On The Current Recapture
of the Grand Tradition

An Address delivered to the Annual Meeting of the
Conference of Chief Justices, by

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There are many people—there are altogether too many people—Gentlemen the Chief Justices of the various Supreme Courts in these United States—to whom the basic question about you seems to be whether you and your brethren are in the nature of Delphic oracles, mere voices with a mission only of accurate transmission, or whether, in sharpest contrast, you and your brethren are in the nature of better-class politicians deciding cases the way you see fit while you just manipulate the authorities to keep it all looking decent.

You resent that kind of misposing of the issue. I join you in resenting it. Nevertheless, that kind of issue-posing is there, and it is uncomfortable. When the bar does it, or the public does it, the result has to be an undermining of confidence in the appellate bench. Because a Pythian priestess type of job, a purely inspired opinion into which the answer just flows, happens (in my guess) not much oftener than one time in one thousand.

Today, however, I am concerned much less with the emotional effects of the misposing on bar and public than with the effects, emotional and other, on the appellate bench itself. If you are addressed—and this outrageous sort of issue-posing is not gentle in so addressing you—if you are addressed with the question: Didn't you go hunting around for authorities after you already knew how you wanted to decide? Don't you, now, know in your soul that you then shaped those authorities up like a lawyer so as to make the opinion look good? Do you mean to say, then, that it was the Rules of Law and not You that tipped the scales?—Against these questions for half, or even two-thirds of the run of cases, there can be only one answer.

What I now suggest is that this kind of queer but persistent misposing of the issue by bar and public, coupled (as it is coupled) with the facts of life about how appellate deciding is, and has to be, done, has been producing among the appellate bench themselves an unease which hampers their own work inside themselves. What I shall proceed to suggest is that a touch of history and of analysis can turn this very unease into a welling fountain of new strength; and also, incidentally, into a wherewithal for restoring a faith and confidence of the bar that has long been in dangerous decay.

My position is going to be that the course of history has led not only bar and public, but you yourselves and your brethren, into holding as a general picture of what your job is and of how it should be done, a picture which is a snide false picture. It is a picture which, thank God, is at odds, and in tension, with what you have for decades been actually doing and with how you are actually doing your vital work today. This tension, I argue, both accounts for the unease and offers a machinery for stepping up the work.

Professor Karl N. Llewellyn at the Conference of Chief Justices.
Let me get down to detail; but as I do, let me remind you that American legal history is (the Supreme Court excepted) one of the more neglected and is at the same time, for any lawyer, one of the most accessible avenues to not only pleasure but illumination. All a lawyer has to do is to read his earlier reports and statutes not for their doctrine alone, but also or indeed primarily as a series of documents from the times: Why the result? Why this road to the result? And what is being simply taken for granted, and again specially, why?

To work: Since our reports first begin to accumulate—say 1810—there have been two well-nigh complete revolutions in the way and theory that deal with how you supreme appellate judges have been going and ought to go about your job. You can test this cleanly by looking, say, at 1859, 1909, and 1959. This is a matter of plain fact. I shall proceed to urge that it is a most important fact. But first I want to test in advance another proposition of fact on which I expect to rely.

How many of you are familiar with the two revolutions of your craft-ways? No, that would be dice-loading. Let me rephrase: When I say: “There have been two complete revolutions, since 1820, in the general way in which American appellate judges have gone about their work, contrasting, in general, such times as 1859, 1909, and 1959,” to how many of you does this assertion make any real sense? [Not one person suggested that it made any sense.]

Thank you.

In 1859, one era and manner of your work was perhaps beginning to wane, though it was still definitely dominant—say, like a moon one or two days after full. Roscoe Pound has called this general period our “formative period” when his eye was on the rather lovely building of doctrine in that time. In a happier phrase, he has also called it our “classic period”. Then he was thinking of the method.

