Opinions of Judge Edgerton A Study in the Judicial Process

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In the 14 years since Henry W. Edgerton became a circuit judge of the United States Court of Appeals for the District of Columbia Circuit he has created a body of judicial writing that will have an increasing impact upon the development of the law. The influence of his work rests in part upon the enlightened and progressive precedents his decisions have set; in part upon the profound critical expositions in his dissenting opinions; in part upon his creative use of the implements and materials with which a judge must work; and finally upon his courageous declaration of principles in the most honored traditions of our democracy. But above all, his work is shaped by a deep current of determination to effect justice and to announce principles and reach results that will best serve the interests of society. On this account, and also because his work exemplifies an important trend in American judicial thought, his opinions merit study.

THE MAINSPRINGS OF JUDGE EDEGERTON'S THINKING

Function of the Law and the Judge

Judge Edgerton's work is in the main stream of man's age-old quest for justice, justice between man and man, between man and his government, and in the general ordering of things. "We should decide the question before us 'in accordance with present-day standards of wisdom and justice rather than in accordance with some outworn and antiquated rule of the past' . . ."1 Concern for justice echoes throughout Judge Edgerton's decisions.

But in every era many have avowed the objective of justice. The merit of the avowal depends upon the meaning of "justice." In our own time judges find little opportunity to expatiate upon its meaning. They teach us their conception of justice more by what they decide than by

what they say. This is especially true of Judge Edgerton, with whom economy of expression and directness of decision are as much a mandate of office as a characteristic of style.

Yet sparse though they are, general statements of his idea of justice may be found scattered through his opinions. It involves "fairness,"2 "custom and convenience,"3 but above all the good of society.4 In a case of first impression the law should be declared "with a view to the social interests which seem to be involved and with such aid as we can get from authorities elsewhere and from 'logic, and history, and custom, and utility, and the accepted standards of right conduct'."5 Mechanical standards such as speed and uniformity are not the most important considerations.6

A lawsuit is not a game in which the judge tallies the arguments of counsel and awards the decision on points. He has an active duty to make the just decision. "A procedural question not raised by the parties lurks in the record."7 "This is not the relief which appellant depositors ask. . . . but the court may grant the appropriate relief for which appellants failed to ask."8

That judges make policy is so clear to Judge Edgerton that he is ever concerned with the wisdom of the policy inherent in a decision.9 But however others may regard it,10 judicial freedom is not unlimited. This

4 "No doubt contribution seems just as between the tortfeasors, but a recent study by Professor James of the Yale Law School leads me to doubt whether it is good for society." Dissent in George’s Radio, Inc. v. Capital Transit Co., 126 F.2d 219, 223 (D.C. Cir. 1942). See also Eastburn v. Levin, 113 F.2d 176, 178 (D.C. Cir. 1940); Clark v. Associated Retail Credit Men of Washington, D.C., 105 F.2d 62, 65 (D.C. Cir. 1939).
5 Clark v. Associated Retail Credit Men of Washington, D.C., 105 F.2d 62, 64 (D.C. Cir. 1939). The phrases Edgerton quotes are from Cardozo, The Nature of the Judicial Process 112, 113 (1937). Years before Edgerton became a judge he wrote: "'Just' means, not merely fair, as between the parties, but socially advantageous, as serving, directly and indirectly, the most important of the competing individual and social interests involved." Edgerton, Legal Cause, 72 U. Pa. L. Rev. 343, 373 (1924).
8 Cooper v. Goldsmith, 135 F.2d 949, 951 (D.C. Cir. 1943).
10 The problem of the extent of judicial freedom has been one of the main preoccupations of students of the law. Cardozo declared: "The judge as the interpreter for the community
has sometimes been expressed by the epigram: Ours is a government of laws, not of men.\(^{11}\) The functions of the judge, and especially of the appellate judge, are set within the framework of our governmental system. Therefore Judge Edgerton adheres to the literal meaning of a Congressional mandate in the O. P. A. legislation\(^{12}\) and is critical of “some of the State court cases on which the dissenting opinion relies” in which the principle adopted\(^{13}\) “is a euphemism which covers judicial refusal to follow a legislative mandate addressed to the court.”\(^{14}\)

The special reverence in which courts have come to be held\(^{15}\) has obscured the down to earth fact that judges are government officers and courts government agencies, not tribunals separate and distinct from government.\(^{16}\) Nor should courts usurp the prerogatives of other agencies.\(^{17}\)

In a democracy government must be responsive to the will of the people. The legislative process is the closest approximation to this goal.

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\(^{11}\) See Wormuth, *Aristotle on Law* in *Essays in Political Theory* 45 et seq. (1948); Mason, *Brandes: Lawyer and Judge in the Modern State* 4-5 (1933); for a discussion of the origin of this phrase. Clearly, however, the make-up of the judge and his views are considered in his selection. Is this not a recognition that they will affect his action?

\(^{12}\) In making it obligatory to issue an injunction, upon application by the Price Administrator, restraining O.P.A. violations, Edgerton holds “shall” means “must” and not “may”. The Supreme Court, on the other hand, departed from the literal phrasing of the statute and reversed.

\(^{13}\) That “shall” means “may”.


\(^{15}\) “In no country in the world today has the lawyer a standing remotely comparable with his place in American politics. The respect in which the federal courts and, above all, the Supreme Court are held is hardly surpassed by the influence they exert on the life of the United States.” Laski, *The American Democracy* 110, 112 (1948). But see Llewellyn, *Law and the Social Sciences—Especially Sociology*, 62 Harv. L. Rev. 1286 (1949).


But courts, especially in the federal system in which judges are appointed and do not even submit their record to popular referendum periodically, are as least twice removed from the people. Judge Edgerton, concerned with threats to "a democratic society," especially by officers of government itself, warns of the delicate balance courts must observe in effecting justice and yet not impairing "the democratic process." Dissenting against disregard of express statutory language, Judge Edgerton declares that the court "thereby substitutes for a constitutional and relatively democratic process [i.e., legislation] one that is neither democratic nor constitutional."

The Role of Precedent

Perhaps the most important implement in the common law judicial workshop is precedent. It can become the oppressive hand of the dead past. Blindly applied it often works injustice. In the hands of a wise and liberal judge it makes for stability in the law yet does not prevent the creative molding of the law toward the just result. The ability to achieve this seemingly paradoxical end is a crucial test of judicial greatness.

There are several levels in the hierarchy of precedent. The first of these, and the least compelling, are the decisions of courts of other coordinate jurisdictions. Yet courts are prone in a case of first impression to be swayed by such decisions. But Judge Edgerton, protesting against the decision of the majority of his court that misrepresentation as to one's intention could not be the basis of the crime of larceny by false pretenses, declares: "The court holds that 'the great weight of authority... compels us.' This is a new rule and an important one. I think it is erroneous. Usually there are good reasons for a doctrine which is widely accepted, and uniformity itself has some value even in criminal law. Accordingly we should consider the weight of authority elsewhere for what it may be worth. But we should not determine our action by a count of foreign cases regardless of logic, consistency, and social need. 'The social value of a rule has become a test of growing power and importance.'

18 Colpoys v. Foreman, 163 F. 2d 908, 910 (D.C. Cir. 1947): "Lawless invasion of homes is the more menacing to a democratic society when it is committed by public officers."
19 Beach v. United States, 144 F. 2d 533, 538 (D.C. Cir. 1944).
Yet Edgerton himself has demonstrated the paradox that at times a judge may be a more effective instrument of democracy than the legislature. See his dissent in Barsky v. United States, 167 F. 2d 241, cert. denied, 334 U.S. 843 (1948), rehearing denied, 339 U. S. 971 (1950).
20 HOLDSWORTH, SOME LESSONS FROM OUR LEGAL HISTORY 13 et seq. (1928).
let judges who lived and died in other times and places make our decisions would be to abdicate as judges and serve as tellers. This court, like every other American court, overrules its own decisions when need arises. Decisions of other courts are not more binding on us. . . . This court’s new rule against new rules appears to mean that this court must take no part in the development of the law.”

To appraise Judge Edgerton’s opinions with regard to the remaining two levels of precedent, it is necessary to recall the unique status of the court upon which he sits. The District of Columbia has its own system of local law. In this sphere the United States Court of Appeals for the District of Columbia Circuit performs a function akin to a state court of last resort. Yet the court also operates within the national framework of the federal judicial system as an intermediate appellate court, coordinate with the court of appeals in each of the other ten federal circuits. In one role, it acts as the high appellate tribunal for the municipal courts of the District of Columbia and for the United States District Court for the District of Columbia in cases of a local nature. In the other, it hears appeals from the District Court in cases of a federal nature and also, both directly or indirectly, is often called on to

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23 “The court ‘possesses the jurisdiction and power of Federal courts of the several States, with such added jurisdiction as a State may confer on her courts’—Mr. Chief Justice Taft in Public Utilities Commission v. Potomac Electric Power Co., 261 U.S. 443. This means that the jurisdiction of the court is broader than any circuit court of appeals or any State supreme court.” H.R. REP. No. 1628, 71st Cong., 2d Sess. 2 (1930), Additional Justices for the Court of Appeals of the District of Columbia. See also H.R. REP. No. 1748, 73d Cong., 2d Sess. 2 (1934), To Change the Name of the Court of Appeals of the District of Columbia.
24 DISTRICT OF COLUMBIA CODE (1940 ed.).
25 “It is an appellate court for matters arising in the District of Columbia, just as the Supreme Court of Utah is for matters arising in Utah, but this is only a part of its jurisdiction . . . .” H. R. REP. No. 1748, supra note 23. H. R. REP. No. 1628, supra note 23.
26 “This court possesses the usual jurisdiction of State appellate courts in litigation arising in the District of Columbia; the jurisdiction of Federal circuit courts of appeal in Federal matters; and the peculiar jurisdiction resulting from special acts of Congress . . . .” SEN. REP. No. 847, 71st Cong., 2d Sess. 1 (1930), To Authorize the Appointment of Two Additional Justices of the Court of Appeals of the District of Columbia.
27 SEN. REP. No. 917, 73d Cong., 2d Sess. (1934), To Change the Name of the Court of Appeals of the District of Columbia to the United States Court of Appeals for the District of Columbia.
28 See also 1 MOORE’S FEDERAL PRACTICE §§ 0.06 and 0.07 (1938) and 3 MOORE’S FEDERAL PRACTICE § 106.02 (1938).
29 By virtue of its general equity jurisdiction and of various specific statutes.
review the many national administrative agencies and boards which are located in, and operate from, the District of Columbia. In either role, the court's work may be subjected to Supreme Court review.

Stare decisis is the forbidding mien of the two remaining levels of precedent with which Judge Edgerton's court must deal: the previously decided cases of the court itself and the pertinent decisions of the Supreme Court. A court of last resort may follow any of several courses in dealing with a previously decided case cited as controlling authority. It may, of course, adhere to the previous case. It may distinguish the case and hold it inapplicable. It may pose a countering precedent, or it may overrule the previous decision and announce a new rule.

The dilemma of jurisprudence finds its nub in the open recognition that stare decisis is not an invariable obligation of the common law judge. It is understandable that some may feel that there is unfairness in a practice which retroactively changes law without notice to those who have relied upon the old rule. Those who deem the judiciary the ministers

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30 See note 25 supra.

31 "Judges march at times to pitiless conclusions under the prod of a remorseless logic which is supposed to leave them no alternative. They deplore the sacrificial rite. They perform it, nonetheless, with averted gaze, convinced as they plunge the knife that they obey the bidding of their office." CARDOZO, THE GROWTH OF THE LAW 58, 66 (1939). See also CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 20 (1939); Goodhart, Case Law in England and America, 15 CORNELL L.Q. 173, especially 179 et seq. (1930); Cardozo, The Judicial Process Up To Now, note 32 infra; Catlett, The Development of the Doctrine of Stare Decisis and the Extent To Which It Should Be Applied, 21 Wash. L. Rev. & St. Bar J. 158 (1946).


34 See, for instance, Pritchett, The Roosevelt Court 19-20 (1948): "However, from the accumulation of one hundred and fifty years, precedents can be found to support almost any judicial decision."

35 "I think that when a rule, after it has been tested by experience, has been found inconsistent with the sense of justice or with social welfare, there should be less hesitation in the frank avowal and full abandonment." CARDozo, THE NATURE OF THE JUDICIAL PROCESS 150 (1937); see also at pp. 158-160.


37 Commissioner of Internal Revenue v. Church's Estate, 335 U.S. 632 (1949). Black, J., declared at 647: "The argument for continuing the error of May v. Heiner is not on the merits but is advanced in the alleged interest of tax stability and certainty, stare decisis and a due deference of the just expectations of those who have relied on the May v. Heiner doctrine." Burton, J., dissenting, declared at 698: "Since 1931, countless taxpayers doubtless have relied upon and benefited by the interpretation announced in May v.
of the law and not its masters urge that an element of caprice is introduced into a system of law in which courts are free, even if only to a degree, from the restraints of stare decisis. They affirm that judges do not make law; they merely find and apply it.\textsuperscript{38} Can law be law, they ask, when it is merely a prediction of what a judge or court will do?\textsuperscript{39}

The answer has many prongs. Judges have made and do make law.\textsuperscript{40} To deny this power to present-day judges, even if it were possible to do so, would be to give the "judges who lived and died in other times and places"\textsuperscript{41} precedence and control over the judges of the present and future.\textsuperscript{42} Furthermore, since judges have "a roving commission to find the just solution,"\textsuperscript{43} a degree of freedom from precedents which would

Heiner. They had no more right to such benefits than has the taxpayer in this case. If the Government, after this reversal, issues regulations to relieve, in all fairness, settlers . . . such special regulations will further emphasize the unique unfairness of enforcing the present decision against the taxpayer in the instant case." See also Frank, Courts on Trial 269-271 (1949); Cardozo, supra note 32, at 33-37; Cardozo, The Nature of the Judicial Process 145-148 (1937); Morris R. Cohen, Law and the Social Order 117 (1933); Roberts, J., dissenting, Helvering v. Hallock, 309 U.S. 106, 128-130 (1940).

\textsuperscript{38} For discussions of this point of view, see Frank, Mr. Justice Holmes and Non-Euclidean Legal Thinking, 17 Cornell L.Q. 568, 579-580, 582 (1932); Frank, Courts on Trial 262-265 (1949); Cohen, Law and the Social Order 242 (1933); Llewellyn, Law and the Social Sciences—Especially Sociology, 62 Harv. L. Rev. 1286, 1296 (1949).

\textsuperscript{39} Wormuth, supra note 36, at 50.

For other discussions of this question see Llewellyn, Law and the Social Sciences—Especially Sociology, 62 Harv. L. Rev. 1286, 1296 (1949); Radin, The Permanent Problems of the Law, 15 Cornell L.Q. 1, 15 (1929); Holmes, The Path of the Law, 10 Harv. L. Rev. 457 (1897); Cardozo, The Growth of the Law 42 et seq., 52 (1939); Frank, Law and the Modern Mind 48 (1930); Cohen, Law and the Social Order 242 (1933).

\textsuperscript{40} "We must urge upon judges that in their law-declaring function they are indeed lawmakers with the responsibilities for wise social engineering that rests upon all lawmakers." Pound, The Theory of Judicial Decision, 36 Harv. L. Rev. 940, 956 (1923).

"The fiction that judges do not legislate has long since been abandoned by all who are for a conscious and realistic jurisprudence." Laski, Judicial Review of Social Policy in England, 39 Harv. L. Rev. 832 (1926).

"The absence of an 'all fours' decision need not dismay us, however. There must always be a first time for every legal rule. That is the way the law grows." Goodrich, J., Kroese v. General Castings Corp., 179 F.2d 760, 765 (3d Cir. 1950).

