

## THE HISTORY OF AN IDEA

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Today we mark the twenty-fifth anniversary of *Against Settlement*,<sup>1</sup> although in truth it has a longer history. The essay was published in May 1984, but the animating idea—that the purpose of adjudication is justice, not peace—can be traced to the civil rights era and the 1960s.

In 1960, I was studying philosophy at Oxford and grew increasingly restless with the inward, almost obsessive, orientation of the discipline. Oxford seminars were devoted to Descartes's riddle—how do you know you are not dreaming?—as the struggle for racial equality in the United States became more heated and took to the streets.

I began law school in the fall of 1961, marched through the required courses, and spent the third year studying and writing on school segregation. My interest in this subject deepened as a result of my clerkships with two of the most exalted architects of the jurisprudence of equality, Thurgood Marshall and William Brennan, but the impact of working for the Civil Rights Division of the Department of Justice from 1966 to 1968, then under the leadership of John Doar, registered in another key altogether. It was transformative. I came face to face with the trial process and the heroic attempt by a number of judges in the lower federal courts in the South to make *Brown v. Board of Education*<sup>2</sup> a living reality. When I began working at the Division, there were approximately 2000 school districts in the South that operated in open defiance of *Brown*.

Of all the federal judges involved in the implementation process, the work of Frank M. Johnson, Jr., then sitting as a district judge in Montgomery, was the most instructive.<sup>3</sup> In 1964, he began the arduous process of desegregating the Montgomery County schools, and by 1966 he had in effect taken charge of the desegregation for almost all of the school districts in Alabama.<sup>4</sup> Shunned by his neighbors and friends and scorned by local politicians, including the governor, Judge Johnson knew all too well the hostile character of the environment in which he acted. He therefore had to labor mightily to establish his legitimacy—a pervasive

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1. See Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

2. 349 U.S. 294 (1955); 347 U.S. 483 (1954).

3. See JACK BASS, *TAMING THE STORM: THE LIFE AND TIMES OF JUDGE FRANK M. JOHNSON, JR. AND THE SOUTH'S FIGHT OVER CIVIL RIGHTS* (1993). See generally JACK BASS, *UNLIKELY HEROES* (1981); FRANK T. READ & LUCY S. MCGOUGH, *LET THEM BE JUDGED: THE JUDICIAL INTEGRATION OF THE DEEP SOUTH* (1978).

4. *Lee v. Macon County Bd. of Educ.*, 267 F. Supp. 458 (M.D. Ala. 1967).

recognition of his authority—so that even those who disagreed with the substance of his orders—almost everyone—would comply with them.

In personal manner, the judge was strong minded and stern, and ran a rather strict courtroom. He knew that behind his orders lay the contempt power and, beyond that, the force of the federal government, yet he was most reluctant ever to go down that path. Perhaps he feared that the use of force would render martyrs of local officials and make desegregation all that more unlikely. Or perhaps he thought it would be inappropriate, indeed unfair, to punish a local school superintendent for a course of conduct that was dictated by intense, sometimes brutal, pressure from his constituency.

Thus determined to avoid the contempt power and the use of force, Judge Johnson turned to the rationalistic processes that have long characterized the law to establish his legitimacy. He patiently listened to all the grievances that were presented to him, heard from all the affected parties, tried the law and facts in open court, and then publicly justified his decision on the basis of principle.

I took special note of this experience and the effect it had in the courtroom, and it was very much in my mind when, in the summer of 1968, I left the government and began my teaching career at the University of Chicago. I was appointed to replace a professor who was retiring, Sheldon Teft, and was asked by Dean Phil C. Neal to pick up Teft's course on equity. So I offered a course on the subject—named by me "Injunctions," but by the Dean "Equitable Remedies"—and prepared a new casebook for it.<sup>5</sup> The book collected material on all types of equity cases, including antitrust, labor, and nuisance. However, as was evident to my students, the civil rights experience, not just school desegregation but also the voting and protest cases of the early 1960s, were at the very heart of the course and the book.

A casebook is a luxury. It allows the instructor to assemble material and present it to the students without having fully digested all that is included. The 1972 edition of *Injunctions* had that quality. In it I tried to create new ways of categorizing injunctions. I introduced the idea of the structural injunction—the means by which a judge reorganizes an ongoing bureaucratic organization to bring it into compliance with the Constitution—and illustrated it through a study of Judge Johnson's management of the Montgomery school desegregation case over a five-year period. However, because Judge Johnson was, in my eyes, the epitome of the law, I did not think it necessary to address questions of judicial legitimacy in any systematic way.

Matters began to change by the mid 1970s. Provoked by increasing attacks on structural reform by a newly constituted Supreme Court<sup>6</sup> and inspired by Abram Chayes's justly famous 1976 article on public law

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5. OWEN M. FISS, *INJUNCTIONS* (1972).

