

Justice Matthew O. Tobriner Memorial Lecture[†]

The Role of a Supreme Court in a Democracy

by
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The role of the judiciary is to adjudicate disputes according to law. Adjudication involves three functions: fact determination (done mostly by the trial court), law application and law determination. The third function—law determination—does not involve, in most cases, any creation. The law is known and determined. The court merely declares what the law is. The court is, in the words of Montesquieu, a “mouth that pronounces the words of the law.”¹ However, there are hard cases. In such cases, the law is uncertain. There is more than one meaning to be given to the legal text. There is more than one solution to the legal problem. In such cases, law declaration also involves law creation. Prior to the judicial determination, the law (the constitution, the statute, the common law) spoke—even after all rules of interpretation were used—with a number of voices. After the judicial determination the law speaks with a single voice. The law was changed. A new meaning was created. The creation of a new norm—to be binding on all courts by

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1. BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* 191 (Thomas Nugent trans., D. Appleton 1900) (1748).

the rule of precedent—is the main function of the supreme court in a democracy. Such creation involves discretion. The judge of a supreme court is not a mirror, passively reflecting the image of the law. He is an artist, creating the picture with his or her own hands. He is “legislating”—engaging in “judicial legislation.” He does so in concrete cases, as an incidental and interstitial outcome of the adjudicative function.

Such “law creating” (“legislative”) activity is not a reflection of judicial imperialism. It is an indication of the uncertainty inherent in the law itself. Law is not mathematics. Law is a normative system. So long as we cannot predict the future, so long as language does not enable generalizations that extend to all relevant situations, so long as we cannot overcome human limitation, we will have to live with uncertainty in law. Such uncertainty—and not any sense of judicial imperialism—is the source of judicial creativity. Such uncertainty derives from human limitations and the nature of society. Thus, there is no one legal answer to every legal problem. There are legal problems that have more than one answer. Indeed, we cannot and we do not want to have a legal system that has in advance all the legal answers to all the legal problems. Judicial creativity—judicial legislation—is natural to law itself. Law without discretion is a body without a spirit. Judicial creativity is part of legal existence. Such creativity—“judicial lawmaking”—is the task of a supreme court.

Judges tend to hide their creative function. “We declare what the law is—we don’t make it,” is a common motto in many judgments from Blackstone’s time onwards. Judges fear that public confidence in the judiciary will be affected if the public discovers the truth. “Personally,” wrote Lord Radcliffe, “I think that judges will serve the public interest better if they keep quiet about their legislative function.”² I disagree. The public has the right to know that we make law and how we do it; the public should not be deceived: “The right to know the architect of our obligations,” wrote Professor Julius Stone, “may be as much a part of liberty, as the right to know our accuser and our judge.”³

Judges tend to be apologetic about their creative role. They do so mainly because of their nonrepresentative character. But our nonrepresentative character—our nonpolitical accountability—is not a source of our weakness. It is the main source of our strength. Courts are not representative bodies, and it will be a tragedy if they become representative. Courts are reflective bodies; they reflect the basic values of their system. Thus, we should not be defensive in face

2. Lord Radcliffe, *The Lawyer and His Times*, in *THE PATH OF THE LAW FROM 1967* 9, 16 (Arthur E. Sutherland ed., 1968).

3. JULIUS STONE, *SOCIAL DIMENSIONS OF LAW AND JUSTICE* 678 (1966).

of representational kinds of arguments. Democracy is not only representation. Democracy is also basic values, the center of which are human rights. When the majority takes away the right of the minority—this is not democracy. Democracy is a delicate balance between majority rule and individual rights. Furthermore, our creative power stems from the law itself. A constitution involves a delegation by the people to the judges of the power to interpret the constitution, and thus to create constitutional law; legislation is an authorization for judicial lawmaking in and around the statute. And the common law—our Lady of the Common Law—is the creation of judges for almost a thousand years. “I recognize without hesitation,” wrote Justice Holmes in 1917, “that judges do and must legislate.”⁴

Thus, the main question is not “if,”—it is not—“do judges of the supreme court make law”; the main question is “how.” How does a judge of a supreme court make law? How should we decide hard cases? A judge is not allowed to flip a coin, though it achieves full objectivity. How, thus, is judicial discretion in making law used?