\textsuperscript{41} Edgerton, J., dissenting in Chaplin v. United States, 157 F.2d 697, 699-700 (1946).

\textsuperscript{42} "If judges have woefully misinterpreted the mores of their day, or if the mores of their day are no longer those of ours, they ought not to tie in helpless submission the hands of their successors." Cardozo, The Nature of the Judicial Process 152 (1937).

"... on the evidence, judge-made law is almost always concerned to slow down the pace of change by adapting judicial results to a framework of principles the main explanation of which more often lies in the past, perhaps even in the distant past, than in the problems of the contemporary scene." Laski, The American Democracy 587-588 (1948).

work injustice is essential.\textsuperscript{44} Justice, not symmetry or uniformity, is the goal of the law.\textsuperscript{45} In any event, the judicial process, as exemplified by our best judges, is not capricious; it would be more accurately described as scientific, for it is premised upon a close examination of the facts, both of the precedents and of the case to be decided, upon a critique of the premises and logic of the precedents, especially in the light of current conditions. The very life of the law depends upon its ability to grow and develop to meet the changing needs of society with justice. The change does not come suddenly or stealthily; it is usually long heralded by insistent criticism and discussion.\textsuperscript{46} And often the only practical, convenient or possible method of changing an erroneous or outmoded rule of law embodied in a precedent is by another judge-made rule.

It is against this background of contemporary thinking that the role of precedent in Judge Edgerton’s opinions should be appraised. In some cases, even in the face of apparent hardship, he has adhered to controlling precedent established by previous decisions of his own court.\textsuperscript{47} On the other hand Judge Edgerton follows, that is to say uses, precedent to forward just results. He led a majority of the court to apply and even extend a new precedent, not handed down until after the trial of the case under consideration\textsuperscript{48} had been completed, but announced before the argument of the appeal. Since the new precedent\textsuperscript{49} had departed from a previously established rule, the plaintiff had tried his case on an entirely different theory. Judge Edgerton held that the plaintiff was entitled to a new trial at which he could utilize the new precedent.

In \textit{New York Life Insurance Co. v. Taylor} Judge Edgerton was con-


\textsuperscript{45} “Some judges give relatively great weight to symmetry and stability and so to the sources of the rules they lay down. Others give relatively great weight to the effects of their rules.” Edgerton, \textit{Mr. Justice Rutledge}, 63 \textit{Harv. L. Rev.} 293 (1949).

\textsuperscript{46} Commissioner of Internal Revenue v. Church’s Estate, 335 U.S. 632 (1949). Black, J., declared at 648: “Certainly, May v. Heiner cannot be granted the sanctuary of stare decisis on the ground that it has a long and tranquil history free from troubles and challenges.”

\textsuperscript{47} Orlove v. National Savings & Trust Co., 98 F.2d 259 (D.C. Cir. 1938).

\textsuperscript{48} Schaff v. R.W. Claxton, Inc., 144 F.2d 532 (D.C. Cir. 1944).

fronted with a ruling against which he had dissented in a previous appeal in the same case and thus with a precedent which he had opposed in the making. He declared: “I concur in the result only, on the ground that a recent decision of this Court should not be overruled in the absence of extraordinary circumstances.”

On the other hand, while not departing from this view, his dissent in *Mays v. Burgess* sought to avert the result reached in a previous appeal in the same case, also against his dissent, not by proposing to overrule the prior decision but by the use of stare decisis. The case was a suit in equity to enforce a racial covenant. He declared: “The former decision of this court expressly left in effect the rule of the Hundley case that a covenant of this sort will not be enforced when, because the character of the neighborhood has changed, the covenant can no longer accomplish its purpose and its enforcement would probably depreciate the property values which it was intended to enhance.”

In *In re Rice* the refusal of the court, over Judge Edgerton’s protest, to follow precedent made one dent in the dam erected to prevent economic chaos in our then war economy.

But the line of precedent is not always clear and unequivocal. In *Soffos v. Eaton*, an action for malicious suit arising out of four successive suits, all unsuccessful, by the defendant against the plaintiff, the court was confronted with a precedent which held that no action for malicious suit will lie if no arrest or attachment is involved. On the other hand, the court had previously declared that “The right to litigate is not the right to become a nuisance.”

As between these two principles, Judge Edgerton chose relief for those who are badgered by successive civil suits on a single claim.

Frequently the path to justice is unblocked by astute analysis of the facts in the case and in the asserted precedent. In *Chesapeake & Potomac Telephone Co. v. Lewis*, a suit for false arrest, the defendant urged that the arrest was solely the act of police officers with no participation by it other than identification of the plaintiff by an employee of the defendant who had accompanied the officers. Previous cases had established

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50 158 F.2d 328, 330 (D.C. Cir. 1946).
51 Mays v. Burgess, 152 F.2d 123, 125 (D.C. Cir. 1945).
52 165 F.2d 617 (D.C. Cir. 1947).
53 152 F.2d 682 (D.C. Cir. 1945). See also Orlove v. National Savings & Trust Co., 98 F.2d 259 (D.C. Cir. 1938), for another example of choice of precedent.
55 Melvin v. Pence, 130 F.2d 423, 426 (D.C. Cir. 1942).
56 99 F.2d 424 (D.C. 1938).
that the mere giving of information is not a sufficient participation in an
arrest to impose liability. Judge Edgerton said: "If A tells B that X
carries a valuable watch, and B thereupon steals it, A does not necessarily
share B's guilt. That case may be assimilated to the 'mere information'
of the Prigg and Kinchlow cases." On the other hand if B, on receiving
A's information, tells A that B would like to steal the watch but does not
know X by sight, and invites A to accompany B in order to identify X
and thus enable B to rob X, and this plan is carried out, A's guilt is
clear. . . . one who takes part in an unlawful act does not necessarily
escape responsibility by limiting his part to the identification of the
victim."

In the Joint Anti-Fascist Refugee Committee case, Judge Edgerton
dissented from the court's refusal to allow a suit for a declaratory
judgment and an injunction against the Attorney General and the Loyalty
Review Board. He distinguished a precedent, which held an order of
the War Labor Board not subject to a similar suit, on the ground that
the War Labor Board's "views were not enforceable against anybody,
were not defamatory, and caused no loss. The ruling now in suit is
defamatory; unless it is set aside, it is enforceable against appellant's
supporters who are government employees; and it has caused loss."

The critical point in the judicial process is the precedent "on all fours"
which blocks the just result; the precedent cannot be distinguished, nor
is there an alternative precedent. In such a case the court is faced with the
dilemma of adhering to an outworn and unjust rule or candidly over-
ruling the obstructing precedent. The latter course is an open departure
from the common law doctrine of stare decisis and a frank revelation
of the major political fact that judges make and unmake law. Judge
Edgerton has recognized that in some cases this course is best.

In both Mays v. Burgess and Hurd v. Hodge the court faced the

58 See note 57 supra.
59 99 F.2d 424, 425 (D.C. Cir. 1938).
60 Employers Group of Motor Freight Carriers v. National War Labor Board, 143 F.2d
61 Joint Anti-Fascist Refugee Committee v. Clark, 177 F.2d 79, 91 (D.C. Cir. 1949),
rev'd, 341 U.S. 123 (1951). Two other cases illustrate this technique: Maryland Casualty
Co. v. Cardillo, 107 F.2d 959 (D.C. Cir. 1939); National Rifle Ass'n of America v. Young,
134 F.2d 524 (D.C. Cir. 1943).
62 Dissent in Chaplin v. United States, 157 F.2d 697, 700 (D.C. Cir. 1946); Ross v.
Hartman, 139 F.2d 14 (D.C. Cir. 1943); cert. denied, 321 U.S. 790 (1944); Mullen v.
Canfield, 105 F.2d 47 (D.C. Cir. 1939).
63 147 F.2d 869 (D.C. Cir.), cert. denied, 325 U.S. 868, rehearing denied, 325 U.S. 896
(1945).
OPINIONS OF JUDGE EDGERTON

historic constitutional issue of the enforceability of racial covenants. In 1924 Corrigan v. Buckley had set the court on the course of enforcing covenants restricting realty on the basis of race. The United States Supreme Court had dismissed an appeal taken as of right. In Mays v. Burgess the decision in fact turned on the attitude of the judges not only toward the social and political problem of racial discrimination but even more upon the binding effect of the Corrigan case. The majority opinion held that “rights created by covenants such as these have been so consistently enforced by us as to become a rule of property and within the accepted public policy of the District of Columbia.” A concurring opinion rested solely upon the precedents. Dissenting, Judge Edgerton declared: “Quite aside from the fact that our Corrigan case decision was probably unsound when it was rendered, and the fact that it would not cover this case even if general conditions in the District of Columbia had remained the same, I think it is quite inapplicable today because general conditions have not remained the same. . . . If, as the majority say, decisions of our court have determined these questions adversely to appellants, we should overrule the decisions.”

Two years later, in Hurd v. Hodge, Judge Edgerton, dissenting again from enforcement of racial covenants, declared that his court’s past decisions “were reached without full consideration of the questions involved, are erroneous and should be overruled.”

Stare decisis becomes most conclusive in the final category—the precedent of a “higher” court applicable to a case before a “lower” court of the same jurisdiction. The precedent cannot be overruled, yet the result it dictates may seem intolerable. Must the “lower” court then serve merely as a conduit of “higher” court precedents for transferring them into current cases even at the cost of justice? Is its creative activity confined to molding the facts of a case within given principles? As an intermediate

68 Groner, C. J., id. at 872.
69 Justin Miller, J., id. at 873.
70 Id. at 876, 878.
71 162 F.2d at 237 (D.C. Cir. 1947).
See also Franklin v. Franklin, in which Judge Edgerton spoke for a majority of the court against a dissent which urged that the precedents were sound and should not be overruled. Judge Edgerton held that precedents which “imply” that a court issuing an equitable decree “lacks authority to apply equitable principles when asked to enforce payment of accrued installments [of alimony] under its own order . . . rest on a misunderstanding of the earlier cases and should be overruled.” 171 F.2d 12, 13 (D.C. Cir. 1948).
appellate court the United States Court of Appeals for the District of Columbia Circuit faces this issue in the precedents of the Supreme Court. Judge Edgerton has recently said: "Some cases that reach appellate courts seem to be covered by fairly clear and unanimous precedents, or principles, that almost everyone accepts as either sound or harmless," but in other cases "Judges of equal technical competence reach opposite results because there is no measure of the pertinence or the worth of precedents and principles. . . ."\(^7\) This is the essence of his approach to Supreme Court precedents.

When his court reversed on the facts a judgment of recovery for personal injury based upon a jury verdict, Judge Edgerton pointed out in dissent that "The Supreme Court has repeatedly reversed appellate courts that overturned jury verdicts supported by evidence\(^73\) and declared, "This court's disregard of these principles in the present case goes to the authority of the Supreme Court. . . ."\(^74\)

When the court disregarded\(^75\) the Supreme Court mandate that persons arrested for crime be arraigned without unnecessary delay, in the face of a recent Supreme Court reversal of another of his court's cases,\(^76\) Judge Edgerton, dissenting, called for adherence to Supreme Court precedent.\(^77\)

Similarly in Bailey v. Richardson Edgerton dissented from a failure to follow what he considered Supreme Court precedent. The issue was the legality of a loyalty board's dismissal of a government employee and of a three-year bar against her reemployment in the federal service. While there was unanimity on the illegality of the bar to future employment, the majority of the court upheld the dismissal. Judge Edgerton pointed out that the Supreme Court in United States v. Lovett\(^78\) had nullified dismissal by Congressional fiat of federal officials branded as disloyal. "The Supreme Court held that their dismissals for supposed disloyalty, 'which stigmatized their reputation and seriously impaired their chance to earn a living,' were equivalent to punishment for crime and therefore could not be imposed by Congress or without judicial trial. . . . This

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\(^72\) Edgerton, Mr. Justice Rutledge, 63 Harv. L. Rev. 293 (1949).
\(^73\) Citing as precedent Ellis v. Union Pacific Railroad Co., 329 U.S. 649 (1947).
\(^76\) Upshaw v. United States, 335 U.S. 410, reversing 168 F. 2d 167 (D.C. Cir. 1948).
\(^77\) Upshaw v. United States, 335 U.S. 410 (1948); McNabb v. United States, 318 U.S. 332 (1943); Haley v. Ohio, 332 U.S. 596 (1948), in which paralleling the facts in the Garner case, supra note 75, secret continuous interrogation of youthful defendants for several hours was held to constitute coercion sufficient to invalidate confessions.
\(^78\) United States v. Lovett, 328 U.S. 303 (1946).
court is deciding this case as if the Supreme Court had sustained the attempt of Congress to dismiss Lovett and the others, denied their claims to salaries, and awarded them nothing but an assurance that they would be eligible for possible future appointments. . . . If the Court's words had been inconsistent with its decision our duty would of course have been to follow the decision, not the words. But they were not inconsistent. 79

One of the interesting facets of the two Busey opinions, both of which Judge Edgerton wrote for the court, is his use of Supreme Court precedent. Busey and his co-defendant were convicted of distributing Jehovah's Witnesses magazines and collecting money on the streets of the District of Columbia without paying the license tax required of all street vendors. In the first Busey case 80 in the face of a dissent by Justice Rutledge, at that time a member of the Court of Appeals, Judge Edgerton treated the defendant's activity as the sale of magazines rather than the distribution of religious propaganda, chose to rely upon Cox v. New Hampshire 81 in which a license tax on parades in general was upheld in its application to a religious parade, 82 and distinguished two other Supreme Court precedents which struck down a statute interfering with religious contributions 83 and invalidated a tax aimed at certain publications in order to restrict their circulation. 84 He wrote: "... requiring sellers of religious magazines, along with all other street sellers, to pay a reasonable license fee cannot be made an instrument to attack freedom of the press or of religion. . . . We conclude that a reasonable license fee, applicable to street sellers generally, and not intended or shown to restrict the expression of any views, is valid in its application to sellers of religious magazines. 85 No doubt the decision was in part the result of the impression of Supreme Court policy, generated by the decision in Minersville School District v. Gobitis, 86 that the legislative power, exercised without apparent discrimination, would be sustained even when enforcement of the law clashed with religious convictions.

80 129 F.2d 24 (D.C. Cir. 1942), vacated and remanded, 319 U.S. 579 (1943).
81 312 U.S. 569 (1941).
82 129 F.2d 24, 27 (D.C. Cir. 1942).
86 310 U.S. 586 (1940). This impression appeared to be confirmed when two months after Edgerton's first Busey opinion the Supreme Court decided the first Jones v. Opelika case, 316 U. S. 584 (1942).
But the Supreme Court remanded the *Busey* case for reconsideration in the light of new Supreme Court decisions overruling the first *Opelika* case. Upon the rehearing Judge Edgerton said: "The appeal has been here before. When we decided it in April, 1942, the majority of this court thought that decisions of the Supreme Court required us to hold the statute valid. In cases from other jurisdictions which it decided two months later, the Supreme Court not only confirmed that view but went beyond it. . . . But the Chief Justice and three Associate Justices dissented in those cases, and upon a change in the Court's membership in February, 1943, it granted rehearings in them. Though no member of the Court changed his position, the Court afterwards adopted the dissenting opinions which had previously been filed and reversed the state court judgments which had previously been affirmed. Judge Edgerton now distinguished the *Cox* case by pointing out that the tax there was imposed upon all "parades and processions in order to meet the cost of policing them," while in the *Busey* case "it would be neither rational nor convenient to presume that the uniform fee by which Congress sought to cover the cost of policing all sorts of street sales happens not to exceed the cost of policing the particular sort involved here. . . . No presumption which lacks a probable basis in fact should be permitted to conceal an interference with essential freedoms."

