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The Limits of Judicial Creativity*

By ROGER J. TRAYNOR**

Once upon a time, as new towers of power displaced windmills, economists rejoiced in the growth and development of the landscape and scientists waxed confident of displacing magicians in the creation of new wonders. Lawyers, however, buried their heads as before in the casebooks, in a perennial search for appropriate magic words to unravel the legal entanglements of man. Recurringly they also rooted out magic words for women and children who bore a properly beautiful relationship to man, as by marriage or descent, that could be conventionally expounded with dotting care and many a dotty maxim. Over a long age, for example, the law made it clear to any woman entering marriage that now the twain were one, and then made it clearer that she was not the one. In the main, decisions in the courthouse were the dominant ground rules of legal relations. Once upon a time.

By the time I became a judge in 1940, there were abundant signs that though the courthouse still had the last word in case or controversy, the legislatures were formulating steadily more of the daily ground rules. What the legislators lacked in skill, they made up for in volume. In every state and countless cities and villages, as well as in the Potomac fever wards of Washington, D.C., statutes emerged from the hoppers with never a break. Only very recently have we begun to ask sunrise and sunset questions: Why should a statute rise? How good does it look by dusk?

In this heyday of mass-produced laws, I finally came to a space-age vision of them as "*Statutes Revolving in Common-Law Orbits.*"¹ A judge was bound to learn that the modest premises of the common

* Reprinted by permission of the Iowa Law Review. Text of the Murray Lecture at the University of Iowa College of Law, March 31, 1977, which invokes at various junctures some reflections the author has set forth in earlier essays.

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1. 17 *CATH. U. L. REV.* 401 (1968).

law would have to sprout a few wings to keep pace with the astronomical consequences of all those statutes revolving wildly in the same orbits as sedately-paced judicial decisions.

For better or worse, legislatures have responded to real or imagined needs as courts could not. Given the massive number of statutes that are breeding grounds for controversy, courts have had an increasingly heavy task of interpreting statutes, or adjudging their constitutionality, or resolving conflicts of law to avert collision and preserve harmonious relations among states, and between states and the federal government. From such a context emerges the tripartite theme of this inquiry into the limits of judicial creativity:

(1) Even though judicial decisions have been superseded by statutes as the primary source of law, a judge has a greatly expanded role as the final interpreter of the law.

(2) As an interpreter, whether of judicial precedent or statutory law, he² is necessarily an active analyst and not a passive oracle. An actively analytical judge bears no relation to that ill-defined character, the so-called judicial activist.

(3) Even at his most active, he must be alert to set limits on judicial creativity sufficient to preserve the distance between judicial analysis and legislative innovation.

There is now growing awareness that legislators, not judges, are writing most of the rulebooks. In the context of this legislative ascendancy, one must take account of a double paradox. First a judge's jobsite, seemingly so decorous, affords far from tidy working conditions. Ordinarily what passes before judges on the reviewing stand is not a well-programmed, orderly parade, but fragments from a circus on the loose, collared by anxious barkers for a motley procession across the line of vision that defies the viewing judges to guess at all that has escaped notice and to foresee what may still appear. Nonetheless a determined judge can impose order on such chaotic scenes by searching out from a clutter of detail the significant elements for reasoned evaluation.

The second paradox is that a legislature in the main operates amid tumult and too often without adequate study, even though it has the advantage of relatively splendid working conditions for rational lawmaking. A legislature can respond readily to an urgent

2. The masculine form used throughout the text as a space-saver carries a shorthand reference to both man and woman.

problem, tailoring specifications to meet the need. It can call upon scholarly help, and often it has recourse to research staffs of its own. It can draft in haste and still revise at leisure. It can erase one slate clean and mark up another, without regard for precedent. It can do advance work in trouble-prone areas with a view to comprehensive legislation. Its only disadvantage, though not a fatal one for courageous legislators reinforced by courageous journalists, is its vulnerability to political pressures, to the whims and whammies of so-called elitist groups or so-called oppressed groups or a so-called *vox populi*.

