MAGISTRATE MONTAIGNE'S FOLLOWER*

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Fellow students:

It is a great honor for me to have a chance to address you on this lectureship. I have taken as my topic, "A Follower of Montaigne."

Montaigne, as I suppose most of you know, was at one time a petty magistrate in Bordeaux. He occupied a position which, from the point of view of its title, was certainly not very significant. Yet the point of view which he developed in his essays and in other writings makes it quite clear that he recognized that from a judicial perch one has a chance to see a great deal of life as a venture toward some kind of structural picture of the society in which he lives. Montaigne had as his motto, "*que scais je*?," ("What do I know?"). And at the end of his essay, *Of Experience*, he reminded us that "though ye sit upon the top of the world, yet sit ye upon your tail."[1]

You may think that it is not important to talk about the job of a District Judge in the spirit of Montaigne; but I will try to persuade you to the contrary. I am going to talk tonight about the job of a United States District Judge, first, in ordinary cases, and then, in rather extraordinary and complicated cases, and finally, in constitutional matters.

The job of the federal district judge has changed a great, great deal in my lifetime. When I went to the Harvard Law School, there was a single course in Federal Jurisdiction, and that was open only as a seminar to a few students—literally 20—and the school had 1800 students. The teacher, fortunately, was Professor Felix Frankfurter. Under his direction the topic gave opportunity for an enlarged view—even though federal juris-

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1. MONTAIGNE, *Of Experience*, in THE COMPLETE ESSAYS OF MONTAIGNE 815, 857 (1958).

diction, from the point of view of the curriculum, was not thought to be extremely significant.

Much water has passed over the dam. It is hard for me to realize it, but one-third of all of the cases decided by the Supreme Court, or at least one-third of all the reports, have been published since I entered Harvard Law School. There have been over 120 volumes of the United States Supreme Court since I appeared in the Supreme Court of the United States to argue *United States v. George W. Norris*.[2] Norris was not the senator, but the grocer from Broken Bow, Nebraska, who ran against the senator and who committed perjury and then sought to escape the consequences by recanting[3]—a course that did not succeed.

I said that I would talk first about ordinary cases. Needless to say, litigation in the district court embraces diversity jurisdiction, admiralty, bankruptcy, copyright, patent, and unfair competition cases as well as many cases under federal, criminal, tax, and other civil statutes. In the handling of this ordinary litigation, the business is not very different from that which occurs in the state courts. Yet it has multiplied enormously in the last few generations. There is a sociological theorem that as population increases arithmetically, contacts, which include conflicts, increase geometrically. So as the population of the United States has increased, obviously the ordinary judicial business has multipled, if for no other reason than the multiplication of contacts.

Speaking generally, I think that the capacity to handle ordinary business does not require exceptional learning. In fact, I am not quite sure whether learned people are very good as trial judges. What makes a good trial judge in ordinary matters is, of course, first of all, integrity; then a certain capacity to convey authority; then a gift for clarity and simplicity of expression—maybe not a gift, perhaps it is an acquired habit; then the managerial efficiency with which he does his business and arranges his calendar; not least, good manners; and then the ability to persuade the people who hear him that he has common sense.

I am well aware that the American Bar Association and other groups sometimes think that nobody should be appointed to the trial court unless he has had extensive practice as a trial lawyer. Since I never had it, I do not think that it is necessary.

2. 300 U.S. 564 (1937).
3. *Id.* at 568-72.

But neither did Learned Hand have it, nor Augustus Hand, nor Julian Mack, nor Edward Weinfeld, nor quite a number of the best trial judges in our history. What is really requisite are traits of character and personality, such as I have outlined above, rather than unusual technical skill. And as to learning, the great danger is that a fellow who has unusual intellectual gifts finds it very difficult to be patient in a trial court, and he also has a tendency to try to develop the case along his own lines—which not all lawyers or all litigants like.

With respect to ordinary cases, it is my belief, as it was Judge Augustus N. Hand's belief, that it is quite simple to determine what evidence is and is not admissible without being able to recite every rule in Wigmore or in any code of evidence. There are a few cases which require detailed knowledge of the rules of evidence; but in general you play it by ear and you use common sense. That generalization is not quite true in criminal cases. Nor is it ever true when the rule of evidence is a rule of substantive law as distinguished from a rule of procedure. But one gets to have the feeling of what is fair under the circumstances, and one has a sixth sense as to what you ought to let in and ought not to let in. As Judge A. N. Hand said, "I have never as an appellate judge reversed a trial judge in a civil case on a rule of evidence." This may not be quite true of every appellate judge, but it tends to be true.

