The Bench and The Bar

Address by
Honorable Benjamin N. Cardozo
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Mr. President, and Gentlemen of the Bench and Bar:

I jotted down a few headings for a talk to you today. Before I had gone very far I found that instead of jotting down some headings, I had written something like an address—a desultory, vagrant sort of thing to be sure, so vagrant that I ought probably to be arrested and put in jail instead of paraded in the light of day, but still in its way and according to its capacity an address. So I am going to do something that I never like to do: for economy of effort I am going to read what I have written, and trust to your charity and patience to put up with the ordeal.

I was asked not long ago to address the members of a club where no one was eligible to be a member; or a fortiori, I suppose, to speak, unless it could be said of him with truth that he was the author of a book.

Science warns us that we must define our terms, and an invitation so restricted made me seek a definition of a book.

Are we to include the humble pamphlet, or must the product of the brain be bound? If externals are not to count, are we to say that contents also are indifferent? A bookseller in my city displayed the sign upon his window, books and novels. Shall we accept that classification? Asquith in his recent memoirs quotes the comment made by Gladstone upon Kinglake's Crimean War that the book was too bad to live and too good to die. Shall we adopt that standard as expressive of a minimum? Shall we say that a book is not a book if a rational system of eugenics would strangle it at birth? Finally, and this is the point of the matter, the muck of it all for you and me, are legal opinions or legal treatises or legal arguments books at all?

Well, I am not going to give an answer to that question now, if for no better reason than that I am disqualified by interest in the subject matter of the cause from taking part in the decision. I have written things myself which had the outward semblance of a book, and I always have felt proud of the binding, though humble when I looked inside. Not only that, but in moments of extraordinary indiscretion I have even asked myself the question how judges and lawyers ought to write and talk if their deliverances are to be fit to live. A few years ago I wrote a little article for the Yale Review under the title Law and Lit-
haps I may say, however, that prolixity is the great evil against which legal should pray to be delivered. I think it is permissible to suggest that if I were to go back to practice and become an advocate myself. Per-

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recesses for the writing of opinions, the strain isn't so bad, and we have
our evenings to ourselves.

I have spoken of the consultation table. Matthew Arnold said of
Oxford in a famous passage that it was the home of lost causes and for-
saken beliefs and impossible loyalties. That is the consultation table
also. It is the most interesting part of our work. It is there that one
catches the liveliest sense of the intellectual stimulus to be found in the work
of a great court. There is the clash of minds. There are the varying
forms and phases that the case assumes as it travels about the table.
Why, sometimes at the end its own mother wouldn't recognize it. There
is the effort of seven minds, each bent upon the same quest, to discover
and unfold the truth. Truth is a
frail thing, so met times at the end its own mother wouldn't recognize it. There
is no substitute for men and women and the liveliest g's

...and the United States Attorney General was under a duty to uphold the statute. He set
...and they are not so sure; they are merely doing the best they can. Old Dr.
Johnson, arguing with Boswell that it was legitimate to defend a bad
cause, and seeking to assuage Boswell's qualms of conscience, said, "Why,
sir, you do not know whether you are right or wrong until the judge has
rendered his opinion." If only, we could be certain then! They treat
us better, anyhow even when we make mistakes than they treated our
predecessors some centuries ago. I have read in Prof. Thayer's book on
Evidence that in ancient times not only were jurors subject to arrest
and punishment when they gave a wrong verdict, but judges also were
subject to like penalties when their judgments were reversed, and that in
still more ancient times they were expected to defend their judgments
by the duel. These were the days when a seat on an appellate court, and
preferably, I should say, on the highest appellate court, had the most
obvious advantages. And yet even today the consequences of error, if not
dangerous to life and limb and worldly goods, are still sufficiently
disheartening. Any morning's mail may bring a law review from
Harvard or Yale or Columbia or Pennsylvania or Michigan or a score of
other places to disturb our self conceit and show with pitless and relent-
less certainty how we have wandered from the path. The reviewer seems
to say with Shakespeare speaking through the mouth of Brabantio in the,
tragedy of Othello: "It is a judgment mad 'd and most imperfect."

