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Justice - Whatever Happened to It

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JUSTICE—WHATEVER HAPPENED TO IT?

*Stanley Sporkin**

IN these dynamic times we are experiencing change at such a rapid pace that I am among those in society who refrain from buying a new gizmo because I fear it will be outmoded by the time I arrive home. It was not too many months ago when I bought a new VCR only to learn that it had been supplanted by a gadget called a DVD. Change is certainly in the air. We are communicating no longer through this nation's great mail system but by use of something called "E-mail." Even our phone system is going through radical changes. Long distance calls that used to cost 25 cents a minute or more can now be made at pennies a minute through use of the computer. Indeed, even the computer, which more than anything else symbolizes the dynamic nature of the changes that are taking place, may not be around in the not too distant future.

What I find interesting is that the changes taking place are not limited to one segment of our society. The changes in the past, while substantial, were not as sweeping as they are today. For example, in my lifetime, I remember the transition from radio to television. That change was gradual, occurring over a number of decades.

The changes that I now refer to are so sweeping that they are touching all aspects of the way we live. They are even having a profound impact on the two old line professions of medicine and the law. The transformations taking place in medicine are as deep seated as in any segment of our society. On virtually a daily basis, we are unraveling all of life's secrets, many of which have stood for many centuries.

In law the blessings from these dynamic changes are somewhat of a mixed bag. With respect to the technical aspects of law, the new electronic toys have been a god-send. We are now able to research a problem in a much more complete and thorough way virtually on a real time basis. The way we litigate cases has also been transformed to the point where we can hear and see witnesses in the courtroom appearing live from virtually anyplace in the world. Yes, my friend, we now have what I refer to as the "Ted Koppel" courtroom.

These changes, along with the concepts of electronic filings and the other steps being taken to reach the ultimate of a paperless court system, are all for the good. The changes that are bothersome to me are those

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that seem to be taking the courts away from the great contributions they made during the second and third quarters of the past century.

The call we hear daily from many of our political leaders is we do not want judges to be judicial activists. While I do not really know what is encompassed by the term judicial activism, I do know there are some in society who say they want their judges to be so-called strict constructionists. Here again we have no precise definition.

In the past, I have railed against what I have termed so-called "Magooist" judges. Those are judges who blindly follow the "law" no matter where it leads with no or little regard to the consequences. Like the legendary Mr. Magoo, a cartoon character from my early days, they keep their heads down and are oblivious to the consequences, and eventually find themselves walking over the edge of a cliff.

As students of law soon to become lawyers, I ask you not to forget the vital role the judiciary played in securing and protecting the rights of this nation's citizens. A few years ago, I was called upon to pay tribute to a dear friend of mine, Judge Charles Richey, who passed away in May 1997. To set the stage for the discussion that will follow, I am going to quote some of what I said on that occasion:

> In this day and age, when judges are often attacked by the political branches, we sometimes forget the vital role judges play in securing and protecting the rights of this nation's citizens. Alex Sanders, a former Justice of the South Carolina Supreme Court and current President of the College of Charleston, made these poignant observations [some time ago]: "Wherever and whenever injustice has been banished, conflict reconciled, and human understanding fostered, judges and the judicial process have played a vital role." He noted, it was not so long ago that the courageous judges of the United States Court of Appeals for the Fifth Circuit "translated the Supreme Court's basic school desegregation decision, [*Brown v. Board of Education*,] into a broad mandate for racial justice and equality under the law." He reminded the audience that courageous judges such as Elbert P. Tuttle, John Minor Wisdom, John R. Brown, Richard Taylor Rives, Frank M. Johnson, Jr., and [my own circuit's] beloved J. Skelly Wright not only "accepted the Constitutional philosophy that extended downward from the Warren Court, but reinforced it upward and outward, stretching and expanding the law to protect rights and liberties granted by the Constitution."
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> Those judges were attacked, just as some of our best judges are attacked today. Those judges were willing to stick their necks out to protect the vital rights of all minorities, and, in doing so, quite possibly averted another civil war. President Sanders put it this way: "Nobody—not generals or admirals, not preachers, not journalists, not legislators, not governors, not even Presidents—have shaped America as profoundly as the judicial process."
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> [I went on to ask] the question: how long could this nation have survived on a segregated basis. One might ask what corresponding courageous action was taken by the Executive and Congressional branches? I submit often in the Warren Court years they stood on

> the sidelines or tried to impede the progress mandated by these magnificent judges.
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> Perhaps the slogan, "Impeach Earl Warren," that appeared on bumper stickers over forty years ago in response to his decision—the outstanding decision of this century—in *Brown v. Board of Education*, should be seen in retrospect as a badge of honor and greatness. The strides this country made in the 1950s and 60s towards equality under the law are directly attributable to our constitutional system, which provides for an independent, vibrant judiciary—a judiciary not coerced into making unfair and unjust decisions for fear of political retribution.
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> As Justice Sanders stated, those courageous, independent judges knew that "the law is not a matter of mechanical applications of rules." History has shown that the truly great judges demonstrate a special courage. According to Sanders, great judges are "sensitive to injustice." "They realize that justice demands equality under the law, and equality is brought about by application of the Golden Rule as well as the Rule of Law."

