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Judge Lewis R. Morgan: A Partisan Retrospective

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Neither the time nor the speaker would be right for a comprehensive, scholarly assessment of Judge Morgan's work on the federal bench. The speaker could not claim the requisite detachment. And the effort would be premature, because Judge Morgan's work is not finished. Senior status is not retirement. It is instead admission to membership in a distinguished assemblage of jurists whose contributions to American law have continued and grown during the time after active service. Judge Morgan joins Judges Rives, Tuttle, Jones, Wisdom, Gewin, Dyer, Simpson, and Ingraham. Many of these men still sit not only on the Fifth Circuit, but on other courts grateful to draw from such a reservoir of wisdom and experience. Judge Morgan, too, will add many more pages to the *Federal Reporter.*

Granted, then, that full scholarly analysis must await another time and author, this occasion does invite some less ambitious, openly partisan retrospective by those who have known Judge Morgan well as a person and as a judge. Having read the thoughtful, uniformly affectionate comments of fellow clerks in letters I solicited, and having read most of Judge Morgan's signed opinions, I shall attempt here to identify some of the important unifying elements in the career of the man we so happily honor today.

No Morgan clerk has been able to talk about the Judge without at some point, usually at the very beginning, using the word "fair." Judge Morgan has been fair. Nevertheless, I was tempted at first to avoid using the word here, because it seemed to describe a quality

* Professor Brussack first presented his tribute to Judge Morgan at a gathering of Judge Morgan's colleagues and former law clerks on October 20, 1978, at the University of Georgia School of Law.

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the community assumes of all its judges, a minimum requirement notable only when lacking. But I decided that when we clerks speak of Judge Morgan's fairness, personal impartiality is only *part* of what we mean. Judge Morgan also has been intellectually fair, and that is a rarer asset, at least in the full measure Judge Morgan can claim. In my clerkship year, I never knew the Judge to give short shrift to any *idea* legitimately contending for attention in a case. There were no red-flag facts or doctrines I could count on to end prematurely Judge Morgan's deliberation. Until the point of decision, when some ideas and some litigants necessarily lost, no aspect of a dispute was forced to contend for dominance with a hand tied behind its back.

Edward Levi, in his short, but classic discussion of the process of legal reasoning,[1] states that the law forum "protects the parties and the community by making sure that the competing analogies are before the court. The rule which will be created arises out of a process in which if different things are to be treated as similar, at least the differences have been urged."[2] But the success of the law forum requires more than the *urging* of differences. It requires also that the court give the urged differences open-minded consideration. In my experience, Judge Morgan never has done less.

Apart from personal impartiality and open-mindedness, there is yet another sense in which the idea of fairness has been a unifying element of the Judge's work. Judge Morgan always has demanded fairness of those who have come before his court. He has been particularly insistent that the government cut square corners in its operation of the criminal justice system.

There is, for example, the case of Roland Gamble against the State of Alabama.[3] Gamble had been convicted of second degree murder by an Alabama state court. During the sixteen month period between his arrest and the exhaustion of the state appellate process, he had been confined in the Etowah County jail, not the state penitentiary. The jail time was not credited toward Gamble's thirty year sentence. The state would have credited the period of confinement if Gamble had asked to be transferred to the penitentiary for detention during the appellate process. Gamble petitioned the federal court to require Alabama to give him credit for his time in the county jail. A Fifth Circuit panel majority held that Gamble could

[1] E. LEVI, AN INTRODUCTION TO LEGAL REASONING (1949).

[2] *Id.* at 5.

[3] Gamble v. Alabama, 509 F.2d 95 (5th Cir.), *cert. denied*, 423 U.S. 924 (1975).

not complain, because he easily could have avoided the harm by requesting transfer. Judge Morgan dissented. He wrote:

> The majority today takes its cue from Richard Lovelace, author of the oft-quoted lines, "Stone walls do not a prison make/Nor iron bars a cage."
>
> . . . .
>
> No amount of legal legerdemain can hide the fact that Gamble was not given credit for punishment already exacted in the county jail when he was transferred to the state prison. We offer him but cold comfort in holding that he was not being "punished" while in the county jail because he had chosen to remain there. I believe the Constitution demands that he be given credit for that time . . . .[4]

