Two Thirds of a Century: Sights Taken in 1911 and 1978

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Tonight my offering is a bit of a smorgasbord -- something of the present, something of the past, something of the future. I won't pretend that there's any obvious unifying theme. In fact I guess I am struck by the difference wrought in the legal profession by even a short time.

For example, when I look at this representative segment of this bar, the images of change since I left its company 21 years ago to try to make laws tumble about in my mind. First some qualitative impressions. A sense of openness, less of a sense of a closed guild, presided over by the Mandarins. And this in large part because of the impact of young lawyers. Having a first rate law school in our midst is a constant source of and spur toward quality. Women at long last are becoming accepted. The profile of the "establishment" is younger, more socially concerned.

The quantitative changes are even more obvious. Where the community had three firms of perhaps a dozen lawyers and a handful of firms half that size, firms today push toward 30 lawyers and the predictable yearly expansion of most firms never fails to surprise me -- whether the rest of Maine is in the slough of depression or not. And, of course, the ultimate mystery: why is there enough business to go around . . . and support so many so well?

In this spirit of documenting the sense and pace of change, I thought I would give you a brief snapshot of how our work on the federal court of appeals is changing. As I was musing at home how to introduce the subject, my eyes came to rest on the bottom shelf of a bookcase near my desk. What I saw was a volume privately bound shortly after the turn of the century -- with brown leatherette on the backing and corners and mottled black and white on the front and back covers. The binding contained, in gold print, these words: "Law Court, Dec. Term 1911 McGillicuddy and Morey".

My grandfather, Frank Morey, was a Lewiston, Maine lawyer for 42 active years, from 1891 to 1933. He and his partner, Dan McGillicuddy, thought enough of their excursions to the Law Court to put in yearly bindings the records and briefs of every case they argued -- reliably six or seven each year. Somehow this gesture touched me. Here are two lawyers putting money into preserving in fine style their advocacy -- a gesture that adds not a whit to their income. I like to think they were saying to themselves: "When we were called upon to address our Supreme Judicial Court, this is what we did and we are proud of it."

Reading their work, I am proud of it, too. They had six cases in 1911. One was a major criminal case, about an immigrant Italian fruit peddler, nicknamed Joe Bill, who was convicted for the peccadillo of killing his wife who had taunted him for not being the father of her last child. Three cases were good solid personal injury cases. In two, McGillicuddy and Morey were trying to keep jury verdicts for industrial workers who had been injured by supposedly faulty equipment. In the third the trial judge had directed a verdict against the plaintiff. Grandfather, naturally, had appealed. One case was a neat little lien case where the question was whether the materials purchased had actually been made a part of the building. Part of them, two columns, had been installed, but subsequently removed.

To these appeals in criminal law, tort, and property, there was added one in contract. It had to do with whether the jury could properly find that a father had agreed to be responsible for his son's growing grocery bill. What is interesting to me is that grandfather had won a jury verdict in the munificent sum of $76.49 . . . and that this was appealed. The briefs and record

preserved in the book for 1911 must have cost almost as much.

But even more than this, I found one other fact more impressive. None of the briefs in these six appeals was over six pages in length. They stated the issue crisply, succinctly summarized facts or reproduced critical testimony, and cited, without quoting at length, pertinent authority. It seemed to me that the lawyers of those days had more trust in their courts. They would simply cite cases, without extensive quotation or argument, as if to say, "There. You read these and see what you think." The authority, typically, was drawn from all states, with Maine not necessarily predominating. It seemed to this reader as if Maine's jurisprudence had not quite come of age. And the Cyclopedia -"Cyc."- was relied upon for everything.

Having read the briefs I could hardly wait to see how the story ended. I am sorry to report that 1911 was not a vintage year on appeal for McGillicuddy & Morey. They tried to keep a $1202 verdict for a 19 year old who lost most of his hand; the defendant got a new trial. In the second trial the judge directed a verdict for the defense. Grandfather appealed that, too, and lost again. They won $4750 in a death case; the Law Court granted a new trial; this time they won a $6958 verdict; but on a second appeal this too was set aside. In a third personal injury case a directed verdict for defendant was upheld. In their murder case, the Court affirmed the conviction, but not without a stinging dissent. And in the pitiful little contract case, the Court wouldn't even let them hold their $79 verdict. Only in the lien case did they win a partial victory.

Think of the pride and care that went into the printing of the volume of briefs. And think of the succession of defeats -- defeats which led to further trials and a second round of appeals. And note that they fought as hard in the $79 case as in the murder prosecution. In a sense they were ahead of their time. In later decades the law was friendlier to personal injury victims.

And in the prosecution of Joe Bill, I suspect that criminal justice in 1911 was a good bit rougher than two thirds of a century later. The prosecutor was none other than the Attorney General, W. R. Pattangall. Chief Justice Cornish wrote the majority opinion as if the only question was guilt. The dissent saw the question in terms of the fairness of the trial. It felt that somehow the trial judge was going rather far in, for example, allowing the prosecution to ask a witness to tell what he had <u>heard</u> others say about defendant having killed another person in another state. All I know is that as a boy I remember seeing a lovely gray model steamship framed in a box in my grandfather's study. It had been made by Joe Bill in Thomaston and given to grandfather.

How much we owe to the generations of lawyers who fought, and lost, and sometimes won, and helped move the law toward better justice. Now, two thirds of a century later, I sit on a court that in 1911 was only 19 years old. The 1911-1912 judicial year began with a diversity case involving a bank's duty as a collecting agent, an admiralty case involving a collision between two ships, and two patent cases. One supposed invention was called a "handling horse for shoe-uppers". It was simply a piece of wire bent double, so that leather collars could be pinioned by each projection. The court disposed of this by saying, "This idea is as old as the first boy who cut a forked stick from a bush for stringing and holding his fish." Federal statutes were few and far between. Private law was just about all the law there was. The Constitution was something to be included in speeches but seldom to be invoked in the trial of cases . . . and then usually to defend the sanctity of contract against the dangers of social legislation.