In such emergencies, I have taken comfort at times in a form of rearguard that I found recorded not
long ago in Sandburg's Life of Lincoln. A Kentucky justice annoyed
by the bacchanalian excesses of counsel after he had announced his ruling shut off dis-
...and the review...with these words: "If the court is right, and she thinks she air,
why then you air wrong, and she knows you be, shut up."

All this, however, is an affectation of serenity. In my heart of
hearts I am disturbed and troubled. I sometimes think I might escape
some of the mistakes I am sure I often make if I had had the training
which is given in the law schools of today. As ill luck would have it,
I went to Columbia Law School in the transition days when the old order
was passing into the new, the text book system into the case book one, now,
we are told at times, to be in turn supplanted by something else. For one
year I had the old text book system under Profs. Dwight and his asso-
ciates. For the second year, I had a mixture of the old and the new.
It was neither one thing nor the other. As I look back on it now, it
seems as if we didn't have any instruction worthy of the name. We just
grew up into lawyers, or rather into members of the bar. I feel grate-
ful, however, that I learned a little more than a lawyer who was trying a
case not long ago in the federal court in New York. It was a suit in
equity to set aside a fraudulent transfer. There had been some earlier
litigations which it was hard to form the judge to understand them
said to counsel: "If I follow the case aright, the fact is that in the
earlier action you waived the tort and sued in assumpsit." "Oh, no,"
said the counsel. "I sued in the City Court."

Yes, it is comforting to know that lawyers make their blunders as
well as judges. I remember that Sir Frederick Pollock said in his lec-
tures on the Common Law that every disappointed litigant believes one
or other of two things; he believes either that the court was unjust or
that his lawyer was incompetent. The lawyer is generally at pains to remove the latter impression,—indeed, the litigant is generally convinced that his case is so strong that not even incompetence could spoil it—and so I fancy the weight of odium is borne by the judge. But if rumour survives in the hearts of disappointed litigants, it has little home, I am glad to say, in the hearts of the bar. I think it is surprising that this is so. I have not been so long away from the bar as to have forgotten what it means to lose a case. The cherished verdict which was won with so much toil, reversed and nullified; a sentence in the charge to which the jury never listened, held to have controlled the judgment; everything to be done over again as if it had never been done before: the whole judgment in the quaint but emphatic form of order in use in our court, "reversed, set at naught and altogether held for nothing." I have tried to look cheerful while surveying some such scene of ruin. For the sceptical and disconsolate, I commend Mr. Dooley's comment on the winged figure of Victory. You remember the headlessfigure in the Louvre whose not even the last head can obscure the impression of exciting triumph. Dooley looked at it and mused, and he said to his friend Hennessey: "Victory," he said, "they call that Victory. Well, all I can say is the other lady put up a devil of a fight."

