutional principles ... as they are written"\textsuperscript{108} may similarly establish the fidelity to original intent of whichever decision a majority of the court elects with respect to a regulation of rates or prices. The doctrine of hard-and-fast exemption of most businesses from such regulation was written so lately\textsuperscript{109} that its recent unwriting\textsuperscript{110} (at least for the time being) occasions little surprise.

The alternative way of escape is to find underneath both written instrument and precedents a deeper and truer original intent than those apparent on their surfaces. This way is still in course of improvement by experiment. When perfected it may come to this: The real, true, all-pervasive, profoundly fundamental and dominant original intent was that the whole and every part of the written instrument should conduce to general welfare. The framers and adopters knew—who does not?—that conditions change, and that a measure which would subvert welfare at one time may promote it at another. It must therefore have been and therefore was intended that constitutional provisions be elastic; that every granted power extend as far as the circumstances of whatever may be the moment make right and reasonable; and that limitations should similarly stretch and shrink with changing circumstances. It would follow, for example, that if the conditions of a time of depression were such that a debtors' moratorium would undermine "the confidence essential to prosperous trade,"\textsuperscript{111} the moratorium would be forbidden by the Contract Clause; it would not be forbidden, however, if the conditions of the depression were such that the moratorium would tend to restore confidence. So read, the Constitution is unchanging; for it is always the same as the right and reason whose imperatives change with conditions. And all past decisions can be deemed consistent with its intent—at least in aim, even if a good many of them were misses.

Free constitutional decision could thus be reconciled with consecrated constitutional beliefs much as free decision in other fields could, through the technique of the Funk case, be reconciled with \textit{stare decisis}. But even in constitutional law, free ways are still in tug of war with old ways of common lawyers. There are still cases in which precedentented standards are applied without thought or claim of right


For other antithetical pairs among "constitutional doctrines as they are written," see Corwin, \textit{op. cit. supra} note 98; also Note (by Harry Shulman), \textit{The Supreme Court's Attitude toward Liberty of Contract and Freedom of Speech} (1931) 41 Yale L. J. 262.


\textsuperscript{109} See Hamilton, \textit{Affectation with Public Interest} (1930) 39 Yale L. J. 1089.

\textsuperscript{110} Nebbia v. New York, 54 Sup. Ct. 505 (1934).

\textsuperscript{111} Moratorium case, \textit{supra} note 105.
or reason. Not long ago, for instance, the reasonableness of protecting immigrants from frauds by steamship ticket agents was deemed irrelevant to the question of the validity of a state statute with that object; for steamships carry foreign commerce. And when it was decided that regulation of fees charged by employment agencies is unconstitutional, one judge concurred on the sole ground that in another case regulation of theatre ticket brokers' charges had been held unwarrantable.

Such mechanical submission to stare decisis, though still common, now often seems extraordinary in cases where it would have been taken as matter of course in Taney's time. It becomes conceivable that reasonableness is superseding stare decisis as the paramount obligation in judicial mores—that it may even come to be felt as improper to follow precedents except where, as probably in a great majority of cases, doing so could be defended as reasonable.

Such a change of basic obligation would not ipso facto end confusion in judicial ways. There might be little diversity as to reasonableness in every-day cases where ways which come near to having common warrant are already established in use or easily discoverable. But as to the most important matters which courts deal with in a society deeply divided in interests and opinions, constructions of reasonableness might be as various and conflicting as they are at present. "Propositions as to public policy rarely are unanimously accepted, and still more rarely, if ever, are capable of unanswerable proof." And they are still commonly acted on "rather as inarticulate instincts than as definite ideas for which a rational defence is ready."

Even, moreover, where reasonableness was undisputed, fidelity to obligation to decide reasonably would depend upon what men were judges and what powers of persons, driven by what interests and opinions, they looked to chiefly for backing and approval. Whatever moral ways and standards were nominally respected, it could still be law in some places that extortion and homicide by powerfully protected persons are ordinarily exempt from prosecution. And the sophist's art of "making the worse appear to be the better reason" would not go out of use so long as credit could be gained by experts in it.

But unless Spengler is right in believing that mysterious forces beyond human control are whirling Occidental societies towards an inexorable destiny of death, there is no reason to suppose that legal unsatis-

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115 Decline of the West (1926, 1928).
factoriness would be relatively greater than it is at present. With release from fetters of tradition, it seems certain that many legal ways of almost undisputed unreasonableness would cease to be followed, and probable that reasonableness would become an object of study instead of guess. And it is possible that wise men would discover the essentials of a body of law with which satisfaction would be general, and solve the engineering problem of how to generate man-power enough to make their legal ideals facts.

VI

THE DECAY OF LEGAL ILLUSIONS

Whether for better or worse, it seems unlikely that ways derived from medieval illusion about the nature of law will be maintained much longer in judicial mores, unless as empty forms.

There is some vitality left in old illusions. Practicing lawyers still tend "to regard the doctrines of the system in which they have been trained as parts of the legal order of nature." They can sometimes be heard to say that some recent decision of their highest court is "not law" because contrary to those doctrines. If they bother to attend and listen, they applaud the priestly rhetoric of leaders of their profession in public addresses—in which, however, the object set up for reverent adulation is more likely to be the courts than the law. In court their professional mores require them to seem to wrangle rather about the mandate of authority than the reasonable disposition of the case, as if assuming that authority is binding upon appellate judges. They know well, however, that no case is so binding upon their court as one lately decided by the persons who now compose it; and that the way to win cases is by reaching the hearts and prepossessions of those persons. But if, for practical purposes, they take law as "the will of the judges," they do not say so.