Unquestionably the most difficult part of the ordinary business of a district judge relates to criminal cases. Criminal cases, at least in the federal court, tend to have a very large measure of ceremony. The judge is there conducting an inquest of moral importance; and he does well if he remembers that that aspect of his role is central. He should not intervene too much; of course he should not be partisan; and he ought constantly to bear in mind that the justice which is seen to be done is a very large part of the justice that is being done. When it comes to sentencing there are no rules that are worth reciting—and I regret to say there is very little in three and a half decades of experience which I have gained as certain knowledge which I would feel free to transmit to anybody. I am quite sure that you do well to remember that forbearance is an important principle, and not to suppose that you are the Lord to whom vengeance is given.

But when you are dealing with sentences, is it quite clear that equality is the right rule? That is a rather shocking question, isn't it? Those of you who know John Rawls' *A Theory of*

Justice[4] assume perhaps that equality ought to be the basis of any fair system. And any of you who have read a book by Caleb Foote,[5] a California professor who as a Quaker went to jail rather than serve in the Vietnam War, know that Caleb Foote thought that the chief cause of unrest in the prisons where he was, was the inequality of sentences. Yet I recall that when I was a member of the National Defense Mediation Board in 1941, the representatives of union labor were always telling me, "We really do not care about the precedents. We want you to decide the case on its merits." What they meant was that they wanted subjective justice, tailored to what they thought to be the particular circumstances of their case, rather than equality with others. I do not for one moment suppose that the union leaders were unique. Look into your own heart and ask yourself how you, were you a convict, would want to be treated. Is it clear that what you would want is equality of treatment or an understanding of your particular circumstances?

All I can say is that the problems do not lend themselves to an answer; they merely lend themselves to a series of questions. It is partly because of these questions that I so strongly support the view that all sentences should be reviewable on appeal—not necessarily by an appellate court; it may be by a group of judges of coordinate jurisdiction. But it is worthwhile to reconsider sentences, at least when the defendant feels aggrieved.

Now I am going to turn to another and quite difficult branch of the federal trial court: the kind of complicated cases which come more to the federal than to most state courts—antitrust, environmental, and pollution cases, and those suits which involve attempts to achieve some kind of equality of opportunity regardless of differences in race or sex. Most of these cases, not all, are matters which a judge hears without a jury. I said most, not all. Those of you who have any familiarity with the antitrust laws know that there are not only criminal and equitable antitrust proceedings, but private treble damage suits. Even when such cases are heard by a jury, perhaps a judge feels a degree of freedom to review the factual determination made by the jury in a way that he would not feel were it an ordinary case. At any rate, I can say to you that the only two times in thirty-six and a half years that I have entered a judgment notwithstanding the verdict of the jury were two antitrust cases, one in 1942,

4. J. RAWLS, A THEORY OF JUSTICE (1971).

5. C. FOOTE, STRUGGLE FOR JUSTICE: A REPORT ON CRIME AND PUNISHMENT IN AMERICA (1971) (prepared for the American Friends Service Committee).

Momand v. Universal Film Exchange,[6] and one earlier this year in San Francisco in the case of *Walsh v. Burroughs*.[7] In each case, despite jury verdicts for the plaintiff of over a million dollars, I entered a judgment n.o.v., *non obstante veredicto*.

The complicated case presents the most difficult problems of management and of recognition of the ambiguity of the law. Speaking generally, in cases of complexity, a judge will find that the Congress deliberately has not spoken clearly. Those of you who are familiar with the Sherman Act will know what I am about to say. As is revealed in the debates in Congress, Senator Edmunds, who was the true author of the Sherman Antitrust Act, and Senator Hoar, who was the next most important author, both explicitly stated that they were using terms of indefinite nature in order to leave to the courts the power to make the determination of the legal rules—not merely the facts, not merely the application, but the rule itself.