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In creating law we should give expression to the basic values of our legal system. Those values are the key to constitutional and statutory interpretation. They are the force behind the common law. Those values reflect ethical values of morality and justice; they include social values relating to public order, judicial independence, separation of powers, public peace and security; they are based on concepts of reasonableness, tolerance, proportionality, good faith, and honesty. Those values include an aspiration to realize reasonable expectations and certainty in law. At the center of these fundamental values stand human rights—political, social and economic.

The judge learns about those basic values from the fundamental documents—like the constitution—of his or her legal system. But those documents are not the only source. The judge learns about the basic values of his or her legal system from the aggregate national experience, from the nature of the political system as a democracy, and from understanding the basic concepts of the nation. The movement of his legal system through history, its social, political and religious roots are the sources from which a judge learns about those basic values. And ultimately, he learns about those basic values “from reading life.”

The values which direct the judge are the basic and fundamental values. They are not the outcomes of public-opinion surveys; they are not populism carrying away the masses. They are not transient and

4. *S. Pac. Co. v. Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting).

revolving fashions. They are not blaring headlines. They reflect history, not hysteria. When a society is not faithful to its basic values, the judge is not to express the fleeting winds of the hour. He or she should express the deep values and the fundamental vision of society. When terror swept my country, and when bombs exploded in the street, the mood was “get the terrorists, interrogate them by any means, and find out where the bombs are.” But, the Israeli Supreme Court said—no. Dignity is a human right for everyone—including the terrorist. A state cannot use force against anyone—not even the terrorist that is planting a bomb in the supermarket. Those are our basic values as a democracy, and the Court, as an independent and nonrepresentative body, should express them. And I added:

We are aware that this decision does not ease dealing with that reality. This is the destiny of democracy, as not all means are acceptable to it, and not all practices employed by its enemies are open before it. Although a democracy must often fight with one hand tied behind its back, it nonetheless has the upper hand. Preserving the Rule of Law and recognition of an individual's liberty constitutes an important component in its understanding of security. At the end of the day, they strengthen its spirit and its strength and allow it to overcome its difficulties.⁵

Of course, human rights are not the only values. The existence of the state, its security and public peace are also basic values. A charter of rights should not become a prescription for suicide. Human rights should not become tools for national destruction. Human rights need a community. Ensuring the political and social framework is a necessary condition for securing human rights themselves.

And here comes the main difficulty in judicial lawmaking. In the hard cases a judge is faced with a conflict between basic values. Dignity of the individual conflicts with state security; free speech conflicts with public order or privacy and reputation. Freedom of religion conflicts with freedom from religion. The dignity of the fetus conflicts with the dignity of the mother. We must solve those conflicts. But our legal system does not provide us with the necessary tools to reach a solution in every case. In many cases we are told that the solution to the conflict lies in a balance between the conflicting values. But neither our legal system nor philosophy provides us with an answer to the question what weight is to be assigned to each value and how should the judge balance the conflicting basic values. Balancing and weighing are, of course, metaphors. How do we decide which value is of greater importance in a particular case, and which supersedes other values?

5. H.C. 5100/94, Pub. Comm. Against Torture in Israel v. The State of Israel, 53(4) P.D. 817, 845.

Of course, the existence of discretion in those cases means that there are no fast rules as to how to weigh and balance in every case the conflicting basic values. But it does not follow that a judge can do whatever he or she wishes. There is no absolute discretion. Absolute discretion for judges, as well as any other public official, would be the beginning of the end of democracy. Furthermore, although there are no fast rules about weighing and balancing, it does not follow that every solution is as good as the other. There is good balancing and there is bad balancing. What makes good balancing? What makes a good solution?

