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The Annual John Randolph Tucker Lecture

PARTNERS IN A PROCESS: THE ACADEMY AND THE COURTS

WADE H. MCCREE, JR.*

Mr. Justice Black, as the story goes, used to insist that he never read law reviews. The reason, he said, was that "the law reviews always tell me I reached the right result for the wrong reasons."

I suspect that Mr. Justice Black had more occasion to refer to law reviews than he was willing to admit. Nonetheless, his remark, like so many of his observations, was in its unpretentious way both insightful and provocative. Comments like his raise the question of what role legal scholars and commentators play in judicial decision making. Are the commentators, as Mr. Justice Black wryly suggested, just crabby bystanders, kibbitzing critically, but heard for the most part by one another and not by the judges whose decisions they criticize? Or do the commentators play a more integral and significant role in the development of the law as it is fashioned day by day in the courts?

These, of course, are very broad questions, and it is beyond the scope of this paper to treat them in any comprehensive manner or to pretend to offer any definitive answers. Instead, I will venture a few general observations about the ways courts and legal scholars interact, and I will try to show how these general observations apply to one specific area of the law in the development of which the academics have indisputably played a significant role. From the pattern revealed in this area, I hope to draw a few conclusions about the process by which legal commentary makes its influence felt on the development of modern American law.

I. A Multi-Faceted Relationship

I should state at the outset that in my view legal scholars have had a very significant impact on the development of American law in this century. Skeptics often remark that there is so much legal writing these days

* Solicitor General of the United States; A.B. 1941, Fisk University; LL.B. 1944, Harvard University. This lecture represents the expansion of an idea that I first expressed at a meeting of the Southeastern Chapter of the American Association of Law Schools in Asheville, North Carolina, in August, 1977. Although I accept full responsibility for the concept and its development, I want to acknowledge the considerable assistance of William C. Bryson, Esq., formerly one of my assistants, who conducted much of the research and assisted me with the draft, and Louis F. Claiborne, Esq., one of my deputies, who reviewed the paper and furnished useful insights into British practice.

that the courts cannot conceivably be expected to keep up with it or to pay much attention to it. Judges are too busy, the argument goes, to spend time reading abstract ruminations on the law in the law reviews and treatises, when it is all they can do to keep up with the pertinent governing decisions in their own jurisdictions.

There is just enough truth to this assertion to make it misleading. It is certainly true that a lot of what is written on the law today is not widely read or much relied on by the courts.[1] But the growth in the volume of business with which courts must deal, as well as the growth in the amount of legal writing, has not had the effect of dampening the impact of legal scholarship on the courts. The best of what is written is still heavily relied on and is still profoundly influential, even though with the proliferation of legal publications it may be harder to find.

In fact, because the volume of appellate litigation has increased so much in this century, courts have found it necessary to rely more heavily than ever before on secondary sources, including law reviews, treatises, and encyclopedias, to keep up with current legal developments. In addition to the volume of litigation, the pace of change in the law has made resort to academic writings even more common, and even more important for the courts. I suspect that anyone from another discipline, reading a collection of American appellate court opinions, would be surprised by the extent to which the courts rely on academic works as authority alongside, and in some instances in preference to, judge-made law. And I am confident that a common law judge from the eighteenth century would be profoundly surprised — perhaps even shocked — at the extent to which the courts rely on academic work to support the result they reach.

Consider, for example, a recent Supreme Court decision that I have selected almost at random, *Parklane Hosiery Co. v. Shore*.[2] In that case, the Court held on January 9, 1979, that collateral estoppel prevents a party from relitigating before a jury issues that were adjudicated against the party in a previous equitable proceeding. The majority cited academic works, including the Restatement of Judgments, which I regard as an academic work, on no fewer than twelve occasions in a seven-page opinion. Not to be outdone, Mr. Justice Rehnquist cited academic sources a total of twenty-three times in his nine-page dissenting opinion in that case. I recognize, of course, that this is an extremely crude method of measuring the impact of academic work on the decision-making process but it serves at least to discount the contention that courts do not pay any attention to

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[1] The volume of legal writing being produced today is enormous. The latest edition of the Index of Legal Periodicals indexes the contents of 412 regularly published legal periodicals. The volume of reported decisions is equally great. The West Publishing Company's three federal court reporters contain an average sum of 1200 pages per week, and the various regional state reporters contain perhaps another 2500 pages per week. Even to begin to keep up with this volume of writing would take a prodigious effort.

[2] 439 U.S. 322 (1979).

the work produced by legal scholars.[3] The simple answer is that they do pay attention to it, they cite it freely, and, when they find it persuasive, they follow it.

