The Law-Making Function of the Judge

Albert Tate Jr.
THE LAW-MAKING FUNCTION OF THE JUDGE*

Albert Tate, Jr.**

Law students are no longer surprised by an admission that our judges sometimes create law-rules as well as apply them. Indeed, perhaps law schools overrate the influence of social policy upon the decisional process. The settled rule governs almost all the area of everyday law practice, and the vast mill-run of litigation neither requires nor allows much free play of judicial discretion. In the trial court only the rare case involves the uncertain rule rather than the uncertain application of a rule itself indisputable. Even in the appellate courts, which decide the borderline litigation of many law practices and of many trial courts, only a small minority\(^1\) of cases involve respectable discretion to select the decisive law-rule.

My remarks concern the law-making function of the appellate judge, but they must be viewed in this context. To single out this limited judicial role must necessarily overemphasize its quantitative importance. Nor at this late date can novelty of theme enhance any discussion of rule-creation by judges.\(^2\) What, then, may justify yet another glance at this now familiar text?

Over the past thirteen years of experience as a state appellate judge I have come to see that law-improvement functions are an inescapable part of the duties of an appellate court. Though they be minor quantitatively, these functions are quali-

---

* A paper delivered April 22, 1967, at ceremonies inducting the writer as an honorary member of the Order of the Coif at the Law School of Louisiana State University, Baton Rouge, Louisiana.

** Presiding Judge, Louisiana Court of Appeal, Third Circuit, on leave of absence to serve as Professor of Law, Louisiana State University Law School, 1967-68. The writer is indebted for research and editorial assistance to A. Lynn Wright, II, law clerk to the Third Circuit 1966-67, member of the Calcasieu and Orleans Bars.


tatively important, for they aid the law to keep alive and current and responsive to the changing needs of our society. The subject of judicial creativity has become a sensitive subject during these same years, when the national Supreme Court's recent constitutional rulings, unpopular with many as to substantive result, have been attacked as unwarranted judicial legislation. My hope is that by discussion of the judicial law-choosing role in its more humdrum day-to-day aspects—as it affects a state appellate court disposing of its ever increasing docket of mostly private disputes—we may note that law-creation functions performed by appellate courts are not exercised in derogation of the paramount law-making power vested in the legislatures but rather as a necessary supplement to it.

Let me at the outset repeat the usual disclaimers. The proper function of the courts is to adjudicate, not to legislate; the legislature is and must be the ultimate and paramount source of law. Inevitably, however, the adjudicative process in American jurisdictions requires that on occasion the courts create or modify a general rule in order to decide a dispute pending before the courts. Indeed, historically, our Constitution and customs envisage that the courts will perform law revision and law adaptation functions in order to maintain the coherency and currency of the law. Nevertheless, in the small proportion of cases in which judicial law-creation is appropriate, such power must be exercised subject to traditional restraints and more to accord with the reasoned development of pre-existing doctrine than to express any personal philosophy of the judges.

In further preliminary, we will limit the ambit of our discussion. We will not now consider the various philosophical concepts which divide legal philosophers. We will instead accept as our present working definition that the law is simply the rules of substance or procedure by which the courts decide cases before them. Thus, for present purposes we will assume that law-rules formulated by judicial decisions represent judicial law-making, disregarding the civilian concept that judicial decisions are only interpretations and that law results from legislation alone. Also, we will focus our view on private law—the judicial law-making responsibility arising from the decision

of disputes between private persons to settle private rights and liabilities. By doing so, we will attempt to avoid the emotion-charged atmosphere surrounding the duty of the courts to decide public-law questions of policy and constitutional interpretation. Our concern will thus be with the courts' law-making function in the development of the "lawyer's law" of the quiet law libraries, not the "political law" of the bustling legislature or of the strident street corners.

I

Before we generalize about judicial law-making, it may be well to illustrate one of the aspects of the problem by a specific example.

When I was a member of the old Louisiana First Circuit, in 1957, we were faced in Alexander v. General Acc. Fire & Life Assur. Corp. with an issue never before explicitly decided by any previous Louisiana decision—the standard of care owed by a host to a social guest injured through some defect of the host's premises (in this case a carelessly attached runner-rug in a dark hall). No statute of our legislature directly regulated the matter. The only legislation applicable was our Civil Code's general provision obliging those who cause damage through "fault" to pay for it.

Under the common law of England and the court-made law of most American jurisdictions, a host generally owes to a social guest only the duty to warn him of latent dangers the host actually knows about. This is to be contrasted with the care required of the host for almost all other invitees, to whom his duty includes an affirmative responsibility to warn of or to correct latent defects which are reasonably discoverable—in short, to take reasonable precautions against undue risk of reasonably foreseeable harm, the usual duty owed in most areas of negligence law. The courts of other states had applied this common-law social-guest rule over a current of dissent. Some tort scholars felt that the host should owe the guest in his home the same duty not to injure him negligently through premise defects as he admittedly owed to business callers—or for that

5. 98 So.2d 730 (La. App. 1st Cir. 1957).
6. LA. CIVIL CODE art. 2315 (1870).
matter, to the social guest himself for negligently inflicted injuries not caused by defective premises.\(^8\)

In 1957, then, this question of law, the duty of a host to a social guest for premise defects, came before our court for decision in the *Alexander* case. Even though there were no Louisiana statutes or decisions to guide us, we as a court nevertheless had to decide the case. To do so, of course, we had to select and apply some rule of law based upon no previous Louisiana authority and to set this forth in a reasoned opinion to be published. We could not, for instance, withhold action indefinitely until the legislature might act on the question, if ever.

