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# The Honorable Ralph Cappy: Distinguished Keeper of the King's Bench Tradition

*Hon. Ruggero J. Aldisert\**

It was the spring semester of 1968 when Ralph Cappy enrolled for my course in Common Pleas practice at the University of Pittsburgh School of Law. I was an adjunct professor and was enjoying myself with the students those days, a formal relief every Wednesday afternoon from my duties as an Allegheny County Common Pleas Court judge. The text for the course was the newest (1968) edition of *The Pennsylvania Rules of Civil Procedure*, and in the years that followed, it would serve as the most important book in my students' law offices. I sought to maintain the attention and interest of the students because, within only a few months, they would be practicing law.

But those were months yet to come. Ralph sat in the first row of the class, claiming a seat next to his best friend, Robert Cindrich. I remember they were two very serious law students. They were the smartest students in the class—not because they raised their hand at every opportunity, which they did not, but because when I did call on them, they always knew the answer. If other members of the class were unable to answer my question, I knew I could always count on Ralph Cappy to keep the discussion going. His energetic and assured understanding of Common Pleas practice foreshadowed his career to come.

The study plan was rather simple. We established fact patterns from which the students created fact-based pleadings, performed any needed discovery, and conducted a mock trial from opening statement to closing argument. Early in the semester, the students became aware that the Pennsylvania Rules text was merely a beginning point in absorbing not only the aspects of the common law, but, on a more formal basis, a body of civil procedure rules based on that tradition.

The heart of the common-law tradition is adjudication of specific cases.<sup>1</sup> According to the late Harvard professor and legal philoso-

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\* Chief Judge Emeritus and Senior U.S. Circuit Judge, U.S. Court of Appeals for the Third Circuit. Many thanks to my 2008-2009 law clerks, Matthew P. Bartlett and Meehan Rasch, for their help in preparing and editing this tribute.

pher Lon L. Fuller, adjudication is the device that gives formal and institutional expression to reason in argument in human affairs.<sup>2</sup> It assumes a burden of rationality not borne by other social processes. A decision that is a product of reasoned arguments must be prepared to meet the tested reasons. Case-by-case development allows experimentation because each rule is re-evaluated in subsequent cases to determine whether it produces a fair result. If it operates unfairly, it can be modified. The modification does not occur at once, "for the attempt to do absolute justice in every single case would make the development and maintenance of general rules impossible; but if a rule continues to work injustice, it will eventually be reformulated."<sup>3</sup>

In other words, what is at work is gradualness. Common law "creeps from point to point, testing each step"<sup>4</sup> and, most characteristically, is a system built by gradual acquiescence from resolution of specific problems. Through this process, rules of law are made, "precepts attaching a definite detailed legal consequence to a definite, detailed state of facts,"<sup>5</sup> or "fairly concrete guides for decision geared to narrow categories of behavior and prescribing narrow patterns of conduct."<sup>6</sup> Formulation of a legal principle, therefore, is an even more gradual process—one shaped from numerous legal rules, themselves products of actual incidents in social, economic, and political experience.

I emphasized these ideas to my students, saying that the genius of the common law is that it has proceeded empirically and gradually, testing the ground at every step and refusing—or, at any rate, evincing an extreme reluctance—to embrace broad theoretical principles. This incremental development has produced a fundamental distinction between the American law student's approach to the study of law and that of his counterpart in civil-law countries. The student of civil law views law not as a process for the perception and resolution of problems, but as a set of established rules and institutions. Those who study the common-law

1. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 373 (1978).

2. *Id.*

3. MUNROE SMITH, *JURISPRUDENCE* 21 (Columbia Univ. Press 1909).

4. See ALFRED NORTH WHITEHEAD, *ADVENTURES OF IDEAS* 28 (Cambridge Univ. Press 1961) (1933); see also Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 468 (1897) (noting that the great growth of the common law came about incrementally).

5. Roscoe Pound, *Hierarchy of Sources and Forms in Different Systems of Law*, 7 TUL. L. REV. 475, 482 (1933).

6. Graham Hughes, *Rules, Policy and Decision Making*, 77 YALE L.J. 411, 419 (1968).

tradition—judicial scholars such as Ralph Cappy—examine how judicial institutions perceive and resolve problems, or how they make, interpret, and apply the law.

This tradition would be the impetus for Ralph Cappy's long and illustrious career as a lawyer, judge, and justice. Immediately following his graduation from law school and his success with the Pennsylvania Bar Examination, he was selected by Henry Ellenbogen, President Judge of the Court of Common Pleas of Allegheny County, to serve as his law clerk. From 1968 to 1970, Ralph Cappy served with distinction in that capacity, right down the hall from my former chambers, while his friend, Bob Cindrich, a few blocks down Grant Street, served from 1968 to 1969 as my first clerk in the U.S. Court of Appeals for the Third Circuit.<sup>7</sup> Because Cappy's law clerk position was considered part-time, during his clerkship he began a small private practice, primarily in civil and family court litigation.

