The Anatomy of Decisionmaking

Irving R. Kaufman

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A TRIBUTE TO THE
HONORABLE IRVING R. KAUFMAN

THE Fordham Law Review is proud to present "The Anatomy of Decisionmaking," by one of Fordham's most distinguished alumni, Judge Irving R. Kaufman. We are also pleased to take this opportunity to congratulate Judge Kaufman on his thirty-five years of active service on the federal bench. In his article, the Judge writes that "abstract principles of judging must be grounded in life's experiences and augmented by an understanding of the day-to-day realities of the judicial process." Judge Kaufman's great experience gives him a unique and valuable understanding of the role of the judiciary.

Appointed at age thirty-nine to the District Court by President Truman, Judge Kaufman spent twelve years as a trial judge. When a vacancy on the Second Circuit Court of Appeals arose in 1961, the Judge's mentor and friend, Judge Learned Hand, wrote to President Kennedy: Judge Kaufman "is a man of most exceptional capacity. He has an admirable mind, . . . is most anxious to discharge his duties without prejudice or favor, and is extraordinarily diligent." Judge Hand's recommendation has been more than borne out during Judge Kaufman's twenty-three years on the Second Circuit Court of Appeals, seven of which he served as Chief Judge. In addition to producing his many thoughtful opinions, Judge Kaufman as Chief Judge instituted bold new programs to ease the ever-growing caseload in the Second Circuit, reforms that have since been adopted throughout the federal system. These innovative changes prompted Justice Marshall to write, "[No one] can point to any forward movement in judicial administration . . . in the last twenty-five years that [Judge Kaufman] wasn't either the leader of or had a hand in."

Judge Kaufman also has an outstanding record of involvement in extrajudicial activities. His contributions include service as Chairman of the Committees on the Judicial Branch and on the Operation of the Jury System of the Judicial Conference of the United States, President of the Institute of Judicial Administration, Chairman of the ABA-IJA Juvenile Justice Standards Project, and director of a number of community organizations. Currently, he is serving as Chairman of the President's Commission on Organized Crime.

Finally, Judge Kaufman has contributed enormously to the body of legal scholarship on which students, members of the bar and judges rely. His bibliography—which comprises some three hundred articles—covers a broad expanse of topics: free expression, juvenile justice, criminal law, business and regulatory law, international law, practice and procedure, judicial reform and administration, and legal ethics, to name a few. Rather than limiting his publications to law reviews and scholarly journals, the Judge has endeavored to educate the public about the law and the judicial process. His frequent contributions to the New York Times
and other general interest publications have gone far in achieving this goal.

These commitments to judicial excellence, extrajudicial involvement and scholarship have marked Judge Kaufman's productive and successful career. Moreover, they serve to make his discussion of judicial decisionmaking particularly valuable. We applaud Judge Irving R. Kaufman on his thirty-five years of distinguished service on the bench, and look forward to many more.

The Board of Editors
THE ANATOMY OF DECISIONMAKING

IRVING R. KAUFMAN*

INTRODUCTION

Judicial decisionmaking is a process that is generally associated with theoretical concepts. The practical considerations that guide appellate judges, however, are equally important and all too often ignored. The process of adjudication is a delicately calibrated mixture of theory and practice, of art and science. Academic appraisals and criticisms have often proved valuable in rethinking this society’s approach to justice and the role of its courts. Nevertheless, such commentary may create the impression that dispassionate analysis is the sole determinant in judicial decisionmaking, irrespective of the facts of the particular case.

After thirty-five years of service on the federal bench, I have found that abstract concepts of judging must be grounded in the realities of the judicial process. This selective reminiscence is an attempt to articulate many of the principles that have guided one judge over the years.

I am not the first judge to have thought and rethought the conundrums of decisionmaking, the untangling of the meaning of a statute or a case, the degree to which a constitutional question requires or forbids a particular judicial response. Yet these familiar themes, like great melodies, are worth repeating. Not only does each judge bring his or her own interpretation to the work, to the emphasis given each note, but the re-playing of these familiar chords recalls the importance of the individual pieces that together create and remake that great human composition known as the law.

There are, as Cardozo reminded us, many ingredients in the “brew” that makes up a judicial decision; and a discussion of any one element of that “strange compound”1 is, of necessity, tainted by an artificial separation of parts. Yet sever we must, because language precludes our stating more than one idea at a time.

In speaking first of facts, then of law, and finally of the influence of the judge’s individual character, I intend no indirect statement of philosophical ordering. It is the relationship among the parts, unconscious though it may be, that is of the essence of the work of judging. To begin, however, I present a brief exposition of the importance of facts at the appellate level.

I. FACTS: THE BEDROCK OF DECISIONMAKING

By the time facts reach a court of appeals, they have fallen into disre-
pute, and their low status is due in large part to their having been “found.” “I hate facts,” Holmes once wrote, and that animosity may have arisen from his awareness that facts generally lack the malleability that would permit a supple intellect to mold a principle or rule into a better one. Facts are also frustrating because, although fixed in time, they can nonetheless be elusive to establish. Jerome Frank, who was perhaps more concerned than any other judge with the troublesome nature of fact-finding at the trial level, titled one of his essays, “Facts are Guesses,” leaving all of us who must work with these defective materials less certain as we ponder them.

I agree with Karl Llewellyn that “facts are hardy weeds. They will not down. Whatever the theory, courts of review of ‘pure law’ feel the pressure of the individual case, and strain to decide it right.” One of the most common mistakes made by attorneys is to succumb to the temptation to overgeneralize. A judge cannot and must not resolve cases by reference to abstract tenets alone. Indeed, to learn to resist the seduction of pure logic—to challenge pristine ideas with the mundane materials of everyday life—may be among the most important lessons for those embarking on careers in law. The elusive distinction between the general and particular, the intangible and concrete, must be discovered and rediscovered with a scrupulous care that places a high priority on the importance of the case to the individual litigant. In the end, law is among the most human of all enterprises, and those who are appointed to decide questions of “law” must contend with all the drama, confusion, failure and achievement that constitute the human experience.

Facts assert their importance in a variety of ways at the appellate level. When they arrive in droves there is no avoiding them, regardless of how much we might wish to see a briefer appendix or limit our consideration

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2. 2 Holmes-Pollock Letters 13 (M. Howe ed. 1941). That the Justice’s remark was less than completely serious is evidenced by the line immediately following it: “I always say the chief end of man is to form general propositions — adding that no general proposition is worth a damn.”


5. See infra notes 107-113 and accompanying text for an illustration of why a judge must look beyond abstract legal tenets when deciding a case.

6. I have argued on another occasion that the American model of legal education is flawed, in that it steeps law students in doctrine but fails to stress practical training in litigation techniques. See Kaufman, Attorney Incompetence: A Plea for Reform, 69 A.B.A. J. 308, 311 (1983). Some slight rays of hope in this regard are beginning to emerge as clinical education of aspiring litigators is becoming more widespread. Nevertheless, far too few recent law graduates evidence an understanding of the fact that “[a]dvocacy is the art of persuasion, not merely memorization or logical deduction.”