In either the judicial or the legislative domain, luck plays a part. Once, for example, three cases came before my court in tidy sequence instead of the usual random ramble. They afforded the court an ideal opportunity to re-examine the purported rules, long entrenched by early misconceptions of the law, that permitted forfeiture of a defaulting vendee's interest under a contract for the conditional sale of land. The decisions in the first two cases, *Barkis v. Scott*³ and *Baffa v. Johnson*,⁴ established that the vendee's interest could not be forfeited if his breach was neither wilful nor negligent. The third case, *Freedman v. Rector*,⁵ advanced upon this text with a decision that forfeiture even for a vendee's wilful breach would be denied when it was clear that such forfeiture would give the vendor more than fair compensation for whatever injury he had sustained. By thus articulating a new principle in three instalments, the court dislodged unsound precedents with a minimum of shock.

Comparable luck is regularly at hand for legislators. The state-by-state adoption of the Uniform Commercial Code ensued from years of scholarly work sponsored by the American Law Institute and the Commissioners on Uniform State Laws. There is no dearth of other such riches. All too often, however, these sources remain neglected wasting assets, one of the most grievous wastes in our profligate country. Once we perceive that an appellate court does not review statutory law except by chance, when litigation arises, we then can understand how urgent it is that every legislature rationalize its mass production of laws by making full use of the assets at its disposal. Law reviews and daily journals have a corresponding obligation to keep watch that a legislature does so. Wherever situated, from Congress to village councils, legislators should take the initiative to

3. 34 Cal. 2d 116, 123, 208 P.2d 367, 372 (1949).

4. 35 Cal. 2d 36, 39, 216 P.2d 13, 14 (1950).

5. 37 Cal. 8d 16, 22, 230 P.2d 629, 632 (1951).

establish lines of communication with the many associations, law centers, and scholars at work on legislative problems. Within each state, the natural agency for such communication is a law revision commission with ready access to appropriate legislative committees, so that carefully documented studies and proposals can receive timely legislative consideration. A state that muddles along without such a commission needlessly muddles along on candlelight when electricity is readily available.

A legal center operating within the purview of a law school affords an ideal environment for such a commission. There a commission could devote itself, free from political pressures, to the drafting of needed statutes. It could constantly review existing statutes detecting those that become aimless scarecrows for no more than the befuddlement of harried citizens. It could sound timely alerts for sunrise or sunset laws. It could evaluate competing requests for public expenditures. It could hasten the day of rational public budgets and readily available public accounts. It could trace the tortuous streams of federal funds into the various states and the equally tortuous streams of federal and state funds into local communities. It could compile a true detective story on who determines the flow of the funds from the source, who receives the funds and then channels them, and who does the basic accounting. There could be a key chapter on the qualifications and whereabouts of independent auditors, if any. Along with these studies of public expenditures, the lifestream of most legislation, there could be corresponding studies of taxes, the sources of the stream.

Given such rational reinforcements, many an otherwise indifferent or timid legislator might improve the tenor of his own communications with his constituents. In today's climate the public seems not only ready but eager for improvements in the legislative process. There are even signs that some journalists also stand ready to re-examine their own responsibilities, their *noblesse oblige* in the fourth estate to upgrade the daily journalistic intake of its readers.

One can hardly imagine anything more beneficial to the law than permanent lines of communication between those entrusted to review laws critically and those entrusted to legislate. The long-range studies of scholars can richly complement the applied research that legislators recurrently ask of their legislative aides. In turn, the work of a law revision commission within a legal center would offer hearty sustenance not only to a law review but to many other projects of a law school, not the least of which is the classroom.

Pending the millenium, however, we must resign ourselves to the antic ways of legislators. Now and then they are very good indeed, thanks to a talented draftsman among them and their own good will to work. Now and then they are very good by chance, approving a well-drafted bill, for extraneous reasons, that they have not troubled to read. Too often they legislate madly, confounding the confusions of one paragraph with several more to explain what the first paragraph is deemed to mean if read alone, if read in conjunction with two others, or if read pursuant to the famous Welsh treatise on the active and inert elements of a homeless verb.

Recurringly legislators abstain from any action, moving ingeniously their wonders not to perform. When they abdicate responsibility for clarifying the controversial language of their own statutes, in effect they relegate the task to the courts. It is worse still when legislators appear not to see or hear a problem that clamors for legislative attention, mystifying others by their silence. Even so modest a proposal as that of the American Law Institute some six years ago for a rational allocation of jurisdiction between state and federal courts still awaits congressional action.

