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## A Judge Judges Judges

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*United States Circuit Court for the Fourth Circuit*

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# WASHINGTON UNIVERSITY LAW QUARTERLY

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## A JUDGE JUDGES JUDGES\*

ARMISTEAD M. DOBIE†

It is indeed a gladness and a joy for me to be privileged to speak at this time, in this presence and on this occasion. When I was a young lawyer here in St. Louis, at the beginning of this century, Tyrrell Williams and I became good friends and I formed a deep admiration for him as a man, a lawyer, a teacher and a dean. Altogether fitting is it that a memorial lectureship should be established to commemorate his loyal and distinguished service to the Law School of Washington University.

The story is told of the Greek painter Appelles that a shoemaker criticized the painting of a shoe in one of the master's pictures. Appelles, recognizing the technical knowledge of shoes possessed by a shoemaker, made the suggested change. The emboldened shoemaker then began to criticize other features of the picture, whereupon he was sternly bidden by Appelles to stick to his last. Now, by the kindness of Franklin D. Roosevelt, the charity of the United States Senate, and the grace of God, I am a judge. And I shall obey the injunction of Appelles by sticking to my last.

To my lecture this morning, I have given the somewhat cryptic title, "A Judge Judges Judges." This I have done not with the idea of lending to my scattered remarks an adventitious dignity they would not otherwise possess, but merely because those elusive spirits, custom and convention, require that we christen even children of the brain.

If judges are to be judged, they would doubtless prefer to be judged by judges, whose critical judgments on their brothers are certainly tempered by sympathy and founded in experience. And

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\* Tyrrell Williams Memorial Lecture, delivered before the School of Law of Washington University, May 2, 1951.

† United States Circuit Judge for the Fourth Circuit.

I have little sympathy with the attitude of some judges who appear to resent any criticism of their judicial acts. Judges inhabit no ivory tower; they sit upon no holy hill. On the contrary, they are of, for and by the people and should welcome any criticism, provided only it be fair and intelligent. Said Chief Justice Taft in an address before the Judicial Section of the American Bar Association:

Judges are men and are not so keenly charged with the duty of constant labor that the stimulus of an annual inquiry into what they are doing may not be helpful. With such mild visitation they are likely to cooperate much more readily in an organized effort to get rid of business and do justice.

Criticizing judges has long been, and will doubtless remain, a popular indoor sport. My own feeling is not that of a young matron who, when asked if she liked indoor sports, promptly replied "I did till I married one."

On the other hand, judges very properly resent criticisms of the prejudiced, the uninformed and the unintelligent, which have no basis in either fairness or fact.<sup>1</sup> And particularly is this true, when a disgruntled lawyer who has lost a case is too prone, in an attempt to explain his lack of success to a client, to resort to vilification of the judge.

My viewpoint must be that of one on the inside looking out. Time does not permit my approach to be historical; I shall try not to make it hysterical. Since many within sound of my voice (which includes rather a wide area) are not versed in the lore and language of the law, I shall not be technical, and, as I believe in safe and sane celebrations, I shall use my utmost endeavor not to be pyrotechnical.

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1. See, for example, an utterly unfair (but very widely read) article *Behind the Black Robes* by Howard Whitman, in the February 1948 number of *The Woman's Home Companion*, which begins:

On the benches of America, along with our wise judges, our learned judges and our Solomons, we have a shocking—almost unbelievable—number of incompetents, idlers, tyrants, political hacks, knaves and bunglers. Some of our judges are so unfit they rely on secretaries and hangers-on to write their decisions. Some sleep on the bench. Some are alcoholics. Some are such miserable administrators no business firm in the country would tolerate them.

Minority though they are, such judges are a repugnant blemish on the face of justice. They have hidden too long behind the black robe and the awesome aura of 'Your Honor' and 'If it please the Court.' They are a disgrace to your able righteous judges. And more important, they are a menace to *your rights* as a citizen.

