THE COST OF JUDGE-MADE LAW

BY HARRY HIBSCHMAN

One of the hoary myths sedulously cultivated by the more conservative members of the bench and bar is that judges do not make law. Lawmaking, it is affirmed, is the function of the numerous legislative bodies with which the country is blessed, while the function of the courts is merely to "discover" and apply the law. The judge is "but the mouth which pronounces the law".

Unfortunately for this beautiful theory, the judges really have the last word. After Congress or some State legislative body has solemnly enacted what it conceives to be a wise and lucid statute, some high court has the final say both as to the validity of that statute and as to its meaning. Thus, between 1914 and 1923 minimum wage laws were held constitutional by the appellate courts of four States, and the United States Supreme Court in 1917 divided four to four on the question of the validity of the Oregon law; but in 1923, in the Adkins case, the Federal Supreme Court by a vote of five to four declared such legislation unconstitutional. Thirty-five judges of courts of last resort in all declared the minimum wage laws valid while but ten thought them invalid. Yet, because five of those ten sat on the Supreme Court in Washington at the right moment, their view became the law of the land, though, of course, according to the idealistic theory, they did not make law.

Another case involving a constitutional question of the first magnitude was that in which Frank S. Myers, of Portland, Oregon, challenged the right of the President to remove him as postmaster in that city without the consent of the Senate, and thus raised a point that had engendered bitter controversy from the beginning of the government. Andrew Jackson was impaled on this point when he removed Duane as Secretary of the Treasury without the Senate's consent, and suffered the humiliation of having a resolution charging him with having broken his oath of office written into the Senate Journal. And poor Andrew Johnson, though acquitted under the two-thirds rule, was impeached by the House and haled before the Senate for having removed Stanton without the Senate's approval and over its positive opposition.

Still the question remained unsettled until now at last in 1924 this fighting Oregon politician threw it into the lap of the Supreme Court. Before that august tribunal it was argued twice, Senator Pepper being invited to appear at the second argument to defend the Senate's claimed prerogative. The court's decision was not rendered until 1926, when Chief Justice Taft filed an opinion seventy pages in length and Justices Brandeis and Reynolds filed two dissenting opinions, joined in by Justice Holmes, covering one hundred and eighteen pages. The majority holding was that the President did have

the power to remove his appointees without the consent of the Senate and that a statute enacted in 1876, requiring such consent, was unconstitutional. Though Myers lost, the law was thus settled after a hundred and thirty-nine years, and no doubt he found great satisfaction in that.

How, in like wise, even after the validity of a statute has been established, its meaning must be judicially determined before the layman can safely govern his conduct under it, is well illustrated by the Eighteenth Amendment and the acts passed for its enforcement. In accordance with the amendment, all these acts prohibit the transportation of intoxicating liquors; but what does transportation mean? Weird have been the decisions on that question. In Indiana, for example, it was held in 1923 that carrying liquor from a woodshed on the rear of a man's premises to the attic of the house was not such transportation as the law contemplated, but in Wisconsin it was held in 1928 that carrying liquor from a cellar under the house to a woodshed across an alley at the rear of the premises was transportation. In South Dakota and Virginia it has been judicially declared to be illegal transportation to carry liquor in one's pocket, but in Missouri the contrary rule has been laid down. The star case, however, arose in Kentucky in 1924, when a defendant by the name of Rush was charged, contrary to all the glorious traditions of that Commonwealth, with violating the law by carrying liquor in his stomach. He was actually convicted in the lower court, but the higher court showed better sense and set the conviction aside.

However, the determination of the constitutionality of legislative enactments, and their interpretation, construction, and application, constitute but a part of the law-making activities of our higher courts. There still remains for the exercise of their power and the expression of their wisdom the vast territory in which there is no statutory law and in which they are called upon to apply the Common Law, which, theoretically, covers every question that can possibly arise.

But before they can apply it, they must first find out what it is, and to do this they turn to their own prior decisions and to the decisions of other courts, including those of England. In other words, they look for precedents. These decisions are so numerous that the reports containing them, in the most compact form in which they are available, now amount to more than seven thousand volumes, enough, if piled one on top of the other, to make a stack higher than the Empire State Building. That is the precious repository of our judge-made law.

II

But, of course, it happens now and again that a question arises that is not covered by any statutory enactment and for which there is no precedent; for instance, when some new invention like the radio or the airplane comes into general use. Then the courts make a great pretense of simply applying ancient rules and principles. But what they do in fact is to legislate in accordance with their own social, economic, and political points of view and in accordance with their own individual psychology. As that realistic jurist, Mr. Justice Holmes, once said, "I recognize without hesitation that judges do and must legislate."