The tendency to underestimate the impact of legal scholarship on the courts stems from another misconception as well — the misconception that scholars communicate with the courts only through the pages of law journals and that, except when a judge reads and cites a law review article, the academician's efforts have been wasted. This characterization of a judge's contacts with the academic world ignores the varied ways in which academic insights make their way into judicial thinking. The most direct route — through judges' reading law reviews and treatises themselves — is more common than the casual observer might think. Indeed, the reliance these days on such leading authorities as Wright and Miller,[4] or Moore on Federal Procedure,[5] or Collier on Bankruptcy,[6] or Nimmer on Copyright,[7] or Nichols on Eminent Domain,[8] is so extensive that what those treatise writers say often has more to do with the course of the law than anything short of a Supreme Court opinion on point. In addition, the positions taken in the various Restatements of the Law are immensely influential in shaping the direction taken by courts in deciding cases in areas covered by the Restatements. And since most of the reporters and many of the members of the ALI committees are academics who specialize in the area they are called on to "restate," current academic ideas inevitably have a substantial influence on the positions taken in the Restatements.[9] The same phenomenon occurs through the active participation of academics on bodies such as the Advisory Committees on the Federal Civil, Criminal, and Appellate Rules, not to mention their equivalents at the state level. The reporters for all three Advisory Committees are academics,[10] who are in an ideal position to bring academic

[3] Other examples from the current term of court provide further illustrations of the extent to which the justices rely on academic thinking in formulating their views and supporting their opinions. *See, e.g.*, Scott v. Illinois, 440 U.S. 367, 373-74 n.5 (1979); *id.* at 380, 383 n.14 (Brennan, J., dissenting); Montana v. United States, 440 U.S. 147, 153-54 nn. 4-5, 162 (1979); Vance v. Bradley, 440 U.S. 93, 114, 120 (1979), (Marshall, J., dissenting); International Bhd. of Teamsters v. Daniel, 439 U.S. 551, 562 nn. 15 & 16, 565 n.19, 567 n.21 (1979).

[4] C. Wright & A. Miller, Federal Practice & Procedure (1979).

[5] Moore's Federal Practice (2d ed. 1976).

[6] W. Collier, Collier on Bankruptcy (14th ed. 1979).

[7] M. Nimmer, Nimmer on Copyright (1980 ed.).

[8] P. Nichols, Nichols on Eminent Domain (3d ed. 1980).

[9] The Restatements now cover a wide variety of topics, including torts, contracts, agency, conflict of laws, trusts, property, judgments, restitution, and security. The reporter for each of these Restatements has been an academic. The reporters for the latest editions of the various Restatements included Warren A. Seavey of Harvard (agency); John W. Wade of Vanderbilt (torts); Willis L. M. Reese of Columbia (conflict of laws); Austin W. Scott of Harvard (trusts); A. James Casner of Harvard (property); E. Allan Farnsworth of Columbia (contracts); and Geoffrey C. Hazard, Jr. of Yale (judgments).

[10] The reporter for the advisory committee on the Civil Rules is Bernard J. Ward of the University of Texas, who also edits the portion of the Moore treatise devoted to appellate

insights into application at the most basic practical level — in setting the ground rules by which litigation is to be conducted.

Judges read law reviews for other reasons, of course. After a judge has struggled over an appellate opinion for some weeks, it is difficult for the judge to resist the temptation to see what the commentators have to say about it. To expect that the judge will ignore the law review comments on his work is as unnatural as to expect that an author of a recently published book will ignore the reviews, whatever he may think of the reviewers.

There are other, more indirect methods as well by which academic work makes its way into judge-made law. For example, academic ideas come to judges' attention through advocates who use the ideas, either with or without credit, when those ideas happen to support the positions the advocates are taking. The lawyer who has seemingly well-settled law on his side often seeks to buttress his case with references to the academic commentators to show that he also has the considered view of the "experts" on his side. Even more often, the lawyer who does not have the case law on his side is likely to rely on the views of the commentators. In part, this may be because he can do little else. But, more basically, it reflects a widely shared understanding that the academic experts in a field are well worth listening to, and when they disagree sharply with the positions taken by the courts, the courts might do well at least to reconsider the value of the precedents that they have been following.

