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REMARKS ON THE PROCESS OF JUDGING

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I have been asked to address one aspect of "contemporary challenges to judging." I could regale you with mind-numbing statistics about docket congestion and the like, but I sense that something more philosophical, and perhaps more interesting, is called for by this special occasion.

Legal historian William W. Fisher III recently suggested that the major schools of legal theory which "have developed since World War II are best understood as efforts to meet the challenges presented by Legal Realism," a school of jurisprudence which had its inception roughly around the start of this century.[1] Before Legal Realism, most lawyers and judges operated under the assumption that judges simply "found" the law necessary to decide a particular case. In Oliver Wendell Holmes' words, the law was seen as a "brooding omnipresence in the sky." This "oracular theory of judging" was, in a sense, fully consistent with the underlying theory of English common law at the time our Constitution was adopted: sound legal training in existing case law was all it took to discover the rule of decision applicable to the case at hand.

The advent of the Legal Realist School disabused us of that notion. Few would now argue against the proposition that judging involves creating law, at least to some extent. But if it does, what provides the source of the judge's creative inspiration? Legal Realists—so called because they were said to believe that what a judge had for breakfast made more difference in how he would decide a case than what he knew about existing precedents—were at pains to point out that a judge's background might have as much to do with the way he went about deciding a case as would his legal

* Chief Justice of the United States.

1. William W. Fisher III, *The Development of Modern American Legal Theory and the Judicial Interpretation of the Bill of Rights*, *in* A CULTURE OF RIGHTS; THE BILL OF RIGHTS IN PHILOSOPHY, POLITICS AND LAW—1791-1991, at 267 (Michael J. Lacey & Knud Haakonssen eds., 1991).

education. And I suppose that the large measure of truth that adheres in this view is generally accepted today. Judges, whether at the trial or appellate level, are not fungible. Each one of us brings to the bench a mind imprinted with previous experience, and that experience undoubtedly influences, to a certain extent, how we go about the process of deciding cases.

Today I will briefly discuss three judges who began their judicial careers in the early twentieth century and outline how they came to terms with this central challenge of Legal Realism. I will then offer some concluding observations about what seems to me to be the incompleteness, if you will, of the Legal Realists' treatment of judging. All three of the judges—Benjamin Cardozo, Learned Hand, and Jerome Frank—thought deeply about the process of judging, and all developed answers that satisfied them, although I daresay many critics could debate how satisfactory those answers were. I will largely rely on the views they stated extrajudicially, for all three were prolific producers off the bench. They also left us with some comments on each other, which provide valuable insights into both author and subject.

In the person of Benjamin Cardozo we had the ultimate scholar judge. Although from today's vantage point we may find it hard to appreciate the verve and originality of his seminal work, *The Nature of the Judicial Process*, written in 1921, its central insight—that judges are consciously creative agents in the law's evolution—thoroughly validated the views of the Legal Realists. I think it is important to remember that when Cardozo wrote this work, he was a judge on the New York Court of Appeals and was essentially talking about the evolution of the common law.

Cardozo was born in New York City in 1870. He descended from Sephardic Jews with a long tradition of public service. One ancestor served in the Revolutionary War while another, a rabbi, participated in George Washington's inauguration. Yet another relative wrote the words at the base of the Statue of Liberty. Alas, such illustrious fame did not befall Cardozo's father. The elder Cardozo, a Tammany Hall judge, left a legacy of infamy. Implicated in the Boss Tweed city government scandal and charged with graft, he chose to resign rather than face impeachment. Many believed this family disgrace was a formative influence on Cardozo. Jerome Frank, not one to ignore the psychological impact of such a childhood event, said it made Cardozo into a contradictory personality; a recluse and a public servant; part of the contemporary scene, yet detached from it; "an 18th century scholar and gentleman" living in the twentieth.[2]

Despite the handicap of his father's disgrace, Cardozo was marked for extraordinary achievement from early in his life. He entered Columbia University at the precocious age of fifteen. He studied at Columbia Law School, but joined the New York bar without obtaining a degree. Over the next two decades, Cardozo and his brother enjoyed a successful appellate practice. Then, in 1914, he put aside the practice of law to seek public

2. Jerome N. Frank, *Some Reflections on Judge Learned Hand*, 24 U. CHI. L. REV. 666, 672-73 (1957).

office. In rapid succession he became first a judge of the New York trial court and then a judge of the New York Court of Appeals. He became its chief judge in 1923. Cardozo's service on New York's highest court extended for a total of eighteen years, until 1932, when Herbert Hoover appointed him to replace the retiring Oliver Wendell Holmes on the Supreme Court.

