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Not all the criticism of the United States Supreme Court is unjustified as readers of the following article will agree.

SUPREME COURT USE OF NON-LEGAL MATERIALS

REYNOLDS C. SEITZ*

THE THOUGHT PROCESSES and ingredients that go into appellate court decision-making have consistently been of interest to many students of the law. Judges have thoughtfully pondered the many problems involved.

One of the greatest jurists, Benjamin Nathan Cardozo,¹ in 1921 presented his thinking in a lecture which is widely recognized today as a true legal classic. Under the appropriate heading "Nature of the Judicial Process,"² Cardozo undertook to answer these specific questions:

What is it that I do when I decide a case? To what sources of information do I appeal for guidance? In what proportions do I permit them to contribute to the result? In what proportions ought they to contribute? If a precedent is applicable, when do I refuse to follow it? If no precedent is applicable, how do I reach the rule that will make a precedent for the future? If I am seeking logical consistency, the symmetry of the legal structure, how far shall I seek it? At what point shall the quest be halted by some discrepant custom, by some consideration of the social welfare, by my own or the common standards of justice and morals?³

The answers which Cardozo gave are, of course, not known to the average citizen. Indeed, many lawyers may not have been exposed sufficiently to them; or, if attorneys have studied and remembered the lectures, many find difficult the application of the scholarly jurisprudential reasoning to specific fact situations.

At any rate, appellate court decisions of major importance continue to foster queries bearing upon the nature of the judicial process. Most particularly, a departure from precedent in connection with a holding which has far-reaching social and economic consequences causes both the layman and the lawyer to think about the standards which a judge uses in coming to a conclusion upon a point of law.

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² Copyrighted in 1921 by Yale University Press. Now appearing in many volumes.

³ See HALL, *SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO* 109 (1947).

In modern times, the case which has produced this effect to a startling degree is *Brown v. Board of Education*.⁴ This is the decision in which the United States Supreme Court reversed *Plessy v. Ferguson*⁵ and its "separate but equal" doctrine and held that a state law ordering segregation in public schools offended the "equal protection of the laws" provision of the fourteenth amendment to the United States Constitution. The Supreme Court stated that segregation in the public schools has a detrimental psychological effect upon the negro child and interferes with the learning process. This conclusion, deduced as it is from several volumes⁶ on psychology and sociology which were not presented in the briefs of attorneys, was the particular spark which aroused again wide-spread interest in the judicial process.

The nation's press has played a major role in acquainting the public with the issue. Comment by way of challenge has ranged from criticism by named columnists accusing the Court of relying upon rank propaganda disseminated by ultra-liberals to the restrained presentation of widely respected George Sokolsky in Hearst newspaper editorial pages during the month of October, 1957.

Mr. Sokolsky focuses our attention upon the problem by submitting that Representative Wright Patman of Texas has raised a pertinent question concerning the Supreme Court's use, as the basis of a holding, material selected by the justices themselves or by their law clerks and not submitted to it by either party. Patman is quoted directly as saying:

⁴ 347 U.S. 483 (1954).

⁵ 163 U.S. 537 (1896).

⁶ *Brown v. Board of Educ.*, 347 U.S. 483, 494 n.11 (1954).

Formerly, we had every reason to expect that decisions by our Supreme Court would be controlled by the standards outlined by the Constitution, the law, the facts of the case and by the sound reasoning of the justices. In the past even though we felt the court had decided a case wrongly, we nevertheless felt that we could understand that the court had a basis in the record of the hearing in the case for its decision. . . .

Moving to a conclusion on the issue raised, Sokolsky suggests that "the problem is not so much what material the justices employ to form their opinions as that counsel should know what it is so that they may argue a point." When the issue is spotlighted in such fashion it seems to justify some analysis. That will be the purpose of this article.

Certainly the Supreme Court has often taken judicial notice of non-legal material incorporated into appellate briefs. The Court was first exposed to this approach when Louis Brandeis appeared in 1908 as counsel in *Muller v. Oregon*⁷ and argued in support of regulating hours of work for women. He incorporated into his brief pertinent statistical data, scientific discussion by persons of eminence in their profession, and departmental reports.

The Supreme Court's response to this first use of the technique, which is today familiarly known as the Brandeis brief, is clearly manifest in this excerpt from the *Muller* opinion:

The legislation and opinions referred to in the margin may not be, technically speaking, authorities, and in them is little or no discussion of the constitutional question presented to us for determination, yet they are significant of a widespread belief that woman's physical structure, and the functions she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she should

⁷ 208 U.S. 412 (1908).

be permitted to toil. Constitutional questions, it is true, are not settled by even a consensus of present public opinion, for it is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action. . . . At the same time, when a question of fact is debated and debatable, and the extent to which a special constitutional limitation goes is affected by the truth in respect to that fact, a widespread and long continued belief concerning it is worthy of consideration. We take judicial cognizance of all matters of general knowledge.⁸

The Supreme Court's acceptance of a Brandeis brief has never met with uniform approval. Some attorneys object that it has a drawback of affording no opportunity for testing trustworthiness by the usual methods available in connection with evidence offered at the trial. This becomes particularly vital to attorneys who perceive the effectiveness of modern propaganda techniques. The lay opposition to a Brandeis-brief approach is often grounded upon belief that the judge is not significantly qualified to pass upon underlying questions of fact. Other laymen are willing to acknowledge the judge's competence to decide a pure question of law but are somewhat reluctant to go along with a holding which involves taking a position between two conflicting points of view in such fields as economics, sociology or psychology.

