ADVANCE SHEET – April 29, 2022

President's Letter

In this issue, we include an article by an eminent British judge, Sir Patrick Devlin, on the policy-making role of the judiciary, the first chapter in his illuminating book *The Judge* (University of Chicago Press, 1979) which deserves reading by all judges.

Our case for this issue is also of British origin, the 2015 decision of the Supreme Court of Great Britain in *R. v. Roberts* dealing with the issue of stop and frisk policing, a subject of great local interest in Baltimore.

This anglophile issue concludes with a piece in a lighter vein by the English humorist (and onetime Independent member of Parliament) A.P. Herbert.

George W. Liebmann

The Best & The Worst

"It was the best of times, it was the worst of times." It probably always has been, and most likely always will be. When I think of something that embodies both the best and the worst I think of technology, in particular any that comes with a screen. While it has

opened endless possibilities, it seems to have simultaneously brought forth in us the very worst of who we can be. Is it me or are the Seven Deadly Sins more or less trumpeted in every new devise that's released? Pride, greed, lust, envy, gluttony, wrath and sloth? Yes, you are correct, that is indeed the name of the new mega-tech company that has just opened in Silicon Valley.

I suppose I am just venting over something that took place this morning, and I thank all of you for letting me do it. The day began with my wife sitting in front of a computer looking up to tell me that "Tim was at the Orioles game last night." After a few minutes of back and forth, I discovered that the Tim in question was my cousin's son who is living in California and who I have not seen in over ten years. Still, it was on my cousin's Facebook page and for whatever reason my wife felt I could not make it through the day without knowing that "Tim was at the Orioles game last night."

Well, now that all of you know how difficult it is for my wife Anita being married to a grumpy old man, how about taking a brief look at the good. Technology has afforded the Bar Library access to more legal information than at any point in its history. Cases, statutes, regulations, treatises and secondary sources, not just from Maryland, not just from the United States, but from anywhere there is law and/or men and women writing about it, can be found at the Library. If there is a database of merit we are as they say in Vegas "all in." If there is something out there that we are not aware of, please let us know. The sole and exclusive reason for us being here is all of you, and providing you all that you need, not just some of it, is our goal.

With technology, it does not end there. We have it, and although we would like to see each and every one of you, it is not necessary, that you come to the Library to obtain what you need. Over the course of the past several years we have transmitted by way of e-mail attachments, as well as material directly from Westlaw, a truly massive amount of material. Our Library can be your library and you do not have to leave your office or even home to make it so. How many times have we said, how many times have we heard "I am working from home today." Think of the possibilities that are inherent in thinking of the Bar Library.

Joe Bennett

THE JUDGE

PATRICK DEVLIN

UNIVERSITY OF CHICAGO PRESS

I

The Judge as Lawmaker

In recent years a number of pens have been put to paper to criticize the English judiciary for its torpidity. What is needed today, it is said, is a dynamic, or at least an activist, judiciary, ready and willing to develop the law to fit the changing times. The sloth of the British judges is contrasted with the zest of the American. Certainly no one who reads of the doings of the Warren Court in a book such as that by Professor Cox[1] can fail to be struck by its boldness. Professor Jaffe in his book *English and American Judges as Lawmakers*[2] compares in an attractive and balanced way the two judicial attitudes and gives his reasons for preferring the American.

Behind some of these ideas there seems to me to lurk an assumption too easily made that judging and lawmaking are much the same thing, that a good judge ought to be a good lawmaker, that the two activities call for the same qualities. I question this assumption and must therefore begin by distinguishing between judging and lawmaking.

First, lawmaking. I am not one of those who believe that the only function of law is to preserve the status quo. Rather I should say that law is the gatekeeper of the status quo. There is always a host of new ideas galloping around the outskirts of a society's thought. All of them seek admission but each must first win its spurs; the law at first resists, but will submit to a conqueror and become his servant. In a changing society (and free societies that are composed of two or more generations are always changing because it is their nature to do so) the law acts as a valve. New policies must gather strength before they can force an entry; when they are admitted and absorbed into the consensus, the legal system should expand to hold them, as also it should contract to squeeze out old policies which have lost the consensus they once obtained.

[1] Archibald Cox, *The Warren Court*, Harvard University Press, Cambridge, Mass., 1968.
[2] Clarendon Press, Oxford, 1969.

I have now used three words which are frequently employed in discussions of this sort—*consensus*, *activist*, *dynamic*. I must give each of them a sharper definition.

Alistair Cooke has written: 'When the people in power can neither keep the consent of the governed nor keep *down* the dissent of the governed, then there will be a blow-up.'[1] Adopting this aphorism one may say that the consensus in a community consists of those ideas which its members as a whole like or, if they dislike, will submit to—what is for one reason or another acceptable. By activist lawmaking I mean the business of keeping pace with change in the consensus. Dynamic or creative lawmaking is the use of the law to generate change in the consensus. A law that tried to impose an alien idea upon a free society would come to grief. But in a free society the progress of a new idea from the attraction of some sympathy to the support of an active minority, thence to the acquiescence of the majority, and finally to a consensus, is usually very slow. Since all men are not the ardent and enlightened beings that reformers would like them to be, a touch of the whip to hasten laggards can have a good result. Reformers are always anxious to try it and recently we have seen it used in this country with varying achievements. It is generally agreed that there was no consensus, probably not even a bare majority, for the abolition of capital punishment or the reformation of the laws against homosexuality. Nevertheless both changes were made and are now accepted; the latter change has surely helped to promote a more tolerant attitude to homosexuals. The law has likewise been used cautiously in the field of race relations with, I believe, some success; and not so cautiously in the field of industrial relations without success. To be successful the exercise has to be nicely judged; the *vis inertiae* must be calculated and hostility assessed in terms of the power to resist actively or passively; the ability to make this nice judgement belongs to the art of politics.

Of course I am not saying that there should be no legislation without consensus, nor am I concerned to offer an opinion about the wisdom of dynamic lawmaking. On the one hand it is said that government should offer leadership to a nation; on the other hand it is certain that a series of political misjudgements in the use of the law would diminish respect for it. My question is not about dynamic lawmaking but about whether the judiciary should be employed in it. It would seem to require a surer political touch than a judge is likely to have. Nevertheless there are demands for a creative judiciary to operate upon subjects which governments shirk. It is argued, for

[1] Alistair Cooke, *America*, B.B.C., London, 1973, p. 122.

example, that judges made the law of homicide and so ought to be ready to give a lead on such aspects of it as euthanasia and abortion.

So much for the moment on the lawmaker. What is the function of the judge? Professor Jaffe has a phrase for it—'the disinterested application of known law'.[1] He would put it perhaps as the minimal function. I should rank it as greater than that. It is at any rate what 90% or more of English judges—and I dare say also of all judges of all nationalities—are engaged in for 90% of their working lives. The social service which the judge renders to the community is the removal of a sense of injustice. To perform this service the essential quality which he needs is impartiality and next after that the appearance of impartiality. I put impartiality before the appearance of it simply because without the reality the appearance would not endure. In truth, within the context of service to the community the appearance is the more important of the two. The judge who gives the right judgment while appearing not to do so may be thrice blessed in heaven, but on earth he is no use at all.

A judge must be a very arrogant man (and so probably a bad judge) if he supposes that even on questions of fact he is always right. In a high percentage of cases he is, otherwise he would lose credibility. But there is an appreciable number in which, confronted with two conflicting stories and little else, he has to base his decision, mainly if not entirely, on his impression of the witnesses. In difficult cases he cannot be right every time; certainly he will not convince the losing party that he is right. The object of the process is not, however, to force the contender to submit to superior reasoning. It is to provide a civilized method of settling disputes. It is, as I have said, to remove a sense of injustice.

It is not the bare fact of physical injury or the loss of property that arouses a sense of injustice in a man—this may happen accidentally—it is the feeling that he has been wronged by another whom he cannot challenge or to whom he is forced to submit. It is the affront to his dignity which, if it is left unrelieved, will lead to disorder and, if others like him are similarly wronged, to social unrest. The most primitive means of relief—trial by battle or by ordeal or the duel—are better than none. In the world of nations, if I may venture on the parallel, we have in the twentieth century done away with trial by battle without substituting anything for it. By trial by battle in this context I mean the nineteenth-century concept of fighting between combatants only and in accordance with the Hague Conventions and the other laws of war. Since nuclear massacres are beyond the reach of most aggrieved per-

[1] Jaffe, op. cit., p. 13.

sons, they resort to terrorism—hijacking, kidnapping, and the plastic bomb. We ought never to forget that judges and juries are the institutions which secure us from comparable disorders within the nation and that their value to the community is to be measured by the extent to which they do this and not by the extent to which their judgments and verdicts are pleasing to the critical eye.

Dr. Johnson observed that 'authority from personal respect has much weight with most people, and often more than reasoning'.[1] Respect for office is not so great as it was but respect for the person remains, which is why in all walks of life so many inarticulate people are influential. A judgment must be weighty, but weight, especially in questions of fact, is not given solely by soundness of reasoning. It is the virtue of the English system that from first to last the judge is exposed to the parties; they do not read the judgment: they see and hear it being made and given.

This is why impartiality and the appearance of it are the supreme judicial virtues. It is the verdict that matters, and if it is incorrupt, it is acceptable. To be incorrupt it must bear the stamp of a fair trial. The judge who does not appear impartial is as useless to the process as an umpire who allows the trial by battle to be fouled or an augurer who tampers with the entrails.

