1 In Search of Great Judges

Playing by Their Own Rules

When the current American chief justice, John Roberts, appeared before the Senate's Judicial Committee during his confirmation hearing, he confided that he did not have an "all-encompassing approach" to his judicial role or to constitutional interpretation particularly. He went on to say that "judges are like [baseball] umpires – umpires don't make the rules; they apply them." He sealed this modest portrayal of judicial virtue by insisting that "judges have to have the humility to recognize that they operate within a system of precedent, shaped by other judges equally striving to live up to the judicial oath." The not-so-implicit message of Roberts's credo was that being a good judge required restraint and forbearance; judges, even and perhaps especially Supreme Court ones, were not in the justice game in any expansive or direct way.

Although this humble depiction of judicial responsibility – "it's my job to call balls and strikes and not to pitch or bat" – will strike a reassuring chord with many, it fails to understand the history and nature of the judicial role in common law countries. That is, if the acknowledged pantheon of great judges is anything to go by, judges are much more than umpires. Any proposed list of candidates for a judicial hall of fame is far from being characterized by those judges' self-understanding or by an essentially passive and restrained performance of their role. To paraphrase T.S. Eliot, if immature judges follow and mature judges lead, then great judges blaze entirely fresh trails.

The analogy between judging and umpiring is misleading and inaccurate. As far as their common law duties go in both constitutional and nonconstitutional matters, history demonstrates that judges are very much part of the action. It is less about *whether* they change the rules than about *how* they do so. In the last few hundred years of its lifespan, the law has changed, and judges have been some of the main architects and artisans of that change. Staying with the baseball analogy, whereas some umpires claim to call balls and strikes "as they see 'em," others assert that "they ain't nothin' 'til I call 'em." People might be fated to play a baseball game of the judges' choosing, but the judges are also very much part of the game; they play by as well as change the rules as they go along. In legal terms, not only what counts as "balls" and "strikes" but also what counts as "baseball" changes over time. And it is the judges, for better

and worse, who are the purveyors and guardians of these changes.

That being said, if judges are not umpires, neither are they godly figures. They have no special, let alone sacred, insight into the meaning of legal texts or the nature of social justice – judgeliness is not next to godliness. Just as there is no way to simply read off the meaning of laws, especially constitutions, in an impersonal exercise of professional technique without resort to larger and contested issues of social and political values, there is also no way for judges to negotiate that fraught terrain with a quasi-divine certainty or supernatural wisdom. As Francis Bacon observed, "whoever undertakes to set himself up as a judge of Truth and Knowledge is shipwrecked by the laughter of the gods." This is a major caution for those who aspire to greatness. Some appreciate the risk and succeed in being great (and some even occasionally laugh at themselves). But others are not so vigilant and court godly derision, as they believe their own hype and lose an appropriate sense of perspective; these contenders are often condemned to a watery grave.

Indeed, there is much to be said for taking judges less seriously than lawyers, and perhaps judges themselves often do. Indeed, this book runs the considerable risk of committing exactly that fault in courting the idea of there being so-called great judges. Greatness is a quality that tends too easily to intimate a superhuman capacity or achievement; critics and commentators also chance the shipwrecking laughter of the gods. Consequently, a respect for judges

should be tempered with a little irreverence. Peter Cook of *Beyond the Fringe* (a celebrated English satirical revue of the 1960s) offered a suitably humorous reminder of this in his memorable character of a working-class man:

> Yes, I could have been a judge but I never had the Latin, never had the Latin for the judgin', I never had it, so I'd had it, as far as bein' a judge was concerned. I just never had sufficient of it to get through the rigourous judging exams and so I became a miner instead. I'd rather have been a judge than a miner. Being a miner, as soon as you are too old and tired and sick and stupid to do the job properly, you have to go. Well, the very opposite applies with judges.

