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Essays

SOME REFLECTIONS ON THE QUALITY OF LIFE OF A UNITED STATES DISTRICT JUDGE*

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I was eight years old when I first encountered the federal judiciary. The St. Louis Cardinals, then known as the Gas House Gang, were engaged with the Detroit Tigers in the seventh game of the 1934 World Series with the incomparable Dizzy Dean pitching for the Gang. In the top of the sixth inning, Ducky Medwick, stellar left fielder for the Gang, tripled to center and slud[1] high and hard into Marv Owen, the Tigers' third baseman. Owen was shook[2] up; Medwick later scored. When Medwick returned to his position in left field in the bottom of the sixth, Tiger fans pelted him with overripe fruit and vegetables, and pieces of grandstand and bleacher seats.

Seated behind the first base dugout was a craggy-faced old codger with a fedora scrunched down over his white mane of hair: the Commissioner of Baseball, Judge Kenesaw Mountain Landis, a former activist federal judge. The Judge beckoned Frank "Fordham Flash" Frisch, second base playing

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Judge Marshall has had a distinguished career as a lawyer, professor, and judge. After a number of years in private practice, Judge Marshall returned to his alma mater, the University of Illinois, to become a Professor of Law. He was later appointed United States District Judge for the Northern District of Illinois where he has served since 1973. Judge Marshall has taught at the Law School of the University of Chicago, The Harvard Law School, and is presently an Adjunct Professor at Chicago-Kent College of Law.

1. The past tense of "to slide," per the forementioned Jay Hanna Dean.

2. The past participle of "to shake," *id.; see also* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 2100 (P. Gove ed. 1961).

manager of the Gang, who trotted over to the Judge's box. "Get that guy out of left field before there's a riot," the Judge enjoined. Frisch protested: it was the seventh game of the Series. The Judge responded, "If you can't win without him, you don't deserve to win." Medwick was benched; the Gang won 11-0. I still can't believe it actually happened.

Thus it was that I learned of the grace, power, and majesty of the federal judiciary. I concluded that the office of the Commissioner of Baseball was the best job in all the world. It was then, subconsciously, I resolved to become a federal judge and the Commissioner of Baseball. I made one, but not the other. As Tinker, Evers, and Chance learned in 1906, you can't win 'em all.

My next encounter with the federal judiciary was in law school. When I was a student, the systematic study of federal courts and their jurisdiction was just a gleam in Henry Hart's eye. We were unsystematically exposed to the federal judiciary through a basic course in constitutional law, a course in which we spent far more time studying federal judicial power, relating to the commerce clause and substantive due process, than we did the first eight amendments.

My next and most significant exposure was my law clerkship with Judge Walter C. Lindley of the Seventh Circuit Court of Appeals. No scholarly tributes have been written of Judge Lindley, although he was deserving. He was the most productive judge on that court in those days. Almost every week he finished the two opinions assigned to him within a week. A law clerk was a hindrance. We worked on only a fraction of the assigned cases. During my time with him, he wrote sixty-four opinions and three dissents, plus a significant number of opinions for the then Emergency Court of Appeals. He worked at no more than half of his capacity. And the cases in those days were not simple diversity based personal injury cases. They embraced the full spectrum: antitrust, securities fraud, commodities markets, class actions, major criminal prosecutions, patents, trademarks and copyrights (he devoured patent cases), and yes, even *habeas corpus*.

In the ensuing twenty years, my exposure to the federal judiciary quickened and deepened. I tried both civil and criminal cases and appealed like cases in the federal courts. I taught federal civil procedure and federal courts and jurisdiction. My trial advocacy teaching efforts also had a substantial federal cast.

In 1973, quite mysteriously, I was selected for a district judgeship in the Northern District of Illinois. I say "quite mysteriously" because I was a Democrat and those were Republican years. I was convinced that I was being offered the best job a lawyer—particularly a litigator—could ever want. I loved the courtroom, the contest, the combatants, the strategy and tactics, the hard, oh so hard, work of the lawyers and the rough but substantial justice that was administered in the trial court. The idea of immersing myself in it every day, not just six or eight or ten or even twelve cases a year, but every day, was too good to be true. And the most amazing thing was that they were going to pay me for doing it. They were going to pay me an annual salary of $40,000, a salary which exceeded any guaranteed income I ever received. Finally, it was for life!