In this situation, should we, in selecting the law-rule to apply, choose the old English common-law rule followed by most American jurisdictions? If we did, should we do so without consideration of whether it was better than the ordinary-care rule preferred by many scholars, simply because most other American courts had chosen the English rule to apply? Or should we instead choose from the two law-rules that one which we thought to be the fairer and more socially useful, the more consistent with the general body of tort law and with standards of behavior and social expectations in twentieth-century America?

As my loaded questions suggest, our court did not select the preponderant English-American social guest rule. We felt that the rule recommended by some modern scholars to be the better, and the one more consistent with the general body of Louisiana law and the general social conditions of today. A few years later, our State Supreme Court approved and applied the social guest standard adopted in the *Alexander* case.\(^9\)

But the story is not ended yet. A further development with regard to our social-guest law-rule exemplifies that the scope of judicial law-making is always subject to oversight and review by the legislature.

Following our 1957 decision in *Alexander*, there was no legislative reaction. However, in *Daire v. Southern Farm Bureau*

---

8. As in the cases of food furnished the guest or driving the guest to and from the host's home. See authorities discussed and cited in *Alexander v. General Acc. Fire & Life Assur. Corp.*, 98 So.2d 730 (La. App. 1st Cir. 1957); and in *PROSSER, TORTS* §§ 60, 61 (3d ed. 1964).

Cas. Ins. Co.\textsuperscript{10} in 1962, the Louisiana Third Circuit, upon which I was then sitting, held a host camp owner's liability insurer liable to a social guest for a fall resulting from a defective condition of a fishing camp porch. It was indeed a close question; an invitation to a hunting and fishing camp does not carry with it the same assurance of the safety of the premises as could be expected from an invitation to a home. Nevertheless, a majority of our court felt that the hazard in question, producing a really serious injury, was unreasonable in view of its concealment from ordinary observation. We therefore affirmed recovery. In the next regular session of the legislature, a statute was enacted to provide that no owner or occupant of property was under any duty to keep premises safe for use "by others for hunting, fishing, camping, hiking, sight-seeing, or boating," and also that by any permission given to others "to enter the premises for such recreational purposes he [the owner] does not thereby extend any assurance that the premises are safe . . . ."\textsuperscript{11} Thus, the legislature overruled our social-guest law-rule insofar as it applied to non-commercial recreational premises.

We might well conclude from this prompt legislative reaction that, while the legislature disapproved of the Daire fishing-camp application of the Alexander rule, it did approve and accept Alexander's general rule that a host owed ordinary care to a social guest in usual circumstances. The legislative inactivity following the 1957 Alexander decision, as contrasted with the prompt legislative reaction to the 1962 Daire holding, lends further support to this thesis.

These theoretical deductions are of course largely imaginary. Although the deductions possess an element of general plausibility, the truth of the matter, almost certainly, is that few if any of the 150 legislators serving in 1957 or at any of the subsequent sessions had heard of either the Alexander or the Daire decisions. With the many other more important public questions and the hundreds and hundreds of legislative bills and resolutions for them to consider and dispose of, the rather rare plight of the injured social guest or of his host was simply not grave enough to occupy much if any of the attention of any but a few. The legislature's prompt reaction to Daire resulted from a collision with the interests of hunting groups and the politically

\textsuperscript{10} 143 So.2d 389 (La. App. 3d Cir. 1962).
\textsuperscript{11} LA. R.S. 9:2791 (Supp. 1966). The enactment excluded commercial enterprises from those exempted from liability for premise defect.
articulate farm bureau, who immediately secured legislative revision, rather than from any programmed scanning of the advance sheets by busy legislators to note judicial decisions needing legislative correction. I do not say this in any demeaning vein, for almost all legislation results from the push of interests adversely affected by current conditions. The observation is made simply to keep in perspective the milieu within which legislative oversight of appellate jurisprudence takes place. Simultaneously, we do emphasize that the legislature through its policy deciding primacy may simply overrule the rare case where a judicially created rule or its application is sufficiently displeasing or important to warrant legislative attention.

II

Let us now consider more closely the function of our court in selecting the law-rule to apply in Alexander.

As an appellate court, our role was to decide this pending litigation by a written reasoned opinion. We need now do no more than note briefly the function of the reasoned opinion to assure that legal disputes of similarly situated interests are decided in accordance with consistent principles. But the requirement of a reasoned opinion had as its consequence that our court in Alexander could not simply decide for the plaintiff or for the defendant without stating the legal reasons for the result. Our duty thus required us to formulate a law-rule for the result we reached, even though no previous Louisiana case and no Louisiana statute provided us with one for mechanical application.