Often a judge is aware that he is involved in a problem not merely of determining facts, but also in a small way of legislating. Now it is very essential that the judge find the facts with perfect integrity quite apart from what he ultimately determines shall be the rule of law. I myself have sat in a number of cases of this kind, and I will tell you that the finding of the facts is a challenge which is in itself a joy because there is something remarkably fascinating about taking a very complicated picture and then reducing it to the simplest terms that are possible. I am going to tell you a story about the application of the Sherman Act to a complicated set of facts. The Supreme Court of the United States in the year 1957 in the case reported in 353 U.S.[8] was faced with the question as to whether the DuPont Company, in its ownership of shares of General Motors Company, was in violation of the antitrust laws.[9] In the District Court of Chicago, Judge La Buy had held that there was no violation of the antitrust laws.[10] On appeal three justices were disqualified,[11] and of the six who voted, three others agreed with Mr. Justice Brennan that there was a violation of the antitrust law.[12] Mr. Justice Burton and Mr. Justice Frankfurter dissent-

6. 43 F. Supp. 996 (D. Mass. 1942).
7. No. 71-479 (N.D. Cal. 1977).
8. United States v. E. I. DuPont de Nemours & Co., 353 U.S. 586 (1956).
9. *Id.* at 588-89.
10. United States v. E. I. DuPont de Nemours & Co., 126 F. Supp. 235, 334-35 (N.D. Ill. 1954).
11. Justices Clark, Harlan, and Whittaker were the three justices who took no part in the consideration or decision of the case.
12. 353 U.S. at 607.

ed[13] in an opinion written in part by Mr. Justice Frankfurter, as everybody who had seen his writing in the past knew, but signed by Mr. Justice Burton. I was talking later with Judge Learned Hand about this case, and I said to him, "Judge, Felix was right, wasn't he, in the dissent?" And Learned Hand, beetling his brows, looked at me and said, "Don't you understand the principle of that case? Too big! Too big! Too big!" I assure you that that was a greater insight into the reality than any technical study of the case.

There is no question that there are large cases which are decided ostensibly for technical reasons, but which reflect a total social judgment—hopefully the judgment that society itself, in its sober moments, would make. The complicated case involves a peculiar institutional process because the social, economic, historical, and other factors so enter into judgment. There is very little doubt that the judges who are good in these cases are good because they have a certain kind of, shall I say, statesman-like quality. That may be too flattering. But they have a certain breadth, and they have learned the lesson which Salvador de Madariaga applied to historians but which applies also to lawyers: "He who is nothing else but, is not even." He who is nothing else but a judge, is not even a judge in a controversial case of great complexity.

I am now going to turn to the third and, from many points of view, I suppose to you as to me, the most fascinating aspect of the United States District Courts and other lower courts: its relation to constitutional law. Will you be surprised when I tell you that in the judicial year 1930-1931 when I was a law clerk for Judge Augustus Hand and the part of the year 1932 when I was law clerk for Judge Learned Hand in the United States Courts of Appeals for the Second Circuit, not one case involving constitutional law came before the judges for whom I was clerking, so far as I recall. Today, is there a month, I might even ask is there a week, when a federal lower court judge does not have a constitutional case on his docket?

You perhaps suppose that it was clear from the beginning that federal courts and other courts might have the large volume of constitutional cases which we now have, but if you do suppose that, you are mistaken. As each of you already knows, in 1803, in *Marbury v. Madison*,[14] John Marshall, as Chief Justice for a unanimous Supreme Court, held that when an act of

13. *Id.* at 608.
14. 5 U.S. (1 Cranch) 137 (1803).

Congress, to wit, the mandamus statute, was in conflict with a provision of the Constitution, to wit, article three of the United States Constitution, the act of Congress was invalid. I am not going to pause over the reasoning in that case. I am not going to remind you that the Court's action was forecast in Number 78 of the Federalist Papers written by Hamilton.[15] I do not need to tell you what any of you can find in Hart and Wechsler's casebook on *The Federal Courts and the Federal System*,[16] that there were precedents in Pennsylvania by Judge Gibson and in Virginia by Chancellor Wythe and elsewhere.[17] But what I am going to remind you of is that not another act of Congress was declared unconstitutional by the Supreme Court of the United States until the *Dred Scott*[18] case more than half a century later—and few people would point to that case as an admirable example of judicial work.

In the second half of the nineteenth century, there were so few cases in the Supreme Court, not to mention lower courts, involving the constitutionality of acts of Congress, that Henry Steele Commager, when he came to write in 1943 his lectures on *Majority Rule and Minority Rights*,[19] could not find as many as a hundred separate cases. We are of course aware that there was a great battle over the constitutional validity of acts of Congress in the New Deal, and I am not at this time going to take your attention away from what I really want to say to review the history of the "nine old men" and the "court packing plan" and other incidents of the period 1933-1945.