Each individual judge has a different answer to that question. Every judge develops over the years his or her own philosophy of adjudication. It reflects personal history, life experience, and totality as an individual and as a judge. For many, this philosophy remains unexpressed and is based on intuition. For others, however, it is the result of an attempt to think through and articulate to oneself one's own approach to hard legal questions. It is the product of an attempt to identify the crucial considerations for the individual, and to order them appropriately. And, it is one's own attempt to shape one's judicial philosophy. Let me try to identify some of these considerations. In so doing, I make no claim to comprehensiveness. I make no claim to truth. I make, of course no claim that these considerations are binding on anyone in any legal system. My only claim is that I believe that if a judge in a democratic legal system would take them into account, he would be using his discretion in a better manner than if he ignored them.

My *first* point is this: the weighing and balancing of the conflicting values should be a rational process. Judicial discretion must manifest reason, not fiat. The method by which the judge weighs and balances is different from the method by which the legislature weighs and balances the same values. The legislative process is political. The judicial process is normative. The judicial weighing and balancing should, in Dworkin's term, "fit" within the normative scheme. No such requirement is imposed upon the political process. The judicial weighing and balancing should draw itself out of the existing normative structure. The weighing and balancing in one area of the law should be affected by the weighing and balancing in other areas of the law. Within the same legal system, a judge cannot decide, in one instance, that free speech is of great importance (for example, in a conflict between free speech and public order) and in another instance that free speech is of no importance (for example, in a conflict between free speech and the reputation of another). A judge is always faced with the need for harmony within the system. When a judge exercises judicial discretion, he does not perform a one-time act isolated from an

existing normative order. Judicial discretion is used within the framework of a system and must fit into it. The legal system into which the judicial decision is introduced, is not a frozen body. It is a living organism, and judicial discretion is one of the forces that fertilizes its cells. There must be harmony between the exercise of judicial discretion that develops the cells, on the one hand, and the development of the living organism, the legal system, on the other.

In general, organic growth of the legal system necessitates gradual development. The need to ensure the existence of the system demands evolution, not revolution. Usually, continuity, rather than a series of jumps, is involved. Of course, sometimes, one cannot avoid sharp turns and dangerous leaps, but these occur in exceptional situations. Normally, the proper functioning of a legal system requires slow and gradual movement. Judicial discretion must fit into these frameworks. The judicial process is thus based on organic growth.

In most cases, a judge should reflect the deep public consensus, and not create it, but not in all cases. There comes a moment when the court should lead; where the court is the crusader of a new consensus. *Brown v. Board of Education*⁶ is a good example. A supreme court cannot survive public confidence if it announces every week a new *Brown*. But, a supreme court will not survive public confidence if it misses the special moment to have a *Brown*.

The judge must determine the controversy before him. It is only natural for him to strive for a just solution to the parties before him, yet he cannot ignore the fact that his solution should fit into the existing normative fabric. Nor can he ignore the fact that his solution should be just for similar parties in the future. An ideal exercise of judicial discretion meets the triple test of integration with the past, justice in the present, and an appropriate norm for the future.

My *second* point is this: judicial discretion should be objective. The weighing and balancing of the conflicting values should be objective. Objectivity, of course, has many meanings. Here, I mean an intellectual process by which the judge reaches beyond himself to understand, from the perspective of his or her community, the social values that he is to weigh and balance. Objectivity stands in opposition to the subjective values of the judge. The judge's decision should reflect the deep values of his society, not his personal values. Objectivity means giving expression to the general scale of values, not to the judge's own scale of values. It means that the judge frees himself, as far as he can, from all personal preferences. It means neutrality in the process of balancing. Objectivity means reflecting the deep consensus and the shared values of the society. It is only

6. 347 U.S. 483 (1954).

then that the judge would be able to look straight into the eyes of his nation and say: "I gave expression to your shared and profound values—not to my personal values." It is only then that he will be able to say to the legislator, whose statute he struck down as unconstitutional: "I gave expression, not to my personal values, but to the values of the constitution. The conflict is not between the court and the legislature; the conflict is between the legislature and the constitution."

