

Judging Judges

Judges fascinate our political imaginations. Opinion polls show that no profession in the United States has higher prestige than the judiciary; at the same time, no branch of government seems to arouse so much antagonism and suspicion. This public concern is reflected in the intense scrutiny currently given to judicial appointments. The judiciary seems, in our highest hopes, to be our public philosopher and political conscience; it seems, in our worst fears, to govern by decree.

Consider two cases.

I. In 1971 the mother of a fifteen-year-old girl went before Judge Harold D. Stump in DeKalb County, Indiana. Her daughter, she stated, was mildly retarded; now she was beginning to date and had stayed out all night. The alarmed mother asked Judge Stump to order the tubal ligation of her daughter, and he entered the order the same day. The daughter was told that she needed an appendectomy, and six days after the order the tubal ligation was performed. Two years later the daughter married; when she and her husband were unable to conceive a child, medical tests were undertaken, and she learned what had been done to her. She sued Judge Stump (among others). Eventually the case went to the U.S. Supreme Court, which found that Judge Stump enjoyed absolute immunity from tort-claims from judicial acts.

II. Ten years earlier, a remarkable group of Fifth Circuit judges played a crucial role in implementing the desegregation of southern schools in the face of enormous white hostility. In one dramatic example, in 1960 Judge J. Skelly Wright single-handedly faced down the organized resistance of the New Orleans school board and the governments of New Orleans and Louisiana. Among the dozens of hastily enacted segregationist laws and decrees whose enforcement Wright enjoined in the space of a few days was a statute ordering the arrest of any federal judge attempting to enforce the Supreme Court's *Brown* decision—a statute presumably directed at Wright himself. Along with similar actions of other Fifth Circuit judges, Wright's interventions have been praised by many as among the most remarkable exercises in judicial—not to say physical—courage in the annals of American law.

Both cases illustrate the tremendous discretionary power exercised by judges. Along with such power goes a high ethical responsibility to exercise it wisely and well. Most people would cite Judge Stump's order as a flagrant violation of this high responsibility; and, though the violent passions surrounding the Fifth Cir-

cuit's fashioning of the modern civil rights injunction have not yet subsided, the common view is that it marked the federal judiciary's finest hour. But what are the standards by which such assessments can be made? How are we to define the ethical responsibilities of judges?

Issues in Judicial Ethics

To look at the variety and complexity of ethical issues that arise at all levels of the judiciary, let us follow a civil case through the judicial process. Even before the litigation process is under way, the judge must decide whether he must recuse himself because of too great association (familial, professional, or financial) with one of the parties.

In the litigation proper, judges exercise tremendous leeway in exerting the power of the bench to encourage the parties to settle, and the Federal Rules of Civil Procedures encourage judges to use this power. It is often assumed—given the crowded dockets of most American courts and the expense and fractiousness of the trial process—that it is better to settle cases out of court than to try them. But some cases raise issues of public concern that transcend the interests of the parties to the litigation; such cases ought to be heard by a court to provide order and development in the law governing these matters. How can judges reconcile the conflicting demands for speedy disposition of cases before them and the use of their courts to improve the law?

In the conduct of a trial a judge must make innumerable small decisions that can affect the outcome. He must decide when to intervene in the conduct of the trial, when to discipline attorneys who attempt to delay proceedings, when to invite outsiders in as *amici curiae*, when to certify or decertify a class in a class action. In a jury trial his behavior toward the litigants can significantly influence the jury's perception of the case. His instructions to the jury about the law and about their own responsibilities will often shape if not determine the outcome of the trial.