I call it our Grand Style, or the Manner of Reason. The essence is, I think, that every current decision is to be tested against life-wisdom, and that the phrasing of the authorities which build our guiding structure of rules is to be tested and is at need to be vigorously recast in the new light of what each new case may suggest either about life-wisdom, or about a cleaner and more usable structure of doctrine. In any event, and as overt marks of the Grand Style: “precedent” is carefully regarded, but if it does not make sense it is ordinarily re-explored; “policy” is explicitly inquired into; alleged “principle” must make for wisdom as well as for order if it is to qualify as such, but when so qualified it acquires peculiar status. On the side both of case-law and of statutes, where the reason stops there stops the rule; and in working with statutes it is the normal business of the court not only to read the statute but also to implement that statute in accordance with purpose and reason.

And also, if I may return to my opening: the writing judge has neither any illusion that he is or ought to be a Pythian priest, nor has he any illusion of freedom to move as he wills. He does recognize, indeed, the duty to make a solid case on the authorities. But my reading has turned up only one judge who (according to my sniffer) was completely ready to distort them in the interest of his will. Reasonable, lawyer-like arrangement of authorities in a good cause, even if slightly skewed,—that I am not denying. What I
am saying, and this is important, is that for most judges on most occasions—should I guesstimate over 90 per cent?—this was in no way under cover, and that policy—which means the reason of the situation—was a normal, overt and sometimes lengthy subject of discussion. Thus, as of 1859.

By 1909 such practice had become exceptional, the ideal of it, even the idea of it was all but dead, and most lawyers, indeed most sitting judges, either knew, or thought, or felt, any such way of appellate decision to be simply wrong, and, praise be, absent. Statutes, moreover, tended to be read unfavorably, and even when seen favorably, they tended to be limited to the letter.

I give you a flat fifty-year figure. Have you ever thought about the meaning and power of fifty years in our queer American legal tradition? With us fifty years can re-create the whole nature of the legal universe. We do not work with an unchanging canonized text like the Koran or the Mishnah or the Code Civil. We do not even have a carefully gathered and carefully taught doctrinal tradition such as might have grown up out of Coke, Blackstone, Kent, Story, Cooley, Pomeroy, Wigmore. Success of the case-book completely killed off that line of tradition-building. In result, the organ of tradition is the instructor. And a generation, there, amounts to hardly fifteen years. When you enter law school at twenty-one, a professor of thirty-five has the experience and authority of a father; one of fifty speaks like grandpa, from an ancient past behind which nothing ever has been different.

Hence, by the time any of you entered law school the way of work of 1859, the image of on-going constant and overt reexamination, redirection, rephrasing and general refreshment of the rules, in the light of sense not for the case alone but for the type of situation—that way of work and that image lay buried under formal thinking and formal ideals and a formal manner of reasoning and of writing—lay buried, for you, as they had never been. Even after your experience in practice and on the bench, our test of a moment ago shows that the high tradition of the earlier nineteenth century is not vigorous in your minds as being a thing which once was the thing, which just got temporarily displaced by one unhappy intellectual revolution.

But when you are now reminded of the fact that that way and ideal of work dominated the American appellate bench—great judges and mediocre judges alike—for more than half a century, then you should see and feel at once that the open and conscious quest for the reasonable rule for the type situation which characterizes the work of the American State Supreme Court today, so far from being ground for unease, should be a basis for rich pride. What it means is that your branch of the profession has performed a truly amazing feat. Within fifty years, without conscious planning, in the teeth of the conscious image of duty and of correct craftsmanship misinculcated in your legal youth and insisted upon loudly and bitterly by the whole vocal bar, you have yet managed to work your way back to a daily way of judging which has almost recaptured the full Grand Tradition of the Common Law.