Another channel by which academic ideas make their way into judicial decisions is through the practice of modern American judges of hiring law clerks each year to help with the court's work. These law clerks, recently schooled in the latest academic fashions, exert a persistent, and probably healthy, influence on judges who otherwise might be less keenly aware of current academic views on the issues that come before them for decision. Law clerks, of course, do not always have their way, but the process of collaboration with a new group of energetic and academically keen minds each year forces a judge constantly to confront new ideas in the law, and, frankly, some of them stick.[11]

Yet another channel by which academic work insinuates itself into the judicial decision-making process is through the practice of courts of relying heavily on those appellate court opinions that do an especially thorough job in treating a particular legal issue - the so-called "leading opinions" in each field. Because thorough research includes a canvassing of

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procedure. *See* note 5 *supra*. The Reporter for the Advisory Committee on the Criminal Rules is Professor Wayne R. LaFave of the University of Illinois, whose recently published three-volume treatise on the law of search and seizure appears destined to become a leading work in the field. *See* Dalia v. United States, 439 U.S. 238, 257 n.19 (1979). The newly-appointed reporter for the Advisory Committee on the Appellate Rules is Professor Kenneth F. Ripple of Notre Dame University, formerly the senior law clerk to the Chief Justice.

[11] The Vanderbilt Law Review conducted an interesting study of the "law clerk phenomenon" several years ago. *See Judicial Clerkships: A Symposium of the Institution*, 26 VAND. L. REV. 1123 (1973).

scholarly views on the point at issue, the academic viewpoint is usually well represented in these leading opinions, either expressly or by incorporation into the court's analysis. For that reason, even judges who are insistent on citing and relying only on judicial authorities find that they are adopting new academic ideas, often without recognizing them as such.

Finally, a surpirsingly large number of judges have either been academics themselves or have been closely associated with academic institutions, so that they come to the bench with a predisposition in favor of accepting academic ideas as a perfectly legitimate source of aid and even authority. While Mr. Justice Frankfurter is perhaps the best known example of the law professor-turned-judge, the number of jurists who have been academics, or who have been closely associated with academic works, is surprisingly high.[12]

In sum, even if a judge should choose, as Mr. Justice Black purported to do, to ignore the law reviews altogether, he could not easily escape the influence of academic thinking. It invades the judge's chambers, invited or uninvited, in any number of different forms. Like it or not, a judge today must recognize that academic writings constitute an important part of the legal environment in which he works and play a very important role in the process of decision making of modern American courts.

II. Some General Observations About the Academic Process and the Common Law Tradition

If academics have such a profound impact on the judicial system, then why and how did this come to be? In order to suggest some possible answers to this question, it is necessary to touch briefly on the nature of the common law system and the problems that common law courts have faced in trying to adapt to the social and technological changes that have swept this country in the past century.

I venture into this area cautiously, recognizing that broad statements about the common law tradition are often oversimplified and often ignore one or another important aspect of this complex historical phenomenon. Nonetheless, having offered that disclaimer, let me say a few words about this curious system of common law courts that the English devised and that we Americans in turn adopted, with some important modifications.

It is the essence — sometimes called the genius — of the common law

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[12] The examples from the present federal and state benches of academics-turned-judges are numerous. To take only a few examples, Judge Robinson of the D.C. Circuit was Dean of the Howard Law School; Judges Hays and Mulligan of the Second Circuit taught at Columbia and Fordham Law Schools, respectively; newly-appointed Judge Phillips comes to the Fourth Circuit from North Carolina University Law School, where he served as Dean; and Justices Benjamin Kaplan and Robert Braucher of the Massachusetts Supreme Judicial Court were both formerly professors at Harvard. Even those judges who have not had an academic career often maintain significant academic connections by teaching occasional courses at law schools and making regular appearances in events such as moot courts and symposia.

system that it operates mainly on the level of individual cases, not on the level of general concepts. A common law court moves cautiously from case to case, keeping its attention focused on the facts before it in a particular case and resisting, as much as possible, the temptation to speak or to write broadly, beyond the limits of the case that must be decided. It is a fascinating sort of modesty — almost self-depreciation — that characterizes the reluctance of the common law judge to yield to the temptation to take the grand view of social problems and to resolve those problems in broad, sweeping declarations.[13]

The language of the common law courts is quick to denounce attempts to go beyond the facts of a particular case and to rule in generalities on matters not directly at issue in a case. Such digressions are dubbed with the unflattering term "dictum" or even worse, "*obiter dictum*," and are deemed not worthy of precedential weight. There is a hint in the perjorative term "dictum" that it is a disregard of the common law judge's basic responsibilities to go beyond deciding the problem presented by the case before him, if not an act of infidelity to the common law tradition.

