JUDICIAL AFFIRMANCE AND REVERSAL *

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There is a parallel, not often appreciated, between dissent and reversal. Distinction, not more than formal, lies in the sense that dissents come from brethren of a collegiate court and reversal is directed by a superior to an inferior tribunal. "I suppose," says Cardozo, writing on *Law and Literature*, "I suppose the state of mind of one reversed is akin in quality to the state of mind of one dissenting, though perhaps differing in degree.[1] If so, must we then reduce decisions of our appellate tribunals into statistics and declare prolific dissenters judicial derelicts and dunces? I pass the word of caution that such labor would find wanting Justices Holmes and Brandeis of the Supreme Court of the United States and of our own Court, Justice Perfecto and, perhaps, Justice Tuason. But "deep conviction and warm feeling," continues Cardozo of the dissenting opinion, "are saying their last say with knowledge that the cause is lost. The voice of the majority may be that of force triumphant, content with the plaudits of the hour, and recking little of the morrow. The dissenter speaks to the future, and his voice is pitched to a key that will carry through the years. Read some of the great dissents, the opinion, for example, of Judge Curtis in *Dred Scott vs. Sanford*, and feel after the cooling time of the better part of a century the glow and fire of a faith that was content to bide its hour. The prophet and the martyr do not see the hooting throng. Their eyes are fixed on the eternities."[2] And what of the trial judge whose judgment is reversed? Must he be consigned to a place in the statistical chart, and, found wanting, condemned? Cardozo again tells us of a French judge, M. Ransson, a member of the Tribunal of the Seine, who depicts the feelings of a judge whose judgment is reversed. "A true magistrate," he was quoted as saying, "guided solely by his duty and his conscience, his learning and his reason, hears philosophically and without bitterness that his judgment has not been sustained; he knows that the higher court is there to this end, and that better informed beyond doubt, it has believed itself bound to modify his decision. Ought we even to condemn him if having done his best, he maintains in his inmost soul the impres-

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* Written at a time when Professor Navarro was engaged in a polemical dissertation on the subject, his lengthy article depicts his usual scholarly style and his mastery of Jurisprudence. However, what appear herein are extracts of said article; and a recourse to excerption is made in view of temporal and spatial limitations and an earnest desire to be as impersonal as possible.—*Editor's Note.*

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[1] See *Jurisprudence in Action*, 1953, at p. 48.

[2] Id., at pp. 48-49.

sion that perhaps and in spite of everything he was right? *Causa diis victrix placuit, sed victa Catoni.*"[3] "Cato," continues Cardozo, had a fine soul, but history does not record that he feared to speak his mind, and judges when in the minority are tempted to imitate his candor."[4] Boudin tells us that the New York Court of Appeals has suffered the most reversals of its decisions, in comparison with American State Courts, in the hands of the Supreme Court of the United States. But would any one suggest that the New York Court of Appeals should pay more attention to the "study of cases" otherwise its "judicial career may come to a standstill"?

The falacy into which the uninitiated often falls is the assumption of an implacable, unmitigated certainty in the law. The law is conceived by the tyro and layman as a book of logarithms or mathematics. This is taken to be a general truth. The implication is obvious that if only a judge does his sums right he would undoubtedly arrive at an incontrovertible solution. The author we criticize has fallen into this error, for he says: "A good judge should be able to interpret the law and apply it correctly to a given set of facts." The tyro and the layman are one in this conception. "But propositions," says Cohen, "seem to us self-evident simply because it has never occurred to us to doubt them."[5]