This objectivity demands much from the judge and requires an element of mental accounting. He or she must be aware that his values may not be shared by everyone and that his personal views may be unique. He might attach great importance to issues that, within the legal system, are trivial and meaningless. The judge must be aware of his characteristics, and he must make every possible effort not to exercise his discretion on the basis of these subjective traits.

Judicial discretion should be consistent. Only thus will discretion fit into the legal system as a whole and become an integral part of it. A reasonable exercise of judicial discretion requires that in similar cases discretion be exercised in a similar manner. This is a fundamental requirement of justice. Of course, a judge might exercise his discretion in such a way as to cause a deviation from the existing law. Consistency does not require abstention from all change. Yet, even here the judge should be consistent and neutral. He should apply the new rule in every similar case, and he should be prepared to deviate similarly when like circumstances arise. Herein lies one of the differences between the discretion of the judiciary and the discretion of the legislature. No legal obligation is imposed on the legislator to be consistent. He need not act neutrally. Not so the judge: his discretion should fit into the legal fabric. As a result, he must be consistent and neutral.

The judge is the product of his or her period. He lives at a given time and in a given society. The goal of objectivity is not to cut him off from his surroundings, but the opposite: to enable him to formulate properly the fundamental principles of his period. The goal of objectivity is not to "liberate" the judge from his past, his education, his experience, his faith and his values. On the contrary, its purpose is to stimulate him to make use of all of these in order to reflect as purely as possible the fundamental values of the nation. A person who is appointed as a judge need not change, but he must develop a sensitivity to the weight of his office and to the constraints it imposes. The judge must demonstrate both self-criticism and a lack of arrogance in a way that will enable him to avoid identifying himself with all he believes to be good and beautiful. He must demonstrate self-restraint that lets him separate his personal feelings from the

inner feelings of the nation. He must demonstrate an intellectual modesty that permits him to say, "I erred, for I confused what I want with what I am entitled to." A judge who does not act accordingly and who imposes on the society all that is subjective in him will create tension between himself and his environment. As long as he or she persists in this, the tension between the judicial branch and the other branches will grow. The result of this tension may be hazardous for society, and above all, it may damage the status of the court and the public's confidence in it. Only through the use of objectivity and consistency will the judge have the trust of his legal community, a trust given to him as a neutral arbiter of conflicting values. And, without such trust, the judge cannot fulfill his function. The most important asset the judge possesses is the public's confidence in him. It is also among the most precious assets of the nation. This is the confidence that judging is done fairly, neutrally, while treating each side equally, and without any hint of personal stake in the outcome; confidence in the high moral standard of judging, and in the integrity of every individual judge. The judge has neither sword nor purse. All he has is the public's confidence in him. Public confidence is not a given. Its existence cannot be taken for granted. The public's confidence is a fluid matter. It must be nurtured. It is easier to damage it than to guard it. Years of effort may be lost forever because of one unfortunate decision. Therefore, in exercising his discretion, the judge should bear this need in mind. Every judge should act as though the public's confidence in the entire judicial system depended on the exercise of his balancing. Of course, there is not much one can do with just the public's confidence in adjudication. Yet, without it one cannot do anything. A judge should never reach a point, at which it can be said—as Justice Stevens said recently: "Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the nation's confidence in the judge as an impartial guardian of the rule of law."⁷

The need to ensure confidence does not mean the need to guarantee popularity, but rather, the need to preserve the public's sense that judicial discretion is being exercised objectively, through a neutral application of the laws and the fundamental values of the nation; that judicial discretion is exercised in order to maintain the articles of faith of the people and not the articles of faith of the judge; that the judge is not a party to the power struggles in the state, and that he is fighting not for his own power, but for the rule of law.

My *third* point is this: every judgment is a link in a chain. The world does not start with us, and hopefully will not end with us.