In the course of their work judges quite often dissociate themselves from the law. They would like to decide otherwise, they hint, but the law does not permit. They emphasize that it is as binding upon them as it is upon litigants. If a judge leaves the law and makes his own decisions, even if in substance they are just, he loses the protection of the law and sacrifices the appearance of impartiality which is given by adherence to the law. He expresses himself personally to the dissatisfied litigant and exposes himself to criticism. But if the stroke is inflicted by the law, it leaves no sense of individual injustice; the losing party is not a victim who has been singled out; it is the same for everybody, he says. And how many a defeated litigant has salved his wounds with the thought that the law is an ass!

So I am not distressed by the fact that at least nine-tenths of the judiciary spends its life submerged in the disinterested application of known law. Indeed, to say that one-tenth rises above the waterline that is marked by notice in the legal journals would probably be an exaggeration. The House of Lords most of its time. But the Court of Appeal spends more than half its time on the important task of reviewing on the written record the more difficult decisions of fact. There is an occasional emergence of a judge of the High

[1] James Boswell, *The Life of Samuel Johnson*, J. M. Dent & Co., Everyman edition, London, 1906, Vol. I, p. 615.

Court. Circuit and county courts work in the depths where even the rays of the *Modern Law Review* penetrate only in a refracted glow.

The disinterested application of the law calls for many virtues, such as balance, patience, courtesy, and detachment, which leave little room for the ardour of the creative reformer. I do not mean that there should be a demarcation or that judges should down tools whenever they meet a defect in the law. I shall consider later to what extent in such a situation a judge should be activist. But I am quite convinced that there should be no judicial dynamics.

So much for the nature and function of the judge. I return to the lawmaker and consider what, if anything, judges and lawmakers have in common.

The lawmaker takes an idea or a policy and turns it into law. For this he needs the ability to formulate, and a judge in common with any other trained lawyer should have that. Is the judge any different in this respect from a professor or a parliamentary draftsman? Yes, because he has experience of the administration of the law. So has the barrister and the solicitor, but it is an advantage to see it working from the Bench. So there is no reason why, given the policy, a judge should not be a good activist lawmaker. The question, to which I shall return, is whether he should be the complete lawmaker or whether he would not do better work in committee, pooling his judicial experience with the social, commercial, and administrative experience of others.

Let me repeat the distinction, since it may be one which is fresh, between activist and dynamic lawmaking. In activist lawmaking the idea is taken from the consensus and demands at most sympathy from the lawmaker. In dynamic lawmaking the idea is created outside the consensus and, before it is formulated, it has to be propagated. This needs more than sympathy: it needs enthusiasm. Enthusiasm is not and cannot be a judicial virtue. It means taking sides and, if a judge takes sides on such issues as homosexuality and capital punishment, he loses the appearance of impartiality and quite possibly, impartiality itself. In mercy-killing, for example, Professor Jaffe considers[1] that the judge might, after consulting the common ethic, allow the defence. But if one judge allows the defence, there will be others, perhaps many others, who will not. And those who outrun the consensus will not keep in line. Thus the law will suffer a serious loss of clarity and coherence.

All this seems to me so obvious that rather than elaborate upon it, I prefer to search for an explanation of how it can be that wise men apparently think

[1] Jaffe, op. cit., p. 13.

differently. I think it must be because the wise men and I do not start from the same point. We do not take the same view of the function of the judge. This is why I have stated my view at some length; and because it is important I shall come back to it now by way of an examination of three factors which I think have misled critics into devising too exalted a function for the English judge and then blaming him for not discharging it. The first factor is the historic role of the judiciary as lawmaker. The second is the shining example of the Supreme Court of the United States. The third is a confusion between social and personal justice.

As to the first, there is no doubt that historically judges did make law, at least in the sense of formulating it. Even now when they are against innovation, they have never formally abrogated their powers; their attitude is: 'We could if we would but we think it better not.' Most commentators therefore start from the assumption that English judges *are* lawmakers and that the real question is whether they should not make law with more verve than they do. But as a matter of history did the English judges of the golden age make law? They decided cases which in the commentaries and textbooks were worked up into principles. The judges, as Lord Wright once put it in an unexpectedly picturesque phrase, proceeded 'from case to case, like the ancient Mediterranean mariners, hugging the coast from point to point and avoiding the dangers of the open sea of system and science'.[1] Or as Dr. Johnson, if I may quote him again, put it the other way round: 'The more precedents there are, the less occasion is there for law; that is to say, the less occasion is there for investigating principles.'[2] The golden age was an age of precedent. Its judges were not rationalizers and, except in the devising of procedures, they were not innovators. They translated into law the customs and the steady morality of their times. They did not design a new machine capable of speeding ahead; they struggled with the aid of fictions and bits of procedural string to keep the machine on the road. The appellate courts were still in their infancy.

Today more is expected of the judges, at least of the appellate courts. Lord Wright was himself one of the proponents of the modern appellate judgment which surveys the whole field and seeks to order all that lies within it. But at the same time as judgments are expanding, the sources seeking to contribute to the formation of the law are multiplying. The golden age was not an age of sociology. Judges extracted the law from below the surface by primitive means. Today there are numerous mines being worked by sociologists, by professional and trade bodies, and by those who are only

[1] 'The Study of Law' (1938) 54 L.Q.R. 185 at p. 186.
[2] Boswell, *op. cit.*, Vol. I, p. 416.

half derisively called 'do-gooders', and the surface bubbles with ideas of what the law should be.

I come now to the second factor. There is no doubt that the Supreme Court has been dynamic. In three fields—racial desegregation, voting rights, and reform of criminal procedure—it has legislated where consensus was non-existent or at least doubtful. The distribution of legislative power between the Congress and the fifty States is such that national legislation on these subjects would be almost impossible to secure. The famous desegregation decision of 1954[1] helped to avert a destructive explosion. The Supreme Court has almost from its inception been an organ of government. Professor Cox endorses as up to date de Tocqueville's observation that hardly a political question arises in the United States that is not converted into a legal question and taken to the courts for decision.[2] Consequently the Supreme Court, a Council of Wise Men as it is sometimes called, is and has to be as much political as judicial in its character. Few of its members come to it with judicial experience and many of them have political experience; the political beliefs and philosophy of the candidate are always highly relevant.

The Supreme Court like the vines of France is not for transplantation. The soil and climate in which it flourishes are not those of Britain; the hands that tend it have now like the Bordeaux vignerons acquired unique skills. Moreover, it needs two things which Britain has not got: first, a Constitution as a source of life; second, a legislative vacuum for it to fill. In a unitary as distinct from a federal state there is no such vacuum.

I shall not presume to assess the value of the Supreme Court to the United States. But it is surely wise to remember that there have in the past been periods of slump, that the Court may now be coming to the end of a progressive boom, and that for the boom years there may yet be a price to be paid. Professor Cox has written:

> The gains of decisions advancing social justice are evident when they are rendered; any costs in the erosion of the power of law to command consent are postponed until the loss accumulates.[3]

It must be remembered too that institutions can just as easily be reactionary as progressive and that half a century ago the progressives were preaching the doctrine of judicial restraint. Indeed, Justice Frankfurter, for whom principles did not blow hot and cold, never lost his attachment to judicial restraint. But usually enthusiasm for an institution coincides with enthusiasm for what it is doing. I have yet to meet an American who says of the

[1] *Brown* v. *Board of Education*, 357 U.S. 483.
[2] Op. cit., p. 1.
[3] ib., p. 23.

Supreme Court, 'I disapprove of what you say, but I will defend to the death your right to say it.'

The third factor I have mentioned, the confusion between social and personal justice, is caused by an ambiguity in the use of the word 'justice'. We do not have different words for what, to use legal terminology, I might call justice *in rem* and justice *in personam*. We can use the word to mean social justice and then we say that a law is just if it conforms to some social principle, such as that all men are equal; this is justice *in rem*. We use it also to mean justice *in personam*, that is, between parties to a dispute. Personal justice in a community is dependent on the existence of laws and its exercise consists in the just administration of them. Social justice is above the law; it is the body of principles with which the law should conform. Social justice guides the lawmaker: the law guides the judge. Judges are not concerned with social justice, or rather they need not be more concerned with it than a good citizen should be; they are not professionally concerned. It might be dangerous if they were. They might not administer the law fairly if they were constantly questioning its justice or agitating their minds about its improvement.

A confusion between social and personal justice must be one of the reasons why judges are supposed to be natural lawmakers. It can only be some confusion of thought that leads intelligent progressives to imagine that the British judiciary could ever be made a pliable instrument of social reform according to their ideas. There are progressives who, like moths outside a lighted window, are irresistibly attracted by what they see within as the vast unused potentiality of judicial lawmaking. They would surmount the obstacle of a reactionary judiciary by reconstructing it, diluting the alleged potency of its public-school spirit, and imposing some regimen, as yet unprescribed in detail, upon the daily lives of judges which would result in their becoming less remote. I do not believe that measures of this sort would make a pennyworth of difference. Let the practice of the law be opened up by all means and let the judiciary be composed of the best that the practice of the law can produce. You will find, I am sure, that judges will still be of the same type whether they come from major or from minor public schools, grammar schools, or comprehensives, and whether they like to spend their leisure in a library or in a club. They will all be the type of men—there will be exceptions of course, but the type—who do not seriously question the status quo, men whose ambition it is to serve the law and not to be its master. You can see this already at the university where students in the law faculties all over the world are nearly always on the right while those in sociology are on the left. Lawyers are not naturally interested in social reform, any more than policemen are or soldiers. Without policemen

society would be threatened from within, and without soldiers from without. Judges too are necessary to society, especially in a time of social change. For change, in the measure of its beneficence to the many, causes hardship and displacement to the few. It is essential to the stability of society that those whom change hurts should be able to count on even-handed justice calmly dispensed, not driven forward by the agents of change.