A second illustration of Judge Morgan's impatience with perceived governmental unfairness is *Fain v. Duff*,[5] another habeas corpus decision. Fain had been adjudicated a delinquent by a Florida juvenile court by reason of having raped a woman. Fain had been incarcerated at the Dozier School for Boys. Then the state attorney had asked for and had been given an indictment charging Fain with rape. Fain challenged the indictment on the basis of former jeopardy. Florida resisted the petition for habeas corpus partly on the basis that, since the juvenile proceedings were not criminal in nature, Fain was never put in jeopardy. Judge Morgan, writing for a Fifth Circuit panel majority, disagreed:

> The state's argument that the purpose of the commitment is rehabilitative and not punitive does not change its nature. No authority need be cited for the proposition that a court should look past the labels to the substance of an action. Regardless of the purposes for which the incarceration is imposed, the fact remains that it is incarceration.[6]

Fain and *Gamble* are manifestations of an unyielding feature of Judge Morgan's mindset — the insistence that fundamental ethical considerations should not become obscured by complex or technical argument. Anthony Lewis has identified a like element in the thinking of the late Chief Justice Earl Warren.[7] Lewis has reported that

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[4] *Id.* at 98-99 (Morgan, J., dissenting).

[5] 488 F.2d 218 (5th Cir. 1973), *cert. denied*, 421 U.S. 999 (1975).

[6] *Id.* at 225.

[7] Lewis, *Earl Warren*, in 4 THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969 (L. Friedman & F. Israel ed. 1969).

at oral argument, when government counsel would be asserting the legal authority for some course of action against an individual, the Chief Justice often would interrupt to ask: "But was it fair?"[8] Sometimes the question would be more personalized. The Chief Justice would ask government counsel, who had taken the case only at the Supreme Court level, "Why did you treat him this way?"[9] The approach suggested by those questions is familiar enough to any Morgan clerk.

I do not wish to be understood as asserting that the Judge always has allowed his measurement of the merits of a case to be guided by some internal, personal foot ruler of equity. We who spent so many hours in the library at his bidding know well enough Judge Morgan's regard for precedent. And there is nothing inherently inconsistent between a regard for fairness and a regard for precedent. Judge, later Justice, Cardozo made the point:

> Logical consistency does not cease to be a good because it is not the supreme good. . . . It will not do to decide the same question one way between one set of litigants and the opposite way between another. . . . "If a case was decided against me yesterday when I was defendant, I shall look for the same judgment today if I am plaintiff."[10]

Jim Alt, my friend and former co-clerk, has written an explanation of the relationship between fairness and precedent in Judge Morgan's work upon which I could not improve:

> In discussing cases, [Judge Morgan] often says, "I want to do what's right." In the usual case, the precedents point with reasonable clarity to what is "right," and Judge means that he wants to know what the precedents require. But in the unusual case—an egregious set of facts, or a hard case on the law—Judge means that the outcome, for him, will depend on what is fair to the litigants.[11]

Finally, the doctrine of precedent has been in the marrow of Judge Morgan's outlook because, given the press of business, the modern federal court system, particularly the Fifth Circuit, could not func-

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[8] *Id.* at 2725.

[9] *Id.*

[10] B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 32-33 (1921) (in part quoting W. MILLER, THE DATA OF JURISPRUDENCE 335 (1903)).

[11] Letter from James A. Alt to Robert D. Brussack (Sept. 12, 1978).

tion without it. As long ago as 1921, Judge Cardozo spoke of the practical necessity of the doctrine: "[T]he labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him."[12] Judge Morgan, whose direction of our work in chambers emphasized his appreciation of the swiftness as well as the precision of justice, might have added to Cardozo's thought that the delay between argument and mandate would be intolerably long were it not for those previous courses of bricks.

The impracticality of routinely reopening decided questions explains in part the Judge's usual willingness to leave undisturbed the decisions taken by administrative agencies. In the great majority of cases, the Judge has voted to enforce the orders of the National Labor Relations Board, the Federal Power Commission, the Federal Trade Commission, and other specialized lawmakers. Moreover, Judge Morgan has exhibited little forbearance for litigants who have sought the forum of a federal court without first exhausting administrative remedies.

For example, in *Connell Construction Co. v. Plumbers, Local 100,*[13] Judge Morgan, writing for a panel majority, rejected an employer's attempt to have its dispute with a union considered by a federal district court as an antitrust case. Judge Morgan wrote that the dispute was a labor dispute, not an antitrust dispute, and should be heard in the first instance by the National Labor Relations Board, not a federal court.