By way of illustrating this point I offer a case in which Mr. Justice Holmes wrote the opinion of the court (Goodman vs. B. & O. R. Co., 275 U. S. 66), decided in

1927. The question involved in that case was what degree of care must be exercised by the driver of an automobile at a blind railroad crossing so as not to be guilty of contributory negligence barring a recovery by himself, if injured, or by his legal representatives, if killed. While, of course, thousands of cases involving questions of contributory negligence were to be found in the books, this particular question was an open one in the Supreme Court as well as in most of the State courts; and what the Supreme Court held was that the driver under the circumstances mentioned must stop his car, get out, and walk ahead to where he can obtain an unobstructed view of the track before attempting to drive across. Goodman, having failed to do that, the court held that his widow could not recover for his death, though I am willing to give the picture of a two-headed calf as a premium to any driver who will furnish me an affidavit that he has ever once left his car to look for a train before crossing the track. And that goes for the learned justices who rendered that decision.

That the decision might have been different under what is supposed to be the all-embracing Common Law is evidenced by the fact that since 1927 only seven State appellate courts have followed the United States Supreme Court, while the highest courts of fifteen States have refused to do so. The latter hold that a driver need not leave his car at a blind crossing to look for a train before driving on if he is otherwise careful. In short, these courts do not recognize the holding in the Goodman case as good law. It is, nevertheless, the law for all litigants who must sue in the Federal courts, judge-made law.

That judges also flatly change the Common Law rules may be seen in two recent cases, both having to do with the ancient rule that a man's title to real estate extends to the sky above and to the center of the earth beneath. The first, decided in Massachusetts in 1930, was one in which the owner of a country estate attempted to enjoin the operators of a commercial airport from flying over his land, and the court, refusing to grant him any relief, held that airplane flights at a minimum height of five hundred feet as authorized by State and Federal laws did not constitute a taking of the plaintiff's property without due process of law. (Smith vs. New England Aircraft Co., 170 N. E. 385.) In other words, the limit of ownership upward is now five hundred feet instead of *usque ad coelum*, as Blackstone declared it to be.

The other case of similar import arose in Westchester county, New York, early in 1932. It was one in which the purchaser of real estate claimed that there was a breach of covenant against incumbrances because the local Sewer Commission had previously obtained the right to construct, and had constructed, a sewer across the property at a depth of a hundred and fifty feet. The trial judge who heard the case repudiated the old doctrine that "he who owns the soil owns everything above and below from Heaven to Hell", and held that title was now limited to the extent to which the owner of the soil might reasonably make use of it. He refused to hold that the sewer constituted an incumbrance. (Boehringer vs. Montalto, 254 N. Y. S. 276.) Downward, then, ownership no longer extends *usque ad orcum*, or even to the lower regions, but only somewhere considerably under one hundred and fifty feet.

Now, it is in these different ways that judges legislate: (1) in passing on the constitutionality of statutes, as in the min-

imum wage cases and in the Myers case; (2) in interpreting and construing and applying statutory enactments, as in the Prohibition cases involving the question of what constitutes transportation; (3) in determining what rule or principle of the Common Law to recognize in a case of first impression, like the Goodman case; and (4) in directly repudiating old rules and setting up new ones, as in the two cases last described. And it is through these various operations of the judicial mind that we come under what Jeremy Bentham called, "That most all-comprehensive, most grinding, and most crying of all grievances—the tyranny of judge-made law."

III

But judges make law only in litigated cases, and litigated cases mean costs, lawyers' fees and other expenses, which somebody has to pay. Legislatures operate on money obtained by the State through taxation. The Federal government and the States pay for statutory law. But courts operate under a different system. True, the State pays their running expenses and the salaries of the judges; but no individual, except a defendant in a criminal case or a pauper, can get into court and obtain any relief without an attorney who must be paid or without paying out real coin of the realm for filing fees, jury fees, witness fees, stenographer's fees, and divers other items. In short, it is private litigants who pay for judge-made law; and they have so paid for it in England for many hundreds of years and in this country ever since its birth as a nation, without protest and apparently without being aware of the fact that there was anything vicious about the practice.