What I want you to realize is that everything that I have so far referred to, and everything that anybody else would refer to were he talking about the validity of acts of Congress, involves nothing more than a declaration by the Supreme Court or a lower court that an act of Congress is or is not valid. You do not have in the first 150 and more years of this country any question of using the doctrine of *Marbury v. Madison*[20] to vest in federal courts governing or managerial power. The break, the change, is virtually all since *Brown v. Board of Education*,[21] but not confined, as I am about to say, to the problems of desegregation.

15. THE FEDERALIST No. 78 (A. Hamilton).
16. P. BATOR, P. MISHKIN, D. SHAPIRO, & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (2d ed. 1973).
17. *Id.*
18. Scott v. Sanford, 60 U.S. (19 How.) 393 (1856).
19. H. S. COMMAGER, MAJORITY RULE AND MINORITY RIGHTS (1943), *reprinted* 1958.
20. 5 U.S. (1 Cranch) at 137.
21. 349 U.S. 294 (1955).

Referring to *Brown v. Board of Education*,[22] I am going to drop a totally irrelevant footnote. The day before yesterday I went to the Harvard Law School to look at an exhibit of the memorabilia of Felix Frankfurter which are in glass cases temporarily at the Harvard Law School. I saw the following extraordinarily interesting set of letters. There is first a letter from Mr. Justice Frankfurter to Mr. Justice Reed, written, if I am correct, three days after the decision in *Brown v. Board of Education*,[23] which was May 17, 1954. In substance the letter said, "Dear Stanley, I am so glad that you found it possible to go along in *Brown v. Board of Education* and make it a unanimous opinion. How strange fate is. Had this case been decided a year ago when it was first argued, you, Vinson, Clark, and Jackson were all going to dissent." Then there is a letter from Justice Reed, thanking Mr. Justice Frankfurter for the letter, and in no way correcting or suggesting that there was any error in the Frankfurter letter. Thus we have a most certain indication that when first argued the case divided the Court five to four. That, as I say, is an irrelevant but, I think, interesting footnote.

You will remember that in *Brown v. Board of Education* the first stage produced no precise decree but left for latter argument at a subsequent term of court the form of relief, and merely indicated that desegregation should take place with "all deliberate speed."[24] By the way, the exhibit at the Harvard Law School shows an exchange of letters and manuscripts between Mr. Justice Frankfurter and Chief Justice Warren and shows that Mr. Justice Frankfurter was the author of the phrase. I cannot really say that he was the inventor of it; he got it from Mr. Justice Holmes' opinion in *Virginia v. West Virginia*.[25] But what is, for my present purposes important, is that the progeny of *Brown v. Board of Education* includes any number of cases, not least, one in Boston, Massachusetts, in which federal district judges have operated administratively and managerially local governmental situations—schools, and the like, as a consequence of a rather vivid application of the doctrine in the original 1803 *Marbury v. Madison* case.

Now do not suppose for a moment that this managerial administrative work of the trial court is confined nowadays to problems of desegregation. I shall refer to one of the greatest of

22. *Id.*
23. *Id.*
24. *Id.* at 301.
25. 222 U.S. 17, 20 (1911).

federal judges, known I hope to all of you as a judge, as he is surely known to you as a nominee to head the FBI, Judge Frank Johnson, a truly great judge. What has he done? Some of you will be aware of *Wyatt v. Stickney*[26] in which, applying the equal protection clause, he has held that the facilities available in a mental institution—Bryce Hospital[27]—were so inadequate as not to guarantee to the occupants their constitutional rights. The judge then proceeded to lay down in detail how the hospital should be run. If you want to see a very sharp attack upon what the Judge did, look at the lectures which Professor Archibald Cox gave a year and a half ago at Oxford University.[28]

Much more recently, Judge Johnson held that the conditions within the Alabama prisons denied equal protection of the laws and proceeded to lay down in minute detail how the prisons were to be run. A week ago, the Court of Appeals for the Fifth Circuit modified that judgment; but nonetheless, it is illustrative of what he and Judge Lasker in New York in Manhattan and Judge Garrity in Massachusetts have done.