Consider further the resultant implication that, as with all appellate opinions in Louisiana, our eventual decision and our reasoning in Alexander would be published in the Southern Reporter. Of course, this must be to guide litigants and the trial courts within the reviewing jurisdiction that the same appellate court will ordinarily decide a similar question similarly should it be brought before that court in the future. Based upon this expectation, lawyers will advise clients in the regulation of their affairs and in the disposition of unlitigated disputes. Based upon it, trial courts will decide them. The bulk of these trial decisions will not result in any appeal; in the event of appeal, it is most probable that the same appellate court will

not see fit to re-examine and change the law-rule created by its own precedent.

I mention these obvious circumstances to emphasize again what all lawyers know and what few laymen can deny: That the ordinary and customary operation of our judicial process requires the courts on occasion to create law-rules where needed to decide the case, and that these law-rules operate with prospective effect to regulate the clashes of similar interests in the future, in much the same manner (although more limited in scope) as does a new statute.

In choosing or creating the law-rule to apply, few, it seems to me, will suggest that the choice or creation should be exercised by logic or deduction or jurisdiction-counting alone. I suppose almost all will agree that, where the judge is given discretion to select or devise the law-rule to apply, the rule's practical wisdom, general fairness, and future usefulness to society are considerations which should influence the judge, albeit the judge's discretion is circumscribed by the usual necessity that the new rule be an extension generally consistent with pre-existing legal doctrine, as well as by traditional limitations upon the judiciary's exercise of its historic law-making powers.

In Louisiana, our Civil Code specifically authorizes the courts to do so. Article 2114 provides: "In all civil matters, where there is no express law, the judge is bound to proceed and decide according to equity. To decide equitably, an appeal is made to natural law and reason, or received usages, where positive law is silent." To the same effect, but perhaps more explicit, is a provision of the Swiss Civil Code: "The statute governs all the matters within the letter or spirit of any of its provisions. In the absence of any applicable statutory provisions, the judge shall decide according to customary law, and in its absence according to rules he would enact as a legislator. In this he shall follow the established doctrine and decisional law." Even without such legislative mandate, I suggest, courts do or should follow this approach in devising the law-rule by which to decide the unprovided-for case.

14. LA. CIVIL CODE (1870).
15. SWISS CIVIL CODE art. 1 (1907).
III

Judicial creation of a law-rule is obviously necessary to decide a question not provided for by legislation. Closely akin to this situation, but much more common, is the duty thrust upon the courts by the volume of new legislation to synthesize it within the body of pre-existing law.

Where legislation represents a fully integrated and comprehensive scheme of regulation, such as the Uniform Commercial Code, the courts cannot and should not weigh policy considerations or use creative interpretation in the application of the statutory command. But much legislation is piecemeal, sometimes hastily or inadvertently drafted, often without consideration of competing or overlapping or inconsistent enactments. In these instances, the courts must perform, and the legislature intends for them to do so, the function of integrating the interpretation of the statute into the general body of the law, or coordinating its principle with others applicable, and of limiting the statute or extending it according to its intended purpose (for the literal words often permit either broad or narrow applications, the circumference of the statute not being discernible from the words themselves). The courts are thus contemplated as a complementary law-making institute to rationalize isolated statutes in accord with their intended purpose and to permit them to serve as reasoned principle within a coherent and intelligible framework of general law.

An example given by one observer is the married women's emancipation acts of many jurisdictions. Although usually the statute itself merely granted married women the right to sue and be sued and to own and convey property, the incidental results of this change of status forced the courts to reconsider and redetermine the tort liability of the spouses to each other as well as to third persons for the other spouse's torts, as well as other law-rules in other areas of law not ostensibly affected by the sparse terms of the emancipation act itself.


17. Landis, Statutes and the Sources of Law, in Harvard Essays 223-24 (1934). Dean Landis' other illustrations concern general law changes resulting from specific enactment relating to inheritance-by-illegitimates, wrongful deaths, and trade union statutes.
A recent Louisiana example leaps to mind. In 1960, the legislature revised Article 2103 of our Civil Code. The specific intent solely expressed by the Louisiana State Law Institute recommendation with the 1960 amendment was "to provide a substantive law base for the enforcement of contribution among joint tortfeasors" and to overrule prior jurisprudence to the contrary.

In the application of the new statute a host of issues arose for which the statutory provisions furnished no guide. Some of them involved a conflict between the new statute and principles established by prior legislation not necessarily intended to be affected by the new statute. For instance, by a former statutory provision interspousal immunity is established, so that neither spouse can sue the other. Did the new contribution statute permit, in a wife's suit against a tortfeasor, such defendant to demand contribution from the husband (on the ground that the wife's injuries were produced by the husband's contributing fault as a joint tortfeasor), thus permitting the wife to recover indirectly from her husband what she was directly prohibited by the earlier statute from recovering? Again, a statutory provision of the workmen's compensation statute exempts an employer from non-compensation (e.g., tort) liability to an employee injured in an employment accident. Does it likewise still apply so as to exempt the employer when he is called upon, under the provisions of the new statute, as a joint tortfeasor solidarily bound to contribute to recovery against another tortfeasor liable to his workman's survivors in tort. Or, if one tortfeasor attempts to implead another party as joint tortfeasor by third-party demand as authorized by the new statute, can that third-party defendant plead a release between it and the plaintiff as freeing it from the obligation of contribution, thus relying upon prior statutes providing, as between claimant and codebtor, for the claimant's obligation to deduct the part formerly owed by a released codebtor (and does this "part" refer to the monetary amount or to the fractional proportion)?