It is this even-handedness which is the chief characteristic of the British judiciary and it is almost beyond price. If it has to be paid for in impersonality and remoteness, the bargain is still a good one. It is British justice rather than English or Scots law that has been the gift of British lawyers to the world. You cannot visit the countries of the Commonwealth without realizing that. Those who brought the gift to these countries were the second-best, for naturally the best stayed at home; their social contribution to the countries in which they served was nil; they were, if you like, the judicial blimps. But it is the handiwork of the blimps that has survived. In our own country the reputation of the judiciary for independence and impartiality is a national asset of such richness that one government after another tries to plunder it. This is a danger about which the judiciary itself has been too easy-going. To break up the asset so as to ease the parturition of judicial creativity, an embryo with a doubtful future, would be a calamity. The asset which I would deny to governments I would deny also to social reformers.

I have now made it plain that I am firmly opposed to judicial creativity or dynamism as I have defined it, that is, of judicial operations in advance of the consensus. The limit of the consensus is not a line that is clearly marked, but I can make certain what would otherwise be uncertain by saying that a judge who is in any doubt about the support of the consensus should not advance at all. This, however, leaves open quite a large field for judicial activity. In determining its extent it is necessary to distinguish between common law and statute law. This is because the requirement of consensus affects differently the two types of law. The public is not interested in the common law as a whole. When it becomes interested in any particular section of it, it calls for a statute; the rest it leaves to the judges. The consensus is expressed in a general warrant for judicial lawmaking. This warrant is an informal and rather negative one, amounting to a willingness to let the judges get on with their traditional work on two conditions—first, that they do it in the traditional way, i.e. in accordance with precedent, and second, that parliamentary interference should be regarded as unobjectionable.

In relation to statute law, by contrast, there can be no general warrant authorizing the judges to do anything except interpret and apply. Beyond

that the support of the consensus depends on the subject-matter of each particular statute. When the consensus behind the purpose of a statute is clear and strong, a judge could perhaps risk—later on I shall stress the risk—going beyond interpretation towards development. But remember that to be effective a statute does not need to have consensus; it could be extremely controversial. Then a judge must be very cautious about any extension of the written word and may have to decide the case 'in typical English judicial fashion', as Professor Jaffe remarked[1] of the decision in *Rookes* v. *Barnard*,[2] treating 'the matter as an exercise in abstract logic'. It is not, I believe, that an English judge is peculiarly fond of abstract logic, but he prefers it to taking sides.

In sum, in the common law there is a general warrant for judicial lawmaking; in statute law there is not. In the common law development is permitted, if not expected; in statute law there must be at least a presumption that Parliament has on the topic it is dealing with said all that it wanted to say.

I shall now consider judicial activism in the common law and the principal objections that are taken against it. The first is that, since judges are not representative, it is undemocratic. This is an objection that can rightly be taken against creativity but not against activism as I have defined it; if it is the essence of activism that it operates within the consensus, the operation cannot be undemocratic. But let us look more closely at what operating within the consensus means and at what conditions must be fulfilled. The subject-matter of the case must either be one (which I shall put in the first category) on which the public is indifferent, i.e. willing to leave to the judges, or one (in the second category) in which the view of the public is all one way; it must not be one (in the third category) on which, though it is within the province of the common law, the public holds differing views.

Mercy-killing, which I have already mentioned, is an obvious example from the third category. It is a highly controversial subject discussed by intelligent laymen more closely than by lawyers. It could not give satisfaction to the public if a solution were to be found by the use of the blunt instrument of a decision in a particular case, which depended on the composition of the court. In short, Professor Jaffe and others who argue in favour of judicial participation in the controversy are arguing in favour of judicial creativity; and what I have just written is really part of the case against that.

Now take an example from the opposite category, the second. Should a man recover damages from a friend who has given bed and breakfast to his deserting wife? This is a question on which laymen would want to be heard.

[1] Op. cit., p. 91. [2] [1964] A.C. 1129.

They would answer it with a loud and universal No, in which the judiciary, unless inhibited by eighteenth-century precedent, would join. Activism in this category is within the true tradition of judicial lawmaking—putting the consensus into the law.

In between there is the large category, the first, in which the inclination of the layman is to leave it to the judges. Should a man receive damages from the manufacturers as well as from the seller of defective goods? The decision in *Donoghue* v. *Stevenson*,[1] revolutionary in the legal world, was hardly noticed outside it. *Rookes* v. *Barnard*[2] on punitive damages created a legal commotion surfacing in the Court of Appeal in what in less exalted circles would have been called a 'demo', but it left the public cold.

The objection which I have just been considering—that judicial lawmaking is unacceptable because undemocratic—is the only one which could have been fatal, since, Britain being a democracy, it would have gone to the root of the power. There are other objections which taken together are very formidable, but they are not total. I call them objections, but they are really factors which, to the extent to which they have to be accepted, impose such restrictions on the power as to make the judge by comparison with legislatures and rule-making bodies a crippled lawmaker. Let us see what these objections are.

There is the objection of retroactivity. The judge can change the law only by applying to the decision of a case a law different from that in force at the time the legal process in that case was initiated. I think that this objection can be exaggerated. A judge-made change in the law rarely comes out of a blue sky. Rumblings from Olympus in the form of obiter dicta will give warning of unsettled weather. Unsettled weather is itself of course bound to cause uncertainty, but inevitably it precedes the solution of every difficult question of law.

Nevertheless the objection unexaggerated is a strong one. If it does become necessary to choose between a change in the law and a real injustice caused by retroactivity in the case at bar, surely the choice must be against change in the law; that puts a limit on judicial activism. Moreover, for the method to work fairly, there should be some provision for the payment out of public funds for judicial lawmaking. This is a point which attracts little attention although the extent to which the private citizen has to pay for public lawmaking is already intolerable.[3]

[1] [1932] A.C. 562.

[2] [1964] A.C. 1129, discussed in *Broome* v. *Cassell* [1971] 2 Q.B. 354.

[3] See on this point what was said by Hailsham L.C. in *Cassell* v. *Broome* [1972] A.C. 1027 at 1053–5.

Courts in the United States have begun to circumvent retroactivity by the device of deciding the case before them according to the old law while declaring that in future the new law will prevail; or they may determine with what measure of retroactivity a new rule is to be enforced. This device has attracted the cautious attention of the House of Lords.[1] I do not like it. It crosses the Rubicon that divides the judicial and the legislative powers. It turns judges into undisguised legislators. It is facile to think that it is always better to throw off disguises. The need for disguise hampers activity and so restricts the power. Paddling across the Rubicon by individuals in disguise who will be sent back if they proclaim themselves is very different from the bridging of the river by an army in uniform and with bands playing. If judges can make law otherwise than by a decision in the case at bar, why do they wait for a case? Prevention is better than cure, so why should they not, when they see a troublesome point looming up, meet and decide how best to deal with it? Judicial lawmaking is at present, as Professor Jaffe phrases it,[2] 'a by-product of an *ad hoc* decision or process'. That this is so is of course in itself one of the objections to judicial lawmaking. Dependent as it is upon the willingness of individuals to litigate, it is casual and spasmodic. But to remove the tie with the *ad hoc* process would be to make a profound constitutional change with incalculable consequences. What is the business of a court of law? To make law or to do justice according to law? This question should be given a clean answer. If the law and justice of the case require the court to give a decision which its members think will not make good law for the future, I think that the court should give the just decision and refer the future to a lawmaking body.

However, the objection that carries most weight with me is simply that judges by themselves—sitting in banc as it were—are not as a body the complete lawmaker and it is unreasonable to expect that they should be. They can be excellent contributors and formulators, as is shown by the services they have rendered on law revision committees. But the making of law, even if it be only 'lawyers' law', requires much more than a knowledge of existing law and of its administration. Already those appellate courts which are extending the reach of their judgments beyond the facts of the case are beginning to turn themselves into law revision committees working perforce without the aids which such committees have. The aid which the judge has under the English system is limited by the assumption that all he has to do is to try the case. It consists entirely of the argument of counsel; there are no law clerks; personal research is not expected and no time is allowed for

[1] *R.* v. *National Insurance Commissioners, ex p. Hudson* [1972] A.C. 914 at 1015 and 1026.
[2] Op. cit., p. 35.

it. There is a limit to what counsel can do in time that is paid for by their clients; litigants are interested in the decision of their case and not in the development of the law. The persons who may be interested in that are not represented. Yet there are many people who would like to be heard on such questions as liability for careless misstatement or for punitive damages and who could speak adequately through professional bodies. New law ought not to be made until after consultation with the representatives of those who will be concerned with it. Methods of achieving this have been admirably developed by the Law Commission.

This is in my opinion the best way of lawmaking and I hope to see it greatly extended. But until it is in general use we cannot dispense with the second-best. The strongest argument for judicial activism is not that it is the best method of law reform but that, as things stand, it is in a large area of the law the only method. The judges who made the common law must not abrogate altogether their responsibility for keeping it abreast of the times. Of course they can protest, as they frequently do, that it is for Parliament to change the law. But these protestations ring hollow when Parliament has said, as loudly as total silence can say it, that it intends to do nothing at all.