The origin of the office and title of judge is lost in the mists of time; many people doubtless hope it will never be found. Always the title has been one of dignity and importance. The ancient Israelites, as one of the highest attributes of God, were fond of describing God as "Judge of all the earth."<sup>2</sup> Certainly that effectively disposes of all questions of jurisdiction.

And as you well know, the seventh book of the Old Testament is the Book of Judges, which contains many interesting items about the early judges of Israel. To me one of the most interesting of items is the fact that the Fourth Judge of Israel was a woman by the name of Deborah. According to the scriptural narrative, she was not only an excellent judge, but also a songstress and a prophetess.<sup>3</sup> We are not told that her judicial utterances were in song, so captious critics cannot speculate whether her juristic notes in the middle register were round and clear or whether her legislative judgments were sometimes off-key. One cannot help wondering, were Deborah alive today, whether, in her role of prophetess, she could foretell what would be the decision of the United States Supreme Court on a pending case, and how many Justices of that great Court would dissent, how many would concur.

There are, so the judges themselves tell us, many classifications of judges. Thus, on the basis (or *fundamentum divisionis*) of direction, judges are divided into judges *ad quem*, to whom a case comes, and judges *a quo* from whom a case goes. I strongly suspect there is an omitted class on this score (or *tertium quid* as the logicians say)—those judges who do not know where they are going but are on their way.

Perhaps the most important practical classification of judges divides them into trial judges and appellate judges,<sup>4</sup> whose functions are quite different. The trial judge (sometimes alone, sometimes with the aid of a jury, a referee, a master or a commissioner) actually tries the cases. His may be called the worm's-eye viewpoint, from the bottom looking up. The appellate judge

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2. See GENESIS, ch. 18, v. 25; DEUTERONOMY, ch. 32, v. 36; PSALMS, ch. 92, v. 4.

3. JUDGES, chapters 4 and 5.

4. It is interesting to note that in the federal judicial system, the District Court (with a few unimportant exceptions) exercises only original jurisdiction; the United States Court of Appeals has only appellate jurisdiction; the United States Supreme Court is given both original and appellate jurisdiction.

really tries the trial judge's conduct of the case, so the appellate judge's viewpoint might be described as the bird's-eye viewpoint, from the top looking down.

I have myself been both a trial judge and an appellate judge. Without hesitation, I express the opinion that the trial judge is the more practically important of the two. He it is that brings justice home to the public; he is the one with whom the people are thrown into contact and whom they know. From him, in large measure, is derived the popular conception of the administration of justice. His must be the power, in many instances without the aid of elaborate argument or written brief, of quick and accurate decision on points of law which he could not possibly have foreseen. His is the dramatic role in the comedy or tragedy of the law. The cases before him are in truth legion; by comparison, only a small majority of his cases ever reach an appellate court.

Here in these United States, an anomalous but fundamental classification divides our judges into state judges and federal judges. It is indeed difficult to explain to a layman the distinctions and differences between the two systems of courts; yet these distinctions, as to both jurisdiction<sup>5</sup> and procedure,<sup>6</sup> are many, varied and important.<sup>7</sup> Federal judges are appointed for

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5. In some instances, the jurisdiction of state and federal courts is concurrent; in others, the jurisdiction of one system is exclusive of the other.

6. Procedure in the District Courts of the United States is governed, on the civil side by the FEDERAL RULES OF CIVIL PROCEDURE, on the criminal side, by the FEDERAL RULES OF CRIMINAL PROCEDURE.

7. In any Utopian political state there would be a single system of courts to administer the laws of that state, and, further, simplicity in that one organization would be the substance of things to be hoped for, judicially. With two systems of courts must almost inevitably come some indescribable confusion, some unfortunate uncertainty in the legal order. If the jurisdiction of the two systems be rigidly exclusive, each of the other, regrettable waste of preliminary effort ensues, when the litigant must determine which of the two systems is the proper one for his suit, the amount of that waste depending on how sharply and how clearly the lines of cleavage are drawn between the jurisdictions of those systems. If the jurisdiction of the two systems be (totally or partially) concurrent, the even unhappier spectacle is presented of a litigant winning in one system when he would (or might) have lost in the other (or vice versa), with more or less contempt, primarily for the state in which such a situation can exist, secondarily for the judicial organization which makes uncertainty as to the nature and extent of legal rights an integral part of its functioning.

