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The author enters the perpetual debate over the propriety of judicial legislation with the assertion that lawmaking is not only essential to the judicial function, but also contemplated by the structure of our legal system. He explains that the common law's traditional responsiveness to societal needs, the necessity of applying general constitutional and statutory principles to specific cases, and the jurist's obligation to decide cases (and decide them "justly") often require judicial creativity. Judge Day concludes that if a judge refuses to act creatively, his decision will still make law. Consequently, only recognition of the necessity and limitations of the creative duty will protect against judicial excess and best serve the legal system and society.

I

JEROME FRANK has argued that a basic myth implicit in lay criticism of both law and lawyers is that the law could be definite and certain, providing precise legal answers to all human problems, if lawyers (presumably including judges) did not nefariously tinker with the rules.[1] There is evidence that this lay mythology is accepted by many lawyers and judges. The proof lies in the frequency and intensity with which the profession inveighs against judicial innovation.

When openly expressed, this criticism is delivered with a pejorative overtone which implies that judges who "create" rather than find law somehow usurp the legislators' function and profane their own. An intermediate state court's interpretation of decisions of the Supreme Court of the United States was met with this pronouncement by the Supreme Court of Ohio: "Courts in this state

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1. J. FRANK, LAW AND THE MODERN MIND 5 (1963).

are not expected to render decisions on any shamanesque blending of periphrasis, clairvoyance, speciosity and anticipation . . . ."[2] An implicit premise of even such mild invective is that innovation is superfluous because of the presence of law already made, and adequately made, needing only discovery. This is little more than a refinement of the lay attitude that the law is definite and certain. That is, the unchanging law is there to be found and followed if a jurist faithful to his oath will only look for it. It is fair to ask such expounders where the law is to be found, what its perimeters are, and whether the finders (judges) are not making law while determining the course of their search and the boundaries of their find.

Of course, there is another view of judicial lawmaking that responds to these questions. This approach begins with the proposition that law always has been, is, and always will be

> [L]argely vague and variable. And how could this well be otherwise? The law deals with human relations in their most complicated aspects. The whole confused, shifting, helter-skelter of life parades before it—more confused than ever, in our kaleidoscopic age.
>
> Even in a relatively static society, men have never been able to construct a comprehensive, eternized set of rules anticipating all possible legal disputes and settling them in advance. Even in such a social order no one can foresee all the future permutations and combinations of events; situations are bound to occur which were never contemplated when the original rules were made. How much less is such a frozen legal system possible in modern times.[3]

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2. State v. Fletcher, 26 Ohio St. 2d 221, 225, 271 N.E.2d 567, 569 (1971), *cert. denied*, 404 U.S. 1024 (1972).

3. J. FRANK, *supra* note 1, at 6; *see* Glanzer v. Shepard, 233 N.Y. 236, 241, 135 N.E. 275, 277 (1922): "Life has relations not capable always of division into flexible compartments. The molds expand and shrink."

> Ultimate legislative power in the United States has come to rest in the Supreme Court of the United States. This broad statement of an unrecognized fact is not made in opposition. Given the social and economic revolution of the United States, I do not see that the Supreme Court could well have avoided the legislative position in which it now finds itself; and I am in accord with the results it has achieved.

A. BERLE, POWER 345 (1969).

For a summary of the theoretical views of judicial lawmaking, see Smith, *Sequel to Workmen's Compensation Acts*, 27 HARV. L. REV. 344, 365-66 (1914):

> There are at least three different theories as to judicial lawmaking.
>
> 1. That judges cannot "make" law; that they merely discover and apply law which has always existed.
>
> 2. That judges can and do make new law on subjects not covered by previous decisions; but that judges cannot unmake old law, cannot even change an existing rule of "judge-made" law.
>
> 3. That judges can and do make new law; and also can and do unmake old law; *i.e.*, law previously laid down by themselves or by their judicial predecessors. (Footnotes omitted).

It follows that judges applying law under such circumstances are going to "make" law, indeed cannot avoid making it. But the making of new law should not be overemphasized. Creativity is not the factor in every case that it is in the novel case or the hiatus or reform decision. When novelty, a gap in the law, or reformation becomes involved, then inevitably "creation" occurs.[4] The facts, moreover, tend to shape every decision. And even the law emerging from the application of an existing rule may alter the contours of the precedent. Valid queries remain: When is judicial lawmaking inappropriate and when not only appropriate, but essential? A consideration of the "when" issues should throw some light on the "why." And an analysis of the judicial process—what judges do and how they do it—is fundamental to considerations of when and why judges make law.

II

In its simplest delineation judges' work is the settling of disputes. This can be dull, but it is no mean function. At the very least it prevents fighting in the street. However, each decision may do much more. It may have an impact far beyond the case it decides. For each judicial decision is a potential element in the settlement, or even the prevention, of future controversies. Temporarily, a decision may have an unsettling effect on the law. In the long run, as a precedent, the effect may be quite the opposite. Of course, the reach of precedent beyond a particular case widens the importance and function of the judicial process, and in this special sense, each decision makes law.[5]

Among the more difficult elements to assess in the judicial process is the way[6] judges reach the decision which settles a dispute. The method is conditioned by a variety of factors which may affect the judge. Some conditions operate at the conscious level, some below it. One of these subtle influences, usually totally subconscious,[7] is the judge's philosophy of justice.

4. *Cf.* B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 129, 149-50, 163-65 (1932).

5. Judicial concern for the rippling effect of precedent may result in injustice in a particular case because of a court's fear of unsettling law for the future. *See* J. FRANK, *supra* note 1, at 165 on "injustice according to law."

6. On the mental processes of the judge, *see generally* Hutcheson, *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decisions*, 14 CORNELL L.Q. 274 (1939); J. G. Day, Gestalt Psychology and the Judicial Process, 1940 (unpublished master's thesis in Ohio State University Library).

7. *See* Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes J., dissenting): "General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise." For a most

There is quite respectable opinion that justice means strict and mechanical application of the rules whether or not the result is fairness between the litigants.[8] Another concept places the emphasis on ad hoc goodness—simply doing justice—the right thing in the case at hand.[9] Still another view emphasizes the plasticity of the law and expects the courts to bring doctrine into line with the public mores. As the mores change, judges are to adapt the doctrine to them.[10]

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candid expression of extraneous influences, see the comments of Peters, J., in *Ex parte* Chase, 43 Ala. 303, 310-11 (1869):

> [I]t cannot safely be denied, that mere judicial discretion is sometimes very much interfered with by prejudice, which may be swayed and controlled by the merest trifles—such as the toothache, the rheumatism, the gout, or a fit of indigestion, or even through the very means by which indigestion is frequently sought to be avoided.
>
> . . . .
>
> It is . . . unwise longer to keep so indispensable a right as that of a fair and impartial trial, in a criminal case, under the uncertain security of a power, so uncontrollable and liable to error as mere judicial discretion—a power that may possibly be misdirected by a fit of temporary sickness, an extra mint julep, or the smell or looks of a peculiar overcoat, or things more trivial than these, which may imperil the due course of justice in the administration of law.

8. J. FRANK, *supra* note 1, at 169, quotes Dicey for the proposition that "[I]t is a judge's business to determine not what may be fair as between A and X in a given case but what according to some principle of law are the respective rights of A and X."

> 9. A decided cause is worth as much as it weighs in reason and righteousness, and no more. It is not enough to say "thus saith the court." It must prove its right to control in any given situation by the degree in which it supports the rights of a party violated and serves the cause of justice as to all parties concerned.

Adams Express Co. v. Beckwith, 100 Ohio St. 348, 352, 126 N.E. 300, 301 (1919) (Wanamaker, J. dictum).

> The . . . defense is a constitutional defense based upon a broad equitable principle. Certainly the interest in preserving the summary nature of an action cannot outweigh *the interest of doing substantial justice. To hold the preservation of the summary proceeding of paramount importance would be analogous to the "tail wagging the dog."*

Abstract Inv. Co. v. Hutchinson, 204 Cal. App. 2d 242, 249, 22 Cal. Rptr. 309, 314 (1962) (dictum, emphasis supplied) (tenant affirmatively defending against the termination of his tenancy solely because of race).

> 10. See Professor Corbin on this subject: It is the function of our courts to keep the doctrine up to date with the mores by continual restatement and by giving them a continually new content. This is judicial legislation, and the judge legislates at his peril. Nevertheless, it is the necessity and duty of such legislation that gives to judicial office its highest honor; and no brave and honest judge shirks the duty or fears the peril.

Comment, *The Offer of an Act for a Promise*, 29 YALE L. J. 767, 771-72 (1920).

> [T]he life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellowmen, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.
>
> . . . .

Realism dictates the conclusion that even the most obdurate of "law finders" must act "creatively" on occasion and adapt a rule or statute to a case. In this sense realism contemplates at least three elements as basic to the judicial process. All are imperatives. The first "must" is imposed by the pragmatism of decisionmaking; the case must be decided. The second "must" arises from demands of economic or social logic or fairness. Judges simply cannot, or will not, support forever a rule whose consequences offend concepts of equity or rationality. The third imperative is that the law reflect, in some measure, rules sufficiently acceptable for society to support.