Let me take one example. Ideas about sexual behaviour have recently changed with abnormal rapidity and the common law is quite out of touch. Parliament is unlikely to do anything about it and, if the more stringent rules are administered as they stand, the fabric of the law will be damaged. Take the rule which prevents a landlord recovering rent from a couple whom he knows to be living in sin. Many people would still wish to see the rule applied to prostitution and promiscuity. Some people also regard living out of wedlock as socially undesirable. But it is unreasonable now to treat every such association with abhorrence of the *ex turpi causa* type and for the law to insist that all unmarried couples should either be ejected or live rent-free. Topics of this sort are not the stuff that judicial dynamism is made of, but they offer scope for much useful modernization of the type that is now being undertaken by the State courts in America. From what I have read I doubt if the State courts, which resemble English courts more closely than the Federal, have gone much further than modernization. The example of their activity most frequently given is their destruction of immunities earlier granted by the common law, e.g. the exemption of charitable or non-profitmaking bodies, such as hospitals, from liability for negligence.[1] I can see no reason why what the judges originally granted, their mandate then being the general approval of the times, they should not withdraw when

[1] Jaffe, op. cit., pp. 4, 34, and 50.

they consider that the general approval no longer exists; if they miscalculate, Parliament can intervene just as it could have intervened initially if they were wrong in the first instance. The doctrine of common employment in England, for example, was an invention of the courts and it surely would not have been wrong for them to put an end to it when the spirit that animated it was dead. Instead they left it as a nerveless tooth which could still bite even when in decay. What stood in the way of this and other euthanasian practices was Lord Halsbury's prohibition, which prevailed from 1898 to 1966, against the House of Lords moving with the times. This rule was utterly antagonistic to the spirit of the common law. Now that the House has been set free the removal of obsolete law should be the first duty of judicial activism.

The rules of evidence and of procedure I would treat as a special subject. Here I think (though my thought, I fear, is now unlikely to fructify) that it is the duty of the judiciary to take full charge of the common law. While Parliament must have the last word, I should like to see it established as a convention that it did not as a rule intervene. At least in the first instance any change should reflect the view of the judiciary; the public is entitled to know how the judges would order their affairs—for the administration of justice is their affair—before the legislature lays down the law.[1] I agree with the views of the minority in *Myers* v. *D.P.P.*,[2] the case in which the House of Lords considered the hearsay rule. But I am touching now on a subject which needs a paper on its own—the relationship between the courts, the legislature, and the executive.

I turn now to statute law. Judges, I have accepted, have a responsibility for the common law, but in my opinion they have none for statute law; their duty is simply to interpret and apply it and not to obstruct. I remain unconvinced that there is anything basically wrong with the rule of construction that words in a statute should be given their natural and ordinary meaning. The rule does not insist on a literal interpretation or require the construction of a statute without regard to its manifest purpose. There should be, as Lord Diplock has said,[3] 'a purposive approach to the Act as a whole to ascertain the social ends it was intended to achieve and the practical means by which it was expected to achieve them'. But in the end the words must be taken to mean what they say and not what their interpreter would like them to say; the statute is the master and not the servant of the judgment.

[1] There is a statutory warranty for this; see p. 53.

[2] [1965] A.C. 1001.

[3] *R.* v. *National Insurance Commissioners* [1972] A.C. 914 at 1005.

In the past judges have been obstructive. But the source of the obstruction, it is very important to note, has been the refusal of judges to act on the ordinary meaning of words. They looked for the philosophy behind the Act and what they found was a Victorian Bill of Rights, favouring (subject to the observance of the accepted standards of morality) the liberty of the individual, the freedom of contract, and the sacredness of property, and which was highly suspicious of taxation. If the Act interfered with these notions, the judges tended either to assume that it could not mean what it said or to minimize the interference by giving the intrusive words the narrowest possible construction, even to the point of pedantry.

No doubt judges, like any other body of elderly men who have lived on the whole unadventurous lives, tend to be old-fashioned in their ideas. This is a fact of nature which reformers must accept. It is silly to invite the older generation to make free with Acts of Parliament and then to abuse them if the results are unpleasing to advanced thinkers. Not that everything can always be blamed on the conservatism of judges. Statutes are not philosophical treatises and the philosophy behind them, if there is one, is often half-baked. Those who want judges to search for meanings beyond words should first examine some case histories. Let me give you one which recently came to my notice and which, I can assure you, is quite typical.

The Harbours, Docks and Piers Clauses Act 1847 is not a statute infused with a high social purpose, but it is a good example of the sort of statute with which judges habitually deal. Section 74 provides that any damage done by a vessel to a harbour, dock, or pier shall be paid for by the owner of the vessel; in order to make sure that there should be no judicial quibbling about what is a vessel, the statute says 'every vessel or float of timber', but otherwise it is written in normal English. Yet when a case of damage arose at Durham Assizes in 1875, only two out of the seven judges who ultimately had to consider the case could bring themselves to believe that the statute meant what it said and actually imposed absolute liability. Note that the majority judges were taking the liberal view. The common law at that time was seeking to free itself from primitive notions of absolute liability and was at the commencement of a great development in the law of negligence; surely the Act must be made to fit in with the rational idea that liability followed upon fault.

This decision of the House of Lords in *River Wear Commissioners* v. *Adamson*[1] is one of quite a number of its sort which trouble the law of England. The point I want to take from it is that the departure from the natural and ordinary meaning of words usually leads to confusion. Five

[1] (1877) 2 App. Cas. 743.

judges are no more likely to agree than five philosophers upon the philosophy behind an Act of Parliament and five different judges are likely to have five different ideas about the right escape route from the prison of the text. The House of Lords in the *River Wear* case certainly decided that section 74 should not be given its literal meaning. But beyond that, and in spite of several judicial inquests at the highest level, the courts have not yet arrived at any general agreement about what section 74 does mean. After a century it is still fermenting in judicial thought. One of its legacies recently split the High Court of Australia three to two.[1]

Today we should have no difficulty with section 74. Its language fits in nicely with the new philosophy that negligence does not matter and that the statutory object in such a case is simply to make clear who is to take out the insurance policy. Perhaps Parliament in 1847 had a prophetic glimpse of the twentieth-century philosophy, but it is far more likely that it had no philosophical thoughts at all.

So while in theory there is room for judicial activism in the development of a statute when the consensus is clear, I doubt whether in practice it would be productive. The judicial expansion of statutes from the Statute of Frauds onwards has not usually been successful. It would be surprising if it had been. You cannot hope for effective co-operation between bodies which are not expected to converse with each other. 'The organs of government are partners in the enterprise of lawmaking,' Professor Jaffe writes,[2] 'courts and legislatures are in the law business together.' He refers to the 'potentiality' of a fruitful partnership and interaction between them. If this is meant as more than metaphorical, ways and means as yet unmentioned will have to be devised for effectuating the joint enterprise; one partner cannot be left guessing about what the other is doing and why. In a country such as the United States in which the legislature and the executive are independent of each other, it would perhaps be possible, granted some considerable relaxation in the doctrine of the separation of powers, to have legislators and judges working together in a communion which did not imperil essential freedoms. In a country like Britain it would be impossible. For the British Parliament, while it acts as an independent check on legislation brought forward by the executive, is not an independent legislature. Legislation in Britain is introduced by the executive and, when it has been enacted at the behest of the executive, is frequently implemented by ministerial regulation. Thus the executive commands both the principle and the detail of the statute. Is the judge in the case to go into partnership with the government

[1] *Geelong Harbour Trust Commissioners* v. *Gibbs Bright & Co.* (1970) 122 C.L.R. 504.
[2] Op. cit., p. 20.

of the day? On such a statute as, for example, the Industrial Relations Act 1971? Is he to ring up the appropriate Minister and get his views about the next step? Without this sort of conversation the judge, bent on developing the law, is at worst heading for a collision and at best groping in the dark; with it the judge abandons his role of arbiter between the government and the governed.

I appreciate that radical reformers may take a fundamentally different view from mine about the function of the judiciary. They may see it not as arbitrating between citizens and as holding the balance between the state and the individual but as one of the three branches of the government. They may see the need for social reform as demanding that all three arms of the government should smite in unison for its achievement. Judges should give social leadership, they say. What if they are harnessed to an Act of Parliament? They are still free to gallop with it towards the social millennium, treating the sections that rumble along behind as but the wagons that are packed with fodder for progressive judgments.

If judges were men endowed for such a task they would not truly be judges. In every society there is a division between rulers and ruled. The first mark of a free and orderly society is that the boundaries between the two should be guarded and trespasses from one side or the other independently and impartially determined. The keepers of these boundaries cannot also be among the outriders. The judges are the keepers of the law and the qualities they need for that task are not those of the creative lawmaker. The creative lawmaker is the squire of the social reformer and the quality they both need is enthusiasm. But enthusiasm is rarely consistent with impartiality and never with the appearance of it.

Why is it, I ask in conclusion, that the denunciators of judicial inactivity so rarely pause to throw even a passing curse at the legislators who ought really to be doing the job. They seem so often to swallow without noticing it the quite preposterous excuse that Parliament has no time and to take only a perfunctory interest in an institution such as the Law Commission. Progressives of course are in a hurry to get things done and judges with their plenitude of power could apparently get them done so quickly; there seems to be no limit to what they could do if only they would unshackle themselves from their precedents. It is a great temptation to cast the judiciary as an élite which will bypass the traffic-laden ways of the democratic process. But it would only apparently be a bypass. In truth it would be a road that would never rejoin the highway but would lead inevitably, however long and winding the path, to the totalitarian state.

Michaelmas Term
[2015] UKSC 79
On appeal from: [2014] EWCA Civ 69

JUDGMENT R (on the application of Roberts) (Appellant) *v* Commissioner of Police of the Metropolis and another (Respondents)

before

Lady Hale, Deputy President
Lord Clarke
Lord Reed
Lord Toulson
Lord Hodge

JUDGMENT GIVEN ON

17 December 2015

Heard on 20 and 21 October 2015

Appellant	*Respondent*
Hugh Southey QC	Jeremy Johnson QC
Ruth Brander	Georgina Wolfe
(Instructed by Bhatt Murphy Solicitors)	(Instructed by Weightmans LLP)

Respondent/Interested Party
Lord Keen QC
James Eadie QC
Ben Jaffey
(Instructed by The Government Legal Department)

Intervenor (Liberty)
Alex Bailin QC
Iain Steele
Katherine Hardcastle
(Instructed by Liberty)

LADY HALE AND LORD REED: (with whom Lord Clarke, Lord Toulson and Lord Hodge agree)

1. In this country, we are wary of giving too much power to the police. We believe that we should be free to be out and about in public without being subjected to compulsory powers of the police, at least unless and until they have reasonable grounds to suspect that we are up to no good. We have so far resisted suggestions that we should all have to carry identity cards that the police can demand to see whenever they want. We have unhappy memories of police powers to stop and search "suspected persons" even with reasonable grounds. We are even more suspicious of police powers to stop and search without having reasonable grounds to suspect that we are committing or going to commit a crime.

