THE ENTERPRISE OF JUDGING

RUSSELL K. OSGOOD*

My perspective on the various issues that comprise the enterprise of judging has two major sources. First, my views reflect a knowledge and general approval of what might loosely be called the Anglo-American common-law system. Second, as a teacher of jurisprudence, I have found that my views follow in many respects those of two modern descendants of the common-law judges, Henry Hart and Albert Sacks.[1]

I.

There are many different activities that I would label "judging." In a longer version of this article, I would emphasize different judicial qualities with respect to those various activities. For example, I would distinguish between the skills and frame of mind that a judge should possess in making provisional judgments—during a trial, for example, about a piece of evidence that counsel seeks to introduce—and those skills that a judge should possess when making a final judgment, even in the same matter. I would also distinguish between trial and appellate judging, and between intermediate and supreme appellate judging. I would distinguish between judging in a court of record and in proceedings that are not memorialized. I would also base distinctions on the type of tribunal involved. Is it a multiple-member or a single-member bench? Is there a jury? Does the court of which the deciding judge is a member have a collegial aspect, like the federal circuit courts of appeals, or is it a loosely organized group of equals, like the Massachusetts Superior Court? Is the tribunal narrowly specialized, like the Tax Court of the United States? Is it an administrative agency, like the National Labor Relations Board? Finally, judging even at the appellate level has different features depending on whether the matter presented is truly novel, was previously decided by either a respected decision or a vitiated line of authority, or concerns statutory or constitutional interpretation. In each of these situations, the core elements of

* Dean and Professor of Law, Cornell University Law School.

1. *See* HENRY M. HART, JR. & ALBERT O. SACKS, THE LEGAL PROCESS: PROBLEMS IN THE MAKING AND APPLICATION OF LAW (tent. ed. 1958).

the enterprise of judging are different—sometimes significantly so.

II.

Even though there are many different kinds of judging, they are all parts of the same enterprise. The enterprise of judging in the United States in 1993, as a whole, should have five major components: (1) fidelity to law; (2) acceptance of the dynamism in law as a reflection of the underlying social order; (3) an openness to new and different ways of viewing facts, events, and persons—even those thought to be the subject of prior legal determinations; (4) a commitment to decide only the case presented, and (5) deference to the legislative branch as the primary lawmaker.

At least since Lon Fuller taunted H.L.A. Hart in the famous law review article in which he suggested that positivists forfeit all internal legal argumentation against profoundly immoral legal regimes like that of Nazi Germany,[2] there has been a dispute between positivists and crypto-natural law adherents about which group demonstrates or is capable of demonstrating "fidelity to law."[3] Recently, some critical jurisprudence scholars have suggested that the very concept or formulation of "fidelity to law" is itself part of the process of mystification and trickery that masks a discretion-packed system of judicial choice manipulated by powerful and (to the taste of the critical commentators) unsavory people.[4]

Fidelity to law is the core of the enterprise of judging, and consists of several elements. First, like cases ought to be decided alike. The argument for this is not just reliance, for frequently there is no real argument from reliance. The real rationale is that judicial commitment to the consistent application of rules and principles should be recognized as an end in itself. Second, judges should be loyal to the legal system as a semi-autonomous

2. Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 646 (1958).

3. For an excellent narration of the early stages of this debate, see EDWARD A. PURCELL, JR., THE CRISIS OF DEMOCRATIC THEORY (1973) (discussing the Legal Realist critique of traditional legal thought).

4. *See, e.g.*, DAVID KAIRYS, THE POLITICS OF LAW 5-6 (1982); MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 199-202 (1987); James Boyle, *The Politics of Reason*, 133 U. PA. L. REV. 697, 712 n.90 (1985).

aspect of state power in a way that maximizes systemic harmony.[5] Thus, judges should not just look in the immediate zone of a particular rule, statute, or prior decision, but across the entire legal system to resolve ambiguities and answer hard questions.[6]

Though fidelity to law is the primary touchstone for the enterprise of judging, it is also indispensable that a judge understand and accept the dynamism of legal principles, which reflects a similar dynamism in the underlying social order. In our age of very rapid change, the phenomenon of social and legal evolution need not be emphasized; indeed, one might argue that it should be de-emphasized. There is a greater risk that modern minds will see things too dynamically and that the importance of stability and continuity in the law will be neglected. Nevertheless, an understanding and acceptance of social and legal dynamism is important because, since before the time of Blackstone, scholars have consistently discounted the importance of social and legal dynamism in their descriptions of the legal order.[7]