I speak of the American Supreme Bench in general; but I feel safe. I have studied New York at all periods, with closely examined mine-run samplings from 1939, 1940, 1951, and 1958. I have studied Ohio in 1844, 1940, 1953, and 1958. In Massachusetts, North
Carolina, Pennsylvania and Washington there were sustained studies from fifteen or twenty years ago and then from full current samplings as well—all mine-run stuff, the reported cases taken in sequence as they appear. Nine other states, West, South and Middle West, were studied in full current samplings. In each instance the material tested runs regardless of subject matter, accounts to "unfavorable" as well as "favorable" material, and reaches at least a majority of the judges on the court. There have also been a number of intensive borings, especially into Illinois material, to test the possibility of getting further light by approaches from other angles. Results: the historical comparisons show that the march toward re-capture of the Grand Style is unmistakable, strong, steady, and increasing. The fifteen current samplings seem to me conclusive that almost no state can have escaped its influence. It is, I repeat, an amazing achievement, and it is more than time that it should become a source not only of conscious pride but of that even more effective craftsmanship which can be generated when men add to a sound feeling for the job a conscious study directed to improving the know-how of the craft.

Before moving on to a few suggestions which the best work, older or current, holds out for any work of every day, let me take a precaution against possible misunderstanding. When I speak of overt resort to and discussion of sense as an opinion-daily phenomenon of current judging among American Supreme Courts, I do not mean merely such discussion in regard to the application of the rule. Neither do I mean such discussion merely in regard to a choice between two so-called competing rules or principles. I refer to open, reasoned, extension, restriction or re-shaping of the relevant rules, done in terms not of the equities or sense of the particular case or of the particular parties, but instead (illuminated indeed by those earthy particulars) done in terms of the sense and reason of some significantly seen type of life-situation. A short speech is no place to develop what has cost me a 500-page book. I give a single illustration. Oregon had a precedent, based on soapy window-washing water on a sloping sidewalk, that was cast in terms of "not creating a hazard or adding to the danger of pedestrians who might use the sidewalk, by placing therein, or, if so placed, in not removing therefrom, any matter that would cause a slippery or dangerous condition." Some snow fell in Portland, was cleared from steps onto an embankment, melted and ran, and, overnight, left a small patch of ice on the sloping sidewalk. The plaintiff slipped and was injured. What the court did was not to "apply." What it did, in the light of "negligence" "principle" plus some aversion to "strict liability," and in the light of three well considered Eastern cases, was to diagnose a new significant situation: "snow-clearance by the abutter", and to adopt a new rule to further general public convenience by freeing such clearing from risks of liability merely for refreezing.

The case simultaneously brings out another of the more striking phenomena of modern advance sheets. The courts search for, and then quote in some fullness, among out-of-state opinions as well as among home opinions, cases which give not only a rule but also a persuasive presentation of good life-reason in the light of the type life situation. Now I shall be slow to be persuaded that it is, as yet (though God grant it may soon be), the general habit of the bar to dig out and brief-quote this type of opinion in particular; and rarely is the presence of any such given reason even suggested by either digest or encyclopedia. The labor of this increasingly general quest thus indicates to me one of two things: either a hunger of the writing judge for situation-reason, before he can himself be satisfied, and then, in true Common Law Grand Tradition, his hunger also for merging that situation-reason with authority; or else it shows that, as a skilled man who wishes to keep or capture votes among his brethren, he knows this kind of material to be what they will go for. This is the sweetest dilemma any disciple and preacher of the Grand Tradition can ask to be impaled on. Either horn is honey. Neither will I be put off by any judge's conviction and assertion that he never writes to capture votes, that he writes merely his best version of the facts, the law, and the sound and right decision—let votes or heavens fall where they may. No judge of such conviction can deprive me of my comfort. For he could not be a judge unless he was a lawyer. And

*THE COMMON LAW TRADITION: DECIDING APPEALS: (Little, Brown; now in press.)
a lawyer either is no lawyer at all, or else as he shapes up a matter he puts its best foot forward. And a lawyer—including an appellate judge writing for his own conscience (but also to get his duty done, of a right resolution of the litigation in hand)—may indeed not think consciously about the particular tribunal he has in front of him. But his lawyer’s instinct does a lot of that kind of work without his thinking.

With this as a background, let me turn to a few suggestions about both manner of actual judging and manner of opinion-writing which hang like bunches of good grapes, ready to be picked, on the vines of the better practice of your tradition.