Precedent, even when seemingly in point and as compelling as a Supreme Court decision, is not an infallible guide to the "correct" or the just decision. Even a judge with as sure an instinct for justice and the right result as Judge Edgerton may be led astray by the apparent mandate of past decisions, by an incorrect choice of available precedent, or by the elusiveness or seeming insignificance of a fact such as that upon which the reversal in the second *Busey* case turned.

In *King v. United States* Judge Edgerton was again confronted with a seeming conflict of Supreme Court precedent. The case involved the validity of a resentence of a prisoner which resulted in an increase in kind and length of punishment. Judge Edgerton distinguished the precedent which would have upset the resentence and enabled the convict to

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88 138 F.2d 592, 593 (D.C. Cir. 1943).
89 312 U.S. 569 (1941).
91 *Id.* at 596. See Edgerton, *Mr. Justice Rutledge*, 63 Harv. L. Rev. 293, 295 (1949), for a discussion of his change of view.
escape further punishment, and followed the one which sustained the resentenced. Admitting the force in the considerations advanced against his decision, he declared: "but as arguments for exercising judicial discretion in the prisoner's favor they must be addressed to the trial court, and as arguments for a rule of law in his favor they must be addressed to the Supreme Court or to Congress.

In Shelley v. United States the court was confronted with a situation not unlike that in the first Busey case. An expatriate American wife had been denied the right to revive her citizenship because she insisted on the grounds of her religion and pacifism, upon excluding from her oath of allegiance the promise to bear arms. Judge Edgerton declared: "In 1931, in United States v. Macintosh and United States v. Bland, the Supreme Court held that the oath implied a promise to bear arms and that a man or woman who would not make that promise could not be naturalized. Justices Holmes, Brandeis and Stone joined Chief Justice Hughes in dissenting; but in view of the recent flag salute case, we cannot predict that the present Supreme Court will agree with them. We must therefore follow the Macintosh and Bland cases."

Judge Edgerton thus demonstrated two courses that may be followed by a lower court faced with unpalatable precedent. If one can "predict" from the more recent trend of higher court decisions that the precedent in question would not be followed, it may be proper to refuse to follow it. When this prediction cannot be made, the lower court by indicating that attacks have been made upon the precedent from respected quarters may encourage an appeal to the higher court for reconsideration of the principle involved.

The foregoing cases illustrate the necessarily controlling effect of Supreme Court precedent upon a lower court. Yet they also illustrate the paradox that the declarations of a higher court need not always be followed. Statements in an opinion which go beyond the facts of a case

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Footnotes:

93 Murphy v. Massachusetts, 177 U.S. 155 (1900).
94 King v. United States, 98 F.2d 291, 296 (D.C. Cir. 1938).
95 Shelley v. United States, 120 F.2d 734, 735 (D.C. Cir. 1941). The Court, which included Rutledge, J., was unanimous.
or the bare logic of the decision are "dicta". A case in which a critical fact differs from the case at bar may be "distinguished", i.e., not followed. These are wise techniques that the common law has fashioned as an antidote to the straight-jacket tendency of stare decisis. They are indispensable tools in the work of a judge who seeks to keep the law progressive with the needs of the entire community and the advancing concepts of justice. Indeed the greatness of a judge may largely be measured by his ability to sense critical areas in the law's development and the need to navigate in these areas past the shoals of statements by a higher court. This ability must encompass the perception to pierce the facts or logic of the precedent to a point of distinction.

In the face of seemingly adverse Supreme Court authority, which Judge Edgerton distinguished as dicta or not in point, he sustained the right of a wife to sue her husband's co-tortfeasor;\(^97\) denied the power of disbarment to inferior courts;\(^98\) upheld the use of blood-grouping tests in litigation of the issue of paternity;\(^99\) concurred in enlarging the concept of "doing business" as the basis of process against foreign corporations;\(^100\) and dissented from the exclusion of hospital records from the "shop book" rule of evidence,\(^101\) from the enforcement of racial restrictive covenants in the use of realty,\(^102\) and from the acceptance of government employees as jurors in the prosecution of a communist.\(^103\)

The record of the Supreme Court's action in cases in which Judge Edgerton either wrote the majority opinion, concurred specially or dissented, is a fair measure of the degree of his accuracy in his judgment of the Supreme Court's views of the law.\(^104\) Since he came to the bench he

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\(^98\) Mullen v. Canfield, 105 F.2d 47 (D.C. Cir. 1939).
\(^99\) Beach v. Beach, 114 F.2d 479 (D.C. Cir. 1940).
\(^100\) Frene v. Louisville Cement Co., 134 F.2d 511 (D.C. Cir. 1943).
\(^101\) New York Life Insurance Co. v. Taylor, 147 F.2d 297, 301 (D.C. Cir. 1944, 1945).
\(^103\) Eisler v. United States, 176 F.2d 21 (D.C. Cir.), \textit{cert. denied}, 337 U.S. 958 (1949). But in Dennis v. United States, 339 U.S. 162 (1950), a sharply divided Court ruled against the position taken by Judge Edgerton. With Justices Douglas and Clark taking no part in the consideration of the case, Justice Minton wrote the opinion in which three of his colleagues concurred. Justice Jackson concurred in a separate opinion on the ground that he still adhered to his dissent in the \textit{Frazier} case but did not want an exception to the rule of the \textit{Frazier} case to be established solely for communists. Justice Reed, one of the three concurring, declared that he interprets the Court's decision to mean that government employees may be barred for implied prejudice as jurors "when circumstances are properly brought to the court's attention which convince the court that Government employees would not be suitable jurors in a particular case." 339 U. S. at 173. Justices Black and Frankfurter each wrote a dissenting opinion.
\(^104\) The Supreme Court's views of the law, however, also vary from period to period
has written 379 opinions. Of these, 108 or about 28% were brought to the
Supreme Court, i.e., petitions for certiorari were filed. In 29% of these applications the
Supreme Court granted certiorari. Of the applications in cases in which he wrote the majority opinion certiorari was granted in 13%. Of the applications in cases in which he dissented certiorari was granted in 60%. The Supreme Court has granted certiorari only 9 times and denied it 59 times when Judge Edgerton wrote for the court. On the other hand, when he dissented, the Supreme Court granted certiorari 23 times and denied it 14 times.

as to many basic legal and constitutional policies. A judge who has correctly decided in accordance with Supreme Court pronouncements of one period may find himself in conflict with the Court in another period. It is now considered by some students of the Court that its position on basic policy is in transitional stage. Pritchett, The Roosevelt Court xiv (1948); Dilliard, Truman's Supreme Court, 184 The Atlantic Monthly 30 (Dec. 1949); Howe, Justice in a Democracy, id. 34; Rodell, The Supreme Court is Standing Pat, New Republic 11 (Dec. 19, 1949).

As of June 30, 1951. These do not include Per Curiam opinions of which Judge Edgerton may have been the author. A complete appraisal should probably include all cases in which Judge Edgerton sat but did not write or differ. But it is not possible to measure the extent of his influence for the purpose of ascertaining the degree of success with which his views met in the Supreme Court. He himself, in appraising the work of another judge, the late Cuthbert W. Pound of the New York Court of Appeals, has recognized this difficulty:

"Still we do not know that Judge Pound influenced the law; for we do not know that he influenced the decision of the case in which he wrote the opinion, unless that case was decided by a bare majority of the court. No doubt many cases to which Pound's name is attached would have been decided as they were if he had never sat upon the bench; just as, conversely, he doubtless influenced the court's judgment in many cases in which he did not write the opinion. . . . Qualifications have been suggested even upon the proposition that a judicial opinion itself is the author's own. It has been suggested that only a dissenting, or separately concurring, opinion truly represents its author, because in the case of a majority opinion 'the decision, and usually the language, must ordinarily be acceptable to the entire bench for whom the judge writes.' . . . He might have spoken differently if he had not been engaged in finding formulae upon which four or more men could agree; yet he may fairly be assumed to have meant what he said. . . ." Edgerton, A Liberal Judge: Cuthbert W. Pound, 21 Cornell L.Q. 7-8 (1935).

In applying these comments of Professor Edgerton to the work of Judge Edgerton, we should note that in all but the few cases in which the court sat in banc the judge writing the court's opinion had the task of "finding formulae upon which" not four or more men but only one other could agree; but it is doubtful that this could be the basis of a deduction that the opinion more completely represents the views of the judge who writes.

Thirty-two cases. A further caveat which should be appended to these statistics is that the denial of certiorari is an ambiguous result; that it does not mean approval by the Supreme Court of the decision below. See Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912 (1950); Agaston v. Pennsylvania, 340 U.S. 844 (1950).

This does not include the two cases in which Edgerton wrote separate opinions, concurring in the result, in which the Supreme Court denied certiorari.

This does not include Fleming v. Moberly Milk Products Co., 160 F.2d 295 (D.C. Cir. 1947), dismissed on motion of petitioner, 331 U.S. 786 (1947), and one case not yet decided.
3 affirmances and 4 reversals\textsuperscript{109} of Judge Edgerton's majority opinions; but in 22 of the 23 dissents reviewed by the Supreme Court there have been 17 reversals of the decisions against which he voted.\textsuperscript{110}

### Balancing Interests

From Edgerton's earliest writings\textsuperscript{111} all through his more important contributions to legal scholarship\textsuperscript{112} and continuing in his judicial opinions there runs a deep vein of recognition that the contests and controversies with which the law deals involve not only the parties themselves; behind the litigants stand social interests which the parties exemplify and champion and which are contending for recognition and supremacy. Again and again this point of view is frankly expressed.

This approach probably reflects the influence of Dean Roscoe Pound,\textsuperscript{113} under whom Judge Edgerton studied law at Harvard.\textsuperscript{114}

\textsuperscript{109} This does not include the remand in the Busey case.

\textsuperscript{110} As of June 30, 1951 one of the cases had not been decided. Judge Edgerton has dissented in 62 cases. Of these review was sought in 38 cases [including Fleming v. Moherly Milk Products Co., 160 F. 2d 295 (D.C. Cir. 1947); petition for writ of certiorari dismissed on motion of counsel for petitioner, 331 U. S. 786] and granted in 23.

\textsuperscript{111} Edgerton, \textit{Value of the Service as a Factor in Rate Making}, 32 \textsc{Harv. L. Rev.} 516 (1919).

\textsuperscript{112} In his discussion of "legal cause" in the law of torts, Edgerton had made a notable contribution to the literature and theory of the law through his utilization of the principle of the balancing of social interests. Edgerton, \textit{Legal Cause}, 72 \textsc{U. Of Pa. L. Rev.} 211, 343 (1924). The importance of the article has been recognized. Cardozo in \textit{The Paradoxes of Legal Science} 85-86 (1928), states: "Much of the discussion of proximate cause in case and in commentary is mystifying and futile. There is a striving to give absolute validity to doctrines that must be conceived and stated in terms of relativity. . . I find the same idea prefaced in an illuminating discussion by Professor Edgerton of the meaning of legal cause. I do not say that I would follow him in all his conclusions as to the relative function of judge and jury. For present purposes it is enough to mark the discernment and understanding with which he penetrates to the heart and essence of the problem."

See also Felix S. Cohen, \textit{Field Theory and Judicial Logic}, 59 \textsc{Yale L. J.} 238, 255 (1950), in which Cohen states: "At least two great American judges, Benjamin Cardozo and Henry Edgerton, have clearly recognized that in law, as elsewhere, judgments of causation are essentially relative and purposive. . . . Probably the most precise formulation of the value-orientation that is implicit in every judgment of causation is that given by Judge Edgerton in his epochal article on 'Legal Cause'." See also Fleming and Perry, \textit{Legal Cause}, 60 \textsc{Yale L. J.} 761, 775 (1951).

See also Edgerton, Book Review of \textit{Rationale of Proximate Cause} by Leon Green, 29 \textsc{Col. L. Rev.} 229 (1929). Edgerton also applied the same principle in other fields of law. Edgerton, \textit{Corporate Criminal Responsibility}, 36 \textsc{Yale L. J.} 827, 837 (1927); Edgerton, \textit{The Incidence of Judicial Control Over Congress}, 22 \textsc{Cornell L. Q.} 299 (1937).

\textsuperscript{113} Edgerton, \textit{Legal Cause}, 72 \textsc{U. of Pa. L. Rev.} at 242-243, 348 (1924): "Usually, of course, a court's conception of justice does not consciously involve a balancing of interests such as Dean Pound has made familiar to his students."

\textsuperscript{114} He studied law at the Harvard Law School from 1911 to 1914, and practiced in Boston from 1915 to 1916 and from 1918 to 1921.
Indeed Edgerton’s work mirrors the critical process which judicial and other legal writings of the nineteenth and early twentieth centuries had undergone. These writings had been increasingly criticized as conceptualistic and unrealistic. It had been pointed out that while judges appeared to be deciding cases on the basis of accepted, objective, lofty principles, they were in fact balancing, and giving unspoken preference to, one social interest as against another. Not only was the effect of their decisions to extend to one group the support of the law’s sanctions but their opinions contained an unexpressed value judgment that one social interest, in a given factual context, was to be preferred to others. Open recognition that in many legal contests social interests were striving for recognition against other social interests was considered by many an advance in legal thinking, since it provided a more realistic basis for legal principle. Of this process of criticism, analysis, and appraisal, Judge Edgerton’s opinions are an outgrowth.

But the balancing of interests is vital and significant in Edgerton’s judicial work not because of historical perspective, but because it gives content to certain general ideas with which, in his view, the law concerns itself. We begin to see what he means by “justice” or the “just result” and by “policy” or “public policy” when we understand which social or public interests seem to him preponderant in given circumstances. Judge Edgerton himself has pointed out that usually a court’s conception of justice “does not consciously involve a balancing of interests.”

"Laube, The Jurisprudence of Interests, 34 Cornell L.Q. 291 (1949); Cohen, supra note 117, at 259 et seq.


Morris R. Cohen, Law and the Social Order 144 (1933), has made the same point in criticism of our judicial system: “A judge looking only to the interests of the two parties before him is apt to forget that his decision will affect countless others who are not present and whose circumstances are not all identical. Human society is not so organized that a dispute between A and B can be of no concern to anybody else.”
his own opinions the balancing is not always articulate. In some cases
it is expressed in terms of the interests of the parties themselves, and
not of the broader social interests which might be involved. But in
a number of cases Judge Edgerton expressly applies the balancing
principle and identifies the social interests.