Obviously, these "musts" tend to overlap. On occasion, they seem to run into each other. The seeming collision will occur, for example, when a constitutional principle adopted by society in one temper is applied when the mood has changed.[11] Techniques for effecting the corresponding change in the law may vary: Old doctrine may be extended by analogy to new issues; a seemingly binding precedent may be distinguished until at last the undercut doctrine topples; new rules may be fashioned; or the precedent may be simply overruled. But when the milieu for movement exists, the change's arrival—though gradual—is inexorable. Speed or lack of it in this process is, generally speaking, a reflection of the accidentally "appropriate" case, judicial temperament, and judicial courage.[12]

The change may be manifested in any of the several areas of necessary judicial action: the interpretation of constitutions, statutes, administrative rules and regulations, or development of the common law. Whatever the occasion the significant point is the

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> [I]n substance the growth of the law is legislative. And this in a deeper sense than that what the courts declare to have always been the law is in fact new. It is legislative in its grounds. The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned.

O. HOLMES, THE COMMON LAW 1, 35 (1923).

11. *See* text accompanying notes 41-42 *infra.*

12. For a somewhat ironic view of the speed and adaptability of the courts see Comment, *Unjudicial Notes on Judicial Notes*, 13 ROCKY MT. L. REV. 374, 376 (1941):

> Today braver courts, of their very own knowledge, can say that water runs down hill, that light travels 186,427 miles per second, that vitamin D acts as do ultra-violet rays, that minerals can't be located with a divining rod, and that a banana peel if stepped upon will clearly disclose physical signs. Let the detractors who complain of the unadaptability of the law be answered by the fact that a scant 300 years ago the mere affirmation that light was not instantaneous would have occasioned an Inquisition or witch-burning. Three hundred years is too close to the faggot pile to warrant becoming a judicial smart-aleck.

ineluctability of the change when time, circumstance, and the moment for judgment come together.

III

In contrast to the formulation of principles on a more or less comprehensive scale by statute,[13] the common law is a body of legal principles derived from custom and usage and developed by judicial exposition on a case-by-case basis.[14] When a common law rule collides with the changing needs of society, judicial modification is appropriate because

> [A] rule which in its origin was a creation of the courts themselves, and was supposed in the making to express the mores of the day, may be abrogated by the courts when the mores have so changed that perpetuation of the rule would do violence to the social conscience. . . . This is not usurpation. It is not even innovation. It is the reservation for ourselves of the same power of creation that built up the common law through its exercise by the judges of the past.[15]

Noting this creative and regenerative function of the common law, Llewellyn has declared:

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13. *See generally*, K. LLEWELLYN, JURISPRUDENCE, 299-309 (1962); Pound, *The Development of American Law and its Deviation from English Law*, 67 L. Q. REV. 49, 49-51 (1951), for analyses of the common law system.

English common law was not adopted lock, stock, and barrel by the colonies or the states although it is a principal source of law in those jurisdictions. For the methods and limits of the adoptions, see Hall, *The Common Law: An Account of its Reception in the United States*, 4 VAND. L. REV. 791, 798-822 (1951). Ohio enacted a reception statute and then repealed it. *Id.* at 802. This did not eliminate the common law in Ohio. Ohio judicial practice has adopted English common law where suited to Ohio's needs and not inconsistent with either the state or federal constitutions or state or federal statutes. Cleveland, C. & C.R.R. Co. v. Kearney, 3 Ohio St. 202, 205-06 (1854); State v. Cleveland & Pittsburgh R.R. Co., 94 Ohio St. 61, 69-70, 113 N.E. 677, 679 (1916). Legislative abrogation of the common law requires a manifest intent; mere implication is insufficient. Smith v. United Properties, Inc., 2 Ohio St. 2d 310, 313, 209 N.E.2d 142, 144 (1965); Frantz v. Maher, 106 Ohio App. 465, 471-72, 155 N.E.2d 471, 476 (1959).

There are a number of hybrid jurisdictions such as Puerto Rico, the Canal Zone, the Philippines, Quebec, Scotland, South Africa, Sri Lanka (Ceylon), and the state of Louisiana where the common and civil law systems interact. *See* F. H. LAWSON, A COMMON LAWYER LOOKS AT THE CIVIL LAW 3 (1953). On common law judicial behavior in a *civil* system see Tate, *The Role of the Judge in a Mixed Jurisdiction, The Louisiana Experience*, 20 LOYOLA (New Orleans) L. REV. 231 (1974).

14. Although statutory derivations are characteristically the primary source of law in civil law systems, it would be a mistake to assume that only statutes enliven principle in the civil law. Judicial interpretation plays an important, albeit subordinate, role. Morrow, *Louisiana Blueprint: Civilian Codification and Legal Method for State and Nation*, 17 TUL. L. REV. 537, 548 (1943); cf. Tate, *supra* note 13, at 239-40.

15. B. CARDOZO, THE GROWTH OF THE LAW 136-37 (1924).

> On the side of refreshment of policy, the grand tradition of the common law offers its emphasis on continuity and articulateness, but coupled with its ongoing judicial review of prior judicial decision, and with its acceptance and development of statutory or administrative policies declared by other organs.[16]

Large schematic change may have to wait for the legislature.[17] However, "the common law, in its eternal youth, grows to meet the demands of society."[18] The quotation is old measured by modern standards of time. Its accuracy must nevertheless remain unless man and all his works are to become totally and inflexibly automated.

The case of *Green v. Superior Court*[19] dramatically illustrates that the creative tradition is alive and actively refreshing the law

16. K. LLEWELLYN, *supra* note 13, at 310.

17. *But see* Wyatt v. Stickney, 325 F. Supp. 781, 785-86 (M.D. Ala. 1971). In *Wyatt*, a state mental hospital was given 90 days to (a) define the missions and function of the hospital; (b) prepare a specific plan for the "appropriate and adequate" treatment for patients who may be medically responsive to mental health treatment; (c) report in detail on the implementation of a new unit-team approach to treatment. Failure within six months from the date of the order to implement a treatment program to afford each treatable patient a realistic opportunity to be cured or improved is to result in the court's appointing a panel of experts to determine what is required to realize that opportunity. In the latter event the court will determine what is necessary to be done to afford effective treatment, in a constitutional sense, to those patients who have been involuntarily committed and confined.

After the six-month grace period the treatment programs were still wholly inadequate; however, in view of the hospital officials' demonstrated good faith, the court deferred turning the institution over to the panel and set a hearing to determine standards and order their implementation. Wyatt v. Stickney, 334 F. Supp. 1341 (M.D. Ala. 1971).

See also Jones v. Wittenberg, 330 F. Supp. 707 (N.D. Ohio 1971), *aff'd sub. nom.* Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972). The court undertook the reform of the Lucas County, Ohio, Jail. The scope of the regulation imposed is indicated by the principal headings in the court's findings of fact and conclusions of law:

"I. Reduction of Jail Population
II. Interior Lighting
III. Guards
IV. Diet and Food Service
V. Classification of and Program for Prisoners
VI. Sanitation and Personal Hygiene
VII. Medical Program
VIII. Communication and Attorney Visitations
IX. Reading Materials
X. Discipline and
XI. Alterations and Repairs to Physical Plant."

Extraordinary detail was added under most of the principal headings. The court allowed the jail officials a grace period for performance but indicated its willingness to enforce its reform order by contempt proceedings. Jones v. Wittenberg, 357 F. Supp. 696, 701 (N.D. Ohio 1973).

18. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890).

19. 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974).

independently of statutes. It provides an excellent state court example of contemporary common law development and a philosophical and technical model for judicial lawmaking in response to social demands.

At issue in *Green* was whether the common law doctrine that a landlord owed no duty to his tenant to keep leased premises in a habitable condition was to be maintained in California or discarded in favor of an implied warranty of habitability.[20] The Supreme Court of California, recognizing a "new" common law, embraced the implied warranty. In doing so, it fell back on a series of philosophical propositions: (1) legal doctrine must be brought in line with current mores; (2) the law must reflect the economic facts of life by shaping its rules to fit existing conditions;[21] (3) fairness

20. *Id.* at 619, 629, 529 P.2d at 1169, 1176, 111 Cal. Rptr. at 705, 712. There were additional issues in the case but the main issue, and the one generating the philosophies and techniques of doctrine modification, was the rejection of the "old" common law rule. *See also* Tonetti v. Penati, 48 App. Div. 2d 25, 367 N.Y.S.2d 804 (1975), on the implied warranty of fitness for habitability.

21. [F]actual and legal premises underlying the original common law rule in this area have long ceased to exist; continued adherence to the time-worn doctrine conflicts with the expectations and demands of the contemporary landlord-tenant relationship and with modern legal principles in analogous fields. To remain viable, the common law must reflect the realities of present-day society.

. . . .

The recent decisions recognize initially that the geographic and economic conditions that characterized the agrarian lessor-lessee transaction have been entirely transformed in the modern urban landlord-tenant relationship. We have suggested that in the Middle Ages, and, indeed, until the urbanization of the industrial revolution, the land itself was by far the most important element of a lease transaction; this predominance explained the law's treatment of such leases as conveyances of interests in land. In today's urban residential leases, however, land as such plays no comparable role. The typical city dweller, who frequently leases an apartment several stories above the actual plot of land on which an apartment building rests, cannot realistically be viewed as acquiring an interest in land; rather, he has contracted for a place to live. As the Court of Appeals for the District of Columbia observed in Javins v. First National Realty Corp. (1970) 428 F.2d 1071, 1074. . . "When American city dwellers, both rich and poor, seek, 'shelter' today, they seek a well-known package of goods and services — a package which includes not merely walls and ceilings, but also adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation, and proper maintenance. . . ."

. . . .