6. See, e.g., *Rizzo v. Goode*, 423 U.S. 362 (1976); see also Owen M. Fiss, *Dombrowski*, 86 *YALE L.J.* 1103 (1977).

litigation,<sup>7</sup> my attention increasingly focused on questions of judicial legitimacy. These efforts culminated in the November 1979 *Foreword* to the *Harvard Law Review*, *The Forms of Justice*.<sup>8</sup> In that essay I defended the legitimacy of structural reform and contrasted it with what I called the dispute resolution model, which, so alien to what I had seen in Judge Johnson's courtroom, treated adjudication much like arbitration, in which two quarreling neighbors turn to a stranger to resolve their dispute.

In 1980, I participated in two conferences; one was sponsored by Bryn Mawr College, the other by the American Enterprise Institute (AEI). The Bryn Mawr conference, in which Judge Jack B. Weinstein participated, focused on institutional litigation; the other, in a transparent attempt to minimize the significance of adjudication, asked a more general question—how does the Constitution secure rights? For both, I drew on the 1979 *Foreword*, but greatly abbreviated my analysis and presented a highly stylized version of the two models of adjudication—structural reform and dispute resolution. I linked the resurgence of the dispute resolution model to the ever-increasing ascendancy of market ideology we were then experiencing<sup>9</sup> and criticized dispute resolution by examining its underlying premises—an individualistic sociology, the privatization of ends, the supposition of a natural harmony, and the refusal to recognize the judiciary as a coordinate branch of government.

Questions of judicial legitimacy are not pronounced in the dispute resolution model. Because the judge is depicted as the institutionalization of the stranger, to which the quarreling neighbors had turned to resolve their dispute, the authority of the judiciary is linked to the consent of the quarrelling neighbors. Little is asked of the judge other than that he or she be impartial. But once we free ourselves from the assumptions of the dispute resolution model and see the judiciary as a coordinate branch of government, charged with the duty of giving concrete meaning to public values, questions of legitimacy become more pronounced. What gives the judiciary the right, we must ask, to set aside the interpretation of those values that has been articulated by the executive and legislative branches?

Democracy makes popular consent the foundation of legitimacy. That consent is not, however, granted to individual institutions, but extends to the system of government as a whole. The legitimacy of each institution within that system does not depend on consent as imagined in the dispute resolution story, but rather on the institution's capacity to perform a distinctive function within the system of government that is endorsed by the people. The special competence and, thus, the legitimacy of a judge to give concrete meaning to public values, as Frank Johnson had tried, derives not from some personal moral expertise, of which he had none, but rather from

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7. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

8. Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979).

9. See Amy J. Cohen, *Revisiting Against Settlement: Some Reflections on Dispute Resolution and Public Values*, 78 FORDHAM L. REV. 1143, 1150–51, 1153–54 (2009).

his adherence to what I call the strictures of public reason<sup>10</sup>—the obligation to confront grievances he would otherwise prefer to avoid, hear from all affected persons, try the facts and law in open court, and render a decision based on principle.

The Bryn Mawr paper was published in 1982<sup>11</sup> and the one for AEI in 1983.<sup>12</sup> Sometime in the summer or early fall of 1983, I received a call from Stephen Burbank, a professor of law at the University of Pennsylvania and chair of the American Association of Law Schools (AALS) Section on Civil Procedure, inviting me to give a talk at the January 1984 AALS meetings. He mentioned that this would be a joint session with the newly formed Alternative Dispute Resolution (ADR) section and was intended to celebrate the formation of that section.

At that point in the conversation, I recalled having recently read an article that appeared on the front page of *The New York Times*.<sup>13</sup> It gave an account of the report that Derek Bok had issued to the Harvard Overseers, calling upon law schools to train students “for the gentler arts of reconciliation and accommodation.”<sup>14</sup> That was not a goal I supported; indeed, I believed it reflected a misunderstanding of the function of adjudication and thus grossly diminished its value. I shared these thoughts with Professor Burbank and quickly—before he had a chance to reconsider—accepted his invitation. Leo Levin of the University of Pennsylvania and Marc Galanter of the University of Wisconsin joined me on the panel.

In framing my AALS talk and the essay that is the subject of today’s symposium, I very much had in mind the articles I had just published on the two models of adjudication. I saddled the proponents of ADR with the dispute resolution model and used the premises of that model—the rough parity of power of the quarrelling neighbors, the authority of each neighbor to enter into an agreement that would be binding on himself, and the belief that the work of the court is complete once the dispute that divided the two neighbors has been resolved—and used that analysis to warn of the risks and dangers of settlement. Dispute resolution gave a misleading picture of adjudication and the world of which it is part.