My first two or three years on the bench were like a honeymoon. Within weeks of my appointment, three consolidated cases involving alleged race and gender discrimination in the Chicago Police Department were assigned to me. The evidentiary hearings were long and demanding: weeks of testimony on an application for a preliminary injunction, more weeks on the merits, and more on the implementation of the decree. There were superb lawyers in the case, giving and asking no quarter. The stakes were high, the talent commensurate. Suffice it to say that this experience epitomized the role of the federal judiciary—to interpret and apply the Constitution and laws of the United States.

Of course there have been other cases: challenging criminal prosecutions, securities frauds, patents, trademarks (oh, did I go to school on that subject), products liability, and even *habeas corpus*. No day has been the same as another. No case the same, no lawyer the same, no witness has been the same. Judging has been everything I had hoped it would be.

But the grumbling started. I'm not sure when, how, or why it started. Sometimes I think it began with *The Brethren*,[3] that kiss and tell book about the Justices of the Supreme Court. Maybe it was the first litigation over federal judge salary diminution. Maybe it was initiated by some who did not approve of what the federal judiciary was doing and undertook to persuade federal judges that they were doing too much; that is, they were working too hard. Whatever the origin, we know the result. An avalanche of complaints by judges about their jobs ensued. Supreme Court Justices, court of appeals judges, and district judges in a chorus of complaints stated that they are overworked and underpaid. We have too many of everything: prisoner cases, *habeas* cases, diversity cases, class actions, frivolous cases, long cases, and inappropriate jury cases. Aggravating the whole mess is an incompetent bar. The result is that we are not going to be able to recruit capable people for the federal bench. The system will break down. Indeed, it may vanish.

Let me pause for a moment and define the position from which I speak. I speak to you as a single district judge. I am not a chief judge, nor the member of any committee that is concerned directly with the administration of justice. I do not speak for any of my Northern District of Illinois colleagues. As Red Barber, for many years the voice of the Brooklyn Dodgers, used to say, I speak only from the "catbird's seat," my own perch, my own perspective.

From that perspective the overburdened, overworked, and underpaid federal judiciary is a myth. First, let's talk about the gross numerical workload. Last year 465 new civil cases and 50 new criminal cases were assigned to me by lot. At any given time, my inventory of pending cases is 350 civil and 12 criminal.

Of the civil cases, seventy-five percent present federal questions and twenty-five percent are diversity actions. More than ninety-five percent are disposed of without trial. Thirty percent of the civil cases are just plain collection actions: goods sold and delivered, services rendered, accounts stated,

3. B. WOODWARD & S. ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT (1979).

notes, mortgages, and ERISA contributions. Twenty-five percent allege civil rights violations in the broad sense: discrimination in employment and housing; excessive force, unlawful searches, or illegal arrests by police officers; constitutionally impermissible prison conditions and behavior; first amendment rights; and *habeas corpus*. Fifteen percent of the civil cases are commercial actions: contracts, securities, unfair competition, and civil RICO. Ten percent are common law personal injury actions, including actions brought under the Federal Tort Claims Act. Ten percent involve alleged antitrust violations or patent, trademark, or copyright infringements. Three percent involve denial of Social Security disability benefits. The remaining seven percent concern whatever cases are left: truth in lending, odometers, wrongful debt practices, and freedom of information.

Insofar as the criminal cases are concerned, seventy-five percent are disposed of without trial. They run the gamut from income tax violations through gun violations, welfare fraud, mail fraud, mail theft, narcotics offenses, hijacking, RICO violations, official corruption charges, and bank robbery.

During the course of a year, I will try forty cases consisting of twenty-five to thirty civil and ten to fifteen criminal. Every case on my calendar has a trial date. In civil cases I set the trial date within thirty days of the commencement of the action. In criminal cases, the date is set at the arraignment. I do not keep track of my own disposition times, but in 1984 the judges of the Northern District of Illinois, on the average, disposed of criminal cases within six months of indictment and civil cases within five months of commencement. Civil cases that were tried went to trial within fourteen months of the issue being joined. I submit that this is not a system which is breaking down.

During 1983, the sixteen full-time equivalent judges of the Northern District of Illinois tried twenty-four cases that ran ten to nineteen days. Six cases ran longer than twenty days. The average length of a bench trial was two and a half days. The average length of a jury trial was three and a half. My own longest case in 1984 included a ten day criminal jury trial, and an eight day civil bench trial. These are not oppressive figures.

As I previously indicated, I average 350 civil cases in my inventory at any given time. One of my colleagues averages less than 200 and a couple average more than 500. We all receive the same number of cases assigned by lot, and we all stay current with our case flow. The differences in inventory are attributable to differences in case management techniques during the first ninety days a case is pending.