It is this practice of placing the cost of judge-made law on the shoulders of private litigants that I am venturing to indict as antiquated, cumbrous, burdensome, and wholly unjust. Why, for instance, should Goodman's widow and the Goodman estate have been required to bear all the worry and expense of a trial before a court and jury and then, after having recovered a judgment, have had to pay the further expenses of an appeal to the United States Supreme Court to have that judgment reversed in order that there might be established for all litigants in Federal courts the doctrine that it is contributory negligence *per se* for a driver of an automobile at a blind crossing not to get out of the car to look up and down the track before undertaking to cross? Why should Frank S. Myers have had to pay to have the United States Supreme Court determine in 1926 a constitutional question that had existed since the very beginning of the Republic, and, losing, vindicate Andrew Jackson and Andrew Johnson? Or why should one Massachusetts Smith pay for the judicial discarding of a doctrine as old as the Common Law when that discarding affects not only all other Smiths in the State but also all other property-owners?

Figures regarding this matter are difficult to obtain, for the records do not show what money is spent in litigated cases. Only certain statutory costs are given, and as to the actual money spent by the parties, that information is not generally made public. In the minimum wage litigation one can safely guess, however, that the money spent must have reached a tremendous sum, for there were two cases that went to the Supreme Court of Oregon, two that went to the Supreme Court of Minnesota, one that went to the Supreme Court of Arkansas, two that went to the Supreme Court of Washing-

ton, and two that went to the United States Supreme Court, to say nothing of numerous cases that were not appealed. As the lawyers appearing in all of these cases were among the leading members of the bar in their particular States and as organizations having vast financial interests at stake participated, the total spent during the prolonged litigation was probably not a penny under $150,000, to say nothing of the money collected and paid out by the States under their respective laws during the five or ten years that they were in effect.

There are some cases, however, in which I have been able to obtain reliable figures, though they do not present a fair picture of the cost of law-making litigation for the reason that they were all prosecuted by organizations able to enlist the free services of some of the greatest lawyers in the country. Still they throw some light on the subject.

The American Civil Liberties Union has kindly given me the following figures: In the Anita Baldwin case the expenses of the appeal to the United States Supreme Court alone were $2,778.90; in the celebrated Scopes case, though the eminent counsel who represented Scopes made no charge, the cost was $8,993.01; and in the recent California red flag case the total spent was over $5,000.

The National Association for the Advancement of Colored People has been similarly kind in giving me the following statistics: In the litigation over the New Orleans segregation ordinance in 1926 the organization expended over $8,000, made necessary by a decision of the Supreme Court of Louisiana in spite of the fact that the United States Supreme Court had held the similar Louisville, Kentucky, ordinance invalid ten years before. In that earlier case the Association spent only $1,340, though its counsel included Moorfield Storey, one of the country's greatest constitutional lawyers, who, of course, made no charge for his services. The total spent in that case must, however, have been stupendous, as a number of other cities beside Louisville obtained permission to file briefs, and altogether twenty-one lawyers appeared in the Supreme Court.

More recently the Association has been vitally interested in contesting the various schemes adopted to bar Negroes from the Democratic primaries in Texas and other States. In 1927 it took to the United States Supreme Court a case attacking the constitutionality of a Texas statute prohibiting Negroes from participating in such elections. The United States district judge had declared the law valid, but the higher court held it unconstitutional. (Nixon vs. Herndon, 273 U. S. 536.) That case cost the Association just a little under $3,000. It was followed by an attempt of the Texas Democrats to accomplish by rules and regulations what the Supreme Court had held could not be accomplished by statute. Again the same plaintiff took the matter into court, lost in the lower court, and won in the Supreme Court. (Nixon vs. Condon, 52 Sup. Ct. 484.) The cost was again in the neighborhood of $3,000.

But the matter is not yet settled. The court was most meticulous in deciding only the particular question presented, namely, whether Negroes could be barred by a rule or resolution of the party executive committee under a statute vesting power in that committee to legislate for the party. Hence, it may reasonably be argued, and the newspapers so interpreted the decision, that if the discriminatory regulations were made by a party convention, without a statute on the subject, they would be legal. The Texans are sure

to take the hint, and just as surely will the colored people again take the matter to the Supreme Court and pay out another $3,000 of hard-garnered fighting money. All of which furnishes a vivid example of how great constitutional questions are settled at the expense of private individuals struggling to establish principles that concern the nation at large.

Such is the present method of making juristic law in the United States, and it is a rank imposition. It is as unfair as it would be to make one resident of a city or State pay for all its sanitary measures, or to make one dog-owner pay the dog-tax for all other dog-owners as well as for himself. It places burdens of millions on the shoulders of private parties every year. It is a violation of the fundamental principle that the expenses of government shall be divided equitably, and it constitutes a substantial denial of equality under the law.

