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THE HUMAN DIMENSION IN APPELLATE JUDGING: A BRIEF REFLECTION ON A TIMELESS CONCERN

Judith S. Kaye†

It is impossible to let these historic years pass without commenting on the magnificence of our bicentennial celebration. So many times lately we have gathered on community lawns, in courthouses, in schools—with balloons and bands and the Star Spangled Banner—to pay tribute to our Constitution and to this nation's founders for a document and tradition that have endured as our backbone and conscience through 200 years of societal change. What a great refresher course we are having in American origins.

It is ironic that in 1987—while debate raged over how the Constitution should be interpreted¹—we were also given a living lesson, a nationwide seminar in United States government, particularly the interaction of its three branches, through the confirmation process of Judge Robert Bork. I have not found anything on television more magnetizing than the Senate Judiciary Committee hearings, and I am delighted that public interest in these lengthy televised sessions was so widespread. Tradespeople in my neighborhood suddenly wanted only to talk about Bork; more than ever I began to dread long red lights and traffic jams while seated in New York City taxicabs; in Albany a woman told me that every night she set up her ironing in front of the television set. (That's a lot of ironing.) The word "Borkian" is probably in serious contention for the next edition of Webster's.

The personalities were fascinating, to be sure, but by the fifth or fifteenth or fiftieth hour it simply had to be the dialogue and not the actors that captivated viewers and held them riveted to their television sets. The public became genuinely absorbed by the issue of "judicial restraint" versus "judicial policy-making:" what exactly is the proper role of the flesh and blood human being—the individual judge's own values and philosophy—in Supreme Court adjudication of constitutional questions that are so obviously fundamental to the

† Associate Judge, New York State Court of Appeals. This paper is an expanded version of the remarks delivered to the New York County Lawyers' Association, December 10, 1987.

¹ See, e.g., Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985); Wachtler, *Our Constitutions—Alive and Well*, 61 ST. JOHN'S L. REV. 381 (1987).

kind of society we have? The words “judicial policy-making” and “judicial law-making,” for some, have become words of terror signifying an arrogation of power, an intrusion into the domain of the legislature, judges gone wild.

If you believe that there can be such a thing as coincidence, then an extraordinary coincidence occurred on September 17, 1987—the day 200 years ago that convention delegates in Philadelphia actually put their signatures to the Constitution. That was Judge Bork’s third day of testimony before the Senate Judiciary Committee and, coincidentally, also the day Justice Brennan delivered the Cardozo Lecture at the Association of the Bar of the City of New York—a talk plainly prepared long in advance of Justice Powell’s resignation and the Bork nomination. Justice Brennan’s lecture was called “Reason, Passion, and ‘The Progress of the Law.’”² It was the antithesis of the judicial philosophy being expressed that very day in Washington.

Passion, according to Justice Brennan, is “the range of emotional and intuitive responses to a given set of facts or arguments, responses which often speed into our consciousness far ahead of the lumbering syllogisms of reason.”³ I have to admit, I never thought of “passion” quite that way. In eloquent passages intensifying the grace, the sheer poetry of Judge Cardozo’s *Nature of the Judicial Process*, Justice Brennan had as his thesis that interpretation of the Constitution—particularly its guarantee of due process—demands the full measure of every human capacity, that we cannot “take refuge in the illusion of rational certainty.” The interplay of forces, he said, the “internal dialogue of reason and passion, does not taint the judicial process, but is in fact central to its vitality,”⁴ particularly in mat-

² 42 REC. ASSOC. BAR. CITY OF N.Y. 948 (1987).

³ *Id.* at 958.

⁴ *Id.* at 951. According to Justice Brennan:

[The Constitution’s] broadly phrased guarantees of our freedoms ensure that the Constitution need never become an anachronism: the Constitution will endure as a vital charter of human liberty as long as there are those with the courage to defend it, the vision to interpret it, and the fidelity to live by it.

Yet the open-ended nature of a written constitution, and the difficulty of reconciling competing principles and passions, places an enormous responsibility on the judge.