One aspect of the judging job that law teachers, lawyers, and the public sometimes overlook is the extensive motion practice. Motions to dismiss, for summary judgment or for preliminary relief, go to the merits of the case. I write seventy-five to a hundred memorandum orders a year on these motions, ranging in length from three to fifty pages. I decide as many or more than that through one paragraph minute orders or oral statements from the bench. All these motions have been fully briefed. Most of them are ruled on within sixty days of the filing of the last brief. In the main, they do not include discovery matters, for I ask our magistrates to supervise most of that

work. In criminal cases, I rule on all discovery motions from the bench. I have frequently observed that I see very few frivolous complaints; I see a considerable number of frivolous, dilatory motions.

The ultimate action in the district court is the trial of the case. There is only one time and place that a district judge can try a case: in a public courtroom during normal working hours. That being so, the brief reading and memorandum writing must be done early in the morning, in the evening, or on the weekends. For this reason, I regard the motion practice as the most burdensome aspect of the job.

In addition to my basic workload, I am a member of our court's sentencing council. This is a voluntary activity where a half-dozen judges meet weekly to review the upcoming cases set for sentencing before them. My colleagues on the council and I study and discuss about 350 pre-sentence reports every year. I am also a member of the Judicial Ethics Committee; consequently, I annually review 100 financial disclosure statements filed by federal judges. The committee meets twice a year for two or three days, and I devote about three days a year to reviewing the financial disclosure statements. I am a member of two federal criminal case jury instruction committees—one local and one national. The meetings take eight to ten days a year plus preparation preceding the meeting. I am active in continuing legal education and participate in about six programs a year. In addition, I teach a course at a Chicago law school.

My correspondence is extensive. I answer every letter I receive unless it relates to a pending case, is anonymous, or is irrational. Many are letters from persons confined in either jail or prison. Of course, I cannot advise them, but I can and do guide them to a source of advice.

I get to my chambers every morning between 7:00 and 7:30 and occasionally as early as 6:00. I stay in the evenings until 5:30 or 6:00. I work a couple of hours at home three or four evenings a week and about eight hours on the weekend. It adds up to a sixty hour week. I do not regard myself as overworked. As a litigating lawyer my hours were significantly longer when engaged in trial. As a law professor, they were slightly, but not appreciably, shorter.

One reason district judges can handle the load is the staff that we are provided. We have first rate secretarial service; two law clerks (the best and the brightest); a courtroom deputy clerk who administers the call and a full-time court reporter who is willing to hold court when I want to hold court.

My chambers are spacious and comfortable. A courtroom is assigned to me together with a jury room, a witness room, a clerk's office, and a court reporter's office. I have a personal library, plus access to the courthouse library, word-processing equipment, and Lexis. There isn't a lawyer in the country with a better staff or better working conditions.

At the present time, a district judge is paid $76,000 a year for life. Since 1973, the salary has increased ninety percent. At age sixty-five, with fifteen years of service, I will be eligible for senior status. This means that I can work as much or as little as I want and continue to receive any increments in the salary of the office. Or if I choose, I can resign to do whatever I please

and receive an annuity based on the salary of the office at the time of my resignation.

Like you, I read from time to time about those big dollars that are supposed to be available in private practice. Of course some lawyers reap enormous incomes. Most of them practice in the megafirms. That's a life I don't choose to lead again, with their committees, marketing, multi-city offices, and footnoted announcements. The fact is, my salary exceeds what most lawyers net, and I don't have late night phone calls, slow payers, and client "entertainment." Instead, I go fishing.

The important thing is the challenge of the job. Federal judges are the last of the generalists. We hear all types of cases. Yesterday it was a criminal case, today it's a patent case, tomorrow it will be an antitrust case, next week a products liability case, and a month from now a securities fraud case. It is a potpourri of our profession and our society. I love it. Now let's talk about some of the burdensome areas.

Prisoners' Civil Rights Cases. In 1984, the Northern District of Illinois disposed of 317 prisoner complaints, an average of eighteen per judge. There are 3500 maximum security state prisoners in the district, plus 2000 persons incarcerated in the Cook County Jail. Thus, about five percent were complainants in federal court during the year.

Most of the complaints seek review of in-house discipline, a subject over which we have virtually no authority. These complaints are promptly disposed of on the papers. But some prisoners complain of guard or inmate brutality, and some prevail in jury trials. Some complain of the conditions of their confinement, and discovery discloses that the complaints are well-founded.