A corollary to the notion that judges should understand and accept dynamism in law and the underlying social order is the idea that judges should be willing to see that facts can be arrayed and minutely altered in ways that require a reassessment of a previously recognized rule or principle. The greatest insight of the common-law system was that no single written formulation could adequately capture the essence of a legal principle or idea and that additions and emendations of fact sometimes require reanalysis of a legal rule.[8] This is not a nullification of the principle that like cases ought to be treated alike but it does tug against that principle.

Fourth, judges should only decide the case presented to them. They cannot adequately perceive unpresented fact situations. In attempting to so secure comprehensiveness for the law, they inevitably and ironically destabilize it. There are rare occasions—*Mi-*

5. *See, e.g.*, Richard H. Fallon, Jr., *Non-Legal Theory in Judicial Decision Making*, 17 HARV. J.L. & PUB. POL'Y 87 (1994).

6. *See* RONALD M. DWORKIN, LAW'S EMPIRE 225 (1986) ("The adjudicative principle of integrity instructs judges to identify legal rights and duties, so far as possible, on the assumption that they were all created by a single author—the community personified — expressing a coherent conception of justice and fairness.").

7. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *41 (The "law of nature . . . is binding over all the globe in all countries and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, from this original.").

8. *Cf.* JOHN H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 224-30 (3d ed. 1979).

randa v. Arizona[9] may be one—in which a court can articulate a justifiable and durable standard or procedure that goes beyond the facts and issues presented. In such instances, however like the Massachusetts constitutional provisions that authorize the state courts to issue advisory opinions,[10] it is no accident that decisions rendered under the standard frequently are not given full precedential weight.[11]

Finally, and perhaps most controversially, judges should accept the fact that state legislatures and the United States Congress are the supreme lawmakers. This principle requires that very general and remote constitutional principles should not be twisted and tortured to nullify a clear articulation of legislative will. On the other hand, it does not mean two things that one occasionally sees in judicial opinions. First, no court should ever decline, in a justiciable matter before it, to change a presently challenged rule out of the hope that the legislature may resolve the dispute. Some state supreme courts, for instance, delayed changing from contributory to comparative negligence, even though they found the former logically or legally insupportable, and instead invited their respective legislatures to act.[12] Second, deference to the legislature does not necessarily require an extreme version of plain meaning statutory interpretation instead of a purpose-oriented interpretive approach like the one Hart and Sacks advocated.[13]

III.

Some will find in the foregoing a vacuity; others might more charitably say that my five principles lack any core value commitment. In this section, I wish to address the issue of whether beyond my five principles of judging, the judicial enterprise requires some general or specific commitment to "justice," and if so, what it is. Second, this section will address whether and in what ways a judge may properly act according to his personal, principled conception of what is just.

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9. 384 U.S. 436 (1966).

10. MASS. CONST. pt. II, chap. III, art. II, *amended by* MASS. CONST. amend. LXXXV.

11. *See, e.g.*, Young v. Duncan, 106 N.E. 1, 4 (Mass. 1914), discussing *In re* Opinion of the Justices, 90 N.E. 308 (Mass. 1911) (holding that an advisory opinion is not an adjudication by the court and thus has no stare decisis effect).

12. *See, e.g.*, Maki v. Frelk, 239 N.E.2d 445, 447 (Ill. 1968).

13. *See* HART & SACKS, *supra* note 1, at 1410-17.

The questions to be answered may be restated as follows: Is there some part of the enterprise of judging that requires, either as part of or in addition to fidelity to law, that judges should strive for and appear to attain "justice?" Is there some way to identify the meaning of justice? There is obviously some quantum of truth in affirmative answers to these questions. Indeed, many judicial oddities can only be explained in terms of judges' attempts to appear to do justice, in some popular estimation of that word, in the face of a reasonably clear and contrary expectation based on the settled law.

Striving for justice or an appearance of striving for justice is part of the idea of fidelity to law, but the *concept* of justice is defined by reference to the legal order.[14] Thus, if a judge, as a matter of personal preference, thinks that public assistance payments are bad because they encourage dependency, he is not free to take that personal preference and translate it into judicial fiat on the ground that he is striving to achieve or to appear to achieve justice.