2. Nevertheless, there are a few instances in which our Parliament has decided that such "suspicionless" stop and search powers are necessary for the protection of the public from terrorism or serious crime. The court can examine whether such a law is itself compatible with the rights set out in Schedule 1 to the Human Rights Act 1998. However, if it finds that it is not, the most the court can do is to make a declaration of incompatibility under section 4 of the Human Rights Act, leaving it to Parliament to decide what, if anything, to do about it. This is the primary remedy sought by Mr Southey QC on behalf of the claimant in this case. But, under section 6 of the Human Rights Act, even a compatible law has to be operated compatibly with the Convention rights in any individual case. There are many laws which are capable of being operated both compatibly and incompatibly, depending upon the facts of the particular case. The

compatibility of the law itself has therefore to be judged in conjunction with the duty of the police to operate it in a compatible manner.

3. The law in question is contained in section 60 of the Criminal Justice and Public Order Act 1994. It is now common ground that the power of "suspicionless" stop and search which it contains is an interference with the right to respect for private life, protected by article 8 of the European Convention on Human Rights, although perhaps not at the gravest end of such interferences. It is also common ground that the power pursues one of the legitimate aims which is capable of justifying such interferences under article 8(2), namely the prevention of disorder or crime. The argument is about whether it is "in accordance with the law" as is also required by article 8(2). In one sense, of course it is, because it is contained in an Act of the United Kingdom Parliament. But the Convention concept of legality entails more than mere compliance with the domestic law. It requires that the law be compatible with the rule of law. This means that it must be sufficiently accessible and foreseeable for the individual to regulate his conduct accordingly. More importantly in this case, there must be sufficient safeguards against the risk that it will be used in an arbitrary or discriminatory manner. As Lord Kerr put it in *Beghal v Director of Public Prosecutions (Secretary of State for the Home Department and others intervening)* [2015] UKSC 49; [2015] 3 WLR 344, at para 93, "The opportunity to exercise a coercive power in an arbitrary or discriminatory fashion is antithetical to its legality" in this sense.

Section 60

4. Section 60 is directed towards the risk of violence involving knives and other offensive weapons in a particular locality at a particular time. It provides:
"(l) If a police officer of or above the rank of inspector reasonably believes -
(a) that incidents involving serious violence may take place in any locality in his police area, and that it is expedient to give an authorisation under this section to prevent their occurrence,
(aa) that -
(i) an incident involving serious violence has taken place in England and Wales in his police area;
(ii) a dangerous instrument or offensive weapon used in the incident is being carried in any locality in his police area by a person; and
(iii) it is expedient to give an authorisation under this section to find the instrument or weapon; or
(b) that persons are carrying dangerous instruments or offensive weapons in any locality in his police area without good reason, he may give an authorisation that the powers conferred by this section are to be exercisable at any place within that locality for a specified period not exceeding 24 hours.
(3) If it appears to an officer of or above the rank of superintendent that it is expedient to do so, having regard to offences which have, or are reasonably suspected to have, been committed in connection with any activity falling within the authorisation, he may direct that the authorisation shall continue in being for a further 24 hours.
(3A) If an inspector gives an authorisation under subsection (1) he must, as soon as it is practicable to do so, cause an officer of or above the rank of superintendent to be informed.
(4) This section confers on any constable in uniform power -
(a) to stop any pedestrian and search him or anything carried by him for offensive weapons or dangerous instruments;
(b) to stop any vehicle and search the vehicle, its driver and any passenger for offensive weapons or dangerous instruments.
(5) A constable may, in the exercise of the powers conferred by subsection (4) above,

stop any person or vehicle and make any search he thinks fit whether or not he has any grounds for suspecting that the person or vehicle is carrying weapons or articles of that kind."

5. "Dangerous instruments" are defined in section 60(11) as "instruments which have a blade or are sharply pointed". "Offensive weapons" have the same meaning as in section 1(9) of the Police and Criminal Evidence Act 1984 ("PACE"), that is, any article "(a) made or adapted for use for causing injury to persons; or (b) intended by the person having it with him for such use by him or by some other person". If an incident of serious violence has already taken place (as contemplated by section 60(1)(aa)), it includes "any article used in the incident to cause or threaten injury to any person or otherwise to intimidate …".

6. Thus it will be seen that the individual police officer's powers in section 60(4) and (5) depend upon a general authorisation (a) given by an officer of the rank of inspector or above, (b) for a period of up to 24 hours, although renewable for one further period of 24 hours, (c) within a particular locality, and (d) where the senior police officer reasonably believes that one or more of the three grounds set out in section 60(1) exists. Section 60(5) makes it clear that the individual police officer operating under such an authorisation does not have to have any grounds for suspecting that the person or vehicle stopped and searched is carrying offensive weapons or dangerous instruments. But section 60(4) makes it clear that his or her purpose must be to search for such things.

7. The exercise of the powers set out in section 60 is subject to a number of safeguards and restrictions, including those contained in section 2 of PACE and in the Code of Practice for the exercise of such powers, issued under section 66 of that Act. In the Metropolitan Police area, it is also subject to the Metropolitan Police Service's published Standard Operating Procedures, both on the general *Principles for Stop and Search* and on *Section 60 of the Criminal Justice and Public Order Act 1994* in particular. It is well-established that failure to comply with published policy will render the exercise of compulsory powers which interfere with individual freedom unlawful: *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12; [2012] 1 AC 245. It is also likely to expose the individual officer to disciplinary action. It will therefore be necessary to return to these additional constraints in some detail later.

The facts

8. The events which gave rise to these proceedings took place on 9 September 2010. There was then a significant problem of gang related violence in the London Borough of Haringey, resulting from tensions between two rival gangs, and the risk that gangs from outside the borough would come to their aid. Between 1 and 9 September there were many police intelligence reports relating to violent crime and the use of firearms, knives and other offensive weapons. There was an attempted murder and a stabbing on 4 September and another stabbing on 5 September. On 8 September there were intelligence reports about the use or storage or movement of firearms. These indicated a risk of further violence on the afternoon, evening and night of 9 September. In the morning of 9 September, Superintendent Barclay, Superintendent (Operations) in the Borough of Haringey, formed the belief (under section 60(1)(a)) that further incidents of serious violence were likely to take place that day and also (under section 60(1)(aa)) that people would be travelling to Haringey in possession of weapons that had been used in the incidents which had already taken place.

9. Accordingly at 11.20 am he completed Form 5096, which constituted the authorisation. This authorised searches between 1.00 pm on 9 September 2010 and 6.00

am on 10 September in the whole Borough of Haringey apart from the wards of Fortis Green, Highgate, Bounds Green, Alexandra, Muswell Hill and Woodside. Under "Grounds" he checked the boxes corresponding to section 60(1)(a) and (aa). Under "Additional notes" was stated "There are increasing tensions at present between gangs in this borough and boroughs beyond those neighbouring ours. … A section 60 in the terms requested would support the aims of the tasked resources [to tackle Most Serious Violence, Serious Youth Violence and Knife Enabled Crime] and be a visible presence to deter the commission of offences in this borough". There followed details of the numerous intelligence reports, many to do with rivalry between the Wood Green Mob and the Grey Gang, which had led to this belief. The form concluded that "In respect of the Human Rights Act 1998 … Authorisation is Proportionate, Legal, Accountable and Necessary, in order to protect members of the public from being involved/surrounded by serious unlawful violence between opposing gang members. There is a history of violence between rival gangs on the borough which has previously resulted in serious assaults and criminal damage". Officers on duty were notified of the authorisation either in their daily briefing packs or over their radios.

10. At the time of these events, Mrs Roberts was 37 years old, and working as a support worker providing in-class support for young people with disabilities and learning difficulties. She had no convictions or cautions for criminal offences. She is of African-Caribbean heritage. On 9 September 2010, shortly after 1.00 pm, she was travelling on the No 149 bus in Tottenham. She had not paid her fare. A ticket inspector read her Oyster card and found that, not only had it not been validated for that journey, but also that it did not have enough funds on it to pay the fare. When questioned, Mrs Roberts gave a false name and address and also falsely stated that she did not have any identification with her.

11. The police were called and Police Constable Jacqui Reid attended. Mrs Roberts again denied having any identification with her. She appeared nervous and was keeping a tight hold upon her bag. PC Reid considered that she was holding her bag in a suspicious manner and might have an offensive weapon inside it. It was not uncommon for women of a similar age to carry weapons for other people. Earlier that day PC Reid had been involved in the search of such a woman who had been found to be in possession of a firearm and an offensive weapon and arrested. PC Reid explained her powers under section 60 of the 1994 Act and that she would search Mrs Roberts' bag. Mrs Roberts said that she would prefer to be searched in a police station. PC Reid said that this was unnecessary and she would do it there and then. As she went to take Mrs Roberts' bag, Mrs Roberts kept tight hold of it and began to walk away. She was restrained and handcuffed but continued to walk away. Eventually the police succeeded in restraining her. PC Reid searched her bag and Mrs Roberts gave her correct name and address. Inside the bag were bank cards in Mrs Roberts' name and in two other names. She was arrested on suspicion of handling stolen goods, but no further action on that matter was taken once it was confirmed that the cards were indeed her own, in her maiden name, and her son's.