I have been talking to you in lighter vein, perhaps too light if I am to keep alive the notion, or more properly the fiction, of grave and reverent wisdom which is supposed to be of the essence of the judicial mind and spirit. I am not sure that I have made a mistake in explaining this amiable error (which like most other fictions is not wholly lacking in utility). "I rose by my gravity," said a public speaker who had experienced the effects of misplaced and futile humor, "I rose by my gravity and fell by my levity." You must not think me wholly frivolous, for in truth I am interested in some of the weightier aspects of the work of bench and bar, and have even dabbled at times in the waters of high philosophy. Now, it is hard to write philosophy, harder still to talk of it, harder again to get anyone to listen to it, and hardest of all perhaps to apply it in our lives. Every now and then I find myself giving effect to some antiquated rule of law, so imbedded in the legal structure as to make it almost impossible for any judge to extricate it and cast it into outer darkness, and yet belying much that I have written about the progressive growth of justice within the shell of legal doctrine. Take such a hideous rule as the one prevailing in this state and very likely in many others, that a municipality is not liable for the torts of its employees under the principle of respondeat superior when they are engaged in the fulfillment of functions that are classified as governmental rather than proprietary. Was there ever a more foolish, inhuman, unjust and antiquated doctrine? No one understands it. No one approves of it. Yet day by day it applies it. The city is immune from liability if a traveler is run down through the negligence of a driver of a city ambulance, but subject to liability if the delinquent is driving a wagon for the removal of garbage, snow or rubbish. I can state these pronouncements with a straight face. Well, the truth of the matter is that fossil remains like these will abide in the legal structure until it becomes the business of some board of public officers to keep track of the abnormalities in the body of legal doctrine and report from time to time to the legislature the changes that are essential to keep the body sound. What is everybody's business is nobody's business. I have been urging for many years the need for a ministry of justice or permanent commission to mediate between the judiciary and the legislature and keep our law up to date. Perhaps I may be permitted to quote from a report which I prepared four years ago, in January, 1925, in behalf of a commission appointed by the Governor to consider these and other problems. "Anachronisms persist, not because they are desired, but because they lie buried from the view of those who have the power and the will to end them. Reforms are not made because the impulse to make them is sporadic, working by fits and starts, and at times because the motives of the sponsors are unworthy or at least suspect. A disinterested agency should exist to survey the body of our law patiently and calmly and deliberately, attempting no sudden transformation, not cutting at the roots the growths of centuries, the products of a people's life in its gradual evolution, but pruning and transplanting here and there with careful and loving hands. The experiment, however fair its prospect, may fail like any other. If achievement is worthy of opportunity, authority and prestige will be augmented with the years. But whatever the outcome, one gain at least will be assured—the State will have done its part. It will not have turned a deaf ear to the unorganized multitude who, unable to speak for themselves, must look to it as parens patriae for the correction of abuses. It will have created the agencies through which attention can be focused upon hardship and injustices. The wise years must judge whether it has built well or ill."

Thus I spoke in 1925. Till now, the wise years have been unable to sit in judgment upon my proposed commission, for though it was favored by Governor Smith, the legislature would not follow him. In the meantime, while judicial councils, approximating my plan, but differing from it in important elements, have been formed in many states. In New York, the new Governor, Mr. Roosevelt, has expressed an interest in the reform of law and its administration which fills me with the hope that he will revive the failing cause. The State Bar Association has appointed a committee directed to the same or one not greatly different. Perhaps something may yet come of it. Until such an agency is created, we shall have to trust to the slow methods of the judicial process, harried by the many restrictions inherent in its nature, though accelerated by sporadic statutes, and by the work of bar associations and others,—we shall have to trust to these methods to keep the law alive. I have written a good deal about the judicial process, its methods and its possibilities, and I have no thought to speak of it disrespectfully or slightly. We could not, if we could, replace by a code our system of case law developed at the hands of judges, here a little and there a little, as the instance may require. What I complain of is merely this, that the method, admirable when understood and properly applied, has been subjected to too great a strain. At times, it brings one to an impasse, and then we need the steam shovel of legislation to clear the obstacles away. One must know
when to use the pick and axe and spade, and when the charge of dynamite.

Men are complaining every now and then that the abstractions of jurisprudence, its principles and concepts, seem to be in a state of flux, that they are variable and inconsistent, that they have no finiteness about them. But abstractions never have. You will find some interesting thoughts about abstractions in a series of essays by an author whose work is far removed from jurisprudence, the essays by Aldous Huxley to which he gives the title "The Gifted Bulldog." "An abstraction," he says, "can never be true. To abstract is to select certain aspects of reality regarded as being, for one reason or another, significant. The aspects of reality not selected do not thereby cease to exist, and the abstraction is therefore never a true, in the sense of a complete, picture of reality. It is the very incompleteness of the picture that makes it valuable for us. Reality is so immeasurably complicated that it is impossible for us to comprehend it synthetically in entirety." This, I take it, is the reason why so many of our legal formulas are approximate and tentative, and failure to remember this is why so many are rebellious against an uncertainty which is inherent and essential.