The fathers of the Constitution, however, saw clearly (and the results seem amply to have vindicated their wisdom) that, without

life by the President of the United States, subject to confirmation by the Senate, and the average salary of a federal judge is far in excess of that paid to his brethren on state courts. Comparisons, though perhaps odious, are none the less interesting. It is my own belief (though I admit to being a prejudiced witness) that, in the main, federal judges, on the scores of competence and distinction, compare more than favorably with state judges. With more confidence, I express the view that the federal courts tend more and more to acquire jurisdiction of the most important and the most far-reaching cases which American courts are called upon to decide.

Oddly enough, a fact familiar to lawyers but not to laymen, the powers of a judge are conditioned and limited by time and place. A judge may do a number of things in open court<sup>8</sup> which he may not do in his chambers; while a judicial step, proper in the earlier procedural stages of a case, cannot be taken at a later stage of the case.<sup>9</sup>

It has always seemed passing strange to me how badly the judge has fared in song and story. Poems, plays, novels, stories—all have been written for the glorification, sometimes almost the apotheosis, of the doctor, the priest and the teacher. Not so with the poor old judge. Usually he is held in fiction as either a vindictive tyrant, a fatuous ass, or (as is too current in American screen plays) as a stooge or middleman to give point and pith to the jokes of the handsome young district attorney or the lovely girl on trial before him. Notable exceptions in modern American fiction are Irvin Cobb's lovable Judge Priest and

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a federal judicial branch of the government, the Constitution, laws and treaties of the United States might indeed prove a futile 'supreme law of the land.' A supreme federal government, with its powers enumerated in a written Constitution, seemed to connote an entirely separate federal judiciary with power to pass finally on the nature and extent of those powers. One almost instinctively shudders at what might have been had the Constitution been turned over to the tender interpretative mercies of the courts of the states, or even to the final decisions of any system of courts, other than a federal system created by that very instrument itself. DOBIE, *FEDERAL PROCEDURE*, 2, 3 (1928).

8. Thus Rule 18 of the *FEDERAL RULES OF CRIMINAL PROCEDURE* begins with these words: "Arraignment shall be conducted in open court."

9. It is, of course, true, too, that certain objections by counsel must be seasonably made. Thus, under Rule 51 of the *FEDERAL RULES OF CIVIL PROCEDURE*: "No party may assign as error the giving or the failure to give an instruction [by the judge] unless he objects thereto before the jury retires to consider its verdict."

Melville Davisson Post's Judge Braxton; but the activities for which these two are extolled are quite extra-judicial.

Thus in Pope's *Rape of the Lock*, we find:

The hungry judges soon the sentence sign,  
And wretches hang that jurymen may dine.

The best that Shakespeare could do in *As You Like It* was to describe the justice "in fair round belly with good capon lined." Dickens is even more bitter. Everyone remembers the interminable suit of *Jarndyce v. Jarndyce* in *Bleak House*, to say nothing of the scathingly clever account of the great case of *Bardell v. Pickwick*, in which Mr. Justice Stareleigh, ably assisted by those mendacious mountebanks, Sergeant Buzfuz and Sergeant Snubbin, gives an excellent example of how to dispense with justice.

Arthur Train, in one of his charming stories about the delectable Mr. Tutt, thus describes Judge Rufus Bunbury:

The Honorable Rufus, on the other hand, looked exactly like a judge. He was fifty-one years old, portly, with a clean shaven, rather flabby face, pale blue eyes and an impressive dome streaked with thin gray hair and dotted with liver spots. . . . Judge Bunbury knew he was not an admirable person, but, being a pragmatist, whenever his conscience reared its head, he pushed it gently down.