First, the increasing complexity of modern apartment buildings not only renders them much more difficult and expensive to repair than the living quarters of earlier days, but also makes adequate inspection of the premises by a prospective tenant a virtual impossibility; complex heating, electrical and plumbing systems are hidden from view, and the landlord, who has had experience with the building, is certainly in a much better position to discover and to cure dilapidations in the premises. Moreover, in a multiple-unit dwelling repair will frequently require access to equipment and areas solely in the control of the landlord.

Second, unlike the multi-skilled lessee of old, today's city dweller generally has a single, specialized skill unrelated to maintenance work. Further-

should characterize negotiated legal relationships.[22]

Having established a philosophical foundation for change, the court repudiated caveat emptor in residential leases and then added another layer to the strata of rationalization by analogizing tenants to consumers and leased premises to consumer products. This approach permitted use of resources in products liability and consumer law to support the "new" common law.[23] The court also

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more, whereas an agrarian lessee frequently remained on a single plot of land for his entire life, today's urban tenant is more mobile than ever; a tenant's limited tenure in a specific apartment will frequently not justify efforts at extensive repairs. Finally, the expense of needed repairs will often be outside the reach of many tenants for "[l]ow and middle income tenants, even if they were interested in making repairs, would be unable to obtain any financing for major repairs since they have no long-term interest in the property."

Green v. Superior Court, 10 Cal. 3d 616, 620-25, 517 P.2d 1168, 1170-74, 111 Cal. Rptr. 704, 706-10 (1975).

22. [U]rbanization and population growth have wrought an enormous transformation in the contemporary housing market, creating a scarcity of adequate low cost housing in virtually every urban setting. This current state of the housing market is by no means unrelated to the common law duty to maintain habitable premises. For one thing, the severe shortage of low and moderate cost housing has left tenants with little bargaining power through which they might gain express warranties of habitability from landlords, and thus *the mechanism of the "free market" no longer serves as a viable means for fairly allocating the duty to repair leased premises between landlord and tenant.* For another, the scarcity of adequate housing has limited further the adequacy of the tenant's right to inspect the premises; even when defects are apparent the low income tenant frequently has no realistic alternative but to accept such housing with the expectation that the landlord will make the necessary repairs. Finally, the shortage of available low cost housing has rendered inadequate the few remedies that common law courts previously have developed to ameliorate the harsh consequences of the traditional 'no duty to repair' rule. (emphasis supplied).

Id. at 625, 517 P.2d at 1173-74, 111 Cal. Rptr. at 709-10. For a discussion of "previously . . . developed" remedies see *id.* at 625 n.10, 517 P.2d at 1173 n.10, 111 Cal. Rptr. at 709 n.10.

23. These enormous factual changes in the landlord-tenant field have been paralleled by equally dramatic changes in the prevailing legal doctrine governing commercial transactions. Whereas the traditional common law "no duty to maintain or repair" rule was steeped in the caveat emptor ethic of an earlier commercial era, . . . modern legal decisions have recognized that the consumer in an industrial society should be entitled to rely on the skill of the supplier to assure that goods and services are of adequate quality. In seeking to protect the reasonable expectations of consumers, judicial decisions, discarding the caveat emptor approach, have for some time implied a warranty of fitness and merchantability in the case of the sale of goods. . . . In recent years, moreover, California courts have increasingly recognized the applicability of this implied warranty theory to real estate transactions; prior cases have found a warranty of fitness implied by law with respect to the construction of new housing units. . . .

In most significant respects, the modern urban tenant is in the same position as any other normal consumer of goods. . . . Through a residential lease, a tenant seeks to purchase "housing" from his landlord for a specified period of time. The landlord "sells" housing, enjoying a much greater opportunity, incentive and capacity than a tenant to inspect and maintain the condition of his apartment building. A tenant may reasonably expect

drew back from property law principles and adopted traditional contract concepts to fit its new conclusions within established legal principles.[24] It found comfort both in the legislative concern for habitable quarters expressed in contemporary housing codes[25] and in the well-established trend in other states toward installing the implied warranty of habitability in a "new" common law.[26]

The court specifically characterized its decision as a common law development.

> Indeed, even before the turn of the century, common law courts had recognized an implied warranty of habitability in leases of furnished rooms or furnished houses. In the seminal case of Ingalls v. Hobbs (1892) 156 Mass. 348, 350, 31 N.E. 286, 286, the Supreme Judicial Court of Massachusetts explained why the traditional no warranty of habitability rule did not apply to such rentals: "[T]here are good reasons why a different rule should apply to one who hires a furnished room, or a furnished house. . . . Its fitness for immediate use . . . is a far more important element entering into the contract than when there is a mere lease of real estate. . . . An important part of what the hirer pays for is the opportunity to enjoy it without delay,

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that the product he is purchasing is fit for the purpose for which it is obtained, that is, a living unit. Moreover, since a lease contract specifies a designated period of time during which the tenant has a right to inhabit the premises, the tenant may legitimately expect that the premises will be fit for such habitation for the duration of the term of the lease. It is just such reasonable expectations of consumers which the modern "implied warranty" decisions endow with formal, legal protection.

Id. at 626-27, 517 P.2d at 1174-75, 111 Cal Rptr. at 710-11.

24. In the past, California courts have increasingly recognized the largely contractual nature of contemporary lease agreements and have frequently analyzed such leases' terms pursuant to contractual principles. . . . Similarly, leading legal scholars in the field have long stressed the propriety of a more contractually oriented analysis of lease agreements. . . . Our holding in this case reflects our belief that the application of contract principles, including the mutual dependency of covenants, is particularly appropriate in dealing with residential leases of urban dwelling units.

Id. at 624, 517 P.2d at 1172-73, 111 Cal. Rptr. at 708-09.

25. These comprehensive housing codes affirm that, under contemporary conditions, public policy compels landlords to bear the primary responsibility for maintaining safe, clean and habitable housing in our state. As the Supreme Court of Wisconsin declared with respect to that state's housing code: "[T]he legislature has made a policy judgment—that it is socially (and politically) desirable to impose these duties on a property owner—which has rendered the old common law rule obsolete. To follow the old rule of no implied warranty of habitability in leases would, in our opinion, be inconsistent with the current legislative policy concerning housing standards. . . ." (citations omitted).

Id. at 627, 517 P.2d at 1175, 111 Cal. Rptr. at 711.

26. "This emerging line of decisions, along with a veritable flood of academic commentaries, demonstrates the obsolescence of the traditional common law rule absolving a landlord of any duty to maintain leased premises in a habitable condition during the term of the lease." *Id.* at 623, 517 P.2d at 1172, 111 Cal. Rptr. at 708.

> and without the expense of preparing it for use. It is very difficult, and often impossible, for one to determine on inspection whether the house and its appointments are fit for the use for which they are immediately wanted, and the doctrine of *caveat emptor*, which is ordinarily applicable to a lessee of real estate, would often work injustice if applied to cases of this kind. . . ." Recent cases have recognized that the rationale underlying the *Ingalls* court's adoption of an implied warranty of habitability in the rental of furnished dwellings is now applicable to urban residential leases generally. . . . *Our decision today may be seen as a logical development of the common law principles* embodied in the *Ingalls* decision. (Emphasis added).[27]

Of course it is arguable that the Supreme Court of California was not "compelled" to innovate and therefore should not have done so. This argument, however, leaves unanswered the question whether the court would not have been making law had it left untouched a situation in which tenants without bargaining power were being forced to pay for something they were not getting.

The *Green* example is not an exercise in generalization from the particular. For even a cursory review of the advance sheets in any season will disclose additional examples of a vibrant common law. And despite the pronouncement in *Erie R.R. v. Tompkins* that "there is no federal general common law,"[28] a body of decisional law existed then and continues to develop from the need for federal decisions on questions peculiarly within the federal province,[29] the need for uniformity of national policy,[30] and the emanations from federal statutes[31] and rulemaking.[32] There are many more exam-

27. *Id.* at 626, n.11, 517 P.2d. 1174-75, n.11, 111 Cal. Rptr. 710-11, n.11.

28. 304 U.S. 64, 78 (1938). It has been suggested that what *Erie* did was simply to leave "to the states what ought to be left to them." In consequence, there emerged "a federal decisional law in areas of national concern" which "we may call a specialized federal common law." H. FRIENDLY, IN PRAISE OF ERIE—AND OF THE NEW FEDERAL COMMON LAW 26-27 (1964). *Erie* was decided on April 25, 1938. On the same day, the Court decided Hinderlider v. LaPlata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938). Both opinions were written for the Court by Justice Brandeis. In *Hinderlider* it was said "[W]hether the water of an interstate stream must be apportioned between the two States is a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive." *Id.* at 110.

29. *See e.g.*, Banco Nacional De Cuba v. Sabbatino, 376 U.S. 398, 427 (1964) ("the act of state doctrine must be determined according to federal law."); Hinderlider v. LaPlata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938).

30. *See* the discussion of the federal courts' use of the Uniform Commercial Code, not adopted by Congress except in the District of Columbia, to fashion a common law for federal questions not covered by federal statute. Leflar, *Appellate Judicial Innovation*, 27 OKLA. L. REV. 321, 338-39 (1974).