Id. at 962. Justice Brennan focused particularly on the Due Process Clause, noting that:

[it] demands of judges more than proficiency in logical analysis. It requires that we be sensitive to the balance of reason and passion that mark a given age, and the ways in which that balance leaves its mark on the everyday exchanges between government and citizen. In order to do so, we must draw on our own experience as inhabitants of that age, and our own sense of the uneven fabric of social life. We cannot delude ourselves that the Constitution takes the form of a theorem whose axioms need mere logical deduction.

ters of constitutional interpretation.

I do not intend to discuss the bicentennial or Judge Bork or constitutional decision-making by the United States Supreme Court or by the New York Court of Appeals. But I do wish to share a few related thoughts about one of the many timeless issues rekindled by these most recent chapters in American history—the part played by a judge's own values and sense of justice, or "passion," when sitting in review of *nonconstitutional* questions, the statutory issues as well as the everyday problems that are the grist of our common law process. While often less dramatic than the burning constitutional issues, these decisions made day in and day out by appellate courts throughout the nation are obviously also a major force in shaping the kind of society we have, and they touch the lives and affairs of most of us perhaps even more directly.

Long before the issue flared up in connection with the recent Supreme Court nomination, and especially as a judge, I had thought a great deal about the proper balance of person and precedent in deciding the publicly significant issues that come before the courts. By that I do not mean to suggest that any case in our court is unimportant—it is not; but what I wish to focus on are the cases that come to us with lights flashing and bells ringing as issues that likely will have broad social impact.

Every human being—judges included—certainly has a view or philosophy or outlook on life, some notion about what society needs, and all manner of personal feelings, beliefs, and experiences. Yet the Court of Appeals is exclusively a court of law. With few exceptions, we are by constitution, statute, and abundant case law without jurisdiction to decide anything but issues of law.⁵ Over the years that it has been my good fortune to serve on the Court of Appeals, I have come to appreciate how as a court of law, deciding only issues of law, within a government of law, we can and do and must, also bring the full measure of every human capacity to bear in resolving the cases before us.

I doubt that anyone today would seriously question the proposition that appellate decision-making is more than a mechanical exercise of locating citations and affixing them to facts found below. The view of the function as entirely formalistic, as a matter of pure reason and scientific search, manifests not judicial restraint but intellectual nonsense. Judge Cardozo himself observed that judges do not stand aloof on the chill and distant heights of pure reason, im-

Id. at 966-67.

⁵ See, e.g., N.Y. CONST. art. VI, § 3(a); N.Y. CIV. PRAC. L. & R. 5501(b) (McKinney, 1983); N.Y. CRIM. PROC. LAW § 450.90(2)(a) (McKinney 1983); *People v. McRay*, 51 N.Y.2d 594, 601, 416 N.E.2d 1015, 1018, 435 N.Y.S.2d 679, 682 (1980).

mune from the tides and currents that engulf the rest of mankind, "and we shall not help the cause of truth by acting and speaking as if they do."⁶ He recognized that the judicial process "in its highest reaches is not discovery, but creation."⁷ Those sentiments expressed in the year 1920 were apparently widely regarded as a legal version of hard core pornography that no one but a saint like Cardozo could get away with.⁸ I suspect that the public view has changed somewhat over the past 68 years—both as to what constitutes hard core pornography and as to the true and proper function of appellate judges.

To my mind, the mere statement of the proposition that human values must be abjured by appellate judges exposes its fallacy: how but by the application of some measure of human understanding and contemporary experience could a judge today resolve the unprecedented legal issues that crowd the court dockets? Even if the law were declared dead, always to remain static, the problems confronted by the courts are people's problems, and the infinite ingenuity of the human mind seems never to concoct the identical situation twice. Immediately there is judicial handtailoring to be done, often requiring choices among sound alternatives, simply to fit existing precedents to the very next suit. And even if nothing more were required of appellate courts than the application of codes made by others, the exercise is necessarily more than mechanical. There are inevitably gaps to be filled and anomalies to be treated as statutes are tested in the crucible of live controversies that even the most far-seeing legislators could not have contemplated.