Cardozo's greatest contribution, however, was his work as a common law judge on the New York Court of Appeals and the extrajudicial writings he used to explain his views on the judicial experience. Those views evolved from an oracular view of law to something far different. As a judge, he wrote of being troubled in his search for legal certainty, "to find how trackless was the ocean on which [he] had embarked."[3] As the years progressed he came to accept the inevitability of uncertainty:

> I have become reconciled to the uncertainty, because I have grown to see it as inevitable. I have grown to see that the process in its highest reaches is not discovery, but creation; and that the doubts and misgivings, the hopes and fears, are part of the travail of mind, the pangs of death and the pangs of birth, in which principles that have served their day expire, and new principles are born.[4]

Cardozo's insights laid bare what Learned Hand called the basic contradiction of a judge's role. "[H]e must preserve his authority by cloaking himself in the majesty of an overshadowing past; but he must discover some composition with the dominant trends of his time."[5] Cardozo was fascinated with how judges could manage this role, and he devoted his career to carrying it out in practice, as well as describing it. By judging "in the grand tradition," he pointed out a way for reconciling the creative side of judging with a judicial style that values continuity, tradition and stability.

Learned Hand, as you can probably guess from his comments, regarded Cardozo as one of his judicial idols. The feeling was mutual. Cardozo placed Hand in a group of "two or three" judges who approached Oliver Wendell Holmes in his esteem. By the end of his long judicial career—he spent over fifty years on the bench if you include his time in senior status—Hand was admired almost as much as Cardozo and Holmes, even though he never sat on the Supreme Court. Instead, he spent his entire career on the lower federal courts—first the United States District Court for the Southern District of New York and later the United States Court of Appeals for the Second Circuit.

Hand began his life in Albany, New York and also came from a family with a long tradition of legal service. His grandfather served as a New York State judge for eight years, and his father received an interim appointment to New York's highest court, although a change of political fortunes denied

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3. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 166 (1921).

4. *Id.* at 166-67.

5. LEARNED HAND, *Mr. Justice Cardozo*, *in* THE SPIRIT OF LIBERTY 98, 99 (Irving Dilliard ed., Vintage Books 1959) (1952).

him a permanent seat. Learned Hand's favorite cousin, Augustus Hand, followed him to the district court and later to the Second Circuit, where he developed a reputation second only to his cousin. Indeed, in some circles Augustus Hand's decisions were regarded as more reliable. Supreme Court Justice Robert Jackson used to say "quote Learned and follow Gus."

Hand gained professional recognition from the soundness of his decisions and the power of his judicial prose. Although his opinion style might be regarded today as a bit formal and legalistic, it nonetheless resounded with pithy aphorisms. Hand would still make anyone's "top ten" list of quotable judges—witness his dissent to a majority decision attempting to anticipate developments in the Supreme Court, where he wrote, "[it's not] desirable for a lower court to embrace the exhilarating opportunity of anticipating a doctrine which may be in the womb of time, but whose birth is distant."[6]

Hand also gained fame because of his personality. You could describe him as a "real piece of work." Jerome Frank wrote that Hand made his life a work of art, like a novel written by himself. He was a notable raconteur and mimic. He would break out into a Gilbert and Sullivan song or sea chantey with the slightest encouragement, he sang hymns at noon in the courthouse to accompany the chimes of a nearby church, and the Library of Congress has a recording of him singing folk songs. On the bench, he had a deserved reputation for angry outbursts. According to one of his Second Circuit colleagues, "[h]is thunder terrified the boldest counsel and his lightning questions and comments could short-circuit any argument."[7] Afterwards, however, he often repented and offered apologies for his abruptness.

Like Cardozo, Hand also gained recognition from his extrajudicial writings. He did not produce scholarly treatises like Cardozo's, but he was a frequent public speaker. In those speeches Hand reacted to the challenge of Realist Jurisprudence—partly accepting its assumptions, but denying its conclusion that idiosyncratic, subjective judging was inevitable. He accepted, almost as an article of faith, that a judge could avoid asserting his own predilections by practicing detachment, skepticism, and the virtues of institutional self-restraint. Detachment was the first crucial element of Hand's judicial craftsmanship. '[J]udge as though it weren't your fight,' he urged.[8] He believed this was possible despite the conclusions of the Realists:

> There are those who insist that detachment is an illusion; that our conclusions, when their bases are sifted, always reveal a passional foundation. Even so; though they be throughout the creatures of

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6. Spector Motor Serv., Inc. v. Walsh, 139 F.2d 809, 823 (2d Cir. 1944) (Hand, C.J., dissenting).

7. J. Edward Lumbard, *Learned Hand Memorial Issue*, 33 N.Y. ST. B.J. 410 (1961), *quoted in* MARVIN SCHICK, LEARNED HAND'S COURT 15 (1970).