If this be an accurate description, who, I ask you, would want to look "exactly like a judge?" Since when has it been characteristic of a judge that his liver is unacquainted with the functional approach? To one, then, whose ideas of the typical judge are gleaned from modern fiction, the judge must be classed as a periodic pest, in the same category as the boll weevil, the seven year locust and the after dinner speaker.

The Honorable Joseph C. Hutcheson, Chief Judge of the United States Court of Appeals for the Fifth Circuit, my colleague and distant cousin (he lives in Texas and I live in Virginia) gives us, on a very high plane, this picture:

If you ask me what is the prime requisite of the ideal judge, I must tell you that it is faith. If you ask me, faith in what, I must tell you faith in the natural law principles upon which our freedom depends, faith in the rights of man, faith in the constitution which declares and in the constitutional way of life which protects them, faith in law as liberator, faith in the justice of the general will, faith in the American way of life, faith, in short, in the principles and

practices which in Madison's immortal phrase 'enable the government to control the governed, yet also oblige it to control itself.'

From the *Canons of Judicial Ethics of the American Bar Association*, I quote:

#### What a Judge Should Be

In every particular his conduct should be above reproach. He should be conscientious, studious, thorough, courteous, patient, punctual, just, impartial, fearless of public clamor, regardless of public praise, and indifferent to private political or partisan influences; he should administer justice according to law, and deal with his appointments as a public trust; he should not allow other affairs or his private interests to interfere with the prompt and proper performance of his judicial duties, nor should he administer the office for the purpose of advancing his personal ambitions or increasing his popularity.

Certainly, any judge who fully, fairly and freely lives up to these Canons, deserves well of the Commonwealth. Indeed, to go further, he seems assured of a golden crown and a celestial harp in that far-off land, where "beyond these voices there is peace." Or, to put it another way, we shall find the ideal judge if, as and when there is combined in a single person the strength of Samson, the patience of Job, the wisdom of Solomon, the statesmanship of Marshall, the economic foresight of Mansfield, the political acumen of Machiavelli, the trenchant pen of Holmes and the nervous system of William J. Bryan.

This brings me to a brief discussion of what manner of judge has brought the bench into disrepute. Obviously, the worst offender is the corrupt and venal judge, who has sullied the ermine by betraying a high trust for his personal gain. No punishment, short of death, is too severe for him, but fortunately such judges have been very few and exceedingly far between.

Popular clamor has justly been directed at two other types of judges. The first of these is the pompous and arbitrary judge. He regards himself not as a minister in the temple of justice, rather as justice personified. On the bench, he knows nothing of courtesy or consideration for others. He rides rough-shod over other officers of the court, clerks, marshals, referees and commissioners; they are merely dust beneath his judicial feet and shine, when permitted to shine at all, only in the glory reflected from



him. Lawyers, jurors and witnesses merit only moderate contempt from the judicial stuffed shirt. It is a common argument against judicial life tenure that it tends to breed such judges.

Far more common than the corrupt judge or the arbitrary judge, and far more detrimental to the efficient administration of justice is the lazy judge, who seldom lets his manifest duty interfere with either his private pleasure or his personal convenience. He is the sand in the judicial gear-box. His theme-song appears to be "Please go way and let me sleep;" his motto, "Never do today what you can put off till tomorrow." True it is that a court cannot be run along the lines of a retail grocery store, yet almost any business would be wrecked if those in charge pursued the dilatory tactics of the procrastinating judge.<sup>10</sup> The public here has been long suffering and of great tenderness, and much of the blame must fall on the lawyers who have aided and abetted in the perpetuation of this needless nuisance. Every judge knows the lawyer whose chief stock-in-trade seems to be a perpetual desire for an eternal continuance.