On reflection, this portion of the essay seems labored—as my editor, Pam Karlan, then diplomatically suggested, although to no avail. It now seems clear to me that the more revealing and more important point appears much later in the piece, where I argued that the purpose of adjudication is not the resolution of a dispute, not to produce peace, but rather justice, and that the

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10. See generally OWEN M. FISS, *THE LAW AS IT COULD BE* (2003).

11. Owen M. Fiss, *The Social and Political Foundations of Adjudication*, 6 *LAW & HUM. BEHAV.* 121 (1982).

12. Owen M. Fiss, *Two Models of Adjudication*, in *HOW DOES THE CONSTITUTION SECURE RIGHTS?* 36 (Robert A. Goldwin & William A. Schambra eds., 1985).

13. Edward B. Fiske, *President of Harvard Brands Legal System Costly and Complex*, *N.Y. TIMES*, Apr. 22, 1983, at A1.

14. Derek C. Bok, *A Flawed System*, *HARV. MAG.*, May–June 1983, at 38, as reprinted in *N.Y. ST. B.J.*, Oct. 1983, at 8, *N.Y. ST. B.J.*, Nov. 1983, at 31, 32.

rationalistic processes of the law have an intimate and important relationship to the achievement of that end.

In Judge Johnson's courtroom, adherence to the strictures of public reason was a source of legitimacy. The underlying assumption was that adherence to these strictures enhanced his access to justice—it freed him from the constraints of interests and personal circumstance and thus deepened and broadened his understanding of the underlying constitutional value and its implications for the case at hand. Of course, in any particular instance the judge might be mistaken. Public reason is only an instrument for achieving justice and, like any instrument, is fallible. But the assumption governing Judge Johnson's work and adjudication in general is that over time and in the generality of cases, adherence to the strictures of public reason will give the judge special access to justice, and for that reason is the source of his authority.

The bargaining that normally takes place between litigants—characterized, as I then assumed, by the pursuit of self-interest, imbalances of material resources, inequalities of information, and strategic behavior—has no connection to justice whatsoever. It is obviously not constitutive of justice, nor is it much of an instrument for achieving justice. On occasion, bargaining might produce a just outcome, just as the judicial process might sometimes fail and produce an unjust outcome. But there is no reason to presume that the outcome of the bargaining process—a settlement—is just. All we can presume of a settlement is that it produces peace—often a very fragile and temporary peace—and although peace might be a precondition for the achievement of justice, it is not justice itself.

Admittedly, if consent is freely given, we can assume that the agreement is preferred by both parties compared to going to trial. But the normative implications of this assumption are limited.<sup>15</sup> Justice is a public good, objectively conceived, and is not reducible to the maximization of the satisfaction of the preferences of the contestants, which, in any event, are a function of the deplorable character of the options available to them. The contestants are simply making the best of an imperfect world and the unfortunate situation in which they find themselves. There is no reason to believe that their bargained-for agreement is an instantiation of justice or will, as a general matter, lead to justice.

Sometimes judges step in and try to facilitate the bargaining process and thus encourage settlement; sometimes they even insist upon it. This too was part of my formative experiences. At roughly the same time I was observing Judge Johnson at work in Alabama, I represented the United States as an attorney with the Civil Rights Division in a case in Cleveland, Ohio, before Judge Ben C. Green. The suit charged Local 38 of the International Brotherhood of Electrical Workers with racial discrimination. Judge Green thought that the suit should be settled and, with the aim of

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15. See John Bronsteen, *Some Thoughts About the Economics of Settlement*, 78 *FORDHAM L. REV.* 1129, 1139–41 (2009).

promoting or “strong arming” such an outcome, held a meeting in chambers with counsel for both sides long before trial, indeed, even before discovery was complete.

Judge Green was a longtime resident of Cleveland, and very active in local Democratic politics. He drew on his general knowledge of the community in his efforts to promote a settlement and in that spirit gave counsel a preview of how he was likely to rule. He said that he was likely to find that the Union had discriminated on the basis of race in the admissions to the apprenticeship program and in the operation of its hiring hall, but that he was likely to give more limited remedies than the Division had asked for. Local 38 was prepared to accept a settlement that embodied such an outcome. But I stood firm, as you might well imagine, and resisted the pressure the judge was imposing on us to settle. Even more to the point, I wondered about the rightful authority of Judge Green—and the countless judges who followed in his tradition—to do what he was doing. Judge Green carried out his threat, but was promptly reversed.<sup>16</sup>

Judges sit to try cases and to make findings of fact and conclusions of law. Only after hearing witnesses, examining the relevant documents, and sorting out the truth of the lawyers’ claims about the facts and law does a judge have a basis to declare what justice requires: to determine whether the law has been violated and if so, what remedy should be imposed. The strictures of public reason not only confer authority, but also limit it, and thus ban the use of judicial power to insist upon, or even promote, settlement in the way that Judge Green did. Such activity is beyond the authority that rightly belongs to the judiciary.