Even greater numbers of attorneys and laymen oppose the reliance of the Supreme Court upon non-legal materials which are not cited in the appellate briefs. The Brandeis brief at least gives the opponent indication of material presented to the Court so that an effort could be made to rebut.

The questions raised by those who challenge the weight which the Court has placed upon non-legal materials which

⁸ *Id.* at 420-21.

come to its attention in a Brandeis brief or which it may have discovered through its own research warrant mature thought.

An analysis suggests a need first to recognize that many phrases in the United States Constitution are not expressed in terms of mathematical dimensions but are statements which gain meaning in the light of developments in such fields as science and social science. Benjamin Cardozo said that "the great generalities of the Constitution have a content and a significance that vary from age to age."⁹ Chief Justice Hughes, in his majority opinion in *Home Building & Loan Association v. Blaisdell*,¹⁰ stressed that the interpretation of the great clauses of the Constitution must not be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them. He said:

It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning — "We must never forget that it is a *Constitution* we are expounding, a Constitution intended to endure for ages to come, and, consequently, be adapted to the various *crises* of human affairs." . . . The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.¹¹

This assumption suggests the propriety of a court welcoming evidence uncovered through research in fields of learning other than law. Cardozo makes the point clear when he states in his "Nature of Judicial Process" that:

Courts know today that statutes are to be viewed, not in isolation or *in vacuo*, as pronouncements of abstract principles for the guidance of an ideal community, but in the

⁹ HALL, SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO 111 (1947).

¹⁰ 290 U.S. 398 (1934).

¹¹ *Id.* at 443.

setting and framework of present-day conditions, as revealed by the labors of economists and students of the social sciences in our own country and abroad.¹²

This philosophy fully explains, for example, a court's desire for medical and sociological evidence bearing upon individual health in a contest raising the issue of state infringement of the right to contract and of the due process clause of the United States Constitution by reason of legislation restricting hours of work. A wish for psychological and sociological evidence would seem to be just as reasonable when an issue of the equal protection of the laws under the fourteenth amendment is raised by state legislation requiring separate educational facilities for members of the negro race.

This admission, however, leaves unresolved the correctness of an appellate court's reliance upon facts in a Brandeis brief which have not been tested under the careful procedures of a trial. Also unresolved is the appropriateness of the court basing a decision upon non-legal facts which its own research has discovered.

The position of this writer is that the Supreme Court should not turn its back on a Brandeis brief and that the Court itself can appropriately do research on non-legal materials and, if the findings are pertinent, rely upon them in making a decision. To conclude otherwise would seem to make the Court susceptible to the criticism which Cardozo aims at the jurists who conceive their task to be nothing more than "... to match the colors of the case at hand against the colors of many sample cases spread out upon their desk."¹³

This attitude, however, is qualified by the opinion that, if the Supreme Court discovers

¹² HALL, *op. cit. supra* note 9, at 139.

¹³ HALL, *op. cit. supra* note 9, at 113.

non-legal materials which it feels bear upon a constitutional issue involved in a case, it should order reargument before it to allow counsel to undertake refutation and marshal non-legal materials in rebuttal. Presumably there would not be the same need to command reargument if non-legal materials were introduced by a Brandeis brief since opponents would be alerted and could meet the materials in their briefs and arguments. It does not seem necessary to send the case back to a trial court for jury consideration. Reargument before the Supreme Court should be sufficient when the Court has drawn upon non-legal sources to help it decide the meaning of a constitutional phrase. Adequate time should, of course, be allowed for the preparation of material to meet an argument in a Brandeis brief or to meet non-legal data which Court research has uncovered. The time for oral argument should be extended to permit an adequate presentation of a position in respect to non-legal research. This seems necessary in order to insure that the Court will be fully enlightened about fields of knowledge outside the law.

If the suggested precautions in respect to reargument are taken, the justices will be educated "... in the humanities and in social sciences . . . [and will be in] possession of data, statistics, and surveys which illuminated shadowy areas of the law."¹⁴

There is a discernible difference between situations of the type where the issue is whether A promised to pay B or whether automobile driver X failed to pull to a halt at a stop light and hit Y, and the interpretation of the application of clauses like the

¹⁴ This is a phrase used by Justice William Douglas of the United States Supreme Court to describe the ability of the late Judge Jerome Frank of the Court of Appeals of the Second Circuit. See Douglas, *Jerome N. Frank*, 10 J. LEGAL ED. 1, 6 (1957).

due process or equal protection statements found in the United States Constitution. There is obviously great need in contract and tort situations to determine the credibility of witnesses. For this purpose cross-examination and the reaction of a jury are most appropriate. If, on the other hand, non-legal materials are introduced to help with a decision on the due process and equal protection of the laws clause, the responsible justice seems sufficiently, well qualified to test credibility. In many instances the non-legal material will have been prepared by parties whose professional reputation can be readily ascertained. Basic honesty can be rather quickly verified from public or semi-public sources. If, of course, the justices should, in an unusual situation, have serious doubts which cannot be resolved, the matter can be sent back to the trial court.