When legislators fail to confront such salient legislative problems as reapportionment or school desegregation, partisans then make their way to the courthouse for a judicial pronouncement. This recourse to a less appropriate forum is a makeshift solution. Via this circuitous route, the eventual judicial decision compels legislators to confront the problem they sought to avoid. At best they can do so without great to-do. Sometimes, however, a judicial decision quickens the long taciturn legislators into a hullabaloo of lawmaking, with the usual risks attendant upon feverish activity.

Some years ago, for example, the legislature in California had ample warning that common-law precedents on sovereign immunity had worn thin and that the consequent problems had become so massive as to clearly signify a need for comprehensive legislation. The legislature looked away and said nothing. The problem then came to a head in the *Muskoph v. Corning Hospital District*⁶ decision that repudiated sovereign immunity. Only then did the legislature bestir itself to spell out long-needed statutory law.

In the area of sovereign immunity, the legislature should have known, from the hours successively striking, that the zero hour was coming. The doctrine of sovereign immunity had become so riddled

6. 55 Cal. 2d 211, 221, 359 P.2d 457, 463, 11 Cal. Rptr. 89, 95 (1961).

with exceptions that its terminal illness was apparent. The warnings are not always so clear, however. Their varying intensity serves to illustrate anew that everything in the law is a matter of degree. The subtleties of degree are particularly significant in an age when so much lawmaking is preoccupied with social reform. Thus, constitutional lawyers will be pondering for years to come the implications of the recent decisions in *Serrano v. Priest*,⁷ which imposed upon the legislature the formidable task of instituting a new system of financing public schools throughout the state. Whatever the merits of a ruling in a state court that turns on the interpretation of the equal protection clause of a state constitution, the fact remains that resolution of the controversy through the judicial route impels a legislature to shorten drastically the time it might normally take to enact comprehensive long-range statutes in the complex field of taxation.

On cases of such dimension, students of constitutional law will find valid grounds for difference as to how readily a court should arrive at a constitutional rule that nudges a legislature into social reform along one expansive front or another, such as schooling, housing, health, or transportation. Nevertheless there remains widespread agreement that the court itself cannot be the engine of social reform. The very responsibilities of a judge as an arbiter disqualify him as a crusader.

It is no contradiction to say, however, that the responsibilities of a judge do compel him to bring an actively analytical mind to his work. At this juncture I reiterate my early warning that an active mind is not to be confused with the misbegotten catch phrase, judicial activism, as it has too frequently been confused by the slovenly of speech.

It is important to remember that by the time a case reaches an appellate court there are certainly two sides to the question, and at times maybe three or more. There is no way an appellate judge can find an easy answer to the hard question before him, no way he

7. 5 Cal. 3d 584, 614, 487 P.2d 1241, 1250, 96 Cal. Rptr. 601, 610 (1971) (*Serrano I*); 18 Cal. 3d 728, 769, 557 P.2d 929, 953, 135 Cal. Rptr. 345, 369 (1976) (*Serrano II*), cert. denied, 97 S. Ct. 2951 (1977). (In *Serrano I* the California Supreme Court reversed and remanded a trial court decision on the stipulation that if the plaintiff's allegations were sustained, the state public school financing system must be held unconstitutional. The trial court's decision, which applied the "strict scrutiny" test and found that the state had failed to establish that the classification in question was necessary to achieve a compelling state interest, was subsequently affirmed in *Serrano II*). The *Serrano* problem remains open to so many variations and ramifications that it is still far from being definitively resolved.

can spare his mind from thinking, no way he can abstain from writing an opinion in some measure original. At the same time he must remain the watchful keeper of the continuity scripts, entrusted to make the paragraph transitions from one case to another in the same area, to explain any amplification or updating of a familiar text, to justify in detail any departure therefrom, to elucidate the principles underlying the solution of a problem without true precedent. Ideally, he should be able to state his reasons plainly enough to enlighten counsel as to why they won or lost, and to allay the suspicions of any man in the street who regards knowledge of the law as no excuse for making it.