With every session of our court in Albany, I am increasingly struck by the changed nature of the business of a common law court in a great commercial state, which is surely reflective of profound changes both in the litigation process and in society generally. Our docket is substantially devoted to criminal appeals, to the interpretation of ever-proliferating statutes as our law has grown increasingly codified, and to review of administrative agency decisions, where the problems of our citizenry seem more and more to be resolved. In the past year, for example, there has likely not been a single session without appeals involving children under the Family Court Act and the penal laws—child abuse and neglect cases, parental rights termination cases, juvenile delinquencies—as the family has taken the law into its midst; and there has likely not been a single session without

⁶ B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 168 (1921).

⁷ *Id.* at 166. See also Clark & Trubek, *The Creative Role of the Judge: Restraint and Freedom in the Common Law Tradition*, 71 *YALE L.J.* 255 (1961).

⁸ G. GILMORE, *THE AGES OF AMERICAN LAW* 77 (1977). See *supra* note 2, at 951 for the historical context in which these unorthodox views were expressed.

appeals from prison administrative determinations arising under regulations of the Commissioner of Corrections. In the year 1920, when Judge Cardozo delivered the lectures that became the classic *Nature of the Judicial Process* there were no such cases. The entire law of prisoners' rights probably could have been summarized in one sentence: This page intentionally left blank.

But while the business of the Court of Appeals has changed dramatically as society has evolved, while the number and topics of the cases we hear today are vastly different, when the meaning of a statute is in dispute, there remains at the core the same process of discerning, interpreting, and applying the will of the lawmakers. In applying the laws declared by others—be they statutes, regulations, or orders—there is no question that judges frequently are left to choose among competing policies, thereby narrowing or broadening the reach of the law, and determining its range and direction.

A time-honored principle of statutory construction often may be found to support the position of each party, as is evident in the fact that two courts below ours may already have divided respectably on the meaning of the provision in issue. One principle of construction tells us that courts interpreting statutes must look to the words used by the legislature; explicit statutory provisions should be applied as written. But another principle tells us that if literalness yields absurdity, or if it fails to give effect to the underlying legislative purpose, courts are not to apply the statutory provisions as written but are to seek some other meaning. McKinney's Book on Statutes is filled with such bedeviling points and counterpoints.⁹

I am reminded by several recent volumes of Court of Appeals opinions that, just within the past few years, the court has determined, under one rubric of statutory construction or another, many socially significant issues within the state statutory law. The court has determined, for example, that a medical license acquired by one spouse during marriage may be "marital property" as that term is used in the Domestic Relations Law,¹⁰ and that increases in the value of separate property of one spouse may also fall within that statutory term;¹¹ that there is no private right of action for securities fraud under the General Business Law;¹² that the term "environment" as used in environmental conservation laws may include

⁹ See generally Breitel, *The Lawmakers*, 65 COLUM. L. REV. 749, 767-69 (1965), and particularly, K. LLEWELLYN, *THE COMMON LAW TRADITION* 521-35 (1960).

¹⁰ O'Brien v. O'Brien, 66 N.Y.2d 576, 489 N.E.2d 712, 498 N.Y.S.2d 743 (1985).

¹¹ Price v. Price, 69 N.Y.2d 8, 503 N.E.2d 684, 511 N.Y.S.2d 219 (1986).