12. PC Reid completed Form 5090, which recorded when and where the search had taken place, and gave the following reasons:
"Area is a hot spot for gang violence and people in possession of knives. Subject kept holding tightly onto her bag and appeared nervous and as if trying to conceal something she didn't want police to find."
Mrs Roberts was handed a copy of this form after she was arrested and interviewed at the police station for the offence of obstructing the search. She was later cautioned for that offence but the caution was quashed by consent following the institution of these proceedings.

13. Mrs Roberts explains that she did not want to be searched on the street because she was concerned that some of the young people with whom she worked might see it. But it is now conceded that PC Reid acted in accordance with section 60 of the 1994 Act, and indeed that the interference with Mrs Roberts' article 8 rights was proportionate to the legitimate aim of the prevention of crime.

14. Mrs Roberts brought judicial review proceedings alleging breaches of article 5 and of article 8 and of article 14. Both the Divisional Court ([2012] EWHC 1977 (Admin)) and the Court of Appeal ([2014] EWCA Civ 69; [2014] 1 WLR 3299) held that there was no deprivation of liberty within the meaning of article 5 (and there is no appeal against that). Both courts rejected the claim that the section 60 power was used in a manner which discriminated on grounds of race, contrary to article 14 (and there is no appeal against that). Both courts held that there was an interference with the right to respect for Mrs Roberts' private life in article 8, but that it was "in accordance with the law". That is the issue in this appeal.

The case law

15. As it is admitted that the interference with Mrs Roberts' rights was, in the circumstances, proportionate to the legitimate aim of preventing crime, her claim can only succeed if the power under which it was done is in itself incompatible with the Convention rights because it does not have the character of "law" as required by the Convention. As Lord Reed explained in *R (T) v Chief Constable of Greater Manchester Police* [2014] UKSC 35; [2015] AC 49, at para 114, "for the interference to be 'in accordance with the law', there must be safeguards which have the effect of enabling the proportionality of the interference to be adequately examined. Whether the interference in a given case was in fact proportionate is a separate question". The *T* case, as Lord Hughes explained in *Beghal*, at para 31, was concerned with a rigid rule which did not have the flexibility to ensure that interferences with article 8 rights were proportionate. In *Beghal*, as in this case, on the other hand, the court was concerned with the reverse situation, where safeguards may be required to guard against a broad discretion being used in an arbitrary, and thus disproportionate manner.

16. This is the first case in which the power in section 60 has come before this court or before the European Court of Human Rights in Strasbourg. But two other powers of "stop and search" have come before this court or its predecessor, the appellate committee of the House of Lords, and one of those cases has gone to the Strasbourg court. We will deal with these, and another relevant Strasbourg decision, in chronological order.

17. *R (Gillan) v Commissioner of Police of the Metropolis* [2006] UKHL 12; [2006] 2 AC 307, concerned the powers in sections 44 to 46 of the Terrorism Act 2000. Section 44(4) empowered a police officer of at least the rank of assistant chief constable to grant an authorisation for a renewable period of up to 28 days covering a specified area or place, which could be the whole of a police area. The practice was to grant successive 28 days authorisations covering the whole Metropolitan Police area. Under section 46(3) to (7), authorisations were subject to confirmation by the Home Secretary within 48 hours, failing which they ceased to have effect. But such confirmation had never been refused. Under section 44(3), authorisations can be given "only if the person giving it considers it expedient for the prevention of acts of terrorism", a very broad ground. "Terrorism" is widely defined in section 1 of the 2000 Act. Under section 44(1) and (2) an authorisation allowed any uniformed police officer to stop a vehicle in the area and search it, the driver and any passenger, and to stop a pedestrian in the area and search the pedestrian and anything carried by him. Under section 45(1),

the power could be exercised "only for the purpose of searching for articles of a kind which could be used in connection with terrorism", but "whether or not the constable has grounds for suspecting the presence of articles of that kind". Under section 45(4), he could detain the person or vehicle for "such time as is reasonably required to permit the search to be carried out at or near the place where the person or vehicle is stopped". Two people, a student and a journalist, who had been stopped and searched on their way to a demonstration, complained of breaches of several Convention rights, including article 8.

18. In considering the Convention requirement of legality common to all the rights in question, Lord Bingham said this, at para 34: "The lawfulness requirement in the Convention addresses supremely important features of the rule of law. The exercise of power by public officials, as it affects members of the public, must be governed by clear and publicly accessible rules of law. The public must not be vulnerable to interference by public officials acting on any personal whim, caprice, malice, predilection or purpose other than that for which the power was conferred. This is what, in this context, is meant by arbitrariness, which is the antithesis of legality. This is the test which any interference with or derogation from a Convention right must meet if a violation is to be avoided."

19. He went on to hold, at para 35, that the power in question did meet these requirements. That the constable need have no suspicion
"cannot, realistically, be interpreted as a warrant to stop and search people who are obviously not terrorist suspects, which would be futile and time-wasting. It is to ensure that a constable is not deterred from stopping and searching a person whom he does suspect as a potential terrorist by the fear that he could not show reasonable grounds for his suspicion."
He had earlier, at para 14, when rejecting the argument that "expedient" must be read down to "necessary" identified 11 constraints on the abuse of the power. The other members of the committee agreed with him on this point, while adding observations of their own, in particular that race or ethnicity could never be the sole ground for choosing a person to stop and search.

20. In *Gillan v United Kingdom* (2010) 50 EHRR 1105, the Strasbourg court took a different view. The authorisation could be given for reasons of "expediency" rather than "necessity". Once given, it was renewable indefinitely. The temporal and geographical restrictions were no real check. Above all, the court was concerned at the breadth of the discretion given to the individual police officer, the lack of any need to show reasonable suspicion, or even subjectively to suspect anything about the person stopped and searched, and the risks of discriminatory use and of misuse against demonstrators and protesters in breach of article 10 or 11 of the Convention. "In particular, in the absence of any obligation on the part of the officer to show a reasonable suspicion, it is likely to be difficult if not impossible to prove that the power was improperly exercised" (para 86). Hence the applicants' article 8 rights had been violated.

21. Despite this, it cannot be concluded from *Gillan* that the Strasbourg court would regard every "suspicionless" power to stop and search as failing the Convention requirement of lawfulness. In *Colon v The Netherlands* (2012) 55 EHRR SE45, it declared inadmissible a complaint about a Dutch power which in some respects was more comparable to the power at issue in this case than was the power in *Gillan*. Acting under the Municipalities Act, with the authority of a byelaw passed by the local council, the Burgomaster of Amsterdam designated most of the old centre of Amsterdam as a security risk area for a period of six months and again for a further

period of 12 months. Under the Arms and Ammunition Act, this enabled a public prosecutor to order that, for a randomly selected period of 12 hours, any person within the designated area might be searched for the presence of weapons. The prosecutor had to give reasons for the order by reference to recent reports. The applicant refused to submit to a search when stopped and was arrested and prosecuted for failing to obey a lawful order.

22. The applicant's complaint that this interference with his article 8 rights was not "in accordance with the law" was limited to the ineffectiveness of the judicial remedies available, in particular that no prior judicial authorisation for the order was necessary (para 74). The court pointed out that the Burgomaster's designation had to be based on a byelaw adopted by an elected representative body, which also had powers to investigate the Burgomaster's use of the power. There was also an objection and appeal mechanism. The criminal courts could then examine the lawfulness of the use made of it. Hence the power was "in accordance with the law" (paras 75-79). The court went on to find that the interference was "necessary in a democratic society". The legal framework involved both the Burgomaster and the prosecutor, hence no single executive officer could alone order a preventive search operation. These preventive searches were having their intended effect of helping to reduce violent crime in Amsterdam. These reasons were sufficient to justify the unpleasantness and inconvenience to the applicant.

23. Mr Southey suggests that the reference, in the Dutch government's observations, to the individual police officers being "given no latitude in deciding when to exercise their powers" (para 68) must mean that they had to stop everyone in the designated area during the 12 hours in question and that therefore there was no risk of arbitrary decision-making. That cannot be right. Old Amsterdam is a sizeable area frequented by many people both for business and for pleasure purposes. His better point is that the applicant limited his complaint to the lack of prior judicial sanction. The fact remains that the Strasbourg court held that particular "suspicionless" stop and search power compatible with article 8.

24. More recently, in *Beghal*, the Supreme Court has considered a rather different power, under Schedule 7 to the Terrorism Act 2000. This allows a police or immigration officer to question a person at a port or in the border area whom he believes to be entering or leaving the United Kingdom or travelling by air within it. It also applies to a person on board a ship or aircraft which has arrived anywhere in the United Kingdom. The object of the questioning is to determine whether the person "appears to be" a terrorist within the meaning of that part of the Act. But the officer does not have to have grounds for suspecting that he does. This "core" power is supplemented by additional powers to stop, search and detain the person for a short time, and to require the production of documents. The claimant was stopped and questioned for an hour and three quarters on returning to this country from a visit to her husband in France where he was in custody in relation to terrorist offences. She was prosecuted for refusing to answer some of the questions.