Another illustration of the Judge's impatience with premature resort to the federal courts is *American General Insurance Co. v. FTC,*[14] in which an insurance company asked the court to enjoin an FTC antitrust proceeding against it on the ground that the agency was without jurisdiction. Judge Morgan wrote that the challenge was premature. The court would take the jurisdictional issue only in the context of review of any final order that might be entered in the case. The Judge wrote that the result was dictated in part by considerations of administrative and judicial efficiency.

Although the Judge's deference to the decisions taken by administrative bodies has been usual, it has not been merely reflexive. Administrative lawmakers have had to earn the deference with rea-

[12] B. CARDOZO, *supra* note 10, at 149.
[13] 483 F.2d 1154 (5th Cir. 1973), *aff'd in part, rev'd in part,* 421 U.S. 616 (1975).
[14] 496 F.2d 197 (5th Cir. 1974).

soned articulation and procedural fairness. For example, in *Eagle Motor Lines, Inc. v. ICC,*[15] a Fifth Circuit panel, in an opinion by Judge Morgan, overturned ICC action against a trucking company because the agency had acted without giving the company an opportunity to be heard. And in *NLRB v. Operating Engineers, Local 925,*[16] the Judge wrote for a unanimous panel that the court would not enforce the labor board's assessment of back pay liability against a union's business manager unless the board gave some reason for its departure from previous contrary decisions.

Judge Morgan has defended his deference to administrative agencies not only on the basis of efficiency, but also because of what he has termed "systemic factors."[17] The Judge has quoted with approval, for example, Professor Jaffe's statement that the exhaustion doctrine is "an expression of executive and administrative autonomy."[18] The Judge has shown in other contexts as well his appreciation of the principle that power can be diffused and controlled through structure, a principle as old as the Constitution. One manifestation of the principle, of course, is the idea or the bundle of ideas labeled federalism, and Judge Morgan has made manifest more than once his conviction that the division of authority between the states and the federal government should be a factor in federal judicial decisionmaking.

Kelly v. Smith[19] arose from a gun battle between suspected game poachers and the members of a private hunting preserve on an island in the Mississippi River. The suspected poachers, fleeing from the island by boat, were shot by hunting club members firing from the shore of the island. The suspected poachers filed tort claims in federal court, invoking admiralty jurisdiction. A Fifth Circuit panel majority, in a delightful piece of writing by Judge Godbold, held that the suit was properly brought in admiralty. In a similarly entertaining dissent, Judge Morgan contended that the federal admiralty interest was minimal, and the state's interest in the application of its own tort law was strong:

> [The suspected poachers] used a 15-foot boat to sneak across the Mississippi River onto Woodstock Island to engage in

[15] 545 F.2d 1015 (5th Cir. 1977).

[16] 460 F.2d 589 (5th Cir. 1972).

[17] American General Ins. Co. v. FTC, 496 F.2d 197, 200 (5th Cir. 1974).

[18] L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 425 (1965), *quoted in* 496 F.2d at 200.

[19] 485 F.2d 520 (5th Cir. 1973), *cert. denied,* 416 U.S. 969 (1974).

> poaching. There is simply no overriding federal interest in protecting such conduct. This is not to say that trespassers should not be protected against over-reaction by their victims. But the extent to which they should be protected is a matter of purely local concern, not of federal concern.[20]

In *Westberry v. Gilman Paper Co.*,[21] an employee of the paper company brought an action in federal court against company officials, claiming the defendants had violated one of the Reconstruction civil rights statutes, 42 U.S.C. § 1985(3), in that they had conspired to kill him. Westberry, the employee, alleged that the conspiracy was hatched to still his opposition to the company in various environmental, tax, and political matters. A Fifth Circuit panel, in a decision later vacated as moot,[22] held that Westberry's claim was maintainable under § 1985(3). In a short dissent, Judge Morgan warned that the decision would transform the civil rights statute into a "general federal tort law."[23]

A third example of Judge Morgan's regard for the boundary between state and federal power, *Miree v. United States*,[24] arose out of the crash of a private jet some years ago in take-off from the DeKalb County Airport in metropolitan Atlanta. The Georgians in the audience may remember the case. Birds had clogged the engines of the craft. One theory of the plaintiffs' action against the county was that they were third party beneficiaries of a contract between the county and the FAA, in which the county promised to maintain the airport in a safe condition. The Fifth Circuit, sitting en banc, held that although the action was brought in diversity, federal common law controlled on the question of third party beneficiary rights under the contract. Judge Morgan dissented:

> It seems quite clear to us . . . that absent explicit Congressional command, federal common law should be chosen in a diversity case only when there exists an identifiable federal interest in the outcome of the particular case or in a consistent result in cases of its class. Such an interest is not involved in this case. Here we have litigation between two non-federal parties over the rights of one as a third party beneficiary to a

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[20] *Id.* at 527 (Morgan, J., dissenting).