¹² CPC Int'l, Inc. v. McKesson Corp., 70 N.Y.2d 268, 514 N.E.2d 116, 519 N.Y.S.2d 804 (1987). See also *All Seasons Resorts, Inc. v. Abrams*, 68 N.Y.2d 81, 497 N.E.2d 33, 506 N.Y.S.2d 10, (1986) (defining "securities" under, Section 352-e of New York General Business Law).

short-term and long-term effects of secondary displacement of local residents and businesses;¹³ that only communications made confidentially to journalists come within the Shield Law;¹⁴ that letters of credit are not attachable "property" as that word is used in the Civil Practice Law and Rules.¹⁵ The court in a recent celebrated criminal case defined the statutory defense of "justification,"¹⁶ and it defined the word "death" for purposes of homicide prosecutions under the Penal Law.¹⁷

The legislature has established the requirement of corroboration for certain crimes, but it remains for the court as a matter of statutory construction to give substance to the word "corroboration,"¹⁸ and the phrase "mistake of law,"¹⁹ and the term "actually present"²⁰ as used in the penal statutes. These words can rarely be defined by simply consulting a good dictionary. The cases would hardly reach us if there were not genuine ground for difference. Yet when the court interpreting a statute concludes that an indictment must be dismissed or a conviction affirmed or a damages award modified, that determination not only affects the litigants but also influences future decisions of others as to what crimes will be prosecuted and what lawsuits brought—in short, what conduct will be tolerated by society generally.

If this is so as to statutory law, where the role of the court is circumscribed by the words and intent of the legislature—if human value judgments can play any part in a judge's choice between one reading of key statutory provisions and another—then it must be all the more so as to the common law. Common law, after all, is law that is out-and-out made by judges.

The value judgments of appellate judges can hardly be alien to the development of the common law; they are essential to it. Choices among the precedents of another day—which to bring for-

¹³ *Chinese Staff and Workers Ass'n v. City of New York*, 68 N.Y.2d 359, 502 N.E.2d 176, 509 N.Y.S.2d 499 (1986). See also *Jackson v. New York Urban Dev. Corp.*, 67 N.Y.2d 400, 494 N.E.2d 429, 503 N.Y.S.2d 298 (1986).

¹⁴ *In re Knight-Ridder Broadcasting v. Greenberg*, 70 N.Y.2d 151, 511 N.E.2d 1116, 518 N.Y.S.2d 595 (1987).

¹⁵ *In re Supreme Merchandise Co. v. Chemical Bank*, 70 N.Y.2d 344, 514 N.E.2d 1358, 520 N.Y.S.2d 734 (1987).

¹⁶ *People v. Goetz*, 68 N.Y.2d 96, 497 N.E.2d 41, 506 N.Y.S.2d 18 (1986). See also, *People v. Magliato*, 68 N.Y.2d 24, 496 N.E.2d 856, 505 N.Y.S.2d 836 (1986) and *People v. McManus*, 67 N.Y.2d 541, 496 N.E.2d 202, 505 N.Y.S.2d 43 (1986).

¹⁷ *People v. Eulo*, 63 N.Y.2d 341, 472 N.E.2d 286, 482 N.Y.S.2d 436 (1984).

¹⁸ *People v. Groff*, 71 N.Y.2d 101, 518 N.E.2d 908, 524 N.Y.S.2d 13 (1987); *People v. Moses*, 63 N.Y.2d 299, 472 N.E.2d 4, 482 N.Y.S.2d 228 (1984). See also *In re Nicole V.*, 71 N.Y.2d 112, 518 N.E.2d 914, 524 N.Y.S.2d 19 (1987) (defining "corroboration" in child protective proceedings).

¹⁹ *People v. Marrero*, 69 N.Y.2d 382, 507 N.E.2d 1068, 515 N.Y.S.2d 212 (1987).

²⁰ *People v. Hedgman*, 70 N.Y.2d 533, 517 N.E.2d 858, 523 N.Y.S.2d 46 (1987).

ward, which to leave behind, which to extend to meet some new condition, which to limit or overrule—mark the progress of the law. This process breathes life into our law; it gives relevance and rationality in the year 1988 to rules fashioned for another day, so that they command acceptance as principles by which we live.