The general problem is not whether or not any judge *ought* to be "a judge of Truth and Knowledge." The fact of the matter is that they *are* treated as if they *do* have that power. Many common law jurisdictions, like Canada, the United States, and lately the United Kingdom, have bestowed that enormous and elevated power on them. Although this may not have been a deliberate decision and may even run counter to the traditional defense of judicial propriety, judges wield enormous power and are often accorded exaggerated respect in their professional capacity to intuit "Truth and Knowledge." Whether or not the gods like it and whether or not they are laughing are almost beside the point. Sometimes mutedly and sometimes uproariously, the judges are effectively laughing right back at them. By personal undertaking or institutional insistence, great judges

are thrust into the political business of "Truth and Knowledge" (or, more pointedly, Justice). And, as is often the case, the joke is on society as much as on anyone else.

So judges, even great ones, are neither heavenly saints nor sporting officials. Those who chance greatness must strive to tread a thin line between an unconvincing modesty (i.e., does anyone really believe that judges are or can be compared to baseball umpires?) and a precious hubris (i.e., does anyone really believe that judges are anything more than ordinary mortals doing a difficult and demanding job?). Judging is by nature an audacious task; however, it is not necessarily the most audacious who are recognized as great. Robert Jackson, a justice of the American Supreme Court, hit the right note when he famously stated that "we are not final because we are infallible, we are infallible because we are final." The last word is not the only word or the best word.

So what is involved in judging? And what distinguishes a great judge from a merely very good one? Of course, the debate over what makes a great judge and which judicial personalities should be included among the hallowed numbers of great judges is as heated and as divisive as any other in the jurisprudential literature. Nevertheless, the obvious difficulties of arriving at any neutral or uncommitted account of what makes a great judge and who should be included in this hypothetical judicial hall of fame have not managed to dissuade lawyers and jurists from engaging

in such an exercise. Indeed, developing lists of the essential qualities that great judges should possess and determining which judges meet such exalted standards has become something of a jurisprudential parlor game.

It should come as no surprise that this debate over great judges is as contested as the broader engagement over the nature and purpose of law and adjudication more generally – the two are connected in obvious and inextricable ways. The particular standards of what counts as a paradigmatic example of good judging will be informed by the protagonist's commitment to a particular theory of law and adjudication. For instance, whether judges are to be praised for their technical expertise, their political acumen, or both will largely depend on the background understanding about the task in which the judges are supposed to be engaged and the resources that they are expected to utilize. Those with a more positivistic account of what law is (i.e., that there is or should be some important differentiation between the existence of legal rules and their moral merit) will laud very different traits from those with a more naturalist orientation (i.e., that there is and should be a tight connection between the existence of legal rules and their moral worth). Fraught with difficulties and disagreements, the debate in and around great judges is simply one more intellectual location for further engagement over what law is and is supposed to be.

For example, a classic and esteemed effort to identify judicial greatness is made by Henry J. Abraham. He offers a list of the top ten qualities of a great American judge to which

all judges should aspire and that a small handful of judges actually do embody. For him, whereas Hugo Black and Lewis Powell make the cut, Thurgood Marshall and Learned Hand do not. Although Abraham's list contains many predictable qualities (e.g., craftsmanship, personal integrity, and proper training) that most observers would accept, it also includes a number of question-begging requirements (e.g., demonstrated judicial temperament, absolute fair-mindedness, and a solid understanding of the proper judicial role of judges under the Constitution) that go to the very heart of the debate over what makes a judge great and, by implication, what the judicial task is all about. Moreover, there is no particular reason to think that the qualities of a great American judge will necessarily be the same as those of other jurisdictions. Although there will obviously be some substantial overlap, the demands of one society's legal system and its civic expectations might manifest themselves in a significantly different set of vaunted judicial qualities.