IV

I admit readily enough that it may be both foolish and futile for me to rail against this practice, so thoroughly is it established in our politico-legal philosophy and so long has it been passively acquiesced in; and I would keep my hand over my mouth and my fingers off the key-board were I not certain that we have the means of greatly modifying it and of developing a system more in consonance with the principles of justice and modern efficiency. There are ready at hand at least two instrumentalities that can be adapted to this purpose, both of which have already been tested and both of which have the endorsement of many eminent members of the bench and bar. All that is necessary is to extend their use in this direction, though before that can be done there must be a radical change in the attitude of that great majority of the lawyers and judges of the country who are now inhospitable to any such reforms.

At present it is nobody's business to watch over the substantive law, to note its imperfections and inadequacies, and to take steps for the correction of its faults and short-comings. The first of the instrumentalities needed to place the cost of judge-made law on the State, where it belongs, is an agency invested with the duty of observing the functioning of the law and of moving for such legislative or other corrective measures as may appear necessary.

Mr. Justice Cardozo warmly advocated the setting up of some such agency about twelve years ago. Referring on the one hand to the judges "left to fight against anachronism and injustice by the method of judge-made law" and on the other to "the Legislature informed only casually and intermittently of the needs and problems of the courts", he asserted, "Some agency must be found to mediate between them." And for this task he urged a Ministry of Justice.

Since Mr. Justice Cardozo wrote that famous article twenty States have established agencies along the line suggested, calling them, in most instances, judicial councils. These councils consist, as a rule, of a certain number of judges and a certain number of lawyers, the former representing both appellate and trial courts and the latter being selected from the officers of bar associations, members of law school faculties, and the bar at large. Three States have laymen on their councils. The number of members varies from five to a hundred and seventy-five, though nine or ten is the usual number. As to their duties, a typical enumeration of

them may be found in the act establishing the council of the State of Washington, section 5 of which provides:

> It shall be the duty of the council:
>
> (1) Continuously to survey and study the operation of the judicial department of the State, the volume and condition of business in the courts, whether of record or not, the methods of procedure therein, the work accomplished, and the character of the results;
>
> (2) To receive and consider suggestions from judges, public officers, members of the bar, and citizens as to remedies for faults in the administration of justice.
>
> (3) To devise ways of simplifying judicial procedure, expediting the transaction of judicial business, and correcting faults in the administration of justice;
>
> (4) To submit from time to time to the courts or the judges such suggestions as it may deem advisable for changes in rules, procedure, or methods of administration;
>
> (5) To report biennially to the Governor and to the Legislature on the condition of business in the courts, with the council's recommendations as to needed changes in the organization of the judicial department or the courts or in judicial procedure.

The duties here outlined are fairly broad; but they are not broad enough to remedy in any material degree the evil which I am condemning. The emphasis, it will be noted, is placed on "rules, procedure and methods of administration", matters that certainly do need study—in short, on what is known as adjective law. It should, in addition, be the duty of these councils to study the substantive law of their States, the law of rights and duties, which specifically touches the citizen, and to make recommendations for remedial legislation wherever gaps or faults or archaisms are discovered.

Take, for example, the rule of the Goodman case in the States in which the question there decided has not yet been before the courts of last resort. It ought to be the duty of the councils in those States to call to the attenion of their respective Legislatures the anomalous condition of the law in this respect and to recommend that the rule that is to prevail be settled by legislation instead of litigation at the expense of private parties. Or take the matter of the old doctrine with reference to the title of real estate. If on account of the airplane and modern sewers it is to be abrogated, it should be done by legislative enactment and not by juristic lawmaking; and the initiative in bringing the matter to the attention of the legislators should be taken by the judicial councils.

This embryonic ministry of justice, then, the judicial council, is the first of the two instrumentalities that I contend should be used to relieve private litigants of the responsibility and expense of shaping our judge-made law.

The second instrumentality that I have in mind is the advisory opinion, an opinion rendered by a court at the request of a Legislature or an executive without there being any pending litigation. Six American States provide in their constitutions for the rendering of such opinions by their courts of last resort, particularly as to the constitutionality of proposed legislative enactments, and at least half a dozen other States have attempted to require such opinions by legislation. In most instances, however, such legislation has been practically useless, as the courts are almost uniformly hostile to any attempt to compel them to render opinions. Their main objections are that it is not their duty to decide "moot" questions, that to require advisory opinions destroys the separation between the judicial and the legislative departments, and that when they give such opinions they are not bind-

ing on anybody, not even on the judges rendering them.