31. *See* Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 456-57 (1957): "[T]he substantive law to apply in suits under § 301(a) is federal law, which the courts

ples, perhaps less dramatic because less innovative, which are dictated more by the practical considerations of dealing with "gaps" in the common law than by a sense of social necessity or fairness.[33] Such pragmatism can always find its justification in the "must" impelled by the necessity to decide. Frequently it is also anchored by a philosophical root in a concept of "justice." Whatever the philosophical bases of such decisions, they reinforce judicial lawmaking as the source of the traditional responsiveness of the common law.[34]

IV

Constitutional interpretation is equally dependent upon judicial creativity. The U.S. Constitution, for example, is a "transcendental" document. This "higher law" makes general provision for the governance of the nation. In the grand constitutional scheme, at least four major objectives are discernible: The first is to establish a viable central government; the second is to prevent an oppressive concentration of governmental authority; the third is the assurance of open government; and the fourth is the protection of individual rights. To achieve these ends, the Constitution balances power between the executive, legislative, and judicial branches; it indicates that a residual power exists in the people but does not specify the nature of this power.[35] It is arguable that it is general by design.

> [T]he Framers had a genius for studied imprecision. They were conscious of the need to phrase the constitution in generalized terms and without a lexicographical guide, for they meant to outline an instrument that would serve fu-

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must fashion from the policy of our national labor laws . . . . The range of judicial inventiveness will be determined by the nature of the problem." *Cf.* United Steelworkers of America v. American Mfg. Co., 363 U.S. 564, 567-68 (1960); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 577-78 (1960); United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596-98 (1960).

32. *See e.g.*, 28 U.S.C. §§ 2071, 2075 (1970).

33. *E.g.*, Avellone v. St. John's Hospital, 165 Ohio St. 467, 473, 474 (1956) (limiting charitable immunity).

34. Because of the enormous activities of state legislatures in the United States in expanding, contracting, and declaring the common law, it is probably true that courts "have ceased to be the primary makers of law in the sense in which they legislated the common law." Frankfurter, *Some Reflections on the Reading of Statutes,* 47 COLUM. L. REV. 527, 527 (1947). Yet the role of court decisions in rewriting and adapting the common law is not played out. Indeed, the common law process continues to work even after a statute comes into existence. The words of the enactment acquire a common law lustre from burnishing at the hands of judges, both in the process and substance of interpretation.

35. U.S. CONST. amends. IX, X.

> ture generations. . . . the Constitution was purposely made to embody first ideas and sketchy notions. Detailed codes, which become obsolete with a change in the particular circumstances for which they were adopted, are avoided by men trained in the common law. They tend rather to formulate principles that are expansive and comprehensive in character. The principles and not their framers' understanding and application of them are meant to endure. The Constitution, designed by an eighteenth-century rural society, serves as well today as ever because an antiquarian historicism that would freeze its original meaning has not guided its interpretation and was not intended to.[36]

Judicial "lawmaking" gives specific life to these generalized principles and is essential to the operation of the constitutional system.

The separation-of-powers doctrine provides a classic example of a political concept requiring constant interpretation if it is to function. The technique is the setoff of power between branches of government in order to achieve a balance that prevents either the executive, the legislative, or the judicial arms from exercising uncontrollable or untested power. A constant delineation of authority between the federal government and state governments and between state and state is also necessary. This does not imply a mutual cancellation of power but rather action and interaction whose net effect is balance. The ultimate objective is a synchronized limitation of function without paralyzing action. But the problem is complicated by the fact that the Constitution defines the boundaries between powers in very general terms. Such a scheme makes a referee essential, especially with respect to the divisions of authority within the federal government which must interact on a regular basis. Inevitably that referee makes law.

And the Supreme Court of the United States has established itself as the chief referee. When the Court settled on the judiciary as the defining agency,[37] that autogenous act may have made law

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36. L.W. LEVY, FREEDOM OF SPEECH AND PRESS IN AMERICAN HISTORY: LEGACY OF SUPPRESSION 308-09 (1963).

37. Marbury v. Madison, 5 U.S. (I. Cranch) 137 (1803); Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810). Perhaps the earliest suggestion of judicial review was made without reference to *written* higher law. But Sir Edward Coke's dictum in Dr. Bonham's Case, 77 Eng. Rep. 646, 652 (K.B. 1612), places the common law on a similar transcendental plane.

> And it appears in our books, that in many cases, the common law will (*d*) controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an act of parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void . . . .

the Court did not need to make[38] but it certainly made extensive future judicial lawmaking inevitable. Judicial review institutionalized a process which one could call judicial constitution-making. The checking and balancing thus begun has generated rules not written anywhere except in the opinions of the courts. Such rules delimit, distribute, and synchronize relations between elements of this complex government—a process in which, given judicial review, judges must make law.

There is a hint of inconsistency in empowering one of the entities to be "balanced" to reconcile its own functions with others in the system. But the balancing function must be performed if the system is to work; and arguably, the judiciary is the branch of government best suited for the arbitration of the limits of power.

For several obvious reasons judges are better equipped to referee this scheme than either legislators or executives.[39] Of the three branches, the courts have the strongest tradition of self-restraint and dispassionate consideration in the exercise of power. The judiciary is the least political[40] and has the least capacity to initiate comprehensive programs resulting in the accrual of authority. It has more resources for prohibition than promotion. These negative aspects of judicial power deter any potential abuse. Finally, it has little or no leverage through the purse and its troops are marshalls or sheriffs, not infantry. The ability to enforce judicial decrees

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The "(*d*)" refers to Calvin's Case, 77 Eng. Rep. 377, 393 (K.B. 1609), where it was said:

> By the statute . . . a man attainted in a *Praemunire*, is by express words out of the King's protection generally; and yet this extendeth only to legal protection, as it appeareth by Littleton, fol. 43, for the Parliament could not take away that protection which the law of nature giveth unto him; and therefore notwithstanding that statute, the King may protect and pardon him, . . .

38. It is not inherently necessary that the balancing function be performed by the courts. Legislative supremacy is the constitutional rule in Great Britain although the integration of executive and legislative elements in a system of ministerial responsibility makes the example of Britain a less than perfect exemplification of legislative supremacy in "a separated and balanced power" constitution. Quite obviously, the ultimate check in Great Britain inheres in the capacity of the majority parliamentary party (or that party and its allies) to prevent the erosion of its political base in the electorate.

39. *But see* Thomas Jefferson's dissent: "To consider the judges as the ultimate arbiters of all constitutional questions [is] a very dangerous doctrine indeed, and one which would place us under the despotism of an oligarchy . . . . The Constitution has erected no such single tribunal." A. CHANDLER, THE CLASH OF POLITICAL IDEALS 50 (1940).

40. This is not to say that even an appointed bench is wholly immune from political considerations. Nor is this political susceptibility evidenced only during the appointing and confirmation period.

depends overwhelmingly on the continuation of a moral consensus that orders of the court are law and ought to be obeyed.

The examples of judge-made law in the constitutional area (both federal and state) are legion. It can be argued that many examples do not support the idea that the courts "must" make law in any imperative sense, but this depends upon one's perception of "must." If the "must" is laminated with the necessity to decide "justly" as well as the simple necessity to decide, much of the argument over "must" disappears. It is not that the concept of justice is so easy to define. It is not. But over a lifetime individuals continually reach new conclusions as to what is "just." And when enough individual consciences concur, the concept of justice announced in constitutional interpretation by the Supreme Court may come to reflect that accord.[41] A good illustration is the transformation of the idea of racial justice (in an equal protection sense) from *separate but equal*[42] to *separate is inherently unequal.*[43] There are few better demonstrations to show that in refreshing its approach to the grand governmental plan of the Constitution, the "Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function."[44]

This empiricism is evident in the Court's attempts to coordinate constitutional objectives: the protection of individual rights; the assurance of open government; the prevention of oppressive concentration of governmental authority; and the establishment of a viable central government.

The measuring of federal legislative action against the power to regulate interstate commerce[45] is one example of judicial tacking toward a stronger role for the central government. This is not the place to catalogue the whole of the commerce clause policy undulations in the Supreme Court of the United States. It is plain enough that constitutional challenges to the use of the commerce power come in a variety of economic and social contexts and each has to be resolved. The social ambience may be the pivotal fact of decision. Whatever the cause of the difference in result, a comparison of the view of commerce expressed in *Hammer v. Dagenhart*[46] and

41. *See* text accompanying notes 10-12 *supra.*

42. Plessy v. Ferguson, 163 U.S. 537 (1896).

43. Brown v. Board of Educ., 347 U.S. 483 (1954).

44. Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 407-08 (1932) (Brandeis, J., dissenting).

45. U.S. CONST. art. I, § 8.

46. 247 U.S. 251, 269-76 (1918) (act prohibiting transportation in interstate commerce of goods produced by child labor held unconstitutional).

that in such cases as *NLRB v. Jones & Laughlin Steel Corp.*[47] and *United States v. Darby*,[48] permits the conclusion that the Supreme Court, in the necessity of decision, was making law both when it struck down legislation outlawing child labor, and when it held, in effect, that Congress had the constitutional power to establish a national economic policy and to prevent the economic balkanization of the United States.

The development of rules governing the respective faculties of the executive, legislative, and judicial branches of government is a prime example of judicial creativeness. These relationships have not yet been fully delineated; the definition grows from time to time. Judicial lawmaking, both controlling the allocation of power between branches of government and supporting open government, has been visible in the executive and legislative confrontation over Presidential power to protect information from congressional and public scrutiny.[49] The recent cases involving the Pentagon Papers[50] and the newsman's privilege[51] have required the Court to devise rules to preserve open government. And whether one agrees or disagrees with the outcome of those cases, the necessity of decision evoked court-made "law." The "lawmaking" result was unrelated to the actual outcome of each case. The Supreme Court faced hard questions. Whatever role it played, including abstention, would have had the impact of "lawmaking."