I am glad to state that in the United States Court of Appeals for the Fourth Circuit, of which I am proud to be a member, the average time for the disposal of a case, after argument and submission is measured in weeks, not years or even months. No fixed limit is set beforehand to the length of each regular term of court;<sup>11</sup> we sit as long as is necessary to hear every case on the docket.<sup>12</sup> We emulate the example of our brethren of the British Privy Council by deciding cases utterly lacking in merit before we rise from the bench. And I heartily recommend to my appel-

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10. In the federal judicial system, the Circuit Judges of each Circuit constitute a Judicial Council, charged with expediting the work of the federal courts in the Circuit. In my own Circuit, the Fourth, we have found occasions in a few instances to use this power very effectively. Similar expediting machinery is a crying need for the courts of our States.

11. When occasion demands, we hold special terms for the prompt disposition of important cases. Thus we held a special term recently in Baltimore, the most convenient city in the Circuit for the lawyers. A decision was reached and announced to the lawyers just one hour after the conclusion of the arguments.

12. Many United States Courts of Appeals sit regularly only in a single city. Thus, in the First Circuit, the Court sits only in Boston; in the Second Circuit, the Court sits only in New York; in the Third Circuit, the Court sits only in Philadelphia. Others of these courts are migratory. Thus, our Court sits each year in Richmond, Baltimore, Charlotte and Asheville. This is a bit hard on the judges but it is a great convenience to lawyers and it has the added advantage of bringing a federal appellate court to the attention of the people in many places within the Circuit.

late brethren our practice of frequently writing a very brief per curiam opinion when a case is quite devoid of legal consequence.

A good deal has been written and said about the *judicial mind*.<sup>13</sup> Much of it seems to me, in the language of Hamlet, "Words, words, words." If by the term *judicial mind* is meant that, in his mental processes, the judge works in thought-tight compartments, entirely oblivious of what is going on in the workaday world outside, then I think as the old Negro said when he first saw a giraffe: "There ain't no such animal." A man becomes no less a man when he dons the black robe; the more of a man he remains, the better is he as a judge.

Any experience, I care not what its character or calibre, which extends a man's mental horizon, broadens his social philosophy and deepens his humility and sympathy, is that much gain for a judge just as it is for any individual charged with the responsibility of making decisions affecting human beings. And this is none the less true, though the approach of a judge to his problems, and the precise technique he employs in their solution, must and do differ from the approach and technique of other professions, such as pure science or medicine.

The job of the judge, and it is difficult to imagine a more important one, is to resolve human conflicts in the administration of justice under the law. This is not as simple as it sounds and seems. It is "of the essence of the law to be always torn between the ideal and the actual, the permanent and the changing, the right and the necessary, the general principle and the concrete case."<sup>14</sup> The theoretical internal coherence of law must often give way to practical external flexibility.

When these factors clash, as often they must and do, it is for the judge to hold the scales and to decide in favor of the one and against the other.<sup>15</sup> That is a difficult, delicate and dangerous

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13. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1928) is a classic in this field. See also, EMERY, *CONCERNING JUSTICE* (1914); JUDSON, *THE JUDICIARY AND THE PEOPLE*, (1913).

14. This quotation, and a large part of the analysis of this and the succeeding paragraph, are taken from an excellent article by Professor Iredell Jenkins, Chairman of the Department of Philosophy at the University of Alabama, *The Role of Ethical Values in Legal Decisions*, 12 OHIO ST. L. J. 36 (1951).

15. In the article just quoted (*Id.* at 43), Professor Jenkins writes: The literature of jurisprudence is replete with studies of problems where the law is torn between competing forces, or is made to choose

task. The judge must deal with human imperfections, with irreconcilable tensions, with hostile interests, with continually changing environmental conditions. And all of these are as many and as varied as the Miltonian leaves that "strewed the brooks of Vallembrosa."