The United States Supreme Court refused to render an advisory opinion early in its history when Washington and his Cabinet submitted twenty-nine questions and requested answers from that body. The justices found "strong arguments against the propriety of our extra-judicially deciding the questions alluded to." Nevertheless, in spite of that fact, no less a constitutional lawyer than James M. Beck, now Congressman, when Solicitor-General of the United States in 1924 advocated the rendering of advisory opinions by the court on constitutional questions. Such opinions could not be compelled by legislation, perhaps not even by a constitutional amendment. Still it is not impossible that the court as now constituted might hesitate to decline to give advisory opinions if called for by reasonable legislation.

And what a saving there would be to private litigants and, for that matter, to the Federal government and to the States, especially when the proposed laws in question involved the setting up of expensive administrative machinery and the collection of large sums in fees as in the case of the minimum wage laws! It would certainly be a rational procedure and one that modern-minded justices should be willing to adopt without constitutional compulsion. After all, there is nothing essentially sacred about the traditional separation of judicial and legislative departments; and for the higher good of the nation, coöperation might well prevail over separation.

If precedents are required, there are plenty of them. In England the advisory opinion has been an accepted thing for centuries. The famous McNaghten's Rule as to insanity tests in criminal cases, for instance, was laid down in an advisory opinion or opinions given the House of Lords by the judges *after* the trial of McNaghten and his acquittal. The opinions were rendered in order to remove uncertainty in future cases. And in Canada the Supreme Court has since 1875 been required to give advisory opinions to the Governor in Council. Similarly a judge before whom an action is pending may, without trying the case, certify a question to the same court as to the validity of either an act of the Dominion Parliament or an act of the Legislature of a Province, and the court must give an opinion regardless of the amount involved.

The law of Canada does away with one of the objections frequently advanced against advisory opinions, namely, that there is no argument. The Canadian act provides that if a Province is interested, its attorney-general shall be notified and given an opportunity to appear, that any person or class interested may be heard, and that the court may request counsel to appear, such counsel to be paid out of the public funds.

The Alabama act of 1923 likewise authorizes the court to request briefs from the attorney-general and from other attorneys as *amici curiae*. And in a Delaware case involving the constitutionality of the school code of 1929, the judges heard eight lawyers in addition to the attorney-general.

With the adoption of the practice of having counsel appear in all cases, there would be no valid reason against the rendering of advisory opinions on constitutional and other vital questions at the request not only of the Legislature or the Governor of a State but also at the request of the judicial council. Only such opinions should not be merely advisory—they should be as conclusive as any other opin-

ion. And by extending the practice to the Federal Supreme Court, by a constitutional amendment if necessary, we would have the machinery with which to shift the cost of judge-made law from the private litigant to the State, at least so far as practically all constitutional questions and most questions of mere statutory construction are concerned.

By means, then, of the judicial council with enlarged functions and the advisory opinion, we can, if we will, relieve private litigants of a large part of the unjust burden of juristic law-making. To do so would, furthermore, make for the speedy settlement of most of the questions that under the present practice, often for years, leave vast social and economic interests up in the air on a sort of legal teeter-totter. It would make for certainty. It would make for a reduction in the amount of litigation. It would make for justice. And it would certainly serve to bring the law more nearly in tune with the times.

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CALIFORNIA

FOOTNOTE on the Hoover Prosperity from the *Brotherhood of Light Quarterly*, published by the massed astrologers of Los Angeles:

When Do We Gain Money?—It was our intention to have a report on this subject for the present issue of the *Quarterly*, but it would seem that everyone has temporarily forgotten he ever made any money. We have had no difficulty collecting data on when people lost money; but have been unable to get more than a few charts based on when people made gains.

BUSINESS announcement of a San Francisco scientist:

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GEORGIA

FROM the editorial prospectus of the *Southern Literary Review: A Literary Magazine of the South*, edited by Richard Merton Petty, and published in Atlanta:

The editors will welcome stories of any length and subject with the exception of sex. They must have a strong love interest. . . . A department will be devoted to humor, jokes, gags, cartoons and bright sayings. For special features we will use beauty hints, household hints, movie chats, book reviews, articles of nature, etc.

IOWA

THE art of reporting as practiced on the Centerville *Daily*:

M. E. Crowder, seventy-six years old, was thrown from a wagon load of wood when the wheel struck a stump and was knocked unconscious and badly hurt when he struck the ground. As he was falling he had presence of mind to stop the horses. Had he not he would have been hurt worse or killed in the timber. Alone, badly hurt, unconscious, he finally got able to crawl on the load and get home, but badly bruised.

MICHIGAN

THE Ludington correspondent of the Chicago *Tribune* reports a novel addition to the armamentarium of Michigan sportsmen:

The fantastic story of a night traveler, who said yesterday that he saw a group of