Again, with regard to suits instituted prior to the effective date of the new contribution statute, are the rights created by the new statute substantive or procedural, or is this material, with regard to the retroactivity or not in application of the new statute?

I sat as a member of the court called upon to decide these sometimes complex questions arising from the collision of the concepts of the new statute with those provided by former legislation. If the new enactment had clearly been intended to govern, of course there was no problem—we were simply to apply the later legislation. However, there was no legislative indication that the new statute should supersede the earlier legislative principles not directly within its scope. We would abdicate the judicial function by simply applying the later legislation on some mechanical rule that the latest enactment must always supersede all earlier statutes even arguably affected, without attaching any relevance to whether this later enactment was really intended to apply.

And I should at this point state that the legislative "intent" or its absence was in the instances noted largely imaginary—for (and we were fortunate to have a Law Institute recommendation specifically ascribing legislative purpose, unlike for the bulk of legislation) it was quite obvious that, in furnishing the new principle that one joint tortfeasor is allowed a substantive base to enforce contribution from another, the legislature had not remotely contemplated the surrounding questions which arose when the new principle was to be introduced into the context of pre-existing law. In such instances, the legislature must expect the courts to formulate the synthesizing rules, by which the new legislative principle will, in coordination and harmony with prior laws, serve socially useful aims consistent so far as possible with related legal doctrine. In so doing, it is the courts which will make the policy-determinations as to which of the legislative principles shall be accorded priority, and it is the courts which must create from the competing statutes that new law-rule which will synthesize what in the court's judgment is the wisest rule to apply in the penumbra area created by the overlapping of the statutory principles.

Many observers believe that additionally, as a constitutionally contemplated judicial responsibility, the courts must exercise a law-revision function more general and more pervasive than those so far illustrated.  

In his classic work, *The Nature of the Judicial Process*, Cardozo quoted Professor Arthur Corbin, a distinguished scholar, as follows: "It is the function of courts to keep the doctrines up to date with the mores by continual restatement and by giving them a continually new content. This is judicial legislation, and the judge legislates at his peril. Nevertheless, it is the necessity and duty of such legislation that gives a judicial office its highest honor; and no brave and honest judge shirks the duty or fears the peril."

Cardozo continued: "You may say that there is no assurance that judges will interpret the mores of their day more wisely and truly than other men. I am not disposed to deny this, but in my view it is quite beside the point. The point is rather that this power of interpretation must be lodged somewhere, and the custom of the constitution has lodged it in the judges. If they are to fulfill their function as judges, it could hardly be lodged elsewhere. The recognition of this power and duty to shape the law in conformity with the customary morality is something far removed from the destruction of all rules and substitution in every instance of the individual sense of justice. . . . The form and structure of the organism are fixed. The cells in which there is motion do not change the proportions of the mass. Insignificant is the power of innovation of any judge, when compared with the bulk and pressure of the rules that hedge him on every side. Innovate, however, to some extent, he must, for with new conditions there must be new rules."

Especially in the area of private law, over the decades the legislatures have been content for the courts to perform their traditional judicial function to modify and revise law concepts.
and applications to suit the changing conditions of newer times. The legislature could not, practically, perform such a function itself, with its limited time and facilities. Indeed, some observers have pointed out that legislation is often a later attempt to generalize the regulation of social disputes which had first emerged in litigation initially decided by courts alone—that legislation is as much a reaction to judicial decision, as judicial decisions are to legislation, with the courts often providing the first initiative toward principled regulation of a social situation through piecemeal case-by-case improvisation resolving the early varied facets of the emerging problems. Of course, as the legislative treatment of our Third Circuit decision in *Daire* illustrates, judicial law-making is subject to veto or modification by the legislature. The legislature's primacy in law-making must always be recognized, even though the courts do perform important subsidiary and complementary law-making duties.

V

Perhaps a detailed case-study of this general law-revision function in operation may illustrate that it is not usurpatory of the legislature's power but rather supplementary to it and a necessary consequence of the judicial function in contemporary America.

Of the many examples of continuous judicial revision to keep the law useful and fair as applied to current conditions, to me one of the most illustrative for Louisiana is the treatment by our State Supreme Court of the "assured clear distance" rule. In *Louisiana Power & Light Co. v. Saia*, that court in 1937 affirmed the dismissal of a suit which alleged that the plaintiff's truck had run into an unlighted truck and trailer parked on the public highway on a dark night. The court held

---


29. The *Work of the Louisiana Supreme Court for the 1958-59 Term—Torts*, 19 LA. L. REV. 388 (1959); for the 1956-57 Term, 18 LA. L. REV. 68 (1957); for the 1955-56 Term, 17 LA. L. REV. 345 (1957). In these commentaries, Professor Malone suggests that we should frankly realize that the old "assured clear distance" rule has been modified to reflect modern conditions, so that "the duty could not be appropriately described as one merely obliging the driver to maintain such control and speed as will enable him to bring his car to a reasonable stop if faced with a sudden obstruction in his path of travel."