Many jurists have envisaged a perfect legal order, with a permanent and all embracing code that can adjust with mathematical precision and complete justice all individual differences, without any resulting friction. That is a Utopian dream. Life is too complex, too rich, too imaginative, ever to be confined in a juristic straight-jacket or a Procrustean bed. There never has been, and there never will be, a judge worthy of his salt who can be classified as a cold and clammy thinking machine.<sup>16</sup> No judge, however he may try, can, in his decisions, completely and effectively divorce himself from what he has seen, has heard, has experienced and has been. He is like the man who met a friend who gave every appearance of deep sorrow. Said the man to the friend: "What on earth is the matter with you?" Replied the dejected friend: "I've just lost my mother-in-law and that is very hard." "Hard," rejoined the man, "I've found it impossible."

May I illustrate one phase of this discussion (the clash of law and morality)<sup>17</sup> with two actual cases: *Olef v. Holdap*,<sup>18</sup> decided by the Supreme Court of Ohio, and *Scarborough v. Atlantic Coast Line Ry. Co.*,<sup>19</sup> decided by the United States Court of Appeals for the Fourth Circuit Court?

In the *Olef* case, an uncle and a nephew had a joint bank account, so that either could at any time draw out the full account. The nephew murdered the uncle. Was the nephew entitled to the account? Under a technical rule of law, upon the death of one of the owners of a joint bank account, the survivor takes the account. On the other hand, it is a great equitable principle, based on morality, that no one should profit by his own wrong, and the wrong here was a brutal and sordid murder. The Supreme Court of Ohio awarded the account to the nephew, stating that

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between competing goals. In fact, one is justified in saying that every general theory of law, and every analysis of special legal problems, culminates in a dilemma; law always seems called upon to meet demands that are contradictory.

16. See Pound, *Mechanical Jurisprudence*, 8 COL. L. REV. 605 (1908).

17. See Ames, *Law and Morals*, 22 HARV. L. REV. 97 (1908).

18. 129 Ohio St. 432, 195 N. E. 838 (1935).

19. 178 F.2d 253 (4th Cir. 1949), *cert. denied*, 339 U.S. 919 (1950).

situation was covered by a precise rule of law establishing legal relations and the concrete rights arising therefrom; that a judge should not upset these actual constancies in the name of extra-legal principles of morality.<sup>20</sup> One judge dissented. Said the judge writing the majority opinion:

Property cannot be taken from an individual who is legally entitled to it because he violates a public policy. *Property rights are too sacred* to be subjected to a danger of this character. We are a court of law, not a theological institution. [Italics added]<sup>21</sup>

Said the dissenting judge:

It is a natural revulsion that arises on being compelled by judicial decree to assure to a murderer the fruits of his crime. . . . It is always hard to be forced to sacrifice the right for the sake of a syllogism. . . . Reason and authority sustain the conclusion that the murderer cannot recover the amount of the deposit.<sup>22</sup>

In the *Scarborough* case, a rascally claim agent of the railroad induced an ignorant and unsuspecting boy to delay a suit against the railroad until the expiration of the period prescribed in the statute of limitations. The claim agent, in the guise of a friend, told the boy that the claim agent would secure a handsome sum of money for the boy and warned the boy against seeking outside advice or hiring a lawyer. The question was whether the agent's fraud stopped the running of the statute of limitations. This statute was what lawyers call a substantive rather than a remedial statute. The weight of judicial authority was that while

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20. See CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS*, 40-41 (1928):

Let me take as an illustration of such conflict the famous case of *Riggs v. Palmer*, 115 N.Y. 506. That case decided that a legatee who had murdered his testator would not be permitted by a court of equity to enjoy the benefits of the will. Conflicting principles were there in competition for the mastery. One of them prevailed, and vanquished all the others. There was the principle of the binding force of a will disposing of the estate of a testator in conformity with law. That principle, pushed to the limit of its logic, seemed to uphold the title of the murderer. There was the principle that civil courts may not add to the pains and penalties of crimes. That, pushed to the limit of its logic, seemed again to uphold his title. But over against these was another principle, of greater generality, its roots deeply fastened in universal sentiments of justice, the principle that no man should profit from his own inequity or take advantage of his own wrong. The logic of this principle prevailed over the logic of the others.