The content of the concept of justice is defined by reference to the whole legal system as it is now and as it is evolving, rather than in terms of any single judge's or particular group's preferences. The most difficult issues in this regard arise when the legal order is shifting or torn by inconsistent impulses on an important issue. An example that comes easily to mind is *Dred Scott v. Sandford*,[15] both the facts of the case and the Supreme Court's opinion. There is no doubt that a sensitive common-law judge, when thinking about *Dred Scott*, would have had to weigh the different legal approaches to slavery at the time of the case. There were formal indications of federal and state hostility to slavery, and there were countervailing indications of federal and state constitutional support for slavery.[16]

What was wrong in Chief Justice Taney's opinion in *Dred Scott* is that he took his personal and political preference for slavery and a bolt-out-of-the-blue political resolution of the issue and at-

14. *See* DWORKIN, *supra* note 6, at 225.

15. 60 U.S. (19 How.) 393 (1857).

16. See the many cases, pamphlets, and laws referenced and summarized in STATE SLAVERY STATUTES: GUIDE TO THE MICROFICHE COLLECTION (Paul Finkelman ed., 1989); SLAVERY IN THE COURTROOM: AN ANNOTATED BIBLIOGRAPHY OF AMERICAN CASES (Paul Finkelman ed., 1985); ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS (1975).

tempted to superimpose both on the legal order.[17] He impliedly struck down the Missouri Compromise of 1820[18] when the question of its validity could have been avoided. Taney and the Court did have to face the issue of whether Scott could sue, but Taney decided that issue in such a sweeping and overbroad fashion that he failed to act acceptably in his role as a judge. This is not to say that everything in Taney's opinion is inconsistent with my ideal of the enterprise of judging. Nor do I believe that my own moral views condemning slavery make it impossible to defend, as a legal result, every judicial act upholding that institution. It is, however, a mistake to leap from a personal view about the repugnancy or desirability of slavery in 1857 to writing a decision for the Supreme Court of the United States that adopts and pervasively applies that view as a matter of law.

The most difficult issue for any analysis of the enterprise of judging arises in cases where there is no clear legal answer, but only a range of more or less plausible choices. Given a common-law approach and an estimation of judging as presented here, and given a situation in which a judge either cannot or does not see that one choice is the most valid, should he act on a guess about where the law is headed, based on a broad and deep consideration of the legal system and the society in which it is situated? For example, may a judge presented with an early Jim Crow case, if he predicts that there is a movement toward a fuller and richer conception of equality, properly choose to advance that movement? Even more important, is he *obligated* to make a prediction? Note that he is not simply reflecting his own viewpoint (although that viewpoint will undoubtedly be a feature of the decisional process); he is trying to make his own judgment fit the general principles of the evolving legal order. The answer from the common-law point of view is that the judge can and probably should make such predictions to facilitate his selection from among the range of plausible decisions that are consistent with his prediction.[19] Common-law history, however, also teaches us that such a prediction might be wrong.[20]

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17. *See* 60 U.S. (19 How.) at 393-454.

18. *Id.* at 449-52.

19. *Cf.* DWORKIN, *supra* note 6, at 228-32 (likening a similar judicial strategy to the writing of a "chain novel" by successive authors).

20. *See, e.g.*, Plessy v. Ferguson, 163 U.S. 537, 543-44 (1896). The majority of the justices thought the Supreme Court could and should make predictions on social issues:

> The object of the [14th] amendment was undoubtedly to enforce . . . the absolute equality of the two races before the law, but in . . . the nature of things, it

IV.

Some will say that the version of common-law judging that I have sketched above appears to be contrary to some passages in the writings of Sir William Blackstone[21] and Joseph Story,[22] in which they argued or claimed that the common law was a fully realizable and static system in its ideal—a choate natural law. Neither writer, of course, claimed that the common law was totally realized in his own epoch. Holmes's derogatory reference to the "brooding omnipresence in the sky"[23] captures this aspect of Blackstone's and Story's thought.

