Address: The Art of Judging

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Two hundred and six years ago this morning a crowd of eight thousand men invaded the Hotel des Invalides in Paris, and seized muskets, powder, and cannon. Whereupon someone cried out, "To the Bastille!" In the afternoon, Louis XVI returned to Versailles after a day's hunting and made this diary entry: "July 14: Nothing."

It is my fond hope that at the end of this day's events you will not be tempted to draw the same conclusion, even though continuing judicial education is not in the same class as storming the Bastille. There is, however, one similarity between me and the Paris mob. Both our efforts may have been misdirected. For the Bastille housed only seven well-to-do prisoners who didn't particularly want to be liberated, and my audience knows as much as I about the art of judging and probably does not yearn for liberation, at least by me.

I blame the Chief Justice for getting us into this fix. Of course I was delighted to be asked to speak to you. But your Chief is most beguiling and while I was casting around for a subject, he chose "The Art of Judging." I immediately thought of G.K. Chesterton's comment:

> Any man with a vital knowledge of the human psychology ought to have the most profound suspicion of anybody who claims to be an artist, and talks a great deal about art.[1]

So I tread warily. We are not interested in resonating rhetoric and high-flying generalities but rather some insights into how we can do our job better. What I propose to do is try to identify with some concreteness what we mean by the "art" of judging, how we might go about acquiring it, and why, in these troubled times, the game is worth the candle.

What do we mean?

"Art" in the classic sense refers to working with words, sounds, colors, forms, or movements to create beauty. We really can't claim this as our arena. The word can also apply to the principles and methods of a trade or craft, as in "the art of baking." While this concept is getting close, it doesn't quite reach us because methods and principles alone will not raise us to the pinnacle of excellence which would deserve to be called "art."

What fits us best, I suggest, is the concept of "craft plus." Stephen Sondheim, the composer, defines "good art" as "a combination of emotional response and craft." In our work the combination would be craft and intellectual response, with a dash of intuition added. The American Heritage Dictionary has a formulation that carries this idea: "a specific skill in adept performance . . . requiring the exercise of intuitive faculties that cannot be learned solely by study." The lawyer-author, Charles P. Curtis, illustrated the concept: "Your best, your very best, must be done as a matter of course, as a sequel of yourself. It drops from you as a part of yourself. In the hand of a good surgeon, the knife is another or a longer finger."[2]

So, for our purposes, let us use the word "art," as in "the art of judging," as the state of rare excellence achieved by a top performer in a complex discipline functioning at his inspired

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[1] Quoted in Charles P. Curtis and Ferris Greenslet, eds., The Practical Cogitator. 3d ed., (Boston: Houghton Mifflin Co., 1962), p. 482.

[2] Charles P. Curtis, A Commonplace Book (N.Y.: Simon and Schuster, 1957), p. 135.

best. But saying this still doesn't move us very far along. For what, under this definition, would separate us from most computer programmers? My answer would be that if we are to apprentice in the art of judging, we must begin with a deep-seated reverence for our role.

A judge by definition is not one whose goal is material reward. The reverse, however, is not true; being a judge does not signify a love of penury. All good judges could prosper in law practice. A judge also gives up certain freedoms -- to associate in business, to be gregarious, to support causes. Why? The simple answer is that we perceive, distinctly or dimly, in our restrained model of democracy, the uniqueness and sacredness of the calling of individuals appointed to pronounce judgment, to decide who shall inherit property, who shall have custody of children, who shall be paid damages, who shall be deprived of freedom, whether individuals shall prevail against the state, and even whether actions of the executive and legislative branches have violated the constitution.

This function, affecting liberty, property, privilege, duty, power, and right, is sacred and knows no degrees of value. The court of first instance and the court of last instance, though having different roles, are equally important. We should make no distinction between trial and appellate judges as to value or prestige. Nor between state and federal judges. Nor between courts of general and specialized jurisdiction. Reverence for the role of judge embraces this unitary concept of judging.

With these thoughts in mind, I sought to identify areas at every level of judging where "art" in the sense I use the word can be practiced. Although I felt reasonably competent to survey the appellate opportunities, I had no license to pronounce on those in other kinds of courts. So I consulted Justices Roberts and Lipez, not only about the appellate function, but about their insights into opportunities for the superior court justice. For insights into the work of the district judge, I thought I could do no better than exploit Justice Calkins, before her memory fades. In identifying these sources, I should make it clear that whatever I say that makes sense must be ascribed to them; the nonsense is mine alone.