I make these remarks today because I am deeply concerned about the future of our judiciary and, indeed, our legal system. In my visits to law schools, I find more and more students buying into the so-called Magoo approach. The refrain is this is the law and if there is an injustice, then it is for the legislature to change the law. I can state quite clearly that adjudicating disputes is not that simple. Every case has its own set of facts. They cannot be ignored. For example, what is a court to do when it has before it an American citizen in his mid 80s, a victim of the Holocaust who is suing the German government for reparations.

He had first requested reparations from the German government but was denied because at the time he was placed in a Concentration Camp he was an American citizen and the German government said it would pay reparations only to German citizens. The fact that he and his family were Americans was of no significance to the Hitler government. The family's Jewish heritage was all that mattered. During the family's incarceration, the Plaintiff's parents, his two brothers, and his sister were slaughtered by the Nazi's. I denied the government's motion to dismiss, stating:

> This court finds that the Federal Sovereign Immunity Act has no role to play where the claims alleged involve undisputed acts of barbarism committed by a one-time outlaw nation which demonstrated callous disrespect for the humanity of an American citizen, simply because he was Jewish. The Court cannot permit such a nation, which at the time these barbaric acts were committed neither recognized nor respected U.S. or international law, to now block the legitimate claims of a U.S. citizen by asserting U.S. law to evade its responsibilities.[1]

On appeal I was reversed by a two to one decision.[2] The majority,

1. Princz v. F.R.G., 813 F. Supp. 22, 26 (D.D.C. 1992).
2. Princz v. F.R.G., 26 F.3d 1166 (D.C. Cir. 1994).

reading the Foreign Sovereign Immunity Act (FSIA) strictly, held:

> The district court held that it had jurisdiction of the case on the ground that the FSIA "has no role to play where the claims alleged involve undisputed acts of barbarism committed by a one-time outlaw nation which demonstrated callous disrespect for the humanity of an American citizen, simply because he was Jewish." 813 F. Supp. 22, 26 (D.D.C. 1992). As we shall see below, this is not the law.[3]

Specifically, the Court interpreting the various provisions of the FSIA said:

> As it turns out, however, we need not decide whether leasing prisoners as slave labor constitutes a commercial activity under the FSIA. For certain it is that this activity did not have a "direct effect on the United States."
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> b. Direct effect on the United States.
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> To be "direct" within the meaning of the FSIA an effect need not be "substantial" or "foreseeable" so long as it is more than "purely trivial" and "it follows 'as an immediate consequence of the defendant's . . . activity." *Weltover,* 112 5. Ct. at 2168 (citation omitted). Germany here argues that the Nazis' enslavement of Mr. Princz in Poland and Germany "had no impact, much less an immediate consequence, in the United States." Mr. Princz, per contra, instances three such effects.
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> First, Mr. Princz argues that the work he was required to perform as a slave had a direct effect in this country because he worked for firms directly supporting the Nazi war effort against the United States. A "direct effect" however, "is one which has no intervening element, but, rather, flows in a straight line without deviation or interruption." *Upton v. Empire of Iran,* 459 F. Supp. 264, 266 (D.D.C. 1978), *aff'd mem.* 607 F.2d 494 (D.C. Cir. 1979). Many events and actors necessarily intervened between any work that Mr. Princz performed—as a bricklayer for 1G. Farben in Poland or as a laborer in the Messerschmidt aircraft works in Germany—and any effect felt in the United States.
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> Finally, Mr. Princz argues that his continued suffering in the United States is a direct effect of his forced labor under the Nazi yoke. After Mr. Princz was liberated by the United States Army he spent time recuperating in a military hospital. From there he went to Czechoslovakia to search for relatives and to attend to his family's property, only after which did he move to the United States. Mr. Princz's subsequent suffering was clearly an effect, but just as clearly not "a direct effect in the United States" of the Nazis' actions. Mr. Princz was enslaved in Poland and Germany; the immediate consequences of his enslavement were felt in those countries, and much time passed before Mr. Princz came to this country. See *Martin v. Republic of South Africa,* 836 F.2d 91, 95 (2d Cir. 1987) (no "direct effect" where South African government allegedly caused perma-

3. *Id.* at 1168.

> nent disability to American citizen who did not return to the United States until more than a year later).
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> We therefore hold that even if the Nazis' leasing of Mr. Princz's labor was a "commercial activity" within the meaning of the FSIA, that activity did not have a "direct effect" in the United States.[4]

I cite the *Princz* case to demonstrate that we seem to be retreating from the concept that our Courts exist to do justice. I suggest that the trend today clearly is the other way.

Since I am no longer a member of the Third Branch, there is little I can do to change the course of events other than to try to persuade our future leaders of the profession to think about where the legal system is going. I would hope, after a careful evaluation of these various legal concepts, that you would find merit in returning to the judicial principles of the past. The ones, in my view, that contributed greatly to making this nation the world class nation that it is.

4. *Id.* at 1172-73.

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