My response to this claim of inconsistency with Blackstone and Story is that neither believed nor acted as though the common law could be static. Both did suggest that it was becoming purer, however.[24] Both also blithely endorsed a notion of natural law,

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could not have been intended to . . . abolish distinctions based on color, or to enforce social, as . . . distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either.

21. BLACKSTONE, *supra* note 7, at *69-70. To Blackstone, there was an exception to the rule that precedents were binding:

> [T]his rule admits of exception, where the former determination is most evidently contrary to reason; much more if it be contrary to the divine law. But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is not manifestly absurd or unjust, it is declared, not that such a sentence was *bad law,* but that it was *not law.*

For an interesting twist on this argument, see Gary Lawson, *The Constitutional Case Against Precedent,* 17 HARV. J.L. & PUB. POL'Y 23 (1994).

22. JOSEPH STORY, REPORT ON THE CODIFICATION OF THE COMMON LAW 30 (1836), *microformed on* 19th Century Legal Treatises, no. 1185 (Research Publications). Story described common-law reasoning:

> When a case, not affected by any statute, arises in any of our courts of justice, and the facts are established, the first question is, whether there is any clear and unequivocal principle of the common law which directly and immediately governs it, and fixes the rights of the parties. If there be no such principle, the next question is, whether there is any principle of the common law which, by analogy, or parity of reasoning, ought to govern it. If neither of these sources furnishes a positive solution of the controversy, resort is next had (as in a case confessedly new) to the principles of natural justice, which constitute the basis of much of the common law; and if these principles can be ascertained to apply in a full and determinate manner to all the circumstances, they are adopted, and decide the rights of the parties.

23. Southern Pacific Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

24. For Blackstone's views, see BLACKSTONE, *supra* note 7, at *442:

> [T]he fundamental maxims and rules of the law, which regard the rights of persons, and the rights of things, the private injuries that may be offered to both, and the crimes which affect the public, have been and are every day improving, and are now fraught with the accumulated wisdom of ages.

For Story's thoughts, see STORY, *supra* note 22, at 36:

> [T]he basis of the actual administration of justice in every country must comprehend principles of far more extensive reach than those which become the subjects of direct adjudication in courts of justice, and be capable of a progressive

but that notion was rarely called upon in any specific development of any rule.

To say that Blackstone and Story did not endorse or envision a permanently static common law is not to say that they were not common-law irredentists, patriots, or admirers. They were. Their loyalty was to the system of five principles I have set out above.

Recall the preceding section of this essay, which claimed that judging in the common-law mode has no irreducible, eternally valid definition of justice that a judge should act on or strive to achieve. Instead, I argued that judges should strive to achieve only that form of justice that the current legal system incorporates actively or latently.[25] Story and Blackstone, as men of another age, would disagree and say that the *residuum* of common law extant in their respective epochs reflected a number of immutable principles that judges must always follow.[26] However, their claims in this respect were hollow. Every principle they cited or described as immutable was, in fact, contingent and capable, when weighed against other imperatives, of being nullified. Alternatively, their core principles were so vacuous as to be meaningless.

V.

The enterprise of judging in the common-law tradition that I embrace and urge on my colleagues of all ideological stripes, is composed of five core principles. First, judges must demonstrate, practice, and understand fidelity to law. Second, judges must recognize the dynamic nature of law and of the society that spawns, supports, and recasts law constantly. Third, judges should recognize that any legal formulation is best viewed in terms of the facts surrounding it and that new facts, events, and persons may require a revision or at least a reconsideration of the formulation. Fourth, judges are not legislators or seers. They should only decide the unique case that is presented to them. Fifth and finally, judges should defer to the legislatures as the primary lawmakers.

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adaptation to new cases as they arise, or the most manifold public and private mischiefs must pervade the whole community.

25. *See supra* part III.

26. *See* 3 BLACKSTONE, *supra* note 7, at *379-80 ("The principles and axioms of law, which are general propositions . . . and not accommodated to times or men, should be deposited in the breasts of the judges, to be occasionally applied to such facts as properly come before them."); *see* STORY *supra* note 22, at 29-30 (explaining that "the common law is not in its nature and character an absolutely fixed, inflexible system . . . [but] [t]here are certain fundamental maxims in it which are never departed from").

These are the indicia of common-law adjudication. While the nature of the American judicial enterprise varies greatly from court to court, all common-law judges worth their salt ought to subscribe to these fundamental principles.