I should also refer to *Hawkins v. Town of Shaw*,[29] where Judge Elbert Tuttle, surely one of the greatest of living judges, held with the concurrence of now Attorney General Bell, that equality in the sewers, garbage collection, and like public facilities in that Mississippi town was guaranteed by the Constitution and that those facilities were subject to managerial orders by the federal court.

I do not want you to suppose that because I have recited this so-called "parade of horribles" that *I* think that they are horrible examples. I am trying to make you focus on what has happened, and I hope that you will not emotionally jump to the conclusion either that this was what ought to have been done or that this is what ought not to have been done. We are facing a very difficult set of problems. They are problems which are not unique to the United States. Throughout the world we are moving from a period of merely civic and political rights or claims, to claims with respect to economic, cultural, and social rights. The Universal Declaration of Human Rights promulgated by the United Nations and ratified in some but not in all countries

26. 344 F. Supp. 373 (M.D. Ala. 1972).

27. Bryce Hospital is located in Tuscaloosa, Alabama. *See* the discussion in Wyatt v. Stickney, 344 F. Supp. at 374-76.

28. A. COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 96-98 (1976).

29. 461 F.2d 1171, 1172 (5th Cir. 1972).

shows this direction.[30] There has grown up a widespread feeling that individual rights must be vindicated through the courts or something like courts by law suits brought against sovereign states. Turn across the Atlantic and look at the European Court of Human Rights.

Also it is quite plain that there lies behind the enlargement of the federal judicial power, an awareness that in order to maintain the balance of power which from the beginning was thought to be desirable among the executive, legislative, and judicial powers, one must look not merely at judicial power but at executive power and at legislative power. Think how executive power has grown in two World Wars, one Great Depression, one Asian War, and one Cold War. Think of the industrial-military complex. Think of the power that the Congress of the United States has had since the adoption of the sixteenth amendment. Federal revenues have multipled by such an enormous degree that you in this room can hardly believe when I tell you that when I became solicitor to the Department of Labor in 1933 the total federal budget was six billion dollars. That was only forty-four years ago.

What we have seen is an enormous growth of all kinds of power. If we are to maintain any system of rights; if we are in any way to deal effectively with the claims of individuals; if we are to remember that the purpose of the social order is ultimately to increase the spiritual, as well as the material, well-being of the individual; then, one must expect a degree of judical power adequate to the task.

Yet now let me turn over the coin. All of us have heard of the preaching of Thayer and of Holmes and of Brandeis and of Hand and the people of that generation, who told us again and again that the courts are not "Platonic Guardians;" and that the people have the right through their own elected representatives to determine what shall be the governance of society; and that judges are not qualified to pass upon ultimate political questions. We are warned that if judges do that, judges will be named only for their political views and will be chosen quite apart from their technical competence or general qualities of character and fitness for judicial office. We are warned that judges are of necessity hearing cases in courts under limited rules without access to kinds of evidence which are surely relevant in a social sense, even if they are not relevant in a legal sense; and that the

30. 3 U.N. GAOR, 71 (1948).

tools with which judges work do not fit them to deal with such tasks. And, moreover, it is stressed that ultimately, these are not questions of logic; these are not questions of judicial reason; these are questions of power; and power is not the business of judges.

Do not suppose that now that I have given you one argument and then the other argument that I am going to indicate that one is plainly right. Like most important issues in life, there is a degree of polarity; there is much to be said on both sides. But this is clear—proceed with care. We cannot afford to have the judges taking on a battle with a number of different offended minorities who, forming a coalition, will then attack the judiciary as an institution. There is very good reason for judges to move slowly, even if it is inevitable that more and more they must be managerial. Yet let the federal judge not forget that one of the secrets, perhaps the greatest secret, of the success of American government has been its federal character. Lord Acton, one of the most distinguished and philosophical of historians, thought that the United States stood, above everything else, for a successful combination of national and local authorities. It is important that the local structures should be maintained, not necessarily in precisely the same form. I am quite certain that there will be, in the course of time, changes. But local government is participatory government. Local government is much more democratic government. Local government is more sensitive to the spiritual ends of man.

What I am trying to say in a short summary is that, although it seems to me that the United States District Court and all federal courts have grown in importance and authority, and that such growth was necessary in order to maintain balanced government in which neither the executive nor the legislative was left untrammeled, and although I strongly support the development of social and economic as well as political and civil rights for individuals, I do not think it follows that we must at once reach Heaven. Here, as so often, leg over leg the dog will get to Dover.