University of Richmond Law Review

Volume 40 | Issue 1 Article 9

11-1-2005

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LET US NOW PRAISE FAMOUS JUDGES: EXPLORING THE ROLES OF JUDICIAL "INTUITION" AND "ACTIVISM" IN AMERICAN LAW

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In contemplating Judge Robert R. Merhige's career as a judge, I have been struck by how often I have heard his law clerks and the lawyers who appeared in his courtroom remark on the extent to which Judge Merhige seemed self-confidently guided by his "judicial intuition" as to how a pending matter ought to be resolved.

We live in a time in American history in which there is an escalating debate over the role of judges in our society, a debate often cast in the vocabulary of slings and arrows aimed malevolently at "judicial activists." My purpose in this essay is to explore this critique of "judicial activism," contrasting and comparing it with the role of "judicial intuition" in American law, taking as exemplar and foil the remarkable career of Judge Merhige.

Activists Anonymous

For about as long as I can remember there has been a brouhaha in America over judges who abuse their judicial power by failing to "follow the law." The usual sneer-word for this is "judicial activism," a shorthand for "making up the law" instead of "following the law." The label "activist" usually connotes a judge who cheats. If the judge were just to "follow the law" in a particular case, the judge would be forced to reach conclusion "x." But conclusion "x" strikes the judge as unjust, or unfair, according to the judge's own subjective moral, religious, or political views. And so the judge looks for a way to reach conclusion "y," the very *opposite* of "x."

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This attack on activism often comes from politicians—from presidents, senators, congressmen, governors, or mayors. These political officials typically see it as *their* job to be the activists in society—that is to say, to be the *legitimate* agents of legal change. It is okay for a senator or president to act to change the law, because that is their job, and they are accountable to the people. In a democracy, the argument goes, law should be changed by majority vote. The politicians represent the people and the votes of politicians reflect the will of the democracy. Judges have no business interfering.

This critique of judicial activism also comes from other quarters. Public interest "activists," the people who power lobby groups, political action committees, special interests, thus often decry judicial activism. So do others in the chattering classes—the vocal hoards of lawyers, professors, journalists, columnists, writers, talk radio hosts, internet bloggers, television panelists—those who comprise the great maw of pundits and pontificators who populate modern public discourse. Many of these folks are themselves activists. They are passionately engaged in debate over American politics, culture, morality, and law, actively seeking to advance their own views of right and wrong, wisdom, or folly.

Yet again, however, American orthodoxy is that these are *legitimate* activists, properly licensed for the work, as James Bond is licensed to kill. This is the laudable activism of argument and persuasion, the means by which citizens in a democratic republic attempt to persuade one another to generate a consensus backed by a majority vote.

Perhaps most interesting are the anti-activist judges, those who reproach other judges for their activism. These judges are convinced that their colleagues are making up the law, imposing their own subjective views on the populace, thereby lacking the integrity, self-restraint, and self-discipline, to "follow the law," whether or not they find the results that follow pleasing.

Attacks on judicial activism are fueled in part by the passions that surround certain especially controversial issues in American life. Liberals may attack conservative judges for activism in advancing a conservative agenda in judicial rulings, such as deci-

sions awarding the presidency to George Bush over Al Gore,[1] shifting power from the federal government to the states,[2] or approving the death penalty.[3] In turn, conservatives may attack liberal judges for activism in advancing a liberal agenda in judicial rulings, such as decisions on abortion,[4] gay and lesbian rights,[5] or affirmative action.[6]

At times the rhetoric against judicial activism would lead one to believe that it has become a veritable epidemic, a spreading contagion undermining the whole American system. Yet curiously, in all my years as a lawyer, I have never met a self-proclaimed judicial activist. You'd think with all this activism running rampant, one would run across an occasional confession. Shoot, you would expect to find chapters of "activist's anonymous" in every state and federal jurisdiction. (The meetings would begin: "Hello, I'm Judge Joe Schmo, and I'm a judicial activist. Hello Joe Schmo!")

In my years of law, never *once* have I heard a judge say, "My notion of what it means to be a judge is that you impose your own political views on others, pretending to follow the law. I just do what I think is right, according to my own subjective sense of justice, morality, and political wisdom. Then I fancy it up as 'the law.'"

Every judge I have ever known insists with steadfast sincerity that he or she would never dream of imposing his or her subjective preferences on the outcomes of cases. Judges all claim that what they do is "follow the law," as best they can determine it, whether or not they agree with what the law is. The law is the law.

So what are we to make of this dissonance? What do we make of the fact that there is so much complaining about activism, but no owning up? I suppose it could be a massive cover-up, a mammoth ruse being perpetrated on the American people. This is an

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1. *See generally* Bush v. Gore, 531 U.S. 98 (2000).

2. *See generally* Printz v. United States, 521 U.S. 898 (1997) (Tenth Amendment); Seminole Tribe v. Florida, 517 U.S. 44 (1996) (Eleventh Amendment); United States v. Lopez, 514 U.S. 549 (1995) (Commerce Clause).

3. *See generally* Johnson v. Texas, 509 U.S. 350 (1993).

4. *See generally* Roe v. Wade, 410 U.S. 113 (1973).

5. *See generally* Lawrence v. Texas, 539 U.S. 558 (2003).

6. *See generally* Grutter v. Bollinger, 539 U.S. 306 (2003).

improbable explanation, however. A contrary possibility is far more plausible. I think that what may well be at issue here is not "activism," but "intuition."