21. *Olef v. Holdap*, 129 Ohio St. 432, 438, 195 N.E. 838, 841 (1935).

22. *Id.* at 447, 195 N.E. at 844.

fraud would stop the running of the remedial statute, fraud would not (and could not) have that effect on the substantive statute. The court held unanimously in favor of the boy. From the opinion I quote:

The ancient maxim that no one should profit by his conscious wrong is too deeply imbedded in the framework of our law to be set aside by a legislative distinction between the closely related statutes of limitations. Here the proper approach is not technical and conceptualistic. Rather, we think it should be realistic and humane. The spirit, not the letter, should control.<sup>23</sup>

I wish there were time to discuss at some length these two cases, in which two courts reached diametrically opposed conclusions, when in each case a rock-ribbed rule of technical law ran head-on into a generally recognized principle of universal morality. Much can be said, and much has been said, on this problem which is neither new nor unique and has as many facets as a diamond. It has often been before the United States Supreme Court, with varying results (frequently by a closely divided Court), notably in the *Minimum Wage Case*,<sup>24</sup> the *Shoshone Indians Land Case*<sup>25</sup> and the cases involving compulsory salutes to our flag by a religious group known as Jehovah's Witnesses.<sup>26</sup>

Certainly I do not attempt to offer any complete or universal solution, if any there be, to so complex a problem. I simply close this part of my discussion by telling you that the judge who wrote the *Scarborough* opinion, where fraud, like the villain in the old time melodrama, met with utter defeat, is the lecturer who stands before you this morning.<sup>27</sup>

And now, as Walter Winchell is wont to say, I must beat the red hand around the clock. Speaking for myself, I find my job as a federal appellate judge delightful, vivid and even romantic.

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23. *Scarborough v. Atlantic Coast Line Ry. Co.*, 178 F.2d 253, 259 (1949).

24. See *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *Adkins v. Children's Hospital*, 261 U.S. 525 (1923).

25. *Northwestern Bands of Shoshone Indians v. United States*, 324 U.S. 335 (1945).

26. See *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), overruling *Minersville School District v. Gobitis*, 310 U.S. 586 (1940).

27. For excellent discussions of many of the cases cited in the preceding notes, see Brown, *A Scholastic Critique of Case Law*, 12 OHIO ST. L. J. 14 (1951); Cohen, *Judicial Ethics*, 12 OHIO ST. L. J. 3 (1951); Hartman, *Value Analysis of Legal Decisions*, 12 OHIO ST. L. J. 23 (1951); Jenkins, *The Role of Ethical Values in Legal Decisions*, 12 OHIO ST. L. J. 36 (1951).

In figurative terms, through my judicial endeavors, I live more lives than the proverbial cat; I play more roles than the most versatile of actors. If variety is the spice of life, as many people think, and if you seek a spicy life, then I recommend that you get yourself appointed to the federal bench.<sup>28</sup>

For example, just before I left the Blue Ridge Mountains of Virginia, in writing an opinion in a thrilling admiralty case, I had to speak the language, and know the ways, of the men who go down to the sea in ships. Even further, in a violent storm on the broad reaches of the Atlantic, I went down in the bowels of the ship, into the engine room. In another admiralty case, with all ship's lights blacked out during World War II, I was (as we lawyers say) *pro hac vice* Captain of the United States Battleship New Mexico, which ran down and sank, off Nantucket Island, a \$9,000,000 cargo ship, and drowned over thirty men of her crew.