7. I have written that “[f]or the private citizen engaged in litigation, the outcome of his lawsuit may profoundly influence the future course of his life whether the issues presented raise questions of constitutional stature and great moment to the Republic, or merely rules of law that allow of limited application and arouse slight jurisprudential interest.” Guardian Life Ins. Co. of Am. v. Robitaille, 495 F.2d 890, 891 (2d Cir. 1974).
to principles alone. I shall never forget the sheer volume of information that had to be assimilated before resolving the legal questions in Berkey Photo, Inc. v. Eastman Kodak Co.,\(^8\) a complex antitrust case. Moreover, certain standards—constitutional or statutory—require a court to cast a particularly bright light on the details of a case as we approach a decision. The intricacies of fourth amendment adjudication, for example, press us to pay even more than our usual attention to the precise factual context.\(^9\) Similarly, troubling questions concerning attorney ethics demand particularly painstaking analyses of the facts.\(^{10}\)

8. 603 F.2d 263 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980). Berkey stands as an exemplar of the critical importance of facts in deciding cases. Berkey Photo, Inc.—something of a David to Kodak's Goliath—brought suit alleging that Kodak had monopolized a number of separate markets within the meaning of section 2 of the Sherman Act, 15 U.S.C § 2 (1982). See id. at 267. The purpose and proper construction of section 2 have been subjects of furious debate since the Act was passed in 1890. See R. Bork, Antitrust Paradox 17 (1978) (describing competing policies). Some have argued that size is an evil in itself, and that the enduring success of American capitalism is the result of competition among many small firms in a given industry. Cf. Chicago Bd. of Trade v. United States, 246 U.S. 231, 238-39 (1918) (among purposes of antitrust law is protection of small competitors). Others have maintained that the antitrust laws are meant to protect competition rather than individual competitors. See generally R. Posner, Antitrust Law: An Economic Perspective 3-22 (1976) (economic theory provides the only suitable basis for antitrust policy). Thus, as a first step, we were required to decide a doctrinal question: What was the Sherman Act meant to protect against? Writing for the court, I stated that it was abuse of market power. See Berkey, 603 F.2d at 274-75. Kodak, enormous as it was (and is), had grown because of good management, not unfair or predatory practices. To penalize Kodak for its good business judgment exercised over the years struck me as particularly unfair—and unwise. Learned Hand wrote: "The successful competitor, having been urged to compete, must not be turned upon when he wins." United States v. Aluminum Co. of Am., 148 F.2d 416, 430 (2d Cir. 1945).

But such a choice was merely the beginning of the inquiry. To determine whether Kodak had misused its power in various markets required a painstaking analysis of the minutiae of the photographic industry: sales figures of the various firms; an examination of the effects of international competitors in the domestic market; products on the cutting edge of the new photographic technologies; and so on. See Berkey, 603 F.2d at 268-71. Unlike commentators who announce doctrinal positions, judges must go one step further: We must understand the particular facts of each case in sufficient detail to ensure that our legal views—and occasionally our philosophical leaning—are applied correctly. See infra notes 61-80 and accompanying text. Of necessity, the voluminous factual record in Berkey determined the outcome of the case.

9. An illustration is seen in the case of United States ex rel. Mahoney v. LaVallee, 396 F.2d 887 (2d Cir. 1968), cert. denied, 395 U.S. 985 (1969). We were asked to decide whether a search was incidental to a lawful arrest. Guided only by vague standards such as substantial contemporaneity and reasonableness, the precise circumstances of the search became all-important. Id. at 889. In the end, we held that the search had been conducted lawfully. Id. at 889-90. My point here is that the outcome had more to do with the exact interval between the time of arrest and the commencement of the search—a mere ten minutes—than with any profound notions of fairness under the fourth amendment. As I wrote then, “reasoning in the air in disregard of the circumstances of the particular case is an untrustworthy guide to decision.” Id. at 889.

10. Almost thirty years ago, as a District Judge, I wrote: When dealing with ethical principles, . . . we cannot paint with broad strokes. The lines are fine and must be so marked. Guide-posts can be established when virgin ground is being explored, and the conclusion in a particular case can be
The different backdrops against which facts appear dictate the contours of our powers to review the findings of the trial judge. We are bound by the trial judge's determinations regarding the credibility of witnesses. Uncontested documentary evidence, however, may allow us to draw our own inferences despite our absence from the courtroom. New technologies have also enabled appellate judges to divine meanings once reserved to the senses of the trial judge.

One procedural device of immense importance, summary judgment, has required courts of appeals to grapple with the ultimate conundrum: the elusive line between fact and law. After all, to declare the existence or nonexistence of a genuine issue of material fact, one must know not only what is genuine and material, but what is "fact." Because of the

11. At the outset, it is important to recognize that appellate courts serve two functions. In the first, the court finds and reverses errors made below. Perhaps just as important, however, is its role in affirming decisions made at trial. In so affirming, a panel of appellate judges leaves the imprimatur of a higher court on the trial judge's disposition. In a society governed by the rule of law, the value of such consensus cannot be overstated. Once affirmed, a decision may no longer be viewed as the product of one judge's personal predilections. Insofar as appellate panels reflect the pluralistic ethos of the community, an affirmance represents a far broader statement than that emanating from a trial judge sitting in isolation. Thus a judge's decision, once affirmed, becomes, to a far greater degree, society's decision.

For these reasons, a trial judge does not look with trepidation upon appellate review of his findings. On the contrary, particularly in a controversial case, he welcomes the opportunity to have his individual decision elevated to the status of legal consensus.

12. Rule 52(a) of the Federal Rules of Civil Procedure provides in part that "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." Fed. R. Civ. P. 52(a); see United States v. Birnbaum, 373 F.2d 250, 257 (2d Cir.) ("relevant inquiry for an appellate court . . . is not whether the trial was free from errors, but rather whether it was free from prejudicial errors") (emphasis in original), cert. denied, 389 U.S. 837 (1967); United States v. Robbins, 340 F.2d 684, 687 (2d Cir. 1965) (where "evidence [is] sufficient to warrant submission to the jury, . . . appellate judges [should not] weigh evidence or judge credibility").


14. In United States v. Huss, 482 F.2d 38 (2d Cir. 1973), we were asked to decide whether a criminal defendant in a bombing case had "just cause" to withhold testimony. Id. at 44. The defendant's guilt or innocence turned on our deciphering the meaning of a tape recorded phrase. Id. at 41, 49-50. The state claimed that the phrase was, "You know it's done on wiretaps"; the defendant argued that the phrase was, "You know it's not on wiretaps." Id. at 49-50 (emphasis in original). We concluded the phrase was the former. Id. at 50.

15. Fed. R. Civ. P. 56(c) ("The judgment shall be rendered forthwith if . . . there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.").

16. See Empire Electronics Co. v. United States, 311 F.2d 175, 179 (2d Cir. 1962).
difficulties inherent in this device, I have long felt that it is the responsi-

bility of the appellate courts to assist trial judges and attorneys by period-
ically rearticulating and illustrating the law of summary judgments. Such pronouncements help trial judges to recognize the point at which factual exploration—whether in discovery or in full-blown litigation—is sufficiently complete to move from the realm of gathering fact to that of applying law.\textsuperscript{17}

The "case or controversy" mandate under which all article III judges operate\textsuperscript{18} is not only a reminder of the respective functions of the different branches of government,\textsuperscript{19} but is also a precise means of ensuring that facts retain their central and paradoxical role in decisionmaking. This constitutional directive ensures that the law can change, yet it prevents change at a pace or in a manner that ignores the dilemmas of a society at a given time. Facts prevent wooden or mechanical reliance on legal principles, for "[a]lthough deliberative examination of . . . precedents is helpful, we can hardly expect to be provided with all-purpose, ever-applicable standards . . . ."\textsuperscript{20} Each case forces some modicum of invention, yet these same facts serve to contain an otherwise overbroad discretion by limiting the degree to which a judge can extend an innovative holding beyond its origins.