The first of these is obvious: (1) The drive should be for consistent and sustained application and development of the best modern manner. Today, at unpredictable moments, there still pops up into consciousness and control the unhappy and obsolete 1909 image of your office as being purely formal, non-creative, powerless, indeed in a deep sense irresponsible: “It is the rule and not the court . . . etc.” Whenever that image does so pop up, it interferes with the job. It interferes in the case in hand, which is bad; but, what is much worse, it slows and checks the smooth development of your general recurrence to the Grand Tradition. The doctrine I am preaching is, of course, not that a clear rule which leads to a right result needs anything more than mere clear statement in a single paragraph. The doctrine is instead that under the Grand and Only True Manner of deciding: (a) any rule which is not leading to a right result calls for re-thinking and perhaps re-doing; and, also and equally, (b) any result which is not comfortably fitted into a rule good for the whole significant situation-type calls certainly for cross-check and probably for more worry and more work.

(2) The second of the points is one which as between the 1939-1941 samplings I have studied and the current ones seems to be on the perceptible increase. That is the practice, whenever time permits, of what I think of as a tidying-up of the whole particular little corner of doctrine, so as to afford the court a canvass of all the local experience to date, and so as to afford the bar a fresh and clean foothold. Note how comfortably this fits with any persuasive life-reason for a significantly seen type of situation which a court may locate in experience from across the border. Note also, where no such ready-made rationale is at hand, how the tidy-up provides an authority-underpinning for any rationale the court may reach on its own. Note finally the dividends such a job pays not only to the bar in guidance, but to the court itself in speed of disposing of further cases in the same area. I have been proud of my Common Law Tradition, as I worked through my current samplings (in all, 350-400 cases) and met instance upon instance in which, even after such a recent tidying-up, the court was willing to review the field once more. I have been disturbed when, after two such jobs, a court has not felt that it was time to take a little skin off the back of slovenly counsel who despite the recent clean-up had been wasting court’s time and clients’ hopes and money.

(3) Save for the course of the prior discussion, the third point might well have been put first. It is a formula for avoiding both “Hard cases make bad law” and any splintering of “the law” into narrow jackstraw-decisions which offer to neither bar nor tomorrow’s court any helpful pattern for guidance. In my judgment this formula is always helpful, in three cases out of five it resolves the chief difficulties almost automatically and in the rest it presses things toward sound solution. The formula is simple to state, and not hard to apply. It is this: As you size up the facts, try to look first for a significant life-problem-situation into which they comfortably fit, and only then let the particular equities begin to register; so that when the particular equities do begin to bite, their bite is already tempered by the quest for and feel for an appropriate rule that flows from and fits into the significant situation.

This kind of language means little by ear, or in the abstract. Let me try both to illustrate and to save time by taking a case most of you met (and were misinstructed) while you were still students: McPherson v. Buick. That was a case in which the defendant not only had done every normal thing that in the then state of the art there was to do, but also had an astounding record of experience to show both its care and the soundness of its judgment. If you take the party-equities as a base-line and if you take “fault” of any kind as a principle, that pretty well cleans up the plaintiff. And Willard Bartlett’s reminder that at the time of the accident the car was
moving only at a stage-coach speed of eight miles an hour also becomes crushing argument. What Cardozo did, in contrast, was to take a significant life-situation, first, and to take these individual equities only against that background. I am not going to argue whether or not he was right or wise as to the doctrine in the particular situation. For my concern is with method; and not even the grand methods of the Grand Style give any assurance of sound outcome in any individual case. What they do is to double or treble the probability that the outcome will be sound. But the case does show sound method going to one value which would be live and real even if the particular case-result were most unhappy in its substance; to wit, the gain at least in predictability which can be achieved by a combination of looking first for a significant type of situation, and then doing a careful tidy-up. Thus before McPherson v. Buick the law of New York had for some demonstrable forty years been swinging around on this matter like a weather-vane. I urge that even Willard Bartlett's beautiful argument (which Law School never introduced you to—Have you ever read it? Who has?) was just another of the same: another individual equity job. The Torts boys praise Cardozo in this one because of his beautiful new doctrine. I agree, but that is not my point here. I praise him here because of his beautiful old method, and—as I hope my book makes unmistakable—I would praise that, even though I objected violently to his particular result.