Reflecting on the subject of this article, I have read the Court of Appeals decisions of the year 1928—which will no doubt lend a wonderful freshness and vitality to my own opinions in 1988. I have a new wealth of knowledge on the law relating to barge canals and the common law of insurance. I picked 1928 because it yielded an even number, and because it fell within the tenure of Chief Judge Cardozo, before he left our court for the United States Supreme Court. That was the year of *Moch v. Rensselaer*,²¹ *Meinhard v. Salmon*,²² and *Palsgraf v. The Long Island Railroad*,²³ to name a few. In one sense I found it disheartening; so few of the hundreds of decisions of that year are familiar to me today, and so many utterly unknown. That is a sobering thought for the future as I prepare for the argument of new cases, which seem to me, as always, to raise momentous issues that will live forever in the law. But it is in another sense elevating that, even given the small relative number, so many of the 1928 decisions remain central to the law today, which perhaps best illustrates the nature of the common law process—constantly to test and retest the rules and principles established by judges of another day, and to retain and build upon what remains sound.

Mrs. Palsgraf, as every student of the law knows, was waiting for the Rockaway Beach train when a Long Island Railroad employee dislodged a wrapped package of fireworks carried by another passenger. The impact of the package falling to the ground caused an explosion that toppled scales at the other end of the platform, injuring her. Four judges voted to dismiss her case against the railroad. Three of the seven thought she should have won. Ample authority was collected by both sides; the opinions made a plausible, reasoned argument for both conclusions. Yet in thousands of guises, that bare majority decision—which of course became the law of the state—has lived through the decades as a root principle of the law of negligence. To this day we cite *Palsgraf*. The facts are moderu—should a landlord be liable when a 16-year-old is forced into his unlocked building and attacked;²⁴ should the state be liable to a mur-

²¹ H.R. Moch Co. v. Rensselaer Water Co., 247 N.Y. 160, 159 N.E. 896 (1928).

²² 249 N.Y. 458, 164 N.E. 545 (1928).

²³ 248 N.Y. 339, 162 N.E. 99, *reargument denied*, 249 N.Y. 511, 164 N.E. 564 (1928).

²⁴ *Waters v. New York City Hous. Auth.*, 69 N.Y.2d 225, 505 N.E.2d 922, 513 N.Y.S.2d 356 (1987).

dered student's family when a prison physician, completing a college medical form for an inmate about to be released to attend the college, fails to disclose the inmate's extensive psychiatric history;²⁵ should the Transit Authority be liable when a young student waiting for a subway train is beaten to death, while a toll collector stands in the booth?²⁶ What standard of care is owed to baseball spectators,²⁷ to baseball players,²⁸ to jockeys,²⁹ to trespassers,³⁰ to fetuses?³¹ Should damages be allowed for purely psychic injury, and if so how far should responsibility for such injury be extended?³² The times are different, the facts are different, the answers vary. But always the court's function is the same, that of weighing and balancing the relation of the parties, the nature of the risk and the public interest, and then setting the outer limits of one person's duty of care to another, unquestionably an important element in our social order today.

By the same token, only four judges of the Court of Appeals several decades ago joined in another famous opinion, *MacPherson v. Buick*,³³ upholding the liability of an automobile manufacturer for a defective wheel on a car purchased by the injured plaintiff. The dissenting opinion—again replete with creditable authorities—rejected the imposition of liability on the automobile manufacturer because it was the wheel that was defective, the wheel was made by someone else, and the plaintiff was not the customer of the wheel manufacturer. There was no "privity of contract" between the injured plaintiff and the automobile manufacturer, and the dissent concluded that under existing law there could be no liability. But the court's

²⁵ *Eiseman v. State of New York*, 70 N.Y.2d 175, 511 N.E.2d 1128, 518 N.Y.S.2d 608 (1987).

²⁶ *Crosland v. New York City Transit Auth.*, 68 N.Y.2d 165, 498 N.E.2d 143, 506 N.Y.S.2d 670 (1986).

²⁷ *Davidoff v. Metro. Baseball Club, Inc.*, 61 N.Y.2d 996, 463 N.E.2d 1219, 475 N.Y. 367 (1984); *Akins v. Glens Falls City School Dist.*, 53 N.Y.2d 325, 424 N.E.2d 531, 441 N.Y.S.2d 644 (1981).