The most important function of these poor cousins of lofty abstrac-
tions may be their usefulness in prodding otherwise reluctant judges into the lap of justice. A statute whose flat prose at first yields only a dry and one-dimensional meaning may receive deeper thought when the human story to which it has become attached elicits some feeling in the judge. The process to which I refer, however, brings me a step ahead of my intended subject at this point. I shall return to the complex alchemy of judicial character and case. I turn now, however, to my second broad category: the interpretation of constitutions, statutes and precedents—what we commonly term "law."

\section*{II. PLUMBING THE MEANING OF THE WRITTEN WORD}

Federal judges quickly become adept at deciding questions concerning virtually every variety of law.\textsuperscript{21} The diversity jurisdiction suits that un-


\textsuperscript{18} The Constitution provides that: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, [and] the Laws of the United States . . . ." U.S. Const. art. III, § 2, cl. I.

\textsuperscript{19} Mr. Justice Day explained the role of the "case or controversy" requirement in apportioning power among the branches as follows: "[T]he right to declare an act of Congress unconstitutional [can] only be exercised when a proper case between opposing parties [is] submitted for judicial determination; . . . there [is] no general veto power in the court upon the legislation of Congress . . . ." Muskrat v. United States, 219 U.S. 346, 357 (1911).

\textsuperscript{20} United States v. Winfield, 341 F.2d 70, 71 (2d Cir. 1965).

\textsuperscript{21} Among other things, we are responsible for what Judge Henry Friendly once de-
happily inundate our dockets require us to remain familiar with and give deference to state law precedents in both traditional common law areas such as contracts and torts, as well as the construction of state statutes. At the same time, we must be versed in the interpretation of federal statutes, including those that by their terms incorporate entire doctrines from common law. Finally, we deal with the awesome task of deciding constitutional questions.

A. Statutory Interpretation: Divining the Legislative Will

I turn first to one particularly fascinating species of our work: the creation of what is known as the judicial gloss on a statute. Legislation, as many scholars have remarked, is inherently incapable of encompassing the infinitely varied concrete facts of human existence, or predicting the needs of circumstances that have not yet occurred. As a result, collective political bodies that create law must, of necessity, accept that there will be some judicial additions to or modifications of the work they have produced. These judge-made creations, rooted in the bedrock of legislation, are hybrids coupling language and intent with unforeseen or unacknowledged realities. The political stock thus may bear unexpected dividends.

How does this odd evolution take place? Or, to be more precise, how should a judge construe a statute and how does he or she in fact do so? Although the temptation to take refuge in generalities is great, I will instead respond to these questions by reference to an actual case that came before my court. I will set forth the facts, the legal issue and the jurisprudential alternatives before revealing the resolution of the matter.


23. See B. Cardozo, supra note 1, at 15; J. Frank, supra note 3, at 293. The Internal Revenue Code of 1954, 26 U.S.C. §§ 1-9602 (1982), aptly illustrates the complexity attendant to efforts to legislate all aspects of human existence in a particular area. Its sheer complexity and volume place its comprehension beyond the pale of all but the most skilled tax lawyer. Moreover, in attempting to legislate comprehensively, Congress has been hoisted on its own petard: as the Code’s letter has expanded infinitely, its spirit has been subjugated.

24. J. Frank, supra note 3, at 293. As the pace of technological innovation quickens, the number of controversies that the legislature could not have foreseen greatly increases. In 1976, when Congress passed the new Copyright Act, 17 U.S.C. §§ 101-810 (1982), it clearly understood that the legislative scheme would be looked to in solving many types of novel questions. Yet, barely half a decade later, the Supreme Court was left with little guidance in deciding whether home taping of television programs for personal use was infringing activity within the meaning of the Act. See Sony Corp. v. Universal City Studios, 104 S. Ct. 774, 782-83 (1984). Very simply, Congress did not (and probably could not) foresee the evolution in technology that generated the explosive growth of home taping. Once again, the legislative chinks were left to be filled with judicial mortar.
ANATOMY OF DECISIONMAKING

Rosenberg v. Richardson\(^2^5\) concerned the Social Security Act's provisions for widow's benefits. A gentleman had been married twice, once from 1920 to 1933, and for a second time from 1935 until his death in 1971.\(^2^6\) The latter marriage took place in Connecticut to ensure that no problems would be created by the Mexican divorce secured from his first wife.\(^2^7\) Although the foreign decree was not recognized under the Social Security Act, this fact alone would not have disqualified the second wife from receiving benefits from her deceased husband's account, for Congress had anticipated the possibility that marriages contracted in good faith might be invalidated by state law technicalities.\(^2^8\) The statute therefore created the category of "deemed widow," and the second wife was, without question, able to receive benefits in that status.\(^2^9\)

No controversy would have arisen if the first wife had not appeared in December of 1971 to lay claim to the decedent's social security account. An administrative law judge, confronted with two claimants, looked to the statutory language for assistance. The pertinent section provided:

The entitlement to a monthly benefit . . . of a person who would not be deemed to be a . . . widow . . . but for [the special provisions creating the "deemed widow" classification for persons like the second wife] . . . shall end with the month . . . that another person is entitled to a benefit under section 402(e) . . . if such other person is . . . the . . . widow.\(^3^0\)

The administrative law judge held that deference to the literal meaning of the statute required him to disqualify the second wife and declare the first wife, (as the "legal widow") the rightful recipient.\(^3^1\) Wife number one, however, had a social security account of her own, and thus was able to receive only $1.40 per month from the decedent's account.\(^3^2\) Under the judge's ruling, the government retained the difference between $1.40 and the total monthly payments, and wife number two, cast out by literalism, was left to survive as she might.\(^3^3\) The district judge agreed,\(^3^4\) and this woman's plight found its way to the Second Circuit.\(^3^5\)

The legal dilemma in this case, then, concerned the proper construction of the statutory provision just quoted. What does it mean to speak of a court construing a statute? One of my esteemed colleagues has re-

\(^2^5\) 538 F.2d 487 (2d Cir. 1976).
\(^2^6\) Id. at 488-89.
\(^2^7\) Id. at 489.
\(^2^8\) Id.
\(^2^9\) Id.
\(^3^1\) Rosenberg, 538 F.2d at 490.
\(^3^2\) Id. Under the Act, amounts received by a widow must be reduced "dollar-for-dollar" by the widow's own old age benefits. 42 U.S.C. § 402(k)(3)(A) (1982). In Rosenberg, wife number one "was already receiving $168.30 per month on her own work account." Rosenberg, 538 F.2d at 490.
\(^3^3\) See Rosenberg, 538 F.2d at 490.
\(^3^4\) Id.
\(^3^5\) Id.
phrased the dilemma aptly: The interpretation of statutes is "a Faustian conflict between adherence to the words and search for the will—a search moreover, that often is not for the will that was but the will that would have been."36 In this case, the literal language of the statute may have pointed to the narrow interpretation adopted by the administrative law judge: Wife number two lost her right to the money and that was that.