See what he did. It is so simple. It is so grand.

Instead of individual parties doing their best, or queer articles: "dangerous instruments," he set up a significant type-situation: consumer-purchase in a community which has to rely on increasingly ununderstandable basic technology. That typical situation, seen that way, stepped up the aspect of reliance and stepped down the aspect of fault. And the typical situation, as of course, included the need for marketing the product through middlemen. You will find no such overall picture sharply expressed in the opinion. What the opinion does is to feel that picture. Indeed, it is not the job, even of a great judge, to get fully explicit, all at once, about great social change. His job is to feel what he can, and to see what he can, and to say what he can. But his method has to be to reach, first, for the significant type-situation. Then, to diagnose a problem, and to prescribe an answer accompanied by an explicit life-reason: this not only helps toward a good answer, but is also priceless in affording easy wherewithal for tomorrow's intelligent application, or else for tomorrow's explicit correction, as tomorrow's case may prove to need. Finally, the good judge's office, in the Grand Tradition, is to do a careful and honest tidy-up in his opinion.

Out of a dozen more further matters there are three which press peculiarly for mention, even though the mention must be cut to the bare bones. There is, to begin with, the syllabus by the court. The propositions are these: (1) Whether or not there is a present practice for the court to prepare its own syllabus, it ought to. (2) A syllabus court which prepares the syllabus not before the opinion is written, but only after the opinion has been written, sacrifices the main value offered by the syllabus to the opinion, to the court, and to the law. (3) My argument is independent of any theory or doctrine to the effect that "it is the syllabus which states the law."

On the third point first: My book demonstrates, from Ohio, and I will undertake to demonstrate from any jurisdiction, that regardless of local theory on the point, a syllabus-court is up against the same multi-wayed problems of handling prior authorities as is a non-syllabus court. My guess is that the diverging correct doctrinal possibilities merely rise from 60 plus to 80 plus, as syllabus and opinion come to interact in their operation and application.

Now on the first two propositions together, and flat, and simple: Elementary theory of argument makes it clear that if the points to be made are thought out, arranged, and also phrased, before writing begins, the result has to improve in

(a) clarity, and
(b) force, and
(c) speed of production. And almost always improves also in
(d) shortness and bite.

Again let me avoid being mistaken. When I apply the theory of argument to an appellate judicial opinion, I do not mean that an opinion is merely an argument. What I do mean is that whatever else it is, it is also and necessarily an argument: A conclusion has been reached and has been tested and has been found both right and solid. The opinion writer now has a lawyer's job: the facts, issues, and authorities are to be marshalled so that on any point the rule announced is shown to any reasonable reader to be properly controlling, and so that the application of that rule is shown to any reasonable reader to be not only justifiable but wise. Only thus can a satisfying opinion come into being. The laws of argument apply: The points to be made are best thought out, arranged, and also phrased, before the writing begins. Of course the writing may show rearrangement or rephrasing to be required. Sometimes a judge may be forced to reverse his initial conclusion. But that cuts down not one tittle on the value of preliminary phrased organization.

It is a queer thing that you gentlemen, who, in order to make things clearer for yourselves to see and easier for yourselves to handle, force upon the bar in their briefs an organization by way of phrased points which come first, should in your own work and in your own product disregard that method. This calls for some soul-searching on your part.6