Moreover, in his preoccupation with any given script, for example the continuity script in Contracts, the judge must visualize it in the context of others. The quarrel over a contract to build a tunnel through Sunnyhills must be analyzed in terms of the appropriate chapter in Contracts; but it may also have to be analyzed with reference to Torts or Equity or Conflict of Laws, or a host of new statutes on land use or environmental controls.

Given the hodgepodge appearance of cases, entirely dependent on the chance of who undertakes to litigate what, it is no easy task to ensure a continuity script that will not look like a crazy quilt. The printouts of a stare decisis computer, as we might define a routine judge, would result in such a crazy quilt. The sociological tracts of a crusading judge for *liberté, égalité, fraternité*, et al., would likewise result in a crazy quilt. Nothing stands against lunacy in the law but the reasoning judge, taking heart from Pascal's observation that though man is the frailest reed in nature, he is a thinking reed.

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

this way, moving not by fits and starts, but at the pace of the tortoise that steadily advances though it carries the past on its back.

A reasoning judge's painstaking exploration of place and his sense of pace give reassurance that when he takes an occasional dramatic leap forward he is impelled to do so in the very interest of orderly progression. When he has encountered endless chaos in his long march on a given track, the most cautious thing he can do is to take a new turn. He does so though he knows that ours is a profession that prides itself on not throwing chaos lightly to the winds.

Now and again a legal problem surfaces that defies definitive solution, particularly in a time of rapid change. There are few clues in the rusting wheels of *Winterbottom v. Wright*⁸ as to how we should deal with novel problems of vehicles in outer space. There are few clues in Blackacre or Sunnyhills for resolving future squabbles among the good buddies in Galaxy Hollow. When there is no help from the past, a judge can do no more than seek what Cardozo has called the least erroneous answer to an insoluble problem. Nevertheless, a searching error is a useful worm, burrowing deep to leaven the hard ground of tradition that it may nourish new growth as dogma dies.

The very caution of the judicial process offers the best of reasons for confidence in the recurring reformation of judicial rules. A decision that has not suffered premature birth has a reduced risk of premature death. Insofar as a court remains uncommitted to unduly wide implications of a decision, it gains time to inform itself further through succeeding cases. It is then better situated to retreat or advance with little disturbance to the evolutionary course of the law and to those who act in reliance upon judicial decisions.

After a generation of experience, I believe that the primary obligation of a judge, at once conservative and creative, is to keep the inevitable evolution of the law on a rational course. Twenty years ago I wrote that the danger was not that judges would exceed their power, but that they would fall short of their obligation.⁹ Better the active pilot, sensitive to the currents of the river, than an arm-chair captain hidebound to a dated rulebook. The pilot who knows the river, however, must above all know the moorings well. If he

8. 152 Eng. Rep. 402 (Ex. 1842).

9. Traynor, *Some Open Questions on the Work of State Appellate Courts*, 24 U. CHI. L. REV. 211, 244 (1957).

disengages his bark from one, he must be certain he can reach another.

So constant a responsibility, involving such active thought, resists inclusion within so befuddled a term as activism. Given reason and not merely the rulebook as the soul of law, I would also voice a cautionary note that the reasoning judge, the pilot on the *qui vive*, is not one indifferent to rulebooks. He takes care to keep them up-to-date, reading more than ever to do so, with a critical eye for words that wear poorly and a discriminating sense for those that wear well. If he is on guard against mechanical incantations of obsolescent rules in the name of ancestral loyalty, he is also on guard against mechanical rejections of sturdy rules in the name of social justice. The complacent captain in the armchair is not more of a danger than the pilot who would navigate with a clenched fist in the air instead of at the helm.

In sum, the thinking judge might reexamine the rules that had been preserving the status quo of Marie Antoinette, but he would not join those who would repudiate the spirit of the law so that they could proceed to behead her.