We are often told that judges are not to evaluate a law's wisdom, even where the statute leads to a seeming injustice.37 Here, however, we had facts different from those envisaged by overworked legislative drafters. The statutory language evinced a legislative intent to ensure rapid resolution of a conflict between claimants, one a "legal" and one a "deemed" widow, both of whom demanded the entire disputed account.38 Whether Congress meant those words to apply to a case in which a sizeable balance remained once the "legal" wife had taken her rightful share was unclear.39 The administrative law judge either had not thought of this question or had not been sufficiently troubled by it to inquire into the legislative intent underlying the statutory scheme. I, however, believe that a court cannot rest without considering the statutory scheme and its underlying aim. The "lodestar must be the statute's fundamental purpose."40

I do not pretend that gleaning congressional intent from the often barren language of the United States Code is an easy task. For one thing, it is not always clear whose "purpose" we ought to be discerning,41 because a statute is the creation of many minds. Worse still is the fact that the difficulties of so-called interpretation arise when the Legislature has no meaning at all; when the question which is raised on the statute never occurred to it; when what the judges have to do is, not to determine what the Legislature did mean on a point which was present to its mind, but to guess what it would have intended on a point not present to its mind, if the point had been present.42

36. H. Friendly, supra note 21, at 199.
37. See infra note 57 and accompanying text.
38. Rosenberg, 538 F.2d at 489, 491.
39. See id. at 491.
40. Silver v. Mohasco Corp., 602 F.2d 1083, 1087 (2d Cir. 1979), rev'd on other grounds, 447 U.S. 807 (1980); see also GAF Corp. v. Milstein, 453 F.2d 709, 716 (2d Cir. 1971) (failure to consider legislative history "would close off the only light available to illumine the statute"), cert. denied, 406 U.S. 910 (1972); cf. United States v. Marion, 535 F.2d 697, 706 (2d Cir. 1976) (where clear meaning of statute and expressed intent coincide, judiciary "must decline to redraft the legislative enactment"); Lisi v. Alitalia-Linee Aeree Italiane, 370 F.2d 508, 511-12 (2d Cir. 1966) (language of Warsaw Convention should be viewed not in isolation but in light of other articles and overall purpose), aff'd per curiam, 390 U.S. 455 (1968).
41. See J. Frank, supra note 3, at 305.
42. J.Gray, The Nature and Sources of the Law 173 (2d ed. 1921); see also FHA v. Darlington Inc., 358 U.S. 84, 92 (1958) (Frankfurter, J., dissenting) ("The task is imaginatively to extrapolate the contemporaneous answer that the Legislature would have given to an unconsidered question . . . .")
ANATOMY OF DECISIONMAKING

In Rosenberg v. Richardson, 43 the threshold issue was whether this peculiar nondistribution of benefits earned by the husband was foreseen by the legislators, thereby mandating the administrative law judge's literal interpretation. 44 An examination of legislative history revealed no definitive answers—or even clues—regarding Congress' will in these circumstances. 45 The draftsmen's failure to address a specific contingency does not prove that it was never considered. Nonetheless, a court may conclude that it was as likely as not that the fates of two such wives had not been contemplated. In short, there was nothing to indicate that a solution reached by reference to a statute's "fundamental purpose" rather than its literal terms would defeat congressional foresight. Moreover, the legislative history suggested that "a benefit" received by the first wife and displacing the second should be understood as a "full benefit." 46 Hence, it could reasonably be deduced that Congress would prefer to distribute the proceeds of the account rather than provide the government with a windfall at the second wife's expense. I therefore concluded, as did my colleagues on the panel, that the second wife should receive whatever monies remained after the first wife—the "legal" wife—had taken her one dollar and forty cents. 47

In following this approach, I confess that we made law. But "judicial lawmaking," often used in the pejorative, need not be confined to the announcement of an entirely new rule. It also encompasses the clarification of a rule that, for whatever reason, had not been made manifest by the statutory language. I hope and believe that the solution in this case, while doing no damage to the democratic process, served as well to do what we commonly call justice. 48

Divining the complex interplay of language and intent is only one of the challenges judges face in construing statutes. Ambiguity, often the result of the inability of lawmakers to reach a consensus, also requires

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43. 538 F.2d 487 (2d Cir. 1976).
44. See id. at 491.
45. Id.
46. Id.
47. Id. at 490-91.

My conception of justice in this setting is guided by the consistent application of statutory language and intent where ascertainable. But in the absence of such palpable guidance, justice must by necessity derive its lifeblood from norms of higher moral obligation and by discriminating individualization where general precepts of equity are applied to concrete social situations.
that we assume an active role in determining the meaning of statutes. The labyrinthine complexity of some legislation is such that courts must untangle the innumerable competing strands of thought.\textsuperscript{49} In each of these situations, a judge must discover the proper limits of judicial explanation and, where necessary, judicial lawmaking. Cardozo saw the task of interpreting statutes as one of the skills that must be mastered by any judge.

[The judge] fills the open spaces in the law. How far he may go without traveling beyond the walls of the interstices cannot be staked out for him upon a chart. He must learn it for himself as he gains the sense of fitness and proportion that comes with years of habitue in the practice of an art.\textsuperscript{50}

The decision in \textit{Rosenberg v. Richardson}\textsuperscript{51} turned more on legislative purpose than legal precedent. Indeed, the play of precedent and factual setting operates differently in the context of statutory construction than on the broader stage of the common law. Statutes oblige us to place ourselves in the shoes of the legislature: to know the legislature is to know the law.\textsuperscript{52}

\textbf{B. Adherence to Precedent}

Although precedents also force a judge to enter another mind, opinions permit us greater leeway in determining what was and what will be in the law.\textsuperscript{53} How, then, should we view a precedent that may, or may not, bear on a case under consideration? At the outset, we must view that creature known as the holding with a mixture of reverence and wariness. A judge is bound to follow case law; yet he must be prepared to distinguish or deviate from it, for each new factual variation demands a

\begin{itemize}
\item \textsuperscript{49} As I have noted elsewhere, the complexity of some statutes is “certain to accelerate the aging process of judges.” Lok \textit{v. Immigration and Naturalization Serv.}, 548 F.2d 37, 38 (2d Cir. 1977).
\item \textsuperscript{50} B. Cardozo, \textit{supra} note 1, at 113-14. Given the inherently amorphous character of statutory “walls,” judges enjoy a potentially vast but generally untapped reservoir of decisional latitude. Calibrating the precise “play in the joints” of a statute that has purposefully been constructed broadly is among the most difficult of all the tasks with which we are faced. In large part, judicial activism is spawned by breaking free from the nebulous semantic bounds of restraint and conceiving judicial logic relative to the social consequences of a chosen statutory interpretation, rather than a literal interpretation. \textit{Cf.} J. Dewey, \textit{Experience and Nature} 17-27 (1929) (acknowledging subjective element in all human experience).
\item \textsuperscript{51} 538 F.2d 487 (2d Cir. 1976).
\item \textsuperscript{52} Judge Frank likened the judge to a performer, the lawmaker to the composer, and declared that the judge must try to “reconcile the impulses of his (own) imagination with the principle,” and he must “obey the prescription . . . as well as he can.” J. Frank, \textit{supra} note 3, at 301 (quoting E. Krenek, a modern composer).
\item \textsuperscript{53} \textit{See} United States \textit{v. Drummond}, 354 F.2d 132, 143 (2d Cir. 1965) (“The genius of the common law lies in the process of reasoned elaboration from past precedent; unless we explain our decisions of today with all the precision and exactitude at our command, today’s holdings will become but simple fiat and will provide no guidelines for tomorrow’s problems.”), \textit{cert. denied}, 384 U.S. 1013 (1966).
\end{itemize}
dynamic examination of the static precedent. This tension is but a re-
statement of Cardozo's paradox: "Law never is, but is always about to
be. It is realized only when embodied in a judgment, and in being real-
ized, expires." 54