Clark v. Associated Retail Credit Men of Washington, D.C., Inc.,
was a suit for damages arising out of nervous shock intentionally
cau sed by the dunning of a debtor by a collection agency. In sustaining
such a cause of action, Judge Edgerton declared that the correct rule
should be established "with a view to the social interests which seem to
be involved... For the sake of reasonable freedom of action, in our own
interest and that of society, we need the privilege of being careless
whether we inflict mental distress on our neighbors. It is perhaps less
clear that we need the privilege of distressing them intentionally and
without excuse... The advantage to society of preventing such harm
seems greater than the advantage of leaving ill-disposed persons free to
seek their happiness in inflicting it." In Lukens Steel Co. v. Perkins
a prospective bidder for a government contract sued to nullify a determi-
nation of a prevailing minimum wage rate and enjoin its incorporation
in the contract. The interest of business in obtaining government con-
tracts, i.e., "to make money by dealing with the United States" is balanced
against the public interest not "to disturb the whole contracting system
of the government." In Eastburn v. Levin, an attractive nuisance case,
Judge Edgerton said: "On the one side is the occupant's interest, and
the general interest, in the profitable use of land. On the other is the
child's interest, and the interest of his parents and of society, in life and
limb and in compensation for their injury. Imposing responsibility is
more apt to make occupants careful than denying responsibility is to

120 Brownley v. Peyser, 98 F.2d 337 (D.C. Cir. 1938)—the interests of the creditors
of the subsidiary corporation as against the interests of the creditors of the parent corporation.
We b v. Lohnes, 96 F.2d 582, 584 (D.C. Cir. 1938), cert. denied, 306 U.S. 637 (1939)—
the right of an administrator to appeal from an order probating a lost will and superseding
him with an executor.
Leventhal v. District of Columbia, 100 F.2d 94, 96 (D.C. Cir. 1938). "It must be
presumed that the rezoning which plaintiffs seek would actually inflict injury on the
owners and occupants of the other property in the neighborhood...
Ewald v. Lane, 104 F.2d 222, 224 (D.C. Cir.), cert. denied, 308 U.S. 568 (1939)—
suit by wife against husband's co-tortfeasor. "If they were given immunity, they would
receive a windfall which they have done nothing to deserve. No interest would be served
except the interest of tort-feasors in escaping responsibility."
121 105 F.2d 62, 64, 65 (D.C. Cir. 1939).
122 Edgerton, J., dissenting in Lukens Steel Co. v. Perkins, 107 F.2d 627, 645, 646 (D.C.
Cir. 1939), rev'd, 310 U.S. 113 (1940).
make children careful; occupants may know little about law, but children know nothing about it, and children will play where they can." In Sweeney v. Patterson, a libel suit by a Congressman against a newspaper publisher and a news commentator, Judge Edgerton affirmed dismissal of the suit, declaring: "Since Congress governs the country, all inhabitants, and not merely the constituents of particular members, are vitally concerned in the political conduct and views of every member of Congress. Everyone, including appellees and their readers, has an interest to defend, and any one may find means of defending it. The interest of the public here outweighs the interest of appellant or any other individual. The protection of the public requires not merely discussion, but information. . . . Information and discussion will be discouraged, and the public interest in public knowledge of important facts will be poorly defended, if error subjects its author to a libel suit . . . ." In United States v. Public Utilities Commission, Judge Edgerton, dissenting from affirmance of rates fixed by the Public Utilities Commission of the District of Columbia, declared: "It is an error of law to ignore the interest of the public in low rates. 'The rate-making process under the Act, i.e., the fixing of "just and reasonable" rates, involves a balancing of the interest of the investor and the consumer interest.' The Commission's order does not balance these interests."

But in the first Busey case the principle of balancing interests found its limitations. Judge Edgerton said that "Within wide limits, democracy and the Constitution require freedom of expression and freedom of legislation. We are asked to invade the second freedom in order, it is said, to protect the first. It is not for us to say whether the license law is good for the community. It is an Act of Congress." This statement intimates, at least, that the public interest in enforcement of the Bill of Rights could be balanced against the public interest in vindicating the legislative power, or more specifically, the power of taxation. But when

123 113 F.2d 176, 178 (D. C. Cir. 1940).
127 Id. at 28. But Edgerton went on to say: "Though it covers some sales of religious literature, it conflicts with no defensible concept of the constitutional freedom of the press or of religion."
the Supreme Court had remanded the case for reconsideration. Judge Edgerton concluded that "Freedoms of speech, press, and religion are entitled to a preferred constitutional position because they are 'of the very essence of a scheme of ordered liberty.' They are essential not only to the persons or groups directly concerned but to the entire community. Our whole political and social system depends upon them. Any interference with them is not only an abuse but an obstacle to the correction of other abuses."129

This view became his fixed star of decision in Bill of Rights cases. If there was to be any balancing of interests in these cases, the scales were to be heavily weighted in favor of liberty. In Barsky v. United States, involving a conviction of officers and directors of the Joint Anti-Fascist Refuge Committee for contempt of the Un-American Activities Committee, Judge Edgerton, dissenting from affirmance, reiterated the preferred position of the public interest in upholding the Bill of Rights, and at the same time declared that as to "Investigation in general, and this investigation in particular . . . There is no basis in authority, policy, or logic for holding that it is entitled to a preferred constitutional position."130 When a defendant claims the protection of the Bill of Rights, as in the Barsky case, "The problem is not, as the court suggests, that of balancing public or social interests against private interests. 'The principle on which speech is classified as lawful or unlawful involves the balancing against each other of two very important social interests, in public safety and in the search for truth. . . . Imprisonment of "half-baked" agitators for "foolish talk" may often discourage wise men from publishing valuable criticism of governmental policies. . . . The great interest in free speech should be sacrificed only when the interest in public safety is really imperiled. . . ."131 In Bailey v. Richardson, dissenting from affirmance of a loyalty board dismissal of an employee, Judge Edgerton declared: "The court thinks Miss Bailey's interest and

128 Id. at 24.
129 138 F.2d 592, 595 (D.C. Cir. 1943). But see American Communications Ass'n, C.I.O. v. Douds, 339 U.S. 382 (1950). The trend of the Douds case was confirmed in Dennis v. United States, 341 U.S. 494, 503 (1951), in which it was stated: "An analysis of the leading cases in this Court which have involved direct limitations on speech, however, will demonstrate that both the majority of the Court and the dissenters in particular cases have recognized that this is not an unlimited, unqualified right, but that the societal value of speech must, on occasion, be subordinated to other values and considerations."
131 Id. at 258, quoting from Chafee, FREE SPEECH IN THE UNITED STATES, 35 IX, 180 (1941).
the public interest conflict. I think they coincide. Since Miss Bailey’s
dismissal from a nonsensitive job has nothing to do with protecting the
security of the United States, the government’s right to preserve itself
in the world as it is has nothing to do with this case. The ominous
theory that the right of fair trial ends where defense of security begins
is irrelevant. . . . We have no reason to suppose that an unpatriotic
person in her job could do substantial harm of any kind. Whatever her
actual thoughts may have been, to oust her as disloyal without trial is to
pay too much for protection against any harm that could possibly be
done in such a job. The cost is too great in morale and efficiency of
government workers, in appeal of government employment to inde-
pendent and inquiring minds, and in public confidence in democracy.
But even if such dismissals strengthened the government instead of
weakening it, they would still cost too much in constitutional rights.
We cannot preserve our liberties by sacrificing them.”

Economic, Social and Political Issues

The foregoing opinions begin to indicate Judge Edgerton’s standard
of values in the balancing process—what interests tend to outweigh what
others. These values give content to the concept of justice. Justice seen
from one side of the tracks may be different from justice seen from the
other side. The mettle, the orientation, the basic drive of a judge are
revealed by whether he favors the public interest over a private or
special interest, whether the welfare of the community prevails over
other claims. But it is not easy to say in every case in which direction
the public interest is touched. No one individual, group, agency nor
even government is invariably found on the side of what any other indi-
vidual regards as the higher social or public interest.

Judge Edgerton began his judicial service during the New Deal, when
the nation was still struggling to overcome the effects of the Great
Depression. Then came the pre-war emergency, the war years, and the
post-war period. Each episode in the panorama sprouted its configuration
of social, economic and political problems, which in one form or another
were bound to come before the courts. In many cases the public interest

133 Ibid. See also Bakery Sales Drivers Local Union No. 33 v. Wagshal, 161 F.2d 380,
385 (D.C. Cir. 1947), aff’d, 333 U.S. 437 (1948), in which in a somewhat analogous field
—involving one of labor’s basic charters, the Norris-LaGuardia Act—Judge Edgerton, dis-
senting from the court’s refusal to hold the Act applicable, declared that the court’s “theory
is that there is no labor dispute unless the court thinks the interests [the employees] seek
to promote are ‘legitimate’ and are more important, on balance, than the conflicting interests
of the plaintiffs. . . . But the Act says nothing about the legitimacy of objectives or the
balancing of conflicting interests.”
was clearly arrayed against a private or special interest, and in some of these it was not a matter of one being right and the other wrong. The desperate necessity of keeping the nation's economy on an even keel in the midst of the life-and-death struggle with the fascist powers made it imperative that price control violations, unwitting or not, be prevented. "'Innocent non-conformity with the Price Control Act is as inflationary and as damaging to competitors and the public as guilty non-conformity.'

. . . Section 205(e) reflects the view that occasional hardship to one who honestly and intelligently endeavors to comply with the law is not too high a price to pay for the protection of the whole community against inflation."^134

An indictment for violation of the anti-trust laws charged that a milk producers association, controlling 80 percent of the milk sold in the Washington metropolitan area, had conspired to suppress competition, fix prices, and control the quantity of milk put on the market. Judge Edgerton held that these practices were not sanctioned by any of the laws granting special status to agricultural producers.^135 In another decision, which the Supreme Court reversed, he took the rare^136 course of overruling an order of the Secretary of Agriculture under the Sugar Act, because the quotas it fixed for refined sugar to be imported from Puerto Rico favored the largest and oldest Puerto Rican refining companies and gave little weight to the growth of smaller companies during the war and post-war years. The effect of his decision would have been to loosen the grip of entrenched interests in the sugar industry and to stiffen the competition from the refiners who had expanded their plants since 1941.

In *Sheridan-Wyoming Coal Co. v. Krug* a company mining coal on leased public lands sought to nullify a lease of public coal lands to a competitor, by invoking a government regulation restricting the leasing of public coal lands. Apparently the purpose of the new lease was to

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^136 Central Roig Refining Co. v. Secretary of Agriculture, 171 F.2d 1016 (D.C. Cir. 1948), *rev'd*, 338 U.S. 604 (1949). It is interesting to note that Mr. Justice Frankfurter, who wrote the majority opinion for reversal, nevertheless agreed with Judge Edgerton, who was in the minority on this question in his own court, that the issue of the constitutionality of the Sugar Act should be decided. Mr. Justice Black dissented from the reversal and stated he "would affirm the judgment of the United States Court of Appeals for the District of Columbia for the reasons given in that court's opinion." 338 U. S. at 620.

See *infra* pp. 188-92 for Judge Edgerton's views in the field of administrative law.
permit "the expansion of an existing mine, which is running out of coal reserves." The effect of the action of the Secretary of Interior in leasing to plaintiff's competitor was to maintain salutary competition in that part of the coal industry. Judge Edgerton dissented from the court's decision which permitted the maintenance of a suit to enjoin the Secretary. On the other hand, the consideration of competition was not deemed a sufficient basis for overturning the Federal Communications Commission's refusal to license the Mackay interests to operate a direct public radiotelegraph service between Long Island and Norway, in competition with the R.C.A. group. Judge Edgerton held that the Federal Communications Commission had power to refuse the license even if it meant the creation of a communications monopoly between the points in question.

In some cases the broader public issue is not evident on the face of the case. The faculty of a judge to discern it affects his ability to render justice. In Wolpe v. Poretsky the spot rezoning of a single small plot from apartment house to separate residence use was in issue. Judge Edgerton held, "Appellee's proposed apartment building will accommodate many more people than the single dwellings which might be built on the lot.... Even apart from the housing shortage, it [the order of the Zoning Commission] would have borne no positive relation to the public welfare and would have been arbitrary and unreasonable. In view of the acute housing shortage it bore a negative relation to the public welfare."

In Potomac Electric Power Company v. Public Utilities Commission public utility regulation and rates were the issue. In 1924 a consent decree had fixed the value of the company's property at a stated amount and the fair rate of return at 7½%. In the event that earnings in any year exceeded the fair rate a sliding scale for reduced utility rates in subsequent years was provided until the excess earnings were absorbed. In the nineteen years that followed, the company nevertheless piled up excess earnings in the aggregate sum of $16,000,000, and in each of these years but one the rate of return exceeded the fair rate fixed in the consent decree. In 1944 the Commission ordered the company to file new rate

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For another case prompted by the desirability of competition, see Southern Railway Co. v. Acme Fast Freight, Inc., 124 F.2d 229 (D.C. Cir. 1941). Rutledge, J., concurred; Vinson, J., dissented.


schedules, reducing its gross operating revenues. The Commission’s order would give the common stock a return, after all expenses and charges, of $3,250,000 for their current year. In affirming this order to reduce electric rates Judge Edgerton declared that “This would be, as the Commission observes, 8.91 percent of the ‘common-stock equity’. It would also be, as the Commission does not observe, some 36 percent of the par value of the common stock and some 60 percent of the amount which the Company received for the stock and invested in plant. The Commission says that the proposed return, in its opinion, will enable the Company ‘to maintain its financial integrity, to attract capital, and to compensate its investors for the risks assumed.’ This is understatement if not irony. The risks, if any, are as small as the human mind can conceive. The return is enormous.”

In Philadelphia Company v. Securities and Exchange Commission enforcement of the Public Utility Holding Company Act by the Commission was sustained. The Commission ordered a holding company to dispose of the gas and transportation interests which it had combined with its electric utility system, and to dissolve. The Commission determined that the electric and gas utilities were essentially competing interests. Judge Edgerton affirmed this decision. He sustained the Commission’s finding that the transportation system was not incidental or necessary to the electric utility system and that common control of the two was not “‘necessary or appropriate in the public interest or for the protection of investors or consumers and not detrimental to the proper functioning of such system or systems.”

In East Ohio Gas Co. v. Federal Power Commission Judge Edgerton dissented from a decision that excluded from the controls of the federal Natural Gas Act a gas company which operated wholly within the State of Ohio but drew 85 percent of its gas from outside the state through its own high pressure lines.

Basic controls in the national banking system were involved in two cases that came before Judge Edgerton. In both he dissented from his


141 177 F.2d 720, 725 (D. C. Cir 1949).

court's refusal to sustain the regulatory action of the Board of Governors of the Federal Reserve System. In both dissents he was sustained by the Supreme Court.\textsuperscript{144}

When mass unemployment and wholesale loss of purchasing power were still a fresh experience and the national emergency, which was the prelude to the war, was upon us, the nation's welfare and its very safety hinged upon government policies designed to maintain the stability of the economy. This objective inevitably included maintenance of the living standards of the working population at decent levels. To do its part, the government adopted the statutory policy of requiring its contractors furnishing supplies, materials and equipment to pay their employees at least those wages which the Secretary of Labor found to be "the prevailing minimum wages ... in the locality in which the materials, supplies, ... or equipment are to be manufactured." Secretary of Labor Perkins had found that the prevailing minimum rate in the iron and steel industry for the northeastern section of the country was 62\(\frac{1}{2}\) cents an hour. The Lukens Steel Company and a group of smaller steel companies in the industries affected brought suit to nullify the determination of the Secretary. They contended that the correct prevailing minimum wage rates were from 52\(\frac{1}{2}\) cents to 56\(\frac{1}{2}\) cents an hour. The majority of the court sustained this contention. Judge Edgerton, dissenting, voted for the right of government to play its part, free from judicial interference at the instance of special groups, in maintaining wage levels.\textsuperscript{144}

With the coming of war, new issues involving labor arose. The rights of labor, including the right to strike, had to be preserved if the war against fascism was to mean anything. Yet the war effort required the settlement of labor's demands without interruption of production. To meet this problem the War Labor Board was created. In two important efforts by employers to attack the decisions of the War Labor Board Judge Edgerton refused to sanction interference with the Board's work.\textsuperscript{145}

To maintain the war effort, the battle to control inflation also had to be won. The instrument of national policy on this front was the Office of Price Administration. In\textit{ Brown v. Hecht Company}, a suit by the

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O. P. A. Administrator to enjoin price control violations, Judge Edgerton, in a decision with which the Supreme Court did not agree, held that at the suit of the O. P. A. the issuance of an injunction by the court was mandatory. In an undeviating series of opinions, he maintained the crucial public interest in holding the price line—in preventing erosion of the powers of the O. P. A. and its successors and in maintaining efficiency of the government's price control machinery. He sustained penalties against unintentional violators of price ceilings and refused to permit these penalties to be whittled down to mere nominal amounts. He construed the O. P. A.'s powers of allocation to include the power to suspend violators of the rationing regulations from all business activity. He recognized as a price control violation the sale to a customer in one price class above ceiling prices fixed for that class although the increased prices were within the ceilings fixed for customers of another class. He concurred in the affirmance of a conviction for price control violations, taking pains to write a special opinion favoring the admissibility of evidence obtained by searching the voluntary prosecution witness before and after the purchase to establish the amount paid by the witness for the article sold by the violator above ceiling price. Even though the "Price Control Act... does not expressly authorize delegation of any power of the Administrator," he held that the O.P.A. administrator could delegate his subpoena powers. "Obviously he must delegate most of his functions if they are to be performed at all." He dissented from affirmance of a judgment enjoining the O.P.A. administrator from enforcing his plan of allotment of sugar for industrial nonwar use.

