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Chief Judge Stanley H. Fuld

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CHIEF JUDGE STANLEY H. FULD

There were Whiz Kids before McNamara, and never more than during the tenure of the late Thomas E. Dewey as District Attorney of New York County. Only thirty-three years old when he became special prosecutor for the investigation of organized crime in New York and thirty-five when he took office as District Attorney in 1937, Dewey surrounded himself with a remarkably talented group of young lawyers. Frank Hogan, for example, was thirty-five in 1937, Charles Breitell all of twenty-eight. Stanley Howells Fuld, who had graduated from the Columbia Law School one year after the District Attorney, was thirty-four. Nine years later, in April of 1946, Dewey, then Governor, again exhibited his uncanny gifts as a legal talent scout by appointing Stanley Fuld to fill an unexpired term on the Court of Appeals of New York. The following year, Judge Fuld was elected to the first of his 14-year terms on the Court; he was re-elected in 1961. He has been Chief Judge of the State of New York and of the Court of Appeals since 1967.

The comparison with Cardozo is inevitable. Cardozo, too, was in his early forties when first appointed to the Court of Appeals and served on that court for a long time, nineteen years to Fuld's (to date) twenty-five. Each of them worked during a formative period in which inherited legal doctrines had to be recast for contemporary needs, and each of them has influenced the path of the law in many and lasting ways. Thus, to cite but one example of many that might be chosen, Fuld's opinion for the court in the products liability case of *Randy Knitwear v. American Cyanamid Co.*¹ embodies the same judicial pragmatism as Cardozo's opinion for the court in the landmark case of *MacPherson v. Buick*² and may in time prove to be as influential.

The several thoughtful articles in this issue of the *Review* furnish ample evidence of Chief Judge Fuld's analytical power and decisional influence in a wide range of substantive and procedural fields. It is particularly impressive, as proof of his impartiality and rare detachment, that this former assistant district attorney and longtime head of that office's criminal appeals division, was known throughout the country, even before the Warren Court's massive intervention in the area of criminal procedure, as a searching and compassionate judicial guardian of the rights of accused persons. Chief Judge Fuld is quick, too quick many of us think, to disclaim the comparison with his great predecessor, Cardozo, just as Cardozo was quick to dismiss comparisons of himself with Holmes. But law students, who encounter Fuld opinions in practically every one of their private law casebooks, readily see

1. 11 N.Y.2d 5, 181 N.E.2d 399, 226 N.Y.S.2d 363 (1962).

2. 217 N.Y. 382, 111 N.E. 1050 (1916).

affinities and similarities in the methods and values of the Cardozo of the nineteen-twenties and the Fuld of our own time. "Fuld," a first-year law student once said, "is Cardozo's son in law."

An appellate judge, unavoidably, is known and appraised by his published opinions. This, of course, is an incomplete measure, since it fails to take into account a great judge's less tangible and unannounced contributions to the work of his court—the testing and redirection of oral argument, the sharpening of the issues in judicial conference, and the occasional diplomatic intrusion of clarifying or moderating passages into opinions prepared and signed by other judges. But, until a definitive judicial biography is written, we have to go largely by Chief Judge Fuld's opinions, and these tell us more about the man than judicial opinions generally tell about their authors. He is an eminently modern judge in his candor, in his disdain for vestigial technicality, and in his sensitivity to considerations of public policy. At the same time, his analytical approach and adjudicative style are deeply rooted in the common law tradition: respect for the facts of cases, skepticism toward easy generalizations, and profound awareness that the law is forever unfinished business. His opinions never cheat or oversimplify; he is mindful of past decisions but critical in his interpretations of precedent and creative in its socially necessary reformulation. My colleague, Harry Jones, in his *Pelagius*,³ recounts how the late Karl Llewellyn, the great modern theoretician of the common law judicial process, unhesitatingly put Stanley Fuld on his imaginary All-American court. Few legal scholars, and I think few practicing lawyers, would quarrel with this ranking.

There is a story told about Chief Judge Fuld that symbolizes, about as well as anything could, his judicial philosophy and his faith in law as a means to the end of justice. In the summer of 1959, he was persuaded to overcome his well known reluctance to engage in off-the-bench pontification and to serve as a faculty member at the law session of the Salzburg Seminar in American Studies. His first assignment there was to present a judge's-eye view of the judicial process to the Salzburg constituency of young lawyers and judges from many European countries. As would have been expected, his lecture dealt in depth with the inevitable ambiguity of formal legal sources in borderline situations, with the policy choices judges have to make in hard cases, and with the responsibility of the common law judge to use the sources and concepts available to him to reach and justify fair and feasible results in litigated controversies. The civil lawyers in attendance were fascinated by the lecture, never having heard the judicial process discussed with such candor by judges or even professors in their own countries. One concept-ridden young German advocate could not quite believe it. "But Judge Fuld,"

3. Jones, *Pelagius*, 29 U. CHI. L. REV. 611 (1962).

he said, "what do you do in a case where the positive law of New York leaves you no choice but *compels* you to reach a socially unjust result?" There was a moment of silence before Judge Fuld replied: "That's an interesting question, but, you know, I have been on the Court of Appeals only thirteen years, and I've never had a case like that. If I ever do, I'll let you know." Cardozo, I suspect, would have answered the question the same way.

In almost every discussion of Chief Judge Fuld's career, there are expressions of regret that it did not fall to his lot to be appointed to the Supreme Court of the United States. If there is still vitality in the idea of federalism, state appellate judges of surpassing distinction, like Fuld of New York and Traynor of California, should certainly be among the first to be considered for vacancies on the national Court. But no such career line exists. Of the fourteen justices confirmed by the Senate during the twenty-five years of Judge Fuld's tenure on the Court of Appeals of New York, only one was chosen from a state court of last resort. Times have changed since Holmes went to the Supreme Court from the Supreme Judicial Court of Massachusetts and was, in turn, succeeded by Cardozo of the Court of Appeals.

Much as Chief Judge Fuld's admirers in the universities and at the practicing bar have regretted that appointment to the Supreme Court has not come as fitting recognition of his superb judicial work, the one sure thing is that it does not bother Stanley Fuld. In a quarter of a century on the most important of American private law tribunals, he has become the master craftsman in the great art of judging. He has had the joys of hard work and the challenges of adjudicative responsibility on a court he loves as Cardozo loved it and with judicial colleagues for whom his respect has been deep and abiding. The law has been enriched, not only in New York but throughout the country, by his creative intelligence, his sensitivity to moral issues, and his unfailing awareness of the social responsibility of judicial decision-making.

Stanley Fuld is one of those rare men of law who are, in Learned Hand's words, "content to be themselves, confident that, if they are faithful in that, their light will shine steady and far."⁴ My faculty colleagues and I like to remember that it was at the Columbia Law School that he began the study of law, the study on which he has been engaged unceasingly through his professional and judicial career. Now that the Chief Judge is at the height of his reputation and his powers, it is manifest to everyone that his light does indeed "shine steady and far," and his School is honored by the reflected glory.

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4. L. HAND, *THE SPIRIT OF LIBERTY* 138 (1960).