After he concluded his two-year clerkship, his first choice was to work for next to nothing as an assistant public defender in the newly created office in Allegheny County. From 1970 to 1975, he quickly established a fine reputation as a defender of litigants in the criminal court of Allegheny County, and, in short time, he would serve as First Assistant Homicide Attorney and Deputy Director for the Office of the Public Defender. Having served as a trial defender participating in the common-law experience, it was not very long before he became comfortable in the criminal courts, which, until the Pennsylvania Constitutional Convention made changes, bore the unabashed trappings of our common-law heritage. For felonies, the court was known as the Court of Oyer and Terminer and General Jail Delivery; misdemeanors were indicted and tried in the Court of Quarter Sessions of the Peace.

Thereafter, young Cappy served for three years as the Public Defender of Allegheny County. It was 1979 when he was appointed and subsequently elected as a Judge of the Court of Common Pleas of Allegheny County. During this time, the Supreme Court of Pennsylvania exercised its power by naming Cappy the Administrative Judge of the Civil Division of his court, where he would develop profound skills in court administration while be-

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7. After his own truly brilliant career as a lawyer in Pittsburgh, Bob Cindrich served nine years with great distinction as a U.S. District Judge on the U.S. District Court for the Western District of Pennsylvania. He stepped down from his robes to accept the post of Chief Legal Counsel for University of Pittsburgh Medical Center.

coming a true expert of the substantive law presented on the civil side of the court.

In 1989, he successfully made his bid for Justice of the Pennsylvania Supreme Court. He was later re-elected and—by virtue of seniority—became Chief Justice in 2003. He served on that court for a total of 18 years until 2008, when he decided to retire his commission.

Given Chief Justice Cappy's splendid career, you must resist the temptation to label him a cloistered bookworm. Far from it. He was truly a man of the wide-open spaces. He rode a motorcycle and crisscrossed the country on it, including several jaunts to the West Coast. An avid golfer, he once used his persuasive powers to play a round at the famed Pebble Beach Golf Links (then with a greens fee of \$250) as a guest of the management. They took pity on the young "Easy Rider" from the East who traversed the land with a golf bag strapped to his bike.

His good friend and Pittsburgh lawyer Bill Pietragallo described him as a man "who never met a sport he couldn't master. He competed in basketball, softball, squash, tennis, and golf, and he usually won. He was a consummate sportsman, a tenacious competitor; although you never felt as though you were in anything but a friendly competition." And Bob Cindrigh, Justice Cappy's law school classmate and lifelong friend, described him as being "as compassionate and caring as he was athletic and adventurous," adding:

To those who knew him well, it was hardly a surprise or a contradiction. Lean, muscular, and athletic, he managed to harness those attributes to his sharp mind and extraordinary gifts for communication and for cultivating friendships. No one of his many gifts outshined the others. In fact, it was this unique combination, brought together in perfect harmony, which brought him the highest respect, success, and recognition.

Nor did Cappy isolate himself from volunteer community activities, especially in his outstanding leadership role in University of Pittsburgh administration. As an old-time Pitt trustee myself, I was pleased to approach Cappy with an offer to nominate him to be a member of the Board of Trustees. He modestly dragged his feet, but I eventually persuaded him to let me send up his name. He was elected as a trustee in June 1992. On June 19, 2003, he was elected Chairman of the Board, where he served until his

death with preeminence and great admiration and respect from the entire university community.

Mark Nordenberg, Chancellor and Chief Executive Officer of the University of Pittsburgh, emphasized Ralph's very special human qualities:

These included an active and agile mind, commitment, courage, good judgment, common sense—and, perhaps most important of all, a caring heart. He was one of the kindest, most considerate, and genuinely empathetic individuals I ever have known. He took his responsibilities seriously without taking himself too seriously—a wonderful combination of qualities in any person, but especially in a jurist. He was the embodiment of what Justice Frankfurter called “dominating humility”—which includes the ability both to form and to unform habits of mind, the capacity for detachment, and the temperament for putting one's passion behind his judgment instead of in front of it.

The common-law tradition that “law student Cappy” grappled with on those Wednesday afternoons in the spring of 1968 is most gamely represented by the Pennsylvania Supreme Court.

Outdating the United States Supreme Court by 67 years, Pennsylvania's highest court was established by the General Assembly on May 22, 1722. It took on the responsibility of the Pennsylvania Constitution and became the first independent Supreme Court in the United States possessing the power to declare laws made by an elective legislative body unconstitutional. Until Pennsylvania's Constitution was amended to establish a 10-year term of office, each Supreme Court Justice was elected for a single term of 21 years, the longest of any elected office in the United States.