One would think this judicial view would be taken for granted in the legal profession, perhaps even in the community. There is little ground, however, for such optimism. In highly literate nations, as in primitive societies, the voices of those who speak only reason are frequently lost amid the cacophonies, all uttered in the name of the law, of the zealous defenders of the so-called status quo and the zealous advocates of so-called social justice. Among the defenders there are even a few lawyers who still believe that it is for a judge to state, restate, occasionally expand, or even contort established precedents, but that he cannot properly create a new one. The blunt fact remains that every precedent once had to be created by a judge for a then unprecedented case. The argument then goes that innovation today rests with the legislators by virtue of their unique sensitivity to public moods, or what is sometimes called an ear to the ground. The trouble with this view is that we certainly cannot afford now, if we ever could, to play the law entirely by ear. There are a number of objections to such improvisation. The most obvious is that one who relies on the ear without attendant reflection offers no assurance of sensitive hearing. In the din of a largely urban society, he may hear the bellowing of militant groups or the siren songs of sophisticated special pleaders, but not the murmurs of other individuals. He may be quick with a generous dispensation of pub-

lic funds to groups for ostensibly worthy projects, so long as such dispensation attracts little public notice. He is given to assessing the effect of a given action upon his chances for re-election. His will for lawmaking is a will of many wisps. It is the exceptional legislator who is guided by *fiat lux* rather than the murky light of *ignis fatuus*.

We have all too few watchdogs of the legislative process to report not only when legislators legislate to no good purpose, but also when they abdicate their responsibility to deal with controversial issues. Legislators have become astute at turning away from highly visible issues on which they do not wish to gamble their political lives. The final irony is that when they thus fail not only the old guard that would trust them with all innovation, but also the zealots of controversial causes, the latter then turn to the courthouse. Though they often fail to obtain a hearing for an inappropriate cause in that forum, their efforts prompt warnings of judicial activism from the very people who fail to decry legislative inaction.

In so confusing a scene, few people recognize that indiscriminate pleas for judicial hearings, and an occasional indiscriminate grant of one, are abnormalities in the courthouse. A judge is constrained by training, experience, and the office itself, not to undertake responsibilities that belong to the legislature.

In his quite different responsibility of assuring the rational continuity of the law, a judge may now and again be compelled by reason to arrive at an innovative decision, in the honorable tradition of ancestral precedent-setters. Such a decision exemplifies judicial responsibility at its most challenging. The innovative decision is the most difficult for a judge to elucidate, for it usually concerns a controversy that has compelled him to evaluate conflicting interests in terms of a changing social or economic context. He is himself in the moving picture of that change, but must somehow view it dispassionately. That perspective he can achieve only by a long look at the past, in terms of the present, to evaluate whether once useful precedents are impaired by obsolescence, or whether there are no useful precedents, and then by a long look at the present in terms of the future, to evaluate what the long-range prospects of currently visible change are.

This generation has witnessed innovative precedents, reflecting a rapidly changing world, on such matters as products liability, charitable and sovereign immunity, fiduciary obligations in various con-

texts, new intrafamily obligations, new concepts of land ownership and use, and a variety of questions under the Bill of Rights and the fourteenth amendment.

A judge must elucidate painstakingly a decision that involves the overruling of an earlier one. He soon learns that a bad precedent is easier said than undone. If the discarded precedent was intrinsically unsound from the outset, he must undertake an exposition of the injustice of confusion it engendered. When he thus speaks out, his words may serve also to quicken public respect for the law as an instrument of justice. If the discarded decision has merely become obsolete, he must also specify how it fails to mesh with contemporary laws or with other judicial rules or statutes. Again, a judge can quicken public respect for the law by his own care to keep it free of trappings that no longer serve any useful purpose.

The constant repair and renewal that ensures the sturdy continuity of the common law involves significant judicial creativity in such overruling of ill-conceived, moribund, or obsolete precedents. It is easy enough to perceive the usefulness of such creativity, but we must be on guard against supposing that we have thus neatly encompassed all that is involved in the process of overruling. In this regard, as in any other area of the law, one must beware the simplifier who comes bearing nutshells. Students in law schools are frequently cautioned to think about the alternatives as a lawyer would; now and again they should also think about the complexities as a judge should. When your first roadblock as a judge is a bad precedent, you thereafter confront a second, the retroactive consequences of an overruling decision. The prospect of a consequent hardship to one party or another, though not invariable, has in the past inclined some judges to let bad enough alone. Then came the technique of prospective overruling, which enables a judge to halt a bad precedent, but only at the threshold of the future, so that there will be no violence to the reasonable expectations of those who had relied upon that precedent. The technique is as serviceable as it is imaginative in certain areas, such as property and contracts, where reasonable expectations are the dominant rules of the game. The buyer of a home or the contractor who builds one can reasonably expect that the rules will not be changed without fair warning. Likewise, prospective overruling has a place in the area of expanding criminal liability. One who has long tended a smokestack with im-