[21] 507 F.2d 206 (5th Cir.), *vacated as moot*, 507 F.2d 216 (5th Cir. 1975) (en banc).

[22] 507 F.2d 216 (5th Cir. 1975) (en banc).

[23] 507 F.2d at 215 (Morgan, J., dissenting), *quoting* Griffin v. Breckenridge, 403 U.S. 88, 102 (1971).

[24] 538 F.2d 643 (5th Cir. 1976) (en banc), *vacated*, 433 U.S. 25 (1977).

> contract executed by the other. While the federal government was a party to this contract, it has no particular interest in the outcome of the third party beneficiary question in this diversity suit. Such a question is a matter to be decided by the particular state's own contract law. Indeed, whether or not the plaintiffs could recover as third party beneficiaries is of no significance to the United States in that it affects no rights or liabilities of the United States and involves no impact on a federal fiscal policy.[25]

Miree went to the Supreme Court,[26] which adopted Judge Morgan's view, as indeed the high court has on a number of occasions[27] in the past several years.

The *Kelly-Westberry-Miree* line suggests strongly that litigants who have been able to link their position with a federalism-related interest have been able to count on sympathetic treatment from Judge Morgan. Even federalism, however, as strong as its influence has been, has not been the red-flag doctrine ending the Judge's thinking about a problem. In fact, the record shows that once the Judge has become convinced of the involvement of a fundamental federal interest in a case, the significance for him of federalism considerations has paled. In *Speight v. Slaton,*[28] the district attorney in Atlanta had brought a civil action in state court to abate an adult bookstore as a public nuisance. The bookstore owners went to federal court to stop the state proceedings, alleging that the nuisance action violated the first amendment. The three-judge court, on federalism grounds, declined to intervene in the state proceedings. Judge Morgan, the Fifth Circuit member of the court, dissented. He wrote:

> Acting under this statute, agents of the state could, by finding a single volume which they could successfully have declared legally obscene, seize and destroy every other book—including the Bible and the United States Constitution—which was found on the premises of the bookstore from which the legally obscene matter was obtained. Furthermore,

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[25] *Id.* at 646 (Morgan, J., dissenting) (footnotes omitted).

[26] Miree v. DeKalb County, 433 U.S. 25 (1977).

[27] *See* National Broiler Marketing Ass'n v. United States, 434 U.S. 1032 (1978), *aff'g* 550 F.2d 1380 (5th Cir. 1977); Ingraham v. Wright, 430 U.S. 651 (1977), *aff'g* 525 F.2d 909 (5th Cir. 1976) (en banc).

[28] 356 F. Supp. 1101 (N.D. Ga. 1973), *vacated,* 415 U.S. 333 (1974).

> they could enjoin permanently the operation of the bookstore at that location, no matter what type of presumptively protected First Amendment materials were to be disseminated therefrom.[29]

The Judge thought the statute so utterly unconstitutional that federal intervention was not only allowable, but compelled.

The constitutional faith evident in Judge Morgan's *Speight* dissent and in his other first amendment cases has revealed itself too in the Judge's terse, tough, lets-get-on-with-it opinions in the school desegregation cases. The tone of these opinions is illustrated in the following spare prose taken from a 1970 decision involving the Dade County school system:

> It is ordered that Lewis [school] . . . be paired with Cooper . . . .
>
> It is ordered that West Homestead . . . be paired with Florida City . . . .
>
> It is ordered that Gladeview . . . be paired with Haileah . . . .
>
> The mandate herein shall issue immediately and no stay will be granted for filing Petition for Rehearing or Petition for Writ of Certiorari.[30]

In *McNeal v. Tate County School District*,[31] the court was faced with the sale of an old and deteriorated public school facility to a private academy which, regardless of its public admissions policy, was segregated. Judge Morgan wrote:

> We will not allow a school board to circumvent our decision in Wright v. City of Brighton . . . by ignoring local conditions and then claiming that it did not know that public property was being sold to those who would practice racial discrimination. As Judges Wisdom and Goldberg of this court have observed, federal judges are not so naive in the field of civil rights.[32]

The panel ordered the district court to enjoin the purchasers from using the property to operate a racially discriminatory institution.