25. By a majority, Lord Kerr dissenting, the Supreme Court declined to hold that the prosecution was an unjustified interference with her Convention rights. Lord Hughes (with whom Lord Hodge agreed) pointed out that there is a distinction between port controls and street searches. The former are a lesser intrusion than the latter. We expect people to be searched at airports, for the safety of all. He listed, at para 43, a number of effective safeguards which he considered sufficient to meet the requirement of legality:
"They include: (i) the restriction to those passing into and out of the country; (ii) the

restriction to the statutory purpose; (iii) the restriction to specially trained and accredited police officers; (iv) the restrictions on the duration of questioning; (v) the restrictions on the type of search; (vi) the requirement to give explanatory notice to those questioned …; (vii) the requirement to permit consultation with a solicitor and the notification of a third party; (viii) the requirement for records to be kept; (ix) the availability of judicial review … if bad faith or collateral purpose is alleged, and also via the principle of legitimate expectation where a breach of the code of practice or of the several restrictions listed above is in issue; …"

26. Lord Neuberger and Lord Dyson agreed, adding that in considering whether the legality principle was satisfied, "one must look not only at the provisions of the statute or other relevant instrument which gives rise to the system in question but also at how that system actually works in practice" (para 86). The differences from the system in *Gillan* showed that these powers were more foreseeable and less arbitrary (para 87). They could only be exercised (i) at ports and airports; (ii) against those passing through the UK's borders; (iii) for a limited purpose (para 88). Unlike the powers in *Gillan*, they were not extraordinary; they were used against a tiny proportion of passengers; and they yielded useful results. Nor could they be used against demonstrators and protesters (para 89). They also pointed out that it was important to the effectiveness of these powers that they be exercised randomly and therefore unpredictably. If this were not permissible the valuable power would either have to be abandoned or exercised in a far more invasive and extensive way, by questioning everyone passing through ports and airports (para 91).

27. Mr Southey points out that there are other ways of securing the benefit of random and thus unpredictable searches than leaving the choice of whom to search to individual police officers. He himself has experienced a system in Mexico where passengers were randomly given a red or a green light: those given a red light were searched, those given a green light were not. It is, however, rather hard to see how this would work with searches conducted on the street or even on the No 149 bus.

The other constraints

28. In addition to the limited scope of the power in section 60 itself, it is necessary to take into account the other constraints upon the exercise of these powers. Those constraints arise both from the legal protection of the citizen from the misuse of police powers, and from the mechanisms designed to ensure that the police are accountable for their actions.

29. In relation to legal protection, we have mentioned section 6 of the Human Rights Act, to which it will be necessary to return. In the event of a breach of that section, the victim of the unlawful act is entitled to seek a judicial remedy under section 8, which might in an appropriate case include an award of damages (as, for example, in *H v Commissioner of Police of the Metropolis (Liberty and another intervening)* [2013] EWCA Civ 69; [2013] 1 WLR 3021). But the legal protection of the citizen pre-dates the Human Rights Act. In relation to searches, the starting point is the common law, under which it is contrary to constitutional principle and illegal to search someone to establish whether there are grounds for an arrest (*Jackson v Stevenson* (1897) 2 Adam 255). Powers of stop and search therefore require Parliamentary authority. The 1994 Act is one of a number of statutes which provide such authority. Like other aspects of the relationship between the citizen and the police, however, the exercise of the powers conferred by the 1994 Act is subject to detailed statutory regulation by PACE. Where there is a failure to comply with PACE, rendering the search unlawful, the victim can in principle bring an action for damages against the chief constable (or, in the case of the Metropolitan Police, the Commissioner), who is vicariously liable for the unlawful

acts committed by his or her officers (as, for example, in *O'Loughlin v Chief Constable of Essex* [1998] 1 WLR 374 and *Abraham v Commissioner of Police of the Metropolis* [2001] 1 WLR 1257).

30. Legal remedies before the courts are not, however, the only mechanism for protecting citizens against the misuse of police powers and ensuring the accountability of police officers. At a national level, a variety of powers are possessed by the Home Secretary, including the power to issue Codes of Practice under section 66 of PACE, and the power to appoint Her Majesty's Inspectors of Constabulary and to direct them to carry out inspections and report to her, under section 54 of the Police Act 1996. A wide range of policing matters, including operational decisions by chief constables, are also examined in Parliament by the Home Affairs Select Committee.

31. At a local level, police and crime commissioners, directly elected by the communities they serve and subject to scrutiny by local police and crime panels, are responsible for holding the chief constable of their area to account for the way in which he or she, and the people under his or her direction and control, exercise their functions: Police Reform and Social Responsibility Act 2011, section 1(7). In relation to the Metropolitan Police, the equivalent function is performed by the Mayor's Office for Policing and Crime, an office occupied by the Mayor of London: section 3(7) of the 2011 Act. At the time of the events with which this appeal is concerned, a broadly similar function was performed by police authorities established under the Police and Magistrates' Courts Act 1994, and, in relation to the Metropolitan Police, by the Metropolitan Police Authority established under the Greater London Authority Act 1999.

32. In individual cases, complaints about the misuse of police powers can be made to the chief constable (or, in the case of the Metropolitan Police, to the Commissioner), to the police and crime commissioner (or, in the case of the Metropolitan Police, to the Mayor's Office for Policing and Crime), or to the Independent Police Complaints Commission, an independent body established under the Police Reform Act 2002. Provision is made under that Act for the determination of complaints and for a system of appeals.

33. That general explanation forms the background to the constraints and safeguards applying specifically to the powers with which this appeal is concerned. First there are the requirements of sections 2 and 3 of PACE, which apply to most stop and search powers, including those under section 60 of the 1994 Act. Under section 2, before the officer begins the search, he must take reasonable steps to tell the person being searched his name, the station to which he is attached, the object of the search and the grounds for making it, and that the person can only be detained for the time reasonably required to carry out the search. Breach of section 2 would render the search unlawful (*Osman v Director of Public Prosecutions* (1999) 163 JP 725). Section 3 requires the officer to make a record in writing unless this is not practicable, either as part of the custody record if the person is arrested and taken to a police station or on the spot or as soon as practicable after the search if he is not. The person searched is entitled to a copy of the record if he asks for one within three months. This was the Form 5090 handed over to Mrs Roberts after her arrest (see para 12 above).

34. Next there are the statutory Codes of Practice, issued under section 66 of PACE. Code A relates to the exercise by police officers of statutory powers of stop and search. This governs both the authorisation and the search itself. It is not practicable to cite all the relevant paragraphs of the 2009 version in force at the time of this encounter. But the flavour may be gleaned from para 1.1:

"Powers to stop and search must be used fairly, responsibly, with respect for people

being searched and without unlawful discrimination. The Race Relations (Amendment) Act 2000 makes it unlawful for police officers to discriminate on the grounds of race, colour, ethnic origin, nationality or national origins when using their powers."

35. Mr Southey complains that this does not in terms tell police officers that they must not select people on grounds of race or ethnicity alone. But that is what discrimination means. If anything, this paragraph is clearer than the one in the current (2015) version, which has been updated to refer to all the characteristics now protected by the Equality Act 2010, without listing them. The current Code does contain a helpful paragraph, para 2.14A, which was not present in the earlier version:
"The selection of persons and vehicles under section 60 to be stopped and, if appropriate, searched should reflect an objective assessment of the nature of the incident or weapon in question and the individuals and vehicles thought likely to be associated with that incident or those weapons. The powers must not be used to stop and search persons and vehicles for reasons unconnected with the purpose of the authorisation. When selecting persons and vehicles to be stopped in response to a specific threat or incident, officers must take care not to discriminate unlawfully against anyone on the grounds of any of the protected characteristics set out in the Equality Act 2010 (see para 1.1)."
Nevertheless, the earlier Code explains and stresses the importance of explaining and recording the reasons for the stop (paras 3.8-3.11 and section 4). Supervising officers must monitor the use of stop and search powers and "should consider in particular whether there is any evidence that they are being exercised on the basis of stereotyped images or inappropriate generalisations" (para 5.1). They must keep comprehensive statistical records so as to identify disproportionate use either by particular officers or against particular sections of the community (para 5.3).

36. As to the authorisation, both the period of time and the geographical area defined in the authorisation must be the minimum necessary to achieve the legislative aim (para 2.13 and Notes for Guidance, para 13). Thus the authorisation in this case was for less than the maximum 24 hours permitted and the area, although substantial, excluded quite large areas of the borough of Haringey. The Notes for Guidance, at para 10, stress that:
"The powers under section 60 are separate from and additional to the normal stop and search powers which require reasonable grounds to suspect an individual of carrying an offensive weapon (or other article). Their overall purpose is to prevent serious violence and the widespread carrying of weapons which might lead to persons being seriously injured by disarming potential offenders in circumstances where other powers would not be sufficient. They should not therefore be used to replace or circumvent the normal powers for dealing with routine crime problems."
Paragraph 11 points out that authorisations require a reasonable belief that must have an objective basis, of which examples are given.

37. Then there are the applicable policies and instructions of the police force in question, in this case, the Metropolitan Police. The Metropolitan Police *Standard Operating Procedures* are published on their website. These largely repeat the requirements of the legislation and the Code, but with some additional features. They are designed to be relatively simple to use and easy to remember. The *Principles for Stops and Searches*, current at the time, contains a section on the Race Relations (Amendment) Act 2000, which extended the duties in the Race Relations Act 1976 to public authorities including the police. This reminds officers of their general duty to have due regard to eliminating unlawful discrimination. More to the point, it states that "Officers must be aware that to go beyond their powers and search somebody solely on grounds of race, colour, or otherwise treat someone unfavourably on such grounds is

unlawful and the individual officer, in addition to the Commissioner, may face legal or disciplinary proceedings". The *Principles* also contain a section on Human Rights, instructing officers to apply the PLAN B checklist to all their decision making. Their actions must be Proportionate, have a Legal power or purpose, Accountable (through record keeping and scrutiny), Necessary in the circumstances and use the Best information available. The specific Standard Operating Procedures on *Section 60 Criminal Justice and Public Order Act*, current at the time, instructed senior officers giving the authorisation that these "must be justified on the basis that the exercise of the power is, in all circumstances a proportionate and necessary response for achieving the purpose for which Parliament provided the power". It reminds officers that they must have a reasonable belief in the grounds and that there must be an objective basis in intelligence or relevant information. It suggests that the use of section 60 should be considered where there has been a significant increase in knife-point robberies in a limited area and also, for example, for gang related violence or disorder, football related violence and events such as demonstrations and music concerts that typically include a large-scale gathering of people which, combined with other factors, indicate a likelihood of violence or the commission of offences. It stresses the importance of engagement with local community groups and of feedback. Briefings should be the rule, if practicable. For individual officers carrying out the stop and search, it provides guidance on filling out Form 5090 and about the encounter. The mnemonic GOWISELY (Grounds, Object, Warrant, Station, Entitlement to a copy, Legal power, and tell the person 'You are being detained') applies, with some additional guidance.