Significant also is how the judge uses his law-making and law-interpreting power. There are two questions of judicial responsibility here. The first concerns conflicts between the law and morality. How should judges decide cases that they believe are legally clear-cut but in which the legally correct result is morally abhorrent? Should judges enforce immoral laws? Or should the judge bend the law when applying it in a straightforward way leads to an unjust outcome? The second

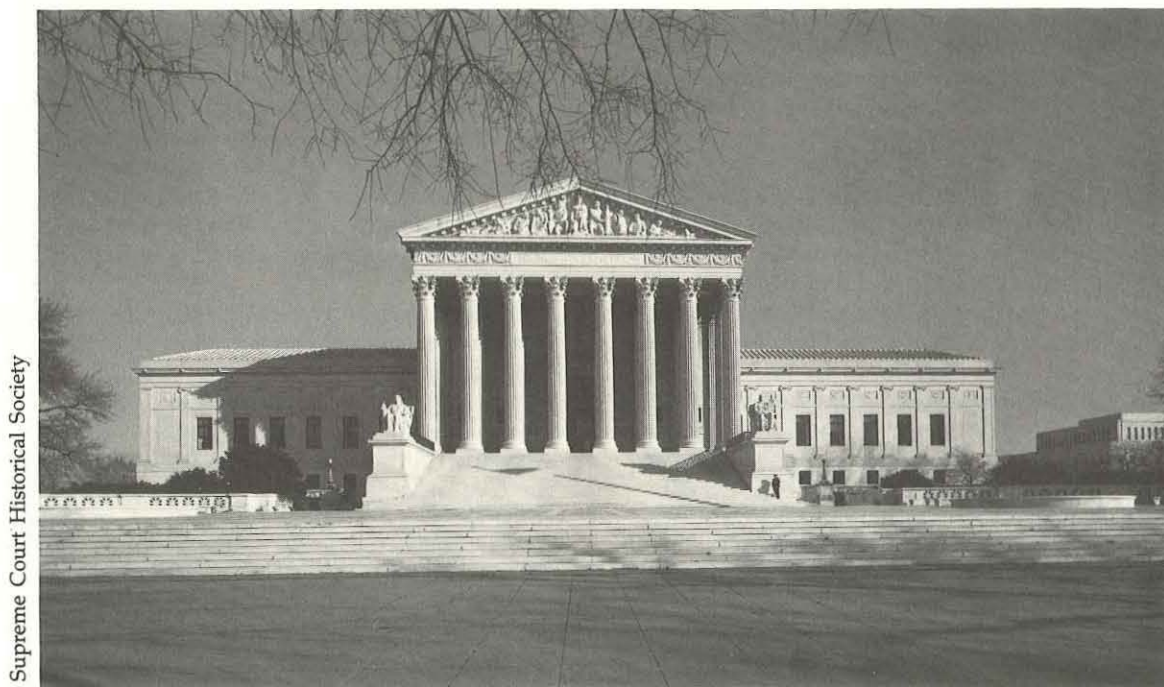
question concerns conflicts between enunciating useful and wise general rules and meeting the demands of justice in particular cases. Should the judge see it as his responsibility to lay down a test or rule that other judges will find useful in deciding future cases, even if it does not lead to the best outcome in the case before him?

The most notorious issue concerning the conduct of judges is that of "judicial activism." This term actually describes two distinct practices: interpreting the law broadly and using very far-reaching remedies (as Judge Wright did during the New Orleans school crisis, or as Federal Judge Frank Johnson did in virtually taking

of the role of the judge in a democratic society. The two aspects cannot be separated in the study of professional ethics, for the moral obligations of professionals derive from their institutional roles. For judges especially, we cannot hope to understand ethical duties without addressing issues in democratic theory.

A Framework for Analysis

Two prejudices have prevented the development of a satisfactory theoretical framework for addressing these questions: these are realism and legalism, the dominant assumptions of American jurisprudence. Roughly, realism says that the law is whatever the judge



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over the operation of the Alabama prison system). Often people who are upset by the latter practice mistakenly believe that judges have engaged in the former; but only confusion can result from blurring the distinction, since the two practices have little to do with each other.

The use of far-reaching remedies raises very important questions of judicial ethics. Should judges intervene so directly in political decisions? Is judicial activism simply the imposition of the judge's political ideology on that of officials responsible for these institutions? Do judges have the wisdom or expertise to assume such broad supervisory powers over society?