In 1976, an inmate at Stateville named Henry Cook filed a *pro se* class action complaining of the lack of adequate medical services in the penitentiary. Lawyers were obtained to represent him. In the course of the discovery proceedings, the lawyers for Mr. Cook found a report commissioned by the State Department of Corrections in 1973, three years before Mr. Cook filed his suit. That report described the delivery of medical services at Stateville in the following terms:

> There are no bylaws, rules and regulations. . . . The preponderance of care in the hospital is rendered by inmates.[4]
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> * * *
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> For the most part [medical records] are worthless. . . . The records are pretty much under inmate control. . . . .[5]
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> * * *
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> . . . If the Board of Health were asked to inspect [the kitchen] I'm sure they would order it closed.[6]
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> * * *
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> [T]his report . . . is not a criticism of any individual, but of a Correctional System that has paid little or no attention to the medical

4. Kenneth Babcock Report, Illinois Prison Survey 29 (July 13, 1973).
5. *Id.* at 30-31.
6. *Id.* at 34.

needs of its inmate population.[7]

Today, thanks to Mr. Cook's lawsuit and the cooperation of the incumbent Department of Corrections staff, good medical service is delivered to the inmates of Stateville under the observation of a volunteer panel of five non-state employee medical experts.

I am certain that *pro se* prisoner complaints, often aided by court-appointed or volunteer lawyers after filing, have contributed greatly to the improvement of the penal system. These lawsuits have sensitized state officials to the conditions of confinement. Officials now comprehend that prison residents are living in a state of captivity, albeit necessarily so. As a result, officials have undertaken to humanize the conditions of that captivity.

In addition, the *pro se* prisoner is trying to come to grips with his or her situation in a rational, non-violent way, perhaps for the first time since childhood. Would we rather have the prisoner do that or sit in his cell fashioning a shiv?

Habeas Corpus. One can get the impression that federal judges do nothing but review state court convictions and, in some areas of the country, turn state convicts loose as fast as state courts can put them away. It just isn't so.

First, let's not forget that *habeas corpus* is a constitutional remedy that can be suspended only in time of rebellion or invasion. The availability of the writ of *habeas corpus*, more than anything else, distinguishes us from totalitarian nations. Keep in mind also that federal *habeas corpus* is available to state prisoners only to remedy violations of the United States Constitution and then only after the prisoner exhausts available state court remedies.

In the year 1984, the judges of the Northern District of Illinois decided 236 *habeas corpus* cases, an average of fifteen per judge. I have no statistics on how many were granted, but in my twelve years on the bench I have granted ten. Assuming that in 1984 each Northern District judge granted one, that is a total of 16 out of 236. Of those, the court of appeals will probably reverse half. So the federal judiciary in the Northern District of Illinois ordered new state court trials for eight or nine state prisoners.

Eight or nine trials ordered out of how many? Not out of 236. In 1982, there were 16,000 felony convictions in Cook County, and 8,000 persons went to Illinois Department of Corrections facilities from the counties in the Northern District of Illinois. Today, those 8,000 persons are potential *habeas corpus* petitioners. Thus, the impact of *habeas corpus* on the prosecution of state offenders is infinitesimal. The impact on the workload of a federal judge is equally minimal.

Most of the *habeas corpus* petitions seek review of the adequacy of the evidence under the "beyond a reasonable doubt" standard. In my experience, I have encountered meritorious cases involving a serious conflict of interest for trial counsel, a plea of guilty entered under the influence of heroin, and a knowing use of perjured testimony.

Class Actions. Once again, one can get the impression that all district

7. *Id.* at 37.

judges do is manage huge class actions in which lawyers generate enormous fees for themselves. Generally, I see about six class actions a year. I have tried one and disposed of the rest, either by settlement or summary disposition. In those instances where the plaintiffs prevailed and substantial relief was obtained, the fees were substantial. But there have been a goodly number of no recovery/no fee cases. Most particularly, I have not seen the class action device used as a tool of extortion. It is an effective device for the disposition of multiple claims. Indeed, its use could be expanded.

Diversity of Citizenship. Twenty-five percent of the filings assigned to me have diversity of citizenship as their jurisdictional basis. Seventy-five percent of the collection cases are diversity cases. This leaves about five to ten percent that are meaningful diversity actions. They are very interesting. They keep me abreast of state tort trends and state commercial law trends—particularly the Uniform Commercial Code.

I believe that diversity jurisdiction is still needed in certain circumstances to protect non-resident litigants. This is particularly true with expanded long-arm concepts. There are foreign defendants who cannot, or at least realistically believe that they cannot, receive a fair hearing in certain pockets of some states. Indeed, in my own district I am aware of cases where the chief law enforcement officer of the state removed federal question cases from state court to federal court with the implicit suggestion that, given the circumstances, he felt more comfortable in the federal court than in the state court.