Appellate Judging

I start with what comes to mind first, but in truth is today seldom realized -- the elegant, pithy, memorable phrasing of a principle or standard. Holmes, Cardozo, and Hand are cherished in no small part because of the grace of their writing. All of us appellate judges would dearly love to follow suit but the truth is that the volume of published decisions makes us skeptical of the immortality of our prose.

More likely to attract our efforts are less explicitly artistic activities. One is the drafting of an opinion in such a way as to command unanimity. Chief Justice Warren realized that the nation would stand the best chance of healing if Brown v. Board of Education were a unanimous opinion. And, although then an advocate, not yet a Justice, Abe Fortas saw his job, as appointed counsel for Clarence Earl Gideon, as not just to win 5 to 4, but, as Anthony Lewis quoted him in Gideon's Trumpet. "[In] this case -- a constitutional case of fundamental importance, and with political overtones in terms of federal-state relations -- it seemed to me the responsibility was ... to get as many justices as possible .... to have as much unanimity as possible." Similarly, the opportunity often exists for us appellate judges to achieve unanimity without sacrificing principle, if we are only sensitive to unnecessary dicta, abrasive nuances, or loaded words that needlessly exacerbate our colleagues.

Other art-potential opportunities include putting the kind of incisive question at oral argument that really advances the court's understanding of the case; sensing and ferreting out a hidden issue not addressed by the parties; canvassing the record to identify every scrap of

prejudice or of corroboration in order to make the soundest possible harmless error analysis; and so handling the relevant case authorities that sense and principle emerge.

Perhaps as important as anything else is to make clear to the trial judge, if there is a reversal or remand, just what he or she is expected to do. Nothing, I sense from thirty years of postmortem talks with federal district judges, is more aggravating to a trial judge than to read through a lengthy and opaque opinion, which makes a number of exquisitely refined distinctions in which the Olympians partly agree and partly disagree with the result reached below, and, at the end, find the illuminating command: "Reversed and remanded for further proceedings consistent with this opinion." Before settling on this formulation, the appellate judge should ask himself what he really means.

Judging in the Trial Court of General Jurisdiction

Opportunities for artistry in the Superior Court begin with case management. They exist at all times during the trial, become focused at the point of submission to the jury, and involve the element of communication with the outside world at the time of final decision and sentencing. Case management offers a wide field for innovation and experimentation. A masterly use of pre-trials is a major opportunity for a trial judge. During trial, the difference between mere craft and art is found in the judge who sees his role not merely to give a ruling when counsel rings the bell, but to remain alertly, though not obnoxiously, in control whether or not an objection or proffer or request has been made by counsel. The fact that a judgment is affirmed because an issue was not preserved or was forfeited by counsel should be of little solace to the trial judge if, because of his passivity, unfairness crept in.

Working with juries offers a large opportunity for artistry. The crafting of intelligible jury instructions is an obvious candidate. On the one hand, abstract principles exhumed from case law are not designed to aid a jury in a specific context; some adaptation may well be needed. The object is to get through to the average juror. I have been told that sometimes there is too much looking over the shoulder to wonder about the Law Court's reaction. On the other hand, there are some minefields, like "reasonable doubt" instructions where caution may well outweigh valor.

Apart from the formal task of charging the jury, there remain many opportunities to make the jurors feel at home, part of the system, appreciated, and proud. Some judges go out of their way, orally or in writing, to thank jurors for their efforts. Over time, juror alumni must amount to a considerable part of our citizenry. Their collective memory of satisfaction or frustration can be a potent force in determining future support of the judiciary.

Final decision in a bench trial usually requires findings of fact. Here, art consists in taking useful help from counsel, without abandoning judgment, and in framing a minimum number of adequate findings. Even district judges, who are pressed for time and without staff, must somehow put their most salient findings on paper. But what is on paper is not the whole story. A bench decision orally announced is an opportunity to exhibit sensitivity to the parties, to avoid the appearance of arbitrariness, and, if not to persuade all of the Tightness of the decision, at least to carry conviction that a serious effort to do justice has been made.

Nowhere is such an effort to reach out to nonlawyers more important than in sentencing -- not only to explain to the defendant and to the public the reasons for the sentence, but to victims and their families the process the judge followed in reaching the bottom line. It makes a difference whether the victim community leaves the courthouse feeling that the judge was hopelessly unfair and capricious or whether she, though not as severe as she should have been, had conscientiously tried to follow the law and principles of sentencing.