During the war, it was to be expected that in one form or another fascism and its viruses, racism and anti-semitism, would receive the attention of the courts. Judge Edgerton refused the sanction of libel

146 137 F. 2d 689 (D. C. Cir. 1943), rev'd, 321 U. S. 321 (1944).
149 "... it has been urged that low rates to favored customers should disappear because the competitive conditions which produced them have disappeared. As an economic argument, this attacks the whole theory and purpose of price regulation, which are to prevent changes in competitive conditions from producing the price increases which they would produce in the absence of regulation." Rainbow Dyeing & Cleaning Co. v. Bowles, 150 F. 2d 273, 274 (D. C. Cir. 1945).
against a newspaper and its columnist who had charged anti-Semitism to a Congressman and against a Congressman who had labeled a newspaper "a Nazi Trojan Horse." In another libel suit against a newspaper publisher, by the author of a book, he affirmed a judgment dismissing the suit, based upon a jury's verdict that the plaintiff was in fact the "author of a defeatist, anti-Jewish book." Judge Edgerton held: "The contents of the book, which are in the record, sufficiently support the jury's verdict. Since that is the case, the Post's opinion that the book was defeatist as well as anti-Jewish was at least a reasonable opinion...." He dissented from the dismissal of the indictments of the alleged American fascist leaders and sustained the eviction of one of the defense lawyers from the case for contempt of court in seeking to enlist congressional pressure against the trial judge. He saw that racial discrimination at home and especially against the Negro could not be reconciled with the war against the avowed exemplar of racism abroad. In the first racial restrictive covenant case to come before him he declared that "Requiring Negroes to live according to their common color instead of their individual capacities hampers the war effort...." In his second racial restrictive covenant case he said: "The Charter of the United Nations provides that 'the United Nations shall promote... universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race...' and that 'all Members pledge themselves to take joint and separate action' for that purpose. ... America's adherence to this Charter, the adherence of other countries to it, and our American desire for international good will and cooperation cannot be neglected in any consideration of the policy of preventing men from buying homes because they are Negroes. In many countries the color of a man's skin is little more important than the color of his hair and in many others the favored color is not white. In western Europe, to say nothing of other parts of the world, the position of Negroes in America is widely advertised and widely resented."
Rights of Labor

Before he became a judge, Edgerton declared: "A liberal judge has a heterodox picture of a good society. When he is called upon to determine where the balance of social advantage lies, he allows less weight than is orthodox to the interests of the propertied, enterprising, and employing classes, and more weight than is orthodox to the interests of the propertyless and working classes."\(^{160}\)

Since he came to the bench Judge Edgerton has written opinions involving collective bargaining, the right to organize, standards of pay, picketing and the right to strike, and workmen's compensation. In these cases he has expressed, in terms, no general philosophy. His results are favorable to the interests of workingmen.

During a period when the interpretation and enforcement of the National Labor Relations Act was evolving, he sustained orders of the Labor Board requiring discontinuance of unfair labor practices by employers\(^{161}\) and compelling reinstatement of employees who complained they had been discharged for union activity.\(^ {162}\) He dissented from a partial reversal of an NLRB decision finding unfair labor practices committed by an employer.\(^ {163}\) After the establishment of the War Labor Board during World War II, he held that proceedings to enforce an NLRB order against an employer for failure to engage in collective bargaining with a union had not been supplanted by proceedings before the War Labor Board.\(^ {164}\) He also refused to enjoin action threatened by the War Labor Board.\(^ {165}\) In a case involving a jurisdictional dispute between railroad unions he sustained a broader industrial, rather than a narrower craft, basis for determining a collective bargaining unit.\(^ {166}\) When an employer in the District of Columbia attempted to enjoin a union under the Sherman Anti-Trust Act from conducting a strike aimed at preventing importation of baked goods from Philadelphia shops

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162 National Labor Relations Board v. Willard, Inc., 98 F.2d 244 (D.C. Cir. 1938).
166 Order of Railway Conductors of America v. National Mediation Board, 113 F.2d 531 (D.C. Cir. 1940).
which maintained lower wage scales, Judge Edgerton held that the union's aim was not an anti-trust law violation and that, moreover, peaceful picketing could not be prohibited under the Sherman Act.\(^{167}\) Dissenting from an affirmance of an injunction obtained by an employer against a union, he urged that the Norris-LaGuardia Act prohibited issuance of the injunction.\(^{168}\)

In various aspects of the problem, Judge Edgerton has sustained efforts to protect or improve wage standards. His position in the important \textit{Lukens} case\(^{169}\) has already been noted. He upheld the Wage and Hours Administrator's ruling which placed certain base metal workers in the higher wage category of the jewelry industry.\(^{170}\) He refused to disturb a War Labor Board award of wage increases.\(^{171}\) He sustained the rights of certain government employees in the Customs service to overtime pay.\(^{172}\) He dissented from a decision giving super-seniority rights under the Veterans Preference Act to temporary members of the Coast Guard Reserves during World War II, declaring that such preference would weaken the competitive position of other war workers and of veterans.\(^{173}\)

The social purpose of Workmen's Compensation has been given full effect in Judge Edgerton's opinions. In \textit{Maryland Casualty Company v. Cardillo}, in which he sustained recovery by the widow of a collection agent who died of injuries received when he was assaulted and robbed after business hours while returning to his office with his collection "book" in his hand, Judge Edgerton expressed the keynote of his decisions in this field:\(^{174}\) "If a man's employment exposes him to special risk of attack not only during working hours, but during certain off hours also, it is as socially desirable that the industry carry the off-hour risk as that it carry the working-hour risk. Both alike are hazards of the industry. Moreover, compensation acts 'should be construed liberally in furtherance of the purpose for which they were enacted and, if possible, so as to


\(^{169}\) Dissent in Lukens Steel Co. v. Perkins, 107 F.2d 627, 644 (D.C. Cir. 1939), \textit{rev'd}, 310 U.S. 113 (1940), discussed, pp. 175 \textit{supra}.

\(^{170}\) Art Metal Workers v. Walling, 129 F.2d 50 (D.C. Cir. 1942).


\(^{172}\) Callahan v. United States, 122 F.2d 216 (D.C. Cir. 1941).


\(^{174}\) 107 F.2d 959, 961-962 (D.C. Cir. 1939).
avoid incongruous or harsh results.'

The Constitution

In each era the Constitution must be reinterpreted and expounded in terms of the problems and aspirations of the day. A judge cannot perform this task solely by the application of settled authority. In this field perhaps more than any other a judge's course reflects his views as to the most desirable solution of the problems before him.

Judge Edgerton appears to have steered for himself, and at times for his court, a course between two constitutional purposes: strengthening the hand of government so that it may better serve the people while at the same time preserving the fundamental safeguards of human freedom. On the one hand he maintained that "the Constitution does not require that a rationing program which is at least a reasoned attempt to comply with the law shall be subjected to judicial review." In another case he would have strengthened the Federal Communications Commission,

176 Accordingly Judge Edgerton has liberally construed the Workmen's Compensation Act in the following cases: Maryland Casualty Co. v. Cardillo, 99 F.2d 432 (1938)—commissioner may reconsider and reverse own prior decision denying award; Cardillo v. Liberty Mutual Ins. Co., 101 F.2d 254 (D.C. Cir. 1938)—medical expenses may be awarded in addition to statutory maximum amount; Associated General Contractors of America, Inc. v. Cardillo, 106 F.2d 327 (D.C. Cir. 1939)—requirement of corroboration of deceased workman's statement as to the injury liberally construed; Potomac Electric Power Co. v. Cardillo, 107 F.2d 962 (D.C. Cir. 1939)—statute of limitations held to run not from date of accident but from time effect is felt; Avignone Freres, Inc. v. Cardillo, 117 F.2d 385 (D.C. Cir. 1940)—award sustained for death caused by slight injury aggravating worker's diabetic condition; Cardillo v. Hartford Accident & Indemnity Co., 109 F.2d 674 (D.C. Cir. 1940), cert. denied, 309 U.S. 699 (1940)—bus driver's deviation from route for lunch no bar to recovery; Penker Construction Co. v. Cardillo, 118 F.2d 14 (D.C. Cir. 1941)—award for death caused by assault by fellow employee arising out of a personal dispute.


178 Cardozo, The Nature of the Judicial Process 17 (1937): “Above all in the field of constitutional law, the method of free decision has become, I think, the dominant one today. The great generalities of the Constitution have a content and significance that vary from Age to Age.” See also William O. Douglas, Stare Decisis, 49 COL. L. REV. 735, 737 (1949); William O. Douglas, The Dissenting Opinion, 8 LAWYERS GUILD REVIEW 457, 468 (1948); Bernhardt, Supreme Court Reversals on Constitutional Issues, 34 CORNELL L. Q. 55 (1948); Callett, The Development of the Doctrine of Stare Decisis and the Extent to Which It Should Be Applied, 21 WASH. L. REV. & BAR JR. 158 (1946); Radin, The Trail of the Calf, 32 CORNELL L. Q. 137 (1946).

which had granted increased broadcasting time and power to a radio station. From a reversal of the Commission’s order because the Commission had denied a hearing to a competing station, Judge Edgerton said in a dissent which the Supreme Court did not sustain: “The Constitution does not, in my opinion, give appellant a right to a full hearing, of the trial type, in the proceedings before the Commission. . . . Since the Commission had to decide primarily a question of policy and only incidentally a question of fact, the technique of a trial would have been clumsy and wasteful.”

He sustained a District of Columbia tax based upon the taxpayer’s gross receipts despite the fact that the taxpayer’s business was “carried on outside as well as inside the District” and involved “the exploitation of land” outside the District. He sustained the jurisdiction of the Federal Power Commission to control the exploitation of the water power of a stream which “is now capable of navigation, in broken stretches, by boats of a sort.” Other decisions give adhesive power to the cement which the “full faith and credit” clause was intended to supply to “weld the independent states into a nation.”

But as already pointed out, the Busey case had demonstrated that even as fundamental a power as the taxing power was limited by the civil liberties provisions of the First Amendment. Judge Edgerton’s experience in that case became a touchstone for him in civil liberties cases. He constantly uses and cites the Busey case and the Supreme Court cases which caused its reversal, in important opinions in which Judge

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180 Dissent in National Broadcasting Co. v. Federal Communications Commission, 132 F.2d 545, 567-568 (D.C. Cir. 1942), aff’d, 319 U.S. 239 (1943). Rutledge, J., wrote the principal opinion in the Court of Appeals. Groner, C.J., and Vinson and Stephens, JJ., concurred in the result. In a subsequent case, involving the Federal Communications Commission’s power to dispense with oral argument, in which Judge Edgerton voted with the minority to sustain such power, the Supreme Court upheld this dissent in an opinion by Rutledge, J., FCC v. WJR, 337 U.S. 265 (1949), reversing 174 F.2d 226, 243 (1948).


183 Junghans v. Junghans, 112 F.2d 212 (D.C. Cir. 1940); Miller v. Miller, 122 F.2d 209 (D.C. Cir. 1941).


185 See pages 161-62, 169 supra.

186 See pages 161-62, notes 80-91 supra.

Edgerton has sought to give unstinted effect to the constitutional restraints imposed upon government in the interest of freedom.

Of course, positive governmental action to promote the welfare of the nation is also essential to the promotion of freedom. In certain areas of activity the advancement of freedom requires that the legislative or executive branches of government be free from judicial restraints. The other side of the coin is the traditional set of restraints contained in the Constitution, and especially in the Bill of Rights, to guarantee individuals, groups and the nation itself against the abuse of governmental power.

Negro Rights: The Constitution has catalogued threats to liberty in such historic formulae as “without due process of law,” “unreasonable searches and seizures,” “abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition the government,” “deny the . . . equal protection of the laws,” “self-incrimination.” The most pressing problems of the times are often reflected in the constitutional questions which these clauses present to the courts for solution. It may well be the judgment of history that our age faced no more vital issue than the achievement of equality of the Negro people and the protection of unpopular and minority groups. One of the highlights of Judge Edgerton’s opinions is his forceful awareness that the time is at hand for fulfilling to the Negro the glittering assurances so long held out.

In his dissent in Carr v. Corning, in which he urged the abandonment, in the field of public school education, of the “separate but equal” doctrine of Plessy v. Ferguson, he declared: “The education required for living in a cosmopolitan community, and especially for living in a humane and democratic country and promoting its ideals, cannot be obtained on either side of a fence that separates a more privileged majority and a less privileged minority. . . . segregation in public schools affects children during their formative years and does so continually. It also affects them unequally. Here at least, as a current brief for the United States says of segregation in general, ‘separate but equal’ is as much a contradiction in terms as ‘black but white’; facilities which are segregated by law solely on the basis of race or color, cannot in any real sense be regarded as equal.” It is notorious that segregated colored schooling is never equal to segregated white schooling in objectively

188 See President Franklin D. Roosevelt’s “Four Freedoms” message to Congress, Jan. 6, 1941, 7 Vital Speeches 197-200, 87 Cong. Rec. 4446 (1941).
189 182 F. 2d 14, 32-33 (D.C. Cir. 1950).
190 163 U.S. 537 (1896).
measurable ways. Independently of objective differences between white and colored schooling, school segregation means discrimination against Negroes for two distinct reasons. (1) By preventing a dominant majority and a depressed minority from learning each other's ways, school segregation inflicts a greater economic and social handicap on the minority than on the majority. It aggravates the disadvantages of Negroes and helps to preserve their subordinate status. (2) School segregation is humiliating to Negroes. Courts have sometimes denied that segregation implies inferiority. This amounts to saying, in the face of the obvious fact of racial prejudice, that the whites who impose segregation do not consider Negroes inferior. . . . It is sometimes suggested that due process of law cannot require what law cannot enforce. No such suggestion is relevant here. When United States courts order integration of District of Columbia schools they will be integrated. It has been too long forgotten that the District of Columbia is not a provincial community but the cosmopolitan capital of a nation that professes democracy."