Men are complaining also, every now and then, that there is unwillingness on the part of this one or another to rest content with the past, and the complaint becomes the shriller if he who evinces unrest or discontent holds the position of a judge, who is then, as often as not, looked upon as an unstable weathercock, a menace to society. Again I turn to Mr. Huxley. "It is to the unstable-minded (he says) that we owe progress in all its forms, as well as all forms of destructive revolution. The stable-minded, by their reluctance to accept change, give to the social structure its durable solidity. There are many more stable—than unstable—minded people in the world (if the proportions were changed we should live in a chaos), and at all but very exceptional moments, they possess power and wealth more than proportionate to their numbers. Hence it comes about that at their first appearance innovators have generally been persecuted and always derided as fools and madmen." Now, law, more perhaps than any other branch of human thought, is an expression and embodiment of the principle of stability. An infusion of instability in the mind of a judge may be a menace to order, a contradiction of his essential function, when in other lines of activity it would be insignificant and harmless. Infusion to some extent, however, there must be, even though the quantity be small, unless progress is to be checked and stability to petrify into deadening paralysis. Here is the endless paradox, the never-ceasing antithesis, of rest and motion, of permanence and change.

From time immemorial lawyers have been vaguely conscious of this opposition, and yet have tried to shut their eyes to it. From time immemorial they have felt the need of changing the old rules when in conflict with the present needs, yet have gone about trying to disguise the change and announcing in all sincerity that it was all as it had been before. Only the other day in going over the pages of DeToqueville I ran across his comments upon this tendency as active then as now: "Under our common law system," said DeToqueville, "laws are esteemed not so much because they are good as because they are old; and if it be necessary to modify them in any respect, to adapt them to the changes which time operates in society, recourse is had to the most incoercible subtleties in order to uphold the traditionary fabric and to maintain that nothing has been done which does not square with the intentions and complete the labors of a former generation." He is the wise judge who has the perceiving eye to mark when the need is for change and motion, and when the better choice is rest. He must know the litanies and rubrics of the law and must not lightly put them by. But he must know at the same time that like other litanies and rubrics they are not to be mouthed and intoned forever with mechanical repetition when their meaning has departed. Where shall we find the perfect equilibrium between these antithetical extremes? "Has it occurred to you," writes a cynical critic of politics and society (F. M. Comford), "has it occurred to you that nothing is ever done until everyone is convinced that it ought to be done and has been convinced for so long that it is now time to do something else?" To this I ought to add the comment of an English barrister, wise as well as witty: "The evidence on the whole goes to show that a man who has made up his mind on a subject twenty-five years ago and continues to hold to his opinions after he has been proved to be wrong is a man of principle; while he who from time to time adapts his opinions to the changing circumstances of life is an opportunist."

When I first went upon the bench, I was a good deal perplexed and harassed by the consciousness of these opposing tendencies. In my own mind and practice, as well as in some of others, but as the years have gone by, I have become reconciled to them, for I have come to know them as inevitable. Everywhere through life, in nature and in the mind of man, there runs the principle of polarity. You cannot escape from it in law any more than in anything else. The opposing and contradictory forces of stability and progress are tugging us at every step. You may try to avoid the conflict, but the avoidance is sure to fail. Sooner or later you will be driven to a choice.

If anyone wishes to understand the essence of the judicial process, its defects, its limitations, its possibilities, one should read a book published very recently, "Law in the Making," by Prof. Allen of Oxford. In which I could have had the benefit of it wish I had.

The business of a court in deciding any particular issue is to work its way by the inducive principle which I have mentioned to a rule. To this end the arguments of counsel are directed, and the process from first to last is one of logical development. Any material of logical relevancy, whether it be 'legal' or 'historical' or 'literary,' is legitimate and germane. Doubtless the best possible instrument of demonstration is the exact analogy of a previous case. But analogies are seldom exact, and counsel is rarely fortunate enough to be able to checkmate, so to speak, in one move. Almost invariably he has to justify or amplify his analogy from other sources, and it matters not what those sources are provided they are material to his main purpose. If he betakes himself to the opinions of reputable writers, to decisions of other countries, to history, to
common sense, to natural justice, to convenience and utility, to the etymology and interpretation of words, he will never be stopped by the court because the sources on which he is drawing are not 'legal.' He cannot observe only when his argument, whatever its source, is beside the main purpose. This is as true of a legal argument as of any other kind of argument; and a legal argument is not governed by any peculiar magic of its own. Lawyers do not possess, and do not claim to possess, a monopoly of the art of dialectic. They have to deal in argument more frequently than other people, and they naturally develop facility in doing so, but the principles of reason and logic upon which their arguments are based are the common property of mankind. 