In a large measure, much of our present confusion is due to our habits of mind acquired for more than half a century. We still believe, as did our forbears in the nineteenth century across the seas, that the end of the law is logic and analysis, and nothing more. We think, if we may borrow a stock illustration of Roscoe Pound, that the judicial process is to be a "sort of slot machine proceeding in which the facts were put in, the Court pulled in a logical lever, and pulled out the predetermined result."[6] If the law were as certain, there would not be so many worshipping at her shrine. We hazard a statement that this cast of mind has been largely moulded by our reverential adherence to Spanish commentators whose end of analysis now belongs to a passing age. Those who have sat in many a courtroom and observed the everyday working ideal of the lawyer are familiar with this mode of thought. How vain must this ideal be to those growing number who believe with Holmes that the life of the law has not been logic but experience?[7]

The contemplative legal scholar, viewing the panorama of legal philosophies produced throughout the centuries, realizes the difficulty of defining the law. Read, for instance, the volumes published by the As-

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[3] Id., at p. 48.
[4] Id., at p. 48.
[5] See "Law and Scientific Method," *Jurisprudence in Action*, 1953, at p. 124.
[6] "A Generation of Improvement of the Administration of Justice," 22 *New York University Law Quarterly Review*, at pp. 370- 371.
[7] See Navarro, "A Word more on Moncado v. People's Court, Et Al" 23 *Philippine Law Journal*, at pp. 433-434.

sociation of American Law Schools as the twentieth century legal philosophy series and one will not fail to gain humility in the face of an impossible problem. The problem is so knotty and recondite that Max Radin refers to it as one of the permanent problems of the law.[8] Indeed, if the law were mathematics or logic and analysis, one who has the latest index of the daily grind of cases would necessarily be the best lawyer. But while an index is useful, it is by no means indispensable and the fruits it yields are not general truths but only starting points in the construction of hypotheses. "The popular conception," says Max Radin, "is that somewhere there is a book like an encyclopedia which gives the answers . . . and that most of the answers have been voted on by some authoritative body. The only reason that we can't all use this book is that the answers are badly arranged and there is no index . . . I think I am not exaggerating the popular conception of what the law is, and I hope I am not robbing any one of a fond illusion when I say there is no such encyclopedia."[9] Read Boorstin's *The Mysterious Science of the Law*, Frank's *The Law and the Modern Mind*, or Cardozo's *Nature of the Judicial Process* and one will realize that the problem of justice is individual and insoluble.

Thus far, we have been discussing only the problem of the law. We have not touched on the problem of the facts to which the law applies. Max Radin calls this the second permanent problem of the law. Let Radin speak:

> ". . . Every act or event is necessary a past act when it comes before the judge. All he has to do is to reconstruct it exactly as it took place.
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> "Quite obviously this cannot really be done. Events are unique, and no imagined or imitative reconstruction will precisely reproduce them. And yet somehow or other it must be attempted, because plainly we cannot expect the judge to decide the lawfulness of an event, unless he knows what it is. What are the means at his disposal? They are easily described. He must rely on statements of persons as to what they did, statements of persons as to what they saw, statements of persons as to what they thought. And if there are objects presented to him—written documents, certificates of various sorts, he must depend on statements as to when, by whom, and how they were made.
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> "If this were all, his difficulties would be great but still not portentous. They are our own in so many of the affairs of our lives. We too must act on reports of other men, though our responsibilities are slighter. But the reports are presented to the judge under conditions which make dealing with them peculiarly hard. Not only are those on whom he must rely often gravely deficient in memory, in power of observation, in capacity to state what they remember, but they present their account under circumstances which give many of

[8] See, "The Permanent Problems of the Law ,"*Jurisprudence in Action*, 1953, at pp. 415 et seq.

[9] Id., at p. 433.