To a visitor from another planet, or even a visitor from another discipline, this insistance on enforced tunnel vision might seem rather odd. But it reflects an important and fundamental insight about the nature of the decision-making process: that people do better in resolving disputes when they have the flesh and blood of a particular dispute before them. The practical sense of fairness that many of us have, when presented with a particular dispute between two real people in a real factual setting, may desert us when we begin to abstract from that case and speak generally of governing principles of fairness. Abstractions, except in the hands of the most talented, often lead to misjudgments. The judge who may have an almost unerring instinct for coming to the right result on a particular set of facts may have a much less keenly developed sense for formulating broader principles to govern cases that are not before him at the time. Put another way, a judge may be able to rule fairly in a particular case without being able to identify accurately the general principles that drew him to reach the result he reached. Or, to paraphrase Mr. Justice Stewart's famous comment on obscenity, a judge may not be able to define fairness, but he may still know it when he sees it.[14]

It is this insight that has proved to be the great contribution of the common law tradition. Under a pure common law system, the court's task is simply to focus squarely on the facts of the case, to find the precedent most closely analogous to the fact situation before it, and then to apply that precedent to reach a result. In the case of competing analogies among the precedents, the task of the court is simply to determine which

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[13] A provocative and insightful overview of the nature of the common law process is provided in K. LLEWELLYN, THE BRAMBLE BUSH (1951).

[14] Mr. Justice Stewart's famous quip about hard-core pornography—it may be difficult to define, "But I know it when I see it"—comes from Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

analogy is closer, and to reach the result indicated by that analogy. This system, in its pure form, is not designed to encourage inventiveness on the part of the courts. The courts are instructed to stick closely to the facts of the case before them, and they are encouraged to feel their way to the right result by applying the results reached in the past in closely analogous factual situations. A pure common law system is, as Justice Holmes put it, truly interstitial.[15]

In a static society, the common law system would provide a highly efficient way of resolving disputes. The range of problems that would arise in such a society would be limited, and, as the law developed by resolving more and more of these problems, the process would become simpler and simpler. Out of the finite universe of problems to be solved, a smaller and smaller number would remain to be decided each year, and the increasing supply of available precedents would give increasingly detailed direction about the proper resolution of the issues remaining to be decided. Precedents would develop in an orderly fashion, narrowing the remaining problems until they appeared like the last unsolved words in a Sunday crossword puzzle. The necessity for imagination and inventiveness in the application of the precedents would become smaller and smaller as time passed.

Because under such a regime, creativity would have such a restricted — and progressively limited — role, the field would not be apt to generate much in the way of academic interest. The art of dispute resolution would gradually become a dry, mechanical task, one to which academics would not be much attracted and one in which their insights would not be of much use.

Needless to say, this is hardly an accurate account of the way the law has developed. This model of the pure common law system has never existed anywhere, except perhaps in the minds of some of the most rigid of the common law judges in the most sterile periods in the development of the law. The problem with this theory has been that it has run afoul of a basic fact of modern life: rapid social and technological change. The range of problems has not remained fixed long enough to make the process of reasoning by analogy from one problem to the next a simple one. Instead, the number of problems, and even the kinds of problems with which the courts have had to deal have expanded much more rapidly than the ponderous, fact-oriented process of common law adjudication could easily handle.

In part, the response to the accelerating pace of change has been through legislation. Where the courts could not adjust fast enough to new kinds of problems, sometimes the legislatures have stepped in and, with one stroke, have promulgated a new set of precepts from which the common law courts would work. But, of course, legislation has not been the whole answer. There were areas that were not reached by legislation, ei-

[15] Southern Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting).

ther because legislation seemed inappropriate or for some reason legislatures were unable to bring themselves to act. In these areas, the courts fashioned their own solutions, and it was in these areas, particularly, that the symbiosis of the courts and the commentators provided the means by which the common law system could adjust to the pressures of very rapid social and technological change.

It was partly because of the difficulty that the common law system had in coping with that change that legal scholarship became a much more active and effective factor in the late nineteenth and early twentieth centuries. In part, it was the very awkwardness of the common law system in adjusting to rapidly changing social and technological conditions that made the legal process a source of challenge for the academics. And it was the difficulty of the task that led the courts to rely increasingly on academics to point the way to adjust the common law system to the demands of a changing society. Perhaps if the common law system had adapted with greater facility to the adjustments it was forced to make, it would have presented a less interesting subject for academic inquiry, and it would have had less need for direction from the academics. Neither, however, was the case.

III. An Illustration: The Law of Products Liability

Many instances can be given of an area of the law that has been significantly affected by academic work, in order to illustrate the interaction between the courts and the academics in concrete cases. Let me briefly discuss one example — the law of products liability. This may be atypical, since the impact of the academic contribution on this subject has been particularly dramatic. But I think it will serve to illustrate some of the characteristics of the interaction between the courts and academics that occur in other areas as well, although often in less obvious or effective fashion.

Products liability has developed very quickly. In fact, the development in this area has been so rapid that it would have strained a pure common law system to adjust to change so quickly, at least without help from one or another quarter. But, here, the help has come not in the form of legislation or simply a disregard of the common law background. Instead, in the course of the development of this area, academic contributions have served as a catalyst for change within the scope of the common law process.