Even though the justices may be satisfied as to basic honesty, there may remain the question as to the validity of the scientific or professional technique which has been used by the one or several who have prepared a study or report in the science or social science areas. If reargument is permitted, the opposition will have the chance to marshal sources which would raise such questions for judicial consideration. This type of issue is one which can be better resolved by a court than a jury. Certainly the average jury would not be particularly well equipped to decide the scientific validity of techniques employed by researchers in the field of science and the social sciences.

Furthermore it appears that the type of non-legal evidence which would be introduced as bearing upon a substantive due process or equal protection of the laws question would frequently raise a debatable

issue because various studies may end in different ultimate conclusions. Since, however, the Court is trying to decide an issue of law — the meaning of due process or equal protection of the laws clause — it has the right and the need to take an attitude toward the debatable issue and decide the constitutional question. It is not a matter for jury decision. The meaning of the Constitution is not decided upon the vote of a jury.

The Supreme Court is perfectly familiar with handling debatable issues. In connection with state regulation of business, the Court has frequently been introduced to non-legal materials. In resolving debatable issues which arise in the business-economics area, the Court, since the late thirties, has mostly ruled in favor of state police power. Justice Douglas in 1952 pointed out that, if recent cases mean anything, they leave debatable issues, such as respect business and economics, to legislative decision.¹⁵ This, of course, is because the Court, in the weighing process, is not impressed with the plea that contract and property rights should be looked upon as more important than the state's interest in such things as health, safety, morals or the general welfare. As long as the issue was debatable, the Court was willing to take the word of the legislature for the need to protect health, safety, morals or general welfare.

We do not, of course, know exactly what the Court would have done if it had ordered reargument on non-legal materials in the *Brown v. Board of Education*¹⁶ controversy and had, as a result, been confronted with a debatable issue. It is most likely that

¹⁵ See *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 425 (1952).

¹⁶ 347 U.S. 483 (1954).

the ultimate decision would have been the same as rendered in 1954. In the weighing effort, a consciousness that all human beings have a natural due process right not to be treated as inferior would undoubtedly have served as a most adequate reason for the Court to conclude that, as long as there were reputable materials indicating the psychological effect of segregation, the state law should be condemned as violative of equal protection of the laws clause. This would furnish the justification for overruling the "separate but equal doctrine" of *Plessy v. Ferguson*.¹⁷

The use by the Court of non-legal materials, forcing as it often will the need to react to debatable issues, requires more than ever before that we have justices who are guided by principles of sound philosophy and a recognition of natural law.

This additional responsibility should most certainly not induce non-use of non-legal knowledge. The Court ought not turn away from non-legal sources of information because, in passing upon a constitutional question, it is not merely deciding a narrow issue between two parties. It is giving life to a clause in the Constitution. What the Court says will often have an impact on hundreds of thousands. Therefore, the Court should not penalize those thousands because the trial or appellate counsel may not have had the vision to see the value of non-legal research.

The rights of interested parties will be protected if reargument is allowed. Reargument needs to be ordered when counsel at the appellate level have not had time to study and reply to non-legal information which the Court feels bears upon the controversy. No lack of skill should be imputed to counsel for failure to anticipate the non-

legal knowledge which the Court may find through its own research. A lawyer may be held responsible for not finding pertinent legal citations and studies, but it seems somewhat unrealistic to hold him accountable for failure to anticipate all research findings which may be used in deciding a problem at the appellate level.

The Constitution should be permitted to grow under the interpretation of a Supreme Court educated on all knowledge applicable to the problem of interpreting such great phrases as "due process" and "equal protection of the laws."

It seems obvious that the Court should not attempt to side-step controversy in the ordering of reargument by the practice of refraining from citing non-legal materials. It would appear that the right-minded justice would want to make sure that his education in pertinent non-legal areas was well-rounded. Furthermore, if the Court follows the procedure suggested, it will impress the public with its philosophy of complete fairness. Most certainly courts of justice should be acutely conscious of the value of creating such impression.

The Court has every right to enlighten itself on non-legal facts and to ask counsel for further help in all relevant non-legal fields. As Justice Walter Schaefer of the Illinois Supreme Court pointed out in commenting upon a phase of the effort of a reviewing court, an appellate tribunal, in addition to being interested in the views of the legal profession as expressed formally in court decisions, treatises, and law reviews, should also desire the opinion of any informed group. "Witness, for example," he says, "the impact of the views of psychiatrists on the tests for determining sanity in criminal cases as announced in *McNaghten's* [sic] case."

¹⁷ 163 U.S. 537 (1896).