30. 188 LA. 358, 177 So. 238 (1937).
that at night "the driver of an automobile is guilty of negligence in driving at a rate of speed greater than that in which he could stop within the range of his vision." The only statute relied upon by the court was the provision requiring that every vehicle operated on the public highways after dark be equipped with headlights sufficient to render clearly discernible any person on the highway for a distance of 200 feet ahead. The court felt that the plaintiff's negligence was not excused by the defendant's failure to comply with another statutory provision prohibiting the parking of an obstructing vehicle on the highway after dark without appropriate signal lights.

Nevertheless, just twelve years later, in Dodge v. Bituminous Cas. Corp., the same court found an oncoming night motorist free of negligence when he did not see the defendant's unlighted parked truck until he was too close to avoid colliding with it, because his visibility ahead was disturbed by the burning lights of oncoming traffic. Without referring to the statutory headlight-provision relied upon in Saia, the court simply stated that the parking of the defendant's truck on the highway, without lights or signals in violation of the statutory provision brushed aside by Saia, was "the proximate cause of the collision." As the court's summary in the opinion of statutory history illustrates, there had been no intervening change in the substance of the statutory regulation since the Saia decision.

The majority opinion stated, incidentally, that in the absence of express statute "the court may adopt theoretical standards from common sense experience for the insuring of the safety of the road." A dissent in Dodge noted that the holding was at variance with the court's 1937 decision in Saia, which was neither discussed nor even cited in Dodge's majority opinion. The dissent also pointed out that there were no exceptional circumstances as in Gaiennie v. Cooperative Prod. Co., which ten years earlier had established an exception to the harsh application of the "assured clear distance" rule enunciated by Saia.

31. Id. at 361, 177 So. at 239.
32. La. Acts 1932, No. 21, § 9(g)(1), (12). These are the predecessor provisions of those enacted by La. Acts 1962, No. 310.
34. 214 La. 1031, 39 So.2d 720 (1949).
35. Id. at 1038, 39 So.2d at 722.
36. Id. at 1038, 39 So.2d at 722-23.
37. Id. at 1038, 39 So.2d at 723.
38. 196 La. 417, 199 So. 377 (1940).
And so it continued, with the most recent expressions of our Supreme Court holding flatly that "a motorist traveling by night is not charged with the duty of guarding against striking an unexpected or unusual obstruction, which he had no reason to anticipate he would encounter on the highway."\(^{39}\) For this reason, these Supreme Court opinions and numerous intermediate court opinions\(^ {40}\) have held night motorists who run into obstructing vehicles parked unlighted upon the highway to be free of contributory negligence, despite the night motorists' failure to slow when their powers of perception are disturbed by the lights of oncoming traffic.

With regard to the two most recent opinions of the Supreme Court, *Suire v. Winters* (1957)\(^ {41}\) and *Vowell v. Manufacturers Cas. Ins. Co.* (1956),\(^ {42}\) no change of substance in the statutory provisions in effect at the time of the *Saia* decision in 1937 had taken place in the interval.\(^ {48}\) What has changed are the context social conditions, especially the conditions of travel at night. With better highways and with better vehicles, it became safe to drive at higher speeds. It became more dangerous to obstruct normal night traffic by darkened obstacles. For instance, while earlier statutes of 1870\(^ {44}\) and 1914\(^ {45}\) had provided nominal misdemeanor penalties for blocking a road, our Criminal Code of 1942 provided for imprisonment of up to 15 years for the intentional obstruction of a highway foreseeably endangering human life.\(^ {46}\) Thus, under more modern conditions, night motorists are to a large extent entitled to assume that other persons will not criminally obstruct the highway by unlighted vehicles and cause such a great hazard to the ordinary traffic of the present day.

41. 233 La. 585, 97 So.2d 404 (1957).
42. 229 La. 798, 86 So.2d 909 (1956).
43. The statutory provisions in effect at the time of these decisions are found in *La. R.S. 32:241* (1950) (no obstructing at night without signal lights) and *La. R.S. 32:290, 301* (1950) (vehicles operated at night to be equipped with headlights making discernible a person 200 feet ahead).
The erosion of the "assured clear distance" rule was accomplished by conscientious judges of our Supreme Court and of our lower courts who realized that the old rule applied literally was no longer a practical or a fair regulation of the nighttime speed of modern drivers of modern cars on modern highways. The judges faced up to the circumstances that a negligence rule designed mainly for regulation of forty-mile-an-hour traffic on gravel roads was not a sound basis for deciding the rights of drivers and passengers several decades later, under the vastly changed conditions of later times. They therefore modified the previous law-rule they had applied, so as to base the standard of care exacted of the nighttime driver not on a mechanical rule but instead upon the particular circumstances, the apparent risk, and the driver's opportunity to deal with it. This, I might add, is paralleled by similar erosion of the "assured clear distance" rule in many other American jurisdictions.47

VI

Before we leave our discussion of the treatment by the Louisiana courts of the "assured clear distance" rule we should analyze the relationship of the court decisions to relevant legislation.