> them every motive to lie, since they will profit by some versions of the past event and lose by others. He must therefore correctly estimate thier ability to do so. And this desire and ability are not matters which can be classed as either absent or present, but may vary be minute gradations from almost zero to almost one hundred per cent.
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> "Is the problem soluble? In imagination, surely. Our psychologists may some day become expert enough to establish infallible indicia of intention in this matter. The various forms of lie detectors that have from time to time been offered to judicial bodies may become really effective. It is true that a certain amount of skepticism is legitimate on this subject. But, even if they were all completely trustworthy, they would provide only half a solution, or somewhat less than half. It is not enough to know whether a man is lying, but it is necessary to have some means to compel him to tell the truth. I see nothing to indicate the way in which those means may be arrived at. But, leaning again heavily on the psychologist of the future, I am not prepared to deny that some sort of physiological or psychological pressure may some day be established which will create in any one an irresistible propensity to describe a past event as accurately as he can. Then all that will be necessary will be for the eugenists to have developed a race in which all the senses have a maximum potentiality of development, and for the educators to have trained all men in habits of constantly observing everything carefully and rapidly and in clearly and fully expressing the results of their observation." [10]

In view of the subjectivism of the twin problems of the law, how can we say objectively with any degree of definiteness that the conclusion of a trial judge on both are correct or wrong? Most surely the task of a trial judge is not like a school child's homework on grammar or arithmetic which the teacher can classify as either correct or wrong. Excluding palpable abuses or ignorance of a trial court, a higher court's reversal of its judgment is no reflection on its integrity, learning or competence. A reviewing authority may differ in conclusion or policy and, consequently, reverses a judgment, declaring a trial court to have committed an error; but, not having seen the face of truth, it has no business saying the trial court absolutely wrong.

"Error" is a judicial term to express disagreement and is no cause for mortal combat. Indeed, the reviewing authority may find error in the findings of facts of a trial court; but I wonder whether the trial court may not itself murmur that the appellate court has fallen into error in so doing. This is not to deny a power of review altogether. Indeed, the fallibility of the trial court should be sifted; but the instrument designed for this purpose cannot be anything else but fallible, though, undoubtedly, better informed. An erring appellate court may reverse a question of fact properly decided by a trial judge. And the appellate court may, on account of the subjectivism of the question, insist that its error is the true account. To correct this human propensity to

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[10] Id., at pp. 419-420.

error Erle Stanley Gardner organized what he called the "Court of Last Resort," an institution superior to and above appellate tribunals.

Of course, I assume that the trial judge knows the tools of the profession and how to use them. I also assume that the judge is good, that he knows the law (no matter what it is or means), that he can think, that he is honest and that he can express himself. If he is none of these, he has no place in the task of judging his fellowmen. But it is precisely with such a judge that the facts and the law would prove elusive. And it is precisely such a judge whose decision or order the reviewing court may reverse. The reversal of his decision does not, therefore, imply any want of intelligence or application in the performance of his duties. On the contrary, "judicial valour," as Pollock says, born of sound learning and great skill, may account for reversals of his judgments. "Doubtless it is very true," Pollock writes, "that the more valiant judge runs the risk of his exposition being sooner or later disapproved by superior authority, while the more cautious one avoids that risk, but at the price of falling under a censure now familiar. Those who make no mistakes, it has been said, will never make anything; and the judge who is afraid of committing himself may be called sound and safe in his own generation, but will leave no mark on the law." [11]

It has now, consequently, become obvious that the bare reversal of a judge's decision is devoid of significance. Unless we know what was reversed and why, we are in no position to pass judgment. Not less important is that we ourselves have read and judged the literary quality of the reversed judgment. For it is not true that the literary quality of a decision can be divorced from its substance. "Form alone *takes*," writes Henry James to Hugh Walpole, "and holds and preserves substances, saves it from the welter of helpless verbiage that we swim in as in a sea of tasteless tepid pudding." [12] As Cardozo says: "The argument strongly put is not the same as the argument put feebly any more than the 'tasteless tepid pudding' is the same as the pudding served to us in triumph with all the glory of the lambent flame. The strength that is born of form and the feebleness that is born of the lack of form are in truth qualities in the substance." [13]

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[11] See "Judicial Caution and Valour," *Jurisprudence in Action*, 1953, at p. 376.
[12] Quoted in *Law and Literature*, *supra*, note 2, at p. 32.
[13] Supra, note 2, at p. 32.