The second remaining "must" for mention is a question of judicial statesmanship: the value of a two-stage operation whenever any important change of doctrine either portends or is undertaken. Warning is a tremendous value to a counselling lawyer. Warning is also old practice. Take the familiar cases where the court says: "Now look: here is what we are not deciding." Or, beside and against these, take the cases where the court says: "Of course, if the facts were this other way, it seems clear that the outcome would be the opposite." Both caveat and prophecy, when carefully considered, give good warning. Both caveat and prophecy, even when carefully considered, offer the court a second think. Note now a new factor on the scene: we have today, in the law reviews, to a degree and with a general spread never before met in the history of our country, a forum for dubious or dangerous, even though carefully considered, suggested ideas of the State Supreme Court to be explored with freedom and with fullness, before they bite. To open an idea to such a forum is

*Up to this point, except two additions to clear up what discussions in the Chief Justice's "workshops" showed to be expressions which had led to misunderstanding, the text is almost exactly as delivered. The following portions of the speech (save for minor later clarifications) were distributed, but had to be cut from delivery for lack of time.

Keith Parsons, JD'37, is presented to the Vice President by Chancellor Kimpton.

...to widen materially the likelihood and range of information the court can hope to tap. Not infrequently such additional material can shift what seems the balance of wisdom. Meantime, the counselling lawyer has marked his chart with a danger flag, and transactions are so channeled that—no matter which way it goes—disappointments are reduced. That is pure gain for everybody.

Why, in the light of these facts, is not the principle of warning and the practice of two-stage operation made general? Thus, for example, when there is some novel ruling, it is almost always technically easy to add at the end an alternative which on the facts leaves the main, and meant, ruling still open, if real reason should appear, to be distinguished for cause.

A study of your current practices of distinguishing shows that purely technical distinguishing is today almost as extinct as the dear dodo. Today a distinction without a reason expressly given is rare; and almost always the reason given goes to reason of fact, which is reason of life, as seen by the court. I therefore feel no hesitation at all in suggesting a standard technical procedure to avoid silly questions of face ("Can We Overrule So Recent a Decision?") while a court still keeps its eye on the ball in a two-stage operation.

Finally, on this matter, and again in the interest of "general principle" (not coined for this argument, but built out of a careful examination of a century of our case-law experience)—finally: why should you not generally, instead of at odd moments, bring this principle of warning and this practice of two-stage to bear on the problem of overruling, as well as of any other change or warning? There is no time to develop this. I ask you only to think about three questions:

(1) If the argument and study in a case persuade...
you that a rule in the immediate area is ready to fall in the next wind, I am suggesting that warning of that is by any discoverable standard of decency as much needed as can possibly be the carving out of a little Swiss cheese hole in any pending decision.

(2) If the case in hand just slips in under an exception (so to speak, "on other grounds") to a rule which the argument has persuaded you no longer fits our people: why is this not the perfect opportunity to give, in regard to a rule, the warning notice which every man of you is willing to give with regard to an exception?

You will observe that what I am here urging, to wit, the considered expression that "When we get a clean chance, we will extirpate," does not even touch the problem of the Sunburst Oil case.

And yet, as far as my limited reading goes, this easier and more useful method has found more resistance among you gentlemen and your brethren than has even the bold move of deciding the pending case by the old rule, while announcing a new rule (or a new approach to a statute) for the future. I think that this difference is because you have been (rightly) trained to think protection against retroactive "law" to be not only decency, but your office; while you have also been mistrained to think that your office has no part in prophecy. But surely any good case-law judgment is in its best part a combination of prophecy and of clear guidance toward fulfillment thereof. In any event:

(3) Why do not the principle of warning, and the practice and policy of two-stage operation become a standard approach to possible overruling, prospective overruling, and to the case which has, in itself, to be excepted from the overruling—easing all of these, while it effectively warns the bar, and also opens up whatever may be elicited to inform the court before the final leap?

The last matter which refuses to be left without mention is that of the statutes. Here the image of 1909—"We must accept what is written, we have only to read the [mostly non-existent] 'intent of the legislature,' we have no power to add," etc.—modified only by the 1959 willingness to abdicate self-will and to try to make sense—here, I say, the image of 1909 stalks not only active (though most intermittently) but vicious.

The simple basic principle which expresses both the Grand Manner and today's need is this: It is contrary to a Supreme Court's duty, and therefore to its power, to allow any statute to remain as an undigested and indigestible lump in the middle of Our Law.