The courts were deciding whether either or both vehicle operators were at fault in a nighttime rear-end collision, in order to determine pecuniary liability for the damages sustained. The courts cited provisions of the highway regulatory acts which prohibited parking at night on the highway without lights or which required headlights of a certain efficiency for vehicles operated at night; but in truth the courts were not enforcing these legislative provisions. Rather, they were performing their function to allocate civil liability for fault under the entirely separate and distinct provision of our Civil Code obliging those who caused damage through "fault" to pay for it.48

The provisions of the highway regulatory acts do not provide that persons who obstruct the highway by parking an unlighted vehicle upon it at night are liable for damages to other vehicles which ran into the darkened obstacles.49 Likewise, the provision that vehicles must be operated on the highway at

47. Prosser, Torts § 37, at 211 (3d ed. 1964).
49. See, e.g., one of the substantially similar provisions of the successive statutes, La. R.S. 32:241 (1950).
nighttime with headlights of a given visibility does not pro-
vide that a driver who fails to observe an object in his path
within the requisite distance of visibility is or is not at fault.50
The only sanction specifically provided for violations of the
motor vehicle regulatory act is a criminal penalty of minor fine
or imprisonment.51 Nevertheless, by a process of analogy, the
courts deduced from the highway regulatory acts a standard
of conduct, a law-rule for decision, by which to determine pri-

tate disputes as to who should pay between those who collide
on the highways at night. We must emphasize, however, that
it was not a legislative rule but rather a court-made rule of law
which was used to decide the question of who should pay for
damages caused by these collisions. No legislative act provided
that a violation should be any indicia of civil liability or have
the effect of barring recovery, although the courts reasonably
concluded that a legislative regulation designed to assure high-
way safety indicated a standard of conduct required by ordinary
care in usual circumstances.

Thus, quite often statutes are generalizations which the leg-
islature intends for the courts to extend and complete insofar as
they may afford principles for the determination of civil litiga-
tion in the different contexts of varying facts and later times.
The highway regulatory acts provide explicit commands to police
agencies to prevent cars parking or driving at night without
adequate lights. The acts do not, however, provide explicit com-
mands to the courts to allocate civil liability for accidents result-
ing from failure to obey the highway regulations. The legislature
did not, for instance, provide that no one parking on the highway
at night without lights could recover damages for injuries there-
by caused; if it had, judicial inquiry as to an obstructor's fault
barring recovery would be barred. However, rather than speci-
ifying myriad factual situations in which violation might or
might not be fault for purposes of determining any post-accident
civil liability, the legislature instead left this function to be per-
formed by the courts in their historic duty to particularize leg-
islative generalizations.

Again, in determining the tort liability of the various liti-
gants, the sole legislative standard provided was that he who
caused damage through "fault" should pay for it. By the use of

50. See La. R.S. 32:290, 301 (1950).
51. Id. 32:57; see former law, id. 32:361-62, and La. Acts 1832, No. 21, § 13.
this general term "fault," the legislature delegated to the courts the duty to develop a series of standards for the more particularized and varied type-situations of everyday life and, further, the function of individualizing these applications to the countless gradations and permutations of event and conduct which can be expected in a living society which must also inevitably change with the decades. Emphasizing again, therefore, that the courts must enforce the explicit command of statutes in order to accomplish their intended purpose, we must also point out that quite often the statute does not so much as command but suggest. The legislative suggestion, moreover, may intentionally invite the courts to fashion the more particularized laws-rules used to decide the various type-situations of civil litigation. It may contemplate that the courts will individualize the application of the legislative standard in accordance with exceptional unforeseen circumstance and that the courts will harmonize the application of the statutory principles to accord with the social and jurisprudential context of the times in which subsequent litigation may arise.

VII

Is it ever proper for a court to ignore the express words of a statute seemingly applicable?

Let me reiterate once again, before we embark upon this sensitive topic, that the courts must acknowledge without reservation the legislature's paramount control of law-making and policy-decision. Whether the judges personally agree or disagree with legislation, they must enforce it according to its purpose. Under the guise of interpretation, they should not thwart the legislative aims because they disfavor them. In legal history, unfortunate instances may be found where by literal mechanical application of precise statutory language hostile judges thwarted the statutory purpose. But these instances also indicate that legislators, in passing a statute, do not intend to enact words merely but, more, the principles enclosed in those words.

Holmes has somewhere said that words are the skins of ideas. It is these ideas which the legislature intends to put into effect; the words are merely auxiliaries used for that purpose. Thus, when application of literal wording leads to an absurd or

unreasonable result, the literal application has been disregarded by Louisiana courts, because, in the words of Justice Martin in an 1840 decision, "even where a law is clear and unambiguous, the letter may be disregarded with the honest intention of seeking its spirit." We know that this principle of interpretation must be used sparingly. It does illustrate, however, that the sanctity of legislation does not attach to the word-formula used but rather to the regulatory principle expressed by those words. The essential authority of legislation derives not from the printing of words on paper; it proceeds rather from its enactment as the will of the people adopted by the people's legislators chosen for that purpose. In applying legislation, the courts do so in accord with the legislative purpose and in order thus to carry out the represented will of the people.

Legislation is enacted to regulate the social and legal environment of a living society. As Gény points out, to apply it to unforeseen or substantially changed conditions of other times, even though the original statutory purpose is no longer served, is to apply mechanically an abstract formula which no longer represents the will of the legislature. Thus, our Louisiana Civil Code provides that "Law is a solemn expression of legislative will." Although our Code likewise states that "when a law is clear and free from all ambiguity, the letter of it is not to be disregarded, under the pretext of pursuing its spirit," the principle thus codified is not, as Planiol notes, intended to require mechanical application of the rigid word-text of a statute to situations not foreseen by the legislature, since "the cause of the law ceasing, the law ceases." Further, as earlier noted, our Civil Code expressly provides that "In all civil matters, where there is no express law [i.e., no enactment of the legislative will intended expressly to apply], the judge is bound to proceed and decide according to equity. To decide equitably, an appeal is made to natural law and reason, or received usages, where positive law is silent." (Emphasis added.)