Whenever the Supreme Court of the United States addresses civil liberties or criminal procedure questions, its lawmaking has a high profile because of the dramatic quality of the issues. Here again, decisional necessity has played a role in effecting judicial legislation. In these civil liberty cases, however, the "justice" aspect of the imperative to legislate has been a large factor not only in deciding the issues, but in deciding them in a particular way. For example, the unfulfilled promise of constitutional liberty and fair criminal process, a condition of law, might have remained unfulfilled had the Court not "legislated." Granting primacy for first amendment rights and opening up the 14th amendment, the Court promoted open government and expanded the protections for indi-

47. 301 U.S. 134-37 (1937) (holding the National Labor Relations Act of 1935—regulating unfair labor practices which induce strikes tending to obstruct interstate commerce—constitutional).

48. 312 U.S. 100, 118-22 (1941) (upholding the constitutionality of the use of the commerce power to regulate wages and hours in the Fair Labor Standards Act of 1938).

49. *See* United States v. Nixon, 418 U.S. 683 (1974).

50. New York Times Co. v. United States, 403 U.S. 713 (1971).

51. Branzberg v. Hayes, 408 U.S. 665 (1972).

vidual rights.[52] Although it might not seem so at first blush, open-government issues as well as the protection of individual rights may be involved in developing fair criminal procedure. The stake of the individual in such condign rights as those against self-incrimination,[53] confrontation,[54] counsel,[55] and jury trial[56] is clear. On examination, all those rights, except the right against self-incrimination also reveal a design to facilitate open access to information.

Public trial is another aspect of open government. But when the Court swells a defendant's fourth amendment right against the illegal seizure of evidence to include a right to bar such evidence from his trial,[57] it is not aiding openness. The Court is legislating in a different direction by opting to limit government while giving substance to an individual right against unreasonable searches and seizures which would mean much less without the exclusionary rule.

And, of course, an enormous lawmaking process is involved every time the Supreme Court acts to import another of the rights in the first eight amendments into the fourteenth amendment through the due process clause.[58] It is arguable that the Court must read the

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52. If . . . appellant seeks for freedom of conscience a broader protection than for freedom of the mind, it may be doubted that any of the great liberties insured by the First Article can be given higher place than the others. *All have preferred position in our basic scheme* . . . All are interwoven there together. Differences there are, in them and in the modes appropriate for their exercise. But they have *unity in the Charter's prime place* because they have *unity in their human sources and functionings.* . . .

Prince v. Commonwealth of Massachusetts, 321 U.S. 158, 164-65 (1944) (emphasis supplied). "These freedoms are delicate and vulnerable, as well as *supremely precious* in our society . . . . Because First Amendment freedoms need breathing space to survive, government may regulate in the area *only with narrow specificity.*" NAACP v. Button, 371 U.S. 415, 433 (1963) (emphasis supplied).

53. U.S. CONST. amend. V; *e.g.*, Brooks v. Tennessee, 406 U.S. 605, 610-13 (1972); Murphy v. Waterfront Comm'n, 378 U.S. 52, 77-78 (1964); Malloy v. Hogan, 378 U.S. 1, 6 (1964).

54. *E.g.*, Pointer v. Texas, 380 U.S. 400, 403 (1965); Douglas v. Alabama, 380 U.S. 415, 418-19 (1965).

55. *E.g.*, Argersinger v. Hamlin, 407 U.S. 25, 36-37 (1972); Gideon v. Wainwright, 372 U.S. 335, 342 (1963).

56. *E.g.*, Duncan v. Louisiana, 391 U.S. 145 (1968).

57. *E.g.*, Mapp v. Ohio, 367 U.S. 643, 655-57 (1961).

58. *E.g.*, Benton v. Maryland, 395 U.S. 784, 794 (1969); Douglas v. Alabama, 380 U.S. 415, 418-19 (1965); Pointer v. Texas, 380 U.S. 400, 403 (1965); Malloy v. Hogan, 378 U.S. 1, 6 (1964); Murphy v. Waterfront Comm'n, 378 U.S. 52, 77-78 (1964); Gideon v. Wainwright, 372 U.S. 335, 339-45 (1963); Edwards v. South Carolina, 372 U.S. 229, 235 (1963); Mapp v. Ohio, 367 U.S. 643, 655-57 (1961); Saia v. New York, 334 U.S. 558, 559-60 (1948); Taylor v. Mississippi, 319 U.S. 583, 588-89 (1943); American Fed'n of Labor v. Swing, 312 U.S. 321, 325-26 (1941); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940); Schneider v. State, 308 U.S. 147, 160 (1939); Lovell v. City of Griffin, 303 U.S. 444, 450 (1938); DeJonge v. Oregon, 299 U.S. 353, 364 (1937); Grosjean v. American Press Co.,

Constitution in this fashion. There is no other way to insure that the "justice" policy nurtured both by open government and protection for the citizen against *federal* encroachments is not frustrated by either *state* depredation of individual rights or state lethargy in affirmatively protecting them.

Of course, the illustrations given here are limited. There are many more examples of constitutional lawmaking by the Supreme Court of the United States, to say nothing of similar processes in the inferior federal courts and the state courts. It is unnecessary to demonstrate further. The point is that when the Court considers any constitutional issue, whatever the Court decides—even when it decides to do nothing—that decision will make law. The problem is not how to quell judicial constitutional lawmaking because such lawmaking is a necessary component of the constitutional system. Rather one must quarrel, or not, with the law as made.

V

It is daily duty for courts to interpret and apply statutes.[59] Judicial lawmaking is as integral to the interpretation and implementation of statutes as it is to the functions of the Constitution and the common law. When this process is taking place, the courts commonly speak of legislative purpose[60] or intent as though the legislature were a single-headed, single-minded individual whose total judgment on the statutory subject was graven in marble at the instant of enactment. Only slight reflection is needed to expose this fiction.

In the first place, the collective nature of a legislative act complicates the search for intent. The vote is rarely unanimous, especially in controversial matters. Even unanimity does not indicate the intensity of support nor the degree to which the final measure represents a victory of accommodation or compromise.[61]

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297 U.S. 233, 242 (1936); Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 707 (1931); Stromberg v. California, 283 U.S. 359, 368 (1931).

59. Justice Frankfurter has said that in the Supreme Court of the United States "almost every case has a statute at its heart or close to it." F. Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 527 (1947). Query whether the state cases are vastly different?

60. Obviously, a statute must be read "[I]n the light of some assumed purpose. A statute merely declaring a rule, with no purpose or objective, is nonsense." Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about how Statutes are to be Construed*, 3 VAND. L. REV. 395, 400 (1950).

61. Statutory language may be drafted with the degree of ambiguity required by the "language of politics." *See* Freund, *The Use of Indefinite Terms in Statutes*, 30 YALE L.J. 437 (1921).

Legislators, or some of them in each legislature, are in constant transit; particular minds may or may not change but personnel does. With the impact of new attitudes, it may become more and more difficult to assess the current legislative mind in terms of prior legislative action, especially when the current legislature has not taken up the same problem.[62] Any present intent "found" is based on words formulated in time past by a few legislators (or a drafting staff), touched perhaps by the tinkering of a few more, and then approved by a ballot of many voting with more or less conviction. It is not surprising that Professor Radin finds legislative intention "undiscoverable."[63] Kohler has noted the vicarious nature of the legislature as a peoples' representative: "[Statutes] should be interpreted sociologically, as if they were the products of the entire people of which the legislator was but the organ."[64] This suggests a continuum which will not accept old legislative intents in newer sociological contexts.[65] Nevertheless, the presumption is indulged that when a legislature has left its old work undisturbed over a period of time, it means to continue with whatever gloss interpretation has given. In practice, the presumption could hardly be otherwise. Each newly elected legislature cannot be expected to review its past in detail.[66] However, none of this rebuts the notion that there may be a measure of fiction in any judgment which concludes that there is a continuing legislative intent. Perhaps that measure enlarges or contracts with the passage of time. But certainly an intent on an unanticipated issue was not clearly fixed at the moment of enactment.

62. The verdict of quiescent years cannot be invoked to baptize [sic] a statutory gloss that is otherwise impermissible. This Court has many times reconsidered statutory constructions that have been passively abided by Congress. Congressional inaction frequently betokens unawareness, preoccupation, or paralysis. "It is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law." Girouard v. United States, 328 U.S. 61, 69 (1946). Its significance is greatest when the area is one of traditional year-by-year supervision, like tax, where watchdog committees are considering and revising the statutory scheme. Even less deference is due silence in the wake of unsuccessful attempts to eliminate an offending interpretation by amendment. See, *e.g.*, Girouard v. United States, *supra.*
Zuber v. Allen, 396 U.S. 168, 185-86, n.21 (1969).

63. Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870 (1930). Dean Landis recognizes the problem but takes a more sanguine view of discoverability. Landis, *A Note on Statutory Interpretation*, 43 HARV. L. REV. 886 (1930).

64. J. KOHLER, JUDICIAL INTERPRETATION OF ENACTED LAW 187, 189 (1917).

65. "To believe that legislation depends exclusively on the intention of the legislator is evidence of an entirely unhistorical attitude." *Id.* at 188.

66. It is probably as much as can be expected that legislatures adopt broad recodification from time to time, *e.g.*, the revamping of the Ohio Criminal Code effective January 1, 1974. OHIO REV. CODE ANN. §§ 2901-67 (Baldwin, 1974).