Before the Supreme Court had prohibited judicial enforcement of racial restrictive covenants in the field of housing, Judge Edgerton in two dissents written at different stages of the case of *Mays v. Burgess* urged that his court not lend its powers to the perpetuation of this type of segregation. Two years later he foreshadowed the Supreme Court decision in a third dissent in which he declared: "Negroes have a constitutional right to buy and use, and whites to sell to Negroes, whatever real property they can without direct government interference based on race. . . . It has been contended that enforcement of covenants which exclude a race from a neighborhood does not involve discrimination because it permits reciprocity. This amounts to saying that if Negroes are excluded from decent housing they may retaliate by excluding whites from slums. Such reciprocity is not merely imaginary and unequal but irrelevant. . . . Rules which the due process clause forbids legislatures to enact it forbids courts to adopt, for substantive due process is not a matter of method. . . . It is strangely inconsistent to hold as this court does that although no legislature can authorize a court, even for a moment, to prevent Negroes from acquiring and using particular property, a mere owner of property at a given moment can authorize a court to do so for all time."
In both the public school and housing segregation cases Judge Edgerton's dissenting opinions go beyond the technical constitutional arguments. Departing from his customary brevity he sketches the sociological background and consequences of segregation. In Hall v. United States Negroes, though included in the panel from which a trial jury was chosen, were all challenged peremptorily by the prosecutor, and the government impliedly admitted that the challenges were intended to exclude all Negroes from the jury. Judge Edgerton declared: "Whether this discrimination against Negroes did or did not violate the Act of Congress I think it violated the plainly expressed policy of Congress, the plainly expressed policy of the Supreme Court, the prosecutor's obligation of fairness, and the due process clause of the Fifth Amendment."

Civil Liberties. Ever since the first group of "free speech" cases decided by the Supreme Court of Holmes and Brandeis, there has been debate as to the extent to which radicals and dissenters should be permitted to advocate their doctrines. After World War I Socialists and assorted political dissenters were the interdicted groups. Currently the Communists and those who appear to adhere to non-conforming views on a wide range of subjects are the objects of hostile government action. The campaign against "un-American" and "subversive" groups creates a crucial stage in the constitutional development of the scope of our civil liberties. This in turn involves basically the degree of flexibility for change with which we are to endow our constitutional and legislative framework, for the amending process becomes jejune unless people may advocate every side of every issue and every conceivable solution of the nation's problems.

In a series of notable dissents that may receive an honored niche in the constitutional history of this era, Judge Edgerton has become one of


This concern for the rights of Negroes is probably an element in other constitutional opinions of Judge Edgerton, in which the person involved is a Negro but in which the express ground of the opinion is directed toward other constitutional considerations. See for examples, Johnson v. United States, 110 F.2d 562 (D.C. Cir. 1940); Bullock v. United States, 122 F.2d 213 (D.C. Cir. 1941); concurring opinion in Holmes v. United States, 171 F.2d 1022, 1024 (D.C. Cir. 1948); dissent in Garner v. United States, 174 F.2d 499, 503 (D.C. Cir. 1949), cert. denied, 337 U.S. 945 (1949).

195 Schenck v. United States, 249 U.S. 47 (1919); Frohwerk v. United States, 249 U.S. 204 (1919); Debs v. United States, 249 U.S. 211 (1919); Abrams v. United States, 250 U.S. 616 (1920); Schaefer v. United States, 251 U.S. 466 (1920); Pierce v. United States, 252 U.S. 239 (1920). See, Vinson, C.J., in Dennis v. United States, 341 U.S. 494, 503 (1951): "No important case involving free speech was decided by this Court prior to Schenck v. United States. . . ."
the foremost exponents of the liberal and what was until recently the prevailing view of civil liberties. By a curious quirk of history, just when the liberal position on civil liberties seemed to have become the accepted view in the Supreme Court, a shift of political climate, brought about by a combination of circumstances domestic and foreign, again put the liberal position on civil liberties in the shade. In the face of this shift, Judge Edgerton held fast to that position and thereby helped to give renewed vitality to the civil liberties tradition. But even more, by adhering to it he has braced those who have felt that the nation's highest destiny lies in the fulfillment of its professions of freedom. If it is true that "judges, howsoever they may conscientiously seek to discipline themselves against it, unconsciously are too apt to be moved by the deep undercurrents of public feeling," and if this explains the current anti-libertarian trend in judicial decision, Judge Edgerton is an important exception in the development of constitutional law.

In the Barsky case he declared: "In my opinion the House [Un-American Activities] Committee's investigation abridges freedom of speech and inflicts punishment without trial; and the statute the appellants are convicted of violating provides no ascertainable standard of guilt. . . . The power of investigation, like the power of taxation, stops short of restricting the freedoms protected by the First Amendment. . . . The investigation restricts the freedom of speech by uncovering and stigmatizing expressions of unpopular views. . . . This exposes the men and women whose views are advertised to risks of insult, ostracism, and lasting loss of employment. . . . The Committee's practice of advertising and stigmatizing unpopular views is therefore a strong deterrent to any expression, however private, of such views. The investigation also restricts freedom of speech by forcing people to express views. Freedom of speech . . . includes freedom not to speak. 'To force an American citizen publicly to profess any statement of belief' is to violate the First Amendment. . . . The privilege of choosing between speech that means ostracism and speech that means perjury is not freedom of speech. . . . People have grown wary of expressing any unorthodox opinions. No one can measure the inroad the Committee has made in the American sense of freedom to speak. . . . There is no evidence in the record that propaganda

196 Frankfurter, J., in Dennis v. United States, 341 U.S. 494, 556 (1951). There are at least two points of criticism of this dictum. First, there appear to be periods, as during the first term of President Franklin D. Roosevelt, when the Supreme Court has acted contrary to majority opinion of the people. Secondly, it may not be any easier for courts to learn what "the deep undercurrents of public feeling" are than for prognosticators of national elections.
has created danger, clear and present or obscure and remote, that the government of the United States or any government in the United States will be overthrown by force or violence. ... The premise that the government must have power to protect itself by discovering whether it is in clear and present danger of overthrow by violence is sound. But it does not support the conclusion that Congress may compel men to disclose their personal opinions, to a committee and also to the world ..."}

In *Joint Anti-Fascist Refugee Committee v. Clark* the same organization that was involved in the *Barsky* case sued to enjoin the Attorney General and the Loyalty Review Board from designating the organization as subversive and thereby in effect forbidding membership therein to all government employees. Dissenting from an affirmance of the dismissal of the suit, Judge Edgerton declared: "Helping former Spanish Republicans is not evidence of disloyalty to the government of the United States. ... Appellees' ruling, in its context, is a public warning that sympathetic association with appellant may cause government employees to be dismissed. It therefore puts government employees, present and prospective, under economic and social pressure not to support any of appellant's activities, verbally or otherwise, and in particular to stay away from appellant's meetings. In other words the ruling restricts the freedom of speech and assembly of government employees."}

Dissenting in *Bailey v. Richardson*, he declared: "Without trial by jury, without evidence, and without even being allowed to confront her accusers or to know their identity, a citizen of the United States has been found disloyal to the government of the United States. For her supposed disloyal thoughts she has been punished by dismissal from a wholly nonsensitive position in which her efficiency rating was high. The case received nation-wide publicity. Ostracism inevitably followed. A finding of disloyalty is closely akin to a finding of treason. The public hardly distinguishes between the two. ... However respectable her anonymous accusers may have been, if her dismissal is sustained the livelihood and reputation of any civil servant today and perhaps of any American tomorrow are at the mercy not only of an innocently mistaken informer but also of a malicious or demented one unless his defect is apparent

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to the agent who interviews him. . . . *Appellant's dismissal for wrong thoughts has nothing to do with protecting the security of the United States.* . . . Since dismissal from government service for disloyalty is punishment, due process of law requires that the accused employee be given all the safeguards of a judicial trial before it is imposed. . . . *Appellant's dismissal bridges freedom of speech and assembly.* Mr. Justice Holmes' famous statement, made in 1892 when he was a member of the Supreme Judicial Court of Massachusetts, that 'the petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman' is greatly oversimplified. . . . the premise that government employment is a privilege does not support the conclusion that it may be granted on condition that certain economic or political ideas not be entertained. . . . Freedoms that may not be abridged by law may not be abridged by executive order. . . . Appellant's dismissal attributes guilt by association, and thereby denies both the freedom of assembly guaranteed by the First Amendment and the due process of law guaranteed by the Fifth.'

In *Lapides v. Clark,* Judge Edgerton had occasion to pass upon the practice of subjecting naturalized citizens to special disabilities. He dissented against excluding from the country a naturalized citizen who had lost his citizenship by sojourning abroad, in Palestine, for more than five years: "The Constitution empowers Congress 'to establish an uniform rule of naturalization.' . . . It increases the number of citizens but does not divide them into classes. . . . Deprivation of liberty by severe and arbitrary discrimination is not due process of law. Aside from the Nationality Act, citizens may live abroad. By imposing a heavy penalty on the exercise of this liberty the Nationality Act takes part of it away from all naturalized citizens, regardless of their devotion to America and their connections here." In another case he dissented from a conviction not as technical rules but as elements indispensable to the democratic way of life. In some cases he has expressly stated this view, as in a dissent against a conviction obtained by third degree methods, which he declared to be "a violation of civil rights that cannot be tolerated in a democratic society." In another case he dissented from a conviction

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193 182 F.2d 46, 66, 67, 70, 71, 72, 73, 74 (D.C. Cir. 1950), aff'd by an equally divided Court, 341 U.S. 918 (1951) (Italics Judge's.); and see concurring opinions of Douglas and Jackson, JJ., in Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 1123, 175, 183 (1951).


upon evidence obtained by police who broke into a rooming house, stood on a chair in a hall, and looked through a transom into the defendant's room. Judge Edgerton said: "To hold that McDonald cannot complain because he is only a roomer perverts the letter as well as the spirit of the constitutional guaranty against unreasonable searches and creates a discrimination in civil rights that is out of place in a democratic society." Though not inclined to stand on technicality, Judge Edgerton has been insistent, often in dissent, that the right of criminal defendants to counsel be enforced, that the police refrain from third degree practices and from unlawful searches and seizures, and that trials be fair and free from prejudice.

**Administrative Action**

In accordance with one segment of his constitutional views, there runs through Judge Edgerton's opinions a strain of principle sustaining government administrative action. These opinions cover a wide range of departments and agencies both of the United States and of the

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203 See, for example, Pope v. Huff, 141 F.2d 727 (D.C. Cir. 1944); United States v. Boyer, 150 F.2d 595 (D.C. Cir. 1945); Hawkins v. United States, 158 F.2d 652 (D.C. Cir. 1946), cert. denied, 331 U.S. 830, 869 (1947); Christoffel v. United States, 171 F.2d 1004 (D.C. Cir. 1948), rev'd, 338 U.S. 84 (1949).
204 Johnson v. United States, 110 F.2d 562 (D.C. Cir. 1940); dissent in McJordan v. Huff, 133 F.2d 408 (D.C. Cir. 1943).
206 Dissent in McDonald v. United States, 166 F.2d 957 (D.C. Cir. 1948), rev'd, 335 U.S. 451 (1948); McKnight v. United States, 183 F.2d 977 (D.C. Cir. 1950); see also Jillson v. Caprio, 181 F.2d 523 (D.C. Cir. 1950); Colpoys v. Foreman, 163 F.2d 908, 910 (D.C. Cir. 1947): "Lawless invasion of homes is the more menacing to a democratic society when it is committed by public officers."
208 See pp. 180-82 supra.
District of Columbia. He phrases the judicial standard for determining the validity of administrative action variously: the presumption of administrative correctness; whether the decision or action could be said to be unreasonable or consistent with the evidence, or supported by the evidence, or by substantial evidence, or arbitrary, or within the purposes and scope of the legislation governing the case. Behind
these legal conclusions are basic considerations. Some of these have already been discussed in terms of the social interests that have priority in his scale of values.\textsuperscript{218} He recognizes, too, that administrative bodies developed to deal with a special activity, science, or art should not be overruled lightly; that courts are less fitted to cope with problems in these special fields.\textsuperscript{219} Unless plainly obligated to do so, courts should not intrude upon the jurisdiction of administrative tribunals nor straight-jacket administration by the "conventional judicial modes for adjusting conflicting claims."\textsuperscript{220}

An overlapping factor, perhaps, has been a belief that most of the administrative action he has been called upon to review has been in the public interest.\textsuperscript{221} Thus the fact that a patent is a monopoly plays a part\textsuperscript{222} in his many decisions upholding denials of patents. In \textit{Abbott v.}\textsuperscript{219}

\footnotesize{218 See pages 166-180 supra.}


the presumption of the correctness of administrative decisions was applied, on the basis of a dissent by Judge Edgerton in a previous case, to a Patent Office decision that patent claims showed no "invention." The court had long treated the question of "invention" in suits to obtain a patent, of which there are many in the District of Columbia, as an original question. Since Abbott v. Coe the court has given due weight to the findings of the Patent Office and the District Court in these cases.

Judge Edgerton has of course sometimes found it necessary to reject administrative rulings. In some cases the agency had in effect confessed error by failing to appeal from a reversal in a lower court. In some there were new or additional factors that had not been considered by the administrative agency. In several cases Judge Edgerton thought the administrative finding unsupportable on the merits. He wrote for the court reversing the Patent Office and the District Court and holding a pain-reducing drug used in cancer treatment clearly useful and patentable. He construed patent procedure liberally, reversing the Patent Office's construction of the statutory requirement of a description of the claimed invention. He dissented from affirming a refund, by the Commissioner of Internal Revenue, of a sugar processing tax which the processor had not absorbed but had passed on to his customers. He dissented from dismissal of the government's petition for lower electric rates in the District of Columbia, basing his view in part on inordinate utility profits in previous years.

Reversing the action of the Postmaster General in barring from the plea of monopoly is not effective. Mackay Radio & Telegraph Co. v. Federal Communications Commission, 97 F.2d 641 (D.C. Cir. 1938).

223 109 F.2d 449, 452 (D.C. Cir. 1939), before Edgerton, Vinson, and Rutledge, JJ.

224 Carbide & Carbon Chemicals Corp. v. Coe, 102 F.2d 236 (D.C. Cir. 1939).

225 See also Power Patents Co. v. Coe, 110 F.2d 550 (D.C. Cir. 1940), for another instance of the use of the technique of distinguishing a seemingly applicable precedent.

226 See dissent in Helvering v. Insular Sugar Refining Corp., 141 F.2d 713, 722 (D.C. Cir. 1944): "The principle of administrative finality, as I understand it, does not require or permit this court to sustain a decision which has no rational basis in the evidence and is based upon an error of law."


228 Allison Coupon Co. v. Bank of Commerce & Savings, 111 F.2d 664 (D.C. Cir. 1940); Gebhard v. General Motors Sales Corp., 135 F.2d 248 (D.C. Cir. 1943); Braniff Airways, Inc. v. Civil Aeronautics Board, 147 F.2d 152 (D.C. Cir. 1945); Jones v. Clemmer, 163 F.2d 852 (D.C. Cir. 1947).

229 Canadian Pharmaceutical Co. v. Coe, 126 F.2d 847 (D.C. Cir. 1942).


231 Helvering v. Insular Sugar Refining Corp., 141 F.2d 713, 717 (D.C. Cir. 1944).

mails a pamphlet containing detailed information about marriage, he held that the publication was not obscene nor violative of the prohibition against birth control literature, that the exclusion of the paper without a hearing was a denial of due process, and that it might be a violation of freedom of speech. In one of the loyalty cases previously discussed he urged reversal of the Loyalty Review Board on the ground that its action was not supported by evidence and violated the governing statute and regulations and the Bill of Rights. In the other loyalty cases he dissented from dismissal of suits to overturn rulings of the Attorney General.

**IMPACT UPON VARIOUS CATEGORIES OF THE LAW**

Judge Edgerton's opinions reflect the re-examination and reappraisal of judicial doctrine—in more placid times a measure of the stature of a judge. In some cases they sweep away cobwebs that hamper the progress of the law; in others they conform legal rules to recent developments in other fields, or to his conception of social needs.