A legal decision, then, is not one but many choices coming together at
last in one case; a solution of awesome complexity, good for a moment
but honored as the embodiment of lasting law. 55 Cardozo also wrote:
"Cases do not unfold their principles for the asking. They yield up their
kernel slowly and painfully." 56 His thought would have been more pre-
cise if "kernel" were in the plural. Indeed, determining the expanse of a
particular decision requires a sophisticated understanding of the con-
tours and contexts in which the legal point arose.

I do not intend to suggest that case precedents and statutes are never
clear. Indeed, stare decisis and adherence to the unequivocal statutory
mandate are the bedrock of our legal system, as they must be, for reasons
of both principle and efficiency. 57 As Cardozo stated: "[T]he labor of
judges would be increased almost to the breaking point if every past deci-
sion could be reopened in every case, and one could not lay one's own
course of bricks on the secure foundation of the courses laid by others
who had gone before him." 58 In reality, the majority of holdings are not
obfuscated by tempting dicta, confused facts or an offhand attitude to-

54. B. Cardozo, supra note 1, at 126 (emphasis in original).
55. See id. at 29.
56. Id.
57. The unequivocal statutory mandate imposes an absolute restraint on a judge, but
we must adhere to it if there is to be a structure in the law. Thus, in enforcing the clearly
expressed will of Congress, a judge must remain cognizant of his duty to subordinate his
personal views to those of the representative body.

It is the rare statute, however, that by its express terms delimits the judiciary's inter-
pretative role. I believe that more often than not, the legislative branch expects and in-
vites courts to participate actively in the evolution of statutory guidelines.
58. B. Cardozo, supra note 1, at 149. It must be remembered that these words were
written in 1921. Cardozo's prescience was remarkable given that the import of his words
is far more telling today than it was 63 years ago. At that time, the spectre of a judiciary
staggering under the weight of a seemingly infinite case load comprised of complex ac-
tions had not yet become apparent. Although the qualitative uncertainties attendant to
judicial decisionmaking did exist, the quantitative dimension did not.

Today the situation is radically different. The number of cases filed in federal courts
has increased tremendously during my tenure as a judge. For example, in the last six
years, filings in the Second Circuit alone have increased from 1,801 in 1978, to 2,731 in
Statistics 3 (1983). This surge has been accompanied by a dramatic increase in the com-
plexity of the cases themselves. Reliance on precedent, accordingly, is essential to effec-
tive judicial administration; but it is not enough. As Chief Judge of the Second Circuit, I
implemented a series of reforms to provide additional time for reflective decisionmaking in
important cases. This is critical to the maintenance of judicial excellence. The most
notable of these reforms is the Civil Appeals Management Plan. See Kaufman, The Pre-
Argument Conference: An Appellate Procedural Reform, 74 Colum. L. Rev. 1094 (1974);
1170 (1958) (urging flexible and informal pretrial conferences as a method of eliminating
calendar congestion).
ward past authority. Moreover, many appeals present questions that are only slightly different, if at all, from those that have come before, thus occasioning little legal evolution.59

The challenges arise when the facts are not replicative from those in cases past, when the precedents are pregnant with ambiguity or conflict,60 or when the case presents a combination of the two. No statutory or common law rule points the way to an inevitable result. At such moments, the judge and the law become one, and when justice arrives—if it is to arrive at all—it bears the indelible imprint of the values and beliefs of that one individual. The attempt, then, to treat the law as a discrete entity merges, as it must, with the wholly different question of the judge's character. It is to this question that I now turn.

III. JUDICIAL PERSPECTIVE: THE SILENT FORCES THAT GOVERN DECISIONMAKING

The paths of judicial decisionmaking have long been the source of spirited debate. The English scholar, Sir Carleton Allen, has written that judges rely, in the end, on “reason, morality, and social utility” in deciding cases of first impression.61 Cardozo described four adjudicatory routes that a judge may choose in arriving at a decision: philosophy, evolution, tradition and sociology.62 Cardozo did not intend that these paths be discrete; he emphasized instead that more often than not, they would flow together to form a wider stream capable of sustaining a broader, farther-reaching legal principle.63 I will not reiterate the meaning of each of these categories or surmise the relation they might have to the determinative methods named by Sir Carleton. Instead, I shall attempt to articulate what animates the judge to select one route rather than another.64

To some extent, the path chosen is a function of the nature of the case under consideration, for different questions require different approaches.

59. See B. Cardozo, supra note 1, at 164; see also Southern Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting) (Judges legislate “only interstitially; they are confined from molar to molecular motions.”).
60. This is to be expected because the law of judicial precedent does not constitute a logically cohesive and unified deductive system; it is at best an incomplete aggregate. See Jones, Legal Inquiry and the Methods of Science, in Law and the Social Role of Science 123-24 (H. Jones ed. 1966).
62. Cardozo expounded on these decisionmaking routes as follows:
   The directive force of a principle may be exerted along the line of logical progression; this I will call the rule of analogy or the method of philosophy; along the line of historical development; this I will call the method of evolution; along the line of customs of the community; this I will call the method of tradition; along the lines of justice, morals and social welfare, the mores of the day; and this I will call the method of sociology.
   B. Cardozo, supra note 1, at 30-31.
63. Id. at 31.
64. See infra notes 109-13 and accompanying text.
But ultimately, the choice reflects the personal bent of the individual judge. When I think of any one of my esteemed colleagues on the Second Circuit, for example, I cannot predict with certainty how he or she will lean in a case allowing for judicial discretion. Nevertheless, certain dominant traits do reveal themselves over time. One judge may appear attracted to the law's need for broad conceptualizing, another to precision, and yet another to the plight of an individual litigant. Were I to enumerate the traits I deem most valuable in those men and women who ply our trade, my terms might appear less lofty. For the personal characteristics I most esteem are simply an intuitive sense of fairness, an understanding of the real world and the capacity to continue learning.

The relationship between the judge and the culture at large is a necessary concomitant of these very personal forces that animate judicial decisionmaking. Learned Hand spoke eloquently of the need for judges to gauge the ethos of the community they serve. The profession of law, he wrote, “must feel the circulation of the communal blood or it will wither and drop off, a useless member.”

