

Critical Practice, Judging and Teaching

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I was a criminal defense lawyer and civil rights lawyer for twenty-four years, then a federal district court judge for seventeen, and now principally, a law teacher, write and occasional (returned) litigator. I was at the founding CLS conferences, conferences that grew out of a study group with many of the attendees here.

When I was a practicing lawyer, CLS informed why I was doing what I was doing, where my work fit in the context of the issues I cared about and the social movements of which I was then a part. One example: I was one of the earliest Title VII and section 1983 litigators, representing women, people of color, LGBTQ people, prisoners, criminal defendants, etc. I recall Alan Freeman's articles on critical race theory, highlighting the ways in which discrimination law, by identifying what fit within in the narrow legal categories of biased conduct necessarily legitimized other plainly biased conduct, not so easily categorized. But, while I have wonderful memories of reading Hegel in the Boston Municipal Court – a study group assignment – neither Hegel, nor CLS, informed what I said in court, the strategies I pursued. I was adept at using those legal categories in the work I was doing, to be sure; the challenge for me was not to lose sight of their limitations. CLS invited constant reflection and criticism of the work I was doing even as I did it. Since CLS was so focused on the legal academy, I was determined to continue to teach part time even with an active criminal and civil practice if only to refresh my critical perspective. I needed that double consciousness – what the case required, and the larger, critical questions that CLS raised.

As a judge of the United States District Court for the District of Massachusetts (from 1994 to 2011), I experienced what CLS identified as the indeterminacy of the law up close and personal. I would not pretend that the "law" always required a particular outcome, when it was often clear that it did not. I would not indulge in the fiction that judges had no "choice," when choice was everywhere. There was choice on a ministerial level: How much time to give to the case? Would I allow an evidentiary hearing or just legal argument? Was it at the top of the pile or the bottom? I concluded- no, I saw, -"judicial shortcuts, procedural rules, affected not just the speed of justice, but the quality. Efficiency was not neutral; it affected outcomes."¹ There was choice with respect to doctrine – split supreme court decisions, the studied ambiguity of a divided court; the choice to cede the opinion to a law clerk who lacked the context to see what you were seeing, whose idea of drafting opinion was to pick out quotes from cases found on Westlaw, etc.

Immediately after leaving the bench, in my small way, following in Professor Freeman's footsteps, I wrote "Losers' Rule"s about how case management and procedural pressures that were ostensibly neutral skewed the outcomes especially in civil rights cases:

"When the defendant successfully moves for summary judgment in a discrimination case, the case is over. [Under the Rules], the judge must 'state on the record the reasons for granting or

¹ Nancy Gertner, *Opinions I Should Have Written*, 110 NWULR 423, 432 (2016).

denying the motion,' which means writing a decision. But when the plaintiff wins, the judge typically writes a single word of endorsement— denied"--and the case moves on to trial."²

The result of this practice--written decisions only when plaintiffs lose--is the evolution of a one-sided body of law. Decision after decision grants summary judgment to the defendant. After the district court has described-- cogently and persuasively, perhaps even for publication--why the plaintiff loses, the case may or may not be appealed. If it is not, it stands as yet another compelling account of a flawed discrimination claim. If it is appealed, the odds are good that the circuit court will affirm the district court's pessimistic assessment of the plaintiff's case. Over time, the way judges view these cases changes: "If case after case recites the facts that do not amount to discrimination, it is no surprise that the decision makers have a hard time envisioning the facts that may well comprise discrimination. Worse, they may come to believe that most claims are trivial."³

It was, as Robert Cover described it, speaking of the antislavery judges who enforced the Fugitive Slave Act rigorously, the "judicial can't" (as distinguished from "judicial cant.")

I was most critical of the criminal law I was obliged to enforce. This was not merely concern about disproportionate sentences, racially skewed outcomes. I tried to understand how the law – here Sentencing Guidelines, so rational and neutral, promulgated by an independent agency, the U.S. Sentencing Commission – was embedded with unexamined values, ideology, criminal law tropes- that made them difficult to reject even when the Supreme Court declared the Guidelines to be advisory. I tried to understand why in case after case judges who had been opposed to Guidelines found them impossible to resist.

I am now writing a book about the men I sentenced, *Incomplete Sentences* (Beacon, forthcoming) in effect, trying to describe what it was like to be a judge in a time of mass incarceration. I have met some of the men whose sentences most troubled me in the time since I left the bench. I wanted to know now what I did not know then. I want to put a critical lens on my work as I have tried to do with the work of others.

And, in a different project, I want to write about "Judging in a Time of Trump." Judges who joined me on the bench, Republican and Democrat alike, indulged in practices I called "duck, avoid, or avoid." They resorted to doctrines that narrowed access to justice; created a set of procedural trip wires to avoid dealing with substantive issues on the merits, reducing certain kinds of cases- notably civil rights cases and police misconduct litigation – to what I called kabuki rituals in which plaintiffs, and plaintiffs alone, regularly lost. It was as if they wanted to avoid the legal battles that had roiled the courts in the 70s and 80s.

What will happen now with new judges not so inclined, not the "constrained activists" that Duncan Kennedy wrote about, but the full throated change agents, who says as the Institute for Justice says: "It is not 'judicial activism' to strike down unconstitutional laws or government actions. It is judicial *engagement*- taking the Constitution seriously and applying it. Additionally, refusing to strike down unconstitutional acts is not laudable 'judicial restraint.' It is instead judicial *abdication* – the failure of judges quite to fulfill their constitutional duties."

² Nancy Gertner, *Losers' Rules*, 122 Yale L.J. Online 109, 116-123 (2012).

³ Id.

What will CLS and its heirs have to say about these judges? To what extent were we unmasking one phenomenon, when more dangerous ones were brewing?