Frivolous Cases. Of course there is a legal definition of frivolous. But that is not what those who decry the frivolous case mean. They use frivolous to mean a case which, in their subjective judgment, does not "belong" in the federal court and, indeed, does not "belong" in any court. They are offended by actions brought by parents on behalf of their children for perceived wrongs at the hands of school officials. They don't want court calendars "cluttered" by prisoners who seek relief regarding the minimal wants of life. They seem to apply a dollar standard to actions, thus confusing frivolousness with their notions of *de minimis non curat lex.* I see a frivolous case five or six times a year. When I see one, I dismiss it with a one or two sentence order. Most people who bring their complaint to a federal court do not regard their grievance as frivolous, and I share their view.

Inappropriate Jury Trials. More and more I read of cases said to be so complex as to be beyond the ken of a jury. This is frequently said of lengthy trials. Of course one solution is to shorten the trial. Another solution is to bifurcate or even trifurcate the trial. In my twelve years as a judge, I have not had a case tried to a jury that the jury did not comprehend. I recall a complex antitrust action where, at the behest of the defendant, I submitted a ten-page special interrogatory, special verdict. The case took twelve weeks to try. The jury deliberated four days. The jury did not ask a single question during its deliberations. At the end the jury returned the special verdict. Every question was answered correctly; that is, every answer supported the jury's ultimate decision in favor of the plaintiff. It was a virtuoso performance by the six ubiquitous reasonable persons in the box.

In my days as a lawyer, teacher, and judge, I have known few judges in

whom I have had as much or more confidence than a jury. Day in and day out, we judges have our biases. Day in, day out, the multiple person jury, be it six in a civil case or twelve in a criminal case, must work through those biases by the rule of unanimity.

Quality of the Bar. Of course there are incompetent lawyers. There are also incompetent doctors, teachers, airplane pilots, and even judges. I don't see incompetence running rampant in the courtroom to the degree that it is painted.

I don't tolerate unpreparedness. Before a civil case goes to trial on my calendar, there is full disclosure of the witnesses and their anticipated testimony and of all exhibits. Trial briefs must be filed. Jury instructions for jury cases and proposed findings and conclusions for bench trials must be submitted. Suggested *voir dire* examination for jury trials must be offered. The case is buttoned up and ready to go. The lawyers are prepared. "Incompetence" is a pejorative synonym for unpreparedness.

To the extent possible, the same thing is true in criminal cases. With rare exceptions, I require both sides to identify their witnesses and exhibits. The government almost always agrees to pre-testimony (if not pre-trial) disclosure of section 3500 material. The defense does likewise with respect to pre-trial statements obtained from its witnesses. The parties are called upon to submit instructions before or very early in the trial. The case moves along smoothly.

Incompetence is largely a matter of low judicial expectations. If judges expect and tolerate a bum performance, they're going to get one. If judges hold lawyers to a high degree of performance, that's what they're going to get.

Judges are becoming more and more like baseball fans. They are preoccupied with statistics: filings per judge; dispositions per judge; time of disposition; court of appeals filings; opinions; orders; unpublished orders; decisions without oral arguments; and the utilization of staff attorneys (those invisible courts of appeals). The most significant statistics are these. In 1937, there were 122 million people in the United States. There were 155 district judges, forty-six court of appeals judges, and nine Supreme Court Justices. In 1980, there were 266 million people in the United States, an increase of 220% since 1937. By this time, we increased our number of district judges to 516 and court of appeals judges to 132. Thus, we tripled our supply of judges.

The number of filings per judge rose beyond those proportions. Why did the filings increase? First, because we made the courts more accessible by increasing the number of lawyers, expanding the availability of legal services to poor people, granting the privilege of proceeding *in forma pauperis*, and providing free records for appeals by poor persons. Second, we went through a period of meaningful legislative implementation of the constitutional promise of equality. The beneficiaries of that legislation sought and continue to seek judicial enforcement of their rights. Third, we went through a period where certain state, local and federal government agencies systematically and intentionally failed to discharge their duties. This, coupled with the legislative implementation of basic constitutional rights and

the increased access to the courts, triggered a flow of meritorious litigation. We have not been inundated with spurious, frivolous, vindictive litigation.

In my judgment, federal courts and federal judges are discharging their duties. They interpret and apply the Constitution and laws of the United States to the cases and controversies submitted to them. The quality of my life is challenging. It is exciting; it is good. To borrow from a recent statement attributed to a Supreme Court Justice, "This is a hell of a way to earn a living." Yes, it is a hell of a *good* way.