> A fundamental misconception prevails, and pervades all the books as to the dealing of the courts with statutes. Interpretation is generally spoken of as if its chief function was to discover what the meaning of the Legislature really was. But when a Legislature has had a real intention, one way or another, on a point, it is not once in a hundred times that any doubt arises as to what its intention was. If that were all that a judge had to do with a statute, interpretation of statutes, instead of being one of the most difficult of a judge's duties, would be extremely easy. The fact is that the difficulties of so-called interpretation arise when the Legislature has had no meaning at all; when the question which is raised on the statute never occurred to it; when what the judges have to do is, not to determine what the Legislature did mean on a point which was present to its mind, but to guess what it would have intended on a point not present to its mind, if the point had been present. . . .[67]

A court's legislative function does not only arise from the duty to interpret statutes. Legislatures also delegate legislative powers either intentionally or as the result of political necessity. Competing interests exert great pressure on the legislative process. Legislators are often the champion of one "interest" cause or another. The resulting product is apt to be a compromise containing, in general language, the most specific consensus capable of achieving a majority vote.[68] Legislators understand and expect that the courts will import content into the generalizations as the statute is applied.

When a legislature "enacts," it frequently leaves the implementation of the statute to an administrative agency, usually subject to judicial review, or it makes no specific provision for implementation. The latter situation is interpreted as an intentional delegation to the courts.[69] Implementation occurs with case-by-case adjudication.

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67. J. C. GRAY, NATURE & SOURCES OF LAW, 172-73 (2d ed. 1921).

68. *See* Cohen, *Judicial "Legisputation" and the Dimensions of Legislative Meaning*, 36 IND. L.J. 414, 415 (1961).

69. "Congress has incorporated into the Antitrust Acts the changing standards of the common law, and by so doing has delegated to the courts the duty of fixing the standard for each case." United States v. Associated Press, 52 F. Supp. 362, 370 (S.D.N.Y., 1943) (L. Hand, J.), *aff'd*, 326 U.S. 1 (1945); *cf.* McCleary v. State, 49 Wis. 2d 263, 275-76, 182 N.W.2d 512, 518-19 (1971). In *McCleary*, the Supreme Court of Wisconsin noted that 13 of the 50 states have statutes providing for sentence review and 7, including Wisconsin, have it by judicial construction. The court stated and applied the objectives of such review adopted by the American Bar Association Standards on Appellate Review of Sentences. The rationale for the court's action details the problem facing a judge when confronted with a legislative generalization:

> The imposition of an excessive sentence and its review presents a judicial problem and not a problem for either the legislature or the ex-

Inevitably this process results in the statute's acquiring a judicial patina. This oxidizing process is lawmaking. Delegation is a logical consequence of legislatures' inability to anticipate administrative detail. They are equipped to design large regulative schemes but not to enforce them. They are equipped to determine policy but not to apply it. Therefore, they must delegate to administrative agencies or to the courts.

There is nothing extraordinary in judicial subrogation. It has a long history. But for some reason courts are not usually perceived as proper surrogates of the legislature. Of course, delegations of legislative power may raise constitutional questions. However, the delegation issue is apparently larger in state constitutional law than in federal. The U.S. Constitution has seldom been invoked to strike down such assignments of authority.[70]

It is true that courts are not suitably staffed for elaborate admin-

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ecutive. When the legislature grants sentencing power to the courts to impose sentences covering a range . . . it is apparent that it left it to the judicial discretion to determine where in that range the sentence should be selected. It is also apparent that the legislature concluded that all criminals convicted of a particular crime were not to be treated alike in respect to sentencing. . . . Since it is the role of the courts to find rationality in legislative enactments where possible, we must conclude that the legislature intended that maximum sentences were to be reserved for a more aggravated breach of the statutes, and probation or lighter sentences were to be used in cases where the protection of society and the rehabilitation of the criminal did not require a maximum or near-maximum sentence. The legislature intended that individual criminals, though guilty of the same statutory offense, were not necessarily to be treated the same . . . .

It is thus apparent that the legislature vested a discretion in the sentencing judge, which must be exercised on a rational and explainable basis . . . .

[T]his court will determine whether or not a trial judge has abused his sentencing discretion.

See also the congressional policy epitomized in the Administrative Procedure Act § 10(e), 5 U.S.C. § 706 (1966): "To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."

70. K. DAVIS, ADMINISTRATIVE LAW TEXT 28 (3d ed. 1972). The problem of unconstitutional delegation is usually discussed in contexts involving delegations to administrative agencies. *See, e.g., id.* at 43-46. Professor Davis discusses this question and others in terms of the constitutional nondelegation doctrine and its ineffectiveness. Realism, it is argued, requires the recognition that responsible delegation is necessary to the legislative function. This being so, the issue is how to control discretionary power. It is suggested that the preferable course for the courts is not to insist on legislative standards but to require administratively developed criteria and procedures for regulation, subject to judicial review. *See* Environmental Defense Fund v. Ruckelshaus, 439 F.2d 584, 597-98 (D.C. Cir. 1971); United States v. Bryant, 439 F.2d 642, 652 (D.C. Cir. 1971).

istrative regulation and have avoided it.[71] Such evasion, when coupled with judicial innovation, can create problems. Professor Leflar has listed a series of 11 relevant questions that would have been left unanswered had there been a simple judicial pronouncement establishing comparative negligence in the tort policy of a state.[72] And, when legislatures have acted in equally simplistic fashion, courts have had to supply the necessary detail piecemeal. Case-by-case adjudications occasionally have resulted in elaborate rules resolving a cluster of issues essential to the effective operation of the statute but neglected by the legislature. For example, Wisconsin's short comparative negligence statute was originally passed in 1931.[73] More than 30 years later the courts were still piecing in details and all the problems involved in the implementation of the statute were not yet solved.[74] Of course, this lawmaking is imposed by the necessity of deciding cases under the statute. Had the courts of Wisconsin refused to act, on the ground that the legislative policy did not establish sufficient guidelines, that too would have made law. The refusal to legislate judicially would have produced an anomaly —the frustration of the legislature's policy as a consequence of a narrow judicial view of the judicial function.

Faced with the necessity of performing interpretive and implementing functions, the courts have developed theoretical approaches to construction. These approaches, which either influence law making or make law, are limited or expanded by the courts' philosophical vision of their function as legislators within gaps,[75] as en-

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71. But not always. *See* note 17 *supra*.

72. Leflar, *Comments on Maki v. Frelk—Comparative v. Contributory Negligence: Should the Court or Legislature Decide?*, 21 VAND. L. REV. 918, 920-21 (1968).

73. WIS. STAT. ANN. § 895.045 (West 1966):

> Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not as great as the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributable to the person recovering.

Amended in 1971 to read:

> Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not . . . *greater than* the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributable to the person recovering.

74. Leflar, *supra* note 72, at 923-26.

75. In Usatorre v. The Victoria, 172 F.2d 434, 440-41 (2d Cir. 1949), Judge Frank, dissenting in part, pointed out that the civil law countries

> [A]re accustomed to interpret their statutory enactments "equitably," *i.e.*,

forcers of policy,[76] or as reflectors of community needs[77] or custodians of justice (however they interpret it).[78] One method is analytical. The principles of interpretation and assisting maxims[79] are utilized with minimum reliance on intrinsic or extrinsic aids.[80] Another emphasizes the social policy necessary to effect community needs as the guide to interpretive policy. A third gives free intuition a wide latitude in order to achieve a just result.[81]

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to fill in gaps, arising necessarily from the generalized terms of many statutes, by asking how the legislature would have dealt with the "unprovided case." In civil-law countries, "there are countless examples of judicial interpretation of statutes . . . which give the statutory interpretation a meaning either not foreseen by or openly antagonistic to the opinions prevailing at the time of the Code, but in accordance with modern social developments or trends of public opinion. This attitude finds expression in Art. I of the Swiss Civil Code [of 1907] which directs the judge to decide as if he were a legislator, when he finds himself faced with a definite gap in the statute.

See, e.g., Green v. Pederson, 99 So. 2d 292, 295-96 (Fla. 1957), where the court declined to require a license for a miniature trackless trolley train under a statute requiring "motor vehicle" licensing, thus filling a gap. Justice Cardozo points out that often there are no gaps, that the law is so clear that a judge has no discretion. B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 129, 149-50 (1932).

76. See note 8 *supra.*

77. See note 10 *supra.*

78. "Justice" may mean engrafting a condition of "reasonableness" upon a seemingly absolute grant of authority by the legislature. This happened when a social agency with apparent absolute authority refused to consent to an adoption. The court's reasoning clearly reflects a concept of justice:

> Obviously, a "structured" agency system taking into account many factors before giving consent to adoption as urged by the professionals is of great importance . . . but few standards in human affairs can be Procrustean in application. In the light of the total evidence, and the singular emphasis on age as the key factor in denying consent, the denial in this case seems an example of a loss of the spirit of the *whole* adoption system while holding to the letter of *part* of it. The fault, the unreasonableness, the arbitrariness and the caprice, lie precisely with this extraordinary emphasis on a single negative factor in the face of remarkably unanimous opinion that by all other standards the appellees are outstandingly qualified to be adoptive parents.

In re Haun, 31 Ohio App. 2d 63, 70, 286 N.E.2d 479, 482-83 (1972).

79. See Llewellyn's amusing and instructive catalogue of offsetting legal maxims, Llewellyn, *supra* note 60, at 401-06.

80. Intrinsic aids may include maxims, grammatical rules, construction of particular words (*p.e.*, technical words are used in their technical sense if they have one; otherwise they are read in their ordinary meaning) and integral parts of the statute, such as the preamble, if part of the official enactment, or chapter and section headings. Examples of extrinsic aids are historical background, legislative proceedings, committee reports, draftsmen's views, other statutes *in pari materia*, and prior judicial or administrative construction. For an extensive discussion of intrinsic aids, see 2A J. SUTHERLAND, STATUTES & STATUTORY CONSTRUCTION §§ 47.01-.38 (4th ed. 1972); P. LANGAN, MAXWELL ON INTERPRETATION OF STATUTES 3-20, 58-64 (12th ed. 1969). For a discussion of extrinsic aids, see SUTHERLAND, *supra*, 48.01-20.