7. *Bush v. Gore*, 531 U.S. 98, 128-29 (2000) (Stevens, J., dissenting).

Every judgment is one step in a long unending journey. We should always realize from where we come, and to where we are going. In solving hard cases, a judge should hold deep respect for tradition. Tradition means a sense of history. Tradition means an appreciation of precedent. Tradition means a fusion of the horizons of the past and the present; it means a dialogue between generations. Tradition creates continuity.

Judicial creativity, like the writing of a book in serial installments, is a continuous activity.⁸ Judges who are no longer on the bench wrote the early chapter. Current judges write the continuation, but they do so by basing themselves on the past. And the chapters being written, as they are written, become part of the past, and new chapters, the fruits of new judge's labors, are written. Thus the judicial creation is achieved. It has no beginning and no end and is all continuity.

My *fourth* point is this: the judicial decision should fit into the general structure of the institutional-governmental systems. The judge who exercises discretion does so as part of the judicial branch. His or her judicial decision should match the fundamental concepts of the relations between his branch and the other branches of the state. These fundamental concepts stem from society's view of democracy and separation of powers. They are affected by the society's view of the judicial function. Judicial lawmaking is not the only form of lawmaking or even the primary form. The other branches also create law. Judicial lawmaking should mesh with this overall lawmaking. The judge is not the only musician within the grand legal orchestra, and his playing must be in harmony with the rest of the music. Thus, for example, in the United States, separation of power leads to the nonjusticiability of the proceedings of Congress. In other countries, like Germany, Spain, and Israel, separation of powers—checks and balances—leads to the justiciability of those proceedings.

My *fifth* point is this: in exercising discretion and in balancing conflicting values, a judge should be open-minded; he or she should be receptive to new ideas. He should realize that in a pluralistic society there are many points of view and there is no single "right" solution. A judge should be aware of the complexity of the human being. Our approach should be holistic. When we construe one statute, we construe all statutes. During our life in law, we will face many conflicting theories: Naturalism, Positivism, Feminism, Law and Economics, Law and . . . and many others. There is some truth in all of them. They reflect different aspects of the human experience. We should learn from all of them. We should not become slaves to any

8. See Ronald Dworkin, "Natural" Law Revisited, 34 U. FLA. L. REV. 165 (1982).

one of them. Eclecticism—not purity—reflects the complexity of human nature and human relations.

A judge should lack any trace of arrogance. He should exercise humility. He should be aware of his personal strengths and weaknesses. He should know that he may fail. Though his decisions may be final, they are not infallible, and the judge may commit grave mistakes. He may misread the national way of life. He may not strike the proper balance between stability and change. Any theory of judging in a democracy should consider the possibility that mistakes can be made. And the judge should admit errors. The strength of our judgments lies in our ability to be self-critical and to admit our errors in the appropriate instances. Law hasn't started with us. It will not end with us. I myself make it a point to say openly in my judgment that I made a mistake in the past, and that correction by myself is needed. In one of my judgments I deviated from a previous judgment of mine. I wrote:

This conclusion of mine contradicts the conclusion I reached in the previous judgment. In other words—I changed my mind. Indeed, since issuing the previous judgment, I have not stopped asking myself if my approach to the law is well-founded. I am not of the school that believes that the finality of a decision testifies to its correctness. We all make mistakes. Our professional integrity requires us to admit our mistake if we are convinced that we indeed erred. In our tough hours, when we question ourselves, the North Star that must guide us is the quest for truth that leads us to actualize the justice within the law. We must not become entrenched in our preconceived opinions. We must be ready to admit our mistakes.