All of these are ethical issues with a public or political dimension. They are ethical because they concern principles governing the exercise of personal discretion by judges; they are political because the justification of such principles must come from an understanding

says it is, while legalism says that the most secure way to resolve normative disputes is by appealing to well-defined procedural rules.

Because of realism, what judges do is taken as the yardstick of justice, not as something itself to be measured. And legalism steers us away from ethical inquiry into a study of the procedural rules hedging the judicial process. Realism and legalism combine to make their adherents generally uninterested in the questions of political morality that must be addressed if we are to understand and evaluate the judge's responsibilities.

Realism nevertheless contains within it the raw materials for a better analytical framework than it itself provides. The realists may have said that the law is whatever the judge says it is, but they did not mean it. They would have ruled out the pronouncements of judges who were (for example) bribed, drunk, or clinically insane. However, once one has started down the

path of sorting judges normatively into those whose pronouncements count and those whose pronouncements do not, it is hard to stop. What about a judge who would have ruled differently had she only known a certain precedent but for hasty research? Or who would have ruled differently had she deliberated longer? Once we move from "the law is whatever the judge says it is" to "the law is whatever the judge *would have said it is if only* . . ." we are led inexorably to complete the sentence with factors derived from a normative theory of judgment. Crucial issues of judicial ethics therefore turn on a correct understanding of the human "faculty of judgment."

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Consider, once again, the question: should judges enforce morally iniquitous laws? The strongest argument in favor of judges enforcing such laws is often thought to be that for a judge to do otherwise is to substitute his own "personal morality" (as it is often called) for the law.

This argument, however, presupposes that the judge's moral beliefs rest on purely private or personal convictions. This will be true, for example, if the judge derives his personal morality from an experience of religious revelation. In such a case we can see what is wrong with the judge refusing to enforce (what he takes to be) immoral laws: his standard of morality comes from revelation, and he is then in effect legislating religion.

But do all moral beliefs rest only on private convictions? Many philosophers have thought not. Aristotle, for example, argued that the standard of judgment (or what he called "practical wisdom") was a public standard of appropriateness and not a personal inner conviction. Kant claimed that judgment is exercised by examining the thing to be judged from several representative points of view; judgment based on personal conviction is unreliable. Hannah Arendt argued that judgment is cultivated by thinking from the points of view of other people. All of these philosophers see judgment as a "situation sense" that derives from pluralistically representing community outlooks and standards within oneself. On this view, the conflict between law and morality is in reality a conflict between what past legislators have done and what the community really stands for. The judge, then, is correcting a defect in legislative representation by—so to speak—judicial representation.

If this view of moral judgment is correct, it leads us to consider the political role of the judge, for it makes us ask how representative the judge's function should be, and who the judge is supposed to represent.

The realists operated on the assumption that a court should function mainly as a dispute-resolution mechanism to provide conflicting interests with an alternative to force. Because of this assumption, they ignored the question of whether courts also have a role as "public philosopher," articulating public or community values rather than simply reconciling private interests.

This assumption is open to question. According to Yale Law School Professor Owen Fiss, for example, the dispute-resolution model is based on a faulty sociology which views contemporary society as a "state of nature" containing individualized private interests interacting in a void. Instead, Fiss argues, we must realize that in a "high-density" society such as ours private disputes have public significance, so that the courts must formulate and realize public values in adjudicating ostensibly private cases. If Fiss is right, we must examine anew the way in which judicial formulation of public values is able to represent paradigmatic standpoints within society rather than simply imposing the judge's own particularistic political views.

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Conclusion

Right now the federal courts are being explicitly politicized, with the Justice Department using ideological litmus tests to screen judicial appointments. This is an unfortunate legacy of realism. At their most simplistic, the realists believed that the law is just "whatever the judge ate for breakfast." Current ideological screening of judges assumes that the answers to hard legal questions should turn on whether judges have liberal or conservative breakfasts. This cynical understanding of the rule of law, however, can only cheapen it. More complex questions need to be asked to determine what, besides location on the left/right continuum, goes toward making a wise judge.

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