The difficulty of such a task cannot, however, be overstated. It is certainly true that there are as many conceptions of community and its needs as there are judicial panels. The diversity of the community is represented to some extent by the constituent members of the judiciary. Although the reflection is not perfectly precise, the manifold conceptions of Zeitgeist held by judges guard against the rise of aberrant perspectives. Similarly, the constitutionally mandated independence of the judiciary protects against the installation of a unitary conception of community on the court.

Moreover, even if an individual jurist were able to discern the pulse of the times, it would be pure foolhardiness to think our pluralistic society could move to a single beat. All societies will have conflicting ideals, of course, at least as long as there is sufficient freedom to permit the expression of differences. Indeed, litigation is often a reflection of an outlet for the struggle between such competing values. It is hardly likely that a

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65. As Cardozo noted, “There is in each of us a stream of tendency . . . .” B. Cardozo, supra note 1, at 12.
67. These traits have been referred to collectively under the rubric “common sense.” This label, however, embraces too much and conveys too little.
68. L. Hand, The Spirit of Liberty 15 (3d ed. 1960). Thus, a judge is “constantly recasting and adapting existing forms, bringing to the high light of expression the dumb impulses of the present.” Id. at 16.
70. Id. Judicial independence is not a cliche conjured up by those who seek to prevent encroachments by the other branches of government. The term is one of art, defined to achieve the essential objective of the separation of powers: that justice be rendered without fear or bias and that it be free from prejudice. See Kaufman, The Essence of Judicial Independence, 80 Colum. L. Rev. 671, 687-94 (1980).
71. Alternatively, litigation has been described as “a critical breakdown of the smooth-running, non-legal social regularities.” J. Frank, supra note 3, at 336. This same
judge could forge a consensus that society has not been able to achieve on its own. Yet, at least in part, courts do serve that function. Whether judicial pronouncements are perceived as oppressive commands or as just solutions depends to a great extent on a judge's capacity to discern and sound the common note of an era. Indeed, the law is a remarkably blunt instrument if it is not supported by a social consensus that is consonant with its important objectives.

How does a judge go about fulfilling this task? Part of the answer rests in a judge's willingness to verse himself in the everyday events of the society and their historical antecedents. A judge who can divine the common element in a heterogeneous society is one who never forgets that individual experiences must be viewed as part of a broader context. Thus, the successful judge must refer to the contributions of the great figures in philosophy, literature, history, psychology and other studies as well as law. To conclude that a human being can take the measure of other people's conflicting understandings of the law without enriching his own experience with the insights of other minds is to reduce this great profession to an isolated and sterile exercise.72

The difficult task of shaping the paths of the law must therefore be informed by considerations of our culture's rich diversity and past. Yet in the end, what the judge perceives as communal is merely a reflection of the judge's own "values."

We live in a post-Freudian era, and our profession has been deeply

point has been made more recently by Derek Bok, President of Harvard University. See N.Y. Times, June 1, 1983, at A1, col. 2. Yet, this idea is hardly one of recent vintage. Indeed, Confucius believed that conflicts are disruptive of the natural peaceful order and should be resolved by amicable compromise, thereby allowing nature to follow its harmonious course. See Moser, Law and Social Change in a Chinese Community: A Case Study From Rural Taiwan 61-63 (1982). The role of courts in the resolution of conflicts has been viewed somewhat more charitably by Roscoe Pound:

[T]he law is an attempt to satisfy, to reconcile, to harmonize, to adjust these overlapping and often conflicting claims and demands... so as to give effect to the greatest total of interests or to the interests that weigh most in our civilization, with the least sacrifice of the scheme of interests as a whole.


72. This exercise of ongoing education is essential when courts find themselves caught up in the forces of history in the making. The Vietnam era is a salient example. The court on which I sit heard many appeals concerning procedures for young men claiming to be conscientious objectors. See, e.g., United States v. Chorush, 472 F.2d 917 (2d Cir. 1973); United States v. Aull, 469 F.2d 151 (2d Cir. 1972); United States v. Holmes, 426 F.2d 915 (2d Cir. 1970), vacated, 402 U.S. 969 (1971); United States v. Bornemann, 424 F.2d 1343 (2d Cir. 1970); United States v. Delfin, 419 F.2d 226 (2d Cir. 1969); Hammond v. Lenfest, 398 F.2d 705 (2d Cir. 1968); United States v. Gearcey, 379 F.2d 915 (2d Cir.), cert. denied, 389 U.S. 959 (1967). A host of legal issues, including double jeopardy, United States v. Velasquez, 490 F.2d 29 (2d Cir. 1973), cert. denied, 421 U.S. 946 (1975), political questions, DaCosta v. Laird, 471 F.2d 1146 (2d Cir. 1973), and freedom of speech, Wolin v. Port of New York Auth., 392 F.2d 83 (2d Cir.), cert. denied, 393 U.S. 940 (1968), grew out of that war fought so far from this continent. I will discuss one set of those cases briefly when I turn to the question of decisionmaking in cases interpreting the Constitution. See infra notes 85-106 and accompanying text.
touched by the lessons of legal realism. It can no longer be disputed that we bring to our work what Cardozo called that "empire of [our] subconscious loyalties." Indeed, Jerome Frank advocated that every judge undergo what he referred to as "something like a psychoanalysis." The judgment uninformed by self-examination is no better than the over-informed opinion, with its insistence on maintaining certain personal beliefs about what is right or wrong in the world.

I have written elsewhere that the "personal element—that individual sense of justice—is not only inextinguishable, but essential for the orderly development of the law." Thus, the question for judges is not whether or not to detach. Rather, it becomes one of how much detachment will permit us to take heed of the law while simultaneously recognizing the human element implicated in the dispute. Our gravest error may be in repressing our individual values in the hopes of achieving a pure legal result.

Cardozo understood the temptation on the part of judges to disregard their intuition because of the doubts generated thereby. If what is in fact an ambiguous law can be read so as to provide an unequivocal result, a judge can circumvent the tortuous process of balancing compelling and conflicting equities. In discussing this choice of juridical approach, Cardozo wrote:

I was much troubled in spirit, in my first years upon the bench, to find how trackless was the ocean on which I had embarked. I sought for certainty. I was oppressed and disheartened when I found that the quest for it was futile. I was trying to reach land, the solid land of fixed and settled rules . . . . As the years have gone by, and as I have reflected more and more upon the nature of the judicial process, I have become reconciled to the uncertainty, because I have grown to see it as inevitable. I have grown to see that the process in its highest reaches is not discovery, but creation.

Despite Cardozo's seeming acceptance of uncertainty inherent in judicial decisionmaking, his admission is expressed with a surfeit of discomfort. It is axiomatic that as conflicting precedents have appeared, and as competing interests in society have multiplied, the task of the judge has become increasingly burdensome. But this decisional anguish reflects the dynamic nature of the judicial process. Certainty is a close affiliate of stagnation. The difficulties attendant to appellate adjudication, therefore, confirm my belief that the law serves as a vibrant and capacious vehicle for social advancement, capable of accommodating the variegated demands posed by an ever more sophisticated society.