Analogy. Consequently the pleader is limited to the arguments that can be adduced, and the Judge, with faculties governed by reason and logic, needs to suggest that what is known so well to me can be unknown in heaven. If at one time the work has a variety all its own and a fascination even to the most permissive arguments he can adduce, and the Judge, with faculties specially trained to this end, becomes adept at distinguishing between the stranger and the weaker of the arguments presented to him.

"The Judge himself addresses his task in much the same way as counsel. His decision is given in the form of a structure of logic, in which he may use any material which he considers admissible even if it is not governed by the clear and unambiguous provision of a statute, his task is still that of a great majority of cases, no statute is applicable, and even if it is applicable, it is frequently the reverse of clear and unambiguous. The judge must then proceed, as Bacon laid down long ago, either by "parity of reasoning (vel per processum ad similium) or by the use of examples though they have not been embodied in any statute ("vel per usum exemplorum hoc in legem non conhaerentem") or by rules of natural reason and discretion ("vel per jurisdictiones quae statuunt arbritio bonti viti at acutum discretionem sanat"). The method of his reasoning may take innumerable forms provided they achieve a logical conclusion."

There is material here for a whole essay or even treatise on the art of juridical and forensic dialectic. I have sometimes thought it could be developed in an interesting way by concrete illustrations, and by pointing out certain differences in method in different systems or at different epochs. I had occasion not long ago to read Cicero's speech in defense of Archias, and it was instructive to contrast his method with any that would be permissible in our own courts of law today. There is no need in truth to go back to distant times. An article on French criminal procedure in the current Law Quarterly Review reminds us pointedly of the wide space between our own forensic methods and those of other lands, though perhaps the methods of the advocate differ more profoundly than those followed by the judge.

Let me take another extract from the same book by Mr. Allen, an extract which may help to reconcile us when we are tempted to rail at judges as logicians and nothing more, the devotees of a sterile professionalism, a professionalism run to seed. "For here and always," he says, "the Judge is performing a function not merely subsidiary to the operation of law, but inherent in its very essence. Law exists in order to be applied; and it must be applied through some human agency. If all men apprehended rules in precisely the same manner; if all men were at one about their rights and duties; there would be no need for legal exposition, and indeed little need at all for 'law,' as that term is usually understood. But since unanimity is impossible, there arises very early in the development of law the necessity for analysis and application through the medium of the skilled, impartial interpreter. The veriest tyro in legal study is soon made aware how omnipresent the influence of the interpreter has been. It has not always been an influence for good; 'professionalism,' both in ancient and in modern societies, has too often impeded progress and brought justice into disrepute. But in another and more characteristic aspect; in the devoted search after exactitude and the quest for justice for its own sake, the expert interpretation of law has rendered incalculable service to mankind. 'The force and discipline of legal reasoning have not only been a constant attraction to commanding minds, but have made the lawyer a model of that dispassionate thinking, clear vision, and nice appreciation of evidence, without which it is impossible to progress far in the orderly conduct of mundane affairs.'"
point you sorely. We are handing down decisions in closely balanced
cases where the patient and careful work of months and even of years
of conscientious members of the bar is shattered over night. If one were
to consider such a situation in the abstract without knowledge of the
facts, one might suppose that the result would be a chronic state of irri-
tation and hostility between two contending camps. Nothing of the kind!
If we do the day's work with a reasonable measure of intelligence and
devotion, we are rewarded by a friendship which is really more than
friendship,—by a friendship so tinged with emotion that we can only
describe it as affection.

I was a stranger to everyone in this room when I went upon the
bench fifteen years ago. I have made my share of blunders, but I have
done the best I could. You have rewarded me—richly rewarded me—
with a friendship and, I sometimes feel, with an affection which fills me
with solemn pride and stirs in my heart an affectionate response.

For these abounding blessings, I can only pledge you in return my
gratitude and loyalty, my brotherly devotion, and my consecrated effort
to be worthy of the fellowship of the bar.