The development of products liability law in this century has occurred, basically, in two stages. The first stage involved the question whether manufacturers could be held liable generally on a negligence theory for injuries suffered by persons other than the immediate purchasers of their products. The second stage involved the question whether manufacturers should be held liable for defective or dangerous products on a strict liability rather than negligence theory. Under English law, it had been held that in the absence of a contractual relationship between the

purchaser and the seller, tort law offered no cause of action to persons injured by products. That quintessentially nineteenth century view was squarely attacked in this country in a scholarly article published in 1905,[16] and it was then gradually rejected by the courts in the early years of this century.

That change was not particularly surprising, as it was in accordance with the gradual maturation of the general principles of negligence through the nineteenth and early twentieth centuries. Nonetheless, from the viewpoint of social history it is interesting to compare the judicial attitudes displayed in the two leading decisions in this phase of the development of products liability law. The first decision was *Winterbottom v. Wright*,[17] a notorious English case decided in 1842. The action was brought by a passenger in a mail coach, who was injured when the coach collapsed. The passenger sought recovery against the manufacturer of the coach on the contract between the manufacturer and the purchaser of the coach, under which the manufacturer had agreed to keep the mail coach in good repair. The court rejected not only the contract theory of liability but a tort theory of liability as well. Lord Abinger bristled with outrage at what he termed the preposterous notion that a manufacturer could be held liable for injuries caused by his products to someone he had never met, let alone someone with whom he had not entered into contractual relations. To us, Lord Abinger's attitude seems hopelessly antiquated and callous, but it must be remembered that he was writing at the height of the English Industrial Revolution, at a time when it appeared that the salvation of man would come through iron and steam. The costs of modernization suffered by individual victims were thought to be secondary to the need to stimulate industrial progress for the good of all.

The change in that attitude was gradual, but easily detectable in tort law decisions throughout the last half of the nineteenth century and the first years of the twentieth. In effect, the courts did a slow end run around *Winterbottom v. Wright* by ruling, first, that the principle of nonliability of manufacturers did not apply to inherently dangerour products,[18] and then by expanding the class of inherently dangerous products to include just about anything that has the capacity to injure people.[19] The key step in that process of expansion was the inclusion of the automobile in the class of inherently dangerous products, a step that effectively disposed of *Winterbottom v. Wright* by allowing the exceptions to swallow the rule.

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[16] Bohlen, *The Basis of Affirmative Obligations in the Law of Tort*, 44 AM. L. REG., N.S. 209 (1905).

[17] 10 M. & W. 109, 152 Eng. Rep. 402 (1842).

[18] The leading case developing the inherently dangerous products exception was Thomas v. Winchester, 6 N.Y. 397 (1852).

[19] For a discussion of the expansion of the class of inherently dangerous products, *see* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 642 (4th ed. 1971) [hereinafter cited as PROSSER].

The decision that brought the automobile into products liability law was the famous case of *MacPherson v. Buick Motor Co.*[20] That decision seized on the principle underlying the exception to *Winterbottom v. Wright* for dangerous products and used that principle to extend negligence liability to any "thing of danger," which the court defined as anything "that is reasonably certain to place life and limb in peril when negligently made."[21] While attempting to square the decision in the *MacPherson* case with prior precedents, however, Judge Cardozo conceded that the task was not so easy. Before resting his case, he voiced a comment that could be taken as a thematic lament of the common law judge trying to ply his trade in a society changing too fast for orderly common law development. He wrote:

> Precedents drawn from the days of travel by stage coach do not fit the conditions of travel today. The principle that the danger must be imminent does not change, but the things subject to the principle do change. They are whatever the needs of life in a developing civilization require them to be.[22]

The standard established in the *MacPherson* decision was duly recorded as the proper rule in the First Restatement of Torts, and it was enthusiastically applauded by the commentators.[23] In part for these reasons and in part because the rule was so clearly in accordance with the developing sense of the proper allocation of risk in the case of injuries caused by dangerous products, *MacPherson* was accepted, within a few years, as the law of virtually every American jurisdiction.[24]

One suspects that Judge Cardozo harbored no illusions that his resolution would settle the "needs of life in a developing society" for very long. Even as the *MacPherson* case was gaining adherents in the various jurisdictions, with the aid of the Restatement's benediction, further upheavals were clearly in the works. Indeed, almost before the *MacPherson* decision had made it out of the pocket parts, the movement began toward an even more expansive standard of liability for manufacturers.

The new movement toward a strict liability standard began in the area of unsafe food and drink. As a greater and greater portion of our population began to rely for its sustenance on food produced elsewhere, and even packaged and sold through an elaborate distribution network, the problem of unsafe food products became an increasingly serious one. In addition, as the use of distribution networks became more common than

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[20] 217 N.Y. 382, 111 N.E. 1050 (1916).