Now I speak after spending a dozen years on the First Circuit Court of Appeals. In this period our caseload has more than doubled. This means jumping from 200 to nearly 500 cases for our three judge court. But, more to the point, the nature of the litigation has changed significantly. Beginning at about 1968, the nature of our caseload underwent a dramatic sea

change. Private law yielded to public law, especially to the new breed of litigation bottomed on 42 U.S.C. § 1983. Here is how our workload profile looked last year. The first claimants on our time were cases involving the interpretation of federal statutes. Including a staple crop of 20 labor cases, these involved 75 appeals and at least 24 such statutes. A strong second was criminal law, including mostly direct federal appeals and a diminishing number of habeas corpus appeals raising a constitutional challenge to state court convictions. There were about 60 such appeals. Diversity came third with about 32 cases. Following closely came civil rights cases, including prisoner petitions, some 25 of them.

I draw from this snapshot several impressionistic conclusions. This federal court is more concerned with national law than ever. Our overview of state institutions and laws via habeas corpus and diversity cases is diminishing. But the steady stream of civil rights cases, challenging state officials, somewhat offsets this reduction. On the other hand, the sheer number, pervasiveness, and complexity of new federal statutes is a recent development which accounts for an increasing portion of our expended energy. A few years ago the federal courts were often criticized for being "activists" in interpreting the Constitution. We are now often cast in that role, not only because of judges' readings of the Constitution, but because Congress has decreed that we must review decisions on environment, information disclosure, consumer goods and credit, occupational safety, and other such matters of wide impact.

I view the "federal-state" problem as having entered a new era. Ten or more years ago the value systems commanding state and federal courts sometimes diverged. Today I think they are much more parallel. A fair if not a generous share of the Justices of the highest state courts in our circuit rank at the very top of our profession. The legislatures have also not been inactive. Post-conviction and other modern reforms have been and are being carried out. The federal Constitution is a reality. This does not mean that we shall not occasionally find what we think is a blind spot in the workings of a state's criminal justice system, or a local law inconsistent with national law. But I do mean to say that state courts generally give sensitive treatment to federal issues, and are a viable alternative forum for many causes. The corollary is that the occasions for a federal court differing from a state court on an issue of constitutional law are far fewer than a decade ago.

Finally, in addition to developments in civil rights and issues, connected with new federal statutes, I must take note of the evolving field of remedial law. The developments in remedial law during the past few years -- in scope, novelty, and importance -- are a major phenomenon. The content that has been given individual rights both by court decisions and by legislation, and the wide resort to the class action device have forced upon trial judges the tasks not only of managing complex litigation but of devising remedies deeply affecting the conduct of institutions in both the public and private realms. The remedies often themselves require continued oversight. To the traditional trial function of reviewing evidence and making findings of facts and conclusions of law is added that of obtaining both fact and informed opinion concerning remedy.

The job of appellate review of complex remedial orders is also novel. To the traditional functions of reviewing the findings for evidentiary support and the legal conclusions for error, there is added the prudential function of overseeing the balancing process involved in the tailoring of remedies. The appellate court is distanced from the arena of action both by the lapse of time and the coldness of the record. If this distance is disadvantage in one sense, necessitating the reposing of broad discretion in the trial judge and sometimes rendering any remedy at all impossible, it yields the advantage of perspective, which is a critical ingredient of the appellate

court's role as guardian of process. Perhaps the most valuable contribution that can be expected from remedial review is a steady focus on such things as opportunity for participation by the parties, responsiveness to changed circumstances, and openness to alternative courses. Appellate opinions on remedy may take on more of the character of colloquy than of precise rulings of affirmance and reversal. Whether, out of such colloquies, anything like a jurisprudence of institutional remedy will develop is impossible to predict. Perhaps all we should hope for is that over time a body of guidance, wisdom and prudence approaching principle will be built to inform remedial discretion and bring it, like equity itself, within generally expectable limits.

As I reflect on my dozen years on the court, I realize, first, how the law has drastically changed -- from private law to public law, from individual action to class action, from simple damages or negative injunction to the most complex, wide-ranging, long-lasting positive relief.

As I look at the future, the only certitude I see is change. Continued growth in litigation is probably the fate of our increasingly complex and justice-sensitized society. But this does not mean more of the same. The pattern of appeals shifts. A new statute or agency generates its galaxy of practice and case law; eventually that galaxy reaches some stability. A new right is articulated and, for a time, produces a chaotic eruption of cases; then the galaxy finds it stable structure. So it was with the long hair cases of the late 'sixties. So it may be with the sex discrimination cases of today. Institutions, from prisons and universities to welfare systems, are litigation prone during the testing of rights and procedures; the hope is that in time each will work out its own justice subsystem with only infrequent occasion for intrusion by the courts. Habeas corpus and diversity are no longer major feeders of federal courts. As for civil rights, the first generation of that species of litigation centered in the struggle for school desegregation in the South in the 'fifties. The second generation saw the targets broaden to the spectrum covered by 42 U.S.C. § 1983 in the 'sixties. We seem now, in the late 'seventies, to be well into the third generation, exploring the frontier of remedies. And -- who knows? -- a reverse tide of civil rights and civil liberties causes toward the state courts may even be in the making.

Meanwhile, the cluster of statutory galaxies bids fair to fill any void left by older stars. With the years ahead promising restrictions in the use of energy, other resources, and space, the tension between society's effort to regulate itself and man's instinct for privacy, access, fairness, and equal treatment promises to give the courts ever new generations of causes.