38. These instructions are regularly reviewed. Since the encounter in question they have been updated to take account of the *Best Use of Stop and Search Scheme* ("BUSS"), issued by the Home Secretary and College of Policing in April 2014 following reports prepared by Her Majesty's Inspectors of Constabulary, under the direction of the Home Secretary, on the use of stop and search powers. Announcing this to Parliament, the Home Secretary explained that she had long been concerned about the use of stop and search by the police. Although an important police power, when misused it could be counter-productive. It was an enormous waste of police time. And when innocent people were stopped and searched for no good reason it was hugely damaging to the relationship between the police and the public. Nevertheless, adopting the scheme was not compulsory. Police forces in this country are not subject to direction from the government. They are operationally independent. But in fact all of them have adopted it, including the Metropolitan Police.

39. BUSS covers all kinds of stop and search powers, but in relation to section 60 it specifically provides: (i) that Forces in the scheme will raise the level of authorisation to Assistant Chief Constable (or the equivalent in the Metropolitan Police and City of London Police); (ii) that authorisations must only be given when the officer believes it "necessary", rather than merely expedient, for any of the statutory purposes; (iii) that in relation to future serious violence, the officer must reasonably believe that it "will", rather than "may", take place; (iv) that authorisations should be for no more than 15 hours in the first instance; and (v) that Forces must communicate with the public in the area in advance where practicable and afterwards.

40. Mr Southey argues that these improvements show that section 60 as enacted does not contain sufficient safeguards. On behalf of the Secretary of State, Lord Keen QC argues that BUSS is irrelevant. The Home Secretary's determination to seek improvements in the operation of all stop and search powers in order to promote better community relations does not prove that the previous use of the power was not in accordance with the law. However, it is worth bearing in mind that there has been a very significant reduction in the use of these powers in recent years.

Discussion

41. Any random "suspicionless" power of stop and search carries with it the risk that it will be used in an arbitrary or discriminatory manner in individual cases. There are, however, great benefits to the public in such a power, as was pointed out both by Lord Neuberger and Lord Dyson in *Beghal* and by Moses LJ in this case. It is the randomness and therefore the unpredictability of the search which has the deterrent effect and also increases the chance that weapons will be detected. The purpose of this is to reduce the risk of serious violence where knives and other offensive weapons are used, especially that associated with gangs and large crowds. It must be borne in mind that many of these gangs are largely composed of young people from black and minority ethnic groups. While there is a concern that members of these groups should not be disproportionately targeted, it is members of these groups who will benefit most from the reduction in violence, serious injury and death that may result from the use of such powers. Put bluntly, it is mostly young black lives that will be saved if there is less gang violence in London and some other cities.

42. It cannot be too often stressed that, whatever the scope of the power in question, it must be operated in a lawful manner. It is not enough simply to look at the content of the power. It has to be read in conjunction with section 6(1) of the Human Rights Act 1998, which makes it unlawful for a police officer to act in a manner which is incompatible with the Convention rights of any individual. It has also to be read in conjunction with the Equality Act 2010, which makes it unlawful for a police officer to discriminate on racial grounds in the exercise of his powers.

43. It might be thought that these two additional legal restraints were sufficient safeguard in themselves. The result of breaching either will be legal liability and probably disciplinary sanctions as well. It is said that, without the need to have reasonable grounds for suspecting the person or vehicle stopped to be carrying a weapon, it is hard to judge the proportionality of the stop. However, that is to leave out of account all the other features, contained in a mixture of the Act itself, PACE and the Force Standard Operating Procedures, which guard against the risk that the officer will not, in fact, have good reasons for the decision. The result of breaching these will in many cases be to render the stop and search itself unlawful and to expose the officers concerned to disciplinary action.

44. First, as to the authorisation itself: (i) the officer has reasonably to believe that the grounds for making an authorisation exist; (ii) those grounds are much more Page 18 tightly framed than the grounds in *Gillan*; (iii) the officer's belief clearly has to be based on evidence; (iv) he has to record in writing, not only what his grounds are, but the evidence on which his belief is based; (v) he has expressly to consider whether the action is necessary and proportionate to the danger contemplated; (vi) that is why, in reality, he has to believe that an authorisation is necessary rather than merely expedient; (vii) the authorisation can only be for a very limited period of time; (viii) it can only be renewed once for a limited period of time; rolling renewals are not possible; (ix) it can only cover a limited geographical area; (x) it is subject to review.

45. Second, as to the operation itself: (i) there should be prior briefing if possible and certainly de-briefing afterwards; (ii) there should be prior community engagement if possible and certainly afterwards; (iii) where the authorisation is given by an officer below the rank of superintendent, it is subject to review by a superintendent; (iv) after the authorisation is over, the operation should be evaluated, in terms of whether its objectives were met, numbers of searches, number of arrests, number of weapons seized, disproportionality etc, and community confidence and reassurance.

46. Third, as to the actual encounter on the street: (i) the officer must be in uniform and identify himself by name and police station to the person stopped; (ii) the officer must explain the power under which he is acting, the object of the search and why he is doing it; (iii) the officer must record this in writing; (iv) the person searched is entitled to a copy of the form; (v) the purpose is limited to searching for offensive weapons or dangerous implements.

47. All of these requirements, in particular to give reasons both for the authorisation and for the stop, should make it possible to judge whether the action was "necessary in a democratic society … for the prevention of disorder or crime". No system of safeguards in the world can guarantee that no-one will ever act unlawfully or contrary to orders. If they do so act, the individual will have a remedy. The law itself is not to blame for individual shortcomings which it does its best to prevent. It is not incompatible with the Convention rights.

48. It would not, therefore, be right to make a declaration of incompatibility in this case. Neither would it be appropriate to make a declaration that the Guidance current at the time, or now, was inadequate or that this particular search was not "in accordance with the law". We would dismiss this appeal

Sir Alan Patrick Herbert

Sir Alan Patrick Herbert CH (A. P. Herbert, 24 September 1890 – 11 November 1971), was an English humorist, novelist, playwright, law reformist, and between 1935 to1950 a n Independent Member of Parliament for Oxford University. Born in Ashtead, Surrey, he attended Winchester College and New College, Oxford, receiving a starred first in jurisprudence in 1914. He joined the Royal Naval Volunteer Reserve as a seaman in the First World War , becoming an officer in the Royal Naval Division. He fought in Gallipoli and on the Western Front, as a battalion adjutant in 1917, before injury removed him from the front line. After the war he published *The Secret Battle* and in 1924 joined the staff of *Punch*. As an MP he campaigned for private-member rights, piloted the Matrimonial Causes Act o f 1937 through Parliament, opposed Entertainments Duty and campaigned against the Oxford Group. He joined the River Emergency Service in 1938, captaining a boat on the River Thames in the Second World War as a petty officer in the Royal Naval Auxiliary Patrol.

In 1915, Herbert would marry Gwendolyn Harriet Quilter, several months after meeting her. They would have four children and remain married until his death in 1971.

As part of its collections the Library has thirteen works by A.P. Herbert, all of which are contained in the Horwitz collection, and all of which may be borrowed. From time to time we will feature snippets from the writings of Herbert. In this issue I thought it might be fun to include some of the quotes that emanated from him over the years. I hope you enjoy and remember if you want more it's as close as a trip to the Library.

Joe Bennett

A highbrow is the kind of person who looks at a sausage and thinks of Picasso.

A man who has made up his mind on a given subject twenty-five years ago and continues to hold his political opinions after he has been proved to be wrong is a man

of principle; while he who from time to time adapts his opinions to the changing circumstances of life is an opportunist.

Citizens who take it upon themselves to do unusual actions which attract the attention of the police should be careful to bring these actions into one of the recognized categories of crimes and offences, for it is intolerable that the police should be put to the pains of inventing reasons for finding them undesirable.

If nobody said anything unless he knew what he was talking about, a ghastly hush would descend upon the earth.

It cannot be too clearly understood that this is not a free country, and it will be an evil day for the legal profession when it is.
Let's find out what everyone is doing, And then stop everyone from doing it.

Men who would face torture without a word become blasphemous at the short fourteenth. It is clear that the game of golf may well be included in that category of intolerable provocations which may legally excuse or mitigate behaviour not otherwise excusable.

The concept of two people living together for 25 years without a serious dispute suggests a lack of spirit only to be admired in sheep.

The critical period in matrimony is breakfast-time.

The Englishman never enjoys himself except for a noble purpose. He does not play cricket because it is a good game, but because it creates good citizens. He does not love motor-races for their own sake, but for the advantages they bring to the engineering firms of his country. And it is common knowledge that the devoted persons who conduct and regularly attend horse-races do not do so because they like it, but for the benefit of the breed of the English horse.

The whole Constitution has been erected upon the assumption that the King not only is capable of doing wrong but is more likely to do wrong than other men if he is given the chance.

There is no reason why a joke should not be appreciated more than once. Imagine how little good music there would be if, for example, a conductor refused to play Beethoven's Fifth Symphony on the ground that his audience might have heard it before.

Well, fancy giving money to the Government! Might as well have put it down the drain.