But the main problem is that Abraham's criteria do not so much provide answers to the problem posed, but simply rephrase the main questions to be answered. Determining what counts as "demonstrated judicial temperament" and "a solid understanding of the proper judicial role of judges under the Constitution" is the very stuff of jurisprudential debate. Unless you subscribe to some Platonic notion that "essence or true existence are always what they are, having the same simple self-existent and unchanging forms, not admitting of variation at all, in any way, at any time," the

qualities of judicial greatness are historically contingent; they shift and change over time. There is no one set of qualities that define a great judge. Like beauty and goodness, greatness is an ideal that is always on the move. Prevailing conceptions of greatness are simply the currently unchallenged but soon-to-be-resisted markers for a working consensus that was temporarily reached.

A sampling of judicial biographies reveals that they are as much about the appropriate criteria by which to assess judicial achievement as they are about the particular judge under scrutiny. In a recent biography on another American titan, Billings Learned Hand, Gerald Gunther compares him with another reputed colossus of the American legal scene, Oliver Wendell Holmes Jr. In touting the virtues of Learned Hand over Holmes, he argues less that Learned Hand has the qualities of a great judge than that the qualities of a great judge are defined by and embodied in Learned Hand. Although Learned Hand's judicial record is marked by "disinterestedness and lack of crusading zeal," this did not condemn him to intellectual impotence, because, according to Gunther, "his decisions were noted for . . . superior craftsmanship and for creative performance within the confines set by the executive and legislative branches." In campaigning to include a judge on the list of undisputed great judges, biographers shape as much as respond to the conditions of membership. "Greatness" is itself revealed as a crafted quality, not a naturally assumed distinction or enduring status.

Any effort to locate the essential and enduring qualities of a great judge, therefore, will be very much a function of the view that the list maker has of what law is. For me, the common law is a dynamic and engaged activity in which how judges deal with rules is considered as vital as the resulting content of the rules and actual decisions made; judges are social artisans of the first order whose impact, although often more subtle and understated than their political counterparts, is undeniable. The common law is better understood less as a fixed body of rules and regulations than as a living judicial tradition of dispute resolution. Because law is a social practice and society is in a constant state of agitated movement, law is always an organic and hands-on practice that is never the complete or finished article; it is always situated inside and within, not outside and beyond, the society in which it arises. In short, the common law is a *work in progress* – evanescent, dynamic, productive, tantalizing, untidy, and bottom-up: it is more tentative than teleological, more inventive than orchestrated, more fabricated than formulaic, and more pragmatic than perfected.

Having this experimental, catch-as-catch-can, and anything-might-go sense about it, the common law recommends that its judicial personnel also adopt some of those qualities. Although it is clearly a great help to possess an excellent set of technical skills, these will not be enough in and of themselves; they are a necessary but not sufficient condition of greatness. The battery of adjudicative techniques for rule application does not amount to a self-contained or

self-operating technology: the techniques only make sense as part of a larger understanding of law as a rhetorical and dynamic enterprise. Being a practical activity, adjudication does not consist of a series of formulaic applications in an abstract space. Instead, it is more profitably understood as an organic and judgment-based engagement in real time and in real places; it is less an occasion for logical operations than an exercise in operational logic.

Nonetheless, although the learned knack of using legal materials with adroitness and dexterity is not to be underrated, the effect of such a limited depiction of lawyers' special and distinctive expertise is misleading. It can too easily be used to avoid the democratic responsibility of justifying judicial power and authority by reference to the real-world pressure of getting the job done. The depiction of the judicial craft as an inward and insular undertaking serves to cut off law and adjudication from the sustaining sociopolitical context and rich historical resources from which they gain their vigor. Legal artistry demands more than technical proficiency. The best judicial craftspersons are not those who simply reproduce mechanically and mindlessly old arguments and trite analogies; they are those who can rework legal materials in an imaginative and stylish way. A bare legal craft can too easily acquire the elite habits of a Masonic order and fail to meet or sabotage its civic obligations: a job well done is not always its own reward.

To be worthy of the highest professional prestige, lawyers and judges must nurture a sense of social justice and