Even the most formal judges of the Formal Period recognized this principle. Their response was sound in terms of office-instinct: The Law does call for wholeness. Their response was not good, in terms of measure. They refused to participate in the intrusion. They excreted what they could, via unconstitutionality. They walled off the rest by literalistic construction.

That is past, in regard to the particular. But it is still with us at odd moments, and vigorously whenever a court settles down to a sermon on its lack of power over the written word.

But in my current samplings

(a) I have found no single court which, even if it mouthed the statute-image of 1909 today, cannot also be found operating in conflict with that image, and in an approach to the Grand Approach to statutes, on the same opinion-day or on the next.

(b) Nor have I found any court which, judged on a sequence of cases, is not moving with regard to statutes about as freely in the average as it is in the case-law field. This holds also for the 1939-1940 and 1944 work examined from six courts. What you get in the statutory field is a jerker, less predictable movement: here more of a hitch, there a sudden jump, so to speak, under cover; no adequate guidance, as to when which will occur.

That is not healthy judging.

According to the Grand Style, it is the office of the Supreme Courts in these United States to do, with statutes, too, what you have for now a demonstrable two legal generations been doing for the rules of our case-law. You must accept them, to start with: you are no independent agents. You must shape yourselves to what, in essence, they give you to receive; you are no officers to move as you see fit. You must also accept policy and basic measure, if, as and when the legislature gives them to you. Indeed—and here begins the tough duty—your job is also the perplexing one of remaining true to such policy and measure and at the same time to the nature and spirit of the inherited rule-machinery—of somehow handling the individual case according to all of these at once, as you labor in the vineyard of the heritage. You accept today from the Legislature, as your forebears of 1889-1909 would not, the Legislature's essential declarations of policy, and its outlines of measures. But as you do it, and very queerly, you still proceed to pick up, proclaim, and sometimes even trip yourselves on, the very noises that the foot-draggers of 1909 used to use in order to keep legislative policy from receiving any real recognition. For "We have no power," when that slogan was first popularized in the Formal Period, meant "Thank God, we can whittle it down to frustration."

Briefly, then: (1) A piece of legislation, like any other rule of law, is, of course, meaningless without reason and purpose.

(2) Few are the legislatures, even when equipped with tops legislative reference bureaus, who also have had time to give this particular bill the visiting Queen Elizabeth treatment, or who, in passing any bill, pass
it with any real "intention," as to the question which is now before the court.

(3) Even when legislators do have demonstrable intentions—as with an open grab-bill—there can be times when a court has a duty of restrictive construction. (On this Breitel's forthcoming article advances—yet with sweet restraint—far beyond any earlier writing.)

In the net, then: as in the Grand Tradition, so in current practice, and even more in current need, the recapture of the Grand Tradition is almost there, but irritatingly is not yet there, quite. It needs to be fulfilled.

In regard to the How, my guess is that most of you who may disagree with me may be worried more about statutes than about anything else. In regard to statutes, and with my own mind on the way statutes have been viewed in our tradition in the first Elizabeth's time, and in Coke's, and in Marshall's or Shaw's, and in Hughes', as his viewing changed through his long legal life, and as I work over instance after instance of your current work—in regard to statutes, the essence comes to this: that except for occasional almost unwelcome reappearances you are almost back to getting at them in terms of "where the reason stops, there stops even the enacted rule." You are still, however, far short of the other duty, addressed to the undigested lump—the hard, the troubling stone in the law's stomach. That other, complementary duty is: Whither the reason leads, thither goeth the rule, as well. That is the principle of implementation by purpose. It is a Supreme Court's duty, the duty to keep Our Law Whole, and a working Whole.

There is so much in this, my plea for conscious recreation of the responsible forward-guiding of our Common Law, which may offend all or some of you. To these I can only say in the words of old Oliver Cromwell: "I beseech you, in the bowels of Christ, bethink you that ye may be mistaken."