²⁸ *Maddox v. City of New York*, 66 N.Y.2d 270, 487 N.E.2d 553, 496 N.Y.S.2d 726 (1985).

²⁹ *Turcotte v. Fell*, 68 N.Y.2d 432, 502 N.E.2d 964, 510 N.Y.S.2d 49 (1986).

³⁰ *Basso v. Miller*, 40 N.Y.2d 233, 352 N.E.2d 868, 386 N.Y.S.2d 564 (1976).

³¹ *See, e.g., Tebbutt v. Virostek*, 65 N.Y.2d 931, 483 N.E.2d 1142, 493 N.Y.S.2d 1010 (1985); *Martinez v. Long Island Jewish-Hillside Medical Center*, 70 N.Y.2d 697, 512 N.E.2d 538, 518 N.Y.S.2d 955 (1987). *See also Woods v. Lancet*, 303 N.Y. 349, 102 N.E.2d 691 (1951) (recognizing the right of an infant to recover against a doctor for injuries in utero). The Court wrote: "We act in the finest common-law tradition when we adapt and alter decisional law to produce common-sense justice." *Id.* at 355, 102 N.E.2d at 694.

³² *Bovsun v. Sanperi*, 61 N.Y.2d 219, 461 N.E.2d 843, 473 N.Y.S.2d 357 (1984).

³³ 217 N.Y. 382, 111 N.E. 1050 (1916). Judges Hiscock, Chase, and Cuddeback joined in the opinion of Judge Cardozo; Judge Hogan concurred in result only; Chief Judge Bartlett dissented; and Judge Pound did not participate in the case at all.

majority chose a different route. Although the dissent saw the automobile as an innocuous object moving at the speed of eight miles an hour, the majority saw that same object as a potentially dangerous instrument that could travel 50 miles an hour and had space for passengers. The majority therefore chose an entirely separate line of authority that bypassed the notion of privity and instead treated the automobile as a dangerous instrument for which the manufacturer should be held liable, likening an automobile with a bad wheel to a deadly poison falsely labeled.³⁴ And from that choice, an entire body of product liability law has emerged and flowered.

MacPherson too has lived countless additional lives as appellate courts throughout the country, responding to changing social needs and social conditions, have inch by inch, case by case, moved the law beyond privity of contract and beyond liability to the ultimate purchaser, beyond the manufacturer,³⁵ beyond actual negligence,³⁶ and some courts, even beyond strict liability to enterprise or "market share" liability,³⁷ openly using policy-based justifications such as the superior ability of manufacturers and sellers both to recognize and cure defects, and to minimize and spread the risk among all consumers. In our sophisticated, materialistic society, can anyone today doubt the profound influence of judge-made product liability law on our social development?

In *Moch v. Rensselaer*,³⁸ a waterworks company furnishing the water for city fire hydrants was sued by a warehouse owner when his property burned to the ground because there was no water in the hydrants to put out the fire. This time, however, the court denied recovery because there was no "privity of contract" between the warehouse owner and the waterworks company. The only contract was with the city. The court perceived that to allow recovery, to

³⁴ For an analysis of *MacPherson*, see K. LLEWELLYN, *supra* note 9, at 430-37. "[P]rinciple, in terms of 'the needs of life,' must be recurred to constantly, so as to correct and to readjust precedent—that is vital. But so far as it suggests that principles themselves do not change, the suggestion is legal convention and not legal fact. Principles are born in travail, and some of them die, and sometimes, like the one here, they take new shape in mid-career." *Id.* 436-37.

³⁵ The cases, of course, are legion in this burgeoning area of law. For an interesting development at ten-year intervals, see *Voss v. Black & Decker Mfg. Co.*, 59 N.Y.2d 102, 450 N.E.2d 204, 463 N.Y.S.2d 398 (1983); *Codling v. Paglia*, 32 N.Y.2d 330, 298 N.E.2d 322, 345 N.Y.S.2d 461 (1973); and *Goldberg v. Kollsman Instrument Corp.*, 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963).