**Evidence and Procedure**

Judge Edgerton has favored a broad and less technical construction of the rules of adjective law. In Beach v. Beach, a wife's suit for

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233 Walker v. Popenoe, 149 F.2d 511 (D.C. Cir. 1945).
236 Evidence: Alamo v. Del Rosario, 98 F.2d 328 (D.C. Cir. 1938); General Finance, Inc. v. Stratford, 109 F.2d 843 (D.C. Cir. 1940); Nu Car Carriers, Inc. v. Traynor, 125 F.2d 47 (1942); Pennsylvania Railroad Co. v. Rochinski, 158 F.2d 325 (D.C. Cir. 1946); Rosinski v. Whiteford, 184 F.2d 700 (D.C. Cir. 1950).


Pleading: Jones v. Metropolitan Life Ins. Co., 116 F.2d 555 (D.C. Cir. 1940); Kelser v. Walsh, 118 F.2d 13 (D.C. Cir. 1941); Brady v. Games, 128 F.2d 754 (D.C. Cir. 1942).
support, the husband denied paternity of a child and counterclaimed for divorce on the ground of adultery. Affirming the trial court's order that the wife and child submit to blood grouping tests, Judge Edgerton held that the scientific validity of such tests had been established; that the Federal Rules of Civil Procedure, though not specifically mentioning these tests, impliedly sanctioned their use in paternity cases; and that this conclusion "is aided... by the direction in Rule 1 to construe the rules to secure a just result. The historic restrictions on testimony to 'non-access' are an added reason for admitting this evidence, which is independent of non-access."

He has advocated liberal interpretation of the federal shop book rule to admit in evidence hospital records and police accident reports as records made in the regular course of business. But he has not favored relaxation of procedural or evidentiary rules when important safeguards would be impaired.

**Corporations**

In *Brownley v. Peyser* a holding company had milked its subsidiary. Both companies became insolvent and the receiver of the holding company attempted to collect a debt from the subsidiary. In effect this was a suit between the creditors of the two corporations. In upholding a dismissal of the receiver’s complaint, Judge Edgerton said: "Much of appellant’s argument proceeds as if it were immaterial which was the holding corporation and which the subsidiary. There is danger that a sole stockholder will take advantage of his corporation, and so of its creditors, and rules have grown up to check that danger. It is less likely that a corporation will take advantage of its sole stockholder, and so of its creditors, and the same rules do not apply. Appellant’s position is that the tail wagged the dog. Actually the wagging was of the normal sort."

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*Jurisdiction:* Concurring opinion in Frene v. Louisville Cement Co., 134 F.2d 511, 518 (D.C. Cir. 1943).

237 114 F.2d 479, 482 (D.C. Cir. 1940).


239 MacWilliams v. Lewis, 125 F.2d 200 (D.C. Cir. 1941).


242 105 F.2d 796 (D.C. Cir. 1939).
In *Bowen v. Mount Vernon Savings Bank* corporate interrelations were again involved. A bank which exacted usury transferred the note to another bank. Two officers and directors handling the usurious loan for the first bank were also officers and directors of the transferee bank. Holding that the knowledge of the interlocking officers and directors was imputable to the transferee bank, Judge Edgerton sustained the defense of usury.

**Agency**

He also said in the *Bowen* case: "The real reason for the rule which charges a principal with his agent's knowledge is simply the injustice of allowing the principal to avoid, by acting vicariously, burdens to which he would become subject if he were acting for himself." The principal's duty of fair dealing is underlined in two interesting cases. In one a salesman engaged for an indefinite period was discharged before the effects of his salesmanship could be determined. Permitting a recovery of commissions for orders received after the discharge, Judge Edgerton held that "the termination must be in good faith" and not "for the purpose of depriving the broker of commissions to become due for work already done." In the other case a broker brought about the sale of property on terms deviating from but more advantageous than those the owner had authorized. In sustaining the broker's recovery, Judge Edgerton said: "Appellants are in much the same position as a man who refuses to accept $101 because his contract called for only $100."

But an agent also has a duty of fair dealing. "... his duty forbids him, during the agency, to ask his principal's customers to transfer their custom, even though the transfer is not to take effect until after the agency ceases."

**Equity**

In *Berrien v. Pollitzer* Judge Edgerton came to grips with the "tradition that equity protects only property rights." The plaintiff's suit for an injunction against exclusion from the National Woman's Party had been dismissed by the lower court on the ground of this "tradition." In reversing, Judge Edgerton declared: "The doctrine that equity jurisdiction is limited to the protection of property rights conflicts with the familiar

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242 105 F.2d 796, 799 (D.C. Cir. 1939).
246 Buckner v. Tweed, 157 F.2d 211, 212 (D.C. Cir. 1946).
246 Keiser v. Walsh, 118 F.2d 13, 14 (D.C. Cir. 1941).
principle that equity may give preventive relief when the legal remedy of money damages ... is inadequate ... Obviously money has little in common with such personal rights or interests as reputation, domestic relations, or membership in nonprofit organizations.\textsuperscript{2247}

Judge Edgerton's stress of fairness and justice and his rejection of mechanistic application of law is illustrated by his opinions with regard to restrictive covenants. On the one hand he approved an injunction to enforce a covenant, given in the sale of a business, not to engage in a similar business in the District of Columbia, when the seller established a new business outside the District but advertised it in Washington.\textsuperscript{246}

On the other hand he has freely applied the principle that restrictive covenants governing the use of land, admittedly breached, do not necessarily merit equitable relief, because changed neighborhood conditions may make it inequitable to grant an injunction.\textsuperscript{249}

\textbf{Marital Relations}

In \textit{Parks v. Parks},\textsuperscript{220} Judge Edgerton initiated a line\textsuperscript{251} of liberal interpretations of the District of Columbia statute authorizing absolute divorce for "voluntary separation" for five consecutive years without cohabitation. The wife claimed that because the separation was originally involuntary on her part, the ensuing period of separation was also involuntary. Holding that neither the involuntary origin of the separation nor the husband's fault were defenses to his suit, Judge Edgerton declared: "Even if she did in fact wish her husband to return, in the course of time her silent acquiescence in the separation made it voluntary in the statutory sense. Desires which are not reflected in conduct have little or no social or legal significance."\textsuperscript{2262} In another case he declared: "When a separation has continued more than five years and neither party has tried to end it a divorce should be granted."\textsuperscript{2253} He summed up his views: "The liberal purpose [of the statute] ... was to permit termination in law of certain marriages which have ceased to exist in fact."\textsuperscript{2254}

\textsuperscript{2247} 155 F.2d 21, 22 (D.C. Cir. 1947).
\textsuperscript{2248} Hartung v. Hilda Miller, Inc., 133 F.2d 401 (D.C. Cir. 1943).
\textsuperscript{2250} Bowers v. Bowers, 143 F.2d 158 (D.C. Cir. 1944); Buford v. Buford, 156 F.2d 567 (D.C. Cir. 1946).
\textsuperscript{2251} Bowers v. Bowers, 143 F.2d 158 (D.C. Cir. 1944); Buford v. Buford, 156 F.2d 567 (D.C. Cir. 1946).
\textsuperscript{2252} Parks v. Parks, 116 F.2d 556, 557 (D.C. Cir. 1940).
\textsuperscript{2253} Buford v. Buford, 156 F.2d 567, 568 (D.C. Cir. 1946).
\textsuperscript{2254} Parks v. Parks, 116 F.2d 556, 557 (D.C. Cir. 1940).
"The purpose of the five-year law is not to punish vice or reward virtue..."\textsuperscript{255}

In *Garman v. Garman*\textsuperscript{256} he dealt with the effect of a "mail order" Mexican divorce. Dissenting from sustaining the husband's right to sue for divorce subsequently in the District of Columbia, Judge Edgerton urged that the husband should be estopped by his participation in the Mexican proceedings from complaining of his wife's conduct subsequent to the Mexican decree. The non-punitive approach is reflected in his treatment of other problems in this field. A wife divorced by her husband because of adultery was nevertheless awarded custody of her children, alimony for their support, and counsel fees; the important consideration was that "the wife was a devoted and successful mother."\textsuperscript{257} A meretricious relationship was permitted to ripen into marriage upon removal of the impediment of a prior marriage of one of the parties.\textsuperscript{258}

**Criminal Justice**

Judge Edgerton's attitude in this field is reflected in his decision that "The view that evidence of uncommunicated threats... should be admitted seems to us logical and humane."\textsuperscript{259} In *Bullock v. United States* he was confronted with one of the baffling\textsuperscript{260} problems of criminal law—a meaningful distinction between first and second degree murder. The trial court had charged that the "deliberate and premeditated" intent necessary for first degree murder did not require "any appreciable length of time." Reversing the conviction, Judge Edgerton declared: "To speak of premeditation and deliberation which are instantaneous, or which take no appreciable time, is a contradiction in terms. It deprives the statutory requirement of all meaning... Statutes like ours, which distinguish deliberate and premeditated murder from other murder, reflect a belief that one who meditates an intent to kill and then deliberately executes it is more dangerous, more culpable or less capable of reformation than one who kills on sudden impulse; or that the prospect of the death penalty is more likely to deter men from deliberate than from impulsive murder."\textsuperscript{261}

In *Chaplin v. United States* Judge Edgerton dissented from adoption

\textsuperscript{255} Buford v. Buford, 156 F.2d 567, 568 (D.C. Cir. 1946).

\textsuperscript{256} 102 F.2d 272, 274 (D.C. Cir. 1939).

\textsuperscript{257} Jaffe v. Jaffe, 124 F.2d 233, 234 (D.C. Cir. 1941).

\textsuperscript{258} Thomas v. Murphy, 107 F.2d 268, 269 (D.C. Cir. 1939): "Since marriage is preferable to concubinage, this result seems socially sound."

\textsuperscript{259} Griffin v. United States, 183 F.3d 990, 992 (D.C. Cir. 1950).

\textsuperscript{260} CARDOZO, LAW AND LITERATURE 95-101 (1931).

\textsuperscript{261} 122 F.2d 213-214 (D.C. Cir. 1941).
of the prevailing view that a misstatement of intention cannot be the basis of obtaining money by false pretenses: "The fiction that a promise made without intent to perform does not embody a misrepresentation conflicts with the facts, with the deceit cases, and with the interest of society in protecting itself against fraud. . . . That a fool and his money are soon parted was once accepted as a sort of natural law. . . . But in modern times, no one not talking law would be likely to deny that society should protect mental as well as physical helplessness against intentional injuries."

In Johnson v. United States the casualty was the old common law rule that husband and wife are legally incapable of conspiring with each other. In holding that the married women’s emancipation laws made this rule obsolete, he declared: "... the relation of husband and wife does not prevent two persons from conspiring to commit an offense. The interest of society in repressing crime requires that the fact be recognized, and our common-law system does not require that its recognition await express legislative action."

Humaneness but not softness, yet concern for the interests of the community, disregard of technicalities, regard for substantial rights—these are the differing

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263 157 F.2d 209 (D.C. Cir. 1946).
264 King v. United States, 98 F.2d 291 (D.C. Cir. 1938); Bennett v. United States, 104 F.2d 209 (D.C. Cir. 1939); McGowen v. United States, 105 F.2d 791 (D.C. Cir. 1939), cert. denied, 308 U.S. 552 (1940); Berry v. United States, 113 F.2d 183 (D.C. Cir. 1940); Boyer v. United States, 132 F.2d 12 (D.C. Cir. 1942); dissent in Lindsey v. United States, 133 F.2d 368, 378 (D.C. Cir. 1942); Fretz v. United States, 140 F.2d 468 (D.C. Cir. 1944); Pope v. Huff, 141 F.2d 727 (D.C. Cir. 1944); Hawkins v. United States, 158 F.2d 652 (D.C. Cir. 1946), cert. denied, 331 U.S. 830, 869 (1946). See Edgerton, Corporate Criminal Responsibility, 36 YALE L.J. 827 (1927), especially at 833.
265 Johnson v. United States, 110 F.2d 562 (D.C. Cir. 1940); dissent in Welch v. United States, 135 F.2d 465, 467 (D.C. Cir. 1943), cert. denied, 319 U.S. 769 (1943); Williams v. Huff, 142 F.2d 91 (D.C. Cir. 1944). "A repellant charge does not destroy the presumption of innocence or justify a conviction on evidence which is neither competent nor trustworthy."
266 King v. United States, 98 F.2d 291 (D.C. Cir. 1938); Guy v. United States, 107 F.2d 288 (D.C. Cir.), cert. denied, 308 U.S. 618, 640 (1939); Morris v. District of Columbia, 124 F.2d 284 (D.C. Cir. 1941); dissent in Lindsey v. United States, 133 F.2d 368, 378 (D.C. Cir. 1942); Fretz v. United States, 140 F.2d 468 (D.C. Cir. 1944); Boyer v. United States, 132 F.2d 12 (D.C. Cir. 1942); Bord v. United States, 133 F.2d 313 (D.C. Cir. 1942), cert. denied, 317 U.S. 671 (1942). In the Lindsey case, supra at 380, he declared, quoting Wigmore: "It is neither correct nor useful to attach 'the monstrous penalty of a new trial' to supposed technical errors, if any, which are not prejudicial."
267 Williams v. United States, 110 F.2d 554 (D.C. Cir. 1940); Boyer v. United States, 132 F.2d 12 (D.C. Cir. 1942); Brown v. United States, 152 F.2d 138 (D.C. Cir. 1945).
and often conflicting considerations which Judge Edgerton has weighed and balanced. Though the criminal law is not a game in which "a wrong move by the judge means immunity for the prisoner,"\textsuperscript{268} the prisoner's rights must be respected.\textsuperscript{269}

**Torts**

Judge Edgerton's treatment of the cases in this field exemplifies his practice of evaluating and reappraising legal rules. He does not adopt reform for reform's sake. Contribution among joint tortfeasors, a reform advocated by respectable authority,\textsuperscript{270} was rejected because he doubted whether it was good for society "even though it [the common law denial of contribution] mars a theoretical symmetry in the law of negligence."\textsuperscript{271}

While recognizing that the law does not permit recovery for all nervous shock, he breached the common law wall against recovery in such cases.\textsuperscript{272} Despite the dearth of authority, he sustained the right of a married woman to sue her husband's co-conspirator in the making of a false

\textsuperscript{268} King v. United States, 98 F. 2d 291, 296 (D.C. Cir. 1938).
\textsuperscript{269} In one of his pre-judicial writings, Edgerton, Book Review, 19 CORNELL L.Q. 511, 512 (1934), he declared: "When prosecutors always seek justice rather than convictions, when prisons are preventive and curative rather than vindictive, when sentences are short and parole is prompt for men who are no menace to society, criminal defense may have little appeal to socially-minded lawyers. But while the four corners of the country can produce a Mooney case, a Centralla case, a Sacco-Vanzetti case and a Scottsboro case, some men are playing a deadly game in the name of the state, and the game that other men play in behalf of defendants is relatively humane as well as inevitable."

The sensible practice of permitting the jury to take with them a written copy of the judge's instruction was approved, because "We see no good reason why the members of a jury should always be required to debate and rely upon their several recollections of what a judge said when proof of what he said is readily available." Copeland v. United States, 152 F.2d 769, 770 (D.C. Cir. 1945), \textit{cert. denied}, 328 U.S. 841 (1946).

The rule against the use of evidence of other crimes has not been a shibboleth, Bord v. United States, 133 F.2d 313 (D.C. Cir.), \textit{cert. denied}, 317 U.S. 671 (1942); Copeland v. United States, 152 F.2d 769 (D.C. Cir. 1945), \textit{cert. denied}, 328 U.S. 841 (1946), but has been followed when injustice would result if it were not. Boyer v. United States, 132 F.2d 12 (D.C. Cir. 1942).