55. LA. CIVIL CODE art. 1 (1870).
56. Id. art. 13.
57. 1 PLANIOL; CIVIL WAR TREATISE (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) Nos. 216, 216, 224, 224A (1959). The maxim translated in the text is quoted in Planiol as "Cessante causa legis, cessat lex." See, e.g., State ex rel. Thompson v. Department of City Civil Service 214 La. 683, 38 So.2d 385 (syllabus 2) (1948).
58. LA. CIVIL CODE art. 21 (1870).
In essence, then, the words of legislation contain a principle of regulation intended by the legislators to apply to contemplated norms of their own and succeeding times. But if there is a substantial change in the social conditions the statute is designed to regulate, the mechanical adjudication by reference to the statute's literal wording alone may, under the changed conditions, amount to an irresponsible application of a legal rule devised neither by legislative intention nor by the deciding court.

Early in my judicial career occurred what to me still is a dramatic illustration of responsible judicial craftsmanship in failing to apply the literal wording of a statute when to do so would accomplish an unjust result never intended by any legislature. In *Mooney v. American Automobile Ins. Co.* the issue was whether a motorist was contributorily negligent for passing to the right of another vehicle going in the same direction on a four-lane highway. The overtaken vehicle veered to its own right and collided with the plaintiff. The plaintiff was charged with contributory negligence because the passing provision of the highway regulatory act then in effect stated that an overtaking vehicle was to pass "to the left" of an overtaken vehicle.

Although under its express wording the statute seemed to prohibit passing to the right on any state highway, our court held that the enactment did not apply to four-lane highways (such as that on which the 1953 accident had occurred), but only to the two-lane highways in existence at the time the statutory provision was adopted in 1938. The organ of our court who recommended the opinion's adoption was Judge Robert Ellis of the First Circuit, in my opinion a great and imaginative judge. Judge Ellis pointed out that to apply this 1938 provision forbidding passing on the right to the four- and eight-lane highways of the Nineteen Fifties could greatly impair the usefulness of these arteries designed to transport heavy traffic volume quickly—a slow-moving vehicle in the inside, or left, lane, for instance, could stop traffic in all other lanes proceeding in the same direction if the slow vehicle slowed and stopped for a left turn. In the *Mooney* case, therefore, the passing motorist was held free of negligence in passing, despite his violation of the literal prohibition of the statute forbidding any passing on the right.

59. 81 So.2d 625 (La. App. 1st Cir. 1955).
This illustration of judicial discrimination as to whether or not to apply a statute—by deciding that a statutory rule had been limited or modified through the changed circumstances of another day— is not advanced to suggest that all legislation should be deemed valid for its own decade only, nor that the courts should ignore the express command of statutory words just because the social conditions change. Usually, an express statutory provision is designed to and does regulate not only present day conditions but also the societal conditions of the indefinite future, until the legislature itself may repeal it, so that the courts cannot ignore the statute's express command. Nevertheless, the Mooney case may illustrate the all-important principle that the function of the courts is to enforce the legislative purpose, not mechanically to apply printed words because they are in a statute book. Mooney's limitation of an obsolescent statute's effect to its intended legislative purpose may also serve to illustrate the function of the courts to adapt both legislative and judge-made law to changing conditions of society, so that the law-rules may continue to serve their functional purpose. Just as out-of-date cases may be reinterpreted to accord with a changed social context, so may the word-rule expressed by an out-of-date statute be reinterpreted and limited so as to conform to its original functional intent.

VIII

These remarks have touched upon a few of the more obvious aspects of the law-making function of our courts. The specific illustrations from the work of Louisiana state appellate courts are designed to illustrate that usual and routine performance of this function is a necessary and traditional part of the judicial duty to decide cases fairly and according to law.

However, our concentration upon the law-making responsibility of the courts does have the demerit of overemphasizing its importance as a factor which influences our society. In the first place, clear provisions of statutory law, unquestionably applied and obeyed, undoubtedly represent the customary form of governmental direction, without any intervention of the courts. Likewise, great areas of our social and economic life are affected by the interpretations and applications of executive departments and administrative agencies, usually obeyed as valid regulation without questioning in or by the courts. As
Cardozo remarked, “unnumbered human beings . . . go from birth to death, . . . and not once do they appeal to judges to mark the boundaries between right and wrong.”

In the full picture of the division of the policy-making function among the organs of government, law-making by the courts plays a small role indeed.

IX

I will conclude with the realization that a comprehensive and more rounded discussion of judicial law-making should include many other aspects of the subject.