[21] 217 N.Y. at 389, 111 N.E. at 1053.

[22] 217 N.Y. at 391, 111 N.E. at 1053.

[23] *See, e.g.*, Currie, *Tort Liability of a Manufacturer*, 2 WIS. L. REV. 431 (1924); Feezer, *Manufacturer's Liability for Injuries Caused by his Products: Defective Automobiles*, 37 MICH. L. REV. 1 (1938); James, *Products Liability*, 34 TEX. L. REV. 192 (1955); Katz, *Liability of Automobile Manufacturers for Unsafe Design of Passenger Cars*, 69 HARV. L. REV. 863 (1956); Note, MacPherson v. Buick *Comes of Age*, 4 U. CHI. L. REV. 461 (1937).

[24] *See* PROSSER, *supra* note 19, at 643.

the direct purchase of food by the consumer from the producer, the contract doctrine of warranty became of increasingly little use. Whether under one rubric or another, it was clear that if there was to be recovery at all for most plaintiffs, it would have to be through the devices of tort law.

The extension of strict liability in tort in the food and drink area and beyond became almost an academic crusade. Countless articles appeared in the legal journals promoting and encouraging the gradual process of the extention of strict liability standards to areas where negligence would not often permit recovery.[25] One of the leaders of the charge was the almost ubiquitous and irrepressible Dean William Prosser, whose 1960 article on strict liability in the *Yale Law Journal* ranks with his article on privacy as one of the most influential law review articles of the past twenty years.[26]

Again combining exhaustive research with trenchant analysis, Dean Prosser purported merely to report what the courts were doing, while in fact he did much more. He traced the trend to extend strict liability beyond food products, and he marshalled the arguments in favor of further extension of the doctrine. Shortly before Prosser's article, Harper and James had published their influential treatise on tort law,[27] in which they had made a compelling case for strict liability and, like Prosser, had endeavored to demonstrate that the courts were headed inexorably in the direction of extension of the doctrine beyond the limited reaches to which it had been extended at that time. And finally, at about the same time, the American Law Institute was gearing up for the Second Restatement of Torts, and the problem was presented to the ALI of what to say about the shifting sands of strict liability law.

What happened in the decade following 1958 is a truly extraordinary event in the history of the development of the common law. A major extension of an important tort doctrine took place in that period. As Dean Prosser noted later,[28] there are still open questions about the scope of strict liability in the products liability field, but the period since about 1965 has been devoted mainly to mopping up operations: the major steps were taken in that short time period in the late 1950s and early 1960s.

During that period, the doctrine of strict liability erupted out of the area of food and related products and was extended in quick sequence to defective building materials, unsafe automobiles, and dangerous machin-

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[25] *See, e.g.*, A. EHRENZWEIG, NEGLIGENCE WITHOUT FAULT (1951); Friedmann, *Social Insurance and the Principles of Tort Liability*, 63 HARV. L. REV. 241 (1949); James, *Some Reflections on the Bases of Strict Liability*, 18 LA. L. REV. 293 (1958); Leidy, *Another New Tort?* 38 MICH. L. REV. 964 (1940); Prosser, *The Implied Warranty of Merchantable Quality*, 27 MINN. L. REV. 117 (1943).

[26] Prosser, *The Assault on the Citadel (Strict Liability to the Consumer)*, 69 YALE L. J. 1099 (1960).

[27] F. HARPER & F. JAMES, THE LAW OF TORTS 1534-1606 (1956).

[28] Prosser, *The Fall of the Consumer (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966).

ery.[29] The Restatement drafters found themselves almost overrun by the court decisions, and the section of the Second Restatement dealing with products liability had to be redrafted several times during this period.[30] But even as the courts rapidly moved to embrace the new doctrine, they took their lead, or at least their encouragement, in substantial measure from the academics, who were insisting all the while that the new doctrine was not so revolutionary after all, but was merely the culmination of a legitimate common law response to problems that had been recognized for years.

As the process continued, the drafters of the Restatement sought to capture the direction in which the courts were headed in what is now section 402A of the Second Restatement of Torts. That provision stated the developing law of products liability as a general rule under which the seller of any defective product or any product unreasonably dangerous to a user or consumer is subject to liability irrespective of fault. The adoption of this rule in the Restatement further cemented the acceptance of strict liability until today, as Judge Henry Friendly has noted, section 402A of the Restatement is cited by courts as if it were a statute.[31]