³⁶ See, e.g., *Micallef v. Miehle Co.*, 39 N.Y.2d 376, 348 N.E.2d 571, 384 N.Y.S.2d 115 (1976); *Sage v. Fairchild-Swearingen Corp.*, 70 N.Y.2d 579, 517 N.E.2d 1304, 523 N.Y.S.2d 418 (1987).

³⁷ See *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, *cert. denied*, 449 U.S. 912 (1980); *Martin v. Abbott Laboratories*, 102 Wash. 2d 581, 689 P.2d 368 (1984).

³⁸ 247 N.Y. 160, 159 N.E. 896 (1928).

enlarge the company's duty beyond its contract, would have been to extend potential liability indefinitely. Today that same principle also lives in many forms, most recently as the basis for decisions favoring Consolidated Edison in suits for personal injuries suffered by New York City residents during the last blackout. It was the court's perception in 1985, just like *Moch* in 1928, that it would impose a crushing burden on the utility if every person in the City of New York who suffered injury during the blackout were allowed to recover against Consolidated Edison. As a matter of public policy the complaints were dismissed.³⁹ That same concept of "privity of contract" as limiting the ambit of tort responsibility was again critical in the famous case of *Ultramares Corp. v. Touche*,⁴⁰ defining an accountant's liability in negligence. More than 50 years later in *Credit Alliance*,⁴¹ the Court of Appeals chose to adhere to the "wisdom and policy"⁴² of *Ultramares*; state supreme courts elsewhere, for policy reasons, have chosen otherwise.

I believe I could multiply these examples in every area of the law—substantive and procedural.⁴³ There is no question that appellate courts and appellate judges throughout the nation traditionally and necessarily do shape the law and sometimes even make the law, and that this is not a subject for sheepishness or apology.⁴⁴ Judges

³⁹ *Strauss v. Belle Realty*, 65 N.Y.2d 399, 482 N.E.2d 34, 492 N.Y.S.2d 555 (1985). The judge-made law of municipal immunity comes quickly to mind as another *Moch* derivative. See, e.g., *Cuffy v. City of New York*, 69 N.Y.2d 255, 505 N.E.2d 937, 513 N.Y.S.2d 372 (1987).

⁴⁰ 255 N.Y. 170, 174 N.E. 441 (1931).

⁴¹ *Credit Alliance Corp. v. Arthur Andersen & Co.*, 65 N.Y.2d 536, 483 N.E.2d 110, 493 N.Y.S.2d 435 (1985).

⁴² *Id.* at 551, 483 N.E.2d at 118, 493 N.Y.S.2d at 443.

⁴³ Indeed, there are so many examples that I find it hard to stop reciting them. See, e.g., *Bing v. Thunig*, 2 N.Y.2d 656, 143 N.E.2d 3, 163 N.Y.S.2d 3 (1957) abrogating the judge-made charitable immunity doctrine, in which the court wrote:

To the suggestion that *stare decisis* compels us to perpetuate it until the legislature acts, a ready answer is at hand. It was intended, not to effect a 'petrifying rigidity,' but to assure the justice that flows from certainty and stability. If, instead, adherence to precedent offers not justice but unfairness, not certainty but doubt and confusion, it loses its right to survive, and no principle constrains us to follow it.

Id. at 667, 143 N.E.2d at 9, 163 N.Y.S.2d at 11. See also *Buckley v. City of New York*, 56 N.Y.2d 300, 305, 437 N.E.2d 1088, 1090, 452 N.Y.S.2d 331, 333 (1982) (abolishing the fellow servant rule in New York) and *McGee v. Adams Paper & Twine Co.*, 20 N.Y.2d 921, 233 N.E.2d 289, 286 N.Y.S.2d 274 (1967), *aff'g* 26 A.D.2d 186, 271 N.Y.S.2d 698 (1966) (adopting the fireman's rule).