Laymen too still stick to traditional ways of talking about law. They ask their lawyer friends what the law is as to this or that, and express surprise if they get a doubtful answer. But they know well enough that law suits are uncertain. They are not surprised if they are told that a case will probably result in a way that seems to them outrageous. Usually they are quite free from illusion that law is always just or reasonable. Not uncommonly, indeed, their loose opinions of law and courts are far more cynical and disrespectful than unrevenerate lawyers with ampler information would deem warranted. In the past year the "man in street"


118 See Bachrach, Reflections on Brief Writing (1932) 27 Ill. L. Rev. 374.
of not much economic consequence has often been amazed when told that Recovery legislation is likely to be held constitutional—not because he has mystical notions of constitutionality, but because he is used to believing that the Supreme Court always kills everything that might give the little fellow a chance. He has no illusion that law orders and adjusts things "in a fixed, absolutely predetermined way, excluding all merely individual feelings or desires of those by whom the ordering and adjustment are carried out." His illusion is rather that his own desires and feelings can have no influence upon law.

As early as 1864 the fictitious character of the assumption that law is found, not made, was openly indicated in a judicial opinion. And in all the years since I doubt if any important judge has let fall a pious statement of the nature of Marshall's in Osborne v. The Bank or Story's in Swift v. Tyson. To do so would seem simple-minded. Those who still advocate maintaining the pious fiction do not ask intelligent persons to believe it. They contend only that it is salutary for the vulgar; that social order depends upon popular respect for law, and that popular respect for law depends upon illusion about it. Popular respect for law depends much more upon belief that it is just, and regardful of popular interests. And diminution of that belief by judges who are partisan or mechanical has not been fully counterbalanced by judges who look for ways of dealing which will come close to having common warrant. If law which deserves respect is the object of desire, disrespect for law when it deserves it, even if greater than law as a whole deserves, may be more salutary than illusion.

Another attempted pragmatic justification of fiction was this by Schofield:

"No judge in England or the United States ever did need to be told, I think, that he has power to make law, but many judges in the United States have needed to be reminded from time to time, vi et armis, of the constitutional and

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119 "The Supreme Court of Iowa is not the first or the only court which has changed its rulings on questions as important as the one now presented. I understand the doctrine to be in such cases, not that the law is changed, but that it was always the same as expounded by the later decision, and that the former decision was not, and never had been, the law, and is overruled for that very reason." Miller, J., dissenting in Gelpcke v. Dubuque, supra note 56, 1 Wall. (U.S.) 175, 211 (1864).

120 9 Wheat. (U.S.) 738, 866 (1824), supra note 39.

121 16 Pet. (U.S.) 1, 18 (1842): "It will hardly be contended that the decisions of courts constitute laws. They are, at most, only evidence of what the laws are."

122 See the views of Demoge and Wurtzel, summarized in Frank, Law and the Modern Mind (1930) 222-235. Many American jurists have held these views, but usually without exposing them in print.

legal restraints binding upon them, when engaged in the judicial process of making law. . . . When you say judges only declare pre-existing law, and do not make new law, you emphasize those restraints and keep them fresh in the memory better than when you say judges make law. . . . The ‘fiction’ that judges only declare law is all that stands between us and a judicial autocracy.”

In other words, by telling your child that the cookies are locked up when he knows well that they are not, you can keep him from violating your prohibition of taking cookies, which anyway is “binding upon him.” If you could make him believe the cookies were locked up, it might restrain him. But it would be as hard to induce a twentieth century court to believe the fiction that judges only declare law as to get a twelve-year-old to believe in Santa Claus. The most he will do is pretend to believe for the benefit of the younger children. And he will stop doing that when their sophistication becomes such that it makes him look silly to them.

The fiction of judicial impotence seems just about to have died with realization that there is no use pretending any longer. There is more life left in the illusion that “constitutional and legal restraints” can be valid, or “binding upon” judges, for some other and higher reason than that a sufficient power of persons makes them so. Obviously the “restraints” (presumably traditional legal-moral standards) to which Scolfield referred as “binding upon” judges were not binding in fact. That was his grievance. When an ideal or standard seems desirable or excellent, it has often had propaganda value to proclaim that it is binding or valid in the inception of a movement to make it so. 124 But de facto validity depends upon power. A court, through its power of physical coercion, can validate any decision or standard which its public will put up with. But nothing can make a standard binding upon judges (or perhaps persuasiveness is the limit of possibility) except a pressure of high man-power. The man-power of moral pressure for traditional restraints on courts has been diminishing for generations. I suspect that pressure for judicial freedom to deal reasonably is now stronger. The forms of belief that judges are bound by the legislation of their predecessors are still observed. But scepticism is rife and profound conviction is rare, though belief handed down through all the changes in conditions since Bracton’s time is still skin-deep in countless vague and unobservant persons. Such belief generates little man-power, especially in conditions when most of the believers would rather be wrong than right, at least with respect to the bindingness of much of the con-

124 See the analysis of the “natural rights” talk which fanned revolutionary fires in the eighteenth century in Becker, The Heavenly City of the Eighteenth Century Philosophers (1932).
stitutional legislation of the Supreme Court in former periods. In these conditions those who, like Mr. James M. Beck, 125 despairingly insist upon transcendental notions of constitutional validity, seem to be talking to the echoes in an empty lecture hall.

WALTER NELLES

125 See his speeches and articles on the constitutionality of the National Recovery Act, 77 Cong. Rec. (1933) 2935 ff., Cong. Digest (Dec., 1933) 301, 8 Fortune (1933) 48.