But what should a judge do when all this advice fails? How should he decide a hard case when rationality, objectivity, consistency, neutrality, continuity, tradition and humility fail to lead to a single answer? There is no one answer to this question. Different judges have different answers. My answer is this: in that exceptional instance—and it is a very rare instance of the very hard case—subjectivity is allowed to enter. The final decision will be shaped as Cardozo observed, by the judge's "experience with life; his understanding of the prevailing canons of justice and morality; his study of the social sciences; at times, in the end, by his intuitions, his guesses, even his ignorance or prejudice."¹⁰ Of course, the judge should not cut corners in the decision-making process. He should not go straight to his subjective beliefs. There is a long objective road to travel. But, after all the objective means have been exhausted, he should be allowed to apply his subjective beliefs.

9. Cr.F.H. 7048/97, *Anonymous v. Minister of Def.*, 54(1) P.D. 721.

10. BENJAMIN CARDOZO, *THE GROWTH OF THE LAW* 86 (1924).

Those subjective beliefs differ, of course, from judge to judge, from one generation of judges to the next, from country to country. Every judge is part of his people. At times he lives in an ivory tower, but my tower is on the hills of Jerusalem, not on Mt. Olympus. As a judge, I am conscious of what is taking place in my country. It is my duty to study my country's problems, to read its literature, to listen to its music. A judge is a creation of his time. He moves with history. All of these conditions shape his judicial philosophy. And it is the judge's judicial philosophy that guides him in the hard cases. This philosophy may not contain the answer to all the difficult cases, yet it seems to me that without it, there is no proper solution at all.

I would like to point out the following two considerations that shape my judicial philosophy and my subjective beliefs when I use discretion in those very hard cases.

First, law is not an end in itself. It is a means for social order. The court has a social function. A supreme court does not merely solve disputes; it also creates law. It closes the gap between law and life. It preserves democracy both by protecting the political process and by guaranteeing human rights. It safeguards the rule of law. The judge is of course an objective arbiter. But he is an arbiter with a special function. We should realize that we are a social institution with a social function. It is our function—alongside the legislature—to preserve stability and change. “Law must be stable,” said Professor Roscoe Pound, “and yet it cannot stand still.”¹¹ Stability without change is stagnation; change without stability is anarchy. We must ensure stability through change. The law, like an eagle in the sky, is only stable when it moves. We should recognize that our function is to effect both stability and change, within the constitutional scheme, and through action that is sensitive to the other branches of government and to the idea of the separation of powers. But within these limitations, we should not view the closing of the gap between the law and the needs of the community as a function that is foreign to us.

Second, whenever all other objective considerations fail, the stage is set for reflection upon the most important value—justice. Of course, justice accompanies our judging throughout the adjudicative process. But at that final stage, when the objective considerations fail to produce one and only one answer, justice is foremost. At this point, law and justice unite. Law is justice, and justice is law. The justice does justice.

Let me end my lecture with a personal note.

When I was only three years old, World War II broke out. In 1941—when I was five years of age—my family and I were placed in a

11. ROSCOE POUND, INTERPRETATIONS OF LEGAL HISTORY 1 (1923).

ghetto, in Kovnus, Lithuania. We were in hell. Out of 30,000 Jews in the Ghetto, only several hundred were saved. I am one of very few survivors. Almost all my family was killed. Most of the children of the Ghetto were shot in the streets. I was saved by miracles and the grace of a Lithuanian family. What is my lesson from this experience? It is not hatred; it is not hopelessness about the nature of the human being. Quite the opposite: my lesson is a belief in the human spirit; my lesson is the centrality of the human being; my lesson is equality among all of us; my lesson is that we are all made in the image of God. Protecting dignity and equality and doing justice is my North Star, which guides me in my difficult moments.

I see my role as judge as a mission. Judging is not merely a job. It is a way of life. An old Jewish Talmudic saying regarding judges is the following:

You would think that I am granting you power?

It is slavery that I am imposing upon you.¹²

But it is an odd sort of slavery, where the purpose is to serve liberty, dignity and justice. Liberty to the spirit of the human being; dignity and equality to everyone; justice to the individual and to the community.

This is the promise which accompanies me to the courtroom daily. As I sit *at* trial, I stand *on* trial.

12. TB *Horayot* 10b.