The Role of Intuition in Judging

If there are no self-confessed activists to be found, there are self-confessed "intuitionists." That is to say, there are many judges and scholars who have argued, over the years, that judging is not an exercise in mathematics, but an exercise in judgment. In turn, the art of "judgment" involves mental and deliberative processes that include, inevitably and fittingly, a role for intuition.

Intuition in judging, properly understood, is never an end, but a means. It is not a substitute for sound legal reasoning, but a means by and through which sound legal reasoning is reached.

Edward Levi, distinguished lawyer, legal scholar, and legal educator who served as Dean of the University of Chicago Law School, and then as that great university's Provost and President, once noted that the "function of articulated judicial reasoning is to help protect the Court's moral power by giving some assurance that private views are not masquerading behind public views."[7] Dean Levi's point appears irrefutably correct. To eschew the naked imposition of "private views," however, is not to eschew the *private search* for the sound result that is an essential part of any deep and difficult exercise of judicial power.

While we do not want "judicial activism" on the bench, we do not want "sterile intellectualism" either. Judge J. Braxton Craven, Jr., a judge who served on the United States Court of Appeals for the Fourth Circuit, once took a shot at sterile intellectualism in law schools, stating derisively in an article published in the *North Carolina Law Review* that "[t]here are probably yet some law professors who think the word 'justice' belongs in Sociology I rather than in Property II."[8] In contrast to this sterile intellectualism, Judge Craven professed admiration for Chief Justice Earl Warren, because Chief Justice Warren made it

7. Edward H. Levi, *The Nature of Judicial Reasoning*, 32 U. CHI. L. REV. 395, 409 (1965).

8. J. Braxton Craven, Jr., *Paean to Pragmatism*, 50 N.C. L. REV. 977, 980 (1972).

respectable to ask the elemental question: "Is it fair?"[9] The subjective or indeterminate nature of concepts such as "fairness" or "justice" was undaunting to Judge Craven: "The legal mind that will not talk about injustice because it cannot be defined is like a surgeon who will not treat cancer because it is not yet fully understood."[10]

As Oliver Wendell Holmes posed the problem in his classic work *The Common Law*, "[t]he very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life."[11] Holmes puts the matter strongly:

> Every important principle which is developed in litigation is in fact and at bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practice and traditions, the unconscious result of instinctive preferences and inarticulate convictions, but none the less traceable to views of public policy in the last analysis.[12]

These insights are especially apt when the legal dispute involves fundamental questions of constitutional law. Judges dealing with difficult constitutional issues must by necessity employ all the tools of the trade, always beginning with the constitutional text in contest, but always including thoughtful consideration of the surrounding history, tradition, precedent, structure, context, and function of that text. As the Supreme Court of the United States recently explained in an important Eighth Amendment case, "[t]he prohibition against 'cruel and unusual punishments,' like other expansive language in the Constitution, must be interpreted according to its text, by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design."[13]

Once these tools are added into the mix, some degree of subjectivity, some role for intuitive judgment, must be counted as well. Consider a series of questions posed by Justice Benjamin Cardozo, in his book *The Nature of the Judicial Process*:

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9. *Id.*
10. *Id.* at 980–81.
11. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 35 (1881).
12. *Id.* at 35–36.
13. Roper v. Simmons, 125 S. Ct. 1183, 1190 (2005).

> What is it that I do when I decide a case? To what sources of information do I appeal for guidance? In what proportions do I permit them to contribute to the result? In what proportions ought they to contribute? If a precedent is applicable, when do I refuse to follow it? If no precedent is applicable, how do I reach the rule that will make a precedent for the future? If I am seeking logical consistency, the symmetry of the legal structure, how far shall I seek it? At what point shall the quest be halted by some discrepant custom, by some consideration of the social welfare, by my own or the common standards of justice and morals?[14]

Judge Merhige as Exemplar and Foil

Justice Cardozo's list is especially helpful in considering the judicial career of Judge Merhige. I had the great privilege of being able to talk to Judge Merhige on many occasions about the art of judging, including an interview I once conducted for a film documentary. He had an unflagging reverence for the law, and would never have characterized himself as an activist. But he would readily concede that judging involved judgment, and while he may never have introspectively reduced the process to the precise inventory of questions suggested by Cardozo, in my view these were precisely the considerations that brought constancy and integrity to Judge Merhige's rulings, and that earned him such great respect within our profession.

Judge Merhige was full of spark and sparkle, and undoubtedly his judgments were often informed by a sparkling flash of intuition that directed him toward a result even before his fine analytic mind had fully puzzled out the rationale. So be it. In one of the more intellectually honest soul-bearings ever attempted by a thoughtful jurist, Judge Joseph C. Hutcheson, Jr. once wrote:

> I, after canvassing all the available material at my command, and duly cogitating upon it, give my imagination play, and brooding over the cause, wait for the feeling, the hunch—that intuitive flash of understanding which makes the jump-spark connection between question and decision, and at the point where the path is darkest for the judicial feet, sheds its light along the way.[15]

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14. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 10 (1921).

15. Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 274, 278 (1929).

These words are apt in describing Judge Merhige's career. Judge Merhige had a profound impact on the metropolis that is greater Richmond, on the state, the nation, and the profession. I doubt that any graduate of the University of Richmond School of Law ever contributed more. Judge Hutcheson's remarks on judging provide the perfect metaphor for praising Judge Merhige, who justly deserves to be treated as a hero, as important in his way to the country as the likes of Holmes or Cardozo. Judge Merhige's life, "at the point where the path is darkest for the judicial feet, sheds its light along the way."[16]

16. *Id.*

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