I also believe that it is impermissible for judges to approve settlements and lend their authority to them as when a consent decree is entered or a class action is settled. This is true not only in the institutional reform or civil rights cases that have been at the center of my concern, but also in the mass tort cases that dominate the contemporary docket. In all those cases judges exercise some supervisory power over the bargaining process and can avoid some of its excesses.<sup>17</sup> For example, in the class action context, the judge must determine that the proposed settlement is “fair, reasonable, and adequate”<sup>18</sup> and typically holds a so-called fairness hearing for that purpose. But the judgment of reasonableness is often made without the benefit of a truly adversarial process—the parties who control the litigation have already reached agreement—and a sharp distinction must be made between a judgment of the court, after trial, as to what justice requires, and a judgment that what the parties had agreed to is reasonable or within the ballpark.

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16. *United States v. Int’l Bhd. of Elec. Workers, Local 38*, No. 67-575, 1969 U.S. Dist. LEXIS 9536 (N.D. Ohio Mar. 13, 1969), *rev’d*, 428 F.2d 144 (6th Cir. 1970).

17. See Samuel Issacharoff & Robert H. Klonoff, *The Public Value of Settlement*, 78 *FORDHAM L. REV.* 1177, 1184–88 (2009).

18. *FED. R. CIV. P.* 23(e)(2).

Third parties can make an important contribution to the bargaining process, not only to facilitate the agreement, but also to improve the chances that the agreement reached will be a closer approximation of justice than what otherwise might prevail.<sup>19</sup> As we saw with the 9/11 Victims Compensation Fund, however, this third party need not be a judge. Congress called the third party it empowered a special master, but he was taken out from under the supervision of a judge and used procedures that were markedly nonjudicial and in fact at odds with the kind of procedures customarily employed at trial.<sup>20</sup> Ex parte communications were common; there were plenty of meetings, but no public trials, and no pretense of rendering decisions based on established principle.

My hunch is that the success of the special master in effectuating a settlement under the 9/11 Fund for the vast majority of claims depended on his willingness to operate in such nonjudicial and irregular ways. Maybe a judge could have performed as well—after all, Kenneth Feinberg, the special master, once told me in conversation that in discharging his duties under the Fund he modeled himself after Judge Weinstein.<sup>21</sup> My concern, however, is not success, understood in a purely pragmatic sense—for example, whether a social problem has been solved, whether the economic viability of the airlines has been preserved, or whether the families of the 9/11 victims were quickly given a measure of comfort and support. Rather, the issue is one of legitimate authority: whether a person who is nominated by the President to be a judge, and confirmed by the Senate on those terms, can use the power with which he is vested in a way that disregards the strictures of public reason.

In the years since my encounter with Judge Green, judicial involvement in the settlement process has become more entrenched. Sometimes, as in the Prison Litigation Reform Act,<sup>22</sup> Congress has denied the federal judiciary the power to enter consent decrees in a special category of cases. But such statutes seem to be the exception. For the most part, Congress has embraced consent decrees, even when, as in the Tunney Act,<sup>23</sup> it sought to regulate some of the procedures governing them. Moreover, the Federal Rules of Civil Procedure, notably Rule 16 and Rule 23, have institutionalized and enlarged the role of the judiciary in the settlement process.

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19. They may even turn the interactions among the parties into the kind of collective deliberation identified as one strain of ADR by Cohen, *supra* note 9, at 1165–66, and exalted by Susan Sturm. See Howard Gadlin & Susan P. Sturm, *Conflict Resolution and Systemic Change*, 2007 J. DISP. RESOL. 1, 51–60.

20. See generally KENNETH R. FEINBERG, *WHAT IS LIFE WORTH?: THE UNPRECEDENTED EFFORT TO COMPENSATE THE VICTIMS OF 9/11* (2005).

21. See generally PETER H. SCHUCK, *AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS* (1986).

22. Prison Litigation Reform Act of 1995 § 802, 18 U.S.C. § 3626(c)(1) (2006).

23. Antitrust Procedures and Penalties (Tunney) Act, Pub. L. No. 93-528, 88 Stat. 1706 (1974) (codified as amended at 15 U.S.C. § 16(b), (d) (2006)).

I do not believe, however, that Congress, much less the authors of the Federal Rules (whoever they might be), are free to mold the judiciary into instruments of their own liking. Judges are judges, not brokers of deals, and I fear that a too-ready acquiescence in the directives of those who want them to behave otherwise will—not in a day, but over time—diminish their authority in the eyes of the community. Judges must, I believe, confine themselves to the core activity of their profession, and adhere to the procedures that have long allowed them to wear the mantle of the law.