Judging in the People's Court

Now we come to the District Court, where everything comes to a head -- the judge's relations with lawyers, parties, officers, clerical employees in a vortex of cases day after day with little or no supporting staff or equipment. In the other two levels we have discussed, we could identify particular activities that lend themselves to a craft-plus-intuition attempt at excellence. Mining the trial record, drafting a consensus opinion, crafting meaningful jury instructions were examples. In this court, however, as Judge Calkins confessed to me, there are no tricks. Or rather, there is one big trick: the task of coping. Coping with high volume, while giving meritorious cases individual attention.

Not only does a district judge enter a courtroom filled with people, with forty to sixty files awaiting him on the bench that day, but an increasing number of the cases are pro se. This may well reflect the fact that a large segment of the middle class has been outpriced for legal services. And since so many of the pro se's come from this stratum, there is a far greater demand on judges for explanations, for service, for written instructions. Add to this the relative isolation of our district judges, particularly those outside of the Portland area, and we can sense their feelings of harassment and loneliness.

A very specific art challenge for the district judge, essential to the overall task of coping, is sorting, somehow expeditiously going through the day's crowded docket and determining which cases are defaulted, which have reached or are approaching resolution, and which must be resolved. Just how this is done, I have no idea. But the judges do it, probably some more successfully than others. Another challenge is to manage the alternation between the mass handling of a crowded day's docket and the immersion in one or two cases a day or even an occasional five to ten day hearing in a family law litigation. An allied problem -- and opportunity -- is presented by the substance of family law, one of the fastest growing and most sophisticated vineyards of the law. Another is elder law.

Beyond these areas for the practice of the art of the district judge are those we have already identified for the Superior Court -- sentencing, pre-trial management, findings of fact, and oral decision.

<u>How Can We Learn?</u>

Identifying areas and activities where the judge may aspire to the art of judging is only the start of our quest. Our next step is to ask whether such qualities as initiative, innovation, creative improvisation, and intuition are communicable. Six years ago, I launched a feature in the Ohio State Law Journal called "Judges on Judging," in which judges write on something within their experience that might be helpful to others. Chief Justice Wathen has contributed to this series. My essay was entitled "Grace Under Pressure: A Call for Judicial Self-Help."[3]

I related a conversation I had had with a respected judge who had taught negotiating. I asked him, "Can this be taught?" He answered, "Can it be learned? If it can be learned it can be taught. Of course not everything can be taught. While the basic skills and attitudes and sensitivities can be passed on, there is always something more to it. But this is better than trying to do all of it on the job. Anything that is learned wholly on the job can be improved." I then opined: "[T]he essence of learning how to live and work with grace under pressure [is] seeing what the masters do." I invoked the example of art students going to the Louvre to probe the secrets of the masters, and medical students who troop to the operating room theater.

Well, we may not have acknowledged grand masters, but we have among us judges who are exceptionally good at certain aspects of their work, whether it be district court sorting, superior court pre-trials or trial management, or Law Court record reading or opinion

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[3] 50 Ohio State Law Journal, No. 2, 1989, p. 399.

condensing. As Joe DiMaggio once said, "If you've done it, ain't braggin.'" The Federal Judicial Center puts out a newsletter entitled "Chambers to Chambers," containing nuggets that some judge has found useful. Videotaping opens up the possibility of circulating oral discussions to all interested judges. And probably judicial self-help is the best reason for having meetings like this. This undoubtedly happens informally, but some self-conscious attention to making sure that each level of court takes time every once in a while to exploit its own members would return dividends disproportionate to the investment.

Why Bother?

I am deeply conscious of the fact that I am speaking to you at a time when Maine's support for its courts has, for some years now, been disgracefully inadequate. Your compensation is not only low compared to most other states but you alone among all state employees have not had an adjustment to reflect cost-of-living increases for the past four years. Your trial courts are the most undermanned in the nation, and computers are still almost nonexistent. Isn't this the worst time to talk to you about pursuing the art of judging?

I think it may be just the right time. Let us embrace the primal faith that if the lawmakers and people of Maine come to realize that they are blessed with a cadre of judges bent on excellence in the worst of times, they will eventually accord the judiciary its intended place as a fully coequal and independent branch of government. As an outsider privileged to have a ringside seat, I can say that the Maine judiciary at all levels is well on the way to earning Churchill's tribute to his countrymen -- "This is your finest hour."