Further, although it was couched in elegant prose, Cardozo's point was hardly novel. This was the very lesson preached by Holmes when he

73. B. Cardozo, supra note 1, at 174.
74. J. Frank, supra note 3, at 250.
75. Kaufman, supra note 69, at 714.
76. B. Cardozo, supra note 1, at 166.
wrote that "certainty generally is illusion, and repose is not the destiny of man." 77 The dangers posed by the inexorable search for certainty prompted Jerome Frank to write: "We need a new kind of courage—the courage to face unconquerable imperfections in the solution of human problems." 78 When the law provides us with decisional leeway, we do well to recognize that our intuition, emotion and conscience are appropriate factors in the jurisprudential calculus. Our human qualities may cause us to make mistakes; after all, judges are not infallible. But these same human qualities may also prevent our making the worst error of all: creating a schism between a formalistic legal order and commonly held notions of social justice.

A judge's reliance on intuition is checked not only by precedent and the need for consensus among the members of an appellate panel, but also by the judge's own conscience. The society has given the honor of making difficult legal choices to a select few. But that privilege, if I may call it that, is two-sided. A judge, as Charles Clark once wrote, "is on his own." 79 The litigant experiences the outcome of a case directly; the judge, through his sense of responsibility, feels the results indirectly. Each decision is inevitably and perpetually subjected to re-examination by reference to the judge's internalized notions of justice.

The constraints imposed by a judge's individualized conscience are offset by the sweep of society's collective hopes and aspirations insofar as they exert a liberating force upon him. The experience of judging must never be cut off from the community's ideals. Our individual beliefs, for whatever they are worth, are inextricably tied to our perceptions of the common weal. The challenge for a judge is to ensure that those perceptions are not narrowed by ignorance. We need not and ought not detach ourselves completely. Rather, we must continually enlarge the breadth of our vision and study the world around us while we study the law. 80

I have described two types of learning that I recommend to anyone who sits on the bench: knowledge of the humanities and self-understanding. There is, of course, another mode of education that is equally critical to a judge, and that is legal scholarship. The interplay between precedent and scholarly writing is a fascinating subject that is deserving of a lengthier examination than this forum provides. A law review article or note may provide the impetus for a change in the law even when no express authority exists in either precedent or the relevant legal rule. I do

77. Holmes, supra note 66, at 466.
78. J. Frank, supra note 3, at 425.
79. Clark, The Limits of Judicial Objectivity, 12 Am. U.L. Rev. 1, 12 (1963); see also Craig v. Harney, 331 U.S. 367, 376 (1947) ("Judges are supposed to be men of fortitude, able to thrive in a hardy climate.")
not mean that scholarship provides us with a fortuitous citation when we are desperate for support at the end of a shaky paragraph. At its best, legal scholarship yields the collective thought of those who have mastered the intricacies of a given body of law and have taken the time to anticipate the prospective ramifications that might result from the suggested change. Judges are thus reassured that other minds—relying on much investigation of cases, legislative history and other scholarly work—have also decided that the time is ripe to forge a new direction in the law.

IV. CONSTITUTIONAL ADJUDICATION: APPLICATION OF THE ABSTRACT TO THE CONCRETE

No cases more fully implicate a judge's personal values than those involving questions of constitutional dimension. Scholarly arguments concerning neutral principles, fundamental rights and the scope of substantive or procedural due process assess the role of courts as one component of our tripartite system of government. By implication, such colloquy calls into question the extent to which courts ought to be injected into the process of shaping societal values. For the moment, my inquiry is a simpler one: Do courts approach decisionmaking differently in constitutional cases? Because I need not render an opinion here, I have the rare luxury of not being required to provide a definitive affirmative or negative vote. My answer, then, is "Sometimes yes and sometimes no." I shall explain that response by reference to two examples.

A number of important constitutional cases were generated during the Vietnam era. One case concerned a teacher who was discharged for wearing a black armband as a symbolic protest against the war. The potential for emotional response was apparent. Every American citizen had his or her own view on the war in Vietnam; judges were no exception. Furthermore, the issue presented a stark conflict between two important societal concerns: individual freedom and the authority required to preserve the democracy so crucial to realizing that freedom. This case required another determination of the nature of individual freedom guaranteed by the first amendment when balanced against the desire to

82. See Lochner v. New York, 198 U.S. 45 (1905). See generally J. Ely, supra note 81, at 43-72 (discussing various sources from which constitutional values can be gleaned).
83. See generally L. Tribe, American Constitutional Law 501-63, 886-990 (describing various viewpoints).
84. See supra note 72.
provide the best for our children.  

Judge Frank once said that all great jurists have viewed the Constitution as a masterpiece, for "the 'number of possibilities in which a work of art may be interpreted convincingly is an indication of its greatness.'" The first amendment is a broad charter of freedom that courts must apply and refine in particular situations. The breadth of possibility, however, is greater than in ordinary adjudication, for the pull of stare decisis is less strong when courts must return to the words of the great document in an attempt to fathom their meaning as applied to a new controversy. At the same time the need to tread with care is great, for a constitutional holding is weightier (and often harder to repair) than a statutory or common law interpretation.

Our impulse to express our own convictions, our personal beliefs, and the values we imagine to have been in the minds of the framers is checked, as it must be, by reality. I referred earlier to the importance of the article III stricture concerning cases or controversies, and herein lies its majesty: I can go no further as a judge than the case itself permits. Nevertheless, the open-ended clauses in the Constitution invite more far-reaching consideration of the implications of facts than do the narrow words of statutes.

In the teacher protest case, one might have proceeded to explore the abstract conflict between free expression and the need for education undisrupted by the political activism of the day. That approach, however, would have ignored the factual setting that properly shaped our decision. Our contextual inquiry revealed that there was no need to fashion a broad principle, for the record revealed that "the Board of Education...made no showing whatsoever at any stage of the proceedings that [the teacher], by wearing a black armband, threatened to disrupt class-

89. See B. Cardozo, supra note 1, at 150; H. Friendly, supra note 21, at 164 (referring to Justice Brandeis' dissent in Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 405-06 (1932)).
90. See supra notes 18-20 and accompanying text.
91. It was this vision of the judiciary as a passive dispenser of justice on a case-by-case basis that prompted Alexander Hamilton to note: "The judiciary...may truly be said to have neither force nor will, but merely judgment;..." The Federalist No. 78, at 428 (A. Hamilton) (G. Smith ed. 1901).
92. See supra notes 18-20 and accompanying text.
room activities or created any disruption in the school." In short, there was no evidence that required us to decide whether first amendment expression was destructive of other societal rights. Without questioning the necessarily broad discretion of local school authorities in setting classroom standards, we held that the teacher's discharge violated the first amendment. Writing for the court, I reiterated words from an earlier opinion on free expression in public educational institutions:

The best one can hope for [in cases involving the first amendment] is to discern the lines of analysis and advance formulations sufficient to bridge past decisions with new facts. One must be satisfied with such present solutions and cannot expect a clear view of the terrain beyond the periphery of the immediate case.

By contrast, the factual setting surrounding *Herbert v. Lando*, a case addressing the scope of protection afforded by the first amendment to the compelled disclosure of the editorial process, invited and indeed mandated the consideration of abstract constitutional principles relating to freedom of expression. The adjudication of this dispute hinged upon a delineation of the contours of the first amendment. Because such decisions are by necessity as imprecise as they are significant, a judge must include a panoply of elements in his or her jurisprudential calculus.