The Pennsylvania Supreme Court's discipline over the operations of its trial courts is traceable to the Pennsylvania Colonial Provincial Act of May 22, 1722,<sup>8</sup> which vested in the Supreme Court all the jurisdictions and powers of the three superior courts at Westminster, namely, the King's Bench, the Common Pleas, and the Exchequer. Significantly, since 1722, the Pennsylvania Supreme Court possessed all the unrestrained power of its British forbearer, the King's Bench—the only court authorized to issue the King's Writ—as held by the Pennsylvania Supreme Court in two opinions excerpted below:

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8. 1 Sm.L. 131, 140, § XIII, 17 P.S. § 41 (1722).

Inherent in the Court of King's Bench was the power of general superintendency over inferior tribunals, a power which was of ancient inception and recognized by the common law from its very beginnings. Blackstone says, Book III, "The jurisdiction of this court [of King's Bench] is very high and transcendent . . ." *By the Act of 1722 the Supreme Court of Pennsylvania was placed in the same relation to all inferior jurisdictions that the King's Bench in England occupied[.]*<sup>9</sup>

[T]hese powers were confirmed by the constitution of 1776. Thus our judicial institutions appear to have grown naturally out of prior institutions, whose jurisdiction is to be studied in the history of jurisprudence. In such an historical investigation we can hardly desire to go beyond such authorities as *Coke* and *Hale*, at least for general outlines . . . There we find that the justices of the King's Bench are the supreme and general justices (*capitales et generales*) of the kingdom, these terms indicating both the order and the extent of their jurisdiction . . . [They act] by virtue of their offices, as justices of the King's Bench. These are inherent authorities of their office, and are not given to them by any writ, patent, or commission, as in the case of other judges.<sup>10</sup>

This is the time-honored, solidly-rooted way of the Pennsylvania state judiciary. Very few (if any) other courts in America possess such judicial power, a power described by Blackstone as "high and transcendent." As we honor Ralph Cappy for his dedication to the Pennsylvania Supreme Court, we emphasize the King's Bench because this legacy gives rise to the most powerful element of the Pennsylvania Supreme Court's jurisdiction. That unabashed power to make law makes it unnecessary for the Court to depend on the state legislature for statutes enacted by it, or on city ordinances or county resolutions.

Ralph Cappy served on the Pennsylvania Supreme Court for almost 20 years, retiring at age 64. He was a walking treasure trove of Pennsylvania's King's Bench experience, not only for duties calling for supervision of inferior courts, but also in participating on the bench to decide the most sensitive and serious legal issues to face Pennsylvania. Judge Cindrich notes that:

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9. *Carpentertown Coal & Coke Co. v. Laird*, 61 A.2d 426, 428 (Pa. 1948) (emphasis added).

10. *Commonwealth v. Ickhoff*, 33 Pa. 80, 80 (Pa. 1859).

no one who knew him well would be overly surprised to learn that, in addition to being recognized as a distinguished and learned jurist, Chief Justice Cappy's many accomplishments during his tenure included ensuring gender equality in the courts, setting standards for lawyers in death penalty cases, greatly improving the quality of education for judges, and almost single-handedly reforming medical malpractice litigation in Pennsylvania.

His participation and obvious profound influence in two decades of fashioning this state's case law cannot be gainsaid.

I again recall Ralph Cappy front and center those Wednesday afternoons at the University of Pittsburgh Law School. Little did I know he would serve as steward and caretaker of this honorable King's Bench tradition. But looking back on young Ralph Cappy, the student absorbing the intricacies of the common law, am I surprised? Not one bit.

Although courts no longer depend exclusively on the practitioner's efforts as the primary source of law, the energies and talents of the common-law practitioner are still primarily influential in the basic chores of decision-making: choosing among competing legal precepts, interpreting the precepts chosen, and applying these precepts to the facts before the court. The common law is no longer the major source of legal precepts, but the common-law tradition is still alive—very well, thank you—and kicking vigorously. It still forms the body of traditional ideas about how precepts should be developed and applied and cases decided. The tradition is still the technique used to develop a body of philosophical, political, and ethical ideas about the ends of law. But most of all, it is still the framework by which Ralph Cappy met head-on the polycentric problems of social change, political unrest, and economic tension.

It is to be expected, nay, *avowed*, that, as Justice Cappy left behind a grieving family and a host of melancholy friends, his past acclaims what the future will bring. It will be a measure of a man whose life already has been commemorated in ceremony, speech, and thought, but more importantly, a measure that will not be evanescent because present memories will be solidly etched in times to come. The judge's voice, of whatever tone or tempo, cannot possibly remain mute. Recollections of his counseled whisper in the past will always draw us toward what is yet to come. It will inspire, and remind us of the truly magnificent spirit he bequeathed to all. And we will savor it.