81. *See* Friedman, *Statute Law and Its Interpretation in the Modern State*, 26 CAN. B. REV. 1277, 1279-89 (1948).

Coke's report in *Heydon's Case* announced an elaborate guide to intent, a "sure and true interpretation of all statutes in general be they penal or beneficial, restrictive or enlarging of the common law." That case held that the judicial obligation during the construction process is to consider: (1) The common law before the statute. (2) What is the mischief or defect for which the common law did not provide? (3) What remedy has the legislature devised to cure the defect in the common law? (4) What is the "true" reason for the remedy adopted? With these considerations behind it, it is the office of the court always to make that construction "as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief. . . . [A]nd to add force and life to the cure and remedy, according *to the true intent of the makers of the Act.* . . ."[82]

However, a court usually does not articulate the theoretical approach applied to a statute it is construing. Even were the motivation a conscious one, a court is most unlikely to say, "We are construing this statute in accordance with principles of the analytical, social policy or free-intuition school of construction." Thus the philosophical thrust of a particular statutory interpretation ordinarily can be more accurately determined from what the court does than what it says about what it does.[83]

When Holmes declares, "We do not inquire what the legislature meant; we only ask what the statute means,"[84] he may be simply suggesting the application of a phase of the analytical or plain-meaning approach. That is, if the meaning is plain, the meaning is applied. However, it does not help much to say that when a meaning is plain, one need not search for legislative intent. If the meaning is plain, then the intent has been found.[85] It may

82. 76 Eng. Rep. 637, 638 (—— 1584).

83. For an example of the Ohio Supreme Court's expressed devotion to literalness, see State *ex rel.* Foster v. Evatt, 144 Ohio St. 65, 104-05, 56 N.E.2d 265, 282 (1944). However, when strict adherence to literal language would have effected an unjust result, the court avoided that effect, while keeping the rule formally intact, by reading "person" to include an unborn child. According to the court, this made a statute "clear, unambiguous and . . . not requir[ing] interpretation." Jasinsky v. Potts, 153 Ohio St. 529, 533-34, 92 N.E.2d 809, 811 (1950); *cf.* Lape v. Lape, 99 Ohio St. 143, 147-48, 124 N.E. 51, 53 (1918) (Legislative intent will prevail over literal statutory terms even when the latter are quite express. The court refused to decide that a statute allowing a wife alimony "out of her husband's property" precluded a court from giving consideration to the ability of the propertyless husband "to earn money" when determining alimony awards).

84. Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 419 (1899).

85. Where statutes are ambiguous there is room for judicial interpretation but where instead of an ambiguity there is an absence of enactment, courts are without power to supply the deficiency. . . . [I]n seeking legislative

be more useful for the interpreter to remember the import of another Holmes dictum—that a word is the "skin of a living thought."[86] In context the phrase becomes a warning that "skins" may vary greatly in hue and composition depending upon the conditions of use—a point to remember in interpreting statutes.

That particular rules of construction do not eliminate the fictional quality in a determination of legislative meaning has been noted.[87] Nevertheless, the courts continue to interpret statutes under the limiting circumscriptions of legislative "intent." And the search for legislative meaning will go on, if for no better reason than the influence of the well entrenched idea that judges are not legislators. Nonetheless, the courts will be "making" law whenever they extend a statute to reach the unprovided case, interpret to clarify and apply an enactment, reconcile the conflicting values reflected in statutes *in pari materia*, or add a gloss to "constitutionalize" legislation. Of course, law is also made when courts decide a case by refusing to do these things.

Courts must construe statutes. No doubt most are happiest working with enactments in which the legislative words are clear beyond doubt. Then the certainty of literalness is available and there can be a rigid adherence to the statutory word[88] without a

intention courts are to be guided by what the legislative body said rather than what we think they ought to have said.

State *ex rel.* Foster v. Evatt, 144 Ohio St. 65, 104, 56 N.E.2d 265, 282 (1944). Still, in an instance when the legislature said nothing, the same Supreme Court (but different personnel) inferred language needed to prevent the unconstitutionality of an immunity statute. The court found that statutory language providing a witness immunity "from any prosecution based on his testimony or other evidence given by him, other than a prosecution for perjury or tampering with evidence" so unclear "on its face" as to require a construction adding immunity from derivative use. State v. Sinito, 43 Ohio St. 2d 98, 100-02, 330 N.E.2d 896, 898 (1975).

86. "A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." Towne v. Eisner, 245 U.S. 418, 425 (1918).

87. *See* text accompanying notes 59-68 *supra*.

88. *But see* Cabell v. Markham, 148 F.2d 737, 739 (2d Cir. 1949) (L. Hand, J.):

> Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, a contract, or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.

See also Boston Sand Co. v. United States, 278 U.S. 41, 48 (1928) (Holmes, J.):

> It is said that when the meaning of language is plain we are not to resort to evidence in order to raise doubts. That is rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists. If Congress has been accustomed to use a certain phrase with a more limited meaning than might be attributed to it by common practice, it would be arbitrary to refuse to consider that fact when we come to interpret a statute.

strain on the logic or sense. The literal rule is the conservative offshoot of the "plain and natural" rule. The latter intends that the statutes whose word meanings are obvious will be interpreted to effect that meaning unless the result is a manifest injustice[89] or an absurdity.[90] It is the manifest injustice (sometimes it is not so manifest) and the absurdity (sometimes not clearly absurd) which launches the court into uncharted waters with attendant anxieties. Although the necessity for a legislatively uninstructed cerebration may produce anxious judicial moments, it can also produce creative results. A development in point is "statutory common law."

James M. Landis has remarked the curious fact that a common law case may quicken a whole doctrinal development—witness the influence of *Rylands v. Fletcher*[91] on the doctrine of absolute liability—while legislative innovations give far less impetus to new developments.[92] This is an anomaly of esoteric origin. A court faced with the necessity of decision can find principles to decide the case derived from either statutory *or* decisional law. There is no reason in logic why the one source should have more seminal consequences than the other.

Of course, some decisions do indicate a common law process at work in statutory interpretation. These analogize new principles from "legislative law" even though the case at issue does not in-

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89. *See* note 78 *supra.*

90. See Holy Trinity Church v. United States, 143 U.S. 457, 472 (1892), where the Court, interpreting a statute prohibiting the importation of alien labor, declined to extend its reach to bar an alien pastor with whom a New York church had contracted, saying:

> Suppose in the Congress that passed this act some member had offered a bill which in terms declared that, if any Roman Catholic church in this country should contract with Cardinal Manning to come to this country and enter into its service as pastor and priest; or any Episcopal church should enter into a like contract with Canon Farrar; or any Baptist church should make similar arrangements with Rev. Mr. Spurgeon; or any Jewish synagogue with some eminent Rabbi, such contract should be adjudged unlawful and void, and the church making it be subject to prosecution and punishment, can it be believed that it would have received a minute of approving thought or a single vote? Yet it is contended that such was in effect the meaning of this statute. The construction invoked cannot be accepted as correct. It is a case where there was presented a definite evil, in view of which the legislature used general terms with the purpose of reaching all phases of that evil, and thereafter, unexpectedly, it is developed that the general language thus employed is broad enough to reach cases and acts which the whole history and life of the country affirm could not have been intentionally legislated against. It is the duty of the courts, under those circumstances, to say that, however broad the language of the statute may be, the act, although within the letter, is not within the intention of the legislature, and therefore cannot be within the statute.

91. L.R. 3 NL. 330 (1868).

92. Landis, *Statutes and the Sources of Law*, 2 HARV. J. LEGIS. 7, 14-15 (1965).

volve the specific statute or statutes from which the analogy is drawn. In *Keifer & Keifer v. Reconstruction Finance Corp.*[93] the issue was formulated by the Court: "Whether a Regional Agricultural Credit Corporation . . . is immune from suit."[94] Suability, assuming adequate proof, would result in the credit corporation's financial liability for injury to livestock caused by its negligent failure "to provide sufficient feed and water" under a "so-called cattle-feeding" contract.[95] Noting that Congress had not expressly granted the Regional Corporation immunity, the Court found congressional policy justifying denial of immunity

> [I]mmanent not merely in the single statute from which flow the rights and responsibilities of Regional, but in a series of statutes utilizing corporations for governmental purposes and drawing significance from dominant contemporaneous opinion regarding the immunity of governmental agencies from suit.[96]
>
> . . . .
>
> To give Regional an immunity denied to more than two score corporations, each designed for a purpose of government not relevantly different from that which occasioned the creation of Regional, is to impute to Congress a desire for incoherence in a body of affiliate enactments and for drastic legal differentiation where policy justifies none. A fair judgment of the statute in its entire setting relieves us from making such an imputation of caprice.[97]

Similar considerations of legislative policy trends against domestic governmental immunity played a role in the decision in *National City Bank v. Republic of China.*[98] In that case the Court held that the Republic of China could not sue in the courts of the United States and at the same time defeat legitimate counterclaims through the interposition of the sovereign immunity defense available to foreign governments under the rule of *Schooner Exchange v. McFaddon.*[99]

A more fundamental explanation for the decision in *Keifer & Keifer* is merely implicit: Did Congress really intend the credit corporations "to be without the law"?[100] If so, a grave injustice would be done those who contracted with the corporation and were

93. 306 U.S. 381 (1939).
94. *Id.* at 387.
95. *Id.*
96. *Id.* at 389.
97. *Id.* at 394.
98. 348 U.S. 356, 360 (1955).
99. 11 U.S. (7 Cranch) 116, 137-42, 147 (1812).
100. 306 U.S. at 392.

damaged through its negligence. In *Republic of China* the injustice consideration implicit in *Keifer & Keifer* became explicit: "We have a foreign government invoking our law but resisting a claim against it which fairly would curtail its recovery. It wants our law, like any other litigant, but it wants our law free from the claims of justice.[101]

Court-made law provides flexibility. Sometimes it is freshly fashioned, sometimes derived from cases, but it is capable of derivation by analogy from policy expression in other statutes. General concepts are extended to reach the unanticipated problem. Such decisionmaking may clarify, refine, or harmonize the meanings in the legislative language. Frequently, the necessity for deciding the case will illumine obscure implications locked in the words. It is sometimes impossible to "see" what is in a statute or a rule until its application is tried.