In the products liability area, it is not easy to say whether the commentators or the courts took the lead in changing the law. The better view, I think, is that the process of change was a cooperative one. Social pressures built up to modify the law to accord with new technology and a changing sense of social mores. Yet, the fundamental conservatism of the common law resisted the pressures for change. The commentators in the products liability field pointed the way that the courts could follow to adopt the changes without wholly abandoning the traditional common law approach to legal decision making. Where there was no case law authority directly supporting the proposed change in the law, the commentators pointed to decisions that anticipated the coming change. Where the facts of prior decisions were contrary to the direction that the commentators thought the law should be moving, they pointed to the underlying principles of those decisions which, they argued, required that different results be reached on similar facts. Where the principles of the

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[29] *See, e.g.*, Greenman v. Yuba Power Products, Inc., 59 Cal.2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962) (dangerous machinery); Spence v. Three Rivers Builders & Masonry Supply, Inc., 353 Mich. 120, 90 N.W.2d 873 (1958) (defective building materials); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960) (unsafe automobiles).

[30] The section of the Second Restatement dealing with strict liability is § 402A. Initially, the section covered only food and drink. *See* RESTATEMENT (SECOND) OF TORTS § 402A (Tent. Draft No. 6, 1961). The section's drafters then expanded it to cover products designed for intimate bodily use. *See* RESTATEMENT (SECOND) OF TORTS § 402A (Tent. Draft No. 7, 1962). The third revision expanded it to reach all products. *See* RESTATEMENT (SECOND) OF TORTS § 402A (Tent. Draft No. 10, 1964). For a discussion of the circumstances surrounding the adoption of § 402A, *see* Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L. J. 825, 830-31 (1973).

[31] Friendly, *The Courts and Social Policy: Substance and Procedure*, 33 U. MIAMI L. REV. 21, 26 (1978).

prior decisions were against them, they pointed to the basic interests being protected by the decisions and urged that the protection be maintained, albeit under the banner of differently stated principles.

In sum, the theme of the best and most influential legal scholarship of the last 100 years has been a theme of reform, but reform well within and highly solicitous of the common law tradition was not well suited to the rapid, substantial changes in the law that the academics were urging and society was demanding. This institutional resistance to rapid change on the part of the common law has been overcome in part by the development of a fascinating sort of symbiotic relationship between the courts and the academics. The courts have generally focused on resolving particular disputes, without attempting to mold broad principles of law. The commentators, in response, have used the decisions of the courts as data from which to derive and even design these general principles. The courts, in turn, have made use of the principles articulated by the commentators to justify the shifts in direction dictated by social and technological changes. The process has been one to which both partners have contributed, and from which both have benefitted. And it has helped preserve a valuable institution — the common law method of resolving disputes — from early retirement as another victim of the rapid pace of modern times.

IV. A Contrast: The View From England

I have stressed the partnership between the judge and the academic, and, especially the important contribution of academe to the development of judge-made law. I have no doubt that this has been, and continues to be, a salutary aspect of our legal system. But it is perhaps appropriate to notice a somewhat different view prevailing on the other side of the Atlantic. I refer to it not only for the sake of contrast but also to sound a cautionary note.

The judges of England, I am told, are not swayed by the opinion of any mere "academic." Invoking the writings of even the most distinguished legal scholar is, for the most part, not "the done thing" in an English court. And when the rash barrister attempts it, he is more likely than not to be greeted with a response from his Lordship in this vein: "How very interesting that Professor Worsthorne should think that! Shall we move on?" One may occasionally quote Bracton, Lord Coke, Sir Matthew Hale, or Blackstone. But their respectability derives from being long dead, and more important, having held the office of Justicar or Lord Chief Justice of England. On the other side of the Atlantic, one hesitates to cite a living writer who is not on the Bench. Nor do Judges invoke academic writing, much less student Notes and Comments.

This does not mean that English judges, in the privacy of their rooms, never read a law review. I suspect some of them do. For the most part, however, English academic writing about the law does not criticize judicial opinions. They are usually merely summarized and explained, with a

deference that many American judges would envy. The English judge who reads about his recent decision in the law journals is not likely to be led to doubt the correctness of his ruling. At best, he will discover that counsel failed to remind him of a precedent looking the other way. Having no law clerks, the judge there is much more dependent on the advocates to lead him to relevant precedents. Next time, the judge may ask counsel whether the other case mentioned in the law journal is not an obstacle.

Such occasional prompting of the judiciary offers the academic a modest role indeed. But there is another branch of legal writing that explores "first principles," in which judicial decisions are merely cited, if at all, as illustrative only. Much of this is very remote from concrete cases, although it may help mold the direction in which the judges will eventually take the law—not today, or tomorrow, but in the fullness of time. The English still do not like sudden change.

I recite this English contrast not to suggest that it ought to be preferred to our own practice. Far from it. What is more, even in England, there appears to be a modest trend toward real academic criticism of judicial decisions, and, even, from an extraordinary judge like Lord Denning or Lord Edmund Davies, a mention of academic opinion.[32] Yet there is something to give us pause in the manner in which English judges and academics view their respective roles in the development of the law.

