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# Should a Judge Seek To Help Repair the World?

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It's not, though, that the judge might be looking hither and thither for a case—or a way—to help repair a perceived injustice. Instead, it's typically about what a judge can and should do when faced with a case that affords her the opportunity to create that goodness, if you will, for the “wronged” litigant, and for those (similarly-situated) who might benefit from the judge's “idealistic” decision.

Some might have titled this essay differently. They might call it, “May Judges Use Their Robes To Make Things Right?” Wouldn't the world, after all, some would argue, be a better place if a “society's ombudsman” of sorts dressed in black robes—could determine every case's outcome in Voltairian “best of all possible worlds” terms? Judges capable of truly looking at cases from both sides who somehow could always undo wrongs that needed to be righted.

“Knight-errant”! A term brought to the fore by the greatest common law judge in American history, Benjamin N. Cardozo. As he, seemingly opposed to this hypothetical Voltairian judge, oh-so-poetically, put it: A judge “is not a knight-errant, roaming at will in pursuit of his [or her] own ideal of beauty or goodness.”

In his poetry Cardozo perhaps overstates his point. The real issue is whether it is a judge's proper role in any case that pits the potentiality of a “righteous” judgment—one that a thoughtful, caring citizenry might readily applaud—against one doomed to precedent, to decide it in a way that makes the judge (deservedly) sleep better having performed that quixotic “goodness.” That tilting at windmills to which some judges aspire, but rarely admit, even to themselves, as Judge Richard Posner so aptly argued (“they are simply un-self-aware”).

It's not, though, that the judge might be looking hither and thither for a case—or a way—to help repair a perceived injustice. Instead, it's typically about what a judge can and should do when faced with a case that affords her the opportunity to create that goodness, if you will, for the “wronged” litigant, and for those (similarly-situated) who might benefit from the judge's “idealistic” decision. Cardozo's formulation rebukes the judge performing his function as a jurist in the mien of what we now call “activist” judging. Put otherwise, a judge deciding in a way to fix something in disrepair from her idiosyncratic viewpoint.

Consider this example. Few will dispute that the U.S. Supreme Court's decision in *Brown v. Board of Education*, perhaps the most consequential holding of the 20th century, pitted an entrenched status of segregation in places around the United States against a forward looking—maybe, forward thrusting—view of what America should “ideally” be.

Still, even though evolving precedent had already begun the trek past the “separate but equal” doctrine of *Plessey v. Ferguson* along the slow road away from segregation, many then, even now, have viewed *Brown* as an “activist” decision designed by Chief Justice Warren to carry the nation away from its horrendous racial past. Was the Chief Justice, motivated by his dismal role in the Japanese Exclusion, acting as a knight-errant? Had he simply interpreted the evolution of existing precedent in an “idealistic” manner (per Cardozo's

phraseology) that was already predestined for the court's decision? Or, finally, was his policy-making decision, if I might use the term, right down the middle of the plate?

Perhaps only biographers or psychiatrists of Warren and his eight Brothers might know if the Court's members decided that way due to evolving precedent, or because they simply determined that both the executive and legislative branches of government had failed to right the wrong of segregation. That, accordingly, *they*, the Court's members alone, were the last resort to fix it. Or, as we phrase it here, did they decide the case intending to make the world better?

And yes, maybe the iconic *Brown*, as a deliberately do-gooder decision, stands as a beneficial obelisk in the desert. Or maybe *Brown* is not as an obelisk at all—that what occurred in *Brown* is a daily occurrence at every level of the judiciary. Meaning that judges, every day, try to address injustices and somehow find legitimate ways, sometimes only ostensibly employing precedent, to create “favorable” results notwithstanding seemingly adverse precedent.

We tend to view judges as above the fray. But isn't it true that oftentimes, either by design or individual choice, they become part of the fray? Maybe even benevolent potentates thereof.

Maybe, though, the premise is largely off kilter. It's not about judges employing a wild card that allows them to decide cases in ways that make them comfortable with the results they reach. Do they wake up in the morning, wiping sleep from their eyes, deciding “how can I improve the world today?” Certainly not. But when the legal papers in a new case are presented to them, is their first reaction to quickly determine what the law allows them to do given the facts presented to them? Or do they first have a reflexive reaction to what is presented and say to themselves, “This is wrong. How can I make this better?” Or do they even articulate to themselves their inner thoughts?

Indeed, before they ascend the bench (even for the first time), they have views about abortion, same-sex marriage, restricting houses of worship due to COVID-19, undocumented immigrants, mass incarceration, the role of incarceration, etc. And these and other beliefs that have guided their lives guide them on how, regarding *these* issues, the world could be better. And, whether they acknowledge it or not, some—indeed, many—apply the existing case law, perhaps even unaware of their personal predilections that told them, while wiping sleep away that morning, the result that will “make the world better”—at least to them. Cardozo recognized that best—and he didn't require a judge to lie on a psychiatrist's couch to admit to himself what was going on. Cardozo instinctively knew that it just was.

Did Earl Warren, even though new to the court with no judicial experience, even need to review precedent to determine where he intended to go with *Brown*? And how relevant is it that he had been a lifetime politician, never previously a judge? Something to think about.

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And one thinks about all this, especially today, when we mourn the loss of that greatest of legal giants, The Honorable Jack B. Weinstein, who so clearly looked at the inequities of the world and urgently set about to repair them.

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