⁴⁴ While Judges Cardozo and Holmes more than a half-century ago described judicial lawmaking as interstitial and molecular—even that recognition of a limited policymaking role was at the time regarded as radical—I think it has long been true that the traditional judicial activity is broader:

It is now a commonplace that courts, not only of common-law jurisdictions but also those which have codified statutory law as their base, participate in the lawmaking process. The commonplace, for which the

exercising their policy-making function are not exhibiting a lack of judicial restraint, and it strikes me as a false issue to equate the two. Moreover, this accepted judicial function so permeates our social order that, even if in principle subject to legislative correction, as a practical matter its effects cannot readily be undone by legislative action.

The concern—and I believe a valid one—is that there must be limits. Judicial policy-making cannot be a freewheeling exercise. If appellate adjudication is not a cold, scientific process of affixing precedents to facts found below, neither is it a free-form exercise in imposing a judge's personal beliefs about what would be a nice result in a particular case. Our government is after all a government of law, and our court is a court of law. Though it must move, the law also must have stability, certainty, and predictability so that people will know how to conduct themselves in order to come within the law, and will know what rights they may reasonably expect will be protected or enforced. An appellate court decision resolves a dispute between litigants, but it also establishes the rule for the future. Stability is essential for fairness and evenhandedness: if certain conduct produces a result in one case, then blind justice should produce the same result for other people in other cases like it. Courts simply cannot decide one way one day and another way the next.⁴⁵

Holmeses and the Cardozos had to blaze a trail in the judicial realm, assumes the rightness of courts in making interstitial law, filling gaps in the statutory and decisional rules, and at a snail-like pace giving some forward movement to the developing law. . . . The simplest observation of the vast, direct and profound overriding of old rules and principles and the substitution of new ones in both the state and federal courts establishes the contrary, namely, that the courts do not confine their lawmaking activity to the interstitial.

Breitel, *supra* note 9, at 765.

It is evident that the massive changes in the field of public law are greater because of the need to interpret broadly-worded constitutional provisions and the difficulty of constitutional amendment. But the capacity, and the habit perhaps, of significant law creation under the pressure of constitutional interpretation has extended to private law, and here without the public and political controversy engendered by issues involved in public law.

Id. at 766. In his article, former Chief Judge Breitel offers an excellent analysis of the reasons for and the limitations of judicial lawmaking.

⁴⁵ [*Stare decisis* does not spring full-grown from a 'precedent' but from precedents which reflect principle and doctrine rationally evolved. Of course, it would be foolhardy not to recognize that there is potential for jurisprudential scandal in a court which decides one way one day and another way the next; but it is just as scandalous to treat every errant footprint barely hardened overnight as an inescapable mold for future travel.

People v. Hobson, 39 N.Y.2d 479, 488, 348 N.E.2d 894, 901, 384 N.Y.S.2d 419, 425 (1976). See also *Bing v. Thunig*, 2 N.Y.2d 656, 143 N.E.2d 3, 163 N.Y.S.2d 3 (1957).

The point, however, is that they do not. There must be limits, and there are limits. There is first and foremost respect for the separate functions of the legislative and executive branches of government. I have found no better lesson in the significance of the distribution of powers than the profound and enduring Cardozo Lecture delivered by former Chief Judge Breitel, which concludes with the observation that "self-restraint by the courts in lawmaking must be their greatest contribution to the democratic society."⁴⁶ Statutes are limits; the court's focus is to implement the will of the legislature, not its own will. Cases are limits; courts do not render advisory opinions, they resolve live disputes on the facts before them. Then too, appellate decisions are not written on blank sheets of paper. They are the product of a system that values stability and faithful adherence to precedent. They are the product of a process of extracting the principles of the past and assiduously following their path through history and logic. They are the product of consensus among independent judges who are restrained additionally by the traditions of the institution, not the least of which is the tradition of making public a reasoned explanation for the results they reach.

My concluding thought from all of this is that the danger is not that judges will bring the full measure of their experience, their moral core, their every human capacity to bear in the difficult process of resolving the cases before them. It seems to me that a far greater danger exists if they do not.

⁴⁶ Breitel, *supra* note 9, at 777.