The modern English judge — unlike Coke in the days of the Stuarts — has a very modest notion of his job. He is magnificently robed; on his travels, he is heralded by trumpets; his haughty manner strikes fear in mere mortals and even most barristers. Yet, he sees his role as severely circumscribed. He unquestionably obeys the statutes of Parliament, as written, without looking into legislative history (which is absolutely forbidden) or asking himself why such a law was enacted. He follows precedent to a degree unthinkable in this country.

It was only in 1966 that the Judicial Committee of the House of Lords — the highest court in the land — held itself free to depart from its own prior decisions. Although in the years since it has not done so more than three or four times within those strict boundaries, the court may occasionally find a way to move the law along to meet changing realities. But mostly, the judges merely decide cases under the law as it stands.

Obviously, this tradition of self-restraint makes it less likely that the judges will be influenced by innovative ideas spawned by the academic world. And it makes it less appropriate for scholars to criticize judicial decisions which, for the most part, merely apply existing law to new situations. This is reflected in judicial opinions. Most of them are delivered extemporaneously and usually confine themselves to resolving the immediate controversy. Even written opinions — the invariable practice in the House of Lords — are remarkably informal and do not attempt to ration-

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[32] *E.g.*, Attorney General ex. rel. McWhirter v. Independent Broadcasting Authority [1973] Q.B. 629, 648 (per Denning, M.R.); D.P.P. v. Lynch [1975] A.C. 653, 707, 709-10 (per Lord Edmund-Davies).

alize the whole subject in the manner of a treatise. With very few exceptions, English judges today resist the temptation to "make a name" for themselves by striking out in a novel direction. Nor are they looking over their shoulder for the applause of the scholars.

There is another related reason why English judges and English legal scholars are further apart than they are in this country. It is the notion that deciding a concrete case is the sole responsibility of the judge himself, specially trained for the task and selected — with far more discrimination than we select our judges — for his unique ability to perform it. In the English view, that responsibility cannot be *shared* with law clerks or even with scholars, however eminent. In effect, the English judge has a sign on the Bench reading, "The buck stops here." After counsel have argued the case, the matter is *sub judice*, and that does not leave the judge free to consult assistants or the opinions of academe. To some degree, that would be delegating the unavoidable duty the judge has undertaken to discharge alone.

Besides, the judges believe — and there is something in it — that the acute responsibility of decision making concentrates the mind in a way that does not happen when one is simply thinking and writing about the law without immediately affecting the liberty or property of real people. This is a familiar experience to all of us who have been faced with making a decision that affects others. What is more, the English judge believes that the right result — provided it does not disregard binding statutes or precedent — matters more than whether the decision fits neatly into an overall grand design. Like most of our courts — even the Supreme Court — English courts reach their decisions immediately after the case is submitted. But, unlike us, English appellate judges rarely feel the need to rationalize the outcome in long treatises demonstrating the ineluctable logic of the ruling and its place in a structured scheme of law. We are perhaps sometimes too ambitious and too anxious to justify our decisions in the eyes of a critical academic world. The English today follow Holmes' dictum that "the life of the law has not been logic, but experience" more faithfully than do some of our judges.

This approach leaves ample room for the academic. It is his role to make a coherent whole of judicial decisions, if he can, and to suggest new directions. Of course, on both sides of the Atlantic, there are wrong decisions. But they are perhaps fewer than some of the carping critics would say. And it is no doubt true that judges sometimes make the right decision for the wrong reason. But that is of minor importance. Some of our scholars would do well to accept the correctness of court rulings and build upon them, instead of hacking away — for the most part, vainly — at the foundations.

I have deliberately overstated this final theme. I mean only to strike a cautionary note. The partnership of judge and academic in this country has been fruitful. Academicians and judges perform quite different roles that are complementary to one another and are significant in the development of the law. Judges principally concern themselves with deciding

cases and controversies but they always know that the academicians are looking over their shoulders to see whether their decisions are consistent with precedent and legal analysis. This symbiosis of academicians and judges permits our law to grow responsibly, the judges prevent its stagnation as they decide cases and controversies according to their sense of justice. Nevertheless, they keep the growth of the law within bounds because they know that the academicians will be highly critical whenever there appears to be an abrupt or unprincipled departure from past precedent, and as we have seen, the academicians stimulate growth by expanding doctrinal horizons. Academics and judges working together have significantly aided the development of the law in the United States, where our courts perform their function somewhat differently from the way courts do elsewhere and academicians are vigilant critics of the judicial product. All of us are the beneficiaries of this process.