\textsuperscript{271} Dissent in George's Radio, Inc. v. Capital Transit Co., 126 F.2d 219, 223 (D.C. Cir. 1942); quoting from James, Contribution Among Joint Tort-feasors: A Pragmatic Criticism, 54 Harv. L. Rev. 1156, 1169. See also, Yellow Cab Co. v. Janson, 179 F.2d 54 (D.C. Cir. 1949).

\textsuperscript{272} Clark v. Associated Retail Credit Men, 105 F.2d 62 (D.C. Cir. 1939); Colpoys v. Foreman, 163 F.2d 908 (D.C. Cir. 1947).
charge of adultery in a divorce suit.\textsuperscript{278} He has taken a broad view of the right to redress for false arrest and imprisonment. In one case, though police officers actually made the arrest, Judge Edgerton sustained the liability of the telephone company whose employees pointed out the plaintiff to enable the police to seize him.\textsuperscript{274} In another he held a psychiatrist liable for advising the police to detain a woman as insane without following the statutory procedure for commitment. ‘Not only the perpetrator but the instigator of unlawful violence is fully responsible to its victim. A request or advice, express or implied, that is effective in fact is effective in law; neither command nor authority is necessary. . . . In providing protection for persons whose relatives think or pretend to think they require restraint because of mental illness, Congress necessarily struck a balance between individual liberty and public safety. A policeman or a psychiatrist may think Congress should have drawn the line in a different place but may not make arrests on that theory.’\textsuperscript{276} In a similar vein, Judge Edgerton held a United States Marshal liable for forcible entry into a home to serve a valid warrant of civil arrest for contempt.\textsuperscript{278}

The defamation cases demonstrate the balancing process. On the one hand the social objective of providing a remedy for injury creates a drive for redress for harmful statements. On the other hand “Whatever is added to the field of libel is taken from the field of free debate.”\textsuperscript{277} Accordingly, even in the face of contrary judicial opinion, Judge Edgerton held that a charge of price cutting was slanderous \textit{per se}, as harmful to the plaintiff’s business, though there is no consensus in the community against the practice;\textsuperscript{278} and in the same opinion he ruled that ambiguous statements subject to interpretation as aspersions upon business credit were also actionable \textit{per se}.\textsuperscript{278}

In \textit{Colpoys v. Gates} he held that the United States Marshal for the District of Columbia was liable for his defamatory statements about deputy marshals who, after suspension, had resigned their positions.

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\textsuperscript{278} Ewald v. Lane, 104 F. 2d 222 (D.C. Cir. 1939).
\textsuperscript{274} Chesapeake & Potomac Telephone Co. v. Lewis, 99 F. 2d 424 (D.C. Cir. 1938).
\textsuperscript{276} Jillson v. Caprio, 181 F. 2d 523, 524-525 (D.C. Cir. 1950).
\textsuperscript{278} Colpoys v. Foreman, 163 F. 2d 908 (D.C. Cir. 1947).

See also Soffos v. Eaton, 152 F. 2d 682 (D.C. Cir. 1945), for another interesting instance of redress for tort.
\textsuperscript{278} And, it might be said but was not, despite the fact that many successful and respected businesses have been built up on the reputation of price cutting. Indeed, in a competitive economy, it appears to be anomalous that price competition in itself should bring disrepute.
\textsuperscript{279} Meyerson v. Hurlbut, 98 F. 2d 232 (D.C. Cir. 1938).
\end{flushleft}
Though a cabinet officer is "absolutely privileged to publish defamation, not only in doing his duty but also in discussing it" such a privilege does not extend to a marshal whose duty to dismiss his deputies does not include the duty "publicly to discuss their dismissal." In *Thackrey v. Patterson* Judge Edgerton sustained a libel suit by a newspaper publisher and her editor, who were husband and wife, against another publisher who had printed articles charging marital discord between the plaintiffs and romantically linking the wife's name with a third publisher. And in proving a case of libel, the plaintiff was accorded wide latitude to show malice and hostility.

But in *Potts v. Dies* Judge Edgerton held that a publication by a Congressman which charged a magazine with Nazi sympathies was privileged because "Published work is of public interest. It is well settled that fair criticism or comment on matters of public interest is not actionable in the absence of 'malice,' i.e., bad faith or bad motive. . . . the qualities which [an author or publisher] has shown by what he has published are open to such analysis and comment as an honest and intelligent man might make." In *Sweeney v. Patterson* he held that newspaper articles written by the columnists Pearson and Allen charging a Congressman with anti-semitism in his political activity were privileged because of the public interest in information and discussion regarding the governing body of the nation. "Cases which impose liability for erroneous reports of the political conduct of officials reflect the obsolete doctrine that the governed must not criticize their governors." And in *Brown v. Shimabukuro* he construed the absolute privilege accorded pleadings and affidavits to include all statements "that a reasonable man might think . . . relevant" even though they are not "relevant in any strict sense."

Years before he became a judge, Edgerton wrote: "I believe that, in cases which present problems of 'legal cause' in the familiar sense of the phrase, it is seldom possible to isolate a question the answer to which will not be influenced by the trier's ideas of policy or justice." Certainty and fixed rules in this area of the law are not possible or desirable since "The field is one in which intelligence cannot accomplish a decent

280 118 F. 2d 16, 17 (D.C. Cir. 1941).
281 157 F. 2d 614 (D.C. Cir. 1946).
285 118 F. 2d 17, 18 (D. C. Cir. 1941).
result without the aid of intuition" and a judgment as to policy. This judgment must be made by the trier of the fact—the jury in a jury trial, the judge in a trial by the court.

These statements keynote much of his judicial writing in negligence cases. In Christie v. Callahan, dissenting against holding a doctor liable for malpractice in X-ray treatments, he concluded that it was "doubtful whether a jury could reasonably find" that the doctor’s treatment caused the injury. But regardless of causation, he contended there was no substantial evidence of negligence. In Hecht Co., Inc. v. Harrison he sustained a jury’s finding of negligence in favor of a store customer who was tripped by a 3/16 inch difference in level between a floor and the end of a ramp, although thousands of other customers had walked through the same place without injury.

In several cases Judge Edgerton dealt with the legal effect of intervening acts by third persons. He held that an "intermeddler’s conduct [which] was itself a proximate cause of the harm, and was probably criminal" did not insulate from liability the owner of a truck left unlocked in violation of an ordinance. He refused to apply the family car doctrine because the father was only the nominal owner and the daughter who drove the car had supplied all the funds for its purchase and maintenance. In Balinovic v. Evening Star Newspaper Co., perhaps the most dramatic case in this group, Judge Edgerton held that liability for injury caused by a newspaper’s truck and its driver, commandeered by the police for pursuit, could not be imposed upon the newspaper company. He reasoned that at the time of the injury the driver "was

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289 "If anything substantial is to be left of the jury’s fact-finding function in the matter, they cannot be prevented from considering policy and justice along with ‘pure fact.’ There is no way of unscrambling the eggs, and giving the whites to the jury while the judge gets the yolks." Edgerton, Book Review, 29 Cor. L. Rev. 229, 232 (1929).
290 "Whenever a jury decides that anything is ‘reasonable’ it gives effect to its ideas of policy; it weighs interests." Edgerton, supra note 289, at 232.
291 124 F.2d 825, 842 (D.C. Cir. 1941); the majority opinion was by Rutledge, J. The treatments were for a pilonidal cyst, which after the treatments, necrosed and sloughed off.
292 137 F.2d 687 (D.C. Cir. 1943).
294 Smith v. Doyle, 98 F.2d 341 (D.C. Cir. 1938); this case was nullified by legislation in effect at the time of the decision but enacted subsequent to the accident. See 98 F.2d at 344; Jones v. King, 113 F.2d 522 (D.C. Cir. 1940).
doing the work of the District of Columbia”; that the government’s immunity did not shift liability to the company; that “chasing criminals” was remote from the work of the company; and that the news company “by putting the driver on the road and keeping him there, did not create the risk that the criminal-catching activities of the District would injure a bystander.”

He reversed a tort judgment for money damages against an employer for a homicide which an employee had committed because the slain man had taunted the employee and prevented him from obtaining drinking water. He held that the killing was not within the scope of employment; that the jury was not warranted in inferring that the employee “was actuated by any other motive than the purely personal one of revenge. . . . Where water is plentiful, a man does not break another’s skull in order to get it.” In another case Judge Edgerton wrote for reversal of a judgment against an employer on the ground that the employee whose automobile caused the injury was a “free lance” salesman over whose driving and course the employer did not have a degree of control sufficient to impose vicarious liability.

Judge Edgerton has uniformly urged recognition of liability for injuries caused by dangerous conditions on real property. In Eastburn v. Levin he applied the attractive nuisance doctrine to sanction recovery by a child injured in a junk yard by a junked car which the child could not see from the street. Distinguishing the leading case of United Zinc Co. v. Britt, and relying upon more favorable Supreme Court decisions, he said: “Junked cars attracted him and a junked car injured him. He cannot be required to show that he was injured by the same specimen, as well as the same species, which lured him to the premises. . . . the liability in question is less exceptional than is sometimes supposed. Rather, the immunity of occupants of land, so far as immunity persists, from responsibility for unreasonably dangerous conditions is one of the exceptions to the growing and healthy tendency of the law to require all

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296 Park Transfer Co. v. Lumbermens Mut. Casualty Co., 142 F. 2d 100 (D.C. Cir. 1944).

297 Rabenovets v. Crossland, 137 F.2d 675 (D.C. Cir. 1943). In neither of these two decisions, adverse to the plaintiffs, was relief for the injury altogether lacking. In the Rabenovets case the very same opinion affirmed the judgment against the salesman. In the Park Transfer Co. case, supra note 296, the family of the slain man had recovered workman’s compensation, and the suit in reality was by the compensation insurance company to shift the loss to the employer or his insurer.

298 Holmes, J., 258 U. S. 268 (1922), which held that the dangerous condition causing the injury must attract, i.e., be visible to, the trespassing child before he enters the defendant’s property.
social conduct to conform to social standards. In *Gleason v. Academy of the Holy Cross*, Judge Edgerton rejected the traditional distinction between social and business guests, or gratuitous licensees and business invitees, and imposed liability upon a school for injury caused to a guest by a hidden step. In *Doctors Hospital v. Badgley*, the affirmative duty of discovering wetness on a floor was imposed upon a hospital. In *Washington Loan & Trust Co. v. Hickey*, in which a portable ventilator owned by a tenant fell from an outer window ledge and injured a passerby, Judge Edgerton held that "A landlord who keeps control of part of his building and leases space to different tenants must use care to keep the windows and screens, and the exterior generally, of the leased space from becoming dangerous to passersby. It was appellant's duty not merely to refrain from doing dangerous acts or creating dangerous conditions . . . it was also its duty to use reasonable care, i.e., to make reasonable efforts, to discover and to eliminate such conditions if others created them." He rejected the common law rule that a landlord has no duty to light an outside stairway of an apartment house. He extended the landlord's duty of care of the common parts of an apartment house to the electrical system, including the switches in tenants' apartments.

He has construed the "last clear chance" doctrine broadly. The requirement that the person injured must be oblivious to the danger or unable to extricate himself has been attenuated. He even urged the extension of the doctrine to cover a case in which, though the injured person had seen the streetcar immediately before it struck her, the motorman, to a mathematical certainty, had had ample opportunity to stop the car.

In this field, too, he has not permitted technicalities to triumph over realities and prevent a just result.

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299 113 F. 2d 176, 178 (D.C. Cir. 1940). But see Harris v. Roberson, 139 F. 2d 529 (D.C. Cir. 1943), not involving a dangerous condition on land, however, in which the attractive nuisance doctrine was held by Judge Edgerton not to extend "to things which become dangerous only when adults set them in motion."

300 168 F. 2d 561 (D.C. Cir. 1948).
301 156 F. 2d 569 (D.C. Cir. 1946).
302 137 F. 2d 677, 678 (D.C. Cir. 1943).
303 Kay v. Cain, 154 F. 2d 305 (D.C. Cir. 1946).
307 See, for example, Alamo v. Del Rosario, 98 F. 2d 328 (D. C. Cir. 1938); dissent in Christie v. Callahan, 124 F. 2d 825, 840 (D.C. Cir. 1941).
Judge Edgerton's style is a powerful instrument of his art, and one of his distinguishing qualities. His opinions, except a few concerning civil rights, are very brief. Eschewing both literary flourishes and extensive authoritative quotations, he tailors his writing to the task in hand with meticulous severity. The precision of his phrasing cuts the point at issue to the bone; the less attentive reader may even feel at times that he pares off some of the skeletal parts. His knack of reasoning simply by contradictories, i.e., demolishing a proposition by posing its opposite, makes it possible to omit intermediate links in the chain of logic. This sparseness may sometimes convey an appearance of austerity. Yet often the words strike fire and, as in the opening phrases of the Bailey case opinion and in paragraphs of his Negro rights cases, may even be deeply moving.

Any appraisal of a living and active judge is necessarily incomplete. Yet it may be more useful to the bench and bar, and to the public, than it would be if he had written his last opinion. Judge Edgerton's appointment was part of a new development—elevation to the bench of many teachers of law—which aroused criticism in some quarters. The work of these jurists is a measure of the desirability of resorting to the universities for judicial candidates.

Attempts have been made to prescribe the essential characteristics of a good judge. A single epochal achievement or quality has sometimes been selected as the measure of greatness. Judge Learned Hand, in his short eulogy of Mr. Justice Cardozo, emphasizes wisdom. "And what is wisdom ...? I do not know; like you, I know it when I see it, but I cannot tell of what it is composed." Others have chosen statesmanship, an admirable philosophy expressed with great literary art, or the "creative spirit". Since greatness is unique, its distinguishing

307* See p. 184 supra.
309 Ibid.
310 Parker, THE JUDICIAL OFFICE IN THE UNITED STATES, 23 N.Y.U.L.Q. REV. 225, 227-229 (1948). Judge Parker lists: (1) character, i.e., intellectual and financial honesty, courage, and sympathy, (2) ability, i.e., learning and wisdom, (3) independence, and (4) experience in the practice of law.
311 Evatt, MR. JUSTICE CARDOZO, in ESSAYS DEDICATED TO MR. JUSTICE CARDOZO (1939).
312 Learned Hand, MR. JUSTICE CARDOZO, in ESSAYS DEDICATED TO MR. JUSTICE CARDOZO (1939).
marks must vary from person to person. 316

Dean Pound has told us that four characteristics have caused certain American judges to be "rated in the first rank": (1) mastery of the lawyer's craft, (2) coincidence in time with a formative legal era, (3) sound judicial technique and sound judgment and discretion in expounding, interpreting and applying the law, and (4) legal scholarship. 317 In discussing the work of Dean Pound's kinsman, Judge Pound, Edgerton called him a great judge by these criteria and also in his varied knowledge and understanding of life, his grasp of the background and meaning of the diverse problems before his court, the excellence of his style, his "tolerance toward statutes, judicial legislation and change," his "ability to differentiate between the interests of the privileged class to which judges belong and the interests of society," and his "impulse to protect the interests of the unprivileged." 318 Two other qualities should be mentioned; courage, which is indispensable to intellectual honesty, and a sense of humor, so essential to objectivity and to clarity of understanding. By many of these standards Judge Edgerton ranks high in the history of our judiciary and of our time.

316 "He is great who is what he is from Nature, and who never reminds us of others." Emerson, Representative Men. Uses of Great Men 6 (Houghton Mifflin Co. 1903).


318 Edgerton, supra note 317, at 45.