Figuratively speaking, I have been a yardmaster directing freight trains in one of the busiest railroad yards in America; I have been at the wheel of automobiles which killed scores of persons; I have successfully performed the most delicate surgical operations, though in two cases I sewed up sponges in my patients, with disastrous results; and as a fake minister of the gospel I read the marriage service for a fake bride and a fake groom. As a crooked trainer who doped a race-horse, I was disbarred from a leading Eastern race-track. I even invaded the sanctity of my lady's boudoir, when a young girl lost her eyesight through the inept use of a depilatory, or hair destroyer. I have figured in the most despicable of crimes, murdering innocent victims, burning houses to collect the insurance, and robbing national banks and post-offices. If all the prison sentences that I

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28. For a splendid article, see *A Judge Looks at His Job: The Rewards and Burdens of the Bench*, 36 A.B.A.J. 833, (1950) by John C. Knox, Senior United States District Judge for the Southern District of New York, from which I quote (at page 834):

At the same time, the judges of the federal courts have the most interesting jobs in the world. . . . The judges of our courts, in the exercise of maritime jurisdiction, sail the seas and traverse the shores of every ocean on the globe. . . . Sometimes we visit the laboratories of science, and there, we learn of the innermost secrets of the alchemists and sorcerers. Our common duty may lead us through cesspools of iniquity and we see sights that are hard to believe. We thus learn the depths to which humanity may sink; and yet, more often than not, we perceive manifestations of the highest principles.

have imposed or affirmed were added together in years, they would reach back beyond the time when William the Conqueror overcame Harold at the Battle of Hastings in the Eleventh Century. On the brighter side, I have endowed hospitals, created trusts for needy widows and orphans, refunded taxes to citizens who suffered at the hands of greedy tax collectors and compelled cruel employers to re-hire employees wrongfully discharged, with complete restitution of all back wages. You can, then, easily believe me when I tell you that my twelve years on the federal bench have been anything but monotonous.

Indeed, I go a bit further to state that every phase of humanity, every type of transaction, every branch of science and knowledge, is, potentially at least, within the ken of the judge. He must, at times, penetrate the very reserves and silences of the human soul, the inmost thoughts of the human mind. When he undertakes to interpret a will, the judge must look over the shoulder of the testator (now dead) to determine just what the testator meant in the words of his will. In construing a commercial contract, the judge must enter the busy marts of trade to inform himself of the wiles and customs of those who engage in that trade.

To express the same thought figuratively, if there be any boundaries to the field of judicial endeavor, it is bounded on the North by the flights of fancy, on the East by the confines of the imagination, on the South by the realm of the absolute and on the West by the potentialities of the human soul.

In the face of tasks so varied, so difficult, so delicate and so dangerous, will our judges quail? I think not. Probably the greatest of all baseball umpires in the big leagues was old Bill Klem. His intuitions and decisions on the diamond were so accurate as to be uncanny. When Bill, at the height of his fame, was asked the secret of his success, he gave the cryptic reply: "I calls 'em as I sees 'em."

Judges can do no more, provided only they strive manfully to insure that the judicial eye be neither dimmed by legal myopia nor blurred by juristic astigmatism. Much the same idea is beautifully expressed by Rudyard Kipling in the last four lines of his great poem "When Earth's Last Picture Is Painted":

And only the Master shall praise us, and only the  
Master shall blame;  
And no one shall work for money, and no one shall  
work for fame,  
But each for the joy of the working, and each in  
his separate star,  
Shall draw the Thing as he sees it, for the God  
of Things as they are.

And now, though I have never aspired to be a lyric tenor, I should like to end this lecture on a high note. It is my fond hope that in these United States there may issue forth a far-flung battle-line (and I use the military metaphor advisedly) of adequately trained and ethically energized judges, who will see to it that on distant dune and faroff headland shall not sink the legal fire. It is my fervid prayer that the ancient spirit of our law may become incarnate at even higher and finer levels for those judges who under that spirit crave guidance, and within it seek light. If this hope be realized, this prayer be answered, as I have an abiding faith must come to pass; then, indeed, our judges, in the twin fields of truth and service, will have eternally enriched the bench's storied fame as, by that same token, they will have forever enhanced the spiritual heritage of our nation's glory.