The process does not necessarily eliminate "certainty" as some may believe. On the contrary, it may provide certainty more readily. For courts deciding cases can supply the obviously unintended omission, reconcile conflicting statutory policies, add a constitutionalizing interpretation, or correct an absurdity without the delay inherent in deferring to action by the legislature. In this way statutory interpretation works to supplement and buttress the legislators' law. For the best results one hopes, of course, for legislators and judges with capacities to match those in Judge Frank's musical methaphor:

> [T]he wise legislative composer will be in accord with Krenek's attitude toward musical performers: A judge with an imaginative personality supplies "an increment of vitality that is . . . desirable . . . and truly necessary in order to put" the legislative "message across." For only such a judge can read a statute "with an insight which transcends its literal meaning."[102]

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101. 348 U.S. at 361-62. *See also* Jewish Hosp. v. Doe, 252 App. Div. 581, 583-84, 300 N.Y.S. 1111, 1117 (1937) where policy considerations, certainly related to the justice of the cause (as seen by the court), were advanced to exempt a charitable corporation from the purview of a statute regulating injunctions in labor disputes. The court found the plaintiff hospital to be "in fact, if not in name, a governmental agency performing a governmental function" in caring for the indigent sick.

102. Frank, *Words and Music: Some Remarks on Statutory Interpretation*, 47 COLUM. L. REV. 1259, 1264 (1947); and see *id.* at 1260-62:

> Krenek, a brilliant modern composer, criticizes those musical "purists" who insist . . . [that] the performer of a musical piece . . . should . . . engage in "authentic interpretation" which eliminates the interpreter altogether, by "the actual rendition" of the musical symbols just as they were written . . . .
>
> . . . .
>
> Krenek urges a mean: There is middle ground between disregarding the

VI

Judicial lawmaking can be obvious or subtle. At the appellate level overruling a precedent, fashioning a new rule or extending an old one to reach a novel issue is patent law-shaping. Perceptive lawyers, however, do not practice law (or judging) long before discovering subtle but inevitable court-made law at all levels. At the trial stage the process is simply more obscure.

A trial court makes the law of the case in a bench trial when it assesses the credibility of witnesses, determines the admissibility of testimony and exhibits and weighs the evidence. Factfinding flows from these actions and the facts dictate the rule. The factfinder makes the law. Moreover, the same set of facts may quicken any one or more of several legal principles giving the court a range of rule selections.[103] These choices involve shadings of determination which, like an acute angle, are narrow at the apex but widen as their lines are extended to decide the case.

A jury trial differs somewhat in kind because of the jurors' role as arbiters of the facts.[104] Nonetheless, the trial judge subtly exerts the same generic molding influence when he admits or rejects evidence and instructs the jury on the law, to say nothing of how he conducts himself in the presence of the jurors. While it is elemental that the charge on the law must have support in the evidence, it is the judge who determines what charges the evidence requires. Unless there is an appeal, *and* the court has erred *prejudicially*, his reading is the law of the case.

Both bench and jury trials are subject to review. And, while a reviewing court bears only a limited relation to the factfinding process as compared to a jury or judge in a bench trial, it does determine factual issues when deciding that a record does not justify a particular charge or that a verdict or judgment is against the weight

composer's intention and being intelligently imaginative. . . . The wise composer expects the performer to read his score "with an insight which transcends" its literal meaning.

103. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 413 (1971). In *Volpe* the Court was reviewing an action of the Secretary of Transportation under the Administrative Procedure Act, 5 U.S.C. § 706 (1970), which supplied six grounds for holding an agency action unlawful and setting aside its actions, findings and conclusions. Thus the statute provided the court with alternatives to utilize in determining whether to upset administrative determinations on review. The choice of one alternative over another exemplifies judicial lawmaking under legislative imprimatur.

104. So-called "jury equity" also plays a part in the making of law. An example is provided when a jury finds a principal in a crime guilty of a higher degree of criminality than his aider or abettor. In legal theory, they share the principal's guilt. Query whether the young lookout in a bank robbery bears "in fairness" the same culpability as the seasoned gunman inside who kills a cashier?

of the evidence, is supported by no evidence or is unsupported by substantial evidence.

Although reviewing courts disclaim "factfinding" power (meaning explicit credibility determinations and the resolution of factual conflicts), "found" fact does not necessarily limit the judge to only one appropriate rule of law. Thus, because the appellate interpretation of the facts plays such a large role in selecting the rule, one aspect of appellate review is the substitution of one judicial lawmaker for another through the choice of precedent. And it is virtually axiomatic that precedents on both sides of any issue can be found if one searches long enough.

The necessity for deciding the case or presiding over the trial or reviewing the judgment on appeal preforms the various roles of the judges. Whether they recognize that they are making law or approve of doing it, they do it. It is obvious that they must. Otherwise, cases could never be tried or reviewed and the judicial obligation never satisfied.

Of course, it may be useful, even obligatory, for a court to follow precedent if one is available. But what if a precedent does not exist? Or, if it does, what if it is absurd, obsolete, or unjust? Surely a court need not persist in error today simply because it or its predecessors were wrong in the last century or even yesterday. Age will not do for errors, absurdities, or injustice what it is reputed to do for violins and cheese.

VII

If a single generalization could be formulated to sum up, it might be that courts must make law because they are the legal delegates of duties, both implicit and explicit, which require it. Such authority imposes awesome responsibilities. Professor Jaffe, speaking in the context of administrative law, warned against profligate delegation of legislative power while arguing the case for selective devolvement. His terms easily fit the argument for judicial surrogates:

> We must not take lightly the objection to indiscriminate and ill-defined delegation. It expresses a fundamental democratic concern. But neither should we insist that 'lawmaking' as such is the exclusive province of the legislature. The aim of government is to gain acceptance for objectives demonstrated as desirable and to realize them as fully as possible. We should recognize that legislation and administration are complementary rather than opposed processes; and that delegation is the formal term and method for their interplay. Finally we should demand

> no more than that in the total process we achieve government by consent.[105]

One may say that the Siamese twins of judicial function are deciding and deciding justly. Cast in terms of the traditional common law task of refreshment, of giving specific life to generalized constitutional and statutory principles, and in terms of the duty to select a governing principle from a variegated store during trial or on review, some judicial creativity is ineluctable. And one may argue without embarrassment that such "creativity" falls within those spheres of judicial lawmaking which have been called "nonusurpatory."[106] It is hardly credible, given the Protean quality of society and the variety of laws necessary to control it, that even Ned Lud,[107] or a comparable mumpsimus, could conceive of effective governance without the flex, shaping, and fitting afforded by judge-made law.

What, beyond the judge's personal sense of responsibility keeps the courts within bounds? Restraint is the key to keeping judicial lawmaking nonusurpatory. And it has been suggested that consciousness of the inevitability of judicial lawmaking will tend to confine that function rather than expand it. For awareness provides a controlling influence of its own:

> A judge like Learned Hand, who publicly admits that at times he cannot help legislating, is far more demanding of himself, far more restrained when doing so. Such a judge will do his best to enforce the policy of a statute even when he detests its aim.[108]

A judge consciously sensitive to a creative duty, and its limitations, is more apt to be conscious of his obligation to fulfill the duty with restraint. This does not provide absolute assurance against judicial excess. But a case can be made for the proposition that the nature of the judicial process simply makes courts the best available instrument for fairly fitting law to necessity.

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105. Jaffe, *An Essay on the Delegation of Legislative Power*, 47 COLUM. L. REV. 359, 360 (1947).

106. Cohen, *Judicial "Legisputation" and the Dimensions of Legislative Meaning*, 36 IND. L.J. 414, 415 (1961). Professor Cohen points out that actual judicial usurpation of legislative power is probably rare (*i.e.*, it is rare when "both legislative language and purpose are unmistakably clear, yet the court, at odds with the legislative purpose, proceeds to ignore the language or to invent an ambiguity for the sole purpose of dissipating it, and then fills the void with its own cherished policy.")

107. Luddite—one of a band of workmen who (1811-16) tried to prevent the use of labor-saving machinery by breaking it, burning factories, etc. Said to have been so called after Ned Lud, a halfwitted man who about 1779 broke up stocking frames.

WEBSTER'S UNABRIDGED INTERNATIONAL DICTIONARY 11344 (3d ed. 1961).

108. Frank, *supra* note 102, at 1271.