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[29] *Id.* at 1105 (Morgan, J., dissenting).

[30] Pate v. Dade County Sch. Bd., 434 F.2d 1151, 1154, 1156-57 (5th Cir. 1970), *cert. denied*, 402 U.S. 953 (1971).

[31] 460 F.2d 568 (5th Cir. 1972), *cert. denied*, 413 U.S. 922 (1973).

[32] *Id.* at 571 (footnotes omitted).

Alloyed with the stubborn toughness in Judge Morgan's school case opinions has been a sensitivity manifested, for example, in *Bell v. West Point Municipal Separate School District.*[33] The West Point school desegregation plan had closed two formerly all-black schools solely because school officials feared white students would refuse to attend them. Jack Greenburg, whose civil rights representation has given him a place in the history of the Fifth Circuit, argued to the panel that the closing of the schools was unconstitutional. Judge Morgan agreed: "While it is undisputed that a particular school may be terminated for sound educational reasons, an otherwise useful building may not be closed merely because the school board speculates that whites will refuse to attend the location. Such action constitutes racial discrimination in violation of the Fourteenth Amendment."[34]

When United Nations Representative Andrew Young visited this campus last Law Day, he referred to the judges of the Fifth Circuit as unsung heroes of the civil rights movement. Perhaps the judges themselves would not describe their role in quite that way, but it is clear enough that these men, men of the South, have demonstrated a deep, enduring constitutional faith and have had that faith guide them with dignity, honor, and, at times, personal courage.

Because of the ethical simplicity and force of the school desegregation cases, the federal courts have felt permitted, even compelled to involve themselves intricately in the day-to-day affairs of communities. But such involvement by a relatively small number of unelected, powerful governmental officials always raises, in a democratic society, fundamental practical and philosophical questions. In contexts other than racial discrimination, contexts in which the claim of unconstitutionality has not been so essentially compelling, Judge Morgan has been influenced by these felt limitations on the role of the federal courts.

In *Karr v. Schmidt,*[35] a male high school student had challenged on constitutional grounds his school's regulation limiting the length of students' hair. Writing for the en banc court, Judge Morgan rejected the student's claim:

> [W]e feel compelled to recognize and give weight to the very strong policy considerations in favor of giving local school

[33] 446 F.2d 1362 (5th Cir. 1971).

[34] *Id.* at 1363.

[35] 460 F.2d 609 (5th Cir.) (en banc), *cert. denied,* 409 U.S. 989 (1972).

> boards the widest possible latitude in the management of school affairs. . . . Federal courts, and particularly those in this circuit, have unflinchingly intervened in the management of local school affairs where fundamental liberties, such as the right to equal protection, required vindication. At times that intervention has, of necessity, been on a massive scale. But in the grey areas where fundamental rights are not implicated, we think the wiser course is one of restraint.[35]

The Judge reiterated the point recently in *Ingraham v. Wright,*[37] the constitutional challenge to corporal punishment in schools. He wrote, again for the en banc court:

> We think it a misuse of our judicial power to determine . . . whether a teacher has acted arbitrarily in paddling a particular child for certain behavior or whether in a particular instance of misconduct five licks would have been more appropriate punishment than ten licks. We note . . . the possibility of a civil or criminal action in state court against a teacher who has excessively punished a child.[38]

Ingraham v. Wright was affirmed by the Supreme Court.[39]

Despite the insight, sensitivity, and clarity of thought obvious in Judge Morgan's work for the court, he would not have us think of him, as he does not think of himself, as a close student of legal philosophy or as a great writer. The ideal that has sustained the Judge, I submit, that has left its mark on his work and on his life, has been the ideal of the lawyer as member and keeper of an honorable profession. Judge Morgan's career on the bench has been but an extension, with some differences of course, of his career at the bar. The qualities that have made him a fine judge have their roots in this commitment, this loyalty to a professional ideal. We who have been his clerks learned much while with him about the real significance of our membership in the profession. We have taken from that time a keen appreciation of the importance of fairness, dignity, and courtesy. And, we are happy to say, we have taken and kept the friendship of this man, whose easy affability and complete lack of pretension have made the Morgan clerkship well known in the circuit as something much more than a year of research and writing between law school and the rest of one's life.

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[35] *Id.* at 615-16.

[37] 525 F.2d 909 (5th Cir. 1976) (en banc), *aff'd,* 430 U.S. 651 (1977).

[38] *Id.* at 917.

[39] 430 U.S. 651 (1977).