The case aptly illustrates the manner in which controversies implicating broad constitutional principles are adjudicated and the manifold sources of authority that inform such decisions. The action stemmed from allegations aired on the CBS program "60 Minutes" that a retired Army officer, Anthony Herbert, had fabricated reports of war crimes in Vietnam. Herbert sued the producer of the segment for libel. By the time the appeal reached the Second Circuit, CBS had already provided massive amounts of material in discovery relating to what producer Barry Lando knew, saw, said and wrote during his research for the program. Indeed, Lando had been deposed on twenty-six separate occasions, and his testimony filled almost three thousand pages of transcript. Herbert, however, was not satisfied; he wished to discover information regarding Lando's state of mind as he prepared the program—the thoughts, opinions and conclusions he developed in the course of his work.

In my opinion for the court, I concluded that the compelled disclosure of such personal matters would strike dangerously close to the "heart of

96. In addition, there was strong authority in one Supreme Court case for giving weight to the absence of such significant facts. See *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969).
99. Id. at 982.
100. Id.
101. Id.
102. Id.
the vital human component of the editorial process"¹⁰³ and was not required by the first amendment.¹⁰⁴ This conclusion of constitutional dimension was derived by reference to a varied assortment of guideposts rooted in history, logic, precedent and social welfare. In reaching it, I was required to navigate the turbulent waters of first amendment jurisprudence.

Freedom of thought, freedom of speech and freedom of the press are valued in our society because they furnish vehicles for the new and the provocative, and serve as barriers to tyranny. The debate on public issues must therefore be robust and uninhibited.¹⁰⁵ On occasion, the exercise of liberties so precious as freedom of speech and of the press may do harm that the state is powerless to recompense. Yet this is simply the price that must be paid if we are to maintain a viable democracy.

This overarching principle is more than a personal predilection; it represents my assessment of the equipoise that exists among history, logic, precedent and the societal will. The opinion articulated my efforts to strike the appropriate balance.¹⁰⁶

It is apparent, then, that cases interpreting the Constitution are different, for they are more awesome, broader in their impact and more lasting in their effect. Yet they are also the same as nonconstitutional cases in that their resolution depends on the particular context in which they arise. Facts work to limit the reach of judicial values, just as a judge must remain cognizant of the judiciary's role in the greater political scheme. I have come full circle, then, and have returned from law and character to facts. My ideals as a judge are shaped by the restraints embodied in article III. I might, therefore, call my jurisprudence an amalgam of external legal constraints and an internalized desire to respond to the world in which we live.

CONCLUSION

I have discussed the importance of facts, the deference we are required to pay statutes and precedents, and the internal—and often unconscious—influences that are brought to bear in deciding appeals. I have also expressed the view that abstract principles of judging are best understood by reference to concrete situations. In concluding, then, I shall try to illustrate my jurisprudential approach not with amorphous precepts, but rather with the facts of one noteworthy case.¹⁰⁷

¹⁰³. Id. at 984.
¹⁰⁴. Id.
¹⁰⁶. Questions of great constitutional import, such as the one described in the text, are inevitably susceptible of myriad jurisprudential approaches. The Supreme Court applied one different from my own, and reversed. See Herbert v. Lando, 441 U.S. 153 (1979).
¹⁰⁷. See Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980); see also Kaufman, A Legal Remedy for International Torture?, N.Y. Times, Nov. 9, 1980, § 6 (Magazine), at 44 (a discussion of the Second Circuit's condemnation of international torture).
In the early spring of 1976, in the town of Asuncion in Paraguay, a young woman, the daughter of a political dissident, was awakened by the military police and taken to the home of Inspector-General Pena-Irala. Inside, she was shown a brutally mutilated body, discolored and carved by the marks of systematic torture. The body was that of her brother.

Two years later, when this young woman, Dolly Filartiga, was living safely in Washington, D.C., she learned that Americo Norberto Pena-Irala was being deported from the U.S. after having overstayed his visa. Acting quickly, she arranged for service of a summons and complaint upon him, alleging that he was responsible for the torture and death of her brother. Thus, the story—the genesis of which lay in a small town in Paraguay—found its way into our federal courts. Its life in the Eastern District of New York was brief, however, for in May of 1979 the court dismissed the complaint on jurisdictional grounds. The plaintiff appealed.

The legal issue was whether Dolly Filartiga might invoke the jurisdiction of the United States courts to sue a man accused of the brutal murder of her brother outside this country. The trial judge ruled that the court lacked subject matter jurisdiction, based upon his reading of two Second Circuit cases that appeared to construe narrowly the phrase “law of nations” in the Alien Tort Statute, a part of the Judiciary Act of 1789. The question on appeal, then, was whether the alleged torture violated the “law of nations.”

At the outset, my inclination was to announce that torture was certainly condemned by international law. As a judge, however, I was required to look beyond my own convictions. A Supreme Court case supplied us with an enumeration of the sources of the law of nations. Another Supreme Court precedent directed us to examine “customs and usages of civilized nations; and, as evidence of these, the works of jurists and commentators.” Thus, in determining Dolly Filartiga’s legal rights, we relied on cases and scholarly works. From there, we found our way to passages from the United Nations Charter and the Universal Declaration of Human Rights. Finally, we turned to the documentation underlying a variety of international treaties and accords. This examination reinforced my original inclination that official torture is universally condemned both by law and by custom, and that this prohibition “admits of no distinction between treatment of aliens and [of our own] citizens.” In authoring the unanimous decision of the court, I was thus able to reject the trial court’s narrow interpretation of the phrase “law of na-
tions" that might have been read to preclude federal jurisdiction over Dolly Filartiga's suit.

As Cardozo wrote, a judge "is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles."114 The record, briefs and other sources turned to in analyzing the issues presented by Filartiga demonstrated that the court's intuitive response was not unique, but was widely shared and reflected in scholarly writings and legal documents. Thus, the controlling precedents, the views of the judges and the collective conscience of civilized society coalesced to form the court's holding: "[T]he right to be free from torture" is among those fundamental rights conferred upon all people by international law.115

The cases we confront may concern human stories in our public schools, administrative agencies, the media, or any other sphere of social action. They may turn on an interpretation of the Constitution or of our contemporary laws. We may also face a legal dilemma generated by a tragedy played out in distant lands, the resolution of which turns on a statute almost two hundred years old. Whatever the genesis of the controversy, it is always my hope that my ultimate consideration will be not merely the avoidance of injustice, but what we might call the most just result not only for our place and time, but also for what lies before us.

114. B. Cardozo, supra note 1, at 141. Moreover, this inspiration is not to be channelled randomly, but is to be applied rationally, guided by certain traditional and established methods — what Pound referred to as "the received technique." See Pound, Hierarchy of Sources and Forms in Different Systems of Law, 7 Tul. L. Rev. 475, 481 (1933). The discovery of consecrated principles or the authoritative sources of legal order coupled with the "received technique" make appellate judicial decisions "reckonable." See K. Llewellyn, The Common Law Tradition: Deciding Appeals 1-61 (1960).

115. Filartiga v. Pena-Irala, 630 F.2d at 885. Other issues were implicated in that case, the most important of which concerned the constitutionality of § 9(b) of the Judiciary Act of 1789. 28 U.S.C. § 1350 (1982). I need not elaborate here on the manner in which that question was resolved, except to state that we did find it constitutional.