8. HERSHEL SHANKS, THE ART AND CRAFT OF JUDGING: THE DECISIONS OF JUDGE LEARNED HAND 20 (1968).

> past emotional experience, it does not follow that that experience can never predispose us to impartiality. A bias against bias may be as likely a result of some buried crisis, as any other bias.[9]

Skepticism was the second element in Learned Hand's triad of judicial values. He abhorred absolutes, and believed that a judge must always be prepared to question his own assumptions. He frequently quoted, as key to his overall judicial philosophy, Oliver Cromwell's speech before the Battle of Dunbar: 'I beseech ye in the bowels of Christ, think that ye may be mistaken.'[10] If we are to be saved, he said, it must be through skepticism. This led Hand to subject his own premises to scrutiny and to set out clearly the basis for his judicial decisions, lest he fall into what he regarded as one of the greatest judicial sins—to beg the question or hide the means by which he reached a result. Consequently, you can always follow the path of reasoning in his opinions—they are like those books on castles and cathedrals by David MacCaulay—the framework and mortar are all shown, and nothing is obscured from view.

Finally, as the third component of his judicial philosophy, Hand believed in judicial self-restraint. "The price of their [the judiciary's] continued power," he stated, "must therefore be a self-denying ordinance."[11] This notion came out of Hand's understanding of democracy and the judiciary's limited role in nullifying actions of the political branches of government. The judiciary would lose its independence, Hand believed, should it take upon itself the burden of having the last word in basic conflicts of right and wrong. Instead, those decisions should be left to the give and take of the democratic process. Hand accordingly adhered to a philosophy that is somewhat out of fashion in some circles today, for he was skeptical about judges' attempts to enforce the Bill of Rights' vaguer guarantees. To do so, he believed, would not only destroy the judiciary, but would also show democracy's bankruptcy. In a letter to Chief Justice Harlan Stone at the time when the majority of the Roosevelt Court was giving a more expansive reading to some constitutional guarantees, he referred to these Justices as the "heralds of a brighter day."

Jerome Frank was not nearly so restrained in his responses to Legal Realism, which is not so surprising, given that he was one of the vigorous proponents of that school of thought. To begin with, Frank had a forceful style of writing that minced no words and left no doubts where he stood. In contemporary slang it would be called a "take no prisoners style." A good example is what he said about Lord Coke, former Chief Justice of England, who was revered by those who believed in an oracular theory of law:

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9. LEARNED HAND, *Thomas Walter Swan, in* THE SPIRIT OF LIBERTY 158, 165 (Irving Dilliard ed., Vintage Books 1959) (1952).

10. LEARNED HAND, *Morals in Public Life, in* THE SPIRIT OF LIBERTY 170, 174 (Irving Dilliard ed., Vintage Books 1959) (1952).

11. LEARNED HAND, *The Contribution of an Independent Judiciary to Civilization, in* THE SPIRIT OF LIBERTY 118, 121 (Irving Dilliard ed., Vintage Books 1959) (1952).

> Coke was a nasty, narrow-minded, greedy, cruel, arrogant, insensitive man, a time-serving politician and a liar who, by his adulation of some crabbed medieval legal doctrines, had retarded English and American legal development for centuries.[12]

He used equally strong words about those he disagreed with, as well as his colleagues on the bench, all of which made him no friends. Yet to those who knew him other than through his written works, he was a warm-hearted and generous man. Paradoxes such as this characterized Jerome Frank's life.

Like Cardozo and Hand, Frank came from a family of lawyers—his father practiced corporate law in Chicago, where Frank grew up. His finance law practice took him frequently to New York City, where he moved in 1928. While continuing his finance practice in New York, he began his writing career. When his seminal work, *Law and the Modern Mind*, was published in 1930, the legal world recognized it as one of the boldest statements of Legal Realism. Based on his own readings and experience with psychiatry, Frank stated the Realist credo that law was neither logical nor predictable, but instead depended on the judge's unconscious motivations and prejudices.

Frank was one of a number of lawyers who was attracted to government service by Franklin Roosevelt's New Deal. He served in the legal departments of several government agencies, and in 1939 succeeded William O. Douglas as Chairman of the SEC. In 1941, Roosevelt appointed him to the Court of Appeals for the Second Circuit. This choice was likened to "the choice of a heretic to be a bishop of the Church of Rome."[13] Along with his contributions to debunking the "cult of the robe," Frank had helped found the National Lawyers Guild in 1936, which won him the enmity of some of the legal establishment. His views on judging were thought to be too radical to qualify him for the bench. Despite these views, he wore his judicial robes well.