punity, for example, might reasonably expect that a court newly attuned to consequent hazards for others would make a new punitive ruling prospective only.

Lest it be thought that the problem of overruling can now rattle comfortably in the nutshell called "prospective," one should consider still more complications. Tort cases, for example, do not fit that small mold, for neither the tortfeasor nor the victim nurses any reasonable expectations about injury that has yet to occur. When everyone's daily life is prone to risk, it is hardly realistic to suppose that people are assiduously studying current rules of liability so that they may set out to hit or be hit advantageously.

Absent any reasonable reliance of the parties on current rules, why should courts that expand or contract rules of tort liability resort to prospective overruling only? What rational justification is there for distinguishing between tort victims before and after an overruling decision? As a corollary, what rational justification is there in a prospective overruling that would end a sovereign or charitable immunity henceforth, but not in the instant case?

We must ask these questions of an outstandingly good judicial process because, like the good workhorse, it can suffer greatly for want of a nail. The issue of retroactivity has been decided at times in both the United States Supreme Court and the state courts with needless arbitrariness. We can hardly rest content with such guidelines as the United States Supreme Court has delineated for resolving the issue of retroactivity in criminal cases.¹⁰ Rapid readers or uncritical slow ones should scrutinize those liting guidelines, namely: the purpose of the new rule; the extent of reliance by law-enforcement agencies on the old standards; and finally, the effect on the administration of justice. None of these guidelines clearly encompasses a consideration of the hardship or inequity suffered by those who are denied the benefit of the new rule and compelled to bear the burden of what is now recognized as an unjust rule. That consideration, particularly if imprisonment or death is at stake, weighs heavily against the reliance of law-enforcement agencies or any increased burden on the administration of justice that might result from equal treatment of all those equally situated.

A critic who finds that a horse is limping along for want of adequate nails has some responsibility to provide them. The basic

10. *Stovall v. Denno*, 388 U.S. 293, 297-99 (1967); *Tehan v. United States ex rel Shott*, 382 U.S. 406, 419 (1966).

guidelines I envisage for prospective overruling would compel analysis within straight and narrow channels, namely: First, there must be a marshalling of the reasons why a precedent should be overruled; and second, there must be a reasoned demonstration that the hardship on a party who has relied on the old rule outweighs the hardship on the party denied the benefits of the new rule.¹¹ However simply stated, such guidelines are not for the fainthearted. A judge must do more than decree; he must reason every inch of the way.

The technique of prospective overruling offers an apt example of how a judge can be creative for better or for worse. It is an admirable technique if attended by rigorous guidelines for the rational evolution of the law. Ineptly or indiscriminately used, however, it is open to abuse by zealous advocates casting for new rules that escape rigorous analysis. A judge must be on guard against invoking it carelessly to lend spurious grace to a departure from the old rule without painstaking explanation. When he takes on such facile grace, the judge loses his unique quality, the plodding tenacity that enables him to puzzle out where to place markers that will afford enduring guidance for others. Before undertaking a dramatic leap forward, when it becomes clear that prospectivity will be an issue, he should wait until the litigants have had an opportunity to be heard on the issue via briefs and perhaps oral argument. By thus insuring that a decision on prospectivity will not have to await another case, a judge precludes the uncertainty that would otherwise bedevil counsel and other courts in the interim.

To say that a judge must plod rather than soar is not to call him pedestrian. It takes vision to recognize the junctures where markers can best help those who travel the long trails of the law. Such vision is essential in the occasional cases where a judge must choose between conflicting lines of precedent or, in an unprecedented case, between conflicting lines of policy. How now, brown cow, when here comes a white one?