I have not discussed, for instance, the inherent institutional and political limitations to law-making by courts, nor touched on appropriate standards for the exercise of their undoubted power to overrule their prior decisions where current needs greatly outweigh the valued stability of legal precept. I have not noted the stabilizing influence of doctrine, which generally confines judicial law-making to incremental changes only. I have not referred to responsible views suggesting that judicial self-restraint in law-making is especially appropriate with regard to issues of pronounced change in public policy that should preferably be decided by the legislature. Neither have I mentioned the view that the courts should to some extent disguise exercise of their undoubted law-making so as not to weaken the popular half-myth that judges only interpret and do not create law, nor the opposing argument that the law’s self-respect and the democratic ideal demand that there be open responsibility for the exercise of discretionary power by officials of the people.

62. Id. at 112-14, 146-65; LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS (1960); SCHAFFER, PRECEDENT AND POLICY (1956); Friedmann, Legal Philosophy and Judicial Lawmaking, 61 COLUM. L. REV. 821 (1961).
A comprehensive discussion of the question should also include discussion of the practical reasons why the legislature shares law-making responsibility with the court for the development and reform of law. The schedule of a normal legislative session is harried and crowded. The state legislators are usually part-time public servants, underpaid for the substantial time they must devote to the governmental and private interests of their constituents. Most legislative sessions take place within a period limited in time. Not only must many legislative bills be considered, but during the same crowded time the legislator must attend to constituent-errands and to at least some of the duties of his regular occupation. In Louisiana, for instance, in the last three regular sessions of 1962, 1964, and 1966, at each session over 1,500 bills were introduced and well over 500 laws were enacted—all during the harried period of 60 days, during which of necessity the legislative preoccupation must be directed more to issues of public policy, state taxation, and economic regulation than to minor reforms of private law.

With some understanding of this actual legislative milieu, the unreality of the charge of judicial usurpation made by critics of creative court law-making becomes apparent. The legislature makes little effort to correlate present enactments within the entire body of the law. For one reason, it has no time to do so. For another, it fully expects and relies upon the courts to perform their historic mission of synthesizing and harmonizing the fragments of piecemeal legislation into the mosaic of the general body of the law. The law-making function of the court is


69. By letter of March 29, 1967, to the writer (a copy of which is on file with the Louisiana Law Review), Honorable Wade O. Martin, Jr., Secretary of State of Louisiana, furnished the following statistics from the records of his office concerning the regular legislative sessions of 1962, 1964, and 1966:

<table>
<thead>
<tr>
<th>Year</th>
<th>Bills Introduced</th>
<th>Bills Enacted</th>
</tr>
</thead>
<tbody>
<tr>
<td>1962</td>
<td>1,278 House, 306 Senate</td>
<td>549 House, 406 Senate</td>
</tr>
<tr>
<td>1964</td>
<td>1,251 House, 406 Senate</td>
<td>565 House, 345 Senate</td>
</tr>
<tr>
<td>1966</td>
<td>1,202 House</td>
<td>577 House</td>
</tr>
</tbody>
</table>
cooperative with the legislature, complementary to its work; the courts are not in any sense a competitive law-making institution. Understanding the legislative process in its actual environment, it is unrealistic to attribute to legislative inaction any approval of the multitudinous facets of the law as they exist prior to judicial decision: the inaction much more often stems from a lack of time for detail-changing or from the clogging of the legislative process through pressures requiring priority attention.

With the consent of the legislatures, the American courts have always exercised the responsibility to revise and accommodate private law where needed to adjust it to the legal and social environments of the times. To defer their performance of this duty on the sole excuse that the legislature alone is charged with law-change and will do so if dissatisfied with the law as it is, is an unrealistic excuse for shirking this traditional duty of the judiciary; it is also an historically unsound view of the separation of powers. Further, the judicial exercise of this law-revision responsibility is subject to oversight and review by the legislature (save perhaps where constitutional questions are concerned). If dissatisfied with any court-made law-change, the legislature can assert its primacy and can overrule or modify the judicial decision by statute — and, as studies have illustrated, the legislatures have done just that when displeased with judicial innovations or interpretations in the law.

XI

In a day when there is an outcry against judicial legislation by many sincere elements of our population, as well as by some irresponsible extremists, it is important for us to recognize and restate the obvious truth that the courts do possess and should exercise law-making responsibilities.

By frank recognition that judicial creativity is an essential component of the process of deciding cases, we may perhaps find courage to correct the misinformation on the subject of many of the lay public. Misled by Francis Bacon’s half-truth, “Judges ought to remember that their office is . . . to interpret law, and

not to make law." and by several generations of oversimplifying high school civics teachers, multitudes of our citizenry have come to believe that it is somehow improper for judges to admit to law-innovation, law-choice, or law-revision. Unjust criticism by the lay public and trust-eroding cynicism may perhaps best be healed by open recognition that the courts do perform, and always have, a day-to-day law-adaptation function as a necessary part of their traditional decisional process.

In deference to prevalent if erroneous sentiments, conscientious and sincere judges may question their own law-making power. Historically, however, the circumscribed law-making functions normal to the judicial branch have been considered a supplement to, not an invasion of, the legislature’s work. Our judges must not shirk the hard choice of values sometimes imposed upon them by their duty to maintain the law’s regularity and order and sense by creative revision and adjustment within the limited area where appropriate. If the courts will not perform this duty, the legislatures cannot—and the reasoned development of the law and its ability to serve current needs must suffer.

71. BACON’S ESSAYS, the essay Of Judicature.