Although Frank's Realist views presumably regarded Hand's philosophy of detachment and restraint as hopelessly naive, Frank was nonetheless an unabashed admirer of Hand. He dedicated one of his books to him and thought him a "great judge," despite the fact that during one ten year period they agreed with each other only thirty-seven percent of the time when they sat together.

How could an avowed "rule-skeptic" such as Frank follow *stare decisis* and the other commandments of the judicial craft? One answer, I suppose, is that Frank's views changed over time, and that despite his earlier "debunking," he came to appreciate the need for order and authority that legal rules provide. Another is that although Frank never changed his basic assumptions, he nonetheless saw his judicial role as serving a valuable

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12. Frank, *supra* note 2, at 666.

13. William Seagle, Book Review, 29 VA. L. REV. 664, 664 (1943).

function—that of the judge's teacher. Felix Frankfurter said that "No judge in our time used his judicial opinions so systematically as a candid and discursive means for legal education."[14] But Frank also came to accept the institutional constraints of judging as a partial antidote for the inherently subjective nature of the process.

Each of these three judges made significant contributions to understanding the process of judging, and the legal profession is much indebted to them. One unfortunate aspect of their writings, when taken out of context, however, and indeed of the writings of many of the Legal Realists, is the emphasis on the individualized nature of judging at the expense of its collegial and institutional aspects. On more than one occasion, I have been asked with respect to our Court, "does oral argument really make any difference?" This question is usually asked, if not with a sly wink, at least with the implied suggestion that of course everybody knows that it doesn't. The next logical question, I suppose, is "do the briefs really make any difference?" The implication of these questions is that the process of briefing and arguing a case is largely ceremonial, because each judge will have decided in advance of all that how he will vote based on his subjective predilections.

This sort of skepticism—nay, cynicism—puts too little store in the fact that appellate judging is a deliberative process. Although the process ends up with the casting of a vote, it is not like the vote of a legislator. One member of Congress, for example, may have made a very careful study of the merits and demerits of a particular pending bill, assessed its effect on constituents, and may vote accordingly. Another may know virtually nothing about the bill; upon entering the chamber, he gets a signal from the party whip as to how to vote, and dutifully complies. Both votes count the same; and that is democracy.

Appellate judging, happily, does not work this way. Judges read the briefs, they study the cases, they sit on the bench to hear the case orally argued, and they then sit around the conference table to discuss and vote upon it. Ultimately a proposed majority opinion is circulated, and if the court is divided, dissenting and perhaps concurring opinions are forthcoming. Only after all of these steps have taken place does a judge finally decide how to vote. A judge's vote may be exactly the same as his tentative inclination was at the time he first read the briefs. But it may not be; in the interim between reading the briefs and finally voting, he has had the benefit of oral argument, listening to the views of colleagues at conference, and seeing the way in which a proposed result is justified in writing. Minds can and do change at any stage in this process.

The judge whom we honor by these dedication proceedings—Lewis F. Powell—recognized to the fullest degree that judging is not only a process, but a deliberative process. He brought with him to the bench, as we all do, a mind imprinted with past experience. His past experience was quite

14. Felix Frankfurter, *Jerome N. Frank*, 24 U. CHI. L. REV. 625, 625 (1957).

remarkable—a high ranking officer in Air Force Intelligence overseas during World War II, a senior partner in a very successful Richmond law firm, President of the American Bar Association, President of the Richmond School Board during the time of Virginia's massive resistance to school desegregation. Inevitably these experiences helped to shape his judicial philosophy.

But Lewis Powell recognized, more than some of his predecessors, that judging is not simply an exercise in intellectual virtuosity. He had his own views, and at times could cling tenaciously to them, but he always saw the Supreme Court as an institution that was greater than the sum of its parts. There must be an effort to get an opinion for at least a majority of the Court in every case where that is possible, in order that lower court judges and the profession as a whole may know what the law is without having to go through an elaborate head-counting process. To accomplish this, some give and take is inevitable, and doctrinal purity may be muddied in the process.

It is this sort of institutional constraint and discipline, too often unrecognized or subordinated in the pigeonholing of judges by labels, that itself furnishes a very substantial check on judges who might otherwise be guided only by their individual predilections in any given case. Judging inevitably has a large individual component in it, but the individual contribution of a good judge is filtered through the deliberative process of the court as a body, with all that this implies. Lewis Powell knew this, and during his fifteen years of distinguished service on our Court he acted accordingly. He wrote more than his share of opinions for the Court, some memorable; he wrote his share of dissents, some memorable. But he never lost sight of the fact that an appellate judge's primary task is to function as a member of a collegial body which must decide important questions of federal law in a way that gives intelligible guidance to the bench and bar. Memorable opinions were the by-product of that process, not an end in themselves.