In such cases, we should not be misled by the half-truth that policy is a matter for the legislators alone to decide. The word "policy" has one connotation in the legislature and another in court. Legislators can embark on any policy at will, whether wise or expedient or artful, without regard either for the continuity scripts of

11. See Traynor, *Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility*, 28 HASTINGS L.J. 533 (1977).

the law or for the coherence of their own ticker tapes. A judge, in contrast, cannot speak unless he is spoken to, and he must mind his musing when he does so. There is always an area not covered by legislation in which judges must revise old rules or create new ones, and in that process policy may be an appropriate and even a basic consideration. The briefs carry the first responsibility in stating the policy at stake and demonstrating its relevance; but if they fail or fall short in this task, no conscientious judge will set bounds to his inquiry. If he finds no significant clues in the law reports or statutes of his own or other jurisdictions, he will not close his eyes to a pertinent study merely because it was written by an economist or perhaps an anthropologist or an engineer.

Why should judges not inquire, the better to resolve a hard case, into what Kenneth Davis calls the "legislative facts"¹² or what we might call the environmental data, as distinguished from selected litigated facts about the parties presented with partisan fortissimos and pianissimos? When hard cases make good law, is it not usually because the judges had before them the data requisite for informed judgment? Is it not just as foolish in the judicial process as anywhere else to resolve problems of enormous factual complexity without adequate data? The alternative is to assume the risk of dubious a priori assumptions. The common law is replete with such assumptions, as for example, the assumptions in the law of evidence that an innocent person is more likely to deny an accusatory statement than a guilty one and that an admission against one's property interests is probably true whereas an admission against one's penal interest is not.

Though only a small fraction of cases are of a complexity that calls for inquiry beyond the facts about the parties and available precedents, those cases may be of major significance in the development of the law. Yet the courts all too rarely have the benefit in such cases of Brandeis briefs comparable to the original. There are all too few law reviewers scrutinizing the work of either legislators or lawyers as they scrutinize that of judges; were they to do so, they might turn up some eye-opening material like the pioneer eye-opening brief that devastated, with overwhelming environmental data, the a priori assumptions of a century.

We need not distrust judicial scrutiny of such extralegal materials. The very independence of judges, fostered by tradition even

12. K. DAVIS, 2 ADMINISTRATIVE LAW TREATISE § 15.03, at 353 (1958).

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

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

Even so much, however, constituting the judicial contribution to lawmaking, adds up to no more than interweaving in the reformation of law. If judges must be more than passive mechanics, they must certainly remain much less than zealous reformers. They would serve justice poorly by weaving samplers of law with ambitious designs for reform. Judges are not equipped for such work, confined as they are to the close work of imposing design on fragments of litigation, bits and pieces that blow into their shop on a random wind.

As one who has declared himself against rote readings of the law, I now voice a comparable warning against zealous incantations that could be no less ritualistic. Applause for a judge who throws chaos to the winds should not be interpreted as encouragement likewise to abandon caution. A judge will remain cautious if he remembers that his decisions, even though less than stone tablets, are nonetheless resistant to easy liquidation or revision. Fortunately, he is not likely to fancy himself raising hell as a benevolent dictator. If he keeps his own identity in mind, neither will he risk becoming the dictator's nearest kin, a benevolent savior with a capacity for raising holy hell.

It is of a piece with reason that a judge envisage a decision as one that promises to be manageable within the limited controls of the courts, namely, specific decrees and awards of damages. If

on rare occasion he contemplates a decision of constitutional tenor, intended to prompt legislators to take action, he must first analyze exhaustively the claimed urgency of such action, particularly in the context of possibly equally strong competing claims, no one of which might be fulfilled without cost to the others. If this hurdle is cleared, he must still analyze whether legislators would otherwise remain delinquent toward the federal or a state constitution, despite the pleas of their constituents. The second hurdle cleared, he must finally analyze whether his own decision is one that the legislature can implement with justice to all and within the time prescribed.

Meanwhile, well-tempered judges will do the best they can, within the constraints of their responsibility, to stabilize the explosive forces of the day. They are not miracle workers, but it will be miracle enough if they do everything within their power of reasoning to make each day in court something more than a mere day of judgment.